

No. 25-407

In the Supreme Court of the United States

SCOTT BREIMEISTER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

**BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND THE
CATO INSTITUTE AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Founded in 1958, the National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has nationwide membership of many thousands of direct members, and up to 40,000 with affiliate members. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. It files many *amicus* briefs each year in this Court, and in other federal and State courts around the country, providing *amicus* assistance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the

¹ No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice of the intent to file this brief.

protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement. Cato regularly advocates for a robust interpretation of the Fifth Amendment's Double Jeopardy Clause, as envisioned by the Framers in the Constitution, as an important check on prosecutorial excesses and a vital bulwark for liberty.

Amici have profound concerns about the Fifth Circuit's decision below and a strong interest in the outcome of this case. The decision below undermines bedrock constitutional Double Jeopardy protections and reflects a longstanding split of authority regarding the standard for determining when defendants lose their Double Jeopardy rights in the context of mistrials. Worse, the case arises from a mistrial caused by pervasive prosecutorial errors and gives the Government the benefit of a re-do after a free trial run of its case. If permitted to stand, the Fifth Circuit's rule would create an uneven playing field tilted firmly in favor of permitting re-prosecutions, while criminal defendants' rights fall by the wayside. Defendants bear the financial, emotional, and strategic burdens when retried after a mistrial; their constitutional right against Double Jeopardy cannot be so easily lost.

Amici submit this brief to explain that, in order to find implied consent to a mistrial (and thus a forfeiture of Double Jeopardy rights), the circumstances must clearly and unequivocally indicate that defendants impliedly consent. That standard protects a key Double Jeopardy right: "that the defendant retain primary control over the course to be followed in the event" of "prosecutorial error." *United States v. Dinitz*,

424 U.S. 600, 609 (1976). But the decision below stretched to find any ambiguity in the record—even where, as here, there was a written objection to a mistrial—and then resolved that purported ambiguity against the defendant. That is bad law and bad constitutional policy. This case also presents an opportunity to clarify that “the strictest scrutiny is appropriate when,” as here, the Government causes a mistrial, and that “the prosecutor” shoulders the “heavy” burden to show manifest necessity for a mistrial. *Arizona v. Washington*, 434 U.S. 497, 505, 508 (1978).

INTRODUCTION AND SUMMARY OF ARGUMENT

It has been four decades since this Court has heard a case at the intersection of the Double Jeopardy Clause and mistrials. See *Oregon v. Kennedy*, 456 U.S. 667 (1982); *Richardson v. United States*, 468 U.S. 317 (1984). Meanwhile, the federal courts of appeals and State courts have diverged on the proper standard for determining when defendants impliedly consent to mistrials, and thus lose their Double Jeopardy protection against later prosecutions. When defendants do not consent, they may be retried only if the Government can show a manifest necessity for mistrial. The decision below is wrong—on both consent and manifest necessity—and reveals a sharp conflict between competing approaches. This case presents an opportunity to clarify the constitutional guardrails in place for criminal defendants who face the prospect of a mistrial, which here was caused by pervasive prosecutorial errors.

1. The decision below is reflective of a longstanding split among both federal and State courts regarding

the standard for determining when defendants lose their Double Jeopardy rights in the context of mistrials. Some courts apply a high standard for finding implied consent to a mistrial, which appropriately safeguards Double Jeopardy rights. Those courts construe doubt *against* finding consent and require that the circumstances clearly and positively indicate that the defendant *did* consent. Others, like the Fifth Circuit, apply a different and lower standard, under which doubt is construed *toward* finding implied consent and which effectively requires defendants to expressly make clear they did *not* consent.

2. The higher standard for finding implied consent is consistent with fundamental Double Jeopardy principles. Defendants have the primary right to have their case completed before the first jury. When prosecutorial errors raise the prospect of disrupting that right, defendants retain the right to choose whether to request a new trial or continue to defend the case before that first jury. Any ambiguity in this inquiry must be resolved in favor of protecting defendants' Double Jeopardy rights.

The issue of which standard applies is outcome determinative in this case. Just hours before the district court's *sua sponte* mistrial declaration, Scott Breimeister (the defendant) filed a written objection specifically opposing a mistrial—unless certain conditions were met, the fundamental ingredient of which was protection against a second prosecution. That ingredient was missing in the district court's *sua sponte* mistrial ruling. And in that ruling, the court stated that “additional comment[s]” would probably *not* “alter” the decision. Petition (“Pet.”) 4 (quoting ROA.9127).

