No.

IN THE

Supreme Court of the United States

RAVNEET SINGH

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, upon invalidating one of two alternative theories of liability presented to a jury, the reviewing court should ask if there is "sufficient evidence" to justify predicating liability on the remaining theory of liability; a "reasonable probability" that the jury so found; or "evidence beyond a reasonable doubt" that the jury so found?

2. Whether Congress, pursuant to its authority over foreign affairs and immigration, can dictate to states how to structure their own political processes?

RULE 29.6 STATEMENT

The petitioner has no parent company, and there are no publicly held companies that hold any stock of petitioner.

STATEMENT OF RELATED CASE

Jose Susomo Azano Matsura was tried with petitioner Singh, No. CR 14-388 mma, and the district court entered judgment against him on November 9, 2017. The Ninth Circuit subsequently consolidated the two appeals (No. 17-50387) for the purpose of oral argument. Azano is filing a separate petition to this Court based on an unrelated issue.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is available at 924 F.3d 1030 (9th Cir. 2013) and is reproduced in the Appendix at App. A. Petitioner filed a petition for rehearing en banc in the Ninth Circuit which was denied by order issued July 30, 2019 (App. B).

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Ninth Circuit were entered on May 16, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

18 U.S.C. 1519 provides "Whoever knowingly alters, destroys, mutilates, conceals, covers up,

falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

52 U.S.C. 30121 provides "It shall be unlawful for— (1) a foreign national, directly or indirectly, to make— (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 30104(f)(3) of this title); or (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national."

STATEMENT OF THE CASE

This case arises from the trial and conviction of petitioner Ravneet Singh for aiding a San Diego homeowner who is not a citizen contribute to two candidates by providing social media services in connection with the 2012 San Diego mayoral campaign and for not disclosing such efforts to the candidates' campaigns.

REASONS FOR GRANTING THE WRIT

1. This Court should grant the petition for a writ of certiorari first to resolve the split in the circuits following *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), with respect to application of the harmless error doctrine after invalidation of one of alternative theories of liability presented to the jury. The Ninth Circuit held in this case that, as long as "sufficient evidence" existed supporting the theory that was not invalidated, harmless error existed. In contrast, other circuits – albeit in different ways -- have required the government to demonstrate instead that it is clear "beyond a reasonable doubt" that the jury voted to convict on the theory left standing.

2. This Court also should grant the petition to preserve the fundamental tenets of federalism embodied in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which held that Congress is without power to interfere with the election machinery of the states.

I. CERTIORARI IS APPROPRIATE TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE APPROPRIATE TEST REQUIRED BY *HEDGPETH V. PULIDO* TO DETERMINE WHEN, AFTER INVALIDATING ONE OF ALTERNATIVE THEORIES OF LIABILITY PRESENTED TO THE JURY, A REVIEWING COURT SHOULD HOLD THE ERROR HARMLESS

A. Split in the Circuits

This Court in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), held that, after invalidating one of alternative theories of liability presented to the jury, a court should apply harmless error review. The courts below have articulated disparate tests as to what constitutes harmless error review in that context.

The government below relied upon alternative theories in pressing for conviction under the document shredding statute, 18 U.S.C. 1519. First, it argued that petitioner Singh's failure to report his work on the Dumanis and Filner mayoral campaigns was tantamount to filing a false report and, alternatively, that Singh "caused" the campaigns under 18 U.S.C. 2(b) to file inaccurate reports by not being more forthcoming about the amount he was paid for his work, and who was paying. There was no factual dispute underlying the first theory, because Singh never contended that he reported his efforts to the campaigns, but rather argued that he had no duty to do so. On the other hand, whether and to what extent

petitioner received money to work on the campaigns was hotly contested.

The Ninth Circuit agreed (924 F.3d at 1050) with petitioner that, in the absence of a duty to make a report, his omission could not satisfy the actus reus of the document shredding offense: "San Diego's Municipal Code . . . imposed the reporting requirement on campaigns and candidates, not on individuals 'volunteering' or providing services to the campaigns." 924 F.3d at 1050. Nonetheless, the court determined that there was "sufficient evidence" (924 F.3d at 1051) for the jury to conclude on the alternative theory that Singh "caused" the Dumanis campaign, but not the Filner campaign, to file a false report by concealing how much he had been paid to work on the campaign.

