No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JUAN MANUEL CASTRO,
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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QUESTION PRESENTED

Whether a party that establishes that a public or business record was created in anticipation of litigation has met its burden of showing that the record is unreliable and must be excluded as hearsay, or whether the party must set forth additional evidence of unreliability.

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Prayer for Relief

Petitioner, Juan Manuel Castro, respectfully prays for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, No. 16-50074.

Jurisdiction

Petitioner was convicted of importation of a controlled substance, in violation of 21 U.S.C. §§ 952 & 960, in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, affirmed the conviction on August 22, 2017, and amended its opinion and denied Petitioner's petition for rehearing on November 1, 2017. The Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

Opinion Below

The Ninth Circuit's unpublished memorandum opinion, as amended, is reproduced in the appendix. *See* Pet. App. at 1a-4a. The opinion held that the district court's admission of several records created in anticipation of litigation did not violate the rule against hearsay because "Castro did not meet his burden to show that the records are untrustworthy under Federal Rules of Evidence 803(6) and (8)." Pet. App. 4a.

Statement of the Case

Petitioner was arrested at the Otay Mesa port of entry to the United States after packages containing suspected contraband were discovered in his truck. He was charged with one count of "knowingly and intentionally import[ing] a mixture and substance containing a detectable amount of methamphetamine" into the United States, in violation of 21 U.S.C. §§ 952 & 960. Petitioner pleaded not guilty to the charge.

At trial, the government called two government officials in an effort to show that the packages seized from Petitioner's truck at the port of entry were the same ones that, months later, were tested at a government laboratory and eventually brought to court for admission as evidence at trial. The first witness, Agent Nacpil, testified that he retrieved twenty, plastic-wrapped bricks of "suspected contraband" from the truck at the secondary inspection area. He testified that he weighed the packages, but couldn't remember how much they weighed. And he testified that after removing the packages from the truck, he placed them in the bed of the truck and photographed them *en masse* there. The photographs were admitted into evidence.

The second witness was the government forensic chemist, Tarin-Brousseau. She testified that she received in her laboratory two cardboard boxes containing twenty, brick-like packages containing certain markings in Spanish. She testified that the net weight of the packages was "about 16 pounds," and that the substance they contained tested positive for methamphetamine. She explained that she took individual, close-up photographs of several of the bricks with their markings. These photographs were admitted into evidence. The chemist further testified that it was her understanding that the cardboard boxes had arrived at her laboratory from the Otay Mesa vault. However, the district court sustained Petitioner's objection to a government question regarding the chain of custody—whether she had "determined by th[e] seals [on the boxes] whether the drugs or the contents therein came from the seizure from [Petitioner] and his vehicle"—on the ground that the chemist lacked personal knowledge.

The government also called a value expert, who testified that the net weight of the packages seized from Petitioner's truck at the border was 19.49 pounds and that there was a large number of drug seizures at the Otay Mesa port of entry. The government then rested its case.

Petitioner made a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 on the ground that the government had failed to prove the drugs' chain of custody. The court agreed that the government had failed to establish that the substance seized from Petitioner's truck at the port of entry was the same substance that the chemist tested and identified as methamphetamine. The court then insisted that the government reopen its case to present additional evidence establishing the chain of custody, and denied Petitioner's Rule 29 motion accordingly.

Upon reopening, the government called its case agent, Agent Medrano, to fill in the missing links in the chain of custody. Through Agent Medrano, the government for the first time introduced two evidence-tracking forms containing the statements of more than a dozen government officials responsible for shepherding the drug evidence from seizure to trial.

Agent Medrano testified that the first form, entitled "Custody Receipt for Seized Property and Evidence," identified Petitioner's name and criminal case number at the top. This form included the signed statements of eleven Department of Homeland Security ("DHS") agents (one of whom was Agent Medrano) who attested, per the form, to handling the drug evidence in Petitioner's then-pending case from the time of seizure to the time it was brought to court. None of these declarants had testified about their chain-of-custody statements in the government's initial case-in-chief. And only one of the eleven testified upon reopening: Agent Medrano himself. The other ten declarants were never called to testify about their statements. Instead, Agent Medrano simply read these declarants' signed statements into the record.

