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Supreme Court, U.S.
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In the Supreme Court of the United States

**KEVIN M. TRUDEAU,
PETITIONER**

v.

**UNITED STATES OF AMERICA,
RESPONDENT**

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Speedy Trial Act applies to “any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by [a military court]).” 18 U.S.C. § 3172(2). The criminal contempt statute does not classify criminal contempt as a Class B or C misdemeanor; it provides only that a federal court “shall have power to punish [contempt of its authority] by fine or imprisonment, or both, at its discretion.” 18 U.S.C. § 401.

The first question presented is:

Whether a violation of 18 U.S.C. § 401 should be classified as a Class A felony under 18 U.S.C. § 3559 (as the First and Fourth Circuits hold), similarly to the closest analogous offense (as the Sixth, Seventh, and Ninth Circuits hold), or *sui generis* based on the penalty actually imposed by the court (as the Third, Fifth, and Eleventh Circuits hold).

2. The second question presented is:

Whether the willfulness *mens rea* of criminal contempt requires the government to prove that the defendant’s wrongful conduct was knowing (as the First and Eleventh Circuits hold), reckless (as the Fifth, Seventh, and D.C. Circuits hold), or negligent (as the Eighth and Ninth Circuits hold).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
INTRODUCTION	2
STATEMENT.....	5
A. The contempt statute and the Speedy Trial Act.....	5
B. Factual background	8
C. Pretrial proceedings.....	9
D. Trial and post-trial proceedings	11
E. Proceedings before the Seventh Circuit.....	13
I. This Court should resolve the entrenched circuit split over the classification of criminal contempt.	16
A. The First and Fourth Circuits follow Congress’s statutory scheme, classifying criminal contempt as a Class A felony.....	16
B. The Third, Fifth, and Eleventh Circuits read this Court’s decision in <i>Frank</i> to require classifying criminal contempt based on the “penalty actually imposed.”	18
C. The Seventh, Sixth, and Ninth Circuits classify criminal contempt based on the most analogous offense.	20

D. Without review, the circuit split will create uneven results.....	22
E. The decision below conflicts with this Court’s precedents.....	23
II. This Court should determine whether the willfulness element of criminal contempt requires knowledge.	26
A. The circuits are intractably divided over the meaning of the willfulness requirement for criminal contempt.....	26
B. The Seventh Circuit’s recklessness standard conflicts with this Court’s precedents, which require knowledge to satisfy willfulness requirements in criminal cases.....	30
CONCLUSION	35
APPENDIX A: <i>United States v. Trudeau</i> , No. 14-1869, Opinion, Court of Appeals for the Seventh Circuit, February 5, 2016, reported at 812 F.3d 578 (7th Cir. 2016).....	1a
APPENDIX B: <i>United States v. Trudeau</i> , No. 10-CR-886, Excerpt from Transcript of Proceedings, District Court for the Northern District of Illinois, December 7, 2011, oral ruling, not reported	30a
APPENDIX C: <i>United States v. Trudeau</i> , No. 10-CR-886, Memorandum Opinion and Order, District Court for the Northern District of Illinois, January 29, 2014, unpublished, available at 2014 WL 321373.....	40a

APPENDIX D: <i>United States v. Trudeau</i> , No. 14-1869, Order on the Petition for Rehearing and Suggestion En Banc, Court of Appeals for the Seventh Circuit <i>en banc</i> , March 7, 2016, unreported (7th Cir. 2016)	47a
APPENDIX E: Criminal Contempt Statute, 18 U.S.C. § 401	49a
APPENDIX F: Speedy Trial Act, 18 U.S.C. § 3161, <i>et seq.</i>	50a
APPENDIX G: Sentencing Reform Act, Sentencing classification of offenses, 18 U.S.C. § 3559	63a
APPENDIX H: <i>FTC v. Trudeau</i> , Civ. No. 03-C-3904, Stipulated Final Order for Permanent Injunction and Settlement of Claims, District Court for the Northern District of Illinois, September 2, 2004	73a
APPENDIX I: <i>FTC v. Trudeau</i> , Civ. No. 03-C-3904, Order to Show Cause, District Court for the Northern District of Illinois, Gettleman, J. presiding, April 16, 2010	105a
APPENDIX J: <i>FTC v. Trudeau</i> , No. 10-CR-886, Order to Show Cause, District Court for the Northern District of Illinois, Guzmán, J. presiding, December 8, 2011	107a
APPENDIX K: <i>FTC v. Trudeau</i> , Civ. No. 03-C-3904, Government's Response to Defendants Memorandum and Motion to Dismiss Order to Show Cause, District Court for the Northern District of Illinois, August 13, 2010	109a

APPENDIX L: <i>FTC v. Trudeau</i>, Civ. No. 10-CR-886, Government's Response to Defendant's Motion for Judgment of Acquittal, District Court for the Northern District of Illinois, December 8, 2011	121a
APPENDIX M: <i>FTC v. Trudeau</i>, Civ. No. 10-CR-886, Defendant's Reply in Support of Motion for Judgment of Acquittal, District Court for the Northern District of Illinois, January 3, 2014.....	130a

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. Dunn</i> , 6 Wheat. 204 (1821).....	4, 5
<i>Ashcraft v. Conoco, Inc.</i> , 218 F.3d 288 (4th Cir. 2000)	28
<i>Betterman v. Montana</i> , 136 S. Ct. 1609 (2016)	6
<i>Bryan v. United States</i> , 524 U.S. 184 (1998)	3, 15, 30, 31, 32, 34
<i>Cheek v. United States</i> , 498 U.S. 192 (1991)	11, 30
<i>Commonwealth v. Kneeland</i> , 37 Mass. 206 (1838).....	31
<i>Cooke v. United States</i> , 267 U.S. 517 (1925)	5
<i>Dixon v. United States</i> , 548 U.S. 1 (2006)	3, 30, 34
<i>Doral Produce Corp. v. Paul Steinberg Assoc., Inc.</i> , 347 F.3d 36 (2d Cir. 2003).....	27
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	28, 29, 31

<i>Frank v. United States</i> , 395 U.S. 147 (1969)	3, 13, 17, 20, 23, 24
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 131 S. Ct. 2060 (2011)	31
<i>Green v. United States</i> , 356 U.S. 165 (1958)	4, 31, 33, 34
<i>Int'l Union, United Mine Workers of Am. v.</i> <i>Bagwell</i> , 512 U.S. 821 (1994)	4, 35
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	33
<i>Klopfert v. North Carolina</i> , 386 U.S. 213 (1967)	3, 23, 24, 25
<i>Musacchio v. United States</i> , 136 S. Ct. 709 (2016)	33
<i>Nye v. United States</i> , 313 U.S. 33 (1941)	6
<i>Pennsylvania v. Local Union 542, Int'l</i> <i>Union of Operating Eng'rs</i> , 552 F.2d 498 (3d Cir. 1977).....	28
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	30
<i>Safeco Ins. Co. of Am. v. Burr</i> , 551 U.S. 47 (2007)	3, 15, 30, 32
<i>In re Solomon</i> , 465 F.3d 114 (3d Cir. 2006).....	3, 18, 20

