No. 16-1259

In the Supreme Court of the United States

ANTONIO FARIAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
AMANDA B. HARRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that the superseding indictment in this case related back to the filing of the original indictment, where the superseding indictment alleged a conspiracy with the same factual basis as the original indictment, but included an additional federal statute that the co-conspirators' agreed-to scheme would violate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 836 F.3d 1315. The order of the district court is not published in the Federal Supplement but is available at 2014 WL 4930641.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2016. A petition for rehearing was denied on December 19, 2016 (Pet. App. 36-37). On March 7, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 18, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted of conspiring to traffic in contraband cigarettes and stolen goods, in violation of 18 U.S.C. 371. Pet. App. 6, 11. The district court sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2, 32. The court of appeals affirmed. *Id.* at 1-29.

1. Marlboro manufactures cigarettes in North Carolina, South Carolina, and Virginia, and pays a federal excise tax on cigarettes before they leave the manufacturing plants. Gov't C.A. Br. 4. All States, including Florida, impose a separate excise tax on cigarettes, which is applied when cigarettes arrive in the State. *Ibid.* As proof of payment of the state excise tax, a unique stamp is placed on each pack of cigarettes. *Ibid.* In Florida, only licensed wholesalers or distributors may obtain a roll of tax stamps. *Id.* at 5.

From June 2008 to April 2009, petitioner purchased more than 18 million unstamped Marlboro cigarettes from undercover agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in Miami, Florida. Pet. App. 1-3. Petitioner purchased the cigarettes, which he believed to be stolen, at "significantly below" list price and then sold them to his co-conspirator, Stephen Valvo, at a markup, but still below list price. *Id.* at 2-3. Valvo then transported the cigarettes from Miami to an Indian reservation in upstate New York where he could sell the cigarettes for profit with a lower risk of detection by law enforcement. *Id.* at 3.

2. On June 21, 2013, a federal grand jury in the Southern District of Florida indicted petitioner and Valvo on one count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371—namely, to traffic in contraband cigarettes, in violation of 18 U.S.C. 2342(a)—and seven substantive

counts of trafficking in contraband cigarettes, in violation of Section 2342. Indictment 1-2; Pet. App. 4. The indictment alleged that the conspiracy between petitioner and Valvo ran from April 7, 2006 to April 2, 2009. Indictment 1. It described the "object and purpose of the conspiracy" as enabling "the defendants and their co-conspirators to unlawfully enrich themselves by receiving, possessing, and purchasing contraband untaxed cigarettes in Florida, which they believed to be stolen, and subsequently shipping them to New York for sale at a marked-up price, while evading applicable state cigarette taxes." *Id.* at 2. It listed 15 overt acts in furtherance of that conspiracy, consisting of alternating purchases by petitioner of "purportedly stolen cigarettes bearing no evidence of payment of applicable state cigarette taxes to the State of Florida" and subsequent wire transfers from Valvo to petitioner. *Ibid.*; see *id.* at 3-4.

On July 17, 2014, the grand jury returned a superseding indictment, which again charged petitioner and Valvo with a single count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371—this time, to traffic in contraband cigarettes, in violation of 18 U.S.C. 2342(a), and, as part of the same conspiracy, to traffic in stolen goods, in violation of 18 U.S.C. 2314. Superseding Indictment 1-2; Pet. App. 6. The superseding indictment recited the identical "object and purpose of the conspiracy" but shortened the timeframe of the conspiracy to between June 4, 2008 and April 2, 2009. Superseding Indictment 1-2. It detailed essentially the same overt acts as the original indictment (minus one act from 2006), but omitted the seven substantive counts of trafficking in contraband cigarettes. Pet. App. 7.

