No. 18-7219

IN THE
Supreme Court of the United States

JOSE AMADOR,
DIANA MEKAEIL
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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REPLY FOR PETITIONERS

The invited-error doctrine is known as "a cardinal rule of appellate review."[1] Circuit courts regularly invoke it to bar appellate review in both civil and criminal cases.[2] And yet this Court has never fully delineated the contours of invited error. This case provides a perfect opportunity to do so. The question presented is clean and simple: whether a finding of invited error requires a finding of deliberateness. This question divides the circuits. Review by this Court is necessary to ensure equal access to appellate review.

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[1] *United States v. Carpenter*, 803 F.3d 1224, 1236 (11th Cir. 2015); *accord Sierra Club v. Yeutter*, 926 F.2d 429, 438 (5th Cir. 1991) (same); *Harris v. Roadway Exp. Inc.*, 923 F.2d 59, 60 (6th Cir. 1991) (same).

[2] In 2018 alone, circuit courts held that at least 39 civil and criminal litigants should be precluded from appellate review of errors deemed invited. *See, e.g., Lindenberg v. Jackson Nat'l Life Insurance Co.*, 912 F.3d 348, 356 (6th Cir. 2018); *Dailey v. Hecht*, 108 Fed. R. Evid. Serv. 90 (10th Cir. 2018); *United States v. Redmond*, 748 Fed. Appx. 760, 762 (9th Cir. 2018); *United States v. Margarita Garcia*, 906 F.3d 1255, 1279 (11th Cir. 2018); *Pagan v. Broward County Sheriff*, 742 Fed. Appx. 482, 485 (11th Cir. 2018); *United States v. Solis*, 750 Fed. Appx. 357, 361 (5th Cir. 2018); *United States v. McCardell*, 750 Fed. Appx. 314, 322 (5th Cir. 2018); *United States v. Vitale*, 749 Fed. Appx. 895, 896-97 (11th Cir. 2018); *United States v. Martinez*, 749 Fed. Appx. 698, 707 (10th Cir. 2018); *Federal Trade Comm'n v. Dantuma*, 748 Fed. Appx. 735, 739 (9th Cir. 2018); *United States v. Avery*, 747 Fed. Appx. 482, 484 (9th Cir. 2018); *United States v. Durham*, 902 F.3d 1180, 1235-36 (10th Cir. 2018); *United States v. Taylor*, 731 Fed. Appx. 945, 946 (11th Cir. 2018); *United States v. Lozada*, 742 Fed. Appx. 451, 454 (11th Cir. 2018); *United States v. Wheeler*, 742 Fed. Appx. 646, 653 (3d Cir. 2018); *United States v. Leaks*, 740 Fed. Appx. 675, 677 (11th Cir. 2018); *King v. McGee*, 739 Fed. Appx. 864, 866 (9th Cir. 2018); *United States v. Whigan*, 739 Fed. Appx. 588, 589 (11th Cir. 2018); *United States v. Lopez*, 733 Fed. Appx. 520, 521-22 (11th Cir. 2018); *In re Mirzataheri*, 730 Fed. Appx. 861, 864 (11th Cir. 2018); *Lawson v. Lawson*, 728 Fed. Appx. 756, 756 (9th Cir. 2018); *United States v. Garcia*, 727 Fed. Appx. 74, 76 (4th Cir. 2018); *United States v. Holmes*, 727 Fed. Appx. 644, 645 (11th Cir. 2018); *United States v. Brown*, 892 F.3d 385, 393 (D.C. Cir. 2018); *Houston Specialty Insurance Co. v. Vaughn*, 726 Fed. Appx. 750, 753 (11th Cir. 2018); *United States v. Davis*, 726 Fed. Appx. 252, 253 (5th Cir. 2018); *United States v. Chiddo*, 737 Fed. Appx. 917, 922 (11th Cir. 2018); *United States v. Kimmell*, 725 Fed. Appx. 586, 587 (9th Cir. 2018); *United States v. Brooks*, 734 Fed. Appx. 120, 124 & 124 n.17 (3d Cir. 2018); *United States v. Whaley*, 733 Fed. Appx. 486, 489 (11th Cir. 2018); *Legacy Data Access, Inc., v. Cadrillion, LLC,* 889 F.3d 158, 170-71 (4th Cir. 2018); *United States v. Recio*, 884 F.3d 230, 236 n.3 (4th Cir. 2018); *Gucwa v. Lawley*, 731 Fed. Appx. 408, 416 (6th Cir. 2018); *United States v. LeFleur*, 728 Fed. Appx. 983, 986 (11th Cir. 2018); *United States v. Rodriguez*, 714 Fed. Appx. 982 (11th Cir. 2018); *United States v. Jereb*, 882 F.3d 1325, 1335-41 (10th Cir. 2018); *Callwood v. Jones*, 727 Fed. Appx. 552, 558 n.8 (11th Cir. 2018); *United States v. Parker*, 720 Fed. Appx. 684, 690 (4th Cir. 2018); *United States v. Thomas*, 711 Fed. Appx. 365, 366 (8th Cir. 2018).

