No. _____

In The
Supreme Court of the United States

GUZMAN LOERA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under this Court's precedent in *United States v. Rauscher supra*, 119 U.S. 407, 430 (1886), individuals have standing to assert violations of an extradition treaty, irrespective of whether the foreign sovereign raises an objection.

2. Whether excessive and punitive pretrial restraints impaired petitioner's right to counsel, a defense, and compulsory due process.

PARTIES TO THE PROCEEDING

Petitioner Guzman Loera was the defendant in the district court proceedings and appellant in the court of appeals proceedings. Respondent, the United States of America, was the plaintiff in the district court proceedings and the appellee in the court of appeals proceedings.

RELATED CASES

- *United States v. Guzman Loera*, Docket No. 19-2239, U.S. Court of Appeals for the Second Circuit, Judgment entered January 25, 2022.

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OPINION BELOW

The opinion of the court of appeals (App. *infra*, 1a-9a) is reported at 24 F.4th 144.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in law and Equity, arising under . . . the Laws of the United States."

Mexico Extradition Treaty, May 4, 1978, [1979] United States – United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (Extradition Treaty or Treaty).

INTRODUCTION

Evident from the proceedings below, when adjudicating the claims of a high-value target like Joaquin Guzman Loera, even the most fair-minded jurist may be tempted to look past defects in the underlying

prosecution and simply get on with the business of incapacitation.

But this presumed impulse must be resisted. "A core promise of our criminal justice system is that even the very worst among us deserves to be fairly tried and lawfully punished." *See U.S. v. Tsarnaev*, 968 F.3d 24, 35 (1st Cir. 2020). Indeed, that imperative "cannot be avoided" by "media"-stoked "hysteria over," or "craven fear" around a particular "individual." *Boudin v. Thomas*, 533 F.Supp. 786, 787 (S.D.N.Y. 1982) (Duffy, J.).

We don't rewrite the rules or throw away the book because the defendant is an arch public enemy. If anything, we enforce them more vigilantly – to subdue popular passions, condemn the scourge of mob justice and extol the supremacy of the law.

Guzman's prosecution was marred by rampant excess and overreach, both governmental and judicial – needless resorts if he was really a kingpin extraordinaire his adversaries insisted. If we are to vindicate the preceding maxims and redeem our justice system's promise – if they are more than catchphrases and empty sloganeering – its result cannot be tolerated.

The primary question here is whether Article III affords a foreign national individual standing to challenge the validity of a post-extradition rule of specialty waiver, particularly where it is alleged that the waiver was obtained through Government fraud. The Court of Appeals has said *no*, only foreign governments do. But this Court, and many sister circuits, has ruled that an

extradition Treaty embodies a "principle of the recognition of the rights of *prisoners*," not merely States-parties. *United States v. Rauscher supra*, 119 U.S. 407, 430 (1886).

The Court of Appeals' misguided view of the relationship between the standing requirements of Article III, Section 2, and extradition treaties, should not be left to stand uncorrected. That view not only runs contrary to the holdings of this Court and several sister circuits, but it runs the risk of spilling over into future cases.

STATEMENT OF THE CASE

Trial Court Proceedings

After a three-month jury trial, petitioner was convicted in the United States District Court for the Eastern District of New York (Brian M. Cogan, District Judge), of *inter alia* conducting a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848(a)-(b).

The evidence at trial, whose legal sufficiency is not contested, permitted a rational jury to conclude that petitioner played a leading role in the Sinaloa Cartel, a group billed as the world's largest and most powerful narcotics trafficking organization. In that capacity, the government alleged, petitioner and others arranged and supervised shipments of vast quantities of cocaine,

heroin, methamphetamine and marijuana to the United States and elsewhere over a 25-year period.

Although tried on federal charges in Brooklyn, New York, petitioner was originally extradited to Texas and California, to face indictments pending against him in those judicial districts. *See* ECF 110 at 2-3 (8/3/17). Upon his transfer to America, the government sought and gained Mexico's after-the-fact consent to prosecute Guzman under a different indictment in Brooklyn. *Ibid.* 110 at 10-13 (8/3/17).

Petitioner subsequently moved to dismiss the Brooklyn indictment, insisting that prosecution violated the rule of specialty as incorporated in the operative extradition treaty between the U.S. and Mexico. In his motion to dismiss, petitioner accused the Government of fraudulently procuring Mexico's consent to a specialty waiver – by knowingly including material misrepresentations and omissions in the extradition papers and possibly the waiver request itself. ECF 110 at 4-10, 22, 25-28 (citation omitted). Regarding the latter, petitioner noted that the district court had allowed the Government to withhold production of the documents presented to Mexico in support of the waiver request, preventing the defense from scrutinizing or contesting their veracity. *Ibid.* 11 n. 8, 25-27; *see also* A:145-50.

