No. _____

In The

Supreme Court of the United States

MARK SAMI IBRAHIM,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether DEA Special Agent Mark Sami Ibrahim raised a colorable claim of a legislated immunity in the text of the statute and regulation granting Federal law enforcement officers a right not to be tried, such that the Court of Appeals must review the merits of an interlocutory appeal from denial of a motion to dismiss.

PARTIES AND RELATED PROCEEDINGS

Parties

- Petitioner Mark Sami Ibrahim was Appellant below and defendant in the district court.
- Respondent United States of America was Appellee below and the prosecution in the district court.
- Respondent United States Court of Appeals for the District of Columbia Circuit was the appellate court below.

Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Ibrahim*, No. 23-3037, United States Court of Appeals for the District of Columbia Circuit. Per curiam order of dismissal entered on June 2, 2023. Order denying rehearing, and order denying rehearing en banc, entered on September 11, 2023.
- *United States v. Ibrahim*, No. 21-CR-00496-TJK, United States District Court for the District of Columbia. Opinion and order denying motion to dismiss Count Three read from the bench by the Hon. Timothy J. Kelly on March 3, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Mark Sami Ibrahim respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia. In the alternative, Mark Ibrahim suggests issuance of a writ of mandamus to the Court of Appeals for the District of Columbia Circuit, in preservation of this Court's ultimate jurisdiction, directing the Court of Appeals to recall its order of dismissal and restore Ibrahim's appeal to the calendar for merits briefing and decision.

OPINIONS BELOW

The unpublished Order of the United States Court of Appeals for the District of Columbia Circuit, *United States v. Ibrahim*, No. 23-3037, 2023 WL 3909352 (D.C. Cir. June 2, 2023), dismissing the appeal for lack of jurisdiction, is attached to this Petition at App. 1. The unpublished Order denying rehearing (Sept. 11, 2023), is attached to this Petition at App. 35. The unpublished Order denying rehearing en banc, 2023 WL 5985770 (D.C. Cir. Sept. 11, 2023), is attached to this Petition at App. 36.

The transcript of the unpublished final decision by Hon. Timothy J. Kelly, U.S. Dist. J., in *United States v. Ibrahim*, No. 1:21-CR-00496-TJK (D.D.C. Mar. 3, 2023), denying the motion to dismiss Count Three of the Indictment, is attached to this Petition at App. 3. An additional excerpt from the transcript of hearing

including an oral ruling from the bench denying Ibrahim's motion for discovery re selective prosecution (D.D.C. July 28, 2022), is attached to this Petition at App. 38.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and its later progeny of cases. With respect to the requested alternate relief of writ of mandamus, jurisdiction lies in 28 U.S.C. §1651.

The United States Court of Appeals for the District of Columbia Circuit entered its order dismissing this appeal on June 2, 2023. The Court of Appeals entered its Orders denying rehearing and rehearing en banc on September 11, 2023.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

28 U.S.C. §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of

the Virgin Islands, except where a direct review may be had in the Supreme Court. . . . .

28 U.S.C. §1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

40 U.S.C. §5104(e)(1)(A)

§5104 Unlawful activities

. . . .

(e) Capitol Grounds and Building security

(1) Firearms, dangerous weapons, explosives or incendiary devices. An individual or group of individuals –

(A) Except as authorized by regulations prescribed by the Capitol Police Board –

(i) may not carry on or have readily accessible to any individual on the Grounds or in any of the Capitol Buildings a firearm, a dangerous weapon, explosives, or an incendiary device;

(ii) may not discharge a firearm or explosives, use a dangerous weapon or ignite

> and incendiary device, on the Grounds or in any of the Capitol Buildings; or
>
> (iii) may not transport on the Grounds or in any of the Capitol Buildings explosives or an incendiary device; . . . .

Police Board Regulations Pertaining to Firearms Explosive Incendiary Devices and Other Dangerous Weapons (1967), Section 2.

. . . .

2. Except as specified below, the provisions of section 6(a)(1)(A) of the Act, as amended, relating to the carriage of firearms shall not apply to officers or employees of the United States authorized by law to carry firearms, duly appointed federal, state or local law enforcement officers authorized to carry firearms, and Members of the Armed Forces, while engaged in the performance of their duties, or any person holding a valid permit under the laws of the District of Columbia to carry firearms in the course of his employment. . . .

STATEMENT OF THE CASE

This interlocutory appeal presents a federal law enforcement officer seeking review and enforcement of his legislated right not to be prosecuted and tried for exercising his statutory authority to lawfully carry a firearm in locations where others are prohibited. Mark Ibrahim respectfully asks the Court to direct the U.S.