<i>United States v. Allen</i> , 587 F.3d 246 (5th Cir. 2009)	4, 15, 27, 29
<i>United States v. Allen</i> , 73 F.3d 64 (6th Cir. 1995)	28
<i>United States v. Armstrong</i> , 781 F.2d 700 (9th Cir. 1986)	4, 27, 29
<i>United States v. Beals</i> , 145 F.3d 1346 (10th Cir. 1998)	28
<i>United States v. Bland</i> , 961 F.2d 123 (9th Cir. 1992)	7
<i>United States v. Bostic</i> , 59 F.3d 167 (4th Cir. 1995)	28
<i>United States v. Broussard</i> , 611 F.3d 1069 (9th Cir. 2010)	20, 21
<i>United States v. Carpenter</i> , 91 F.3d 1282 (9th Cir. 1996)	20, 21
<i>United States v. Cheeseman</i> , 600 F.3d 270 (3d Cir. 2010)	27
<i>United States v. Cohn</i> , 586 F.3d 844 (11th Cir. 2009)	3, 18, 19, 20
<i>United States v. Greyhound Corp.</i> , 508 F.2d 529 (7th Cir. 1974)	31
<i>United States v. Hendrickson</i> , No. 15-1446, 2016 WL 930134 (6th Cir. Mar. 11, 2016)	28

<i>United States v. Holmes</i> , 822 F.2d 481 (5th Cir. 1987)	3, 18, 20
<i>United States v. Love</i> , 449 F.3d 1154 (11th Cir. 2006)	22
<i>United States v. McMahon</i> , 104 F.3d 638 (4th Cir.1997)	28
<i>United States v. Moncier</i> , 492 F. App'x 507 (6th Cir. 2012)	20, 21, 23
<i>United States v. Mottweiler</i> , 82 F.3d 769 (7th Cir. 1996)	31
<i>United States v. Mourad</i> , 289 F.3d 174 (1st Cir. 2002)	4, 15, 27, 28
<i>United States v. Myers</i> , 302 F. App'x 201 (4th Cir. 2008)	3, 18
<i>United States v. Rapone</i> , 131 F.3d 188 (D.C. Cir. 1997)	27, 29
<i>United States v. Straub</i> , 508 F.3d 1003 (11th Cir. 2007)	4, 15, 27, 28
<i>United States v. Themy-Kotronakis</i> , 140 F.3d 858 (10th Cir. 1998)	28
<i>United States v. Trudeau</i> , 812 F.3d 578 (7th Cir. 2016)	1, 27
<i>United States v. Vezina</i> , 165 F.3d 176 (2d Cir. 1999)	27
<i>United States v. Wright</i> , 812 F.3d 27 (1st Cir. 2016)	2, 16, 17, 18, 22

<i>Wright v. Nichols</i> , 80 F.3d 1248 (8th Cir. 1996)	27, 29
<i>Young v. United States ex rel. Vuitton et Fils</i> S.A., 481 U.S. 787 (1987)	4, 5

Statutory Provisions

18 U.S.C.:

§ 401	1, 2, 5, 9, 16, 19, 24
§ 401(1)	5
§ 401(2)	5
§ 401(3)	6, 33
§ 402	6
§ 3161	1, 9
§ 3161(c)(1)	7
§ 3162(a)(2)	7
§ 3172(2)	2, 7
§ 3559	1, 24
§ 3559(a)	7, 16, 17, 18
§ 3559(a)(1)	8

28 U.S.C. § 1254(1)	1
---------------------------	---

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Appropriations Authorization Act, Pub.

L. No. 107-273, div. B, tit. III, §

3002(a)(1), 116 Stat. 1805 (2002)	6
---	---

Judiciary Act of 1789, 1 Stat. 83	6
---	---

Speedy Trial Act of 1974, Pub. L. No. 93-

619, tit. I, § 101, 88 Stat. 2085 (1975)	6
--	---

Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, §§ 212(a)(2), 223(i), 98 Stat. 1991, 2029 (1984).....	7
---	---

Other Authorities

Judicial Council of the Eleventh Circuit, <i>Eleventh Circuit Pattern Jury Instructions (Criminal Cases)</i> § 9.1A (2010), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf	28
Brief of the United States, <i>United States v. Moncier</i> , 492 F. App'x 507 (6th Cir. 2012) (No. 11-5196), 2011 WL 3662644	23
Brief of the United States, <i>United States v. Wright</i> , 812 F.3d 27 (1st Cir. 2016) (No. 14-2335), 2015 WL 5934327	22
Petition for Certiorari (pending), <i>Wright v. United States</i> , No. 15-9432 (filed May 18, 2016)	16

PETITION FOR A WRIT OF CERTIORARI

Kevin Trudeau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–29a) is reported at 812 F.3d 578. The orders denying rehearing (App. 47a–48a) are unpublished. The oral ruling of the United States District Court for the Northern District of Illinois on petitioner’s motion for dismissal under the Speedy Trial Act (App. 30a–38a) is unreported. The district court’s opinion on petitioner’s motion for acquittal (App. 40a–46a) is unpublished, but is available at 2014 WL 321373.

JURISDICTION

The judgment of the Seventh Circuit was entered on February 5, 2016, and rehearing was denied on March 7, 2016. App. 47a–48a. On May 6, Justice Kagan granted an application to extend the time to file a petition for certiorari until July 6, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.* (App. 50a–62a), the sentencing classification statute, 18 U.S.C. § 3559 (App. 63a–72a), and the criminal contempt statute, 18 U.S.C. § 401 (App. 49a).

INTRODUCTION

This case presents two critical questions involving the law of criminal contempt: whether contempt is properly classified as an offense other than a Class B or C misdemeanor, and thus is subject to the Speedy Trial Act; and whether the government may satisfy the willfulness requirement of criminal contempt by proving only a reckless state of mind rather than knowing misconduct. Both questions are recurring, and both have divided the federal circuits. Moreover, the decision below conflicts with this Court's precedents and the plain text of the criminal contempt law.

First, the Seventh Circuit held that the Speedy Trial Act does not apply to a defendant whose charging document—not the offense statute—limits a potential sentence to six months or less. App. 12a. But Congress has extended Speedy Trial Act rights to “any Federal criminal offense” “other than a Class B or C misdemeanor.” 18 U.S.C. § 3172(2). Because the criminal contempt statute (18 U.S.C. § 401) does not contain a letter classification or an explicit statutory maximum, the Seventh Circuit held that it would classify Trudeau's contempt as “analogous to an indictment for a Class B misdemeanor.” App. 12a. In so doing, the court acknowledged that it was joining the Sixth and the Ninth Circuits, which classify criminal contempt offenses the same as the most analogous offense. App. 12a n.3.

The rule in those circuits, however, squarely conflicts with that applied in the First and Fourth Circuits, which hold that “criminal contempt [] must as a matter of statutory construction be treated as a Class A felony.” *United States v. Wright*, 812 F.3d 27, 28–29 (1st Cir. 2016); see also *United States v. Myers*,

302 F. App'x 201, 206 (4th Cir. 2008) (per curiam). Further, the decisions of those five circuits conflict with the decisions of the Third, Fifth, and Eleventh Circuits, which read *Frank v. United States*, 395 U.S. 147 (1969), to require treating criminal contempt as *sui generis*—as neither a misdemeanor nor a felony, but rather as an offense classified by “the actual sentence imposed.” *In re Solomon*, 465 F.3d 114, 120 (3d Cir. 2006); accord *United States v. Holmes*, 822 F.2d 481, 493 (5th Cir. 1987); *United States v. Cohn*, 586 F.3d 844, 848 (11th Cir. 2009) (per curiam). In addition to further dividing the circuits, the decision below grants the government unlimited discretion over when to bring a case to trial, in conflict with *Klopper v. North Carolina*, 386 U.S. 213, 216 (1967).

