No. ___-_____

In the Supreme Court of the United States

YEHUDI MANZANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

American courts routinely prohibit criminal juries from hearing any argument that they should judge both the law and facts of a case – pejoratively described as jury nullification – or any evidence related to sentencing consequences. The United States halted proceedings in this criminal case on the eve of trial when the district court granted the petitioner's motion for permission to argue, during his counsel's closing argument, that the jury decide both law and fact and reserved decision on his motion to introduce evidence regarding sentence consequences until trial.

The Second Circuit granted the United States' application for a writ of mandamus to reverse the former decision even though the United States did not provide a jurisdictional basis for its appeal under the Criminal Appeals Act. The Second Circuit also could not point to any controlling authority from this Court or itself that clearly prohibited the district court's decision, merely stating that it was firmly convinced that the district court took an incorrect view of the law.

The questions presented are:

1. Whether the United States may seek a writ of mandamus in a criminal case to bring an interlocutory appeal that is not permitted by 18 U.S.C. § 3731.

2. Whether a writ of mandamus may issue where the applicant does not have a clear and indisputable right to it by established law, but the issuing court is firmly convinced that the lower court is wrong.

PARTIES TO THE PROCEEDING

Petitioner is Yehudi Manzano. He is the defendant in the district court and the defendant-appellee in the court of appeals.

Respondent is the United States of America. The United States of America was the prosecuting authority in the district court and the appellant in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

This Court has repeatedly held that writs of mandamus are extraordinary writs that may issue if the applicants satisfy certain strict requirements, including showing that they have a clear and indisputable right to the writ. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004) (compiling cases). This Court has also held that the United States may not use writs of mandamus to bypass the constraints established by 18 U.S.C. § 3731 on its rights to take interlocutory appeals in criminal cases. *Will v. United States,* 389 U.S. 90, 96-97, 97 n.5 (1967). Some circuit courts, however, have played fast and loose with both holdings, creating a veritable patchwork of standards for mandamus.

This is a case in point. The United States sought a writ of mandamus to countermand a district court's decision to allow a criminal defendant's counsel to argue that the jury should judge both law and fact – in other words, jury nullification. The Second Circuit, shocked that any judge could make such a decision, relaxed the standards for reviewing the United States' application for a writ of mandamus and completely ignored the fact that it was statutorily prohibited from seeking the writ. In other words, the Second Circuit permitted the United States to circumvent Congress's limitation on its appellate rights in criminal proceedings in direct contradiction to this Court's precedent.

The Second Circuit is not alone. The Third, Fifth, and Ninth Circuits have also permitted the United States to seek writs of mandamus in criminal cases without establishing a permissible basis under 18 U.S.C. § 3731. To the contrary, the First,

Seventh, and Tenth Circuits have required the United States to establish a permissible basis under 18 U.S.C. § 3731 before seeking a writ of mandamus.

Shock drove the Second Circuit to further disregard the strict requirements of the mandamus standard. Unable to find clear and indisputable evidence that the district court's decision was not within the range of permissible decisions and confronted by the United States' concession on two separate occasions that none of its precedents prohibited the district court's decision, the Second Circuit contorted the meaning of "clear and indisputable" into a firm conviction that the district court had taken an erroneous view of the law. Only the Ninth Circuit has taken such a lax view of "clear and indisputable," but seven other circuits have required an applicant for a writ of mandamus to show that the decision was non-discretionary.

The Second Circuit's fixation with the underlying issue, jury nullification, led it to reshape the well-established principles governing mandamus review into a ghost of the original form established by this Court. The result is the blatant frustration of Congressional intent and the drastic curtailing of a district court's discretion over a criminal defendant's closing argument. This Court should intervene to resolve the circuit splits, bring clarity to the principles governing mandamus review, and protect Congress's prerogative and district courts' discretion.

OPINIONS BELOW

The Second Circuit's opinion is reported at 945 F.3d 616 and reproduced at App.1-57. The order denying rehearing en banc is reprinted at App.58-59. The hearing transcript of the district court's decision is reprinted at App.60-121. The

district court's minute order memorializing the court's decision at the hearing is reprinted at App.109-110 (Dkt. 58).

JURISDICTION

The Second Circuit issued its opinion on December 18, 2019. Petitioner filed a timely petition for rehearing en banc, which the court denied on January 31, 2020. On March 19, 2020, this Court issued a general order extending the time for filing any petitions for a writ of certiorari due on or after March 19, 2020 to one hundred and fifty (150) days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 3731 is reproduced at App.154.

STATEMENT OF THE CASE

A. Factual Background

During a state statutory rape investigation, Connecticut law enforcement officers discovered a video of the petitioner, Yehudi Manzano, *in flagrante delicto* with a 15-year-old girl.[1] App.4-5. Manzano created the video in Connecticut with the girl's

[1] The evidence will show that this is no ordinary 15-year-old girl. She pursued Manzano for the purpose of a sexual relationship for over a year. When he declined to leave his wife for her, she sought to disrupt his marriage and extort him. These

knowledge and consent, using a cellphone that traveled in interstate commerce. App.4, 130-31. He transferred the video to his personal Google Photos folder by means of the "cloud," an electronic file-sharing platform which utilizes internet servers located outside of Connecticut. App.5, 130-31.