The second form, called a DEA-7, included a notation that its purpose was to track drug "evidence." It, too, included Petitioner's name and criminal case number at the top. Like the DHS evidence-tracking form, the DEA-7 included the signed statements of several government agents who attested, per the form, to handling the drug evidence in this criminal case as it was pending prosecution. And, as with the DHS evidence-tracking form, Agent Medrano read these declarants' statements into the record.

Petitioner objected that the chain-of-custody records constituted inadmissible hearsay. The court overruled the objections.

The jury ultimately returned a verdict of guilty.

Petitioner appealed, challenging the admission of the chain-of-custody records as hearsay. The panel affirmed. Pet. App. 4a. The panel, presuming that the records had been created in anticipation of litigation, nonetheless held that they were admissible under the public and business records exceptions to the hearsay rule, under Federal Rules of Evidence 803(6) and (8)—because Petitioner "did not offer any evidence . . . meet[ing] his burden to show that the records are untrustworthy." Pet. App. 4a.

Reasons for Granting the Writ

This case presents an important question over which the lower courts are intractably fractured: whether a public or official record created in anticipation of litigation nonetheless may be deemed inherently reliable, and thus admissible, as a majority of courts have held, or whether such records are inherently unreliable and constitute inadmissible hearsay, as numerous other courts (including the court of appeals in this case) have held. This Court should grant review to identify the correct standard and ensure uniformity in the interpretation and application of the rule against hearsay.

I. Under ***Palmer v. Hoffman*** and the Federal Rules of Evidence, a record created in anticipation of litigation inherently lacks reliability or trustworthiness.

It is well established that business records are presumptively excepted from the general rule against admitting hearsay statements at trial. *See Palmer v. Hoffman*, 318 U.S. 109, 114 (1943). That rule, later codified in Federal Rule of Evidence 803(6) and mimicked in the public-records exception under 803(8), recognizes that such records are inherently trustworthy if they are "kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the [record]." FED. R. EVID. 803(6); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321-22 (2009) (acknowledging that *Palmer*'s analysis with respect to business records created in anticipation of litigation applies equally to public records under Rule 803(8)).

It has also long been recognized that the presumption of trustworthiness may be rebutted if "the method of circumstances of preparation [of a business or public record] indicate lack of trustworthiness." FED. R. EVID. 803(6); *see also Melendez-Diaz*, 557 U.S. at 321-22. This Court has recognized that one such circumstance is when the record was prepared in anticipation of litigation. *See Palmer*, 318 U.S. at 114 (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least in part in anticipation of litigation). That is because, as this Court recognized in *Palmer*, a report "calculated for use essentially in the court, not in the business," raises concerns of a motive and opportunity to falsify the record. *See id*. The Federal Rules Advisory Committee has acknowledged and incorporated this concern with potential bias in records prepared in anticipation of litigation. Specifically, the Advisory Committee notes provide that a party may rebut the presumption of admissibility of business or public records by establishing the "possible motivation problems suggested by *Palmer v. Hoffman.*" *See* FED. R. EVID. 803(8) advisory committee note; *see also* FED. R.

EVID. 803(6) advisory committee note (discussing *Palmer* and the "problems of the motivation of the informant").

But while it is clear that the presumption of reliability may be overcome when a business or public record has been prepared in anticipation of litigation, the lower courts are hopelessly confused about what more, if anything, a party must prove to show that the record is unreliable and, therefore, inadmissible. That is the question presented here.

II. The courts of appeals are intractably divided over whether a party opposing admission of a business or public record must do more than simply prove that the record was prepared in anticipation of litigation to overcome the presumption of reliability.