The Ninth Circuit has applied harmless error similarly in prior cases. For instance, in *Babb v. Lozowsky,* 719 F.3d 1019 (9th Cir. 2013), the court noted that, even though there was "no way to be absolutely certain what leads a juror to a particular decision," *id.* at 1033 n.9, the court was "reasonably certain" from the evidence introduced at trial that the jury voted to convict under the remaining theory of liability. *Id.* at 1035. The Ninth Circuit articulated the test similarly in *United States v. Vazquez-Hernandez,* 849 F.3d 1219, 1226 (9th Cir. 2017), stating that "where a jury instruction permits a conviction on either of two alternative theories, one of which is later found to be unconstitutional, the error affects the defendant's substantial right if there is a *reasonable*

probability that the jury convicted the defendant on the invalid theory."[1]

In contrast, the Tenth Circuit has held that, where one ground for conviction is invalid, the only way that a verdict may be sustained is if "it is possible to determine that the jury relied on the valid ground or necessarily made the findings required to support a conviction on the valid ground." *United States v. McKye,* 734 F.3d 1104 (10th Cir. 2013). The Fourth Circuit similarly in *Bereano v. United States*, 706 F.3d 568, 578 (4th Cir. 2013), stated that it would affirm a conviction only if "the evidence that the jury necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground." *See also Sorich v. United States,* 709 F.3d 670 (7th Cir. 2013) (upholding a conviction on the remaining, valid count because the alternative theories of fraud under which the defendant was charged were "coextensive," essentially based on a "single scheme").

The difference between the approach of the Tenth and Fourth Circuits on the one hand and that of the Ninth is vividly illustrated in this case. There was no factual dispute underlying the theory invalidated in

[1]A divided North Carolina Supreme Court in *State v. Malachi,* 821 S.E.2d 407, 421 (N.C. 2018), recently held similarly to the Ninth Circuit that harmless error as under *Pulido* can be demonstrated if there is "sufficient support" in the record for the remaining valid theory.

this case – the only question was whether culpability could attach under 18 U.S.C. 1519 in the absence of a duty to provide information. Under the test articulated in *McKye* and *Bereano,* the error would not be harmless because the jury's verdict on the invalidated theory relied on *no* facts relevant to the remaining, valid theory. Indeed, it is far more logical to conclude that the jury voted to convict under the theory that did not involve contested facts. Instead, the Ninth Circuit made its own independent assessment of the record to determine that "sufficient evidence" existed that defendant "caused" one of the two campaigns to file inaccurate information.

The Fifth Circuit, like the Tenth and the Fourth, also will consider whether the jury "in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory." *United States v. Skilling,* 638 F.3d 480, 482 (5th Cir. 2011) (citations omitted). But, that court also will uphold the verdict when the court "after a thorough examination of the record is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* (citations omitted). The Fifth Circuit, like the Ninth, permits judges to scour the record to weigh the evidence against a defendant on the valid ground. That Circuit requires the evidence to be overwhelming as opposed to the Ninth Circuit's requirement that there be "sufficient" evidence" of guilt or "a reasonable probability" that the jury voted to convict on the remaining valid theory. The Third Circuit similarly has explained that "where there is a clear alternative theory of guilt, supported by overwhelming evidence, a defendant likely cannot

show . . . harmless error." *United States v. Andrews,* 681 F.3d 509, 521 (3rd Cir. 2012). The Tenth Circuit in fact, has noted the different standards among the circuits. *See McKye,* 734 F.3d at 1113 (Brisco, J., concurring) (explaining that the Fifth and Third Circuit tests were less demanding of the government than that of the Tenth Circuit).[2]

Moreover, courts are split as to whether the government or defendant bears the burden of proof. While the Fourth Circuit has placed the burden on proving harmlessness on the government, *Bereano,* 706 F.3d at 578, the Third Circuit places the burden on the defendant. *United States v. Andrews,* 681 F.3d 509, 521 n.10 (3d Cir. 2012). The Ninth Circuit's "sufficient evidence" approach relieves the government of that burden as well. In light of the lack of uniformity, review by this Court is warranted.

