No. 20-

In the Supreme Court of the United States

DAVID MING PON, PETITIONER

v.

UNITED STATES, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court reviewing a cold criminal trial record may determine that an error at trial was harmless by applying an "overwhelming evidence of guilt" test that considers only the potential effect of the error on the government's case and not on the defense.

RELATED PROCEEDINGS

United States District Court (M.D. Fl.)

United States of America v. *David Ming Pon*, No. 14-cr-00075-BJD-PDB (May 9, 2017)

United States Court of Appeals (11th Cir.)

United States of America v. *David Ming Pon*, No. 17-11455 (June 29, 2020)

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Constitutional Provision, and Rule

Other Authorities

INTRODUCTION

This case raises an important and recurring question of criminal law: Can a trial error be held harmless based on *the government's* "overwhelming evidence of guilt" without considering the error's potential effect on the jury's view of *the defendant's* case? In holding that it can, the divided decision below deepens an entrenched lower-court split left unresolved in *Vasquez* v. *United States* (No. 11-199), dismissed as improvidently granted, 566 U.S. 376 (2012). Further, the decision conflicts with this Court's precedents, and reviewing it will allow the Court to clarify a doctrine affecting more criminal appeals than any other.

The indictment here alleged that Dr. David Pon, a highly credentialed and experienced ophthalmologist, defrauded Medicare by falsely diagnosing patients with wet macular degeneration (WMD) and billing for laser treatments not rendered. The government theorized that, because Pon's patients lacked the "telltale" scars caused by conventional laser treatment, he never treated them. Pon insists that he did—and that his innovative treatment method was both successful and left no scars.

Pon took the stand for three days, testifying that he used specialized equipment capable of detecting WMD early, in its "moist" phase, and administered a low-powered laser technique, called "sub-threshold pulsating laser photocoagulation," that did not cause scarring. Pon learned of this approach at a presentation by a world-renowned ophthalmologist, refined it by clinical use and study of leading scholarship, and believed it worked for the "simple reason" that patients "told [him] it worked." Fourteen witnesses testified that Pon successfully laser-treated them or a

spouse. Several of these patients had been diagnosed by *other* doctors, leaving no question they had WMD.

An ever-growing body of medical studies supports Pon's methods (*infra* at 9–10), and a jury could well believe they work. Even so, because the government had to prove that Pon "knowingly and willfully" defrauded Medicare (18 U.S.C. 1347(a)), his defense emphasized that, at a minimum, he believed in his treatments and lacked criminal intent.

On the last day of testimony, however, the district court made a highly prejudicial error that gutted his defense. Over Pon's objection, it let the government present rebuttal testimony that he fraudulently billed for *52 procedures* on the blind eye of patient Jerome Lewis, Pon's witness—falsely suggesting that, because the eye was blind, the procedures were pointless. The government claimed its rebuttal went to "the conduct [Pon] [was] on trial for"—"billing for services not rendered." But the inflammatory theory that Pon needlessly treated *blind* eyes appeared nowhere in the indictment or case-in-chief. And the claim, while deceptively simple, was false. Indeed, the government does not dispute Pon's proffer that injury to one eye can cause blindness in the other, or that his tests of Lewis followed textbook methods. The government's new testimony made it look like he routinely submitted false bills, shredding his credibility.

Calling this new evidence "very damning," the district judge queried whether the "Sixth Amendment" and "fairness" required allowing Pon to respond. But after "pushing [the] schedule back" to hear arguments, he barred Pon from addressing 49 of 52 bills, mistakenly believing Pon introduced the issue. The govern-

ment then twisted the knife in cross, noting (over objection) that Pon's handicapped surrebuttal explained "just three entries"—creating the impression he had no answer for 49 bills, which the government knew was false. And because that climactic moment came at the close of evidence, the jury began deliberating minutes after hearing unanswered false testimony that Pon was a charlatan who needlessly treated blind eyes at taxpayer expense. He was convicted and received a ten-year sentence.

A split Eleventh Circuit panel affirmed on harmless-error grounds, reasoning that the "harmless error rule" imposed a "duty" to "rely on overwhelming evidence of guilt to find an error harmless." App. 58a–60a. Citing the government's witnesses—all doctors holding the conventional view that WMD could not be laser-treated "without leaving a scar"—the majority declared that *the government's case* was "uninfluenced by the exclusion of any of Pon's proposed surrebuttal." App. 56a. Critically, however, it never analyzed how the new unanswered fraud allegations might have affected the jury's view of *Pon's case*, and especially his credibility and intent. It ignored both the fourteen witnesses' testimony that Pon's treatments succeeded and the trial judge's assessment that the rebuttal was "very damning." By the majority's lights, the damning testimony was peripheral and filled "only eleven" insignificant pages of transcript. App. 56a.

