No. 14-1272

In the Supreme Court of the United States

VALENTINO ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing to seek the suppression of physical evidence obtained from his wife following police conduct that allegedly violated her right to substantive due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 772 F.3d 969. The opinion of the district court (Pet. App. 16a-44a) is not published in the *Federal Supplement* but is available at 2013 WL 5769976.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2014. On February 9, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 23, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the District of Vermont returned an indictment charging petitioner with conspiracy to distribute cocaine base and heroin, in violation of 21 U.S.C. 841 and 846; possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841; and distribution of heroin, in violation of 21 U.S.C. 841. Before trial, the district court granted petitioner's motion to suppress drug evidence obtained from his wife, Crystal Anderson, during her detention by police. Pet. App. 43a. On the government's interlocutory appeal, the court of appeals reversed and remanded for further proceedings. *Id.* at 1a-15a.

1. At approximately 9:45 p.m. on October 30, 2012, Trooper Michael Studin of the Vermont State Police stopped petitioner as he was driving away from a service station with the headlights of his car off. Pet. App. 3a-4a, 20a, 69a. When questioned, petitioner, a front seat passenger, and petitioner's wife (Ms. Anderson) gave conflicting and implausible accounts of their trip. *Id.* at 4a, 20a.

Petitioner and Ms. Anderson consented to a search of their persons and the vehicle. Pet. App. 4a, 20a-21a. The officers found a small amount of powder cocaine in the pocket of petitioner's jacket. *Id.* at 4a, 22a. Inside Ms. Anderson's purse, police located a ziploc bag of white pills, two condoms, several razor blades, and a bottle of hand sanitizer. *Id.* at 4a, 21a. Another handbag contained drug paraphernalia. *Ibid.*

During the encounter, a police officer observed Ms. Anderson's lower abdomen moving rapidly. Pet. App. 21a. While seated in a police car, Ms. Anderson "moved around a lot" and "kept asking [one of the

officers] to check on her husband," which the officer construed as an effort to induce him to leave the vehicle. *Id.* at 22a. A dog alerted both to petitioner's vehicle and to the seat in the police cruiser where Ms. Anderson had been sitting. *Id.* at 4a, 22a.

Believing that Ms. Anderson was carrying illegal drugs on her person, officers transported her to a nearby barracks and informed her that they would seek a warrant to search her body cavities. Pet. App. 5a, 23a. Ms. Anderson replied that she knew her rights and that the troopers had no basis for a warrant. *Ibid.* The officers applied for a warrant, but a state judge denied the application. *Ibid.*

While the police were awaiting the warrant, they handcuffed Ms. Anderson to a chair in a processing room. Pet. App. 23a. Officer Aubrey Crowley, who was female, checked on Ms. Anderson periodically and offered her water. *Id.* at 23a-24a. After Ms. Anderson had been detained for approximately three hours, Officer Crowley checked on her and told her that a trooper was going to see the judge to get a warrant to search her body cavities. *Id.* at 5a, 24a.[1]

Approximately thirty minutes later, Officer Crowley returned, provided more water, and stated that they were "going to be headed over to the hospital, okay?" Pet. App. 5a-6a, 24a. Officer Crowley attempted to get Ms. Anderson to "chat" by noting that she was also "a girl" and suggesting that the other officers could be "a little brusque" and "hard to talk

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[1] The record does not disclose when the judge denied the warrant application or when the officers detaining Ms. Anderson learned of its denial. The district court nonetheless appeared to presume that the officers were aware of the denial by the time this conversation occurred. See Pet. App. 5a, 25a.

to." *Id.* at 6a, 24a. Ms. Anderson asked to see a signed warrant and questioned why the police would not show her one if they were going to a hospital. *Ibid.* Instead of answering those questions, Officer Crowley left the room, acknowledging that Ms. Anderson did not want to talk to her. *Id.* at 24a-25a.

