No. 15-1134

In the Supreme Court of the United States

FRANK PEAKE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, on plain-error review, correctly rejected petitioner's challenge to his indictment, which charged a violation of Section 1 of the Sherman Act, 15 U.S.C. 1, where the trial evidence established that petitioner's price-fixing conspiracy affected commerce both between continental States and between the continental United States and Puerto Rico.

2. Whether the court of appeals correctly concluded that the prosecutor's improper remarks during opening argument were harmless.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 804 F.3d 81. The district court's opinion denying petitioner's motion for judgment of acquittal and for a new trial is not published in the Federal Supplement but is available at 2013 WL 11070536.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2015. A petition for rehearing was denied on December 15, 2015 (Pet. App. 86-87). The petition for a writ of certiorari was filed on March 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition contains the district court's initial opinion, see Pet. App. 42-85, rather than the amended opinion. This brief cites the amended opinion (which corresponds to docket entry number 230 in the district court, dated December 6, 2013).

STATEMENT

Following a nine-day jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of conspiracy to suppress and eliminate competition by agreeing to fix rates and surcharges for freight services in restraint of interstate commerce, in violation of 15 U.S.C. 1. The district court sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-41.

1. Petitioner was one of the ringleaders of "one of the largest antitrust conspiracies in the history of the United States." Pet. App. 2-3. The conspiracy involved fixing the prices for freight shipped between the continental United States and Puerto Rico, including freight shipped between States on its way to Puerto Rico. *Id.* at 3, 6.

Freight shipping to Puerto Rico was "dominated by four freight carriers: Horizon Lines, Sea Star, Crowley, and Trailer Bridge." Pet. App. 3. Horizon Lines and Sea Star entered into an "extensive" antitrust conspiracy, in which they "agreed not to undercut each other in price and allocated precise market share quotas" through "bid rigging and careful planning, coordination, and * * * self-enforcement." *Ibid.* Petitioner was the president and chief operating officer of Sea Star. *Ibid.* He "played a managing role in the conspiracy" by "coordinating with competitors through meetings, phone calls, and emails, and attending to pricing or consumer-allocation disputes that his subordinates could not resolve on their own." *Ibid.*; see *id.* at 4.

After federal officials investigated the conspiracy and executed search warrants to recover evidence relating to the conspiracy, four of petitioner's co-conspirators cooperated with federal authorities and pleaded guilty to antitrust violations. Pet. App. 4.

2. A grand jury in the District of Puerto Rico returned an indictment charging petitioner with one count of conspiracy to suppress and eliminate competition by agreeing to fix rates and surcharges for freight services in restraint of interstate commerce, in violation of 15 U.S.C. 1. Pet. App. 4-5; see Indictment 1-5 (Docket entry No. 1) (Nov. 17, 2011).

Petitioner filed a change-of-venue motion, arguing that it would be impossible to empanel an impartial jury in Puerto Rico because potential jurors might have paid higher prices for goods as a result of the conspiracy. Pet. App. 16; Reply in Support of Mot. to Transfer Case 2-3 (Docket entry No. 33) (Jan. 27, 2012). The district court denied the motion, explaining that "potential jurors are not the direct purchasers of [freight] services" and therefore would have no direct financial interest in the trial's outcome. Op. & Order 9 (Docket entry No. 62) (June 5, 2012). During jury selection, the court required all potential jurors to complete a lengthy questionnaire, which included questions aimed at uncovering potential bias arising from the impact of the conspiracy on Puerto Rico. Gov't C.A. Br. 28; Gov't Opp. to Mot. for Mistrial 3-4 (Docket entry No. 161) (Jan. 19, 2013). The court then questioned prospective jurors to ensure that they had no financial interest affected by the charged conspiracy. See Gov't C.A. Br. 28-29.

