No.

In the Supreme Court of the United States

ANDREW DOWD, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

JOHN P. ELWOOD
Counsel of Record
KOLYA D. GLICK
DANA KAGAN MCGINLEY
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

QUESTION PRESENTED

1. Whether a district judge impermissibly blends the judicial and prosecutorial roles such that "his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), where he repeatedly "urge[s] the government to continue their investigation" and "pursu[e]" certain "corrupt doctors" and then presides over the ensuing trial.

2. Whether an appellate court may determine that an error at trial was harmless by evaluating only the strength of the government's case and not the potential effect of the error on the jury.

3. Whether a district court violates a criminal defendant's due process rights when it imposes an $8 million restitution order based on the prosector's off-the-docket email to chambers, without notifying the defendant when or how he should respond, and without even waiting the 14 days local rules provide for responses to motions filed on the public docket.

PARTIES TO THE PROCEEDINGS

Petitioner Dr. Andrew Dowd was a defendant and appellant below. Petitioner's co-defendant at trial and co-appellant below was George Constantine.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y):

United States v. *Constantine*, No. 21-CR-530 (Apr. 25, 2023) (judgment)

United States v. *Constantine*, No. 21-CR-530 (July 20, 2023) (amended judgment)

United States Court of Appeals for the Second Circuit:

United States v. *Constantine*, Nos. 23-6440(L), 23-6474 (Con), 23-6879 (Con) (Feb. 25, 2025) (summary order affirming judgment)

United States v. *Constantine*, Nos. 23-6440(L), 23-6474 (Con), 23-6879 (Con) (Apr. 17, 2025) (order denying petition for panel rehearing)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Constitutional Provisions, Statutes, and Rules

Other Authorities

Other Authorities—Continued Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, App.1a-11a, is unreported, but available at 2025 WL 601201. The court of appeals' order denying rehearing, App.12a-13a, is unreported. The district court's order denying recusal, App.14a-24a, is unreported, but available at 2023 WL 2592835. The district court's order of restitution, App.25a-29a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered February 25, 2025. The court of appeals denied a timely petition for rehearing on April 17, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

28 U.S.C. § 455 provides, in relevant part:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

INTRODUCTION

This petition represents the culmination of the government's highly irregular criminal fraud prosecution of petitioner Andrew Dowd, a successful 69-year-old orthopedic surgeon with "essentially no criminal history." Dowd C.A.App.3086.

The case arises from the second of two criminal trials for a conspiracy to file fraudulent lawsuits based on staged slip-and-fall accidents in New York City. It began when, over the course of more than a year during the first case (involving "runners" in the scheme), the trial court repeatedly "urge[d] the government to continue their investigation" to "pursu[e] the corrupt * * * doctors." Dowd C.A.App.158, 183-184; see Dowd C.A.App.184 ("I would hope the government is following through on a continuing investigation."). When the government proceeded to indict petitioner as urged, the judge randomly assigned to preside over the case was replaced with the same judge who had "made it clear to the government" that he wished to see further action against petitioner's "corrupt" conduct. Dowd C.A.App.183-84.

During the ensuing trial, the district court permitted a private insurance-fraud investigator to testify as a lay witness based on her review of hearsay insurance claim files, without firsthand knowledge of the alleged conspiracy. Among other things, the witness told the jury how her experience as a fraud investigator allowed her to identify indicia of insurance fraud she called "red flags," and testified that those "red flags" were present *in this case*, purportedly making fraud obvious to observers.

The jury reached the same conclusion as the professional fraud investigator. Though it was undisputed that each of petitioner's allegedly fraudulent patients had positive MRI reports indicating soft-tissue damage and told petitioner they continued to suffer pain after physical therapy and other conservative treatment, the jury found

petitioner guilty of wire fraud on a "conscious avoidance" theory based entirely on circumstantial evidence.

After sentencing, the government did not file a motion for restitution on the docket. Rather, the government sent the judge an email requesting restitution. The district court did not acknowledge receipt of the email or set a hearing or briefing schedule, as it had done for defendants in the first trial; nor did the court indicate when it intended to rule. Instead, without waiting the 14 days that local rules prescribe for responding to *docketed* motions, and without ever hearing from petitioner, the district court entered the government's proposed $8.1 million restitution order verbatim. The Second Circuit affirmed the conviction and restitution order in an unpublished summary order.

This petition raises three important questions with far-reaching implications.

First, it presents a question about whether a district court impermissibly blends the judicial and prosecutorial roles under 28 U.S.C. § 455, when it repeatedly "urge[s]" the prosecutor to pursue a criminal investigation and then presides over the subsequent criminal trial. As this Court has made clear: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *In re Murchison*, 349 U.S. 133, 137 (1955); see *Donziger* v. *United States*, 143 S. Ct. 868, 868-869 (2023) (Gorsuch, J., dissenting from denial of cert.). Prosecutors and district court judges interact daily, and "[j]udges often are tempted to seek a larger role in the conduct of litigants that appear frequently before them." *In re United States*, 398 F.3d 615, 618 (7th Cir. 2005). But when judges appear sufficiently interested in a specific criminal case to seek to influence the prosecution's decisions, they cannot then preside over the ensuing prosecution.

Second, this petition raises an important and recurring question of criminal law: Can an appellate court hold harmless an evidentiary error without considering the error's prejudicial effect on the jury? By holding that it can, the Second Circuit exposed circuit courts' longstanding confusion over harmless error review, which this Court recognized but left unresolved in *Vasquez* v. *United States* (No. 11-199), dismissed as improvidently granted, 566 U.S. 376 (2012), and which has continued to divide circuits and panels alike, see, *e.g.*, *United States* v. *Pon*, 963 F.3d 1207, 1246 (11th Cir. 2020) (Martin, J., dissenting in part). The Second Circuit's freeform harmless-error analysis exemplifies the well-documented problems with circuit courts' subjective "guilt-based" harmlessness jurisprudence, underscoring the need for this Court's guidance regarding a doctrine that affects more criminal appeals than any other. At minimum, this Court should grant certiorari, vacate, and remand for the Second Circuit to assess the prejudicial effect of the evidence it breezily deemed "harmless."

Third, this petition presents the question whether district courts' discretion over restitution procedures allows them to impose $8.1 million in restitution based on the prosecutor's off-the-docket email to chambers, without providing the defendant notice of when the restitution order will issue, and without even waiting the 14 days local rules provide for responding to *docketed* motions—the only written procedure available for petitioner to consult. The *ad hoc*, unwritten restitution procedure that the district court followed (and which the Second Circuit endorsed) is a flagrant due process violation. If due process permits such devastating penalties to be imposed using casual, improvised procedures, this Court should say so to provide fair notice to criminal defendants.

