No. 19-5436

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN ARAIZA-JACOBO,
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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The most important feature of the government's brief in opposition is its concession that the Fifth Circuit's standard for applying harmless-error doctrine to the trial error at issue here conflicts with the standard that governs in at least four other circuits (the Second, Seventh, Eighth, and Ninth). BIO 12-14. In those circuits, the erroneous submission of a "deliberate ignorance" instruction—like any other trial error—is subject to this Court's traditional standard for assessing harmlessness under Federal Rule of Criminal Procedure 52(a). Pet. 11-12, 14-15; *see also* 28 U.S.C. § 2111. Under that standard, determining whether a trial error "affect[ed] substantial rights," Fed. R. Crim. P. 52(a), requires the appellate court to ask whether, in view of the entire record, there is a reasonable possibility that the error may have influenced the jury's verdict, *Kotteakos v. United States*, 328 U.S. 750, 776 (1946); *Chapman v. California*, 386 U.S. 18, 23 (1967), and that inquiry is "entirely distinct" from an inquiry into the sufficiency of the evidence. *United States v. Lane*, 474 U.S. 438, 450 n.13 (1986).

The Fifth Circuit, in contrast, adheres to different test adopted by at least six other circuits (the First, Third, Fourth, Sixth, Tenth, and Eleventh). BIO 13; Pet. 12-14. In petitioner's case, that test compelled a finding that the jury's erroneous exposure to the deliberate-ignorance instruction was harmless precisely *because* the record contained sufficient evidence of actual knowledge, and thus, guilt. BIO 11-13.

This case thus raises a question that is the subject of a deep and acknowledged circuit split: whether the standard for assessing the harmlessness of an erroneously submitted deliberate-ignorance instruction turns on the legal sufficiency of the evidence, or instead requires

the traditional inquiry into the instruction's potential effect on the jury's verdict. That division alone warrants this Court's intervention.

Despite acknowledging the split, the government contends (BIO 8-20) that review is unwarranted. That is not surprising: the majority approach makes a finding of harmlessness automatic, immunizing this prevalent instructional error from independent appellate review, as long as there is enough evidence to avoid outright judgment of acquittal. *See United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995) (holding error harmless "as a matter of law"); *United States v. Stone*, 9 F.3d 934, 939 (11th Cir. 1993) (error is "harmless *per se*"). But the government has not identified any compelling reason why this Court should leave the circuits divided over whether that approach is correct. The opportunity to resolve the split is squarely presented (the error below is undisputed); and, as demonstrated by the government's (presumably incomplete) list of petitions presenting the same question (BIO 8), the issue is a frequently recurring one. The petition for certiorari should be granted.

A. The circuits are split over the question presented.

The government agrees (BIO 14) that the circuits apply "different" standards in answering the question presented, and it does not dispute that this split of authority has long been acknowledged by commentators and the courts involved. *See* Pet. 18. Instead, the government seeks to avoid review by downplaying the split (BIO 12-19), mischaracterizing the approach of the minority circuits, suggesting that several of those circuits may be retreating toward the majority approach, and disputing petitioner's placement of the D.C. Circuit on the minority side of the divide. Neither the government's attempts to obscure the point on

which the circuits disagree nor its attempts to minimize the extent of that disagreement withstand scrutiny.

1. The government characterizes the harmless-error standard applied by the minority of circuits (and the standard advanced by petitioner) as limited to an assessment of whether the evidence of actual knowledge adduced at trial was "overwhelming." BIO 14, 16-18; *see* BIO 19 ("Petitioner's preferred standard asks whether the evidence at trial of actual knowledge was overwhelming.") (citing Pet. 15). That is not the standard that the Second, Seventh, Eighth, Ninth, and D.C. Circuits apply, and the petition cannot reasonably be read as endorsing that test.

