No.

# In the Supreme Court of the United States

PHIL LAMONT TRENT,

*Petitioner*,

v.

UNITED STATES,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


EUGENE R. FIDELL
*Yale Law School*
*Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4992*

MURRAY W. BELL
*2435 Kimberly Rd.*
*Suite 235 S.*
*Davenport, IA 52803*
*(563) 325-4095*

PAUL W. HUGHES
*Counsel of Record*
CHARLES A. ROTHFELD
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
*Mayer Brown LLP*
*1999 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*
*phughes@mayerbrown.com*

*Counsel for Petitioner*

## QUESTION PRESENTED

Whether the exclusion of testimony on the specific length of the mandatory minimum sentence faced by a cooperating witness violates a defendant's Sixth Amendment right to cross-examination.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**



**Statutes**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**Other Authorities**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Phil Lamont Trent, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–16a) is reported at 863 F.3d 699. The district court's judgment (App., *infra*, 17a-22a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 13, 2017. Justice Kagan extended time for filing this petition until December 8, 2017. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

## STATEMENT

In this case, the key prosecution evidence was provided by two witnesses who testified against petitioner pursuant to deals with the government under which, in return for their incriminating testimony, they escaped twenty-year mandatory minimum sentences; both cooperating witnesses—one of whom changed his account of the crime in response to government pressure—in fact had many years sliced from their sentences after they testified. The courts below, however, barred petitioner from cross-

examining these witnesses about the precise nature of their bargains with the government and the magnitude of the mandatory minimum sentences that they avoided as part of those deals. This limitation made it impossible for petitioner to make a meaningful and effective challenge to the credibility of the crucial witnesses against him.

In identical circumstances, other federal courts of appeals and state courts of last resort have held that the Sixth Amendment *guarantees* defendants the right to cross-examine adverse witnesses as to the specific mandatory minimum sentences they avoided by cooperating with the government. Courts and commentators repeatedly have recognized this "circuit split on the issue of whether defendants should be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sentences and sentencing agreements with the government to expose the witnesses' bias." *United States* v. *Lanham*, 617 F.3d 873, 884 (6th Cir. 2010). And the issue is of crucial importance: mandatory minimum sentences, and the danger of falsified testimony offered to avoid them, are ubiquitous in the criminal law. Further review, accordingly, is warranted.

**A. Legal background.**

Congress has enacted more than 140 offenses that carry mandatory minimum penalties. See *Federal Mandatory Minimums,* Families Against Mandatory Minimums, Feb. 25, 2013, https://goo.gl/ih7mqY. Many establish minimum terms of 20 years, 30 years, or life imprisonment. *Ibid.* Relevant here, 21 U.S.C. § 841(b)(1)(C) provides a mandatory minimum of 20 years incarceration for distribution of controlled substances resulting in death.

Section 3553(e) of title 18 supplies the principal means for a defendant to avoid a mandatory minimum.[1] It authorizes the government to make a motion "reflect[ing] a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *Ibid.*

**B. Factual background.**

On August 29, 2014, Kyle Hull bought heroin from a local dealer, Curtis Land, at a gas station in Rock Island, Illinois. App., *infra*, 6a.

Later that day, Hull helped Tyler Corzette cook and inject some of this heroin while the two were sitting in Corzette's parked car. App., *infra*, 3a. Corzette passed out and Hull left to attend a music festival. *Ibid.* When he returned a few hours later, Corzette was still unconscious, and he was covered in vomit. *Ibid.* Hull checked Corzette's pulse, believed him to be fine, and left him in the car overnight. *Ibid.* Upon returning the next morning, Hull found Corzette dead. *Ibid.* Hull panicked; he initially went to work, but he called police to report Corzette's death within an hour. *Ibid.*

Hull agreed to cooperate with the Rock Island Police Department's investigation; the next day, on August 30, he participated in a controlled purchase of more heroin from Land. App., *infra*, 4a. Police subsequently arrested Land. *Ibid.*

Land likewise agreed to cooperate with the police. App., *infra*, 4a. During his initial interrogation, Land did not know that he had sold drugs that re-

---

[1] There also exists a limited safety-valve for first time offenders, who commit low-level, non-violent offenses. See 18 U.S.C. § 3553(f).

sulted in a death. D. Ct. Dkt. No. 68 ("6/28 Trans."), at 292-296; see also D. Ct. Dkt. No. 75, Tr. Trans. ("6/30 Trans."), at 678. He was thus unaware of any difference between the drugs he distributed on August 29 and those he distributed on August 30.

Land told detectives that he had received the drugs he sold to Hull on August 29 from a dealer named Tone, and the drugs he sold on August 30 from a different dealer, petitioner Phil Trent. 6/28 Trans. 292-296; see also 6/30 Trans. 679, 683-684.[2]

The investigators were not satisfied with Land's answer. The interrogating detective became "angry," called Land's initial version of events "B.S.," and pressured him to identify Trent as the supplier of drugs on both days. 6/28 Trans. 293-94. The officer "made it clear he didn't believe [Land] about Tone." *Id*. at 295.

The officer *then* informed Land about Corzette's death, telling Land that he was on "the hook." 6/30 Trans. 687. This information "shocked" Land. *Id*. at 704. The officer left the room to let this information sink in, returning about 15 minutes later. *Id*. at 702-703.

Land testified that he knew petitioner "was the guy" the investigators "were looking for" and thus petitioner "was the guy" that Land "had to give them." 6/28 Trans. 296. Thus, when the investigators returned, Land changed his earlier account and identified petitioner as the seller of the drugs on August 29. *Ibid*; see also 6/30 Trans. 678-684.

---

[2] Land acknowledged that, during August 2014, he had "more than one source for heroin" and there where were "a number of people" from whom he would buy. 6/28 Trans. 284.

