No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OLISER HERNANDEZ-VILLALOBOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

Whether a judge may force an accused to choose between his due process right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1969), or his constitutional rights to a speedy trial and to avoid unlawful seizure.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Oliser Hernandez-Villalobos and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Hernandez-Villalobos,* 19-mj-23508-MSB-AJB, U.S. District Court for the Southern District of California, Oral ruling by magistrate court issued November 10, 2020.
- *United States v. Hernandez-Villalobos,* 19-mj-23508-MSB-AJB, U.S. District Court for the Southern District of California, Oral ruling by district court issued September 18, 2023.
- *United States v. Hernandez-Villalobos*, No. 23-2362, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued April 22, 2025.

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INTRODUCTION

The star government witness testifying at Mr. Hernandez's trial for illegal entry under 8 U.S.C. § 1325 was a Border Patrol agent. This agent had a history of physically abusing arrestees and lying about it. He was also a member of a Facebook group known for its racist and xenophobic posts. During the 15 months leading up to trial, Mr. Hernandez made five general and specific requests for discovery about this agent under *Brady v. Maryland*, 373 U.S. 83 (1969)—all of which the prosecutor ignored.

On the day of trial, the judge finally ruled that the prosecutor had to turn over this evidence about the Border Patrol agent. But to receive it, the judge held that Mr. Hernandez had to waive his rights to a speedy trial and to avoid being unlawfully seized. This forced Mr. Hernandez to choose between several critical constitutional rights, the type of coercive choice this Court prohibited in *Simmons v.*

United States, 390 U.S. 377 (1968), *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *United States v. Jackson*, 390 U.S. 570 (1968)). This Court should grant certiorari to resolve the important federal question of whether a judge may force an accused to choose between his due process right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1969), and his constitutional rights to a speedy trial and unlawful seizure.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Hernandez's conviction in an unpublished decision. *See United States v. Hernandez*, No. 23-2362, 2025 WL 1163728 (9th Cir. Apr. 22, 2025) (attached here as Appendix A). This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

JURISDICTION

On April 22, 2025, the Ninth Circuit denied Mr. Hernandez's appeal and affirmed his conviction. See Appendix A. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

On August 22, 2019, Mr. Hernandez encountered Border Patrol agent Luke Nirelli several miles north of the international border between the United States and Mexico. Agent Nirelli had a history of disturbing activity, including an incident three years earlier in which he had used excessive force against an arrestee and then lied about it in his official reports. Agent Nirelli was also a member of the "I'm 10-15" Facebook group, a group of more than 9,500 Border Patrol agents in which

some posts expressed racist and xenophobic violence towards migrants and lawmakers.[1]

Agent Nirelli arrested Mr. Hernandez and claimed that Mr. Hernandez had made several incriminating statements at the time of his arrest. The government then charged Mr. Hernandez with illegal entry under 8 U.S.C. § 1325(a)(1).

For the next 15 months, Mr. Hernandez's lawyer made repeated discovery requests about Agent Nirelli under *Brady v. Maryland*, 373 U.S. 83 (1969); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). Immediately upon receiving the case, his lawyer sent the prosecutor a discovery letter requesting information under *Brady*, *Giglio*, and *Henthorn*. Six weeks later, when the prosecutor had not responded, Mr. Hernandez filed a motion to compel discovery. Yet the prosecutor still did not disclose any information about Agent Nirelli's prior physical abuse, lack of truthfulness, or membership in the Facebook group.

After a COVID-related delay in early 2020, the case proceeded to trial. In October 2020—a month before trial and approximately 14 months after his first discovery request—Mr. Hernandez renewed his discovery requests and again requested evidence relating to Agent Nirelli. Two weeks later, Mr. Hernandez independently discovered Agent Nirelli's past misconduct and sent another request.

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[1] *See* A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes, ProPublica,* https://www.propublica.org/article/secretborder-patrol-facebook-group-agents-joke-about-migrant-deaths-postsexist-memes (July 1, 2019).

This request explained that in a case three years earlier, Agent Nirelli had ordered an unarmed arrestee to lie prone on his stomach with his hands spread away from his body and then stomped on his back. As a result of this excessive force, Agent Nirelli had to take the detainee to a nearby hospital, where medical records confirmed the injury. Agent Nirelli and another agent then wrote and adopted false reports omitting this use of force. And when the detainee filed a motion to dismiss on the basis of outrageous government conduct, the government offered the defendant a very favorable plea deal.