B. Sixth Amendment Jury Right

Framing the harmless error test is important not just because of the split in the circuits. Harmless error review as in the Ninth Circuit invites judges to reweigh the evidence, robbing defendants of their critical Sixth Amendment right – "ensur[ing] that the government must prove to a jury every criminal charge beyond a reasonable doubt." *United States v. Raymond,* 139 S. Ct. 2369, 2376 (2019). The Ninth Circuit and to some extent Fifth and Third Circuits

[2] For an earlier summary of the disagreement among the circuits, see Erika A. Khalek, *Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions*, 83 Fordham L. Rev. 295 (2014).

have not asked what the jury actually found, but rather how the panel itself would have voted as a jury. As this Court stated in *Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993), the proper inquiry is not whether "in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."[3] Only when there is no "reasonable doubt" that the jury voted to convict on the remaining theory should the verdict be upheld. Accordingly, this Court should grant certiorari to consider whether such an open-ended test as used by the Ninth Circuit is consistent with *Pulido* as well as the Sixth Amendment.

[3] As a dissenting Justice in North Carolina wrote about the similar harmless error standard there, "I do not consider it to be within a judicial forum's proper purview to sift through the evidence and to speculate as to which theory, between or among multiple ones, a jury considered to be persuasive to reach its verdict." *State v. Malachi,* 821 S.E.2d 407, 423 (N.C. 2018) (Morgan, J., dissenting in part).

II. CERTIORARI IS APPROPRIATE AS WELL TO PRESERVE THE FEDERALISM TENETS REINFORCED IN *OREGON V. MITCHELL*

Certiorari also is warranted because the Ninth Circuit's decision on the Section 30121 counts threatens to destabilize our plan of Union by sanctioning Congress's decision to prohibit foreign nationals living in states from participating in state and local elections through campaign contributions. Currently, eleven states have authorized resident foreigners to vote in municipal elections such as the election in this case, http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx, and resident foreigners vote in addition in public school elections in Maryland, Illinois, and California. https://bppj.berkeley.edu/2019/03/04/spring-2019-journal-noncitizen-voting-rights-in-the-united-states/ These jurisdictions have authorized noncitizen participation in light of the fact that such individuals live in their jurisdictions, pay taxes, and send their children to the public schools. But if their noncitizen residents contribute to the very same elections in which they vote, they face a felony charge under federal law. The federal interference is palpable.

Congress lacks the power to dictate to states whether noncitizens living in their jurisdictions can vote or contribute to state and local elections. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court struck down Congress' directive that states mandate

an eighteen-year old voting age in state and local elections. This Court explained that "the Constitution intended the states to keep for themselves. . . the power to regulate elections." *Id.* at 124-25. Previously, this Court in *James v. Bowman*, 190 U.S. 127 (1903), struck down a congressional enactment criminalizing bribery in state and local elections and, before that, in *United States v. Reese*, 62 U.S. 214 (1876), the Court struck down a federal criminal statute imposing duties on inspectors of municipal elections. This Court therefore has blocked Congress in the past from interfering with states' efforts to regulate their own political structures, other than when issues of individual constitutional rights have arisen.

