No.

IN THE

Supreme Court of the United States

JESUS ARLEY MUNERA-GOMEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant is constitutionally entitled to obtain use immunity for the only person who can disprove the defendant's guilt, when the Government threatens the witness with prosecution and causes the witness to invoke his privilege against self-incrimination unless his testimony is immunized.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

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

United States v. Munera-Gomez, No. 22-1473 (June 7, 2023).

U.S. District Court for the District of Massachusetts:

United States v. Munera-Gomez, No. 20-cr-10079 (Nov. 5, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesus Arley Munera-Gomez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-24a) is reported at 70 F.4th 22 (1st Cir. 2023). The decision of the district court (Pet. App. 25a-50a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2023. On August 24, 2023, Justice Jackson extended the time to file this petition to November 3, 2023. The jurisdiction of this Court is invoked 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…."

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 …."

The federal use-immunity statute, 18 U.S.C. § 6003, provides in relevant part that:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

INTRODUCTION

This case pits a defendant's rights to compulsory process and a fair trial against a witness's right against compelled self-incrimination. But those rights do not conflict if the witness has "use immunity" for his testimony—*i.e.*, although the witness can still be prosecuted, the witness's *testimony* cannot be used against him. But here, the Government held open the threat of prosecution and refused to immunize the testimony. So the defendant's key exculpatory witness refused to testify, and the lower courts held the defendant could not make him. The prosecution prevented the defendant from exculpating himself.

This case presents an opportunity for this Court to resolve an acknowledged and persistent split on whether, and when, the Government's prevention of exculpatory testimony violates the Constitution. The courts recognize that the right to present a defense implicates both the express right "to have compulsory process for obtaining witnesses in [a defendant's] favor," U.S. Const. amend. VI, and the right to a fair trial that comports with due process, *id.* amend. V. But while almost every circuit has weighed in on the question presented, there is no consensus as to an answer.

Several circuits hold that the defendant's right to present an effective defense can require immunizing an exculpatory witness's testimony, even when the defendant cannot show that the prosecution created the need for immunity *through misconduct*. It can suffice that the prosecution does not have a sufficiently weighty reason for withholding immunity, as the Third Circuit has held, or that the

prosecution's immunity decisions have distorted the fact-finding process, as the Ninth and Sixth Circuits have recognized. But many circuits, including the First Circuit here, hold that the Government can withhold immunity from an exculpatory witness—and benefit from the witness's resulting silence—as long as it does not commit overt prosecutorial misconduct. There is no textual or historical basis for such a requirement. Nor, indeed, is there any agreement on what type of misconduct is required: the Seventh and Tenth Circuits require misconduct that is intended to mislead the jury; the First, Second, Fourth, and Eighth will make do with a wider range of prosecutorial misconduct, such as harassing or threatening a defense witness.

Lost in the circuits' struggle to find a workable standard is the defendant's right to "compulsory process for obtaining witnesses in his favor." A use-immunity order, like a subpoena, is *process*, although the issuing court has no discretion as to the order's issuance. If the compulsory-process right is to place a criminal defendant on an even footing with the Government regarding "process" for obtaining witnesses—as the right has historically been understood—there is no principled reason why a "process" statutorily prescribed only to the Government is exempt from that constitutional commitment. But, ever since this Court described the compulsory-process right as one of "the most basic ingredients of due process of law," *Washington v. Texas*, 388 U.S. 14, 18 (1967), the courts of appeals have improperly and inexplicably neutered the compulsory-process right into something lesser, a due-process check of last resort against prosecutorial misconduct.

This Court should grant certiorari to resolve the longstanding and recurring split on the circumstances under which a defendant is constitutionally entitled to use immunity for a witness who refuses to testify because of the fear of prosecution. In doing so, the Court has an opportunity to give full effect to a right that Chief Justice Marshall once described as "sacred": the right to "the process of the court to compel the attendance of [the defendant's] witnesses." *United States v. Burr*, 25 F. Cas. 30, 33 (Cir. Ct. D. Va. 1807).

STATEMENT

I. Mr. Munera is charged with drug offenses and raises an entrapment defense, but the Government refuses to provide his key witness with use immunity.

One day in August 2019, a confidential source for the U.S. Drug Enforcement Administration (DEA) approached Mr. Munera at a bar. Pet. App. 2a. The confidential source pressured Mr. Munera on multiple occasions to conduct a drug transaction with him, pressure to which Mr. Munera eventually acceded. Pet. App. 3a. This transaction was in fact an undercover DEA operation, and Mr. Munera was arrested. Pet. App. 3a, 5a-6a.

Hoping to receive a lighter sentence in exchange for testifying against Mr. Munera, the confidential source testified that he approached Mr. Munera in the bar because he overheard someone call Mr. Munera "Pikachu"—the confidential source believed someone who had supplied cocaine to one of the

confidential source's former business partners, Fabio Quijano, in 2016 and 2017, used that pseudonym. Pet. App. 2a-3a, 6a; C.A. Gov. Supp. App. 85-86 (7:25-8:7), 232 (154:1-2). When interviewed, however, Quijano confirmed he knew Mr. Munera but denied that Mr. Munera conducted drug transactions with him. Pet. App. 6a. Because Quijano was simultaneously under indictment for other offenses he committed during a different time period—between 2018 and 2020, Pet. App. 6a—it was likely Quijano would invoke his Fifth Amendment privilege against self-incrimination if called to testify, *see* Pet. App. 32a-33a. And indeed, Quijano's attorney indicated Quijano would invoke this privilege. C.A. Gov. Supp. App. 32-33 (118:24-119:6). Accordingly, Mr. Munera requested use immunity for Quijano. Pet. App. 6a. But the Government refused to confer this immunity. Pet. App. 6a. Mr. Munera therefore requested that the district court order the Government to do so. Pet. App. 6a. The district court denied Mr. Munera's request at the final pretrial conference, reasoning that there was "no evidence that the prosecution withheld immunity in an attempt to distort the factfinding process." Pet. App. 6a.

