No. 17-1130

In the Supreme Court of the United States

THEODORE E. OKECHUKU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Government confirms that this case checks every box for plenary review. By identifying its preferred "majority rule" (BIO 17), the Government acknowledges that other circuits reject its position—and still captures only *part* of the multifaceted conflict in this case. The Government's tepid, incomplete defense of that rule demonstrates that its position lacks merit. And its purported "vehicle problems" are not really problems at all, but only confirm the pressing need to address the festering conflicts captured in the Question Presented. Indeed, the Government nowhere denies that this case exemplifies the prosecutorial abuses its preferred rule encourages, in which dangerous error is repeatedly found, and repeatedly excused, in a great and growing swath of cases.

Certiorari should be granted.

I. There are multiple admitted circuit splits on the Question Presented.

The Government acknowledges that Okechuku's petition raises at least two separate circuit splits on the standards for determining whether an erroneous deliberate-ignorance submission is harmful. Yet the Government would not see the Court confront these conflicts, because the current fractured system allows it to maintain an unfair advantage in a "majority" of circuits—one it fears losing if the law is universalized. Those fears are justified.

A. The persistent split over the evidence needed to rule out harm from an erroneous deliberate-ignorance instruction will not resolve itself.

On the first of these circuit conflicts—over the evidence needed to rule out harm from an erroneous

deliberate-ignorance instruction—the Government adopts the position of the "*per se*" circuits (Pet. 17-18): that courts should assume the jury simply disregarded the erroneous submission under *Griffin* v. *United States*, 502 U.S. 46 (1991). BIO 11 (citing *United States* v. *Stone*, 9 F.3d 934 (11th Cir. 1993)). It then declares "the substance" (BIO 14) of that rule to be the same as that applied in the "substantial" or "sufficient" evidence circuits, Pet. 18-20.

The Government mushes these standards together so that it might locate the lower court within its cobbled-together "majority." BIO 17. But that will not work. These rules are incompatible and represent deliberate breaks from one another. The *per-se* circuits' *Griffin*-based rule rests on the view that deliberate-ignorance instructions are no different from any other instructions, e.g., *Stone*, 9 F.3d at 939. "Substantial evidence" circuits like the Fifth Circuit disagree, recognizing that deliberate-ignorance instructions possess a unique "danger of confusing the jury," *United States* v. *Mendoza-Medina*, 346 F.3d 121, 134 (5th Cir. 2003), which makes it impossible to assume that when faced with an erroneous deliberate-ignorance instruction, "the jury will disregard it," *ibid.* This friction also means that the Government's defense of the lower court rests on a rule that the lower court rejected.

That these overly permissive standards lead to similar results, and virtually no reversals, certainly indicates that they are bad rules, especially for circuits, like the Fifth, that recognize the dangers in deliberate-ignorance instructions. But that does not make them the same.

The Government does acknowledge that four circuits have, at one time or another, adopted a different standard, demanding "overwhelming" evidence of knowledge before an improper deliberate-ignorance submission can be

ignored as harmless. BIO 15-19. The Government contends that *Griffin* has caused dissipation of this conflict. But it has not.

The Ninth Circuit, for instance, has not come over to the *per-se* camp. The Government's contrary view (BIO 17) rests on a single, never-again-cited unpublished decision citing *Griffin*, *United States* v. *Daly*, 243 Fed. Appx. 302 (2007). But *Griffin's* application to deliberate-ignorance was not remotely at issue in *Daly*. Neither party cited *Griffin* nor briefed harmless error. The panel found the deliberate-ignorance submission harmless because Daly "d[id] not dispute that there was sufficient evidence of his actual knowledge;" indeed under his *own theory,* he *necessarily* had the requisite knowledge to convict. *Ibid.* The instruction was thus harmless under *any* standard.

Nor does the Ninth Circuit's en banc decision in *United States* v. *Heredia*, 483 F.3d 913 (2007), soften the circuit's stance, first articulated by Justice Kennedy, on the potential for harm from improper deliberate-ignorance instructions. Pet. 22. Whatever *Heridia* might say about the standards for *giving* the instruction, 483 F.3d at 923–924, it reaffirms its recognition of Justice Kennedy's concern that such submissions might "confuse the jury," especially "where the government does not present [evidence of] a deliberate ignorance theory." 483 F.3d at 924. The Ninth Circuit has not budged.