The government offers no reason why a finding of invited error should *not* require a finding of deliberateness. And it does not argue that petitioners' counsel *deliberately*—that is, with knowledge of the controlling law or for a strategic purpose—invited error in this case. In fact, the government barely touches on the question presented. When it does, its effort to downplay the circuit split is unconvincing.

Instead of fully grappling with the question presented, the government spends most of its energy positing alternative justifications for the result in the Tenth Circuit that it claims make this case a poor vehicle. But the government's alternative justifications were never addressed by the Tenth Circuit (and they are wrong to boot). The outcome below hinged exclusively on the question presented, and that is the only question this Court need consider. The petition should be granted.

1. The circuit split on the question presented is real and significant.

Three circuit courts have stated that they require record evidence that a litigant acted with knowledge of controlling law or for a strategic reason to support a finding of invited error. Pet. 8-9 (discussing *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); *United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010); *Gov't of Virgin Islands v. Rosa*, 399 F.3d 283, 291-92 (3d Cir. 2005); *United States v. Brown*, 849 F.3d 87, 90-91 (3d Cir. 2017); *United States v. Bastian*, 770 F.3d 212, 218-19 (2d Cir. 2014)). Three other circuit courts have explicitly rejected such a requirement. Pet. 9-11 (discussing *United States v. Aptt*, 354 F.3d 1269, 1281, 1283-

84 (10th Cir. 2004); *United States v. Natale*, 719 F.3d 719, 730 (7th Cir. 2013); *United States v. Mariano*, 729 F.3d 874, 880-81 (8th Cir. 2013)).

The government argues that this split is not significant because the Tenth Circuit has not suggested that mere "inadvertent" error will constitute invited error. BIO 18. But the Tenth Circuit has held that counsel's acts may bar review notwithstanding counsel's "apparent confusion" about what he had done. *Aptt*, 354 F.3d at 1284 (citing *United States v. Hawkins*, 185 F.3d 1146, 1155 (10th Cir. 1999)). And it has found invited error despite a litigant's mistaken reliance on outdated law when requesting an erroneous jury instruction. *Martinez*, 749 Fed. Appx. at 706-07. Likewise, the Seventh Circuit has held that invited error need not be "knowing and intentional," but rather may result from counsel's "negligent failure to recognize the error." *Natale*, 719 F.3d at 730 (though questioning this "harsh result").[3]

Regardless of the precise language used by the circuits, that the invited-error question plays out differently depending on what circuit an appeal is in is easily illustrated. The Ninth Circuit, for instance, has since *Perez* continued to ask whether a litigant's invited error was accompanied by a deliberate relinquishment of a known right before barring appellate review of the error. *See, e.g., United States v. Myers*, 804 F.3d 1246, 1254-56 (9th Cir. 2015) (court would consider claim of error where, though counsel invited the error, "[o]n this record . . . we cannot say that Myers knowingly waived" the right asserted on appeal); *United States v. Tuyet Thi-Bach*

[3] The Seventh Circuit did not use the phrase "invited error" in *Natale*, instead describing counsel's affirmative approval of proposed jury instructions as "waiver." *Id*. The Seventh Circuit equates "invited error" with "waiver," and uses the terms interchangeably. *See, e.g., United States v. Gaya*, 647 F.3d 634, 640 (7th Cir. 2011).

Nguyen, 565 F.3d 668, 676 (9th Cir. 2009) (declining to bar review on invited-error grounds where "it is not clear that Nguyen considered the controlling law and accepted the flawed instruction"). The Second Circuit, too, continues to ask this question post-*Bastian*. *See, e.g., Cassotto v. Donahoe*, 600 Fed. Appx. 4, 6 (2d Cir. 2015) (new trial not barred by invited-error doctrine where litigant "did not seek a tactical advantage" by requesting erroneous jury instruction).

