No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

2. Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal?

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This case presents two clean and well-developed splits and an option to resolve yet a third split. The government makes only a limited and erroneous attempt to mitigate the first split, concedes the second split, and fails to respond regarding the potential third split. The government instead directs most of its efforts to arguing that it should win on the merits of the first split and would win on remand under the second. Such posturing regarding the merits or remand issues not addressed below does not diminish the existence or importance of these splits, the regularity with which they arise, or the quality of this case as a vehicle for resolving them. Indeed, with such professed confidence, the government should be glad of the opportunity to resolve the splits rather than run from the opportunity to do so. Given the conflict in the circuits, this Court's institutional goal of uniformity in the law would be satisfied regardless of the outcome on the merits. And Petitioner is confident he can more than adequately defend those many courts on the other side of the split that disagree with the government's view of the merits.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Regarding the Scope of the Law-of-the-Case Doctrine as Applied to Extra-Statutory Elements Included in Jury Instructions.

As the Petition explained, at 10-16, there is a clean split between the Fifth and First Circuits on one side and the Eighth and Tenth Circuits on the other regarding whether the law-of-the-case doctrine can bind the government to an erroneously added addi-

tional element to which the government did not object. There also are numerous cases from other courts addressing the same issue and, in many cases, taking sides in the split. Pet. 17-19. Such cases demonstrate that the issue arises regularly, makes the outcome of a case depend on the venue in which it is tried, and hence warrants this Court's review.

The government offers relatively little to challenge the value of granting certiorari. After a lengthy protest that the Fifth Circuit side of the split is correct on the *merits*, the government attempts to distinguish several of the cases on the other side of the split. Such purported distinctions are mistaken.

For example, the government, at 12-13, denies a split with the Eighth Circuit by citing to *United States v. Inman*, 558 F.3d 742, 748 (8th Cir.), *cert. denied*, 558 U.S. 916 (2009), and claiming that the case refused to apply the law-of-the-case doctrine. *Inman*, however, was discussed at length in the Petition, is inaccurate and inconsistent in its own description of Eight Circuit law, and *still* conflicts with the First and Fifth Circuits regardless whether it unilaterally modified established Eighth Circuit precedent. *See* Pet. 13-16 (discussing *Inman* and the post-*Inman* case of *United States v. Johnson*, 652 F.3d 918, 922 (8th Cir. 2011), which continued to rely on pre-*Inman* cases and rejected the First and Fifth Circuit rule).

The government also briefly claims, at 13-14, that the earlier Eighth Circuit cases applying the law-of-the-case doctrine can be distinguished as involving evidence sufficient under *any* standard and hence not

genuinely raising the split. That claimed distinction is incorrect.

United States v. Staples, 435 F.3d 860, 866-67 (8th Cir.), *cert. denied*, 549 U.S. 862 (2006), applied the law-of-the-case doctrine in circumstances identical to those here. Although the evidence against one defendant was weak on both conjunctively instructed elements, the court recognized that the case for one of the two elements – and all that the statute disjunctively required – was "stronger with respect to" a co-defendant. *Id.* at 868. The court nonetheless reversed as to that co-defendant precisely because the government could not establish the second, erroneously instructed in the conjunctive, element. The law-of-the-case doctrine was squarely applied, was outcome determinative, and would not have been applied in the First or Fifth Circuits.

United States v. Ausler, 395 F.3d 918, 920 (8th Cir.), *cert. denied*, 546 U.S. 861 (2005), also explicitly adopted and applied the law-of-the-case rule to an additional element – knowledge of the *specific type* of controlled substance – that was not required by statute. There was no dispute that the defendant knew he possessed a controlled substance as a general matter – all that the statute itself required – as he did not even appeal the first count of his conviction. *Id.* at 919. The only reason he even had a viable appeal on the second count was his claim that there was insufficient evidence to show he *knew* he also had a second form of the drug, *i.e.*, the erroneously added element required by the jury instructions. *Id.* at 920. The court accordingly proceeded to measure sufficiency of the evidence for the second count against the

higher standard set forth in the jury instructions. Having expressly applied the more stringent law-of-the-case standard, the fact that the court ultimately affirmed the conviction does not convert its ruling into dicta. Indeed, *Ausler* continues to be cited in the Eighth Circuit for its the law-of-the-case holding.

Regarding *United States v. Torres-Villalobos*, 487 F.3d 607, 611 n. 1 (8th Cir. 2007), the government argues that it did not involve a sufficiency-of-the-evidence challenge or the "clear error" exception created in the First and Fifth Circuits. The Eighth Circuit recognized however, that the instruction was plainly erroneous in exactly the same way as the instruction in this case – it took a statutory "or" between two elements and instructed the jury with a conjunctive "and" requiring proof of both elements. *Id*. That the argument arose in the context of admissibility rather than sufficiency is irrelevant given that the rule applied was the identical *Staples* rule and the error was exactly as plain as here.

