No. 25-407

IN THE

Supreme Court of the United States

SCOTT BREIMEISTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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The government concedes that no controlling authority exists on the question of implied consent. Nor does it dispute that the circuits are split on how to determine implied consent. The main thrust of its argument is that the proceedings below were "close[]" enough. Opp. 12. It argues that the circuits' tests on implied consent are close enough; that the district court's interpretation of Mr. Breimeister's intentions was close enough; and that—despite prosecutorial error—deference to the district court's decision to declare a mistrial is warranted because it was close enough to a manifest necessity. But "close" is not enough.

I. AN ENTRENCHED, RECURRING CIRCUIT SPLIT EXISTS.

The government argues that the circuits broadly agree that failing to object to a mistrial, when given the opportunity, can constitute implied consent. But the relevant question is not whether failure to object given the opportunity *can* constitute implied consent. The split concerns what evidence to consider and how to weigh the factors in that determination. Five circuits treat the question as a threshold inquiry in which a missed opportunity is sufficient to establish implied consent. By contrast, the Third, Sixth, and Ninth use a balancing inquiry, requiring a defendant's greater manifestation of positive assent to the declaration of a mistrial and weighing the failure to object against other considerations, such as the values supporting double jeopardy, the cause of the mistrial, and procedural fairness. The government's efforts to recast these holdings fail.

Beginning with the Ninth Circuit, the government relies on *Stanley* v. *Biter*, which sets up an opportunity-based analysis. *Stanley* v. *Biter*, No. 21-55371, 2023 WL 2325540, at *1 (9th Cir. Mar. 2, 2023); Opp. 14. But *Stanley* is a fact-bound habeas case, rather than a direct appeal. This Court has held that habeas cases are exceptional in nature and should not be read in the same light as other criminal matters. See *Brecht* v. *Abrahamson,* 507 U.S. 619, 633 (1993) ("The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence."). More recently, the Ninth Circuit reaffirmed a positive acquiescence theory of implied consent in *United States* v. *Crowe*, No. 22-10139, 2023 WL 7297332, at *1 (9th Cir. Nov. 6, 2023) ("[C]onsent to a mistrial may be inferred 'only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order.'" (citation omitted)).

As for the Sixth Circuit, the government relies on an outdated case for the proposition that a defendant's "failure to object to a mistrial can be construed as a 'positive indication' of his consent to a mistrial . . . [under] the totality of the circumstances." *United States* v. *Gantley*, 172 F.3d 422, 428–29 (6th Cir. 1999); Opp. 14. There are two main distinctions on this issue. First, the Sixth Circuit has held more recently that implied consent based on opportunity alone is "disfavored and may only be done after an especially careful examination of the totality of the circumstances that positively indicate this silence was tantamount to consent." *United States* v. *Williamson*, 656 F. App'x 175, 180 (6th Cir. 2016) (cleaned up). Second, the inclusion of a "totality of the circumstances" element represents a balancing inquiry that courts on the other side of the split apply. The Sixth Circuit includes more context in

its analysis and enforces a presumption against implied consent as an opportunity-based test "[i]n light of the drastic consequences attached to a finding of consent." *Glover* v. *McMackin*, 950 F.2d 1236, 1239 (6th Cir. 1991).

Lastly, the Third Circuit balances these issues differently than the other side of the split, as it requires that trial courts give defendants a "meaningful" opportunity to object to a mistrial and applies a tie-breaker test in which "close cases regarding the propriety of a mistrial 'should be resolved in favor of the liberty of a citizen.'" *Love* v. *Morton*, 112 F.3d 131, 138 (3d Cir. 1997) (citation omitted). Where other circuits erect a threshold test for whether there was an opportunity to object, the Third Circuit compels a higher standard of evidence that balances other issues as well.

The difference in analysis between the circuits is not just descriptive; it is dispositive. For example, similar facts resulted in divergent outcomes in the Sixth and Seventh Circuits. In *Camden* v. *Circuit Court of Second Judicial Circuit*, the court declared a mistrial in front of the jury and explained its reasoning. 892 F.2d 610, 615 (7th Cir. 1989). The Seventh Circuit held that, despite the judge's failure to notify the parties beforehand and his refusal to solicit objections, defense counsel's failure to object constituted implied consent, as they were "afforded a minimal but adequate opportunity to object, albeit in the presence of the jury[,] while the mistrial was being declared." *Id*. By contrast, in *Glover* v. *McMackin*, the Sixth Circuit reviewed a mistrial declared in front of the jury with no prior warning or solicitation of objections. 950 F.2d at 1239. The court declined to treat defense counsel's silence as acquiescence, finding no implied consent because "such an objection would have been difficult, and probably futile. . . . The summary nature of the trial court's

actions, a swift declaration followed by the immediate dismissal of the jury and adjournment of the court, rendered an objection both unlikely and meaningless." *Id*. at 1240. *Camden* and *Glover* involved swiftly declared mistrials in front of the jury, without prior notice or requests for objections, yet the courts reached opposite conclusions. Had Mr. Breimeister's case been in the Sixth Circuit, he would have prevailed.

