NO. 19-208

In the Supreme Court of the United States

MARK A. BECKHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

JUSTIN K. GELFAND
COUNSEL OF RECORD
MARGULIS GELFAND, LLC
8000 MARYLAND AVENUE, SUITE 420
ST. LOUIS, MO 63105
(314) 390-0234
JUSTIN@MARGULISGELFAND.COM

DECEMBER 5, 2019 *COUNSEL FOR PETITIONER*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

JUDICIAL RULES

REPLY BRIEF OF PETITIONER

Since holding in *Neder v. United States*, 521 U.S. 1, 15 (1999) that the omission of an element of a crime from a jury instruction is subject to harmless-error analysis, this Court has repeatedly safeguarded the constitutional right to a jury finding that the Government proved all elements beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt"); *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) ("in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury") (Thomas, J., concurring); *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019) ("A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct"). But it is easy to lose sight of this jurisprudence when reading the government's opposition. Against this backdrop, a deep circuit split has emerged regarding how a court should conduct harmless-error analysis where a jury did not find all elements beyond a reasonable doubt.

This case presents an important question on which the courts of appeals are split and is the perfect vehicle for revisiting *Neder*: whether, if ever, a conviction can stand when a jury has not found all elements beyond a reasonable doubt.

The government argues there is no circuit split notwithstanding that the circuits are applying different tests to determine whether the omission of an element

is harmless. In *Neder*, this Court held, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 521 U.S. at 16. Certain courts understand *Neder* as establishing a two-part test, necessitating a finding that an omitted element omitted was both "uncontested and supported by overwhelming evidence." *See, e.g., United States v. Guerrero-Jasso*, 752 F.3d 1186, 1193-95 (9th Cir. 2014); *United States v. Pizarro*, 772 F.3d 284, 298 (1st Cir. 2014). Other courts, while agreeing that *Neder*'s test consists of two parts, conclude an additional inquiry is required when a defendant contests the evidence of an omitted element to determine whether the evidence could rationally lead to a contrary finding. *See, e.g., United States v. Brown*, 202 F.3d 691, 701 (4th Cir. 2000); *United States v. Needham*, 604 F.3d 673, 679 (2d Cir. 2010), *abrogated on other grounds by Taylor v. United States*, 136 S.Ct. 2074 (2016). Extending the split further, in the decision below, the Eighth Circuit articulated another iteration of *Neder*, construing the test as an "either-or" proposition in which omitting elements is harmless if the evidence is *either* uncontested *or* overwhelming. App.7a-8a.

In its opposition, the government disputes the existence of a circuit split by asserting *Neder* did not articulate a test. Opp.14. Instead, the Government argues, *Neder* "applied *Chapman*'s harmless-error test to hold that the omission of an offense element from the jury instructions may be found harmless beyond a reasonable doubt." Opp.11 (citing *Neder*, 527 U.S.

at 8-20; *Chapman v. California*, 386 U.S. 18 (1967)). Indeed, the government clings to the fiction that recent decisions by this Court cast no doubt on the vitality of *Neder*. *See* Opp.21-22. The government asserts that *Haymond*, *Alleyne,* and *Apprendi* do not discuss *Neder* and analyze only the "constitutionality of statutes that authorized additional punishment based on judicially found facts" as opposed to "the appropriate remedy for erroneous jury instructions." Opp.21-22. However, the Government's attempt to distinguish these cases from *Neder* factually—not legally—constitutes an attempt to shoehorn these constitutional holdings into only the narrowest of circumstances. In *Haymond*, *Alleyne*, and *Apprendi*, members of this Court consistently emphasized the role of a jury in the criminal process: a jury, not a judge, must make factual findings necessary to take away a person's liberty. Remarkably, the government devotes a considerable portion of its brief to arguing the merits of its interpretation of *Neder*, but when it comes to whether this Court should grant review based on the jurisprudence that has developed since *Neder*, the government has little to say.

