No. _____

IN THE

Supreme Court of the United States

PHILIP ALEJANDRO POWERS, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a person who is compelled to commit a criminal act in order to avert a greater evil be denied the protection of the necessity defense if he could have committed the criminal act in a "safer" manner?

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. *Powers*, No. 21-mj-04310 (Feb. 13, 2023) (finding petitioner guilty on all counts charged)

United States v. *Powers*, No. 23-cr-08027 (Sep. 12, 2023) (affirming in part, and remanding in part, magistrate judge's judgment)

United States Court of Appeals (9th Cir.):

United States v. *Powers*, No. 23-2218 (Feb. 24, 2025) (affirming convictions on direct appeal); (Jun. 20, 2025) (denying petition for rehearing)

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Philip Alejandro Powers, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A) is reported at 129 F.4th 617. The order of the United States District Court for the District of Arizona affirming in part and remanding in part the magistrate judge's judgment (App. B) is unreported, but is available at 2023 WL 5926442. The magistrate judge's order (App. C) is unreported.

JURISDICTION

The court of appeals issued its opinion on February 24, 2025, and denied petitioner's petition for rehearing on June 20, 2025. Apps. A, D. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely. *See* S. Ct. R. 13.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions underlying petitioner's convictions are as follows:

18 U.S.C. § 1856

§ 1856. Fires left unattended and unextinguished

> Whoever, having kindled or caused to be kindled, a fire in or near any forest, timber, or other inflammable material upon any lands owned, controlled or leased by, or under the partial, concurrent, or exclusive jurisdiction of the United States, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted, and including any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under the authority of the United States, or any Indian allotment while the title to the same is held in trust by the United States, or while the same shall remain inalienable by the allottee without the consent of the United States, leaves said fire without totally extinguishing the same, or permits or suffers said fire to burn or spread beyond his control, or leaves or suffers said fire to burn unattended, shall be fined under this title or imprisoned not more than six months, or both.

36 C.F.R. § 261.52(a)

§ 261.52 Fire.

> When provided by an order, the following are prohibited:
>
> (a) Building, maintaining, attending, or using a fire, campfire, or stove fire.
>
> * * * *

36 C.F.R. § 261.5(c)

§ 261.5 Fire.

The following are prohibited:

* * * *

(c) Causing timber, trees, slash, brush or grass to burn except as authorized by permit.

* * * *

STATEMENT OF THE CASE

1. In May of 2018, 37-year-old IT technician Philip Powers drove to the parking lot for the Dogie Trailhead, in northern Arizona's Coconino National Forest, intending to do a day-hike the next day. He parked and camped overnight, so he could start his hike early in the morning to avoid some of the heat. He began his hike around 6:00 to 6:30 a.m. the next morning.

Philip believed he was setting off on the Cabin Loop hike—a 17.8-mile moderate-difficulty hike in a Ponderosa Pine Forest. In fact, he was beginning the Taylor Cabin loop hike—an 18.8-mile, strenuous-difficulty, hard-to-navigate hike in the "high desert" of the Sycamore Canyon Wilderness Area. Federal wilderness areas are "free from mechanized use," meaning there are no roads or vehicles. He had a full three-liter water bladder, plus a 16-ounce bottle of water, for a total of 116 ounces of water, as well as mandarin oranges, a mango, and freeze-dried granola.

Philip hiked to the Taylor Cabin, a small trailside shelter, looked around the cabin for about ten minutes, then continued on the trail. He intended to complete

the loop and return to the trailhead that day. But a few miles past the cabin the trail ran into a wash, and he was unable to find where it resumed on the far side. After searching for 30 to 40 minutes, Philip realized that "shit was getting real." It was 4:00 to 5:00 p.m. He had been hiking for about ten hours, and it was many miles back to the car. He had seen no one else on the trail, and he was running low on water. He hiked back to the Taylor Cabin.

He had only sixteen to twenty ounces of water left—not enough for the return hike—and his only food was his mango and two mandarin oranges, as well as some peanut butter, jelly, and coconut oil he found in the cabin. He tried to sleep, but his legs were cramping so painfully that he got not more than an hour of rest.

