

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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KEVONDRIC FEZIA,

*Petitioner,*

*versus*

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Does the Confrontation Clause apply to statements made by a prosecutor during closing arguments that detail for the jury what a non-testifying witness would have said if the person would have testified?

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## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's sentence can be found at *United States v. Fezia*, No. 22-30391, fezi (5th Cir. July 12, 2023) (unpublished), and is set forth at App. 001. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing en banc on August 8, 2023, can be found at App. 004.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## **STATEMENT OF THE CASE**

The petitioner Kevondric Fezia was tried and convicted on charges of sex trafficking and attempting to entice a minor to engage in prostitution. The alleged 14-year-old victim *did not* testify. During the prosecutor's rebuttal closing argument, the prosecutor told the jury what the victim would have said if she was called as a witness. Fezia was not allowed to cross-examine the absent witness or rebut her supposed statements. Fezia was swiftly convicted.

## **I. Background**

Fezia was charged in a two-count indictment. Count one charged Fezia and Calista Winfrey with sex trafficking in violation of 18 U.S.C. § 1591(a)(l). Count two charged Fezia with attempting to entice a minor to engage in prostitution in violation of 18 U.S.C. § 2422(b). ROA.11-12.

The indictment alleged that Fezia communicated with N.G., a 14-year-old female, over social media and enticed her to run away from her Lake Charles, Louisiana home and become a prostitute for him in Texas. ROA.11-12.

## **II. The trial evidence**

At trial, the government called only five witnesses. N.G., the alleged victim, was not one of them.

First, the government called Willa Dean Golden, N.G.’s grandmother. Golden testified that in February 2021, N.G. lived with her in Lake Charles, Louisiana. ROA.106-10. Golden testified that she filed a police report when N.G. ran away from home in February 2021. Golden acknowledged that N.G. had previously run away from home and that N.G. had behavioral problems and “has a condition in which her personality changes.” ROA.112-13.

Second, B.P., N.G.’s 16-year-old cousin testified. B.P. (hereinafter “the cousin”) testified that she lived with N.G. at their mutual grandparents’ house. ROA.118-19. The cousin testified that after N.G. went missing, she used her tablet that she shared

with N.G. to break into N.G.'s Snapchat account. ROA.120. Once in N.G.'s Snapchat account, the cousin found messages between N.G. and someone named "Lil Keke." ROA.121. The cousin screen captured of the messages. ROA.121-22. The cousin then looked on other social media accounts and found the name Kevondric associated with the same account as "Lil Keke." ROA.123. The account the cousin located appeared to be from Texas. ROA.128.

Third, Detective William Loving with the Lake Charles Police Department testified that he was assigned to the case when N.G. was reported missing and received the Snapchat messages from N.G.'s cousin. ROA.132-34. Loving used the messages to identify an Instagram account believed to belong to Kevondric Fezia, from Texas. ROA.136. Loving pulled Fezia's driver's license from a police database and identified the picture. ROA.139.

Loving then travelled to Beaumont, Texas to surveil Fezia because Fezia's Instagram page posted from Beaumont. ROA.140. Loving located Fezia in Beaumont in an area known for prostitution. Fezia was in a Mercedes sedan registered to Calista Winfrey. When officers stopped the Mercedes, they found Fezia and another male, but there was no sign of N.G. or any prostitutes. ROA.142-43.

Loving testified that he next observed a post on Fezia's Instagram page a few days later showing four females wearing lingerie with a geotag of Beaumont, Texas. ROA.148-49. One of the females was N.G. ROA.149. Fezia was not in the picture. Loving also identified another female in the picture as Calista Winfrey and tracked N.G.'s cellphone on I-10 heading from Beaumont to Houston, Texas. ROA. 149-52.

Loving went to Winfrey's residence in Houston, Texas. ROA.153. Once there, they encountered Calista Winfrey outside of the residence. Winfrey lied and told the officers that there was nobody else in the residence. Once inside, Winfrey stomped her feet heavily to alert the other occupants of the residence that police were there. ROA.173. Inside the residence, officers located Fezia, N.G. and another female. ROA.153-55. Winfrey was arrested on an outstanding prostitution warrant. Fezia was not arrested. ROA.173.

Loving also obtained search warrants to search the cell phones of Fezia, Winfrey, and N.G. Yet, Loving found nothing supporting trafficking or prostitution on any of the phones. ROA.180-81.