Faced with such facts, courts in several jurisdictions would find that the defendant did not impliedly consent to a mistrial—nor would they require defendants to renew a futile objection to clear up any ambiguity. But other courts, including the Fifth Circuit, find implied consent—here, because the court below believed there was “lack of clarity” regarding the objection to a mistrial, and Breimeister should have (but failed to) contemporaneously renew his objection to clear up a purported ambiguity with that objection. Petition Appendix (“Pet. App.”) 12a. The Fifth Circuit’s decision cannot be reconciled with deeply rooted Double Jeopardy Clause principles and has grave consequences.

Because the decision below was wrong about consent, the Government can only re-prosecute Breimeister if there was a manifest necessity for mistrial. The Government’s self-inflicted discovery errors cannot meet that standard. Indeed, the decision below does not even mention whether the Government met its requisite heavy burden to show manifest necessity. To the contrary, the decision does what the Double Jeopardy Clause strictly forbids: grants a mistrial that allows the prosecution to strengthen its case—based on its own legal violations—while disadvantaging the defendant.

And in cases of stark prosecutorial errors like this one, the “strictest scrutiny” applies. The Fifth Circuit erroneously applied a watered-down standard of review because the Government’s discovery errors were unintentional and not in bad faith. Intent and bad faith are irrelevant to whether the “strictest scrutiny” applies, as other courts have so held in accord with this Court’s precedent. The decision below reaches an

outcome rejected by other courts, whereby a defendant is penalized for prosecutorial errors if that defendant cannot prove intentional misconduct, yet the misconduct nonetheless warrants a mistrial over a defendant's objection.

3. Finally, the questions presented are critically important, and this Court has yet to articulate the constitutional guardrails that apply in the implied consent analysis. Mistrial decisions are high stakes and made in hectic, fast-paced trial environments. Such circumstances require resolving any ambiguities in favor of defendants' liberty and Double Jeopardy rights. Defendants bear the emotional, financial, and strategic burdens of successive trials, and they should not be penalized for prosecutorial self-inflicted errors. With the mistrial here, Breimeister lost the strategic benefit of using such errors to impeach the Government's case in the first trial. What is more, the decision below would give the Government the benefit of retrying Breimeister using information gained in that first trial concerning the strengths and weaknesses of its case. Prosecutors should be held accountable for the risk they assume when impaneling a jury without first disclosing legally-required material—jeopardy attaching, barring re-prosecution, and having their case in the first trial undermined by those due process violations.

ARGUMENT

I. There Is A Longstanding Split Among Federal Circuit Courts And State Courts Regarding When Defendants Lose Their Double Jeopardy Rights In The Context Of Mistrials.

Courts have long recognized that different jurisdictions “have taken different approaches in determining” whether defendants have impliedly consented to a mistrial. See *Love v. Morton*, 112 F.3d 131, 138 (3d Cir. 1997); *People v. Lovinger*, 473 N.E.2d 980, 986 (Ill. App. Ct. 1985); *Commonwealth v. Fredericks*, 340 A.2d 498, 501 (Pa. Super. Ct. 1975). The disagreement boils down to selecting the proper analytical lens for determining implied consent.

Given the myriad of factual situations in which mistrial issues can arise—and the heated trial environment—there is often ambiguity regarding whether implied consent exists. When courts sift through such ambiguity, “[t]he important consideration,” for Double Jeopardy purposes, “is that the defendant retain primary control over the course to be followed” when “prosecutorial error” could warrant a mistrial. *United States v. Dinitz*, 424 U.S. 600, 609 (1976). The “cornerstone” of Double Jeopardy “is the defendant’s right, in the event of prosecutorial * * * error * * * , to choose whether to request a new trial before an untainted jury or to continue to defend the case before the already empaneled jury.” *Davis v. Brown*, 664 N.E.2d 884, 886 (N.Y. 1996).

