No. 16-1190

In the Supreme Court of the United States

MICHAEL DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the government violated petitioner's due process rights by refusing to grant use immunity to a prospective defense witness whom the government reasonably believed would perjure himself.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 845 F.3d 282.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2016. The petition for a writ of certiorari was filed on March 30, 2017. 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 Northern District of Illinois, petitioner was convicted of attempted extortion, in violation of 18 U.S.C. 1951, and of using extortionate means to collect a loan, in violation of 18 U.S.C. 894. Judgment 1. He was sentenced to 48 months of imprisonment, to be followed by two years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-24.

1. In June 2012, petitioner loaned $300,000 to R.J. Serpico and Joseph Serpico to finance the opening of their used car dealership. Pet. App. 1. Within months, "Joseph had gambled the money away and [the dealership] had fallen deep in arrears." *Ibid.* In January 2013, petitioner confronted R.J. Serpico about the default on the loan and made comments intended to threaten him and his family. See *id.* at 8-9; Gov't C.A. Br. 3-4.

In June and July 2013, when the debt remained unpaid, petitioner conspired to have R.J. Serpico's legs broken. Pet. App. 1-2. Petitioner set the violent scheme in motion by contacting Gigi Rovito, a local restaurant owner. *Id.* at 2-3; Gov't C.A. Br. 6-9. Gigi Rovito subsequently involved his brother, John Rovito, and a reputed Chicago mobster named Paul Carparelli. Pet. App. 2-3. On July 11, 2013, petitioner brought a $5000 down payment on a total payout of $10,000 to Gigi Rovito, who passed the payment to Carparelli via John Rovito. *Id.* at 3. "The scheme came to light" when Carparelli contacted George Brown, his "long-time associate," to arrange the beating. *Id.* at 2. Brown was cooperating with the FBI, and he recorded a number of relevant telephone calls among the co-conspirators. *Id.* at 2-3. On July 23, 2013, FBI agents arrested Carparelli and found the $5000 down payment at his house. *Id.* at 3.

2. In April 2015, a federal grand jury in the Northern District of Illinois returned a two-count superseding indictment that charged petitioner with attempted extortion, in violation of 18 U.S.C. 1951, and using extortionate means to collect a loan, in violation of 18 U.S.C. 894. Pet. App. 4.

As relevant here, petitioner filed a motion during trial asking the district court to grant use immunity to Gigi Rovito, who stated that he would invoke his Fifth

Amendment privilege against self-incrimination if called to testify. Pet. App. 18. During FBI interviews in March and May 2014, Gigi Rovito "denied any knowledge of the beating conspiracy" and "specifically denied forwarding the down-payment from [petitioner] to his brother John [Rovito]." *Id.* at 19. However, he "did not rule out that others might have used his restaurant to carry out the hand to hand exchange" of the down payment. *Id.* at 53. Gigi Rovito's denials of involvement in the scheme contradicted a substantial amount of evidence proving that he was a member of the conspiracy. See *id.* at 19, 36-37; see also Gov't C.A. Br. 37-38 (summarizing evidence). Because the government determined that he would perjure himself if he testified consistently with his FBI statements, it declined to grant him immunity that would facilitate that perjury. Pet. App. 19, 37.

The district court denied petitioner's motion to grant Gigi Rovito immunity. Pet. App. 40, 44. The court observed that the decision to grant immunity rests with the government. *Id.* at 32. The court further concluded that the government's refusal to immunize Gigi Rovito did not violate petitioner's due process rights. *Id.* at 40. That refusal, the court concluded, was not motivated by an intent to "distort[] the fact-finding process." *Ibid.* The court observed that the government "has significant discretion to decline" to immunize a witness and concluded that the government had "properly declined to grant immunity" under the circumstances. *Ibid.*

After a two-week trial, the jury found petitioner guilty on both charges. Pet. App. 2; Gov't C.A. Br. 11. The district court sentenced petitioner to concurrent terms of 48 months of imprisonment on each count. Judgment 1-2.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1-24.

