No. 23-____

IN THE

Supreme Court of the United States

KHAN MOHAMMED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

NATHANIEL H. NESBITT
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
Tel.: (303) 899-7300

PETER S. SPIVACK
REEDY C. SWANSON
Counsel of Record
KEENAN ROARTY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
reedy.swanson@hoganlovells.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Government may be required to prove the factual basis for a sentencing enhancement by clear and convincing evidence, rather than a preponderance of the evidence, in "extraordinary circumstances" including when the enhancement "would dramatically increase the sentence," a question this Court expressly reserved in *United States* v. *Watts*, 519 U.S. 148, 156 (1997).

2. Whether the law of the case doctrine applies to factual findings.

PARTIES TO THE PROCEEDING

Petitioner is Khan Mohammed, an individual. Respondent is the United States of America.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the District of Columbia Circuit:

United States v. *Mohammed*, No. 22-3072 (D.C. Cir. Dec. 22, 2023) (reported at 89 F.4th 158) ("*Mohammed III*").

United States v. *Mohammed*, No. 16-3102 (D.C. Cir. July 21, 2017) (reported at 863 F.3d 885) ("*Mohammed II*").

United States v. *Mohammed*, No. 09-3001 (D.C. Cir. Sept. 4, 2012) (reported at 693 F.3d 192) ("*Mohammed I*").

U.S. District Court for the District of Columbia:

United States v. *Mohammed*, No. 06-357 (CKK) (D.D.C. July 18, 2022) (unreported but available at 2022 WL 2802353).

United States v. *Mohammed*, No. 06-357 (CKK) (D.D.C. Dec. 9, 2021) (unreported but available at 2021 WL 5865455).

United States v. *Mohammed*, No. 06-357 (CKK) (D.D.C. July 22, 2016) (unreported but available at 2016 WL 3982447).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 23-____

KHAN MOHAMMED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Khan Mohammed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's opinion (Pet. App. 1a-13a) is reported at 89 F.4th 158. The District Court's opinion is unreported but available at 2022 WL 2802353.

JURISDICTION

The D.C. Circuit entered judgment on December 22, 2023. Pet. App. 1a-13a. On March 5, 2024, this Court extended the deadline to petition for a writ of certiorari

to and including April 22, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

INTRODUCTION

This petition asks this Court to resolve two long-standing splits involving nearly every circuit. These splits concern frequently recurring questions about two foundational issues of procedure: the standard of proof for sentencing enhancements and the scope of the law of the case doctrine.

Petitioner Khan Mohammed is an Afghan national. Mohammed was initially convicted of drug trafficking and narcoterrorism and sentenced to life in prison. The narcoterrorism charge was subsequently vacated because Mohammed received ineffective assistance of counsel—in particular, trial counsel completely failed to investigate witnesses who could discredit the Government's star witness. After vacatur, the Government declined to attempt a second time to prove the narcoterrorism charge beyond a reasonable doubt, and instead sought to achieve the same life sentence through a terrorism sentencing enhancement. This enhancement sent the Sentencing Guidelines into the stratosphere, increasing the Guidelines range from a *maximum* of 121 months to a *minimum* of 360 months all the way up to a possibility of life. Mohammed was ultimately resentenced to life—the same sentence he had received before the narcoterrorism conviction was vacated.

In *McMillan* v. *Pennsylvania*, this Court noted the possibility that large sentencing enhancements—like the one here—may serve as the "tail which wags the dog" when determining the amount of time that a defendant spends in jail. 477 U.S. 79, 88 (1986). And later, in *United States* v. *Watts*, this Court expressly reserved whether, in such "exceptional circumstances," the relevant factual findings "must be based on clear and convincing evidence." 519 U.S. 148, 156-157 (1997) (per curiam). The Court noted, however, that lower courts were then divided on that issue. *See id.* at 156 & n.2.

A split persists on that question today. The Ninth Circuit has long held that a district court may be required to hold the Government to the clear-and-convincing standard, including where an enhancement increases the Guidelines substantially compared to the offense of conviction. *United States* v. *Staten*, 466 F.3d 708, 717-718 (9th Cir. 2006). In the decision below, by contrast, the D.C. Circuit joined seven other circuits in holding that a preponderance of the evidence is *always* the appropriate standard of proof. Although a number of the circuits on the majority formerly embraced the Ninth Circuit's approach, many have since concluded that after this Court rendered the Guidelines advisory in *United States* v. *Booker*, 543 U.S. 220 (2005), the concerns identified in *McMillan* and *Watts* no longer have any force.

Those courts badly misunderstand how the Guidelines function even since this Court rendered them advisory—they remain the "starting point," "lodestone," and indeed "in a real sense the basis for the sentence." *Peugh* v. *United States*, 569 U.S. 530, 541-544 (2013) (quotation marks and emphasis omitted). Given the central role

the Guidelines continue to play in sentencing even after *Booker*, due process may sometimes require a heightened standard of proof for sentencing enhancements that are the true drivers of the sentence. That is all the more true where, as here, the Government relies on facts that it declined to prove at trial.

The D.C. Circuit committed a second error, and deepened another existing circuit split, by refusing to evaluate whether the factual record supported the terrorism enhancement. Instead, it applied the law of the case doctrine because a prior panel had resolved the same factual question in a different legal context. The court thus joined a 8-3 split on the issue of whether the "law of the case" doctrine applies to purely factual issues. Once again, the D.C. Circuit's approach was wrong. This Court's precedents limit the law of the case doctrine to *law*, in line with early American practice.

Both splits are longstanding. This case presents a clean opportunity to resolve both and provide much needed guidance on these exceptionally important issues. The petition should be granted.

STATEMENT OF THE CASE

A. The Government's Investigation

Khan Mohammed is a farmer from a small village in Afghanistan. CADC JA 533-534. In 2006, the Government suspected that Mohammed might be involved in planning an attack on an airfield in Jalalabad, Afghanistan. Pet. App. 52a-53a. It encouraged an informant, Jaweed, to approach Mohammed wearing a wire. *Id.*

According to the Government, the early conversations between Mohammed and Jaweed suggested a plan to acquire weapons and deploy them in an attack. *See, e.g.*, CADC JA 89. In discussing this alleged plan—and before illicit drugs ever entered into the conversation—Mohammed specifically mentioned that he owned a car. CADC JA 94 ("I share my car and drive around this way and that way so I can be trusted.").