1. Adhering to those bedrock Double Jeopardy principles, several courts rightly set a high bar for

finding implied consent. These courts hold that a “defendant’s consent to mistrial may be inferred ‘only where the circumstances positively indicate a defendant’s willingness to acquiesce in the mistrial order’”—a standard which looks for “clear” indications that a defendant meant to consent. *Weston v. Kernan*, 50 F.3d 633, 637-638 (9th Cir. 1995) (quoting *Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991)). Other courts similarly frame the standard as mandating “unequivocal acquiescence to a mistrial without prejudice.” *Davis*, 664 N.E.2d at 887; *State v. Nilson*, 854 P.2d 1029, 1032 (Utah Ct. App. 1993) (circumstances must “unequivocally constitute consent”). This standard does “not search for consent,” and instead asks whether consent is “clearly evident on the record.” *Lovinger v. Circuit Court*, 845 F.2d 739, 744 (7th Cir. 1988). Courts “must proceed with caution in inferring consent,” even where there is a failure to object, and “close cases” should “be resolved in favor of the liberty of a citizen” and Double Jeopardy protections. *Love*, 112 F.3d at 138 (citation omitted).

Under this approach, courts have thus declined to find implied consent in various circumstances and resolved doubts in favor of defendants’ Double Jeopardy rights. *E.g.*, *United States v. Gaytan*, 115 F.3d 737, 744 (9th Cir. 1997) (defense counsel’s statement before mistrial declaration was “ambiguous,” and there were no “affirmative” “comments implying consent *after* the court announced its ruling”); *Weston*, 50 F.3d at 637 (whether defense motion for mistrial was with or without prejudice was “ambiguous”); *Lovinger*, 845 F.2d at 743-744 (prior defense mistrial motion did not constitute implied consent to a later mistrial declaration

based on other grounds); *United States v. Mastrangelo*, 662 F.2d 946, 950 (2d Cir. 1981) (“for all practical purposes, though not in so many words,” defendant withdrew his mistrial motion); *Sanchez v. United States*, 919 A.2d 1148, 1151-1152 (D.C. 2007) (noting “confusion” regarding a jurisdictional defect in case and defense’s initial “silen[ce]” regarding a mistrial, but “what matters” is that defendant “ultimately” objected). In other words, “the equivocation or ambiguity of a defendant’s response are important factors to consider,” and “[a]ny doubts or close calls will be resolved in a defendant’s favor.” *Nilson*, 854 P.2d at 1032.

2. Contrary to the above approach, other courts apply a far lower standard for finding implied consent, effectively requiring defendants to expressly make clear that they did not consent.

The decision below exemplifies how this approach is a near polar opposite of the wrong side of the split. For starters, it is undisputed that Breimeister objected to a mistrial. The issue is the clarity of that objection. Pet. App. 10a-11a. According to the Fifth Circuit, “the critical question” was “whether Breimeister’s anticipatory objection *clearly* applied to the mistrial *as declared* by the district court”—and, according to the court, the onus was on Breimeister to clear up that perceived ambiguity. Pet. App. 11a-12a. The court then held that the “lack of clarity” meant that Breimeister was required to renew his objection—“to object contemporaneously” to the mistrial declaration—and his “failure” to do so “constitute[d] implied consent to the mistrial.” Pet. App. 12a.

The Fifth Circuit is not alone in adopting such a low bar for implied consent. In *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975), the court looked for whether the defendant said anything “to dispel the inference of” consent based on his *partial* silence—even though the defendant offered an alternative of “re instruct[ing]” the jury on the very issue that raised the possibility of mistrial, and the district court otherwise “cut off” defense counsel from speaking. *Id.* at 909 & n.8 (finding implied consent even while recognizing “the difficulty” of defense counsel’s “position”).

The Seventh Circuit has held that a defendant impliedly consented to a mistrial when there was only a “minimal * * * opportunity to object, albeit in the presence of the jury while the mistrial was being declared,” see *Camden v. Circuit Court*, 892 F.2d 610, 615 (7th Cir. 1989) (footnote omitted)—effectively *requiring* defense counsel to interrupt the judge mid-mistrial declaration in front of the jury, *id.* at 619-620 (Posner, J., dissenting) (the defense first learned about the possibility of mistrial “when the judge declared the mistrial and excused the jurors”); see also *United States v. Ham*, 58 F.3d 78, 84 (4th Cir. 1995) (defense counsel “could have interrupted the judge before he discharged the jury”).

The First Circuit has also suggested that an objection to the jury’s discharge *after* a mistrial declaration would be insufficient to overcome a finding of implied consent, and has found implied consent even where “the court did not explicitly notify counsel that it was considering a mistrial” and “the jury was dismissed when the mistrial was declared”—even though the

defendant did move for a “judgment of acquittal” to bar a re-prosecution. *United States v. DiPietro*, 936 F.2d 6, 10-11 (1st Cir. 1991).

