

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*vs.*

VILASINI GANESH,

Defendant-Appellant.

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C.A. No. 18-10333  
Consolidated with  
C.A. No. 18-10133

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Appeal from a Judgment of the United States District Court  
for the Northern District of California (San Jose Division)  
The Honorable Lucy H. Koh, District Judge  
District Court No. 5:16-cr-00211-LHK-1

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**AMICUS BRIEF OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE, ACLU  
NEVADA, INDIA COMMUNITY CENTER OF SILICON VALLEY NORTHERN  
CALIFORNIA, SENIOR ADVOCATES GROUP OF THE SUPREME COURT OF  
INDIA, DOCTORS OF COURAGE, EUGENE G. IREDALE, WILLIAM A. CO-  
HAN, JOSEPH H. LOW IV, MICHAEL J. KENNEDY, AND AMIN EBRAHIMI  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION  
FOR REHEARING AND REHEARING EN BANC**

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JULIAN GREGORY, ESQ.  
Nevada Bar No. 11978  
California Bar No. 287844  
**LAW OFFICE OF JULIAN GREGORY, L.L.C.**  
411 South Sixth Street  
Las Vegas, Nevada 89101  
(702) 625-1183  
Counsel for *Amici Curiae*

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that the corporations that participated in this brief do not have parent corporations or issue publicly held stock.

**STATEMENT OF INTEREST**

The *amici curiae* are the Nevada Attorneys for Criminal Justice, ACLU Nevada, India Community Center of Silicon Valley Northern California, Senior Advocates Group of the Supreme Court of India, Doctors of Courage, Eugene G. Iredale, William A. Cohan, Joseph H. Low IV, Michael J. Kennedy, and Amin Ebrahimi. The *amici* are a broad and varied group of legal and social justice organizations as well as individual attorneys and legal scholars who have between them decades of experience in the criminal justice system. The organizational *amici* are invested in ensuring a fair legal process and upholding the constitutional rights of persons who fall under the jurisdiction of the Circuit. The individual *amici* are equally interested in Sixth Amendment right-to-counsel issues: three of them have been the subject of leading cases in this Court and before the United States Supreme Court. All of the individual *amici* are what this Court might consider experts in the realm of criminal justice and the right to counsel of one's choosing.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that counsel for neither party authored this brief in whole or in part; neither party nor counsel for either party contributed financial support to fund the preparation or submission of this brief; and two individuals contributed financial support intended to fund the preparation and submission

of this brief, namely, Ganesan Venkatakrishnan and Prashanth Malyala. The Government has consented to the timely filing of this brief.

**STATEMENT OF THE CASE**

*Amici* adopt the Jurisdictional Statement and Bail Status, Statement of the Case, and Relevant Procedural History and Facts set forth in Appellant's Opening Brief (Dkt. 68 at 1-3.) *Amici* submit this brief in support of Appellant's Petition for Rehearing. (Dkt. 108.)

**SUMMARY OF THE ARGUMENT**

The right to counsel of one's choosing is a fundamental constitutional one that is being litigated in the court of public opinion for the first time in recent memory, simultaneously with Dr. Ganesh's case. Dr. Ganesh presents a sympathetic picture of a defendant who has shouted from the rooftops with the hope that someone in the judiciary with the power to help will do so, ultimately to no avail. Now, having been given the opportunity to obtain counsel of her choosing on appeal, Dr. Ganesh sought redress from this Court, only to once again have her grievances fall upon deaf ears. *Amici* would now ask this Court to review the decision of the panel as it is in direct contravention of United States Supreme Court case law and misapprehends several points of law and fact.



**ARGUMENT ON THE ISSUES**

**I. The Panel Decision Conflicts With a Decision of the United States Supreme Court and Misapprehends Several Points of Law and Fact.**

Federal Rule of Appellate Procedure 35(b)(1) requires that a petition for en banc reconsideration begin with a statement that either (A) the panel decision conflicts with a decision of the United States Supreme Court or of this Court; or (B) the proceeding involves one or more questions of exceptional importance. Rule 40(a)(2) requires a petitioner seeking rehearing to state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended.