STATEMENT

A. Overview Of Petitioner's Prosecution

Ten defendants were found guilty of participating in a fraudulent staged-accident scheme orchestrated by disgraced former chiropractor Peter Kalkanis. Five defendants were convicted in the first case, and five in the second. For nine of the defendants ("the Conspirators"), the government produced extensive *direct* evidence of their knowledge of, and intent to join, the scheme: They socialized, shared office space, exchanged money using untraceable cash payments, spoke explicitly about staging accidents, testified expressly about each other's knowledge of the scheme, and warned each other when the Travelers Insurance Company (Travelers) began to investigate their scheme. See, *e.g.*, Dowd C.A.App.806-807, 814, 1999-2000, 2204-2205, 2228-2231.

Yet, throughout the 14-day trial, the government mustered no comparable evidence about petitioner, the supposed tenth co-conspirator. To the contrary, the record demonstrates that the Conspirators used petitioner (like many other uncharged doctors) to increase the value of their fraudulent lawsuits by sending him patients for medical treatment under false pretenses because: he had a "monster practice" with ten offices and thousands of patients; he had worked for years providing medical care in no-fault personal injury cases; and, when presented with patients complaining of pain with MRI reports reflecting soft-tissue damage, he was not reluctant to perform arthroscopy—an elective, low-risk, minimally invasive technique used for diagnosing and treating joint pain. Dowd C.A.App.1336, 1341-1342, 2211-2212, 2482, 2513, 2279-2281, 3107-3108; see Dowd C.A.App.2000. As even the government has conceded, its "evidence against Dowd was unquestionably the weakest of all the defendants." Pet. C.A. Br. 73; see Gov't C.A. Br. 70.

The Conspirators recruited fraudulent plaintiffs, most of whom had preexisting knee injuries; instructed the plaintiffs to stage accidents on insured premises; sent the plaintiffs to petitioner with MRI reports showing soft-tissue damage; directed the plaintiffs to lie to petitioner about their injuries; and paid the plaintiffs to tell petitioner they wanted surgery. See, *e.g.*, Dowd C.A.App.1946-1947, 1955-1956, 2055-2056, 3167, 3193, 3218. While the Conspirators spoke freely about the scheme with one another, they lied to petitioner; never informed petitioner that the plaintiffs' accidents were staged; and, when they learned of the Travelers investigation, they discussed the investigation among themselves, but *never told petitioner*. See Dowd C.A.App.2228-2231.

Petitioner's conduct bore none of the hallmarks of the Conspirators. He had no personal relationship with the Conspirators and no contact with most of them. Cf. Dowd C.A.App.2204-2205. He never dealt in cash, instead issuing surgery-related payments in checks bearing his own (or his company's) name; deposited checks into his personal bank and investment accounts, whose year-end records he provided to his accountant; declined to refer patients to the Conspirators' preferred MRI facility (which one Conspirator owned); did not operate on dozens of patients Kalkanis referred; and frequently diagnosed patients with degenerative conditions caused by age rather than traumatic injury, *decreasing* the value of the Conspirators' fraudulent lawsuits. Dowd C.A.App.723, 1391, 1493, 1920, 1922, 1943-1944, 1958-1959, 1999-2000.

B. The District Court Denies Petitioner's Recusal Motion

1. The government first prosecuted five individuals—Peter Kalkanis, Bryan Duncan, Kerry Gordon, Robert Locust, and Ryan Rainford—on fraud and conspiracy charges. *United States* v. *Duncan*, No. 18-

CR-289 (S.D.N.Y.), ECF 2. Kalkanis and Gordon pleaded guilty and testified for the government. Duncan, Locust, and Rainford proceeded to trial before District Judge Sidney H. Stein.

Ringleader Kalkanis directed a team of "runners" (Duncan, Locust, and Rainford) to recruit fraudulent plaintiffs—most of them actually injured—to stage accidents at insured businesses. Dowd C.A.App.1946-1947, 1955-1956, 2055-2056. The runners led the fraudulent plaintiffs through emergency-room visits, meetings with lawyers, chiropractor appointments, and MRIs, before delivering them to a rotating set of physicians for treatment. Dowd C.A.App.723-724, 968-970. At the *Duncan* trial, Kalkanis testified that every person involved—including runners, lawyers, and doctors—was aware the lawsuits were fraudulent. See, *e.g.*, *Duncan* Tr.1065-1066, ECF 159. The jury convicted all three runners.

2. Throughout the *Duncan* trial, the runners deflected culpability by arguing that Kalkanis, the lawyers, and the doctors (specifically naming petitioner) were most culpable. *Ibid*; Dowd C.A.App.125. Over an 18-month period, the district court repeatedly urged the government to pursue those doctors and lawyers. At Duncan's sentencing, for instance, the court stated:

> *I would urge the government to continue their investigation here*, because, based on this testimony, the lawyers and the doctors were heavily involved in this.

Dowd C.A.App.158 (emphasis added).

At Locust's sentencing, the court agreed with defense counsel that "the worst people involved in this conspiracy were people who had never, ever been prosecuted," Dowd C.A.App.183:

> I assume, I would hope, and I made it clear to the government during the trial and at other proceedings in this case, that the government is pursuing the corrupt lawyers, the corrupt doctors who were involved in this scheme. * * * I would hope the government is following through on a continuing investigation.

Dowd C.A.App.183-184.

3. Shortly after the court "urge[d] the government" to "investigat[e]" and "pursu[e] the corrupt * * * doctors" at Duncan's sentencing, the government indicted petitioner and four others for mail fraud, wire fraud, and conspiracy. Dowd C.A.App.68. It accused lawyers George Constantine and Marc Elefant of "commenc[ing] personal injury lawsuits" against property owners without "disclos[ing] that the Patients had either deliberately fallen or never fallen at the Accident Sites," and litigation financier Adrian Alexander of funding the suits. Dowd C.A.App.70-71. The government also alleged that petitioner and Dr. Sady Ribeiro conducted "surgeries regardless of the legitimate medical needs of the Patients," Dowd C.A.App.72, to "maximize the value of their Fraudulent Lawsuits," Dowd C.A.App.74.

The allegations against the two doctors were distinct. The indictment relied on Ribeiro's *own* inculpatory communications, such as one Ribeiro email stating: "I will play [a] very honest 'game' with you * * * I see the patient and I generate a very good dictation that justifies the treatment—there is a cost for that and I hope a profit." Dowd C.A.App.73. The trial evidence showed Ribeiro directing other Conspirators to "delete" emails discussing fraudulent cases. Dowd C.A.App.802-803.

