

No. _____

**In The
Supreme Court of the United States**

◆

GHASSAN ELASHI, SHUKRI ABU BAKER,
MUFID ABDULQADER, and ABDULRAHMAN ODEH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

LINDA MORENO
LINDA MORENO P.A.
P.O. Box 10985
Tampa, FL 33679
Telephone: (813) 247-4500

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery Street,
Suite 1070
San Francisco, CA 94104
Telephone: (415) 322-8319
cline@johndclinelaw.com
Counsel for Petitioner
Ghassan Elashi

[Additional Counsel Listed On Inside Cover]

NANCY HOLLANDER
FREEDMAN BOYD HOLLANDER
GOLDBERG IVES & DUNCAN P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
Telephone: (505) 842-9960
Counsel for Petitioner
Shukri Abu Baker

MARLO P. CADEDDU
LAW OFFICE OF
MARLO P. CADEDDU, P.C.
3232 McKinney Avenue, Suite 700
Dallas, TX 75204
Telephone: (214) 220-9000
Counsel for Petitioner
Mufid Abdulqader

GREG WESTFALL
HILL GILSTRAP, P.C.
1400 West Abram Street
Arlington, TX 76013
Telephone: (817) 877-1700
Counsel for Petitioner
Abdulrahman Odeh

QUESTIONS PRESENTED

1. Whether or under what circumstances the Confrontation Clause permits the prosecution to present trial testimony from an anonymous witness.
2. Whether the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), extends to out-of-court statements in furtherance of a lawful joint venture.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were petitioners Ghassan Elashi, Shukri Abu Baker, Mohammad El-Mezain, Mufid Abdulqader, and Abdulrahman Odeh; respondent United States; and the Holy Land Foundation for Relief and Development.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION AND RULE INVOLVED	1
STATEMENT OF THE CASE.....	2
I. FACTS.....	4
II. PROCEEDINGS BELOW	9
REASONS FOR GRANTING THE WRIT.....	14
I. THE COURT SHOULD REAFFIRM THE BRIGHT LINE <i>SMITH</i> RULE THAT THE PROSECUTION MUST DISCLOSE THE NAMES OF ITS TRIAL WITNESSES.....	14
A. The Federal and State Courts Are Deeply Split on the Prosecution's Use of Anonymous Witnesses.....	14
B. The Use of Anonymous Witnesses Presents an Important and Recurring Question	23
C. This Case Is an Ideal Vehicle for Deciding the Important Question Presented	25

D. The Court of Appeals Violated the <i>Smith</i> Principles	27
II. THE COURT SHOULD GRANT THE WRIT TO ADDRESS THE "LAWFUL JOINT VENTURE" VARIANT OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE.....	31
A. The Court of Appeals' Uncritical Acceptance of the Lawful Joint Venture Theory Is Mistaken.....	32
B. The Viability of the Lawful Joint Venture Theory Is an Important and Recurring Question.....	36
C. This Case Is an Excellent Vehicle for Addressing the Lawful Joint Venture Theory	37
CONCLUSION	38

APPENDIX

Court of Appeals Decision (Dec. 7, 2011)	App. 1
District Court Order granting in part and denying in part defendants' discovery motion (Aug. 13, 2008).....	App. 234
District Court Memorandum Opinion and Order on motion for reconsideration of order concerning witness identities (July 11, 2007).....	App. 247

District Court Memorandum Opinion and Order granting in part and denying in part motion concerning witness identities (May 4, 2007)	App. 250
Court of Appeals Order denying petition for rehearing en banc (Feb. 17, 2012).....	App. 261
Partial Transcript of Telephonic Status Conference (Aug. 27, 2008).....	App. 265

TABLE OF AUTHORITIES

Page

CASES

<i>Alford v. United States</i> , 282 U.S. 687 (1931).....	14, 29
<i>Alvarado v. Superior Court</i> , 5 P.3d 203 (Cal. 2000).....	15, 19, 20
<i>Beck v. Prupis</i> , 529 U.S. 494 (2000).....	33
<i>Beech Aircraft Corp. v. Rainey</i> , 488 U.S. 153 (1988).....	36
<i>Bonar v. Dean Witter Reynolds, Inc.</i> , 835 F.2d 1378 (11th Cir. 1988).....	26
<i>Bourjaily v. United States</i> , 483 U.S. 171 (1987).....	31, 36
<i>Clark v. Ricketts</i> , 958 F.2d 851 (9th Cir. 1992)	15
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	28
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	26
<i>Drake v. Portuondo</i> , 553 F.3d 230 (2d Cir. 2009)	26
<i>Giles v. California</i> , 554 U.S. 353 (2008).....	27
<i>Iannelli v. United States</i> , 420 U.S. 770 (1975).....	33
<i>Krulewitch v. United States</i> , 336 U.S. 440 (1949).....	32
<i>Kumho Tire Co. v. United States</i> , 526 U.S. 137 (1999).....	36

<i>Lilly v. Virginia</i> , 527 U.S. 116 (1999).....	37
<i>Ohler v. United States</i> , 529 U.S. 753 (2000).....	36
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	36
<i>Roviaro v. United States</i> , 353 U.S. 53 (1957).....	13, 28
<i>Siegfriedt v. Fair</i> , 982 F.2d 14 (1st Cir. 1992).....	15
<i>Smith v. Illinois</i> , 390 U.S. 129 (1968).....	<i>passim</i>
<i>State v. Tonelli</i> , 749 N.W.2d 689 (Iowa 2008)	32, 33
<i>Tome v. United States</i> , 513 U.S. 150 (1995).....	36
<i>United States v. Argueta</i> , 2012 U.S. App. LEXIS 6087 (4th Cir. Mar. 21, 2012).....	20
<i>United States v. Celis</i> , 608 F.3d 818 (D.C. Cir.), <i>cert. denied</i> , 131 S. Ct. 620 (2010)	15, 16, 17, 27
<i>United States v. Coe</i> , 718 F.2d 830 (7th Cir. 1983)	32
<i>United States v. Fuentes</i> , 988 F. Supp. 861 (E.D. Pa. 1997)	17, 18, 19, 29
<i>United States v. Garcia</i> , 2012 U.S. App. LEXIS 7042 (4th Cir. Apr. 6, 2012).....	20
<i>United States v. Gewin</i> , 471 F.3d 197 (D.C. Cir. 2006).....	32, 34
<i>United States v. Gil</i> , 604 F.2d 546 (7th Cir. 1979)	35