Since *Palmer*, the lower courts have come to opposing—and sometimes internally conflicting—conclusions regarding whether a party that has shown that a business or public record created essentially for use in court must do *more* to meet its burden of overcoming the presumption of reliability of the record. On the one hand, a majority of courts have held that simply showing that a record was created in anticipation of litigation sufficiently suggests bias or motivation problems, such that the record must be excluded as unreliable hearsay. On the other hand, a minority of courts—including the Ninth Circuit in this case—have held that a party must offer *additional* evidence, beyond the fact that the record was created in anticipation of litigation, to meet its burden of proving untrustworthiness. The split is deeply entrenched, and this Court alone can resolve it.

A. A majority of lower courts recognize that a record created in anticipation of litigation is inherently unreliable and that a party need not show more to prove inadmissibility.

A significant majority of lower courts take the *Palmer* holding at its word. In these circuits, a party opposing admission of a business or public record need only show that the record was created primarily for use in court.

For example, the Sixth Circuit in *Applebaum v Target Corporation*, 831 F.3d 740, 755 (6th Cir. 2016), recently held that business records must be barred when they are made by counsel in response to a claim for indemnification by a party to a possible lawsuit. Such a record, the court held, "lack[s] the objectivity of a typical business record" and "indicate[s] a lack of trustworthiness." *Id.* (citing *Palmer*, 318 U.S. at 113-14).

And the Eleventh Circuit in *Noble v. Alabama Dep't of Environmental Management* 872 F.2d 361, 366-67 (11th Cir. 1989), held that once the opposing party alleges that a document was prepared for possible use in court, the burden shifts back to the document's proponent to "lay an adequate foundation for admission of the [document] as a business record . . . compiled as a matter of regular practice, as opposed to one prepared in anticipation of litigation."

The Eighth Circuit in *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 702, 706-07 (8th Cir. 1996), also held that a document created with knowledge that an incident could result in liability inherently lacks reliability and trustworthiness because it is not made in the normal course of business. The court of appeals noted that the report "show[ed] on its face that it was prepared in anticipation of litigation and not in the ordinary course of . . . usual . . . business operations." *Id.* Accordingly, the court held that the record "lack[ed] reliability or trustworthiness." *Id*; *see also Chadwell v. Koch Ref. Co.*, 251 F.3d 727, 732 (8th Cir. 2001) (holding that exclusion of business report was proper because "records kept in anticipation of a lawsuit . . . do not qualify for the Rule 803(6) hearsay exception").

Similarly, the Seventh Circuit in *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993), held that a lensometer report prepared at the behest of the FBI and with knowledge that any information it supplied would be used in a pending criminal investigation was not prepared and kept in the ordinary course of eyeglasses business and thus was inadmissible. The court of appeals noted that "the method by which these documents were generated was, to be sure, highly reliable." *Id.* Nonetheless, the court held that "when a document is created for a particular use that lies outside the business's usual operations—especially when that use involves litigation"—the normal presumption of reliability of a business record does not "hold[]." *Id.* Instead, the court of appeals "adhere[d] to the well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception." *Id.* (citing *Palmer*, 318 U.S. 109)); *see also Jordan v. Binns*, 712 F.3d 1123, 1135 (7th Cir. 2013) (holding plaintiffs "carried their burden" of showing that a business report was inadmissible because it was prepared for use as evidence at trial and noting that "documents prepared with an eye toward litigation raise serious trustworthiness concerns because there is a strong incentive to deceive (namely, avoiding liability).").

The Fifth Circuit adheres to the same rule. In *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979), the court of appeals held that an affidavit prepared by an official of the United States Treasury Department was unreliable simply on the ground that it was prepared in anticipation of litigation. Indeed, the Fifth Circuit has held that even when a business record is created by an entity that is not a party to the litigation, the record is inadmissible so long as it was created in order to support a party's litigation. *See Young v. U.S. Dep't of Agriculture*, 53 F.3d 728, 730-31 (5th Cir. 1995).