Judge Martin dissented, explaining that courts must be "particularly wary of invoking 'overwhelming evidence' to hold an error harmless." App. 73a. As she noted, "the government had to prove more than misdiagnosis and unnecessary treatment"; it had to show intent—that Pon "submitt[ed] claims he knew 'were, in fact, false.'" App. 74a. "In a case all about

Mr. Pon's intent," "a rational jury" might have believed Pon and the "uniform" patient testimony that "[his] laser treatment helped." App. 76a–77a. Pon's defense "would have been even stronger" with his full answer to the government's "highly prejudicial" rebuttal—exacerbated by its false "impli[cation] [Pon] had nothing to say," when "it knew he had an explanation." App. 77a. The jury may have taken Pon's compelled silence as "essentially a confession to an unrelated fraud"—the "'most probative and damaging evidence'" possible. *Ibid*.

The Eleventh Circuit's over-reliance on the prosecution's supposedly "overwhelming evidence of guilt" warrants certiorari. The strength of the government's case is *relevant* to harmless-error review. But this Court has condemned "overemphasis" on reviewing courts' "view of 'overwhelming evidence'" (*Chapman* v. *California*, 386 U.S. 18, 23–24 (1967)), and numerous circuits and state high courts hold that reviewing courts must also analyze the defense's evidence and key factors suggesting the verdict may have been infected by the error. Particularly when "credibility is the key to the case," even evidence "totaling less than a page of transcript" can be "devastating." *United States* v. *Cudlitz*, 72 F.3d 992, 1000 (1st Cir. 1996).

Vasquez raised similar issues, but was dismissed after oral argument, leaving the law in disarray. This case is an excellent vehicle to confirm that "[w]hen it comes to the loss of liberty, it is better to know on remand than guess on appeal." *United States* v. *Henry*, 852 F.3d 1204, 1209 n.3 (10th Cir. 2017) (Gorsuch, J.).

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a–78a) is reported at 963 F.3d 1207. The court's order denying rehearing en banc (App. 79a) is not reported.

JURISDICTION

The judgment below issued on June 29, 2020. The order denying rehearing en banc issued on December 11, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

28 U.S.C. 2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Fed. R. Crim. P. 52(a):

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

The federal healthcare-fraud statute, 18 U.S.C. 1347, provides:

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

STATEMENT

A. The harmless-error standard

Harmless-error doctrine determines "the outcome of more criminal appeals than any other." John M. Walker, Jr., *Foreward: Harmless Error Review in the Second Circuit*, 63 Brook. L. Rev. 395, 395 (1997). Yet "how to conduct th[e] analysis" in this "most frequently invoked doctrine" remains "surprisingly mysterious." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119–2120 (2018).

Until *Chapman*, "it was generally accepted" that "any error of constitutional dimension was sufficient to merit the reversal of a defendant's conviction." Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 10 (2002). But *Chapman* held that some constitutional errors are "so unimportant" that they may "be deemed harmless"—*if* the government "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 22, 24. The Court there warned against "overemphasis" on the reviewing "court's view of 'overwhelming evidence'" (*id.* at 23–24)—a warning the court below did not heed.

B. Pon's laser treatments

WMD is a vision-impairing disease caused by blood vessels leaking into the retina's macula. Eyes with WMD have excess vascular endothelial growth factor (VEGF) protein, which produces leak-prone vessels. WMD's effects can be irreversible, and conventional treatment—using lasers to scar vessels shut—can itself damage vision. Ophthalmologists discovered that an alternative approach—monthly injections of anti-VEGF agents—stops leaking temporarily, but risks

pain, infection, hospitalizations, and even increased mortality. Neither traditional laser treatments nor injections consistently work.

Dr. Pon is—or was—a dedicated ophthalmologist with thousands of patients from across the country. Many of those patients travelled long distances to obtain his specialized services for testing and treatment of WMD, which took hours longer than conventional methods. Dkt. 231 at 267–280. Pon trained at Stanford, UC Berkeley, UC San Francisco Medical School, Harvard, University of Chicago, and the world-renowned Wills Eye Institute. Dkt. 228 at 27–43.

