No. 25-407

In the Supreme Court of the United States

SCOTT BREIMEISTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in rejecting petitioner's claim that the Double Jeopardy Clause barred a retrial, erred both in finding that petitioner impliedly consented to a mistrial, and in finding that in any event the mistrial was permissibly based on manifest necessity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is published at 133 F.4th 496. The order of the district court (Pet. App. 20a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2025. A petition for rehearing was denied on May 5, 2025 (Pet. App. 26a-27a). On July 29, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 2, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the United States District Court for the Southern District of Texas returned a superseding indictment charging petitioner with one count of conspiring to commit mail, wire, and healthcare

fraud, in violation of 18 U.S.C. 1349; three counts of wire fraud, in violation of 18 U.S.C. 1343; and six counts of healthcare fraud, in violation of 18 U.S.C. 1347. Superseding Indictment 13-18. During the government's case-in-chief, the district court declared a mistrial. Pet. App. 2a, 6a. Petitioner later moved to bar a retrial under the Double Jeopardy Clause. *Id.* at 6a. The district court denied the motion. *Id.* at 20a-25a. On petitioner's interlocutory appeal, the court of appeals affirmed. *Id.* at 1a-19a.

1. In October 2019, a federal grand jury in the Southern District of Texas returned a superseding indictment against petitioner and four co-defendants on conspiracy and fraud charges. See Superseding Indictment 1-24. The indictment detailed petitioner's participation in a conspiracy to defraud healthcare benefit programs by submitting claims for prescriptions that were medically unnecessary and/or procured through unlawful kickbacks. *Id.* at 9-18. The government alleged that the conspirators defrauded the programs of more than $140 million and that petitioner personally secured more than $12 million in profit from the scheme. Pet. App. 2a; Gov't C.A. Br. 4-8.

Petitioner and his co-defendants proceeded to trial. Pet. App. 2a. The government presented 21 witnesses and numerous exhibits over the course of five weeks. *Ibid.* In the fifth week of trial, the government presented testimony from a forensic accountant as a (non-expert) summary witness. *Id.* at 2a-3a. The forensic accountant introduced summary charts that he had prepared based on underlying records from banks and payroll companies. *Ibid.* During cross-examination, questions arose regarding the forensic accountant's pro-

cesses and sources for creating those summary charts. *Ibid.*

Although the government had previously provided the defense with redacted versions of the accountant's personal notes, the district court ordered the government to provide the defense with unredacted versions. Pet. App. 3a. After continued cross-examination, the defendants moved to strike the accountant's testimony and associated exhibits based on inconsistencies between the accountant's testimony and his unredacted notes. *Ibid.* The district court granted the motion in part, striking some of the exhibits and related testimony. *Ibid.*

The district court then ordered the government to review its files and ensure that all notes and written records related to government witnesses had been turned over to the defense. Pet. App. 4a. Upon conducting such a review, the government discovered that several typewritten interview reports and handwritten interview notes involving government witnesses had mistakenly not yet been provided to the defense and turned them over. *Ibid.*

At a hearing outside the jury's presence, the district court discussed various potential remedies it was considering for the nondisclosure—including striking witness testimony, allowing the defendants to recall witnesses, or declaring a mistrial. Pet. App. 4a. The court ordered the government to complete its ongoing review and make any additional disclosures by later that evening, and it ordered the defendants to submit filings detailing the effect of the newly produced materials by the following morning. *Ibid.*

Petitioner subsequently submitted (among other things) an *ex parte* filing in which he "stated that he 'op-

posed a mistrial'" "'unless one or more of the following' occurred," one of which was if "the court made a finding that it was forced to order a mistrial *sua sponte* solely because of the Government's misconduct and not at [petitioner]'s request." Pet. App. 5a (brackets omitted). For its part, the government offered alternatives to a mistrial. *Id.* at 6a.