At trial, Mr. Munera conceded the underlying offense conduct but raised an entrapment defense. Pet. App. 7a. After a four-day jury trial, Mr. Munera was convicted of one count of attempting to possess with intent to distribute five kilograms or more of cocaine. Pet. App. 2a, 7a. Before sentencing Mr. Munera, the district court commented on his immigration status, referring to Mr. Munera as "an illegal alien" and stating that his immigration status "add[ed] insult to injury." Pet. App. 22a-23a. The

court opined that Mr. Munera had "remained an illegal alien while [he] committed this and no doubt other crimes" and that "[f]or all of that, [he] deserve[d] a long prison sentence." Pet. App. 22a-23a. The district court then sentenced Mr. Munera to 120 months of imprisonment. Pet. App. 7a.

II. Expressly disagreeing with the Ninth Circuit, the First Circuit holds that, absent bad faith, only the Government, not Mr. Munera, can invoke use immunity for its witnesses.

Mr. Munera appealed to the First Circuit, arguing, among other things, that the district court's denial of use immunity deprived him of his constitutional rights to due process and a fair trial. Pet. App. 7a. Specifically, Mr. Munera argued that Quijano's testimony would have directly contradicted the confidential source's testimony with respect to Mr. Munera's predisposition (or lack thereof) to engage in drug trafficking, a key aspect of the entrapment defense. Pet. App. 7a-8a. Mr. Munera reiterated on appeal that Quijano would most likely have invoked his privilege against self-incrimination if called to the stand, and that use immunity was the only means of obtaining Quijano's testimony.

The First Circuit rejected Mr. Munera's argument that he was constitutionally entitled to use immunity. Citing circuit precedent, the court of appeals held that a "district court may circumvent the government's discretionary call [on providing immunity] only in the rare circumstance that a prosecutor abuses his or her discretion by intentionally attempting to distort the fact-finding

process." Pet. App. 8a (citation, alteration, and quotation marks omitted). Under the First Circuit's standard, the Government needed to provide only a "plausible reason for denying use immunity," the assertion of which would "adequately deflect[] any insinuation that the government's handling of the witness was motivated by the sole purpose of keeping exculpatory evidence from the jury." Pet. App. 8a-9a (citation, alteration, and quotation marks omitted). Because the Government's asserted reason for denying use immunity to Quijano was to "avoid[] potential obstacles to Quijano's prosecution on pending federal charges," the court concluded the Government had "fend[ed] off a claim of prosecutorial misconduct." Pet. App. 9a.

In reaching this conclusion, the First Circuit acknowledged that its standard was narrower than the Ninth Circuit's standard for evaluating use-immunity claims made by defendants. Pet. App. 10a n.3. But it noted that it had "repeatedly rejected" the Ninth Circuit's "effective-defense" approach, under which "a strong need for exculpatory testimony can override even legitimate, good faith objections by the prosecutor to a grant of immunity." Pet. App. 10a (citation omitted). Here, the First Circuit once again explicitly "reject[ed]" the Ninth Circuit's approach "[t]o the extent … [it] embraces the effective defense theory." Pet. App. 10a.

The court left open the possibility that in cases involving "very extreme facts," a defendant might be entitled to use immunity even without a showing of affirmative Government misconduct. Pet. App. 11a (citation omitted). Specifically, the First Circuit opined that, if a prosecutor had only "a trivial

interest in withholding immunity and—to avoid a complete miscarriage of justice—the defendant has an overwhelming need for specific exculpatory evidence that can be secured in no other way than through the grant of immunity," the defendant might be constitutionally entitled to obtain use immunity for his exculpating witness. Pet. App. 11a (citation omitted). But the First Circuit declined to address that "hypothetical" because it thought the facts here were not sufficiently "extreme." First, the court reasoned, the Government had more than a "trivial" interest that justified withholding immunity. Although the Government had not indicted or attempted to prosecute Quijano for the alleged 2016-2017 drug transactions, the statute of limitations for these alleged offenses was close to expiring, and use immunity "would not necessarily bar prosecution based on evidence obtained independent of his testimony," Pet. App. 11a-12a, the court summarily concluded that "a future prosecution of Quijano … would be hampered by immunization" and that the "government's strong interest in withholding immunity alone brings this case outside" of the required "very extreme" factual scenario, Pet. App. 11a-12a. And second, the First Circuit concluded that Mr. Munera did not have an "overwhelming need" for Quijano's testimony. Although Quijano's testimony could have contradicted and discredited the confidential source's testimony, the court thought it was sufficient for Mr. Munera to testify *himself* that he did not sell drugs to Quijano. Pet. App. 12a-13a. The First Circuit accordingly affirmed Mr. Munera's conviction and sentence. Pet. App. 24a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are openly split on the question whether a defendant is constitutionally entitled to obtain use immunity for an exculpating defense witness, when the witness invokes his privilege against self-incrimination, and the witness's testimony is the only means of obtaining exculpation.[1] This Court should resolve what is, at the very least, a four-way split on that question, before the split devolves further.

The First Circuit and at least three of the four sides of the split have provided the wrong answer to the question presented. Under both the express terms of the Sixth Amendment and the fair-trial guarantee of the Due Process Clause, a defendant has the right to "have compulsory process for obtaining witnesses" in the same manner as the Government. The right is an affirmative one—it is not predicated on prosecutorial misconduct, as the First Circuit and other courts of appeals have held.