The indictment cited *no such communications* from petitioner. Rather, it rested principally on the allegation that petitioner "almost invariably" recommended surgeries to patients with positive MRI reports and

complaining of persistent pain, which the indictment alleged were unnecessary. Dowd C.A.App.71.

4. Petitioner's case was randomly assigned to District Judge Loretta Preska. Dowd C.A.App.10. Two days later, the government submitted a related-case letter on the *Duncan* docket. No. 18-CR-289 (S.D.N.Y.), ECF 363. Petitioner's case was promptly reassigned to Judge Stein without explanation. Dowd C.A.App.10. After reassignment, Elefant, Alexander, and Ribeiro pleaded guilty.

At Alexander's plea hearing, the court again commented on the culpability of individuals like petitioner, "[h]ighly educated professionals—doctors, lawyers," who "were involved in a scheme that boggles the mind" and provided a "frightening insight into human nature." Dowd C.A.App.221-222. Petitioner was then awaiting trial.

After reviewing Alexander's plea minutes and the prior sentencing transcripts, petitioner moved for Judge Stein's recusal. Dowd C.A.App.122. The court denied the motion orally, Dowd C.A.App.305, and memorialized its decision after trial, App.14a-24a.

C. The District Court Allows Lay Testimony From A Professional Insurance Fraud Investigator

1. Unlike for the Conspirators, no witness offered testimony regarding petitioner's direct knowledge. Recognizing that its case against petitioner was entirely circumstantial, the government pursued a "conscious avoidance" theory against him. App.81a-82a. The jury was thus permitted to convict even if petitioner lacked actual knowledge of the scheme if he "was aware of a high probability that a crime was being committed," and purposely "clos[ed] his eyes to it or intentionally fail[ed] to investigate it." App.82a.

2. The government largely sought to prove its conscious avoidance case through Tara Arce, a Travelers insurance-fraud investigator. Petitioner moved pre-trial to exclude Arce's testimony entirely, arguing that she was an undisclosed expert and would offer highly prejudicial, improper lay opinion testimony, namely, that her investigation found "hallmarks of fraud." Def's Mot. to Exclude Expert Test., ECF 113.[1] During trial, petitioner separately moved to exclude Arce's testimony because it was based on hearsay documents never produced to defendants. Def's Mot. to Exclude Hearsay Test., ECF 142; see App.74a-77a; Dowd C.A.App.1098-1115. Despite recognizing that Arce's testimony came "pretty close" to saying that there "were indicia of fraud" in the insurance files, App.60a, the district court allowed her testimony.

3. Arce testified as a purported lay witness over the course of two days. The government elicited Arce's extensive background in insurance fraud investigations: as a "claim investigator for [Travelers'] major case unit," where she "investigate[d] organized fraud," Dowd C.A.App.1066; a "claim investigator for Prudential healthcare national anti-fraud division," Dowd C.A.App.1066; and an "investigative analyst" for the "New Jersey Office of Insurance Fraud Prosecutor," Dowd C.A.App.1066.

Arce detailed patterns that her experience led her to believe were "red flags" indicating insurance fraud. App.68a. Those "red flags" included: "[1] unwitnessed accidents, [2] late reporting, [3] no medical treatment at the [accident] scene, [4] no incident report to the insured, [5] questionable * * * or incomplete medical records, * * * [6] funding company involvement with high interest rates,

---

[1] Unless otherwise noted, ECF citations refer to the district court docket in petitioner's case, No. 21-CR-530 (S.D.N.Y.).

and * * * [7] possible provider attorney relationships." App.68a

Although Arce had no medical training, she also described "red flags" in medical records, such as repeated use of the same medical provider, App.68a, App.71a, or surgery not preceded by conservative treatment like physical therapy or acupuncture, App.65a. Arce implied that petitioner featured heavily in her fraud investigation, App.74a, but petitioner was the doctor for just five of Constantine's 41 Travelers claims, Dowd C.A.App.1147.

After testifying extensively about what kinds of "red flags" indicate insurance claims are fraudulent, App.68a, Arce explained that she initiated her investigation after an unnamed colleague identified "red flags" on Constantine's claims with Travelers, App.72a-73a. After overruling repeated objections to Arce's testimony, App.68a-74a, the court instructed the jury to disregard that *single* answer, App.72a-73a.

4. Arce's testimony formed a central theme of the government's case. In closing, the government argued:

> Tara Arce testified about some of the red flags that she looks for when she's looking at trip-and-fall cases—unwitnessed accidents, late reporting, no incident reports to the insurer, questionable medical reports, provider-attorney relationships, and funding company involvement—all of which you saw in George Constantine's cases and the cases that Dowd treated as well.

App.81a.

The government *repeatedly* invoked Arce's testimony throughout closing and rebuttal. See, *e.g.*, App.80a ("Tara Arce * * * explained to you how insurance companies rely on the allegations in complaints and the medical treatment provided to evaluate and settle claims."); see also App.81a; Dowd C.A.App.2672, 2885. The government

also featured Arce's colorful "red flags" metaphor prominently in closing: The government recited evidence—virtually none of it relevant to medical treatment and thus unknown to petitioner—and argued, "think about all of the red flags, * * * bright red flags that Dowd and Constantine cannot ignore, cannot bury their head in the sand, to avoid learning." App.82a.

Arce's testimony was *the only "red flags" evidence at trial*. The government thus leaned heavily on her terminology to support the central theme of its entirely circumstantial "conscious avoidance" case against petitioner. The jury convicted petitioner and Constantine on all counts. App.30a. Judge Stein sentenced petitioner to eight-and-a-half years of imprisonment. App.32a.

Recognizing that petitioner's appeal raised "a substantial question of law or fact likely to result in reversal [or] an order for a new trial," the district court granted petitioner bail pending appeal. ECF 278 at 2 (alteration in original) (quoting 18 U.S.C. § 3143(b)(l)(B)).

D. The District Court Orders $8.1 Million In Restitution Based On The Government's Email

For every defendant sentenced before petitioner, the government (and the district court) agreed that $3.8 million represented the *total* restitution amount for all victim losses. See, *e.g.*, ECF 284, 285, 286. When it was petitioner and Constantine's turn, however, the government tallied approximately $11 million in *additional* losses, allegedly from the same scheme. ECF 299. The government argued that petitioner should pay $8,177,011 in restitution. ECF 299.

The government never filed a restitution motion on the docket. Instead, the government sent the judge an email attaching (1) a letter requesting restitution; (2) a proposed restitution order; and (3) assorted spreadsheets and emails from insurance companies claiming losses.