The following morning, the parties and the district court reconvened outside the jury's presence. Pet. App. 6a. The court explained that it had "come to the heavy decision that justice requires a mistrial," and that while the court "could invite additional comment," the court was "not sure it would alter" that determination. 12/13/22 Tr. 7, 12. The court described the "wide-ranging" impact of the errors on the testimony and evidence in detail, see *id.* at 7-12, observing that the mid-trial discovery productions affected at least 6 of the 21 witnesses called up to that point, and an even greater proportion of the overall testimony, see *id.* at 9.

The district court also considered other alternatives, including striking prior witness testimony, but determined that such measures would impose "a burden too heavy for this jury." 12/13/22 Tr. 12. "[T]aking as a whole all of the disclosures, the wide-ranging impact, the surgery that would be required to the testimony and the exhibits that would ultimately be before this jury," the "Court's opinion" was that the errors had "the real possibility of altering the outcome of this trial" and therefore "[a] just result would be in jeopardy." *Id.* at 12-13.

The district court emphasized that it had considered the parties' motions and that its declaration was "the decision of the Court not on motion of any particular defendant." 12/13/22 Tr. 12. And the court made clear

that its decision was based on the government's failure to disclose documents earlier, while noting that it had not yet made any "finding one way or the other" on whether the government's disclosure failures "were simple omissions or intentional." *Id.* at 11-12. No party objected, and the court took a brief recess. Pet. App. 6a.

After the recess, and before calling the jury back in, the district court invited the parties to offer argument. See 12/13/22 Tr. 14. The court asked: "Counsel for the defense, anything before we bring the jury in?" *Ibid.* Counsel for one of petitioner's co-defendants answered, "No, Your Honor." *Ibid.* No one else, including petitioner or his counsel, said anything. See *ibid.* The court brought the jury back in, explained the mistrial and its view that continued trial would not lead to "a just verdict," and excused the jurors from their service. *Id.* at 17-18; see Pet. App. 6a.

2. Three months later, petitioner moved to bar a retrial on double-jeopardy grounds. See Pet. App. 6a, 28a-29a. The district court initially denied the motion without a hearing, but it later granted petitioner's motion for reconsideration, held a hearing, and issued a written order denying petitioner's motion. *Id.* at 6a-7a; see *id.* at 20a-25a.

The district court emphasized that "[b]efore declaring a mistrial, [it] carefully and weightily considered every possible alternative," but that the "potential consequences were too heavy a burden for the jury to shoulder with the expectation that it would or could reach a fair and just result." Pet. App. 22a-23a. And the court explained that because "[a]ny verdict would have been looked upon as askew," the "declaration of a mistrial was a 'manifest necessity.'" *Id.* at 23a.

The district court additionally found, "[b]ased on the Court's own review and the results of the Government's own investigation into its trial team's actions," that "the prosecutors did not withhold the legally required * * * disclosures with nefarious intent or motive." Pet. App. 24a. The court accordingly cautioned that, while it was declining to find a retrial barred, it had "yet to make its final determination about what sanction(s) will be appropriate for the retrying of this case." *Id.* at 25a.

3. Petitioner filed an interlocutory appeal. Pet. App. 2a. The court of appeals unanimously affirmed on two independent grounds. *Id.* at 1a-19a.

First, the court of appeals found that petitioner had impliedly consented to the mistrial, "thereby forfeiting his double jeopardy claim." Pet. App. 9a-14a. The court explained that "[i]f a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later proceeding." *Id.* at 9a (quoting *United States* v. *Palmer*, 122 F.3d 215, 218 (5th Cir. 1997)). And it observed that in this case, "the district court gave the parties an opportunity to be heard before calling in the jury," but "[n]o party"—including petitioner—"objected." *Id.* at 10a n.1.

The court of appeals acknowledged that petitioner's filing in advance of the mistrial order, in which petitioner had conditionally objected to a mistrial, did not need to be "renew[ed]" after the order itself. Pet. App. 10a. But the court emphasized that petitioner's filing "stated that he would consent to a mistrial if 'the [c]ourt ma[de] a finding that it was forced to order a mistrial *sua sponte* solely because of the Government's misconduct and not at [petitioner]'s request.'" *Id.* at 11a (first

and second brackets in original). And the court found that "even viewing the record in [petitioner]'s favor," it was "at best unclear whether the district court satisfied [petitioner]'s stated condition." *Id.* at 12a.