Manzano subsequently deleted the recording from his cell phone because he had no intention of showing it to anyone, and, in fact, he never showed or sent it to anyone. App.5, 130-31. Unbeknownst to Manzano, however, his cell phone automatically "backed up" the media stored in his cell phone's Google Photos folder to his Google account's backup cloud storage. App.6, 130-31. Consequently, the law enforcement officers did not discover it in his phone, but rather in the backup storage designed to enable a user to recover his data in case of a phone failure or accidental deletion. App.6, 130-31.

B. Procedural History

Connecticut authorities charged Manzano with one count of second-degree sexual assault, three counts of risk of injury to a minor, one count of threatening, and one count of possession of child pornography. App.130. Only the sexual assault and the possession of child pornography charges carry mandatory minimum sentences of incarceration – a total of five years and nine months – if Manzano is convicted.

Faced with difficulty in proving their charges, Connecticut authorities requested that the federal government pursue charges against Manzano. In May

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issues were aired at a sealed hearing under Fed. R. Evidence 412, but the transcript is not part of this record as it sheds no light on the reasons that the Government offered for seeking relief.

2018, a federal grand jury indicted Manzano on one count of production of child pornography in violation of 18 U.S.C. § 2251(a) and one count of transportation of child pornography in violation of 18 U.S.C. § 2251(e). App.6. The production count is punishable by a mandatory minimum term of fifteen years' incarceration, and the transportation count is punishable by a mandatory minimum term of five years' imprisonment. App.6.

Prior to jury selection, Manzano filed motions asking for permission to argue for jury nullification and to inform and question jurors during voir dire about their power to nullify. App.6-7, 131. The district court denied the Manzano's request to inform jurors during voir dire about their power to nullify, but reserved decision on whether Manzano could argue for jury nullification at trial. App.8, 131.

After a jury had been selected and on the eve of trial, Manzano submitted a proposed jury charge that included a charge on jury nullification. App.131. He also renewed his motion for permission to argue jury nullification and moved for permission to introduce evidence containing the mandatory minimum sentences that he faces. App.8, 131-33.

The district court orally ruled that, if Manzano succeeded in introducing evidence of the mandatory minimum sentences under the Federal Rules of Evidence, it would permit him to inform the jury of its power to nullify the charges against Manzano and argue for them to do so. App.94-95, 132-33. The district court granted the United States' emergency motion to stay the trial while it sought a writ of mandamus from the Second Circuit ordering the district court to preclude any

evidence of sentences and to prevent Manzano from arguing for jury nullification. App.119, 133.

In a 2-1 decision, the Second Circuit granted the United States' application for a writ of mandamus to prohibit Manzano to argue for jury nullification, but it denied the United States' application for the writ to prohibit the district court from admitting evidence of sentencing consequences. App.32. In granting the writ prohibiting Manzano from arguing for jury nullification, the Second Circuit held that (1) the United States had no other adequate means to obtain relief, (2) the United States had a clear and indisputable right to the writ because the Second Circuit reached a "firm conclusion" that the district court's interpretation of the law was wrong, and (3) the writ was appropriate under the circumstances. App.11-24.

Manzano petitioned the Second Circuit to reconsider the grant of the writ of mandamus en banc, but it denied his petition. App.59.

REASONS FOR GRANTING THE PETITION

In the 125 years since this Court held that a trial court has no responsibility to instruct a jury regarding its power to nullify a law or a prosecutorial charging decision, *Sparf v. United States*, 156 U.S. 51 (1895), the American criminal justice system has arrived at an unofficial consensus that a defendant may never make an argument to a jury that it "bring in a [not guilty] verdict in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920). This unofficial consensus places a severe categorical limitation on a criminal defendant's Sixth Amendment right to defend himself without subjecting it to the careful constitutional

scrutiny that the limitation demands. Indeed, this Court and most of the circuit courts have never reviewed the question before.[2]

The Second Circuit is one of the circuit courts that has never reviewed whether a criminal defendant has a Sixth Amendment right to argue for jury nullification. It chose to do so in the context of the United States' application for a writ of mandamus. Despite the Second Circuit's "firm conviction" that jury nullification is essentially legal blasphemy, App.18, the method that it used to reach its conclusion ignores Congress's intent to constrain United States' criminal appellate rights and disregards district courts' discretion regarding criminal defendants' closing arguments.

The result is a clear circuit split involving more than seven circuit courts, a glaring conflict between this Court's precedents and four of the seven circuit courts, a complete disregard for Congress's statutory mandate, an abridgement of district courts' authority, and a nullification of criminal defendants' Sixth Amendment rights to a jury trial. Furthermore, because the extraordinary writs such as mandamus are inherently extraordinary, this Court has rarely reviewed them. The rarity of this Court's review has led to significant error by circuit courts in the mandamus process.

This case presents the Court with an opportunity to establish uniformity in the federal mandamus process by resolving the circuit splits, which will clearly delineate

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[2] Prior to this case, only the Fourth and Eleventh Circuits have directly reviewed the question of whether a defendant may argue for jury nullification. *See United States v. Trujillo*, 714 F.2d 102, 105-06 (11th Cir. 1983); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969).

and protect the respective interests of the United States, Congress, the district courts, and criminal defendants.

I. A Circuit Split Exists As To Whether The United States May Seek A Writ Of Mandamus In A Criminal Case To Bring An Appeal That Is Not Permitted By 18 U.S.C. § 3731.

