No. _____

IN THE
Supreme Court of the United States

HUGO CHAVEZ VALDIVIAS
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for a Writ of Certiorari

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
KAYLA GASSMANN
Assistant Federal Public Defender
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: kayla_gassmann@fd.org
Counsel for Petitioner

QUESTION PRESENTED

Does the Sixth Amendment right to a jury trial guarantee a jury informed of its power to return a verdict against the law and the facts?

Does the Sixth Amendment right to a jury trial guarantee a jury informed of the sentencing consequences of any conviction it may return?

RELATED PROCEEDINGS

United States v. Valdivias, D. Kan. Case No. 2:20-CR-20054-DDC-2 (judgment filed 11/22/2024).

United States v. Valdivias, 10th Cir. Appeal No. 24-3179 (opinion filed 08/26/2025).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Hugo Chavez Valdivias respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's unpublished panel opinion is available as *United States v. Valdivias*, 2025 WL 2450161 (10th Cir. Aug. 25, 2025); it is reprinted in Petitioner's Appendix (Pet. App.) at 1a-2a. The district court's unpublished order denying Petitioner's pretrial motion to inform the jury of potential penalties and permit nullification arguments is available as *United States v. Valdivias*, 2024 WL 3936469 (D. Kan. Aug. 26, 2024); it is reprinted at Pet. App. 3a-8a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231; the Tenth Circuit, under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III provides in relevant part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

U.S. Const. Art. III, § 2, cl. 3.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

U.S. Const. Amend. VI.

INTRODUCTION

"The text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial." *Ramos v. Louisiana*, 590 U.S. 83, 89 (2020) (emphasis in original). One of those requirements was jury independence—from the government (or king), the legislature, and the judiciary. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

Jury independence includes the "power to bring in a verdict in the teeth of both law and facts," that is, a "technical right, if it can be called so, to decide *against the law and the facts*." *Horning v. District of Columbia*, 254 U.S. 135, 139-140 (1920) (emphasis added). This power has been labeled, among other things, the power of "nullification," *Jones v. United States*, 526 U.S. 227, 246 (1999), or the power to exercise "jury lenity," *United States v. Powell*, 469 U.S. 57, 65 (1984). *See also* BLACK'S LAW DICTIONARY (12th ed. 2024) (defining jury nullification as a jury's "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness").

Exercising this power is "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Powell*, 469 U.S. at 65. Juries exercise this power through the general verdict form in criminal

cases, which—by design—prevents "speculation or inquiry" into the jury's grounds for the verdict. *Smith v. United States*, 599 U.S. 236, 253-254 (2023) (citations omitted).

Juries undoubtedly retain this nullification power today. *See McElrath v. Georgia*, 601 U.S. 87, 94 (2024) ("the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons") (citation omitted). But today—unlike at the time the Sixth Amendment was adopted—judges intentionally keep juries in the dark about information necessary to understand and exercise this power. The Tenth Circuit continued this trend of judicially enforced jury ignorance in Petitioner's appeal when it adhered to circuit precedent holding that (1) a criminal defendant "is not entitled to have the jury instructed that it can, despite finding the defendant guilty beyond a reasonable doubt, disregard the law"; and that (2) "when the jury has no sentencing function, . . . it should reach its verdict without regard to what sentence might be imposed." Pet. App. 2a, *citing United States v. Courtney*, 816 F.3d 681, 686 (10th Cir. 2016).

This Court should grant this petition and decide the questions presented because judicially enforced jury ignorance is inconsistent with the Sixth Amendment jury trial right as that right was understood by the Founders. This Court has not directly addressed jury nullification in over a century, and yet nullification-related questions continue to be hotly debated both in and out of the lower courts (see Section 4 of Reasons for Granting the Writ below). The vast majority of state and federal courts today require both jury ignorance about the jury's power to return a verdict against

the law and the facts, and jury ignorance of matters (like the harshness of drug sentences) relevant to the exercise of that power. As a result, today's juries are not our Founders' juries. It is time to set the historical and constitutional record straight about the crucial—and constitutionally compelled—role of jury independence. This case is the perfect vehicle for doing so.