Around 9:00 p.m., in his first effort to attract rescuers, Philip used his lighter to ignite some dead grass. He knew the fire was prohibited, because he had seen no-fire notices. This first fire, later named the Taylor Fire, went out overnight, never spreading beyond a tenth of an acre.

The next morning, Philip ate his mango and mandarin oranges, and some peanut butter and jelly he found in the cabin. He had sixteen to twenty ounces of water. Before sunrise he started trying to hike back to the trailhead. It was hard to get moving. He felt "spent." His body was so depleted that every 200 yards he had to stop, and sit in the shade for 20 minutes, before trying to continue. He ran out of water. He drank his own urine. He made it only about three miles from Taylor Cabin when he felt that he could not go on. He realized, "I am not making this. I am done…. This is it." But he had seen planes overhead, and again he thought he might

save himself by setting a signal fire. He lit a second fire in a dead tree, hoping to generate smoke. This was the fire that saved his life.

At the time, however, Philip thought that this second fire, which would later be called the Sycamore Fire, was another dud. He waited about an hour, but the fire appeared to be dying out. He decided he needed to move and try again. He jettisoned his backpack and started back down the trail. He drank his own urine, again.

After making it a few hundred yards, Philip saw a fixed-wing plane circling the area of the second fire. About thirty to forty minutes later he saw a helicopter circle the area. He cut off his orange underwear, put it on the end of his walking stick, and waved it around, hoping to draw attention.

When that didn't work, Philip lit a third fire. This fire, which would be called the Sycamore 2 Fire, spread to a three-foot circle before going out. But the firefighting team in the helicopter saw Philip lying under a tree as they landed to address the Sycamore Fire. Recognizing that Philip was in distress, the firefighters helped him into the helicopter and gave him water. As he was being rescued, Philip looked back toward the second fire and realized that it had not gone out but had grown, apparently fanned by the wind, and he thought, "Oh shit." The Sycamore Fire eventually grew to about 230 acres—a little over one-third of a square mile—before it was contained.

The firefighting team flew Philip to Sedona, where they helped him walk from the helicopter to a waiting ambulance. The ambulance crew inserted two fluid

IVs, one in each arm. At the same time, a Forest Service Law Enforcement Officer boarded the ambulance and asked Philip whether he knew anything about the fire. "It was me," Philip immediately replied. He explained how he had lost the trail, run out of water, and set the fires as a "last resort."

Philip was transferred to the emergency room at the Sedona Medical Center, where he was treated by Dr. Jeff Hardin. Dr. Hardin diagnosed Philip with severe dehydration, rhabdomyolysis, acute renal failure, weakness, and heat exhaustion. Philip agreed to be transferred to the hospital in Cottonwood, where he received further treatment.

2.a. The government filed a seven-count criminal complaint against Philip. Count 1 charged him with leaving the Sycamore Fire without totally extinguishing it, in violation of 18 U.S.C. § 1856, and Counts 2 through 7 charged him with violating two federal regulations in connection with each of the three fires: 36 C.F.R. § 261.5(c), which outlaws "[c]ausing timber, trees, slash [*i.e.*, dead trees], brush or grass to burn except as authorized by permit"; and 36 C.F.R. § 261.52(a), which outlaws "[b]uilding, maintaining, attending or using a fire, campfire, or stove fire" when prohibited by an order.

Philip opted for a bench trial, which lasted two days. In her opening statement, Philip's counsel asserted that he set the fires because he "was faced with a terrible choice, and he chose to save his life."

The government presented testimony from a firefighter who had been part of the crew that rescued Philip, and from the law enforcement officer who had

interviewed him in the ambulance and at the hospital. Philip testified in his defense, and also called Dr. Hardin, who testified that running out of water on the strenuous hike had "endangered [Philip's] life," and noted that every year, dehydration and heat stroke caused "several deaths" in the area. Asked to state what would have happened to Philip after another day in the wilderness, Dr. Hardin testified that he likely would not have survived: "Possible if he stayed in the shade he could have survived another day, or even two, but unlikely. You know, it probably would have been fatal."