The First, Seventh, and Tenth Circuits have held, based on the text of 18 U.S.C. § 3731 and this Court's decision in *Will v. United States,* 389 U.S. 90, 98 (1967), that the United States must establish its right to a criminal appeal under 18 U.S.C. § 3731 before an appellate court may grant its application for a writ of mandamus. *See United States v. Kane*, 646 F.2d 4, 9 (1st Cir. 1981); *United States v. Horak*, 833 F.2d 1235, 1244 (7th Cir. 1987); *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997).

The Third, Fifth, and Ninth Circuits reached a different conclusion, holding that the United States does not need to establish a right to a criminal appeal under 18 U.S.C. § 3731 before an appellate court may grant its application for a writ of mandamus. *See United States v. Wexler*, 31 F.3d 117, 128 n.16 (3rd Cir. 1994); *In re United States*, 397 F.3d 274, 283 (5th Cir. 2005); *United States v. U.S. Dist. Court, Cent. Dist. Of Cal., Los Angeles, Cal.*, 717 F.2d 478, 481 (9th Cir. 1983).

In this case, the Second Circuit reached the same conclusion as the Third, Fifth, and Ninth Circuits in holding that 18 U.S.C. § 3731 does not act as a jurisdictional prerequisite to the United States' application for a writ of mandamus. App.14. Consequently, a writ of mandamus, which the United States sought without a legal basis, now requires the district court to prevent the petitioner from making

his desired closing argument to a jury, infringing on his Sixth Amendment right to present a defense.

A. This Court's precedent indicates that the United States must possess a jurisdictional basis under 18 U.S.C. § 3731 before it may seek a writ of mandamus.

Will v. United States states that "this Court has never approved the use of the writ [of mandamus] to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." 389 U.S. 90, 98 (1967). *Will* expressly declined to decide whether a writ of mandamus could ever be used to review such an order. *Id.* ("We need not decide under what circumstances, if any, such a use of mandamus would be appropriate"). The *Will* Court based this holding on two fundamental considerations: the defendant's right to a speedy resolution of his charges and Congress's statutory limitation on the criminal appeals the United States may take.

The Criminal Appeals Act (codified at 18 U.S.C. § 3731) narrowly constrains the types of appeals that the United States may take in a criminal case, and this Court has repeatedly held that it is to be "strictly construed against the Government's right of appeal." *Id.* at 96-97; *see also United States v. Jorn*, 400 U.S. 470, 476 (1971) (reaffirming the strict construction rule even after Congress added a clause to construe the statute liberally); *United States v. Sisson*, 399 U.S. 267 (1970) (tracing the history and meaning of the Criminal Appeals Act and affirming its strict construction). This Court has further established that a writ of mandamus may never be used as a substitute for an interlocutory appeal or a circumvention of the

constraints on the United States' right to appeal. *Will*, 389 U.S. at 97 (compiling cases); *see also id.* at 97 n.5 ("This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold."). While this Court did allow that mandamus may be invoked to review procedural orders, this Court has confined such review to matters that 18 U.S.C. § 3731 permits. *Id.* at 97-98 (identifying cases where trial courts deprived the government of the right to initiate prosecution or stayed a prison sentence despite a valid conviction).

18 U.S.C. § 3731 provides only three specific instances where the United States may appeal in criminal cases and constrains each instance with specific conditions. The United States may appeal from (1) a dismissal of an indictment or if a new trial has been granted after a verdict or judgment, (2) a decision to suppress or exclude evidence or requiring the return of seized property, and (3) a decision regarding the release of someone charged or convicted. 18 U.S.C. § 3731.

In this case, the United States did not have a permissible basis under 18 U.S.C. § 3731 and *Will* to seek any of the relief that it sought from the Second Circuit. The district court did not dismiss its indictment, suppress or exclude evidence, or make a decision regarding the release of the petitioner. Instead, the district court merely stated that it would permit the petitioner to make an argument for jury nullification during his closing argument and that it would reserve a decision on whether to *admit*, not exclude, evidence of sentencing consequences. App.94-95. Consequently, this Court's precedent in *Will* implicitly required the instant denial of the United States' application for writ of mandamus.

B. Seven circuit courts have reached different conclusions on whether 18 U.S.C. § 3731 limits the permissible scope of the United States' applications for writs of mandamus.

Relying on this Court's precedent, the First, Seventh, and Tenth Circuits have held that 18 U.S.C. § 3731 constrains the United States' ability to seek mandamus relief in a criminal case. *See United States v. Kane*, 646 F.2d 4 (1st Cir. 1981); *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987); *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997). Their reasoning is simple. 18 U.S.C. § 3731 allows federal appellate courts to exercise jurisdiction only over narrowly delineated matters in a criminal case, and federal appellate courts cannot exercise their mandamus power to thwart Congressional choice. *McVeigh*, 106 F.3d at 333 (citing *Will*, 389 U.S. at 97); *Horak*, 833 F.2d at 1249 (citing *Will*, 389 U.S. at 96-97); *Kane*, 646 F.2d at 96-97. As the First Circuit indicated in *Kane*, this Court has repeatedly held that mandamus is not a substitute for appeal, available merely to correct an error of law. *Kane*, 646 F.2d at 9 (compiling cases from this Court).

