No. 22-6665

IN THE
Supreme Court of the United States

ORLANDO CORTEZ-NIETO,
JESUS CERVANTES-AGUILAR
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Joint Reply for Petitioners

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
PAIGE A. NICHOLS
Assistant Federal Public Defender
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
117 SW 6th Avenue, Suite 200
Topeka, Kansas 66603
Tel: (785) 232-9828
Email: paige_nichols@fd.org

VIRGINIA L. GRADY
Federal Public Defender
SHIRA KIEVAL
Assistant Federal Public Defender
COLORADO AND WYOMING FEDERAL
PUBLIC DEFENDER
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Email: shira.kieval@fd.org

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REPLY FOR PETITIONERS

This case is the perfect vehicle for this Court to finally resolve an important circuit split over "the precise limits" on a court's post-verdict "power to [sua sponte] substitute a conviction on a lesser offense for an erroneous conviction of a greater offense" when, under its instructions, the jury was required to acquit. *Rutledge v. United States*, 517 U.S. 292, 306 (1996).[1]

In opposing review, the government doesn't dispute the importance of the question presented. Instead, the government attempts to obfuscate the circuit split we've identified (despite its recognition by several courts of appeals), proposes that a 10-year-old denial of review in an easily distinguishable case should dictate a similar denial here, and argues that we are wrong on the merits of the question presented. But the government offers no persuasive reason to deny review.

1. The circuit split is real and justifies review.

The government does not meaningfully dispute the existence of a circuit split on the question presented. For instance, the government acknowledges that the Second Circuit decision resolving the question presented is "in tension with the court of appeals' decision below," but then dismisses the Second Circuit decision as "mistaken." BIO 16 (discussing *United States v. Dhinsa*, 243 F.3d 635 (2d. Cir. 2001)). But of course the split is no less real, and no less in need of this Court's resolution, simply because the government disagrees with one side of it. The government further

[1] This Court just heard argument in a case about a court's post-verdict power when, under its instructions, a jury was required to acquit for lack of venue. *See Smith v. United States*, Sup. Ct. No. 21-1576 (argued March 28, 2023). We discuss *Smith* at pages 5–6 below.

proposes that "the Second Circuit may reconsider its conclusion if afforded the opportunity to do so." BIO 16-17. But it's always the case with a circuit split that one side or the other may eventually "reconsider its conclusion." This possibility can't be a reason to deny review; otherwise this Court would have to discount all circuit splits—thereby ignoring one of the "primary considerations governing review on certiorari." Sup. Ct. R. 10. Finally, the government suggests that this Court should disregard the Second Circuit decision because "numerous courts" have entered post-verdict convictions on lesser-included offenses without regard to jury instructions. BIO 16 & n.2. But the fact that a split leans in one direction is no reason to deny review. Indeed, this Court recently granted certiorari to resolve a six-to-one split against the petitioner in *Babcock v. Kijakazi*, 142 S. Ct. 641, 645 (2022) ("While most circuits to address the question have reached the same result, one has come out the other way. We granted certiorari to resolve the split.").

The government also acknowledges the Ninth Circuit's conclusion that courts may not enter post-verdict judgments on lesser-included offenses absent jury instructions on those offenses, but then dismisses that conclusion as dictum. BIO 17 (discussing *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992)). But the Ninth Circuit hasn't treated it that way. *See Douglas v. Jacquez*, 626 F.3d 501, 506 (9th Cir. 2010) (stating that in *Vasquez-Chan*, "we laid out three 'conditions necessary'" to entering judgment on a lesser-included offense, and "[o]ne condition was 'the jury must have been expressly instructed that it could find the defendant guilty of the lesser-included offense and must have been properly instructed on the elements of that offense'"). In

Douglas, the Ninth Circuit declined to apply *Vasquez-Chan*'s instructional requirement *not* because that requirement was dictum, but because it was "a matter of federal procedural law" that did not apply in the state habeas action before the court. 626 F.3d at 507.

The government attempts to distinguish the decision below from the Second and Ninth Circuit decisions on grounds that "those decisions involved an appellate court's own authority"—as opposed to a district court's authority—"to direct entry of a conviction for a lesser-included offense following a remand." BIO 15. This is a distinction without a difference. If a district court is obligated to fully acquit in the circumstances present here, then so is an appellate court, and vice versa. *See Burks v. United States*, 437 U.S. 1, 11 (1978) ("it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient"; holding otherwise "would create a purely arbitrary distinction between those [who receive a remedy on appeal] and others who would enjoy the benefit of a correct decision by the District Court" (emphasis in original; citations omitted)).

The government's efforts to dematerialize the circuit split contradict the Tenth Circuit's own recognition that "[s]ome circuits have agreed with" the petitioners, while "other circuits have said that a lesser-included-offense instruction is not a prerequisite to imposing a conviction on a lesser-included offense." Pet. App. 26a. The Tenth Circuit is not the only court to have recognized this split. *See, e.g., United States v. Petersen*, 622 F.3d 196, 205 (3d Cir. 2010) (noting that some courts of appeals "have declined or hesitated to reduce a conviction to a lesser included offense when

the district court did not give a lesser included offense instruction"); *United States v. Hickman*, 626 F.3d 756, 770 (4th Cir. 2010) (noting that some circuits have limited courts' authority to convict on a lesser-included offense upon finding the evidence insufficient on the greater offense, by requiring "that the jury have been instructed on the lesser included offense"); *United States v. Hunt*, 129 F.3d 739, 745 n.5 (5th Cir. 1997) (noting and rejecting Ninth Circuit's approach).

The petitioners' case squarely presents the perfect opportunity to resolve a real, longstanding, and long-recognized circuit split; the government's arguments to the contrary are unpersuasive.