Circuit courts on the other side of the split would have barred review of the above litigants' appellate claims on invited-error grounds without inquiring into deliberateness. *See, e.g., United States v. O'Malley*, 739 F.3d 1011 (7th Cir. 2014). In *O'Malley*, defense counsel stated at trial that he had "no objection" to a proposed jury instruction. 739 F.3d at 1005. The defendant then challenged the instruction on appeal. *Id*. at 1006. The Seventh Circuit cited *Natale* for the proposition that counsel's "no objection" statement barred review—without asking whether counsel's statement was knowing or strategic. *Id*. at 1007; *accord United States v. Kirklin*, 727 F.3d 711, 716 (7th Cir. 2013) (relying on *Natale* to preclude review of jury instructions without inquiry into counsel's knowledge or strategy where district court asked counsel if he had objections, and counsel responded: "[n]one that I can think of, your Honor"). The Eighth Circuit likewise continues to bar appeals on invited-error grounds without considering whether counsel acted strategically or with knowledge of controlling law. *See, e.g., United States v. Jackson*, 913 F.3d 789, 793 (8th Cir. 2019) ("Jackson's challenge is unreviewable on appeal" where counsel requested flawed jury instruction and never objected to it; citing *Mariano*). In the Tenth Circuit, the petitioners' case is

a prime example of the Circuit's indifference toward deliberateness. Counsel's failure to cite controlling Fourth Amendment caselaw on the government's burden cannot under any analysis be deemed deliberate. There's no conceivable benefit to be gained by inviting a district court to *lower* the government's burden at a motion to suppress. And yet the Tenth Circuit barred review on invited-error grounds. Pet. App. 19. None of these cases would have resulted in invited-error findings in the Second, Third, or Ninth Circuit.

2. The government's alternative justifications for the result in the Tenth Circuit were not adopted by the Tenth Circuit, and pose no barrier to review by this Court.

The government argues that certiorari is inappropriate here because the Tenth Circuit was right to bar review (if not on invited-error grounds, then on waiver grounds under Rule 12 of the Federal Rules of Criminal Procedure), or because the petitioners would lose their Fourth Amendment claim on the merits, or because the denial of their suppression motion was harmless error. BIO 11-16, 19-22. In other words, the government argues that it should prevail on remand, and therefore this case is not a good vehicle for deciding the question presented.

None of the government's arguments about what might happen on remand should influence this Court's decision whether to grant certiorari. A finding of invited error is a gatekeeping decision that bars appellate review. There will *always* be undecided issues in the background when this Court takes up an invited-error question—unless the circuit court ruled on those issues in the alternative. The Tenth Circuit did not make any alternative rulings here. Rather, it held simply and solely that "the invited

error doctrine precludes our review of defendants' argument that the district court failed to consider the first prong of the test outlined in *Murray*." Pet. App. 19a.

The government's arguments about what might happen on remand are not a basis for denying certiorari. Rather, it is this Court's "usual practice" to decide the question presented and "leave [those] dispute[s] for resolution on remand." *Maslenjak v. United States*, 137 S.Ct. 1918, 1931 (2017). The government made a similar poor-vehicle argument in *Byrd v. United States*, 138 S.Ct. 1518 (2018), arguing that regardless of the outcome of the Fourth Amendment question presented there, the petitioner would lose on remand, either on grounds of consent or probable cause. S.Ct. No. 16-1371, BIO 14-15 (July 17, 2017). This Court nonetheless granted certiorari, answered the question presented, and left the government's remaining claims for decision on remand. 138 S.Ct. at 1531.

If this Court grants review and holds that a finding of invited error requires a finding of deliberateness, it should reverse and remand this case for the Tenth Circuit to consider deliberateness and any other issues that remain after that consideration. If this Court grants review and holds that invited error does not require a finding of deliberateness, then it should affirm the Tenth Circuit. Either way, the question presented will be dispositive in this Court. This Court should follow its usual practice here and reject the government's vehicle arguments as a reason to deny this petition.