<i>United States v. Goldberg</i> , 105 F.3d 770 (1st Cir. 1997)	35
<i>United States v. HLF</i> , 624 F.3d 685 (5th Cir. 2010)	32
<i>United States v. Inadi</i> , 475 U.S. 387 (1986).....	36
<i>United States v. Ingram</i> , 1999 U.S. App. LEXIS 6074 (7th Cir. Mar. 23, 1999).....	26
<i>United States v. Layton</i> , 855 F.2d 1388 (9th Cir. 1988)	32
<i>United States v. Maso</i> , 2007 U.S. App. LEXIS 25255 (11th Cir. Oct. 26, 2007)	15
<i>United States v. Morrow</i> , 39 F.3d 1228 (1st Cir. 1994)	37
<i>United States v. Pecora</i> , 798 F.2d 614 (3d Cir. 1986)	37
<i>United States v. Postal</i> , 589 F.2d 862 (5th Cir. 1979)	32, 35
<i>United States v. Ramos-Cruz</i> , 667 F.3d 487 (4th Cir. 2012)	20, 21, 22, 24, 27
<i>United States v. Richards</i> , 204 F.3d 177 (5th Cir. 2000)	35
<i>United States v. Russo</i> , 302 F.3d 37 (2d Cir. 2002)	32
<i>United States v. Saimento-Rozo</i> , 676 F.2d 146 (5th Cir. 1982)	32
<i>United States v. Salah</i> , 412 F. Supp. 2d 913 (N.D. Ill. 2006)	20
<i>United States v. Salerno</i> , 505 U.S. 317 (1992).....	36

<i>United States v. Zelaya</i> , 336 Fed. Appx. 355 (4th Cir. 2009), <i>cert.</i> <i>denied</i> , 130 S. Ct. 2341 (2010).....	20
<i>Vincent v. Omniflight Helicopters, Inc.</i> , 2009 U.S. Dist. LEXIS 117966 (E.D. Wis. Nov. 24, 2009)	26
<i>Williamson v. United States</i> , 512 U.S. 594 (1994).....	36

CONSTITUTION, STATUTES, AND RULES

U.S. Const. Amend. VI.....	i, 1, 17
18 U.S.C. § 2339B	7
28 U.S.C. § 1254(1).....	1
Fed. R. Evid. 608.....	29
Fed. R. Evid. 801, Advisory Committee Note ...	34, 37
Fed. R. Evid. 801(d)(2)(D)	34, 35
Fed. R. Evid. 801(d)(2)(E)	<i>passim</i>
Fed. R. Evid. 804(b)(6)	27

OTHER AUTHORITIES

Exec. Order 12947, 60 Fed. Reg. 5079 (Jan. 25, 1995).....	6, 7, 8
Exec. Order 12392, 60 Fed. Reg. 15315 (Mar. 28, 2003).....	10
Black's Law Dictionary (8th ed. 2004)	33
Natasha A. Affolder, <i>Tadic, The Anonymous Witness and the Sources of International Procedural Law</i> , 19 Mich. J. Int'l L. 445 (1998)	23

Liza I. Karsai, <i>You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience</i> , 79 Tenn. L. Rev. 29 (2011).....	15
Monroe Leigh, <i>Witness Anonymity Is Inconsistent With Due Process</i> , 91 Am. J. Int'l L. 80 (1997)	23
David Lusty, <i>Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials</i> , 24 Sydney L. Rev. 361 (2002).....	23, 24
Joanna Pozen, <i>Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials</i> , 38 N.Y.U. J. Int'l L. & Pol. 281 (2005-2006)	23
Ben Trachtenberg, <i>Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule</i> , 61 Hastings L.J. 581 (2010)	3, 34, 35, 36
<i>Prosecutor v. Tadic</i> , Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, UN Doc. IT-94-1-T (International Criminal Tribunal for the Former Yugoslavia, Aug. 10, 1995)	23

PETITION FOR A WRIT OF CERTIORARI

Ghassan Elashi, Shukri Abu Baker, Mufid Abdulqader, and Abdulrahman Odeh petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-233) is reported at 664 F.3d 467. The relevant district court orders (App. 234-260, 265-269) are unreported.

JURISDICTION

The court of appeals entered judgment on December 7, 2011. App. 1. The court denied a timely petition for rehearing on February 17, 2012. App. 261. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

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

Fed. R. Evid. 801(d)(2)(E) provides:

(d) Statements That Are Not Hearsay.
A statement that meets the following
conditions is not hearsay:

. . . .

(2) *An Opposing Party's Statement.* The
statement is offered against an
opposing party and:

(E) was made by the party's
coconspirator during and in furtherance
of the conspiracy.

STATEMENT OF THE CASE

Petitioners are serving terms of 15 to 65 years in prison after a trial in which the prosecution called two anonymous witnesses and the district court admitted dozens of documents, many with unknown authors, under the so-called "lawful joint venture" variant of the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E).

The court of appeals affirmed both rulings. Its approval of the prosecution's use of anonymous witnesses deepens a conflict among federal and state courts over the proper interpretation of *Smith v. Illinois*, 390 U.S. 129 (1968). *Smith* declared that "when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. . . . To forbid this most rudimentary

inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131 (quotation and footnote omitted). Many courts have abided by this bright-line rule. But other courts--like the court of appeals here--hold that the defendant's right to know the names of the witnesses against him can be balanced against other interests, including witness safety, and denied when, in the court's view, those other interests weigh more heavily. This case presents the ideal vehicle for resolving this important and recurring question.

The court of appeals' embrace of the lawful joint venture variant of the co-conspirator exception presents another significant question. Recent scholarship demonstrates that the lawful joint venture theory contravenes the plain language, history, and purpose of Rule 801(d)(2)(E). *See* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581 (2010). The rule excludes from the hearsay prohibition statements by a party's "coconspirator" in furtherance of a "conspiracy"--not, as the court of appeals would have it, statements of a party's lawful co-venturer in furtherance of a common, lawful goal. Nonetheless, at least four circuits (in addition to the Fifth) have adopted that theory through flawed and superficial analysis.

The Court should grant the writ to reaffirm *Smith's* bright line rule and to return Rule 801(d)(2)(E) to its original, narrow purpose of facilitating the prosecution of joint *criminal* activity.

I. FACTS.

1. This case involves an organization called the Holy Land Foundation for Relief and Development ("HLF"). Although HLF distributed humanitarian aid in the United States and other countries, its primary mission was providing assistance to Palestinians living under Israeli occupation in the West Bank and Gaza.

Petitioner Baker founded HLF in 1988. He served on the HLF board, as secretary, and as chief executive officer until the government closed the charity in December 2001. Petitioner Elashi joined the HLF board in the late 1980s and served at times as secretary, chief financial officer, treasurer, and chairman. Petitioner Odeh ran HLF's New Jersey office from early 1994 until the organization closed. Petitioner Abdulqader belonged to a band that performed at HLF events (among other places), and he sometimes served as a volunteer for the organization.

According to Edward Abington, the former United States Consul General in Jerusalem, HLF had a "good reputation" for "low overhead costs and for projects of assistance that went to needy Palestinians." 7 R.9186.¹ No one disputed the humanitarian crisis that HLF sought to alleviate; even prosecution expert Matthew Levitt recognized the plight of the Palestinians as "desperate." 4 R.3863-67.

¹ References to "R" are to the electronic record in the court of appeals. Citations are by folder number and page.

As relevant here, HLF distributed humanitarian aid to Palestinians through local West Bank charitable organizations known as zakat committees.