3. Petitioner moved to dismiss the superseding indictment as untimely under the applicable five-year statute of limitations in 18 U.S.C. 3282(a), because the superseding indictment was filed more than five years after the last overt act in furtherance of the conspiracy occurred. Pet. App. 7. The district court denied petitioner's motion and concluded that the superseding indictment related back to the filing date of the original indictment, which had been filed within the five-year limitations period. *Id.* at 7-8. The court found that the superseding indictment did not broaden the original indictment because, although it added an additional basis for the conspiracy ("trafficking stolen cigarettes"), it alleged the same facts, overt acts committed in furtherance of the conspiracy, and factual object of the conspiracy. 10/01/14 Order (Order) 4-5. "The initial Indictment, therefore, placed [petitioner] on notice that the Government [wa]s alleging he was involved in a conspiracy to sell untaxed stolen cigarettes." *Id.* at 5.

4. At trial, petitioner's co-conspirator Valvo, who had pleaded guilty, testified about the two men's scheme to move the cigarettes from Miami to upstate New York. Gov't C.A. Br. 15-17. Valvo admitted that he knew the cigarettes were stolen and unstamped. Pet. App. 10. Evidence also showed that petitioner personally inspected the unstamped cigarettes. Gov't C.A. Br. 33. And the government played recorded conversations between the ATF agents and petitioner, in which the agents indicated that they had stolen the cigarettes from cargo trucks. Pet. App. 8-9.

At the end of trial, the district court gave the jury a special verdict form. Pet. App. 11. The verdict form required the jury to first find whether petitioner was guilty of the conspiracy. *Ibid.* If so, the verdict form

then asked the jury to find whether the object of the conspiracy was to traffic in stolen goods, traffic in contraband cigarettes, or both. *Ibid.* The jury returned a guilty verdict and found that petitioner conspired to traffic both in stolen goods and in contraband cigarettes. *Ibid.*; see Verdict Form 1.

5. The court of appeals affirmed the conviction. Pet. App. 1-29. As relevant here, the court held that the superseding indictment was timely because it related back to the timely filing of the original indictment. *Id.* at 12-15. "Our case law makes it abundantly clear," the court explained, "that the filing of a timely indictment tolls the statute of limitations for purposes of a superseding or new indictment if the subsequent indictment does not 'broaden or substantially amend the original charges.'" *Id.* at 13 (quoting *United States* v. *Italiano*, 894 F.2d 1280, 1282 (11th Cir.), cert. denied, 498 U.S. 896 (1990)). Here, the court determined, the superseding indictment narrowed, rather than broadened, the charges against petitioner. *Ibid.*

In support of that conclusion, the court of appeals noted that the superseding indictment omitted substantive counts, narrowed the timeframe of the conspiracy, and omitted one overt act. Pet. App. 13-14. And "while the superseding indictment added violation of an additional federal statute as an object of the conspiracy, both indictments alleged the very same 'Object of the Conspiracy,' which was for 'the defendants and their co-conspirators to unlawfully enrich themselves by receiving, possessing, and purchasing contraband untaxed cigarettes in Florida, which they believed to be stolen.'" *Id.* at 14. Accordingly, the original indictment "sufficiently placed [petitioner] on notice that the government was alleging that he had joined an unlawful conspiracy

that involved cigarettes that were not only untaxed, but which he believed to be stolen." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 5-13) that the superseding indictment was untimely because it impermissibly broadened the charges against him from the original indictment. The court of appeals correctly rejected that argument. Its decision does not conflict with any decision of this Court or any other court of appeals. In addition, this case would be a poor vehicle to address the question presented because the decision below could be affirmed on alternative grounds. Further review is unwarranted.

1. As petitioner acknowledges (Pet. 8-9), the filing of a timely indictment tolls the statute of limitations for the charges set forth in that indictment such that a superseding indictment filed while the original indictment is pending will be considered timely "unless it broadens or substantially amends the charges." *United States* v. *McMillan*, 600 F.3d 434, 444 (5th Cir.), cert. denied, 562 U.S. 1006, and 562 U.S. 1026 (2010); see, *e.g.*, *United States* v. *Salmonese*, 352 F.3d 608, 622 (2d Cir. 2003); *United States* v. *O'Bryant*, 998 F.2d 21, 23-24 (1st Cir. 1993) (collecting cases). In determining whether a superseding indictment broadens and substantially amends the charges, the question is whether the original indictment provides sufficient notice to the defendants that "they will be called to account for their activities and should prepare a defense." *United States* v. *Grady*, 544 F.2d 598, 601 (2d Cir. 1976) (citing *United States* v. *Marion*, 404 U.S. 307, 323 n.14 (1971)); see *United States* v. *Liu*, 731 F.3d 982, 997 (9th Cir. 2013) ("The central concern * * * is notice."); *Salmonese*, 352

