No. 23-636

In the Supreme Court of the United States

ATIF AHMAD RAFAY,

Petitioner,

v.

ERIC JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADA AS AMICUS CURIAE

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INTERESTS OF AMICUS CURIAE

Amicus curiae, The Criminal Lawyers' Association of Ontario, Canada ("CLA"), is a specialty legal organization in Canada with a direct and substantial interest in the question presented in this case.[1] Totaling over 1,700 members, the CLA is the largest group of criminal defense lawyers in Canada, and its purpose is to be the country's "voice for criminal justice and civil liberties." CRIMINAL LAWYERS' ASSOCIATION, https://criminallawyers.ca/ (last visited Dec. 11, 2023). The organization provides input to all levels of government and the judiciary on criminal justice issues.

This case concerns an investigation technique developed by the Canadian police called the "Mr. Big" technique. In Mr. Big operations, undercover police invent an elaborate alternate reality involving a fake but seemingly powerful criminal organization, induce targets to join that organization, and then elicit (often false) incriminating statements by offering targets escalating enticements or threatening them with violence or death. For example, targets may be told that confessing will help advance them in the organization, earn Mr. Big's trust and respect, and bring financial reward. Or Mr. Big might tell targets they face imminent arrest, jeopardizing Mr. Big himself, but that he can make the damning evidence disappear if they tell

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have received timely notice of the CLA's intent to file an amicus curiae brief in this matter.

him the details of how they committed the crime, ostensibly so Mr. Big's accomplices can cover it up. Nearly twenty years after Petitioner Atif Rafay's false confession elicited during a Mr. Big operation, the Supreme Court of Canada in *R. v. Hart* ruled that such confessions are "presumptively inadmissible." *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, para. 10 (Can.).

The CLA has a particular interest in this case because it has spent decades advocating for the rights of persons charged with crimes based on Mr. Big confessions. The CLA intervened in *R. v. Hart* to do precisely that and critique this inherently coercive investigative tactic. The Supreme Court of Canada agreed with the CLA's criticisms, given the unreliability, abuse, and prejudice that accompany Mr. Big confessions. *Id.* at para. 81. As Canada's leading voice for criminal justice and civil liberties, the CLA played a significant role in shepherding this shift in Canadian law.

Here, the CLA's interest is particularly acute because the Mr. Big confession obtained in Canada was used to secure a conviction in an American court. The CLA writes to explain the history of the Mr. Big investigatory technique, why that technique is inherently coercive, and why it should have no place in the American legal system.

SUMMARY OF ARGUMENT

For over a decade, academic researchers have sounded the alarm about the dangers inherent in using the Mr. Big technique—which involves creating an intricate alternate reality designed "to enmesh the suspect in a criminal organization and drive him or her towards a confession"—the very structure of which

is coercive. *Id.* at para. 216 (Karakatsanis, J., concurring). The tactics used are invasive, persistent, and designed to achieve one goal—to compel, under duress, the often false confession of a criminal suspect where there is little to no other evidence tying him to the alleged crime.

Yet to this point, no American court has considered whether the Mr. Big technique comports with principles of American due process, let alone the merits of why Canadian courts have created a presumptive inadmissibility rule for confessions obtained this way. The Ninth Circuit below dodged the question, concluding that "[i]t is irrelevant that Canadian courts now disapprove of the Canadian law enforcement investigation techniques at issue." *Rafay v. Jackson*, No. 20-35963, 2023 WL 2707187, at *1 n.3 (9th Cir. Mar. 30, 2023). In doing so, that court failed to consider Petitioner's claim that the Mr. Big technique is per se coercive under American law.

The CLA's argument proceeds in three parts. First, the CLA explains the history of the Mr. Big technique and how it is employed. Second, the CLA addresses why confessions obtained using the Mr. Big technique are inherently coercive and, thus, incompatible with principles of American due process. Third, the CLA urges this Court to take action regarding this important and unsettled issue. For these reasons, the CLA fully supports Petitioner's request that the Court grant the Petition, vacate the decision below, and remand to the Ninth Circuit so that court may consider the issue of whether confessions derived from the Mr. Big investigative technique are inherently coercive. Alternatively, the Court should grant the petition and consider the important issue the Ninth Circuit dodged.