Police subsequently conducted two controlled heroin purchases from petitioner. App., *infra*, 4a. After the second purchase, they arrested him. *Ibid.*

Hull and Land both pled guilty to distribution of a controlled substance, resulting in death, in violation of 21 U.S.C. § 841(b)(1)(C). They each agreed to provide substantial assistance to the government's prosecution of petitioner in exchange for Section 3553(e) motion, to avoid the 20-year mandatory minimum. App., *infra*, 6a.

**C. Proceedings below.**

1. The government brought five charges against petitioner: three counts of heroin distribution, one count of heroin distribution resulting in death, and one count of conspiracy to distribute heroin resulting in death. App., *infra*, 17a-18a; see also *id.* at 1a.

At trial, petitioner—who testified in his own defense—admitted that he distributed the heroin sold on August 30, as well as the heroin at the subsequent sting operations. 6/30 Trans. 751, 763. He thus agreed that the jury should convict him on those counts. *Id.* at 769.

But petitioner denied having distributed the August 29 heroin that resulted in the death of Corzette. *Id.* at 763-68. He explained that he lacked a supply that day. *Ibid.*

At trial, Land testified that the drugs he sold Hull on August 29, and which ultimately killed Corzette, came from petitioner. 6/28 Trans. 292-296. Petitioner sought to impeach this testimony by recounting that, during his initial interrogation, Land had identified Tone as the supplier of those drugs, and further that Land had changed his story upon

pressure of the investigators, after they informed him that a death had occurred. *Ibid*.

Indeed, petitioner's central theory at trial was that Land had changed his testimony to fit the government's theory, so as to obtain a substantial assistance motion. See 6/28 Trans. 299-303; D. Ct. Dkt. No. 77, Tr. Trans. (Closing Arg.) at 45-46.

Petitioner sought to develop this motive by questioning Land and Hull as to the precise mandatory minimum that each would face but for the government's substantial assistance motion. The prosecutor, however, moved to foreclose petitioner's counsel from identifying the specific mandatory minimum. See 6/28 Trans. 214-216. Instead, the government asked the court to require petitioner to "keep it as general as" asking whether Land and Hull faced a "substantial mandatory minimum." *Id*. at 214.

Petitioner's counsel objected. "[S]ubstantial," he explained, "is so nebulous." *Id*. at 216. "Somebody may think substantial is three years." *Ibid*. Indeed, petitioner explained, "for anybody sitting on this jury, one year is substantial." *Ibid*. Thus, "substantial" alone does not "convey[] the real thing." *Id*. at 215. See also App., *infra*, 10a.

The court agreed with the government. It allowed petitioner to question Land and Hull "regarding that [they] face[] a substantial mandatory minimum without quantifying the exact amount." 6/28 Trans. at 215.

Petitioner was therefore limited to questioning Land about his motive to avoid "a substantial mandatory minimum"—and not the specific 20-year mandatory minimum. 6/28 Trans. 299. The same

limitations applied to his cross-examination of Hull. *Id.* at 248-250.[3]

The jury returned a guilty verdict on all counts, concluding that petitioner had distributed the drugs that caused Corzette's death. App., *infra*, 8a. The district court sentenced petitioner to a term of 300 months imprisonment. *Ibid.* If the jury had acquitted petitioner of the counts relating to Corzette's death, the statutory maximum would have been 240 months imprisonment.[4]

2. The court of appeals affirmed. It rejected petitioner's contention that the trial court's cross-examination restriction violated the Sixth Amendment. See App., *infra*, 9a-14a.

The court held that a "district court has discretion to place reasonable limits on cross-examination." App., *infra*, 9a. In particular, the court found it proper to prevent the jury "from learning information from which they could infer defendants' potential sentences." *Ibid.*

---

[3] On August 17, 2016, nearly 15 months after he had pled guilty, Land was sentenced to 11 years incarceration—a significant reduction from the 20-year mandatory minimum. See *United States* v. *Land*, No. 14-cr-40074 (C.D. Ill.) (Dkt. No. 36). As a result, Land will be released from jail at age 64, rather than 73. Hull, meanwhile, received a sentence of eight years; he will be released from jail at age 31, rather than age 43. See *United States* v. *Hull*, No. 14-cr-40074 (C.D. Ill.) (Dkt. No. 39).

[4] The three offenses that did not relate to a death, 21 U.S.C. § 841(b)(1)(C), have a 20-year statutory maximum. Conviction on the distribution offenses resulting in death was therefore essential to the 300-month sentence. App., *infra*, 17a-18a. Moreover, at sentencing, the district court commented that "the waste of the life of Tyler Corzette" was a substantial factor in the sentencing analysis. D. Ct. Dkt. No. 71, at 28. See also *id.* at 29, 34.

Because the district court allowed petitioner to cross-examine Land and Hull regarding their "substantial mandatory minimum[s]," the court concluded that the trial court's restriction on cross-examination did not violate "the core values of the Confrontation Clause." App., *infra*, 12a.

## REASONS FOR GRANTING THE PETITION

As two courts of appeals, a host of other courts, and numerous commentators have observed, there is a deep conflict regarding whether a defendant has a right to impeach a cooperating co-conspirator by identifying the details of the mandatory minimum sentence that the witness will avoid by way of testifying. The question arises frequently. And the decision below is wrong. Review is warranted.

### A. The courts of appeals are sharply divided as to the question presented.

The Sixth Circuit has recognized "a circuit split on the issue of whether defendants should be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sentences and sentencing agreements with the government to expose the witnesses' bias." *Lanham*, 617 F.3d at 884.