STATEMENT OF THE CASE

1. District Court Proceedings

For fifteen months in 2019–2020, Kansas City area law-enforcement officers repeatedly sent a confidential informant to buy methamphetamine from a man who called himself "Playboy." R3.501-506, 915. And yet—despite repeated opportunities that they themselves controlled—the officers did not arrest Playboy until after their informant had, over the course of 15 separate transactions, requested and bought more than 17 pounds of methamphetamine from Playboy. *Id.* Officers originally believed Playboy to be one Juan Carlos Chavez Valdivias. R3.635. Indeed, Juan Carlos's name appeared at least a thousand times in investigative reports related to Playboy. R3.810-811. An FBI agent even identified Playboy as Juan Carlos in a sworn wiretap application. R3.807-808. And a year later, this same agent swore to a grand jury that Playboy had been "confirmed" to be Juan Carlos. R3.813, 887-890, 975. But when officers finally arrested a man they thought was Juan Carlos, that man turned out to be Juan Carlos's brother Hugo Chavez Valdivias (Petitioner). A federal grand jury ultimately indicted Petitioner with conspiring to distribute and possess with intent to distribute methamphetamine (Count 1), and eleven counts of distributing methamphetamine (Counts 5-10, 12, 19-22). R1.146.

Shortly before trial, Petitioner moved the district court to (1) instruct the jury that each of the twelve crimes charged carried a mandatory penalty of ten years to life in prison (this mandatory penalty was based on the quantity of drugs the informant bought, 21 U.S.C. § 841(b)(1)(A)(viii)); (2) not instruct the jury that it was required to ignore this harsh penalty in determining guilt; and (3) permit Petitioner to argue that the facts in his case warranted avoidance of this harsh penalty, and that the jury should therefore return not-guilty verdicts. Pet. App. 3a-4a; R1.165-178 (written pretrial motion); R3.1049, 1051-1052 (reassertion of motion during instructions conference).

The district court found Petitioner's motion "interesting" and opined that "perhaps at the circuit level or even the Supreme Court the defendant would convince courts to revise long-standing precedent." R3.364. But the district court denied the motion based on its reading of precedent from the Tenth Circuit and this Court. R3.363-365 (oral ruling before opening statements); R3.1050, 1052 (oral ruling during instructions conference); Pet. App. 3a-8a (written ruling after trial).

Petitioner proceeded to trial, where his jury—uninformed of either the harsh sentencing consequences of a guilty verdict or its own power to override those consequences—convicted him of the charged conspiracy and all the distribution counts. R1.324-332. The district court sentenced Petitioner to 30 years in prison based primarily on the quantity and purity of drugs involved in the offenses, and despite no evidence that the drug sales involved any minors, weapons, violence, threats, or gangs. R1.389-390; R2.34-35; R1.1113; R3.1133, 1144.

2. Tenth Circuit Proceedings

Petitioner timely appealed to the Tenth Circuit. R1.395. He argued that the district court erred when it deprived his jury of information, instructions, and argument relevant to its power to return a not-guilty verdict despite evidence of guilt. Br.16-25. He explained that historical evidence shows that the juries contemplated by the jury-trial guarantees in the Constitution had full knowledge of their nullification powers and the sentencing consequences of their verdicts, and that depriving juries of this knowledge is inconsistent with the Sixth Amendment jury trial right as that right was understood by the Founders. Br.17-26. But he conceded that his argument was foreclosed by Tenth Circuit precedent. Br.17.

