No.

In the Supreme Court of the United States

STEVEN M. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
PAIGE A. NICHOLS
LYDIA KREBS ALBERT
Assistant Public Defenders
FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF KANSAS
United States Courthouse
500 State Avenue, Suite 201
Kansas City, KS 66101

KANNON K. SHANMUGAM
Counsel of Record
ABIGAIL FRISCH VICE
EMILY SHAH
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

CHRISTIE MAYBERRY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

QUESTION PRESENTED

Whether a prosecutor's intentional, unjustified intrusion into a defendant's attorney-client communications violates the Sixth Amendment without a showing of discrete, trial-specific prejudice.

RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. *Baitey*, Crim. No. 12-20003 (Jan. 30, 2014) (entering judgment of conviction)

United States v. *Carter*, Crim. No. 16-20032 (Aug. 13, 2019) (ordering consolidated proceedings following special-master investigation)

Hohn v. *United States*, Civ. No. 19-2082 (Dec. 9, 2021) (denying petitioner's Section 2255 motion)

United States Court of Appeals (10th Cir.):

United States v. *Hohn*, No. 14-3030 (Apr. 1, 2015) (affirming conviction on direct appeal)

United States v. *Hohn*, No. 22-3009 (Dec. 16, 2024) (affirming denial of Section 2255 motion)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

Constitution, statutes, and rule:

Miscellaneous:

In the Supreme Court of the United States

No.

STEVEN M. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Steven M. Hohn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-162a) is reported at 123 F.4th 1084. The opinion of the district court denying petitioner's Section 2255 motion (App., *infra*, 162a-227a) is not reported but is available at 2021 WL 5833911.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2024. On February 24, 2025, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including April 15, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

STATEMENT

This case arises from one of the worst prosecutorial-misconduct scandals in recent memory. Prosecutors in the Kansas City division of the United States Attorney's Office for the District of Kansas engaged in a widespread practice of listening to the attorney-client phone calls of incarcerated defendants for strategic advantage. The practice was concealed for years because the office took an exceptionally narrow view of its disclosure obligations and did not disclose such communications unless they would be used at trial. Estimates indicate that the office illegitimately obtained more than 1,400 attorney-client communications over the course of five years. Yet the full extent of the misconduct will likely never be known because, during district-court proceedings and a special-master investigation, the office failed to preserve and took steps to destroy relevant evidence, precipitating a finding of civil contempt.

This Court's longstanding precedents make clear what should already be obvious: the Sixth Amendment—and

the adversary system it protects—cannot abide such tactics. After the misconduct came to light, the office changed its internal policies. But it continued to defend its past practice. And in the decision under review, the office persuaded a divided en banc Tenth Circuit to deny relief to criminal defendants affected by that practice. Specifically, it convinced the Tenth Circuit to deepen an entrenched circuit conflict by overruling a decades-old precedent providing a clear remedy for such egregious prosecutorial misconduct. Under the Tenth Circuit's new rule, a defendant must show discrete, trial-specific prejudice in order to establish a Sixth Amendment claim based on an intentional, unjustified prosecutorial intrusion into the defendant's attorney-client communications.

That is a rule that prosecutors do not need and should not want. Prosecutors are in the best position to avoid circumstances like these in the first place—by excluding attorney-client calls from requests for call recordings, for example, or by using filter teams to screen out attorney-client communications. And prosecutors, with their special obligation to pursue justice, are better positioned to bear the consequences when such intentional misconduct occurs.

As acknowledged in all of the opinions below, the Tenth Circuit's new rule departs from the rules of other circuits. The Third Circuit has recognized that a defendant need not show discrete, trial-specific prejudice in order to establish a Sixth Amendment claim based on an intentional, unjustified prosecutorial intrusion into attorney-client communications. The First and Ninth Circuits similarly provide that a defendant satisfies his prima facie Sixth Amendment burden by showing an intentional, unjustified prosecutorial intrusion into his attorney-client communications, at which point a rebuttable presumption of prejudice arises. And the Fourth, Sixth, and District of

Columbia Circuits evaluate prejudice using a multifactor test that stops short of requiring a showing of discrete, trial-specific prejudice.

The Tenth Circuit's new rule asks a defendant to do the impossible: to demonstrate what changed over the course of a prosecution, directly or indirectly, by virtue of the fact that the prosecutor listened to the defendant's attorney-client communications. That rule at best tolerates, and at worst incentivizes, prosecutorial misconduct. This Court's review is needed in order to resolve the circuit conflict and clarify that a prosecutor's intentional, unjustified intrusion into attorney-client communications violates the Sixth Amendment. The petition for a writ of certiorari should be granted.

A. Background

1. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The Sixth Amendment right to counsel is a specific application of the Constitution's broader guarantee of due process. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984).

The Sixth Amendment right to counsel protects the adversarial system, which is premised on the notion that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975). In a criminal case, the sides are unbalanced—with the accused on the one and "the prosecutorial forces of organized society" on the other. *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985) (citation omitted). By protecting the historic right to counsel, the Sixth Amendment enables, if not a level playing field, then a fairer

fight. See *United States* v. *Cronic*, 466 U.S. 648, 657 (1984).

The Sixth Amendment does so in numerous respects. With respect to the relationship between the accused and counsel, the best known right is "the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 683, 686 (citation omitted). A defendant is also entitled to have conflict-free counsel, see *Wood* v. *Georgia*, 450 U.S. 261, 271 (1981); to choose his counsel, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006); to choose not to be represented by counsel, see *McKaskle* v. *Wiggins*, 465 U.S. 168, 173 (1984); and to choose the objectives of his counseled defense, see *McCoy* v. *Louisiana*, 584 U.S. 414, 422 (2018).

Of particular relevance here, the Sixth Amendment also constrains the powers of the government when acting in its capacity as the adversary in a criminal case. Broadly speaking, the government can place "no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring*, 422 U.S. at 857.

Accordingly, the Sixth Amendment protects the right to counsel by imposing limitations on each branch of government. For example, legislative and judicial entities cannot restrict counsel's ability to give closing argument, see *Herring*, 422 U.S. at 864-865; to question the defendant on direct examination, see *Ferguson* v. *Georgia*, 365 U.S. 570, 596 (1961); to make an informed recommendation whether the defendant should testify, see *Brooks* v. *Tennessee*, 406 U.S. 605, 612 (1972); or to consult with the defendant during recesses, see *Geders* v. *United States*, 425 U.S. 80, 91 (1976). And of particular relevance here, prosecutors and law-enforcement officials have an "af-

firmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171. This case concerns the right to be free of such an intrusion.