ARGUMENT

I. THE TACTICS USED IN MR. BIG INVESTIGATIONS ARE INVASIVE, PERSISTENT, AND COERCIVE.

The Mr. Big technique is a "Canadian invention." *Hart*, at para. 56. The tactic was developed by the Royal Canadian Mounted Police and involves creating a fictitious criminal organization that develops a relationship with the target of a police investigation. Timothy E. Moore et al., *Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy*, 55 Crim. L. Q. 348, 349 (2009). Over a period of months, the police use the organization to pressure the target into confessing to the crime being investigated. *Id*. Notably, the Mr. Big technique is often employed when the police "have a suspect but lack the evidence needed to lay charges." Lisa Dufraimont, *Hart and Mack: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence*, 71 Sup. Ct. L. Rev. 475, 477 (2015).

A similar script is followed each time the Mr. Big technique is used. First, undercover police officers approach the target of an investigation and attempt to cultivate a relationship with him. *Hart*, at para. 57. Often times the targets are vulnerable and susceptible to influence. Using information gained from previous surveillance, the operatives develop a "friendship" with the target over the course of several months, often by providing "entertainment, companionship, a listening ear, gifts, meals" and other benefits. Moore et al., *supra*, at 351–352. Gradually, the target learns that his "new friends" are members of a criminal

organization run by a boss—"Mr. Big." Dufraimont, *supra*, at 477.

Once the officers have gained the target's trust, they "slowly involve [him] in staged illegal activities" on behalf of the organization. Moore et al., *supra*, at 349. Such activities typically include low-level tasks like "serving as a lookout, delivering packages, or counting large sums of money." *Hart*, at para. 57. The target often receives "substantial compensation" for these minor tasks and the promise of even larger rewards, should he continue to advance within the organization. Moore et al., *supra*, at 352; Dufraimont, *supra*, at 477. Importantly, targets of Mr. Big operations are "often unemployed or of low socioeconomic status," and thus "jump at the opportunity" to receive such generous compensation. Moore et al., *supra*, at 352. As the operation wears on, the target is offered "increasing responsibility and financial rewards," and given "a life of luxury and close friendships," including free stays in fancy hotels and paid dinners at expensive restaurants. *Hart*, at paras. 57–58 (citing K. T. KEENAN & J. BROCKMAN, MR. BIG: EXPOSING UNDERCOVER INVESTIGATIONS IN CANADA 20 (2010)). Amidst this opulence, the target is consistently reminded that his "ultimate acceptance" within the organization "depends on Mr. Big's approval." *Hart*, at para. 58.

The tactics used in Mr. Big investigations are "invasive and persistent," lasting for months and often including displays of violence. Moore et al., at 349. The target is frequently told by the undercover officers that their organization "demands honesty, trust, and loyalty" from its members, and an "aura of violence is cultivated to reinforce these values." *Hart*, at para. 59. The officers often remind the target that the

organization "kills 'rats,'" and to prove it they stage "simulated acts of violence" against purported members of the group who have supposedly lied to Mr. Big. *Hart*, at para. 59; Dufraimont, *supra*, at 477.

R. v. Hathway provides a stark example. 2007 SKQB 48, 292 Sask. R. 7. In that case, undercover officers simulated an assault on a woman who had betrayed the criminal organization. *Id.*, at para. 19. During the beating, officers threatened to kill the woman, her husband, and her infant child. The accused watched as undercover officers threw the bloodied woman into the trunk of a car. *Id.*