On the opening day of trial, petitioner moved for a mistrial, contending that portions of the government's

opening statement improperly appealed to the jurors' personal interest by referring to the conspiracy's effect on Puerto Rico. C.A. App. 101, 420. Petitioner also proposed a curative instruction. *Id.* at 420. The district court denied the motion, Am. Op. & Order 1-6 (Docket entry No. 178) (Jan. 25, 2013), but gave a curative instruction, Pet. App. 25-26. The court found no error in the opening statement because it "generally la[id] out the evidence [the government] anticipated to be presented including the purported harm done to direct victims of the conspiracy." Am. Op. & Order 3 (Jan. 25, 2013). But in an abundance of caution, the court gave a curative instruction stating that jurors should not decide the case based on sympathy to consumers in Puerto Rico or the effect of the conspiracy on consumers in Puerto Rico. *Id.* at 4-5; see C.A. App. 523-524 (trial transcript).

Three of petitioner's co-conspirators testified against him at trial, detailing his involvement in the conspiracy and recounting specific discussions with him about "setting surcharges, fees, and market share allocations." Pet. App. 5. The government introduced contemporaneous emails, travel and phone records, and other documentary evidence to corroborate the co-conspirators' testimony. *Id.* at 28-29. The government also presented witnesses who testified about the effects of the conspiracy on interstate commerce, specifically, on the interstate procurement and transport of food and other supplies for fast food franchises (C.A. App. 527-552) and federal food assistance programs (*id.* at 879-894). The defense presented no witnesses.

At the close of trial, the district court repeated its curative instruction, emphasizing that jurors "are not

to decide this case based on pity and sympathy to Puerto Rican business, to Puerto Rico, or to Puerto Rican consumers" and that "[a]ny statement made in opening statement or any question and answer that may have implied or that you may have understood that this case is relating to effects on Puerto Rico is an erroneous interpretation." C.A. App. 1379-1380. The court "sternly order[ed]" the jury "not to take such statements into consideration." *Id.* at 1380. The court also told the jury not to "be influenced by any personal likes or dislikes, prejudices or sympathy," *id.* at 1358, and reminded it that "arguments and statements by lawyers are not evidence," *id.* at 1362.

The jury returned a guilty verdict. Pet. App. 5. Petitioner sought a new trial or judgment of acquittal on numerous grounds, including that the government had improperly appealed to jurors' sympathy and bias through its opening statement and witness testimony. Am. Op. & Order 19 (Docket entry No. 230) (Dec. 6, 2013). The district court denied the motion, concluding that "the Government did not engage in any misconduct" and "the evidence presented at trial did not expose the jury to any cognizable prejudice which could not be eradicated by a curative jury instruction." *Id.* at 22. The court explained that the trial evidence was limited to the direct victims of the conspiracy (the "Burger Kings and Office Maxes of Puerto Rico" who "directly contracted with the maritime shipping companies"), and the "Government did not infer that th[e] higher prices were passed onto the victims' customers." *Id.* at 20. And even if "a juror may have made [such] an inference," the court's two curative instructions dispelled that inference. *Ibid.* Finally, the court noted that the evidence at trial

"overwhelming[ly]" established petitioner's guilt. *Id.* at 38, 45.

3. The court of appeals affirmed. Pet. App. 1-41. As relevant here, the court rejected petitioner's challenge to the validity of the indictment and his argument that the jury was tainted by the prosecutor's improper remarks during opening argument. *Id.* at 2.

a. Petitioner argued for the first time on appeal that the indictment was deficient because Section 1 of the Sherman Act "prohibits agreements in restraint of trade or commerce 'among the several States,'" Pet. App. 6 (quoting 15 U.S.C. 1), and "Puerto Rico is not a state," *id.* at 5-6. The court of appeals rejected petitioner's argument on two independent grounds. First, the court explained that Puerto Rico sometimes is treated as a State for statutory purposes, and the court had already held that Puerto Rico should be treated like a State for purposes of Section 1 of the Sherman Act. *Id.* at 6 (citing *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981) (Breyer, J.)).