2. In 1987, Palestinians revolted against the Israeli occupation in an uprising known as the first Intifada. Hamas emerged during the Intifada as a popular offshoot of the Muslim Brotherhood, an Islamic organization founded in Egypt in 1927. Hamas' main political rival was Fatah, a secular organization headed by Yasser Arafat. Hamas resisted the occupation at first through small-scale violence directed against Israeli soldiers. By the mid-1990s, however, Hamas had conducted several suicide attacks against Israeli civilians inside Israel.

In September 1993, Arafat and Yitzhak Rabin, Prime Minister of Israel, signed what became known as the Oslo accords. The accords contemplated the creation of a limited Palestinian governing authority. Many Palestinians opposed the accords, believing they did not go far enough in establishing Palestinian sovereignty. Hamas was among the Palestinian organizations that opposed the Oslo accords. Under the accords and follow-on agreements, the Palestinian Authority ("PA") was created and given power to administer some aspects of portions of the West Bank and Gaza. Throughout the period at issue, Fatah controlled the PA.

In October 1993, soon after the Oslo accords and at a time when support for Hamas was legal, Baker, Elashi, and other prominent American Muslims met at a hotel in Philadelphia. The FBI secretly recorded the meeting. The attendees

discussed a range of subjects, including their opposition to the accords, the role of Hamas in resisting the Israeli occupation, and HLF's function in providing assistance to the Palestinian people. Baker emphasized that HLF "must act as an American organization which is registered in America and which cares for the interests of the Palestinian people. It doesn't cater to the interests of a specific party. Our relationship with everyone must be good, regardless." 7 R.5380. Baker declared that HLF "must stay on its legal track as far as charitable projects are concerned without going after a sentiment that could harm the foundation legally" 7 R.5381. He added: "We shouldn't take part in any illegal transactions." 7 R.5382.

3. The United States first banned financial support for Hamas on January 25, 1995, more than a year after the Philadelphia meeting, when President Clinton issued Executive Order 12947. 60 Fed. Reg. 5079 (Jan. 25, 1995). Thus, the earliest unlawful conduct alleged in the indictment is January 25, 1995. 3 R.7055, 7060. It was undisputed that appellants' conduct before that date did not violate any federal criminal law. As the government conceded in its opening statement, "[I]t didn't become illegal to support Hamas or to fund Hamas until 1995." 4 R.3563.

The Executive Order implemented the ban on financial support for Hamas by naming it a Specially Designated Terrorist ("SDT"). E.O. 12947 gave the Treasury Department authority to designate additional SDTs, including "persons determined . . . to be owned or controlled by, or to act for or on behalf

of, any of the foregoing persons," including Hamas. E.O. 12947, § 1(a)(iii), 60 Fed. Reg. at 5079; 7 R.7301-02.²

Beginning with the designations of Hamas and others in January 1995, the Treasury Department maintained a public list of all designated persons and entities, including SDTs and FTOs. 7 R.7277-78, 7302. The list included persons and entities designated because they were determined to be "owned or controlled by, or to act for or on behalf of" Hamas. 7 R.7305. Hamas and several Hamas officials appeared on the Treasury Department list. But the government never designated as an SDT or FTO (and placed on the list) any of the zakat committees, or anyone connected with the zakat committees. 4 R.3860-62; 7 R.7344.

In February 1995, shortly after E.O. 12947 designated Hamas an SDT, Elashi (on behalf of HLF) and representatives of other American Muslim organizations met at the Treasury Department in Washington, D.C. with the head of the Office of Foreign Assets Control and other Treasury Department officials. HLF and the other organizations sought guidance on "the new executive order and its implications for charitable giving by American Muslims." 7 R.7298, 7312-15. The Treasury officials responded that the Department "was not going to make a determination for them as to who they could or couldn't send money to beyond

² The United States further criminalized financial support for Hamas on October 8, 1997, when the State Department designated it a Foreign Terrorist Organization ("FTO") and thus brought it within the prohibitions of 18 U.S.C. § 2339B.

the entities already listed in Executive Order 12947." 7 R.7315. The Department declined to provide a list of approved entities--a so-called "white list." 7 R.7352-54. The Treasury officials referred Elashi and the other attendees to a White House press release about E.O. 12947, which stated that the Executive Order was "intended to reach charitable contributions to *designated organizations* to preclude diversion of such donations to terrorist activities." GX OFAC 4 (emphasis added); see 7 R.7319-20. As noted, the West Bank zakat committees were not among the "designated organizations."

In a call the government secretly recorded on April 23, 1996, Baker and Elashi discussed the possibility that the Treasury Department might designate and list the zakat committees. Baker emphasized that if Treasury placed the committees on the list, HLF could no longer distribute charity through them. 7 R.7053-56. Baker told Elashi that if the committees were designated, "[Y]ou have to abide by the law," and Elashi--though determined to speak out publicly against any such designation--responded, "Well, I'm gonna abide by the law because I won't be able to make a transfer. I know that." 7 R.7504-05.

Reports appeared occasionally in the media that the government was investigating HLF for supporting Hamas. 7 R.8498. In late 1997, HLF retained lawyer and former Congressman John W. Bryant to address the reports with the government. 7 R.8497. Bryant testified at trial that in 1998 and 1999, he met with officials from the State

Department, the FBI (on three occasions), and the Israeli Embassy. In each instance, he asked if HLF should do anything differently. No one cautioned him that HLF should not deal with the zakat committees. 7 R.8498-8505.

In December 2001, the Treasury Department designated HLF a terrorist organization, seized its assets, and put the charity out of business.

II. PROCEEDINGS BELOW.

1. The grand jury indicted petitioners July 26, 2004. The indictment charged conspiracy to provide material support to Hamas, conspiracy to violate the International Emergency Economic Powers Act, and other offenses.

At trial, the government did not contend that HLF provided funds directly to Hamas or that its funds were used (or intended to be used) to support suicide bombings or other violence.³ Rather, the government's theory was that Hamas controlled the zakat committees that HLF used and that by distributing aid through those committees, HLF helped Hamas win the "hearts and minds" of the Palestinian people. Two ways by which the government sought to prove that theory are pertinent here.

First, the government presented in-court testimony from two anonymous witnesses: (a) "Avi,"

³ *E.g.*, 7 R.9424 (government closing: "No one is saying that the defendants themselves have committed a violent act" or that the HLF funds went directly to buy a suicide belt or bomb).

an anonymous expert witness who purported to be from the Israeli Security Agency ("ISA"), and who opined, based on criteria he selected, that Hamas controlled the committees named in the indictment, and (b) "Major Lior," who purported to be a member of the Israeli Defense Forces and testified about the seizure of documents from the zakat committees and PA headquarters.

The district court granted the government's motion to withhold the witnesses' names from the defense on the basis that the identities were classified and their disclosure could place the witnesses or their families in danger. 10 R.4279, 4284-86; 2 R.4917.⁴ Neither petitioners nor their counsel ever learned the witnesses' true names. The district court permitted the government to present Avi's testimony even though the government had noticed another, named expert--Colonel Jonathan Fighel, a retired Israeli military officer--to cover the same subjects.