2. Unlike *Dorsett*, this case is an ideal vehicle for resolving the question presented.

The government notes that this Court denied review more than a decade ago in *Dorsett v. United Sates*, No. 10-8266, 563 U.S. 991 (2011), and urges this Court to "do the same here." BIO 9. Petitioner Dorsett asked this Court to review whether he was properly convicted of a lesser-included offense when his jury was not instructed on that offense. This Court requested a response from the government. In its Brief in Opposition, the government pointed out that Dorsett's petition "would not provide a good vehicle for review" because, even though the district court had not instructed Dorsett's jury on lesser-included offenses, it had "provided the functional equivalent" of such instructions in the form of a special verdict form. *Dorsett v. United States*, No. 10-8266 BIO 20 (filed April 6, 2011). And the jury in fact used that special verdict form to convict Dorsett of the lesser offense and clear him of the greater offense. *See United States v. Petersen*, 622 F.3d 196, 205 (3d Cir. 2010) (explaining that "the

special verdict form enabled the jury to make a separate finding as to each element of the charges . . . and they did"). This Court ultimately (and understandably) denied review.

The petitioners' case, in contrast, is the perfect vehicle for the question presented. Here the government charged the petitioners with drug-related crimes alleged to have occurred within 1,000 feet of a playground. At trial, the government took an all-or-nothing approach and chose not to proffer instructions or special verdict forms on lesser-included offenses (the drug crimes minus the proximity element). The district court accordingly instructed the jury only as to the crimes charged, with no option for convictions on lesser-included offenses. Under these instructions, absent sufficient evidence of proximity to a playground, the jury was required to acquit. Unlike Dorsett's jury, the petitioners' jury had no "functional" alternative to acquittal. Thus, unlike *Dorsett*, this case is a perfect vehicle to answer the question presented: whether a court may sua sponte enter post-verdict convictions on lesser-included offenses that the jury had no authority to return.

The government does not dispute that this is an important question, or that this case presents the perfect vehicle for deciding it. The question might be worded another way: whether, upon a post-verdict finding of insufficient evidence, a court must enter the same acquittal that the jury was required to enter. This Court recognized the importance of this question when it granted certiorari in *Smith v. United States*, Sup. Ct. No. 21-1576 (argued March 28, 2023). The question in *Smith* is whether, upon a post-verdict finding that the government failed to prove venue, a

court must enter the same acquittal that the jury was required to enter. *Smith* does not involve lesser-included offenses and will not resolve the question presented here. It nonetheless raises similar questions about judicial remedies for insufficient evidence (of venue in *Smith*/of an essential element here) that this case is well-positioned to answer—certainly better positioned than *Dorsett*, and perhaps even better positioned than *Smith*. Regardless of the outcomes in *Dorsett* or *Smith*, this Court should grant this petition.

3. The government's merits arguments are not persuasive reasons to deny review.

The government's merits arguments are unpersuasive. To begin with, the government sets up a straw man and spends a whole page knocking it down when it argues that, "[c]ontrary to petitioners' suggestion . . . *Keeble v. United States*, 412 U.S. 205 (1973), does not stand for the proposition that a lesser-included offense instruction is always required before a defendant may be convicted of such an offense." BIO 11. We never said it did. We cited *Keeble* solely for the uncontroversial proposition that "if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal." 412 U.S. at 212. The government does not dispute *this* proposition. The government's discussion of *Keeble* is beside the point.

Next, the government states that "[c]ourts routinely use Rule 29(c) to partially set aside a jury's verdict." BIO 12. This is exactly why review is warranted—to determine whether this use is authorized when a court enters a conviction that the jury was not

authorized to return. Pet. 11. The government further states that "[i]t is well settled" that Rule 31(c) authorizes convictions on lesser-included offenses "where a jury finds that the government has proved the elements of that offense beyond a reasonable doubt." BIO 10. But the government does not acknowledge or address our point that Rule 31 governs *jury* verdicts, not judicial rulings on post-verdict motions for judgment of acquittal. Pet. 11.

To be clear: we are not arguing that the convictions the district court entered were not true lesser-included offenses. We are not arguing that they wouldn't have been proper had the jury been instructed on them. Our question presented is more specific than whether convictions on lesser-included offenses are generally consistent with the Federal Rules of Criminal Procedure; it's whether those (or any other) rules authorize a court to sua sponte enter post-verdict convictions on lesser-included offenses that the jury had no authority to return. The government's discussion of the rules does not fully address, much less persuasively answer that question.

Finally, the government distinguishes the district court's sua sponte action here from the sua sponte actions at issue in *Greenlaw v. United States*, 554 U.S. 237 (2008) and *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020). We don't dispute that the cases are distinguishable. But as we explained in our petition, the considerations underlying this Court's decisions in *Greenlaw* and *Sineneng-Smith* counsel in favor of holding the government to its litigation choices rather than rescuing it with sua sponte convictions that it deliberately eschewed and that the jury was not permitted

to return. Pet. 13-14. Those considerations are salient in a host of different circumstances, including those present here.

The government's merits arguments are unpersuasive. Review is warranted.

CONCLUSION

For all of the above reasons as well as those previously set forth, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief

PAIGE A. NICHOLS
Assistant Federal Public Defender
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
117 SW 6th Avenue, Suite 200
Topeka, Kansas 66603
Phone: (785) 232-9828
Email: paige_nichols@fd.org

VIRGINIA L. GRADY
Federal Public Defender
SHIRA KIEVAL
Assistant Federal Public Defender
COLORADO AND WYOMING FEDERAL PUBLIC DEFENDER
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Email: shira_kieval@fd.org