

No. 24-958

In the
Supreme Court of the United States

LOUIS CIMINELLI, STEVEN AIELLO, JOSEPH
GERARDI, ALAIN KALOYEROS, also known as Dr. K,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit**

REPLY BRIEF

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REPLY BRIEF

The government's submission only reinforces the urgent need for this Court's review. The government stakes out and defends an extreme position: when a criminal defendant challenging the sufficiency of the evidence against him obtains a ruling from this Court definitively construing the statute of conviction, the sufficiency review on remand should proceed based on the lower courts' misunderstanding of the statute, rather than this Court's correct interpretation. That rule—which gives the government a do-over and saddles the defendant with a second jeopardy, while denying him the benefit of the correct construction that he himself procured—is one that only the government could love. It is also flatly wrong and contradicts two bedrock rules: (1) courts cannot bypass a preserved sufficiency challenge by ordering a new trial without violating the Double Jeopardy Clause, and (2) when this Court construes a statute, it determines what the statute has always meant. Unable to deny either bedrock principle, the government resorts to wordplay, suggesting that a preserved sufficiency challenge becomes a mere trial error when the law is clarified on appeal. That effort conflates two fundamentally different kinds of errors and dilutes the basic promise of the Double Jeopardy Clause. It also makes the remand instructions in *McDonnell v. United States*, 579 U.S. 550 (2016), incoherent and flouts the mandate in this very case. And it deepens a circuit split involving every court of appeals with criminal jurisdiction. The government's contrary arguments are uniformly meritless, and it cannot dispute the importance of the question presented. The Court should grant certiorari.

I. The Second Circuit's Decision Is Egregiously Wrong And Violates This Court's Mandate In *Ciminelli*.

The Second Circuit held below that it could remand this case for a second trial without measuring the sufficiency of the existing trial evidence against the statutory requirements for wire fraud set forth by this Court in *Ciminelli v. United States*, 598 U.S. 306 (2023). That holding is plainly inconsistent with this Court's precedent generally and this Court's mandate in *Ciminelli* specifically. *See* Pet.18-29.

The government does not directly take issue with the proposition that courts cannot simply bypass a preserved sufficiency challenge by ordering a new trial (a.k.a., a second jeopardy). Instead, the government defends the Second Circuit on the theory that the sufficiency of the trial evidence should be measured against "the prevailing legal standard" at the time of the trial—and here, the court below made a correct "finding that the evidence was sufficient under the right-to-control theory" that this Court repudiated (and the Solicitor General refused to defend) in *Ciminelli*. BIO.17, 25. The government acknowledges that this Court determines what a statute has always meant and that a defendant ordinarily gets the benefit of the statutory construction that he has procured, but it nonetheless insists that, when the law is "clarified" by a higher court "post-trial," such legal clarifications transform preserved sufficiency challenges into claims involving "trial errors," which "warrant[] a new trial" and a second chance for the government to present a sufficient case to the jury under the "new" law. BIO.13, 20.

That submission is flawed on every level. It fails first as a matter of logic and language. There is a fundamental difference between sufficiency challenges and trial errors. The former warrant acquittals and are the province of Rule 29. The latter warrant new trials and are the province of Rule 33. And courts are not free to bypass sufficiency challenges and order a new trial, even when the Rule 29 issues are hard and the Rule 33 error is glaring. To the contrary, this Court has taken pains to “distinguish[]” the two and make clear that the former must be addressed to preserve the basic guarantee of the Double Jeopardy Clause. *Burks v. United States*, 437 U.S. 1, 10-11 & n.5, 15 (1978). The government’s conflation of the two undermines that basic guarantee and does violence to the English language by creating a brave new world where there are multiple “sense[s]” of sufficiency review. BIO.16 n.1; *cf. MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227 (1994) (warning that, if the same term is given two contradictory meanings, “it will in fact mean *neither* of those things”).

