No. 25-851

In the Supreme Court of the United States

ASHLEY GRAYSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the evidence-suppression provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, under which "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial[] * * * if the disclosure of that information would be in violation of this chapter," 18 U.S.C. 2515, contains a "clean hands" exception applicable to any party uninvolved in the illegal activity through which the contents of the communication were acquired.

PARTIES TO THE PROCEEDING

Petitioner is Ashley Grayson.

Respondent is the United States.

Joshua Grayson was also a defendant in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is available at 2025 WL 2366262. The order of the district court (Pet. App. 22a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2025. A petition for rehearing was denied on September 15, 2025 (Pet. App. 38a-39a). On November 18, 2025, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including January 14, 2026, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner

was convicted of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958. Indictment 1; Judgment 1. The district court sentenced her to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-21a.

1. Petitioner "was a social media influencer in Dallas who made her name helping people repair their credit." Pet. App. 2a. Through her online activities, petitioner became acquainted with Olivia Johnson, a Memphis-based influencer and hairstylist. Order Denying Mot. for New Trial & for Acquittal (Order) 3. Petitioner offered Johnson credit services in exchange for Johnson promoting those services on social media—an arrangement that initially proved mutually beneficial. Pet. App. 2a.

Later, petitioner told Johnson that she wanted to buy a house for a single mother in need, and Johnson suggested several candidates, including her own mother. Pet. App. 2a. Petitioner chose Johnson's mother and purchased a new home. *Ibid.* Although Johnson believed that the house would belong to her mother, petitioner's name remained on the deed while Johnson's mother lived there. *Ibid.* That situation eventually became a point of contention between Johnson and petitioner. *Id.* at 2a-3a. Around the same time, petitioner's social-media business was threatened by online accusations that she was "scamming her clients and being an untrustworthy individual." *Id.* at 3a.

In August 2022, petitioner invited Johnson and Johnson's husband, Brandon Thomas, to visit her in Texas and agreed to pay their travel expenses. Pet. App. 3a. Petitioner was aware that Johnson had previously been charged with aggravated assault and that Thomas had two felony convictions, including one for attempted

murder. Order 3; 3/27/24 Tr. 293. Johnson believed that the purpose of the visit was to discuss her mother's housing. Pet. App. 3a. Instead, petitioner asked Johnson to kill three people: petitioner's ex-boyfriend and two women who had criticized her online. *Ibid.*

Petitioner offered Johnson and Thomas $80,000 to commit the three murders and indicated that she had the cash with her to make a payment. Pet. App. 3a. She also provided the victims' addresses and stated that she wanted the killings to occur "as soon as possible." Order 6 (citation omitted). Johnson and Thomas expressed agreement to the plot, and Johnson suggested that the conspirators hold future conversations over the video-communication platform FaceTime, claiming that FaceTime calls are untraceable. Pet. App. 3a-4a.

In fact, Johnson and Thomas had no intention of committing the murders. Pet. App. 4a. Instead, they planned to "play along" while collecting evidence that they would "'[t]urn * * * over' to authorities to ensure their own safety." *Ibid.* (citation omitted). Johnson also hoped to make an incriminating video of petitioner that she could sell to the gossip website TMZ or use as leverage to get petitioner to sign over the deed to her mother's home. *Ibid.*

After Johnson and Thomas returned to Memphis, Johnson followed up with petitioner by text message. Pet. App. 4a. Johnson stated that she and Thomas were committed to the murder-for-hire plot but asked for a deposit payment. *Ibid.* Petitioner was hesitant to discuss their "business plan" over text message, and eventually the two women discussed the details during a FaceTime video call. *Ibid.* (citation omitted). Unbeknownst to petitioner, Johnson and Thomas used

Thomas's phone to video record the call. *Ibid.*; 3/27/24 Tr. 273-274.

On the call, Johnson told petitioner that she and Thomas had already been to one intended victim's home and that it would be "real easy to get her." Pet. App. 4a (citation omitted). Petitioner indicated that she wanted that murder committed as soon as possible and offered Johnson and Thomas an additional $5000 to carry it out within a week and a half. *Ibid.*; Order 9. The call ended with Johnson telling petitioner to "[b]e looking out for us tonight," conveying that she and Thomas planned to go to the victim's home that evening. Pet. App. 4a (citation omitted; brackets in original).