B. Facts And Procedural History

1. This case arose from rampant misconduct in the Kansas City division of the United States Attorney's Office for the District of Kansas. Going back at least to 2011, prosecutors in that office routinely obtained and accessed inmate phone calls, including attorney-client communications, without disclosing them, and used attorney-client communications for their strategic advantage. The practice came to light in 2016 in a case called *United States* v. *Black*, Crim. No. 16-20032 (D. Kan.), later renamed *United States* v. *Carter*.

a. Specifically, in *Black*, it came to light that prosecutors had obtained the recordings of over 48,000 inmate phone calls, including at least 74 attorney-client calls, and also over 700 video recordings, from a single pretrial detention facility. See *United States* v. *Carter*, 429 F. Supp. 3d 788, 835, 848-849 (D. Kan. 2019). As it turns out, that kind of collection was standard in the office. In one of the most chilling pieces of evidence, a prosecutor, Erin Tomasic, testified that she was taught she "should always get calls if the case is going to trial." *Id.* at 847. The prosecutors in *Black* obtained calls both by subpoena and by informal request. See *id.* at 848. That was typical office practice: prosecutors obtained calls by means of grand-jury subpoenas, administrative subpoenas, United States Marshals Service forms, e-mails, and telephone requests. See *id.* at 847.

By contrast, a 2014 memo from the Department of Justice had instructed prosecutors to "obtain recorded

phone calls of detainees only by grand jury or trial subpoena," and only with "prior approval" from a United States Attorney (or Section Chief). *Carter*, 429 F. Supp. 3d at 857.

b. The prosecutors in *Black* made no effort to exclude attorney-client communications from the calls they collected. See *Carter*, 429 F. Supp. 3d at 864. With rare exception, that too was the office's typical practice. See *ibid.* Each request for recorded calls involved a 28% chance of including attorney-client communications. See *id.* at 856. According to one estimate, the office obtained at least 1,429 attorney-client calls, though the precise number is unclear because the office failed to preserve and produce relevant evidence. See *ibid.* And in some cases, the prosecutors listened to the recordings they obtained. The office took the position that attorney-client privilege had been waived in light of signs and messages warning inmates that their calls would be recorded and monitored. See *id.* at 843-844, 860-861. No prosecutor had litigated the issue in Kansas or the Tenth Circuit, and the office could not identify any binding authority supporting its position. See *id.* at 860.

The 2014 DOJ memo, which required a subpoena and management approval to request inmate calls, warned that prisoners' "communications with attorneys" were "not within the scope of this memorandum." *Carter*, 429 F. Supp. 3d at 857. A 2008 DOJ memo instructed prosecutors to use filter teams to "avoid ethical problems" stemming from becoming privy to privileged information. *Ibid.* For her part, Tomasic was advised by DOJ's Office of Professional Responsibility that, if privilege had been waived (as she had represented), she should still "employ a [filter] team to review the recordings." *Id.* at 852. Having previously used a filter team, Tomasic eventually

started listening to attorney-client calls herself. See *id.* at 849, 852.

c. The prosecutors in *Black* initially disclosed their possession of recorded attorney-client communications in an effort to gain a strategic advantage. Specifically, the prosecutors tried to conflict a defense attorney off a case by accusing her of disclosing, to a client, information from another client's case. When she denied it, the prosecutors told her that they were reviewing recordings of her meetings with her client. See *Carter*, 429 F. Supp. 3d at 837, 858.

Such disclosures were unusual; the office's typical practice was not to disclose recordings. The office had taken an exceptionally narrow view of its disclosure obligations, including that Federal Rule of Criminal Procedure 16 does not require disclosure of attorney-client communications—even those obtained and reviewed by prosecutors—unless they would be used at trial. See *Carter*, 429 F. Supp. 3d at 858, 861-862. At some point, Tomasic told others that she had learned, in training at DOJ's National Advocacy Center, that prosecutors should turn inmate calls over to the defense under Rule 16. See *id.* at 861. But remarkably, a senior attorney in the office told Tomasic that the NAC trainer was not "knowledgeable on th[e] subject." *Ibid.*

Indeed, the office's typical practice was not to disclose intercepted attorney-client communications, but rather to deploy them for tactical advantage. See *Carter*, 429 F. Supp. 3d at 849-854. As an example, one prosecutor, Tanya Treadway, took 106 pages of handwritten notes while listening to the attorney-client communications of a defendant she was prosecuting. See *id.* at 852-853. From those calls, Treadway learned that the defendant wanted custody of the child she shared with her co-defendant husband. See *id.* at 853. In subsequent plea negotiations,

Treadway assured the defendant that she would be released before her husband. See *ibid.* That made the plea deal attractive, as Treadway knew it would, because it would ensure that the defendant regained custody of her child. See *ibid.* Unsurprisingly, the defendant took the plea. See *ibid.* Yet before the defendant was released, Treadway double-crossed her by striking a time-served deal with her husband, which allowed him to seek custody after all. See *ibid.*

More generally, former prosecutors described the office as an "inmates-run-the-jail" and a "Lord of the Flies" type of environment. *Carter*, 429 F. Supp. 3d at 865. One manager testified that he was met with strong resistance when he attempted to implement standard discovery practices. See *id.* at 863. Prosecutors pursued tactics such as "abusive charging practices"; the delayed disclosure of exculpatory evidence; the "retaliatory use" of sentencing enhancements; and "bait and switch" agreements for substantial assistance. *Ibid.*

2. Having learned, from the defense attorney threatened by the prosecutors in *Black*, that the office possessed recordings of inmates' attorney-client communications, the Federal Public Defender moved to intervene in *Black* in 2016. See *Carter*, 429 F. Supp. 3d at 801, 837. The Federal Public Defender also began filing motions seeking the return of recordings in other cases. See *id.* at 801.