More fundamentally, the government’s submission misunderstands both sufficiency review and basic principles of retroactivity. Contrary to the government’s repeated mischaracterizations, reviewing courts are *not* supposed to assess the sufficiency of the evidence “standing in the shoes of the jury and applying the same legal standard to the same evidence.” BIO.17 & n.2. This Court’s decision in *Musacchio v. United States*, 577 U.S. 237 (2016), could hardly have made the point clearer: “A reviewing court’s ... determination on sufficiency review ... *does not rest on how the jury was instructed*,” as courts must

examine the evidence against the *correct* “essential elements of the crime.” *Id.* at 243 (emphasis added). The government weakly tries to limit *Musacchio* to its factual posture where an otherwise correct jury instruction “incorrectly add[ed] one more element,” BIO.17 n.2, but nothing in *Musacchio* limited its explication of “sufficiency review” to that narrow context, 577 U.S. at 243. That presumably explains why the government itself could invoke *Musacchio* in this case the last time around, despite the different factual context. *See Ciminelli*.U.S.Br.31

Musacchio thus leaves no doubt that sufficiency review focuses not on the trial court’s instructions, but on the law as definitively construed by this Court. A host of this Court’s precedents confirm that “an appellate court must apply the law in effect at the time it renders its decision.” *Henderson v. United States*, 568 U.S. 266, 269, 271 (2013); *see Griffith v. Kentucky*, 479 U.S. 314 (1987). The government does not dispute this rule, which has governed judicial review “for near a thousand years.” *Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 94 (1993). And it acknowledges that “decisions interpreting the elements of a federal statute are clarifying what the statute *always* meant.” BIO.18 (internal quotation marks omitted).

The government nonetheless bravely insists that these bedrock principles are “no answer” when the meaning of the statute of conviction changes “post-trial” while a sufficiency challenge is pending. BIO.13, 18. Of course, no matter how many times the government talks about the law changing, “it is not accurate to say” that a decision from this Court “finally decid[ing] what [a statute] had *always* meant”

is a “change[]” in the law. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). That admonition applies with particular force here, where the government could not even bring itself to defend the right-to-control theory once it came before this Court. The simple reality is that the law did not change here; the law simply caught up with the government when this Court granted certiorari to consider a Second Circuit rule so out of step with plain meaning and this Court’s caselaw that the Solicitor General declined to defend it. Absent sufficient evidence in the trial record to sustain a conviction under the correct (and conceded) understanding of the law, this case must end.

That is the clear lesson of *McDonnell*’s remand instructions, for which the government has no coherent answer. As in *Ciminelli*, *McDonnell* clarified that a federal criminal statute obligated the government to show more than the lower courts and jury instructions required. *See* 579 U.S. at 567-77. Far from suggesting that the Fourth Circuit should simply order a new trial or refrain from measuring the sufficiency of the trial evidence against the demands of the clarified statute, the Court directed the opposite: If, “in light of the interpretation” of the bribery statute “adopted” in *McDonnell*, the Fourth Circuit “determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an ‘official act,’ his case may be set for a new trial,” but “[i]f the court instead determines that the evidence is insufficient, the charges against him *must be dismissed*.” *Id.* at 580 (emphasis added).

The government does not dispute that the Second Circuit’s decision here is wrong if *McDonnell*’s remand instructions reflect generally applicable principles, rather than one final gratuity to the Governor. The government thus doubles-down on the improbable theory that those remand instructions were just unreasoned “dicta,” not a “constitutional imperative.” BIO.19-20. The government’s refusal to defend the Second Circuit’s “notice”-based rationale for ignoring *McDonnell* underscores the flaws with that reasoning,¹ but the government’s rationale is even less convincing, as it means that this Court affirmatively instructed the Fourth Circuit to commit legal error by evaluating the trial evidence’s sufficiency based on the Court’s clarification of the statute’s demands, rather than on the law as (mis)stated in the jury instructions, as the government would have it.