F.3d at 622 ("[T]he 'touchstone' of our analysis is notice."); cf. *Marion*, 404 U.S. at 323 n.14 ("[I]t is unjust not to put the adversary on notice to defend within the period of limitation.").

The court of appeals correctly applied these principles in this case, concluding that the superseding indictment related back to the filing of the original indictment because the superseding indictment "actually narrowed, rather than broadened, the original charges." Pet. App. 13. The superseding indictment alleged the same offense, a conspiracy in violation of 18 U.S.C. 371; the same conspirators; the same factual object and purpose of the conspiracy; the same overt acts (minus one) committed in furtherance the conspiracy; and a shorter timeframe for the conspiracy, spanning from June 2008 through April 2009 instead of April 2006 through April 2009. See Pet. App. 13-14.

Petitioner nevertheless argues (Pet. 5, 11-12) that the superseding indictment broadened the charges against him because it alleged that the defendants conspired (1) to traffic in stolen goods, in violation of 18 U.S.C. 2314, and (2) to traffic in contraband cigarettes, in violation of 18 U.S.C. 2342, whereas the original indictment alleged only that the defendants conspired to traffic in contraband cigarettes, in violation of 18 U.S.C. 2342. In his view (Pet. 5), the superseding indictment thereby added an "entirely different offense with no overlapping elements" to the original charges. That is incorrect.

Petitioner errs (Pet. 11) in analogizing the situation in this case to the addition of a new count charging the violation of a different offense. As the jury was instructed in this case, "the Government [wa]s not charging [petitioner] with transporting stolen goods in

interstate commerce." Jury Instructions 14. Rather, the charge in both the original and superseding indictment was a single "conspir[acy] * * * to commit an[] offense against the United States." 18 U.S.C. 371. The identification of an additional legal prohibition that would be violated by the conduct contemplated by the conspirators' agreement did not fundamentally alter the nature of the offense charged. "The conspiracy is the crime, and that is one, however diverse its objects." *Braverman* v. *United States*, 317 U.S. 49, 54 (1942) (citations omitted).

The conspiracy allegations in the original and superseding indictments were nearly identical. In both indictments, petitioner was charged with conspiring with Valvo "to unlawfully enrich themselves by receiving, possessing, and purchasing contraband untaxed cigarettes in Florida, *which they believed to be stolen*, and subsequently shipping them to New York for sale at a marked-up price, while evading applicable state cigarette taxes." Superseding Indictment 2 (emphasis added); Indictment 2 (emphasis added). That description of the "Object of the Conspiracy," duplicated between the two indictments word-for-word, alone made clear from the outset that the charged conspiracy was a conspiracy to traffic in *stolen* cigarettes. *Ibid.* (capitalization altered). In addition, the overt acts alleged in the original indictment—also copied verbatim into the superseding indictment, with one exception—contained numerous with allegations that the cigarettes at issue were not just unstamped, but "stolen." Indictment ¶¶ 1, 3, 5, 7, 9, 11, 14, 15. Petitioner thus had sufficient notice that he would be called to "account for th[ose] activities and should prepare a defense." *Grady*, 544 F.2d at 601.