Second, the Seventh Circuit held that the willfulness element of criminal contempt requires only proof of recklessness—that is, proof that the defendant was “conscious of a substantial risk that the prohibited events will come to pass.” App. 16a. In so doing, the court rejected this Court’s willfulness precedents as limited to “statutory-willfulness requirements in other contexts.” App. 19a. But this Court “ha[s] regularly read the modifier [willfully] as limiting liability to knowing violations.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 n.9 (2007). And it has done so “[a]s a general matter, when used in the criminal context.” *Bryan v. United States*, 524 U.S. 184, 191 (1998). This Court’s willfulness *mens rea* requires proving that a defendant knew what he was doing was wrong. *Dixon v. United States*, 548 U.S. 1, 5 (2006).

In concluding otherwise, the decision below deepens an entrenched circuit split. The First and Eleventh Circuits hold that willfulness in criminal con-

tempt cases contemplates “knowledge that one is violating a court order.” *United States v. Mourad*, 289 F.3d 174, 180 (1st Cir. 2002), *United States v. Straub*, 508 F.3d 1003, 1012 (11th Cir. 2007) (“Willfulness means a deliberate or intended violation.”). But the Seventh, Fifth, and D.C. Circuits hold that willfulness in the context of criminal contempt is satisfied by “a finding of recklessness” (*United States v. Allen*, 587 F.3d 246, 255 (5th 2009)); and the Eighth and Ninth Circuits adhere to the negligence standard where the defendant “should reasonably be aware.” *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986). Worse yet, in many circuits the standard is unclear. See p. 39, *infra*. Only this Court can bring order to the circuits.

These intractable splits are especially troubling in the context of “the contempt power,” which “uniquely is liable to abuse.” *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). That power is the “nearest akin to despotic power of any power existing under our form of government.” *Green v. United States*, 356 U.S. 165, 194 (1958) (Black, J., dissenting), overruled by *Bloom v. Illinois*, 391 U.S. 194, 196 (1968). “In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges’ in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth * * * the prospect of ‘the most tyrannical licentiousness.’” *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 228 (1821)).

Recognizing this danger, this Court has repeatedly stated that “care is needed to avoid arbitrary or oppressive conclusions.” *Cooke v. United States*, 267 U.S. 517, 539 (1925). The “exercise of [the contempt power] must be restrained by the principle that only ‘the least possible power adequate to the end proposed’ should be used in contempt cases.” *Young*, 481 U.S. at 801 (quoting *Anderson*, 6 Wheat. at 231). “This principle of restraint in contempt counsels caution.” *Ibid.*

Yet the decision below—like those of several other circuits—was anything but cautious. Petitioner Trudeau is serving a ten-year sentence for criminal contempt based on statements about his own book, made in an infomercial. He was denied his Speedy Trial Act rights based on a flagrant violation of the statutory text. And had the government been required to prove that Trudeau knew what he was doing was wrong, he would have been acquitted.

The Court should grant certiorari.

STATEMENT

A. The contempt statute and the Speedy Trial Act

1. The criminal contempt statute (18 U.S.C. § 401) permits a federal court “to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority” as is defined in three subsections. First, courts may punish “[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.” *Id.* § 401(1). Second, courts may punish “[m]isbehavior of any of [the court’s] officers in their official transactions.” *Id.* § 401(2). Third, and relevant here, courts may punish “[d]isobedience

or resistance to [the court's] lawful writ, process, order, rule, decree, or command." *Id.* § 401(3).

Section 401 traces to the First Congress and the Judiciary Act of 1789. Section 17 of that Act granted the federal courts "power to * * * punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat. 83.

Yet there were soon abuses of that broad grant of authority. Most notoriously, a contempt prosecution by Judge Peck—who "imprisoned and disbarred one [Mr.] Lawless for publishing a criticism of one of his opinions in a case which was on appeal"—led to "a drastic delimitation by Congress of the broad undefined power of the inferior federal courts." *Nye v. United States*, 313 U.S. 33, 45 (1941). In the Act of March 2, 1831, Congress set out the three types of contempt that courts may punish today.¹ Apart from minor changes and a revision permitting both fines and imprisonment (Pub. L. No. 107–273, div. B, tit. III, § 3002(a)(1), 116 Stat. 1805 (2002)), the statute remains largely unchanged. The statute's text specifies no *mens rea* and does not classify the offense.

2. Congress enacted the Speedy Trial Act of 1974 (Pub. L. No. 93-619, tit. I, § 101, 88 Stat. 2085 (1975)) "to give effect to the sixth amendment right." *Bettermann v. Montana*, 136 S. Ct. 1609, 1616 (2016). The Act generally provides that the "trial of a defendant charged in an information or indictment with the commission of an offense shall commence within sev-

¹ The Act also introduced the precursor to the current § 402, which governs contumacious conduct that is illegal of its own accord.

enty days from the filing date.” 18 U.S.C. § 3161(c)(1). Time may be excluded under § 3161(h), but if trial does not begin within 70 (nonexcluded) days “the information or indictment shall be dismissed on motion of the defendant.” *Id.* § 3162(a)(2).

The Act defines an “offense” as “any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by [a military court]).” *Id.* § 3172(2). Originally, the Act provided that an offense was anything “other than a petty offense.” *Id.* § 3172(2) (1980). A petty offense was defined as “[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both.” *Id.* § 1(3) (1980). But, when Congress enacted the Sentencing and Reform Act of 1984, “petty offense” was changed to “Class B or C misdemeanor or an infraction.” Pub. L. No. 98-473, tit. II, § 223(i), 98 Stat. 2029 (1984).

The 1984 Act also implemented the classification schedule that provides a letter grade for offenses. § 212(a)(2), 98 Stat. 1991. Under that schedule, which lists a range of punishments assigned to letter grades, “[a]n offense that is not specifically classified by letter grade in the section defining it, is classified [by] the maximum term of imprisonment authorize[d].” 18 U.S.C. § 3559(a). When Congress has not prescribed a maximum penalty, courts uniformly hold that a sentence of life imprisonment is authorized. *United States v. Bland*, 961 F.2d 123, 128 (9th Cir. 1992) (collecting cases). If the maximum term of im-

prisonment is life, the offense is a Class A felony. *Id.* § 3559(a)(1).

B. Factual background

Kevin Trudeau is a #1 *New York Times* bestselling author of books on topics such as natural health, the credit and banking system, the First Amendment, and the American food and weight loss industry. His books provide advice and self-help opinions based on his personal experience and opinions. In part, he promotes those books on infomercials.

In 2004, Trudeau and the FTC entered into a consent order (“2004 Consent Order”) before Judge Gettleman to settle an FTC enforcement action alleging deceptive acts and practices in violation of a prior stipulated order. App. 73a–104a. The FTC agreed to end its suit, and there was no finding or admission of guilt. In exchange, Trudeau agreed that he would not, among other things, “misrepresent the content of [a] book, newsletter, or informational publication” in an infomercial. App. 81a. During this process, the FTC approved Trudeau’s infomercials promoting his new book: “*Natural Cures ‘They’ Don’t Want You to Know About*” (“*Natural Cures*”) as acceptable under the pending consent order.