The problem is that anytime a defendant does not specifically and clearly object, consent to a mistrial can *only be implied* (not express). Faced with that lack of clarity, the standard employed by the Fifth Circuit and other courts leans *toward* a finding of implied consent and requires sufficiently clear indications that the defendant did *not* consent. But what indications would count as sufficiently clear to overcome a finding of *implied* consent and clean up any perceived ambiguity—besides a contemporaneous *express* objection—is unclear. It cannot be that the only way to negate implied consent is for defendants to expressly not consent.

II. The Decision Below Is Wrong.

The Double Jeopardy Clause and its driving principles require a clear showing to imply a defendant’s consent to a mistrial and the corresponding forfeiture of Double Jeopardy protections. And where, as here, a mistrial is due to self-inflicted prosecutorial errors, Double Jeopardy protections should be at their peak.

The Fifth Amendment provides that “[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. This “deeply ingrained” principle protects defendants from the Government making “repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

anxiety and insecurity.” *Green v. United States*, 355 U.S. 184, 187 (1957).

A “principal thread[] * * * embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him.” *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982). Once the first jury is selected and sworn, the default rule is that defendants are entitled to a verdict from that jury unless they validly consent or the prosecution proves a “manifest necessity” for a mistrial. See *id.* at 672-673. Any doubt in this inquiry must be resolved “in favor of the liberty of the citizen” defendant, not the Government’s ability to retry that defendant. *Downum v. United States*, 372 U.S. 734, 738 (1963) (citation omitted). That is because the cornerstone of Double Jeopardy “is that the defendant retain primary control over the course to be followed in the event of [prosecutorial] error.” *Dinitz*, 424 U.S. at 609; see *Davis*, 664 N.E.2d at 886.

The decision below contravenes these settled principles in two respects: (A) its implied consent finding; and (B) the fatally flawed manifest necessity analysis.

A. Double Jeopardy Principles Demand A Clear Showing Of Implied Consent, Which Is Not Met Here.

1. A standard that requires clear, unequivocal, and positive circumstances in order to find implied consent is in accord with fundamental Double Jeopardy principles, and safeguards against the concerns at which the Clause is aimed. An application of the correct standard to the facts of this case illustrates why. That also shows the split of authority is outcome determinative in this case, making it an ideal vehicle for this Court to decide the questions presented.

To safeguard Double Jeopardy rights, there must be “unequivocal acquiescence to a mistrial without prejudice,” *Davis*, 664 N.E.2d at 887, and “[a]ny doubts or close calls” must “be resolved in a defendant’s favor.” *Nilson*, 854 P.2d at 1032. The fact that Breimeister specifically *objected* to a mistrial should thus be a heavy, if not decisive, weight on the side of declining to find implied consent. Yet the Fifth Circuit viewed “the critical question” as whether a defendant’s objection “*clearly* applied to the mistrial *as declared* by the district court,” with the burden placed on the defendant to make his lack of consent expressly clear. Pet. App. 10a-12a. That is the wrong analytical starting point, asks the wrong question, and decisively stacks the deck against defendants.

Breimeister’s written filing explicitly “oppose[d] a mistrial,” unless certain conditions were met. Pet. App. 5a. The Fifth Circuit’s view that those conditions were “arguably satisfied,” Pet. App. 11a-12a, completely ignores the fundamental point of the objection.

Breimeister expressly did not want the Government to “get a ‘do-over,’ or a second bite at the apple”—i.e., retry him—and he clearly stated that “[i]t would violate due process if the Government [were] allowed to retry” him. Pet. 12 (quoting written objection). The implication of these conditions is obvious: He wanted any dismissal to be *with prejudice*, such that Double Jeopardy protections would kick in. That did not occur, so Breimeister did not consent. See *Sanchez*, 919 A.2d at 1151-1152 (defense’s position was “that a mistrial would be in order *provided* it meant dismissal . . . with prejudice” (cleaned up)); *Lovinger*, 845 F.2d at 743-744 (no implied consent where the defense moved for mistrial, but then the court later declared a mistrial on other grounds).