Rule 52(a) of the Federal Rules of Criminal Procedure and Section 2111 of Title 28 each define "harmless" error as an error that does not "affect substantial rights." The petition clearly sets out the traditional test this Court has derived from that language, *see* Pet. 11-12 (citing *Kotteakos*, 328 U.S. at 776; *Chapman*, 386 U.S. at 23; *O'Neal v. McAninch*, 513 U.S. 432, 435, 437-38 (1995)), noting that the "indispensable feature" of that test "is its focus on the error's potential *effect* on the jury's verdict, in view of the *entire* record." Pet. 12 (original emphasis). After describing the point of tension between the circuits as over whether "this standard should be modified" in the context of the erroneous submission of a deliberate-ignorance instruction, petitioner explained that a minority of five circuits adhere to the traditional test by "focusing the harmlessness inquiry on the probability that the erroneous instruction influenced" the verdict. Pet. 12-14.

To be sure, petitioner acknowledged that the minority circuits "often loosely reference their inquiry as a search for 'overwhelming evidence' of actual knowledge." Pet. 15. "But," he followed up, "there is no doubt that these courts are applying the traditional harm analysis established in *Kotteakos* and *Chapman*." Pet. 15 (citations omitted); *see Harrington v. California*, 395 U.S. 250, 254 (1969) ("We admonished in [*Chapman*] against giving too much emphasis to 'overwhelming evidence' of guilt" in the harmless-error inquiry). And petitioner left no room for doubt that this traditional, effects-based harm analysis is the standard he prefers. *See* Pet. 23-24 (assailing the Fifth Circuit's decision below as incorrect for its failure to apply the traditional mode of harm analysis).

The government knows full well what the traditional *Kotteakos-Chapman* test applied by the circuits on the minority side of this split looks like. Indeed, the government advocated for this very test in defending the harmless-error judgment of one of the *minority* circuits (the Seventh) before this Court just seven years ago: "This Court's modern harmless-error jurisprudence recognizes that a reviewing court's evaluation of harmlessness requires consideration of the impact of the error on the jury's verdict 'in relation to all else that happened.'" Brief for the United States at 20-21, *Vasquez v. United States*, 566 U.S. 376 (2012) (No. 11-199), 2012 WL 605017 (quoting *Kotteakos*, 328 U.S. at 764). And the government concedes, as it must, that at least seven circuits have eschewed this traditional effects-based standard in the deliberate-ignorance context, holding instead that this instructional error must be deemed harmless in any case where the evidence is merely "sufficient to support a finding of actual knowledge[.]" BIO 13.

2. The government's attempt to dull the force of that concession by characterizing the two standards as only "slightly different" is unavailing. BIO 14. This Court's cases are replete with statements that the harm analysis cannot be folded into an inquiry into the mere sufficiency of the evidence. *See* Pet. 24 (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988), *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), and *Kotteakos*, 328 U.S. at 765). Just four terms ago, the Court reiterated the point in the context of an erroneous jury instruction that added an element not charged in the indictment. *See Musacchio v. United States*, 136 S. Ct. 709, 715 n.2 (2016) ("[W]e also do not suggest that an erroneous jury instruction cannot result in reversible error just because the evidence was sufficient to support a conviction."). The inquiry into sufficiency "essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to the jury,'" *id.* at 715 (quoting *Burks v. United States*, 437 U.S. 1, 16 (1978)), and it is "entirely distinct" from Rule 52(a)'s inquiry into an error's potential effect on the jury. *Lane*, 474 U.S. at 450 n.13. Obviously, inquiries that are "entirely distinct" cannot be "slightly different."

3. The government's remaining attempts to minimize the extent of the disagreement over the question presented likewise fail.

The government doubts (BIO 15-17) that each of the circuits that it agrees falls into the minority camp (the Second, Seventh, Eighth, and Ninth) is fully committed to the traditional effects-based approach, pointing to isolated decisions that appear to endorse or apply

its preferred sufficiency-based standard. But none of those decisions purports to abrogate circuit precedent applying the traditional test.[1]

