No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH BOSWELL, SR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an appellate court vacates some, but not all, counts of conviction on appeal, what standard or test should the appellate court apply to determine whether there is "spillover" prejudice from the vacated count, such that a new trial should be ordered on the remaining counts?

The circuits have diverged and adopted different tests in this situation. For example, the First, Second, and Ninth Circuits have adopted a clear three-part test looking at the inflammatory nature of the evidence on the vacated count(s), the similarity of the counts, and the strength of the evidence on the remaining count(s). The Third Circuit has a similar test but that also considers whether the elimination of the invalid count would significantly alter the strategy of the trial and weighs the factors in favor of the defendant.

But the Fifth Circuit below adhered to its precedent relying on whether the vacated and remaining counts were "inextricably bound up" or "inextricably intertwined" an amorphous test lacking the rigor or protections of the tests from other circuits. This Court should grant certiorari in this case and establish a clear test for "spillover" prejudice when a count of conviction is vacated on appeal.

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *United States v. Boswell*, 109 F.4th 368 (5th Cir. 2024), and is set forth at App. 001.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions at issue in this case.

STATEMENT OF THE CASE

I. Factual background

The petitioner Joseph Boswell, Sr. operated a business that cleaned and serviced pizza ovens for restaurant chains nationwide. Around 1995, Boswell stopped reporting his income and paying his taxes. When Boswell later filed for bankruptcy in 2011, he claimed to owe $751,000 in back taxes to the IRS covering the years 2001 through 2010. App. 002

While the IRS investigated Boswell and began enforcement efforts in the 2000s, Boswell operated his pizza oven services through various corporate entities. For example, in 2001, Boswell incorporated Bosco Services Group, LLC. Boswell also worked for Franchise Services Group, Inc., which was owned by Marcia Boswell, his then-wife, and Howard Wells, a childhood friend who had loaned him money. Wells claims that Boswell established Franchise Services Group with Marcia and Wells as

owners to ensure that Marcia would receive an allowance and that Wells would be paid the money he was owed. This explanation is corroborated by a letter Boswell sent Wells sometime after 2008, in which he wrote that he formed Franchise Services Group to "make [Wells] and Marcia happy" and so that he could be "held accountable." App. 002.

Boswell faced several financial setbacks throughout the 2000s. After Hurricane Katrina, Boswell's revenue decreased, and some of Boswell's crew members began working directly with pizza franchises, which cut off Boswell's business. In 2007, after Wells sought a judgment against Boswell for $177,000 of debt, Boswell and Wells signed a promissory note to schedule Boswell's payment of this amount plus interest. In 2008, Marcia filed for divorce, resulting in a consent judgment that required Boswell to pay $1,000 per month for ninety months for Marcia's share of the equity of their home on Horseshoe Drive in Alexandria, Louisiana (the "Horseshoe house"). App. 002-003.

Following the divorce, Boswell began working for Patriot Green Technologies, Inc. ("Patriot Green"), which was incorporated in 2008 in the name of Boswell's sister, Brenda Murphy. The Horseshoe house, where Boswell, Murphy, and Murphy's husband lived, served as Patriot Green's corporate headquarters. The Government alleges that Murphy only nominally owned Patriot Green and that Boswell used the corporate entity to evade debt owed to the IRS and other creditors. In support of this theory, the Government references the aforementioned letter that Boswell wrote to Wells, in which he admitted that a levy from the IRS caused Boswell to "move things

to a corporate structure that takes things out of my direct control in order to protect my ability to have income move to you instead of to [the IRS]." At trial, Wells testified that when he confronted Murphy about her role at Patriot Green, she admitted that "[Boswell] was running everything and set everything up and handling all that" and that her name was "just put ... on the paperwork to help him out." App. 003.