Second, the court determined that even if Puerto Rico is not considered a State for purposes of Section 1, petitioner's indictment nonetheless is valid because his conspiracy involved transportation between States in the continental United States as well as transportation between the continental United States and Puerto Rico. Pet. App. 6. "[T]he evidence in the record shows that part of the freight carried by the companies in the conspiracy originated in one state before being transported to a port in a second state to be shipped to Puerto Rico." *Ibid.* Therefore, "the commerce affected by the conspiracy was not only be-

tween a state and Puerto Rico, but also among the states." *Ibid.*

b. The court of appeals then concluded that, although part of the prosecutor's opening statement improperly implied that the conspiracy harmed consumers, that error was harmless. Pet. App. 23-30. The court noted that whether a prosecutor's improper remarks warrant a new trial depends on whether the remarks "so poisoned the well that the trial's outcome was likely affected," which depends on "the severity of the misconduct"; "whether curative instructions were given"; and "the strength of the evidence against the defendant." *Id.* at 24 (quoting *United States* v. *Gonzales-Perez*, 778 F.3d 3, 19 (1st Cir.), cert. denied, 135 S. Ct. 1911 (2015)).

The court concluded that the prosecutor's remarks about the impact of the conspiracy on consumers were harmless based on "the extent and the level of detail the district court included in its curative instruction"; "the fact that the district judge intervened repeatedly in the examination of witnesses to avoid any reference to end consumers"; and the "overwhelming amount of corroborating documentary evidence that tied [petitioner] to the conspiracy." Pet. App. 25. The court noted that the district court promptly gave a "comprehensive and detailed curative instruction," which was "arguably more detailed than the proposed instruction [petitioner] submitted," *id.* at 25-26, and that the district court repeated the instruction after closing arguments, adding the line, "I sternly order you not to take such statements into consideration," *id.* at 27. The court "presume[d] that juries follow instructions" and found "nothing in the record to suggest"

that the jury disregarded the curative instruction here. *Id.* at 28 (citation omitted).

The court of appeals also concluded, based on its review of the trial evidence, that the improper remarks were harmless because "the government's case was robust." Pet. App. 28-30. The "testimony of co-conspirators and direct customers of the shipping companies established that there was a conspiracy to fix prices, that [petitioner] knowingly participated, that the conspiracy had the effect of increasing shipping rates and surcharges, and that this affected interstate commerce," and this testimony was supported by "numerous exhibits, including emails sent by [petitioner] himself." *Id.* at 28.

ARGUMENT

1. Petitioner first contends (Pet. 12-19) that his conviction should be overturned because his indictment charged a violation of 15 U.S.C. 1, which includes an interstate-commerce element, and in his view Puerto Rico is not a State for purposes of that statute. Petitioner did not present that argument to the district court, and so it is reviewable only for plain error. Regardless of the merits of petitioner's interpretation of the statute, no error occurred, because the trial evidence established that petitioner's conspiracy affected commerce between States within the continental United States (as well as between the continental United States and Puerto Rico), and so petitioner was properly charged under Section 1.

a. Petitioner never argued to the district court that the indictment was insufficient because Puerto Rico is not a State for purposes of the interstate-commerce element of Section 1 of the Sherman Act. See Pet. App. 5 (noting that the argument was "rais[ed] on

appeal for the first time"). As a result, petitioner's argument is reviewable only for plain error. See Fed. R. Crim. P. 52(b); see also Fed. R. Crim. P. 12(b)(3)(B) (defect in the indictment must be raised in a pretrial motion).[2] To prevail under that review, petitioner is required to show that the error (1) was "clear or obvious, rather than subject to reasonable dispute," (2) "affected [his] substantial rights," and (3) "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted).