Court of Appeals to do what it does best – review his appeal on the merits to issue a reasoned opinion. The courts of appeals have an obligation and duty to review a colorable claim raised on appeal as of right.

A. Factual Background

From September 2019 through March 2021, Mark Sami Ibrahim was a Special Agent (SA) of the Drug Enforcement Administration (DEA). Mark joined the DEA after a successful ten years as a military intelligence officer in the U.S. Army, including special operations experience. Mark was assigned to work in the DEA office in the Orange County District Office within the Los Angeles, California Division from March 2020.

Mark's mother lives in northern Virginia, where Mark spent holiday leave time in 2020-2021. On January 6, 2021, Mark attended a political rally and protest in the District of Columbia. Joining Mark was his brother, who was and remains a Special Agent of the Federal Bureau of Investigation (FBI). Both Mark and his brother complied with the longstanding directives of their respective law enforcement agencies, and each off-duty officer carried his badge, credentials, and agency-issued handgun.

Both brothers joined the crowd walking to the United States Capitol and entered the Capitol Grounds (the outdoor area surrounding the Capitol Building). Mark Ibrahim remained outdoors that day and never entered any of the Capitol Buildings. SA

Ibrahim's agency-issued firearm remained in its holster the entire time he was on the Capitol Grounds.

Agent Ibrahim identified himself as a federal law enforcement officer to federal officers he recognized on duty and advised them he was available to assist. At one point, Mark stepped in to shield a fellow police officer from an angry protester – thereby fulfilling his duty as a federal law enforcement officer to halt a felony committed in his presence, regardless of whether Mark was officially on duty. Agent Ibrahim never attacked or assaulted any police officer, and he never entered any Capitol Building.

Mark photographed and recorded events of the day and shared some of them later on social media. Mark expressed his disappointment in the breakdown of the political protest in self-recorded videos saved on his phone. Mark later decried the shooting of Ashli Babbitt, after Mark witnessed her body covered in blood, being carried out of the Capitol Building.

Mark's brother was present and by Mark's side for most of the time the two men were on the Capitol Grounds. However, Mark's brother did not post or express any personal political opinions or disapproval of government actions on any social media. In a later interview by FBI Internal Affairs, Mark's brother was asked about the Ashli Babbitt shooting, and Mark's brother had no criticism for the Government's actions. Mark's brother (correctly) has not been charged with any violation of law.

Following Mark's return home to California, a Special Agent of the Department of Justice Office of Inspector General interviewed Mark about his presence and conduct at the Capitol on January 6. The IG agent interviewed Mark by video teleconference, as the DOJ IG agent was in Virginia.

B. Proceedings Below

In July 2021, a grand jury of the District of Columbia indicted Mark Ibrahim. App. 52. The Indictment charged Ibrahim with four counts: (1) Entering and remaining in a restricted building or grounds with a deadly or dangerous weapon, in violation of 18 U.S.C. §1752; (2) Injuries to property, in violation of 40 U.S.C. §5104(d); (3) Firearms and dangerous weapons on Capitol Grounds, in violation of 40 U.S.C. §5104(e)(1)(A)(i); and (4) False Statement, in violation of 18 U.S.C. §1001(a)(2). App. 52-55.

Ibrahim moved before trial to dismiss individual counts of the Indictment. Ibrahim moved to dismiss Count Four (section 1001 false statement) on grounds of improper venue. Ibrahim also sought discovery to allege unlawful selective prosecution for exercising his First Amendment rights, compared to similarly situated law enforcement officers present at the Capitol Grounds.

At issue in this appeal, Ibrahim moved to dismiss Count Three (carrying firearms on Capitol Grounds) based on explicit exemption of federal law enforcement officers in the text of the statute and regulation. That

text bars and precludes proceeding against Special Agent Ibrahim under Count Three. It is a condition precedent and not an affirmative defense. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006) ("if the Legislature clearly states that a threshold limitation on a statute's scope is jurisdictional, then courts and litigants will be clearly instructed."); *Gonzalez v. Thaler*, 565 U.S. 134, 141-42 (2012) (same).

The district court granted the motion to dismiss Count Four for improper venue. The district court denied the motion for discovery as to selective prosecution. App. 38. And in March 2023, the district court denied the motion to dismiss Count Three for the claimed legislated immunity and right not to be tried as written in the statute and the regulation. App. 3.[1]

Ibrahim timely noticed an appeal from the district court's final decision denying the motion to dismiss Count Three. The district court has informally continued the case pending Ibrahim's interlocutory appeal.[2]

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[1] The district court also denied two additional motions to dismiss counts of the Indictment, which motions are not part of the present interlocutory appeal.