After Ms. Anderson had been detained for approximately four hours, Officer Crowley reentered the room and said "let's go," as if the police were taking Ms. Anderson to the hospital. Pet. App. 6a, 25a. Ms. Anderson replied that there was "no point" unless the police could "show [her] the warrant." *Ibid.* Instead, Officer Crowley handcuffed Ms. Anderson and escorted her to a conference room. *Ibid.* Some time later, Officer Crowley and Trooper Max Trenosky entered the conference room and removed the handcuffs. *Ibid.* Trooper Trenosky then suggested that Ms. Anderson had a "poor relationship" with petitioner because he had thrown her "under the bus" by leaving the scene of the traffic stop and returning to Rutland, Vermont. *Ibid.* He also suggested that he was "disappointed" in Ms. Anderson and claimed again that her relationship with petitioner "must not be that good if he was willing to let her take responsibility for his trafficking his drugs." *Id.* at 6a-7a, 25a-26a. Officer Crowley showed Ms. Anderson the search warrant application, and Ms. Anderson asked why it had not been signed. *Id.* at 7a, 26a. After Trooper Trenosky "reiterated how poorly her husband treated her," Ms. Anderson began to "whimper and cry" and said "something to the effect that she was not going to go to jail for twenty years" to protect petitioner. *Ibid.*

At that point, Trooper Trenosky provided Ms. Anderson with warnings under *Miranda* v. *Arizona*, 384

U.S. 436 (1966), for the first time. Pet. App. 7a. At 4:22 a.m., Ms. Anderson signed a *Miranda* waiver form and was interviewed for approximately two hours. *Id.* at 7a, 26a. She admitted that she was hiding drugs in a body cavity and ultimately agreed to retrieve them in the presence of Officer Crowley. In a bathroom, Ms. Anderson removed from her vagina a condom filled with approximately 28 grams of crack cocaine. *Id.* at 7a, 27a-28a. Ms. Anderson responded affirmatively when asked if the officers had treated her "professionally" and "fairly." *Id.* at 8a, 28a. Trooper Trenosky then "update[d]" her by revealing that the judge had denied the search warrant application. *Ibid.* He also informed her that the police "don't necessarily have to tell you the truth one hundred percent of the time" and claimed that as a law enforcement officer "I can lie to you all day long." *Id.* at 8a.

2. On February 27, 2013, a federal grand jury in the District of Vermont returned an indictment charging petitioner and Ms. Anderson with conspiracy to distribute cocaine base and heroin during the fall of 2012 (Count 1), and possessing cocaine base on October 30, 2012, with the intent to distribute it (Count 2). Count 3 charged petitioner alone with distributing heroin on March 3, 2011, during a controlled purchase by the Drug Enforcement Administration. C.A. App. 12-14; Pet. App. 16a-17a.

Ms. Anderson moved to suppress the evidence obtained during her detention, alleging that the police had violated her Fourth and Fifth Amendment rights. Pet. App. 8a, 17a, 47a-66a. She subsequently withdrew that motion, pleaded guilty to the conspiracy

charge pursuant to a cooperation plea agreement, and was sentenced to time served. *Id.* at 17a.

Before Ms. Anderson withdrew her suppression motion, petitioner moved to join in it. He argued that admitting "evidence seized from Ms. Anderson in the course of a bad faith search would constitute a violation of [petitioner's own] 5th Amendment due process rights." Pet. App. 45a; see *id.* at 8a, 17a. The government responded that petitioner lacked standing to challenge the admission of evidence based on alleged violations of his wife's constitutional rights. D. Ct. Doc. 41, at 3-7 (July 24, 2013). In a footnote, the government also argued that the police had not violated Ms. Anderson's right to substantive due process. *Id.* at 7 n.4.