Nevertheless, the district court denied dismissal on procedural grounds, *without* adjudicating the merits of petitioner's claim. In a four-sentence docket entry citing to the Court of Appeals' precedent in *United*

States v. Barinas, 865 F.3d 99, 105 (2d Cir. 2017), the district court held that petitioner had "no standing to raise a Rule of Specialty violation." A:10-11 (9/15/17 Docket Entry). *Barinas* held that extradition treaties create "rights and obligations between" contracting nations, and not "private persons" who "may benefit" from their "existence." *Id*., 865 F.3d at 104-05 (citations and internal quotation marks omitted). Under *Barinas*, "absent protest or objection by the offended sovereign," a defendant lacks standing to assert a specialty "violation." *Ibid.* The district court, finding no such "protest or objection by Mexico" and nothing in the extradition treaty conferring an enforceable right, denied the dismissal motion for want of standing. *Ante* n. 40. The district court acknowledged, however, that barring claims like petitioner's required an "extension" of existing precedent. A: 146.

Appeal

In his brief to the Court of Appeals, petitioner argued that *Barinas* (1) was wrongly decided, (2) that it runs contrary to this Court's precedent in *United States v. Rauscher*, 119 U.S. 407, and (3) that even *if Barinas* were correctly decided, it would not apply to specialty waivers, particularly when attacked as fraudulently induced.

In addressing this issue, the Court of Appeals "decline[d] to reconsider *Barinas*," insisting that it was "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel . . . or

by the Supreme Court." *United States v. Guzman Loera*, 24 F.4th at 151 (internal quotations omitted). As a result, the court deferred to the panel holding in *Barinas* – i.e., that extradition treaties do "not confer an individual right" and concern only the "rights and obligations between States-parties." *Ibid*. Based on this view, the Court of Appeals held that petitioner had no "individual right to assert violations of the Treaty." *Ibid*.

In the alternative, the Court of Appeals – clearly aware that *Barinas* does not rest on firm ground – held that "to the extent there is any disagreement among the circuits about a defendant's standing to raise a specialty objection in the absence of a waiver by the extraditing nation, there is no support for granting such standing in a case like this, in which Mexico has explicitly consented to having [petitioner] tried on the instant indictment." *Id.*, 24 F.4th at 151-52.

Nevertheless, in issuing alternative holding, the Court of Appeals ignored that petitioner was challenging *how* Mexico's consent was obtained. The question whether Mexico's consent was *in fact* induced by fraud was *never* resolved in the *nisi prius* court. The district court, constrained by *Barinas*, denied petitioner's dismissal motion for want of standing; the court made *no* fact findings on the issue of fraudulent consent.

REASONS FOR GRANTING CERTIORARI

Rule 10(a) – Circuit Split

At the outset, petitioner calls this Court's attention to the fact that the underlying Second Circuit opinion and *Barinas* are in conflict with the decisions of several sister circuits. *See U.S. v. Andonian*, 29 F.3d 1432, 1435 (CA9 1994) (holding that "[a]n extradited person may raise *whatever objections the extraditing country is entitled to raise*") (emphasis added); *Accord*, *e.g.*, *U.S. v. Thomas*, 322 F. App'x 177, 180 & n. 4 (CA3 2009) (embracing "majority" view that defendant has individual standing to invoke rule of specialty); *U.S. v. Levy*, 905 F.2d 326, 328 n. 1 (CA10 1990) (finding that individual defendant had standing to mount specialty challenge; *Rauscher* described doctrine as a "right conferred upon persons brought from a foreign country" to this one and "gave extradited defendants a right to claim the rule's protection") (*quoting* 119 U.S. at 424 and *U.S. v. Vreeken*, 803 F.2d 1085, 1088 (CA10 1986)) (internal quotation marks omitted); *U.S. v. Thirion*, 813 F.2d 146, 151 & n. 5 (CA8 1987) (rejecting claim that defendant "lacked standing" to assert specialty violation; extradited individual may lodge any objection rendering country might have raised); *cf. U.S. v. Puentes*, 50 F.3d 1567, 1572, 1575 (CA11 1995) (holding that individual defendant has standing to allege specialty violation – to raise any specialty objection requested nation might have asserted – but opining in dicta that latter's waiving right to object defeats defendant's standing; no suggestion that sending state actually issued any waiver, let alone that U.S.

authorities purportedly extracted one by fraud as in this case); *U.S. v. Fontana*, 869 F.3d 464, 468-70 (CA6 2017) (similar); *but see U.S. v. Burke*, 425 F.3d 400, 408 (CA7 2005) (adopting *Barinas*-type approach); *U.S. ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (CA3 1997) (endorsing *Barinas*-type approach in what *Thomas* (322 F. App'x at 180) and *Fontana* (869 F.3d at 470) respectively called "dicta" and "pure dictum"); *U.S. v. Kaufman*, 874 F.2d 242, 243 (CA5 1989) (deferring to State Dept. view that only "offended nation can complain about purported" specialty "violation") (internal quotation marks omitted).