Given that Agent Nirelli was the only agent present during Mr. Hernandez's arrest (and the only agent whose testimony could establish several elements of § 1325), Mr. Hernandez specifically asked to see Agent Nirelli's personnel file. The government refused.

On the night before trial, the prosecutor disclosed to Mr. Hernandez's lawyer for the first time that Agent Nirelli was a member of the Facebook group "I'm 10-15." But when Mr. Hernandez's attorney asked for more information, including any posts Agent Nirelli had written in this Facebook group and the content of any posts that he had liked or engaged with, the prosecutor did not provide anything else.

Despite Mr. Hernandez's repeated discovery requests and motions to compel, the judge never ruled on these requests or motions until the day of trial. The judge did not do so even though the parties had completed briefing on the discovery dispute nearly two weeks before trial. Instead, the magistrate judge said on the

morning of trial that he would order this discovery if Mr. Hernandez would agree to continue his trial.

But Mr. Hernandez could not agree to a continuance without jeopardizing his other critical constitutional rights. In the months leading up to Mr. Hernandez's trial, Immigration and Customs Enforcement officers had been routinely arresting people charged with illegal entry in the courtroom or adjacent hallway immediately after their criminal cases concluded. Several weeks before his trial, Mr. Hernandez and others charged with § 1325 had filed suit in the Southern District of California objecting to these civil immigration enforcement actions within the courthouse. The Chief Judge agreed and temporarily suspended these courthouse arrests, holding that such arrests jeopardized their "rights of access to the court under the First, Fifth, and Sixth Amendments to the United States Constitution, [and their] Sixth Amendment right to present a defense." *Velazquez-Hernandez v. U.S. Immigr. & Customs Enf't*, 500 F. Supp. 3d 1132, 1141 (S.D. Cal. 2020). But because this stay was only temporary, any continuance of Mr. Hernandez's trial would have meant that he would no longer be guaranteed those rights.

The judge never questioned why the government had not turned over the evidence regarding Agent Nirelli's use of excessive force, false reports, and membership in the notorious Facebook group during the 15-months leading up to trial. Nor did the judge explain why he had failed to rule on any of the discovery disputes before the day of trial. Nor did the judge accept Mr. Hernandez's

alternative remedies—to order the government to immediately produce the discovery, dismiss the complaint, or at least exclude Agent Nirelli's testimony.

Instead, the judge presented Mr. Hernandez with a purely binary choice: give up your due process right to exculpatory evidence under *Brady* or give up your rights to a defense, speedy trial, and court access under the First, Fifth, and Sixth Amendments. Faced with this no-win choice, Mr. Hernandez opted to go forward with his trial. Relying heavily on Agent Nirelli's testimony to establish three of the four elements, the judge convicted Mr. Hernandez and sentenced him to time served.

Mr. Hernandez appealed his conviction to the district court. The district court affirmed the conviction in a brief hearing, finding that Mr. Hernandez had "withdrawn" his discovery requests and "waived" his constitutional rights.

The Ninth Circuit also affirmed. In its view, Mr. Hernandez had "intentionally opted to proceed to trial" due to the "tactical advantage it provided." Pet. App. 4. Thus, the court concluded that Mr. Hernandez "knowingly and without coercion waived his right to additional discovery." Pet. App. 4. This petition follows.

REASONS FOR GRANTING THE PETITION

I.

This Court has long held that a person should not be forced to give up one constitutional right to assert another.

For over half a century, this Court has deemed it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). In *Simmons*, the defendant

moved to suppress a suitcase containing incriminating items. *Id.* at 381. To establish standing to suppress, the defendant testified during a pretrial evidentiary hearing that the items in the suitcase were his. *See id.* After denying the motion to suppress, the district court then permitted the government to use the defendant's statements made during the suppression hearing to establish at trial that it was his suitcase. *See id.*

This Court reversed, rejecting the lower court's conclusion that the defendant's "voluntary" choice to obtain the "benefit" of testifying waived his right against self-incrimination. *Id.* at 393–94. It explained that when "the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created." *Id.* at 394. This tension forced the defendant to "give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* The Court concluded that it was "intolerable" to force a defendant to forfeit "one constitutional right . . . in order to assert another." *Id.*

In another example, the Court rejected a law that required a subpoenaed political official to waive his Fifth Amendment right against self-incrimination or else be barred from political office. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). The Court explained that a law forcing an official to waive his Fifth Amendment rights "impinges on his right to participate in private, voluntary political associations," which is "an important aspect of First Amendment freedom which this Court has consistently found entitled to constitutional protection." *Id.* at

808. The Court thus enjoined the law, concluding that it unlawfully "requires appellee to forfeit one constitutionally protected right as the price for exercising another." *Id.* at 807–08 (citing *Simmons*).