But the Fifth Circuit construed doubt against Breimeister and required that he clarify a perceived ambiguity with an additional, renewed objection—which would have been pointless, if not impossible. Pet. App. 10a-12a. In its *sua sponte* mistrial ruling, the district court stated that “additional comment[s]” would probably *not* “alter” its decision. Pet. 4 (quoting ROA.9127). The district court thus declared a mistrial without taking contemporaneous comments from the parties and left the courtroom; only *after* the mistrial ruling and a short recess, just before the jury was excused, did the court give a brief opportunity for the parties to be heard. Pet. 4-5; Pet. App. 10a n.1. That was too little, too late.

As Judge Posner put it, courts “should not require defense counsel, on pain of sacrificing a client’s constitutional right, to make futile gestures” that will not

change a trial judge’s mistrial decision. *Camden*, 892 F.2d at 619-620 (Posner, J., dissenting); accord *Douglas v. Alabama*, 380 U.S. 415, 421-423 (1965) (repeated objections not required in circumstances “plainly implying that further objection” would have been “futile”); *Holguin-Hernandez v. United States*, 589 U.S. 169, 173-174 (2020) (“By ‘informing the court’ of the ‘action’ he ‘wishes the court to take,’” a defendant “brings to the court’s attention his objection to a contrary decision” (citation omitted)).

“[T]he sequence of events leading to” mistrial is also important in this inquiry, *Nilson*, 854 P.2d at 1032, and it strongly tilts toward “resolv[ing] any doubt” in defendant’s favor, not the Government’s. See *Downum*, 372 U.S. at 738; *Love*, 112 F.3d at 138.

Five weeks into this trial, a series of prosecutorial discovery errors came to light resulting in the district court ordering the Government to produce reams of belated disclosures to defendants. This occurred on a highly accelerated timeline, beginning on a weekend and finishing “[o]vernight” the next Monday. Pet. App. 1a-5a. At the same time, the court ordered defendants to “provide their requested relief in writing by the following morning” (Tuesday). Pet. App. 3a-4a. That is the context in which Breimeister submitted his written objection to a mistrial—overnight, after digesting a mountain of new information five weeks into trial. This context makes the Fifth Circuit’s stilted analysis even more egregious.

On these facts, courts in several jurisdictions would correctly find that Breimeister did not impliedly

consent to a mistrial—nor would they have required him to renew a futile objection to clear up any purported ambiguity. *Supra* pp.7-9. But not so in the Fifth Circuit, nor in other courts adopting a similar approach to the decision below. *Supra* pp.9-11.

The decision below erroneously “read an objection to a mistrial as its opposite—consent—merely because” Breimeister stated that, *if the court* were to *sua sponte* declare a mistrial, he wanted it to be clear it was not on his motion. See *Sanchez*, 919 A.2d at 1152; Pet. 4; Pet. App. 6a, 11a. Under the Fifth Circuit’s “far-reaching interpretation” of implied consent, “[n]early every objection or complaint by a defendant regarding the fairness of the proceedings could be construed” as “a waiver” of Double Jeopardy protections. *Lovinger*, 845 F.2d at 744. That cannot be the law.

2. The decision below also creates uncertainty in going beyond Federal Rule of Criminal Procedure 26.3’s requirement that “[b]efore ordering a mistrial,” the parties must have “an opportunity to comment on the propriety of the order, to state whether [they] consent[] or object[], and to suggest alternatives.” That is exactly what Breimeister did. Rule 26.3 was specifically “designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences”—like the loss of Double Jeopardy rights—and not “change the substantive law.” See Fed. R. Crim. P. 26.3 advisory committee’s note (1993). Yet the Fifth Circuit and other courts have added an atextual rule requiring that defendants object again, *after* the court orders a mistrial, at least in some indeterminate circumstances. “Consent

should not be assessed by the mechanical application of an absolute rule” like that adopted below. See *Glover*, 950 F.2d at 1240.

B. The Fifth Circuit’s Manifest Necessity Decision Contravenes This Court’s Precedent.

1. Because the record belies a finding of implied consent, retrying Breimeister would only be permissible if there was a manifest necessity for mistrial. The Government’s self-inflicted discovery errors here cannot meet that standard.

This Court has held that “the prosecutor must shoulder the burden of justifying the mistrial * * * to avoid the double jeopardy bar.” *Arizona v. Washington*, 434 U.S. 497, 505 (1978). That “burden is a heavy one,” requiring a showing of “a ‘high degree’” of necessity. *Id.* at 505-507. Rightly so, given the defendant’s “valued right to have the trial concluded by a particular tribunal.” *Id.* at 505. And the discretionary power of courts to declare mistrials on this basis should be exercised “with the greatest caution, under urgent circumstances, and for very plain and obvious causes.” *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.).