After hearing argument, the district court orally ruled that petitioner lacked standing to assert claims based on his wife's Fourth Amendment and *Miranda* rights. Pet. App. 18a. The court took under advisement the question whether petitioner could assert his wife's right to substantive due process. *Ibid.*

In October 2013, the district court concluded that petitioner could raise a substantive due process claim, and the court ordered suppression of the drug evidence obtained from Ms. Anderson. Pet. App. 16a-44a. After describing the circumstances of her detention, *id.* at 19a-28a,[2] the court concluded that petitioner had standing to challenge the admission of the drug evidence on due process grounds. *Id.* at 29a-31a. It "analogized" the drugs obtained from Ms. Anderson to

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[2] Because no evidentiary hearing had been held, the district court relied on partial videotapes of the detention, as well as an investigation narrative (Pet. App. 77a-83a) and an affidavit (*id.* at 68a-76a) prepared by the police. *Id.* at 9a n.1, 19a.

a coerced confession, which, it concluded, could not be used against a third party because doing so "'offend[s] the community's sense of fair play and decency.'" *Id.* at 30a-31a (quoting *Rochin* v. *California*, 342 U.S. 165, 173 (1952)).

The district court then held that the police conduct toward Ms. Anderson violated substantive due process. Pet. App. 31a-43a. "While not inhumane," the court concluded, "the circumstances of Ms. Anderson's detention were oppressive and coercive." *Id.* at 37a. The court stated that she had "experienced a lengthy incommunicado detention * * * without a formal arrest," which had continued "long after" a judge had determined that probable cause to search her body was lacking. *Id.* at 36a. It found that being handcuffed to a chair made it "difficult for her to sleep," and that Ms. Anderson "appeared disheveled, disengaged, and groggy." *Id.* at 37a.

The district court further noted that Ms. Anderson had been interrogated in violation of *Miranda*; that the police had falsely suggested that petitioner had incriminated her during the traffic stop; and that the police had pretended to have a warrant and had claimed that the drugs would be removed forcibly if she did not remove them herself. Pet. App. 37a-38a; see *id.* at 42a ("[W]hat distinguishes this case from many others is the prolonged and coercive use of police deception regarding the existence of a search warrant."). Noting that "Ms. Anderson made incriminating statements only after she had 'broken down' and began to whimper and cry," the court found that "[h]er confession was * * * clearly involuntary," and that she likewise "did not voluntarily consent to extract the drugs from her body." *Id.* at 39a-40a. In

light of those "unique facts," the district court held that the police conduct "violates 'those fundamental rights and liberties . . . implicit in the concept of ordered liberty,'" and it declared the drug evidence obtained from Ms. Anderson's body "inadmissible for any purpose." *Id.* at 42a (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 720-721 (1997)).

3. The court of appeals reversed. Pet. App. 1a-15a. On appeal, the government "d[id] not challenge the district court's holding that the police violated Crystal Anderson's substantive due process rights." *Id.* at 10a n.2 (quoting Gov't C.A. Br. 3). Rather, the government contended "that [petitioner] cannot assert such a claim based on conduct directed solely at his wife." *Id.* at 3a.[3]

The court of appeals agreed. The court concluded that *United States* v. *Payner*, 447 U.S. 727 (1980), foreclosed petitioner from seeking suppression of the relevant evidence based on a violation of his wife's substantive due process rights. Pet. App. 11a-12a. The court explained that this Court in *Payner* had considered and rejected the contention that a defendant could object on due process grounds to the use of evidence illegally obtained from the briefcase of a third party. *Id.* at 11a. The court relied in particular

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[3] Contrary to petitioner's suggestions (Pet. 1, 2, 12, 22, 34), the government has not "agree[d]," "concede[d]" or "admitted" that the Vermont police violated Ms. Anderson's substantive due process rights. After arguing in the district court that the police conduct did not "shock[] the conscience," see p. 6, *supra*, the government limited its affirmative appeal to the standing issue. Gov't C.A. Br. 3 (also explaining that the government was "not using the evidence obtained from Crystal Anderson to prosecute her"). That litigating decision does not constitute a concession that Ms. Anderson's substantive due process rights were violated.

on this Court's statement that, "even if we assume that the unlawful . . . search was so outrageous as to offend fundamental canons of decency and fairness, the fact remains that [t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*." *Id.* at 12a (quoting *Payner*, 447 U.S. at 737 n.9) (internal quotation marks omitted). The court of appeals concluded that, although "the conduct of the Vermont state police was deceptive, coercive and illegal," "*Payner* precludes suppression, on substantive due process grounds, of physical evidence obtained through a flagrantly illegal search directed at someone other than the defendant." *Ibid.*