Second, the court of appeals found that even if petitioner had "clearly objected to the mistrial ordered by the district court," the district court "did not abuse its discretion in declaring a mistrial due to 'manifest necessity,'" thereby permitting a retrial. Pet. App. 14a (citing, *inter alia*, *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978)). The court noted that the "standard of review" to determine manifest necessity for a mistrial without the defendant's consent "is not static and varies depending on the cause of the mistrial." *Id.* at 15a (citation and internal quotation marks omitted). And it found that the appropriate standard here lay between the two "end[s] of the spectrum" of review standards. *Ibid.*; see *id.* at 16a.

Quoting this Court's decision in *Washington*, the court of appeals recognized that this Court has instructed that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." Pet. App. 15a (quoting *Washington*, 434 U.S. at 508). The court then observed that "[a]t the other end" of the spectrum, "'broad deference is appropriate where a trial judge declares a mistrial due to jury bias or deadlock.'" *Ibid.* (citation omitted).

The court of appeals reasoned that "unintentional discovery-related lapses * * * merit more scrutiny than the 'broad deference' afforded trial courts in juror-bias or jury-deadlock cases," but also "more deferential

treatment than the 'strictest scrutiny,'" given the district court's finding that "the mistrial was not 'brought about in bad faith for tactical reasons.'" Pet. App. 16a-17a (bracket, citations, and ellipsis omitted). The court also noted that this was not a case in which "a prosecutor proceeded to trial aware that key witnesses were not available to give testimony." *Id.* at 17a (quoting *Washington*, 434 U.S. at 508 n.24) (brackets omitted).

The court of appeals then explained that "[w]herever we might precisely plot this case along our standard-of-review spectrum, the ultimate inquiry is whether the trial judge exercised sound discretion in declaring a mistrial." Pet. App. 17a (citation and internal quotation marks omitted). And the court of appeals found that the district court—which had "'carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner'"—"acted within its discretion in declaring a mistrial due to 'manifest necessity.'" *Ibid.* (citation omitted).

The court of appeals observed that "[o]ver several days, mid-trial, the district court conferred with counsel, requested and reviewed briefing, and heard argument regarding potential remedies that might have allowed the trial to proceed to verdict," and it "found that no alternative was likely to result in a fair verdict and declared a mistrial due to manifest necessity." Pet. App. 19a. Accordingly, the court of appeals determined that the district court's "decision was not an abuse of discretion." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-16) that the court of appeals erred in finding that he impliedly consented to a mistrial under the facts of this case. He further contends (Pet. 14-16) that the factual circumstances in this

case required the strictest scrutiny of the district court's finding of manifest necessity for a mistrial. The court of appeals' fact-intensive resolution of each issue—both of which would need to be decided in petitioner's favor for him to be entitled to relief in this Court—is correct, does not conflict with any decision of this Court, and does not implicate any conflict in the courts of appeals. This case is also a poor vehicle for consideration of either issue. The petition for a writ of certiorari should be denied.

1. The court of appeals' determination that petitioner's consent to a mistrial can be inferred from the record is correct and does not warrant further review.

a. The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The "Clause protects against being tried twice for the same offense." *Blueford* v. *Arkansas*, 566 U.S. 599, 601 (2012). It "does not, however, bar a second trial if the first ended in a mistrial," *ibid.*, where either the defendant consents to a mistrial or there was a manifest necessity underlying the declaration of a mistrial, see *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982); *United States* v. *Dinitz*, 424 U.S. 600, 607 (1976).