The operation culminates in the target meeting Mr. Big. During the meeting, Mr. Big "expresses concern about the suspect's criminal past" and mentions the crime that, unbeknownst to the target, the undercover officers are investigating. *Hart*, at para. 60. Mr. Big then offers a persuasive reason why the target should confess. For example, the undercover officer will sometimes tell the target the organization has received a tip from a corrupt police official "foretelling of a police investigation" of the target. Moore et al., *supra*, at 352. Mr. Big may suggest that the target's arrest is "imminent" and emphasize the "strength of the police evidence" *Id.* The organization then "offers to protect" the target through a variety of means, such as "by offering to eliminate a witness or by having someone else confess to the crime," but only if the target confesses to Mr. Big. *Hart,* at para. 60. In other instances, Mr. Big may assert that he himself has "conclusive evidence" of the target's guilt and that "denying the offence will be seen as proof of a lack of trustworthiness." *Id.* As the meeting unfolds, it becomes clear that confessing to the crime provides both "a

ticket into the criminal organization" and "safety from the police." *Id.* Any denials of guilt are "dismissed as lies," and Mr. Big "presses for a confession," often indicating that the target's further participation in the organization "depends on [his] confessing to the prior crime." *Id.*; Dufraimont, *supra*, at 477.

In the end, the police record the conversation with Mr. Big and, after a confession is obtained, arrest the target. Moore et al., *supra*, at 352. Because the Mr. Big technique is often employed in cases where the police lack evidence sufficient for an arrest, Dufraimont, *supra*, at 477, the solicited confession usually forms both the basis of the arrest and the primary evidence to secure a conviction at trial, *see* Moore et al., *supra*, at 352.

II. MR. BIG CONFESSIONS ARE ABUSIVE, UNRELIABLE, AND PREJUDICIAL.

As the creator of the Mr. Big technique, Canada's evolving jurisprudence on the legality of Mr. Big confessions is pertinent. In less than twenty years, the Supreme Court of Canada switched from virtually no restraints on Mr. Big confessions to pronouncing them "presumptively inadmissible." *Hart*, at para. 10. Although some version of the Mr. Big technique appears to have been used by the police as far back as 1901, its modern and more common usage began in the 1990s to sidestep two Supreme Court of Canada decisions that "set clear limits on the use of undercover investigative techniques against persons *in custody*." Moore et al., *supra*, at 350 (emphasis added) (citing *R. v. Herbert*, 1990 SCC 118, [1990] 2 S.C.R. 151 (Can.); *R. v. Broyles*, 1991 SCC 15, [1991] 3 S.C.R. 595 (Can.)). While the Canadian police's power to elicit confessions

through *post*-arrest undercover techniques was circumscribed, its power to do the same through *pre*-arrest undercover techniques was not. Thus, between 1997 and 2004, the police conducted approximately 180 Mr. Big investigations in the province of British Columbia alone. *Id.*

For nearly two decades, Canadian law placed "few restraints" on these Mr. Big operations, and the confessions obtained were "almost always admissible." Dufraimont, *supra*, at 476. The Supreme Court of Canada described the Mr. Big technique as "skillful police work," *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, para. 21 (Can.), and rejected multiple objections to its legitimacy. For example, in *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, para. 15 (Can.), the Court concluded that Mr. Big confessions were not subject to any voluntariness requirement, meaning the prosecution was "not required to establish the voluntariness" of a Mr. Big confession before "seeking its introduction as evidence." Moore et al., *supra*, at 357–58. Specifically, the Court determined that because the suspect's "subjective belief" was that he was dealing with criminals, the statement was not made to a "person[] in authority," as was historically required by Canada's confessions rule. Moore et al., *supra*, at 359; *Grandinetti*, at para. 15.

The Supreme Court of Canada reversed course in 2014. In *R. v. Hart*, the Court concluded that existing law was insufficient to protect suspects who confessed in Mr. Big operations, and that such operations could no longer be conducted in a "legal vacuum." Dufraimont, *supra*, at 479; *Hart*, at para. 79. Citing the three concerns that arise with Mr. Big confessions—"reliability, prejudice, and the potential for police

misconduct"—the Court created a new common law rule of evidence for Mr. Big confessions. *Hart*, at paras. 81–85. Specifically, the Court held that "[w]here the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible." *Id.* at 85.

Less than two months later, in *R. v. Mack*, the Supreme Court of Canada considered a second issue: whether Mr. Big confessions, even when found admissible, are reliable. 2014 SCC 58, [2014] 3 S.C.R. 3, para. 44 (Can.). The Court noted that "even in cases where Mr. Big confessions are admitted into evidence, concerns with their reliability and prejudice will persist." *Id*. Thus, the Court held that trial judges should caution juries about the dangers of unreliability and prejudice that accompany Mr. Big confessions and provide instructions accordingly. *Id*. at 52–55.