Finally, the government contends the decision below was correct. Opp.22-23. In support, the Government argues, *inter alia*, the special verdict form rendered the instructional error harmless. Opp.23. But the inability of the special verdict form to cure the constitutional errors in this case was briefed extensively in the Eighth Circuit, which instead applied a novel approach to *Neder* to find harmless error. App. 9a-10a.

Because this case presents the perfect opportunity to resolve a deep circuit split on a question of excep-

tional constitutional and practical importance, this Court should grant the petition.

I. THE COURTS OF APPEALS ARE DIVIDED ON HOW TO APPROACH HARMLESS-ERROR ANALYSIS WHEN A JURY HAS NOT FOUND ALL ELEMENTS OF A CRIME.

The courts of appeals ubiquitously construe *Neder* as setting forth a test for determining whether a jury instruction omitting an element is harmless. Nevertheless, in its opposition, the government suggests there is no circuit split because *Neder* did not set forth a test. This Court should reject that contention.

A. The Decision Below Widened the Circuit Split.

The government mischaracterizes *Neder* as being a conduit through which the *Chapman* harmless error test flows and, in doing so, argues the decision below did not widen the circuit split. However, the government cannot meaningfully dispute that the courts of appeals have announced and applied conflicting legal standards on the question before this Court.

In the decision below, the Eighth Circuit treated *Neder* as a distinct test—not as a repackaged *Chapman* harmless error test—citing *Neder*, 527 U.S. at 18-19 and *United States v. Inman*, 558 F.3d 742, 750-51 (8th Cir. 2009) before discussing the district court's omission of two elements from the jury instruction on the count of conviction. App.7a-8a. The decision below cites *Inman* for the proposition that evidence is sufficient to support a conviction despite the failure to submit an element of the offense to the jury when the government presents uncontroverted testimony in support of the element. App.7a-8a; *see also Inman*, 558 F.3d at

749 (quoting *Neder*, 527 U.S. at 17; *Pope v. Illinois*, 481 U.S. 497, 503 (1987)).

The court then turns to the two elements omitted over Petitioner's objection but recognized by this Court in *Marinello v. United States*, 138 S.Ct. 1101 (2018). With respect to *Marinello*'s nexus element, the decision below concluded its omission was harmless because Beckham "did not attempt to dispute" testimony that he had given a day planner to an IRS auditor and, therefore, "no rational juror could find that Beckham did not give the day planner to the IRS." App.8a-9a. The court then turned to *Marinello*'s "knowledge of a pending or imminent IRS proceeding" element. App. 9a. Stating that "the evidence overwhelmingly shows that Beckham knew of a currently-pending IRS audit at the time he gave Agent Grinstead [the] dayplanner," the court found omission of this element was harmless. App.9a.

The decision below focused on *Neder*'s "uncontested and supported by overwhelming evidence" language, but concluded omission of an element is harmless if it is *either* uncontested *or* supported by overwhelming evidence.

In doing so, the Eighth Circuit applied a version of *Neder* that differs from at least four other circuits. And if, as the government contends, the decision below did not utilize *Neder* but instead applied the *Chapman* harmless error test (despite not citing *Chapman*), this does not eliminate the circuit split—it widens it in a different way.

B. Beyond the Eighth Circuit, a Deep Split Has Developed.

The government contends no circuit split is implicated by the First Circuit's decision in *Pizarro* because the split was more thoroughly articulated in a concurring opinion. Opp.17 (citing *Pizarro*, 772 F.3d at 303-312). While Judge Lipez—who drafted the majority opinion and a concurring opinion—delved deeper into the confusion surrounding *Neder* in his concurring opinion, the split remains.

The majority opinion and the two concurring opinions in *Pizarro* reveal that disagreement exists among First Circuit judges as to whether *Neder* requires a finding that evidence of an omitted element was both uncontested and overwhelming for the error to be harmless. *See Pizarro*, 772 F.3d at 297-98. However, because the evidence was uncontested and overwhelming, the court did not decide whether *Neder* articulated a two-part test. *See id.* at 298 ("The panel need not decide whether this view of the law is correct because, in this case, we conclude beyond a reasonable doubt both that Pizarro has never contested the omitted drug quantity elements and that they were supported by overwhelming evidence"). The two concurring opinions then discussed, in depth, confusion among the jurists concerning the proper application of *Neder*. *See id.* at 303-330.