Moreover, if stray decisions were enough to establish a shift from one side of the split to the other, then petitioner could point to several recent panel decisions in the Tenth and Eleventh Circuits as evidence that those courts have "reevaluated" their positions and shifted back to the effects-based standard. *See United States v. Little*, 829 F.3d 1177, 1185 (10th Cir. 2016) (applying *Chapman* reasonable-doubt standard to conclude unsupported deliberate-ignorance instruction "played no part in the jury's verdict"); *United States v. Anaya*, 727 F.3d 1043, 1060 (10th Cir. 2013) (same); *United States v. Esquenazi*, 752 F.3d 912, 931 (11th Cir. 2014) (finding unsupported deliberate-ignorance instruction harmless in light of "overwhelming evidence" of actual knowledge "and the district court's thorough instructions on the knowledge element"). But petitioner has no desire to play circuit "hot potato" with the government. Despite outlier decisions, controlling Tenth and Eleventh Circuit precedent sides with the government, just as controlling precedent in each of the minority circuits sides with petitioner.

[1] For instance, in the Eighth Circuit opinion the government cites (BIO 15) as having "reevaluated" that court's adherence to the traditional test in *United States v. Barnhart*, 979 F.2d 647, 653 (8th Cir. 1992), the panel expressly stated that its "decision does not conflict with *Barnhart*" and then described the harmlessness inquiry as requiring the "absence of substantial influence on the verdict." *United States v. Hernandez-Mendoza*, 611 F.3d 418, 419 (8th Cir. 2010). The Ninth Circuit's decision (BIO 15) in *United States v. Daly*, 243 Fed. Appx. 302 (9th Cir. 2007), is unpublished, and the cherry-picked lines (BIO 15-16) from that court's en banc decision in *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007), are not probative of any shift in Ninth Circuit harmless-error precedent, as that case addressed only the threshold inquiry into whether it was error to give the instruction in the first place. *See* 483 F.3d at 919-24.

The government also disputes (BIO 18) petitioner's placement of the D.C. Circuit, which has only confronted an erroneous deliberate-ignorance instruction on one occasion, *see United States v. Alston-Graves*, 435 F.3d 331, 340-42 (D.C. Cir. 2006), on the minority side of the circuit split. Petitioner reads *Alston-Graves* as focusing the harmlessness inquiry on the instructional error's perceived effect, or lack thereof, on the jury's consideration of the evidence. *See id*. at 341-42 (citing the lack of emphasis placed on the instruction, low likelihood that a reasonable juror would use the instruction impermissibly, and earlier references to the "mountain of evidence" of guilt and "overwhelming" evidence of knowledge). The government reads (BIO 18-19) the case as hewing closer to a sufficiency approach. But it does not matter who has the best reading. Even if the government is correct, the existence of an 8-to-4 circuit split, rather than a 7-to-5 split, presents an equally compelling case for resolving the question presented.

B. The government's merits argument only strengthens the case for review.

Cognizant of the courts of appeals' adoption of "entirely distinct" standards for applying Rule 52(a) to the recurring jury-charge error at issue here, the government primarily contends (BIO 9-12, 14-15) that review is unnecessary because, in its view, the sufficiency-based rule adopted by the majority of circuits is correct. But that is no reason to deny certiorari. The government's endorsement of one side of a circuit conflict has never stopped this Court from stepping in to arbitrate the dispute—even in cases where the government sides with the petitioner. *See Beckles v. United States*, 137 S. Ct. 886, 891-92 & n.2 (2017).

In fact, the government's view of the merits only strengthens the case for this Court's intervention. The government, like the majority of circuits, locates the rationale for discarding Rule 52(a)'s traditional harm analysis in this context in "the logic of this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991)." BIO 9; *see id.* 9-13. The petition (at 24-26) briefly outlines several reasons why *Griffin*—a case arising outside the harmless-error context that found no error at all—should not be read to afford that kind of license. And there are certainly other reasons to doubt *Griffin*'s applicability.[2]

But the salient point is that the government's premature merits argument confirms that the source of the circuit divide is confusion over the interpretation of one of this Court's decisions. At a minimum, the majority circuits' reliance on the "logic" of a case decided outside the harmless-error context to adopt a standard that this Court's harmless-error precedents mark as "entirely distinct" from the traditional *Kotteakos-Chapman* standard demonstrates the need for clarification. One side is misreading *Griffin*, and the need to clarify the scope and meaning of one of the decisions of this Court is a separate and appropriate basis for the exercise of certiorari jurisdiction.