Taken together, *Hart* and *Mack* comprise "a firm and coherent response to the dangers raised by Mr. Big operations," Dufraimont, *supra*, at 476, and mark a major change in Canadian law. Whereas the Supreme Court of Canada had historically praised Mr. Big operations and the evidence they generated, in *Hart* and *Mack* the Court was rightly "sensitive to the dangers of false confessions, prejudicial bad character evidence, and police abuse raised by this investigative technique." *Id.* at 487.

In fashioning the special rule of admissibility for confessions derived from Mr. Big investigations, the Supreme Court of Canada relied on three principal justifications, each of which is explained in more detail next.

A. Mr. Big operations rely on psychological and physical violence or threats of violence to induce confessions.

First, as a matter of course, Mr. Big operations depend on pervasive psychological manipulation that "compromise[s] the autonomy and dignity of the suspect." *Hart*, at para. 165.

Specifically, throughout any Mr. Big investigation, undercover officers provide suspects with inducements targeted to earn their trust and, in turn, obedience. *See id.* at paras. 58–59; Moore et al., *supra*, at 380–81. "If the target has no friends, they provide some. If he has low self-esteem, they bolster his feelings of self[-]worth. If he has no money, they supply it. If he has no long-term prospects, they hold out the expectation of steady work." Moore et al., *supra*, at 381. In effect, the people the suspect comes to consider his closest friends ensure that the suspect knows "that he is valued and trusted, and that they themselves are principled and loyal, albeit crooks." *Id.*

To reinforce those values, however, officers cultivate an "aura of violence" meant to "teach the suspect that those who betray the trust of the organization are met with violence." *Hart*, at para. 59. In fact, officers go so far as staging retaliations against fictious "transgressors" to make it clear to the suspect that "his physical well[-]being, if not his life, are at risk if his loyalty to the group is seen to waver." Moore et al., *supra*, at 381. Such consequences are easy to believe, as "[s]uspects also come to learn that violence is a necessary part of the organization's business model." *Hart*, at para. 68.

The Mr. Big investigation in *Hart* is illustrative. Over the course of four months and sixty-three staged scenarios, "[t]he police deliberately exploited [Mr. Hart's] particular vulnerabilities to ensure he had no realistic option but to give Mr. Big the confession he demanded." *Id.* at para. 221 (Karakatsanis, J., concurring).

For example, at the time the Mr. Big investigation began, Mr. Hart was socially isolated, had few friends, and relied on social assistance to make ends meet. Moore et al., *supra*, at 354; *see also Hart*, at para. 23. While investigating Mr. Hart for murder, undercover officers sought to become his "best friend[s]." *Hart*, at para. 136. "With remarkable ease, the officers quickly and deeply engrained themselves" in Mr. Hart's life—so much so, in fact, that less than two full months into the operation, he told the undercover officers that "they were like brothers to him and that he loved them." *Id.* at para. 137. To Mr. Hart, loyalty to his newly contrived family "was more important to him than money." *Id.*

Like all Mr. Big operations, the police devoted substantial state resources to manipulating Mr. Hart. *See id.* at para 165 (Karakatsanis, J., concurring). Thus, in addition to the promise of friendship, the undercover officers offered powerful financial inducements, including paying him over $15,000 in cash, buying him dinners at expensive restaurants, and giving him a new wardrobe for his new lifestyle. *Id.* at para. 135. Mr. Hart told Mr. Big about the impact the "organization" had on his life, confessing to the boss that "his life had been 'really rough' before he started working for the organization," and that he would

"never ever forget" how good the organization had been to him. *Id.*

Nevertheless, not all inducements were positive. Although the undercover officers had not used or directly threatened Mr. Hart with violence, they "created an aura of violence," in which Mr. Hart "was told that sometimes bad deeds had to be done," and "was led to believe that one of the operatives had assaulted a sex worker in retaliation for betrayal." *Id.* at para. 223. (Karakatsanis, J., concurring). Indeed, the officers themselves recognized the importance that violence played in the investigation, testifying that violence "went 'hand in hand with portraying [themselves] to be criminals.'" *Id.*

For these reasons, Justice Karakatsanis justifiably determined that "the deceit and the inducements used" in the investigation of Mr. Hart—which, to be sure, were common tactics in any Mr. Big operation—deprived Mr. Hart "of meaningful choice about whether to give an incriminating statement to Mr. Big." *Id.* at para. 226.