Fourth, the government called a witness from the Days Inn in Beaumont, Texas who introduced receipts from the Days Inn showing a Calista Winfrey rented rooms on numerous occasions in early 2022. ROA.349-54. The government also introduced surveillance videos from the Days Inn. ROA.185-89

Fifth and finally, the government called Calista Winfrey who testified that she had pled guilty to sex trafficking and was testifying in hopes of receiving a lighter sentence but had not been promised anything by the prosecutors. ROA.199-201. Winfrey knew Fezia from high school. ROA.203. After high school, Winfrey had an Onlyfans page where she sold nude photos and videos of herself. ROA.226-27.

Winfrey claimed that she was "influenced" by Fezia to work as a prostitute and that Fezia became her "pimp." ROA.202, 204. Winfrey testified that she was a "bottom" girl in that she was always with Fezia, and she instructed other girls on how

to work as a prostitute. She claimed Fezia carried a gun and was violent with her if she did not make enough money. ROA.205. She also claimed that Fezia set up the dates and provided protection to her. ROA. 205-06.

Winfrey said she lived with Fezia in Houston in a condo in her own name and that Fezia drove a Mercedes sedan registered in her name. ROA.206. All the hotel rooms booked were booked in her name. ROA.206. Winfrey claimed this was done because Fezia did not have an ID. ROA.207.

Winfrey testified that Fezia used social media to recruit women to work for him. She claimed that Fezia recruited N.G. to work as a prostitute for him using social media. ROA.208. Winfrey testified that Fezia alone drove to Lake Charles to pick up N.G. while Winfrey stayed in the Beaumont hotel room. ROA.209. This story contradicted what she told investigators prior to trial. Winfrey had previously told investigators that she alone had driven to Lake Charles to pick up N.G. ROA.207, 228. At trial, Winfrey claimed she lied because she was “defensive.” ROA.207.

When he returned with N.G., Winfrey claims Fezia told Winfrey that N.G. was 14 years old. Winfrey denied discussing getting N.G. a fake ID. ROA.209. Winfrey, however, explained that Fezia did not target underage girls, just any girl who would come work for him. ROA.209-10.

Winfrey claimed that she explained to N.G. how much to charge for sex and that all the money went to Fezia. ROA.210. Money was paid in cash or on Cash App. ROA.211. In exchange, Fezia paid for everything, including the rooms, lingerie, and

protection devices. Winfrey claimed that Fezia decided that N.G. would not “walk the street” to find customers, instead she would stay in the hotel room. ROA.213.

Winfrey also testified that the photograph on Fezia’s Instagram account that showed her, N.G., and two other women in lingerie was taken by Fezia after he drove them to Walmart to buy the lingerie. This photo was to advertise for prostitution. ROA.220. Winfrey also viewed the Days Inn surveillance tapes and confirmed that her and Fezia can be seen going in and out of the hotel room. ROA.222-23.

The government then rested its case without calling N.G. as a witness. ROA.236. Fezia did not present any evidence. ROA.237.

### **III. Closing arguments**

In closing arguments, defense counsel commented on the government’s decision not to call N.G.:

Mr. Fezia doesn't have to prove anything. The Government has to prove their case beyond a reasonable doubt. I tell you someone else who thought that [N.G.] was hard to handle is the Government because they didn't call her as a witness. I don't need to call her as a witness. I don't need to prove anything. They have to prove it beyond a reasonable doubt, and they wouldn't even call her as a witness. So I think you're entitled to find that the evidence showed that, just like Willa Golden had a whole lot of trouble handling this young woman, the Government had a whole lot of trouble handling her, too. They wouldn't even put her up here.

ROA.246-47. In its rebuttal, the government lashed out at the defense argument that the government failed to call the victim to testify:

So the Defense starts off with why didn't we put on the victim, why didn't we put the victim on to testify. Think about it using your common sense. First of all, the independent evidence, the independent evidence, of his guilt is overwhelming, between the Snapchat posts that he was making with the child, between the Instagram posts. And you may say why would you -- why wouldn't you just go ahead and put her on the

stand. [N.G.] is now 15 years old. She was 14 years old when this happened.

This is what she would have to testify to if she got on the stand. She would have to testify to the fact that she was communicating with that man and talking about things like prostitution, talking about things like having sex with strangers. She'd have to testify about that. She would have to testify about the fact that she went to Beaumont, Texas with him to be a prostitute in Beaumont, Texas. She would have to testify about the fact that she went into a room with an adult man and she would have to testify about what happened in that room. Those are the things she would have to have testified to on direct.