To the contrary, the Third, Fifth, and Ninth Circuits have held that the United States does not need to establish a right to a criminal appeal under 18 U.S.C. § 3731 before an appellate court may grant its application for mandamus. *See United States v. Wexler*, 31 F.3d 117, 128 n.16 (3rd Cir. 1994); *In re United States*, 397 F.3d 274, 283 (5th Cir. 2005); *United States v. U.S. Dist. Court, Cent. Dist. Of Cal., Los Angeles, Cal.*, 717 F.2d 478, 481 (9th Cir. 1983). These circuits reasoned that mandamus was permissible and necessary because 18 U.S.C. § 3731 prevented the United States from obtaining appellate relief through an interlocutory appeal. *Wexler*, 31 F.3d at 128

("appeal from the erroneous [jury] instruction is not an option for the government"); *In re United States*, 397 F.3d at 283 ("the Government's only recourse was through a writ of mandamus"); *U.S. Dist. Court, Cent. Dist. Of Cal., Los Angeles, Cal.*, 717 F.2d at 481 ("The trial court's ruling is not one of the class of orders from which the United States may take its interlocutory appeal"). While the Fifth and Ninth Circuits did not elaborate further on their views, the Third Circuit found that this Court did not expressly prohibit the use of mandamus to review procedural orders in criminal cases. *Wexler*, 31 F.3d 117, 128 n.16 (quoting *Will*, 389 U.S. at 97).

In this case, the Second Circuit adopts the view of the Third, Fifth, and Ninth Circuits by holding that 18 U.S.C. § 3731 does not limit the matters that the United States may seek a writ of mandamus on. App.14. While the Second Circuit acknowledged that "mandamus may not be invoked as a 'substitute' for an interlocutory appeal…," it held that the United States' limited right to an interlocutory appeal is appropriately considered under the first factor of this Court's standard for considering an application for a writ of mandamus in a civil case. App.14; *see generally Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

The Second, Third, Fifth, and Ninth Circuits' holding cannot be reconciled with this Court's statement in *Will*: "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions." *Will*, 389 U.S. at 97 n.5. This principle led this Court to hold that mandamus "may never be employed as a substitute for appeal in

derogation of these clear policies." *Id.* at 96-97 (discussing a defendant's rights to a speedy trial and not being placed in jeopardy twice for the same offense). Consequently, these four circuits have adopted a plainly erroneous interpretation of this Court's mandamus standard and having essentially amended a statute in violation of the separation of powers established by the United States Constitution. App.50-52 (Parker, J., concurring in part, dissenting in part).

This Court's intervention to resolve this circuit split is both necessary to protect criminal defendants' interest in a speedy trial and to provide the United States with clear and uniform guidance on when it may seek mandamus. The current circuit split enables the United States to seek writs of mandamus for matters that it could not seek the same writs for in other jurisdictions. Consequently, this Court's intervention will provide clear guidance to the circuit courts and the United States, resolve the circuit split by establishing a uniform standard for granting a writ of mandamus in a criminal case, and define the contours of criminal defendants' speedy trial rights in the context of the United States' appellate rights.

II. The Second Circuit's Interpretation Of "Clear And Indisputable" To Mean "Firm Conviction" Disregards This Court's Standard For Reviewing An Application For A Writ Of Mandamus And Creates A Circuit Split.

This Court held that the party that applies for writ of mandamus must show that its "right to issuance of the writ is clear and indisputable." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. United States Dist. Court for Northern Dist. Of Cal.*, 426 U.S. 394, 403 (1976)) (internal quotation omitted). In this case, the Second Circuit joined the Ninth Circuit in interpreting the "clear and

indisputable" standard to be satisfied when the reviewing appellate court "is left with 'firm conviction' that the district court's view of the law was incorrect." App.17, 22; *see also In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1305-07, 1306 n.6 (9th Cir. 1982). The Second Circuit's decision solidifies a circuit split between nine circuits over the appropriate meaning of "clear and indisputable."

Furthermore, the Second Circuit's decision cannot be reconciled with the history of jury nullification in the United States, this Court's precedents, and its precedents. The history of jury nullification in the United States clearly indicates that the Sixth Amendment's guarantee of a criminal jury trial includes a guarantee of a jury that judges both law and fact. This Court's precedents do not contradict this historical evidence, and they do not directly prohibit a criminal defendant from arguing that a jury should judge the law. Neither do the Second Circuit's precedents despite its strong view that encouraging jury nullification is, in effect, legal blasphemy.

Regardless of what view that this Court takes of jury nullification, this Court has repeatedly issued holdings that clearly define its standard for mandamus review. The Second and Ninth Circuits strayed from this Court's holdings, creating a circuit split. This Court should intervene to reaffirm its standard and reverse the Second Circuit's decision, which infringes upon the district court's discretion and the petitioner's Sixth Amendment rights.

A. This Court's precedents clearly establish that an applicant for a writ of mandamus does not have a "clear and indisputable" right to it when the matter in question is entrusted to the district court's discretion.

In the context of an application for mandamus in a civil case, this Court held that the applicant for a writ of mandamus must show that it has a "clear and indisputable" right to the relief requested. *Cheney*, 542 U.S. at 381 (quoting *Kerr v. United States Dist. Court for Northern Dist. Of Cal.*, 426 U.S. 394, 403 (1976)). This Court has not elaborated extensively on the meaning of "clear and indisputable," but it did not leave the circuits courts without any guidance on the meaning either.