Petitioner cannot make that showing. As the court of appeals explained, petitioner was properly charged under 15 U.S.C. 1 because his antitrust conspiracy affected both transportation between States in the continental United States *and* between the continental United States and Puerto Rico. Section 1 of the Sherman Act prohibits agreements "in restraint of trade or commerce among the several States." 15 U.S.C. 1. To establish the interstate-commerce element, it is sufficient to allege and ultimately show that the business activity at issue—here, the freight services whose

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[2] Before the court of appeals, petitioner conceded that he failed to raise this argument below but contended that it is jurisdictional. See Pet. C.A. Reply Br. 25 n.9. That is incorrect. Whether the government sufficiently alleged or proved conduct proscribed by a statute is a merits question, not a question of subject-matter jurisdiction. See *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 253-254 (2010) (holding that the question of a statute's reach is a "merits question," not a question of "subject-matter jurisdiction"); see also *United States* v. *Rayborn*, 312 F.3d 229, 231 (6th Cir. 2002) (interstate-commerce element of criminal statute is not jurisdictional). The court of appeals did not decide whether the issue was jurisdictional because it rejected the argument on the merits. See Pet. App. 6 n.1.

prices the conspirators fixed—had a "substantial effect on interstate commerce" or that the illegal activity took place in the flow of interstate commerce. *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242-243 (1980).[3]

The court of appeals concluded that petitioner was properly charged and convicted under Section 1 because "the commerce affected by the conspiracy was not only between a state and Puerto Rico, but also among the states." Pet. App. 6. The court explained that "the evidence in the record shows that part of the freight carried by the companies in the conspiracy originated in one state before being transported to a port in a second state to be shipped to Puerto Rico." *Ibid.* Petitioner was charged with an antitrust conspiracy in restraint of interstate commerce, and the trial evidence established that his conspiracy actually did affect commerce between States.

The government made this argument in its appellate brief, Gov't C.A. Br. 5-6, 45, and petitioner had no response in his reply brief. Petitioner now contends (Pet. 19 n.5) that the court of appeals erred in upholding his conviction on this ground. He is wrong. The indictment gave sufficient notice of the charges (including the interstate-commerce element): Citing 15 U.S.C. 1, the indictment alleged a conspiracy to fix prices for "Puerto Rico freight services," which involved transmission of freight in a "continuous and uninterrupted flow of interstate commerce between various states and Puerto Rico"; alleged that petitioner's and his co-conspirator's "business activities

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[3] Petitioner therefore is wrong to say (Pet. 20 n.5) that "the *conspiracy* must be 'among the several States'" to affect interstate commerce or concern activity in the flow of interstate commerce.

* * * were within the flow of, and substantially affected, interstate commerce"; and detailed petitioner's particular involvement in the conspiracy. Indictment 2-4; see *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (indictment is sufficient if it contains the elements of the charged offense and fairly informs defendant of charge, so that defendant may plead an acquittal or conviction to bar future prosecutions for the same offense). Further, substantial and uncontroverted evidence at trial demonstrated that the co-conspirators fixed the prices for the "intermodal" transport of freight by railcar or truck from States within the continental United States (such as Illinois) to ports in other States (such as Florida) before it was shipped to Puerto Rico. Pet. App. 6; Gov't C.A. Br. 5-6.[4] Indeed, as a "matter of practical economics," the movement of freight from numerous points within the continental United States to sea ports in other States and ultimately to Puerto Rico (as well as the reverse path of transporting goods from Puerto Rico for distribution throughout the continental United States) establishes "the necessary interstate nexus." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329, 331 (1991) (citation omitted). Petitioner does not dispute that the evidence at trial established that his conspiracy actually affected commerce between States.

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[4] See, *e.g.*, C.A. App. 135-137, 166-171 (co-conspirator testimony that all rate components were fixed, including the "intermodal fuel surcharge"); *id.* at 251, 565-568, 571-572 (co-conspirator testimony that conspiracy affected "[a]ll services" including "inland freight"); see also Am. Op. & Order 1-2 & n.1 (Dec. 6, 2013) (noting that the conspiracy fixed prices for both "ocean freight" and the "intermodal fuel surcharge").

Accordingly, the court of appeals did not err in concluding that petitioner was properly charged and convicted under Section 1, let alone err by finding no reversible plain error.

b. Petitioner contends (Pet. 13-19) that certiorari is warranted to review the court of appeals' separate holding that Puerto Rico may be considered a State for purposes of Section 1, which relied on the court's prior decision in *Cordova & Simonpietri Insurance Agency Inc.* v. *Chase Manhattan Bank N.A.*, 649 F.2d 36 (1st Cir. 1981) (Breyer, J.). This would not be an appropriate case in which to review that alternative holding, because (as explained above) even if petitioner were correct, it would not change the outcome in this case. In any event, contrary to petitioner's contention, the court's alternative holding does not present a conflict that warrants this Court's review.