Likewise, the Fourth Circuit in *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000), has held that even when a party to the litigation did not prepare a particular report but merely requested its preparation, the presumption of reliability is still rebutted. In so holding, the court of appeals rejected the plaintiff's argument "that the prohibition against admitting records prepared in anticipation of litigation under the business record exception" does not apply when a party to a lawsuit contracts an outside investigator to prepare a report, and that investigator regularly prepares and maintains a file of such reports. *Id.*

Thus, in these cases, the courts of appeals have concluded that a record created in anticipation of litigation is inherently unreliable. Therefore, the party opposing admission of the record was not required to show more to prove that the record was inadmissible hearsay.

B. A minority of courts—including the Ninth Circuit in this case—have held that a party must do more than show that a record was prepared in anticipation of litigation to prove that the record is untrustworthy.

In direct contrast to the prevailing law in the majority of lower courts to have addressed the issue, some courts of appeals have held that even when a record was prepared in anticipation of litigation, a party opposing admission of the record must produce additional evidence of unreliability. The Ninth Circuit is consistently one of the courts in this minority. For example, in *S.E.C. v. Jasper*, 678 F.3d 1116, 1122-24 (9th Cir. 2012), the court ruled that a financial statement audit was admissible as a business record despite the fact that it was part of an investigation. The court suggested that a party must offer additional evidence of bias or other indicia of reliability," at least when the accuracy of a particular type of record is a "legal requirement" that often leads to a lawsuit "in today's litigation-heavy climate." *Id.* at 1123-24. The court cautioned that to hold otherwise would mean that virtually all business records would be deemed inadmissible whenever the company creating them is "worried about litigation risks." *Id.* at 1124. This, the court held, "is not the law under the Federal Rules of Evidence." *Id.*

Similarly, in *Sana v. Hawaiian Cruies*, 181 F.3d 1041, 1046-47 (9th Cir. 1999), the Ninth Circuit determined that while a business record had some of the appearances of a litigation record, there were countervailing indicia of trustworthiness such that the party opposing admission was unable to overcome the presumption of its admissibility. Specifically, the court of appeals noted that the report was prepared by the defendant's insurer, and noted that the insurer lacked an improper motive or bias given its duty to accurately report the claim and treatment of illness. *Id.*

And, of course, in this case, the Ninth Circuit held that even though the chain-of-custody records may have been created in anticipation of litigation—as evidenced by the fact that Petitioner's name and criminal case number appeared on the records—Petitioner needed to offer additional evidence to "meet his burden to show that the records are untrustworthy." Pet. App. 4a.

The Ninth Circuit is not alone in holding litigants to this heightened burden. In *United States v. Strangstalien*, 7 M.J. 225, 228 (1979), the court held that records created in a pending criminal case were admissible under the business-records exception to the hearsay rule. In that case, the defendant was accused of selling marijuana and LSD to an undercover agent. *Id.* at 226. The substances were transferred from the undercover agent to an evidence custodian and eventually mailed to a government laboratory. *Id.* A chemical examiner employed by the government lab prepared laboratory-analysis reports of the substances. *Id.* at 227. These reports were later admitted into evidence at trial. *Id.* at 226. The court of appeals affirmed the admissibility of the reports. *Id.* at 228. The court recognized that business records "made principally with a view to prosecution" are generally inadmissible. *Id.* (citing *Palmer*, 318 U.S. at 109). Nonetheless, the court held that "a chemist[,] even one in a governmental laboratory[,] does not perform his duties principally with a view to prosecution, discipline, or other legal action[.]" *Id.* Thus, in a distinct split with the

Another court of appeals reached the same result based on a similar rationale. Notwithstanding its general adherence to the letter of the *Palmer* rule, the Eighth Circuit in *United*

States v. Baker, 855 F.2d 1353, 1359 (8th Cir. 1988), the court of appeals held that a laboratory report analyzing a controlled substance in a pending criminal case is admissible as a business record because such reports are "made on a routine basis." In that case, the court observed that the St. Louis Police Department Laboratory ordinarily created lab analyses of controlled substances and kept the records of these analyses in its care, custody and control. *See id.* Furthermore, because the defendants had not claimed that the reports "were made on other than routine basis," they had not satisfied their burden of showing that the records were untrustworthy. In so holding, the Eighth Circuit has demonstrated confusion and inconsistency in applying the rule.