In its Memorandum affirming the judgment of the district court, the panel first seized upon the fact that Dr. Ganesh first made her request for new counsel on the eve of trial. (Dkt. 117-1 at 8.) It should at the outset be noted that this was the second such request, the first having been made September 8, 2017, two months prior to trial—a material fact that the panel has misapprehended. (EOR 7071.) The panel also concluded that two lawyers Dr. Ganesh requested to substitute in prior to sentencing “refused to commit to the established sentencing schedule,” a mischaracterization of the statements of the two attorneys in question. At one point, the lead attorney, Mr. Schamel, stated affirmatively, “if we have to be ready for [the sentencing date of] August 28th, we’ll be ready for August 28th.” (EOR 7557:3–4.)

The decision of the panel in this case goes against the fundamental constitutional right to counsel of one's choosing espoused by the United States Supreme Court in *Wheat v. United States*, 486 U.S. 153 (1988). For that reason, rehearing en banc is appropriate.

The Sixth Amendment to the United States Constitution guarantees to all criminal defendants the right to the assistance of counsel. Concomitant with that are the right to the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 688 (1984), the right to counsel of one's choice, *Wheat v. United States*, 486 U.S. 153 (1988), and the right to conflict-free counsel, *Wood v. Georgia*, 450 U.S. 261, 271–72 (1981). This tripartite set of rights helps ensure that the Sixth Amendment's guarantee of the right to counsel is not an empty promise.

“When a request for substitution of counsel is made on the eve of trial, it presents the court with a difficult problem,” this Court has noted. *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993). While “serious inconvenience” may arise on the one hand, the Sixth Amendment itself is what the court, opposing counsel, and witnesses are weighed against. *See id.* One need only look to Justice Marshall's dissent in *Wheat* for guidance as to the kind of inquiry the district court should have made each and every time it denied Dr. Ganesh of her right to counsel of her choosing:

In my view, a trial court that rejects a criminal defendant's chosen counsel on the ground of a potential conflict should make findings on the record to facilitate review, and an appellate court should scrutinize closely the basis for the trial court's decision. Only in this way can a criminal defendant's right to counsel of his choice be appropriately protected.

486 U.S. 153, 168 (1988) (Marshall, J., dissenting). In *Wheat*, the Court was considering a potential conflict of interest in one attorney representing multiple defendants, though Justice Marshall would have called the potential risks of conflicts of interest in that case overblown; but here, in Dr. Ganesh's case, the lower court was merely trying to juggle its own trial and hearing calendars respectively when it violated Dr. Ganesh's right to counsel of her choosing.

The modicum of legitimacy lent to the district court in denying Dr. Ganesh counsel of her choice by way of the impending trial date was long gone by the time of sentencing. Nevertheless, the panel seemed to express concern in its Memorandum that Dr. Ganesh's sentencing had been "delayed by over a month," (Dkt. 117-1 at 8,) but *amici* would submit that, in a case where, as here, there is no singular named victim and the issues of loss involve complex mathematical calculations, sentencings are commonly continued for months at a time with neither party the worse for wear. The district court's insistence on a particular date for sentencing makes little sense in a

case such as this, and reflects only frustration at Dr. Ganesh's continued attempts to invoke her constitutional rights rather than any legitimate balancing of interests.

## **II. Prosecutorial Misconduct Warrants Reversal in This Case.**

A more malevolent factor in this case is the Government's use of insurance company data from another doctor as evidence of fraud in *this* case. While the Government has conceded that this has occurred and that the data was not evidence of fraud, its unilateral response has been that Dr. Ganesh's counsel should have raised this issue before or during trial and that this cannot be "newly discovered" evidence warranting a grant of relief.

Dr. Ganesh finds herself in quite the Catch-22 in that she cannot avail herself of an attorney, whether retained or CJA-appointed, who will actually review the Government's evidence before trial, but at the same time is expected to have made those challenges prior to trial and not after. Justice cannot be had when the panel permits the Government to benefit from its own malfeasance, or at the very least reckless negligence, while Dr. Ganesh has repeatedly sought counsel capable of acting with diligence necessary to preserve her rights and time and again has been denied.