B. Mr. Big operations produce inherently unreliable confessions.

Second, the Supreme Court of Canada has recognized that suspects in Mr. Big operations confess "in the face of powerful inducements and sometimes veiled threats," which, in turn, "raises the spectre of unreliable confessions." *Id.* at para. 5. In fact, the majority in *Hart* viewed it as a matter of common sense that, due to "the nature and extent of the inducements held out to the accused," the Mr. Big technique generates a significant risk of false confessions. *Id.* at para. 69; *see also id.* at 165 (Karakatsanis, J., concurring).

Officers' weeks- and months-long psychological manipulation culminates in the much-anticipated meeting with Mr. Big. There, the undercover officer posing as Mr. Big is "resolutely unreceptive to denials or exculpatory explanations" regarding the suspect's prior criminal involvement. Moore et al., *supra*, at 387. And by that point, the suspect has a strong incentive—whether it be personal or financial—to tell Mr. Big what he wants to hear, and an equally strong disincentive—namely, the fear of violence, if not death—to continue holding out. *Id.* Under these circumstances, it is easy to see why an innocent suspect would be "motivated to lie to the 'boss', and to lie convincingly." *Id.* at 388.

What's worse, "many of the protections inherently built in to in-custody interrogations are missing from Mr. Big-style operations, and many of the inducements and quid pro quo offers of leniency, which are restricted and at times render any confession inadmissible for in-custody interrogations, are allowable in a Mr. Big scenario." Steven M. Smith et al., *Using the "Mr. Big" Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?*, 15 Psych. Pub. Pol'y & L. 168, 181 (2009); *see also Hart*, at para. 79 (recognizing that Mr. Big operations "are conducted in a legal vacuum," in which the legal protections intended to place limits on the conduct of the police do not apply).

For the above reasons, the *Hart* majority rejected the assumption that it needn't be "concerned about the reliability of Mr. Big confessions simply because the suspect does not know that the person pressuring him to confess is a police officer." *Hart*, at para. 72. Indeed, the risk of a false confession may be even *greater* than

in a typical in-custody interrogation, as "the suspect does not appreciate the adverse consequences of his admissions." Moore et al., *supra*, at 378. This begs the question: if and when the suspect in a Mr. Big operation does "confess," is he truly admitting to committing the crime for which he is under investigation, or, instead, is he attempting "to persuade his friend(s) that he too is capable of extreme violence?" *Id.* at 396–97. *See generally* Emily B. Goldberg, *A Comparative Legal Analysis Between Canada and the United States on the Constitutionality of Undercover and Mr. Big Operations*, 29 ILSA J. Int'l & Comp. L. 41, 60 (2022) (explaining that false confessions in Mr. Big operations are especially concerning due to the concept of "criminal braggadocio," in which a suspect will confess to a crime he did not commit "for the purpose of impressing the gang or criminal organization); *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992) ("[A] statement by one criminal to another criminal . . . is more apt to be jailhouse braggadocio than a statement against his criminal interest.").

Unreliable confessions are not just dangerous in theory—rather, as the majority in *Hart* recognized, they "provide compelling evidence of guilt and present a clear and straightforward path to conviction." *Hart*, at para. 6. Jury research suggests that even when there are good reasons to disregard confessions, jurors have difficulty doing so. Moore et al., *supra*, at 385; *see also id.* ("Jury research also suggests that the confession, even if seriously flawed, can taint jurors' perception of other evidence at trial."). Thus, in addition to producing potentially false confessions, Mr. Big operations increase the risk of wrongful convictions.