The court of appeals noted that, in *United States* v. *Chiavola*, 744 F.2d 1271 (1984), the Seventh Circuit had stated that "a violation of another person's [F]ifth [A]mendment rights may rise to the level of a violation of [a defendant's] rights to a fair trial" in cases where "the government seeks a conviction through use of evidence obtained by extreme coercion or torture." Pet. App. 12a-13a (brackets in original) (quoting *Chiavola*, 744 F.2d at 1273). But the court found no "need" to opine on that possibility, because "neither *Payner* nor this case involved conduct, such as torture, so beyond the pale of civilized society that no court could countenance it." *Ibid.* The court also stated that its decision was "in line with [its] sister circuits that have considered this issue." *Id.* at 13a-14a (citing *United States* v. *Dyke*, 718 F.3d 1282, 1285, 1288 (10th Cir.), cert. denied, 134 S. Ct. 365 (2013); *United States* v. *Teague*, 469 F.3d 205, 210 (1st Cir. 2006); *United States* v. *Noriega*, 117 F.3d 1206, 1214 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998);

United States v. *Valdovinos-Valdovinos*, 743 F.2d 1436, 1437-1438 (9th Cir. 1984) (per curiam), cert. denied, 469 U.S. 1114 (1985); and *United States* v. *Miceli*, 774 F. Supp. 760, 770 (W.D.N.Y. 1991)).

Finally, the court of appeals held that the district court lacked "supervisory power" to suppress the evidence obtained from petitioner's wife. Pet. App. 14a. The court explained that "*Payner* also governs [that claim]," since that decision reflects this Court's "'conclu[sion] that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.'" *Ibid.* (quoting *Payner*, 447 U.S. at 735).

ARGUMENT

Petitioner contends (Pet. 11-36) that a criminal defendant may seek the suppression of physical evidence allegedly obtained in violation of a third party's right to substantive due process. That argument does not warrant this Court's review. The Second Circuit's decision is interlocutory; petitioner's challenge is foreclosed by *United States* v. *Payner*, 447 U.S. 727 (1980); and the decision below does not conflict with any decision of another court of appeals.

1. As an initial matter, review should be denied because this case is in an interlocutory posture. The court of appeals reversed the district court's order suppressing evidence and remanded the case for further proceedings. The lack of any final judgment below is "a fact that of itself alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a

writ of certiorari). If petitioner is acquitted on the counts implicated by the physical evidence obtained from Ms. Anderson (Counts 1 and 2), his claim will become moot. If petitioner is convicted on those counts and his convictions are affirmed on appeal, petitioner will then have the opportunity to raise his current claim, together with any other claims that may arise, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment).

2. The Second Circuit's decision is correct and does not conflict with any decision of another court of appeals.

a. The court of appeals correctly held that petitioner's suppression claim is foreclosed by this Court's decision in *Payner*, *supra*. Pet. App. 12a-13a. Payner was charged with falsely denying on his tax return that he had a foreign bank account, in violation of 18 U.S.C. 1001. 447 U.S. at 728-729. Before trial, he alleged that critical evidence against him had been derived from an illegal search of a bank official's briefcase. *Id.* at 728-730. The district court recognized that Payner lacked standing under the Fourth Amendment to object to an improper search of a third party. *Id.* at 730-731. Nonetheless, relying on both the Due Process Clause of the Fifth Amendment and the court's supervisory power over federal prosecutions, the district court suppressed virtually all of the government's evidence as the product of bad-faith misconduct. *Id.* at 731. After the court of appeals affirmed based only on the supervisory-power rationale,

United States v. *Payner*, 590 F.2d 206 (6th Cir. 1979) (per curiam), this Court granted certiorari. *United States* v. *Payner*, 444 U.S. 822 (1979).