After this conversation, the Government decided to inject the issue of drug trafficking into its operation, on the theory that this might make it easier to arrest Mohammed. Pet. App. 53a. The Drug Enforcement Agency instructed Jaweed to tell Mohammed that "he had a friend looking for opium" and to ask whether Mohammed could help. *See id.* Mohammed replied that he could. *Id.* The two had several conversations about this plan before it came to fruition. *See* CADC JA 107-115, 116-126, 127-146, 147-153. Although the two often switched between discussing details of the alleged attack and the plan to sell opium, none of these conversations indicated any link between the two. *See id*.

During one of these meetings, Jaweed said that "as soon as *it* get[s] here, we will secure *it* right away." *Id.* (emphases added). Mohammed agreed, saying "[y]es, we will tightly and firmly load *it* in our car and bring it." CADC JA 124 (emphasis added). The District Court understood "it" to mean the missiles that would be used for the alleged attack. *See* CADC JA 417.

The day before Mohammed negotiated the opium purchase for Jaweed, the recorder picked up the following statement by Mohammed: "[Unintelligible] I thought

if we get some money we will buy a car [unintelligible] for business. Once we have money, then the money would keep coming." CADC JA 151.

After the opium transaction, the Government instructed Jaweed to ask Mohammed if he would be able to acquire heroin as well. *See* Pet. App. 54a. Jaweed also began conspicuously suggesting that the drugs were bound for America and other western countries. *See, e.g.*, CADC JA 169-170. The heroin transaction ultimately occurred in October 2006, and the Government arrested Mohammed shortly thereafter. Pet. App. 54a.

B. Mohammed's Initial Trial And Sentencing (*Mohammed I*)

Mohammed faced two separate drug-distribution counts: (1) a drug trafficking charge for distribution, in violation of 21 U.S.C. § 959(b)(2); and (2) a narcoterrorism charge for drug distribution "knowing or intending to provide" "anything of pecuniary value to any person or organization that has engaged or engages in * * * terrorism," in violation of 21 U.S.C. § 960a(a).

Jaweed was the primary Government witness at trial, and his testimony was "the bread and butter of the case." *United States* v. *Mohammed*, 863 F.3d 885, 888 (D.C. Cir. 2017) ("*Mohammed II*"). The Government relied heavily on Jaweed to fill in the gaps of the recordings and to provide clarifications of ambiguous words or statements on the recordings. *See id.* The jury convicted Mohammed on both counts, and the District Court sentenced Mohammed to life in prison. Pet. App. 57a.

The D.C. Circuit affirmed the convictions and sentence, including the District Court's decision to apply the terrorism enhancement to the first count. Pet.

App. 65a-67a. The court held Mohammed had the requisite intent for a "federal crime of terrorism" because his narcoterrorism offense was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." *Id.* (quoting 18 U.S.C. § 2332b(g)(5)). Critically, the court believed the District Court did not clearly err in finding that Mohammed's reference to "buy[ing] a car * * * for business" with drug money referred to the same car Mohammed had discussed to in a separate conversation about moving missiles almost two weeks earlier. Pet. App. 66a-67a. Therefore, the District Court could plausibly draw an inference that Mohammed sought to "purchase a car" that he intended to use, at least in part, to carry out terrorist attacks. *Id.*

Separately, the D.C. Circuit concluded that Mohammed had a colorable claim that his trial counsel was constitutionally deficient for failing to investigate whether Afghan witnesses might have undermined Jaweed's credibility with the jury. Pet. App. 67a-72a. It remanded for the District Court to consider that argument. Pet. App. 72a.

C. Subsequent Investigation and Vacatur of Narcoterrorism Conviction (*Mohammed II*)

On remand, the District Court concluded that Mohammed's trial counsel was not constitutionally deficient. *See Mohammed II*, 863 F.3d at 889. The D.C. Circuit reversed. It concluded the case involved a "complete failure to investigate" Afghan witnesses that would undermine Jaweed's credibility. *Id*. at 890. Trial counsel failed to undertake an investigation even though he knew about a "history of conflict" between Jaweed and Mohammed that long predated the investigation that led to this

case. *Id*. at 891. And trial counsel failed to object—except once—to the 118 times the Government asked Jaweed to explain the meaning of Mohammed's statements, that would have ensured the testimony was limited to Jaweed's understanding rather than an objective explanation of Mohammed's words. *Id.* at 888, 891-892. The Government argued Mohammed was a "conduit of the Taliban," but "Jaweed's testimony was the only evidence that linked Mohammed to the Taliban." *Id*. at 892. It was therefore "critical support for the narcoterrorism charge." *Id.* The D.C. Circuit remanded for the District Court to assess whether counsel's failures prejudiced Mohammed by conducting factfinding regarding "what a reasonable investigation" before the trial "could have uncovered." *Id*. at 893-894.

The resulting investigation yielded 16 affidavits from Afghan witnesses that seriously undermined Jaweed's credibility. *See* CADC JA 292-413. These witnesses uniformly testified that Jaweed held a longtime grudge against Mohammed for political reasons, and had twice threatened Mohammed and vowed revenge. *See, e.g.*, CADC JA 293-294; 301-305; 315-316; 322.

After reviewing this evidence, the District Court concluded that Mohammed had indeed been prejudiced by his original trial counsel's failure to investigate. *United States* v. *Mohammed*, No. 06-357 (CKK), 2021 WL 5865455, at *12 (D.D.C. Dec. 9, 2021). The "multitude of allegations" regarding Jaweed's alleged bias "may well have resulted in at least one juror voting against conviction on the narcoterrorism charge." *Id.* at *7, *8. The court therefore vacated Mohammed's

narcoterrorism conviction, *id.* at *12, and the Government declined to re-prosecute that charge.