The Tenth Circuit affirmed in a two-page unpublished decision. Pet. App. 1a-2a. The Tenth Circuit declined to address Petitioner's "broad-ranging argument in favor of jury nullification," instead noting Petitioner's legal concession and holding that "[b]ecause the issue raised is squarely governed by controlling circuit precedent, we reject [his] argument." Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

1. This Court should finally settle the question whether the Sixth Amendment right to an independent jury means a jury informed of both its independence and the sentencing consequences of any conviction it may return.

A. Judicial enforcement of jury ignorance is inconsistent with the history of the Sixth Amendment's jury-trial guarantee.

To understand the Sixth Amendment's jury-trial guarantee, we must understand that guarantee's "original meaning." *Cf. Crawford v. Washington*, 541 U.S. 36, 60 (2004) (revising Sixth Amendment confrontation doctrine "to reflect more accurately

the original understanding of the Clause"). That meaning is inextricably intertwined with the jury's historical and unreviewable prerogative to return a not-guilty verdict against ("in the teeth of") the law and the facts. *Horning*, 254 U.S. at 139-140.

Appreciation for the jury's nullification power—especially in criminal cases, with knowledge of and often in response to sentencing consequences—predates the founding of the United States and the adoption of our Constitution. Under British rule, "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." *Jones v. United States*, 526 U.S. 227, 245 (1999). Juries asserted this "power to thwart Parliament and Crown" by returning "flat-out acquittals in the face of guilt" or convictions on lesser-included offenses—a practice Blackstone called "'pious perjury' on the jurors' part." *Id.*; *see also* Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 845 (2023) (describing how eighteenth century juries "saved . . . defendants from the gallows" by returning lesser ("partial") verdicts). British efforts to confine the jury's role to factfinding only, leaving to judges not just the law but "control over the ultimate verdict, applying law to fact," ultimately failed. *Jones*, 526 U.S. at 246-247 & n.8. "That this history had to be in the minds of the Framers is beyond cavil." *Id.* at 247.

The right to an independent jury was robustly exercised during the founding period, as "American counsel regularly argued the validity of laws directly to juries, which often refused to enforce British laws they felt were unjust." Andrew J.

Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 382-83 (2007) (citing sources). During this time, "the jury's law-finding power came to symbolize resistance to British rule." William Ortman, *Chevron for Juries*, 36 CARDOZO L. REV. 1287, 1306 (2015). "Indeed, British statutes curtailing the power of American juries were among the causes of the Revolution" cited in the Declaration of Independence. *Id*.; *see* Declaration of Independence ¶¶ 2, 19 (listing the King of Great Britain's "repeated injuries and usurpations," including "depriving us in many cases, of the benefits of Trial by Jury"). It was against this backdrop that the States ratified not just one but two express Constitutional guarantees of the accused's right to a jury decision in a criminal case. *See* U.S. Const. Art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"). These guarantees "reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan*, 391 U.S. at 155.

Both during and after ratification, the jury's "nullification power was well-known and used . . . as common-law juries during the seventeenth and eighteenth century saw the development of the jury's power to acquit against the facts, or, as it was referenced in the time, to find the law in addition to the facts." *United States v. Beckner*, 2024 WL 2880613 at *18 (D. N.M. 2024). But juries did not exercise this

power blindly. Rather, given the limited sentences available upon a conviction, they "knew well the repercussions of a guilty verdict for felonies." *Id.* at *34. And they "not only knew about the sentencing ramifications of their verdicts, but historical evidence shows that juries weighed heavily the defendant's sentence in reaching their verdicts." *Id.* at 35. Through at least the early part of the nineteenth century, "the right to return a general verdict was highly esteemed as the jury's prerogative, especially in criminal cases"; judges not only tolerated nullification, they affirmatively "instructed the juries that they were to decide both 'the law' and the facts, not being bound by the opinion of the trial judge." *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 57 & n.8 (2d Cir. 1948) (citing sources); *see also* Clay S. Conrad, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 23-99 (Cato Institute 2013).