The Court held that "the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *Payner*, 447 U.S. at 735. After noting that established Fourth Amendment principles precluded such relief, the Court concluded that the judiciary lacked "discretionary power to disregard" those "considered limitations" by invoking the supervisory power. *Id.* at 737. In a final footnote, the Court held that the principles that precluded Payner from asserting a third party's Fourth Amendment rights likewise defeated his substantive due process claim:

> The same difficulty attends respondent's claim to the protections of the Due Process Clause of the Fifth Amendment. The Court of Appeals expressly declined to consider the Due Process Clause. But even if we assume that the unlawful briefcase search was so outrageous as to offend fundamental "'canons of decency and fairness,'" *Rochin* v. *California*, 342 U.S. 165, 169 (1952), quoting *Malinski* v. *New York*, 324 U.S. 401, 417 (1945) (opinion of Frankfurter, J.), the fact remains that "[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*," *Hampton* v. *United States*, [425 U.S. 484, 490 (1976)] (plurality opinion).

447 U.S. at 737 n.9 (first set of brackets in original).

As the court below correctly held, this Court's analysis in "*Payner* precludes suppression, on sub-

stantive due process grounds, of physical evidence obtained through a flagrantly illegal search directed at someone other than the defendant." Pet. App. 12a. Because petitioner based his claim on police conduct directed at his wife, *id.* at 45a-46a, *Payner* forecloses his suppression claim even if that conduct "was deceptive, coercive and illegal." *Id.* at 12a.

b. In arguing to the contrary, petitioner dismisses the controlling language from *Payner* quoted above as "[i]ndisputably [d]icta." Pet. 14. He asserts that the due process "issue was never presented in *Payner*," Pet. 17, and that the Court addressed it "uninformed by adversarial advocacy." Pet. 11. Petitioner is incorrect.

In both the district court and the court of appeals, Payner argued for suppression based on the Due Process Clause. *United States* v. *Payner*, 434 F. Supp. 113, 126-135 (N.D. Ohio 1977); *Payner*, 590 F.2d at 207. Because the court of appeals affirmed the suppression order based on the supervisory-power rationale alone, the government addressed only that rationale in its briefs before this Court. See Cert. Pet. at 21 n.13, *United States* v. *Payner*, No. 78-1729 (May 18, 1979); U.S. Br., *Payner*, *supra*, No. 78-1729, 1979 WL 199441, at *14-*50 (Nov. 30, 1979). Payner, however, continued to press his due process argument in this Court; he listed the due process issue among the questions presented and devoted seven pages of his 41-page merits brief to addressing it. Resp. Br. *Payner*, *supra*, No. 78-1729, 1980 WL 371759, at *1, *27-*34 (Jan. 7, 1980).

Because Payner both preserved and pressed his due process claim as an alternative basis for affirmance, the Court appropriately addressed it. See

United States v. *Tinklenberg*, 131 S. Ct. 2007, 2017 (2011) (explaining that this Court "may consider, or 'decline to entertain,' alternative grounds for affirmance," and electing to consider the alternative rationale in that case (quoting *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975)). And by clearly rejecting the due process argument, the Court in *Payner* eliminated that issue from the case, obviating any need for the lower courts to address it on remand. That is how the dissent in *Payner* understood the Court's opinion. *Payner*, 447 U.S. at 749 n.15 (Marshall, J., dissenting) (criticizing the Court for "reach-[ing] out to address the [due process] issue in a footnote," and opining that the question "should be left for consideration in the first instance by the Court of Appeals on remand"). It is how the court of appeals on remand understood the Court's opinion. See *United States* v. *Payner*, 629 F.2d 1181, 1182 (6th Cir. 1980) (per curiam) (remanding to the district court without further discussion of the issues raised on appeal). And it is why, as petitioner acknowledges (Pet. 12, 26), the courts of appeals have followed *Payner*'s due process analysis as "binding precedent." See, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206, 1214 (11th Cir. 1997) (reciting the due process "holding" of *Payner*), cert. denied, 523 U.S. 1060 (1998); cf. *United States* v. *Santana*, 6 F.3d 1, 9 (1st Cir. 1993) (describing *Payner*'s due process analysis as "technically dictum," but concluding that it should be "accorded great weight" and "treated as authoritative" because it "bears the earmarks of deliberative thought purposefully expressed" and "has not been diluted by any subsequent pronouncement").