Petitioner's reliance (Pet. 6-7) on *Stirone* v. *United States*, 361 U.S. 212 (1960), is misplaced. That case involved neither a statute-of-limitations issue nor an issue of whether a superseding indictment was sufficiently similar to the original indictment to relate back to the filing of the original. Instead, the question before the Court was whether, having charged the defendant with obstructing interstate importation of sand into Pennsylvania and having failed to seek a superseding indictment, the government had constructively amended the indictment at trial by pursuing a conviction on the basis of obstructing the exportation of steel out of Pennsylvania to other States. See *id.* at 213-214. The Court held that the government could not do so because the indictment could not "fairly be read as charging interference with movements of steel from Pennsylvania to other States." *Id.* at 217. Because "neither this [Court] nor any other court c[ould] know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel," a prosecution on that basis would "destroy the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Ibid.* Here, in contrast, the grand jury did charge petitioner with conspiring. Thus, unlike *Stirone*, this case presents no question of "whether he was convicted of an offense not charged in the indictment." *Id.* at 213.

In any event, even if *Stirone* informed a court's inquiry into whether a superseding indictment relates back to the filing of an original indictment, the difference between the indictment and evidence in *Stirone* was markedly greater than, and not analogous to, the difference between the original and superseding indictments at issue here. The conduct that formed the basis

for conviction in *Stirone* (interfering with steel exports) was factually distinct from that charged in the indictment (interfering with sand imports), while the conduct alleged in both indictments in this case—with the exception of one overt act—was exactly the same. See p. 8, *supra*.

Petitioner suggests (Pet. 12-13) that the original indictment's allegations that the defendants knew the cigarettes had been stolen was mere surplusage because, to prove a violation of 18 U.S.C. 2342, the government was only required to prove the cigarettes were unstamped, not stolen.[1] As a threshold matter, it is far from clear that the allegation was not necessary to support a charge of conspiracy to violate 18 U.S.C. 2342 (even if it would not be necessary to support a charge of violating 18 U.S.C. 2342 itself). In conspiracy cases involving agreements to commit offenses like 18 U.S.C. 2342, which are at least arguably *malum prohibitum* rather than *malum in se*, many courts have required the prosecution to prove a "corrupt motive," in addition to an agreement to commit the particular offense. See *United States* v. *Cohen*, 260 F.3d 68, 71-73 (2d Cir. 2001) (describing the "*Powell* doctrine"), cert. denied, 536 U.S. 922 (2002). Knowledge that the cigarettes were stolen would provide such a motive. In any event, the critical

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[1] See 18 U.S.C. 2341(2) (defining "contraband cigarettes" to mean "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes" in possession of certain nonexempt individuals).

question is whether the original indictment reasonably informed petitioner of the activities for which he would be called to account. And, surplusage or not, the original indictment expressly did inform petitioner that he would be called to account for an alleged conspiracy to traffic in stolen, unstamped cigarettes. See Order 5.

2. Petitioner errs in contending (Pet. 5, 7-10) that this case presents a question that "divides the circuits." The courts of appeals have uniformly endorsed the principles the Eleventh Circuit applied below, including in the cases on which petitioner relies. Pet. 8-9; see, *e.g.*, *United States* v. *Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990) ("If a superseding indictment on the same charges is returned while a previous indictment is still pending, the tolling continues" unless "the counts in the superseding indictment 'broaden[ed] or substantially amend[ed]' the charges in the original indictment.") (citation omitted); *United States* v. *Gengo*, 808 F.2d 1, 5 (2d Cir. 1986) ("Any superseding indictment filed while the original indictment is still pending is timely, if it does not broaden or substantially amend the original charges.") (citing *Grady*, 544 F.2d at 601-602); *United States* v. *Friedman*, 649 F.2d 199, 204 (3d Cir. 1981) ("[A] superseding indictment returned while the original indictment is validly pending is not barred by the statute of limitations if it does not expand the charges made in the initial indictment.").[2]

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[2] See also *United States* v. *Zvi*, 168 F.3d 49, 54 (2d Cir.), cert. denied, 528 U.S. 872 (1999); *United States* v. *Schmick*, 904 F.2d 936, 940 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991); *United States* v. *Jones*, 816 F.2d 1483, 1487 (10th Cir. 1987); *United States* v. *Saussy*, 802 F.2d 849, 852 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987); *United States* v. *Sears, Roebuck & Co.*, 785 F.2d 777, 778-779 (9th Cir.) (per curiam), cert. denied, 479 U.S. 988 (1986).