As relevant here, the court of appeals rejected petitioner's argument that the government violated his a due process rights by declining to grant immunity to Gigi Rovito. Pet. App. 18-19. The court observed that "[p]rosecutors have significant discretion to decline immunity to a witness, especially when it is likely that the witness will perjure himself." *Id.* at 18 (citation and internal quotation marks omitted). The court explained that Gigi Rovito's claims that he had not transferred the $5000 down payment from petitioner to John Rovito and that he lacked "any knowledge of the beating conspiracy" were "inconsistent with other evidence that the government acquired." *Id.* at 19. That evidence included "extensive testimony by George Brown and John Rovito and * * * inculpatory cell phone records" that showed that Gigi Rovito was frequently in contact with petitioner during the period of the conspiracy, including on the evening when petitioner brought the down payment to Gigi Rovito's restaurant. *Ibid.*; see *id.* at 9-10. The court accordingly found that "[t]he government reasonably presumed that if Gigi took the stand, he would likely perjure himself." *Id.* at 19; see *id.* at 20 n.4 ("Given the strong likelihood that Gigi (if he had testified consistently with his statements to the FBI) would have perjured himself, we do not see how his presence would have elucidated issues in the case.") (internal quotation marks omitted). The court held that "[t]he government acted well within its discretion in declining an immunity deal that would have only facilitated such perjury." *Id.* at 19.

ARGUMENT

Petitioner renews his argument (Pet. 21-26) that the government violated due process by refusing to immunize Gigi Rovito. Petitioner further asserts (Pet. 14-21) that a conflict among the circuits exists on the appropriate due process standard in this context. Those arguments lack merit. The court of appeals correctly rejected petitioner's contention that the government was required to grant Gigi Rovito immunity, and this case is not a suitable vehicle for resolving any disagreement among the circuits on the appropriate due process standard because petitioner cannot establish a constitutional violation under the tests he advocates. This Court has recently and repeatedly denied review of cases upholding the denial of immunity for defense witnesses.[1] The same result is appropriate here.

1. a. The court of appeals correctly held that the government did not violate petitioner's right to due process by declining to grant Gigi Rovito immunity.

The government has broad discretion to determine whether it should compel the testimony of a witness who has invoked the constitutional privilege against compelled self-incrimination by granting the witness statutory immunity against the future use of his testimony or

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[1] See, *e.g.*, *Viloski* v. *United States*, 135 S. Ct. 1698 (2015) (No. 14-472); *Wilkes* v. *United States*, 135 S. Ct. 754 (2014) (No. 14-5591); *Quinn* v. *United States*, 134 S. Ct. 1872 (2014) (No. 13-7399); *Brooks* v. *United States*, 133 S. Ct. 839 (2013) (No. 12-218); *Walton* v. *United States*, 133 S. Ct. 837 (2013) (No. 12-5847) (companion case); *Phillips* v. *United States*, 133 S. Ct. 836 (2013) (No. 12-5812) (companion case); *Singh* v. *New York*, 555 U.S. 1011 (2008) (No. 08-165); *Ebbers* v. *United States*, 549 U.S. 1274 (2007) (No. 06-590); *DiMartini* v. *United States*, 524 U.S. 916 (1998) (No. 97-1809); *Wilson* v. *United States*, 510 U.S. 1109 (1994) (No. 93-607); *Whittington* v. *United States*, 479 U.S. 882 (1986) (No. 85-1974).

its fruits in a criminal prosecution. See *Kastigar* v. *United States*, 406 U.S. 441, 443-447 (1972); see also, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 616 (1984). The federal immunity statutes provide that "[a] United States attorney may, with the approval of the Attorney General" or other designated officers of the Department of Justice grant such use immunity "when in his judgment" the witness's testimony "may be necessary to the public interest." 18 U.S.C. 6003(b)(1). "The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation," and "Congress expressly left this decision exclusively to the Justice Department." *Doe*, 465 U.S. at 616-617.

Although federal judges may not immunize a defense witness over the government's objection, see, *e.g.*, *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983), some courts of appeals have stated (or declined to rule out the possibility) that a decision not to immunize a defense witness may violate due process. Those courts have recognized that a due process violation can occur only "in exceptional cases," *United States* v. *Straub*, 538 F.3d 1147, 1166 (9th Cir. 2008), where the government has intimidated or harassed the witness or has distorted the fact-finding process by withholding immunity to keep essential exculpatory information from the jury. As a remedy for such misconduct, the courts have indicated that the government may be required to choose among dismissing the indictment, immunizing a defense witness, or not calling other immunized witnesses. See, *e.g.*, *United States* v. *Quinn*, 728 F.3d 243, 259-260 (3d Cir. 2013) (en banc), cert. denied, 134 S. Ct. 1872