D. Resentencing (*Mohammed III*)

The District Court then turned to resentencing Mohammed solely as to the drug trafficking count. The parties' primary dispute concerned whether to apply the terrorism enhancement when calculating the Sentencing Guidelines range. The Guidelines state that this enhancement applies to a "felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4(a). The Government argued that Mohammed's drug-trafficking conviction was "intended to promote" terrorism because Mohammed intended "to use drug proceeds to support, in part, [a] plan to attack the [Jalalabad] airport, or any base where the Americans were stationed." CADC JA 475.[1]

The District Court accepted this theory. Pet. App. 39a. The court primarily cited statements from Mohammed suggesting he was planning an attack on an "airport" that did not refer to the drug sales or proceeds from the drug sales. *See* Pet. App. 38a-39a. The only link the court provided between the drug sales and the alleged terrorist plot, however, was to incorporate by reference its finding from the initial sentencing "that [Mohammed] intended to use drug proceeds to purchase a car to transport missiles to fire at the airport." Pet. App. 42a.

---

[1] Alternatively, the Government maintained that Mohammed "intended to commit the crime" that was the subject of the vacated conviction—providing something of pecuniary value to a terrorist, namely "himself." CADC JA 444. Although the District Court applied the enhancement on this ground as well, the D.C. Circuit did "not reach" this argument. *See* Pet. App. 13a.

Applying the terrorism enhancement significantly increased the Guidelines range for Mohammed's offense. The enhancement raised Mohammed's offense level by 12 points, from 30 to 42. *See* CADC JA 531-532. It also required the court to treat Mohammed as having a criminal history of VI, even though he had no criminal record. *See* CADC JA 532; U.S.S.G. § 3A1.4(b). As a result, Mohammed's Guidelines range was 360 months to life. *See* Pet. App. 29a. Without that enhancement, the Guidelines range would have been just 97 to 121 months, *id.*—well below the roughly 17 years Mohammed has already served since his arrest in this case, *see* CADC JA 530.

Despite the substantial impact that the sentencing enhancement had on Mohammed's Guidelines range, the District Court applied a preponderance of the evidence standard to the factual questions required to apply the terrorism enhancement—including whether Mohammed intended to use a car purchased with drug proceeds as part of his alleged terrorist activities. Pet. App. 32a. The District Court ultimately imposed the same sentence it had before vacating the narcoterrorism conviction: life. CADC JA 522.

The D.C. Circuit affirmed. Legally, the court held that a preponderance of the evidence standard is *always* the correct standard of proof for facts necessary to apply a sentencing enhancement. Pet. App. 9a. This was true no matter what "extraordinary" circumstances exist—including the effect of the enhancement relative to the offense of conviction, or whether the conduct was uncharged or even the subject of an acquitted or vacated conviction. Pet. App. 9a-11a. The panel noted

that many circuits had previously held that "a higher standard of proof was warranted in extreme cases," and that the Ninth Circuit continued to follow that approach. Pet. App. 10a. But it held that, by rendering the Guidelines advisory, this Court's opinion in *Booker* "put to rest" those concerns "as the reasoning underlying earlier case law" is now inapplicable. Pet. App. 10a (quotation marks omitted).

The D.C. Circuit then refused to consider whether the factual record supported the District Court's application of the terrorism enhancement at resentencing. Mohammed argued the record inarguably established that he *already owned* the car he was supposedly planning to load with missiles before the Government ever injected the issue of drug sales into the case. Pet. App. 12a. Because that was the sole link the District Court identified between the drug sales and terrorism, Mohammed explained, his drug trafficking offense could not be considered "intended to promote" terrorism. Pet. App. 11a-12a.

The D.C. Circuit relied on the law of the case doctrine to reject this argument. The court held the doctrine was "appropriately applied" because "the *Mohammed I* court [had] addressed the same core factual question," even though it had done so in the context of an entirely different legal issue. Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON WHETHER SENTENCING COURTS MAY APPLY A HIGHER STANDARD OF PROOF.

The first question presented is whether a district court may hold the Government to a higher standard of proof when assessing whether a sentencing enhancement applies. The Ninth Circuit correctly recognizes that it can. When the

sentence is the "tail which wags the dog"—as this Court put it in *McMillan*, 477 U.S. at 88—the higher standard of proof is an important safeguard that ensures the Government cannot rely on the sentencing process to bypass its burden at trial.

At one time, a number of other circuits agreed or expressed sympathy with the Ninth Circuit's position. *See, e.g.*, *United States* v. *Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990); *United States* v. *Conley*, 92 F.3d 157, 168 (3d Cir. 1996) (phrasing *Kikumura* in due process terms); *United States* v. *Montgomery*, 262 F.3d 233, 249-250 (4th Cir. 2001); *United States* v. *Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993); *United States* v. *Schuster*, 948 F.2d 313, 315 (7th Cir. 1991); *United States* v. *Townley*, 929 F.2d 365, 370 (8th Cir. 1991). In the wake of *Booker*, however, many of these other courts have reversed course and held that the Government never needs to meet a higher standard of proof at sentencing. The core of their reasoning is the same: Because the Guidelines are now advisory, there is no longer any due process justification for applying a higher standard of proof to sentencing enhancements—ever.

As a result, eight circuits now hold that a preponderance of the evidence standard is always sufficient. This majority approach is wrong. It fails to account for this Court's post-*Booker* precedents stressing the critical importance of the Guidelines to the sentencing process, and creates an impermissible risk that defendants will be sentenced to extraordinarily long terms in prison based on inaccurate factfinding. This Court should grant certiorari to address this

longstanding conflict and correct the lower courts' misunderstanding of *Booker*'s implications.

A. The D.C. Circuit's Analysis Deepens An Existing Circuit Conflict.

Eight circuits hold the sentencing judge must *always* apply a preponderance of the evidence standard for sentencing enhancements. The Ninth Circuit, in contrast, holds that extraordinary circumstances may require a higher standard of proof.

The Third Circuit has issued the most influential opinion in the majority. *United States* v. *Fisher*, 502 F.3d 293 (3d Cir. 2007). In *Fisher*, a criminal defendant was charged with being a felon in unlawful possession of a firearm. *Id.* at 295. The district court applied various enhancements using a preponderance of the evidence standard, raising his upper Guidelines range almost 300%. *Id.* at 296, 305. The Third Circuit had previously ruled that when "enhancements are so substantial as to constitute 'the tail that wags the dog' of the defendant's sentence, the facts underlying those enhancements must be established by clear and convincing evidence." *Id.* at 296 (citing *Kikumura*, 918 F.2d at 1098-103).