Given this multi-faceted division, which has only widened with time and percolation, this Court's intervention is needed to resolve the conflict. And because this question implicates defendants' due process and Sixth Amendment rights—rights meant to ensure defendants receive a fair trial—this case presents an opportunity for this Court to restore full effect to constitutional rights that have been

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[1] *United States v. Moussaoui*, 382 F.3d 453, 467 (4th Cir. 2004) ("The circuits are divided with respect to the question of whether a district court can ever compel the government, on pain of dismissal, to grant immunity to a potential defense witness.").

sidelined by the circuits' convoluted responses to the question presented.

I. The courts of appeals are divided on how to determine when the Government's denial of use immunity violates the Constitution.

The "right to offer the testimony of witnesses, and to compel their attendance, if necessary," is a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). The question presented here is how to handle the Government's frustration of the defendant's rights to summon and present exculpatory witnesses by causing the witnesses to refuse to testify on self-incrimination grounds. The circuits are divided on whether, and under what circumstances, the defendant is entitled to secure the witness's testimony by obtaining use immunity for that testimony.

Despite the Sixth Amendment's textual guarantee of "compulsory process for obtaining witnesses," U.S. Const. amend. VI, few courts have addressed whether such immunity could be compelled under the Sixth Amendment. But courts are divided on this, too. The Second and Sixth Circuits say the Sixth Amendment does not provide any relief under any circumstance to a defendant who faces an exculpating witness who refuses to testify because of the risk of self-incrimination. *United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980) ("[T]he Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged

testimony heard, but does no[t] carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination."); *United States v. Lenz*, 616 F.2d 960, 962 (6th Cir. 1980) ("[D]efendants have no compulsory-process right to have their witnesses immunized."). The Ninth Circuit, by contrast, has indicated that the Sixth Amendment provides a remedy when "the defense witness's testimony would have been relevant, and the prosecutor's denial of immunity intentionally distorted the fact-finding process." *United States v. Croft*, 124 F.3d 1109, 1116 (9th Cir. 1997).

1. The Sixth and Ninth Circuits have both confirmed that the Constitution may require immunizing a defense witness even without a showing of prosecutorial misconduct. *See, e.g.*, *United States v. Allebban*, 578 F. App'x 492, 505 (6th Cir. 2014) ("While this circuit has acknowledged that [the prosecutorial misconduct] exception exists in other jurisdictions, it has not yet adopted the exception itself."); *United States v. Wilkes*, 662 F.3d 524, 534 (9th Cir. 2011) ("[A] finding of prosecutorial misconduct is not required to compel use immunity."). Rather, both courts have adopted a version of the so-called "effective-defense" exception that the First Circuit expressly rejected here, Pet. App. 10a. Under this exception (to the general rule that only the Government can seek immunity), immunity for a defense witness's testimony may be warranted if "the government selectively grant[s] immunity to its own witnesses but denies immunity to the defendant's witnesses." *United States v. Meda*, 812 F.3d 502, 518 (6th Cir. 2015); *see United States v. Straub*, 538 F.3d 1147, 1156-57, 1166 (9th

Cir. 2008) (prosecution's refusal to grant use immunity "distort[s]" the fact-finding process and denies a fair trial where the prosecution granted "substantial incentives or immunity" to a Government witness in order to obtain that witness's testimony, "while denying immunity to a [defense] witness with directly contradictory testimony").[2] Thus, for example, the Ninth Circuit recognized the "distortion of the fact-finding process" that results when immunity decisions prevent the defendant from presenting testimony "directly contradictory" to the prosecution's. *Straub*, 538 F.3d at 1161-62. That was the case in *Straub*, where "the prosecution granted immunity and other incentives to eleven of Straub's co-conspirators, while denying immunity to the one witness who had testimony that, if believed, would make the government's key witness both a perjurer and possibly the actual perpetrator of the crime." *Id.* at 1162.

The Government can shield its own witnesses from prosecution in a variety of ways, whether or not they are labeled "use immunity"; in *Straub*, for example, "eleven prosecution witnesses, many of them serious drug offenders, were granted substantial incentives *or* immunity to testify," and in some cases the immunity was "informal." *Id.* at 1164, 1166

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[2] The Ninth Circuit recognizes intentional prosecutorial misconduct as an alternative basis for use immunity—*i.e.*, a showing of prosecutorial misconduct is sufficient, but not necessary. *Straub*, 538 F.3d at 1156-57. The Sixth Circuit has long reserved the question "whether prosecutorial misconduct in making immunity decisions can constitute a due process violation." *United States v. Pennell*, 737 F.2d 521, 526 (6th Cir. 1984); *see Meda*, 812 F.3d at 518 (acknowledging that the question remains unanswered in that circuit).

(emphasis added); *see id.* at 1152, 1164 (Government stipulated to "the incentives—use immunity, informal immunity, sentence reductions, and even cash—offered to the prosecution's other witnesses for their testimony against Straub"). The distortive effect on the fact-finding process is the same whether or not the Government protects its own witnesses from prosecution through "use immunity," a plea bargain, a non-prosecution or diversion agreement, or something else. Thus, 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).

For its part, the D.C. Circuit has also suggested that there may be a viable basis for defense-witness immunity where "the Government … secure[s] testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for [a defense witness] to free him from possible incrimination to testify for [the defendant]." *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966) ("Arguments could be advanced that … the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.").

But even between these seemingly aligned circuits, there is discord. In the Ninth Circuit, the "effect of distorting the fact-finding process is sufficient." *Straub*, 538 F.3d at 1158; *see id.* at 1160, 1161, 1162 The Sixth Circuit has adopted a narrower formulation, requiring an "egregiously lopsided" imbalance of testimony in order for the effective-

defense exception to apply, *Meda*, 812 F.3d at 518 (citation omitted).