(2014); *United States* v. *Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006), cert. denied, 549 U.S. 1274 (2007). Courts have recognized, however, that "prosecutorial misconduct is an area of the law requiring sensitivity" and that "[c]ourts should be hesitant, absent a strong showing by the defense, to determine that the Government has engaged in misconduct by exercising its prosecutorial discretion and withholding immunity from a witness." *Quinn*, 728 F.3d at 260; see, *e.g.*, *Straub*, 538 F.3d at 1166 ("The Fifth Amendment does not create a general right for a defendant to demand use immunity for a co-defendant, and the courts must be extremely hesitant to intrude on the Executive's discretion to decide whom to prosecute.").

The court of appeals in this case correctly recognized that "[p]rosecutors have significant discretion to decline immunity to a witness" and that the government "acted well within its discretion" in refusing to grant Gigi Rovito immunity. Pet. App. 18-19 (citation and internal quotation marks omitted). Although petitioner objected to the government's decision to grant immunity to John Rovito but not Gigi Rovito, the court found "no evidence" that the government "immunize[d] witnesses with the intention of distorting the fact-finding process." *Ibid.* (citation omitted). Instead, the court concluded that "[t]he government reasonably presumed that if Gigi took the stand, he would likely perjure himself." *Id.* at 19. As the court explained, Gigi Rovito's statements to the FBI that he had not participated in the beating conspiracy or transferred the $5000 down payment from petitioner to John Rovito was "inconsistent with other evidence that the government acquired, including the extensive testimony by George Brown and John Rovito and the inculpatory cell phone

records." *Ibid.* The court accordingly correctly found that "[t]he government acted well within its discretion in declining an immunity deal that would have only facilitated such perjury." *Ibid.*

b. Petitioner's arguments (Pet. 21-24) to the contrary lack merit.

The Compulsory Process Clause, together with the Due Process Clause, "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted); *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). As petitioner acknowledges (Pet. 4), however, a "defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," and "may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987)). Among other legitimate purposes that may warrant the exclusion of evidence, this Court has recognized the court's and prosecutor's "vital interest in protecting the trial process from the pollution of perjured testimony." *Taylor* v. *Illinois*, 484 U.S. 400, 417 (1988); see *ibid.* (holding that witness testimony could be excluded as a sanction for violating a pretrial discovery request when "the record in th[e] case gives rise to a sufficiently strong inference that 'witnesses are being found that really weren't there'").

Petitioner accordingly errs in asserting (Pet. 23) that "the government's asserted interest in preventing perjury * * * should never overcome a defendant's right to present exculpatory testimony at trial." As many

courts have recognized, a grant of immunity poses a particular risk "of cooperative perjury between the defendant and his witness." *Blissett* v. *Lefevre*, 924 F.2d 434, 442 (2d Cir.), cert. denied, 502 U.S. 852 (1991); see, *e.g.*, *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973) ("A person suspected of [a] crime should not be empowered to give his confederates an immunity bath."). "[A]voiding future violations of the law, such as potential perjury, is hardly an unjustifiable and illegitimate government objective." *United States* v. *Wright*, 634 F.3d 917, 921 (7th Cir. 2011). Where, as here, substantial evidence contradicts a potential witness's statements to federal investigators, the Due Process Clause does not require prosecutors to grant immunity that would facilitate the introduction of fabricated evidence at trial. See, *e.g.*, *United States* v. *Moore*, 651 F.3d 30, 82 (D.C. Cir. 2011) (per curiam) (holding that the government permissibly declined to immunize a defense witness because his "accounts were self-contradictory and likely to result in perjury"), cert. denied, 132 S. Ct. 2272 (2012); *United States* v. *Hooks*, 848 F.2d 785, 802 (7th Cir. 1988) ("It is well within the discretion of a prosecutor under 18 U.S.C. § 6003 to decline immunity to a witness who could be charged for false statement and perjury."); *United States* v. *Gonzalez-Rodriguez*, 301 Fed. Appx. 874, 878 (11th Cir. 2008) (per curiam) (observing "that prosecutors have significant discretion to decline to grant immunity to a witness, especially when it is likely that the witness will perjure himself") (citation and internal quotation marks omitted), cert. denied, 556 U.S. 1195 (2009).[2]