The district court ordered that the recordings be impounded, and it held emergency hearings to determine how and why the recordings had been obtained. See *Carter*, 429 F. Supp. 3d at 799, 802. After those hearings, the court determined that further investigation was necessary, and it appointed a special master for that purpose. See *id.* at 802-803.

In 2017, the United States Attorney's Office adopted new policies requiring prosecutors to make written requests for jail calls and providing for filter teams. See *Carter*, 429 F. Supp. 3d. at 865.

In 2018, the district court began to hear evidence from the special master and the parties concerning the office's possession of attorney-client communications. See *Carter*, 429 F. Supp. 3d at 804-805. The court subsequently appointed the Federal Public Defender to represent all defendants whose attorney-client communications the office had obtained. See *id.* at 805.

In 2019, the district court held the office in contempt for failing to cooperate with the investigation. See *Carter*, 429 F. Supp. 3d at 878. The court and the special master had repeatedly instructed the office to preserve relevant evidence. See *id.* at 808-810. But the office proceeded to conduct "cyclical" deletion of computer files; a forensic expert testified that "there was no reason [for the deletion] unless the objective was to destroy the data." *Id.* at 815, 817. Additionally, the district court found that the office had failed adequately to preserve documents for the litigation, see *id.* at 818-823, and had failed to provide access to documents the special master had requested, see *id.* at 828-829. The court also identified multiple occasions on which prosecutors had lied to or misled judges and defense counsel about their review of attorney-client communications. See *id.* at 831, 839, 853.

3. After the office's misconduct came to light, petitioner filed a habeas motion under 28 U.S.C. 2255. On January 25, 2012, petitioner had been indicted on drug and gun charges. He was detained pending trial. On April 23, 2012, petitioner called his newly assigned defense attorney, James Campbell. The call was recorded. Petitioner and Campbell discussed whether petitioner wanted

to go to trial; in the course of that discussion, they addressed petitioner's criminal history, the evidence against him, and problems with that evidence. Petitioner proceeded to trial, and he was convicted and sentenced to 30 years of imprisonment. App., *infra*, 162a-164a, 189a, 193a.

The *Black* investigation revealed that the prosecutor in petitioner's criminal case, Terra Morehead, had obtained his attorney-client communications before trial.[1] In his habeas motion, petitioner asserted that the prosecutor's intentional, unjustified intrusion into his attorney-client communications violated his Sixth Amendment right to counsel. Relying on the Tenth Circuit's decision in *Shillinger* v. *Haworth*, 70 F.3d 1132 (1995), petitioner argued that he was not required to show discrete, trial-specific prejudice from the intrusion in order to establish a Sixth Amendment violation. App., *infra*, 162a-163a, 198a.

After an evidentiary hearing, the district court denied petitioner's habeas motion. App., *infra*, 163a-227a. The

---

[1] Morehead was perhaps the most notorious malefactor in the Kansas scandal. She was recently disbarred after a bar investigation into allegations that she had engaged in extensive misconduct as a federal and state prosecutor. Among other allegations, she interfered with defense witnesses; failed to disclose exculpatory evidence; and failed to disclose a romantic relationship with a judge before whom she regularly appeared. Worst of all, she forced an eyewitness to lie on the stand by threatening to imprison her and take away her children, resulting in the wrongful conviction of a 17-year-old for a double murder. See Peggy Lowe, *Kansas Prosecutor Who Framed Innocent Man Surrenders Law License, Will Soon Be Disbarred*, KCUR (Apr. 16, 2024) <tinyurl.com/moreheaddisbarred>; see also *United States* v. *Orozco*, 291 F. Supp. 3d 1267, 1278-1279 (D. Kan. 2017); Sent. Tr. at 3-4, *United States* v. *Giannukos*, Crim. No. 15-20016 (D. Kan. May 10, 2021); Compl. at 3-4, *Citizens for Responsibility and Ethics in Washington* v. *Department of Justice*, Civ. No. 24-2416 (D.D.C. Aug. 21, 2024).

court reasoned that petitioner's Sixth Amendment claim failed because his communication with his attorney was not protected by the attorney-client privilege. *Id.* at 210a. At one point, the court recognized that "the protection afforded by the Sixth Amendment includes, but is not limited to, the scope of the attorney-client privilege." *Id.* at 203a. But having said that, the court proceeded to conclude that petitioner's communication was not constitutionally protected "[b]ecause the attorney-client privilege is a necessary underpinning of [petitioner's] Sixth Amendment right." *Id.* at 209a.

In the course of its analysis, the district court made several critical factual findings. *First*, the court found that, on the relevant call, petitioner and his attorney had discussed "[petitioner's] desire to have a trial in the matter, his criminal history, what he believed the evidence against him to be and problems with that evidence, concern about his truck being impounded, and the general way that they would proceed to meet and discuss the case going forward." *Second*, the court found that, when requesting petitioner's phone calls, "[t]he prosecution team [had] made no effort to exclude recordings of [petitioner's] attorney-client calls," such as by "using a filter team." *Third*, the court found that Morehead, the prosecutor, had obtained multiple copies of the recordings without a legitimate law-enforcement purpose; intentionally listened to the relevant call between petitioner and his attorney; and then "took steps to conceal th[is] tactical advantage." App., *infra*, 187a, 193a, 196a, 219a, 223a-224a.

4. Petitioner appealed. After a panel of the court of appeals heard oral argument, the court decided sua sponte to hear the case en banc—the first en banc argument in the Tenth Circuit in three years. In a 7-3 vote (with two judges recused), the en banc court of appeals affirmed in a set of opinions spanning over 160 pages.

a. In the majority opinion, the court of appeals began by rejecting the district court's privilege-based reasoning, explaining that "the Sixth Amendment attorney-client confidentiality is distinct from and broader than the attorney-client privilege." App., *infra*, 14a-17a. Having noted that petitioner had "discussed legal advice and trial strategy" with his attorney on the relevant call, *id.* at 6a, the court started from the premise that petitioner had shown "an intentional intrusion into the attorney-client relationship," *id.* at 17a.