Notably, as of 2010, Boswell did not have any bank accounts in his name. Patriot Green, on the other hand, maintained multiple business accounts, with Murphy and Tracy Boswell, Boswell's current wife, as the account signatories. These accounts received hundreds of thousands of dollars in revenue between 2011 and 2013. During that same period, hundreds of thousands of dollars were withdrawn from these accounts in cash. The Government highlighted Patriot Green business account #7472, which had debit cards issued to Murphy, Tracy, and Boswell. From 2011 to 2013, Boswell spent from $48,401.71 to $98,011.42 annually using this card, including thousands of dollars spent on vacation expenses. Boswell also had several debit cards linked to a Green Dot Bank deposit account, which was funded through deposits from Patriot Green and was used to make personal purchases. App. 003-004.

Shortly after Patriot Green was incorporated, Boswell lost the Horseshoe house in foreclosure. In September 2011, Boswell filed a voluntary petition for Chapter 7 bankruptcy. He reported total liabilities of over $1.6 million, including the $751,000 owed to the IRS in back taxes, and he reported $17,500 in total assets. When listing his personal property, Boswell reported that he had no value in any checking, savings, or other financial accounts; no interests in partnerships or other joint

ventures; no accounts receivable; and no licenses, franchises, or other general intangibles. He also reported wages of $950 per month as an employee of Patriot Green. App.004.

In 2012, while Boswell's bankruptcy case was pending, Cheswell Unlimited, LLC was incorporated in the name of Lonnie Chestnut, Boswell's friend and business associate. Boswell began negotiating the repurchase of the Horseshoe house, informing the house's owner that the house would be titled to Cheswell Unlimited. Ultimately, the deal between the house's owner and Cheswell Unlimited fell through. However, Boswell was permitted to move into the Horseshoe house, and Patriot Green cut checks labeled "rent" to the house's owner. App. 004.

In January 2013, Frances Hewitt, an attorney for the Office of the U.S. Trustee, interviewed Boswell as part of his bankruptcy case. When asked why he "put [Patriot Green] in Mrs. Murphy's name," Boswell responded:

> I have—as you probably know, I've got a ton of back taxes to settle, which I was trying—I was working with the IRS to work on a settlement before I filed bankruptcy and they told me once I filed, that we just had to put the brakes on all that until this was over with. So one of the concerns I did have was starting another entity where I had to go get bank accounts and everything else and try to start again with almost nothing and have the IRS—I heard plenty of horror stories, the IRS just seizing everything, so I was fixing to be dead in the water.

App. 004-005. In March 2013, still while Boswell's bankruptcy case was pending, Tiki Pizza, LLC was incorporated in the names of Murphy and Boswell's son, Joseph Boswell Jr., who was still in high school. Boswell closed on the sale of the Horseshoe house, and the sale was recorded in Tiki Pizza's name. In May 2013, Ambient

Solutions, LLC was incorporated in Murphy's name. The Government claims that Ambient Solutions was yet another one of Boswell's nominee businesses. App. 005. On August 29, 2013, the bankruptcy court issued a judgment denying Boswell a discharge. Boswell's bankruptcy case was closed on October 29, 2013.

II. District court procedural history

On July 13, 2018, the Government obtained a single-count indictment against Boswell for "Concealment of Assets" in violation of 18 U.S.C. § 152(1). The indictment alleged that Boswell "did knowingly and fraudulently conceal property belonging to" the bankruptcy estate, specifically "fees earned from nominee businesses and service contracts, from the trustee charged with control of the debtor's property and from the creditors and the United States Trustee." The Government, without providing any reasoning in support, filed a motion to seal the indictment until Boswell's arrest. The magistrate judge ordered the sealing of the indictment that same day. The parties agree that this original indictment was sealed one month before the five-year statute of limitations for a bankruptcy-fraud charge against Boswell was set to expire on August 29, 2018. App. 005.