[2] The fact that other counts of the Indictment remain pending and not on appeal does not bar this interlocutory appeal of the motion to dismiss Count Three. *See Behrens v. Pelletier*, 516 U.S. 299, 312 (1996) ("immunity is a right to immunity ***from certain claims***, not from litigation in general . . . appeal must be available and cannot be foreclosed by the mere addition of other claims") (emphasis original); *Int'l Action Ctr. v. United States*, 365 F.3d 20, 23-24 (D.C. Cir. 2004) (same).

The Government moved the Court of Appeals to dismiss the appeal for lack of jurisdiction. Ibrahim responded with the grounds in law and precedent permitting an interlocutory appeal of his right not to be tried, as written in the statute and regulation. Ibrahim contended that the *Cohen* collateral order doctrine applied to his claim against Count Three, and therefore his claim is a permissible interlocutory appeal, and should have proceeded to briefing and decision on the merits.

On June 2, 2023, the motions panel of the Court of Appeals entered an order dismissing the appeal. App. 1. *United States v. Ibrahim*, No. 23-3037, 2023 WL 3909352 (D.C. Cir. June 2, 2023).

Mark Ibrahim petitioned the Court of Appeals for rehearing and for rehearing en banc, pointing out the opinion incorrectly relied on this Court's ruling in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989). Contrary to the lower court opinion, *Midland Asphalt* recognizes appellate jurisdiction for Ibrahim's interlocutory appeal of his right not to be tried.

On September 11, 2023, the Court of Appeals entered two orders, respectively denying panel rehearing and rehearing en banc. App. 35; App. 36. Mark Ibrahim timely moved to stay the mandate pending this Petition for certiorari. The Government opposed the motion. As this Petition went to the printer, the Court of Appeals has not yet ruled on the motion to stay.

REASONS FOR GRANTING THE PETITION

Mark Ibrahim petitions the Court to grant a writ of certiorari, vacate the dismissal of his appeal, and remand the case to the Court of Appeals for the District of Columbia Circuit for briefing and decision on the merits of Ibrahim's claim. In the alternative, Mark Ibrahim suggests to the Court a remedy of a writ of mandamus to the Court of Appeals for the District of Columbia Circuit, in preservation of this Court's ultimate jurisdiction, directing the Court of Appeals to recall its order and restore Ibrahim's appeal to the calendar for merits briefing and decision.

In *Cohen v. Beneficial Indus. Loan Corp.*, the Court established the Collateral Order Doctrine and decision. *See* Part E.2, *infra*; Sup. Ct. R. 20.1. That Doctrine identifies a class of lower court decisions that can and should be reviewed by the appellate courts before entry of final judgment: Decisions that cannot be reviewed on direct appeal after final judgment, because, "When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen*, 337 U.S. at 546.

A Collateral Order can be reviewed on interlocutory appeal because it "is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen*, 337 U.S. at 546-47. It is an issue that has been finally decided, but it is not essential or integral to the elements of the ultimate claim or charge. It cannot be reviewed or determined by the appellate court if

the appellant were forced to wait for the end of the trial and judgment. It therefore merits interlocutory appeal. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009) ("The District Court's order denying the motion to dismiss turned on an issue of law and rejected the defense. . . . It was therefore a final decision subject to immediate appeal.").

As for criminal cases,

> [t]o be appealable as a final collateral order, the challenged order must constitute "a complete, formal and, in the trial court, final rejection," of a claimed right "where denial of immediate review would render impossible any review whatsoever." Thus we have permitted appeals prior to criminal trials when a defendant has claimed that he is about to be subjected to forbidden double jeopardy, or a violation of his constitutional right to bail, because those situations, like the posting of security for costs involved in *Cohen*, "each involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376-77 (1981) (citations omitted).

A. This case presents an important issue of federal law enforcement liability with nationwide impact.

This is a case of first impression to the Court. This case involves a question of exceptional importance

because the Court's ruling will affect the operations of federal law enforcement in safeguarding not only the U.S. Capitol, but any other federally protected site nationwide and subject to such a law. Sup. Ct. R. 10(a).