In 2007, encouraged by his *Natural Cures* success, Trudeau wrote a new book, “*The Weight Loss Cure ‘They’ Don’t Want You to Know About*” (“*Weight Loss*”), and later promoted it in three infomercials. In September 2007, the FTC initiated civil contempt proceedings against him, alleging that he misrepresented the contents of *Weight Loss* in those infomercials. In November 2007, after a bench trial, Judge Gettleman found Trudeau civilly liable and ordered

him to pay \$37.6 million in restitution—even though the government was not required to prove, and did not prove, that any consumer was harmed.

C. Pretrial proceedings

On April 16, 2010, at the close of the civil contempt proceedings, Judge Gettleman issued a show cause order (“Gettleman Order”) (App. 105a–106a) to hold Trudeau criminally liable under 18 U.S.C. § 401 for the same conduct that spawned the civil proceedings. App. 5a. The Gettleman Order “capped” Trudeau’s potential punishment at six months’ imprisonment. App. 6a.

On April 29, 2010, the U.S. Attorney’s Office accepted prosecution and moved to exclude time under the Speedy Trial Act. *Ibid.* And in August 2010, the government informed the court that, after due consideration, “it will not contest the Court’s announcement that it will cap at six months any prison term it may impose at the conclusion of the contempt proceedings.” App. 109a n.1. Ultimately, the government would move for, and receive, four exclusions of time under the Act.

On September 10, 2010, Trudeau “asked that the criminal proceedings be reassigned to a new judge.” App. 5a. “Judge Gettleman exercised his prerogative as a senior judge to have the case transferred.” *Ibid.* On October 19, 2010, it was reassigned to Judge Guzmán with a new criminal docket number. On October 21, 2010, the government’s fourth and last time exclusion expired.

Judge Guzmán waited until April 7, 2011, to hold a status hearing. App. 6a. By then, the government’s

failure to prosecute the case had resulted in a delay of more than 150 nonexcludable days.

At the April 7 hearing, Trudeau moved to dismiss the case, invoking the Speedy Trial Act. App. 6a. The government responded by “ask[ing] Judge Guzmán to withdraw the initial show-cause order and issue an amended one without the six-month cap.” *Ibid.* The government alleged no new facts, charges, or sentencing enhancements; it argued only that an uncapped order was more appropriate “given the serious nature of the contempt and Trudeau’s history of disobeying court orders.” *Ibid.* Neither point had changed since the government informed the court it would not contest the “capped” potential sentence.

On December 7, 2011, Judge Guzmán denied Trudeau’s motion and granted the government’s motion to issue a new show cause order without the cap. App. 6a. The court orally ruled that the Act applies only to a defendant charged with an offense in an information or an indictment. *Ibid.*² Noting that “the charging document in this case defined the punishment as not exceeding six months,” the court held that “[t]he Act simply doesn’t apply to any criminal proceeding for which the maximum penalty is no more than six months.” App. 35a, 36a. The next day the amended show cause order (“Guzmán Order”) (App. 107a) issued without the cap.

It is undisputed that, between April 29, 2010, and December 8, 2011, 214 nonexcluded days passed under the Gettleman Order. App. 7a. It is also undis-

² The government conceded the trial court’s error on this ground, and the Seventh Circuit agreed the “government was right to make this concession.” App. 9a.

puted that, if the Act applies to the Gettleman Order, it was violated.

D. Trial and post-trial proceedings

During the six-day trial, the government presented no direct evidence as to Trudeau's state of mind. The government's case-in-chief consisted of presenting the 2004 Consent Order, the *Weight Loss* book, transcripts and recordings of the three infomercials, a chart comparing the alleged misrepresentations with quotations from the book, and two witnesses who did not know Trudeau. The government also presented a purchase agreement from the company responsible for the infomercials, which purportedly reflected Trudeau's profit motive.

The two witnesses, a postal inspector and a dietician, presented no testimony on Trudeau's state of mind. App. 131a. The inspector simply introduced the *Weight Loss* book and infomercials into evidence and read excerpts from the book, as directed by the prosecutor. The dietician merely discussed purchasing items mentioned in the book and compared the book's meals with her own advice to clients. She never mentioned, nor had she seen, the infomercials. In the end, the government rested without offering any statements or correspondence authored by Trudeau explaining the circumstances surrounding the infomercials, his understanding of the 2004 Consent Order, or how he chose the infomercials' content. *Ibid.*

After the jury returned a guilty verdict, Trudeau moved for acquittal, contending that none of the government's evidence established that he acted willfully. Citing *Cheek v. United States*, 498 U.S. 192, 200 (1991), Trudeau argued that the prosecution had to

prove that “he voluntarily and intentionally violated” the 2004 Consent Order. App. 133a. The government *conceded* that it had presented no direct evidence of Trudeau’s willfulness, stating that it “need not * * * present direct evidence of what was in the defendant’s mind when he acted.” App. 125a. Ironically, the government relied solely on cases where “the defendant testified and gave some other reason for his actions.” App. 127a.

To bolster its lack of evidence, the government noted that, in the *civil* contempt appeal, the Seventh Circuit had “concluded that defendant ‘clearly misrepresented the book’s content,’ ‘loaded’ his infomercials with ‘statements that are patently false,’ ‘outright lied,’ made ‘blatant misrepresentations,’ and ‘repeatedly distorted’ the content of the book.” App. 125a. According to the government, the jury was “entitled to draw the same inferences” “and to further find that defendant acted willfully”—even though the record, unlike in the civil case, contained no testimony from Trudeau. App. 126a.

The court found that the evidence supported the verdict. Relying on the jury instructions, it held that “direct evidence from a witness about the defendant’s state of mind was not required”—essentially, that the government need not prove what Trudeau was thinking. App. 43a. At sentencing, the court departed from a guidelines range of 235–293 months and sentenced Trudeau to ten years’ imprisonment—twenty times longer than the six months’ imprisonment at which Judge Gettleman had originally “capped” Trudeau’s potential punishment. App. 7a.

E. Proceedings before the Seventh Circuit

Trudeau appealed, challenging the Speedy Trial Act ruling, the jury instruction on willfulness, and the denial of his acquittal motion on sufficiency of the evidence, among other issues. App. 2a–3a. The Seventh Circuit affirmed. App. 29a.

First, the court rejected the argument that the Speedy Trial Act applied to the Gettleman Order's contempt charge. It found an "unusual feature" complicated applying the Act to criminal contempt prosecutions: criminal contempt "carries no statutorily authorized maximum punishment." App. 10a. The court reasoned that Trudeau's textual argument was "hard to square" with this Court's approach "in the analogous context of the right to trial by jury in contempt prosecutions." App. 11a. In those cases, the court reasoned, this Court recognized that contempt was not categorized as "serious" or "petty." *Ibid.* (citing *Frank*, 395 U.S. at 149). Instead, "in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." *Ibid.*

The court created a corollary to the "rule" of *Frank*: "If the document initiating the contempt prosecution caps the sentence at six months or less, then it's not necessary to wait until sentencing to know whether the Speedy Trial Act will apply—it won't." App. 12a. So a document "capping a contempt sentence at six months is analogous to * * * a Class B misdemeanor." *Ibid.* As a result, the court held that the offense based on the Gettleman Order, with its six-month "capped" potential sentence, was not an offense under the Act. *Ibid.*

Second, the court dismissed Trudeau's contention that the government did not present evidence that he violated the 2004 Consent Order willfully. While acknowledging the circuit split over the willfulness standard (App. 18a n.5), the court adhered to its precedent criminalizing conduct that is merely reckless.³ The court swept aside this Court's willfulness precedents as "cases interpreting statutory-willfulness requirements in other contexts, not the judicially implied willfulness requirement in criminal contempt." App. 19a.

