No. 24-6740

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IN THE

SUPREME COURT OF THE UNITED STATES

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ROYEL PAGE, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

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

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# REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Rules

## INTRODUCTION

In his petition for certiorari, Page argued that the Seventh Circuit's en banc decision implicated two important circuit splits. The government's brief in opposition attempts to obscure these conflicts by making irrelevant distinctions. The government also tries to bolster its argument by misconstruing the en banc majority's holdings as unnecessary to the outcome. Neither effort is successful.

Regarding the first circuit split, prior to this case, the Seventh Circuit had long held, pursuant to *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), that evidence of repeat sales of large quantities of drugs is not sufficient, without more, to prove a drug conspiracy. The Ninth Circuit also holds this view. *See United States v. Loveland*, 825 F.3d 555, 560-62 (9th Cir. 2016). The opposing view, based on a misreading of *Direct Sales*, was expressly adopted by the Seventh Circuit's en banc majority in overruling its prior cases. *United States v. Page*, 123 F.4th 851, 862 (7th Cir. 2024); Pet. App. 14a. Thus, an important circuit split exists regarding the evidence necessary to prove a drug conspiracy, as opposed to a mere buyer-seller relationship, which is implicated in hundreds, if not thousands, of federal drug cases every year.

Regarding the second issue, the Seventh Circuit's en banc majority created a circuit split in holding that there is never plain error when a

district court fails to instruct a jury on the distinction between a drug conspiracy and a buyer-seller relationship, as long as the defendant is represented by counsel. *Page*, 123 F.4th at 865; Pet. App. 19a. In his petition, Page argued at length that this holding, which was based on a fundamental misunderstanding of the interplay between Rule 52(b) of the Federal Rules of Criminal Procedure and the party-presentation principle, conflicts with the interpretation of *United States v. Sineneng-Smith*, 590 U.S. 371 (2020), in the First, Sixth, and Ninth Circuits. Tellingly, the government's opposition brief fails to even mention *Sineneng-Smith*.

Instead, the government tries to frame this case as one involving overwhelming evidence of a conspiracy and holdings that should be relegated to mere dicta. But the panel decision unanimously found the evidence to be "thin," *United States v. Page*, 76 F.4th 583, 588 (7th Cir. 2023); Pet. App. 102a, and the Seventh Circuit already has relied on *Page*'s holdings to reject sufficiency claims without further analysis. *See United States v. Coley*, No. 23-2494, __ F.4th __, 2025 WL 1408885, at *5 (7th Cir. May 15, 2025).

This Court should grant certiorari to resolve the circuit splits and put an end to two critical misinterpretations of this Court's decisions.

## ARGUMENT

### I. An important circuit split exists regarding the evidence necessary to prove a drug conspiracy, as opposed to a mere buyer-seller relationship, pursuant to *Direct Sales*.

The government argues that the Seventh Circuit's en banc decision does not conflict with the Ninth Circuit's decision in *Loveland*. Gov't Br. 15-16. Here, the en banc majority held, in no uncertain terms, that "evidence of repeated, distribution-quantity transactions of illegal drugs between two parties, on its own, can sufficiently sustain a drug conspiracy conviction, consistent with the holding in *Direct Sales*." *Page*, 123 F.4th at 862; Pet. App. 14a. The Seventh Circuit recently reiterated this holding and cited it as grounds to dismiss a sufficiency claim without further analysis. *Coley*, __ F.4th at __, 2025 WL 1408885, at *5 ("[*Page*] held that evidence of 'repeated, distribution-quantity drug transactions alone can sustain a conspiracy conviction.'").

By contrast, in *Loveland*, 825 F.3d at 560, the Ninth Circuit held that "even repeated sales and large quantities [cannot] sustain a conspiracy conviction." *See also, e.g.*, *United States v. Mendoza*, 25 F.4th 730, 738-39 (9th Cir. 2022) (reaffirming *Loveland*). Thus, the government's contention that there is no conflict is without merit.

The government also completely ignores Page's argument that the en banc majority's holding has grave consequences for defendants. As the

dissent revealed, the holding "relieve[s] the government of its burden to prove all elements of a conspiracy, striking at the heart of due process." *Page*, 123 F.4th at 888; Pet. App. 68a. Without clarifying the correct reading of *Direct Sales*, most circuits will continue to uphold a multitude of unconstitutional conspiracy convictions, while only defendants in the Ninth Circuit will be assured their constitutional protections.

As Page argued at length in his petition, *Direct Sales* is at odds with the en banc majority's view that repeat, distribution-quantity transactions involving illicit goods can bridge the gap between knowledge and intent and alone demonstrate the "informed and interested cooperation, stimulation, instigation" necessary for a conspiracy. *Direct Sales*, 319 U.S. at 713. This Court should grant the petition to resolve the circuit split.