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[2] Petitioner asserts (Pet. 23) that "[t]he Sixth Amendment assigns the jury—not the prosecutor—the responsibility to assess the credibility of defense witnesses." But it is prosecutors, not jurors, who

2. Petitioner contends (Pet. 14-20) that the circuits are divided about the circumstances in which a prosecutor's decision not to immunize a defense witness violates due process. But petitioner overstates the extent of any tension among the circuits, and his case would, in any event, be an unsuitable vehicle for addressing the question presented because he would not prevail under any standard.

a. As an initial matter, the courts of appeals uniformly agree that "a district court does not have the inherent authority to grant a defense witness use immunity." *United States* v. *Serrano*, 406 F.3d 1208, 1217 (10th Cir.), cert. denied, 546 U.S. 913 (2005); see, *e.g.*, *Quinn*, 728 F.3d at 252-257; *United States* v. *Brooks*, 681 F.3d 678, 711 (5th Cir. 2012), cert. denied, 133 S. Ct. 839 (2013); *United States* v. *Moussaoui*, 382 F.3d 453, 466 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005); *United States* v. *Perkins*, 138 F.3d 421, 424 (D.C. Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Castro*, 129 F.3d 226, 232 (1st Cir. 1997), cert. denied, 523 U.S. 1100 (1998); *United States* v. *Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990); *United States* v. *Capozzi*, 883 F.2d 608, 613-614 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988); *United States* v. *Pennell*, 737 F.2d 521, 527-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Turkish*, 623 F.2d 769, 773

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decide the type of question presented here—namely, whether a grant of immunity is "necessary to the public interest." 18 U.S.C. 6003(b)(1). Petitioner cites no support for his apparent view that the Constitution categorically prohibits prosecutors from considering whether a witness intends to perjure himself when determining whether to grant that witness immunity, and such a prohibition would be at odds with a due process inquiry designed to prevent distortions of the fact-finding process.

(2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976). As the Second Circuit explained in *Turkish*, any judicial interference in the prosecution's immunity decisions raises significant separation-of-powers concerns, because granting immunity is a function of the Executive Branch, not of the judiciary, and "a court is in no position to weigh the public interest in the comparative worth of prosecuting a defendant or his witness." 623 F.2d at 776.

The courts of appeals further agree that the government's refusal to immunize a defense witness could only violate due process in an "exceptional case[]" that involves such a "distort[ion of] the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Straub*, 538 F.3d at 1163. As petitioner acknowledges (Pet. 14 & n.4), most circuits have indicated that a due process violation can be established, if at all, only upon a showing of prosecutorial misconduct. See, *e.g.*, *Ebbers*, 458 F.3d at 118-120; *United States* v. *Washington*, 398 F.3d 306, 310 (4th Cir.), cert. denied, 545 U.S. 1109 (2005); *United States* v. *Angiulo*, 897 F.2d 1169, 1191-1192 (1st Cir.), cert. denied, 498 U.S. 845 (1990); *United States* v. *Taylor*, 728 F.2d 930, 935 (7th Cir. 1984); see also, *e.g.*, *Brooks*, 681 F.3d at 711 (noting that the court had, "[a]t most, * * * left open the possibility that immunity may be necessary to stem government abuse"); *Serrano*, 406 F.3d at 1218 n.2 (reserving the question whether prosecutorial misconduct might justify compelling immunity); *United States* v. *Emuegbunam*, 268 F.3d 377, 401 & n.5 (6th Cir. 2001) (stating without deciding that "immunity might be warranted to remedy prosecutorial misconduct"), cert. denied, 535 U.S. 977 (2002); *United States* v. *Blanche*,

149 F.3d 763, 768-769 (8th Cir. 1998) (declining to decide if a court may immunize a potential defense witness in response to "palpable judicial or government interference" with that witness); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986) (per curiam) (indicating that defendant must show "governmental abuse of the immunity process"), cert. denied, 479 U.S. 1069 (1987); *Autry* v. *Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983) (leaving open the possibility that prosecutorial misconduct may justify a compelled grant of immunity).[3]