Second, the government relied on dozens of documents seized from the homes of two men named Ismail Elbarasse and Abdel Haleem Ashqar, neither of whom ever worked for HLF. The defense objected that the documents predated the designation of Hamas in 1995 and thus could not contain statements of "coconspirators" in furtherance of a

⁴ The identities of Avi and Major Lior were classified because they constituted "foreign government information"--that is, information provided by Israel to the United States government "with the expectation that the information [is] to be held in confidence." Exec. Order 13292, §§ 1.1(c), 1.4(b), 1.6(e), 6.1(r), 68 Fed. Reg. 15315, 15317, 15318, 15331 (Mar. 28, 2003); *see* 10 R.4284-86.

"conspiracy," as Rule 801(d)(2)(E) requires. The district court admitted the Elbarasse and Ashqar documents on the theory that Rule 801(d)(2)(E) extends to statements of a party's co-venturers in furtherance of a lawful joint venture.

The defense vigorously disputed the government's contention that Hamas controlled the zakat committees at issue and that petitioners knew of any such control. To the extent they could without knowing Avi's true name, defense counsel attacked his credibility on cross-examination. Counsel also challenged the credibility of other key government witnesses. And the defense called Edward Abington, who served as the United States Consul General in Jerusalem from 1993 to 1997--the de facto United States ambassador to the PA. Abington served thirty years as a foreign service officer, from 1970 through 1999, and before that he worked for the CIA. He testified that as Consul General he visited the West Bank zakat committees (the only trial witness to do so) and received regular briefings about Hamas. He never heard of any link between Hamas and the committees.

The defense elicited other facts that tended to undermine the prosecution's theory that Hamas controlled the zakat committees. Most of the committees predated Hamas, some by decades. The committees were licensed and audited throughout their existence by the entity governing the West Bank--Jordan before 1967, the Government of Israel from 1967 until the 1993 Oslo accords, and the PA thereafter--all of which were bitter enemies of Hamas. And USAID--which had strict instructions

not to deal with Hamas--provided funds over many years to zakat committees named in the indictment, including the Jenin, Nablus, and Qalqilia committees. 7 R.9168-73, 9180-85; DX102, 1074, 1076. That USAID funding continued after the government closed HLF and even after the indictment in this case. 7 R.9183-85; DX1076. In 2004, for example, the year HLF was indicted, USAID provided \$47,000 to the Qalqilia zakat committee. DX1074.

After twenty days of deliberations, the jury returned a partial verdict on October 22, 2007. It initially acquitted Abdulqader on all counts, but one juror changed her mind when polled and thus the jury hung 11-1 for acquittal on all counts as to him. The jury hung on all counts as to all other petitioners.⁵

2. Following the partial acquittal, the case was reassigned to a new district judge. Before the second trial, the defense again sought disclosure of the names of Avi and Major Lior. 29 R.6364, 6366-70. The district court denied the motion. The court found the names "relevant" but declined to find them "material," because the defense could not specify the evidence it would discover if the names were disclosed. App. 238-41. The court further held that, even if the defense could establish materiality, the "balance of equities lies in the Government's favor; Defendants' interest in obtaining the names of the

⁵ The jury acquitted defendant Mohammad El-Mezain on all counts except Count 1, on which it hung. El-Mezain (who was convicted in the retrial) is filing a separate petition for writ of certiorari, in which he joins this petition.

witnesses is outweighed by the Government's need to keep the information secret." App. 242.

Avi and Major Lior testified at the second trial, as they had at the first, using their pseudonyms. As before, neither the defense nor the jury learned their true names. Avi was the prosecution's principal expert witness linking the zakat committees to Hamas. The prosecution again elected not to call Col. Fighel.

The district court again admitted the Elbarasse and Ashqar documents under the "lawful joint venture" variant of Rule 801(d)(2)(E), over objection.

After deliberating nine days, the jury found petitioners guilty on all counts. The district court sentenced Elashi and Baker to 65 years in prison, Abdulqader to 20 years in prison, and Odeh to 15 years in prison.

3. The Fifth Circuit affirmed the convictions and sentences. Applying a balancing test drawn from *Roviaro v. United States*, 353 U.S. 53 (1957)--a nonconstitutional case involving disclosure of the name of a *nontestifying* informant--the court of appeals affirmed the district court's refusal to disclose the true names of Avi and Major Lior to the defense. App. 20-29. And the court affirmed the district court's decision to admit the Elbarasse and Ashqar documents under the "lawful joint venture" variant of the co-conspirator exception to the hearsay rule. App. 45-61. The court denied rehearing. App. 261.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD REAFFIRM THE BRIGHT LINE *SMITH* RULE THAT THE PROSECUTION MUST DISCLOSE THE NAMES OF ITS TRIAL WITNESSES.

A. The Federal and State Courts Are Deeply Split on the Prosecution's Use of Anonymous Witnesses.

In *Smith v. Illinois*, 390 U.S. 129 (1968), the trial court permitted an informant to testify under an assumed name, much as Avi and Major Lior did here, and it sustained objections to questions about the witness' true name and address. This Court reversed the conviction by an 8-1 vote. It observed that "when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation." 390 U.S. at 131 (quotation and footnote omitted). The Court declared that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.*

In a concurrence joined only by Justice Marshall, Justice White observed:

In *Alford v. United States*, 282 U.S. 687, 694 (1931), the Court recognized that questions which tend

merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling.

Id. at 133-34 (White, J., concurring). The six other Justices in the majority did not address Justice White's concurrence.

In the wake of *Smith*, prosecution use of anonymous witnesses "polarizes scholars and courts alike."⁶ The federal and state courts have split on the question. Some courts have rejected prosecution efforts to present anonymous witnesses.⁷ These

⁶ Liza I. Karsai, *You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience*, 79 Tenn. L. Rev. 29, 30 (2011).

⁷ See, e.g., *United States v. Celis*, 608 F.3d 818, 829-33 (D.C. Cir.), *cert. denied*, 131 S. Ct. 620 (2010); *United States v. Maso*, 2007 U.S. App. LEXIS 25255, at *8-*13 (11th Cir. Oct. 26, 2007) (unpublished); *Siegfriedt v. Fair*, 982 F.2d 14, 17-19 (1st Cir. 1992); *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1992); *United States v. Fuentes*, 988 F. Supp. 861, 863-67 (E.D. Pa. 1997); *Alvarado v. Superior Court*, 5 P.3d 203, 218 (Cal. 2000).

courts sometimes limit disclosure to counsel or impose other kinds of protective measures. But the courts do not permit the prosecution to present testimony from a witness whose name is entirely unknown to the defense. The courts thus ensure that defense counsel can undertake at least a minimally adequate investigation of the witness' credibility and reliability.