Finally, the government, at 14, seeks to distinguish the post-*Inman* case of *United States v. Johnson*, 652 F.3d 918, 922 (8th Cir. 2011), as involving the double error of omitting as well as adding an element. While *Johnson* indeed involved two different types of instructional error, there is no disagreement that the *omission* of a required statutory element does not become law of the case. But on the converse issue of whether an *additional* required element may become law of the case absent objection by the government, *Johnson* unambiguously continues the split sought to be resolved here. It rejects the First and Fifth Circuit rule and relies on both *Ausler* and the

Tenth Circuit's *United States v. Williams*, 376 F.3d 1048, 1051 (10th Cir. 2004), both of which are squarely part of the split. 652 F.3d at 922-23 & n. 2.

At the end of the day, whatever temporary confusion *Inman* may have created in the Eighth Circuit, *Staples*, *Ausler,* and *Torres-Villalobos* remain good law, continue to be cited by Eighth Circuit cases, and thus are sensibly viewed as part of the established split. And even if there is still debate in the Eighth Circuit between the approach used in *Ausler*/*Staples* and the approach in the *Inman*/*Johnson* line, *both* approaches conflict with the First and Fifth Circuit rule and hence such *intra*-circuit debate does nothing to diminish the *inter*-circuit conflict.

Regarding the Tenth Circuit's decision in *United States v. Romero*, 136 F.3d 1268, 1272-73 (10th Cir. 1998), the government merely repeats the First Circuit's empty attempt to distinguish that case. BIO 15 (citing *United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000)). That false distinction was discussed in the Petition, at 18 n. 4, and ignores what the Tenth Circuit actually said. The *Romero* court *assumed* the error of the additional element, found such error irrelevant, applied the law of the case, and held that it was "compelled to find that Romero's conviction must be overturned because of the Government's failure to prove an element of the crime as charged to the jury." 136 F.3d at 1271. It is merely wishful thinking to imagine the Tenth Circuit would suddenly adopt a different rule if only the error were more plain. Certainly no Tenth Circuit case has ever suggested as much.

Ignoring the further Tenth Circuit *Williams* case 376 F.3d at 1051, discussed in the Petition, at 16, the government instead seeks to distinguish an irrelevant Tenth Circuit case in which the government neglected to challenge the law-of-the-case doctrine at all. BIO at 16 (citing *United States v. Kamahele*, 748 F.3d 984, 1003 n. 13 (10th Cir. 2014)). But the government's failure consistently to assert its legal position regarding the law of the case surely has no bearing on the law in the Tenth Circuit, the continued applicability of *Romero* and *Williams*, and hence the problematic existence of a split. Speculation that the government might someday seek to revisit established law in the Tenth Circuit does not diminish the genuineness of the split or the need for review by this Court. Indeed, the very fact that the government neglected to make such an argument in *Kamahele* more likely suggests that it recognized the futility of challenging longstanding circuit precedent and thus corroborates the existence of an established and entrenched split.

Turning briefly to the government's premature merits arguments, none of them is a reason to deny certiorari. The primary issue at the Petition stage is the existence and importance of a split, not how this Court might resolve that split on the merits. Even were the government correct in its merits arguments – and it most certainly is not – that simply means that half the courts in the split are getting it wrong. It does not matter for present purposes which side of the split is eventually found to have the better argument. What matters *now* is the existence of such dis-

agreement and hence the non-uniform administration of justice in the federal courts.

Regarding that issue, the government does seem to suggest, at 8-9, that application of the law-of-the-case doctrine is merely an internal discretionary matter for the circuits, citing this Court's discussion in *United States v. Wells*, 519 U.S. 482, 487-89 (1997) of whether a newly raised law-of-the-case claim could bar this Court's review of an issue properly raised and decided in the appellate court and included in the granted Petition. Not surprisingly, this Court rejected the respondents' last-minute effort to assert the law-of-the-case doctrine for the first time in this Court. Indeed, the law-of-the-case doctrine was not even discussed in the circuit decision in *Wells* – presumably because it was not raised as a bar to the government's change of position. *See United States v. Wells*, 63 F.3d 745, 748-50 (8th Cir. 1995) That is precisely why the court of appeals actually reached and decided the question whether materiality was a substantive element of the offense in that case. This Court's defense of its own authority to decide an issue raised and decided below, and preserved in the Petition, had more to do with the procedural posture of the case and the last minute attempt to torpedo a question properly granted by this Court.