Petitioner does not dispute the general proposition that a defendant's consent to a mistrial may be express (such as by motion), see *Kennedy*, 456 U.S. at 672-673, or it may be inferred from the circumstances, such as where a defendant who is aware of the possibility of a mistrial declaration fails to object to dismissal of the jury despite an opportunity to do so. See, *e.g.*, *United States* v. *Ham*, 58 F.3d 78, 83-84 (4th Cir.), cert. denied, 516 U.S. 986 (1995); *United States* v. *DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991). And the courts of appeals have

consistently held that a defendant's consent may be inferred when the defendant has an opportunity to object to the declaration of a mistrial but fails to do so. See, *e.g.*, *United States* v. *Nichols*, 977 F.2d 972, 974-975 (5th Cir. 1992) (per curiam), cert. denied, 510 U.S. 833 (1993); *DiPietro*, 936 F.2d at 9-12; *Camden* v. *Circuit Court of the Second Jud. Cir.*, 892 F.2d 610, 614-618 (7th Cir. 1989), cert. denied, 495 U.S. 921 (1990); *United States* v. *Puleo*, 817 F.2d 702, 705 (11th Cir.), cert. denied, 484 U.S. 978 (1987).

Here, the court of appeals permissibly found that petitioner's consent to the mistrial could be inferred from the record. See Pet. App. 9a-12a. Petitioner filed a motion lodging an overarching objection to mistrial but delineating several scenarios in which he would consent. See *id.* at 5a. Under one of the listed scenarios, petitioner stated that he would consent if the court "ma[de] a finding that it was forced to order a mistrial *sua sponte* solely because of the Government's misconduct and not at [petitioner]'s request." *Ibid.* (first brackets in original).

The district court then declared a mistrial based on the government's failure to disclose information to petitioner and expressly stated that the mistrial was "the decision of the Court not on motion of any particular defendant." 12/13/22 Tr. 12. And when the district court expressly asked "Counsel for the defense" whether they had "anything" to raise before the court dismissed the jury, a co-defendant's counsel answered "No," and neither petitioner nor his counsel said anything. *Id.* at 14.

As the court of appeals recognized (Pet. App. 10a-12a), under that particular combination of circumstances —consent under a condition that the district court's order appeared to satisfy, followed by the absence of any

objection to that order—petitioner's consent could be inferred. Although the court of appeals focused on "implied consent," its decision did not rest on the absence of objection alone, but instead circumstances that included express consent under a condition that the order appeared to track.

b. Petitioner argues (Pet. 10) that the decision below conflicts with this Court's statement in *Downum* v. *United States*, 372 U.S. 734 (1963), that it would "resolve any doubt 'in favor of the liberty of the citizen,'" *id.* at 738. *Downum* made that statement in the course of deciding whether the Double Jeopardy Clause should bar reprosecution when the prosecution failed to ensure the appearance of an essential witness, not with respect to any determination about a defendant's consent to a mistrial. *Id.* at 737. But in all events, the court of appeals explained that petitioner's consent was apparent in the record even when "viewing the record in [petitioner]'s favor," Pet. App. 12a, and that factbound conclusion does not warrant this Court's review.

Petitioner is similarly mistaken in arguing (Pet. 12-13 & n.4) that the decision below conflicts with *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and Federal Rule of Criminal Procedure 26.3 by requiring repeated objections. In *Douglas*, the Court stated that "[n]o legitimate state interest" existed in "requiring repetition of a patently futile objection, already thrice rejected," where repetition "might well affront the court or prejudice the jury beyond repair." 380 U.S. at 422. But in this case, the court of appeals did not require any repetition of futile objections before the jury—or, indeed, any repetition at all.

Instead, the court of appeals expressly recognized that, "once [petitioner] filed his written objection, he did

not need to renew that objection in open court." Pet. App. 10a. The court of appeals simply applied "the general principle"—stated in *Douglas* itself—"that an objection" is "sufficient" only when it "bring[s] the alleged federal error to the attention of the trial court and enable[s] it to take appropriate corrective action," *Douglas*, 380 U.S. at 422. See Pet. App. 12a. And it found petitioner's conditional objection did not satisfy that standard, in circumstances where the district court's order closely tracked a condition under which petitioner had indicated that he would, in fact, consent to a mistrial. See *ibid.*