B. This Court should resolve the tension between *Sparf v. United States* and the Sixth Amendment right to an independent jury.

Judicial willingness to affirmatively inform jurors of their nullification powers began to erode after this Court decided *Sparf v. United States*, 156 U.S. 51 (1895). In *Sparf*, this Court found no error in a trial judge's refusal to instruct a jury that it could convict the defendants of either the charged crime (murder) or a lesser crime (manslaughter), and the judge's admonition to the jury that it could only return a verdict of guilty or not guilty as to the charged murder because the judge had found as a matter of law that there was no evidence to support a guilty verdict on manslaughter. *Id.* at 59, 63-64, 103. This Court concluded that this admonition was properly given "upon the theory that it was the duty of the court to expound the law,

and that of the jury to apply the law as thus declared to the facts as ascertained by them." *Id*. at 106.

Justices Gray and Shiras dissented, explaining that "the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." *Id*. at 114. Both the majority and the dissent reviewed at length the historical roles of judges and juries as understood and expressed by the founders, early justices, and others, each in support of their opposing conclusions about the correctness of the trial judge's lesser-offense instruction. *Id*. at 64-107 (majority); *id*. at 113-183 (dissent); *see also* Conrad, JURY NULLIFICATION at 103 ("Both opinions draw from the same history, the same precedents, and the same texts, and reach diametrically opposite conclusions.").

The debate in *Sparf* was not so much about whether juries possessed the power to *disregard* the law as it was about whether juries possessed the power to *decide* the law. Before *Sparf*, American juries had (at least sometimes) been entrusted to decide the law, including the meaning and constitutionality of statutes. Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Conrad, JURY NULLIFICATION at 23-99. This law-finding power was a different form of jury independence from the power to disregard the law that we associate with jury nullification today. As Conrad describes it, there were "two trends of jury law-finding that had been developed since the Magna Carta: the use of juries to ameliorate what were commonly considered to be overly harsh penalties, and the more radical true

law-finding view." *Id*. at 29-30. But after *Sparf*, "the line between law-finding in this [more radical] sense and nullification had become blurred," such that "rejecting the law-finding jury meant rejecting nullification" as a power that juries should be informed they can exercise. Epps & Ortman, *The Informed Jury*, 75 VAND. L. REV. at 883-884.

Notwithstanding *Sparf* and the jury ignorance the lower courts read *Sparf* to require, both this Court and the lower courts continue to this day to recognize that "the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons." *McElrath v. Georgia*, 601 U.S. 87, 94 (2024) (citing *Smith v. United States*, 599 U.S. 236, 253 (2023)); *accord, e.g., United States v. Gonzalez*, 596 F.3d 1228, 1237 (10th Cir. 2010) ("a jury may render a verdict at odds with the evidence or the law"); *United States v. Jones*, 580 F.2d 219, 224 (6th Cir. 1978) (noting "the jury's traditional prerogative to ignore even uncontroverted facts in reaching a verdict"). This disconnect between embracing the jury's "unreviewable power" to nullify and enforcing jury ignorance of information relevant to exercising this power is difficult to reconcile. Superheroes cannot exercise their latent powers until they discover them; the same holds true for jurors. This Court should grant this petition and clarify or revisit *Sparf* as necessary to resolve the tension between *Sparf* and the Sixth Amendment right to an independent jury.

C. This Court should also resolve the tension between *Shannon v. United States* and the Sixth Amendment right to punishment-informed juries.