Indeed, at the time of our Founding, noncitizens voted in state and local elections, and a number of states protected that right in their constitutions.[4] As

[4] The Framers of the Constitution clearly intended for aliens to be involved in state elections. For example, the Massachusetts Constitution written principally by John Adams explicitly allowed foreigners to vote. After all, residency and property ownership were the touchstones of voting, not citizenship. The Massachusetts Constitution stated in pertinent part, "every male inhabitant . . . shall have a right to give in his vote [and,] to remove all doubts concerning the meaning of the word 'inhabitant' in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this State, in that town, district, or plantation, where he dwelleth, or hath his home." Mass. Const. part II, chap. I, § 2, art. II, repealed by Mass. Const. part IV, art. II. Massachusetts was not alone. Rather, at the time the Federal Constitution was ratified, at least 11 of the original 13 colonies allowed aliens to vote. Ronald Hayduk, *Democracy For All: Restoring Immigrant Voting Rights in the United States*, 35-52 (2006).

this Court observed, states traditionally "provided[d] that persons of foreign birth could vote without being naturalized for the conditions under which that right is to be exercised are matters for the states alone to prescribe." *Pope v. Williams*, 193 U.S. 621, 633 (1904) (emphasis added), overruled on other grounds by *Dunn v. Blumstein*, 405 U.S. 330 (1972). As this Court further noted, it is "the State's broad power," not that of the federal government, "to define its political community." *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

The court below, however, upheld that displacement of state autonomy, concluding that, because Section "30121(a)(1) regulates only foreign nationals, which is within the ambit of Congress's broad power to regulate foreign affairs and condition immigration," (924 F.3d at 1043), no federalism issue arises. According to the Ninth Circuit, the first Congress could have overridden state constitutions and prohibited foreign nationals from voting and participating in state elections. Yet, as Alexander Hamilton warned in Federalist No. 59, "Suppose an article had been introduced into the Constitution, empowering the United States to regulate the election for the particular state, would any men have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of state government?"

Congress simply lacks the power to alter the states' fundamental control over their own political processes. As this Court explained in preserving Missouri's mandatory retirement age for state judges in *Gregory v. Ashcroft,* 501 U.S. 452, 459 (1991), "[through the

structure of its government. . . and the character of those who exercise government authority, a State defines itself as a sovereign." The reasoning in *Ashcroft* followed that in *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900): "[i]t is obviously essential to the independence of the States, and to their peace and tranquility that their power to prescribe the qualification of their own officers. . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Cf. Arizona v. InterTribal Council of Ariz.,* 570 U.S. 1, 16 (2013) (empowering each state to determine its own voting qualifications "sprang from the Framers' aversion to concentrated power.").

This Court has often noted the line between regulation of noncitizens within the fifty states and those abroad. Despite Congress' concern with foreign affairs, this Court has held that foreign nationals in this country enjoy constitutional protections such as the right to free speech, *Bridges v. Wixon,* 326 U.S. 135, 148 (1945), and the right to be free from unreasonable searches and seizures under the Fourth Amendment. *Verdugo v. Urquidez,* 494 U.S. 259 (1990). In so doing, this Court has generalized that aliens gain the protections of the Constitution "when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271. When afforded the right to vote, resident aliens should be permitted to contribute

to those very campaigns as long as authorized under state and local law.[5]

Leaving campaign finance regulation to the states would not leave contributions from resident foreign nationals unchecked. Indeed, California and other states have passed laws banning or limiting the ability of foreign contributions in their elections. Of particular salience here, California has barred contributions from foreign corporations, U.S. subsidiaries of foreign corporations if influenced by foreign management, foreign political parties, and nonresidents, but has permitted contributions from residents who are foreign nationals. Calif. Gov. Code 85320(b)-(c). And, of course, petitioner does not challenge Section 30121 as applied to campaign contributions from overseas, but rather as applied to a San Diego homeowner, married to a U.S. citizen, who wished to participate in the San Diego mayoral election.

Accordingly, this Court should grant certiorari to consider whether Congress, pursuant to its authority over immigration and national security, may dictate to states who can participate in state and local governmental elections. The federalism structure of

[5] This Court in *Bluman v. FEC*, 565 U.S. 1104 (2012), affirmed a decision by a three-judge court, 800 F. Supp.2d 281 (D.C. Cir. 2011), holding after *Citizens United* that the federal government's unique obligation to define the national political community provided the compelling interest justifying the infringement on speech resulting from the ban on campaign contributions from noncitizens. The three-judge court did not address the federalism issues because no such arguments were raised by the parties.

our nation is too important to permit such significant readjustment without examination by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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