Johnson and Thomas did not, however, attempt to commit the murder. Pet. App. 5a. Instead, they used FaceTime to call petitioner from an unrelated crime scene. *Ibid.* Against a backdrop of lights and sirens, Johnson claimed that she and Thomas had "shot . . . up" the victim's home. *Ibid.* (citation omitted). Petitioner agreed to pay them $10,000, and Johnson and Thomas immediately traveled to Texas to collect. *Ibid.* Surveillance video from early the next morning showed petitioner and her husband handing Johnson and Thomas a duffel bag of cash. Order 13; 3/27/24 Tr. 43-53.

Soon thereafter, Johnson sent petitioner a clip of the recorded FaceTime call. Pet. App. 5a. Petitioner accused Johnson of threatening her and called the Federal Bureau of Investigation (FBI). *Ibid.*; Order 1. During a 23-minute call with the FBI, petitioner told an intake officer that Johnson was attempting to use videos of a FaceTime call to extort her. Order 1-2. Petitioner said that the recorded call included a discussion of "what I would want to have happen to these people who are bullying me online." Order 2 (citation omitted).

The FBI intake agent asked petitioner what was on the recording, and petitioner responded:

> The videos were saying that um I would want the—the people who did this, like, *they deserved to die* because they like put my address out, they put my personal information on social media, they were inciting violence, so *I'm saying they deserved something to happen to them* since they're inciting violence on me. And then she proceeds to ask me, um, about like payments or something, like, you know would you be willing to to pay, and *I'm like yeah I'd be willing to pay* like I don't even care, like they're bullying me, they have my personal address on social media.

Ibid. (citation omitted).

After petitioner sent Johnson a voicemail of an FBI agent following up on her complaint, Johnson, on the advice of counsel, sent the FBI the recorded FaceTime call and text messages between her and petitioner. Pet. App. 5a.

2. A grand jury in the Western District of Tennessee charged petitioner and her husband with conspiring to commit murder for hire, in violation of 18 U.S.C. 1958. Pet. App. 5a; Indictment 1. Before trial, petitioner moved to exclude video of the FaceTime call. Pet. App. 27a-37a. Petitioner argued, among other things, that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, prohibited the government from introducing the recording at trial. Pet. App. 27a-28a.

Title III provides that "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial[] * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. And, subject to a number

of exceptions, Title III prohibits "intentionally disclos[ing] * * * to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. 2511(1)(c); see 18 U.S.C. 2510(4) ("'[I]ntercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.").

One of the exceptions is for recordings made or sanctioned by a private party to the communication. See 18 U.S.C. 2511(2)(d). Specifically, disclosure generally "shall not be unlawful" when "a person not acting under color of law * * * intercept[s] a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception." *Ibid.* But that exception does not apply when "such communication is intercepted for the purpose of committing any criminal or tortious act." *Ibid.*

Petitioner argued that, although Johnson recorded the FaceTime call as a nongovernment party to the call, the recording was nonetheless prohibited because Johnson's purpose was to commit a crime (extortion), and Title III therefore precluded the use of the recording at trial. See Pet. App. 27a-28a. The district court, however, denied petitioner's motion to suppress. *Id.* at 27a-32a. In addressing petitioner's Title III argument, the court stated that, in *United States* v. *Murdock*, 63 F.3d 1391 (6th Cir. 1995), cert. denied, 517 U.S. 1187 (1996), the court of appeals had "carve[d] out an exception" to Section 2515's suppression rule "when the party seeking to introduce the evidence was not involved in

the wrongful conduct." Pet. App. 28a-29a. And it deemed that "clean hands exception" applicable here because the government played no part in recording the FaceTime call. *Id.* at 32a; see *id.* at 30a-32a.