This Court stated that "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 66 (1978) (plurality opinion)). The context in which this Court issued the *Allied Chemical Corp.* holding is particularly illustrative. This Court was reviewing a writ of mandamus that overturned a district court's order granting a new trial, and it stated that "the authority to grant a new trial… is confided almost entirely to the exercise of discretion on the part of the trial court." *Id.* Consequently, this Court held that the applicant was not entitled to the writ of mandamus that it sought. *Id.*

This Court has clearly established that a district court judge enjoys broad discretion over closing arguments:

> This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion.

Herring v. New York, 422 U.S. 853, 861 (1975).

As discussed further in Part II, C *supra*, this Court has never held that a trial judge must prevent a criminal defendant from arguing that the jury should judge the law during his closing argument. Furthermore, history and tradition indicate that a criminal defendant has a constitutional right to make such an argument. *See* Part II, E *supra*.

Without clear controlling precedent from this Court or from every circuit save two, the matter of what the petitioner argues during closing arguments is firmly entrusted to the district court's discretion. Consequently, the United States had no "clear and indisputable" right to the writ of mandamus in this case.

B. The Second Circuit created a split over the meaning of "clear and indisputable" in its own opinion, and it also creates a split between the circuit courts.

The Second Circuit advances two contradictory interpretations of "clear and indisputable" in this matter. Only the Ninth Circuit had previously adopted its first interpretation, *see In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297 (9th Cir. 1982); App. 17-18, and the Second Circuit adopted it expressly for the purpose of dispensing with the district court's decision to allow the petitioner to argue that the jury should judge both law and fact. On the other hand, seven circuits[3] have adopted

[3] *In re Tsarnaev*, 780 F.3d 14, 19 (1st Cir. 2015); *First Jersey Secur., Inc. v. Bergen*, 605 F.2d 690, 701 (3rd Cir. 1979); *In re City of Virginia Beach*, 42 F.3d 881, 884 (4th Cir. 1994); *In re Am. Airlines*, 972 F.2d 605, 609 (5th Cir. 1992); *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986); *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1195 (10th Cir. 2009); *United States v. Shalhoub*, 855 F.3d 1255, 1263 (11th Cir. 2017).

the Second Circuit's second interpretation, *see* App.26-27, which is in line with this Court's interpretation.

The Second Circuit's first interpretation of "clear and indisputable" is whether it was left "with the 'firm conviction' that the district court's view of the law was incorrect." App.17-18; *see also In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d at 1305-07, 1306 n.6. Citing this Court's endorsement of mandamus for issues of first impression in *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964), the Second Circuit held that the United States carried its burden of proving its "clear and indisputable" right to the writ by firmly convincing it that the district court took an erroneous view of the law. App.17-18.

The Second Circuit's second interpretation of "clear and indisputable" held that the United States could carry its burden by "demonstrating that the district court clearly and indisputably abused its discretion in rendering a decision that is well out the range of permissible decisions." App.26 (internal quotation and citation omitted). Relying on this Court's holding in *Allied Chem. Corp.*, the Second Circuit stated that "the more discretion the district court enjoys in a given area, the greater the range of permissible decisions, thus the less likely it will be that any abuse of discretion is clear and indisputable." App.26 (internal quotation and citation omitted).

The only difference between the Second Circuit's selections of interpretation was the nature of the district court's decisions. The Second Circuit applied its first interpretation to the district court's decision to allow the petitioner's counsel to argue for jury nullification. App.11-24. It applied its second interpretation to the district

court's decision to withhold a decision on whether to admit evidence of the sentencing consequences that the petitioner faces if he is convicted. App.24-30. The Second Circuit clearly despises jury nullification, and its omission of any discussion of the district court's broad discretion over closing arguments reflects its disdain for jury nullification. *Compare* App.11-24 *with* App.55-56 (Parker, J. concurring in part, dissenting in part) (referencing the district court's broad discretion over closing arguments). However, the Second Circuit expended more than adequate ink in discussing the district court's discretion to defer evidentiary rulings until the time of trial. App.26-30.

Only the Ninth Circuit has previously adopted the Second Circuit's "firm conviction" standard to interpret "clear and indisputable." *In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d at 1305-07, 1306 n.6. Seven circuits, however, have adopted some form of the "permissible decisions" standard that the Second Circuit applied in reviewing the district court's evidentiary decision. *See* n.3 *infra.*

Six circuits have simply adopted this Court's language[4] in *Allied Chemical Corp. See First Jersey Secur., Inc. v. Bergen*, 605 F.2d 690, 701 (3rd Cir. 1979); *In re City of Virginia Beach*, 42 F.3d 881, 884 (4th Cir. 1994); *In re Am. Airlines*, 972 F.2d 605, 609 (5th Cir. 1992); *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986); *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1195 (10th Cir. 2009); *United States v. Shalhoub*, 855 F.3d 1255, 1263 (11th Cir. 2017). The Fifth Circuit has provided the clearest

[4] "[W]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp.,* 449 U.S. at 36.

explanation of how the *Allied Chemical Corp.* interpretation works: "a writ of mandamus should not issue merely because we believe that we might have exercised the discretion vested in that court differently than the district court exercised it." *In re Am. Airlines*, 972 F.2d at 609 (internal quotation and citation omitted).

The First Circuit has not adopted the exact language of *Allied Chemical Corp.*, but it has reached the same conclusion. In the Boston Marathon bomber's case, it held that "mandamus is generally thought an inappropriate prism through which to inspect exercises of judicial discretion." *In re Tsarnaev*, 780 F.3d 14, 18 (1st Cir. 2015). It further elaborated that it had only granted mandamus "when the lower court was clearly without jurisdiction, or exceeded its discretion to such a degree that its actions amount to a usurpation of power." *Id.* at 19 (quoting *In re Recticel Foam Corp.*, 859 F.2d 1000, 1006 (1st Cir. 1988)) (internal quotation omitted).

