No. 26-68

IN THE

Supreme Court of the United States

JUAN MARTINEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a defendant can be guilty of criminal conspiracy to steal trade secrets when the conspiracy is impossible to achieve because of a legal fact—specifically, the defendant was legally authorized to obtain and use the information—rather than because of a non-legal, circumstantial fact.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Other Authorities

INTEREST OF AMICI CURIAE*

Amici are a group of criminal law professors whose teaching and research involve fundamental questions of criminal responsibility. Further information about the amici is contained in the appendix, attached hereto. Institutional affiliations are listed for identification purposes only, and the views herein are those of the listed individuals, not of their institutions.

Amici are interested in this case given the confusion and conflicts that the impossibility defense has generated among the circuits. As criminal-law professors, we must tell our students that a fundamental question of criminal responsibility yields entirely contradictory outcomes depending on the jurisdiction. This confusion stems largely from courts consistently conflating legal impossibility with factual impossibility, often due to a misguided reliance on the *Model Penal Code*, which attempts to abolish the impossibility defense altogether. Amici believe that this Court needs to provide clarity on this defense and ensure that defendants like Mr. Martinez are no longer deprived of their constitutional right to challenge the sufficiency of the government's proof.

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* No party's counsel authored any part of this brief. No person or entity other than amici curiae, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Counsel of record for all parties received timely notice of the intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a recurring and unresolved question that has split the circuits for decades and that lower courts cannot answer with confidence: whether defendants who are legally entitled to the information that they are charged with conspiring to steal can nonetheless be convicted because a factfinder might find that they were ignorant of this entitlement.

The Second, Third, and Ninth Circuits have held that legal impossibility is no defense to conspiracy at all, treating the objective legality of the defendant's goal as irrelevant once an agreement and an overt act are shown. Other courts, including the panel below, have recognized that legal impossibility can defeat a conspiracy charge in principle, but—precisely because they have not distinguished hybrid legal impossibility from hybrid factual impossibility, see infra Part III—have never articulated a workable test for determining whether a particular conspiracy is legally impossible. The result is that trial courts decide, ad hoc and without guidance, whether a defendant's claim of legal authorization is fit for a jury at all.

This case supplies a timely opportunity to resolve that uncertainty: the record contains a fully litigated, contract-based authorization defense that the trial court barred from closing argument, giving this Court a concrete vehicle for clarifying a defense that criminal-law professors cannot teach with consistency and that lower courts continue to apply in conflicting ways.

The trial court unjustly deprived Mr. Martinez of the opportunity to employ the impossibility defense on the basis of a false assumption: that his conspiracy to steal trade secrets was factually impossible and therefore more akin to attempted pickpocketing than attempting to violate a non-existent law.

Mr. Martinez's objective of stealing trade secrets was not factually impossible but rather legally impossible. His conspiracy to steal trade secrets could not have been successful *not* because of an external, circumstantial fact such as a law-enforcement sting operation. Rather, it could not have been successful because of a *legal* fact: the Proprietary Information Agreement ("PIA") between his employer, APAC, and Gulfstream *legally* authorized Mr. Martinez's use of Gulfstream technical documents.[1] In this way, Mr. Martinez's conduct was not materially different from conspiring to steal a car that turned out to be his own.

At most, Mr. Martinez intended to steal trade secrets. But mere intent to steal trade secrets is legally insufficient for theft, and therefore for conspiracy to commit theft. Culpability for conspiracy to steal trade secrets additionally requires that the information be legally off-limits to the defendant. And that was simply not the case here.

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1. Amici assume throughout this amicus brief that the PIA legally authorized Mr. Martinez's use of Gulfstream's technical documents. The focus of this brief is whether, given this factual assumption, Mr. Martinez had a valid legal-impossibility defense that the district court should have allowed the jury to consider.

ARGUMENT

I. There Are Two Kinds of Legal Impossibility: Pure and Hybrid.

The *Model Penal Code* (*MPC*) famously recommends abolishing the impossibility defense to criminal attempt and criminal conspiracy. *See Model Penal Code and Commentaries* § 5.01 cmt. at 295, 297, 307 (Am. Law Inst. 1985). While no federal courts have adopted the MPC's recommendation with respect to criminal attempt, some federal courts have adopted it with respect to criminal conspiracy. *See United States v. Wallach*, 935 F.2d 445, 470 (2d Cir. 1991), *abrogated on other grounds* by *Ciminelli v. United States*, 598 U.S. 306 (2023); *United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998); *United States v. Sanford*, 547 F.2d 1085, 1091-92 (9th Cir. 1976); *United States v. Petit*, 841 F.2d 1546, 1550-51 (11th Cir. 1988); *United States v. Roeseler*, 55 M.J. 286, 291-92 (C.A.A.F. 2001).