The D.C. Circuit's decision in *United States v. Celis*, 608 F.3d 818 (D.C. Cir.), *cert. denied*, 131 S. Ct. 620 (2010), is typical of these cases. The prosecution in that case--a multi-defendant narcotics conspiracy--sought to present a number of Colombian witnesses with pseudonyms and to withhold their identities from the defense. The government's motion set out "in vivid detail" the concerns with witness safety that motivated the request. *Id.* at 829. The district court granted the motion only in part. It permitted the witnesses to testify under pseudonyms, but it required disclosure of their true names to defense counsel a few days before their testimony, and it permitted counsel to disclose the true names to their clients. In addition, the district court ensured the defense had adequate time after receiving each name to investigate the witness. *See id.* at 830.

In rejecting defendants' argument that the district court's approach violated their Sixth Amendment rights, the D.C. Circuit stressed that the district court had "allow[ed] defense access to the true identities of the protected witnesses days before their testimony and, when shown to be necessary for those purposes, allowed investigation using these

true identities in the United States and Colombia." *Id.* at 833. Thus, the court of appeals approved protective measures when the prosecution raised valid witness safety concerns, but only where some disclosure of the witnesses' names was made to the defense.

The district court's analysis in *United States v. Fuentes*, 988 F. Supp. 861 (E.D. Pa. 1997), is also illuminating. The prosecution in that case sought to withhold the true identity of a key witness (known as "Lozano") from the public and from the defense. It persuaded the district court that "disclosure of Lozano's identity would likely place him and his innocent family members in serious danger" and "compromise ongoing D.E.A. investigations." *Id.* at 863. The court thus agreed to permit Lozano to testify using his pseudonym. *See id.* at 867. But the court rejected the prosecution's request that Lozano's identity be withheld from the defense. After reviewing the relevant Confrontation Clause principles, the court found that the prosecution's approach would

foreclose[] any possibility of defendants' meaningful investigation into Lozano's background, and it requires the defendants to rely exclusively on the government for information about Lozano. It also leaves the defense with no way of testing the veracity or completeness of the Government's disclosures. This complete reliance on the prosecution is, in our view, inimical to our adversary process and to the

checks on government prosecution
embedded in our constitutional
framework.

Id. at 865.

Not even the prosecution's disclosure of significant information about Lozano removed the need for disclosure of his true name. Although the court found that the disclosures "certainly assist the defense because they provide impeachment evidence," it declared:

These disclosures . . . do not alter the Government's sole control over the informational flow or the defendants' inability to test the veracity or completeness of the Government's disclosures. Furthermore, the defense has no means of testing Lozano's reputation for truthfulness (or lack thereof) in his community. *See* Fed. R. Evid. 608. Also foreclosed is the defendants' ability to investigate possible prior bad acts here and in Colombia which would impugn his veracity. *See id.* In sum, even with these disclosures Lozano remains only who the Government says he is, and as for his life of at least thirty years before 1981 [when he became an informant], he remains largely a phantom.

Id. at 866. Accordingly, the court ordered the prosecution to provide Lozano's true name to defense

counsel. It added that counsel "may, of course, reveal Lozano's true identity to their clients. They may also reveal the identity to one investigator who will labor on behalf of all the defendants in investigating Lozano's background. The defendants and the investigator, however, are to reveal this information only as required by the investigation," on pain of contempt of court. *Id.* at 867.

The California Supreme Court similarly refused to countenance anonymous witnesses in *Alvarado v. Superior Court*, 5 P.3d 203 (Cal. 2000). The trial court in that case--which involved a brutal gang-related jail killing--had authorized the prosecution to withhold permanently from the defense the names of crucial trial witnesses. The California Supreme Court reversed, based on its reading of *Smith*. The court declared:

Protecting the safety of witnesses unquestionably is of the utmost importance, and a trial court has broad discretion to deny, restrict, or defer disclosure of a witness's identity prior to trial in order to provide such protection. . . . [W]e conclude in light of controlling constitutional authorities that the trial court and the Court of Appeal erred in determining that, when the risk to a witness is sufficiently grave, the identity of the witness may be *permanently* withheld from a defendant and the witness may testify *anonymously at trial*--even when the witness is a crucial prosecution witness

and withholding the witness's identity will impair significantly the defendant's ability to investigate and cross-examine the witness.

Id. at 205 (citation omitted; emphasis in original).

In contrast with these cases, other courts--including the Fifth Circuit here--have read *Smith* (and especially Justice White's concurrence) to permit the prosecution to withhold a witness' name from the defense permanently when it shows that disclosure might endanger the witness. For example, in a series of cases arising from a gang prosecution, the Fourth Circuit affirmed district court orders permitting witnesses to testify without disclosing their names to the defense.⁸ Similarly, a district court permitted several ISA agents to testify anonymously at trial about obtaining a confession from the defendant. *See United States v. Salah*, 412 F. Supp. 2d 913, 923-24 (N.D. Ill. 2006) (suppression hearing testimony); *id.*, Minute Order (N.D. Ill. Aug. 29, 2006) (trial testimony).

The recent decision in *United States v. Ramos-Cruz*, 667 F.3d 487 (4th Cir. 2012), illustrates the approach of these courts. The case arose from the prosecution of alleged MS-13 gang members for conduct that occurred in part in El Salvador. The

⁸ *See United States v. Ramos-Cruz*, 667 F.3d 487 (4th Cir. 2012); *United States v. Garcia*, 2012 U.S. App. LEXIS 7042, at *5 (4th Cir. Apr. 6, 2012) (unpublished); *United States v. Argueta*, 2012 U.S. App. LEXIS 6087, at *7-*9 (4th Cir. Mar. 21, 2012) (unpublished); *United States v. Zelaya*, 336 Fed. Appx. 355, 357-58 (4th Cir. 2009) (unpublished), *cert. denied*, 130 S. Ct. 2341 (2010).

district court permitted the prosecution to call two El Salvadorian witnesses without disclosing their names to the defense, because of witness safety concerns. The court of appeals majority affirmed, because the evidence of danger to the witnesses was strong, their testimony did not involve the appellant or his activities, but only "generalized information about the operation of MS-13," and the government disclosed pretrial "the substance of the testimony the two witnesses in question would provide at trial. *Id.* at 501. Thus, according to the majority, the defense was "able to effectively cross-examine the witnesses without threatening their safety." *Id.* (quotation omitted).

In an opinion concurring in the result, Judge Henry Floyd disagreed with the majority's analysis. Judge Floyd acknowledged the grave danger that prosecution witnesses may face in a range of cases involving violent conduct. He recognized as well that trial judges must be afforded broad discretion in protecting the safety of such witnesses. But he emphasized the importance to the defense of knowing the names of prosecution witnesses:

Access to the true names of the government's witnesses is critical to ensuring that a criminal defendant is able to rigorously test their testimony in an adversarial manner. As noted, effective cross-examination often entails challenging the witness's credibility. Hence, the opportunity for effective cross-examination, which the Sixth Amendment guarantees, includes the

opportunity to challenge the witness's credibility. But without a government witness's true name, the criminal defendant is unable to perform the type of investigation--whether in court or out of court--necessary to be able to challenge his credibility. The criminal defendant cannot explore the witness's background and qualifications to discover any facts that might reflect poorly on his credibility. In effect, denying a criminal defendant knowledge of the true names of the government's witnesses severely inhibits his ability to perform what is often the most potent aspect of effective cross-examination: impeachment. In my opinion, because completely forbidding a criminal defendant from learning a witness's true name prevents the opportunity for effective cross-examination, it denies the defendant a fundamental aspect of a fair trial.