The district court acknowledged that other circuits have criticized *Murdock*, Pet. App. 29a, but declined to "reconsider[] a clearly established" circuit precedent, *id.* at 30a. The court also found that petitioner's case would not be "an appropriate vehicle" for reconsidering *Murdock* because it was "unclear" whether the recording violated Title III. *Ibid.*; see *id.* at 30a-31a.

3. Petitioner and her husband proceeded to trial, where the government presented evidence of petitioner's efforts to commit murder for hire. See Order 3-26 (recounting evidence). Johnson testified about the proposal and progress of the murder plot, Order 5-7, and the government presented numerous text messages between petitioner and Johnson, including ones discussing their "business plan," which the evidence showed was their pseudonym for the plot, Order 7 (citation omitted); see Order 4-5, 12-16, 20.

Additional evidence—including digital payment records, flight records, Johnson's contemporaneous text messages with family members, and surveillance video from petitioner's husband's apartment building—corroborated Johnson's testimony. Order 5, 7-8, 13; see 3/26/24 Tr. 235-240. The surveillance video, taken the morning that Johnson and Thomas arrived in Texas to collect $10,000 from petitioner, showed petitioner and her husband passing a duffel bag to Johnson and Thomas, and Thomas counting money from the bag. Order 13; see 3/27/24 Tr. 43-53.

The jury watched the recording of Johnson's FaceTime call with petitioner, Order 8-13, but also listened

to the recording of petitioner's 23-minute call to the FBI, in which she described the statements that she made on the FaceTime call, Order 16-20. In addition, the government presented evidence about petitioner's relationship with the principal target of the murder-for-hire plot. Order 21-26. The district court later observed that "it is difficult to overstate the extent of animosity reflected in" the communications between petitioner and that individual. Order 22; see Order 22-25 (reproducing messages).

The defense elected not to put on any evidence. Order 26. The jury found petitioner guilty and her husband not guilty. 3/29/24 Tr. 8. Petitioner moved for a new trial, arguing in part that the district court had erred in admitting the FaceTime recording. Order 58-59. The court denied the motion. Order 59.

4. The court of appeals affirmed. Pet. App. 1a-21a. Among other things, the court rejected petitioner's claim that Title III barred the admission of the FaceTime recording. *Id.* at 11a-15a. The court accepted that petitioner "may be correct in some respects" that the recording violated Title III. *Id.* at 12a. But it concluded that "the legality of the recording ha[d] no bearing on its admissibility" because *Murdock*'s clean-hands exception applied. *Ibid.* According to the court, because "[t]he government neither made nor encouraged the FaceTime recording," *Murdock* "commands" that petitioner "'does not enjoy the . . . right to suppression.'" *Id.* at 13a (quoting *Murdock*, 63 F.3d at 1404).

Petitioner also asked the court of appeals to overrule *Murdock* because that decision "cannot be squared with the plain text of § 2515." Pet. App. 13a. The panel did "not discount [petitioner's] textual analysis," but stated that it was bound by *Murdock*. *Id.* at 14a. Later, in an

unsuccessful petition for rehearing en banc that likewise sought reconsideration of *Murdock*, petitioner noted that the court had last cited *Murdock* in 2008. Pet. for Reh'g 5.

ARGUMENT

Petitioner contends (Pet. 11-34) that the court of appeals erred in construing the suppression provision in 18 U.S.C. 2515 to contain a "clean hands" exception that permits the admission of unlawfully intercepted evidence by a party who played no part in the interception. The government agrees that Section 2515 does not contain such an exception and that the court of appeals' contrary decision in *United States* v. *Murdock*, 63 F.3d 1391 (6th Cir. 1995), cert. denied, 517 U.S. 1187 (1996), conflicts with the decisions of other courts of appeals. Nevertheless, certiorari is unwarranted given the infrequency with which the issue arises. This case appears to be the first in 30 years in which either the court of appeals or any district court in that circuit has applied *Murdock*'s clean-hands exception. And this case would be a particularly unsuitable vehicle for revisiting the exception since the exception's application was not outcome determinative.

The petition for a writ of certiorari should therefore be denied. Alternatively, the Court could grant the petition, vacate the judgment below, and remand for further consideration in light of the government's position in this brief.