The Second Circuit could not find clear authority stating the district court in this case did not have the discretion to make the decision that it did. Instead, it embarked on a voyage of tenuous legal reasoning to find support for its own view that a defendant may never argue for jury nullification. Furthermore, the United States conceded twice that no Second Circuit decision prohibited the district court's decision to permit the petitioner to argue for jury nullification. App.52. Consequently, the Second Circuit completely avoided discussing whether the district court abused its discretion to police the petitioner's closing argument, thus contradicting its own view of the mandamus standard.

Because of the split between nine circuit courts over the appropriate interpretation of "clear and indisputable," this Court's intervention is necessary to establish a uniform interpretation. A uniform interpretation will benefit more than just the immediate parties. It will provide clear guidance to the circuit courts, the United States, criminal defendants, and civil litigants who seek mandamus relief.

C. This Court has never held that a criminal defendant may not argue that a jury should judge the law.

The only case remotely bearing on jury nullification that this Court has ever decided is *Sparf v. United States*, 156 U.S. 51 (1895). The defendants requested that the trial court instruct the jury that, under a murder indictment, they could return verdicts of murder, manslaughter, or attempted murder or manslaughter. *Sparf*, 156 U.S. at 59. The trial court declined to provide the instruction and emphatically declared that "there [was] nothing in this case to reduce it below the grade of murder." *Id.* at 62 n.1. After two hours of deliberation, the jury returned and engaged in an extensive colloquy with the trial judge about whether they could convict the defendant of manslaughter instead of murder. *Id.* After hearing the trial judge's persistent instructions that manslaughter was not at issue in the case, the jury convicted the defendant of capital murder. *See id generally*.

This Court affirmed the conviction, stating that the duty of juries in criminal cases is "to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Id.* at 102. In dicta, this Court further declared that, where not expressly authorized by the Constitution or by statute, defendants and their counsel had no right to dispute the law to the jury. *Id.*

Dicta, however, is not binding law, and *Sparf*'s procedural posture rendered this Court's dicta unnecessary to its holding. This Court never suggested, in *Sparf*, that juries could not *sua sponte* exercise their power to nullify the law. This Court's holding also did not establish a prohibition against federal judges giving jurors an instruction that they could judge the law. Since the issue appealed was the trial court's refusal to inform the jury that it could bring in an ameliorated verdict, this Court only reviewed the trial court's jury instructions for reversible error. Furthermore, this Court's *Sparf* holding expressly acknowledged that defendants could argue for a jury to judge both fact and law when a constitutional provision authorized the judging of fact and law. *Id.* at 102 ("Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury").

Since *Sparf*, this Court has acknowledged juries' constitutional power to judge both law and fact. *See Horning v. District of Columbia*, 254 U.S. 135, 138 (1920). So have the circuit courts. *See, e.g.*, *United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988) (holding that a trial judge's response to a jury that there was no such thing as valid jury nullification was incorrect but harmless error); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (holding that a jury has the power to nullify, but that the court may not instruct them of their power); *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) (holding that a jury may render a verdict at odds with the

evidence or the law); *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) (holding that the power of the jury to acquit in the face of the law and evidence is undisputed). Consequently, no court disputes whether juries have the constitutional authority to judge the law. It follows that defendants have the constitutional right to argue that they should even if a court is required to provide a curative instruction after such an argument.

Furthermore, this Court has held that limitations on closing arguments are limitations on the basic right of an accused to present a defense. *Herring v. New York*, 422 U.S. 853 (1975). History firmly supports this holding:

> In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the Crown. Whatever other procedural protections may have been lacking, there was no absence of debate on the factual and legal issues raised in a criminal case.

Id. at 860. Notably, this historical right to present closing argument also included a right to argue the law.

The right to argue the law to a jury had its foundations in fundamental principles undergirding a jury system that this Court has emphasized even under its post-*Sparf* jurisprudence. Juries stand as the last check against "a spirit of oppression and tyranny on the part of rulers" and as a "great bulwark of [our] civil and political liberties." *United States v. Booker*, 543 U.S. 220, 239 (2005) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)). When the government abused the criminal process or imposed an unconscionably harsh punishment for a particular conviction, this critical check on government oppression historically "took the form not only of flat-

out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses." *Jones v. United States*, 526 U.S. 226, 245 (1999).

It is quite clear then that this Court's modern jurisprudence does not interpret the Sixth Amendment to prohibit either the right for a criminal jury to judge the law of a case or for a defendant to argue that it should. The only limitation that this Court has clearly and indisputably established is that the trial court judge is under no obligation to instruct a jury of its right to judge the law as well as the facts. Consequently, this Court's precedents do not establish a clear and indisputable right to the writ of mandamus that the United States sought.

D. Prior to this case, the Second Circuit has never held that a criminal defendant may not argue that a jury should judge the law, and only two circuit courts have expressly held that a criminal defendant may not argue for jury nullification.

Only two circuit courts have expressly addressed the question of whether a criminal defendant may make an argument to a jury that it should judge the law. *See United States v. Trujillo*, 714 F.2d 102 (11th Cir. 1983); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969). The Second Circuit had never expressly addressed the question prior to the United States' application for a writ of mandamus in this case. App.16-18. Indeed, the United States conceded twice before the Second Circuit that it could point to no cases from the Second Circuit that clearly and indisputably entitled it to the relief that it sought. App.52.