On February 28, 2019, the Government obtained a two-count superseding indictment. The "Concealment of Assets" count (Count One) was relabeled "Bankruptcy Fraud," alleging Boswell fraudulently concealed "monies earned from nominee businesses and service contracts." Count Two of the indictment, "Attempt to Evade and Defeat Payment of Tax," in violation of 26 U.S.C. § 7201, alleged that "[o]n or about September 22, 2011, continuing until August 29, 2013," Boswell "did

willfully and knowingly attempt to evade and defeat the collection of income taxes due and owing by him to the United States of America for the calendar years 2001 through 2009 by concealing and attempting to conceal from the IRS the nature and extent of his assets and the location thereof, in placing funds and property in the names of nominees." Again, the Government moved to seal the indictment without explanation, and the magistrate judge granted the Government's request. Thereafter, the district court granted the Government's motion to unseal the indictments on March 20, 2019, and Boswell was arrested that same day. App. 005-006.

On July 1, 2019, Boswell moved to dismiss Count One of the indictment. Boswell argued that, because the Government lacked a legitimate purpose for sealing the original indictment, the statute of limitations was not tolled by sealing, and therefore, Count One was untimely when the indictment was unsealed on March 20, 2019. Boswell further argued that even if the Government had a legitimate reason to seal, the statute of limitations was not tolled because Boswell was prejudiced by the Government sealing the indictment. Specifically, Boswell argued that because he was kept in the dark about the bankruptcy-fraud indictment, he was unable to instruct his bankruptcy attorney to preserve his client file, which could be destroyed five years after the termination of the representation. The client file was indeed destroyed, erasing evidence that Boswell could have used to establish an absolute defense of good faith reliance on advice of counsel. App. 007.

The Government asserted the following "legitimate prosecutorial purpose" for sealing in response to Boswell's motion:

> As the investigation developed, the government identified potential co-conspirators that required further investigation and approval .... A pattern of conduct identified in the bankruptcy fraud investigation showed that the potential co-conspirators were a component part of the scheme to defraud and assisted the defendant in creating nominal businesses to hide assets and income obtained by him. Therefore, leaving the indictment unsealed would potentially alert the co-conspirators.

App. 007. The Government further contended that any exculpatory evidence contained in the destroyed case file could be found in alternative sources, so Boswell was not actually prejudiced. The district court agreed with the Government and denied Boswell's motion, concluding that the Government had established a "legitimate prosecutorial objective in sealing the indictment." App. 007-008.

During the six-day jury trial in September 2022, the Government alleged that Boswell used corporate entities nominally owned by family members to conceal his assets from both bankruptcy creditors and the IRS. It called as witnesses employees of the U.S. Trustee's Office and the IRS who investigated Boswell. It also called Boswell's ex-wife, Marcia, who testified about Boswell's use of multiple corporate entities to carry out his business, and creditor Wells, who testified about Boswell's use of corporate entities to evade the IRS. App. 008.

Conversely, Boswell's attorney relied on the testimony of Brenda Murphy and Boswell's son, who testified that they were the legitimate owners of the businesses. Boswell further argued, especially during closing argument, that any inaccuracies in Boswell's bankruptcy petition should be attributed to his attorney Christian Chesson, who had previously been sanctioned by a bankruptcy court. App. 008.

Boswell moved for a judgment of acquittal both at the end of the prosecution's case-in-chief and at the end of trial, and the district court denied the motion both times. Following deliberations, the jury convicted Boswell on both counts. App. 009.

The district court sentenced Boswell to sixty months' imprisonment and three years of supervised release. Boswell appealed. App. 009.