1. The court of appeals erred in concluding that the statutory suppression provision in 18 U.S.C. 2515 has a freestanding clean-hands exception that allows the government to use communications intercepted in violation of Title III against the victim of the violation so long as

the government played no part in the unlawful interception. Section 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2515.

This Court has made clear that, "[u]nder § 2515, suppression is not mandated for every violation of Title III." *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). The Court has held, for example, that Section 2515 does not require suppression when the government has filed an application for permission to lawfully intercept certain communications, but the application misstates which of multiple permissible Department of Justice officials authorized the application. *Ibid.* The Court has also held that Section 2515 does not require suppression when such a wiretap application fails to list all likely targets or when the government fails to inform the judge of all identified individuals whose conversations were intercepted. *United States* v. *Donovan*, 429 U.S. 413, 432-439 (1977).

The court of appeals' decision in *Murdock*, however, perceived a "'clean hands' exception to Section 2515," which has been understood to allow the government to introduce the contents of an unlawfully intercepted communication when "the government took no part in the interceptions." 63 F.3d at 1404; see Pet. App. 13a.

The statute cannot be reasonably interpreted to support such an exception. The Court has stated that Section 2515 "serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.'" *Gelbard* v. *United States*, 408 U.S. 41, 51 (1972) (quoting statutory finding) (footnote omitted). A broad clean-hands exception, applied whenever the party introducing an unlawfully intercepted communication was uninvolved in the interception, would undermine that statutory goal.[1]

2. As petitioner observes (Pet. 13-19), the circuits have long disagreed over whether Section 2515 admits a clean-hands exception like *Murdock*'s. But that stale and infrequently arising disagreement does not warrant this Court's review.

Murdock "declin[ed] to follow" *United States* v. *Vest*, 813 F.2d 477 (1987), in which the First Circuit concluded that Section 2515 does not "permit[] the introduction in evidence of an illegally-intercepted communication by

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[1] That is not to say that the circumstances of the interception are always irrelevant. Title III's general prohibitions focus on "intentional[]" interceptions and other misconduct, 18 U.S.C. 2511(1), and specifically prohibit "disclos[ing]" a communication's "contents" only when the disclosing party "*know*[*s*] *or ha*[*s*] *reason to know* that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. 2511(1)(c) (emphasis added). Section 2515's prohibition on the introduction of evidence only when "disclosure of that information would be in violation of this chapter," 18 U.S.C 2515, may therefore be best interpreted not to preclude the government from introducing evidence when it is not aware, or on notice, at the time of the evidence's introduction that the communication's contents were unlawfully acquired.

an innocent recipient," *id.* at 481. *Murdock*, 63 F.3d at 1401. The Eighth Circuit had also previously "reject[ed]" the argument that an intercepted recording is admissible when "the government had no part in the decision to record or the actual recording of the conversation." *United States* v. *Phillips*, 540 F.2d 319, 327 & n.5, cert. denied, 429 U.S. 1000 (1976), and 435 U.S. 974 (1978). Since *Murdock*, three more circuits have rejected its clean-hands exception, with the Fourth Circuit doing so most recently in 2009. See *United States* v. *Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009); *Chandler* v. *United States Army*, 125 F.3d 1296, 1302 (9th Cir. 1997); *In re Grand Jury*, 111 F.3d 1066, 1077-1078 (3d Cir. 1997); see also *Commonwealth* v. *Damiano,* 828 N.E.2d 510, 515-517 (Mass. 2005).

No other circuit, however, has had occasion to address the issue since 2009. And in the 31 years since *Murdock*, the Sixth Circuit has applied the clean-hands exception only twice: in the decision below and in *Doe* v. *SEC*, 86 F.3d 589, vacated, 86 F.3d 599 (1996) (en banc).[2] In *Doe*, a panel of the court of appeals relied on *Murdock* to vacate a preliminary injunction barring the Securities and Exchange Commission from using the contents of a private party's allegedly unlawful recording. *Id.* at 594-596. A dissenting judge called *Murdock* "wrongly decided," *id.* at 598 (Merritt, C.J., dissenting); the court granted rehearing en banc and vacated the