But the court of appeals proceeded to overrule its decision in *Shillinger*, holding that no Sixth Amendment violation occurs when the prosecution intentionally and unjustifiably intrudes into attorney-client communications unless the defendant can further show that the invasion caused a discrete, trial-specific harm. App., *infra*, 3a. The court of appeals contended that this Court had presumed prejudice only in "limited" situations, and the court of appeals disparaged *Shillinger* as having done so "casually" based on "inchoate" concerns. *Id.* at 39a-40a, 42a. And the court of appeals contended that, to the extent the First and Ninth Circuits had adopted a presumption of prejudice, that rule was "incompatible" with this Court's Sixth Amendment precedents. *Id.* at 63a.

b. Judge Bacharach, joined by Judges McHugh and Rossman, dissented. App., *infra*, 65a-86a. Judge Bacharach would have followed the First and Ninth Circuits in adopting a presumption of prejudice, which would require a defendant to make a prima facie showing of prejudice and then shift the burden to the prosecution to negate that showing. *Id.* at 66a-68a. He concluded that "Mr. Hohn satisfied his prima facie burden" here, having proved an intentional, unjustified intrusion resulting in prosecutorial interception of strategic attorney-client communica-

tions. *Id.* at 67a. Judge Bacharach reasoned that the majority's rule impractically required a defendant to show how prosecutors misused the wrongly obtained information. As he noted, "[t]he prosecution typically knows whether and how the communications affected the trial, while the defendant can only speculate." *Id.* at 68a. By contrast, "[the defendant] had no way of knowing whether the prosecution had previously planned to use that evidence or known how [the defendant] was going to attack that evidence," which he would need to know in order to prove prejudice. *Id.* at 71a.

Judge Bacharach added that the majority's rule was inequitable because the issue before the court was limited to "intentional and unjustified" intrusions. App., *infra*, 74a. As a result, "the issue arises only when the prosecution created the problem, could have prevented the problem, and could have redressed the problem earlier." *Ibid.* This case, he explained, well illustrated why it was appropriate to shift the burden to the government, because the prosecutors had "refused to comply" with the district court's orders and "taken 'steps to conceal that tactical advantage,' 'minimizing, deflecting and obfuscating the prosecution's role.'" *Id.* at 73a-74a (citation and alterations omitted).

In Judge Bacharach's view, the majority had improperly relied on cases that did not involve intentional, unjustified intrusions into strategic attorney-client communications—a "unique context" that "triggers the need to shift the burden because of the prosecution's superior access to information acquired through improper conduct." App., *infra*, 79a. Thus, he confirmed, "[t]he majority create[d] a circuit split," having rejected the rebuttable presumption adopted by the First and Ninth Circuits. *Ibid.*

c. Judge Rossman also wrote a separate dissenting opinion, joined by Judge Bacharach. App., *infra*, 87a-

161a. She observed at the outset that this case involves "unprecedented transgressions by federal prosecutors into the defense function." *Id.* at 88a. "At the heart of this case," she continued, is "something ordinary—a defense lawyer talking on the phone to his incarcerated client—and something extraordinary—the prosecutor listening." *Id.* at 90a. Judge Rossman criticized the government for "trivializ[ing]" petitioner's claim, and she noted that the large number of defendants making such claims was "evidence of th[e] misconduct's wide reach." *Id.* at 95a n.6, 98a.

Judge Rossman expressed the view that, under this Court's precedents, *Shillinger* had correctly rejected any requirement of discrete, trial-specific prejudice in the context of the egregious prosecutorial misconduct it addressed. App., *infra*, 99a-151a. The majority's rule, she explained, improperly conflated Sixth Amendment claims premised on ineffective assistance of counsel with those premised on government interference with the right to counsel. *Id.* at 101a-111a. She then set forth in detail the reasons that *Shillinger* was correctly decided under this Court's precedents. *Id.* at 124a-151a. In changing course, Judge Rossman reasoned, the majority had improperly "speculate[d] how [the Supreme] Court *would* rule" in the face of "a widely acknowledged circuit split over whether defendants must show prejudice to establish a Sixth Amendment violation when prosecutors wrongfully invade the attorney-client relationship." *Id.* at 149a-151a. "Under the circumstances," Judge Rossman concluded, "the majority's decision *sua sponte* to abrogate *Shillinger*'s * * * rule *proactively*" was "profoundly destabilizing." *Id.* at 151a.

Judge Rossman would have gone further than Judge Bacharach and retained a conclusive presumption of prej-

udice. App., *infra*, 151a-154a. She reasoned that "it is virtually impossible for *anyone*—even the prosecution itself—to know how that information actually shaped the trial." *Id.* at 153a. That is because "[e]ven the government cannot know *exactly* how its decisions, tone, questions, writing, objections, and so on might have differed in the counterfactual world with no intrusion." *Id.* at 154a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals deepens a well-developed conflict on whether (and, if so, how) a defendant must demonstrate prejudice to claim a Sixth Amendment violation based on a prosecutor's intentional and unjustified intrusion into the defendant's attorney-client communications. Further, the decision below cannot be reconciled with this Court's precedents instructing that no showing of discrete, trial-specific prejudice is required to establish a Sixth Amendment violation in such egregious circumstances. And as the over 160 pages of opinions from the en banc court of appeals amply demonstrate, the question presented could not be more fundamental to our criminal justice system. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts of Appeals

This case presents the ideal opportunity to answer an important question that has deeply divided the lower courts. As recognized in all of the opinions below, the division of authority is not new. App., *infra*, 51a-64a, 66a, 149a & n.34. But until this case, no court of appeals had rejected, for lack of discrete, trial-specific prejudice, a Sixth Amendment claim based on an intentional, unjustified prosecutorial intrusion into a defendant's attorney-client communications. That rule—now the law only in the Tenth Circuit—conflicts with the Third Circuit's rule

that prejudice need not be shown in such circumstances. It also conflicts with the rebuttable presumption of prejudice applied by the First and Ninth Circuits and many state courts. And it cannot be reconciled with the multifactor test applied by the Fourth, Sixth, and District of Columbia Circuits, which stops short of requiring a showing of discrete, trial-specific prejudice. The resulting conflict cries out for this Court's review.