A child who's 15 years old would have had to get on the stand and tell that to strangers, and then she would have had to be cross-examined by [defense counsel]. And there's nothing wrong with the fact that he's going to cross-examine her; but he's going to cross-examine her about the fact that she's a troubled child, as he's talked about. He's going to cross-examine her about everything he can to discredit her. She was exploited by that man, by the defendant in this case. And I submit that the process of testifying, going through that in this courtroom, would have further exploited her. And that was a decision that I had to make and I made it.

ROA.254-55. Defense counsel did not object to these arguments.

#### **IV. Conviction and sentencing**

The jury convicted Fezia on both counts. ROA.86. Fezia was sentenced by the district court on June 23, 2022, to 327 months, ROA.75, and Fezia timely appealed, ROA.84.

#### **V. The Fifth Circuit opinion**

On appeal, Fezia argued that the prosecutor's closing argument violated the Confrontation Clause and was reversible prosecutorial misconduct. The Fifth Circuit, in an unpublished decision, concluded that "closing arguments do not implicate the Confrontation Clause so this claim fails." *United States v. Fezia*, No. 22-30391, 2023

WL 4501866, at \*1 (5th Cir. July 12, 2023) (citing to *United States v. Solis*, 299 F.3d 420, 442 (5th Cir. 2002)). The Fifth Circuit also concluded that Fezia could not show the prosecutors statements were improper or that the statements had a strong prejudicial effect on the jury. *Id.* The Fifth Circuit denied rehearing en banc on August 8, 2023. App. 004.

## **REASONS FOR GRANTING THE WRIT**

An accused has the right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. Testimony by an absent witness is only permitted when (1) “the declarant is unavailable,” and (2) the accused “has had the prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

In rebuttal, government counsel explicitly told the jury what N.G. would have said if called as a witness. Counsel told the jury that N.G. would testify that:

- “she was communicating with that man and talking about things like prostitution, talking about things like having sex with strangers”
- “she went to Beaumont, Texas with him to be a prostitute in Beaumont, Texas”
- “she went into a room with an adult man and she would have to testify about what happened in that room”

ROA.255. The prosecutor did not qualify these statements as a hypothetical discussion, but rather definitively stated “those are the things she would have to have testified to on direct.” ROA.255.

Each of these statements violated the Confrontation Clause. N.G. was not “unavailable;” the government simply decided not to call her. *See* ROA.234-35 (Discussion among government counsel about whether to call another witness or rest their case. The government rested without calling N.G.); ROA.255 (government

counsel talking about not calling N.G. as a witness: “And that was a decision that I had to make and I made it.”).

The statements were also testimonial. Indeed, counsel said what N.G. would *testify* to in this very trial. Since N.G. did not testify, Fezia was deprived of his right to cross examine her on these statements. The Confrontation Clause commands that testimonial evidence be tested “in the crucible of cross-examination.” *Crawford*, 541 U.S. 36, 61 (2004).

In addition to violating *Crawford*, the opinion below is also at odds with published decisions from several other circuits. *See Orlando v. Nassau Cnty. Dist. Attorney's Off.*, 915 F.3d 113, 125 (2d Cir. 2019) (reversing a conviction for a Confrontation Clause violation because the prosecutor repeated the violative statement in closing arguments); *Brown v. Superintendent Greene SCI*, 834 F.3d 506, 519 (3d Cir. 2016) (“We therefore hold, as a matter of clearly established Supreme Court law, that the prosecutor's comments violated the Confrontation Clause.”); *United States v. Hearn*, 500 F.3d 479, 484 (6th Cir. 2007) (reversing a conviction for a Confrontation Clause violation where the prosecutor relied on the impermissible confidential-informant statement in closing argument ); *Hutchins v. Wainwright*, 715 F.2d 512, 515 (11th Cir. 1983) (Reversing a conviction when “in closing argument the prosecutor could no longer withstand the temptation to spell out for the jury the existence of this anonymous informant. In doing so, the prosecutor, in essence, informed the jury that there existed an eyewitness to this crime who accompanied the police to the residence of the defendant, but who refused to testify out of fear of

retribution.”). As such, defendants exercising their right to trial in the Fifth Circuit possess diluted Confrontation Clause rights compared with those in other circuits.

The question presented is of constitutional importance. Delineating the reach of the Confrontation Clause is paramount. As shown above, federal courts carefully review Confrontation Clause violations, especially where prosecutor’s reference in closing inadmissible or erroneously admitted evidence. The opinion below allows prosecutors to ignore the rules of evidence, strategically avoid calling problematic witnesses, and tell the jury in closing what they would have said. Meanwhile, the defendant is unable to cross-examine the absent witness or rebut the proffered testimony. This outcome is antithetical to the fundamental right of Confrontation and violates the Sixth Amendment’s commands.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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