C. Mr. Big operations produce trial evidence tainted by both moral and reasoning prejudices.

Finally, confessions derived from Mr. Big operations are invariably accompanied by prejudicial evidence that "sullies the accused's character" and "creates credibility hurdles that may be difficult to overcome for an accused who chooses to testify." *Hart*, at para. 7.

When a Mr. Big confession is admitted into evidence, related "bad" character evidence usually follows, such as the accused's supposed willingness to associate with a criminal organization, the "crimes" the accused committed as part of that criminal organization, and the accused's purported attempt to leverage the relationship with Mr. Big. Moore et al., *supra*, at 376. The *Hart* majority recognized that this evidence—like all bad character evidence—causes two distinct kinds of prejudice.

First, admitting Mr. Big evidence "causes 'moral prejudice' by marring the character of the accused in the eyes of the jury, thereby creating a risk that the jury will reason from the accused's general disposition to the conclusion that he is guilty of the crime charged." *Hart*, at para. 74. Specifically, when a Mr. Big confession is admitted, a defendant is placed in the unenviable position of having to explain to the jury that "he lied to Mr. Big when he boasted about committing a very serious crime" because his desire to join a gang, and commit *other* crimes, was so strong. *Id.* at para. 106; *see also id.* at para. 201 (Karakatsanis, J., concurring) ("An accused who falsely confessed is in a catch-22 situation; his only course to explain away his statement is to admit that it was made to preserve his

criminal lifestyle."). In doing so, the defendant must attest to the fact that he wanted to join a criminal organization and that he "committed a host of 'simulated crimes' that he believed were real." *Id.* at para. 106. Additionally, the defendant must place his character for truthfulness at the forefront of the jury's mind, causing the jury to wonder if—because he readily admits to lying in the past—he is likely to be lying on the stand.

Second, the admission of a Mr. Big confession causes "reasoning prejudice," in that discussion of the Mr. Big operation as a whole shifts the jury's attention from the offense at issue and toward the defendant's "extraneous acts of misconduct." *Id.* at para. 74. Obviously, the more criminal "scenarios" the defendant participated in, the more harmful this this type of prejudice may become.

Although warning the jury about the dangers inherent in the evidence concerning Mr. Big operations may ameliorate some of its prejudicial effects, *see id.* at para. 107; *Mack*, at paras. 52–53, a mere limiting instruction will never be sufficient to "protect the human dignity and autonomy of the suspect" in a Mr. Big operation, *Hart*, at para. 218. Accordingly, under Canadian law, the state, as the creator of the "potent mix of a potentially unreliable confession accompanied by prejudicial character evidence," bears the onus of establishing that its Mr. Big confession warrants admission into evidence. *Hart*, at paras. 91–93.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION THAT REQUIRES THIS COURT'S INTERVENTION.

The Mr. Big operation employed in Petitioner's case did not just follow Canadian law enforcement's investigative "script" line-for-line, as it went far beyond the standard operation. Using their overwhelming power and resources, the Canadian police created an invasive, persistent, and coercive alternate reality "to obtain a confession of dubious reliability through an operation with a devastating impact on the accused." *Id.* at para. 169.

Specifically, after conducting thousands of hours' worth of undercover surveillance on Petitioner and his friend, Sebastian Burns, officers lacked evidence sufficient to charge either of them with a crime. Indeed, as is more fully explained in the Petition itself, officers previously had been presented with corroborated evidence that (1) Petitioner and Mr. Burns had an alibi on the night Petitioner's family had been murdered and (2) other suspects had a greater motive tying them to the crime. Nevertheless, officers remained committed to pursuing the teens and, in doing so, provided powerful inducements to encourage them to confess and used veiled threats and purported acts of violence when positive encouragement alone wasn't enough. At only nineteen years old and, due to the nature of the crime committed against his immediate family members, left to raise himself and navigate his grief alone, the police targeted Petitioner's particular vulnerabilities to ensure that he had no realistic option but to give Mr. Big the confession he demanded. Moreover, Petitioner's Mr. Big investigation was conducted in a "legal vacuum," in which the usual protections afforded

to suspects did not apply. In short, the very nature of the investigation was coercive.