The *Fisher* court overruled *Kikumura*. Under the advisory Guidelines, the court reasoned, facts relevant to sentencing enhancements "simply inform[ed] the judge's discretion as to the appropriate sentence." *Id.* at 305 (quotation marks omitted). They did not "increase the maximum punishment" available to defendants. *Id.* (quotation marks omitted). "[C]oncerns about the 'tail wagging the dog,'" "valid under a mandatory guideline system," were thus "put to rest." *Id.* Instead, "challenges to large enhancements * * * should be viewed through the lens of Booker

reasonableness rather than that of due process." *Id.* at 306 (quotation marks omitted).

Judge Rendell wrote a separate opinion sharply disagreeing that due process could never require a higher standard of proof. When large enhancements drive the sentence, it "suggest[s] that the defendant is really being sentenced for the uncharged crime rather than the crime of conviction." *Id.* at 311 (Rendell, J., concurring). The advisory Guidelines system "alters, but does not eliminate," these "due process concerns." *Id.*

Other circuits have fallen in line with *Fisher*. In *United States* v. *Walker-Couvertier*, 860 F.3d 1, 17 (1st Cir. 2017), the First Circuit disagreed that a sentencing court's factual finding—the selling of a certain drug quantity resulting in a significant increased sentence—needed to be proven by clear and convincing evidence. Rather, the court held that the preponderance standard is "the settled law of [the] circuit" and saw "nothing that would warrant a departure from this solid phalanx of circuit precedent." *Id.*

The Second Circuit also rejected a defendant's argument that a district court may apply a higher standard of proof when finding a drug quantity that "significantly enhance[d] a sentence." *United States* v. *Jones*, 531 F.3d 163, 176 (2d Cir. 2008) (quotation marks omitted). The court acknowledged apparently contrary language in an earlier Second Circuit opinion, but rejected that language as dictum. *See id.* (citing *United States* v. *Shonubi*, 103 F.3d 1085, 1089-90 (2d Cir. 1997)). The court

understood *Booker* to support its result because it rendered Guidelines ranges, "in the end, only advisory." *Id.*

The Fourth Circuit likewise holds that "[p]reponderance of the evidence is the appropriate standard of proof for sentencing purposes," even where "uncharged conduct substantially increases the defendant's sentence." *United States* v. *Grubbs*, 585 F.3d 793, 799, 803 (4th Cir. 2009) (cleaned up). The court found *Fisher* "particularly instructive," relying heavily on that case in agreeing that "[w]hatever theoretical validity may have attached to the *McMillan* exception to a preponderance of the evidence sentencing standard" had been "nullified" by *Booker*. *Id.* at 801-803.

Confronting the same question, the Sixth Circuit also held that the preponderance standard always applies. *United States* v. *Brika*, 487 F.3d 450, 460 (6th Cir. 2007). In the mandatory Guidelines era, the court believed, there might have been "some basis in due-process principles" for concern. *Id.* at 461. Since *Booker*, however, the court held that the defendant had "only an entitlement to be sentenced to a reasonable sentence within the statutory range." *Id.* Any "such challenges should" therefore "be viewed through the lens of *Booker* reasonableness rather than that of due process." *Id.* at 462.

The Seventh Circuit confronted this issue in the context of alleged sentencing conduct—murder during a conspiracy—that raised the Guidelines range from a maximum of 105 months to between 360-480 months. *United States* v. *Reuter*, 463 F.3d 792, 792 (7th Cir. 2006). The circuit believed any debate on the due process issue was "rendered academic" by *Booker*. *Id.* at 793. With advisory Guidelines, there

was "no need for courts of appeals to add epicycles to an already complex set of (merely) advisory [G]uidelines by multiplying standards of proof." *Id.*

The Eighth Circuit has reached the same result based on somewhat different reasoning. In *United States* v. *Villareal-Amarillas*, 562 F.3d 892, 895 (8th Cir. 2009), a drug quantity finding essentially doubled a defendant's Guidelines range. The Eighth Circuit held that the preponderance standard was correct because, unlike every other court, it understood this Court's opinion in *McMillan* to "stand[] for the proposition that due process never requires applying the clear and convincing evidence standard" at sentencing, *id.* at 897—even though this Court later expressly reserved that very question in *Watts*, 519 U.S. at 156-157. The court also went on to endorse the *Booker*-driven reasoning adopted by other courts of appeals. *Villareal-Amarillas*, 562 F.3d at 897-898.

The Eleventh Circuit aligned itself with the majority when rejecting a defendant's claim that "a heightened evidentiary standard" was warranted where "reliance on * * * acquitted conduct tripled his sentencing range." *United States* v. *Siegelman*, 786 F.3d 1322, 1332 n.12 (11th Cir. 2015). The Court explained its decision not to consider adopting "such a rule" by favorably citing *Villareal-Amarillas* and *Fisher*'s explanation that *Booker* neutralized any concerns justifying a heightened standard of proof. *Id.*

In the decision below, the D.C. Circuit sided with the majority. Before this case, the Court had long held open the possibility that a heightened standard might be required in the face of extraordinary circumstances. *See, e.g.*, *United States* v.

Long, 328 F.3d 655, 670-671 (D.C. Cir. 2003). Mohammed argued that his case presented precisely such a situation because the terrorism enhancement nearly *quadrupled* the bottom end of Guidelines range, put a life sentence on the table, and was based on conduct that was the subject of the conviction ultimately vacated for ineffective assistance of counsel. *See* Pet. App. 29a. The D.C. Circuit assumed this may very well be an "extraordinary" case. Pet. App. 9a. But it held that *Booker* "put to rest" any concerns justifying a heightened standard of proof, relying on the body of post-*Booker* circuit-level precedent recounted above. Pet. App. 10a (quoting *Fisher*, 502 F.3d at 305). The court therefore firmly closed the door on the possibility that a district court may be obligated to find sentencing facts using a higher standard of proof, "even if his case involved extraordinary circumstances." Pet. App. 11a.