Petitioner contends (Pet. 13-14; Pet. Supp. Cert. Br. 2-3) that the court of appeals' holding conflicts with this Court's recent decision in *Puerto Rico* v. *Sanchez Valle,* 136 S. Ct. 1863 (2016). That is incorrect. The question presented in *Sanchez Valle* was whether Puerto Rico and the United States are separate sovereigns for purposes of the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 1867-1868. The Court held that Puerto Rico is not a sovereign under the Double Jeopardy Clause because Puerto Rico, as a U.S. territory, derives its authority to prosecute from Congress. *Id.* at 1876-1877. The Court addressed only the "narrow, historically focused" constitutional question under the Double Jeopardy

Clause, *id.* at 1867, and did not decide any question of Puerto Rico's status under the antitrust statutes.[5]

Petitioner's argument rests on the premise that, because Puerto Rico is not a "State" for purposes of the U.S. Constitution, it may never be treated like a State for purposes of a federal statute. See Pet. 13-19. That is incorrect. This Court has long recognized that Puerto Rico's constitutional status as a U.S. territory does not resolve the question of how Puerto Rico should be treated for various statutory purposes. The Court has treated Puerto Rico as a State for purposes of some federal statutes, see, *e.g.*, *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988); *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 594, 596-597 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 669-676 (1974), but not others, see *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (per curiam). The Court has explained that whether Puerto Rico should be treated like a State for purposes of a particular statute depends on what Congress intended for that statute. See, *e.g.*, *Puerto Rico* v. *Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937) (treatment of Puerto Rico under a federal statute "depends upon the character and aim of the act," and is determined "not only by a consideration of the words themselves," but also by "the context, the purposes of the law, and the circumstances under which the words were em-

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[5] Petitioner suggests (Pet. 13 n.2; Pet. Supp. Cert. Br. 1) that the Court should grant certiorari, vacate the decision below, and remand this case in light of *Sanchez Valle*, but that course is not warranted because *Sanchez Valle* addressed a constitutional question that is different from the statutory question here (and because resolution of that statutory question would not matter in this case).

ployed"). Indeed, just this past Term, the Court recognized that Congress may choose whether to treat Puerto Rico as a "State" for purposes of federal bankruptcy law. See *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1945-1946 (2016).

Accordingly, the *Sanchez Valle* Court's holding, in the context of the Double Jeopardy Clause, that Puerto Rico does not occupy the same position as a State does not answer the question whether Puerto Rico should be treated like a State for purposes of a given federal statute. For that reason, the court of appeals' decision in this case does not conflict with the Puerto Rico Supreme Court's decision in *Sanchez Valle*, see *People* v. *Sanchez Valle*, 192 D.P.R. 594 (P.R. 2015), aff'd, 136 S. Ct. 1863 (2016), and the Eleventh Circuit's decision in *United States* v. *Sanchez*, 992 F.2d 1143 (1993), cert. denied, 510 U.S. 1110 (1994) (both of which addressed the double jeopardy question), or with the First Circuit's decision in *Igartua-de la Rosa* v. *United States*, 417 F.3d 145 (2005) (en banc) (which addressed a different statutory question about voting rights), cert. denied, 547 U.S. 1035 (2006).[6]

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[6] Petitioner errs in asserting (Pet. 11-12, 16-17; Pet. Supp. Cert. Br. 3 n.1) that the position of the United States in *Sanchez Valle* is contrary to the position of the United States in the First Circuit in this case. The government's *Sanchez Valle* brief argued that Puerto Rico is not a "sovereign" for purposes of the Double Jeopardy Clause, U.S. Br. at 15-27, *Sanchez Valle*, *supra*, but recognized that Puerto Rico may be treated as a State for federal statutory purposes, *id.* at 29-30. And contrary to petitioner's assertion (Pet. 16), the government did not disavow its position in this case in its *Sanchez Valle* brief. See U.S. Br. at 32 n.6, *Sanchez Valle*, *supra*. Rather, the government disavowed prior briefs taking a contrary position on the double jeopardy issue in *Sanchez Valle*; it did not address any issue under the Sherman Act. The govern-