The Government is also forced to acknowledge that any movement in the Seventh Circuit is *away* from its "majority" rule, even after *Griffin*. The Government concedes that court is now in the "overwhelming evidence" camp. BIO 18-19 (citing *United States* v. *Macias*, 786 F.3d 1060 (2015)). Yet it claims the Seventh Circuit's rule used to be different, pointing to older cases containing

language about evidentiary sufficiency. BIO 18-19. It is questionable, however, whether these older cases demonstrate that intra-circuit "tension" ever existed. *Id.* 19 n.4. In one, the reference to "sufficient evidence" refers to the evidence needed to *give the instruction*—not what is needed for harmless error. *United States* v. *Salinas,* 763 F.3d 869, 881 (2014). In the other, the Question Presented was not at issue—neither side addressed the standard for harmless error—and the government's *own* briefing three times acknowledged that the Seventh Circuit required "overwhelming evidence," *see* U.S. Br. at 9, 23, 28-29, *United States v. Malewika,* 664 F.3d 1099 (2011). If "tension" ever existed, it is news to the government.

The Eighth Circuit is admittedly a muddle. The Government is right that in *United States* v. *Hernandez-Mendoza,* 600 F.3d 971 (8th Cir. 2010), the court *sua sponte* applied *Griffin* in holding that an erroneous submission was harmless. *See id.* at 980. Yet on rehearing, the panel confounded any notion that this changed the law by deeming its decision not inconsistent with prior cases adopting the "overwhelming evidence" standard. *See* 611 F.3d 418 (2010). Thankfully, precisely locating this holding within an otherwise fully percolated split is unimportant.

That still leaves the Second Circuit—which the Government acknowledges is solidly in the "overwhelming" category. BIO 17-18. The Government's only complaint here is that the Second Circuit has not reversed under this standard. Given its concession that other circuits have *repeatedly* reversed on this standard, *Id.* 16, 18-19, this gripe carries no weight.

The Government's attempts to impugn some of these reversals is mere hair-splitting. It does not matter that, in *Macias*, the Government's harmless-error argument was

cursory (BIO 18), or that, in *United States* v. *L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009), the court combined the harm from the deliberate-ignorance instruction with other errors. BIO 19 n.4. And that still leaves Ninth and Seventh Circuit reversals that the Government never mentions except to grumble about the result. BIO 11 (citing *United States* v. *Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2009)). The Government thus cannot deny that the harmfulness rule matters and is geographically dependent.

The Government would nevertheless see this conflict left uncorrected. It is easy to see why. While the Government must in some circuits follow rules it does not like, and (outwardly, at least) maintains are incorrect, in the "majority" of circuits, it may continue abusing deliberate-ignorance instructions knowing its abuses will always be excused. The Government knows this advantage is lost if the Court takes this case, because it has no hope of convincing the Court to universalize its ill-conceived, *Griffin*-based rule.

That is because applying *Griffin* to deliberate-ignorance instructions would be a disaster. *Griffin*'s narrow exception to the strict rules for charge error depends on the twin assumptions that juries will always read, and invariably understand, the court's instructions—assumptions that seem reasonable for plain-vanilla evidentiary failures. Pet. 29-30. But the misleading nature of deliberate-ignorance instructions means that *when* the jury reads the instructions, it is likely to *misunderstand* them and be misled into convicting for non-criminal behavior.

The risk that deliberate-ignorance instructions will mislead the jury is no mere picayune "concern" of isolated circuits. BIO 16. It has been recognized by commentators, justices of this court, and a *true* circuit majority, including

courts that apply relaxed, prosecution-friendly harmlessness rules. Pet. 18-23, 30-31.[1] Indeed, this risk is exactly why prosecutors so favor these instructions and do not want to see the rules changed. Pet. 31. The Government's belief that these instructions, which are problematic in the best of circumstances, ought to be considered invariably harmless when improperly submitted makes no sense. It is time to cast this nonsense aside.

B. The Government acknowledges the separate, entrenched split over the potential for charge language to contribute to harmful error.