Post-*Sparf* judicial support for jury ignorance was extended to include ignorance about sentencing consequences in *Shannon v. United States*, 512 U.S. 573 (1994). In

Shannon, this Court relied on the "basic division of labor in our legal system between judge and jury" to hold that "when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentences might be imposed.'" *Id*. at 579 (citation omitted). But *Shannon* was not on its face about jury nullification. It was about whether a district court is required to advise jurors of the consequences of a not-guilty-by-reason-of-insanity verdict to guard against jurors' fears that such a verdict would result in the defendant's immediate release into society. *Id*. at 575, 584. This Court answered this question in the negative, reluctant to admit of any exception to what this Court described as a general "rule against informing jurors of the consequences of their verdicts." *Id*. at 586-587; *but see id*. at 587 (recognizing that an exception to the rule "may be necessary under certain limited circumstances," such as to correct misstatements by counsel), *and id.* at 590-591 (Stevens, J., joined by Blackmun, J., dissenting and disputing the existence of such a rule in the first place).

Since *Shannon*, "the general practice in both state and federal courts is that juries are not to be told about punishment, at least in non-capital cases." Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J.L. & PUB. POL'Y 411, 416 (2007). But, as some scholars and jurists have persuasively argued, punishment-ignorant juries are "hard to square" with this Court's modern "cases on the scope of the Sixth Amendment jury-trial right." Epps & Ortman, *The Informed Jury*, 75 VAND. L. REV. at 885; *see also United States v. Polizzi*, 549 F.Supp.2d 308 (E.D.N.Y. 2008) (Weinstein, J., tracing the jury-trial right to conclude

that informing the jury of the mandatory minimum sentence that would apply upon a guilty verdict "accords fully with Sixth Amendment rights to a jury which understands the effects and implications of its decision"), *vacated and remanded by United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009).

From *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to *United States v. Booker*, 543 U.S. 220 (2005), this Court "repeatedly stressed the importance of jury 'authorization' for increased penalties." Epps & Ortman, *The Informed Jury*, 75 VAND. L. REV. at 885. In *Apprendi*, this Court examined the "historic link between verdict and judgment" to conclude that the Sixth Amendment jury-trial right requires that any fact other than a prior conviction that increases a statutory mandatory maximum penalty must be decided by a jury beyond a reasonable doubt. 530 U.S. at 482; *see also Jones v. United States*, 526 U.S. 227 (1999) (same); *Alleyne v. United States*, 570 U.S. 99 (2013) (same as to statutory mandatory minimum penalties); *Booker*, 543 U.S. at 230-44 (same as to maximum and minimum penalties under mandatory sentencing guidelines). In other words, the parameters of punishment must be "authorized by the jury's guilty verdict." 526 U.S. at 494; *accord Blakely v. Washington*, 542 U.S. 296, 305 (2004) (state sentencing procedure "did not comply with the Sixth Amendment" where "the jury's verdict alone does not authorize the sentence").

Enforcing jury punishment-ignorance "has deprived this line of cases of some of its substantive bite." *Id*. at 886. As Judge Weinstein put it in *Polizzi*, "modern practice has eroded a power historically reserved to the jury, to wit, the power to refuse to convict or to modify its decisions based upon its knowledge of sentencing

implications." 549 F.Supp.2d at 431; *see also* Cassak & Heumann, *Old Wine*, 4 RUTGERS J.L. & PUB. POL'Y at 484 (noting the post-*Apprendi*/*Booker* anomaly "that we entrust and insist that juries make factual findings that determine sentencing outcomes in non-capital cases, but tell them neither what they are doing nor what the results of those decisions will be").

Judge Weinstein concluded in *Polizzi* that "*Shannon* require[s] reinterpretation" post-*Apprendi* and *Booker*. *Id*. at 437-38; *see also id.* at 426 ("Those who would limit the powers historically exercised by juries must now consider the Supreme Court's *Booker–Apprendi* line of sentencing decisions."). This Court should grant this petition and clarify or revisit *Shannon* as necessary to resolve the tension between *Shannon* and the Sixth Amendment right to punishment-informed juries.

2. The constitutional right to an independent jury is an exceptionally important right that this Court should address.

The right to a jury trial was considered by the Founders to be "so important to liberty of the individual that it appears in two parts of the Constitution": Article III and the Sixth Amendment. *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955). "This right of trial by jury ranks very high in our catalogue of constitutional safeguards." *Id*. And this right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305-306.