Petitioner also asserts (Pet. 14) that the court of appeals' holding in *Cordova* conflicts with this Court's 1937 decision in *Puerto Rico* v. *Shell Co. (P.R.)*, *supra*. In *Shell Co.*, this Court held that the Sherman Act did not preempt a Puerto Rico antitrust law. 302 U.S. at 255-257. The Court reasoned that Congress gave Puerto Rico broad legislative authority to govern internal affairs and that Puerto Rico's antitrust law did not conflict with federal antitrust law. *Id.* at 260-264. In so holding, the Court rejected the defendant's argument that he could not be charged under Section 3 of the Sherman Act, which applies to "any territory of the United States"; the Court explained that "the word 'territory' * * * properly can be applied to" Puerto Rico. *Id.* at 257. In *Cordova*, the court of appeals acknowledged *Shell Co.* but concluded that events since 1937 (namely, events in the mid-20th century that profoundly enhanced Puerto Rico's self-governing status) warranted treating Puerto Rico like a State for purposes of Section 1 of the Sherman Act. 649 F.2d at 38-43.

While *Shell Co.* stated that Puerto Rico is a "territory" under Section 3, and the *Cordova* Court treated Puerto Rico as a "State" under Section 1, no need exists to resolve that tension in this case. The statement in *Shell Co.* was dicta; the only question before the Court was the preemptive effect of federal law, and the Court did not address the potential applicability of Section 1. See 302 U.S. at 255 ("The single

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ment, like this Court, has recognized that whether Puerto Rico is considered a State under a particular statute depends on Congress's intent with respect to that statute, and not (as petitioner claims, Pet. 15) on a general rule that "Puerto Rico's constitutional legal status dictates its statutory status."

question which we have to decide is whether the existence of § 3 of the Sherman Act precluded the adoption of the local act by the insular legislature."). Further, the *Cordova* Court relied on post-*Shell Co.* events that this Court has recognized "were of great significance" to Puerto Rico because they gave it "a measure of autonomy comparable to that possessed by the States." *Sanchez Valle*, 136 S. Ct. at 1874 (citation omitted). In particular statutory settings, this Court has done the same, while recognizing that the proper classification of Puerto Rico as a statutory matter depends greatly on the context and purpose, and no single answer governs all enactments. See *Calero-Toledo*, 416 U.S. at 672-676 & n.11; pp. 13-14, *supra*.

Whatever the merits of *Cordova*'s holding, no need exists for this Court to decide whether an antitrust conspiracy affecting only commerce between a State and Puerto Rico should be charged under Section 1 or Section 3. The First Circuit's decision in *Cordova* has been settled law for 35 years, and Congress has amended Section 3 of the Sherman Act in other respects while leaving intact the First Circuit's view. See Antitrust Technical Corrections Act of 2002, Pub. L. No. 107-273, § 14102(b), 116 Stat. 1921; see also, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (courts "normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent"). Congress is capable of revising *Cordova*'s holding if it believes that it is necessary to do so. Cf. *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (stare decisis for this Court's statutory holdings has "enhanced force" because "critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees"). And even if the

Court wished to address application of the Sherman Act to Puerto Rico, this would not be an appropriate case for review, because petitioner's claim arises only on plain-error review, and an opinion on the legal question regarding Puerto Rico would have no effect on the outcome.