The court thus held that "the government had no obligation to present direct state-of-mind evidence" and approved the district court's use of "common sense in making reasonable inferences from circumstantial evidence." App 21a. The court justified this result on the basis that the panel in Trudeau's *civil* contempt appeal found—based on different evidence and without applying a willfulness standard—that the *Weight Loss* "infomercials included 'blatant misrepresentations' that were 'patently false' and 'outright lies.'" App. 22a.

³ When reviewing the evidentiary challenge related to *Natural Cures* evidence, the court noted the willfulness standard's subjective nature and acknowledged that "it was error [for the district court] to impose an objective 'reasonableness' requirement." App. 24a.

REASONS FOR GRANTING THE PETITION

The decision below warrants this Court's review on two important issues of criminal law that have divided the circuits. *First*, the Court should resolve the acknowledged split over how criminal contempt is classified. The First and Fourth Circuits hold that criminal contempt is always a Class A felony; the Third, Fifth, and Eleventh Circuits treat it as *sui generis*, based on the penalty imposed; and the Seventh, Ninth, and Sixth Circuits hold that criminal contempt is analogous to a Class B misdemeanor. The decision below not only deepens this three-way split, but conflicts with this Court's precedents and turns the statutory text on its head.

Second, in refusing to adopt the knowledge standard for criminal willfulness, the Seventh Circuit both deepened another acknowledged split and broke from this Court's teaching that, in criminal cases, willfulness is "regularly" limited "to knowing violations." *Safeco*, 551 U.S. at 58 n.9; accord *Bryan*, 524 U.S. at 192. The First and Eleventh Circuits heed this guidance, holding that the willfulness requirement "contemplates knowledge" (*Mourad*, 289 F.3d at 180)—"a deliberate or intended violation" (*Straub*, 508 F.3d at 1012). By contrast, the Fifth, Seventh, and D.C. Circuits find that "willfulness in the context of the criminal contempt statute at a minimum requires a finding of recklessness" (*Allen*, 587 F.3d at 255); and the Eighth and Ninth Circuits require only that a defendant "should reasonably be aware that his conduct is wrongful." The remaining circuits are all over the map. And even apart from this entrenched split, the recurring question of the proper willfulness standard for criminal contempt would warrant certiorari.

I. This Court should resolve the entrenched circuit split over the classification of criminal contempt.

The circuits are in acknowledged conflict over the proper classification of criminal contempt. Two treat it as a Class A felony; three treat it as turning on the particular penalty imposed; and three classify it based on their views of the most analogous offense.

A. The First and Fourth Circuits follow Congress's statutory scheme, classifying criminal contempt as a Class A felony.

The First and Fourth Circuits follow the plain statutory text, treating criminal contempt as a Class A felony based on its potential maximum penalty.

For example, the First Circuit has held “that the criminal contempt here must as a matter of statutory construction be treated as a Class A felony under 18 U.S.C. § 3559(a).” *Wright*, 812 F.3d at 28–29.⁴ The defendant there (*Wright*) was convicted of criminal contempt, receiving a sentence of 80 months. *Id.* at 29. After serving his sentence, he violated his supervised release, and the court sentenced him to another 30 months for criminal contempt. *Id.* at 31. *Wright* claimed that, during sentencing, he was improperly exposed to a five-year potential maximum, instead of two years, because the trial court treated criminal

⁴ *Wright* has sought certiorari on whether “the maximum punishment for criminal contempt under 18 U.S.C. § 401 is imprisonment for life.” *Wright v. United States*, petition for cert. pending, No. 15-9432 (filed May 18, 2016). In support, he identifies the same circuit split between the First, Ninth, and Eleventh Circuits. *Id.* at 11–12. The Court may wish to consider these petitions together.

contempt as a Class A felony. Citing Ninth Circuit precedent, he contended that "his underlying conviction for criminal contempt should be classified as a Class C felony, not a Class A felony." *Ibid.*

The First Circuit rejected this position, explaining that it "do[es] not depart from a statute's plain language absent either" textual ambiguity or an absurd result. *Wright*, 812 F.3d at 33 (quotations omitted). "Under the plain reading of the statute," the court reasoned, "the maximum penalty for criminal contempt" is "life imprisonment." *Ibid.* Then, citing this Court's decision in *Frank*, the court stated that because Congress "declin[ed] to limit the penalty, Congress g[ave] maximum discretion to the sentencing court." *Id.* at 32. The court thus held that the classification statute "makes [criminal contempt] a Class A felony." *Id.* at 32–33.

In so holding, the First Circuit expressly rejected the Ninth Circuit's "analogous offense" methodology (also applied below). As the court noted, "classifying criminal contempt as a Class A felony" is not "patently absurd," and "the concerns raised by the Ninth Circuit are not enough to warrant disregarding the [statute's] plain language." *Id.* at 33. Moreover, "Congress utilizes the classification under § 3559(a) in other criminal statutes," and "it is the choice of Congress, and not the courts, to create sentencing policy." *Id.* at 33–34.

The First Circuit also recognized its disagreement with "the Eleventh Circuit to completely forgo classifying criminal contempt and avoid setting a maximum potential punishment." *Wright*, 812 F.3d at 34. This Court's reference to the offense as *sui generis*, the court stated, was "no basis" to suspect that "Con-

gress could not have intended for an offense with a maximum term of life imprisonment to be classified as a Class A felony for § 3559(a) purposes.” *Ibid.* “That contempt may be charged and prosecuted somewhat differently from other crimes is also not reason enough to eschew Congress’s scheme.” *Ibid.*

The Fourth Circuit likewise rejects the approach of the Seventh and Ninth Circuits. In *Myers*, 302 F. App’x at 206, an attorney did not comply with a subpoena, requiring the court to address the “classification of an offense as a felony or a misdemeanor.” *Ibid.* The probation officer recommended a sentence between 15 and 21 months, classifying the offense as a Class A felony. *Ibid.* Although the district court imposed a sentence of four months, it agreed that, under the statutory scheme, contempt was a Class A felony. *Id.* at 207 (citation omitted). Although the court of appeals did not adopt this scheme explicitly, it approved treating “Myers’ contempt conviction [as] a Class A felony.” *Ibid.*

B. The Third, Fifth, and Eleventh Circuits read this Court’s decision in *Frank* to require classifying criminal contempt based on the “penalty actually imposed.”

The Third, Fifth, and Eleventh Circuits, by contrast, treat criminal contempt as *sui generis*, and classify it based on the “actual sentence imposed.” *Solomon*, 465 F.3d at 120; *Holmes*, 822 F.2d at 493; *Cohn*, 586 F.3d at 848.

In the Eleventh Circuit, for example, the Speedy Trial Act would apply to Trudeau because the “penalty actually imposed” for his offense was a ten-year sentence. In *Cohn*, the court applied the criminal

contempt statute in sentencing an attorney to 45 days in prison for representing a client when he was “not eligible to practice law.” 586 F.3d at 845. The district court held that this punishment was a Class A felony under the classification statute. *Id.* at 846. Accordingly, the court imposed a term of five years of supervised release and the special felony assessment of \$100. *Ibid.*

The Eleventh Circuit reversed, holding that a “[u]niform classification of criminal contempt” is “inconsistent with the breadth of § 401 and appropriate sentences for its violation.” *Id.* at 848. The court reasoned that criminal contempt covers a broad range of conduct, and that “Congress has not seen fit to impose limitations on the sentencing power for contempts.” *Ibid.* Because the classification scheme requires certain punishments based on the offense’s grade, treating criminal contempt uniformly would “pigeonhole” the court and “impinge on its ability to impose appropriate sentences.” *Id.* at 848 n.9. The Eleventh Circuit thus held that “criminal contempt is best categorized as a *sui generis* offense, rather than a felony or misdemeanor.” *Id.* at 848.