Petitioner contends (Pet. 17-20) that those decisions conflict with decisions from the Third and Ninth Circuits, but he overstates the significance of any difference in the due process standards the courts employ. In *Quinn*, the Third Circuit held that a defendant may be able to "prove a due process violation on the basis of the Government's refusal to immunize a defense witness" if he establishes "the following five elements": "[1] [I]mmunity must be properly sought in the district court; [2] the defense witness must be available to testify; [3] the proffered testimony must be clearly exculpatory; [4] the testimony must be essential; and [5] there must be no strong governmental interests which countervail against a grant of immunity." 728 F.3d at 261-262 (brackets in original; citation omitted). Petitioner errs in asserting (Pet. 15) that *Quinn* "hold[s] that due

[3] Petitioner asserts (Pet. 15) that "courts use several different standards" to measure prosecutorial misconduct, but the verbal formulations he cites capture the same misconduct and he does not identify any example in which the "subsidiary split" he alleges (*ibid.*) has yielded disparate outcomes. Nor does he suggest that his claim here would prevail under any articulation of the prosecutorial-misconduct standard.

process may require defense witness immunity without a showing of misconduct or bad faith." To the contrary, *Quinn* emphasized that the five elements illuminate whether "the Government has refused to immunize a witness in order to keep clearly exculpatory and essential testimony from trial without a strong countervailing reason," which "is a type of prosecutorial misconduct." 728 F.3d at 248.

Petitioner's reliance (Pet. 18-19) on the Ninth Circuit's decision in *Straub* likewise is misplaced. In *Straub*, the court observed that the government granted 12 of 13 prosecution witnesses immunity or other benefits in exchange for their testimony, but had denied immunity to the "only defense witness listed," who "had testimony that, if believed, would make the government's key witness both a perjurer and possibly the actual perpetrator of the crime." 538 F.3d at 1162, 1164. "[T]he prosecution claimed it had no interest in prosecuting that [defense] witness," *id.* at 1164, and had neglected to immunize the witness only because the defendant had not "formally requested use immunity from the prosecution," even though the defendant "did make a formal request to the district judge in the presence of the prosecution," *id.* at 1164 n.9; see *id.* at 1152. The court stated that "[e]ven where the government has not denied a defense witness immunity for the very purpose of distorting the fact-finding process, the government may have stacked the deck against the defendant in a way that has severely distorted the fact-finding process at trial." *Id.* at 1160. The court held that a defendant may establish a due process violation if he can show that "the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have

directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Id.* at 1162.

Although the Ninth Circuit does not require proof that a prosecutor selectively immunized witnesses in bad faith, *Straub* made clear that compelled immunity is reserved for "exceptional cases," and it warned that courts should be "extremely hesitant to intrude on the Executive's discretion." 538 F.3d at 1166. In the nine years since *Straub* was decided, the Ninth Circuit has repeatedly rejected claims that the government's refusal to immunize a defense witness violated due process. See, *e.g.*, *United States* v. *Kuzmenko*, 671 Fed. Appx. 555, 556 (2016) (concluding that "[t]his is not the 'exceptional' case in which immunity should have been compelled"); *United States* v. *Lopez-Banuelos*, 667 Fed. Appx. 959, 960 (2016) (rejecting due process claim and observing that the defendant had not identified "any extraordinary circumstances raising fairness concerns regarding the prosecution's exercise of discretion" in denying immunity); *United States* v. *Miller*, 546 Fed. Appx. 709, 710 (2013) (rejecting due process claim because defendant could not show that the government's refusal to immunize a witness who would have provided directly contradictory testimony had the "effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial") (citation omitted). The limited disagreement between the Ninth Circuit and all other courts of appeals on the question whether a showing of prosecutorial misconduct is invariably necessary to establish a due process violation in this context does not warrant this Court's review.

b. In any event, this case would be an unsuitable vehicle for addressing when the government's refusal to immunize a defense witness may violate due process, because petitioner cannot prevail under any standard.

Petitioner urged the court of appeals to apply the standard articulated by the Third Circuit, Pet. C.A. Br. 38 n.6, and he contends without elaboration (Pet. 25) that application of that standard would "produce [a] different result[] for [his] due process claim." That is not correct. The Third Circuit held that prosecutorial misconduct may be found, *inter alia*, when "the Government has refused to immunize a witness in order to keep clearly exculpatory and essential testimony from trial without a strong countervailing reason." *Quinn*, 728 F.3d at 248. This case features a "strong governmental interest[] * * * countervail[ing] against a grant of immunity"—namely, the government's interest in preventing Gigi Rovito from perjuring himself. *Id.* at 262 (citation omitted).