2. Forging a different path, the Ninth Circuit has correctly held even after *Booker* that due process may oblige district courts to apply a higher standard of proof in some circumstances. *United States* v. *Staten*, 466 F.3d 708, 717 (9th Cir. 2006) (even "post-Booker," "a heightened burden may sometimes be required * * * to satisfy due process concerns"). The key question is not whether a district court's sentencing determination was in some way "discretionary," but whether "the factual finding was, as it turned out, *actually* determinative" on the sentence. *Id.* at 719. The Ninth Circuit explained that it—like all courts—"continued, after *Booker*, to impose the preponderance of the evidence standard, as a general baseline." *Id.* at 720. If due process had no role in sentencing, however, "no standard of proof whatever would be necessary." *Id.* Therefore, "neither the holdings nor the reasoning of" the Ninth

Circuit's similar pre-*Booker* caselaw were "irreconcilable with *Booker*." *Id.* The *Staten* court thus required the Government to prove by clear and convincing evidence a fifteen-level enhancement that more than doubled the defendant's sentence. *Id.* at 717-718.[2]

3. The Fifth and Tenth Circuits have left open the possibility that, even after *Booker*, a higher standard of proof may be required in extraordinary cases. Thus, in *United States* v. *Simpson*, 741 F.3d 539, 559 (5th Cir. 2014), the Fifth Circuit acknowledged that "in some circumstances, proof of sentencing facts by clear and convincing evidence may be required." *Id.* (citing *Mergerson,* 4 F.3d at 343-344). And the Tenth Circuit similarly has "left open the possibility that due process may require proof by clear and convincing evidence where an enhancement increases a sentence by an extraordinary or dramatic amount." *United States* v. *Stein*, 985 F.3d 1254, 1266 (10th Cir. 2021) (quotation marks omitted). Neither court has yet applied a higher standard of proof to a sentencing enhancement. *Stein*, 985 F.3d at 1267; *Simpson*, 741 F.3d at 559.

B. The Decision Below Is Wrong.

This Court has "long recognized that sentencing procedures, as well as trials, must satisfy the dictates of the Due Process Clause." *O'Dell* v. *Netherland*, 521 U.S.

---

[2] The Ninth Circuit has taken up *en banc* the question of whether to overrule *Staten* and heard oral argument on January 23, 2024. *United States* v. *Lucas*, 70 F.4th 1218 (9th Cir.), *reh'g en banc granted*, 77 F.4th 1275 (9th Cir. 2023). The *en banc* decision has not yet issued. The Court may wish to hold this petition until the Ninth Circuit has clarified its law on this issue.

151, 171 n.3 (1997). In particular, criminal defendants have a due process right to be sentenced only based on accurate information. *See Townsend* v. *Burke*, 334 U.S. 736, 741 (1948) (finding a due process violation where defendant was sentenced based on "materially untrue" "assumptions concerning his criminal record").

In determining how these rights translate into procedural protections, this Court generally applies the framework laid out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). *See also Wilkinson* v. *Austin*, 545 U.S. 209, 224-225 (2005) (describing *Mathews* as the usual rule). Under *Mathews*, procedural due process claims are analyzed by considering (1) the private interests; (2) the risk of deprivation of such interests through the current procedure used and the value of any additional procedural safeguards; and (3) the Government's interests. *Mathews*, 424 U.S. at 334-335. The *Mathews* framework has been applied to questions of federal criminal procedure. *See United States* v. *Raddatz*, 447 U.S. 667, 677 (1980) (magistrate judge's ability to propose findings and recommendations on motions to suppress evidence).[3]

The private interests at stake—the first *Mathews* factor—are immense. The Guidelines range is "not only the starting point" "but also the lodestar" for sentencing. *Molina-Martinez* v. *United States*, 578 U.S. 189, 200 (2016). Accordingly, it directly impacts how much time a defendant will spend in jail—the quintessential deprivation

[3] In *Medina* v. *California*, 505 U.S. 437, 442-446 (1992), the Court declined to apply the *Mathews* framework to a procedural due process claim against a *state* criminal procedure. This is because "the States have considerable expertise in matters of criminal procedure," and it is therefore "appropriate to exercise substantial deference to legislative judgments in this area." *Id.* at 445-446. Those federalism concerns are nonexistent when dealing with federal criminal procedures.

of liberty that the Due Process Clause guards against. The burden on the Government associated with the standard of proof at sentencing, by contrast, is minimal—after all, under any standard, the Government *already* has strong incentives to diligently investigate wrongdoing and put forward its best evidence at trial and sentencing.

Thus, whether to apply a heightened burden of proof turns on whether the risk of an erroneous deprivation is sufficiently high. This Court's opinion in *McMillan* provides important guidance as to when that condition will be satisfied. *McMillan* approved applying the preponderance of the evidence standard to sentencing findings as a *general* matter. 477 U.S. at 91. Along the way, however, the Court specifically noted that the sentencing factor at issue was not a "tail which wags the dog of the substantive offense." *Id.* at 88.

By contrast, where a sentencing factor serves to increase the Guidelines range several-fold from the offense of conviction, the risk of an erroneous deprivation is much higher. *See Staten*, 466 F.3d at 719. That's because, in such a situation, the critical facts driving the sentence are no longer issues the jury resolved in favor of the Government beyond a reasonable doubt. Instead, facts found only by a judge at sentencing "*actually* are determinative" of the sentence; the offense of conviction is relegated to little more than an afterthought. *Id.* These concerns only multiply when a judge is asked to find facts related to conduct that the Government elected not to charge or—worse still—where it did bring a charge but the jury acquitted or a conviction was subsequently vacated. *See United States* v. *Bell*, 808 F.3d 926, 928

(D.C. Cir. 2015) (en banc) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."). The Sentencing Commission has recently acknowledged the problems posed by acquitted conduct. *See* U.S.S.C., Proposed Amendment: Acquitted Conduct, *Amendments to the Sentencing Guidelines (Preliminary)* (Apr. 17, 2024). But the Commission's proposed action would not resolve the substantial concerns posed by uncharged conduct—including conduct underlying a conviction vacated for ineffective assistance of counsel, which raises particularly acute concerns about the reliability of the adversarial process.

Courts should apply this due process framework when assessing what burden of proof applies to sentencing facts, recognizing that a one-size-fits-all approach is inappropriate. *Cf. Staten*, 466 F.3d at 719-720. Contrary to the view adopted by the majority of lower courts, it makes no difference that the Guidelines are now advisory following this Court's decision in *Booker*. Today, the Guidelines continue to have a powerful effect and are usually determinative of a defendant's ultimate sentence. "[W]hen a Guidelines range moves up or down, offenders' sentences move with it." *Peugh*, 569 U.S. at 544. District and appellate courts must provide special justification for any deviation from the Guidelines, and more significant deviations require stronger justifications. *See Gall* v. *United States*, 552 U.S. 38, 47, 50 (2007). Appellate courts may apply a presumption of reasonableness to any within-Guidelines sentence. *Rita* v. *United States*, 551 U.S. 338, 347 (2007).