3. The government's alternative justifications for the result in the Tenth Circuit are wrong.

The government's alternative justifications for the result in the Tenth Circuit are not only irrelevant, they are wrong. To understand why, a brief restatement of the case history is necessary:

The petitioners moved to suppress the fruit of law enforcement's warrantless search of their hotel room. Pet. App. 7a, 16a-17a. Once they so moved, the burden shifted to the government to invoke and establish one of the "jealously and carefully drawn" exceptions to the warrant requirement, or a recognized exception to the exclusionary rule. *Jones v. United States*, 357 U.S. 493, 499 (1958). In their motion, the petitioners anticipated that the government would be unable to do this; specifically, they anticipated that the government would be unable to bear its burden of establishing that the evidence seized from the room under a later search warrant was discovered by "independent means." Pet. App. 16a-17a. Even more specifically, the petitioners anticipated that the government would fail to prove that the warrant would have issued absent the fruit of the warrantless entry. *Id*. The petitioners did not cite *Murray v. United States*, 487 U.S. 533 (1988), or explain that the government had an "onerous burden" to prove *two* things to establish an independent source: *both* "that no information gained from the illegal entry affected . . . the law enforcement officers' decision to seek a warrant" *and* that "no information gained from the illegal entry affected . . . the magistrate's decision to grant [the warrant]." *Id*. at 540.

In response, the government—which, again, bore the burden of establishing an exception to the exclusionary rule—did not cite *Murray*. Appeal 17-3018, R1.42. At

the hearing, the government did not present any evidence or argument on the first prong of *Murray*. Pet. App. 17a-18a; Appeal 17-3018, R3.12.

The district court denied the petitioners' motion to suppress in an order that the Tenth Circuit agreed failed to hold the government to its two-pronged burden under *Murray*. Pet. App. 15a-16a, 18a. But the Tenth Circuit attributed this error to the *petitioners* rather than to the *government* and denied review, despite no suggestion in the record that the petitioners were aware of *Murray* but wished to subject the government to a less onerous burden. *Id.* at 15-19. We have already addressed the flaws in the Tenth Circuit's invited-error jurisprudence, and will not repeat those arguments here. Pet. 12a-16a.

The government now makes three arguments why, even if this Court vacates the Tenth Circuit's invited-error ruling, the case will come out the same on remand. Its arguments are wrong.

First, the petitioners did not, under Rule 12 or otherwise, waive their right to a decision under the correct law on their motion to suppress. BIO 11-15, 19. Rather, they did precisely what Rule 12 obligates them to do: they timely moved to suppress the fruit of the officers' warrantless search. The government offers no authority for the proposition that a Rule 12 movant must tell the government how to defeat that motion. Such a proposition contradicts longstanding Fourth Amendment jurisprudence. Pet. 13. The government insists that by mentioning the substance of only one *Murray* prong in the district court, and then invoking both prongs on appeal, the petitioners "changed their position" and made an argument "directly contrary to

the position" they took in the district court. BIO (I), 10. But the Rule 12 waiver cases the government cites are inapposite. BIO 11-12. Those cases involve Fourth Amendment claims based on one ground in the district court (particularity of the warrant, say), but on a wholly different ground in the appellate court (adequacy of the affidavit, say). *See, e.g., United States v. Burke*, 633 F.3d 984, 987 (10th Cir. 2011).

Here, the basis for the petitioners' suppression motion remained the same in both courts: the warrantless search of their hotel room was illegal; the government could not (and then did not) bear its burden of establishing the independent-source exception to the exclusionary rule; and the fruit of the search should have been suppressed. The petitioners had no responsibility to tell the government how to meet its burden. The government's Rule 12 waiver argument was thoroughly litigated in the Tenth Circuit. That the Tenth Circuit sua sponte chose another route to dispose of the case is telling. The petitioners preserved their Fourth Amendment claim, and the Tenth Circuit should not have barred it on invited-error or any other waiver ground.

Second, the government's claim that it in fact satisfied *Murray* cannot be credited. BIO 21-22. The government presented no evidence in the district court that law-enforcement officers would have sought a search warrant had they not confirmed the maid's report of drugs in the hotel room by entering the room themselves. Appeal 17-3018, R3.12. The officers conducted no other investigation until after their unlawful entry, which they admitted undertaking to "verify the information we'd been given." *Id*. at 40, 66. If the officers had thought that the maid's report alone was warrant-

worthy, then it made no sense for them to jeopardize their investigation by entering the room without a warrant. On this record, the government did not prove that no information gained from the officers' illegal entry affected their decision to seek a warrant.

Third, and finally, the district court's refusal to suppress the fruit of the unlawful entry was not rendered harmless by Petitioner Amador's conditional guilty plea. BIO 22 n.*. This claim wholly ignores controlling Tenth Circuit authority. *See United States v. Benard*, 680 F.3d 1206, 1213 (10th Cir. 2012) ("an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision to plead guilty") (marks and citation omitted)). The government's harmless-error argument is no reason to deny review.

CONCLUSION

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

Respectfully submitted,

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