No. 21-6156

IN THE

Supreme Court of the United States

VILASINI GANESH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

A. Do Sixth Amendment safeguards require trial courts to inquire into existing conflicts between counsel and the defendant before a trial court may deny substitution on the basis of calendar management alone?

B. What criteria are circuit courts required to examine to determine the adequacy of conflict inquiries which serve to protect defendants?

C. Does the "needs of fairness" factor permit trial courts to consider the lack of adverse effects upon the defendant, contrary to *United States v. Gonzalez-Lopez*?

D. Are trial court decisions "unreasonable and arbitrary" when they disregard the unequivocal and uncontradicted assurances of readiness by retained counsel in a criminal case?

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Association of American Physicians and Surgeons ("AAPS") is a national association of physicians. Founded in 1943, AAPS is dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant in this Court and in other appellate courts. *See, e.g.*, *Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975);

[1] *Amicus* files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd., 627 F.3d 547 (5th Cir. 2010); *Ass'n of Am. Physicians & Surgs. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

This Court has expressly made use of amicus briefs submitted by AAPS. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third and Seventh Circuits have also cited amicus briefs by AAPS. *See United States v. Natale*, 719 F.3d 719, 739 (7th Cir. 2013); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS supports protection of the right to counsel as enshrined in the Sixth Amendment, and thus has a strong interest in this Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

In this prosecution over a private billing dispute, unrelated to any federal programs such as Medicare or Medicaid or the quality of any medical care, solicitude for a defendant's constitutional right to counsel should not be too much to ask. Few constitutional rights are as important and fundamental as one's right to counsel in a criminal prosecution, and if this matter had been handled as civil litigation that right would not have been infringed. The integrity of the process and the validity of judicial outcomes depend heavily on respect for the right to counsel. Yet in the name of calendar efficiency the Ninth Circuit steamrolled that right without a meaningful inquiry. The unjust result was more than 5 years imprisonment over a mere private billing disagreement, based on a conviction obtained against a defendant after denial of her request to be represented by the counsel of her choice.

The constitutional right to counsel should not be eviscerated. Petitioner Vilasini Ganesh ("Ganesh") was justifiably unsatisfied with the misguided approach by her unwanted counsel, and Petitioner Ganesh had a clear constitutional right to substitute different counsel. There was no urgency for a trial concerning billing issues that did not even involve any federal programs. Expediency should not be used to erode constitutional rights, and the Ninth Circuit has made a wrong turn that compels review by this Court.

The Petition should be granted to restore the full constitutional right to counsel in the courts within the Ninth Circuit, as respected by other Circuits. *See* Petition at 13-14, 18.

ARGUMENT

The right to counsel is sacrosanct, and not sacrificed on the altar of managing a court docket. The standard-of-convenience implicitly adopted by the Ninth Circuit is contrary to the Constitution in allowing perceived calendaring goals to override a defendant's Sixth Amendment right to counsel, without even an adequate inquiry into the nature of the conflict between a criminal defendant and her disfavored counsel.

The constitutional right to counsel has heightened significance where, as here, the case consists of a disagreement about billings which should have been more appropriately handled on the civil side. *See* Petition App. B. The insurance companies could have brought their own civil action and proceeded as expeditiously as they liked. Instead, a prosecution was pursued by the government based on the interests of private insurance companies. The underlying

assertion of billing fraud was by the insurance companies, and the resulting sentence of more than 5 years in prison for a mere private billing dispute was excessive. A vigorous requested defense should have been allowed to avert the resulting injustice.

I. Calendar Efficiency Must Yield to the Sixth Amendment Right to Counsel, a Basic Right Compelling Review Here.

The Constitution enhances efficiency, but is not a slave to it. Some constitutional rights may, at times, cause occasional inefficiencies. The right against self-incrimination, for example, can frustrate efficient ways to ferret out the truth. England once used torture to expeditiously obtain a confession. *See Weems v. United States*, 217 U.S. 349, 406 (1910) ("In England there was a time when punishment was by torture, by loading him with weights to make him confess.") (White and Holmes, JJ., dissenting). Though efficient and arguably effective, the Constitution fortunately prohibits that.

The right to counsel enshrined in the Sixth Amendment may cause delays just as the Fifth Amendment protection against self-incrimination might. Cases would be resolved more quickly if defendants and other litigants never changed counsel, or were forced to confess. The Sixth Amendment could have limited the right to counsel to prevent changes midstream when conflicts arise. Instead, this fundamental right in the Sixth Amendment is expressly absolute and unlimited.

No "balancing" of interests is proper where, as here, a criminal defendant has irreconcilable differences with her counsel. The Sixth Amendment right to

effective counsel is absolute. There is no effective representation by counsel amid an irreconcilable conflict between the attorney and the defendant. A proper jury trial cannot proceed under such a conflict. A full inquiry into the nature of the conflict between the defendant and the appointed counsel is essential before a trial can properly ensue with counsel that a criminal defendant does not want. Otherwise, the trial falls short of a genuine, adversarial adjudication that is the hallmark of the American legal system.

As Justice Sotomayor explained last term, there are "many insidious ways that potential Sixth Amendment violations can affect the course of a trial." *Kaur v. Maryland*, 141 S. Ct. 5, 6 (2020) (concurring in the denial of a petition for writ of certiorari). Once prosecutors realized that Petitioner Ganesh had a conflict with her counsel and that the court would not allow her to rectify that conflict with new counsel, then the prosecution had endless possibilities for exploiting that conflict. For example, analogous to the *Kaur* case where there was a breach in confidentiality of the attorney-client communications, prosecutors aware of an unresolved conflict between a defendant and her counsel can "either intentionally or subconsciously" engage in a voir dire strategy to "select[] a different mix of jurors." *Id.* at 7.