As this Court explained, when a "judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." *Peugh*, 569 U.S. at 542 (emphasis in original and quotation marks omitted). District courts "*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* at 541 (emphasis in original and quotation marks omitted). "That a district court may ultimately sentence a given defendant outside the Guidelines range does not deprive the Guidelines of force as the framework for sentencing." *Id.* at 542.

Most critically from a due process standpoint, this Court has repeatedly held that an error related to a Guidelines calculation entails a particularly serious risk that an erroneous sentence will be imposed. *See Molina-Martinez*, 578 U.S. at 199 ("an error related to the Guidelines can be particularly serious"). Such an error "can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* at 198. "In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that the defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration." *Rosales-Mireles* v. *United States*, 585 U.S. 129, 139 (2018).

In light of this precedent, the courts that have relied on *Booker* to hold that sentencing enhancements *never* require a heightened standard of proof—including the court below—fundamentally misunderstood the advisory Guidelines' role. It is telling that this view took root during the period between when this Court issued

Booker and when it reaffirmed the pivotal role that the Guidelines continue to play even in the advisory Guidelines era. Since then, this Court has repeatedly reversed lower courts for similarly writing off the importance of the Guidelines after *Booker*. *See, e.g.*, *Peugh*, 569 U.S. at 546-551; *Molina-Martinez*, 578 U.S. at 204-205; *Rosales-Mireles*, 585 U.S. at 145. It should do so again here.

C. This Case Presents An Excellent Vehicle To Resolve This Longstanding Split.

This case presents a clean vehicle to resolve this longstanding split. The D.C. Circuit's judgment rests entirely on facts that were found at sentencing using the wrong standard of review. Pet. App. 9a. And the District Court conducted its factfinding entirely under the preponderance standard. *See* Pet. App. 32a. In other words, that court made no finding in connection with its resentencing proceedings that the Government would have prevailed even applying the clear-and-convincing standard. *See id.*

The highly tenuous nature of the District Court's findings only reinforces the importance of this issue. Recall that the critical fact finding here is that Mohammed intended to use a car purchased with drug proceeds to move missiles in connection with an alleged terrorist attack. *Supra* p. 9. Undisputed evidence demonstrates that cannot be the case for two reasons.

First, Mohammed said that he already owned the car that would be used to move missiles before the Government ever even introduced drug sales into the case. On August 18, 2006, Mohammed repeatedly states that he has a car and already has a plan to keep weapons out of his home to avoid informers. *See* CADC JA 93-95.

Jaweed first raises the possibility of drug sales—after the Government prompts him to do so—over a *week later*, on August 26. *See* CADC JA 107. Although Mohammed mentions using his car to move missiles a few days later, on August 30, Mohammed does not mention the possibility of using drug money to purchase a car until September 10, nearly two weeks after the discussion about moving missiles. *See* CADC JA 123-124, 151. The Government's timeline thus makes no sense.

Second, on Mohammed's understanding, the supposed terrorist attack was imminent at the time of the recorded conversations in August and September of 2006. *See* CADC JA 455-456 (Mohammed and Jaweed had already identified specific targets and were in the process of acquiring weapons to carry out the plan). By contrast, the plan to expand drug sales was in its earliest days. The first drug transaction did not occur until mid-September of 2006, and only two transactions *total* were accomplished before Mohammed was arrested. *See* CADC JA 530. It beggars belief to suggest that Mohammed thought he could raise enough money from drugs in that time period to fund a car that would be used for a supposedly imminent terrorist attack—particularly given Mohammed's statement that when he previously had been involved in drug sales, the "loss [was] in ten thousands and the profit [was] none." CADC JA 140.

On such a thin record, the Government would not be able to satisfy a clear-and-convincing burden of proof. The preponderance standard nevertheless allowed the Government to secure a life sentence for Mohammed based on this highly attenuated chain of inferences. This Court should act to clarify that district courts

are not powerless when the Government engages in gamesmanship to avoid its burden to prove criminal allegations beyond a reasonable doubt.

II. THE CIRCUITS ARE SPLIT ON WHETHER THE LAW-OF-THE-CASE DOCTRINE APPLIES TO FACTUAL ISSUES.

The circuits are also embroiled in a split about one of the bedrock doctrines of our legal system: the law of the case. The majority of circuits will apply this doctrine even to purely factual findings. The minority do not. The majority approach conflicts with this Court's precedent—and the doctrine's historic origins—and only this Court can resolve this clear, long-standing split.

A. The D.C. Circuit's Law Of The Case Holding Deepens An Existing Circuit Conflict.

The decision below cemented the D.C. Circuit's place within a 8-3 circuit split on whether the law of the case doctrine applies to purely factual issues. The majority, including the D.C. Circuit, hold that it does. The Fourth and Sixth Circuits say it does not, and the First Circuit takes a virtually identical position.

1. Start with the majority. The Second Circuit applies law of the case to factual findings. *See United States* v. *Frias*, 521 F.3d 229, 235 (2d Cir. 2008). In *Frias*, the court held that the law of the case precluded a criminal defendant from re-arguing their Sentencing Guidelines calculations. The court had already "affirmed [the defendant's] conviction" in the first appeal. *Id.* at 231. Because the first appeal had "resolved the merits," the court declined to then reconsider the defendant's "challenge to the district court's Sentencing Guidelines calculations *or to the findings of fact*

underlying those calculations." *Id.* at 234-235 (emphasis added). Its decision rested on the "law of the case doctrine." *Id.* at 234-235 & n.6.