Recognizing the fundamental problems with ordering a new trial without resolving a preserved sufficiency challenge, the government suggests that the *Ciminelli* Court did not view this case as a “sufficiency-of-the-evidence dispute,” but rather as one involving “instructional error.” BIO.16 n.1, 21. The government is, however, forced to concede that this purported understanding would directly contradict literally every argument pressed by every party in *Ciminelli*, who all agreed that this Court was presented *only* with a sufficiency issue. See BIO.16

¹ The Second Circuit dismissed *McDonnell* as “inapposite” because the government in *McDonnell* “had notice that it needed to adduce evidence of an ‘official act’ at trial.” Pet.App.17 n.4. The government concedes that this reasoning is neither “correct” nor “sound.” BIO.18.

n.1; Pet.11-12. The government posits that the Court “disagree[d]” because it “declined the government’s request to ‘affirm [the] convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory.” BIO.16 n.1, 20. But the government’s own request assumed that, if this Court were to address the sufficiency issue, it would of course apply the law that it just definitively established—*i.e.*, evaluate the trial evidence “under a traditional property-fraud theory.” BIO.20. And the government has yet to articulate a coherent theory why the Second Circuit was not compelled to apply that same standard—rather than its abrogated right-to-control theory—on remand. This Court routinely leaves factbound and case-specific issues for lower courts on remand. Doing so does not make those issues vanish or mean that the lower courts should apply different law on remand, as opposed to the law that the Court just clarified and the law that the government invited this Court to apply in evaluating sufficiency.²

The government attempts to draw support from *Richardson v. United States*, 468 U.S. 317 (1984), *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), and *Lockhart v. Nelson*, 488 U.S. 33 (1988). None advances the ball for the government. *Richardson* simply held that the government may

² This Court’s recent decision in *Thompson v. United States*, 145 S.Ct. 821, 828 (2025), underscores the point: It clarified the meaning of a federal criminal statute, rejected the government’s invitation to affirm the conviction because the evidence supposedly sufficed to satisfy the clarified statutory requirements, and remanded for the Seventh Circuit to resolve the sufficiency issue under the law as this Court construed it.

retry a defendant after a hung jury—not at issue here—and it applied a “settled line of cases” with “its own sources and logic” that have no relevance here. 468 U.S. at 322-24. *Lydon* addressed Massachusetts’ unusual “two-tier” system for trying minor crimes,” which involved a first tier involving “jeopardy” in only a theoretical sense.” 466 U.S. at 296-99, 310. That obviously does not describe petitioners’ first trial here, which sent them to prison, the ultimate “jeopardy.” And *Lockhart* held only that “a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible,” even when the court “erroneously admitted” evidence. 488 U.S. at 40-41. Petitioners have never argued otherwise: They welcome consideration of all the evidence admitted at trial, as it all fails under a traditional property-fraud theory, which is no accident given the government’s deliberate abandonment of such a theory in favor of the easier path offered by the misguided right-to-control theory.

That deliberate choice belies the government’s protests of the supposed injustice of holding it to a standard that it “did not know it had to satisfy.” BIO.15. Regardless, the government’s concern about fairness to the prosecution is hardly the animating force behind the Double Jeopardy Clause, which “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” *Burks*, 437 U.S. at 11. That perfectly describes what the government seeks here. There is nothing unfair about denying the government a “second bite at the apple,” *id.* at 17, especially when it tactically narrowed its indictment. To the contrary, prohibiting the

government from obtaining that windfall opportunity is the *raison d'être* of the Double Jeopardy Clause.

II. The Decision Below Entrenches An Acknowledged Circuit Split.

The government next asserts that the decision below “does not conflict with any decision ... of any other court of appeals.” BIO.10. In reality, there is a clear conflict on the critical question whether resolving preserved sufficiency challenges before ordering a new trial is mandatory. *See* Pet.29-33. The government never denies that or (beyond conflating sufficiency and trial errors) really defends the approach of five circuits that view bypassing a sufficiency challenge as a discretionary option that does not offend the Double Jeopardy Clause. Moreover, on the question whether the sufficiency challenge should proceed under the law as clarified by this Court or under the law on which the jury was (mis)instructed, there is a clear conflict between the D.C. and Second Circuits. The D.C. Circuit has determined that sufficiency review is mandatory, *see* Pet.30, and should occur under the law as clarified on appeal, *see United States v. Barrow*, 109 F.4th 521 (D.C. Cir. 2024).