### **III. Public Policy Demands the Preservation of the Right to Counsel of One's Choosing.**

The clarifying lens of public policy is also focused upon this case, as there are strong parallels to be drawn with another, more highly publicized battle taking place in the civil realm: that of pop superstar Britney Spears and her long-term conservatorship struggle in the California state courts. Cori A. Robinson, *Britney Spears Conservatorship Update*, Above the Law (June 24, 2021 1:36 PM), <http://abovethelaw.com/2021/06/britney-spears-conservatorship-update/>. Like Ms. Spears, Dr. Ganesh has until recently been denied counsel of her choosing. *Id.* One stark comparison to be drawn is the manner in which Ms. Spears has been forced to pay for an attorney she does not want, Joe Coscarelli, Liz Day, and Samantha Stark, *Britney Spears's Courtroom Plea Spurs Questions for Her Lawyer*, The New York Times (June 24, 2021), <https://www.nytimes.com/2021/06/24/arts/music/britney-spears-lawyer-samuel-ingham.html>, and the way in which the district court felt it necessary to threaten to sanction Dr. Ganesh for her audacity in being able to afford an attorney of her choosing, (*see* EOR 149:25–150:2 (“If Dr. Ganesh can pay for counsel, I’m not sure why I should not require a repayment of expenses that had been made in the past . . . .”)). *Amici* would submit that it is not too late for either of these women to be heard, in a decision whose time truly has come. Dr. Ganesh is entitled to a reversal of her

conviction and sentence for the violation of her fundamental right to counsel of her choosing.

**CONCLUSION**

*Amici* would therefore ask this Court to reconsider the decision of the panel.

DATED this 19th of July, 2021.

/s/ Julian Gregory

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JULIAN GREGORY, ESQ.

**LAW OFFICE OF JULIAN GREGORY, L.L.C.**

Counsel for *Amici Curiae*

**STATEMENT OF RELATED CASES**

Counsel is unaware of any related cases pending before this Court.

**BIOGRAPHICAL INFORMATION OF AMICI CURIAE**

**I. Organizational Amici**

**A. Nevada Attorneys for Criminal Justice**

Nevada Attorneys for Criminal Justice is a statewide non-profit corporation dedicated to criminal justice in the state of Nevada. Its members consist of public defenders in both state and federal court and attorneys in private practice. Although most of its members are authorized to practice in Nevada, many of its members are also licensed to practice in California and myriad other states that reside within the jurisdiction of the Ninth Circuit

Court of Appeals. Most members of NACJ are authorized to appear in the Ninth Circuit Court of Appeals. There is no parent organization.

### **B. ACLU Nevada**

ACLU Nevada is a non-profit organization dedicated to upholding civil liberties and constitutional guarantees. In addition to its hallmark advocacy of free speech and First Amendment issues, many of its organizational and efforts are focused on ensuring that our criminal justice system is fair and balanced at an institutional level, particularly with regard to minorities and persons of color. ACLU Nevada regularly supports criminal justice issues that impact and touch upon the rights of constitutional rights and civil liberties of litigants where those rights and liberties are at issue within the Ninth Circuit Court of Appeals. There is no parent organization.

### **C. India Community Center of Silicon Valley Northern California**

The India Community Center of Silicon Valley Northern California is devoted to supporting Indian immigrants and Indian Americans within Silicon Valley and Northern California. A non-profit organization, it provides services, community support and cultural heritage celebrations for its constituents and has an interest in ensuring that its constituents are fairly treated within the United States and its myriad legal systems. There is no parent organization.

### **D. Senior Advocates Group of the Supreme Court of India**

The Senior Advocates Group is an organization located in South Delhi, India headed by Mr. Pravin Parekh, who is a graduate of Harvard Law School and has fifty-three years of experience devoted to constitutional rights, international law and human rights. The Senior Advocates Group advocates for the constitutional rights of all Indian citizens, including those who have emigrated to other countries. As such, the Senior Advocates Group of the Supreme Court of India has an interest in ensuring that the United States Constitutional rights of Dr. Ganesh, a naturalized citizen, are upheld. There is no parent organization.

### **E. Doctors of Courage**

Doctors of Courage is a non-profit organization whose mission is to end government misconduct and overreach against medical practitioners. Doctors of courage was founded in 2016 and has been involved in uncovering errors in prosecutions in health care related cases. Doctors of Courage has an interest in Dr. Ganesh's case given the errors made by the Government in presenting evidence that it labeled as "fraud" that was in fact not related to Dr. Ganesh. There is no parent organization.