"[T]he right to trial by jury [is] 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality opinion) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). Erosion of that

right by undermining the right to change counsel amid an irreconcilable conflict, as presented here, is inconsistent with the Constitution and the teachings of this Court. *Haymond* concerned merely a sentencing enhancement for an already convicted defendant, while this case concerns a core right central to the right to the jury trial itself. The concurrence in *Haymond* was likewise vigilant in recognizing the full Sixth Amendment rights inherent in a jury trial at issue here. *Haymond*, 139 S. Ct. at 2392 (Alito, J., concurring) (emphasizing that the Sixth Amendment does apply "in all criminal prosecutions") (quoting *Rothgery* v. *Gillespie County*, 554 U.S. 191, 214 (2008) (Alito, J., concurring)).

Less than a decade ago Justice Scalia expressed his strong dissent to the denial of another petition for writ of certiorari in a Sixth Amendment case. "We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Jones v. United States*, 574 U.S. 948, 950 (2014). The confusion by lower courts as to the contour of the Sixth Amendment right to counsel remains an unresolved problem, which this Court can address by granting certioriari here.

Rewriting the Sixth Amendment cannot be justified by a misperception about the administrative burden of federal jury trials. To the contrary, jury trials have become the exception rather than the rule in federal criminal prosecutions, in an erosion of the American tradition. Chief Judge Robert W. Pratt of the Southern District of Iowa observed that:

> There has been significant discussion in legal literature about "vanishing trials," with much commentary and speculation about why the rate of jury determinations is declining. … Since 1980, the percentage of people going to trial has decreased almost two-thirds, while the percentage of cases resolved by plea has been increased proportionately. From 1980 to 1999, the frequency of federal jury trials fell from nearly 16 percent of all adjudications to just a bit more than 4 percent. In 1980, one defendant went to trial for every four who pled guilty. By 1999, that ratio fell to one in twenty.

Robert W. Pratt, "The Implications of *Padilla v. Kentucky* on Practice in the United States District Courts," 31 ST. LOUIS U. PUB. L. REV. 169, 170 (2011) (citations omitted).

Jury trials may be a model of inefficiency and few would doubt that changing counsel for a jury trial can disrupt a court schedule. But this core constitutional right should be respected regardless of any inefficiencies attendant to it. State supreme courts recognize this, like the Michigan Supreme Court in overturning a conviction obtained without a robust jury trial:

> We believe the interests of justice demand that defendant be given a new trial. We cannot accept the prosecution's argument that the case against defendant was so strong so as to have made the error harmless. The right to trial by jury is among the most fundamental rights provided by our judicial system. The coerced waiver of that right is one we view as so offensive to the maintenance of a sound judicial system that it may not be regarded

as harmless.

People v. Rodgers, 119 Mich. App. 767, 771, 327 N.W.2d 353, 355 (1982).

In light of the paramount importance given to the Sixth Amendment in connection with the right to a jury trial, the right to effective counsel merits granting the Petition for a Writ of Certiorari.

II. Manifest Injustice Resulted Here from the Unconstitutional Breakdown in the Adversarial Process.

In the last quarter-century this Court has corrected multiple violations of the Sixth Amendment, and granting the Petition would enable a straightforward extension of this jurisprudence. *See, e.g.*, *Apprendi v New Jersey*, 530 U.S. 466, 490 (2000) (restoring the preeminence of a jury and the need to prove criminal allegations beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296 (2004) (reversing another violation of the Sixth Amendment); *Alleyne v. United States*, 570 U.S. 99, 112 (2013); *Haymond*, 139 S. Ct. at 2374 (plurality opinion by Gorsuch, J.) (discussed above). While these decisions concerned rights in sentencing, the right to counsel guaranteed by the Sixth Amendment is at least as important, and the 63-month sentence imposed in this case at bar after the denial of substitution of counsel was indeed excessive.

This case involves a run-of-the-mill billing dispute that would ordinarily be handled as a civil matter as other contractual disagreements are. But apparently at the request or behest of an insurance company, Respondent United States converted this into an unusual criminal prosecution and obtained a draconian prison sentence of more than 5 years over a

smattering of billing disputes. This sentence is out of proportion with the infraction found by the jury, analogous to the excessive sentences reversed in the *Apprendi* line of precedents.

The manifest injustice of the excessive 63-month prison sentence for a relatively small billing dispute between private parties underscores the need to grant the Petition for a Writ of Certiorari here. Injustice results when there is a breakdown in the adversarial process. Examples abound of exoneration on retrial after an appellate court found an improper infringement on the right to counsel. *See, e.g.*, *Genzler v. Longanbach*, 410 F.3d 630, 633-35 (9th Cir. 2005) (recounting alleged prosecutorial misconduct that occurred in a state court trial after the defendant's preferred counsel was improperly recused by the court, and the acquittal on the most serious crime in the subsequent retrial after appellate reversal of the denial of use of the preferred counsel at the first trial).

A robust adversarial process is the linchpin of the American judicial system. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.") (citing 3 W. Blackstone, *Commentaries on the Laws of England* 373-74 (1768)). Undercurrents to change our tradition to a less adversarial European style, which does not incorporate a fully adversarial right to counsel, should be resisted. The Sixth Amendment has never been watered down by a subsequent constitutional amendment, and should not be diluted for calendaring goals. When a criminal defendant is denied her full right to counsel in a federal prosecution, then a just

result is unlikely to be attained under our adversarial system. The 63-month prison sentence of Petitioner Ganesh based on a private billing dispute is the sort of manifest injustice that results from an infringement on the Sixth Amendment right to counsel.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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