[2] The petition for rehearing en banc noted (at 5) that the Sixth Circuit also cited *Murdock* in *United States* v. *Gray*, 521 F.3d 514 (2008). That case concerned whether the government could be compelled to disclose the contents of intercepted communications to the defendant, not whether the clean-hands exception barred suppression. See *id.* at 530. And the decision in *Gray* is itself nearly two decades old.

panel opinion, *Doe* v. *SEC*, 86 F.3d 599 (6th Cir. 1996) (en banc); and the en banc court ultimately vacated the injunction as having become moot without addressing *Murdock*, see *Smith* v. *SEC*, 129 F.3d 356, 362-364 (6th Cir. 1997) (en banc).

Petitioner's case is thus the first since *Murdock* in which the court of appeals has actually relied on the *Murdock* clean-hands exception. *Murdock* has also had a minimal impact in the district courts. Other than her own case, petitioner cites no district-court decision within the Sixth Circuit denying a motion to suppress based on *Murdock*, and the government is unaware of such a case. While petitioner claims (Pet. 30-31) that "[f]ederal district courts and state courts outside the Sixth Circuit" have adopted the clean-hands exception, thereby "up-end[ing]" Title III with "sweeping consequences," she fails to meaningfully substantiate that claim. Instead, she cites (Pet. 30) one magistrate-judge decision and one decision of Oregon's intermediate appellate court, each of which is over 20 years old.

The issue is especially unlikely to recur in light of the government's acknowledgment that the *Murdock* exception is unsound. In order for *Murdock* to be at issue, the government would need to affirmatively rely on it in opposition to a suppression motion; otherwise, the issue would be subject to ordinary rules of forfeiture and waiver. See *United States* v. *Reed*, 993 F.3d 441, 453 (6th Cir.), cert. denied, 142 S. Ct. 289 (2021). Accordingly, now that the government has acknowledged that Section 2515 lacks any clean-hands exception, there is no reason to presume that this issue will recur in a case involving the federal government (the only context in which it has ever arisen in the Sixth Circuit). And in the unlikely event that another litigant attempts to rely on

the clean-hands exception, the Sixth Circuit will have an opportunity to reconsider its interpretation in light of the government's position.

While the court of appeals denied rehearing en banc in petitioner's case, that denial might reflect the court's view that the issue is unimportant given petitioner's representation that the court "ha[d] not cited *Murdock* in almost twenty years" and that the issue was unlikely to arise again "for a decade or more." Pet. for Reh'g 5-6. Or the court may have recognized that, as the government maintained before the panel, any error was harmless. See Gov't C.A. Br. 25; pp. 15-17, *infra*. But whatever the reason, a decision with such minimal appreciable effect in the three decades since it was decided and whose incorrectness the government would now acknowledge to the Sixth Circuit does not warrant this Court's intervention.

3. This case would also be an unsuitable vehicle to address the vitality of *Murdock*'s clean-hands exception because the district court's application of that exception was not outcome-determinative.

a. As an initial matter, it is unclear whether the FaceTime recording violated Title III, as required to trigger Section 2515. The lower courts assumed without deciding that Johnson violated Title III by recording her call with petitioner. See Pet. App. 12a-13a, 30a-31a. But under 18 U.S.C. 2511(2)(d), a private party may intercept communications to which she is a party unless she does so "for the purpose of committing any criminal or tortious act"—thereby requiring a finding that a crime or tort was "*the* purpose," not just one purpose, for the interception. *Ibid.* (emphasis added). While petitioner contests (Pet. 27) the application of that exception on the theory that Johnson intended to

extort her, the record reflects that Johnson had multiple reasons for recording the FaceTime call.