The prosecution of this case breaks faith with countless federal law enforcement officers who make themselves available around the clock, 24-7, and carry their agency-issued weapons per agency directives. Failure to address the question of the law's exemption breeds uncertainty and shakes any remaining confidence of the public and the law enforcement officers in the application of the laws.

The DEA directive which bound SA Ibrahim requires DEA agents to maintain access to firearms while off-duty, mandating that **DEA agents are "required to be available for duty with little or no advance notice" and "must have ready access to their firearm in the event that they are recalled to duty."** DEA AGENTS MANUAL § 6122.11(B) (emphasis added). The practical result is that agents always carry their agency-issued firearms.

As on any other day, SA Ibrahim obeyed this DEA mandate on January 6, 2021. Federal law authorizes DEA officers to carry firearms without limitation to official duty. 21 U.S.C. §878. Furthermore, D.C. Code §22–4505 permits federal police officers, who are otherwise authorized, to carry firearms in the District of Columbia, also without limitation to duty status. The practice in the District of Columbia, and even on the very Capitol Grounds, has become common over

the years, especially for announced public events. *See*, *e.g.*, UNITED STATES CAPITOL POLICE PUBLIC EVENTS: *National Peace Officers Memorial Service*, https://www.uscp.gov/visiting-capitol-hill/visitor-information/public-events; FRATERNAL ORDER OF POLICE, *National Peace Officers' Memorial Service*, https://fop.net/about-the-fop/fop-auxiliary/memorial-service/; THE WHITE HOUSE, A Proclamation on Peace Officers' Memorial Day and Police Week, 2023 (May 12, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/05/12/a-proclamation-on-peace-officers-memorial-day-and-police-week-2023/.

Moreover, there is a designated area, within the Capitol Grounds, for officers entering the Capitol Building to securely store their firearms before entering the building. Yet to reach this area, officers have to walk across the Capitol Grounds carrying their firearms. Again, entry into the Capitol Building is not in issue in this case – only the presence outdoors on Capitol Grounds.

The importance and consequences of this issue transcend the confines of the U.S. Capitol. An armed federal law enforcement officer should not hesitate to act or be required to second guess, when confronting an emergency **wherever** that officer might be. Absent assurance the officer will receive the support and confidence of the government for that officer's initiative, when that officer faces exigent circumstances or public disorder, how can that officer be expected to come forward to assist? How then could the federal government continue to rely on its officers in all situations?

Special Agents who face prosecution, despite the clear words of the statute, may refrain from their duties or hesitate, which will endanger themselves and the public. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences"); *Pierson v. Ray*, 386 U.S. 547 (1967). Undesirable consequences include "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people for public service." *Harlow*, 457 U.S. at 816.

This concern extends beyond the Capitol Grounds; the ruling in this case would affect analogous settings of airports, federal buildings, and other sites governed by general prohibitions on firearms that seek to exempt law enforcement officers. *See*, *e.g.*, 18 U.S.C. §930(d), (e) (exempting federal law enforcement officers from the general prohibition of firearms in federal facilities); 49 C.F.R. §1544.219 (exempting law enforcement officers from firearms ban in air travel) and *id*. §1544.219(a)(2)(iv) (specifying "Employed as a federal LEO, whether or not on official travel, and armed in accordance with an agency-wide policy . . . established by the employing agency by directive or policy statement."). Failure to uphold the law's text will enlarge the danger of incidents occurring in any of these places.

More broadly, misapplication of the law exempting federal law enforcement officers from firearms prohibitions also implicates issues of mutual assistance across jurisdictional boundaries, and cross-deputization between law enforcement agencies, state, tribal and federal, both specifically within the National Capital Region as well as any other federally sensitive or controlled areas. *See generally, e.g.*, 25 U.S.C. §2804 (Assistance by other agencies to law enforcement in Indian Country); 54 U.S.C. §102701(a)(2)(A), (b)(1) (designations and authorities to other agencies and law enforcement officers to carry firearms in national parks); *see also* 16 U.S.C. §1a-7(b) (firearms policies in national parks and federal lands).

Failure to uphold the law's text will enlarge the danger of incidents occurring in any of these places. Accordingly, the Court of Appeals's decision is a departure from accepted and usual norms, and calls for the Court's supervisory power. Sup. Ct. R. 10(a).

B. The Court of Appeals has a duty and obligation to review on the merits a colorable claim of legislated immunity in the text of the statute and regulation granting Federal law enforcement officers a right not to be tried.

Congress created a statutory right to appellate review of final decisions in 28 U.S.C. §1291. *See Coppedge v. United States*, 369 U.S. 438, 442 (1962) ("Present

federal law has made an appeal . . . in a criminal case what is, in effect, a matter of right.").