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[2] For example, the government notes (BIO 9) that the majority circuits' reliance on *Griffin* is rooted in the idea that the presumption that juries follow their instructions overcomes the need for a traditional harmless-error inquiry into the possible effect of an unsupported deliberate-ignorance instruction. *See, e.g.*, *Stone*, 9 F.3d at 940-41. But that reasoning is at odds with the long recognition in this Court's harmless-error jurisprudence that jurors are *not* categorically immune from the influence of confusing or misleading instructions. *See Kotteakos*, 328 U.S. at 769 (noting that, "in the face of the misdirection [in the instructions] and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore th[e] vital difference"); *Bihn v. United States*, 328 U.S. 633, 638 (1946) (concluding, despite sufficient evidence of the defendant's guilt, that "the jury might have been influenced by [an] erroneous charge").

C. Resolving the question presented is important, and the government's only vehicle objection is unavailing.

1. The existence of an acknowledged circuit split stemming from confusion over the meaning of one of this Court's decisions is reason enough to grant review of the question presented. It is also important for the Court to do so. As the petition explains (at 20-21), the question presented implicates two vitally important aspects of federal criminal law: (1) the proper standard for reviewing harmless error under Rule 52(a); and (2) an instruction that commentators, courts (on both sides of the split), and a former Justice of this Court have long understood to risk diluting the jury's view of the criminal *mens rea* burden.

The government does not dispute either point. Nor could it. This Court has not hesitated to review and reverse lower court decisions watering down the mental state required for criminal conviction. *See Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019); *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702-03 (2005); *Staples v. United States*, 511 U.S. 600, 604 (1994). Harmonizing the standard federal appellate courts use to decide whether or not to remedy trial-court errors is also undeniably important. Indeed, this Court has recently granted review to address less-robust circuit splits over the interpretation and application of Rule 52(b)'s standard for correcting "plain errors," *see Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341, 1345 (2016); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 & n.2 (2018), and the government has identified no good reason why this Court should ignore the courts of appeals' disparate application of Rule 52(a) to the class of instructional errors at issue here. *Cf. Lane*,

474 U.S. at 439-40, 449-50 (granting certiorari to resolve circuit conflict over the application of Rule 52(a) to "error[s] involving misjoinder").

2. In a final effort to avoid review, the government contends (BIO 19-20) that petitioner's case is a poor vehicle for resolving the circuit conflict because, in its view, petitioner would not be entitled to reversal even under his preferred test. This is the government's sole vehicle objection and, as a basis for denying certiorari, it is unavailing.

The government's view that petitioner would lose even under the appropriate standard is not a compelling objection to the suitability of his case as a vehicle for resolving the acknowledged conflict over the question presented. This Court is primarily concerned with harmonizing the *legal* standards applied throughout the regional federal courts, not with adjudicating factbound disputes over the application of the proper standard in a particular case. For that reason, this Court undertakes to apply the proper harmless-error standard to the facts before it only "sparingly." *Lane*, 474 U.S. at 450 (quoting *United States v. Hasting*, 461 U.S. 499, 510 (1983)).

Here, the question presented asks this Court to decide which of two competing legal standards for assessing harmless error should be applied throughout the country. Under the majority rule, defendants have no opportunity to demonstrate that the unwarranted submission of a deliberate-ignorance instruction is harmful—they are deprived of appellate review of that error's significance "as a matter of law." *Mari*, 47 F.3d at 786. A ruling in petitioner's favor would remedy that deprivation, entitling him to an appellate assessment of the instruction's potential influence on the jury in view of the entire record (not just the government-

favorable inferences from the evidence). Thus, while petitioner believes his case would make for an instructive example of the circumstances in which an appellate court would lack the requisite "fair assurance," *Kotteakos*, 328 U.S. at 765, that the instructional error had no impact on the outcome, *see* Pet. 8-9, 21, 23, application of the correct standard to the facts of his case can be left to the court of appeals on remand. In short, the government has not identified any obstacle that would prevent this Court from reaching the question presented.

CONCLUSION

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

Respectfully submitted,

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