No. 16-37

In the Supreme Court of the United States

KEVIN M. TRUDEAU,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

As the government concedes, this case involves two important issues that have deeply divided the circuits. The government admits that "the [Speedy Trial Act] decision below is in tension with decisions of other circuits addressing the classification of criminal contempt offenses," and that the circuits "are intractably divided" over how to interpret the willfulness requirement of 18 U.S.C. § 401. Opp. 12, 24. Further, the government does not dispute the recurring importance of *either* question presented to criminal contempt law.

The government nonetheless seeks to avoid review of these circuit splits by arguing that this case is a poor vehicle for certiorari. The government dismisses the split over how to classify criminal contempt by arguing that certain conflicting circuit decisions did not involve the Speedy Trial Act, and that the facts of this case are different from other Speedy Trial Act cases. Opp. 14, 17. As to the § 401 willfulness split, the government says resolving the split is not warranted because of a waiver issue raised for the first time in this Court, and because the issue is somehow too "factbound" to merit review. Opp. 21. These arguments lack merit.

The government cannot deny that the Seventh Circuit's basis for not applying the Speedy Trial Act was its conclusion that the "offense" here was not an "offense" under the Act because it was "analogous to * * * a Class B misdemeanor." App. 12a. That holding squarely conflicts with the First Circuit's holding that "the statute's plain language" requires "that criminal contempt [] be classified as a Class A felony" (*United States* v. *Wright*, 812 F.3d 27, 32 (1st Cir. 2016), cert. denied (Oct. 3, 2016)), and three circuits' holding that

contempt is classified based on the "sentence actually imposed." Pet. 18–20.

Further, the notion that Trudeau did not preserve his argument that § 401 requires actual knowledge is baseless. Trudeau pressed, and the court below rejected, the argument that willfulness here requires actual knowledge. The court instead adopted a "recklessness" standard. App. 16a–17a, 19a. No more is required for this Court to reach the question. As this Court held in *Musacchio*—a case ignored by the government—the "sufficiency challenge is for the court to make a 'legal' determination whether the evidence was strong enough to reach a jury," regardless of "how the jury was instructed." *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016).

The need for review is underscored by this Court's special responsibility to police the contempt power. Where court orders prohibit conduct that is not criminal in its own right, courts must be especially careful "to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States*, 267 U.S. 517, 539 (1925). The Court should grant certiorari both to ensure uniformity in the circuits and to vindicate its own authority.

ARGUMENT

I. The government's opposition fails to undermine the need for guidance on how to classify criminal contempt.

A. The government acknowledges the express circuit split over how to classify criminal contempt (Opp. 11–12, 15–16), but insists that the decision below does not deepen that split because the other cases involved "other statutory contexts," not "the Speedy Trial Act."

Opp. 12. Yet the government cannot explain why this difference should matter. It doesn't.

All agree that the Act applies to any offense other than a Class B or C misdemeanor. All agree that the Seventh Circuit's *reason* for not applying the Act was its conclusion that, notwithstanding the Act's express language, the "offense" here was not an "offense" under the Act because it was "analogous to * * * a Class B misdemeanor." App. 12a. That holding squarely conflicts with the First Circuit's holding that "the statute's plain language" requires "that criminal contempt [] be classified as a Class A felony for the purposes of 18 U.S.C. § 3559(a)." *Wright*, 812 F.3d at 32.

As the First Circuit recognizes, it is Congress, not individual judges, that sets the maximum term of imprisonment for offenses—and contempt is no exception. Congress treated contempt the same as every other "offense" for which it assigned no letter grade; it is "classified [by] the maximum term of imprisonment authorized" (18 U.S.C. § 3559)—which all agree is life imprisonment here. Opp. 11–12, in *Wright* v. *United States*, No. 15-9432 (filed Aug. 22, 2016).[1] And Congress has decided that any classification "carries all the incidents assigned to the applicable letter designation" regardless of the statutory context. 18 U.S.C. § 3559(b).