c. Contrary to petitioner's contention, no disagreement exists among the courts of appeals on "the effect of" *Payner* on third-party due process claims. Pet. 25 (capitalization altered); see Pet. 12. Petitioner identifies no post-*Payner* court of appeals decision that has suppressed physical evidence on the ground that the police acquired it by violating the substantive due process rights of a person other than the defendant. In particular, *United States* v. *Chiavola*, 744 F.2d 1271 (7th Cir. 1984), on which petitioner principally relies (Pet. 32), does not depart from *Payner*.

In *Chiavola*, the defendant sought to suppress incriminating statements he had made during a phone call with a co-conspirator, arguing that police had used physical force to induce the co-conspirator to call him. 744 F.2d at 1273-1274. While presuming that the co-conspirator's constitutional rights had been violated, the Seventh Circuit declined to suppress Chiavola's own statements, holding that he had "incriminated himself voluntarily" and that "[h]is trial thus was not fundamentally unfair." *Id.* at 1274. That holding does not conflict with *Payner* or with any decision of another court of appeals. See *id.* at 1273 ("Generally, individuals not personally the victims of illegal government activity cannot assert the constitutional rights of others.").

Petitioner notes that the Seventh Circuit in *Chiavola* "recognized the possibility 'that a violation of another person's [F]ifth [A]mendment rights may rise to the level of a violation of [the defendant's] rights to a fair trial,'" and that such a possibility may exist "where 'the government seeks a conviction through use of evidence obtained by extreme coercion or torture.'" Pet. 32 (brackets in original) (quoting *Chiavo-*

la, 744 F.2d at 1273). Those statements summarized other appellate decisions—which the Seventh Circuit ultimately deemed inapposite—that had reversed convictions (or suggested that reversal would be appropriate) where statements that may have been obtained from a third party through extreme coercion or torture were used at trial. *Chiavola*, 744 F.2d at 1273-1274 (citing to and discussing *LaFrance* v. *Bohlinger*, 499 F.2d 29 (1st Cir.), cert. denied, 419 U.S. 1080 (1974); *Bradford* v. *Johnson*, 354 F. Supp. 1331, 1334-1338 (E.D. Mich. 1972), aff'd, 476 F.2d 66 (6th Cir. 1973); and *United States* v. *DeRobertis*, 719 F.2d 892, 895-896 (7th Cir. 1983)). Because coerced confessions are viewed as unreliable, see *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 349 (2006), this aspect of *Chiavola* does not suggest that the Seventh Circuit would permit suppression of physical evidence derived from unconstitutional conduct directed at a third party. See *Samuel* v. *Frank*, 525 F.3d 566, 569 (7th Cir. 2008) (explaining that the Seventh Circuit does not apply "an exclusionary rule, as such," to coerced "third-party statements, [but] would reverse a conviction if it rested entirely on a coerced statement that was completely unreliable").

There is likewise no conflict between *Chiavola* and the other court of appeals decisions that petitioner cites. Pet. 27-31. None of those decisions addressed the aspect of *Chiavola* invoked by petitioner, which concerns whether the government may use at trial a confession extracted from a third party through torture or extreme coercion. Instead, in each of the cited cases, the defendant sought a judgment of acquittal or

the dismissal of an indictment based on allegedly outrageous government conduct toward third parties.[4]