To fashion some sort of controlling precedent, the Second Circuit extrapolated its decision in *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997). In *Thomas*, the Second Circuit held that jurors have no right to engage in nullification and that "trial

courts have the duty to forestall or prevent such conduct." *Thomas*, 116 F.3d at 616. In this case, it held that *Thomas* established a general and inflexible duty for trial courts to prohibit any conduct that might raise the spectre of jury nullification. App.18-20.

The Second Circuit's extrapolation misses the mark on two key points. First, its *Thomas* holding did not establish a categorical rule that district courts must prohibit any arguments that raise the possibility of jury nullification. Instead, *Thomas* established that "courts may [not] permit it to occur when it is within their authority to prevent. *Thomas*, 116 F.3d at 614. The *Thomas* holding is, therefore, limited to preventing the actual act of nullification rather than a defendant's attempt to argue for it. Second, *Thomas* itself supports this interpretation because the Second Circuit qualified its holding that the trial courts' duty only existed as far as it did not interfere with guaranteed rights. *Id.* at 616. It did not, however, address whether a defendant has a constitutional right to make an argument for jury nullification, nor did it address whether a district court judge must prevent trial participants from raising the spectre of jury nullification.

Absent any consideration of the petitioner's right to argue for jury nullification even if the district court must provide subsequent curative instructions to the jury, the Second Circuit's decision in this case cannot be squared with *Thomas* under any circumstances. *Thomas*, therefore, is a broken reed that does not support the Second Circuit's conclusion.

Furthermore, there is no wealth of circuit authority on a defendant's right to argue for jury nullification. Only the Fourth and Eleventh Circuits have determined that the defendants do not have the right to make a jury nullification argument, and the Second Circuit did not discuss what rights that the petitioner has, focusing entirely on its conception of the district court's duties.

The Fourth Circuit did not use the term "jury nullification" when it reaffirmed a district court's decision to prevent defendants from arguing their destruction of government property and disruption of the Selective Service System was justified on moral grounds by their opposition to the Vietnam War. *Moylan*, 417 F.2d at 1007-09. Recognizing that jury nullification had existed for more than fifty years after Revolutionary War, the Fourth Circuit relied on this Court's *Sparf* decision to hold that a defendant was limited to arguing facts, but not the law, to a jury because it was the judge's exclusive province to instruct the jury on the law. *Id.*

The Eleventh Circuit reached the same conclusion although it did not embark on a lengthy discussion. It simply stated that "[i]n arguing the law to the jury, counsel is confined to principles that will later be incorporated and charged to the jury." *Trujillo*, 714 F.2d at 106. It reasoned that "neither the court nor counsel should encourage jurors to violate their oath." *Id.* The Eleventh Circuit did not discuss the historical foundation for a right to argue for jury nullification, and it relied wholly on the circuit courts which have held that a defendant is not entitled to a jury instruction on nullification. *Id.* at 105-06.

While these cases do support the Second Circuit's conclusion, they are a far cry from establishing clear and indisputable law, especially in the shadow of the historical right to argue for jury nullification. Consequently, the Second Circuit had no "clear and indisputable" authority to point to even among the circuit courts.

E. The historical conception of juries supports both a right to nullify and a right to argue for nullification.

The Founding Fathers understood that juries determine more than just a case's facts. They also determine the law of a case. This Court recognized this principle in a civil case less than three years after the ratification of the Bill of Rights. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794) (unanimously instructing the jury that judging both law and fact were properly within its power).[5] Dictionaries of the time confirmed juries' roles, and English, colonial, and early American trial practice further solidify what it means to have a true trial by a jury of one's peers. Furthermore, the impeachment charges against a former justice of this Court drives home the point that juries' power to nullify was accompanied by a defendant's right to argue that they should.

The history of both jury nullification and a defendant's right to argue for it dates to 1649 and an English radical, John Lilburne, who later served as a source of inspiration for the United States Constitution. Lilburne endured a series of prosecutions before the Star Chamber and other English courts for printing and publishing seditious books. *The Trial of John Lilburne and John Wharton for Printing*

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[5] *Brailsford* arose under this Court's Article III original jurisdiction, and the parties tried their case to a jury in front of this Court.

and Publishing Seditious Books. In the Star Chamber, How.St.Tr. 3:1315 (1637). He subsequently was tried for treason during which he was denied counsel and an opportunity to question witnesses. *The Trial of Lieutenant-Colonel John Lilburne at the Guildhall of London, for High Treason*, How. St.Tr. 4:1269, 1379 (1649). With no other option left, Lilburne requested that the jury judge the law in direct defiance of the court, and the jury acquitted him after 45 minutes of deliberation. *Id.* at 1403.