ECF 294-1, 294-3; see, *e.g.*, ECF 299-3. The government's letter noted that the "[d]efendants d[id] not consent" to the restitution request. ECF 294-3 at 1. The government asked that the court "enter the attached restitution order by July 24, 2023." *Ibid.*

Ten days later, on July 20, without either acknowledging the email or hearing from petitioner, the court entered the government's proposed restitution order unchanged, App.25a-29a, along with an amended judgment, App.30a-31a. The government filed its restitution materials on the docket only *after* petitioner filed a Rule 35 motion to correct certain errors in calculating restitution. ECF 294, 299.

E. The Second Circuit Summarily Affirms

The Second Circuit affirmed in an unpublished summary order.

1. The court rejected petitioner's recusal argument, stating that although petitioner was repeatedly mentioned by name during the testimony that prompted Judge Stein's remarks, the judge's "comments were not directed at and did not refer to the Appellants but, rather, generally referenced the scope of the criminal scheme and the propriety of a full investigation." App.4a. Although the recusal motion was filed and decided before trial, the Second Circuit thought it significant that the trial judge ultimately imposed only an eight-and-a-half year sentence on a then-68-year-old, reasoning that "[t]he fact that Judge Stein imposed significantly below-Guidelines sentences * * * undermines [Appellants'] insistence that he harbored any bias against them." App.4a.

2. The court "assume[d] * * * that Arce's testimony crossed the line into providing an expert opinion that was improperly admitted at trial." App.6a. Without articulating any standard for harmless-error review, the court concluded that any error was harmless. App.6a.

Noting that the district court struck part of Arce's answer to a single question, the court concluded that "the District Court struck most of the 'red flags' part of Arce's testimony and instructed the jury to disregard it." App.6a. The court asserted that "the Government never mentioned [Arce's challenged] testimony in its closing argument to the jury, referring instead to other 'red flags' that alerted the Appellants to the fraudulent scheme." App.6a; but see C.A. Pet. for Reh'g 7-13. The court then remarked that "[t]here was also significant proof besides Arce's testimony that the Appellants knowingly participated in the charged scheme." App.6a. The court later added, "[f]or the same reasons, we conclude there was sufficient evidence that Constantine was aware of the fraudulent scheme." App.8a.

3. The Second Circuit "disagree[d]" that petitioner's restitution order "was imposed without notice or opportunity to be heard," App.10a, noting that the judge had granted the government 90 days from sentencing to collect restitution materials, App.10a. The court did not mention that the government made its restitution submission via an off-the-docket email, or that the district court acted before affording petitioner the 14 days to respond prescribed by local rules.

4. Petitioner filed a petition for panel rehearing, identifying numerous record and legal errors in the order. The panel denied rehearing the next day in a one-sentence order. App.12a-13a. Before 9 a.m. on the morning after the Second Circuit's mandate issued, the district court ordered petitioner to begin serving his sentence on June 6. ECF 331.

REASONS FOR GRANTING THE PETITION

I. THE RECUSAL ISSUE PRESENTS FUNDAMENTAL QUESTIONS WARRANTING THIS COURT'S INTERVENTION

Judges and federal prosecutors interact daily in courts around the country. Precisely for that reason, their respective constitutional roles must remain separate and well-defined. When a judge seeks to influence (or "urge") the prosecution's investigation and charging decisions, he steps outside the bounds of his judicial role and creates an appearance of partiality, disqualifying himself from presiding over the subsequent trial.

A. Judges Who Seek To Influence Prosecution Decisions Must Recuse Themselves

1. The federal recusal statute requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The statute prescribes an objective standard, requiring recusal to avoid even the *appearance* of bias. See *Liteky* v. *United States*, 510 U.S. 540, 548 (1994); *In re Murchison*, 349 U.S. 133, 136 (1955). *Actual* bias is not required. See *Liteky*, 510 U.S. at 567 (Kennedy, J., concurring in the judgment) ("Section 455(a) * * * guarantee[s] not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion.").

When judges step outside their adjudicatory role and seek to influence the government's investigation and prosecution decisions, they cannot avoid the appearance of partiality. Indeed, this Court recognized more than half a century ago the dangers of a judge taking a role in an investigation and prosecution and then presiding over the resulting trial, remarking that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Murchison*, 349 U.S. at 137. "Having

been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Ibid.*; see *Williams* v. *Pennsylvania*, 579 U.S. 1, 8 (2016) (emphasizing "potential for bias" that "exists when the same person serves as both accuser and adjudicator in a case"). To be sure, "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But * * * 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)).

Since *Murchison*, this Court has held repeatedly that a judge with a prosecutorial interest in a case is not "wholly disinterested" in the case and therefore may not adjudicate it. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450 (1971) (holding that Attorney General in charge of criminal investigation and "chief prosecutor at trial" was disqualified from issuing search warrants in case); *Williams*, 579 U.S. at 8-11 (holding that judge who had earlier, as district attorney, approved seeking death penalty against defendant could not participate in defendant's appeal); see *id.* at 9 (noting risk that "[a] judge 'would be so psychologically wedded' to his * * * previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position'" (quoting *Withrow* v. *Larkin*, 421 U.S. 35, 57 (1975)).

2. Here, the district judge's pre-indictment comments impermissibly blended the judicial and prosecutorial roles, revealing the kind of prosecutorial interest in petitioner's case that must preclude a judge from presiding over the resulting trial. *Murchison*, 349 U.S. at 136. As in *Murchison*, *Williams*, and *Coolidge*, the district judge's remarks placed him outside the ordinary judicial role of neutrally adjudicating cases. Instead, he

encouraged the executive branch to expand its investigation to target individuals, like petitioner, whose actions the judge said were "corrupt," Dowd C.A.App.184, "boggle[d] the mind," and provided a "frightening insight into human nature," Dowd C.A.App.221-22. When a judge cares enough about investigation and charging decisions to step outside his adjudicative role and seek to influence the government's decisions, the judge may "not likely have all the zeal of a prosecutor," but "it can certainly not be said that he would have *none* of that zeal." *Murchison*, 349 U.S. at 137 (emphasis added).

The district judge's commentary here served no judicial purpose. He was not adjudicating any case or controversy when he "made it clear to the government during the [*Duncan*] trial and at other proceedings" that he "hope[d] that the government [wa]s following through on a continuing investigation" and "pursuing * * * the corrupt doctors who were involved in this scheme," Dowd C.A.App.183-84, and when he "urge[d] the government to continue their investigation" into the "doctors," Dowd C.A.App.158. There were no doctors, much less "corrupt doctors," then before the court.[2]

The judge's remarks were neither abstract nor academic; they explicitly encouraged prosecutorial action against identified individuals whom the judge apparently believed had escaped accountability. Although the district judge did not identify petitioner by name, his comments indisputably referred to petitioner: They were made in response to testimony during the *Duncan* trial that singled out petitioner and Ribeiro, the very doctors the government charged after the court's repeated "urg[ing]." See App.22a-23a; see ECF 103 at 2. The

[2] This case is unlike *Liteky*, where the petitioner based his recusal motion on prior judicial proceedings in which the *petitioner was a party*. 510 U.S. at 542.