What these courts and the *MPC* fail to realize is that "pure" legal impossibility—the impossibility of violating a law that does not exist—is *always* a defense to criminal conspiracy (as well as criminal attempt). *See United States v. Carter*, 15 F.4th 26, 36 (1st Cir. 2021); *United States v. Fernandez*, 722 F.3d 1, 31 (1st Cir. 2013); *In Re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). For example, conspiring to grow tomatoes in the backyard *cannot possibly be a crime* if growing tomatoes on one's property is not itself a crime. Likewise, if Persons A and B conspire to throw a surprise birthday party for Person C under the mistaken belief that there is a law prohibiting surprise birthday parties, they cannot be arrested for, or convicted of, conspiracy to throw a surprise birthday party because what they are agreeing to do is not itself a crime. *See Carter*, 15 F.4th at 36; *Fernandez*, 722 F.3d at 31; *United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973); *Sealed Case*, 223 F.3d at 779; *cf. United States v. Spurlock*, 386 F. Supp. 2d 1072, 1082 (W.D. Mo. 2005) ("[I]f John Doe believes that it is unlawful to tear a phone book and he rips a page out of his own home telephone book, then even though he believes he has committed a crime, he has not. Hence, legal impossibility.").

The reason why pure legal impossibility is *always* a defense is the so-called "legality principle," which says that there cannot be just punishment without law. *See United States v. Lanier*, 520 U.S. 259, 265-66 (1997). The defense of pure legal impossibility is simply a corollary of the legality principle; it says that a person cannot be convicted of either attempt or conspiracy if their purpose was not illegal. *See Berrigan*, 482 F.2d at 186; *United States v. Farner*, 251 F.3d 510, 513 n.3 (5th Cir. 2001).

In addition to pure legal impossibility, there is a second kind of legal impossibility: "mixed fact/law" or "hybrid". Hybrid legal impossibility involves a particular legal fact making the relevant criminal law entirely inapplicable. *See Fernandez*, 722 F.3d at 31; *Berrigan*, 482 F.2d at 188-89; *Sealed Case*, 223 F.3d at 779. For example, Person A tries to commit bigamy by marrying Person B but fails to realize that he is no longer married to Person C. The law of bigamy is inapplicable because of a legal fact—the absence of a particular marital status. Another example: A thinks that she is stealing B's car, but it is really A's car. Despite being unaware of it, A's legal possession of the car renders the law of theft entirely inapplicable and therefore the charge of attempted theft entirely unwarranted. *See United States v. Hair*, 356 F. Supp. 339 (D.D.C. 1973) (holding that the defendant did not commit attempted receipt of stolen property because of the legal fact that the television was not in fact stolen property).

This objective inquiry must be kept distinct from the mistake-of-fact defense, with which it is easily confused. Mistake of fact is a defense not just to attempt and conspiracy but to all crimes requiring intent or knowledge; it asks whether a defendant's false belief about a material fact both (a) is reasonable and (b) negates the intent or knowledge required for the crime. By contrast, hybrid legal impossibility asks only whether the defendant's objective was, as a matter of law, actually illegal—a question that does not turn on what the defendant believed at all. *See United States v. McKenzie*, 178 F.4th 74, 88-89 (1st Cir. 2026). A defendant who mistakenly believes that she is stealing a car that she in fact owns has a legal-impossibility defense regardless of her belief; a defendant who mistakenly and reasonably believes that a stolen car is not stolen has, at most, a mistake-of-fact defense.

The reason why legal impossibility of both kinds, pure and hybrid, is a defense rather than a crime is because intent to break a law is not sufficient to render criminal either the purpose or the act performed in order to achieve this purpose. Culpability also requires that both the purpose and the act performed be objectively, not just subjectively, illegal. An individual's subjective belief that their conduct or purpose is illegal does not make it so. Only the law—not the individual's subjective belief—determines the legality or illegality of both their act and their purpose. Because A actually owns the car, the law of theft is rendered entirely inapplicable to her taking of it and therefore also to her purpose of taking it. A's subjective belief that she is stealing simply does not override the objective legal reality of her ownership. *See Berrigan*, 482 F.2d at 186; *United States v. Contreras*, 950 F.2d 232, 238 (5th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992); *United States v. Korn*, 557 F.2d 1089, 1091 (5th Cir. 1977); *United States v. Oviedo*, 525 F.2d 881, 884-86 (5th Cir. 1976); *United States v. Lange*, 312 F.3d 263, 268 (7th Cir. 2002); *United States v. Powell*, 1 F. Supp. 2d 1419, 1421-22 (N.D. Ala. 1998), *aff'd*, 177 F.3d 982 (11th Cir. 1999); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982), *cert. denied*, 460 U.S. 1071 (1983).