III. Fifth Circuit procedural history

Boswell appealed the district court's denial of his motion to dismiss Count One as untimely under the statute of limitations. On July 23, 2024, The Fifth Circuit issued a published decision in which it agreed with Boswell that Count One was untimely under the statute of limitations and reversed Count One. App. 010-018. The Fifth Circuit panel, however, declined to grant Boswell a new trial on Count Two (the tax evasion count). The panel applied circuit precedent,[1] which requires the vacated count and the remaining count are "inextricably bound up," and that there was "acute" potential for prejudice on the defendant's conviction under the valid count. App. 019. Applying the precedent to Boswell's case, the panel decided that Boswell's vacated bankruptcy fraud count and remaining tax evasion count were not "inextricably intertwined." The panel held that:

> The prosecution's theory of the case was that Boswell used nominee entities to conceal his assets from bankruptcy creditors and the IRS. The testimony of Howard Wells, as well as Boswell's letter to Wells sent around 2008, helped the Government establish that Boswell specifically set up corporations like Patriot Green to keep his assets out of the IRS's reach. The testimony of Hewitt, who interviewed Boswell during his bankruptcy case, similarly helped the Government establish that Boswell set up Patriot Green in his sister's name to avoid "the IRS just

[1] The panel cited to *United States v. Plyman*, 551 F.2d 965, 967 (5th Cir. 1977), and *United States v. Edwards*, 303 F.3d 606, 639 (5th Cir. 2002).

> seizing everything." The testimony of Boswell's ex-wife, Marcia, primarily discussed Boswell setting up Franchise Services Group as a nominee business, which supported the Government's theory of the case for both the bankruptcy-fraud and tax-evasion charges. This evidence would therefore be admissible in a trial solely pertaining to Count Two, such that there was no unjustified taint of the Count Two conviction due to the simultaneous trial of Count One.

App. 019-020.

REASONS FOR GRANTING THE WRIT

There is disagreement among the circuits about what circumstances should lead to a new trial being granted on the remaining count(s) when the appellate court vacates some of the counts of conviction. Lower courts generally refer to this as the concept of "spillover" prejudice with regard to the remaining counts of conviction.

In this case, the Fifth Circuit applied its "inextricably bound up" (also referred to as "inextricably intertwined") test. In the Fifth Circuit, the defendant must show "that they experienced some prejudice as a result of the joint of the invalid claims" and that "otherwise inadmissible evidence was admitted to prove the invalid [counts]." *United States v. Edwards*, 303 F.3d 606, 640 (5th Cir. 2002). The Fifth Circuit refers to this test as requiring that the defendant's vacated and remaining counts were "inextricably bound up." App. 019. In Boswell's case, he was unable to meet the Fifth Circuit's standard simply because the evidence of his tax evasion and bankruptcy fraud were based on similar evidence the Court believed would be admissible in a trial on only the remaining tax evasion count.

In contrast, the Second Circuit has developed a clear "three-part test" for assessing retroactive-misjoinder claims based on prejudicial spillover: (1) whether the

evidence introduced in support of the vacated count "was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts," (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong. *United States v. Vebeliunas*, 76 F.3d 1283, 1293-94 (2d Cir.), *cert. denied*, 519 U.S. 950 (1996); *see also United States v. Abdelaziz*, 68 F.4th 1, 62 (1st Cir. 2023) (adopting the Second's Circuit's three-part prejudicial spillover test from *Vebeliunas*); *United States v. Lazarenko*, 564 F.3d 1026, 1044 (9th Cir. 2009) (same).

And the Third Circuit has adopted a similar test but with additional protections for the defendant. In the Third Circuit, first a court must consider whether the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count(s). *United States v. Fattah*, 914 F.3d 112, 187 (3d Cir. 2019) (citing to *United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2002). The second step requires that the court "ask whether that evidence (the 'spillover evidence') was prejudicial." *Id.* The court considers four factors: "whether (1) the charges are intertwined with each other; (2) the evidence for the remaining counts is sufficiently distinct to support the verdict on these counts; (3) the elimination of the invalid count [will] significantly change[] the strategy of the trial; and (4) the prosecution used language of the sort to arouse a jury." *Id.* Importantly, these four factors are considered in a light "somewhat favorable to the defendant." *Id.*

The standard applied in this case by the Fifth Circuit lacked an important element from the *Vebeliunas* test that would have affected the outcome and granted Boswell a new trial. The Fifth Circuit standard did not include any analysis of whether the evidence introduced in support of the vacated count was of an "inflammatory nature." *Vebeliunas*, 76 F.3d at 1293-94. This would have made a difference on Boswell's case because the spillover evidence all concerned his bankruptcy proceedings.