Second Circuit was simply wrong that "the [judge's] comments were not directed at and did not refer to [petitioner] but, rather, generally referenced the scope of the criminal scheme and the propriety of a full investigation." App.4a. The district judge's order denying recusal *acknowledged* that his comments referred to petitioner. App.23a ("[T]his Court's acknowledgement of the role of doctors and lawyers, *including Dowd*, * * * does not create an impression that fair judgment of Dowd by the jury during his trial would be impossible"). Any reasonable observer would have understood that the two doctors principally mentioned during the *Duncan* trial were included in the district judge's statements. Indeed, the judge stopped urging further investigation after their indictment.

Timing reinforces the appearance of impropriety. Within six weeks of the district court's latest statement "urg[ing]" the government to pursue the "corrupt" doctors mentioned during the *Duncan* trial, the government indicted them. *Supra* at 7-9. Then, after the case was randomly assigned to another judge, the government promptly suggested reassignment to the judge who had "urge[d]" further action, and that judge promptly took the case. The government claimed below that it did so "[p]ursuant to the District Court's local rules," Gov't C.A. Br. 17, but none require such notification. To the contrary, the Southern District's Rules for the Division of Business Among District Judges instruct that "[c]riminal cases are not treated as related to each other unless a motion is granted for a joint trial." S.D.N.Y. R. Div. Bus. 13(a)(2)(C).

3. The Second Circuit applied a legal standard at odds with this Court's precedents, rejecting petitioner's recusal motion because actual bias had not been proved. The court reasoned: "The fact that Judge Stein imposed significantly below-Guidelines sentences on [petitioner

and Constantine] further undermines their insistence that he harbored any bias against them." App.4a. Even if the judge's views at sentencing—six months after petitioner moved for recusal—were relevant to his mental state at the time of the recusal motion, contra *United States* v. *Liggins*, 76 F.4th 500, 508 (6th Cir. 2023) (court must "consider whether recusal was warranted at the time that the defendant made the motion"); and even if imposing an eight-and-a-half-year sentence (and $8.1 million in restitution) on a 68-year-old were appropriately deemed acts of mercy, whether the district judge *actually* "harbored any bias against [petitioner]," App.4a, is irrelevant. What matters under Section 455(a) "is not the reality of bias or prejudice but its appearance." *Liteky*, 510 U.S. at 548.

B. The Recusal Question Is Exceptionally Important

This case presents a compelling opportunity for the Court to clarify the application of *Murchison*, *Williams*, and *Coolidge* to circumstances where a judge urged the prosecution of individuals and then presided over the ensuing trial. See S. Ct. R. 10(c). The appearance of partiality in such circumstances is acute. Section 455(a) is designed precisely for situations like these where, even absent actual bias, the judge's involvement threatens the perception of neutrality essential to the legitimacy of judicial proceedings. See *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-860 (1998).

When a judge calls for a prosecution and then presides over the resulting case, he impermissibly blurs the division between two branches of government that must remain firmly separate to maintain public confidence in the criminal justice system. "[O]ur Constitution's separation of powers exists in no small measure to keep courts from becoming partisans in the cases before them." *Donziger* v. *United States*, 143 S. Ct.

868, 868 (2023) (Gorsuch, J., dissenting from denial of cert.); see *id.* at 869-70 (criticizing Second Circuit for "arrogat[ing] a power to the Judiciary that belongs elsewhere" and "allow[ing] the district court to assume the 'dual position as accuser and decisionmaker'" (quoting *Williams*, 579 U.S. at 9)).

The relationship between district judges and prosecutors requires clear boundaries. District judges interact with prosecutors daily, and they "often are tempted to seek a larger role in the conduct of litigants that appear frequently before them." *In re United States*, 398 F.3d 615, 618 (7th Cir. 2005). "But temptation must be resisted in order to maintain separation between executive and judicial roles, and between the formulation and evaluation of positions in litigation." *Ibid.*; cf. *United States* v. *Antar*, 53 F.3d 568, 573 (3d Cir. 1995) (requiring recusal where judge said "his goal from the beginning of the criminal proceeding was to enforce a repatriation order"). Where, as here, a judge has yielded to that temptation, the risk is not only one of fairness to the defendant but of fidelity to the Constitution's allocation of powers. Cf. *In re United States*, 441 F.3d 44, 67 (1st Cir. 2006) (requiring recusal where there was a "risk that the line will be crossed 'between executive and judicial roles'" (citation omitted)).

This case offers the Court an opportunity to provide important guidance on the reach of § 455(a) under circumstances that raise institutional concerns as well as individual ones. Without clear precedent on how the federal recusal statute applies when a judge calls for a prosecution and presides over the resulting trial, courts undervalue the structural implications of such entanglement. Review is warranted to reaffirm that § 455(a) serves not only to guard against bias but to uphold the constitutional role of the judiciary as a neutral arbiter.

II. THE SECOND CIRCUIT'S HARMLESS-ERROR DETERMINATION EXEMPLIFIES CIRCUIT CONFUSION THAT REQUIRES THIS COURT'S INTERVENTION

The district court impermissibly allowed a professional fraud investigator to provide supposed "lay" testimony about "red flags" that her professional background taught her were indicative of insurance fraud, many of which were present in this case. The prejudice of her testimony—that the circumstances of this case were obvious indicators of fraud—is difficult to overstate in an *entirely circumstantial* fraud prosecution tried on the theory that petitioner "consciously avoided" learning that his patients' insurance claims were fraudulent. Yet, when reviewing the admission of Arce's testimony for harmlessness, the Second Circuit simply ignored prejudice. Instead, exemplifying an all-too-common error in appellate courts' harmlessness analysis, the court focused only on the purported strength of other government evidence.

A. The Modern Harmlessness Doctrine Has Confused the Circuits

1. The harmless-error doctrine determines "the outcome of more criminal appeals than any other doctrine." John M. Walker, Jr., *Foreward: Harmless Error Review in the Second Circuit*, 63 Brook. L. Rev. 395, 395 (1997); see William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. Legal Stud. 161, 161 (2001) (noting that harmless error is "probably the most cited rule in modern criminal appeals"). When courts perform harmless error analysis, "they conclude that the error under review is harmless with remarkable frequency." Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1793 (2017). Yet "how to conduct th[e] analysis" in this "most frequently invoked doctrine" remains "surprisingly mysterious."

Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119-2120 (2018).