There is no denying what *Barrow* held or that its holding is well-nigh the opposite of what the Second Circuit held below, and the government does not pretend otherwise. Instead, the government suggests that it might have invited the *Barrow* court’s error by failing to “request the opportunity to retry the defendant.” BIO.24. But the government’s restraint presumably was not some unforced error, but a byproduct of the same impulse that caused it to ask

this Court to evaluate the sufficiency of the evidence “under a traditional property-fraud theory,” BIO.20—namely, that even the government recognizes that it would be absurd to tell a court to evaluate sufficiency based on the legal error that the court just corrected. The government also tries to dismiss *Barrow* as an “intracircuit conflict” with *United States v. Reynoso*, 38 F.4th 1083 (D.C. Cir. 2022). But the *Barrow* court begged to differ and expressly distinguished *Reynoso* as involving a missing-element dynamic not present in *Barrow* or here. 109 F.4th at 527 n.3. Thus, the conflict between the D.C. Circuit and the Second Circuit is square and *inter-circuit*—*i.e.*, exactly the sort of conflict that warrants this Court’s intervention, *see* S. Ct. R. 10(a).

III. The Question Presented Is Vitally Important And Warrants Review Now.

The double-jeopardy issue in this case is “vitally important.” *Yeager v. United States*, 557 U.S. 110, 117 (2009); *see* Pet.33-35. The government suggests that this Court has declined to review this issue in the past. *See* BIO.10. But all those prior efforts pre-dated both *McDonnell* and *Barrow*, which together underscore that the decision below conflicts with this Court’s instructions and implicates a clear circuit split. Indeed, some pre-*McDonnell* courts acknowledged that it was “[o]dd[]” that appellate courts performing sufficiency review should apply the “wrong” law. *United States v. Houston*, 792 F.3d 663, 670 (6th Cir. 2015). *McDonnell* subsequently confirmed that it is not just odd but wrong.

Unable to deny the critical importance of getting double-jeopardy principles correct, the government

raises “two” “vehicle” problems. BIO.10, 25. Neither detracts from this case being an ideal vehicle to clarify that resolving sufficiency challenges is not optional and that they need to be resolved under the law set forth by this Court.

The first alleged vehicle problem is that the Second Circuit had an “understanding” from *Ciminelli* that it could not “evaluate the sufficiency of the existing trial evidence against a legal standard that was not expressly presented to the jury.” BIO.26. If true, that is just another way of saying that the court below misinterpreted *Ciminelli*, which is all the *more* reason to grant certiorari. See S. Ct. R. 10(c).

The other supposed vehicle problem is that the government clings to the view that it would inevitably win if a court evaluates the trial evidence “against a traditional theory of property fraud.” BIO.27. That seems like wishful thinking given that the government went out of its way to amend the indictment to abandon a traditional property-rights theory. See *Ciminelli*, 598 U.S. at 310 n.1. But, in all events, that is the precise question that the Second Circuit should have addressed on remand and concededly bypassed. That makes this the perfect vehicle for the Court to make clear that sufficiency review of the evidence in the trial record under the law as clarified by this Court is not optional. It is commanded by the Double Jeopardy Clause; it was expressly required by the remand instructions in *McDonnell*; and it was implicitly required by the mandate in this very case. Whether by plenary review or summary reversal, this Court should make clear once and for all that such review is indeed a

“constitutional imperative.” If the government is confident that it can satisfy that standard, it can make its argument to the Second Circuit on remand. But the Double Jeopardy Clause does not allow the government to get a second bite at the apple without showing that it marshaled sufficient evidence in its first effort to satisfy the law as clarified by this Court in *Ciminelli*. The Second Circuit allowed the government to do exactly what the Double Jeopardy Clause forbids. This Court’s review is imperative.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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