The Eleventh Circuit has likewise observed that "the circuit courts are split on this issue." *United States* v. *Williams*, 665 F. App'x 780, 782 & n.1 (11th Cir. 2016). Other courts have noted the conflict, too. See, *e.g.*, *United States* v. *Dimora*, 843 F. Supp. 2d 799, 842 (N.D. Ohio 2012) ("there is currently a circuit split on the issue"); *Wilson* v. *Delaware*, 950 A.2d

634, 639 n.8 (Del. 2008) ("[t]he Circuits are split on the question").[5]

The decision below conflicts with the holdings of seven courts. Five courts, however, agree with the Seventh Circuit.

1. Four courts—the Ninth Circuit, and the supreme courts of South Carolina, Georgia, and Arizona—have held, in materially similar circumstances, that a defendant has a Sixth Amendment right to cross-examine testifying co-conspirators regarding the length of the mandatory minimum that the defendant hopes to avoid.

In *United States* v. *Larson,* the **Ninth Circuit** held that the "district court * * * violat[ed] Defend-

---

[5] Commentators also acknowledge the division of authority. See, *e.g.*, Zachary K. LaFleur, *Constitutional Law—United States v. Reid*, 33 Am. J. Trial Advoc. 431, 434 (2009) (noting the "current circuit split over a defendant's right to elicit information during cross-examination pertaining to the mandatory minimum sentences avoided by cooperating witnesses"); Marisa Maleck, Comment, *Does the Sixth Amendment Demand That Co-Conspiring Witnesses Reveal Their Plea Bargains?*, 2010 U. Chi. Legal F. 447, 448 (2010) (recognizing that "[t]he federal appellate circuits disagree on whether a defendant's Confrontation Clause rights are violated when the trial court bars the defendant from cross-examining co-conspirator witnesses about the exact details regarding the sentence they avoided by cooperating with the government."); M. Jackson Jones, *Sixth Amendment Limitations Placed on Cross-Examination of an Accomplice-Turned-Government-Witness*, 5 Liberty U.L. Rev. 255, 255 (2011) ("The federal courts of appeals are currently split over whether the Sixth Amendment's Confrontation Clause is violated when a defendant is not allowed to cross-examine an accomplice-turned-government-witness about the specific penalty reduction the accomplice believed he or she would receive for testifying for the government and against the defendant.").

ants' Sixth Amendment constitutional right to effective cross-examination when it prevented defense counsel from exploring the mandatory life sentence that [the witness] faced in the absence of a motion by the Government." 495 F.3d 1094, 1107 (9th Cir. 2007) (en banc).

There, the district court permitted a defendant to cross-examine a co-conspirator regarding his cooperation "with the Government as a witness against Defendants in the hope that his sentence would be reduced." *Larson,* 495 F.3d at 1105. Indeed, the witness testified that "the prosecutor was the only person in the courtroom who could move to reduce his sentence." *Ibid*. But the court precluded the defendant from cross-examining the witness as to the specifics of the mandatory sentence. *Id*. at 1104-1105.

The Ninth Circuit held that this limitation on cross-examination breached the defendant's Sixth Amendment right to effective cross-examination. That is because "the mandatory nature of the potential sentence, the length of the sentence, and the witness' obvious motivation to avoid such a sentence cast considerable doubt on the believability of the witness' testimony." *Larson,* 495 F.3d at 1104. Mandatory minimum sentences are "highly relevant to the witness' credibility," the court reasoned, because "[i]t is a sentence that the witness knows with certainty that he will receive unless he satisfies the government with substantial and meaningful cooperation so that it will move to reduce his sentence." *Id*. at 1106.

For this reason, it was not enough that the jury heard generalized testimony about the witness's cooperation; "the jury did not learn *the extent* to which he stood to benefit from testifying in a manner that

satisfied the Government." *Larson,* 495 F.3d at 1105 (emphasis added). And, although there was a "risk that a jury could infer the potential sentence faced by a defendant from the admission of testimony regarding a witness' mandatory minimum sentence," "any such interest is outweighed by a defendant's right to explore the bias of a cooperating witness who is facing a mandatory life sentence." *Ibid.*[6]

In *South Carolina* v. *Gracely*, the **Supreme Court of South Carolina** held that the "fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury." 731 S.E.2d 880, 886 (S.C. 2012). The court held that to present that information effectively, a defendant has the right to question a witness about "the extent of that bias" and thus disclose the specific mandatory term at issue. *Id.* at 885.

There, two testifying co-conspirators faced a 25-year mandatory minimum. *Id.* at 886. The court allowed cross-examination regarding the statutory *maximum* term the witnesses faced, but "counsel could not show that [the witnesses] actually faced a twenty-five year mandatory *minimum*." *Ibid.* (emphasis added). This breached the defendant's Sixth Amendment rights: "The trial court's instruction im-

---

[6] *Larson* continues to govern and is oft applied. See, *e.g.*, *United States* v. *Nickle*, 816 F.3d 1230, 1235 (9th Cir. 2016); *United States* v. *Galvez-Machado*, 630 F. App'x 733, 734 (9th Cir. 2016); *United States* v. *Schardien*, 499 F. App'x 717, 718-719 (9th Cir. 2012); *United States* v. *Johnson*, 469 F. App'x 632, 637-639 (9th Cir. 2012); *United States* v. *Frias-Cobos*, 349 F. App'x 171, 173 (9th Cir. 2009); *United States* v. *Gradinariu*, 283 F. App'x 541, 543 (9th Cir. 2008); *United States* v. *Fabricant*, 240 F. App'x 244, 245-247 (9th Cir. 2007).

properly prevented [the defendant] from demonstrating the possible bias rising from these plea deals through an examination reaching the requisite degree of granularity." *Ibid*.

In so holding, the court was cognizant that this line of questioning could "have allowed the jury to learn of 'defendant's own potential sentence if convicted.'" *Gracely,* 731 S.E.2d at 886 n.4. It was a Sixth Amendment violation, all the same, to limit the defendant's cross-examination.

