No. 15-1134

In The
Supreme Court of the United States

FRANK PEAKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS COURT SHOULD ADDRESS THE PRESSING QUESTION OF WHETHER PUERTO RICO IS A STATE FOR PURPOSES OF THE SHERMAN ACT.

Petitioner Frank Peake asks this Court to address the important question of whether Puerto Rico is a State for purposes of the Sherman Act. Since Peake's petition was filed, this Court decided *Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (June 9, 2016), which holds that Puerto Rico cannot pursue a successive prosecution against an individual previously prosecuted by the United States government because, unlike the States, the Commonwealth of Puerto Rico is not a separate sovereign. *Sanchez Valle* cements the conclusion that the First Circuit's opinion below was simply wrong; because Puerto Rico is not a State, Peake cannot have been charged under section 1 of the Sherman Act, but rather could only have been charged under section 3. *See* Supplemental Brief of Petitioner.

Not until five pages into its argument does the Government join this discussion and begin to address the conundrum in which it finds itself – that the First Circuit opinion it secured below is inconsistent with this Court's jurisprudence, as recently re-affirmed in *Sanchez Valle*, and (perhaps most troubling) it is entirely at odds with the positions vociferously taken by the Government in virtually every case but this one.

The Government's primary strategy is to set up a straw argument and then knock it down. The Government contends that "Petitioner's argument rests on the premise that because Puerto Rico is not a 'State' for purposes of the U.S. Constitution, it may never be treated like a State for purposes of a particular statute." Opp. 13. This is categorically *not* Peake's argument. If Congress decides it wants Puerto Rico to be treated as a State for purposes of a particular statute, it can add a few words to that statute and make it so. In fact, Congress has demonstrated its ability to do this several times. *See, e.g.*, 15 U.S.C. § 15g(2) (defining "State" as including "Puerto Rico"); 15 U.S.C. § 1171(b) (same). In 1890, however, Congress did the opposite – enacting § 3 of the Sherman Act for "territories," and § 1 for "States."

Peake's actual argument is, very simply, that in the case of the Sherman Act (the only statute that matters to this case), Congress did *not* re-define the common meaning of the term "State," and therefore Puerto Rico cannot be treated as a State. *See Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937). While Congress *could* statutorily define Puerto Rico to be a "State" for purposes of extending the statute's reach to it, there is no such definition in the Sherman Act, from 1890 up to the present. Accordingly, the words have their ordinary meaning. *Id.* at 259 (finding that the 1890 Congress intended § 3 to extend to power under the Territories Clause, whereas § 1 extended to commerce clause power).

This is what the Court unequivocally said in *Shell*. In *Shell*, this Court determined that Puerto Rico's constitutional legal status dictates its statutory status under the Sherman Act, and that Puerto Rico properly was to be considered a territory under section 3. *Id.* at 258-59. *Shell* held that when Congress used the term "territory" in section 3, it meant all lands over which Congress exercises territorial authority under the Territories Clause – specifically including Puerto Rico.

Sanchez Valle matters to the outcome of this case because it addressed the critical underpinning of the holding in *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981) on which the First Circuit relied below in deciding against Peake. App. 6. *Cordova* distinguished *Shell* on the historical basis that the changes to Puerto Rico's status resulting from its adoption of a constitution in 1952 constituted an elevation to *de facto* Statehood, and moved Puerto Rico from the section 3 territory column (where it existed under *Shell*) into the section 1 State column. *Sanchez Valle* rejects that historical interpretation, and in so doing makes clear that *Cordova*'s historical and constitutional conclusion was simply wrong. Accordingly, so too was the First Circuit opinion below, which was bound by and followed *Cordova*. With a corrected understanding of this history from *Sanchez Valle*, the First Circuit can now be expected to rule based upon this revised understanding of Puerto Rico's constitutional status, which would eliminate as "interstate commerce" the only commerce

charged in the Indictment (shipping by water on ocean voyages between Puerto Rico and the continental U.S.).

Given the Government's unequivocal support in *Sanchez Valle* for the position that Puerto Rico is not a State, the Government's continued argument that Puerto Rico should be treated as a State in this case is inexplicable. In the *amicus* brief that the Government submitted in December 2015 in *Sanchez Valle*, it stated that "as a constitutional matter, Puerto Rico remains a territory subject to Congress's authority under the Territory Clause," and that it is not a State. *Amicus* Brief for the United States at 3-4. It also acknowledged that the contrary position the Justice Department took many years ago in the First Circuit on this issue does "not reflect the considered view of the Executive Branch" any longer. *Id.* at n.6. But, having persuaded the First Circuit to reach what it now agrees was the wrong conclusion in these and other cases since the 1980s, the Government nonetheless now asks the Court to accept Puerto Rico's status as a State under the Sherman Act because the First Circuit has been detrimentally relying upon *Cordova* as its "settled law for 35 years." Opp. 16.