1. The Third Circuit has held that discrete, trial-specific prejudice need not be shown if a defendant demonstrates an intentional prosecutorial intrusion into attorney-client communications. In *United States* v. *Levy*, 577 F.2d 200 (1978), the Third Circuit made clear that no "inquiry into prejudice" is necessary when, by a "knowing invasion," "attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case." *Id.* at 208-209. That rule both protects the adversary system, the court explained, and avoids the "virtually impossible task" of deciding "how the government's knowledge of any part of the defense strategy might benefit the government." *Id.* at 208. The court read this Court's decision in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), to provide that a Sixth Amendment violation would occur when "defense strategy was actually disclosed or * * * government enforcement officials sought such confidential information." *Levy*, 577 F.2d at 210. While the Third Circuit has since expressed uncertainty about that interpretation of *Weatherford*, see *United States* v. *Mitan*, 499 Fed. Appx. 187, 192 n.6 (2012), cert. denied, 570 U.S. 919 (2013), it has not retreated from the *Levy* rule.

2. The First and Ninth Circuits apply a rebuttable presumption of prejudice when the government becomes privy to attorney-client communications. See, *e.g.*, *United States* v. *Mastroianni*, 749 F.2d 900 (1st Cir. 1984);

United States v. *Danielson*, 325 F.3d 1054 (9th Cir. 2003). In *Mastroianni*, the First Circuit held that a defendant must make a prima facie showing of prejudice by demonstrating that "confidential communications were conveyed" as a result of government intrusion. 749 F.2d at 907-908. At that point, the burden shifts to the government to show the absence of prejudice. See *id.* at 908; see also *United States* v. *DeCologero*, 530 F.3d 36, 64 (1st Cir.), cert. denied, 555 U.S. 1005 (2008). And in *Danielson*, the Ninth Circuit adopted that rule for cases where a government official "affirmatively" intrudes into the attorney-client relationship. See 325 F.3d at 1071.

In adopting their rules, the First and Ninth Circuits invoked concerns similar to those underlying the Third Circuit's categorical rule. The First Circuit explained that "placing the entire burden on the defendant to prove both the disclosure and use of confidential information is unreasonable" and that requiring "anything less" of the government "would be to condone intrusions into a defendant's protected attorney-client communications." *Mastroianni*, 749 F.2d at 907-908. For its part, the Ninth Circuit acknowledged the "'heavy burden' of showing non-use," but emphasized that the prosecution could "avoid this burden * * * by not improperly intruding into the attorney-client relationship in the first place." *Danielson*, 325 F.3d at 1072.

State courts, too, "tend to favor a rebuttable presumption of prejudice of some sort, with a requirement that the remedy be tailored to address the prejudice caused by the violation." *State* v. *Greenwood*, 548 P.3d 831, 843, 846-847 (Or. Ct. App. 2024); see, *e.g.*, *State* v. *Robins*, 431 P.3d 260, 271-272 (Idaho 2018); *State* v. *Bain*, 872 N.W.2d 777, 790-791 (Neb. 2016); *State* v. *Fuentes*, 318 P.3d 257, 259, 262 (Wash. 2014); *State* v. *Lenarz*, 22 A.3d 536, 542, 550 (Conn. 2011); *State* v. *Warner*, 722 P.2d 291, 295-296 (Ariz. 1986).

In any of the foregoing jurisdictions, on the facts of this case, petitioner would have carried his Sixth Amendment burden. The district court specifically found that the prosecution "intentionally bec[ame] privy to" petitioner's call with his attorney, and the government never argued that its intrusion was justified. App., *infra*, 223a-224a. The district court further found, based on its *in camera* review, that the attorney-client communication "involved legal advice or strategy." *Id.* at 199a-200a. As Judge Bacharach recognized in his dissent, petitioner thus "satisfied his prima facie burden" to demonstrate a Sixth Amendment violation under the rule adopted by the First and Ninth Circuits and many state courts. See *id.* at 67a.

3. The Tenth Circuit's rule is also irreconcilable with the multifactor test applied by the Fourth, Sixth, and District of Columbia Circuits, which stops short of requiring a showing of discrete, trial-specific prejudice. Those circuits consider (1) whether the intrusion produced any trial evidence, directly or indirectly; (2) whether the intrusion was intentional; (3) whether the prosecution received otherwise confidential information concerning defense strategy; and (4) whether the information was otherwise used to the substantial detriment of the defendant. See *United States* v. *Brugman*, 655 F.2d 540, 546 (4th Cir. 1981); *United States* v. *Steele*, 727 F.2d 580, 585 (6th Cir.), cert. denied, 467 U.S. 1209 (1984); *United States* v. *Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986).

Although none of those circuits has committed to a particular combination of factors that would necessarily result in a Sixth Amendment violation, each has indicated that an intentional intrusion by which the prosecution becomes privy to attorney-client communications—as happened here—would qualify. For example, in *Kelly*, the defendant alleged that the government had intentionally

intruded into his attorney-client relationship and that confidential information had been disclosed to the prosecution. See 790 F.2d at 137-138. The D.C. Circuit remanded for further development of the evidentiary record as to those disputed allegations. See *id.* at 138. It explained that, if the defendant were to "demonstrate[] sufficient prejudice to establish a Sixth Amendment violation" by "resolv[ing] disputed facts," the burden of proof would shift to the government to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Ibid.*

In *Steele*, the Sixth Circuit concluded that an intentional intrusion by the government alone, absent an additional showing of prejudice, would not justify "any remedy." 727 F.2d at 586. But the court left open the possibility that the presence of two or more factors, such as an intentional invasion *by the prosecution*, would establish a Sixth Amendment violation. See *id.* at 586-587; cf. *United States* v. *Dobson*, 626 Fed. Appx. 117, 124-125 (6th Cir. 2015) (identifying no Sixth Amendment violation where the intrusion was not intentional and the disclosed information did not involve defense strategy).

Finally, in *Brugman*, the Fourth Circuit held that there was no Sixth Amendment violation because none of the factors was implicated by the conduct at issue: a former co-defendant had pleaded guilty and then testified at trial against the defendant. See 655 F.2d at 545-546. There was no intentional government intrusion, because the former co-defendant became a government witness on his own initiative and testified "based upon his own extensive knowledge of the facts." *Id.* at 546. Further, the information had not otherwise been used to the "substantial detriment" of defendants, nor was there evidence that "the details about trial preparation were learned by the government." *Ibid.* As the D.C. Circuit later noted, the

Fourth Circuit's approach "impl[ies]," even if it "[does] not hold[]," that "each factor alone can establish a constitutional violation." *Kelly*, 790 F.2d at 137 n.5.