The Third Circuit follows the same rule. *Laborers' Int'l Union of N. Am., AFL-CIO* v. *Foster Wheeler Corp.*, 26 F.3d 375 (3d Cir. 1994). *Foster Wheeler* involved an employment dispute. *Id.* at 378. In a third appeal to the Third Circuit, the court addressed the effect of a prior appeal on factual findings regarding the parties' relationships. *Id.* at 396. The court explained that "the [earlier] decision would have established the law of the case" "with respect to those issues the decision reached explicitly or by necessary inference." *Id.* at 397. The court then determined that certain "factual findings" that went unchallenged in the earlier appeal, "absent certain extraordinary circumstances," were "beyond the authority of the district court to revisit." *Id.*

For decades, the Fifth Circuit has likewise applied law of the case to factual findings. *See, e.g.*, *De Tenorio* v. *Lightsey*, 589 F.2d 911, 917 (5th Cir. 1979). In a recent example, the Fifth Circuit addressed the second appeal of a defendant who fraudulently procured life insurance. *United States* v. *Bazemore*, 839 F.3d 379 (5th Cir. 2016) (per curiam). The defendant argued the district court could not apply a sentencing enhancement "based on a finding of actual loss" because the district court's original factual findings "compelled a finding of zero actual loss." *Id.* at 385. The Fifth Circuit agreed that "*an issue of fact* or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *Id.* (emphasis added and quotation marks omitted). Ultimately,

however, the court found that "the district court did not make any [relevant] factual findings," and "the law of the case doctrine did not dictate any outcome." *Id.* at 386.[4]

The Seventh Circuit agrees with the majority approach—emphatically. In *Teague* v. *Mayo*, 553 F.3d 1068 (7th Cir. 2009), the court held that "[a]s to issues of fact," the law of the case "approaches maximum force." *Id.* at 1073 (quotation marks omitted).

The Eighth Circuit also applies law of the case to factual findings. In *United States* v. *Banks*, 340 F.3d 683, 684 (8th Cir. 2003) (per curiam), a criminal defendant brought a second appeal, arguing for the second time that the district court erroneously calculated the drug quantity attributable to him. *Id.* The Eighth Circuit noted that it had already previously held there was "no clear error in the district court's factual findings," and "did not disturb or question the [d]istrict [c]ourt's factual findings on drug quantity." *Id.* at 685 (quotation marks omitted). "Accordingly, those findings became the law of the case." *Id.*

The Ninth Circuit also applies the law of the case doctrine to facts. That court has expressly stated that law of the case means decisions "on a *factual* or legal issue must be followed in all subsequent proceedings in the same case." *Pit River Home & Agric. Co-op. Ass'n* v. *United States*, 30 F.3d 1088, 1096-97 (9th Cir. 1994) (emphasis added and quotation marks omitted).

---

[4] Elsewhere, the Fifth Circuit made clear that factual findings become law of the case when "previously appealed and affirmed as not being clearly erroneous," the exact same context as the case below. *Chapman* v. *Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 242 n.2 (5th Cir. 1984) (per curiam).

The Eleventh Circuit follows the same rule. Thus, in *Friedman* v. *Market Street Mortgage Corp.*, 520 F.3d 1289, 1293 (11th Cir. 2008), a defendant mortgage lender was unable to relitigate in a class certification case the factual issue of whether "services were performed by [the defendant] in exchange for [an] escrow waiver fee." An earlier panel decision had "held, without equivocation, that some services were rendered in this case." *Id.* at 1293-94. That finding of fact thus became "the law of [the] case." *Id.* at 1294.

Finally, in the decision below, the D.C. Circuit applied the law of the case to a finding of fact. The court had to determine whether "the car to be purchased [by Mohammed using drug money] would be used to transport missiles and carry out an attack." Pet. App. 12a. Because "the *Mohammed I* court addressed the same core factual question * * * and upheld the findings on clear error review," the law of the case doctrine applied. Pet. App. 13a. That was true even though the Government conceded that the factual issue had arisen in a different legal context in Mohammed's earlier appeal. *See* U.S. CADC Br. 46 (noting this appeal involved "a different component" of the terrorism enhancement).

2. In contrast, the Fourth and Sixth Circuits correctly hold that the law of the case applies only to legal issues, and the First Circuit agrees with a rare caveat. In the Fourth Circuit, a capital defendant was factually found to be competent by a trial court, which later held a second competency hearing. *United States* v. *Roof*, 10 F.4th 314, 334-341 (4th Cir. 2021) (per curiam). The trial court said that, due to the "law of the case," it would only hear evidence that post-dated the first hearing. *Id.* at 339.

The Fourth Circuit disagreed, holding that the doctrine applies "when a court decides upon a rule of law," and "[f]indings of fact are, by definition, not rules of law." *Id.* at 346 (quotation marks omitted).

The Sixth Circuit applied the same principle to explain why a judge was not bound by a jury's specific damage verdicts against four co-conspirators. *See Solomon* v. *United States*, 276 F.2d 669, 675 (6th Cir. 1960). Those "separate verdicts in th[e] case [were] merely factual findings." *Id.* As such, "[t]hey [did] not constitute the law of the case." *Id.* And the judge was therefore free to fashion its own specific separate verdicts against the conspirators. *Id.* at 675-676. The Sixth Circuit continues to describe the law of the case doctrine as applying *only* to issues of law. *See Gillig* v. *Advanced Cardiovascular Sys., Inc.*, 67 F.3d 586, 589 (6th Cir. 1995) ("The law of the case * * * deals with the circumstances that permit reconsideration of issues of *law*.") (emphasis added and quotation marks omitted).

3. The First Circuit has a slightly unique position, but aligned with the minority view. In *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 462-463 (1st Cir. 1992), the court recited a relevant fact in the background section of its opinion. The appellant, on a second appeal, argued this recitation amounted to a binding factual finding that had been established as law of the case. *Id.* The court said no. Rather, it was "elementary that the 'law of the case' doctrine * * * ordinarily applies to matters of law, not to matters of evidence." *Id.* at 463. Only "in a very select class of cases, the court of appeals may actually find facts—and the facts so found may come under the law-of-the-case umbrella." *Id.* That "very select class"

arises "only when no other resolution of a factbound question would, on the compiled record, be sustainable." *Id*. In the instant case, the "question of what [the entity] knew and believed" did not "come close to meeting so rigorous a criterion." *Id.*