Id. at 507 (Floyd, J., concurring in result).

The majority and concurring opinions in *Ramos-Cruz* thus frame the deep split that now exists in the federal and state courts over prosecution use of anonymous witnesses.

B. The Use of Anonymous Witnesses Presents an Important and Recurring Question.

This Court has called the right to know the identity of a witness testifying against the accused "the very starting point in exposing falsehood and bringing out the truth," the loss of which "is effectively to emasculate the right of cross-examination itself." *Smith*, 390 U.S. at 131 (quotation and footnote omitted). Yet the court of appeals decision and similar decisions from the Fourth Circuit and other courts allow the evisceration of that right in a broad swath of cases. In particular, the balancing test adopted by those courts enables anonymous prosecution witnesses in any case involving a threat of potential violence, even when (as here) the threat does not emanate from the defendants themselves.⁹

The "very real . . . danger associated with the acceptance of any degree of witness anonymity is the proclivity for what start out as exceptional

⁹ The prosecution use of anonymous witnesses has commanded the attention of courts and scholars beyond this country's borders, including international criminal courts. See, e.g., *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, UN Doc. IT-94-1-T (International Criminal Tribunal for the Former Yugoslavia, Aug. 10, 1995); Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int'l L. 445 (1998); Monroe Leigh, *Witness Anonymity Is Inconsistent With Due Process*, 91 Am. J. Int'l L. 80 (1997); David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 Sydney L. Rev. 361 (2002); Joanna Pozen, *Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials*, 38 N.Y.U. J. Int'l L. & Pol. 281 (2005-2006).

procedures to become 'normal' features of the prosecution process."¹⁰ Judge Floyd voiced a similar concern in his *Ramos-Cruz* concurrence:

We must recognize . . . that these concerns [for witness safety] inhere in many prosecutions of defendants who are members of violent criminal organizations. The sad truth is that, in this respect, the situation presented in today's case is not rare. Gangs often employ violence as a means of intimidating witnesses. Witness intimidation is a serious problem of an alarming magnitude, and it plagues many of our communities. As a result, the prosecution of members of violent gangs--such as this prosecution of Ramos-Cruz--will often trigger safety concerns for many of the witnesses involved.

Ramos-Cruz, 667 F.3d at 506 (Floyd, J., concurring in result). The balancing performed in this case and in *Ramos-Cruz* will virtually always tilt toward anonymity in gang cases, terrorism cases, and even routine drug cases, as long as the prosecution can demonstrate that witnesses in such cases face a credible threat of violence.

The Court should grant the writ to stop the erosion of *Smith's* clear rule. A defendant charged with a serious crime has a right to know (or at least

¹⁰ Lusty, *supra* note 9, at 425.

to have his counsel know) the names of his accusers. Any balancing of interests should occur in determining when and how to make the disclosure.

C. This Case Is an Ideal Vehicle for Deciding the Important Question Presented.

This case, for two reasons, presents the perfect opportunity for the Court to determine whether or under what circumstances the prosecution can present anonymous witnesses.

1. The question is cleanly presented and outcome-determinative. There are no disputed factual questions that cloud the issue. And a decision in petitioners' favor will undoubtedly affect the outcome. Although the government argued in the court of appeals that the withholding of the witnesses' names was harmless, that contention was weak to begin with, especially as to Avi. It is hopeless now, because the court of appeals found four *other* errors harmless in affirming the convictions, each of which marked a significant difference between the first trial (which produced a hung jury and acquittals) and the second (which produced convictions). App. 105-27. It is inconceivable that the court of appeals would find a *fifth* error harmless, particularly under the cumulative error analysis that petitioners invoked. App. 127.

2. The facts of this case--in which Avi testified as an expert--vividly illustrate how keeping the identity of a witness secret unfairly hampers the defense. "Unlike an ordinary witness . . . an expert

is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). This latitude, coupled with an expert's aura of authority, creates the potential for "powerful and quite misleading" testimony. *Id.* at 595.

One of the most effective means of countering the "misleading" impact of expert testimony is to show that the purported expert has misstated his experience, education, or training.¹¹ That line of attack was foreclosed here; the defense could not even begin to investigate these matters without knowing Avi's name. It was forced to accept his account of his credentials and expertise with no meaningful ability to challenge his claims. This was particularly so because Avi has published no scholarly work in peer reviewed journals and has given no public lectures, and thus has never been subject to any scholarly critique--or at least none that the defense could find without knowing his name.

¹¹ There are many such cases. See, e.g., *Drake v. Portuondo*, 553 F.3d 230, 235-39 (2d Cir. 2009); *United States v. Ingram*, 1999 U.S. App. LEXIS 6074 (7th Cir. Mar. 23, 1999); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1381, 1384 (11th Cir. 1988); *Vincent v. Omniflight Helicopters Inc.*, 2009 U.S. Dist. LEXIS 117966 (E.D. Wis. Nov. 24, 2009). If the expert witnesses in these cases had remained anonymous, their misrepresentations would never have come to light.

D. The Court of Appeals Violated the *Smith* Principles.

The court of appeals' ruling affirming the prosecution's use of two anonymous witnesses cannot be reconciled with this Court's decision in *Smith*.

The court's fundamental error was in balancing the interests of petitioners, the witnesses, and the government to determine *whether* to disclose the witnesses' names to the defense. *Smith* makes clear that such balancing is improper; the names of prosecution witnesses must be disclosed to the defense without exception and without any weighing of interests. As cases such as *Celis* and *Fuentes* demonstrate, balancing is appropriate in determining *when* and *how* the disclosure should be made, not *whether* it should be made. See *Ramos-Cruz*, 667 F.3d at 507-08 (Floyd, J., concurring in the judgment).

A different case would be presented if petitioners themselves had threatened the prospective witnesses or conspired to threaten them. Under that circumstance, a defendant might well forfeit his right to know the names of his accusers. See, e.g., *Giles v. California*, 554 U.S. 353, 361 (2008) (defendant forfeits Confrontation Clause rights when he takes actions intended to prevent a witness from testifying); cf. Fed. R. Evid. 804(b)(6) (statement not excluded by hearsay rule if the declarant is unavailable and the statement is offered against a party who "wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as

a witness, and did so intending that result"). But when--as here--a defendant neither threatens a witness nor causes the witness to be threatened, his right to know the name of his accuser cannot be cut back because *others* may have made such threats.

The court of appeals' balancing of interests trivializes the right this Court characterized in *Smith* as "the very starting point in exposing falsehood and bringing out the truth." 390 U.S. at 131 (footnote and quotation omitted). The Court recently abandoned an equally amorphous and subjective balancing test in another Confrontation Clause context. See *Crawford v. Washington*, 541 U.S. 36, 63-64 (2004) (rejecting the *Ohio v. Roberts* balancing test for determining the reliability of out-of-court statements). Like the right to cross-examine at issue in *Crawford*, the right to know the names of one's accusers recognized in *Smith* is too fundamental to be balanced away in service of an asserted government interest.