Here, the Government “proffered alternatives to a mistrial,” Pet. App. 6a, and it otherwise cannot carry its heavy burden based on the effects of its “self-inflicted injury” of discovery violations. *United States v. Shafer*, 987 F.2d 1054, 1058-1059 (4th Cir. 1993); *State v. Grays*, 854 S.E.2d 457, 464-466 (N.C. Ct. App. 2021); accord *United States v. Bundy*, 968 F.3d 1019,

1045 (9th Cir. 2020) (affirming dismissal of indictment with prejudice for same reason). The Government witnesses’ “inevitable impeachment by the wrongfully withheld evidence is not a permissible reason to end the trial.” *Shafer*, 987 F.2d at 1058. While the discovery violations may have tainted the jury, Breimeister would have waived any prejudice as to those violations by choosing to go forward with the first jury and using them to impeach the Government’s case. That logical decision should be respected, because the discovery violations hurt the Government’s case. *Ibid.*; cf. *Weston*, 50 F.3d at 639; *Lovinger*, 845 F.2d at 743-744.

The decision below thus greenlights what the Double Jeopardy Clause strictly forbids: a mistrial that allows the prosecution to strengthen its case, giving it an unfair advantage. *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980). It does so without a single mention of *the prosecutor’s* burden. That alone requires reversal.

2. The Fifth Circuit affirmed the district court’s manifest necessity determination because the discovery errors were “inadvertent,” “unintentional,” and not in “bad faith.” Pet. App. 15a-17a. That reasoning again botches the manifest necessity standard.

The standard of review turns on the basis for mistrial. Deference is at its height when cases present a “classic basis” for a mistrial, *Washington*, 434 U.S. at 509, like the prototypical example of a deadlocked jury, *Perez*, 22 U.S. (9. Wheat.) at 579-580. When the basis for mistrial is prosecutorial error, “the strictest

scrutiny is appropriate.” See *Washington*, 434 U.S. at 508.

This Court has given two examples of when such scrutiny is appropriate: the “unavailability” of “critical prosecution evidence,” or “when there is reason to believe that the prosecutor” is harassing the defendant. *Washington*, 434 U.S. at 508. Only one of those non-exhaustive examples is concerned with the prosecutor’s intent behind the error. Indeed, strict scrutiny is warranted based on the error in *Downum*, 372 U.S. at 737-738 (unavailability of witness), even when “nothing” in that case “suggest[ed]” that the prosecutor “purpose[fully]” sought to gain an “advantage” with a second, different jury. *Id.* at 742 (Clark, J., dissenting).

Following this Court’s precedent, other courts have correctly concluded it “cannot be” that the “strictest scrutiny” standard applies only when there is intentional” or bad-faith misconduct. See *Walker v. United States*, 317 A.3d 388, 409 n.13 (D.C. 2024) (citing *Routh v. United States*, 483 A.2d 638, 642 (D.C. 1984)); *Walck v. Edmondson*, No. 05-cv-430, 2005 WL 1907347, at *4 (W.D. Okla. Aug. 10, 2005), *aff’d*, 472 F.3d 1227, 1239-1240 & 1236 n.4 (10th Cir. 2007) (reviewing “using the ‘strictest scrutiny,’” and noting “intentionally created” errors are one factor of many (citing 5 Wayne R. Lafave et al., *Criminal Procedure* § 25.2(c) n.18 (2d ed. 1999)).

Indeed, intentional prosecutorial misconduct can *automatically* bar retrial—i.e., the analysis “ends” and “there is no scrutiny at all of whether manifest

necessity existed, because a retrial is precluded regardless.” See *Walker*, 317 A.3d at 409 n.13. That is consistent with this Court’s decision in *Kennedy*, holding that prosecutorial misconduct intended to goad the defendant into moving for a mistrial (which would otherwise waive Double Jeopardy protections) bars re-prosecution. 456 U.S. at 673-679. Similarly, many State courts have adopted broader Double Jeopardy rules barring re-prosecutions in cases falling short of intentional misconduct. See generally *Commonwealth v. Johnson*, 231 A.3d 807, 825 & n.12 (Pa. 2020) (collecting cases).