## II. The Seventh Circuit has created a circuit split regarding whether the party-presentation principle, as articulated in *Sineneng-Smith*, precludes plain-error review under Rule 52(b).

The government also argues that the Seventh Circuit's en banc decision did not create a circuit split with decisions in the First, Sixth, and Ninth Circuits. Gov't Br. 20-21. Here, the en banc majority held that, pursuant to the party-presentation principle in *Sineneng-Smith*, 590 U.S. at 375, there is never error "when a district court does not sua sponte give an instruction on a defense theory that a defendant did not request." *Page*, 123 F.4th at 865; Pet.

App. 19a. The government, Gov't Br. 21,[1] cites no cases holding similarly regarding a missing buyer-seller instruction, which—to repeat—is not an affirmative defense but rather "restates the elements instruction from the defense's perspective" in the context of a drug-conspiracy charge. *Page*, 123 F.4th at 869 (Easterbrook, J., concurring) (emphasis added); Pet. App. 28a.

In holding that the party-presentation principle precludes plain-error review of a missing jury instruction, the en banc majority unambiguously created a circuit split with *United States v. Cheveres-Morales*, 83 F.4th 34, 42 (1st Cir. 2023), *United States v. Turchin*, 21 F.4th 1192, 1199-200 (9th Cir. 2022), and *United States v. McReynolds*, 964 F.3d 555, 569 (6th Cir. 2020), all of which rejected an "expansive" reading of *Sineneng-Smith* as contradicting Rule 52(b). The government has waived any argument to the contrary by failing to even mention *Sineneng-Smith* in its opposition brief.

The Seventh Circuit's en banc holding has dire consequences, which the government also ignores. As the dissent illuminated, the majority's holding "categorically absolves the district court of its responsibility for ensuring the jury is properly instructed and effectively eliminates appellate review for all

[1] *United States v. Clough*, 978 F.3d 810, 823 (1st Cir. 2020), involved a safe-harbor provision akin to an affirmative defense. *See also United States v. Delgado*, 672 F.3d 320, 343 (5th Cir. 2012) (*Sears* defense); *United States v. Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998) (same). *United States v. Mata*, 491 F.3d 237, 241-42 (5th Cir. 2007), did not apply plain-error review and involved different conspiracy instructions. *See also United States v. Moe*, 781 F.3d 1120, 1128 (9th Cir. 2015) (same); *United States v. Thomas*, 114 F.3d 228, 245 (D.C. Cir. 1997) (same).

unpreserved instructional errors, no matter how apparent or prejudicial the omission." *Page*, 123 F.4th at 897; Pet. App. 86a-87a. This is not the law. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court . . . retains the independent power to identify and apply the proper construction of governing law.").

In sum, this Court should grant certiorari to resolve the circuit split, reiterate Rule 52(b)'s supremacy over the party-presentation principle, and prevent lower courts from improperly using *Sineneng-Smith* to subvert a defendant's statutory right to plain-error review.

## III. This case is an ideal vehicle for review.

As expected, the government seizes on the en banc majority's dubious and irrelevant finding that the conspiracy evidence at Page's trial was "overwhelming" in arguing that the petition should be denied. *Page*, 123 F.4th at 864; Pet. App. 16a. To repeat, this finding defies logic, as the panel unanimously found that the evidence was "thin." *Page*, 76 F.4th at 588; Pet. App. 102a; *see also Page*, 123 F.4th at 891 (dissent reaffirming that "not much at trial suggested a conspiracy beyond evidence showing Page repeatedly purchased distribution-sized quantities of heroin"); Pet. App. 74a. If the evidence actually had been that strong, then the majority would have had no need to expressly overturn its longstanding precedent and completely reinterpret *Direct Sales*. Indeed, the Seventh Circuit already has reaffirmed

*Page*'s holding in summarily rejecting sufficiency claims. *Coley*, __ F.4th at ___, 2025 WL 1408885, at *5.

Page will not repeat the lengthy discussion in his petition regarding the lack of conspiracy evidence at trial. Rather, it is enough to reiterate that, given the evidence, it was imperative that the jury receive the buyer-seller instruction because distinguishing between a conspiracy and a mere buyer-seller relationship is not intuitive. *C.f. Greer v. United States*, 593 U.S. 503, 507 (2021) (denying plain-error relief for a missing *Rehaif* instruction because, intuitively, "a jury will usually find that a defendant knew he was a felon based on the fact that he was a felon") (emphasis in original).

In sum, there are no procedural hurdles to granting Page's petition. The two issues are legal, straightforward, important, and ripe for review.

## CONCLUSION

For the foregoing reasons, Mr. Page's petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 22, 2025