One was to obtain leverage over petitioner as Johnson sought to acquire title to her mother's home. See Pet. App. 4a. But Johnson also wanted to sell the recording to the gossip website TMZ, *ibid.*, and to assert her and Thomas's innocence if petitioner were to kill her intended victims by other means, Order 6 & n.5; 3/27/24 Tr. 14-15. Petitioner, as the party seeking suppression, would bear the burden of proving that the recording was made for an improper purpose. *Traficant* v. *Commissioner*, 884 F.2d 258, 266 (6th Cir. 1989). Given Johnson's multiple stated rationales, it is uncertain whether petitioner could carry her burden. If she cannot, Section 2515's suppression remedy would not apply, regardless of the answer to the question presented.

b. Even if the FaceTime recording was improperly admitted, that admission was harmless in light of the overwhelming other evidence of petitioner's guilt. Rule 52(a) of the Federal Rules of Criminal Procedure directs that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993). And a nonconstitutional evidentiary error is harmless if the record provides a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 764-765, 776 (1946); see *Brecht* v. *Abrahamson*, 507 U.S. 619, 631-632 (1993).

As the government explained below, petitioner would have been found guilty even without the recording of the FaceTime call, given all of the unchallenged evidence that itself convincingly proved petitioner's

guilt. See Gov't C.A. Br. 25. That evidence included Johnson's and Thomas's testimony about their interactions with petitioner; the many text messages between petitioner and Johnson; the security video showing petitioner and her husband handing Johnson and Thomas a duffel bag of cash immediately after the staged shooting; petitioner's highly acrimonious communications with one of her intended victims; and other evidence corroborating Johnson's and Thomas's testimony about the murder-for-hire plot. See pp. 2-5, 7-8, *supra*.

Additionally, the jury heard the recording of petitioner's 23-minute call to the FBI, in which she herself described the contents of the FaceTime call in detail. See Order 1-2. Petitioner acknowledged that the recording showed her offering to pay for the killing of "these people who are bullying me online." Order 2 (citation omitted). Especially in light of the recorded FBI call, whose admissibility petitioner has never disputed, the challenged FaceTime recording was "merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." *Brown* v. *United States*, 411 U.S. 223, 231 (1973). Petitioner's conviction should therefore be affirmed, irrespective of the FaceTime recording's admissibility.

Contrary to petitioner's suggestion (Pet. 32), her husband's acquittal does not indicate that the admission of the FaceTime call materially affected the jury's determination of her guilt. The evidence against petitioner included many text messages and other communications between petitioner and Johnson to which petitioner's husband was not a party, including the initial conversation in which petitioner asked Johnson to murder three people. Pet. App. 4a; see, *e.g.*, Order 3-5, 7, 12-16. Petitioner's husband also was not a party to pe-

titioner's recorded call with the FBI, during which petitioner "emphasize[d] that she wanted those who were online bullying her to die, and that she was willing to pay." Order 18; see Order 16-20. Because petitioner's husband was uninvolved in many of the inculpatory communications in this case, his counsel argued that he was a "clueless husband" who was unaware of his wife's criminal plans. 3/28/24 Tr. 167; see, *e.g.*, *id.* at 170-171 ("Did anybody in this entire trial * * * see one, one text message from that man right there?"). Given the difference in evidence against petitioner and her husband, no substantial likelihood exists that, absent the admission of the FaceTime recording, the jury would have found petitioner not guilty.

4. Although plenary review is unwarranted for the reasons above, this Court could, in the alternative, grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration (GVR) in light of the government's position in this brief. See *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (recognizing the Court's power to GVR in light of "positions newly taken by the Solicitor General"). Some Members of this Court have expressed opposition to that practice where, as here, the court of appeals' judgment is ultimately correct. See, *e.g.*, *Myers* v. *United States*, 587 U.S. 981, 982 (2019) (Roberts, C.J., dissenting) (objecting to a GVR where the court of appeals "made some mistakes in its legal analysis, even if it ultimately reached the right result"); *Nunez* v. *United States*, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting) ("I continue to resist GVR disposition when the Government, without conceding that a *judgment* is in error, merely suggests that the lower court's *basis* for the judgment is wrong."). But this Court has

an established practice of issuing GVR orders in analogous circumstances. See, *e.g.*, *Zielinski* v. *United States*, No. 25-5067, 2026 WL 79683 (Jan. 12, 2026); *Myers*, *supra*. Although simply denying certiorari would be appropriate, a GVR would not be inconsistent with the Court's practice.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court could grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of the government's position in this brief.

Respectfully submitted.

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