II. THIS CASE IS NOT FACT-BOUND.

The government argues that this case is fact-bound because the district court's declaration of a mistrial was "close[]" enough to Mr. Breimeister's written conditions upon which he would have consented to a mistrial, and that he had an opportunity to object. Opp. 12. The government asserts that the district court's order "*appeared* to satisfy" the condition for consent, not that it *did*. Opp. 10 (emphasis added). That equivocation is crucial. Even the Fifth Circuit did not find "[]clear" acceptance of the condition. Pet. App. 12a. The district court did not believe that it had Mr. Breimeister's consent, as it expressly rejected his pleadings and refused to make any findings.

A. The conditions to consent were not met.

The government mischaracterizes Mr. Breimeister's second condition to imply that the district court complied with it when declaring a mistrial. The government erroneously argues that Mr. Breimeister merely requested an implicit finding that the prosecution had caused the mistrial and a *sua sponte* declaration of a mistrial. That is not what he requested.

Before the court declared the mistrial, Mr. Breimeister stated that he "oppose[d] a mistrial" unless "the [c]ourt ma[de] a finding that it was forced to order a

mistrial *sua sponte* solely because of the [g]overnment's *misconduct* and not at Breimeister's request." Pet. App. 5a (emphasis added). The government frames this condition as a general request for the Court to clarify the *sua sponte* nature of its declaration and to acknowledge misconduct as the cause of the mistrial. But the government emphasizes the wrong part of the condition. Mr. Breimeister did not ask for a general declaration; he requested the court to make a specific "*finding*" that the government's misconduct was the "*sole*[]" cause. *Id.* (emphasis added). That is also why Mr. Breimeister requested an evidentiary hearing on the matter. Doc. 385 at 29. Afterwards, the court said it had "read the filings" and "could invite additional comment" but that it would not "alter the course that this Court has determined it must take." It then went out of its way to say that it would not make any specific finding in its declaration of a mistrial. Doc. 568 at 19-12, 13 ("Going forward, the first thing that must be determined is the reasoning and responsibility for these failures on behalf of the prosecution . . . Again, that's not a finding for today."). Critically, the court stated that it made "no finding one way or the other today on th[e] issue of misconduct." *Id.* The court could not have been clearer. Mr. Breimeister's condition requested a contemporaneous, express finding of misconduct, and the court explicitly refused to make that finding. Therefore, the court expressly rejected the condition, and the government's attempt to sow factual confusion fails.

B. There was no opportunity to object.

The government also contends that Mr. Breimeister had an opportunity to object when the court reconvened from a long recess after it declared the mistrial. In particular, the government points to the district

court's perfunctory question asking whether the parties had "anything" before the jury entered the courtroom. Opp. 5.; Doc. 568 at 19-7, 14. However, Mr. Breimeister had already objected to a mistrial in a pleading that the district court invited. Doc 385 at 27. ("Breimeister opposes a mistrial at this juncture. . . . [I]f the Court believes that the misconduct is so egregious that it rises to the level of requiring a mistrial . . . then it should proceed immediately to considering a motion to dismiss the superseding indictment with prejudice based on outrageous governmental misconduct."). The court then expressly rejected the objection and firmly ruled, intending further proceedings after the jury was dismissed. The Fifth Circuit's and the government's suggestion that Mr. Breimeister had to object yet again is not the law in any circuit and is contrary to this Court's decision in *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965) ("[A]n objection which is ample and timely . . . is sufficient . . . to preserve the claim for review here.").

III. MANIFEST NECESSITY IS NOT AN ALTERNATIVE HOLDING HERE.

The government makes the self-serving claim that deference to trial court decisions in these circumstances is appropriate regardless of the government's role in creating the mistrial. Opp. 17. Yet this Court, beginning with *United States* v. *Perez*, has proclaimed the power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." 22 U.S. (9 Wheat.) 579, 580 (1824). While this Court's jurisprudence has emphasized the importance of deference to trial judges insofar as they are closest to the facts, that deference has established limitations that the government ignores. The Court clearly declared that "the strictest scrutiny is appropriate when the basis for the mistrial

is the unavailability of critical prosecution evidence." *Arizona* v. *Washington*, 434 U.S. 497, 508 (1978). This case is no different. Regardless of whether the prosecution intentionally suppressed favorable evidence, it gained a tactical advantage over Mr. Breimeister solely by making critical evidence unavailable. Deference to the trial court should not prevail over Mr. Breimeister's double jeopardy rights.

This view also aligns with the Court's specific intent requirement in *Oregon* v. *Kennedy*, where defendants who request a mistrial and seek to preserve their double jeopardy rights must prove that the government intended to provoke them to move for a mistrial. 456 U.S. 667 (1982). When a defendant requests a mistrial, he must prove that the prosecution may not retry him. Here, because Mr. Breimeister did not request a mistrial, and actively opposed it, greater scrutiny should apply to appellate review of the district court's decision to declare a mistrial than the deference exercised by the Fifth Circuit. Yet, under the Fifth Circuit's holding and the government's framework, the prosecution would face no greater scrutiny where its own misconduct caused the mistrial.

The current regime, as interpreted by the Fifth Circuit, effectively nullifies any consequence for prosecutorial misconduct. Moving for a mistrial almost always permits retrial, while refusing to do so risks either conviction, or a mistrial declared by the court that also permits retrial. This tautological framework provides little constraint on prosecutorial misconduct and only encourages both sides to move for a mistrial instead of searching for solutions. The "strictest scrutiny" should apply to review the district court's *sua sponte* decision to declare the mistrial, and this Court should vacate and remand with instructions to apply that standard.

CONCLUSION

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

Respectfully submitted,

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