"[E]xalted in rhetoric," this right is "less revered in actual practice." Epps & Ortman, *The Informed Jury*, 75 VAND. L. REV. at 824. "Recognizing a constitutional right to an informed jury would—in fact and not just on paper—restore the jury to its central role in criminal justice." *Id*. at 829. This Court "has not directly addressed

nullification since *Sparf*." *Beckner*, 2024 WL 2880613 at 22. This Court should do so here.

3. While the vast majority of courts today require jury ignorance, individual judges and scholars question this position, and it's time for this Court to settle the matter one way or another.

State courts and federal circuit courts have almost uniformly read *Sparf* and *Shannon* to require jury ignorance of both the jury's nullification power and the sentencing consequences of a guilty verdict. *Beckner*, 2024 WL 2880613 at *2 (noting that "[s]tates quickly followed on the heels of the Supreme Court's decision in *Sparf v. United States* to restrict the role of juries"; discussing state cases); *State v. Sayles*, 244 A.3d 1139, 1155-1157 (Md. 2021) (discussing state and federal cases).[1] But individual judges continue to question this view. *See, e.g., Beckner*, 2024 WL 2880613 at *27 (Browning, J., urging that the fact "[t]hat the jurors' lack of knowledge stems at least in part from the judicial exertion of power, and that the jury's nullification power played an important role in criminal jury trials at the Founders' time, counsels in favor of finding this evolution unconstitutional."); *United States v. Diaz*, 2022 WL 3042969 at *2 (D. N.M. 2022) (Vazquez, J.) ("This Court joins Judge Browning in concluding that it 'is not consistent with the concept of a jury trial at the Founders' time . . . [t]o keep the jury ignorant of sentencing ramifications.' . . . . The Court also joins Judge Browning in concluding that the defendant's right to a jury trial can only be fully protected by advising the jury about the sentencing ramifications of its

[1] One outlier is the New Hampshire Supreme Court, which, under state law, allows (but does not require) judges to inform juries of their nullification power. *See State v. Paul*, 104 A.3d 1058 (N.H. 2014).

verdict."); *Polizzi*, 549 F.Supp.2d at 404-448 (Weinstein, J., examining history of jury independence at length and concluding that refusing to inform jury of mandatory minimum sentence upon conviction "constituted a denial of defendant's Sixth Amendment jury rights"), *vacated and remanded by United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009); *Sayles*, 244 A.3d at 1171-1174 (Hotten, J., dissenting and explaining why judge's instruction to jury that nullification was improper, contrary to law, and would violate the jury's oath misstated Sixth Amendment law and was an abuse of discretion). And scholars have long debated whether jurors "should be told outright" of their nullification powers. Teresa L. Conaway *et. al.*, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004) (collecting scholarly articles and monographs, as well as representative federal circuit court cases); Conrad, JURY NULLIFICATION at 12 (urging lawyers to "encourage courts and legislatures to adopt better, more straightforward methods of empowering the jury to do that task which they were intended by the Founding Fathers to perform, and which the Supreme Court has recognized as the enduring purpose of the criminal jury trial: preventing oppression by the government"); *Polizzi*, 549 F.Supp.2d at 424 (listing "academics and other scholars whose commentary has been generally critical of limitations on Sixth Amendment jury power to dispense mercy").

The presence or absence of conflicting court views is only one consideration governing review on certiorari. *See* Supreme Court Rule 10. This Court has previously granted certiorari in the face of long-standing lower-court unanimity. *See, e.g., Rehaif v. United States*, 588 U.S. 225 (2019); *Crawford v. Washington*, 541 U.S. 36 (2004).