The statute specifies jurisdiction to review final decisions and not just final judgments. "It is a final decision that Congress has made reviewable. . . . While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring). The district court's denial of the motion to dismiss Count Three of the Indictment against Mark Ibrahim is just such a final, reviewable decision.

"[A] federal court always has jurisdiction to determine its own jurisdiction" of the matters presented to it. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("In order to make that determination, it was necessary for the [ ] Circuit [Court of Appeals] to address the merits. We therefore hold that appellate jurisdiction was proper."); *see United States v. Mine Workers*, 330 U.S. 258, 291 (1947); *see also Brownback v. King*, 592 U.S. ___, 141 S. Ct. 740, 750 (2021) ("a federal court can decide an element of [a] claim on the merits if that element is also jurisdictional."). At a minimum, the Court of Appeals had an obligation to do that – allow briefing and argument of the threshold jurisdiction question, to render a decision on the merits of appealability.

The Court has long emphasized the "virtually unflagging obligation" of federal courts to exercise the jurisdiction given them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). "In the main, federal courts are obliged to decide cases

within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) ("federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant.").

"Federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." *Wilcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) (quoted in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989)). *See also Deakins v. Monaghan*, 484 U.S. 193, 202-03 (1988) (enforcing "the duty of federal courts to assume jurisdiction where jurisdiction properly exists"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not."). "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

In criminal cases, the Court has ruled that courts of appeal must review a colorable claim of a right not to be tried. "[A]llowing appeals such as this is completely consistent with the Court's admonition in *Cohen* that the words 'final decision' in §1291 should have a 'practical rather than a technical construction.'" *Richardson v. United States*, 468 U.S. 317, 322

(1984) (colorable and nonfrivolous claim is appealable). *See Behrens v. Pelletier*, 516 U.S. at 310 ("whether there is jurisdiction over the appeal . . . must be determined by focusing on the category of the order appealed from, rather than upon the strength of the grounds for reversing the order."); *see also United States v. Joseph*, 26 F.4th 528, 533 (1st Cir. 2022) ("we ask whether either defendant asserts a right that would effectively be lost by proceeding to trial. To answer this question, we consider the rights that the defendants claim are at stake.").

Notwithstanding the appealability of the district court's order under the *Cohen* collateral order doctrine, the D.C. Circuit's refusal to take and review the interlocutory appeal from that order expands the harm: "An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits. For the same reason, this order would be entirely unreviewable if not appealed now." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983). *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 266 (1982) (appealable claim of a "right not to be tried" involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial").

In this case, the D.C. Circuit refused and evaded its duty to take Ibrahim's appeal and fully review his colorable claim on the merits – contrary to the law and precedent of this Court. The district court in all respects treated Ibrahim's motion to dismiss as a colorable and serious claim. App. 18-23. There was never any

allegation of frivolity, and the district court responded positively to the challenge of weighing and deciding the motion. *See* App. 24 ("That, I think, cleans the slate of a lot of very interesting motions you-all had before me."). This Court has ruled "that 'good faith' in this context must be judged by an objective standard. We consider a defendant's good faith in this type of case demonstrated when he seeks appellate review of any issue not frivolous." *Coppedge*, 369 U.S. at 445.

The claim is not frivolous; it has a basis in the law's text; it is therefore appealable. The nature of the legislated right not to be tried necessitates immediate review of the claim before trial, else irreparable harm will occur and the entire legal right be defeated. Sup. Ct. R. 10(a).

C. The Court of Appeals has decided an important question of Federal law that has not been, but should be, settled by this Court, and has decided that important Federal question in a way that conflicts with relevant decisions of this Court.

The D.C. Circuit's Motions Panel order dismissing this appeal misapplies the Court's opinion in *Midland Asphalt*, as principal authority to dismiss the appeal. The order similarly conflicts with opinions applying and following *Midland Asphalt*. Accordingly, certiorari is appropriate to correct this misapplication of law. Sup. Ct. R. 10(c).

The Motions Panel declared that

> the district court's order denying the appellant's motion to dismiss is not appealable under the collateral order doctrine. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-99 (1989). Appellant has not shown that the issues of his appeal are completely separate from the merits of the underlying proceeding or effectively unreviewable on appeal from a final judgment. *See id.* at 798-801.

App. 1-2. *Ibrahim*, 2023 WL 3909352 at *1. The panel order misstates the holding of *Midland Asphalt*, and it misapprehends the claim of Mark Ibrahim both in the district court and on appeal.