Under this Court's Rule 10, the Court of Appeals' decision establishes a Circuit Split that shows no signs of resolving itself. Indeed, "[o]ne of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. ___, ___, 139 S.Ct. 408, 408 (2018) (THOMAS, J., dissenting from denial of certiorari) (quoting this Court's Rule 10(a)).

Rule 10(c) – The Court of Appeals decided an important federal question in a way that conflicts with the relevant decisions of this Court.

In addition to establishing a Circuit Split under Rule 10(a), the Court of Appeals' judgment also warrants certiorari because it is antithetical to "the relevant decisions of this Court." *Id.* The Second Circuit's ruling is inconsistent with this Court's long-standing recognition that specialty clauses of extradition

treaties embody a "principle of the recognition of the rights of *prisoners*," not merely States-parties. *United States v. Rauscher supra*, 119 U.S. at 430 (emphasis added). In *Rauscher*, this Court expressly held that if any tribunal fails "to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government," including by way of "writ of habeas corpus." *Id.* Contrary to the Second Circuit's view, *Rauscher*'s repeated references to rights and remedies, including issuance of the Great Writ, reflects an immemorial understanding that prisoners have an "individual right to assert violations of the Treaty." Guzman Loera, 24 F.4th at 151. After all, foreign states cannot petition for a writ of habeas corpus, only *prisoners* can. *See Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976) (holding that a third-party habeas filing would be allowed "only if it were demonstrated" that the prisoner is physically "unable to seek relief on his own behalf"); *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("To establish an Art. III case of controversy, a litigant first must clearly demonstrate that he has suffered an 'injury in fact,' . . . an injury to himself that is 'distinct and palpable,' as opposed to merely 'abstract' ") (emphasis added).

Article 17 of the U.S.-Mexico Extradition Treaty states, in relevant part:

> 1. A person extradited under the present Treaty shall not be *detained, tried or punished* in the territory of the requesting Party for an offense *other than that for which extradition has been granted* nor be

> extradited by that Party to a third State unless:
>
> a) He has left the territory of the requesting Party after his extradition and has voluntarily returned to it.
>
> b) He has not left the territory of the requesting Party after being free to do so; or
>
> c) The requested Party *has given its consent* to his detention, Trial, punishment or extradition to a third State for an offense other than that for which extradition is granted.

U.S.-Mexico Extradition Treaty, *supra*, 31 U.S.T. at 5071 (emphasis added).

Article 17 has been regarded as "an explicit recitation of a general rule of extradition known as the doctrine of specialty." *U.S. v. Lomeli*, 596 F.3d 496 (8th Cir. 2010). The doctrine, which dates back to the mid-1800s, provides that "a defendant may be tried only for the offense for which he was delivered up by the asylum country." *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987); *see also Rauscher supra*, 119 U.S. at 430.

Here, the Court of Appeals was clearly wrong to conclude that petitioner lacked standing under the Treaty because Mexico "explicitly consented" to a waiver of specialty. *Id.*, 24 F.4th at 152. This holding is misguided because, again, the petitioner was challenging *how* Mexico's consent was obtained. Moreover, a necessary implication of the Court of Appeals' ruling is

that individual-standing under the Treaty *would* exist if Mexico had *not* "explicitly consented" to a waiver. But "consent," of course, is a legal term of art. This Court has long held that "consent" must be "voluntarily given," and "that voluntariness *is a question of fact to be determined from the totality of all the circumstances*." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In the present case, there have been *no* factfindings whatsoever on the crucial issue of whether Mexico's consent was *validly* obtained. As such, the Court of Appeals simply had no business purporting to resolve the *factual* issue of consent on its own accord; in other words, as an appellate court, it was powerless to decide the question of consent *before* the *nisi prius*. The appropriate step would have been to remand the petitioner's case for a hearing in the district court.

Certiorari is also warranted because excessive and punitive pretrial restraints impaired petitioner's right to counsel, a defense, and due process of law.

Relying significantly on a spate of private filings skirting adversarial testing – at least 12 by Aug. 2018 – the government convinced Judge Cogan to commit Guzman to what the court called long-term "solitary confinement," dramatically "restricti[ng]" internal and external "communication" and "visit[ation]," before he'd been tried or convicted of anything. *See* 154 A: 123. Physically separated from, and condemned to total silence around, fellow inmates, Guzman's custodial conditions prohibited substantially all contact – personal,

written, telephone and electronic – with his wife, slashing monitored calls, visits and (delayed) correspondence with other close relatives. *See* A: 95-100. More broadly, the conditions extinguished all direct and indirect communication with potential witnesses, media members and other third parties beyond Guzman's defense team, limiting and delaying access to prescreened books, censored magazines and censored newspapers. A: 91-96, 100-03.