2. Petitioner also contends (Pet. 20-32) that the Court should grant certiorari to review the court of appeals' conclusion that the prosecutor's improper statements during opening argument were harmless. The court of appeals' decision is correct, and its fact-bound determination does not warrant this Court's review.

a. In the government's opening statement, the prosecutor referred to companies that paid artificially higher shipping costs as a result of the conspiracy; petitioner argued that these references improperly communicated to jurors that "higher prices were being passed on to them as directly affected consumers." Pet. App. 18; see *id.* at 23-24. The district court recognized that the government could show that the conspiracy had affected those companies "to establish that the conspiracy affected interstate commerce, a required element of the charged offense," but determined that the government should not address effects on indirect consumers, meaning people who purchased goods from those companies, because that group could include jurors. *Id.* at 20. The court promptly gave a curative instruction to the jury, instructing it not to consider the effects of the conspiracy on indirect consumers. *Id.* at 20-21.

The court of appeals correctly concluded that the prosecutor's remarks were harmless in the context of the nine-day trial. The court explained that soon after

the opening statement, the district court gave a "comprehensive and detailed curative instruction"—one that was "arguably more detailed than the proposed instruction [petitioner] submitted." Pet. App. 25-26. As the trial proceeded, the court regularly "intervened in the questioning of the government's witnesses" to ensure that the witnesses focused on effects on direct consumers (the companies) rather than indirect consumers (people living in Puerto Rico). *Id.* at 26. At the end of trial, the court again gave the curative instruction from the beginning of trial, adding a line that "sternly order[ed]" the jury not to consider the effect of prices on consumers in Puerto Rico. *Id.* at 27. As the court of appeals noted, juries are presumed to follow instructions, and the curative instructions here were clear, repeated, and forceful (even more forceful than petitioner requested). *Id.* at 27-28. And the court found "nothing in the record to suggest" that the jury disregarded these instructions. *Id.* at 28. The district court's "degree of consideration and effort" in "respond[ing] to [petitioner's] valid concern over the prosecutors' appeal to the jury's personal interests" was sufficient to "cure[] any prejudice." *Id.* at 27.

Further, both the court of appeals and the district court recognized that the improper remarks were harmless because "the government's case was robust." Pet. App. 28; see Am. Op. & Order 38, 45 (Dec. 6, 2013) (district court's conclusion that evidence "overwhelming[ly]" established petitioner's guilt). As the court of appeals explained, petitioner's co-conspirators testified at trial and detailed his critical role in the conspiracy. Pet. App. 28. Customers of the shipping companies established the conspiracy's effect on in-

terstate commerce. *Ibid.* And documentary evidence, including petitioner's own emails, confirmed his guilt. *Id.* at 28-30 (reviewing petitioner's emails in detail). The court of appeals therefore correctly concluded that the remarks in the opening statement could not have influenced the jury's verdict. *Id.* at 30.

Petitioner objects to the court of appeals' conclusion, but none of his arguments has merit. He asserts that other errors occurred at trial (Pet. 25-31), but the court of appeals correctly found "no errors" in the trial aside from the improper remarks in the opening statement. Pet. App. 2.[7] Petitioner also contends (Pet. 25) that a prosecutor's improper remarks "should never be considered harmless." He is mistaken; Congress has directed reviewing courts to consider whether trial errors are harmless, see 28 U.S.C. 2111; Fed. R. Crim. P. 52(a), and this Court has found a prosecutor's improper comments harmless. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-643 (1974) (after an "examination of the entire proceedings," holding that prosecutor's comments were harmless); see also *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986) (remarks did not "so infect[] the trial" as to deny the defendant due process (citation omitted)). Petitioner is wrong to argue (Pet. 32 n.6) that curative instructions cannot cure a prosecutor's improper remarks. The Court presumes that juries follow instructions, *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987), and it has found curative instructions sufficient to mitigate the effects of a prosecutor's improper remarks, *Greer* v. *Miller*, 483 U.S. 756, 766 (1987);

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[7] The government explained why each of petitioner's particular arguments is incorrect in its appellate brief. See Gov't C.A. Br. 30-38.