The court of appeals drew its balancing test from *Roviaro v. United States*, 353 U.S. 53 (1957). App. 23. *Roviaro* concluded that the so-called "informer's privilege" may allow the prosecution to withhold the name of a confidential informant when security interests outweigh the defendant's need to know the person's identity. That case, however, had nothing at all to do with the right to confrontation, for the government neither presented the anonymous informant as a *trial witness* nor tried to introduce any of his out-of-court statements. Indeed, it is telling that *Smith*, decided eleven years after *Roviaro*, does not cite that case--not in the majority

opinion, not in Justice White's concurrence, and not in the dissent.

The importance of knowing the adverse witnesses' names is manifest on this record. Without the true names of Avi and Major Lior, the defense could not investigate them. As Avi put it on cross, "You cannot research me." 7 R.8272. For example, the defense could not present opinion and reputation evidence about the anonymous witnesses' character for untruthfulness, *see* Fed. R. Evid. 608(a); *Alford v. United States*, 282 U.S. 687, 691 (1931), or investigate prior acts that might undermine their veracity, Fed. R. Evid. 608(b), or develop other impeachment evidence, *see Alford*, 282 U.S. at 691-92.

The court of appeals nonetheless concluded that the defense had enough information with which to cross-examine Avi. App. 25-27. But all the information that the defense had about Avi's background, training, and associations *came from Avi himself*. Avi retained "sole control over the informational flow," and appellants could not "test the veracity or completeness of the Government's [and Avi's] disclosures." *Fuentes*, 988 F. Supp. at 866. It is fundamentally inconsistent with the adversarial system to leave the ability to investigate a witness--particularly an expert witness--in the sole control of the witness and the party presenting him. Such a procedure gives the witness a license to lie (or exaggerate) with impunity.

Even if a balancing test applied--which it does not--the court of appeals decision would contravene

Smith, because surely the Confrontation Clause cannot tolerate anonymous testimony when the government has available an alternate witness whose identity is known. And here, the government noticed Col. Fighel to cover the same subjects as Avi. According to the government's notice, Col. Fighel was prepared to testify

about each zakat committee listed in the [expert] notices. He will explain, based upon his research which he conducted in preparation for his testimony, how each committee is controlled by Hamas. He will testify about the committee members involvement in Hamas and how the acts of the committees were designed to support the terrorist organization.

10 R.2885; *see* 2 R.977. These are the very matters about which Avi testified. Col. Fighel's identity is not classified, and the defense was able to investigate his training, experience, and background much as it could any other expert.

The court of appeals' "balancing" of interests gave no weight to Col. Fighel's availability. Israel provided the prosecution with two expert witnesses, one whose name was classified and one whose name was public. The court of appeals concluded, in effect, that the prosecution's tactical preference for the classified Israeli expert (who could not be investigated) over the unclassified Israeli expert (who could be) outweighed petitioners' right of

confrontation. If balancing applies at all, the balance the court of appeals struck here was wrong.

II. THE COURT SHOULD GRANT THE WRIT TO ADDRESS THE "LAWFUL JOINT VENTURE" VARIANT OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

Rule 801(d)(2)(E) defines as nonhearsay a statement "made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E); *see, e.g., Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Under this rule, the district court admitted dozens of documents seized from Elbarasse and Ashqar, all of which pre-dated the designation of Hamas in 1995.

The prosecution could not establish the existence of a "conspiracy" when the documents were created, because (in the prosecution's words) conspiracy requires "an agreement among two or more people basically to do something wrong," 7 R.9508, and "it didn't become illegal to support Hamas or to fund Hamas until 1995," 4 R.3563. The district court thus admitted the documents under the so-called "lawful joint venture" theory, by which a number of lower federal courts have extended Rule 801(d)(2)(E) to include statements by a party's joint venturer in furtherance of even *lawful* common action. The court of appeals affirmed the district court's ruling. App. 48-52.

At least one state supreme court has rejected the lawful joint venture theory under its identically

worded version of Rule 801(d)(2)(E). *See State v. Tonelli*, 749 N.W.2d 689, 694 (Iowa 2008). But the theory has become widespread in the lower federal courts.¹² Worse yet, not a single case, including the court of appeals decision here, has subjected that theory to rigorous analysis. Because the lower courts show no willingness to examine the faulty premises on which the lawful joint venture theory rests, this Court should intervene.

A. The Court of Appeals' Uncritical Acceptance of the Lawful Joint Venture Theory Is Mistaken.

This Court has explained that the co-conspirator exception must be narrowly interpreted. The Court has recognized that "[t]here are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another." *Krulewitch v. United States*, 336 U.S. 440, 443 (1949). The *Krulewitch* Court thus resisted a government effort to "expand this narrow exception to the hearsay rule" and "create . . . a further breach of the general rule against the admission of hearsay evidence." *Id.* at 444.

¹² *See, e.g., United States v. HLF*, 624 F.3d 685, 694 (5th Cir. 2010); *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006); *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002); *United States v. Layton*, 855 F.2d 1388, 1398-1400 (9th Cir. 1988); *United States v. Coe*, 718 F.2d 830, 835-36 (7th Cir. 1983); *United States v. Saimento-Rozo*, 676 F.2d 146, 149-50 (5th Cir. 1982); *United States v. Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979).

The lawful joint venture theory goes even farther than the expansion this Court rejected in *Krulewitch*. As Professor Ben Trachtenberg's scholarship demonstrates, that theory rests on a misreading of Rule 801(d)(2)(E)'s language, rationale, and legislative history.

First, by its plain terms Rule 801(d)(2)(E) applies only to a statement of a "party's *coconspirator* during and in furtherance of *the conspiracy*." Fed. R. Evid. 801(d)(2)(E) (emphasis added). Both the common law roots of Rule 801(d)(2)(E) and its legislative history confirm that it uses the term "conspiracy" in its ordinary sense, to mean an agreement to achieve unlawful ends or lawful ends by unlawful means.¹³ Indeed, the Supreme Court of Iowa relied on the common meaning of the word "conspiracy" to conclude that the state analog to Rule 801(d)(2)(E) "may be applied where there is evidence of a conspiracy to accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner, but *not* to combinations or agreements in furtherance of entirely lawful goals advanced by lawful means." *Tonelli*, 749 N.W.2d at 694 (emphasis added). Only by ignoring the text of the rule and its history can "conspiracy" be read to include *lawful* joint ventures. See Trachtenberg, *supra*, 61 Hastings L.J. at 599-608.

Second, courts adopting the lawful joint venture theory have suggested that it depends on

¹³ See, e.g., *Beck v. Prupis*, 529 U.S. 494, 501-02 (2000) (civil conspiracy); *Iannelli v. United States*, 420 U.S. 770, 777 (1975) (criminal conspiracy); Black's Law Dictionary 329 (8th ed. 2004).