Similarly, the Fifth Circuit addressed *Neder* in *United States v. Stanford*, 823 F.3d 814, 830-32 (5th Cir. 2016). The court explained that, in *Neder*,

> "[t]he failure to report such substantial income incontrovertibly establishe[d] that Neder's false statements were material to a deter-

> mination of his income tax liability." Indeed, the "evidence supporting materiality was so overwhelming, in fact, that Neder did not argue to the jury—and d[id] not argue [before the Court]—that his false statements of income could be found immaterial." In sum, the missing element was logically encompassed by a guilty verdict and was not in fact contested.

Id. at 832 (quoting *Neder*, 527 U.S. at 16).

In *Stanford*, the Fifth Circuit addressed a scenario where a special interrogatory did not contain the beyond a reasonable doubt standard. *Id.* at 830-32.

Concluding the "missing standard of proof was not intrinsically linked to the answer to the special interrogatory" in the same manner that "materiality" was intrinsically linked to Neder's failure to report substantial amounts of income on his tax returns, the Fifth Circuit concluded the error in *Stanford* was not harmless. *Id.*

In *Guerrero-Jasso*, the Ninth Circuit interpreted *Neder* as requiring that evidence of an omitted element be both uncontested and supported by overwhelming evidence. 752 F.3d at 1193-95. Despite overwhelming evidence, the court did not find the error harmless because the omitted element was contested. *Id.* at 1194. Arguing *Guerrero-Jasso* did not treat *Neder* as a two-part test, the government asserts "[t]he court did not suggest, however, that an instructional error can never be harmless unless the evidence of an omitted element is uncontroverted." Opp.19. But the Ninth Circuit expressly stated, "[i]n light of Guerrero–Jasso's challenges to the removal warrant and his continued

protestations at sentencing, the lack of an express objection to the removal dates recited in the PSR does not alone satisfy the 'overwhelming and uncontroverted' evidentiary standard in this case." *Id.* at 1195. *See also United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006) ("*Neder* explained that where the record contains 'overwhelming' and 'uncontroverted' evidence supporting an element of the crime, the error is harmless. Conversely, the error is not harmless if 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding'") (quoting *Neder*, 527 U.S. at 17-19).

This test conflicts with the Eleventh Circuit's. On remand to the Eleventh Circuit in *Neder*, the Eleventh Circuit concluded this Court had not held "that omission of an element can never be harmless error unless uncontested." *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999). The Eleventh Circuit, however, concluded that evidence relevant to the omitted element must be overwhelming for the error to be harmless. *Id.* The government asserts that this "reading of *Neder* is correct" and does not conflict with the decisions cited by Petitioner. Opp.20. However, the government's view that *Neder* only requires that evidence of an omitted element be overwhelming—but not uncontested—tacitly acknowledges that the Eleventh Circuit's iteration cannot be reconciled with the tests applied in the First, Eighth, and Ninth Circuits.

In the Second Circuit, where a defendant contests an omitted element, courts must engage in an additional inquiry to determine whether there was sufficient evidence to permit a jury to find for the

defendant on the element and whether the jury would have, nonetheless, returned the same verdict. *See Needham*, 604 F.3d at 679. The government characterizes this version of *Neder* as "not inconsistent with other courts' application of the *Chapman* harmless-error standard[.]" Opp.20. But *Needham* does not cite *Chapman* and the government's insistence that all variations of *Neder* are but *Chapman* by another name ignores the jurisprudence that has developed.

Finally, in *Brown*, the Fourth Circuit expressly states, "if the element was uncontested and supported by overwhelming evidence, the harmless error inquiry ends, and we must find the error harmless." 202 F.3d at 700-01 (footnote omitted). However, even if the omitted element was contested, the instructional error may still be harmless if the element was not "genuinely contested." *Id.* at 701. In the government's view, this unique take on *Neder* does not conflict with the decision below or with any other circuit court's interpretation of *Neder*—despite no other circuit evaluating the extent to which an omitted element was "genuinely contested." *See id.* at 701; Opp.21.