II. Legal Impossibility Is Exculpatory; Factual Impossibility Is Inculpatory.

Legal impossibility is distinct from two other kinds of impossibility: "inherent" or "intrinsic" and "factual". Intrinsic impossibility refers to acts that under no circumstances could possibly achieve the illegal objective. What makes the illegal purpose impossible to achieve is not a legal fact—the absence or inapplicability of a criminal statute—but rather the *laws of nature*. An example of intrinsic impossibility is Person A trying to commit murder by using means that simply do not and cannot work—e.g., voodoo or telekinesis. *See Lange*, 312 F.3d at 269; *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974); *United States v. Thomas*, 13 U.S.C.M.A. 278, 284-85 (1962); *State v. Logan*, 232 Kan. 646, 649-50 (1983); *State v. Bird*, 285 N.W.2d 481, 482 (Minn. 1979).

Factual impossibility refers to acts that *under the particular circumstances* cannot possibly achieve the illegal objective. What makes the illegal purpose impossible to achieve is not a legal fact (the absence or inapplicability of a criminal statute) but rather a *non-legal* fact—a fact about the person, intended victim, the particular circumstances, or the environment. *See Carter*, 15 F.4th at 36; *Roman*, 356 F. Supp. at 434; *Berrigan*, 482 F.2d at 188; *United States v. Frazier*, 560 F.2d 884, 888 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

The classic example of factual impossibility is attempted pickpocketing. If B's pocket does not contain a wallet but A, believing that it does, reaches into B's pocket to take it, A cannot possibly steal B's wallet. A's attempt is factually impossible, not legally impossible—that is, impossible not because of any legal fact but because of the non-legal, circumstantial fact that B's pocket contains no wallet. For this reason, factual impossibility is not a defense. Instead, it is a crime—again, the crime of attempted theft. *See United States v. Zheng*, 113 F.4th 280, 298 (2d Cir. 2024); *Berrigan*, 482 F.2d at 188; *Frazier*, 560 F.2d at 888; *United States v. Powell*, 24 M.J. 603, 607 (1987); *Thomas*, 13 U.S.C.M.A. at 284, 288. Likewise, attempted murder is a crime even if—unbeknownst to the defendant—the intended victim could not possibly have been killed because they were not home. What was impossible here was not violation of a law; the law of homicide very much existed and applied. Rather, what was impossible *in these particular factual circumstances* was the homicide itself. *See United States v. Tykarsky*, 446 F.3d 458, 465 (3d Cir. 2006); *Hsu*, 155 F.3d at 199.

Putting this all together, while legal impossibility says that a defendant tried but failed to break a law that either does not exist at all or that is rendered inapplicable by a legal fact, both intrinsic and factual impossibility say that a defendant tried but failed to break *an existing and applicable* law by means of an act that could not succeed. If it could not succeed under any circumstances, the impossibility is intrinsic; if it could not succeed under these particular circumstances, the impossibility is factual. Unlike legally impossible conduct, which is legally permissible and therefore exculpatory, a factually impossible attempt is legally impermissible and therefore inculpatory. (The status of intrinsic impossibility is unclear because there is so little federal jurisprudence on it.)

III. Courts Are Overlooking a Critical Distinction Between Hybrid Legal Impossibility and Hybrid Factual Impossibility.

Some courts have decided that hybrid impossibility is not a valid defense to conspiracy. These courts generally argue as follows: A conspiracy to, for example, receive stolen goods is a crime even if the goods are not stolen because the objective fact of the goods being stolen is not an element of conspiracy. The object of the conspiracy—receiving stolen goods—is illegal; therefore the conspiracy to achieve this illegal objective is also illegal. *See Hsu*, 155 F.3d at 203-04; *United States v. Yang*, 281 F.3d 534, 543-44 (6th Cir. 2002); *United States v. LaBudda*, 882 F.2d 244, 248-49 (7th Cir. 1989); *United States v. Fiander*, 547 F.3d 1036, 1042-43 (9th Cir. 2008); *United States v. Everett*, 692 F.2d 596, 599-600 (9th Cir. 1982); *Petit*, 841 F.2d at 1550-51; *Thomas*, 13 U.S.C.M.A. at 286-87.