In so holding, the court expressly “decline[d] to adopt th[e] method of classification” used by the Ninth Circuit (and now the Seventh). *Id.* at 848 n.7. That approach, the court reasoned, fails when a “sufficiently analogous guideline is absent,” and “[m]ore importantly, maximum penalties are established by statute, not the Sentencing Guidelines.” *Ibid.* The court thus split with the First Circuit, holding that criminal contempt “cannot be branded a Class A felony in every instance,” but likewise rejected classify-

ing contempt by the “maximum sentence a court could impose for the most analogous offense.” *Ibid.*

Similarly, the Third Circuit holds that “the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.” *Solomon*, 465 F.3d at 119 (quoting *Frank*, 395 U.S. at 149). Thus, when the “sentence actually imposed by the district court was five months’ imprisonment,” the crime was “classified [as] a Class B misdemeanor.” *Id.* at 120. And the Fifth Circuit likewise does not “characterize[] contempt as either a felony or a misdemeanor” but as “an offense *sui generis*.” *Holmes*, 822 F.2d at 493.

C. The Seventh, Sixth, and Ninth Circuits classify criminal contempt based on the most analogous offense.

Unlike any of the foregoing circuits, the Ninth and Sixth Circuits—now joined by the Seventh—hold that criminal contempt should be classified by the most analogous offense. *United States v. Moncier*, 492 F. App’x 507, 510 (6th Cir. 2012); *United States v. Broussard*, 611 F.3d 1069, 1072 (9th Cir. 2010); App. 11a–12a. According to these circuits, “[i]t would be unreasonable to conclude that by authorizing an open-ended range of punishments * * * Congress meant to brand all contempts as serious and all contemnors as felons.” *United States v. Carpenter*, 91 F.3d 1282, 1284 (9th Cir. 1996). Moreover, these courts reject this Court’s guidance in *Frank*, which stated that “the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense” (395 U.S. at 1505), by holding that “the actual sentence may not adequately reflect the

severity of the contemnor's conduct." *Carpenter*, 91 F.3d at 1285.

The Ninth Circuit "focuses on the upper limit of the district judge's discretion, classifying the crime according to the maximum sentence the judge was *authorized* to impose rather than the sentence *actually* imposed." *Broussard*, 611 F.3d at 1072. "[T]he statutory maximum" of the most analogous offense is "the upper limit of the district judge's discretion." *Ibid.*⁵ Thus, where the most analogous offense to the contumacious conduct is escape, the contempt is a Class D felony because the statutory maximum for escape is five years. *Id.* at 1073.

Similarly, the Sixth Circuit holds that contemnors charged with an offense limited to six months' imprisonment is a Class B misdemeanor. *Moncier*, 492 F. App'x at 510. In *Moncier*, the court "stated on the record" that the contemnor would face a "sentence of no more than six months' incarceration." *Ibid.* The court found that "[a] crime for which a defendant faces a sentence of six months or less is a class B misdemeanor." Thus, it was not an "offense" under the Speedy Trial Act. *Ibid.*

Finally, the court below joined these circuits, holding that "[a] show-cause order capping a contempt sentence at six months is analogous to an indictment for a Class B misdemeanor." App. 12a. The court first rejected the statutory scheme, holding that con-

⁵ Before the Sentencing Guidelines became discretionary, the Ninth Circuit held that "criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly analogous offense." *Broussard*, 611 F.3d at 1072.

tempt “carries no statutorily authorized maximum punishment.” App. 10a. The court then found that the contemnor in *Frank* was “not sentenced to any term of imprisonment, and “his contempt was properly treated as a petty offense.” App. 11a. Thus, Trudeau’s contempt charge that was “capped” at six months should also be treated as a Class B misdemeanor, and the Act did not apply. App. 11a–12a.

D. Without review, the circuit split will create uneven results.

The decision below and the First Circuit’s recent decision in *Wright* have only deepened this mature circuit split, guaranteeing that criminal contemnors will have different rights depending on where they are prosecuted. Because criminal contempt is always a Class A felony under the First Circuit’s reading of the Act, Trudeau was unquestionably entitled to dismissal there. *Wright*, 812 F.3d at 34. By contrast, *Wright* would have received less than 24 months under the Seventh Circuit’s analogous offense framework, as his underlying contempt was analogous to a Class C felony. *Id.* at 31.

What’s more, the government encourages courts to reach different results. It has advocated the rule that criminal contempt is a Class A felony. See *United States v. Love*, 449 F.3d 1154, 1158 (11th Cir. 2006) (Barkett, J., concurring) (“The government argues that criminal contempt is properly classified a Class A felony.”); U.S. Br. 17, *United States v. Wright*, 812 F.3d 27 (1st Cir. 2016) (No. 14-2335), 2015 WL 5934327, *17 (the government urged the district court to reject the Ninth Circuit’s (analogous offense) and Eleventh Circuit’s (*sui generis*) precedents). Before the Seventh and Sixth Circuits, the government

has argued that criminal contempt could be analogized to a Class B misdemeanor. Gov't C.A. Br. 18–20 (arguing criminal contempt is not Class A felony); U.S. Br. 46, *United States v. Moncier*, 492 F. App'x 507 (6th Cir. 2012) (No. 11-5196), 2011 WL 3662644, *46 (same).

Even if these conflicts could otherwise resolve themselves (they could not), the likelihood of that happening is nil when the lone repeat player benefits from this three-way split. Only this Court can bring uniformity.

E. The decision below conflicts with this Court's precedents.

Beyond the foregoing split, review is warranted because the decision below conflicts with this Court's decisions in *Frank* and *Klopper v. North Carolina*, 386 U.S. 213 (1967). First, the court misread *Frank* and confused the discretion to punish crime with the power to classify it. Second, the court ignored *Klopper's* central tenet—that the Speedy Trial right prevents prosecutors from having unlimited discretion in bringing the accused to trial.

Finding the statutory scheme “hard to square” with this Court's jury trial precedents, the court below analyzed whether the Gettleman Order charged Trudeau with a “serious” crime implicating his Sixth Amendment right to a jury trial. App. 11a. Citing *Frank*, the court reasoned that not at all criminal contempts are “serious” crimes, and that the “severity of the penalty *actually imposed* is the best indication” of seriousness. *Ibid.* The court then held that if the charging document “caps the sentence at six months or less, then it's not necessary to wait until sentenc-

ing to know whether the Speedy Trial Act will apply—it won't." App. 12a. Because the Gettleman Order (temporarily) capped any punishment at six months, the Act did not apply.

This "analogous offense" two-step, however, confuses the discretion to *punish* crime with the power to *classify* it—and thus misreads *Frank*. *First*, the rule in *Frank* is remedial: "Penalties presently authorized by Congress for petty offenses * * * may be imposed in federal criminal contempt cases without a jury trial." 395 U.S. at 151. The rule limits only the punishment that may be imposed without a jury trial, not access to a jury trial before sentencing.