Philip testified that he had not seen anyone else at the trailhead or on the trail in the course of his hike. Asked why he had set the fires, he answered, "I wanted to live."

b. The magistrate judge found Philip guilty on all counts. App. C. She found that Philip's actions were not protected by the necessity defense because (i) his death was not sufficiently "imminent" when he set the fires, (ii) he had "alternatives" to setting them in the manner that he did, such as building fire rings or digging fire pits, and (iii) he created the conditions underlying the necessity by being reckless and negligent in his preparation for the hike. She sentenced Philip to one year of supervised probation, and the stipulated restitution amount of $293,413.71, for the costs involved in containing the Sycamore Fire. After unsuccessfully appealing his convictions to a district judge (App. B), Philip appealed to the Ninth Circuit.

3. The Ninth Circuit affirmed Philip's convictions in a published opinion. App. A. Except with respect to the Taylor Fire (which the court held was set at a time when Philip's death was not "imminent" (*id.* at 14–15)), the court relied on the proposition that a person who is compelled to commit a criminal act to avert a greater evil is not entitled to the protection of the necessity defense unless the manner in which he commits that act is the safest available—*i.e.*, he did not have "safer alternatives." *Id.* at 9. Citing precedent requiring people invoking the necessity defense to act "reasonably," the court posited that it is not "reasonable" to take unlawful action to avert a greater evil when a "safer" alternative is available. *Id.* at 17–20. But the "safer" alternatives to which the court referred were not alternatives to setting unlawful signal fires—instead, they were more punctilious *ways* of setting unlawful signal fires, such as "clearing brush, creating a fire ring or pit, or extinguishing the Sycamore Fire before leaving it." *Id.* at 17. Philip's failure to set the fires in this manner, the court held, rendered his actions "unreasonable" and thus unprotected by the necessity defense.

Philip filed a petition for rehearing in which he argued that this limitation on the scope of the necessity defense was contrary to the governing law and would effectively render the defense useless. The court denied his petition. App. D.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's "safest-alternative" gloss on the necessity defense is a novel innovation that threatens to effectively nullify this crucial defense.

Necessity is a common-law defense to criminal liability that "traditionally covered the situation where physical forces beyond the actor's control rendered

illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410 (1980). This Court has acknowledged the defense in numerous cases. *See id.*; *Baender v. Barnett*, 255 U.S. 224, 226 (1921) (noting that rule that prisoner who escapes shall be guilty of felony "does not extend to a prisoner who breaks out when the prison is on fire—for he is not to be hanged because he would not stay to be burnt" (internal quotation marks omitted)); *United States v. Kirby*, 74 U.S. 482, 487 (1868) (same); *The Diana*, 74 U.S. 354, 360–61 (1868) (noting that, in a case of "absolute and uncontrollable necessity," a vessel may attempt to enter a blockaded port).

The necessity defense rests on "public policy: the law ought to promote the achievement of higher values at the expense of lesser values[.]" 2 Wayne R. LaFave, *Subst. Crim. L.* (*LaFave*) § 10.1(a) (3d ed., Westlaw through Oct. 2024 Update). It is essentially "utilitarian," in that it "justifies criminal acts taken to avert a greater harm," thereby "maximizing social welfare." *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991). The defense "exists even when a statute does not explicitly include [it]," *Raich v. Gonzales*, 500 F.3d 850, 858 (9th Cir. 2007), and it is assessed "through an objective framework," *United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir. 2008). "When the necessity defense applies, it justifies the defendant's conduct in violating the literal language of the criminal law and so the defendant is not guilty of the crime in question." *LaFave* § 10.1(a).