In *Manley* v. *Georgia*, the **Supreme Court of Georgia** likewise found a Confrontation Clause error where defense counsel was prevented from cross-examining a witness regarding the specifics of a mandatory minimum she avoided. 698 S.E.2d 301, 304-307 (Ga. 2010).

There, the trial court prohibited a defendant from inquiring into the earlier date that the witness was eligible for parole as a result of her cooperation. *Ibid*. The court had allowed the prosecution to bring out that the witness "received a sentence of six years in prison for her role in the crimes." *Id*. at 304. However, the court noted that "[t]his sentence * * * requires [the witness] to serve two years in prison before being eligible for parole" whereas, in the absence of cooperation, she "would have received a mandatory life sentence" under which "she would not become eligible for parole until she had served at least 30 years in prison." *Ibid*. (citations omitted). The defendants "were allowed to ask [the witness] about the length of her sentence as a result of the deal, but they were not allowed to question her about any parole differential." *Ibid*. The court concluded that this was error because "[t]he disparity in this case, eligibility for parole after 30 years of incarceration versus

two years served before eligibility, might have provided [the witness]" with bias in favor of, or motivation to assist, the State. *Id*. at 306.

In *Arizona* v. *Morales*, the **Supreme Court of Arizona** held that the trial court erred by prohibiting a defendant from showing, on cross-examination, that a witness "would have faced, upon conviction, the possible penalty of death or [a minimum of] life in prison without possibility of parole for 25 years[,]" absent cooperation. 587 P.2d 236, 239 (Ariz. 1978) (en banc).

The court noted "that the trial court's reason for precluding evidence of the penalty the witness could have received was to prevent the jury from learning of the penalty the defendants in this case might receive if convicted." *Ibid*. But this interest, the court held, "cannot outweigh the right of the defendant to cross-examine the State's major witness on what he expects in return for his testimony." *Ibid*.

2. Three other courts—the Third and Fifth Circuits and the Supreme Court of Delaware—have gone even further. Those courts hold that a defendant has the right to cross-examine a testifying coconspirator as to statutory maximums or Guidelines ranges that (unlike a mandatory minimum) a witness was not certain to receive. Those holdings—which are more defendant-protective than what petitioner seeks here—are also irreconcilable with the decision below.

In *United States* v. *Chandler*, the **Third Circuit** held that where two witnesses testified only that they hoped to receive a benefit from the government in exchange for their testimony, this "acknowledgment [was] insufficient for a jury to appreciate the

strength of his incentive to provide testimony that was satisfactory to the prosecution." 326 F.3d 210, 222 (3d Cir. 2003). The trial court's restriction on cross-examination breached the Sixth Amendment. *Id*. at 223.

For one witness who would have faced a Guidelines recommendation of "eight years in prison" absent his cooperation, "the jury learned only that he pled guilty to an offense carrying a sentence of between 12 and 18 months, that he could have been charged with a greater offense, and that he received only one month of house arrest, plus probation." *Ibid*.

The court held that the "limited nature of [the witness]'s acknowledgment that he had benefitted from his cooperation" was "insufficient for a jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution." *Ibid*. The court likewise held that a second witness who "mere[ly] acknowledge[ed] that she hoped that the government would move for a lesser sentence did not adequately enable a jury to evaluate her motive to cooperate." *Ibid*.

The court concluded that the government's "desire to prevent the jury from inferring the sentence to which *the defendant* could be exposed were she found guilty" was "outweighed by [the defendant]'s right to probe" the witness' bias. *Ibid*. In so holding, the Third Circuit expressly "decline[d] to adopt the reasoning" of contrary holdings from the First and Fourth Circuits. *Ibid*.[7]

---

[7] *Chandler* is routinely applied in the Third Circuit. See, *e.g*., *Ali* v. *Warren*, 2015 WL 4522720 at *13, *20 (D.N.J. 2015), *vacated in part on other grounds sub nom*. *Ali* v. *Administrator*

In *United States* v. *Cooks*, the **Fifth Circuit** held that the district court erred where it allowed cross-examination of a cooperating witness "about the circumstances and motivations surrounding his cooperation with the authorities" but "declined to allow questioning * * * on the stiff penalties [the witness] faced if convicted." 52 F.3d 101, 103 (5th Cir. 1995).

There, the witness faced charges in two states that would have subjected him to a statutory maximum of 139 years imprisonment in the absence of his cooperation. *Id.* at 104 n.13. The court held that, "although the jury was informed of [the witness]'s status as a paid career criminal informant, and of his hopes for leniency" on one set of charges, "the court's ruling prevented the airing of other important information pertinent to [the witness]'s reliability, namely his effort to avoid the consequences of his own crimes, which, given their seriousness and his recidivism, might have been very severe in this case." *Id.* at 104.

In *Wilson* v. *Delaware*, the **Supreme Court of Delaware** held that a trial court erred where it introduced a co-conspirator's plea agreement with the sentence recommendation redacted. 950 A.2d 634, 639 (Del. 2008). Because the witness's plea agreement was not in the record, the court could not ascertain "the extent of his sentence reduction." *Ibid.* "Had the jury been told of the extent of the benefit [the witness] received, it might have developed a different impression of [the witness'] credibility." *Ibid.*

---

*New Jersey State Prison*, 675 F. App'x 162 (3d Cir. 2017); *United States* v. *Marrero*, 643 F. App'x 233, 237-239 (3d Cir. 2016); *United States* v. *Ferguson*, 394 F. App'x 873, 883-885 (3d Cir. 2010); *United States* v. *Throckmorton*, 269 F. App'x 233, 236-237 (3d Cir. 2008).

The court thus held that defense counsel should have been allowed to inquire about "specifics of [the witness'] plea agreement" during cross-examination. *Ibid*. The court concluded that "the State's interest in withholding the sentencing information was outweighed by [the defendant's] constitutional rights under the Confrontation Clause." *Ibid*.