As couched by defense counsel with court approval (ECF 50 at 7; A: 124) the conditions left Guzman "confined" to a small, windowless cell. He remains in this cell alone for 23-hours a day Mondays through Fridays, when he is permitted a single hour of solitary exercise in another cell that contains one treadmill and one stationary bicycle. On the weekends, he is confined 24-hours a day and not permitted any exercise. His meals are passed through a slot in the door; he eats alone. The light is always on. With erratic air-conditioning, he has often lacked enough warm clothing to avoid shivering. Repeated requests by counsel to adjust the temperature have landed on deaf ears. He never goes outside. His only opportunity to see daylight is when he passes a small window on the way to his counsel visit or the exercise cell. Although he purchased a small clock from the commissary, it was later removed from his cell without explanation. Without a window or access to natural light the clock was the only way for Guzman to distinguish night from day.

But those enormous handicaps – criticized by at least three justices of this Court and denounced as

illicit pre-conviction punishment by a growing chorus of their lower court colleagues – were only the start. By their express terms, the SAMs and ensuing solitary confinement were designed to "restrict Guzman's access to the mail, the media, the telephone, and visitors"; "prohibit[]" the defense team from "forward[ing] third-party messages to or from" Guzman; and "interrupt" his "communication" with the "outside world" – all for the avowed "purpose" of "significantly limiting" his "ability to communicate (send or receive) threatening information." A: 86-87, 89-96, 103.

Yet even those draconian measures – blacking out nearly all channels of internal and external communication – failed to satisfy the government. Leaning heavily on another inscrutable private filing, it insisted on a belt-and-suspenders approach, augmenting the SAMs with a wildly overbroad protective order. Not content merely to ban protected discovery review with the case's predominantly foreign witnesses, the order also gave government lawyers and the court – through strict identification, vetting and judicial admonition protocols – an effective veto over their domestic counterparts. *See ante* 27-28 and sources cited.

And there was more. Pointing to the SAMs and protective order, and rehearsing the same purported security concerns that ostensibly motivated them, the government used the restrictions already in place – plus still further rounds of secret submissions – to incite a series of pyramiding constraints targeting discrete trial and Guzman's trial preparation rights. Leading the way? Orders taxing him with an

anonymous and partially sequestered jury; delaying discovery as to key cooperating witnesses and limiting their cross-examination; and withholding other discovery altogether, "summary substitutions" aside, for supposed reasons of national security. *See ante* 25-26 and sources cited. *E.g.*, ECF 28 at 4 (2/2/17); *id.* 48 at 7 (3/6/17); *id.* 52 at 2; A: 86-89.

How did the government justify this tower of expanding restraints – one stoking the next, each built atop the last – on Guzman's ability to mount a defense and receive a fair trial? With the perpetual refrain that Guzman, as head of the globe's largest drug cartel, had (1) corrupted *Mexican* authorities to promote enterprise affairs, foil investigations and facilitate prison escapes and (2) arranged to violently eliminate prospective witnesses and others suspected of operating against the cartel's interests. *E.g.*, ECF 28 at 4 (2/2/17); *id.* 48 at 7 (3/6/17); *id.* 52 at 2; A: 86-89.

But those tropes prove too much, refuting themselves and ignoring the proverbial elephant in the room. As Chief Magistrate Judge Mann cogently observed, the *American* justice system and detention center housing the then 60-year-old, 5'4" Guzman – Lower Manhattan's forbidding MCC, "the most secure . . . Bureau of Prisons . . . facility in the New York City Metropolitan Area" *Basciano III*, 542 F.3d at 953 n. 1 (citation and internal quotation marks omitted) – was a world away, physically and substantively, from the shady Mexican officials and jails he assertedly bribed, corrupted and contrived his way out of some years earlier. ECF 17 at 11; *id.* 50 at 17; *id.* 52 at 8; A: 173-74

n. 17; A: 88; T. 5515, 5532, 5541, 5990. Thus, absent any claim that Guzman would "collude" with domestic authorities, his government-screened "American lawyers or . . . their staffs" (164 A: 173-74 n. 17) – and given Judge Cogan's own concession that he behaved in "exemplary" fashion and "displayed considerable grace under pressure" despite "difficult [U.S.] proceedings" and stringent detention terms (165) – it simply was "not reasonable to infer that [Guzman] pose[d] the same level of security and escape risks as when he was held in Mexican prisons." A: 173-74 n. 17.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Dated: April 21, 2022

Respectfully submitted,

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