

No. 25-851

In the Supreme Court of the United States

ASHLEY GRAYSON, PETITIONER

v.

UNITED STATES

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government’s brief in opposition confirms that the Court should intervene. The government agrees that the court of appeals’ decision is wrong, because “Section 2515 does not contain [a clean-hands] exception.” Opp. 9. It also agrees “that the court of appeals’ contrary decision in *United States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995),” thus “conflicts with the decisions of other courts of appeals.” Opp. 9. The government thus concedes that it would be appropriate to “grant the petition, vacate the judgment below, and remand for further consideration in light of the government’s position in [its] brief” in opposition. Opp. 9.

The government’s brief makes clear that the Court should not deny the petition. At a minimum, the government’s arguments show that there is no good reason not to grant, vacate, and remand—the path the Court often takes when the government confesses error, as the government recognizes (Opp. 17-18). But the better course is to grant plenary review or to summarily reverse the court of appeals’ clean-hands ruling to free the court of appeals from the precedential force of *Murdock*. Indeed, the Court has not hesitated to grant review to resolve a conflict among the courts of appeals—and to correct a circuit’s outlier rule—despite the government’s confession of error and suggestion that the Court should instead simply grant, vacate, and remand. See *Reyes Mata v. Lynch*, 576 U.S. 143, 147 (2015) (No. 14-185); *Bond v. United States*, 564 U.S. 211, 216 (2011) (No. 09-1227); *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (No. 07-330). Either granting plenary review or summarily reversing would be straightforward and

efficient. And doing so would protect the separation of powers and ensure that the government turns square corners both in this case and in future cases, which are increasingly likely to arise in the digital era.

1. As the government now concedes, “[t]he court of appeals erred in concluding that the statutory suppression provision in 18 U.S.C. 2515 has a freestanding clean-hands exception.” Opp. 9. There is no reasonable contrary argument, as the government recognizes. In the government’s words, “[t]he statute cannot be reasonably interpreted to support such an exception.” Opp. 11. There is no textual basis for a clean-hands exception, Pet. 24-26, and such an exception “would undermine [the] statutory goal[s]” of “protect[ing] the integrity of court and administrative proceedings” and “ensur[ing] that the courts do not become partners to illegal conduct,” Opp. 11 (quoting *Gelbard v. United States*, 408 U.S. 41, 51 (1972)).

The court of appeals panel below didn’t claim otherwise. Rather, it recognized that *Murdock* didn’t conduct “modern day statutory interpretation” but instead relied on “legislative history” to reach an outlier result. App. 14a. The panel followed *Murdock* simply because it was controlling circuit precedent. App. 15a.

That is also why granting, vacating, and remanding—while the very least the Court should do—is insufficient. The government’s proposal would send the case back to a court that has already noted that *Murdock* binds it unless it goes en banc. But there is little reason to put that court and its sixteen active members through those additional proceedings when all now agree that there is no reasonable defense of

Murdock. The Court should grant review or at the very least issue a summary reversal.

2. As the government also acknowledges, the court of appeals' decision conflicts with the decisions of other courts of appeals. *See* Opp. 11. The government counts five courts of appeals that have gone the other way, plus a state high court. Opp. 11-12. The Court should not let that disagreement stand, especially when the court of appeals has proven unwilling or unable to correct its precedent itself.

3. The government suggests two reasons why it thinks the Court should not intervene: the issue rarely arises and it will not "affirmatively rely on" the clean-hands exception in the future, Opp. 12-13, and the exception wasn't outcome-determinative, Opp. 14-17. Both contentions lack merit.

For starters, the issue's importance isn't limited to the number of federal court decisions expressly citing the clean-hands exception. For one thing, the clean-hands exception threatens the separation of powers by substituting judges' policy preferences for Congress's enacted decisions about how to regulate unlawful surveillance. For another, defendants in the Sixth Circuit likely do not raise § 2515 suppression arguments where the government has a clean-hands response given *Murdock* and the court of appeals' persistent refusal to overrule it. And beyond all that, as the petition explains (at 30), § 2515 applies not just in federal courts but also in state courts and administrative proceedings before any state, local, or federal governmental body. What's more, the consequences of the clean-hands exception—and the perverse incentives it creates for private actors and the government alike—are likely to become more

acute in the digital age, when electronically recording communications is easier than ever. *See Tennessee Ass'n of Criminal Defense Lawyers Br. 17-21.* The issue is important and the Court should not pass up the opportunity to correct the court of appeals' error, which the government concedes.

The government's vehicle arguments, for their part, are simply remand arguments. As to harmlessness, the government claims that Grayson "would have been found guilty even without the recording of the FaceTime call." Opp. 15. But the government's own representations in the lower courts belie that assertion. The government conceded before the court of appeals that the FaceTime recording "was important" to securing Grayson's conviction. CA6 Oral Argument, at 26:11-13. It instructed the jury at closing argument to "look closely at that FaceTime call." Dist. Ct. Doc. 147, at 131. And it told the district court that the "two main ... things that [it was] relying on" were the FaceTime call and surveillance footage that purportedly showed Grayson and her co-defendant husband handing cash to their alleged co-conspirators. Dist. Ct. Doc. 60, at 8. But Grayson's husband *was acquitted*, underscoring that the FaceTime recording was the key piece of evidence in the government's case against Grayson. Pet. 32. What the overall evidentiary picture would have looked like without the video—including what other evidence may have implicated Grayson but not her husband—is a question for the court of appeals.

The government also contends that "it is unclear whether the FaceTime recording violated Title III, as required to trigger Section 2515," because it is unclear whether Johnson had a sole purpose to extort Grayson. Opp. 14-15. The factual questions the

government discusses, and whether the purpose to extort must be the sole purpose of the recording, are, like the harmlessness question, questions for the court of appeals on remand. The key point here is that the court of appeals had no occasion to reach those questions given its concededly erroneous application of a clean-hands exception.

The Court should grant plenary review and reverse, or summarily reverse. Denial is unwarranted and would undermine the rule of law—the government has confessed error and acknowledged the circuit conflict. And simply granting, vacating, and remanding—although the minimum the Court should do, *see also, e.g., Montague v. United States*, 144 S. Ct. 2654, 2654 (2024) (No. 23-959); *Wolie Birhanu v. Garland*, 142 S. Ct. 2862, 2862 (2022) (No. 21-539); *Rojas v. United States*, 142 S. Ct. 421, 421 (2021) (No. 20-1594)—would be insufficient because the Sixth Circuit will have to go en banc to correct its error. Yet the court of appeals already refused to do that here, despite recognizing that it had no good reason to adhere to *Murdock*. App. 14a-15a, 38a-39a. Nor should this Court accept the government’s representation that it will no longer invoke *Murdock* or a clean-hands exception, because nothing binds the government to that position. The Court should intervene given the clear error of *Murdock*’s clean-hands rule, the expectation that in a government of laws the government must turn square corners, and the efficiency of granting or summarily reversing.

Respectfully submitted.

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