After Canadian police secured Petitioner's confession, its use in his American trial provided a straightforward path to conviction. As previously mentioned, juries are hard-pressed to ignore evidence of a confession, even when there are good reasons for doing so. This injustice is compounded by the fact that, when admitted at trial, Petitioner's confession was accompanied by prejudicial evidence concerning his character, as he and Mr. Burns were placed in the position of convincing the jury that they had lied to Mr. Big when they confessed—a lie that followed (at least in Mr. Burns's case) months of willing participation in a purported criminal organization.

Under current Canadian law, Petitioner's confession would have been presumptively inadmissible, and, thus, the state would have had the burden to establish that the probative value of the confession outweighed its prejudicial effect. *See id.* at paras. 10, 89. But the state would have been unlikely to meet that burden, as whatever little probative value Petitioner's conflicting and uncorroborated confession had, *see id.* at para. 99 (explaining that Mr. Big confessions' probative value "derives from their reliability"), was surely outweighed by the risks of moral and reasoning prejudice described herein, *see id.* at para. 106 ("Admitting [Mr. Big] confessions raises the spectre of moral and reasoning prejudice."). Even if it had been extremely reliable, however, Petitioner's confession, unlike that of the one in *Hart*, nonetheless would have been excluded because it was, in fact, derived from threats of violence. *See id.* at para. 116 ("A confession derived from physical violence or threats of violence

against an accused will not be admissible—no matter how reliable—because this, quite simply, is something the community will not tolerate.") (citation omitted). The undercover officers in this case freely admitted that it was obvious that Mr. Burns thought that he "risked death" if he did anything to displease Mr. Big, Petition at 18 (citing C.A.E.R.264), and Mr. Burns undoubtedly passed that sentiment along to Petitioner, *see* Petition at 20 (citing C.A.E.R.2433–35).

Nevertheless, because of his unique legal circumstances, Petitioner did not receive the benefit of Canadian law's attempt to rectify the problems inherent in its own investigative creation. Simply put, the Mr. Big operation in Petitioner's case came too early to be inadmissible under Canadian law—a fact (1) used by American prosecutors to subvert the protections of American law and (2) to date, all but ignored by American courts.

Even when the courts below did consider certain challenges to the admission of Petitioner's Mr. Big confession, however, the pertinent analyses demonstrated the inherent difficulty in applying a legal framework built to protect against standard investigative techniques to the nonstandard Mr. Big operation. For example, the trial court concluded that Petitioner and Mr. Burns had not been subjectively coerced because they gave their statements to Mr. Big "in a noncustodial setting" and were "free to consult their Canadian counsel or not, as they chose." *See* Petition at 21 (citing Pet.App.163a). Moreover, the Ninth Circuit affirmed the Washington Court of Appeals' determination that Petitioner's confession was not subjectively involuntary because there was no "credible threat of physical violence" when undercover officers were the ones

making the threats. *See Rafay*, 2023 WL 2707187, at *2. These determinations disregarded the subjectively invasive, persistent, and coercive environment undercover officers create in any Mr. Big operation, and, in turn, fell into the same legal vacuum the Supreme Court of Canada recognized in *Hart*.

As a result, Petitioner faces spending the rest of his life in prison based primarily on the admission of a false confession. This Petition provides the Court with the opportunity to right that wrong for Petitioner and others convicted of crimes they very likely did not commit by granting the Petition, vacating the Ninth Circuit's decision below, and remanding to that Court to finally consider the unresolved question of whether the admission of these unreliable, prejudicial, and abusive confessions are inherently coercive under American law. In the alternative, the CLA believes that, with further briefing, the Court is positioned to consider this issue of first impression itself, ensuring finality and redress for the fundamentally unfair factual and procedural circumstances of this case.

CONCLUSION

For the foregoing reasons, the CLA fully supports Petitioner's request that the Court grant the Petition, vacate the decision below, and remand to the Ninth Circuit so that court may consider the issue of whether, for all the reasons stated by the Supreme Court of Canada and the researchers cited in this brief, confessions derived from the Mr. Big investigative technique are inherently coercive and, thus, inadmissible under American law. Alternatively, the Court should grant the petition and consider the important issue the Ninth Circuit dodged.

Respectfully submitted.

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