To avoid this problem, the Government significantly undersells what arguments it made to this Court in *Sanchez Valle*. The Government did not merely "argue[] that Puerto Rico is not a 'sovereign' for purposes of the Double Jeopardy Clause." Opp. 14 n.6. It explained in its *Sanchez Valle* brief that the reason Puerto Rico is not a sovereign is that it remains a

territory and is not a State, and it rejected the very "post-*Shell Co*. events" that the First Circuit has detrimentally relied upon for 35 years as insufficient to change Puerto Rico from a territory to a State. *See, e.g.*, *Amicus* Brief for the United States at 3-4, 7, 15. The Government affirmatively argued that "*as a constitutional matter*, Puerto Rico remains a territory" and not a State. *Id.* at 3-4 (emphasis added). Under *Shell*, that concession is wholly dispositive of the question presented by Peake, regardless of whether the Government in *Sanchez Valle* expressly "address[ed] any issue under the Sherman Act." Opp. 14 n.6.

Most troubling of all, the Government simply ignores altogether that it *did* address the issue of whether Puerto Rico is a State under the Sherman Act in *United States v. Mercado-Flores*, Case No. 15-1859, Document Number 00116950970 (1st Cir. January 27, 2016). Just eight months ago, the Government filed a brief in *Mercado* in which it stated flatly that Puerto Rico is not a State, and cited favorably to that conclusion in *Shell*. Throughout its *Mercado* brief, the Government repeatedly reiterated that Puerto Rico is a territory, and is not a State. *See, e.g.*, *id.* at 13, 15, 18, 45 (e.g., "Puerto Rico is not an independent nation, nor is it a State. It is a territory of the United States as defined in Article IV"). The Government also criticized *Cordova*, the case relied upon by the First Circuit below and now urged upon this Court by the Solicitor General. *Id.* at 43; *see also id.* at 13 (dismissing *Cordova* as dicta). Inexplicably, although Peake pointed this out in his Petition, the Government's Brief does

not cite to *Mercado* or acknowledge this inconsistency at all.

The bulk of the Government's brief is focused not on the core question, but on a host of distractions that do not undercut the propriety of certiorari in this case. First, the Government contends that the plain error standard applies. Opp. 8-9. This is incorrect, as the interstate commerce element of Sherman Act § 1 is, in fact, jurisdictional. *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242-46 (1980); *United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003). In any event, under any standard, it is "clear" and "obvious" that Puerto Rico is not a State for Sherman Act purposes. Opp. 9. Therefore, at a minimum, the Court should grant, vacate, and remand this case to the First Circuit to address the argument in light of *Sanchez Valle*.

Likewise, there is no merit to the Government's suggestion that the case was decided on another ground. The Government's contention that it satisfied the interstate commerce element of § 1 due to the shipping of goods from one State to another State (suddenly the Government's primary position) is belied by the record. Critically, the Indictment, which was provided to the jury as part of their jury instructions, did not charge a conspiracy to ship from one State to another (as discussed further below), and the evidence was not about shipping from one State to another. Thus, while the Government is correct that this Court has previously held that it "is sufficient to allege and ultimately show that the business activity at issue . . .

took place in the flow of interstate commerce," the Government has neither alleged nor shown that in this case. Opp. 9-10, *quoting McLain*, 444 U.S. at 242-43.

Indeed, *McLain* makes clear that the identification of the basis for interstate commerce (and the proof of such basis) must be express in the Indictment, not merely implied:

> [J]urisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff ***must allege the critical relationship in the pleadings*** and if these allegations are controverted ***must proceed to demonstrate by submission of evidence*** beyond the pleadings. . . .

McLain, 444 U.S. at 242.[1] *See also Stirone v. United States*, 361 U.S. 212, 216-18 (1960); *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*,

[1] This makes sense. After all, many if not most of the cases properly charged under § 3 of the Sherman Act (i.e., those between a State and the District of Columbia, or between a State and a territory), tangentially involve materials that at some point were in another State. This does not magically convert these cases to § 1 cases, without at a bare minimum the Government expressly alleging and proving what interstate commerce between States they are relying upon. The intent of the Sherman Act's drafters plainly was for cases to be brought under § 3 where the alleged commerce at issue in the conspiracy is between a State and a territory (as it is here).

31 F.3d 89, 97 (2d Cir. 1994); *United States v. ORS, Inc.*, 997 F.2d 628, 630 (9th Cir. 1993).

The Government has neither alleged the critical relationship nor demonstrated it by submission of evidence, as *McLain* requires. First, it is incontrovertible that the Government did not allege the "critical relationship" with interstate commerce in the Indictment. To the contrary, the very first paragraph of the Indictment defines the "business activity at issue" as follows: "Freight was transported by water on scheduled ocean voyages *between the continental United States and Puerto Rico* ('Puerto Rico freight services')." Indictment ¶ 1 (emphasis added). Conspicuously absent is any reference to commerce or shipping from one State to another.