## **II. Individual Amici**

### **A. Eugene G. Iredale**

Eugene G. Iredale is a private attorney and founding member of Iredale and Yoo located in San Diego, California. Mr. Iredale is a graduate of Harvard Law School and he has been practicing law for forty-four years. He is licensed to practice law in the state of California and in the Commonwealth of Massachusetts, he is admitted to practice before this Court and before the United States Supreme Court. Mr. Iredale has also been admitted to practice pro hac vice in jurisdictions throughout the country, both state and federal. Mr. Iredale first worked as an assistant federal public defender in San Diego before starting his own practice in the early 1980s. He has taught at the National Criminal Defense College, he has lectured on criminal law topics throughout the country, and he is by all rights a well-known and well-respected trial lawyer not only in San Diego, but across the country. Mr. Iredale is the subject of the United States Supreme Court's opinion in *Wheat v. United States*, 486 U.S. 153 (1988), a Sixth Amendment right to counsel case.

### **B. William A. Cohan**

William A. Cohan is a private attorney who has been practicing law a total of forty-four years. He is a graduate of the University of Washington School of Law. He was admitted to practice in Colorado in 1976 and in Cali-

ifornia in 1989. He has been authorized to practice in the United States District Court in forty-seven different jurisdictions as well as before more courts of appeals across the country as well as before the United States Supreme Court. Mr. Cohan is also a well-known and well-respected trial attorney throughout the country. Mr. Cohan is the subject of this Court's opinion in *United States v. Lillie*, 989 F.2d 1054 (9th Cir. 1993), a Sixth Amendment right to counsel case.

### **C. Joseph H. Low IV**

Joseph H. Low IV is currently an attorney and the founder of the Law Firm of Joseph H. Low located in southern California. He has been admitted to practice in California since 1998. He taught at the Gerry Spence Trial Lawyers College for more than twenty years, assuming the role of director and chief instructor where he taught students from all over the country, imparting the principles of ethics he first learned as a United States marine and later honed through the teachings of Gerry Spence, to always act in an ethical manner beyond reproach. Mr. Low has earned several national awards from the American Board of Trial Lawyers and the Order of the Barristers. In addition, he is the recipient of the Lewis F. Powell, Jr. Medallion for Excellence in Advocacy from the American College of Trial Lawyers. He is a member of the Association of Trial Lawyers of American, the American Civil Liberties

Union, and the National Association of Criminal Defense Lawyers. He is called upon to lecture on legal matters around the country and is also a legal analyst and commentator on legal and national media outlets. Mr. Low is the subject of the United States Supreme Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), a Sixth Amendment right to counsel case.

#### **D. Michael J. Kennedy**

Michael J. Kennedy is a private attorney who has been practicing law a total of thirty-three years and a graduate of the University of Minnesota Law School. He was admitted to practice in Colorado in 1976, California in 1989, and Nevada in 2007. He was the First Assistant Federal Defender in the District of Nevada from 2001 to 2011 and he was Chief Assistant Federal Defender from 2011 to 2016. Mr. Kennedy was in private practice from 1988 to 1992 and from 2016 to the present. From 1992 to 1993 he was an assistant federal defender in the Eastern District of Washington, and he was also an assistant federal defender in the Eastern District of California from 1993 to 1997 and in Nevada from 1997 to 2001.

Mr. Kennedy is a member of the faculty at the National Criminal Defense College, a position he has held from 2000 until the present. He has served as faculty for the United States Courts, Defender Services Office, Trial

Skills Academy from its inception in 2009 to the present and he has served as faculty at numerous substantial presentations on behalf of the United States Courts, Defender Services Division since the mid 1990s, yearly from 2007 to the present. Additionally, Mr. Kennedy has served as faculty for the United States Department of Defense (JAG) trial skills program in 2018 as well as numerous other federal criminal trainings.

#### **E. Amin Ebrahimi**

Amin Ebrahimi earned his juris doctorate degree from the University of California Berkeley and he has graduate degrees from both the University of Oxford and University of Cambridge. He is a legal scholar and Ph.D. candidate at the University of California Berkeley. Mr. Ebrahimi's research spans issues related to constitutional law, legal ethics, and political philosophy.

**ATTORNEY’S CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that, pursuant to Ninth Circuit Rule 35-4, the attached brief is prepared in a format that complies with Federal Rule of Appellate Procedure 32(a)(4)–(6), and is 2945 words exclusive of sections not counted pursuant to Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word for Windows 10 and Georgia 14-point font.

DATED this 19th of July, 2021.

/s/ Julian Gregory

JULIAN GREGORY, ESQ.

**LAW OFFICE OF JULIAN GREGORY, L.L.C.**

Counsel for *Amici Curiae*