Instead of acknowledging the conflict among the circuits regarding what test applies, the government asks this Court to read these decisions as merely applying *Chapman*'s harmless error test. But as it stands, where a jury does not find an element beyond a reasonable doubt, the outcome of an appeal now depends largely on the circuit in which the defendant was tried and that circuit's interpretation of *Neder*.

II. BASED ON RECENT JURISPRUDENCE, THIS COURT SHOULD REVISIT *NEDER.*

In the twenty years since *Neder*, this Court has safeguarded the constitutional right to a jury trial. In *Haymond*, *Alleyne*, and *Apprendi*, this Court concluded that judicial factfinding of any fact necessary to deprive a defendant of his liberty impermissibly infringes on a defendant's fundamental right to a jury trial. If a jury must find facts necessary to enhance a sentence, a jury must surely find the facts necessary to subject a defendant to sentencing in the first place.

In a dissenting opinion to *Neder*, Justices Scalia, Ginsburg, and Souter explained, "depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless." *Neder*, 527 U.S. at 30 (Scalia, J., dissenting) (emphasis in original). The notion that an appellate panel can replace a jury in determining whether the government proved an element beyond a reasonable doubt turns the right to a jury trial on its head.

If, as Justices Gorsuch, Ginsburg, Sotomayor and Kagan recently recognized, "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty," *Neder* cannot stand. *Haymond*, 139. S.Ct. at 2373.

III. THIS CASE PRESENTS THE PERFECT VEHICLE TO RESOLVE THE CIRCUIT SPLIT AND REVISIT *NEDER.*

The government faults Petitioner for not raising the "proper interpretation of *Neder*" in the lower courts. Opp.22. However, in its briefing below, the

government addressed *Neder* only once—as a fleeting alternative to its position that the special verdict form used by the district court rendered the error harmless. Indeed, until the Eighth Circuit issued its opinion, it was impossible to determine that its interpretation of *Neder* would deviate so significantly from *Neder* itself and from the other circuits. Remarkably, in its passing mention of *Neder* in its briefing below, the government argued "there was overwhelming, incontrovertible evidence" of a nexus between Beckham's conduct and a pending IRS proceeding of which he was aware. In other words, the government asked the Eighth Circuit to apply the two-part *Neder* test to determine the instructional error was harmless. That the government would now argue that "Petitioner did not argue in his briefing or in the court of appeals that *Neder* required that court to find that the evidence as to each element was both overwhelming and uncontroverted" is as telling as it is unwarranted. Opp.14.

The government's argument that this Court should decline to resolve the split because it was not briefed at the lower courts is misplaced. The government relies on *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992), in which this Court, citing its own Rules, "decline[d] to consider § 105(a) in this case because Taylor raised the argument for the first time in his opening brief on the merits." This Court explained, "[o]ur Rule 14.1(a) makes clear that '[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court,' and our Rule 24.1(a) states that a brief on the merits should not 'raise additional questions or change the substance of the questions already presented' in the

petition." *Id.* Opp.22. Unlike Taylor, Petitioner raised this question in the petition.

This case purely captures this issue. Petitioner was acquitted of all counts on which the jury was properly instructed—and convicted on the one count where the jury only found three of five elements beyond a reasonable doubt.

Because the Eighth Circuit is the latest to apply its own iteration of *Neder*, this Court should grant review to clarify when, if ever, it is harmless for a jury to not find every element beyond a reasonable doubt. In doing so, this Court has the opportunity to finally conclude that "depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless." *Neder*, 527 U.S. at 30 (Scalia, J., dissenting) (emphasis in original).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTIN K. GELFAND
COUNSEL OF RECORD
MARGULIS GELFAND, LLC
8000 MARYLAND AVENUE, SUITE 420
ST. LOUIS, MO 63105
(314) 390-0234
JUSTIN@MARGULISGELFAND.COM

COUNSEL FOR PETITIONER

DECEMBER 5, 2019