Importantly, however, these courts fail to realize that this argument succeeds only in certain circumstances, not in others. It succeeds only when the hybrid impossibility of achieving the conspiracy to receive stolen goods is *factual*—that is, due to a *non-legal* fact; it *fails* when the impossibility of achieving the conspiracy to receive stolen goods is *legal*—that is, due to a *legal* fact.

The classic example of the former—a *factually impossible* conspiracy to receive stolen goods—is a law-enforcement sting operation. In a sting operation, the conspiracy to receive stolen goods is frustrated simply because the goods were supplied by undercover police officers rather than actual thieves. The circumstantial fact that police intervened prevents the goods from being stolen. This is factual impossibility and therefore not at all exculpatory. *See Farner*, 251 F.3d at 513 (holding that factual impossibility is not a defense to an attempt charge where the defendant believed that he was communicating with a 14-year-old girl who was actually an adult FBI agent, stating that "the only reason he failed was because the true facts were not as he believed them to be").

An example of the latter—a *legally impossible* conspiracy to receive stolen goods—is a situation in which the goods cannot possibly be stolen because, unbeknownst to the defendants, *they themselves owned the goods all along*. Belonging to the defendants is a *legal* fact, a fact about property ownership, making their conspiracy *legally* impossible and therefore fully exculpatory. *See United States v. McInnis*, 601 F.2d 1319 (5th Cir. 1979) (affirming dismissal of conspiracy to kidnap count on the grounds of legal impossibility where defendants never contemplated any unlawful detention of the victim prior to his crossing the international boundary and the victim voluntarily transported himself, rendering it impossible to satisfy the statutory requirement of an unlawful seizure, confinement, or holding under *18 U.S.C. § 1201*).

The Third Circuit in *Hsu* concluded that legal impossibility is categorically not a defense to conspiracy to steal trade secrets or to receive stolen goods. See *Hsu*, 155 F.3d at 203 ("[L]egal impossibility is not a defense to conspiracy. ... [W]e are persuaded by the views of our district courts, and by the decisions of our sister circuits, that the impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *see also Petit*, 841 F.2d at 1550 ("Although some courts have recognized an impossibility defense with regard to attempted crimes … '[c]ourts have generally taken a broader view of the purposes of the law of conspiracy.'") (citations omitted).

The reason why courts like the Third Circuit in *Hsu* and the Eleventh Circuit in *Petit* made this doctrinal error is because they fundamentally conflated hybrid legal impossibility with hybrid factual impossibility. In both *Hsu* and *Petit*, the conspiracies were frustrated by a non-legal fact: the individuals essential to the conspiracies' success were not actual co-conspirators, but rather undercover law enforcement conducting a sting operation. See *Hsu*, 155 F.3d at 192; *Petit*, 841 F.2d at 1548. The hybrid impossibility in both cases was therefore factual, and the defendants' conduct therefore culpable. But rather than correctly classifying a sting operation as non-exculpatory factual impossibility, both courts undermined the legal-impossibility defense—*Hsu* by categorically abolishing it outright, and *Petit* by failing to draw the distinction that would have preserved it. In its place, both courts substituted a pure subjective-intent test for the objective statutory requirements that legal-impossibility doctrine demands.

The *Petit* court's failure to distinguish hybrid legal from hybrid factual impossibility laid the historical groundwork for the erroneous, subjective-intent test that the district court applied in barring Mr. Martinez from presenting his impossibility defense to the jury at all. *See United States v. Martinez*, No. 4:22-cr-170, 2023 WL 8702733, at *6 (S.D. Ga. Dec. 15, 2023) (explicitly relying on *Petit* to preclude Mr. Martinez's impossibility argument), *aff'd on other grounds*, No. 24-10533, 2026 WL 184361 (11th Cir. Jan. 23, 2026). The Eleventh Circuit affirmed without reaching the categorical question *Petit* posed—indeed, the panel expressly recognized that legal impossibility "can, in certain cases," defeat a conspiracy charge—but it left undisturbed the district court's ruling that kept Mr. Martinez's jury from ever considering the question.

IV. The Impossibility in Mr. Martinez's Case Is Hybrid Legal and Therefore Exculpatory.

For purposes of illustrating why the district court's error matters, amici assume that the Proprietary Information Agreement ("PIA") legally authorized Mr. Martinez's use of Gulfstream's technical documents.