Even if a conflict on the admissibility of torture- or coercion-induced statements existed, this case would not be an appropriate vehicle to resolve it. This case does not involve the use of third-party statements at trial, and both courts below correctly recognized that it does not involve extreme coercion or torture. The district court described Ms. Anderson's detention as "oppressive and coercive," but found that it was "not inhumane." Pet. App. 37a. The court of appeals similarly determined that this case does not "involve[] conduct, such as torture, so beyond the pale of civilized society that no court could countenance it." *Id.* at 13a. For that reason, the court specifically declined to decide whether "physical evidence obtained through outrageous conduct—such as torture—inflicted on a third party [could ever] be excluded on due process grounds." *Id.* at 12a-13a. Far from

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[4] See *United States* v. *Schlei*, 122 F.3d 944, 951 n.1 (11th Cir. 1997) ("Schlei lacks standing to assert [his deceased co-defendant's] outrageous government conduct claim because he was not the target of the sting operation."), cert. denied, 523 U.S. 1077 (1998); *Noriega*, 117 F.3d at 1213-1214 (district court could not dismiss indictment based upon injuries inflicted on Panamanians during military invasion that resulted in the defendant's capture); *United States* v. *Valdovinos-Valdovinos*, 743 F.2d 1436, 1437-1438 (9th Cir. 1984) (per curiam) (district court could not dismiss indictment based upon government conduct that caused non-U.S. nationals to contract with defendant, an alien smuggler, to enter the United States), cert. denied, 469 U.S. 1114 (1985); *United States* v. *Alvarado-Machado*, 867 F.2d 209, 210-211 (5th Cir. 1989) (same); *United States* v. *Jannotti*, 673 F.2d 578, 610 (3d Cir.) (defendants lacked standing to challenge allegedly outrageous actions of federal agents during undercover sting operation that was directed at others), cert. denied, 457 U.S. 1106 (1982).

"[d]eepen[ing]" a conflict among the circuits (Pet. 25), the decision in this case would not implicate the conflict even if one existed.

3. Petitioner contends (Pet. 17-25) that, notwithstanding *Payner*, this Court should read the Due Process Clause to preclude admission against any party of evidence "obtained through means that shock the conscience" or, at a minimum, to "allow for standing in circumstances such as those presented here" (capitalization altered). Those arguments lack merit.

a. Petitioner's arguments run directly contrary to this Court's reasoning in *Payner*. Petitioner asserts, for example, that a criminal defendant has "[a] right to not be tried on the basis of improperly obtained evidence," Pet. 19; see Pet. 11, 23, and that extending standing beyond the injured party would help deter government misconduct, Pet. 19, 23, 35. The Court in *Payner*, however, considered and rejected the same arguments. Compare Resp. Br., *Payner*, *supra*, 1980 WL 371759, at *30-*34, with *Payner*, 447 U.S. at 735-737 & n.9. The Court explained that its "Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *Id.* at 735. The Court further held that "[t]he values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power" or the Due Process Clause. *Id.* at 736-737 & n.9.[5]

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[5] Petitioner suggests that *Payner* is distinguishable on its facts because it involved a "flagrantly illegal search," 447 U.S. at 729, rather than "improper coercion." Pet. 18. But "improper coercion" is not the *sine qua non* of a substantive due process claim.

Petitioner identifies no sound reason to reconsider that holding, which has neither proved unsound nor provoked confusion among the lower courts. To the contrary, this Court's more recent precedents limiting application of the exclusionary rule confirm that *Payner*'s balancing of "the competing interests" remains sound. See, *e.g.*, *Hudson* v. *Michigan*, 547 U.S. 586, 596-599 (2006) (explaining, in rejecting exclusion as a remedy for knock-and-announce violation, that other deterrents to unconstitutional police conduct are "incomparably greater" now than they were in 1961 when the exclusionary rule was first applied to the States); *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 368 (1998) (explaining, in declining to extend the exclusionary rule to parole-revocation hearings, that the Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence").

b. Petitioner further suggests (Pet. 20) that a confession forcibly extracted from a third party is inadmissible "for *any purpose* and against *anybody*," and that this Court should "recognize an identical rule with respect to coercively-obtained physical evidence." Pet. 21. Petitioner's premise, however, is not supported by the decisions of this Court that he cites.