2. As noted, the First Circuit rejected the Ninth and Sixth Circuits' "effective-defense" formulation and largely aligned itself with the circuits that have held that a court can only act to obtain use immunity for a defense witness's testimony if that immunity is necessary to correct for prosecutorial misconduct. These courts start from the premise that the ability to prosecute and immunize belongs exclusively to the Government, and thus, use immunity for a witness's testimony can only be compelled by a court if not doing so would deprive the defendant of his due process rights—particularly his right to a fair trial. *E.g.*, *Turkish*, 623 F.2d at 777-78 ("lack of defense witness immunity" must "deny constitutionally protected fairness"); *United States v. Morrison*, 535 F.2d 223, 228-29 (3d Cir. 1976) ("There are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness."); *United States v. Taylor*, 728 F.2d 930, 935 (7th Cir. 1984) ("Prosecutors must exercise [use immunity] authority within the bounds of the due process clause of the fifth amendment.").

But, significantly, there is no agreement among the circuits on what constitutes qualifying prosecutorial "misconduct." In particular, one circuit (the Third) has adopted a much more lenient standard than the First Circuit did here. That highlights the degree to which the circuits have splintered.

The Third Circuit nominally requires prosecutorial misconduct, but a showing of "misconduct" can be made by simply demonstrating that there is no

compelling reason for the Government to withhold immunity. That relaxed standard is the product of the circuit's long internal struggle on the issue. For decades, the law of the circuit had been that no prosecutorial misconduct was required, and that the court did not even need the Government's involvement to issue immunity. So long as "the defendant [was] prevented from presenting exculpatory evidence which is crucial to his case" because of the witness's invocation of the privilege against self-incrimination (and the Government's corresponding refusal to provide use immunity to that witness), a *court* could issue immunity by decree, not "by any order directed to the executive, requiring the executive to provide statutory immunity." *Gov't of Virgin Islands v. Smith*, 615 F.2d 964, 969-70 (3d Cir. 1980), *overruled en banc in part by United States v. Quinn*, 728 F.3d 243 (3d Cir. 2013).

In *Quinn*, the *en banc* Third Circuit held that it was "no longer … a permissible use of judicial authority" for a court on its own to grant immunity to a witness to correct for a defense witness's inability to obtain exculpatory testimony due to the witness's invocation of the privilege against self-incrimination. 728 F.3d at 252-53. But although the en banc court adopted "prosecutorial misconduct" as the nominal trigger for a constitutional claim of entitlement to defense-witness use immunity, its formulation of that standard is much more defense-friendly than the other circuits' standards using the same label. The Third Circuit emphasized that "overt threats or intimidation" were not needed to demonstrate prosecutorial misconduct. *Id.* at 258. Instead, the very act of refusing immunity gave rise

to "a question of misconduct." *Id.* at 259. Under the Third Circuit's current test, if the Government fails to offer a "strong countervailing reason" for withholding immunity, there is "deliberate distortion" that warrants a remedy of immunity. *Id.* That formulation contrasts sharply with the decision below: whereas the Third Circuit asks whether the Government has a "strong countervailing reason" for denying immunity, in the First Circuit any interest above the "trivial" will do. Pet. App. 11a.

Unlike the Third Circuit, the Seventh and Tenth Circuits recognize a defense-witness use-immunity claim *only* when a prosecutor intentionally uses his immunity authority to distort the trier of fact's understanding of the facts. *United States v. Foster*, 701 F.3d 1142, 1155 (7th Cir. 2012) ("Such an abuse of discretion occurs when a prosecutor intends to use his authority under the immunity statute to distort the judicial fact-finding process." (citation omitted)); *United States v. Dalton*, 918 F.3d 1117, 1131 (10th Cir. 2019) ("[W]here the prosecutor's denial of immunity is a deliberate attempt to distort the fact finding process, a court could force the government to choose between conferring immunity or suffering an acquittal." (citation and quotation marks omitted)).

The decision below aligns with several circuits that, while not closing the door as firmly as the Seventh and Tenth Circuits, have nevertheless held that only limited types of prosecutorial misconduct can result in a constitutional violation that warrants a defense witness's receipt of use immunity for his testimony. The Second Circuit recognizes a viable basis for a defense-use-immunity claim where the Government has *prompted* the witness to invoke his

Fifth Amendment privilege against self-incrimination by "overreaching," or has denied immunity to gain a "tactical advantage through … manipulation." *United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (citation omitted). For the Fourth Circuit, either "prosecutorial misconduct" or "overreaching" will do, but the defendant must make a "decisive showing." *United States v. Abbas*, 74 F.3d 506, 512 (4th Cir. 1996). And in the Eighth Circuit, either "deliberate distortion" or "government misconduct or threats to witnesses" can give rise to a circumstance where use immunity might be warranted for a defense witness's testimony. *United States v. Blanche*, 149 F.3d 763, 768 (8th Cir. 1998) (citation omitted). The First Circuit's suggestion that it might apply an interest-balancing "exception" involving "very extreme facts," Pet. App. 11a (quoting *United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997)), likewise allows a grant of immunity only under narrow circumstances. And, as noted, its approach to interest-balancing is the inverse of the Third Circuit's, with the Government prevailing whenever its interest is more than trivial.

3. Had the Government's confidential source approached Mr. Munera in Philadelphia or San Francisco, and not East Boston, Mr. Munera would have had a compelling basis for obtaining use immunity for Quijano's testimony—testimony by a witness who could effectively rebut the confidential source's testimony and exculpate Mr. Munera. As noted, the Third Circuit's approach to use immunity is the inverse of the test used by the First Circuit here; instead of considering whether the Government had a more-than-trivial interest in withholding use immunity for Quijano's testimony, the Third

Circuit's standard would have required the Government to demonstrate that it had a strong interest for withholding immunity. The Government demonstrated no "strong" interest here—to the contrary, it let the clock tick away (close to the expiration of the statute of limitations) on any offenses relating to events that happened during the relevant time period (2016 and 2017), but it quickly brought charges against Quijano on later events that happened in 2018 and 2020. Pet. App. 6a, 11a-12a. And given that the Government incentivized the confidential source to testify against Mr. Munera in the hopes of receiving a reduced sentence, Mr. Munera also would have had a valid claim in the Ninth Circuit under the "effective-defense" exception.