Petitioner's other factbound arguments are likewise misplaced. Petitioner argues (Pet. 10) that his objection clearly covered the district court's order because the relevant condition required a finding of "misconduct" that, in petitioner's view, the district court "expressly refused" to make when it postponed a decision on whether the government's errors were intentional. But as the court of appeals explained, "misconduct" encompasses unintentional misconduct (such as gross negligence), such that his reference to "misconduct" failed to limit his consent in the manner he now asserts. See Pet. App. 11a n.2. As the court of appeals noted, that is particularly clear because petitioner's motion listed "a finding" of certain "intentional[]" violations as a *separate* scenario in which he would consent even without a statement that the court declared a mistrial on its own motion. *Id.* at 5a.[1]

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[1] Petitioner observes (Pet. 10 n.3) that, in later opposing petitioner's motion for a sanction authorizing depositions of witnesses, the government argued that the district court had not identified "misconduct," D. Ct. Doc. 397, at 5 (Jan. 6, 2023). But in context,

Petitioner also errs in viewing (Pet. 12-13) the district court's statement that it "could invite additional comment" but was "not sure [argument] would alter" its decision to declare a mistrial in the interest of justice, 12/13/22 Tr. 7, as dispensing with any need to object or clarify his position. Nothing the district court said would indicate its awareness that it was not satisfying a condition for petitioner's consent; in addition, the court later expressly invited objections. See *id.* at 12. Petitioner is also wrong (Pet. 13) in reading the district court's statement that petitioner's motion to bar a retrial met the minimal threshold of "not" being "frivolous" as constituting an "implied finding" that he opposed the mistrial declaration. The district court initially denied petitioner's motion to bar a retrial summarily, see Pet. App. 6a-7a, and its statement of non-frivolousness is properly understood as a reference to the alternative ground (aside from consent) on which it rested its rejection of petitioner's double-jeopardy argument.

c. Petitioner asserts (Pet. 9-10) that the court of appeals' decision conflicts with "the Third, Sixth, and Ninth Circuits." But each of those circuits has long recognized that a defendant's consent to a mistrial can be inferred from the record when he declines to object despite an opportunity to do so.

The Sixth Circuit has recognized that a defendant's "failure to object to a mistrial can be construed as a

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the government was stating that the district court had not identified "intentional" misconduct that would warrant that sanction. See *id.* at 2. And petitioner's own motion to bar retrial stated that the district court "declared a mistrial *sua sponte* because of multiple instances of governmental misconduct." D. Ct. Doc. 428, at 1 (Mar. 22, 2023).

'positive indication' of his consent to a mistrial" under "the totality of the circumstances." *United States* v. *Gantley*, 172 F.3d 422, 428 (1999); see *id.* at 429 ("Because simple silence can be a positive indication of consent to a mistrial in some circumstances, [a defendant] cannot avoid implication of consent merely by noting he did not expressly consent; his absence of explicit assent must be examined in light of all the circumstances surrounding it."). Thus, the Sixth Circuit has expressly made clear that its "test for whether a defendant has impliedly consented to a mistrial is not materially different from the test used by other Circuits." *Id.* at 428.

Similarly, the Ninth Circuit has repeatedly observed that it will find implied consent where the "district court provided [the defendant] with ample opportunity to object to the mistrial" and the defendant did not do so. *United States* v. *You*, 382 F.3d 958, 965 (2004), cert. denied, 543 U.S. 1076 (2005); *Stanley* v. *Biter*, No. 21-55371, 2023 WL 2325540, at *1 (Mar. 2, 2023) ("[W]here the trial court makes clear its intent to declare a mistrial and provides 'ample opportunity to object to the mistrial,' but defense counsel raises no objection, our court has found implied consent.") (citation omitted), cert. denied, 144 S. Ct. 188 (2023); *United States* v. *Smith*, 621 F.2d 350, 352 (1980) ("Defense counsel did not object to the order of mistrial, despite adequate opportunity to do so. Indeed, we find that he impliedly consented to the mistrial."), cert. denied, 449 U.S. 1087 (1981).