See, *e.g*, *County of Sacramento* v. *Lewis*, 523 U.S. 833, 836, 842-845 (1998) (considering substantive due process claim arising from high-speed pursuit of suspected offender). Instead, such claims require conduct that "'shocks the conscience' and violates the 'decencies of civilized conduct.'" *Id.* at 846 (quoting *Rochin* v. *California*, 342 U.S. 165, 172-173 (1952)). Petitioner identifies no reason why the standing rules for raising such extraordinary claims should differ depending on the nature of the particular conduct challenged.

Pet. 20. The Court's observation that evidence "derived from involuntary statements" is excluded "for *all* purposes," *Michigan* v. *Harvey*, 494 U.S. 344, 351 (1990), refers to use of a defendant's own "compelled statements"—not those of a third party—"against him in a criminal trial." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) (cited in *Harvey*, 494 U.S. at 351). The Court in *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958), likewise held that admission of a defendant's own coerced confession violated his right to due process.

In any event, whatever force there may be to petitioner's argument that due process bars admission of a third party's coerced statements at a defendant's trial, there is no sound reason to extend that rule to physical evidence such as the drugs in this case. This Court has long excluded coerced confessions both because of society's "strongly felt" opposition to "wring[ing] a confession out of an accused against his will," and because a confession so obtained is "likely to be unreliable." *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) (citation omitted); see *Sanchez-Llamas*, 548 U.S. at 349 (courts "require exclusion of coerced confessions both because [they] disapprove of such coercion and because such confessions tend to be unreliable"); *Rochin* v. *California*, 342 U.S. 165, 173 (1952) (same). Even when physical evidence is unearthed through similar coercive means, however, its introduction at trial does not present analogous reliability concerns. The distinction between coerced statements and physical evidence therefore is not, as petitioner asserts (Pet. 22), "indefensible" and "unprincipled." To the contrary, the Court has found that distinction significant in applying the exclusionary rule. See *United States* v. *Patane*, 542 U.S. 630, 643-644

(2004) (plurality opinion) (although otherwise voluntary statements made in violation of *Miranda* are presumed to be coerced for certain purposes, physical fruits of such statements may nonetheless be admissible at trial); *id.* at 645 (Kennedy, J., concurring in the judgment) (noting "the important probative value of reliable physical evidence," and concluding that "[a]dmission of nontestimonial physical fruits [of a *Miranda* violation] * * * does not run the risk of admitting into trial an accused's coerced incriminating statements against himself").

c. Finally, petitioner contends (Pet. 17, 23-25) that his "argument for standing [is] particularly compelling" because the police here engaged in "egregious conduct" by "enlist[ing his wife's] assistance in obtaining evidence against him." Under this Court's precedents, however, a defendant's right to invoke the exclusionary rule turns on whether he was "the victim of the challenged practices," *Payner*, 447 U.S. at 735, not on the egregiousness of those practices. See *id.* at 733 (rejecting defendant's request for exclusion despite law-enforcement behavior that was "unconstitutional and possibly criminal"). The egregiousness of law enforcement conduct, moreover, is a criterion especially ill-suited for determining standing in substantive due process cases, because every claim that police obtained evidence by violating a third party's substantive due process rights will have to include allegations of egregious misconduct. See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998) (explaining that the "shocks the conscience" standard describes the type of "egregious official conduct [that] can be said to be 'arbitrary in the constitutional sense'") (quoting *Col-*

lins v. *City of Harker Heights, Tex.*, 503 U.S. 115, 129 (1992)).

Ms. Anderson, the party subject to the challenged police conduct here, was indicted alongside petitioner and filed a suppression motion asserting multiple constitutional violations. Pet. App. 47a-66a. Indeed, it was her motion that petitioner joined. *Id.* at 45a-46a. Even apart from any civil remedies that might be available to her, see *Hudson*, 547 U.S. at 597; *Samuel*, 525 F.3d at 570, Ms. Anderson's suppression motion confirms that allowing petitioner to seek exclusion based on conduct directed at her is not "the only way to vindicate" the Constitution's due process protections. Pet. 17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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