Although petitioner asserts (Pet. 8) that "[n]o prior reported decision has approved the untimely filing of charges that are not encompassed by elements of a timely-indicted charge," as explained above, no new charges were added in this case. Both the original and superseding indictment charged one count of the same offense: conspiracy to commit a crime against the United States, 18 U.S.C. 371. And other court of appeals decisions have reached results in accord with the decision below in analogous circumstances.

In *United States* v. *Schmick*, 904 F.2d 936 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991), for example, the original indictment charged the defendants with a conspiracy only to manufacture, possess, and fail to register explosive devices, and the superseding indictment added two conspiratorial objects related to the possession of an unregistered machine gun and seven additional overt acts. *Id.* at 940. The court of appeals held that the superseding indictment related back to the filing of the original indictment, because the original indictment had included an allegation that one co-conspirator ordered the others to "[o]btain 'unregistered' firearms." *Id.* at 941. Accordingly, the court held, the defendants were "on notice that they were accused of planning to obtain unregistered firearms," even though the original indictment did not list possessing an unregistered machine gun as an object of the conspiracy. *Ibid.*

Similarly, in *Gengo*, the original indictment alleged that the defendants conspired only to evade federal income taxes, and the superseding indictment added an allegation that the defendants also conspired to make false statements to and defraud the IRS as part of the same scheme. 808 F.2d at 2. As in *Schmick* and this

case, the court of appeals concluded that the superseding indictment related back, reasoning "[t]he later addition of the conspiratorial object to defraud the IRS related to, and only to, the[] evasion schemes," and "the amended conspiracy charge rested on the same factual allegations as the first." *Id.* at 3, 4.

3. In any event, this case would be an unsuitable vehicle for resolving the question presented. Both the original and superseding indictment charged petitioner with conspiracy to traffic in contraband cigarettes. Petitioner has not renewed his challenge to the timeliness of that charge. See Pet. App. 11 (rejecting petitioner's timeliness challenge to that conspiratorial objective). And the jury returned a special verdict finding petitioner guilty of conspiring both to traffic in contraband cigarettes and to traffic in stolen goods. Verdict Form 1; Pet. App. 11. Accordingly, even if the superseding indictment impermissibly broadened the conspiracy charge, the error was harmless. See *United States* v. *Zvi*, 168 F.3d 49, 55-56 (2d Cir.) (finding the impermissible broadening of a conspiracy charge harmless where it was possible to determine that the verdict was "based in part on objects asserted in the indictment that were within the limitations period") (citing *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957)), cert. denied, 528 U.S. 872 (1999).

Although, as petitioner notes (Pet. 3-4), the court of appeals did not reach the issue, the evidence was more than sufficient to support the jury's finding that petitioner conspired to traffic in contraband cigarettes. See Gov't C.A. Br. 33-36. At trial, Agent Richard Checo testified that he approached petitioner posing as a crooked business man with access to untaxed (and stolen) cigarettes. *Id.* at 7; Pet. App. 3. Agents Checo and

Peter Alles testified to and played audio recordings from the seven transactions between them and petitioner, in which petitioner purchased and personally inspected more than 18 million unstamped cigarettes. Gov't C.A. Br. 7-14; Pet. App. 3, 8-10. The agents explained how, despite petitioner's extensive experience in the cigarette business, he accepted these unstamped cigarettes without once asking whether the agents had a license to possess unstamped cigarettes in Florida or claiming to have authority to do so himself. Gov't C.A. Br. 7-8, 14. And, finally, petitioner's co-conspirator Valvo testified to the elaborate scheme he and petitioner devised to move the unstamped cigarettes, which Valvo knew were unstamped and believed to be stolen, from Miami to an Indian reservation in New York without detection from law enforcement. *Id.* at 15-17; Pet. App. 10. Accordingly, petitioner would not be entitled to relief even if this Court decided in his favor the issue he presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
AMANDA B. HARRIS
Attorney

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