Federal Rule of Criminal Procedure 52(a) directs that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). "[T]he broad language of the rule * * * offer[s] little guidance to appellate judges confronted with the question of whether an error in any particular case require[s] reversal." Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1175 (1995). Therefore, "one of the prevailing tests for application of the harmless-error rule"—that governs when federal appellate courts review nonconstitutional errors—"comes not from the rule itself but from" *Kotteakos* v. *United States*, 328 U.S. 750 (1946). *Ibid.* There, this Court explained that an error is harmless when "the court can say with 'fair assurance' that the outcome 'was not substantially swayed by the error.'" Murray, *supra*, at 1799 (quoting *Kotteakos*, 328 U.S. at 765). The relevant "question * * * is *not* whether the jury reached the correct verdict despite the error, but whether the verdict was substantially swayed by the error." Edwards, *supra*, at 1192 (emphasis added) (citing *Kotteakos*, 328 U.S. at 764).

Almost eighty years later, *Kotteakos* "remains the touchstone for harmless error analysis." Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309, 316 (2002). But "despite the pivotal role the harmless error doctrine plays in determining the practical efficacy of procedural [and other] rules, there are worrying signs that reviewing courts are currently bungling that crucial function[.]" Murray, *supra*, at 1794. In recent years, "the clarity of the *Kotteakos* Court's focus on the effect on the

jury has begun to fade * * * ." Cooper, *supra*, at 316; accord Brandon L. Garrett, *Patterns of Error*, 130 Harv. L. Rev. F. 287, 295 (2017).

2. Departing from *Kotteakos*, the circuit courts have gravitated toward a "guilt-based" approach to harmless error review, under which the reviewing court looks to the sufficiency of the government's evidence instead of "whether the error contributed to the verdict." Edwards, *supra*, at 1186. Thus, "in many criminal cases an error is harmless so long as the appellate court remains convinced of the defendant's guilt." *Id.* at 1187; cf. *Neder* v. *United States*, 527 U.S. 1, 35-39 (1999) (Scalia, J., dissenting in part) (explaining tension between harmless-error review and Sixth Amendment jury right).

This Court previously granted certiorari to resolve the disarray among circuit courts' approaches regarding harmless-error review, but it later dismissed the writ as improvidently granted. *Vasquez* v. *United States*, 566 U.S. 376 (2012) (per curiam). Today, circuit courts remain just as confused, and appellate judges continue to affirm convictions under harmless-error review based on their cold-record assessment of the "overwhelming evidence of guilt," without regard for the prejudicial effect of the error. See *United States* v. *Pon*, 963 F.3d 1207, 1240 (11th Cir. 2020); see *id.* at 1246 (Martin, J., dissenting in part) (explaining that, given criminal defendants' jury rights, appellate courts "should be particularly wary of invoking 'overwhelming evidence' to hold an error harmless").

Confusing matters further, circuit courts have articulated the harmless-error standard differently. As scholars have recently noted, "attempts to implement either" the effect-on-the-jury approach or the overwhelming-evidence approach "are frustrated by confusing and conflicting directives," such that "[m]ost federal judges seem to have stopped trying to identify which approach they are employing[.]" Barry Edwards, *A*

Scientific Framework for Analyzing the Harmfulness of Trial Errors, 8 UCLA Crim. Just. L. Rev. 1, 16 (2024); see *United States* v. *Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, C.J., concurring) (noting uncertainty present in "most cases" regarding "whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error"); compare, *e.g.*, *United States* v. *Scott*, 677 F.3d 72, 85 (2d Cir. 2012) ("An error in the admission of evidence may be deemed harmless only if it is highly probable that the error did not contribute to the verdict." (citation omitted)), with, *e.g.*, *United States* v. *Tydingco*, No. 20-10210, 2022 WL 445527, at *1 (9th Cir. Feb. 14, 2022) (mem.) ("For evidentiary errors, reversal is required 'unless there is a fair assurance of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict.'" (quotation marks omitted) (quoting *United States* v. *Bailey*, 696 F.3d 794, 803 (9th Cir. 2012)).

B. The Second Circuit Conflated Harmlessness with Sufficiency of the Evidence

The Second Circuit's reasoning evinces a harmless-error analysis that rests on the court's subjective view of the strength of the government's case and ignores how Arce's prejudicial testimony fit into the trial. Such an approach runs counter to *Kotteakos*.

1. Tara Arce was a walking violation of the Federal Rules of Evidence. Arce testified as an unnoticed expert witness, relying on her 30 years of experience as a professional fraud investigator to tell the jury what circumstances experts consider to be obvious signs of fraud. See Fed. R. Evid. 703. In a case tried on a conscious avoidance theory, Arce's testimony that the patients petitioner treated bore what the government labeled "red flags of fraud," App.57a, was tantamount to impermissible testimony about the "ultimate issue" of petitioner's

knowledge. See *United States* v. *Scop*, 846 F.2d 135, 139-40 (2d Cir. 1988) (holding that expert witness's repeated statements concerning "manipulation," existence of "scheme to defraud," and "fraud" exceeded permissible scope of opinion testimony); *Diaz* v. *United States*, 602 U.S. 526, 534 (2024) (experts not permitted to provide testimony on "ultimate issue" of defendant's knowledge). The government's pre-trial interview notes with Arce unmistakably reflect its purpose in presenting her testimony: "Fraud i[n] these cases. Yes." ECF 113-1 at 2.

The government leveraged Arce's improper testimony in its closing argument and rebuttal, including by relying explicitly on Arce's "red flags" testimony identifying signs of insurance fraud; referencing her other testimony repeatedly; and using her "red flags" catchphrase to describe other factors that purportedly supported the government's conscious-avoidance theory against petitioner. *Supra* at 9-12. In short, Arce's testimony was the heart of the government's case.

The Second Circuit failed to address any of those aspects of the trial to assess whether the admission of Arce's testimony "affect[ed] substantial rights." Fed. R. Crim. P. 52(a). The court simply rested its analysis on the supposed strength of the government's case, without examining what it was supposed to assess: the prejudicial effect of a professional fraud investigator testifying for two days that, in her professional experience, the evidence presented to the jury bore "red flags" of fraud that would be obvious to observers.