The Court has even extended this principle to a coerced choice between a constitutional right and a nonconstitutional right. *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). In *Garrity*, investigators questioning New Jersey police officers about a traffic ticket scheme advised them that refusing to waive their Fifth Amendment right to avoid self-incrimination could result in losing their jobs. The Court reversed, holding that the officers' resulting statements were "infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id.* at 497–98. The Court rejected the notion that officers had "waived" their constitutional rights, explaining that because "conduct under duress involves a choice," the government could always "impose an unconstitutional burden by the threat of penalties" and then "declare the acceptance voluntary." *Id.* at 498 (quotations omitted). And in *United States v. Jackson*, 390 U.S. 570, 583 (1968), the Court held that forcing a defendant to choose between his right to a jury trial and avoiding a death penalty charge was not a valid choice, since the law "impose[d] an impermissible burden upon the exercise of a constitutional right." (quotations omitted).

Here, the magistrate judge's delay in ruling on discovery requests improperly forced Mr. Hernandez to choose between his constitutional right to exculpatory evidence and his constitutional rights to a speedy trial and to be free from an

unreasonable seizure. Mr. Hernandez requested all *Brady*, *Giglio*, and *Henthorn* discovery, as well as all discovery under Rule 16, more than a year before trial. He then requested discovery related to Agent Nirelli's past misconduct and dishonesty through a discovery letter and a motion to compel the month before trial. Yet the government ignored these requests, and the magistrate judge took no action on them until the day of trial. This forced Mr. Hernandez to have to choose between his constitutional right to exculpatory evidence and his constitutional rights to a speedy trial and to avoid being unlawfully seized. As in *Simmons*, *Lefkowitz*, *Garrity*, and *Jackson*, this was error.

II.

This case presents an important and recurring constitutional issue.

The Court should grant certiorari because the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). As detailed above, case after case from this Court reminds us that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons*, 390 U.S. at 394. Yet that is precisely what happened here, since Mr. Hernandez was forced to choose between his constitutional right to exculpatory evidence and his constitutional rights to a speedy trial and to avoid being unlawfully seized.

The Ninth Circuit ignored this Court's decisions in *Simmons*, *Lefkowitz*, *Garrity*, and *Jackson*. Instead, it held that Mr. Hernandez "intentionally opted to proceed to trial" and "knowingly and without coercion waived his right to additional

discovery." Pet. App. 4. But if "conduct under duress" can be recast as a defendant's "waiver," a court could always "impose an unconstitutional burden by the threat of penalties" and then "declare the acceptance voluntary." *Garrity,* 385 U.S. at 498.

For instance, a court could tell a defendant that if he fires his ineffective attorney, he cannot get another trial date for a year, thereby forcing the defendant to choose between his right to a speedy trial and his right to effective assistance of counsel. Or a court could tell a defendant that he can either file a pretrial motion to suppress or have a jury trial but not both. Or a court could tell a defendant that he only has a right to confront the witnesses against him if he testifies at trial. All of these scenarios describe situations where a judge could "impose an unconstitutional burden by the threat of penalties" and then "declare the acceptance voluntary." *Garrity,* 385 U.S. at 498. Forcing a defendant to choose one constitutional right over another should not be characterized as a "waiver," as the Ninth Circuit did here. Because this case presents an important and recurring issue, this Court should grant certiorari.

III.

Mr. Hernandez's case is a good vehicle to address this important and recurring issue.

Mr. Hernandez's case is an ideal vehicle to resolve this important federal question. Because he raised this issue below and the Ninth Circuit squarely rejected it, the issue has been properly preserved and addressed.

Moreover, this coerced choice between constitutional rights changed the outcome. At trial, the government and the court relied almost entirely on Agent

Nirelli's testimony to satisfy multiple elements of the offense—that Mr. Hernandez admitted to being a non-citizen who crossed between ports of entry with the intent to evade apprehension. Though Agent Nirelli's testimony was critical to the government's case, the government refused to turn over, and the court refused to order, evidence that could have shown his testimony was biased and unreliable. If this evidence had contradicted Agent Nirelli's account of events, Mr. Hernandez could have used it for impeachment purposes. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999) ("The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching."). Thus, Mr. Hernandez's coerced choice between constitutional rights raised an important federal question that would have led to a different outcome.

CONCLUSION

For these reasons, this Court should grant Mr. Hernandez's petition for a writ of certiorari.

Respectfully submitted,

Date: July 28, 2025

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