Bankruptcy, by itself, can be a prejudicial fact to jurors who have never filed bankruptcy and believe everyone should have to pay back their debts.[2] In this trial, the vast majority of the witnesses were called to discuss the bankruptcy proceedings. Indeed, of 15 government witnesses, only three witnesses[3] were called to testify about Boswell's tax evasion. In contrast, the jury heard from three government bankruptcy attorneys who testified about the veracity of Boswell's bankruptcy filings.[4] But most prejudicial to Boswell was the testimony from disgruntled creditors of Boswell who were listed in the bankruptcy proceedings, emotionally charged character testimony relevant to the bankruptcy proceedings but not relevant to tax evasion. *See* ROA.967-1044 (testimony of Howard Wells); ROA.1280-1369 (testimony of Marcia Luxemburg). Notably, the government's entire theme was based on a letter written by Boswell to

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[2] Indeed, voir dire in bankruptcy fraud cases often involves exploring jurors' strongly held views against those who use the bankruptcy system to discharge their debts.

[3] *See generally* ROA.1943-2003 (testimony of Sheri Williams, an offer in compromise specialists with the IRS); ROA.1837-96 (testimony of Thomas Bolus, a court witness coordinator with the IRS); ROA.2584-2675 (testimony of Cory Moton, special agent with the IRS).

[4] *See generally* ROA.598-859 (testimony of U.S. Bankruptcy Attorney Richard Drew); ROA.881-965 (testimony of U.S. Bankruptcy Attorney Bryan Gill); ROA.1370-1456 (testimony of U.S. Bankruptcy Attorney Frances Hewitt).

Wells (read by the government in both its opening and closing arguments) that was relevant to the bankruptcy proceedings but not the tax evasion. ROA.703, 3096-97. Indeed, during deliberations, the jury sent a note asking for a copy of the Wells letter repeatedly mentioned by the government. ROA.3121. Much of the bankruptcy evidence in this case was "inflammatory in nature," *Vebeliunas*, 76 F.3d at 1293-94, and would have resulted in a new trial in the First, Second, and Ninth Circuits.

Likewise, the standard applied in this case by the Fifth Circuit lacked an important element from the Third Circuit test as well that would have affected the outcome and granted Boswell a new trial. Here, the Fifth Circuit never considered whether "the elimination of the invalid count [will] significantly change[] the strategy of the trial." *Fattah*, 914 F.3d at 187. As explained above, the overwhelming focus of the trial in this case was the invalid bankruptcy fraud count. The tax evasion evidence and argument took a backseat at trial. When the defense put on its case in chief, it was centered around the testimony of a defense expert, Ronnie Gagnet, a certified public accountant who testified in the fields of public accounting, forensic accounting, and business valuation. ROA.2916. Mr. Gagnet's entire testimony was focused on whether the assets owned by Boswell's family members were assets within the meaning of the bankruptcy code and whether Boswell's personal good will could be considered an asset in accounting or bankruptcy valuation concerns. ROA.2916-66. There is no question that Boswell's defense strategy would have been significantly changed if the government did not call 12 of its 15 witnesses. Finally, Boswell did not receive the Third's Circuit's instruction to consider this test "somewhat favorable to

the defendant." *Fattah*, 914 F.3d at 187.

Because the Fifth Circuit standard applied to spillover prejudice cases is at odds with other circuits, and because Boswell would likely prevail applying the test from the other circuits, this Court should grant certiorari to establish a clear, uniform spillover prejudice test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this October 21, 2024,

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