3. In contrast, six courts have held that a defendant does not have a Sixth Amendment right to cross-examine a cooperating conspirator as to the specific mandatory minimum sentence that he or she seeks to avoid by testifying.

Below, the **Seventh Circuit** concluded that it was proper for the district court to limit petitioner to eliciting on cross-examination that testifying witnesses cooperated so as to avoid a "substantial" mandatory minimum. App., *infra*, 2a. The court noted that, "[i]n response to the questioning," the witnesses "admitted that they were testifying under plea agreements," "that the government agreed to file motions to reduce their sentences if they agreed to testify truthfully," and that they otherwise faced a "substantial mandatory minimum." *Id*. at 12a.

The court believed that this was "ample information to make a discriminating appraisal of the motives of" the two co-conspirators without specific information about their mandatory minimum sentence. App., *infra*, at 13a. The court concluded that "[g]iven the [trial] court's very real and well-founded concerns about misleading or confusing the jury," there was no error in limiting cross-examination. *Id*. at 13a.

In *United States* v. *Wright*, the **Eighth Circuit** held that "the alternative phrase 'decades'" was a

sufficient substitute for the mandatory life sentence a witness would have faced absent cooperation. 866 F.3d 899, 908-909 (8th Cir. 2017). The court found that, because the witness "informed the jury that he was forty-four years old[,]" it "could have inferred that any prison sentence consisting of 'decades' would have been nearly a life sentence." *Id*. at 908. In holding that a defendant did not have the right to introduce the specifics of the mandatory sentence, the Eighth Circuit expressly acknowledged its disagreement with the Ninth Circuit's decision in *Larson*. *Id*. at 907.

In *United States* v. *Rushin*, the **Eleventh Circuit** concluded that a "district court's limitation on cross examination was not improper" because the defendant was able to establish that "the cooperators faced a 'severe penalty' prior to cooperating" and that "they expected to receive a lesser sentence as a result of their cooperation." 844 F.3d 933, 940 (11th Cir. 2016). The court concluded that the "precise number of years the cooperating witnesses may have faced provides little, if any, value above those questions defense counsel were permitted to ask." *Id*. at 939.

In *Peterson* v. *Maryland*, the **Maryland Court of Appeals** held that, although a cooperating witness would have been subject to a "mandatory life sentence" absent his cooperation, a trial court did not abuse its discretion where the "judge noted that most people understand that a conviction of first degree murder may entail severe punishment, and the jury was made aware that [the cooperating witness] had instead pled guilty to a misdemeanor with the expectation of receiving only eight years' imprisonment." 118 A.3d 925, 951-952 (Md. 2015). The court express-

ly disagreed with the Ninth Circuit's holding in *Larson*. *Ibid*.

In *Nebraska* v. *Patton*, the **Supreme Court of Nebraska** held it permissible for a trial court to prevent defense counsel from cross-examining two witnesses facing mandatory minimums "about what sentence they hoped to avoid by testifying against" the defendant. 845 N.W.2d 572, 577 (Neb. 2014). The court identified the question as "whether a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to carry the cross-examination one step further by inquiring as to the specific penalty they faced if convicted of first degree murder." *Id*. at 579. The court answered that question in the negative. *Ibid*.

In *Minnesota* v. *Yang*, the **Supreme Court of Minnesota** held that the trial judge did not err where two cooperating witnesses were initially charged with first-degree murder, which carries a mandatory life sentence in Minnesota, and the court "prohibited defense counsel from questioning informants and his codefendants about the number of years or percentage of time by which their sentences were reduced for testifying in [the defendant]'s case." 774 N.W.2d 539, 552 (Minn. 2009). The court "conclude[d] that the jury had sufficient information about [the defendant]'s codefendants' plea agreements to assess their credibility" because "[t]he jury knew that the codefendants received considerably less jail time in exchange for their testimony." *Id*. at 553.[8]

---

[8] Adding to the confusion, the Fourth Circuit appears to have an internal conflict. Compare *Hoover* v. *Maryland*, 714 F.2d

### B. The question presented is important.

Resolution of this conflict is warranted because the question arises with considerable frequency.

We have identified 22 federal and state cases just since 2007 that have addressed whether a defendant has a right to cross-examine a defendant about the specific mandatory minimum sentence absent a cooperation agreement.[9] Another 43 (or more) have ad-

---

301, 306 (4th Cir. 1983) (finding error where the "court refused to permit [the witness] to be questioned about the amount of time in prison he thought he was avoiding by testifying against" the defendant), with *United States* v. *Cropp*, 127 F.3d 354, 359 (4th Cir. 1997) ("[W]e therefore affirm the limitations placed on cross-examination by the district court in this case."). See also *Dimora*, 843 F. Supp. 2d at 843 n.20 (identifying an "intra-circuit split" in the Fourth Circuit).

[9] See, *e.g.*, *Galvez-Machado*, 630 F. App'x at 734; *Yang* v. *Roy*, 743 F.3d 622, 628 (8th Cir. 2014); *United States* v. *Lipscombe*, 571 F. App'x 198, 198 (4th Cir. 2014); *Schardien*, 499 F. App'x at 718-719; *Johnson*, 469 F. App'x at 637-639; *United States* v. *Walley*, 567 F.3d 354, 358-360 (8th Cir. 2009); *Frias-Cobos*, 349 F. App'x at 172; *United States* v. *Hoang*, 285 F. App'x 133, 139 (5th Cir. 2008); *Gonzales* v. *Wolfe*, 290 F. App'x 799, 808-810 (6th Cir. 2008); *Gradinariu*, 283 F. App'x at 543; *Fabricant*, 240 F. App'x at 245; *Warren*, 2015 WL 4522720, at *13; *United States* v. *Ochoa-Cruz*, 2014 WL 463182, at *1 (D.S.C. 2014); *United States* v. *Cannon*, 2012 WL 6568410, at *1-3 (D.S.C. 2012); *South Carolina* v. *Whatley*, 756 S.E.2d 393, 394-397 (S.C. Ct. App. 2014); *South Carolina* v. *Pradubsri*, 743 S.E.2d 98, 102-104 (S.C. Ct. App. 2013); *United States* v. *Norita*, 2010 WL 1752673, at *6-7 (D. N. Mar.I. 2010); *United States* v. *Graziano*, 558 F. Supp. 2d 304, 326-329 (E.D.N.Y. 2008); *Cohens* v. *Farrey*, 2007 WL 2288067, at *10-13 (E.D. Wis. 2007); *Jackson* v. *Florida*, 37 So.3d 370, 373 (Fla. Dist. Ct. App. 2010); United *States* v. *Hatley*, 2011 WL 2782023, at *7-9 (Army Ct. Crim. App. 2011).