Wells does not represent a general comment on whether the law-of-the-case doctrine can bind the government when properly raised and argued, nor on whether it is the type of outcome-determinative rule that should be made uniform throughout the circuits as advocated here. Rather, the discussion in *Wells* was no more than a rebuke of a last-minute tactic by

the respondents to deny this Court the ability to hear a question properly granted. There is nothing in *Wells* to suggest, as the government does, BIO 9, that requiring the government to satisfy jury instructions containing an additional burden to which the government has acquiesced is merely a discretionary or prudential doctrine that may be applied or ignored by circuit courts at their pleasure.

As for the actual merits of the question presented, suffice it to say that multiple courts disagree with the government on this issue and Petitioner will happily defend the reasoning of those courts. Holding the government to a higher standard set by jury instructions to which it did not object is a perfectly fair, appropriate, and equitable check on the government's exercise of the enormous power of prosecution. There is nothing at all unjust about holding the government to its own assumed burdens and, indeed, the very nature of our system is designed to make it difficult for the government to take away the liberty of its citizens. Statutory definitions of crimes set the minimum bar for taking away a person's liberty, but they most certainly do not set the maximum bar as well.

Indeed, even the First and Fifth Circuits, and the government itself, accept the law-of-the-case rule when the jury instruction does not involve "plain" error but nonetheless incorrectly adds an extra-statutory element. *See* Pet. App. A5-A6 (citing *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992), for the general law-of-the-case rule that continues to apply in the Fifth Circuit in circumstances not satisfying the *Guevara* exception). Yet every aspect of the government's merits argument applies equally in

such circumstances, not merely where the error is "plain." In such instances the government still must prove more than required by the statute, and a defendant may still be acquitted if the government fails to meet the extra-statutory burdens it has assumed. Short of abandoning the law-of-the-case doctrine in all its applications, which neither the government nor any circuit has suggested, the government's position is inherently contradictory.

If this Court grants certiorari here, Petitioner is more than ready, willing, and able to argue the merits on full briefing. Suffice it to say, the government protests too much about its anticipated victory and, in attempting to forestall this Court's review, perhaps reveals that it is less confident of the outcome on the merits than its bravado suggests. [1]

II. The Circuits Are Split Regarding the Reviewability of a Statute-of-Limitations Defense Not Raised at or Before Trial.

The government, at 16-18, makes no attempt to deny the well-established and broad split on whether a statute-of-limitations defense not raised at or before trial is irredeemably waived or merely forfeited with

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[1] Should this Court reverse the Fifth Circuit's restrictions on the law-of-the-case doctrine, this Court would have the option to address a further circuit split on the substance of the "exceeds authorized access" element of the crime alleged in this case. Pet. 8-9, 20-21 n. 5. That potential opportunity to address an additional split makes this case an unusually efficient vehicle for this Court to accomplish considerable legal housekeeping with a single grant.

the opportunity for plain-error review on appeal. Although it briefly suggests that this Court has previously denied certiorari on this split, the government well knows that past denials are largely irrelevant. This Court often denies cases in a developing split in order to allow the issue to percolate or simply because other splits were more pressing at the time. That it may have done so on this issue in the past is no reason to do so again here. Indeed, any percolation has now been amply accomplished and there is no further insight coming from cases that merely cite controlling circuit precedent and move on, as the court below did in this case.

Furthermore, there do not appear to be a host of more pressing splits clamoring for this Court's attention and, indeed, the Court's calendar at present seems to have ample room to address this longstanding, fully developed, yet straightforward split. That it can do so along with at least one and possibly two other splits makes this an exceptionally efficient vehicle and gives this Court a high "return" on its investment of time and energy.

The only other argument of any note by the government on this second question presented is the posturing claim, at 17-18, that it would win on remand even under the alternative standard of review and hence the case is a poor vehicle. Both aspects of that reasoning are flawed.

First, despite the government's purported confidence in its chances on remand, it failed to convince the Fifth Circuit on the merits and instead only obtained a decision applying the waiver rationale. Pet. App. A8-A9. Were the government's position as obvi-

ous as it claims, the court below certainly could have ruled in the alternative using a belt-and-suspenders approach. That it did not do so suggests that the merits of the underlying limitations question would have taken more work to resolve than the government suggests.

Second, the eventual prospects of this case on remand should be of little concern in this Court. The substantive limitations issue was not addressed at all by the court below, only the waiver question. As a vehicle, this case thus is perfect to address the question of waiver without the complication of also having to look to the underlying merits of the limitations issue and potentially moot the question presented. Whatever happens on remand simply has nothing to do with the question presented to *this* Court and hence nothing to do with whether this case is a favorable vehicle for considering that question.

Given that the government offers essentially no reason to deny certiorari, this Court should take the opportunity to resolve this well-developed split. That this Court could resolve two or potentially three splits concurrently makes this case an even more attractive vehicle and an efficient use of the Court's resources.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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