Donnelly, 416 U.S. at 644. Petitioner's disagreement with the court of appeals' application of the harmless-error standard does not warrant further review.

b. Petitioner contends (Pet. 20-26) that certiorari is warranted because the court of appeals used an incorrect legal standard in assessing harmlessness. In his view (Pet. 26), the court of appeals upheld the verdict based on its "personal view that [petitioner] is guilty," rather than consideration of the effect of the error on the jury. Petitioner is mistaken. The court of appeals did not adopt any new legal standard that ignores the effect of the error on the jury. The legal standard was not disputed in the case: Although the government argued that any error was harmless, see Gov't C.A. Br. 38-42, and petitioner disagreed, Pet. C.A. Br. 40-41, the parties did not disagree about the legal standard. As a result, the court of appeals simply used (Pet. App. 24) the standard set out in an earlier decision, *United States* v. *Gonzalez-Perez*, 778 F.3d 3, 19 (1st Cir.), cert. denied, 135 S. Ct. 1911 (2015). Petitioner then sought panel rehearing on the harmlessness issue, but he did not argue that the panel applied a new or incorrect legal standard; instead, he argued that the panel erred in assessing the evidence and the effect of the curative instructions. Pet. for Rh'g 9-15.

Further, in using the standard set out in *Gonzalez-Perez*, the court of appeals focused on the effect of the error on the jury: It asked whether the prosecutor's remarks "so poisoned the well that the trial's outcome was likely affected." Pet. App. 24 (quoting *Gonzalez-Perez*, 778 F.3d at 19). The court's focus on the effectiveness of the curative instructions (*id.* at 24-27) confirms that the court's focus was on the jury. Petitioner asserts (Pet. 23, 25) that the court adopted a

new legal standard when it remarked that the trial evidence "did not preponderate against the verdict" (Pet. App. 30). This was not a new legal test; it was part of the court's summary paragraph about the strength of the government's evidence. The court did not say that the effect on the jury was irrelevant. It, like the district court, found the evidence of petitioner's guilt so overwhelming that it could be "confident" that the "government's remarks did not so poison the well"—*i.e.*, poison the jury—"as to necessitate a new trial." *Ibid.*

Petitioner contends (Pet. 20, 24-25) that review is warranted because of disagreement in the circuits about the harmless-error standard. He notes that the Court granted certiorari in *Vasquez* v. *United States*, No. 11-199, 132 S. Ct. 759 (2011), but then dismissed the writ as improvidently granted, 132 S. Ct. 1532 (2012) (per curiam). The question in *Vasquez* was whether a court assessing harmlessness should focus on the weight of the untainted evidence without considering the effect of the error on the jury. See Pet. at i, *Vasquez*, *supra*. The court of appeals in this case did not address that question because the appropriate legal test for harmlessness was not disputed.[8] And to the extent that petitioner argues that the reviewing court must consider the potential effect of an error on a jury's verdict, the court of appeals did that.

The various formulations of the harmless-error test that petitioner points to do not establish a division among appellate courts; rather, they reflect applica-

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[8] Petitioner does not contend that the First Circuit has previously taken a position on that issue. See Pet. 24-25; see also Pet. at 17-20, *Vasquez*, *supra* (alleged circuit split does not include the First Circuit).

tion of this Court's well-established objective harmless-error standard to disparate situations. See, *e.g.*, Br. in Opp. at 10-12, *Leaks* v. *United States*, 135 S. Ct. 2836 (2015) (No. 14-1077) (denying certiorari). Consistent with that view, since *Vasquez*, the Court has denied certiorari in cases raising the harmless-error issue. See, *e.g.*, *Leaks* v. *United States*, 135 S. Ct. 2836 (2015) (No. 14-1077); *Demmitt* v. *United States*, 134 S. Ct. 420 (2013) (No. 12-10116). This would be a particularly inappropriate case in which to address the issue. The court of appeals did not focus on fine gradations in the legal standard, because the legal standard was undisputed and the evidence of petitioner's guilt was overwhelming. And the error in this case would be harmless under any circuit's standard. Petitioner claims that a different standard would matter (Pet. 23), but he does not explain how that could be true when direct witness testimony and contemporaneous documents established his guilt and he presented no witnesses at trial. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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