The Fifth Circuit, however, erroneously took a requirement for an *automatic* bar to retrial (intentional misconduct) and improperly imported it into a requirement for applying the “strictest scrutiny” standard for determining manifest necessity. At bottom, the Fifth Circuit’s holding that there was “manifest necessity” for a mistrial, Pet. App. 14a-19a, reflects an outcome rejected by other courts “whereby the defendant” is “penalized when” prosecutorial error, “though not rising to the level of [intentional] misconduct * * * , nevertheless would warrant the grant of a mistrial.” See *Davis*, 664 N.E.2d at 887. This Court should reject that holding too.

III. The Questions Presented Are Important And High Stakes For Criminal Defendants.

The questions presented are critically important and arise every time there is the prospect of a mistrial. But this Court has yet to articulate the constitutional guardrails that apply in the implied consent analysis

in particular, which is needed given the conflicting authorities. *Supra* § I.

Mistrial decisions are high stakes and often abrupt—especially when made, as here, deep into trial and are prompted by prosecutorial errors. Defendants face a “Hobson’s Choice”: Either continue with a trial tainted by error (though not one that would necessarily lead to reversal on appeal) and end the case with the first jury; or give up the well-established right to have the case tried before the first jury. *Dinitz*, 424 U.S. at 608-609. And this choice is made in a criminal trial that is, “even in the best of circumstances, a complicated affair to manage,” *United States v. Jorn*, 400 U.S. 470, 479-480 (1971) (plurality op.), and often comes with a “hectic atmosphere.” See *Love*, 112 F.3d at 138-139. That environment lends itself to the ambiguity present in many implied consent cases. Here, for example, late-breaking prosecutorial discovery errors caused the hectic atmosphere, and those errors were being addressed on an incredibly fast-paced timeline.

These circumstances call out for resolving doubts in favor of defendants’ Double Jeopardy rights and ensuring their consent to a mistrial cannot be implied absent clear and unequivocal indications to the contrary.

Consider next the asymmetry between defendants and the Government. Defendants “live in a constant state of anxiety and insecurity” when under threat of prosecution, *Weston*, 50 F.3d at 636, and thus bear “the emotional and financial hardship” of being put in

jeopardy. *Lovinger*, 845 F.2d at 743. Yet here, Breimeister was effectively “penalized when the prosecution’s” errors, “though not rising to the level of” intentional “misconduct,” nevertheless “warrant[ed] the grant of a mistrial.” See *Davis*, 664 N.E.2d at 887. That result gave the prosecution the benefit of a free “trial run of [their] case” in “the first proceeding,” *Washington*, 434 U.S. at 508 n.24 (citation omitted), while causing the defendant to again bear the emotional and financial hardships of a successive prosecution.

Worse still, Breimeister lost the ability to use the prosecutorial errors to his advantage—to try to impeach the Government’s case—in a second trial, which he otherwise could have done at the first trial. Courts should “avoid giving the prosecution [this] unfair” advantage of “retry[ing] the defendant using information gained from the first trial concerning the strengths and weaknesses of [its] case,” *Weston*, 50 F.3d at 636, while strategically disadvantaging defendants in their use of prosecutorial errors when defendants decide to proceed with the first tainted trial. “[T]he defense may effectively impeach” the prosecution’s case, as Breimeister wanted to do, “by pointing out * * * improprieties.” *Lovinger*, 845 F.2d at 744.

Indeed, under the Fifth Circuit’s rule it is entirely unclear whether there is any practical accountability mechanism for violations like those here. Prosecutors cannot be held civilly liable based partly on procedural checks like “the remedial powers of the trial judge” and “appellate review,” *Imbler v. Pachtman*, 424 U.S. 409, 427-429 (1976), which should have militated in

defendant's favor here. When prosecutors "impaneled the jury" without first disclosing legally-required discovery material, they "took a chance" of jeopardy attaching and barring re-prosecution, or otherwise having their case undermined by those due process violations. See *Downum*, 372 U.S. at 737 (citation omitted). The Government should now be held accountable for the risk it assumed—otherwise, the asymmetry between defendants and prosecutors will only become more severe.

Finally, first principles mandate strong constitutional guardrails for defendants. Defendants have the primary right to have their case completed before the first jury. If that right is disrupted by prosecutorial error, the Double Jeopardy Clause's North Star guides courts to side with a defendant's choice about how to proceed—with the default of continuing with the first jury, absent clear and unequivocal circumstances showing implied consent to a mistrial (or express consent). Without such consent, the prosecutor shoulders the heavy burden to show manifest necessity for any mistrial.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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