Instead, Mr. Munera found himself without a viable constitutional argument for defense-witness use immunity because he was prosecuted in a circuit in which the court of appeals adopted a too-stringent test for evaluating such an argument. And that split is only getting worse, as the circuits are altering their frameworks based on "very extreme facts," Pet. App. 11a (citation omitted), "extreme case[s]," *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006), "extraordinary circumstances," *United States v. Hager*, 879 F.3d 550, 556 (5th Cir. 2018), and other ill-defined circumstances warranting expansion or contraction of a defendant's ability to seek use immunity for witnesses' testimony that would exculpate him but for the threat of prosecution. This Court should intervene now to prevent further fragmentation amongst the circuits on this important issue.

II. The decision below is wrong.

1. "The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor." *Kastigar v. United States*, 406 U.S. 441, 443-44 (1972). These requirements are a quintessential part of "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." *Washington*, 388 U.S. at 19. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Id.* This right is not just a textual right guaranteed by the Sixth Amendment—it is also a "fundamental element of due process of law." *Id.*; *accord Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

While "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), the compulsory-process guarantee is specifically intended to place a criminal defendant on a level playing field with the Government when it comes to "obtaining witnesses in his favor." The constitutional right to compulsory process was designed "to abrogate the harsh and tyrannical rules of the common law" by giving "the accused in a position to make his defence and establish his innocence, … rights in all respects similar and equal to those possessed by the government for establishing his guilt." *In re Dillon*, 7 F. Cas. 710,

712 (N.D. Cal. 1854); *see also United States v. Reid*, 53 U.S. 361, 364 (1851), *overruled on other grounds by Rosen v. United States*, 245 U.S. 467 (1918) (explaining that the Fifth and Sixth Amendments "were added to the Constitution" as "safeguards against the restoration of proceedings which were so oppressive and odious" in allowing uneven proceedings). "[T]he object of the constitution is accomplished" when the accused "enjoys rights equal to those of the prosecution … with respect to witnesses." *Dillon*, 7 F. Cas. at 712; *see also Blackmer v. United States*, 49 F.2d 523, 530 (D.C. Cir. 1931) (explaining that the Sixth Amendment is satisfied where a criminal defendant has "substantially equal process to that accorded the United States"), *aff'd*, 284 U.S. 421 (1932).

2. The notion of parity in "obtaining" witnesses is rooted in law that was well established at the time of the Founding. *See Reid*, 53 U.S. at 363-64 (noting that the Compulsory Process Clause, along with other "provisions in the Constitution of the United States," is "substantially the same with those [laws] which had been previously adopted in the several states"). Historically, English law recognized that, in "cases of high treason," a defendant was entitled to "the *same* compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him." 4 Blackstone's Commentaries on the Laws of England *345 (first emphasis added). The Pennsylvania Charter of Privileges, following the English tradition, similarly provided that defendants "shall have the *same* Privileges of Witnesses … as the Prosecutors," Pa. Charter art. V (1701) (emphasis added), as did the New Jersey Constitution of 1776, N.J. Const. art. xvi

(1776) ("the *same* Privileges of Witnesses … as their prosecutors are or shall be entitled to" (emphasis added)). And, shortly after the Founding, the First Congress enacted a compulsory-process law that provided defendants accused of treason "the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them." Crimes Act of 1790, ch. 9, 1 Stat. 112, 118-19. As Chief Justice Marshall later observed during the trial of Aaron Burr, the statute merely codified that which was "declaratory of the common law": that "the prosecution and defence are placed by the law on equal ground." *United States v. Burr*, 25 F. Cas. 30, 33 (Cir. Ct. D. Va. 1807). Chief Justice Marshall opined that parity of process should not apply "only to capital cases," as even "persons charged with offences not capital have a constitutional and a legal right to examine their testimony." *Id.* And the rights afforded by the Sixth Amendment, Chief Justice Marshall declared, "must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter." *Id.*

This Court's compulsory-process caselaw has likewise applied the longstanding principle that the prosecution and defense should be on a level playing field with respect to the procurement of witnesses. In *Webb v. Texas*, 409 U.S. 95 (1972) (per curiam), for example, a trial judge delivered a lengthy admonition to a defendant's sole witness about the perils of perjury. *Id.* at 95-96. "[N]one of the witnesses for the State had been so admonished." *Id.* The witness refused to testify. This Court held that "the judge's threatening remarks, directed only at

the single witness for the defense, effectively drove that witness off the stand," thereby unduly interfering with a defendant's "right to present [his] version of the facts." *Id.* at 98 (citation omitted). Another example comes from *Washington v. Texas*, where this Court discerned a compulsory-process violation arising from a law under which "coparticipants in the same crime could not testify for one another, although there was no bar to their testifying for the State." 388 U.S. at 16-17. The lack of parity in the treatment of witnesses deprived the defendant of "his right to have compulsory process for obtaining witnesses in his favor," witnesses who could have delivered "testimony [that] would have been relevant and material to the defense." *Id.* at 23.

3. The parity that the compulsory-process right affords does not disappear simply because the statutory authority for obtaining a witness's testimony is conferred on the Government alone—if anything, that is when the protections provided by due process and the Sixth Amendment are even more necessary.

In many cases, a witness that has testimony relevant to a case might refuse to testify because that testimony—whether helpful to the Government or helpful to a defendant—might implicate the witness in a crime. All things being equal, the Fifth Amendment privilege against self-incrimination serves as an obstacle that prevents *both* the Government and the defendant from "obtaining" the witness in their respective "favor." No constitutional violation arises because the witness cannot be "obtained" by either side.