The Tenth Circuit has not taken a position, but has acknowledged that there is a lack of clarity on this issue. In *Johnson* v. *Champion*, 288 F.3d 1215, 1225-26 (10th Cir. 2002), a criminal defendant filed a second habeas petition after the first one was dismissed for failing to exhaust the claims in state court. The court remarked that "[w]hether the 'law of the case' doctrine applies to questions of fact, such as whether a particular claim for federal habeas relief has been exhausted, is unclear." *Id.* at 1226 (citation omitted). But the court did not resolve that question, because it found the first decision was "clearly erroneous" and led to a "manifest injustice," meaning the law of the case doctrine was inapplicable anyways. *Id.*

B. The Decision Below Is Wrong.

This Court has repeatedly made clear: the law of the case doctrine applies to questions of law, not fact. "As most commonly defined, the doctrine posits that when a court decides upon *a rule of law*, that decision should continue to govern the same issue in subsequent stages in the same case." *Arizona* v. *California*, 460 U.S. 605, 618 (1983) (emphasis added). Thus, whether law of the case applies depends upon "whether a court previously 'decide[d] upon a rule of law.'" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona*, 460 U.S. at 618). And in a case applying California law, the court favorably cited the proposition that "[i]t is settled beyond controversy that a decision of [a prior court] on appeal, as (to) a matter

of fact, does not become the law of the case" when a new trial has been ordered after the first appeal. *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 547-548 (1947) (quotation marks omitted and parentheses in original). In more recent cases, this Court has never suggested that the doctrine may reach questions of facts, but has invariably framed the doctrine as addressing issues of law. *See Pepper* v. *United States*, 562 U.S. 476, 506 (2011) (law of the case applies when a court "decides upon a rule of law") (quotation marks omitted); *Musacchio* v. *United States*, 577 U.S. 237, 244-245 (2016) (same).

Confining law of the case to issues of law tracks the historic roots of the doctrine. Law of the case emerged from early American practice. *See generally City of Hastings* v. *Foxworthy,* 63 N.W. 955, 957-962 (Neb. 1895) (tracing the origins of the law of the case doctrine). As *City of Hastings* described the doctrine and early cases developing it, law of the case covered settled "questions of law"; "point[s] of law;" "rules" or "rule[s] of law;" and "legal principles." *Id.* And *Hastings* specifically noted a case refusing to follow "former decisions on questions of fact" as law of the case. *Id.* at 957 (citing *Lane* v. *Starkey*, 31 N.W. 238 (Neb. 1887)). Other state courts have agreed. *See, e.g.*, *Wall* v. *Focke*, 22 Haw. 221, 223 (1914) (describing inapplicability of law of the case to facts as "well settled") (quotation marks omitted); *Hudson* v. *Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) (same) (citing *Missouri K. & T. Ry. Co.* v. *Redus,* 118 S.W. 208 (Tex. Civ. App. 1909)).

As courts in the twentieth century expanded the doctrine to cover factual issues, they largely did so without explanation. The historic boundary of the rule, by

contrast, is well justified. Law of the case operates as an exception to federal courts' duty to "hear and resolve questions properly before it," which this Court has repeatedly emphasized is a "virtually unflagging obligation." *Fed. Bureau of Investigation* v. *Fikre*, 144 S. Ct. 771, 777 (2024) (quotation marks omitted). It is likewise an exception to the general rule in federal courts that preclusion does not attach until a final judgment has been entered. *See, e.g.*, *G. & C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28 (1916) ("But it is familiar law that only a final judgment is *res judicata* as between the parties."). Although there may well be a clear interest in maintaining stability of *legal* issues for the parties as a case proceeds to judgment, the same cannot be said for facts. Quite the opposite: It is commonplace for a factual record to change and evolve as a case proceeds through the various stages of litigation—first a motion to dismiss, then summary judgment, and finally through trial and, in criminal cases, sentencing. *Cf. Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (discussing this progression in the context of Article III standing). Courts must constantly reassess their view of the facts as the lifecycle of a case progresses. *See id.*

This reasoning holds equally true for review of factual findings in the courts of appeals. That review already occurs under the deferential "clear error" standard, which fully accounts for the need to give trial courts deference in fact-finding issues. *See Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-574 (1985). When a district court relies on a fact previously found to support a new proposition of law, however, the court of appeals should still be required to exercise its appellate function in the

new legal context. Indeed, the deferential nature of clear error review makes it all the more important for a court of appeals after resentencing to ensure that the factual record in fact supports the revised sentence.

This case well illustrates the point. In the prior appeal, this Court's review boiled down to one, conclusory, unreasoned sentence endorsing the district court's finding. *See* Pet. App. 67a ("That Mohammed may have intended the car for personal use does not mean he could not also have planned to use the car in the attack, and he identifies no evidence directly contradicting the district court's conclusion that he did.").[5] That reasoning is not even responsive to the argument Mohammed raised in this appeal: Mohammed's argument is that there *is* a clear contradiction because the Government's theory was temporally nonsensical. *Supra* pp. 23-24 (laying out the timeline). Sustaining a life sentence should involve at least *some* review of the record.

C. This Case Presents An Excellent Vehicle To Resolve This Longstanding Split.

This case cleanly tees up this longstanding split for this Court's review. The D.C. Circuit rested its judgment on this issue entirely on the law of the case doctrine and recognized that it was applying that doctrine to a "factual question." Pet. App. 13a. Moreover, the Government *conceded* below that the factual issue in question arose in the context of a different legal lens in the prior appeal. U.S. CADC Br. 46.

[5] Because the D.C. Circuit panel did not explain its reasoning, it is impossible to know whether the court was considering in part the credibility of Government's lead witness, which had been thoroughly impeached by the time of the second appeal.

Whether the law of the case applies to purely factual issues was therefore dispositive in this case.

The law of the case doctrine has taken on an increased role as litigation's complexity continues to increase. It is one of the most widely-cited legal doctrines in modern legal thought, and has experienced an "explo[sion]" in the last few decades. *See* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure—Jurisdiction § 4478 (3d ed. 2023 update). In a world of repeated appeals, remands, and vacaturs, it is impossible to avoid the doctrine. With virtually every circuit having taken a position on this split, the results will differ based on nothing but geography. This court should provide a uniform answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHANIEL H. NESBITT
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
Tel.: (303) 899-7300

PETER S. SPIVACK
REEDY C. SWANSON
Counsel of Record
KEENAN ROARTY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
reedy.swanson@hoganlovells.com

Counsel for Petitioner

April 2024