In addition, although *Quinn* permits an inference of government misconduct in narrowly defined circumstances, it requires that "the proffered testimony * * * be clearly exculpatory" in the sense that it "would exonerate or free [the defendant] of guilt or blame." 728 F.3d at 262 (citation omitted). The Third Circuit has specifically rejected the argument that a "less exacting" standard should apply, under which immunity may be warranted if the witness would offer "evidence [that] is materially favorable to the defense on the issue of guilt, * * * or could contribute substantially to raising a reasonable doubt." *Ibid.* (citations and internal quotation marks omitted). Petitioner cannot show that Gigi Rovito's proffered testimony was clearly exculpatory under the Third Circuit's standard. Gigi Rovito "would

have denied his *own* knowledge of and involvement in the conspiracy," but "would not have exculpated [petitioner]." Gov't C.A. Br. 40. While Gigi Rovito told the FBI that he neither knew about nor participated in the conspiracy, he "did not rule out that others might have used his restaurant" in furtherance of the scheme to break R.J. Serpico's legs. Pet. App. 53. Accordingly, "[h]e could not have provided an alibi" to petitioner or "credibly said that [petitioner] did not arrange for the beating." Gov't C.A. Br. 40. Because Gigi Rovito's testimony "even if believed, would not in itself exonerate [petitioner]," it "is not clearly exculpatory." *Quinn*, 728 F.3d at 262 (citation omitted).

Petitioner also contends (Pet. 25) that he can establish a due process violation under the standard articulated by the Ninth Circuit. Petitioner declined, however, to argue below that the Ninth Circuit's standard was correct and should be followed. See Pet. C.A. Br. 38 n.6 (describing standards employed by the Third and Ninth Circuits and then stating that, "[f]or purposes of further review, we maintain that the Third Circuit's approach is correct and should be applied here"). In any event, petitioner cannot show that this constitutes the type of "exceptional case[]" in which "the fact-finding process [was] so distorted through the prosecution's decisions to grant immunity to its own witness while denying immunity to a witness with directly contradictory testimony that [petitioner's] due process right to a fair trial [wa]s violated." *Straub*, 538 F.3d at 1166. The Ninth Circuit described the record in *Straub* as "present[ing] a remarkable picture" of the prosecution's selective denial of use immunity. *Id.* at 1164. The court emphasized that the prosecution granted some form of immunity to nearly all of its witnesses, many of whom

committed "serious drug and weapons" offenses, but denied immunity to the only defense witness for no reason other than that the defendant had failed to formally request immunity from the prosecutor, although he had made the request to the court in the prosecutor's presence. *Id.* at 1152, 1164 & n.9. Moreover, the defense witness in *Straub* would have offered testimony that "if believed, would [have] ma[d]e the government's key witness both a perjurer and possibly the actual perpetrator of the crime." *Id.* at 1162. The court concluded that "[t]here is an unmistakable air of unfairness to a trial conducted under these circumstances." *Ibid.*

Petitioner offers no reason to think the Ninth Circuit would necessarily reach the same conclusion in this case, which features starkly different facts. Unlike in *Straub*, the government here did not "liberally use[] its discretion to grant immunity to numerous witnesses." 538 F.3d at 1160. Although petitioner objects to the government's decision to grant immunity to John Rovito, he was, "to put it mildly, a difficult witness for the government." Pet. App. 12. His testimony was "often evasive," and he routinely "answered the government's questions * * * with some variation of 'I don't recall,' 'I'm not 100 percent sure,' or an ambivalent 'it's possible.'" *Id.* at 11-12. Petitioner has not established that any inconsistencies between John Rovito's testimony and Gigi Rovito's self-serving denials of involvement in the beating conspiracy—which did not exculpate petitioner, see p. 16, *supra*—had the "effect of so distorting the fact-finding process that [petitioner] was denied his due process right to a fundamentally fair trial." *Straub*, 538 F.3d at 1162.

Because petitioner fails to identify any court of appeals that would have afforded him relief on his claim,

his case is not a suitable vehicle to address any variance in analysis that presently exists in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
PATTY MERKAMP STEMLER
Attorney

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