dressed the issue without specifically discussing mandatory minimums.[10]

---

[10] See, *e.g.*, *United States* v. *Borders*, 829 F.3d 558, 566 (8th Cir. 2016); *Marrero*, 643 F. App'x at 237-239; *United States* v. *Foley*, 783 F.3d 7, 18-19 (1st Cir. 2015); *United States* v. *Brown*, 788 F.3d 830, 833-834 (8th Cir. 2015); *United States* v. *Duarte*, 581 F. App'x 254, 257-258 (4th Cir. 2014); *United States* v. *Chitolie*, 596 F. App'x 102, 104 (3d Cir. 2014); *United States* v. *John-Baptiste*, 747 F.3d 186, 211-212 (3d Cir. 2014); *United States* v. *Calderon*, 554 F. App'x 143, 147-150 (4th Cir. 2014); *United States* v. *Roussel*, 705 F.3d 184, 194-95 (5th Cir. 2013); *Lanham*, 617 F.3d at 884; *United States* v. *Cohen*, 539 F. App'x 743, 744 (9th Cir. 2013); *United States* v. *Moreno*, 540 F. App'x 276 (5th Cir. 2013); *United States* v. *Denham*, 437 F. App'x 772, 776 (11th Cir. 2011); *Childers* v. *Floyd*, 642 F.3d 953, 977-979 (6th Cir. 2011) (en banc), *vacated on other grounds*, 568 U.S. 1190 (2013); *United States* v. *Wilson*, 408 F. App'x 798, 803-04 (5th Cir. 2010); *United States* v. *Hall*, 613 F.3d 249, 255-256 (D.C. Cir. 2010); *Ferguson*, 394 F. App'x at 882-883; *Throckmorton*, 269 F. App'x at 236-237; *Burbank* v. *Cain*, 535 F.3d 350, 355 (5th Cir. 2008); *United States* v. *Williams*, 2017 WL 4310712, at *8 (N.D. Cal. 2017); *United States* v. *Bundy*, 2017 WL 2953638, at *3-4 (D. Nev. 2017); *Little* v. *Warren*, 2015 WL 6108248, at *4-6 (E.D. Mich. 2015); *United States* v. *Hinton*, 2014 WL 12703793, at *2-3 (M.D. Ga. 2014); *United States* v. *Ontiveros*, 2014 WL 358431, at *1-3 (D.S.C. 2014); *United States* v. *Minaya-Mena*, 2013 WL 1786395, at *1-3 (D.S.C. 2013); *United States* v. *Potter*, 2013 WL 3936505, at *13-14 (D.V.I. 2013); *Dimora*, 843 F. Supp. 2d at 842-845; *United States* v. *Cheatham*, 2008 WL 4104443, at *2-5 (W.D. Pa. 2008); *United States* v. *Ramirez*, 2008 WL 2780299, at *6-9 (W.D. Tex. 2008); *Herndon* v. *Maryland*, 2017 WL 1493030, at *4-8 (Md. App. 2017); *Washington* v. *Samalia*, 192 Wash. App. 1069, 2016 WL 900946, at *6-8 (2016); *South Carolina* v. *Tate*, 2016 WL 3336080, at *1 (S.C. Ct. App. 2016); *South Carolina* v. *Isaac*, 2015 WL 4137940, at *1 (S.C. Ct. App. 2015); *United States* v. *Aranda-Daiz*, 2014 WL 459607, at *12 (D.N.M. 2014); *Johnson* v. *Texas*, 433 S.W.3d 546, 555-557 (Tex. Crim. App. 2014); *Williams* v. *Georgia*, 742 S.E.2d 445, 448 (Ga. 2013); *George* v. *Virgin Islands*, 59 V.I. 368, 380-382 (2013); *California* v. *Graham*,

This analysis underestimates, likely drastically, the number of cases in which this issue has arisen, as the question is usually resolved by an oral, on-the-fly bench ruling at trial.

The frequent recurrence of this question is unsurprising. In federal court alone, thousands of defendants receive Section 3553(e) substantial assistance motions each year, meaning that they have supplied information against other defendants.

In 2016, for example, mandatory minimums applied to more than one-fifth of federal offenders. See U.S. Sentencing Comm'n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* (July 2017), at 6. Of those individuals convicted of an offense carrying a mandatory minimum in 2016, 24.3% (approximately 3,306 individuals) received relief from the mandatory minimum by way of a substantial assistance motion. *Id.* at 39.

Many of these cases will result in a co-conspirator testifying against a defendant in order to avoid the mandatory minimum. Indeed, "[i]t is a rare federal criminal trial that does not require the use of criminal witnesses—those who have pleaded guilty to an offense and are testifying under a plea agreement." Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. Rev. 679, 697 (1999).