Once this becomes clear, the Seventh Circuit's decision unquestionably exacerbates the undisputed circuit split (Opp. 15–16) over how to classify contempt. Nor is the split limited to the First and Fourth Circuits

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[1] Below, petitioner argued that under any methodology his crime qualified as an "offense." Pet. C.A. Br. 31–33.

(on one side), and the Sixth, Seventh, and Ninth Circuits (on the other). Pet. 16–18, 20–22. The Third, Fifth, and Eleventh Circuits classify contempt based on the "sentence actually imposed." See Pet. 18–20 (discussing case law). Those circuits would classify Trudeau's contempt, with its ten-year sentence, as a Class C felony. In short, the circuits reach starkly different results on the same facts. Only this Court can clarify the law.

The government also says no genuine conflict exists because the Seventh Circuit's ruling is the only "precedential appellate decision to resolve whether the Act applies to a criminal contempt prosecution where the district court announces at the outset that the punishment will not exceed six months." Opp. 14.[2] But that is not a legally significant distinction. *Cf. Konradi* v. *United States*, 919 F.2d 1207, 1212 (7th Cir. 1990) ("[E]very case is factually different from every other case"; the question is whether "the factual differences" are "connected with a difference in principle"). The government offers no reason why crimes should be classified differently for pretrial and post-trial purposes when Congress does not do so. There is none.

B. Aware of this difficulty, the government says Trudeau "was ultimately prosecuted under a second show-cause order that would likely be unaffected by resolution of the question presented in his favor." Opp. 12. This argument rests on the notion that it is "very likely" that "if a Speedy Trial Act violation occurred,

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[2] In *Lewis* v. *United States*, 518 U.S. 322, 330 (1996), this Court reserved the issue of "whether a judge's self-imposed limitation on sentencing may affect the jury trial right."

the dismissal of the prosecution would have been without prejudice." *Ibid.* Both assertions are incorrect.

1. If the contempt here is not classified as a Class B misdemeanor, the second show-cause order is a continuing violation of the Act. "When an indictment is dismissed on motion of the Government, and the defendant is thereafter reindicted," the speedy trial clock "continue[s] to run from the first indictment, with the proviso that the period during which no indictment is outstanding is excluded from the 70-day calculation." *United States* v. *Rojas-Contreras*, 474 U.S. 231, 239 (1985) (Blackmun, J., concurring in the judgment), see 18 U.S.C. § 3161(h)(5). The court below held that the second order was not a violation because "the first charge itself did not fall under the Act." App. 13a. Reversing that holding would require dismissing the second order.

2. Nor would any dismissal be without prejudice. "The relevant provisions of the Act are unequivocal." *Zedner* v. *United States*, 547 U.S. 489, 500, 507 (2006). "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." 18 U.S.C. § 3162(a)(2). Nothing less satisfies the Act.

No court, however, has made the requisite findings here. And as in similar contexts, "[e]xcusing th[at] failure" is not "harmless error." *Zedner*, 547 U.S. at 508–509. Doing so here would "undermine the detailed requirements of the provisions regulating" dismissals. *Ibid.* And had Trudeau's motion to dismiss

with prejudice been granted, the government's motion to amend the show cause order would have been moot and denied.[3]

Nonetheless, citing only a murder prosecution, the government says the Act's statutory factors favor dismissal without prejudice. Opp. 18–19. Not so. Only the government is responsible for the undisputed 214-day violation—three times longer than the Act permits. App. 7a. And Trudeau brought the Act to bear at his first opportunity—the April status hearing.

The government says this delay occurred because "the parties failed to receive notice" of the judicial reassignment and *Trudeau* did not attempt to assert his right before a violation. Opp. 18. Not true. The parties received notice, but the government failed to act. And Trudeau had no duty to seek his own trial. 18 U.S.C. § 3162(a)(2) (the right to seek dismissal is triggered only by "[f]ailure of the defendant to move for dismissal *prior to trial*" (emphasis added)).