One of the "evils" that commonly justifies the application of the necessity defense is the actor's own death. "The law deems the lives of all persons far more

valuable than any property[.]" *United States v. Ashton*, 24 F. Cas. 873, 874 (D. Mass. 1834) (Story, Circuit Justice); *accord LaFave* § 10.1(a) ("[I]t is better to save a life than to save the property[.]"). The defense thus covers prisoners who escape a burning prison, *Baender*, 255 U.S. at 226, and sailors who mutiny to avoid going down with their ship, *Schoon*, 971 F.2d at 196. And it covers people like Philip, who are compelled to break the law to save themselves after becoming lost in the wilderness. Model Penal Code and Commentaries (*MPC & Cmt.*), Art. 3, § 3.02 cmt. at 9 (1985) ("Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions.").

The Ninth Circuit's enumeration of the elements of the necessity defense is typical:

> To invoke the necessity defense, the defendants colorably must have shown that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law.

Schoon, 971 F.2d at 195; *see also LaFave* § 10.1(d). The defendant carries the burden of proving the elements of the necessity defense by a preponderance of the evidence. *United States v. Cruz*, 554 F.3d 840, 850 (9th Cir. 2009).

Philip demonstrated in his appeal that he proved these elements. He lost his way many miles deep in a remote, sweltering, parched wilderness. He had seen no one else on the trail, or even at the trailhead. He was out of water. He was so weak and dehydrated that he was unable to walk more than 200 yards at a time, and every minute that passed made him weaker and more dehydrated. The doctor who

later treated him testified that he likely would not have survived another day in the wilderness. Faced with the choice between dying and breaching a forest-protection statute and two Forest Service regulations, Philip chose the lesser evil. While he was still physically capable of doing so, he set signal fires that he reasonably—and correctly—believed could save his life. The elements of the necessity defense were proved.

The Ninth Circuit's refusal to accept Philip's necessity defense rested on its introduction into the defense of a novel requirement: that the actor claiming the defense prove that he did not overlook "safer" alternatives for committing the necessary unlawful act—by which it meant safer *ways* of committing the unlawful act. App. A at 17–20. This innovation should not be confused with the well-established principle that the actor claiming necessity must not have overlooked *legal* alternatives to his unlawful action. *Bailey*, 444 U.S. at 410. The Ninth Circuit's safest-alternative rule imposes a fundamentally different requirement, providing that even when a person must commit an unlawful act to avert a greater evil, he will nevertheless be denied the protection of the defense unless he pursues what the court deems the safest *manner* of committing that unlawful act.

This requirement represents a deeply unwise innovation that reaches beyond the Ninth Circuit's prior precedent and would, if left in place and permitted to spread, threaten to eviscerate this crucial defense.

In support of its safest-alternative requirement, the Ninth Circuit cited its prior opinions in *Perdomo-Espana* and *Schoon*. App. A at 12. But while these prior

opinions reflect proper applications of the necessity defense as this Court has articulated it, the instant case reaches beyond their holdings and rationales, essentially modifying the nature of the defense in a manner this Court has never sanctioned.

The *Perdomo-Espana* case involved a deported noncitizen who attempted to claim necessity as a defense to his illegal entry into the United States. He asserted that he believed his unlawful entry was necessary to preserve his life, because he was diabetic and needed treatment for his high blood sugar. *Perdomo-Espana*, 522 F.3d at 985. The court rejected the noncitizen's assertion that his subjective belief was adequate to support the defense, holding that the elements of the defense must be assessed "through an objective framework." *Id*. at 987. The court held that the actor's belief that he "chose the lesser evil" must "be reasonable, as judged from an objective point of view." *Id*. at 988. The court found the noncitizen's purported belief that his actions were necessary unreasonable, in light of his medical condition, the availability of medical care on the Mexican side of the border, and his "tactic of hiding in bushes, in dark clothing, and in a remote area, trying to escape border patrol's detection." *Id*. at 985–88.

In *Schoon*, the court addressed an attempt to invoke the necessity defense by individuals who vandalized a local IRS office to protest American involvement in El Salvador in the late 1980s. *Schoon*, 971 F.2d at 195. The court held that the defense is not available to people who commit acts of "indirect civil disobedience"—*i.e.*, acts of protest "violating a law or interfering with a government policy that is not, itself,

the object of protest." *Id.* at 196. The court reasoned that such acts categorically fail to satisfy three of the defense's elements, because (i) they are directed against "the mere existence of a constitutional law or governmental policy," which is not a "legally cognizable harm"; (ii) they are unlikely to avert the "harm"; and (iii) they overlook the legal alternative of seeking congressional action. *Id.* at 197–200.