Second, the Seventh Circuit quoted *Frank* for the proposition that "Congress * * * has not categorized contempts as 'serious' or 'petty.'" Notably, section 401 allows courts "to punish [contemnors] by fine or imprisonment, or both, at its discretion." But the text limits that discretion to the penalty; it does not displace Congress's prerogative to classify the statutory maximum. 18 U.S.C. § 3559. Here, after *Frank* was decided, Congress enacted a classification scheme after *Frank*. And it makes sense that Congress would provide Speedy Trial Act rights for offenses that it did not expressly classify as Class B or C misdemeanors—especially where, as here, the potential punishment for the same conduct can change in the court's discretion.

The decision below also conflicts with *Klopfer*, which guaranteed a speedy trial where prosecutors have unlimited discretion to bring defendants to trial. 386 U.S. at 214. The question there was "whether a State may indefinitely postpone prosecution on an indictment without stated justification over the objec-

tion of an accused who has been discharged from custody." *Ibid.* The prosecutor used a procedural device, the *nolle prosequi*, to keep defendants in permanent limbo with inactive indictments. The defendant was free to go, but the prosecutor could restore the indictment on a whim. *Ibid.* "During [the *nolle prosequi*], there is no means by which [the defendant] can obtain a dismissal or have the case restored to the calendar for trial." *Id.* at 216.

Klopper held that this procedure "clearly denies the petitioner the right to a speedy trial." *Id.* at 222. As the Court explained, "petitioner [wa]s not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go whithersoever he will." *Id.* at 221-222. The "pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Id.* at 222.

The decision below conflicts with this principle. It grants the judiciary unlimited discretion to issue charging documents "capping" the punishment at six months while later removing the cap over the defendant's objection. Here, not only did the court agree to a six-month cap, but the government itself agreed not to contest it. But none of that mattered. After more than 214 nonexcludable days had passed, the district court lifted the cap and Trudeau had no recourse.

II. This Court should determine whether the willfulness element of criminal contempt requires knowledge.

Review is also warranted on the question whether the willfulness requirement of criminal contempt requires the government to prove knowledge, recklessness, or some other *mens rea*. The ruling below both deepens an acknowledged split on that issue and conflicts with this Court's precedents on the meaning of willfulness. Even apart from these conflicts, moreover, the standard for proving willfulness in criminal contempt cases is an important and recurring question that would warrant certiorari.

A. The circuits are intractably divided over the meaning of the willfulness requirement for criminal contempt.

At least two circuits require knowing misconduct; three require recklessness; two require negligence; and the balance are in hopeless disarray.

Citing the decisions of five circuits, the Seventh Circuit acknowledged that the "circuits are split over whether 'knowledge' or 'recklessness' is the appropriate *mens rea*." App. 18a n.5. Yet the court did not understand the full scope of the problem, which this chart illustrates:

Willfulness Standard	Circuits
"Knowledge"	<i>United States v. Mourad</i>, 289 F.3d 174, 180 (1st Cir. 2002) <i>United States v. Straub</i>, 508 F.3d 1003, 1012 (11th Cir. 2007)
"Recklessness"	<i>United States v. Allen</i>, 587 F.3d 246, 255 (5th Cir. 2009) <i>United States v. Trudeau</i>, 812 F.3d 578, 588 (7th Cir. 2016) <i>United States v. Rapone</i>, 131 F.3d 188, 195 (D.C. Cir. 1997)
"Reasonably Should Have Been Aware"	<i>Wright v. Nichols</i>, 80 F.3d 1248, 1251 (8th Cir. 1996) <i>United States v. Armstrong</i>, 781 F.2d 700, 706 (9th Cir. 1986)
Intra-Circuit Willfulness Splits	Second, ⁶ Third, ⁷ Fourth, ⁸ Sixth ⁹ and Tenth ¹⁰ Circuits

⁶ Compare *United States v. Vezina*, 165 F.3d 176, 178 (2d Cir. 1999) (knowledge), with *Doral Produce Corp. v. Paul Steinberg Assoc., Inc.*, 347 F.3d 36, 38 (2d Cir. 2003) (reasonably should have been aware).

⁷ Compare *United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010) ("[A] willfulness requirement, which, if applied, would

Two circuits adhere to this Court's willfulness guidance. In the First Circuit, for example, "willfulness contemplates knowledge that one is violating a court order." *Mourad*, 289 F.3d at 180 (1st Cir. 2002). Similarly, in the Eleventh Circuit, "[w]illfulness means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." *Straub*, 508 F.3d at 1012; see also Judicial Council of the Eleventh Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* § 9.1A (2010).¹¹

By contrast, three other circuits—the Fifth, D.C., and Seventh Circuits—analyze motions for acquittal under the recklessness standard applied in *Farmer v. Brennan*, 511 U.S. 825, 839 (1994), which held that, "to act recklessly," one must "consciously disregard a substantial risk of serious harm." In *Rapone*, the

require him to have had actual knowledge that his prohibited conduct was illegal."), with *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 552 F.2d 498, 510 (3d Cir. 1977) (should reasonably be aware).

⁸ Compare *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 303 (4th Cir. 2000) (knowledge), and *United States v. McMahon*, 104 F.3d 638, 642 (4th Cir. 1997), with *United States v. Bostic*, 59 F.3d 167 (4th Cir. 1995) (recklessness).

⁹ Compare *United States v. Hendrickson*, No. 15-1446, 2016 WL 930134, *5 (6th Cir. Mar. 11, 2016) (knowledge), with *United States v. Allen*, 73 F.3d 64, 67 (6th Cir. 1995) (should reasonably be aware).

¹⁰ Compare *United States v. Beals*, 145 F.3d 1346 (10th Cir. 1998) (knowledge), with *United States v. Themy-Kotronakis*, 140 F.3d 858, 864 (10th Cir. 1998) (should reasonably be aware).

¹¹ <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf>.

D.C. Circuit required the government to show that a defendant “act[ed] with deliberate or reckless disregard.” 131 F.3d at 195. The law in the Fifth Circuit is to the same effect. *Allen*, 587 F.3d at 255 (“[Willfulness under] the criminal contempt statute at a minimum requires a finding of recklessness.”). And the Seventh Circuit requires only that the defendant was “conscious of a substantial risk that the prohibited events will come to pass.” App. 16a–17a (citing *Farmer*, 511 U.S. at 839).

The Eighth and Ninth Circuits set the bar even lower. By their lights, willfulness covers “volitional act[s] by one who knows or should reasonably be aware that [her] conduct is wrongful.” *Wright v. Nichols*, 80 F.3d 1248, 1251 (8th Cir. 1996); accord *Armstrong*, 781 F.2d at 706. In *Wright*, for example, the defendant violated an order not to remove funds or dispose of assets owned by a bankrupt company. 80 F.3d at 1249. After she received a refund check from a former attorney, she endorsed it to the company’s new attorney. *Id.* at 1249–1250. The defendant argued that she did not even consider that the refund check might have been the company’s asset, such that endorsement would violate the court order. *Id.* at 1251. But as the Eighth Circuit explained in affirming her conviction, “anyone in the position [of the defendant] reasonably should have known” as much, and thus that endorsement was “a violation of the TRO.” *Ibid.* The Fifth Circuit, by contrast, has expressly rejected the “reasonably should have known” standard applied by the Eighth and Ninth Circuits. *Allen*, 587 F.3d at 255.

This is to say nothing of the confusion in the Second, Third, Fourth, Sixth, and Tenth Circuits. As the

table above illustrates, those courts do not consistently apply a single willfulness standard, and often do not even cite the conflicting in-circuit authority. Although several cases in these circuits have required actual knowledge, in other cases (sometimes influenced by the Seventh Circuit's standard) those courts lower the *mens rea* threshold.