But all things are not equal: Congress gave to the Government the ability to seek from a court "an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003(a). That is process in the most original sense of the word: the order "proceeds or issues" and through "judicial means" brings the witness to "answer." *Process*, Black's Law Dictionary (11th ed. 2019) (quoting 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 338 (2d ed. 1826)). A use-immunity order allows the Government to "obtain" a witness's testimony because the immunity provided by the statute "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar*, 406 U.S. at 453. In other words, the Government has "process for obtaining witnesses in [its] favor" that a criminal defendant does not. *See id.* at 444.

Where the Government can procure testimony by one of its witnesses who would otherwise fear prosecution, but a defendant cannot do the same for one of his, that violates due process and the Sixth Amendment's guarantee of a defendant's "right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." *Washington*, 388 U.S. at 19. As the history and application of the compulsory-process right demonstrates, a defendant must have the ability to call up witnesses "like" the Government's—to be "on equal ground." *Burr*, 25 F. Cas. at 33.

Otherwise, the promise of compulsory process risks being nothing more than "a dead letter." *Id.*

4. Like several other circuits, the First Circuit took the view here that compelling use immunity from the Government for a defense witness's testimony might interfere with prosecutorial prerogatives—that is, the ability to take action against that witness in the future over the subject of his testimony. Pet. App. 12a; *see also Turkish*, 623 F.2d at 776-77; *United States v. Capozzi*, 883 F.2d 608, 612 n.7 (8th Cir. 1989). That concern is significantly overstated. And, in any event, the Government's convenience is not the highest priority of the Sixth Amendment.

Most significantly, the Government *can* prosecute a witness even after he or she gives immunized testimony. If the Government is genuinely in a position to prosecute the witness at the time of the immunity request, then it can establish "an independent, legitimate" basis for a subsequent prosecution—it just cannot use the immunized testimony itself. *Kastigar*, 406 U.S. at 460-61. The Government secures that basis for its own witnesses, *e.g.*, *United States v. Bianco*, 534 F.2d 501, 509 (2d Cir. 1976), and there is no reason why it cannot do so for the defendant's witnesses. And being unable to use *the immunized testimony itself* against the witness is no loss to the Government—that is exactly what the Fifth Amendment prohibits.

To the extent the Government finds it onerous to keep its basis for prosecution separate from the compelled testimony, that burden is no heavier than the Fifth and Sixth Amendments require the Government to carry. Consider the Sixth

Amendment's companion right to confrontation. If the prosecution threatens a defendant with the confession of a co-defendant that directly accuses the defendant, and the co-defendant subsequently invokes the privilege against self-incrimination, it is the prosecutor that bears the burden of resolving that conflict of constitutional interests. That is what *Bruton v. United States*, 391 U.S. 123 (1968), teaches: when faced with that conflict, the prosecution must withhold the confession, *id.* at 136-37, sever the case, *id.*, grant use immunity to alleviate the self-incrimination problem, *e.g.*, *United States v. Yates*, 524 F.2d 1282, 1286 (D.C. Cir. 1975), or redact the testimony in a way so as to avoid triggering a defendant's right to confront his accuser, *Samia v. United States*, 599 U.S. 635, 640 (2023). With all of these outcomes, the Government bears some inconvenience and burden.

Indeed, the Government has recognized in at least one jurisdiction that the prosecution will have to shoulder some burden if the Constitution requires that a defendant have at least the *opportunity* to obtain access to critical exculpatory testimony by way of use immunity. In the District of Columbia, the Government suggested "a worthwhile approach" adopted by the local court of appeals: a "debriefing" process that allows a court to determine whether "the defendant will not receive a fair trial without the testimony of a crucial defense witness," even where "there is no prosecutorial misconduct." *Carter v. United States*, 684 A.2d 331, 342-43 (D.C. 1996) (en banc). After undertaking that process, if the Government has "no reasonable basis for not affording use immunity to the crucial witness," it faces the choice of dismissal or "some other

commensurate remedy which the court may fashion on Sixth Amendment and due process grounds." *Id.* at 343.

5. To meet the Constitution's compulsory-process obligations, the Government must provide use immunity to obtain a defense witness's testimony when (1) the witness can provide testimony that exculpates the defendant, (2) the witness refuses to provide that testimony because it may result in his own prosecution, and (3) the defendant cannot obtain the substance of that testimony from elsewhere. This Court has long recognized that to implicate the right to present a defense, testimony must be both "relevant and material to the defense," as "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use," *Washington*, 388 U.S. at 23; *accord United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (holding that, because the Sixth Amendment guarantees "compulsory process for obtaining *witnesses in his favor*," the proposed testimony of a witness must be "both material and favorable to [the defendant's] defense" in order for Compulsory Process Clause violation to arise (citation omitted)). But if the witness's testimony is material, the Government must take the necessary steps to produce the witness for the defendant, *i.e.*, by granting use immunity to nullify the threat of prosecution that compels the witness's silence.

If the Government fails to do so, a court must provide some remedy that gives effect to the defendant's compulsory-process right. A court can, for example, direct the Government to either request

immunity for the defense witness's testimony, or face dismissal of its indictment. *See, e.g.*, *Quinn*, 728 F.3d at 259-60. In certain circumstances, a court may also be able to exclude evidence from the Government's case in a targeted way, so that the silent witness's testimony is no longer "relevant and material to … the defense." *Valenzuela-Bernal*, 458 U.S. at 867 (citation omitted). The answer is not, however, reducing the compulsory-process right to "a dead letter," *Burr*, 25 F. Cas. at 33 (Marshall, C.J.), despite some circuits' views to the contrary. *E.g.*, *Turkish*, 623 F.2d at 774 ("[I]t is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity."); *United States v. Thevis*, 665 F.2d 616, 639 & n.25 (5th Cir. 1982) (noting that the Fifth Circuit's cases have "strongly suggested" that courts lack the power to direct the grant of immunity when "use immunity is necessary for essential exculpatory testimony"); *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977) ("Under no circumstances … may a federal court prescribe immunity on its own initiative …."); *Earl*, 361 F.2d at 534 (commanding the "Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony … is beyond our power").