---

2011 WL 6357886, at *8-11 (Cal. App. 2011); *Kansas* v. *Salas*, 253 P.3d 798, 2011 WL 2637432, at *6-7 (Kan. App. 2011); *Kansas* v. *Sharp*, 210 P.3d 590, 607-608 (Kan. 2009); *California* v. *Beard*, 2008 WL 889433, at *7-9 (Cal. App. 2008); *Minnesota* v. *Ferguson*, 742 N.W.2d 651, 656-658 (Minn. 2007); *United States* v. *Carruthers*, 64 M.J. 340, 343-345 (C.A.A.F. 2007).

Given this reality, the question presented will continue to recur—and divide the lower courts—until this Court resolves it.

### C. The decision below is incorrect.

While a clear division among the lower courts on a recurring question is reason enough to grant review, resolution of the question presented is further warranted because the decision below is wrong.

The Confrontation Clause guarantees a defendant's right to effectively expose potential biases of witnesses testifying against him. The specific length of a mandatory minimum sentence that a testifying co-conspirator avoids is powerful evidence of bias; offering a jury mere generalities (such as a "substantial" mandatory minimum) does not convey the magnitude of a witness's potential bias. On the other hand, the government's interest in excluding this evidence—asserted fears of jury nullification—are relatively minimal. The balance here overwhelmingly favors a defendant's right to cross-examine a witness about the details of the mandatory minimum he or she seeks to avoid.

1. A defendant has a Sixth Amendment right to cross-examine witnesses about information that would expose a significant bias.

"[T]he Sixth Amendment's right of an accused to confront the witnesses against him is * * * a fundamental right." *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the

kind of fair trial which is this country's constitutional goal." *Id.* at 405.

This confrontation right is largely "procedural" in nature. It is not a guarantee "that evidence be reliable," but it instead provides "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004). "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Ibid.*

It follows that "[a] specific * * * court-imposed restriction at trial on the scope of questioning" implicates the right to confrontation. *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 53-54 (1987). The cross-examination right is abridged by trial court rules that "infringe upon a weighty interest of the accused" and that are "arbitrary or disproportionate to the purposes they are designed to serve." *Holmes* v. *South Carolina,* 547 U.S. 319, 324 (2006) (alterations and quotations omitted).

In particular, the Court has held that a defendant has a Sixth Amendment right to cross-examine a witness regarding information that might provide a jury "a significantly different impression of [the witness's] credibility." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986); see also *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) ("It is plain to us that 'a reasonable jury might have received a significantly different impression of the witness' credibility had defense counsel been permitted to pursue his proposed line of cross-examination.'") (alterations omitted).

2. The precise length of a mandatory minimum that a defendant seeks to avoid is exactly the sort of information that may provide "a significantly different impression of [the witness's] credibility." *Van Arsdall*, 475 U.S. at 680.

To begin with, "[t]he partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). Thus, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id*. at 316-317.

The government's promise of a Section 3553(e) motion to alleviate a testifying witness from an otherwise certain, mandatory minimum sentence undoubtedly qualifies as evidence of motivation. The Court has found a Sixth Amendment violation where "the trial court prohibited *all* inquiry into the possibility that [a cooperating witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." *Van Arsdall*, 475 U.S. at 679. If informed about the dismissal, the "jury might reasonably have found" that this "furnished the witness a motive for favoring the prosecution in his testimony." *Ibid*.

The motivation for a witness to be partial is even more pronounced when he testifies prior to sentencing. It is common sense that a testifying coconspirator "often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing." *Washington* v. *Texas*, 388 U.S. 14, 22 (1967); see also 4 Julie L. Miller, Linda A. Goldman & William H. Jeffress, Jr., *Goals of the Cross-Examination, in*

*Criminal Defense Techniques* § 79.06 (Robert M. Cipes, et al., eds., 2017) (The plea "agreement usually affords the witness a strong bias toward and motivation to please the government, particularly when the bargain contemplates some future action by the prosecutors toward the witness."); Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L. J.69, 95-96 (1995) ("The most efficient way for the government to keep some hold over the defendant is to postpone sentencing until after his cooperation.").

And this motive to favor the government is at its apex when a witness, who is yet to be sentenced, faces a mandatory minimum unless the prosecutor makes a substantial assistance motion. In that circumstance, there "is a sentence that the witness knows *with certainty* that he will receive unless he satisfies the government with substantial and meaningful cooperation so that it will move to reduce his sentence." *Larson*, 495 F.3d at 1106.

The extent of a cooperating co-conspirator's motive cannot be properly captured by generic statements describing a "substantial" mandatory minimum or the like. The *specific* term a witness would face absent the cooperation is essential evidence.

As petitioner argued to the district court, to most jurors, a sentence of one year would seem "substantial." See 6/28 Trans. 215-16. A vague term like "substantial" does little to inform the jury as to the extent of a testifying witness's motive to please the prosecutor. By contrast, a jury's impression of a witness would likely be quite different if it learned that, but for the witness's testimony, he or she is certain to receive a sentence of 20 years (or some other mandatory minimum).

This basic principle is confirmed by scores of practitioner guides, which uniformly underscore that juries respond to specific data, not generalizations. "[D]etails" are essential "when motivations are in issue." Steven Lubet, Modern Trial Advocacy: Analysis and Practice 454 (4th ed. 2009). "The presence (or absence) of motive can frequently be established through recourse to constituent facts." *Ibid.* As these guides instruct, in assessing accomplice testimony, "the particular motivations in a given case are pivotal" to the jury. 4 Esther Nir & Dror Nir, *Strategic Considerations in Cross-Examining Accomplices and Informers, in Criminal Defense Techniques*, *supra*, § 79.08.

Accordingly, "[t]he first step in cross-examining [a witness] with immunity or a plea-bargain is to establish the awful consequences he faced if he failed to make a deal, and the comparatively light treatment he received under the terms of the deal." Julie Miller, Linda A. Goldman & William H. Jeffress, Jr., *Cross-Examination Strategies for Particular Situations, in Criminal Defense Techniques, supra*, § 79.09. Witness testimony that describes the "awful consequence" as a minimum of 20 years imprisonment is far more impactful than testimony that the describes the minimum as "substantial."