The Court in *Midland Asphalt* explicitly and unequivocally held that the claim of a right not to be tried, resting on an explicit statutory basis, is entitled to review on interlocutory appeal. The Court considered a claim that the *Midland Asphalt* defendants' appeal of a denial of their motion to dismiss the Indictment, alleging grand jury misconduct by the Government, was effectively unreviewable on appeal from a final judgment, and therefore should be immediately reviewable in an interlocutory appeal. 489 U.S. at 796-97.

The *Midland Asphalt* Court confirmed the doctrine of *Cohen v. Beneficial Indus. Loan Corp.* and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), permitting interlocutory appeal for a limited class of final orders which are "effectively unreviewable on appeal

from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468. *Midland Asphalt*, 489 U.S. at 798-99. The "test is satisfied only where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Id*. at 799.

A claim that satisfies this test is a claim of "the right not merely not to be convicted, but *not to be tried at all*." 489 U.S. at 800 (emphasis in original). "[D]eprivation of the right not to be tried satisfies the *Coopers & Lybrand* requirement of being 'effectively unreviewable on appeal from a final judgment.'" *Id*. at 800-01 (citing *Abney v. United States*, 431 U.S. 651 (1977)). *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 1435 S. Ct. 890, 903-04 (2023) (improper trial "is impossible to remedy once the proceeding is over. . . . And as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone.").

The defendants-appellants in *Midland Asphalt* failed this test, not for failing to claim a right not to be tried, but because they based that right only upon violation of Federal Rule of Criminal Procedure 6(e) and the strictures on grand jury information. 489 U.S. at 801-02 (Rule 6(e) "has nothing to do with a 'right not to be tried' in the sense relevant here."). Instead, the Court held, "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur." *Id*. at 801; *see United States v. Durenberger*, 48 F.3d 1239, 1243 (D.C. Cir. 1995) ("A court's jurisdiction to hear an interlocutory appeal may rest on an explicit

statutory or *constitutional* provision guaranteeing that trial will not occur.") (emphasis original) (quoting *Midland Asphalt*); *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 367-68 (D.C. Cir. 1990) (finding "a statutory right not to be tried as a criminal defendant. . . . That right would be irretrievably lost, the decision would be effectively unreviewable," if not allowed interlocutory appeal). That language set forth in an explicit statute, is the basis of Mark Ibrahim's claim not to be tried on Count Three.

In the same Term, a unanimous Court applied *Midland Asphalt* to the case of *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989). While denying immediate review to contractual forum-selection clauses in a civil action because they are not statutory or constitutional guarantees, the Court added,

> We have insisted that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed.
>
> We have thus held in cases involving criminal prosecutions that the deprivation of a right ***not to be tried*** is effectively unreviewable after a final judgment and is immediately appealable.

490 U.S. at 499 (emphasis in original) (citing *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney*, 431 U.S. 651; and *Midland Asphalt*). *See also Lauro Lines*, 490 U.S. at 499-500 ("we have held that the denial of a motion to dismiss based upon a claim of absolute immunity

from suit is immediately appealable prior to final judgment . . . claims of qualified immunity may be pursued by immediate appeal, because qualified immunity too 'is an *immunity from suit*.' ") (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); and *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (emphasis in original)).

The Court continued and affirmed this principle from *Midland Asphalt* in the case of *Will v. Hallock*, 546 U.S. 345 (2006). To illustrate the line that divides immediately appealable rights from those rights that are not, the *Hallock* Court listed appealable claims of a right not to be tried including absolute immunity; qualified immunity; Eleventh Amendment immunity; and a defense of double jeopardy. 546 U.S. at 350 (citing *Nixon v. Fitzgerald; Mitchell v. Forsyth; Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 596 U.S. 139 (1993); and *Abney v. United States*).

In contrast, claims identified as not immediately appealable included lack of personal jurisdiction; expiry of the statute of limitations; denial of the right to a speedy trial; claim preclusion; absence of dispute of material fact entitling movant to summary judgment; and mere failure to state a claim. 546 U.S. at 351 (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)).

Hallock further distinguished these two groups of claims by one additional "characteristic that merits appealability under *Cohen*; and as *Digital Equipment* explained, that something further boils down to 'a judgment about the value of the interest that would be

lost through rigorous application of a final judgment requirement.'" *Hallock*, 546 U.S. at 351-52; *see also Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine.").