Thus, a minority of courts have held that a record created in anticipation of litigation, while it may bear some indicia of unreliability, is not necessarily inherently unreliable. Instead, a party opposing admission of the record must do more to show that the record is untrustworthy and, thus, inadmissible. Moreover, *Strangstalien*'s and *Baker*'s inquiry into the preparer's motivation, even when the record prepared is created at the behest of a litigating party, is in direct opposition to the analysis in the Seventh Circuit, *see Blackburn*, 992 F.2d at 670, the Fifth Circuit, *see Stone*, 604 F.2d at 925-26, and the Fourth Circuit, *see Certain Underwriters*, 232 F.3d at 205, in which even a contracted report prepared in anticipation of litigation is inadmissible.

III. The need to resolve the dispute is urgent, and only this Court can resolve it.

The question of when a record created for use in a pending or possible case may be admitted is a recurring and important one. In view of the split in authorities, litigants in a majority of circuits need do no more than show that a record was created in anticipation of litigation to raise the bias and motivational concerns that this Court in *Palmer* recognized make a business record unreliable and inadmissible. But litigants in a minority of circuits must show more—simply showing that a record was created in anticipation of litigation is not enough to prove the record is inadmissibly untrustworthy.

Given the inconsistency and confusion both among and within the circuits, litigants are left guessing as to when and in what circumstances key records may be deemed admissible. Resolution of this question will provide guidance to litigants and to courts regarding a fundamental evidentiary conundrum arising in both civil and criminal cases.

Moreover, the question at base turns on how to interpret this Court's precedent in *Palmer*. Therefore, this Court is the only institution that can resolve the dispute.

IV. This case is an ideal vehicle for the Court to resolve the question presented

This case presents an ideal opportunity for the Court to resolve the split of authority. The question presented was pressed in district court, where Petitioner objected to the government's introduction of the chain-of-custody records as inadmissible hearsay, and the district court summarily overruled Petitioner's objection.

The issue was also squarely pressed and passed upon by the court of appeals. The Ninth Circuit assumed that the records in this case had been prepared in anticipation of litigation. However, it held that the public records in this case were admissible under Rules 803(6) and (8) because Petitioner "did not offer any evidence [sufficient to] meet his burden to show that the records are untrustworthy." Pet. App. at 4. In other words, the court of appeals in this case unequivocally required Petitioner to do *more* than simply show that a record was created in anticipation of litigation to meet its burden of proving untrustworthiness. Had this case arisen in circuits espousing the majority rule, however, the court of appeals would have determined that Petitioner had sufficiently overcome the presumption of reliability under Rules 803(6) and (8).

In addition, Petitioner continues to serve his sentence. Thus, any concerns with respect to mootness are alleviated.

Finally, review is particularly warranted in this case because the Ninth Circuit is on the minority side, and the wrong side, of the split in authority among the circuits. Contrary to what the Ninth Circuit held, a record created in anticipation of litigation raises concerns with possible bias or improper motivation that render the record *inherently* unreliable. *Palmer* recognized as much seventy-five years ago. And a majority of lower courts recognize the same today. A litigant ought not do more to prove the record is inadmissible, and had Petitioner's case been decided in the Fourth, Fifth, Sixth, Seventh, or Eleventh Circuits, the hearsay question would have come out differently. Accordingly, Petitioner respectfully requests that the Court grant the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

January 30, 2018

Respectfully submitted,

s/ Sarah R. Weinman

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