Given this stipulation, the impossibility in Mr. Martinez's case is hybrid legal (and therefore exculpatory), not hybrid factual (and therefore inculpatory). Even if Mr. Martinez had believed that he was conspiring to steal trade secrets, his objective was impossible to achieve not because of any external, circumstantial fact such as a law-enforcement sting operation but because the law of theft itself was rendered entirely inapplicable by the PIA.

A conviction for conspiracy to steal trade secrets under 18 U.S.C. § 1832 requires that the defendant seek to appropriate the information "without authorization." But *ex hypothesi*, the contract between APAC and Gulfstream completely authorized—*legally* authorized—Mr. Martinez's use of Gulfstream technical documents, even if Mr. Martinez did not know this—indeed, even if Mr. Martinez thought himself to be getting away with something. Because the PIA provided explicit, pre-existing legal authorization, the statutory requirement that the information be obtained "without authorization" could not possibly be satisfied as a matter of objective legal fact.

It may seem at first as though all the elements of conspiracy—the agreement, the intent, and the overt act—are satisfied and therefore that Mr. Martinez is obviously guilty. But the agreement must be to commit an *actual* crime. Consider the parallel: If A agrees to take a car that she objectively owns, the objective itself is legally permissible regardless of whether A knows that she owns it. That is the essence of hybrid legal impossibility: the defense turns on the objective legal fact, not on the defendant's awareness or ignorance of it.

The district court's stated reason for barring Mr. Martinez's defense—that he was unaware of the PIA—was a legal error, not merely a factual one. In deciding whether Mr. Martinez's theory was even legally sufficient to go to the jury, the court asked whether he knew of and relied on the PIA—a mistake-of-fact inquiry into his state of mind. *See supra* Part I.[2]

2. Under the panel's own settled framework, the threshold question is "whether the facts constituting the defense ... if

But the correct threshold question for a hybrid-legal-impossibility defense does not turn on the defendant's awareness. Assuming that a jury credited Mr. Martinez's account of his conduct, would the PIA, properly construed, have authorized it as an objective legal matter? Because the district court applied the wrong test at the threshold, it never permitted the jury to resolve the factual disputes—what Mr. Martinez's conduct actually was, and whether it fell within the PIA's terms[3]—that the correct test would have required it to submit.

At most, Mr. Martinez was intending to steal trade secrets. But mere intent to steal trade secrets is insufficient for theft and therefore for conspiracy to commit such theft. The law of theft must also be applicable to the information that Mr. Martinez sought and used. But—once again—it was not applicable in this case because of the PIA.

Finally, it may be argued that Mr. Martinez has proven himself to be "dangerous" and should not benefit from the fortuitous accident of contract. But, first, this point runs straight into the legality principle. We do

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believed by the jury, are legally sufficient to render the accused innocent." *See United States v. Middleton*, 690 F.2d 820, 826 (11th Cir. 1982) (quoting *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967)).

3. A third ground offered by the panel—that Section 15 of the PIA authorized only Meghan Wright, not Gilbert Basaldua, to disclose Gulfstream information to APAC—is not addressed here. That ground presents a narrower, more textual question about who may act as a discloser under the PIA, distinct from the awareness and scope-of-purpose issues discussed in text, and amici take no position on whether it independently supports the district court's categorical preclusion of the defense.

not punish suspected dangerousness; the state's power to punish requires violation of an actual, applicable law. *See Simmons v. South Carolina*, 512 U.S. 154 (1994) ("Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt.")*; Berrigan*, 482 F.2d at 186 n.27.

Second, criminal law accommodates "moral luck" all the time. If A shoots at B with the intent to kill, but a bird intercepts the bullet, A is saved from a murder conviction—and will likely serve less time for attempted murder—by a purely physical accident outside A's control. *See U.S.S.G. §§ 2A1.1, 2A2.1* (prescribing a lower base offense level for attempted first degree murder (33) than for first degree murder (43)); *United States v. Joseph Martinez*, 16 F.3d 202, 205-06 (7th Cir. 1994) ("'[M]oral luck,' as philosophers refer to distinctions in culpability that are based on consequences rather than intentions, is, rightly or wrongly, a pervasive characteristic of moral thought in our society, at least the moral thought that informs the criminal law."). It is no different with hybrid legal impossibility; the "luck" simply involves a legal fact rather than a physical one. Mr. Martinez might be "lucky" that the PIA authorized his conduct, but we cannot ignore that objective legal reality simply to satisfy a desire to punish a guilty mind.

CONCLUSION

For the foregoing reasons, and those stated by petitioners, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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