Nor is there any basis to the government's assertion that making misstatements in an infomercial is a "serious" offense under the Act. Opp. 18. Indeed, a whole range of felonious conduct is considered non-serious. *E.g.*, *United States* v. *Bundu*, 479 F. Supp. 2d 195 (D. Mass. 2007) (parental kidnapping); *United States* v. *Brown*, 183 F.3d 1306 (11th Cir. 1999) (drug dealing). And because Trudeau has already served 30

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[3] Trudeau has always argued that "the same 70-day speedy trial clock will apply to the new show cause order as applied to the original order." Crim. Doc. 20 at 9 (07/11/11).

months in prison, another prosecution is both unnecessary and would undermine the threat of the Act's sanctions.

3. The record forecloses the view that only the Guzman Order was subject to the Act's protections. Both orders charge Trudeau with making the *same* misrepresentations about the *same* book in the *same* infomercials. App. 106a–107a. The amended charge altered only a few words, and the government conceded below that there were no changed circumstances: the only difference between the issuance of the orders was the judge. Gov't C.A. Br. 25.

4. The government advocates a perverse loophole: It can avoid a Speedy Trial Act violation simply by obtaining a new charging order—even though the only change in circumstances is a new judge. Here, the seriousness of the offense did not change in the slightest. Criminal contempt charges may be constitutionally serious even when the penalty is limited to six months' imprisonment. *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 511 (1974). "Where the contemptuous acts arose out of a single course of conduct by the defendant, * * * they should be treated as a single serious offense." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 519 (1974) (Marshall, J., concurring in part). And "there is no limit to the length of the sentence a judge can impose on a defendant without entitling him to a jury, so long as the prosecutor carves up the charges into segments punishable by no more than six months apiece." *Lewis*, 518 U.S. at 335–336 (1996) (Kennedy, J., concurring). It is even more troubling when courts do the carving.

C. The government ignores our showing that the decision below conflicts with *Frank* v. *United States*,

395 U.S. 147 (1969), under which offenses are classified by the penalty imposed—ten years, a Class C felony. Pet. 23–24. Notably, every circuit contributing to the classification split cites *Frank*, even though it applied the Sixth Amendment jury trial right.

The government attempts to distinguish *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), on the basis that it predates the Speedy Trial Act. Opp. 14–15. But *Klopfer* nevertheless reveals the animating principle behind the constitutional speedy trial guarantee that supports applying the Act here. The Court there rejected North Carolina's unusual procedure to deny defendants their speedy trial rights because "[t]he charges against the defendant were thus never dismissed or discharged in any real sense so the speedy trial guarantee continued to apply." *United States* v. *MacDonald*, 456 U.S. 1, 23 n.8 (1982). So too here.

D. The government's suggestion that this is an "idiosyncratic vehicle for addressing the classification of contempt" (Opp. 17) ignores that *every* contempt case is unique. Contempt can cover anything contained in a court order.

Regardless, this is an especially *good* vehicle for review. First, if the Act applies, there is an undisputed violation. Second, the length of Trudeau's nearly record-breaking contempt sentence ensures that the dispute will not become moot before the Court can rule—which is common in contempt cases. See Opp. 16, in *Wright*, No. 15-9432.

This case does not involve an "inversion of the typical position a defendant would make." Opp. 17. Trudeau's positions mirror those in every "petty offense" doctrine case—where the defendant asks the Court to

vindicate a right when he is accused of a constitutionally serious crime. *Lewis*, 518 U.S. at 324–325 (seeking review for denying a jury trial when charged with multiple petty offenses). Thus, Trudeau is similarly situated to all contemnors seeking their pretrial rights.

II. The willfulness standard as applied to a motion for acquittal was properly preserved and warrants this Court's review.