The Indictment goes on throughout to use its defined term "Puerto Rico freight services" as the subject of the antitrust conspiracy. The Indictment charges a "combination and conspiracy . . . the substantial terms of which were *to fix rates and surcharges for Puerto Rico freight services*, in unreasonable restraint of trade and commerce." Indictment ¶ 5 (emphasis added). The Indictment, by its very terms, limits the commerce at issue in this case as solely that between a State and Puerto Rico, and excludes commerce between States. This Court has long held that "when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another." *Stirone*, 361 U.S. at 218 (reversing conviction for interfering with interstate commerce in a manner different than that charged in the indictment). The

Government's failure to allege interstate commerce by virtue of shipping from one State to another is fatal to its position. *See id.*

Neither did the Government contend at trial that the case satisfied the interstate commerce element by virtue of shipping from one State to another. The Government expressly explained to the jury its argument as to why this case affected interstate commerce. Notably absent was any suggestion that this case had anything to do with shipping between States:

> I want to talk very briefly about that third thing, interstate commerce. The evidence will show that this conspiracy affected interstate commerce *because shipping freight between parts of the United States like Florida and the Commonwealth of Puerto Rico is interstate commerce*.

Tr. 22:9-13 (emphasis added). The Government clearly defined shipping between one State and the Commonwealth of Puerto Rico as interstate commerce and relied solely on that activity to satisfy the interstate commerce element. The Government reiterated over and over that the case was about shipping between a State and Puerto Rico, and nowhere argued that the case affected interstate commerce because some goods were shipped from one State to another before being shipped to Puerto Rico. Instead it argued that "shipping freight between parts of the United States like Florida and the Commonwealth of Puerto Rico is interstate commerce" under section 1 of the Sherman Act.

Tr. 22:9-13. But under *Sanchez Valle*, that argument is no longer valid.

The Government now seeks to recharacterize the case into one it neither brought nor tried. This is unavailing. This case presents clearly the issue of Puerto Rico's status under the Sherman Act and is a good vehicle for resolution of that question.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT ON THE STANDARD FOR HARMLESS ERROR ANALYSIS AND TO REQUIRE CONSIDERATION OF THE EFFECT OF THE ERROR ON THE JURY.

As with its discussion on the first Question Presented, the Government seeks to deflect attention from the highly meritorious question presented, this time by seeking to mischaracterize Peake's request as a review of a "fact-bound determination." Opp. 17. Contrary to the Government's assertion, Peake's second Question Presented seeks the Court's input on a pure question of law; namely, the proper standard for harmless error analysis. Peake asks the Court to address whether the "preponderates heavily against the verdict" standard that was applied below (and most of the time in four other circuits) is appropriate, or whether instead reviewing courts should apply an "effect on the jury" analysis (as is typically applied most of the time in six circuits).

As such, the Government's substantial focus on the relative merit of the curative instructions given by the district court and on the weight of evidence against Peake is misplaced.[2] Opp. 17-19. And while the Government is correct that the "court of appeals did not adopt any new legal standard," and that it "simply used the standard set out in an earlier [First Circuit] decision," Opp. 20, 21, that is precisely the point. Peake's argument is that the standard routinely applied in the First Circuit (and four other circuits) is inconsistent with the standard routinely applied in several other circuits, and that this discrepancy should be fixed in favor of the latter standard.

The Government does not reach this argument, the crux of Peake's petition, until the last two paragraphs of its Opposition. Opp. 21-22. Only then does it, at least nominally, turn to the question Peake presents to this Court: whether there is a circuit split that merits certiorari on the question of the applicable harmless error standard. On this critical question, *the Government does not contest that substantial variation in the standard exists*:

> The various formulations of the harmless-error test that petitioner points to do not establish a division among appellate courts; rather, they reflect application of this Court's

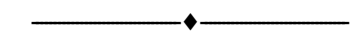
[2] It is worth reiterating that the case was far from a slam dunk for the Government as it now argues. The jury twice reported it was deadlocked, and the district court stated after the verdict that it was a "very close case."

> well-established objective harmless-error standard to disparate situations.

Opp. 21-22. With this concession, the Government agrees with the very underpinning of Peake's petition – that there is inconsistency in the tests that are routinely applied to harmless error analysis.

While the Government cursorily suggests that the circuit split laid out in Peake's petition is engendered by "disparate situations" (Opp. 22), this is simply incorrect, as even the most perfunctory review of the cases reveals. Indeed, as this case demonstrates and the Government itself argues (Opp. 20, 21), it is not the "situation" that is driving the standard imposed; rather, the appellate courts are applying pre-existing circuit precedent to the cases that come before them. *See id.* (arguing that the court below simply applied the standard set out in an earlier First Circuit decision). This standard substantially varies by circuit.

The Government does not address the circuit split laid out in Peake's brief (Pet. 20-25), nor does it cite any of its own cases regarding the applicable standards in each circuit. The Government knows it cannot meet Peake on the battlefield, so it is taking evasive actions instead. This is highly revealing of the merit of Peake's petition.



CONCLUSION

Petitioner Frank Peake respectfully requests that the Court grant a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

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