The Government also acknowledges that Okechuku's petition presents *a second* circuit conflict, BIO 14, and nowhere denies that it is well-developed and entrenched. But in contending that this conflict does not merit this Court's attention, the Government frames it too narrowly. Unlike Iwuoha's companion petition (Iwuoha Pet. 11-12), the conflict Okechuku describes is not simply about whether a deliberate ignorance instruction must "require the jury to find deliberate ignorance beyond a doubt." BIO 14. The division Okechuku identifies is more fundamental and multifaceted. Primarily, it concerns whether the harmlessness inquiry should consider the particular phrasing of a deliberate-ignorance instruction in determining whether it is harmful. Okechuku then describes still *another* conflict on the circumstances in which

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[1] The Government's position also ignores the constitutional dimension of erroneous deliberate-ignorance submissions (Pet. 28), which courts across the circuit divide have recognized to require that the error be harmless "beyond a reasonable doubt" before it can be disregarded. *Stone*, 9 F.3d at 937; *Hernandez-Mendosa*, 600 F.3d at 980; *Ciesiolka*, 614 F.3d at 354.

deliberate-ignorance instructions can be used in conspiracy cases, Pet. 26-27.

Despite what the Government contends (BIO 14), these issues are of enormous significance, because numerous courts recognize that even a legally correct deliberate-ignorance instruction can be worded to amplify its dangerously harmful tendencies, which is especially problematic in complex conspiracy cases. Pet. 24–26. By the same token, corrective language in a charge can also make harm *less* likely. Requiring that deliberate ignorance be found "beyond a reasonable doubt" is one example. Pet. 24-25. But other types of language have been held to matter too.

Indeed, the Government *insists* that the phrasing of several legally correct charges has led to reversals in two circuits. For instance, the Government recounts that the Tenth Circuit reversed in *United States* v. *Hilliard*, 31 F.3d 1509 (1994) because it was "'troubled'" by one aspect of the charge's phrasing: "'the absence of any limiting instructions concerning evidence of civil regulatory violations.'" BIO 15 n.3 (quoting *Hilliard*, 31 F.3d at 1517). The Government likewise argues that the Seventh Circuit's reversal in *Macias* is traceable in part to its concern that the deliberate-ignorance instruction given there could have been "confusing to the jury" and "'in tension'" with another portion of the charge. *Id.* 18 (quoting *Macias*, 786 F.3d at 1061). The Government offers these details in hopes of minimizing the *other* conflicts at issue in this case. But what they *actually* do is highlight how the

conflict—as Okechuku presents it—is independently worthy of plenary review.[2]

II. This case is an excellent vehicle for resolving these splits.

Unable to escape the square circuit conflicts on these issues, the Government tries to manufacture vehicle problems where none exist.

a. The Government begins by emphasizing the past denials on the Question Presented. BIO 10. But the Government nowhere denies that those previous cases had vehicle problems not present in this case, Pet. 34, and it neglects to mention that none of these denials raised the *second* conflict Okechuku's petition presents. The possibility of resolving both conflicts together makes this petition superior to any that has come before—including Iwuoha's companion petition, which raises a narrower and less-consequential second split.

Rather than counsel against review, these previous denials powerfully illustrate that time has not been kind to the arguments against plenary review. The split has not disappeared but has instead taken on new intractable

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[2] Despite what the Government contends (BIO 12 n.2), and unlike Iwuoha's petition, these issues are squarely before the Court. Okechuku objected at the charge conference to applying the deliberate-ignorance instruction to the conspiracy charges. ROA.2773. And he raised the impact of the charge's phrasing in his rehearing motion—only natural because the point only became relevant after the court failed to consider the charge language in finding harmless error. Pet. 14-15. And contrary to what the Government contends (BIO 12 n.2), both issues fall squarely within the Question Presented, as they implicate "the circumstances" under which a deliberate-ignorance instruction is harmless error. Pet. i.

dimensions. And the prosecution-favoring, error-erasing standards employed in the "majority" of circuits have allowed prosecutorial abuse to proliferate, fostering a dramatic increase in the use of deliberate-ignorance instructions, and leading directly to the blatant abuse at issue in this case. Pet. 8-11. If these problems are not addressed, things will only get worse.

b. The Government's second vehicle "problem" is similarly ironic. It is hard to understand how an error so obvious and serious as to constitute plain error can be an argument *against* review. And unsurprisingly its specific objections about this case's plain-error posture are overblown. If the Government was truly worried that the lower court did not understand or apply the proper rules for finding plain error (BIO 21), it could have sought rehearing.

It did not, because it is apparent that the error here *was* plain. Indeed, in contending otherwise (*id.* 22), the Government simply references the evidence advanced in its court of appeals brief—evidence that the panel rejected as improperly focused on Okechuku's alleged *knowledge* of the clinic's pill mill activities, not his deliberate ignorance of those activities. Pet. App. 30a.