As the court below acknowledged, "[t]he circuits are split over whether 'knowledge' or 'recklessness' is the appropriate *mens rea* in criminal cases." App. 18a.[4] The government does not disagree. It says this case is a poor vehicle for resolving the entrenched circuit split based on a newfound waiver argument and an argument that the court below did not rest its analysis on the recklessness standard. On both points, the government is mistaken.

A. The government argues—for the first time—that Trudeau "has waived or forfeited any argument that the evidence was insufficient to establish a knowing violation of the 2004 consent order." Opp. 21–22. Not so. In his motion for acquittal, Trudeau repeatedly argued that § 401 requires actual knowledge and that the government failed to adduce any evidence that he knew his conduct was illegal.

For example, Trudeau argued that the witnesses conceded that they had no interactions with him, and that the government "presented no statements from Trudeau" or "any proof that anyone told Trudeau that

[4] Given the importance of preventing abuse of the contempt power, this question would warrant review even apart from a circuit split.

the *Weight Loss Cure* infomercials violated the 2004 Consent Order." Crim Doc. 150 4–5. Further, he stressed that "[i]n proving 'willfulness' in a criminal context, the law requires the government to do more than prove a mere anticipation of profit." App. 133a. That alone, he argued, "does not equate to proving that defendant *knew* of a legal duty which he *voluntarily and intentionally* violated." *Ibid.* (emphases added) (citing this Court's willfulness standard in *Cheek* v. *United States*, 498 U.S. 192, 201 (1991)).

That Trudeau cited the jury instructions is irrelevant. Citing the jury instructions is not an invitation to err when the defendant argues, as Trudeau repeatedly did here, that knowledge must be proven. As confirmed by this Court's decision in *Musacchio*—which the government never acknowledges—courts must apply the correct legal standard on a motion for acquittal regardless of "how the jury was instructed." 136 S. Ct. at 715.

Moreover, even if Trudeau's challenge to the district court's error had not been preserved, the government waived its waiver argument by failing to press it below. *United States* v. *Moya-Gomez*, 860 F.2d 706, 745 n.33 (7th Cir. 1988) ("[T]he government has not argued on appeal that Celestino waived the sufficiency of the evidence argument" and "therefore has waived Celestino's waiver."). The government admittedly policed waiver vigilantly. Opp. 19–20. Thus, if the sufficiency argument had been forfeited or waived, the government would have said so below. It did not, because the argument was preserved.

B. The government is mistaken that this case is a poor vehicle because the court below did not rest its analysis on the recklessness standard.

The court below addressed whether willfulness requires proof of knowledge or "recklessness" for criminal contempt, holding that willfulness exists when one disregards a known, substantial risk. App. 16a–17a. Indeed, the court expressly rejected this Court's general definitions of criminal willfulness, reasoning that they "interpret[] statutory-willfulness in other contexts, not the judicially implied willfulness requirement in criminal contempt." *Id.* at 19a. The court thus rejected Trudeau's argument that "the Government presented no evidence to show that Trudeau actually knew—and not just recklessly disregarded a substantial risk." Pet. C.A. Br. 47.

Moreover, Trudeau argued that willfulness cannot be inferred from the infomercials and book alone. *Id.* at 48. This Court has held that similar evidence—where the defendant "knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats"—shows only "negligence." *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015). Yet the court below rejected that view, holding that "the government had no obligation to present direct state-of-mind evidence" and that the jury had ample evidence to convict because the court had "previously explained" *in the civil proceedings* that Trudeau had made "blatant misrepresentations." App. 21a, 22a. (The district court relied on the same findings. App. 45a & n.1.)

Because Trudeau invoked his Fifth Amendment right not to testify in the criminal case, neither the jury nor the courts could determine guilt beyond a reasonable doubt without other evidence about his state of mind. There was no such evidence here. And a de-

fendant "would be at a severe disadvantage," "amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, 397 U.S. 358, 363 (1970) (quotations omitted). In concluding otherwise, the court below both contravened this Court's precedents and exacerbated a mature circuit split over the meaning of the willfulness requirement of § 401.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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