Mark Ibrahim's claimed right as a federal law enforcement officer under the specific language of 40 U.S.C. §5104 not to be tried meets this further requirement. *Hallock* specifies, among other concerns, the danger of "threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted . . . " 546 U.S. at 352. The *Hallock* Court confirmed that there is "some particular value of a high order [] marshaled in support of the interest in avoiding trial: [instances including] preserving the efficiency of government and the initiative of its officials." *Id*. These criteria apply foursquare to the case of SA Mark Ibrahim and his fellow federal law enforcement officers.

D. Circuits are split as to the appealability of a colorable claim of a right not to be tried.

In *Richardson v. United States*, the Court noted that "[a] colorable claim . . . presupposes that there is some possible validity to a claim." 468 U.S. at 326 n.6. In refusing to entertain on interlocutory review a colorable claim of a right not to be tried, the D.C. Circuit's ruling sets it in conflict with other Circuits.

The Second, Eighth, Ninth, Tenth and Eleventh Circuits have each upheld the appealability of claims of right not to be tried, regardless of the final merits decision. *E.g.*, *United States v. Harrington*, 997 F.3d 812, 816 (8th Cir.), *reh'g and reh'g en banc denied* (July 13, 2021) ("we have jurisdiction over such an appeal, however, only if the defendant has raised a colorable showing of the elements of" a claim of right not to be tried; absent written district court "findings, we will look to the record to ascertain whether the claim is colorable"); *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 755 (10th Cir. 1992) (District court denial of motion appealable "[b]ecause the court's order implicates defendants' right not to be tried, the order is unreviewable on appeal from a final judgment. The right not to be tried is violated if the defendants have been tried already, and no court can compensate for the violation this right.") (citations omitted); *United States v. Bradley*, 905 F.2d 1482, 1486 (11th Cir. 1990) (appellants "have presented a colorable" claim, and "consequently, . . . this court has jurisdiction to hear the instant appeal."); *United States v. Claiborne*, 727 F.2d 842, 844-45 (9th Cir. 1984); *United States v. Myers*, 635 F.2d 932, 935 (2d Cir. 1980); *see also United States v. Turkiye Halk Bankasi, A.S.*, 16 F.4th 336, 344 (2d Cir. 2021) (dismissal "determination is immediately appealable pursuant to the collateral order doctrine – even in a criminal case."), *aff'd in part*, 598 U.S. 264 (2023).

The Eleventh Circuit emphasized the independent distinction between the nature of the colorable claim raised and the ultimate merits ruling:

> Even though this appeal involves rights not heretofore recognized in our jurisprudence, the assertion of those rights involves significant issues . . . the resolution of which is at best the subject of fair debate.. . . . It is both necessary and appropriate for this court to consider the existence of Hastings' asserted right to be free from prosecution before that assertion is rendered meaningless by the impending trial.

United States v. Hastings, 681 F.2d 706, 708-09 (11th Cir. 1982).

The Court should grant certiorari to resolve the circuit split. Sup. Ct. R. 10(a).

E. This case is suitable for summary disposition.

Although this Court's plenary review may ultimately be warranted, the appropriate course at this point would be to grant certiorari, vacate the Court of Appeals's judgment, and remand for full consideration of the appeal on the merits. Alternatively, this case meets the test for this Court's writ of mandamus to preserve the Court's ultimate jurisdiction of the matter.

1. The Court should grant certiorari, vacate the judgment of dismissal, and remand to the Court of Appeals for review on the merits.

The Court of Appeals has evaded its responsibility to exercise its appellate jurisdiction to hear and determine an appeal as of right, presenting a colorable claim of a right not to be tried, based on statute and regulation text. It is most common practice for the Court to review reasoned and argued issues first heard by the lower appeals courts. *Knickerbocker Ins. Co. of Chicago v. Comstock*, 83 U.S. 258, 270 (1872) ("as those questions have not been re-examined in the Circuit Court, and this court is not inclined to re-examine any such questions coming up from the District Court until they have first been passed upon by the Circuit Court."); *cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues were neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984) ("Though, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, we are generally reluctant to do so.") (citations omitted).

Ibrahim's appeal presents a legal issue only, one ripe for the Court of Appeals to review. With no colorable basis to evade such review, the Court of Appeals must exercise its appellate jurisdiction. This Court need only recognize these conclusions, to justify a grant of certiorari, vacating the judgment of dismissal by the Court of Appeals, and remanding the issue to

the D.C. Circuit for appropriate briefing, consideration and review. *Cf. United States v. Jose*, 519 U.S. 54, 58 (1996) (granting certiorari, vacating judgment, and remanding case).