Thus established, jury independence made its appearance in the colonies in the case of *Rex v. Zenger*, How. St. Tr. 17:675 (1735). In *Zenger*, a German printer published writings harshly critical of the royally appointed governor of New York. *See* James Alexander, *A Brief Narrative on the Case and Trial of John Peter Zenger*, Stanley Katz, Ed., 37 (2d ed., 1972).[6] After the court disbarred both of his lawyers and he retained the services of a renowned Pennsylvania lawyer, the printer admitted that he published the alleged libel and asked the jury to decide whether the law given by the judge was the law of the land. *Id.* The court repeatedly sought to prevent the printer's lawyer from making his arguments, but it could not rebut his argument that the jury retained the power to judge the law. *Id.*

The resulting acquittal sparked intense, decades-long, scholarly debate, which had a profound influence on the jury's role at the time that Framers of the United States Constitution wrote the Sixth Amendment. *See* Clay S. Conrad, *Jury*

[6] James Alexander's history of the trial contains the most complete transcript of the trial and is essentially the same report of the trial that appears in the official record.

Nullification 36-40 (1998). The most common legal dictionary in colonial America was *Jacob's Law Dictionary*, *see id.* at 46, and it defined jury as follows:

> Jury (jurata, from the LAT. jurare, to swear) Signifies a certain number of men sworn to inquire of and try the matter of fact, and declare the truth upon such evidence as shall be delivered them in a cause: and they are sworn judges upon evidence in matter of fact….
>
> Juries are fineable, if they are unlawfully dealt with to give their verdict; but they are not fineable for giving their verdict contrary to the evidence, or against the direction of the court; for the law supposes the jury may have some other evidence than what is given in court, and they may not only find things of their own knowledge, but they go according to their consciences. Vaugh. 153, 3 Leon 147.
>
> If a jury take upon them the knowledge of the law, and give a general verdict, it is good; but in cases of difficulty, it is best and safest to find the special matter, and to leave it to the judge to determine what is the law upon the fact. I Inst. 30.

Jacob's Law Dictionary (1782).[7]

This definition – a mere nine years before the ratification of the Bill of Rights – clearly indicates that a jury was well within its power to go against the court's direction and judge both law and fact according to its members' consciences. Prominent Founding Fathers – renowned lawyers – endorsed this view too. In 1771, John Adams wrote that "[i]t is not only [the juror's] right but his duty… to find the

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[7] The first American dictionary did not disagree:

> JU•RY, n. (Fr. jure, sworn, L. juro, to swear.) A number of freeholders, selected in the manner prescribed by law, empanneled and sworn to inquire into and try any matter of fact, and to declare the truth on the evidence given them in the case. Grand juries consist usually of twenty four freeholders at least, and are summoned to try matters alledged in indictments. Petty juries, consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions. The decision of a petty jury is called a verdict.

Noah Webster's Dictionary of the English Language (1st ed., 1828).

verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."[8] C.F. Adams, *The Works of John Adams*, 253-255 (1856). Thomas Jefferson did not disagree, clearly expressing his view that juries had both a role and a duty in determining the law to be executed: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of laws is more important than the making of them." *Letter of Jefferson to L'Abbe Arnond*, July 19, 1789, in 3 *Works of Thomas Jefferson*, 81, 82 (1854).

In 1804, Alexander Hamilton agreed with Adams and Jefferson, but, unlike them, he expressed his views in the libel case of *People against Croswell*, 3 Johns. Cas. 336 (1804). Arguing for a new trial in the face of the trial court's anti-nullification instructions and the prosecution's "modern view,"[9] Hamilton argued to the New York Supreme Court that the law became the constitutional province of a jury in a criminal case:

> [I]n the general distribution of power, in any system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and

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[8] John Adams was not expressing a rosy idealism, but his confidence in the realities of colonial trial practice. He offered this description of the common interaction between judges and juries: "in many cases judges gave the jury no instructions on the law." 1 *The Legal Papers of John Adams* 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[9] The prosecution argued as follows: "It is the right of the jury to decide the fact, and only the fact; and it is the exclusive province of the court to decide the law in all cases, criminal as well as civil. A jury is wholly incompetent… to decide questions of law; and if they were invested with this right, it would be attended with mischievous and fatal results." *Croswell*, 3 Johns. Cas. at 350-51.

> exclusive. That, in civil cases, it is always so, and may rightfully be so exerted. That, in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact….
>
> That, in criminal cases, nevertheless, the court are the constitutional advisers of the jury, in matters of law who may compromit their consciences by lightly or rashly disregarding that advice; but may still more compromit their consciences by following it, if, exercising their judgments with discretion and honesty, they have a clear conviction that the charge of the court is wrong.

Croswell, 3 Johns. Cas. at 361-62.

The Founding Fathers' view of a jury's role were consistent with this Court's jury instructions in *Georgia v. Brailsford*:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the court are the best judges of the law. But still both objects are lawfully within your power of decision.

3 U.S. (3 Dall.) 1 (1794).

A jury's role to judge both law and fact and a defendant's accompanying right to argue that it should was so deeply ingrained in the original understanding of the right to an impartial jury guaranteed by the Sixth Amendment that it formed the basis of the first article of impeachment against a former justice of this Court, Samuel Chase. Congress impeached Chase in 1805 for his mishandling of a trial, which included failing to impanel an impartial jury and failing to allow the defendant to

argue that the jury should judge both law and fact. *Case of Fries*, 9 F. Cas. 924 (1800). The article of impeachment read in part:

> In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.

Id. at 934. Chase successfully defended himself on the impeachment charge by acknowledging the right and demonstrating that he expressly told the defendant's counsel that they "were at liberty to argue the law to the jury." *Id.* at 940.

Consequently, the clear indication from original understanding of the Sixth Amendment indicates that juries had both the power and the duty to judge the law and defendants had a corresponding right to argue that they should and what conclusions that they should reach.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted

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APPENDIX