B. The Seventh Circuit's recklessness standard conflicts with this Court's precedents, which require knowledge to satisfy willfulness requirements in criminal cases.

Review is also warranted because the decision below conflicts with this Court's willfulness precedents and deprives criminal contemnors of due process. As a result, the courts below weighed the evidence under the wrong legal standard. The government could not satisfy the proper willfulness standard, and Trudeau was therefore denied acquittal as a matter of law. This Court should review the error *de novo*.

1. A host of this Court's precedents confirm that when "'willful' or 'willfully' has been used in a criminal statute, [this Court] ha[s] regularly read the modifier as limiting liability to knowing violations." *Safeco*, 551 U.S. at 57 n.9; see also *Dixon*, 548 U.S. at 5; *Bryan*, 524 U.S. at 191–92; *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek*, 498 U.S. at 200–01. This stands in contrast to cases involving "civil liability," where the Court "[has] generally taken [willfulness] to cover not only knowing violations of a standard, but reckless ones." *Safeco*, 551 U.S. at 57.

The Court's criminal willfulness standard requires "the Government [to] prove that the defendant acted

with knowledge that his conduct was unlawful.” *Bryan*, 524 U.S. at 191–192. As Chief Justice Shaw long ago explained: “The word wilfully, in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose.” *Commonwealth v. Kneeland*, 37 Mass. 206, 220 (1838). And a criminal contempt conviction requires the government prove that “the evidence establishe[s], beyond a reasonable doubt, petitioners’ knowing violations of the [court] order.” *Green*, 356 U.S. at 173–74, 179. Nothing less will do. See American Law Institute, Model Penal Code § 2.02(8) (1985) (defining willfulness as knowledge); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069 (2011) (defining *mens reas*—“us[ing] the [MPC]’s definition as a guide”—“in analyzing whether certain statutory presumptions of knowledge comported with due process”).

The Seventh Circuit rejected this substantial body of precedent, reasoning that this Court’s “cases interpret[ed] statutory-willfulness requirements in other contexts, not the judicially implied willfulness requirement in criminal contempt.” App. 19a. Noting that “willful is a word of many meanings, and its construction is often * * * influenced by its context” (*ibid.*), the court adhered to its earlier holdings that willfulness requires “conscious[ness] of a substantial risk that the prohibited events will come to pass.” App. 16a (citing *United States v. Greyhound Corp.*, 508 F.2d 529, 531–32 (7th Cir. 1974)); *United States v. Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996) (in turn citing *Farmer*, 511 U.S. at 839).

This reasoning, however, cannot withstand scrutiny. *First*, this Court’s precedents interpret criminal willfulness generally. In *Safeco*, for example, the

Court contrasted the usage of “willfully” in civil statutes with its general usage in criminal law, where “[the Court] ha[s] regularly read the modifier as limiting liability to knowing violations.” 551 U.S. at 56 n.9; see also *Bryan*, 524 U.S. at 191–192 (“As a general matter, when used in the criminal context, a “willful” act is one undertaken with a ‘bad purpose.’”)

Second, the notion that “willful is a word of many meanings” is not a “free pass” to use any meaning. As this Court has explained, whether the statute at issue is civil or criminal is critical: “where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.” *Safeco*, 551 U.S. at 57. But “[i]t is different in criminal law”—i.e., “[w]here the term willful or willfully * * * limit[s] liability to knowing violations.” *Id.* at 57 n.9. “This construction reflects common law usage,” as when willfulness is judicially engrafted onto the statute. *Ibid.*

The courts have made willfulness a statutory condition for criminal liability. Accordingly, this Court’s precedents tell us that criminal liability exists only for knowing violations. Review is needed to make that clear.

2. There can be no question that, had the court below applied this Court’s willfulness standard, Trudeau’s motion for acquittal should have been granted. The government presented no evidence that Trudeau knew what he was doing was wrong.

Section 401(3) permits a court to punish such contempt of its authority as “[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or

command.” To prove its case here, the government was required to prove beyond a reasonable doubt that: (1) the 2004 Consent Order was reasonably specific; (2) Trudeau violated that Order by misrepresenting the content of his *Weight Loss* book, and (3) the violation of the Order was willful.¹²

On a motion for acquittal, the reviewing court asks whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Further, this fundamentally “legal” question cannot properly be decided without applying the correct legal standard. See *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016) (holding that the district court was correct to exclude an erroneous element from a sufficiency review included in jury instructions). “A reviewing court’s limited determination on sufficiency review thus does not rest on how the jury was instructed.” *Id.* at 715.¹³ As a result, the lower courts were bound to apply the appropriate definition of willfulness regardless of the instructions provided to the jury.

As this Court has held, the evidence must show, “beyond a reasonable doubt,” that the defendant “knowingly disobeyed the [court] order.” *Green*, 356 U.S. at 174. In *Green*, two defendants who were out on bail were ordered to surrender to the U.S. Mar-

¹² Although the contempt statute “contains no element of willfulness,” “[c]ourts have added this requirement.” Gov’t C.A. Br. 42.

¹³ The Seventh Circuit held only that the jury instruction was waived or forfeited. Trudeau has pressed the willfulness standard in his motion for acquittal at each stage.

shal. *Id.* at 167. Instead, they “disappeared from their homes, failed to appear in court * * * and remained fugitives for more than four and a half years.” *Ibid.* Before turning themselves in, they “issued press releases announcing their intention to surrender,” and one admitted: “[I]t seemed incumbent upon me to resist.” *Id.* at 177 n.7. The government offered evidence relating to the following time periods: (1) before the surrender notice issued, (2) before the surrender order issued, and (3) surrender by the petitioners (including the press releases). This Court affirmed the lower court’s ruling that “petitioners’ statements to the press at the time of their eventual surrender * * * indicated their *knowledge* of the issuance of the order.” *Id.* at 178 (emphasis added). And it was right to do so.

In contrast, the government’s evidence here falls short of proving beyond a reasonable doubt that Trudeau knew the infomercials misrepresented the contents of his book, or that he was “breaking the law.” *Dixon*, 548 U.S. at 5–6. The government’s evidence boiled down to presenting the *Weight Loss* book, the three infomercials, and witness testimony from people who had never met Trudeau. At most, this evidence reflects that the defendant *objectively* disregarded a risk that he might misrepresent the content of his *Weight Loss* book—not that he acted willfully in so doing.

No evidence here supports an inference that the alleged violation of the 2004 Consent Order by Trudeau, a bestselling author, was done with an “evil-meaning mind.” *Bryan*, 524 U.S. at 184. The government offered a purchase agreement as proof that Trudeau would profit from sales of the *Weight Loss*-

book. App. 127a. But proving that he would profit is not enough, and the government did not prove that misrepresenting the book would increase sales or profits. Nor did the government offer evidence that Trudeau needed the money. And at no point did the government attempt to describe the events surrounding the production of the *Weight Loss* infomercials or book.

As a result, there was no evidence from which a rational trier of fact could infer anything about Trudeau's state of mind, let alone that he knew he was violating the 2004 Consent Order. Had the government been required to prove knowledge, Trudeau would have been acquitted. And this Court's review is needed to prevent the lower courts from eroding a basic and fundamental right—requiring the government to prove its case beyond a reasonable doubt—in the context of “the contempt power,” which “uniquely is ‘liable to abuse.’” *Bagwell*, 512 U.S. at 831 (quotations omitted).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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