2. In the alternative, the Court should preserve its ultimate jurisdiction of this case by issuing a writ of mandamus to the Court of Appeals for the District of Columbia Circuit.

The All Writs Act, 28 U.S.C. §1651, empowers the Court to issue all writs in aid of its jurisdiction. 28 U.S.C. §1651(a). As the Court's jurisdiction "is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). "Its authority is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Id.*; *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) (since the Court "could at some stage . . . entertain appeals in these cases, it has power in the proper circumstances, as here, to issue writs of mandamus reaching them."); *see also United States v. United States Dist. Ct. for S. Dist. N.Y.*, 334 U.S. 258, 263 (1948); *Ex parte United States*, 287 U.S. 241, 246 (1932); *McClellan v. Carland*, 217 U.S. 268, 280 (1910).

"Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause." *Knickerbocker*, 83 U.S. at 270.

Unless the D.C. Circuit first reviews on the merits Ibrahim's claim of a right not to be tried, this Court will lose its prospective jurisdiction and the opportunity to timely review on the merits and decide the issue of the claimed right not to be tried. One "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to . . . compel [a lower court] to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26; *id.* at 31 ("refusal to exercise [judicial power], which it is the function of mandamus to correct."). Accordingly, the traditional writ of mandamus is available and appropriate to preserve the issue and obtain Court of Appeals review in preparation or anticipation for this Court's ultimate review. *La Buy*, 352 U.S. at 256 (affirming issuance of writ of mandamus where lower court acts "amounted to little less than an abdication of the judicial function depriving the parties of [decision] before the court").

Elements necessary to support the issue of the writ of mandamus are well established: (1) That no other adequate means exist to attain the relief desired; (2) the party's right sought to be vindicated is clear and indisputable; and (3) the writ is appropriate under the circumstances. *Hollingsworth v. Perry*, 558 U.S. 183,

190 (2010); *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004); *Kerr v. United States Dist. Ct. for N. Dist. Cal.*, 426 U.S. 394, 403 (1976).

Mark Ibrahim's case presents these elements. Sup. Ct. R. 20.1. First, presupposing the denial of certiorari, there remains no other adequate means to obtain interlocutory appellate review, before trial, of the claimed right not to be tried. *Maryland v. Soper*, 270 U.S. 9, 30 (1926) ("Except by the issue of mandamus, [petitioner] is without the opportunity to invoke the decision of this court upon the issue it would raise.").

Second, Ibrahim's is an appeal of statutory right. *See* 15A CHARLES A. WRIGHT, ARTHUR C. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE – JURISDICTION & RELATED MATTERS, §3911 at 415 n.58 (2022) ("Because collateral order appeals are taken under [28 U.S.C.] §1291, satisfaction of the tests for collateral order appeal means that the appeal is available as a matter of right."). The Court of Appeals does not have discretion to abstain or evade review of Ibrahim's claim. *United States v. Weissberger*, 951 F.2d 392, 397 (D.C. Cir. 1991) ("If the matter in dispute satisfies the *Cohen* test, we must hear it.").

Third, the writ is appropriate in these circumstances. Mark Ibrahim raises a colorable claim on first impression, seeking review and interpretation of the written exemption in 40 U.S.C. §5104(e) and regulation, which this Court ultimately should decide. As a right not to be tried naturally expires at trial, unless the Court acts now to issue the writ, jurisdiction to

decide the question evaporates. *Ex parte United States*, 287 U.S. at 246 ("the issue of the writ may rest upon the ultimate power which we have to review the case itself to the Circuit Court of Appeals in which such immediate and direct appellate jurisdiction is lodged."); *McClelland*, 217 U.S. at 280 ("we think it the true rule that where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."); *see also FTC v. Dean Foods Co*., 384 U.S. 597, 603-04 (1966) ("The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court") (citing *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193 (1832) (Marshall, C.J.)).

Accordingly, the Court should issue the writ of mandamus to the Court of Appeals, directing the D.C. Circuit to recall its order of dismissal and restore Ibrahim's interlocutory appeal to the briefing calendar for review and decision on the merits.

CONCLUSION

The Court should grant the writ of certiorari, vacate the judgment of dismissal, and remand the case to the Court of Appeals for decision on the merits. Alternatively, the Court should issue a writ of mandamus to the Court of Appeals for the District of Columbia Circuit, directing the recall of the order of dismissal

and restoration of the case to the merits briefing calendar.

Respectfully submitted,

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