The Second Circuit's application of harmless error analysis was particularly slapdash here. The panel's evaluation of Arce's testimony consisted of two statements, both demonstrably false. The court claimed that "the Government never mentioned [Arce's] testimony in its closing argument." App.6a. But the government *explicitly* mentioned her testimony many

times in closing, reminding the jury that "Tara Arce testified about some of the red flags that she looks for when she's looking at trip-and-fall cases," and explaining that things like "unwitnessed accidents"—which a doctor like petitioner had no reason to know of—indicated insurance fraud. See App.81a. Arce's testimony was *central* to the government's closing and rebuttal. See *supra* at 11-12. The court also mistakenly stated that "the District Court struck most of the 'red flags' part of Arce's testimony and instructed the jury to disregard it." App.6a. In fact, the court struck only *one statement*: Arce's testimony that the many "red flags" she previously identified as indicia of fraud (*none* of which was struck) were present in this case. App.72a-73a. Striking that single line of Arce's testimony did nothing to unring the bell, because the jury could easily apply her admitted testimony to identify each of the "red flags" present in this case, as well as her conclusion that there was "suspicion of fraud" or "confirmed fraud" on Constantine's insurance claims. Dowd C.A.App.1124-1126.

The Second Circuit then applied the sufficiency-of-the-evidence version of harmless-error review, measuring harmlessness "according to [its] own assessment of guilt." Edwards, *supra*, at 1188. When it addressed co-defendant Constantine's sufficiency-of-the-evidence argument, it explicitly equated the two tests, rejecting Constantine's sufficiency challenge "[f]or the same reasons" that it found the district court's evidentiary errors to be harmless, namely "the overall strength of the prosecution's case." App.8a (quoting *United States* v. *Natal*, 849 F.3d 530, 537 (2d Cir. 2017)).

In so doing, the court "consider[ed] only the evidence in support of the judgment and ignore[d] [the] erroneous matter." Roger J. Traynor, *The Riddle of Harmless Error* 28 (1970). The Second Circuit thus performed precisely the sort of "guilt-based" harmlessness analysis that "has

become standard practice for many appellate panels considering both constitutional and nonconstitutional error." Edwards, *supra*, at 1186-87; cf. *Pon*, 963 F.3d at 1246 (Martin, J., dissenting in part) (criticizing majority's guilt-based approach to harmless error review as conflicting with defendants' jury rights). That test is impossible to square with *Kotteakos*.

C. The Harmlessness Question Is Recurring And Important And Should Be Addressed In This Case

1. "[F]or all its practical importance, and for all courts' familiarity with it, harmless error * * * remains surprisingly mysterious." Epps, *supra*, at 2120. And affirmances on harmless error grounds have been on the rise for decades. See *ibid.*; *United States* v. *Garza*, 754 F.2d 1202, 1210 (5th Cir. 1985) (Goldberg, J., concurring) ("I have serious reservations about the increasingly widespread use of the harmless error rule to affirm erroneous trial court rulings."). Indeed, there have been a rash of similar errors in other recent high-profile prosecutions. See, *e.g.*, *United States* v. *Holmes*, 129 F.4th 636, 650-652 (9th Cir. 2025) (in appeal of Elizabeth Holmes's fraud conviction, holding that error in admitting improper lay opinion from laboratory director was harmless based on general strength of government's case). Yet "the question of general harmless error analysis" has been left "dangerously open for interpretation." David A. Shields, Note, *East vs. West—Where Are Errors Harmless? Evaluating the Current Harmless Error Doctrine in the Federal Circuits*, 56 St. Louis U. L.J. 1319, 1321 n.14 (2012). Thus, as commentators have said for decades, "the riddle of harmless error is ripe for revisiting." John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 Hous. L. Rev. 59, 64 (2016).

2. The prevailing "guilt-based" approach to harmlessness raises fundamental questions concerning

the constitutional right to trial by jury, which "grants criminal defendants the right to have juries, not appellate courts, render judgments of guilt or innocence." Edwards, *supra*, at 1192. "It is for a similar reason that trial courts in our system are prohibited from directing verdicts of guilty against criminal defendants, no matter how weighty the evidence favoring such outcomes." *Id.* at 1192-1193 (citing *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977)). If courts of appeals are to continue making independent conclusions of guilt, they should do so only after receiving guidance from this Court.

3. The Second Circuit's summary disposition underscores the importance of certiorari. Commentators (including members of that court) have remarked on the Second Circuit's tendency toward disposing of important legal questions by summary disposition. See, *e.g.*, Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 Fordham L. Rev. 945, 956 (2016) (reviewing summary order practice and acknowledging that "a panel's decision to proceed by summary order and the order itself are sometimes completely wrong"). The inherently summary nature of unpublished opinions means that "[h]armless error * * * presents opportunities for misuse, if not outright abuse, in cases decided by unpublished opinion." Cooper, *supra*, at 343; see Edwards, *supra*, at 1183. The risk of misuse of harmless error in unpublished opinions is "particularly acute when the court applies the overwhelming evidence standard rather than the effect-on-the jury standard." Cooper, *supra*, at 343.

Review is warranted in this case to resolve rampant confusion about the proper application of harmless error analysis to evidentiary errors. Cf. *Eberhart* v. *United States*, 546 U.S. 12, 19, (2005) (per curiam) (summarily reversing where court of appeals' error was "shared

among the circuits" and "caused in large part by imprecision in [the Court's] prior cases"). The Second Circuit clearly strayed from the harmlessness standard this Court announced in *Kotteakos*. As decades of circuit court practice have demonstrated, additional percolation is not necessary; the time to resolve the question is now.

Review in this case would have the additional benefit of emphasizing that courts of appeals must be just as careful in unpublished decisions as they are in published ones. Periodic review of unpublished decisions is necessary to reduce the "risk [of] effectively immunizing summary dispositions by courts of appeals from [this Court's] review." *Stutson* v. *United States*, 516 U.S. 193, 196 (1996).

III. THE DISTRICT COURT'S IMPOSITION OF $8 MILLION IN RESTITUTION WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND REQUIRES THIS COURT'S INTERVENTION

Restitution can carry "profound" consequences, *Hester* v. *United States*, 586 U.S. 1104, 1106 (2019) (Gorsuch, J., dissenting from denial of cert.), yet the district court issued its restitution order without notice, a hearing, or adversarial briefing, and based on the government's off-the-docket email submission. This Court should grant certiorari to clarify that, however much discretion district courts have when fashioning procedures for imposing restitution, such a summary approach to restitution does not comport with minimum due process requirements.

A. The District Court's Restitution Procedures Plainly Violated Due Process

1. "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance* v. *Erickson*, 522 U.S. 262, 266 (1998) (citation omitted); see U.S. Const. Amend V; *Culley* v. *Marshall*, 601 U.S. 377,

380 (2024) (due process requires timely hearing in civil forfeiture proceedings). "The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane* v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citation omitted); accord *A.A.R.P.* v. *Trump*, No. 24A1007, slip op. at 3-4 (U.S. May 16, 2025) (per curiam). For notice to be constitutionally adequate, it must, at minimum, advise the defendant how and when he may lodge any objections. See *Turner* v. *Rogers*, 564 U.S. 431, 449 (2011) (vacating criminal contempt judgment where petitioner lacked sufficient notice of "critical issue" at hearing); cf. *Pereira* v. *Sessions*, 585 U.S. 198, 202 (2018) (holding notice inadequate when it did "not inform a noncitizen when and where to appear for removal proceedings").