This Court should grant this petition not just *despite* the fact that so many courts endorse and enforce jury ignorance, but *because* they do so, and regardless of whether this Court ultimately agrees with them. If the courts are right about both questions presented, this Court's final say-so will ultimately preserve judicial resources by settling this matter once and for all. If they are right for mistaken reasons, then their mistakes stand in need of correction. If they are wrong, then their mistakes stand in need of correction, *and* Petitioner stands in need of a remedy. The courts *are* wrong, and almost uniformly so, which makes review that much more pressing.

4. This case is the right vehicle for both questions presented.

This case presents no procedural impediments to reviewing the questions presented. Petitioner sought an informed jury at trial and the district court ruled squarely against him. Pet. App. 3a–8a. Petitioner timely appealed, raising both questions presented here, and the Tenth Circuit affirmed on the merits. Pet. App. 1a–2a. This case is the right vehicle for deciding these important questions.

The fact that the Tenth Circuit's decision is unpublished does not weigh against granting this petition. As the Tenth Circuit correctly observed, the questions presented here were "squarely governed by controlling circuit precedent." Pet. App. 2a. It is unlikely that the Tenth Circuit (or any other circuit) would have any reason to publish a decision applying controlling circuit precedent. And publication is not a prerequisite to review or a reliable measure of a decision's importance. *See, e.g., Dunn v. Reeves*, 594 U.S. 731 (2021) (reviewing unpublished circuit court decision); *Shapiro v. McManus*, 577 U.S. 39 (2015) (same); *Los Angeles County, California v. Rettele*, 550 U.S. 609 (2007) (same); *National Archives and Records Admin. v. Favish*, 541 U.S.

157 (2004) (same); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (same); *Eastern Assoc. Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000) (same); *Carter v. United States*, 530 U.S. 255 (2000) (same); *Andrus v. Texas*, 590 U.S. 806 (2020) (reviewing unpublished Texas Court of Appeals decision); *Wisconsin Right to Life, Inc. v. F.E.C.*, 546 U.S. 410 (2006) (reviewing unpublished three-judge district court decision); *Kaupp v. Texas*, 538 U.S. 626 (2003) (reviewing unpublished Texas Court of Appeals decision); *Ewing v. California*, 538 U.S. 11 (2003) (reviewing unpublished California Court of Appeal decision). There will be no better vehicle—published or not—for deciding both questions presented.

Finally, an informed jury could well have changed the outcome in Petitioner's case. Jurors take seriously their role as "conscience of the community." Andrew Lambert, *Antigone and Les Miserables: A Pathetic Look At Jury Nullification*, 59 SAN DIEGO L. REV. 437, 468 (2022). In a case like Petitioner's, an informed jury might have wished to discourage the police from inciting and abetting drug crimes through unnecessarily drawn-out undercover operations in the community (with, for instance, acquittals on some if not all charged substantive sales). David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in A New Context*, 28 U. MICH. J.L. REFORM 861, 865 (1995) ("jury nullification is best understood as a community's check on judicial, prosecutorial, and police discretion"). Or perhaps an informed jury might have wished to send a message to the legislature and the courts that drug penalties are "simply too severe"—either in the abstract, or in Petitioner's case specifically (where, again, the police ratcheted up the penalty by continuing to engage

in undercover buys instead of arresting their suspects at the first opportunity; or where the drug sales, like here, did not involve any gangs, minors, weapons, or violence). Epps & Ortman, *The Informed Jury*, 75 VAND. L. REV. at 839. Or perhaps—knowing the harsh consequences of a guilty verdict—an informed jury might have simply held the government more strictly to its burden of proof "to avoid complicity in an erroneous decision." *Id*. at 837. In every one of these scenarios, the jury would have acted as the drafters and ratifiers of the Sixth Amendment intended: to "prevent oppression by the Government." *Duncan*, 391 U.S. at 155.

This Court should grant this petition and decide both questions presented.

CONCLUSION

For all of the above reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief

KAYLA GASSMANN
Assistant Federal Public Defender
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: kayla_gassmann@fd.org
Counsel for Petitioner