The Government's attempts to re-contextualize that evidence are also unavailing. There may be "'circumstances'" in which the evidence of knowledge may be so "'overwhelmingly suspicious'" as to establish a "'purposeful contrivance to avoid guilty knowledge'"—the hallmark of deliberate ignorance. BIO 22 (quoting *United States* v. *Lara-Velasquez*, 919 F.3d 946, 952 (5th Cir. 1990)). But the Government must point out *specific* evidence so "suspicious" as to meet those requirements, else the distinction

between knowledge and deliberate ignorance has no meaning. Its failure to do so speaks for itself.

It is also unimportant that the plain-error context of this case requires that Okechuku, rather than the prosecution, bear the burden of proving prejudice. BIO 21. The standard is the same regardless of who must prove it, and it cannot be met in the "majority" of circuits. That is the problem Okechuku seeks to correct.

c. Finally, the Government contends (BIO 19-20) that the standard is non-determinative here because it believes its own evidence to be "overwhelming." Nothing would require this Court to reach this fact-bound conclusion reached nowhere below; the Government can try that argument on remand.

In any event, the evidence against Okechuku is *far* from overwhelming. The only direct evidence the Government cites to suggest "Okechuku knew from day one" (BIO 20) of the criminal scheme came from Ezenagu, the ringleader and accomplished liar.

The remainder of the evidence was equivocal, circumstantial, and hotly contested. For instance, while the drug dealer Reed met almost daily with Ezenagu—and always "when Dr. Okechuku was not at the clinic" (ROA.1976-1975)—nothing suggests that Okechuku himself "repeatedly" met with Reed. BIO 19. They met at most "a couple of times" (ROA.1975), and never "after hours," BIO 20.[3]

[3] The Government's only evidence of an "after-hours" meeting is a single video showing that one Saturday, Okechuku entered the building after Ezenagu and Reed had entered earlier. ROA.1094-1095, 1103-1107. Nothing indicates Okechuku ever saw the other men, much less met with them, and even Ezenagu did not testify that such a meeting occurred. ROA.1094-1095, 1103-1107.

And although Okechuku occasionally saw Reed at the clinic, this is unsurprising because he and other staff members believed that Reed had a legitimate medical transportation business. ROA.1944, 1975, 2602-2604. As for Okechuku's supposed "close monitoring" (BIO 20), Okechuku merely "spot checked" his video feed (which did not cover locations where the criminal activity occurred) and received a daily report—activities that were hardly surprising for an off-site owner. GE 16, 102 ROA.1280, 1521, 1854-1855, 2157-2169.

The other evidence the Government emphasizes is hardly "compelling." BIO 20. The defense's expert testified that the clinic's high volume, cash-only business, and short visits were all consistent with a legitimate pain-management practice. ROA.2261-2262, 2278, 2294-2295, 2334-35, 2348-2352) And unlike Iwuoha, the Government has never contended that Okechuku routinely wrote prescriptions "after cursory pro forma examinations" (BIO 20); instead, Okechuku was thorough and followed the practices he put in place to *prevent* diversion. ROA.1869; Pet. 6-7.

Most troubling of all is that the TBMA cleared Okechuku of the wrongdoing he was convicted of. *Id.* 7. The Government complains that the TMBA's investigation did not duplicate its own investigative efforts, but the Board's review contained something beyond the jury's ken: direct evaluation of patient files by medical professionals trained in the standard of care, which the Government is in no position to contradict.

Previous reversals (Pet. 20-21, 23-24) demonstrate that a case hinging on "critical[]" testimony (Pet. App. 31a) from a more culpable informant is not "overwhelming." Nor is one that boils down to a battle of experts over highly contested statistical evidence. *Ibid.*

Previous reversals likewise establish that the phrasing of a legally correct deliberate-ignorance instruction may contribute to harmful error. Pet. 25-26. And none of those reversals involved a charge as deceptively crafted as this one, which was deliberately hand-tailored by the prosecution to improperly convince the jury that it should convict Okechuku for being merely "oblivious" to the drug conspiracy. Pet. 8. Accordingly, under a proper view of the evidence and the charge, Okechuku's conviction would have been reversed. And only Okechuku's petition incorporates this full range of contextual factors that ought to be considered in the harmlessness analysis.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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