The court addressed the reasonableness requirement in connection with the final, legal-alternatives element, noting that "[t]he necessity defense requires the absence of any legal alternative to the contemplated illegal conduct which could reasonably be expected to abate an imminent evil." *Id.* at 198. The court used the example of a jail fire:

> A prisoner fleeing a burning jail, for example, would not be asked to wait in his cell because someone might conceivably save him; such a legal alternative is ill-suited to avoiding death in a fire. In other words, the law implies a reasonableness requirement in judging whether legal alternatives exist.

Id.

While *Perdomo-Espana* and *Schoon* confirmed that an actor's belief that the elements of the necessity defense are present must be objectively reasonable in order for the defense to apply, neither opinion equated reasonableness with the safest-alternative requirement that the Ninth Circuit imposed in the instant case. In fact, the *Schoon* opinion appears to *reject* such a requirement, noting that a prisoner need not pursue the "safer" alternative (*i.e.*, the one that would minimize the public's exposure to his dangerous presence) of waiting to be rescued from a burning jail, rather than escaping immediately. *Id.*

Moreover, there is no logical equivalence between the reasonableness requirement and the novel safest-alternative mandate that the Ninth Circuit introduces in the instant case. A person compelled to commit a crime to avert a greater evil will normally have an array of means of doing so available to him. The prisoner in the burning jail, for example, could wait until the flames reach his cell block, or the cell five doors down, or the cell two doors down, or his own cell, before fleeing to safety. Only the last of these alternatives is the "safest," but all of them are reasonable. Likewise in the instant case, instead of carefully igniting a single dead tree and then staying near it until the fire seemed to be going out, Philip could theoretically (assuming he had the energy) have cleared brush and dug a pit. The latter approach might have been "safer," but neither option strayed outside the bounds of *reasonableness*.

Still more troubling are the practical implications of the Ninth Circuit's safest-alternative requirement. The requirement invites a form of Monday-morning quarterbacking that will strip the defense even from people who acted reasonably to avert a greater evil. Indeed, it is difficult to imagine *any* action a person could take in a necessity-defense scenario that would be sure to survive the Ninth Circuit's "safest-alternative" scrutiny. Escaped from prison to avoid being burned alive? *Baender*, 255 U.S. at 226. You could have let the fire get closer first. Stole a full meal from a cabin to avoid starving to death in the wilderness? *MPC & Cmt.*, Art. 3, § 3.02 cmt. at 9. You could have stolen only the minimum amount required to survive. Drove 20 miles per hour above the speed limit to get a severely injured

person to the emergency room? *LaFave* § 10.1(c). You could have driven 15 miles per hour above the limit and still saved the patient. And here: Set a prohibited fire to avoid dying of dehydration and exposure in a remote wilderness? You could have done it better, by clearing brush and digging a pit. Under the Ninth Circuit's safest-alternative rule, the perfect will be the enemy of the socially beneficial good.

Moreover, the safest-alternative rule is fundamentally unsuited to the context of the necessity defense. This defense does not typically come into play in situations in which an actor may calmly and deliberately plan and execute a Platonic-ideal method of averting a greater evil. To the contrary, it arises in the contexts of raging fires, sinking ships, remote wildernesses, and people who—like Philip—are contending with life-threatening physical and mental stresses. *Id.* It is all too easy, with the benefit of tranquility and hindsight, to flyspeck the actions taken by a person facing desperate circumstances. But if this is how the necessity defense is to be applied, few will enjoy its protection, however reasonable—albeit imperfect—their actions may have been.

This Court should take action now to nip this pernicious gloss on the necessity defense in the bud, before it takes root, propagates, and undermines the viability of this crucial defense.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 18th day of September, 2025.

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