4. While not squarely confronting the question, other circuits have indicated that they would not require a showing of discrete, trial-specific prejudice for a Sixth Amendment violation premised on a prosecutor's intentional, unjustified intrusion into a defendant's attorney-client communications. The Seventh Circuit has suggested that prejudice can be presumed when a government intrusion into the attorney-client relationship is intentional. In *United States* v. *Castor*, 937 F.2d 293 (7th Cir. 1991), the court explained that the defendant had not asserted a Sixth Amendment violation because his claims did not involve "proof of governmental intrusion *or* actual prejudice." *Id.* at 298 (emphasis added); see also *United States* v. *DiDomenico*, 78 F.3d 294, 301 (7th Cir.) (describing the "serious issue of the infringement of [the defendant's Sixth Amendment] right" if "the director of [a prison] ordered the bugging, * * * even if the fruits of the bugging were not turned over to the prosecutors"), cert. denied, 519 U.S. 1006 (1996).

So too, the Eleventh Circuit has suggested that discrete, trial-specific prejudice need not be shown for an intentional prosecutorial intrusion into attorney-client communications. In *United States* v. *Ofshe*, 817 F.2d 1508 (11th Cir.), cert. denied, 484 U.S. 963 (1987), the government monitored the defendant's conversation with his attorney, who was wearing a wire. See *id.* at 1515. In holding that no Sixth Amendment violation had occurred, the court emphasized that "no [nonpublic] facts in the case or strategic decisions were discussed" and, "[s]ignificantly, nothing pertinent to the [pending] case was communicated to the United States Attorney assigned this case." *Ibid.* Decisions from some state supreme courts are to the

same effect. See *People* v. *Suarez*, 471 P.3d 509, 561 (Cal. 2020) (requiring some "realistic possibility" that the defendant "was injured by, or the prosecution benefited from," the intrusion, taking into account, among other things, whether the intrusion was for the purpose of learning strategic information); *State* v. *Quattlebaum*, 527 S.E.2d 105, 108-109 (S.C. 2000) (requiring defendants to show "deliberate prosecutorial misconduct *or* prejudice" because "[d]eliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice").

The Second and Eighth Circuits have more generally suggested that prejudice need not be shown for intrusions involving egregious government misconduct; that is, conduct that is "manifestly and avowedly corrupt," *United States* v. *Gartner*, 518 F.2d 633, 637 (2d Cir.), cert. denied, 423 U.S. 915 (1975), or "gross misconduct," *United States* v. *Davis*, 646 F.2d 1298, 1303 n.8 (8th Cir.), cert. denied, 454 U.S. 868 (1981).[2]

In sum, the courts of appeals have taken plainly divergent approaches to the question whether (and, if so, how) a defendant must demonstrate prejudice to claim a Sixth Amendment violation based on a prosecutor's intentional

---

[2] Like the district court in this case, see App., *infra*, 208a-211a, a small number of courts have defined the scope of the Sixth Amendment right by reference to the attorney-client privilege, see *United States* v. *Melvin*, 650 F.2d 641, 645-646 (5th Cir. July 1981) (stating that the privilege "offers an appropriate framework of analysis" in the government-intrusion context); *Burns* v. *State*, 907 S.E.2d 581, 586-587 (Ga. 2024) (concluding that an incarcerated defendant's phone calls were not privileged under state law and thus that a prosecutor's intentional monitoring of those calls did not violate the Sixth Amendment), petition for cert. pending, No. 24-6656 (filed Feb. 5, 2025). In this case, the Tenth Circuit correctly rejected that approach. See App., *infra*, 16a-17a.

and unjustified intrusion into the defendant's attorney-client communications. The resulting conflict warrants this Court's review.

B. The Decision Below Is Incorrect

The court of appeals held that "a Sixth Amendment violation of the right to confidential communication with an attorney requires the defendant to show prejudice." App., *infra*, 64a. That holding was erroneous. As nearly sixty years of this Court's precedents confirm, a Sixth Amendment violation is complete when the prosecution intentionally and unjustifiably intrudes into a defendant's attorney-client communications.

1. This Court has never required a showing of discrete, trial-specific prejudice for a similar intrusion into attorney-client communications. In *Black* v. *United States*, 385 U.S. 26 (1966), agents listened to and took notes on attorney-client communications and then gave their notes to prosecutors, who reviewed them. See *id.* at 27-28. The prosecutors did not use the communications in the case, see *id.* at 28; *id.* at 31 (Harlan, J., dissenting), but that was not dispositive. Citing the need for a "fair trial," the Court reversed the defendant's conviction and remanded for a new trial. *Id.* at 28-29. In a similar case the following Term, *O'Brien* v. *United States*, 386 U.S. 345 (1967), the Court went one step further, reversing and remanding for a new trial even though prosecutors evidently had not become privy to the attorney-client communications at issue. See *id.* at 346 (Harlan, J., dissenting).

In *Hoffa* v. *United States*, 385 U.S. 293 (1966), the Court addressed a Sixth Amendment claim involving two criminal trials. In the first trial, the defendant was charged with violating federal labor law, and the jury hung. See *id.* at 294. In the second, he was charged with

bribing the jury in the first trial. See *id.* at 294-295. The evidence in the second trial included an informant's testimony that, during the first trial, he had overheard the defendant and his attorney discussing bribing the jurors. See *id.* at 295-296. Citing *Black*, the Court explained that, if the first trial "had resulted in a conviction instead of a hung jury," the conviction "would presumptively have been set aside as constitutionally defective." *Id.* at 307. That was so, the Court reasoned, because an intrusion into "the confidential relationship between the defendant and his counsel" is "government intrusion of the grossest kind." *Id.* at 306. The defendant ultimately was entitled to no relief, however, because the violation occurred at the first trial, whereas the conviction he challenged arose from the second. See *id.* at 307-309.