One commentator instructs defense counsel to "place the numbers on a blackboard and do the math in the presence of the jury to demonstrate the degree of benefit the witness receives under the agreement." Benjamin Brafman, *Cross-Examining a Rat*, Litigation Magazine 40, 41 (Spring 1996). For example, "show that the witness now faces '18 months' in jail compared to the potential 'life in prison' before the deal was cut." *Ibid.*

Altogether, the *specific* mandatory minimum a testifying co-conspirator would face but for the agreement to cooperate is compelling evidence of motivation. Because it is likely to impact the jury's consideration of a witness's credibility, a defendant has a Sixth Amendment right to introduce it during cross examination. *Van Arsdall*, 475 U.S. at 680.[11]

3. In opposing this line of cross-examination, the government invariably claims that providing this information to a jury risks nullification. See, *e.g.*, *Larson*, 495 F.3d at 1105; *Gracely*, 731 S.E.2d 886 n.4; *Morales*, 587 P.2d at 239. The government contends that, if a jury learns the mandatory minimum that the defendant faces, the jury might guess as to the defendant's possible sentence—and then engage in nullification. This speculative concern is unavailing.

To begin with, there is no evidence to support it: studies show that nullification is rare and that the modern jury usually bases its verdict on the evidence and faithfully attempts to follow legal principles given by the judge. Valerie P. Hans & Neil Vidmar, *Judging the Jury* 130-149 (1986); see also Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 312 (1993).

Moreover, carving exceptions to the cross-examination right requires much more than mere speculation. As the Court has held, "something more

---

[11] The danger of bias in this context is not merely academic. One study evaluated individuals who had later been exonerated by DNA evidence; "[i]n a remarkable 21 percent of these cases, false testimony by a government informant contributed to the wrongful conviction." R. Michael Cassidy, *"Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1130 (2004).

than * * * [a] generalized finding" must underlie any exception to the cross-examination right. *Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988). Indeed, in the context of an asserted racial bias, the Court has explained that "[s]peculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the witness's] testimony." *Olden*, 488 U.S. at 232.

The invocation of jury nullification is also at odds with historical practice underlying the Sixth Amendment's confrontation right. During the Founding era, juries usually knew just what sentence a criminal defendant faced; at that time, "the general Rules of Law and common Regulations of Society * * * [we]re well enough known to ordinary Jurors." 1 Legal Papers of John Adams 230 (L. Kinvin Roth & Hiller B. Zobel eds. 1965). The confrontation right was thus created against the backdrop of a system where a jury would likely *know*—and not just guess at—the applicable sentence.

To the extent that admission of this testimony has any prospect of encouraging jury nullification, there is a ready-made solution—a jury instruction.

Courts often instruct jurors not to "guess or speculate about the [defendant's] punishment." *United States* v. *Garrett*, 757 F.3d 560, 571 (7th Cir. 2014). Model instructions typically direct a jury not to consider the prospective punishment a defendant might face. See, *e.g.*, 1A Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions § 20.01 (6th ed. 2008) (providing standard jury instruction: "The punishment provided by law for the offense[s] charged in the indictment is

a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the offense[s] charged.").

These instructions cannot be overlooked. This Court has recognized "the almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). A correct jury instruction is thus the answer to any speculative concern that a jury will take into account improper considerations.

4. Ultimately, the defendant's constitutional right to expose a prototypical form of bias outweighs any pragmatic concern over possible jury nullification. The government has no interests significant enough to "justify the limitation imposed on the defendant's constitutional right." *Rock* v. *Arkansas*, 483 U.S. 44, 56 (1987).

In *Davis*, for example, the Court reversed a lower court's denial of a defendant's cross-examination into the criminal records of a juvenile. The Court explained that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." 415 U.S. at 319. "Whatever temporary embarrassment might result to the [juvenile witness] * * * is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Ibid*.

Similarly, in *Olden*, the state sought to preclude testimony that a white woman was cohabitating with a black man, out of fear that it would trigger "racial biases" of the jurors. 488 U.S. at 232. But this "speculate[ve]" concern "cannot justify exclusion of cross examination with such strong potential" to demon-

strate the motive of a witness to testify untruthfully. *Ibid.*

The same accords here. A defendant's fundamental right to expose the bias of a testifying co-conspirator entitles questioning into the specific, mandatory term of prison the witness avoided via cooperation. Any interest in preventing nullification "ha[s] to yield to [the defendant's] constitutional right to probe the possible biases, prejudices, or ulterior motives of the witnesses against [him]." *Chandler*, 326 F.3d at 223; see also *Larson*, 495 F.3d at 1105 ("[W]hile the Government has an interest in preventing a jury from inferring a defendant's potential sentence, any such interest is outweighed by a defendant's right to explore the bias of a cooperating witness who is facing a mandatory life sentence.").

This conclusion is borne out by the facts of this case. Land initially identified Tone as the supplier of the August 29 drugs. After police informed him that he distributed drugs resulting in a death, which meant that he faced a 20-year mandatory minimum, Land changed his testimony to the account favored by the officers. The jury would likely have a different impression of Land's testimony if they knew that, but for his testimony against petitioner, Land was certain to receive a 20-year sentence.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EUGENE R. FIDELL
*Yale Law School*
*Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4992*

MURRAY W. BELL
*2435 Kimberly Rd.*
*Suite 235 S.*
*Davenport, IA 52803*
*(563) 325-4095*

PAUL W. HUGHES
*Counsel of Record*
CHARLES A. ROTHFELD
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
*Mayer Brown LLP*
*1999 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*
*phughes@mayerbrown.com*

*Counsel for Petitioner*

DECEMBER 2017