The Third Circuit has likewise repeatedly recognized that consent may be implied from silence so long as there was a meaningful "opportunity to object." *Love* v. *Morton*, 112 F.3d 131, 138 (1997); see, *e.g.*, *United States* v. *Allick*, 386 Fed. Appx. 100, 104 (3d Cir. 2010)

("[W]e held that a defendant's failure to object to a court's mistrial declaration may constitute implied consent to the mistrial, but that 'we will not infer consent from defense counsel's silence unless there was some opportunity to object.'") (citation omitted), cert. denied, 562 U.S. 1182 (2011); *United States* v. *Brewley*, 382 Fed. Appx. 232, 237 (3d Cir. 2010) (similar).[2]

Courts are therefore in broad agreement that a failure to object after an opportunity to do so can indicate implied consent depending on the facts. See p. 10, *supra*. When "courts have held that the failure to object did not foreclose a good double jeopardy plea"—including in the decisions on which petitioner relies for his claim of a circuit conflict, see Pet. 9—"they have generally done so" based on facts indicating that "there was no opportunity to object." *DiPietro*, 936 F.2d at 10-11 & n.25 (citing cases); see, *e.g.*, *Glover* v. *McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991) (noting that the mistrial declaration was abrupt and not "even mentioned" as a "potential course of action by the court"); *Weston* v. *Kernan*, 50 F.3d 633, 637 (9th Cir.) (defense counsel made "immediate and repeated objections" and therefore it was "not a case where a defendant impliedly consented to the

[2] In a footnote, petitioner erroneously relies (Pet. 9 n.2) on an American Law Reports entry stating that "a split in the law" exists on formulating the test for consent, Aaron L. Weisman, Annotation, *What Constitutes Accused's Consent to Court's Discharge of Jury or to Grant of Motion for Mistrial Which Will Constitute Waiver of Former Jeopardy Plea—Silence or Failure to Object or Protest*, 103 A.L.R. 137 § I.2 (6th series 2015). That entry describes variations in state court and federal circuits' descriptions of the test to determine implied consent, but explains that, under all tests, courts have found that the "defendant's silence or failure to object" can constitute implied consent, depending on the "particular facts before" the court. *Ibid.*

mistrial because he had the opportunity to object to a mistrial declared *sua sponte* but failed to do so"), cert. denied, 516 U.S. 937 (1995); *Love*, 112 F.3d at 138 (explaining that the court "will not infer consent from defense counsel's silence unless there was some opportunity to object," and concluding that the defendant in that case "did not have a meaningful opportunity to object").[3]

In any event, even if some material difference existed between different courts' descriptions of their test to assess implied consent and the approach that the court of appeals followed here (Pet. 10), petitioner has not identified any court that would have reached a different conclusion on the facts of this case. As noted above, petitioner's indications of affirmative consent in circumstances that, at a minimum, closely track the mistrial order that the district court ordered bring this case much closer to explicit consent than most "implied consent" cases.

2. The court of appeals' alternative and independent reason for rejecting petitioner's double-jeopardy

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[3] Petitioner's amicus likewise identifies no conflict in authority that is implicated in this case. See NACDL Br. 8-11. The differences in cases on which amicus relies result from different facts, not any difference in the legal standards applied. See, *e.g.*, *United States* v. *Gaytan*, 115 F.3d 737, 743 (9th Cir. 1997) (defendants had "no opportunity" to "decide" on their position as to a mistrial); *Lovinger* v. *Circuit Court*, 845 F.2d 739, 744 (7th Cir.) (defendant's "earlier objection and mistrial motion" did not constitute consent to the trial judge's substantially later declaration of a mistrial because the defense's "assessment * * * may well have changed in the interim"), cert. denied, 488 U.S. 851 (1988); *United States* v. *Mastrangelo*, 662 F.2d 946, 950 (2d Cir. 1981) (defense had "for all practical purposes" withdrawn a prior mistrial motion), cert. denied, 456 U.S. 973 (1982).

claim—namely, its determination that the district court did not abuse its discretion in finding manifest necessity for a mistrial, Pet. App. 14a-19a—was likewise correct and does not warrant this Court's review.