Later, in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), the alleged government intrusion was that an undercover agent had attended two meetings between the defendant and his counsel. See *id.* at 547-548. The Court held that no Sixth Amendment violation had occurred. See *id.* at 548. But in so doing, the Court emphasized two facts: *first*, that the agent had attended the meeting for the purpose of maintaining his cover, not of intruding, and *second*, that he had never relayed the contents of attorney-client communications to prosecutors. See *id.* at 548-549. The Court observed that, absent those facts, the intrusion would have "created at least a realistic possibility of injury to [the defendant] or benefit to the State" and thus presented a "much stronger case" for a Sixth Amendment violation. *Id.* at 554, 558. The Court thereby implied that such a "realistic possibility" would exist if the misconduct was intentional or unjustified, or if it involved the prosecution becoming privy to attorney-client communications. The Court did not suggest that a defendant must prove

discrete, trial-specific prejudice to establish a Sixth Amendment violation even in those circumstances.

United States v. *Morrison*, 449 U.S. 361 (1981), is to the same effect. As a preliminary matter, *Morrison* involved agents' conversations with a counseled informant in the absence of counsel, rather than intrusions into attorney-client communications. See *id.* at 362-363. The Court nevertheless assumed without deciding that the government had violated the Sixth Amendment, and it discussed prejudice only in determining whether dismissal of the indictment with prejudice was an appropriate remedy. See *id.* at 364. The Court thus distinguished the constitutional right from the remedy for a violation of that right, and it thereby suggested that the right is violated at the point when the defendant proves an intentional and unjustified prosecutorial intrusion.

2. A prosecutor's intentional and unjustified intrusion into a defendant's attorney-client communications belongs in a broader category of cases involving governmental interference with the Sixth Amendment right to counsel, for which the Court has never required a defendant to show prejudice. See *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984) (noting prejudice is "presumed" for "various kinds of state interference with counsel's assistance") (citation omitted). Where the government interferes with the right to counsel, prejudice has been presumed regardless of which branch of government interfered. See, *e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 177 (1985) (interference by law enforcement); *Geders* v. *United States*, 425 U.S. 80, 91 (1976) (judicial interference); *Herring* v. *New York*, 422 U.S. 853, 863 (1975) (legislative interference).

That makes good sense, because the requirements of a Sixth Amendment right-to-counsel claim—and the analytical role of prejudice—depend on the specific nature of

the right. And a defendant need not show discrete, trial-specific prejudice to state a claim for a constitutional violation that corresponds to a discrete event that cannot be attributed to the defendant.

For example, consider a violation of a defendant's right to choose his own counsel. That error necessarily cannot be attributed to the defendant. And it occurs at a discrete moment in time; it is "'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Or consider a violation of a defendant's right to choose the objectives of his counseled defense. That error necessarily cannot be attributed to the defendant either, and the violation is "complete when the court allow[s] counsel to usurp control of an issue within [the defendant's] sole prerogative." *McCoy* v. *Louisiana*, 584 U.S. 414, 426-427 (2018).

By contrast, the right to effective assistance of counsel is qualitatively different. As this Court has explained, a claim based on the quality of representation—that is, a claim of "actual ineffectiveness"—requires a showing of prejudice. *Strickland*, 466 U.S. at 686. That is because the actions of counsel are attributed to the defendant. See *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991). In addition, the right itself guarantees "*effective* (not mistake-free) representation." *Gonzalez-Lopez*, 548 U.S. at 147. That is, "[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *Ibid.* As a result, a violation can be complete only if and when, looking at the

overall representation, a defendant has been prejudiced. See *ibid.*[3]

A Sixth Amendment claim concerning *government interference* with the right to counsel is a "different matter." *Perry* v. *Leeke*, 488 U.S. 272, 279 (1989). Such a claim is "not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." *Id.* at 280. A Sixth Amendment claim based on government interference is premised on a discrete event not attributable to the defendant. The prosecution, not the defendant, is "directly responsible" for the violative conduct, which is thus "easy for the government to prevent." *Strickland*, 466 U.S. at 692. Moreover, the violation occurs at a discrete moment in time and is "easy to identify." *Ibid.* Accordingly, "prejudice is presumed." *Ibid.*

The most recent statements by members of this Court are consistent with the foregoing precepts. See *Weaver* v. *Massachusetts*, 582 U.S. 286, 308 (2017) (Alito, J., joined by Gorsuch, J., concurring in the judgment) (noting that "[t]he Court has relieved defendants of the obligation to make th[e] affirmative showing [of prejudice]" in certain categories of cases, "includ[ing] * * * state interference with counsel's assistance"); *Kaur* v. *Maryland*, 141 S. Ct. 5, 6-7 (2020) (Sotomayor, J., statement respecting the denial of certiorari) (describing the various "insidious ways" in which a prosecutor's access to attorney-client communications prejudices a defendant).

---

[3] For its part, the right to conflict-free counsel requires a showing that counsel had an "actual conflict of interest." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). That violation also has a longer timeframe because it requires showing not just a potential conflict, but an actual conflict that adversely affected the representation. See *Mickens* v. *Taylor*, 535 U.S. 162, 171 (2002). But once an actual conflict is shown, prejudice is presumed. See *ibid.*

3. A prosecutor's intentional and unjustified intrusion into a defendant's attorney-client communications also meets the requirements for structural error—a discrete doctrine that dispenses with an inquiry into prejudice in remedying certain types of constitutional error. See *McCoy*, 584 U.S. at 427. Such an intrusion satisfies all three of the reasons the Court has given for deeming a constitutional violation to be structural. It "inevitably signal[s] fundamental unfairness"; "[its] effects are too hard to measure"; and "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Ibid.* (citation omitted); see *Weaver*, 582 U.S. at 294-296.

First, a prosecutor's intrusion into attorney-client communications inevitably signals fundamental unfairness, both for "the defendant in the specific case" and by "pervasive[ly] undermining * * * the systemic requirements of a fair and open judicial process." *Weaver*, 582 U.S. at 301. The Sixth Amendment was crafted to guarantee "basic fairness and symmetry" in criminal trials. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 117 (1998). But neither fairness nor symmetry exist when the prosecution has eavesdropped on the strategy of the defense. To conclude otherwise would be to ignore a "basic premise of our adversary system": namely, that "the government must prove its case without the aid of information acquired from the mouth of the defendant against his will." Note, *Government Intrusions Into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L. Rev. 1143, 1145 (1984).

Second, it is impossible to measure the effects of a prosecutor's intrusion into attorney-client communications. "A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record."

Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 813 (1987). Any rule that does not require reversal "would be a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

Third, the right to counsel does not merely "protect the defendant from erroneous conviction" but also protects "other interest[s] * * * where harm is irrelevant to the basis underlying the right." *Weaver*, 582 U.S. at 286-287. Specifically, the right to counsel protects not only the defendant's interest in autonomy, see *McCoy*, 584 U.S. at 428, but also "the character [of the trial process] as a confrontation between adversaries," *United States* v. *Cronic*, 466 U.S. 648, 656-657 (1984). To that end, a prosecutor must be more than simply a fair adversary; the prosecutor is "the representative * * * of a sovereignty * * * whose interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985) (citations omitted). A prosecutor who intrudes into attorney-client communications thereby undermines the "structural integrity of the criminal tribunal," *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986), and the "public legitimacy" of the prosecution, *Williams* v. *Pennsylvania*, 579 U.S. 1, 16 (2016).

While the question presented here focuses on the scope of the constitutional right, rather than the appropriate remedy for a violation of that right, the doctrine of structural error further supports the conclusion that "no additional showing of prejudice is required to make the violation 'complete.'" *Gonzalez-Lopez*, 548 U.S. at 146. Further review is warranted to resolve the circuit conflict on the scope of the right and reverse the court of appeals' erroneous holding.

C. The Question Presented Is Exceptionally Important And Warrants The Court's Review In This Case

The question presented is exceptionally important, and this case an ideal vehicle in which to consider it.

1. The district court emphasized that "there is no template" for the "systemic" and "far reaching" prosecutorial misconduct in this case. *United States* v. *Carter*, 429 F. Supp. 3d 788, 903 (D. Kan. 2019). For years, the United States Attorney's Office for the District of Kansas undermined defendants' Sixth Amendment rights by collecting attorney-client calls, seeking to leverage confidential information in the trial and plea-bargaining processes. See pp. 6-9, *supra*. The office then failed to preserve and took steps to destroy relevant evidence, in clear violation of court orders. See pp. 9-10, *supra*. Yet the court of appeals devised a rule that leaves the victims of such egregious misconduct with no practical recourse. As Judge Bacharach's dissent recognized, short of the unlikely scenario in which the prosecution introduces attorney-client communications at trial, a defendant will have "no way of knowing" how the prosecution misused "improperly intercepted information," and thus will never be able to meet the court of appeals' burden of demonstrating discrete, trial-specific prejudice. App., *infra*, 70a-71a.

Prosecutors, by contrast, would know exactly how the information was used. More importantly, prosecutors have many tools to avoid unconstitutionally intruding into attorney-client communications in the first place. See, *e.g.*, *United States* v. *Korf*, 11 F.4th 1235, 1248-1249 (11th Cir. 2021) (discussing the use of filter teams), cert. denied, 143 S. Ct. 88 (2022); *Danielson*, 325 F.3d at 1073 (discussing firewall procedures). Although the United States Attorney's Office eventually adopted policies requiring its prosecutors to make written requests for jail calls and providing for filter teams, see *Carter*, 429 F. Supp. 3d at

865, those policies are not enforceable (and could be reversed at any time).

The court of appeals' rule thus effectively immunizes intentional prosecutorial misconduct that intrudes into attorney-client communications—a defendant's best hope to keep a criminal prosecution a fair fight. If allowed to stand, that rule risks undermining the "public legitimacy" of the prosecution, *Williams*, 579 U.S. at 16, and "public confidence in the fairness" of our adversarial system, *Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986).

The Court has already explained that a prosecutor's intrusion "upon the confidential relationship between the defendant and his counsel" is "government intrusion of the grossest kind." *Hoffa*, 385 U.S. at 306. And more generally, this Court has never countenanced half-measure remedies for "direct government interference with the right to counsel." *Perry*, 488 U.S. at 279. Now is not the time to start. When prosecutors "act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Moulton*, 474 U.S. at 171, the judiciary must "play[] a prominent role in ensuring" that trials are "conducted in a manner consistent with basic notions of fairness." *Young*, 481 U.S. at 808.

2. This case presents the perfect vehicle to resolve the conflict in the lower courts. Petitioner has stipulated to key facts: namely, that the attorney-client communication at issue was not introduced at trial, and that he could not prove discrete, trial-specific prejudice from the prosecutor's review of that communication. App., *infra*, 9a, 70a-71a. That leaves only the pure question of law that was the subject of the supplemental briefing below: namely, whether a prosecutor's intentional, unjustified intrusion into a defendant's attorney-client communications violates the Sixth Amendment without a showing of discrete, trial-specific prejudice. That question is cleanly

presented here, and the answer to that question is outcome-determinative of petitioner's appeal.

Finally, the court of appeals comprehensively considered the previous decisions of other courts of appeals, and the arguments on all sides of the question presented have been fully aired. No further percolation is necessary, and any delay in resolving the conflict would only allow uncertainty to continue. See *Quattlebaum*, 527 S.E.2d at 108 (finding "little guidance from the federal courts" because of the "hopeless conflict among the circuits" on the question presented). There is no reason to postpone resolution of this important constitutional question any longer.

* * * * *

Under any reasonable interpretation of this Court's precedents, the court of appeals' rule cannot stand. That rule is bad law, and it creates bad incentives: a prosecutor may eavesdrop on *any* attorney-client communication, as long as the prosecutor adequately disguises what he or she has learned. This Court's review is desperately needed in this case to clarify that the Sixth Amendment does not permit a prosecutor's intentional, unjustified intrusion into attorney-client communications. And the Court's guidance would resolve a substantial and acknowledged conflict in the lower courts on the appropriate Sixth Amendment test in that context.

The over 160 pages of opinions from the en banc court of appeals fully ventilate the arguments on both sides of the question presented. That question, on the scope of one of our most fundamental constitutional rights, demands the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
PAIGE A. NICHOLS
LYDIA KREBS ALBERT
Assistant Public Defenders
FEDERAL PUBLIC
DEFENDER FOR THE
DISTRICT OF KANSAS
United States Courthouse
500 State Avenue, Suite 201
Kansas City, KS 66101

KANNON K. SHANMUGAM
ABIGAIL FRISCH VICE
EMILY SHAH
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

CHRISTIE MAYBERRY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

APRIL 2025