A defendant's compulsory-process right opens up access to use immunity for the testimony of his reluctant and material exculpating witness, even if there is no prosecutorial misconduct, so long as the witness refuses to testify because of the fear of prosecution. Every circuit that requires

prosecutorial misconduct as a predicate for a defendant obtaining use immunity, including the First, is wrong. The right to compulsory process is not just a due-process check on unfair behavior by the Government; it is a textual commitment to provide all "compulsory process for obtaining witnesses" available to the Government.[3]

To be sure, if viewed solely through the lens of the Fifth Amendment, some form of prosecutorial misconduct may be necessary to raise a due process claim—a defendant, after all, must be deprived of his "right to a fair trial" in this context. *Greer v. Miller*, 483 U.S. 756, 765 (1987) (citation omitted). And in certain circumstances, immunity may be the appropriate remedy for a due-process violation fueled by prosecutorial misconduct. *E.g.*, *Dixon v. Dist. of Columbia*, 394 F.2d 966, 970 (D.C. Cir. 1968) (op. of Bazelon, C.J.) (opining, in a retaliatory prosecution case, that the court is not "foreclosed from granting immunity from prosecution in order to deter blatant Government misconduct"); *see generally Donnelly v. DeChristoforo*, 416 U.S. 637, 648 n.23 (1974) (noting that "trial courts, by admonition and instruction, and appellate courts, by proper exercise of their

[3] The Sixth and Ninth Circuits do not require prosecutorial misconduct, and the "effective-defense" approach used in those two circuits offers some measure of parity—the Government cannot immunize its witnesses while not immunizing the defendant's. But even these two circuits do not have it entirely right: their approaches deliver parity in *outcomes*, not parity of *process*. The defendant's need for an exculpatory witness who invokes his privilege against self-incrimination may arise even if the Government does not immunize any of its witnesses; in that scenario, the defendant would not have access to the process available to the Government of immunizing witnesses and compelling their testimony.

supervisory power" should "discourage" prosecutorial misconduct). And there may even be an actionable due process claim where a prosecutor selectively grants use immunity to obtain a Government witness's testimony to inculpate the defendant, but then denies use immunity for the testimony of a defense witness who can establish that the Government's witness is perjuring himself with the inculpatory testimony. *See United States v. Herman*, 589 F.2d 1191, 1203-04 (3d Cir. 1978) ("use immunity for defense witnesses" may be required "as a matter of fundamental fairness" where the selective use of immunity is done "with the deliberate intention of distorting the judicial fact finding process"); *Earl*, 361 F.2d at 534 n.1 (selective immunity "would vividly dramatize an argument" that the use-immunity statute "denied [the defendant] d[u]e process").

But the right to compulsory process is not just a feature of due process: it is a guarantee found in the text of the Sixth Amendment. The right provides a defendant "substantially equal process to that accorded the United States." *Blackmer*, 49 F.2d at 148. The Government's process for obtaining immunity is just that: process. While a court has no discretion to deny the Government its request for immunity, and its function is largely ministerial, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254 n.11 (1983), the use-immunity statute still confers judicial power, and provides a process for the exercise of that power. The fact that Congress saw fit to make that process available to the Government alone does not

override the Sixth Amendment's preservation of parity in access to witnesses.[4]

The circuits have misapprehended this Court's statement that the compulsory-process right is "a fundamental element of due process of law," *Washington*, 388 U.S. at 19, using that statement to dilute a right rooted in two constitutional provisions into a check of last resort against the Government's misconduct. The courts of appeals have also twisted this Court's caution about the compulsory-process right not "disapproving testimonial privileges, such as the privilege against self-incrimination," *id.* at 23 n.21, into an ill-founded rule that a defendant is not entitled to "compulsory process" to "obtain" a witness, when the "process" implicates the witness's privilege against self-incrimination (but does not displace it). Providing use immunity for the testimony of a witness who can provide the

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[4] The Second and Third Circuits have concluded, with little reasoning, that the Sixth Amendment simply does not apply when "obtaining" a witness's testimony requires use immunity. The Second Circuit casually mused, without citation, that "it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity." *Turkish*, 623 F.2d at 774. The Third Circuit similarly offered the cursory conclusion that "a defendant's Sixth Amendment right of compulsory process gives way when a witness he has subpoenaed invokes his Fifth Amendment privilege against self-incrimination," citing only a district court opinion that, in turn, relies on opinions that do not mention the privilege against self-incrimination at all. *Diggs v. Owens*, 833 F.2d 439, 444 (3d Cir. 1987) (citing *United States v. La Duca*, 447 F. Supp. 779, 786 (D.N.J. 1978), *aff'd sub nom. United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978)).

defendant with exculpatory testimony that the defendant cannot obtain from elsewhere does not "supercede [sic] a witness'[s] invocation of his own fifth amendment privilege," *Taylor*, 728 F.2d at 934 (quoting *United States v. Chagra*, 669 F.2d 241, 260 (5th Cir. 1982)), but honors it, *Kastigar*, 406 U.S. at 460-61.