The district court's restitution procedures fell woefully short of providing petitioner minimum notice. The district court did not announce when it would impose its restitution order. Nor did it issue a briefing schedule on restitution, as it had for the *Duncan* defendants. See, *e.g.*, *Duncan*, ECF 242. Nor did it wait the minimum 14 days local rules allowed for responses to docketed motions, S.D.N.Y. L. Crim. R. 49.1(b), where petitioner had to look to given there are *no* rules or procedures explaining how a criminal defendant should oppose a restitution request submitted via email. Yet, the Second Circuit failed to even *mention* the government's unconventional method of submitting its request or the judge's failure to follow the district's ordinary timing rules.

The Second Circuit's reliance on the district court's "statement at sentencing * * * that it planned to order restitution within 90 days," App.10a, did not constitute constitutionally adequate notice. The district court's offhand and ambiguous remark at sentencing was that it

was granting the government "90 days on restitution." Dowd C.A.App.3083. If anything, that comment gave notice *to the government* of the window it had to submit its proposed restitution request to the court. See 18 U.S.C. § 3664(d)(5). The judge also gave the government "90 days on restitution" for each of the other defendants but imposed restitution between 96 and 131 days after sentencing. Pet. C.A. Reply Br. 41-42. Even if the judge's comment was somehow supposed to alert petitioner that the court would impose restitution 90 days after sentencing, regardless of local rules for responding to motions, the district court *ordered restitution on day 86*. App.25a-29a. Petitioner thus had *no notice whatsoever* that the district court would impose restitution when it did.

2. The district court's denial of due process substantially prejudiced petitioner by precluding him from challenging the government's submission, which was teeming with factual inconsistencies. The government "concede[d]" a $120,000 error in the restitution totals for Conspirators Rainford and Locust, *United States* v. *Rainford*, 110 F.4th 455, 491 (2d Cir. 2024), and there was every reason to believe the government's restitution submission would yield similar errors here, see *id.* at 507 (Merriam, J., dissenting in part) (cataloging inconsistencies in government's restitution evidence and opining that "the entire basis of the restitution calculation [wa]s erroneous").

There were numerous irregularities petitioner would have challenged if he had been given the opportunity to be heard, including:

- The gross disparity between the $3.9 million in losses the government calculated for the *Rainford* defendants and the $14.8 million it sought for *the same conspiracy* against petitioner and Constantine.

- The discrepancies between the same victims' claimed losses in *Duncan* compared to this case. One insurer's loss figure increased $1.85 million and included an unexplained increase of $630,551 for the *very same insurance claims*. See Pet. C.A. Supp. Br. 12-14; ECF 299-2.
- The government's failure to introduce any declarations or other evidence explaining its restitution methodology.
- The inclusion of claims that the insurance-company victims themselves stated were "not part of [the] pattern," see, *e.g.*, ECF 299-3, suggesting that the insurance companies thought certain claims were not part of a fraudulent scheme.

B. The Restitution Issue Is Important And Recurring

Restitution "plays an increasing role in federal criminal sentencing today." *Hester*, 586 U.S. at 1105 (Gorsuch, J., dissenting from denial of cert.). And it carries "profound" collateral consequences: "Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Id.* at 1106.

But courts too frequently treat restitution as an afterthought, disposing of the issue without a hearing or in summary form. Cf., *e.g.*, *United States* v. *Harris*, 813 F. App'x 710, 714 (2d Cir. 2020) (rejecting argument that PSR restitution calculation and co-defendant's hearing provided sufficient process to challenge restitution); *United States* v. *Adejumo*, 777 F.3d 1017, 1020 (8th Cir. 2015) (remanding for further restitution proceedings where notice was inadequte and district court lacked sufficient information to craft restitution order); *United States* v. *Reano*, 298 F.3d 1208, 1212 (10th Cir. 2002) (noting decision to vacate restitution order was "easily made" where district court "enter[ed] a restitution order

with no basis in the record"). This case presents an archetypical example of a district court summarily disposing of restitution issues without regard to the property and liberty interests at issue. Cf. *Hester*, 586 U.S. at 1105 (Gorsuch, J., dissenting from denial of cert.).

The government's off-the-docket email request for restitution carries implications for the justice system more broadly, underscoring the need for this Court's review. Cf. *United States* v. *Rechnitz*, 75 F.4th 131, 147 (2d Cir. 2023) ("The district judge's phone call with the [S.D.N.Y.] prosecutor here was doubly ill-advised because it was both *ex parte and* off-the-record, magnifying the concerns inherent to both types of communications."). As is required in every district court around the country, motions must be "served and filed" *on the public docket*. See, *e.g.*, S.D.N.Y. L. Crim. R. 49.1. That is how it should be, especially in criminal cases. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 (1980) (plurality op.) ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.").

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

This case is an excellent vehicle to address the questions presented. Each question is purely legal, was squarely preserved and passed on below, and is independently capable of altering the outcome of the case. If the district judge should have recused himself, a new trial is warranted. If the Second Circuit applied an incorrect harmlessness standard, remand to the Second Circuit could—and should—result in a new trial. Finally, if petitioner was deprived of due process in the imposition of restitution, vacatur would be warranted, and the district court would have to consider petitioner's objections before imposing any penalty.

None of the questions presented turns on disputed factual issues that would prevent this Court from resolving them. Still, the Second Circuit's egregious misstatements of the record (and its refusal to correct them even when flagged in a rehearing petition), and the unjust and irregular proceedings in this case provide another compelling reason to grant the petition. See *Wetzel* v. *Lambert*, 565 U.S. 520, 524, 526 (2012) (per curiam) (vacating and remanding where court of appeals "overlooked" important factual findings).

Review is important also to ensure that summary dispositions are not "effectively immuniz[ed] * * * from [this Court's] review." *Stutson*, 516 U.S. at 196; see *Plumley* v. *Austin*, 574 U.S. 1127, 1132 (2015) (Thomas, J., dissenting from denial of cert.) (noting that the decision not to publish the opinion was "another reason to grant review"); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 Colum. L. Rev. 1202, 1216 (2003) ("There is even some speculation that, because the Supreme Court is less likely to grant certiorari to an appeal from an unpublished opinion, appellate judges may decide controversial cases via unpublished opinions simply to insulate those decisions from Supreme Court review.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN P. ELWOOD
Counsel of Record
KOLYA D. GLICK
DANA KAGAN MCGINLEY
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

MAY 2025