a. The Double Jeopardy Clause does not bar a retrial over the defendant's objection when the trial court declares a mistrial due to a "manifest necessity"—that is, because "the ends of public justice would * * * be defeated" by continuing the trial. *Arizona* v. *Washington*, 434 U.S. 497, 506 n.18 (1978) (quoting *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Gori* v. *United States*, 367 U.S. 364, 368 (1961). Moreover, because the trial judge is the "most familiar with the evidence and the background of the case on trial," his decision to declare a mistrial is entitled to "great deference," and is not subject to reversal on appeal unless he acts "irrationally or irresponsibly." *Washington*, 434 U.S. at 514.

This Court has explained that the "manifest necessity" standard is not to be "applied mechanically." *Washington*, 434 U.S. at 506 & n.18. Instead, courts must pay careful "attention" to the "spectrum of trial problems" that may give rise to a mistrial and that "vary in their amenability to appellate scrutiny." *Id.* at 506, 510. "At one extreme," this Court has stated that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the

prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Id.* at 507-508. "At the other extreme" are cases where "the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict." *Id.* at 509. In such cases, appellate courts must "allow[] the trial judge to exercise broad discretion" due to the risk of "frustrat[ing] the public interest in just judgments." *Id.* at 509-510. And regardless of the level of "deference" accorded to a trial court, "reviewing courts have an obligation to satisfy themselves that * * * the trial judge exercised 'sound discretion' in declaring a mistrial" and did not "act[] irrationally or irresponsibly." *Id.* at 514.

Thus, in *Washington*, this Court concluded that "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument" (there, defense counsel's opening statement) "is entitled to great deference." 434 U.S. at 514; see *id.* at 499. In such cases, "compelling institutional considerations militat[e] in favor of appellate deference" because the trial judge "has seen and heard the jurors during their *voir dire* examination," is "most familiar with the evidence," "has listened to the tone of the argument as it was delivered," and "has observed the apparent reaction of the jurors." *Id.* at 513-514. The trial court is therefore "far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be." *Id.* at 514.

b. The decision below closely tracked those principles. See Pet. App. 14a-19a. The court of appeals reasoned that the cause of the mistrial here—the effect on the jury caused by the government's "unintentional discovery-related lapses"—"merits more scrutiny than

the 'broad deference' afforded trial courts in juror-bias or jury-deadlock cases." *Id.* at 16a. At the same time, the court reasoned that "the district court's manifest-necessity finding is entitled to more deferential treatment than the 'strictest scrutiny' because, as the district court found, the mistrial was not" caused by prosecutorial "'bad faith for tactical reasons.'" *Id.* at 16a-17a (citation omitted). As the court of appeals recognized, this is not a case where a mistrial was "declared because 'a prosecutor proceeded to trial aware that key witnesses were not available to give testimony, thereby giving the prosecutor a 'trial run of his case.'" *Id.* at 17a (quoting *Washington*, 434 U.S. at 508 n.24) (brackets omitted).

The court of appeals' measured approach is consistent with this Court's decision in *Washington*. The district court's finding in this case that other remedial measures would pose "too heavy" a burden for the jury, Pet. App. 6a, is analogous to determinations about "the prejudicial impact" of improper argument, which *Washington* held must receive even greater "deference" on appeal, 434 U.S. at 514. As in determinations about juror bias, the district court's analysis about the effect on the jury in this case focused on matters that are peculiarly within the expertise of the district court, and "taking as a whole all of the disclosures, the wide-ranging impact, the surgery that would be required to the testimony and the exhibits that would ultimately be before this jury," the court repeatedly explained its view that continuing the trial would not result in "a just verdict." 12/13/22 Tr. 12-13, 17-18; see, *e.g.*, *id.* at 7-12 (describing in detail the "wide-ranging" effect of the errors on the testimony the jury heard); *id.* at 12 ("justice requires a mistrial"); *id.* at 12-13 ("A just result would be in jeopardy"); *id.* at 17 ("The taint of the testimony and the ex-

hibits, I believe, is too great for you to ignore. I believe that the impact that these witnesses have had on the trial * * * would be too great to result in a just verdict."); *id.* at 17-18 ("I do not believe a just verdict could result."); *id.* at 18 ("[G]iven the fact that these defendants that remain are due due process in this courtroom, I could not have justice injured in that way.").