"concepts of agency and partnership law." *E.g.*, *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006); App. 51. But those agency "concepts" fit poorly with the theoretical underpinnings of the co-conspirator exception. As the Advisory Committee Note to Rule 801(d)(2)(E) makes clear, "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." Fed. R. Evid. 801, Advisory Committee Note; *see* Trachtenberg, *supra*, 61 Hastings L.J. at 627-29.

The co-conspirator exception exists not because conspirators are agents of each other, but as a practical recognition that conspiracies are difficult to prosecute because they operate in secret to conceal criminal conduct. *See id.* at 633-34; *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979). Even if the difficulty of prosecuting *conspiracies* justifies admitting potentially unreliable evidence with no opportunity for cross-examination, no such systemic difficulty accompanies the investigation of lawful joint ventures and thus no comparable relaxation of the rules is justified in that context. *See* Trachtenberg, *supra*, 61 Hastings L.J. at 636-37.

Moreover, if the lawful joint venture theory turns on agency, then it should be measured by the hearsay exception directed specifically to an agency relationship, Fed. R. Evid. 801(d)(2)(D). That provision defines as nonhearsay a statement "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Rule 801(d)(2)(D) precisely defines the extent to

which statements of agents may be treated as admissions by their principals--and it plainly has no application here, where there is no evidence that the declarants in the Elbarasse and Ashqar documents (many of them unknown) had any kind of agency relationship with petitioners. *See, e.g., United States v. Richards*, 204 F.3d 177, 202-03 (5th Cir. 2000). Courts should not distort Rule 801(d)(2)(E) to circumvent the restrictions that Congress placed on such vicarious admissions in Rule 801(d)(2)(D).

Other than the baseless agency rationale, the sole support cases cite for the lawful joint venture theory is the following sentence from the Senate Report accompanying Rule 801(d)(2)(E): "While [this] rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged." *United States v. Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979) (quoting S. Rep. No. 1277, 93d Cong., 2d Sess. 24, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073); *see* App. 49. But the quoted statement means only that "despite the explicit inclusion of the word 'conspiracy' in [Rule 801(d)(2)(E)], the drafters did not intend to limit the scope of the [rule] to charged conspiracies. Under Rule 801(d)(2)(E), a 'conspiracy' may be uncharged, but it still must be a conspiracy." Trachtenberg, *supra*, 61 Hastings L.J. at 607; *see id.* at 607-08 (cases cited in Senate Report to support the quoted sentence all involve *illegal* joint enterprises).

As Professor Trachtenberg's analysis demonstrates, the lower courts' uncritical acceptance of the lawful joint venture theory flouts Rule 801(d)(2)(E)'s language, legislative history, and purpose.

B. The Viability of the Lawful Joint Venture Theory Is an Important and Recurring Question.

This Court has granted the writ often to decide important and recurring questions concerning the co-conspirator exception¹⁴ and other rules of evidence.¹⁵ It should do so again here.

The lawful joint venture theory has extraordinary ramifications. It makes out-of-court statements by one supporter of a Presidential candidate in furtherance of the candidacy admissible against all other supporters. It makes out-of-court statements by one member of the National Rifle Association in furtherance of the organization's goals admissible against all other members. It makes out-of-court statements by *any* member of *any* group in furtherance of the group's goals admissible against all other members.

¹⁴ *E.g.*, *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986).

¹⁵ *E.g.*, *Ohler v. United States*, 529 U.S. 753 (2000) (Fed. R. Evid. 103 and 609); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (Fed. R. Evid. 702 and 703); *Old Chief v. United States*, 519 U.S. 172 (1997) (Fed. R. Evid. 403); *Tome v. United States*, 513 U.S. 150 (1995) (Fed. R. Evid. 801(d)(1)(B)); *Williamson v. United States*, 512 U.S. 594 (1994) (Fed. R. Evid. 804(b)(3)); *United States v. Salerno*, 505 U.S. 317 (1992) (Fed. R. Evid. 804(b)(1)); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (Fed. R. Evid. 106).

Courts should be particularly reluctant to expand the co-conspirator exception through the agency "fiction" because "[c]oconspirator statements do not possess the special trustworthiness characteristic of evidence falling within a firmly rooted hearsay exception." *United States v. Pecora*, 798 F.2d 614, 628 (3d Cir. 1986) (quotation omitted); *see, e.g., United States v. Morrow*, 39 F.3d 1228, 1235 (1st Cir. 1994) (noting that "[a]rguably, the co-conspirator hearsay exception is an historical anomaly, there being nothing especially reliable about such statements"); Fed. R. Evid. 801(d)(2), Advisory Committee Note ("No guarantee of trustworthiness is required in the case of an admission."). The lawful joint venture variant thus opens the door to evidence that may well be unreliable and cannot be tested through "the greatest legal engine ever invented for the discovery of truth." *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion) (quotation omitted).

**C. This Case Is an Excellent Vehicle
for Addressing the Lawful Joint
Venture Theory.**

This case is an excellent vehicle for deciding the viability of the lawful joint venture theory. The issue was thoroughly preserved in the district court and the court of appeals. And there is no alternative hearsay exception that covers the Elbarasse and Ashqar documents. It is undisputed that the statements in the documents did not further any joint *unlawful* activity (the documents all dated from before January 1995, when it first became illegal to provide financial support to Hamas), and thus they

are not admissible under Rule 801(d)(2)(E) as it has traditionally been understood.

In addition, the lawful joint venture issue is outcome-determinative. The government has never contended that admission of the Elbarasse and Ashqar documents was harmless error. To the contrary, it emphasized the importance of those documents throughout the trial. In opening it described them as "very important." 4 R.3563. It presented extensive testimony about the documents at trial and used them in cross-examining defense witnesses. It cited the Elbarasse and Ashqar documents repeatedly in closing. And it argued in rebuttal--echoing its opening statement--that the Elbarasse documents are "some of the most compelling and important documents" in the case and will be "studied and discussed by analysts and scholars for years to come because of what they show." 7 R.9727.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LINDA MORENO
Linda Moreno P.A.
P.O. Box 10985
Tampa, FL 33679
(813) 247-4500
Counsel for Petitioner
Ghassan Elashi

JOHN D. CLINE
Counsel of Record
Law Office of John D. Cline
235 Montgomery St.,
Suite 1070
San Francisco, CA 94104
(415) 322-8319
Counsel for Petitioner
Ghassan Elashi

NANCY HOLLANDER
Freedman Boyd Hollander
Goldberg Ives & Duncan P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960
Counsel for Petitioner
Shukri Abu Baker

GREG WESTFALL
Hill Gilstrap, P.C.
1400 West Abram St.
Arlington, TX 76013
(817) 261-2222
Counsel for Petitioner
Abdulrahman Odeh

MARLO P. CADEDDU
Law Office of Marlo P.
Cadeddu, P.C.
3232 McKinney Ave.,
Suite 700
Dallas, TX 75204
(214) 220-9000
Counsel for Petitioner
Mufid Abdulqader

May 2012