III. This Court should grant certiorari on this important, recurring issue and resolve a worsening split.

1. The split on "whether, and under what circumstances, a criminal defendant has a constitutional right to judicially immunized testimony useful to establishing his defense" has been a longstanding one. *E.g.*, *Hunter v. California*, 498 U.S. 887, 887 (1990) (Marshall, J., dissenting from the denial of certiorari). Nearly every circuit has now opined on the issue;[5] rather than reaching uniformity with time, the circuits have found themselves even more splintered. The circuits have now taken at least four different positions as to when a defendant is entitled to use immunity for the

[5] The Eleventh Circuit is the only regional circuit that has not meaningfully opined on the issue, other than to reaffirm that the exercise of immunity power is "delegated solely to the executive." *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1018 (11th Cir. 1993) (citation and quotation marks omitted). Because that court has said little about the question presented, it is difficult to discern whether the court has left the question open, or has concluded that there is *no* circumstance under which a court can compel the Government to grant immunity, which would be an entirely new branch of the circuit split. *United States v. Merrill*, 685 F.3d 1002, 1015 (11th Cir. 2012) (rejecting the Ninth Circuit's approach in a cursory analysis as "foreclosed by our precedent").

testimony of an exculpating witness who has invoked the privilege against self-incrimination. *See* pp. 11-18, *supra*. Consider the Third Circuit's *en banc* decision in *Quinn*: the court of appeals' attempt to align its circuit precedent with the positions taken by its sister circuits only created an even more confusing standard.[6] *See* pp. 15-17, *supra* (explaining how the Third Circuit's "prosecutorial misconduct" standard post-*Quinn* may not require any actual misconduct).

The uncertainty and confusion caused by the existing split will persist absent this Court's intervention. *E.g.*, *United States v. Utsick*, No. 10-cr-20242, 2016 WL 3141751, at *4-5 (S.D. Fla. June 2, 2016) (acknowledging "Eleventh Circuit precedent" on the issue, but proceeding to discuss the Third Circuit's approach post-*Quinn* anyway). Federal trial courts are calling out for clarity, as those accused of crimes continue to seek vindication of their compulsory-process rights. *E.g.*, *United States v. Baca*, 447 F. Supp. 3d 1149, 1222-29 (D.N.M. 2020) (despite initially taking the view that the Tenth Circuit has an "articulated approach" to defense-use-immunity claims, discussing the approaches taken by the various circuits, and expressly advocating that the Tenth Circuit "should

[6] Consider, too, the Fifth Circuit's vacillation between positions over time. Having previously taken the position that courts lack the power to grant immunity "under any circumstances," *Thevis*, 665 F.2d at 639 n.25, the Fifth Circuit now acknowledges that courts might be able to compel immunity "to stem government abuse" under "extraordinary circumstances," *Hager*, 879 F.3d at 556 (citations omitted). It is therefore unclear what, exactly, the Fifth Circuit's position is, despite more than four decades' worth of circuit caselaw.

choose the majority approach … instead of the Ninth Circuit's approach or the Third Circuit's approach"), *aff'd sub nom. United States v. Cordova*, 25 F.4th 817 (10th Cir. 2022). State courts also require clarity, as their consideration of the question presented has been driven predominantly by the different positions taken by the circuits.[7] As a result, the confusion affecting federal trial courts has also started to take hold in state courts.[8] *See also* pp. 26-27, *supra* (discussing the approach taken by the courts of the District of Columbia).

This Court's intervention is necessary because the circuits have demonstrated they cannot reach a uniform approach to the question presented, and that further percolation will only make the existing disarray even worse, especially as the circuits drift

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[7] *E.g.*, *Commonwealth v. Brewer*, 472 Mass. 307, 318-20 (2015) (applying the rationale of the Ninth Circuit's decision in *Straub*); *State v. Bland*, No. 2 CA-CR 2014-0065, 2015 WL 802860, at *3 (Ariz. Ct. App. Feb. 25, 2015) (discussing the Third Circuit's approach in *Morrison*).

[8] For example, the California Supreme Court's decision in *People v. Masters*, 365 P.3d 861 (Cal. 2016), discussed the Third Circuit's opinion in *Smith*, and the impact of its subsequent *en banc* decision in *Quinn*. Although *Masters* "assume[d] *Smith* and *Quinn* state the appropriate test for evaluating a constitutional claim arising from the denial of witness, immunity," *id.* at 886, at least one district of the California Court of Appeals has since applied *Quinn* for deciding such claims without making the same assumption. *People v. Hull*, 31 Cal. App. 5th 1003, 1024-25 (Cal. Ct. App. 2019) (applying *Quinn* factors "[a]s the Third Circuit and our high court have noted"), while another district has noted that the *Quinn* standard may not be consistent with California's "more general standard for prosecutorial misconduct." *People v. Robinson*, No. A163873, 2023 WL 2365305, at *6 (Cal. Ct. App. Mar. 6, 2023).

further away from the compulsory-process right's twin underpinnings—one of which requires that "the prosecution and defence are placed … on equal ground" with respect to the "obtaining" of witnesses. *Burr*, 25 F. Cas. at 33 (Marshall, C.J.).

2. This case is an excellent vehicle for considering the question presented. There is no dispute that Quijano would have provided Mr. Munera with exculpatory testimony, and that the only reason Quijano did not testify was because of the fear of self-incrimination. No one else could have provided that testimony—that Quijano had worked with a "Pikachu," whom the confidential source knew as a cocaine supplier, but Quijano did not engage in drug transactions with Mr. Munera. Mr. Munera clearly raised his claim of compelled immunity for Quijano before the district court and the court of appeals. There are no barriers to this Court's review.

* * *

This Court should grant certiorari to end a longstanding split that has only gotten worse over time. In crafting their respective approaches to the issue of compelled use immunity, the courts of appeals have plainly lost sight of the foundational principle that the right to present a defense includes the right to obtain witnesses on like terms and "process" as the Government. This Court should grant certiorari to resolve this persistent circuit split, and to restore a compulsory-process right apparently forgotten or discarded by the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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