c. Petitioner argues (Pet. 14-15) that the court of appeals should have applied the "strictest scrutiny" because the government's inadvertent errors caused the mistrial. And he further contends that the court of appeals' reliance on a lack of "'bad faith'" "conflated" the manifest-necessity inquiry with the "'intentional goading' test" that is used to determine whether the prosecution goaded a defendant into requesting a mistrial. See Pet. 15 (citing *Kennedy*, 456 U.S. 667). But as this Court has explained, the strictest scrutiny of a trial judge's manifest necessity finding is reserved not for all cases in which the government caused the mistrial, but for "cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence" or otherwise engages in "'bad-faith conduct'" designed "to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 507-508 (citation omitted). The court of appeals expressly applied that lesson from *Washington*. See Pet. App. 15a & n.4, 17a.

Petitioner further argues (Pet. 8) that, as a matter of "constitutional policy," courts should not allow the prosecution to "engage in misconduct serious enough to trigger a mistrial *sua sponte*" and get a "second bite at the apple." But the court of appeals' decision addresses "inadvertent" prosecutorial errors, Pet. App. 16a, and permits a trial court to impose other sanctions short of barring retrial—as the district court indicated that it was

considering in this case, see *id.* at 25a. More fundamentally, petitioner fails to acknowledge the district court's obligation to vindicate "the public interest in just judgments," *Washington*, 434 U.S. at 510; accord *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). Even if petitioner was willing to take the gamble on an unjust verdict, "[n]either party has a right to have his case decided by a jury which may be tainted by bias." *Washington*, 434 U.S. at 516; contra NACDL Br. 18.

d. The court of appeals' circumstance-dependent decision regarding how much deference to give the district court's assessment in this case does not warrant further review. Petitioner does not identify any conflict with any decision of another court of appeals. See Pet. 14-16. And to the extent that he suggests (Pet. 15) that the court of appeals departed from its own prior precedent, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[4]

3. At all events, this case would be a poor vehicle to address either of the questions presented for additional reasons. As an initial matter, the court of appeals' two separate determinations—that petitioner impliedly consented to a mistrial, and that the district court did not abuse its discretion in finding that manifest neces-

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[4] Petitioner's amicus likewise does not argue that any conflict of authority exists, and the decisions cited by amicus (NACDL Br. 19) do not show one. One of those cases states only that strict scrutiny of a manifest necessity determination is not limited to cases of "intentional goading" of a defendant to seek a mistrial, see *Walker* v. *United States*, 317 A.3d 388, 409 n.13 (D.C. 2024); the decision below did not hold otherwise. And another merely listed the factors for a determination of "manifest necessity," and was not thereby addressing when the strictest scrutiny should apply. See *Walck* v. *Edmundson*, 472 F.3d 1227, 1236 & n.5 (10th Cir. 2007).

sity existed regardless of petitioner's consent—are alternative grounds that independently support the court of appeals' judgment. Accordingly, this Court would need to review, and petitioner would need to prevail on, both issues before petitioner could have a chance at relief.

Moreover, even if petitioner were to prevail on both of those issues and obtain the requested relief of a "remand" for the court of appeals to apply "strict scrutiny" to the district court's finding of manifest necessity, see Pet. i, 16, it is far from clear that the result would change. The court of appeals determined that the district court "acted within its discretion" regardless of where the court of appeals "precisely plot[ted] this case along [the] standard-of-review spectrum." Pet. App. 17a. Although the court of appeals declined to apply "the 'strictest scrutiny,'" *id.* at 16a (citation omitted), its review appears to have encompassed a level of scrutiny close enough to that extreme as to render any change in outcome from the requested remand doubtful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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