At a conference around 2000, Pon heard Dr. Robert Murphy, an ophthalmologist with hundreds of published articles, present clinical support for using an 810-nanometer laser at non-scarring, graduated power levels to treat WMD. *Id.* at 123–124. Murphy explained two key points: first, specialized equipment can detect macular degeneration "early," when the vessels are otherwise "hidden" and "may not even be leaking"; and second, by pulsing the laser, he could perform "[v]ery safe" treatment with "minimal to no retinal damage" and "quite impressive" results—"[m]ost of the time" without "a visible burn." App. 167a–184a (transcription of presentation). When one government expert, Dr. Thomas Friberg, was asked if Murphy—his Stanford roommate—believed doctors could successfully use a "laser and gradually increase the power level" to "whatever's needed to close the feeder vessel" without "a burn," Friberg admitted: "He says you can." Dkt. 220 at 191–195. In Murphy's words: "The bottom line is that it works." App. 173a.

Murphy inspired Pon to develop a cure for WMD. Dkt. 228 at 155. He bought the recommended equipment and developed diagnostics that, with in-depth exams, detected WMD early—in its "moist" phase. Like Murphy, he discovered that, with early diagnosis, he could safely treat WMD with photocoagulation that neither caused scars nor required routine injections. Dkt. 230 at 64. The technique, called sub-threshold pulsating laser, often kept WMD from progressing. He refined this scarless laser treatment over years of study, including of Murphy's work. *Id*. at 200–201.

Pon relied on scientific literature explaining that this method "can be as effective as more damaging laser treatments" because "the mechanism of action of photocoagulation, *with or without* visible burn * * * is based on laser-induced modifications of endogenous gene expression in the retina." C.A. Appellant's App'x Ex. 130, at 5. Research on such low-level laser therapy (LLLT) for age-related macular degeneration (wet and dry) shows 97% of eyes experience improved vision. B.T. Ivandic, et al., *Low-Level Laser Therapy Improves Vision in Patients with Age-Related Macular Degeneration*, 26 Photomed. Laser Surg. 241–245 (2008); see K. Koev, et al., *Five-year Follow-up of Low-level Laser Therapy (LLLT) in Patients with Age-related Macular Degeneration (AMD)*, 992 J. Phys.: Conf. Ser. 012061 (2018) (LLLT "for both forms of AMD" is "highly-effective" for "long-term improvement of the visual acuity [93.9%]").

Continuing scholarship likewise confirms that diagnosing WMD early, even at asymptomatic stages, is possible with in-depth exams, specialized equipment, and "use of ICGA (indocyanine green angiography)," which is "not routinely performed." Luiz Roisman, et al., *Optical Coherence Tomography Angiography of*

Asymptomatic Neovascularization in Intermediate Age-Related Macular Degeneration, 123 Ophthalmology 1309, 1313 (2016). These "expensive, time consuming, [and] resource intensive" methods detect WMD that previously "would have remained unnoticed." *Id.* at 1313, 1317. Further research confirms previously unnoticed "subclinical" neovascular AMD —a new "category" tracking the moist phase to which Pon testified—and LLLT's efficacy. *Ibid.* The Appendix collects relevant literature. App. 188a–205a.

Demand for Pon's services was intense. Patients travelled long distances for exams, which took hours longer than typical treatments. Dkt. 231 at 267–280. But they were worth the wait: at trial, many patients testified to improved vision. *Infra* at 13.

C. Pon's trial

As a high biller for WMD laser treatment, Pon attracted government scrutiny. He was charged with violating 18 U.S.C. 1347, which prohibits defrauding Medicare. Because § 1347 criminalizes only "knowing[] and willful[]" fraud, the government had to prove that Pon "inten[ded] to do something the law forbids." Dkt. 234 at 207. He could not be convicted for actions based on "[a]n honestly held opinion," "honestly formed belief," or "mistake in judgment." *Id.* at 206.

The 20-count indictment alleged that, for eleven patients, Pon "purport[ed] to treat falsely diagnosed retinal diseases, including wet macular degeneration, with laser treatments that were neither medically necessary nor rendered." Dkt. 1. The government's theory was not that Pon's treatment was outside the scope of the relevant billing code—"destruction of localized lesions of choroid (e.g., choroidal neovascularization); photocoagulation (e.g., laser), one or more

sessions." *Id.* at 8. It argued that he "diagnos[ed] people with [WMD] who didn't have it and then claim[ed] to do laser photocoagulation when all [he was] really doing [was] turning the laser on." Dkt. 234 at 86.

In a blow to the defense, the government successfully moved to exclude testimony from Giorgio Dorin, an expert with an M.S. in nuclear electronics, a minor in nuclear medicine, numerous peer-reviewed publications, several laser-related medical patents, and decades of experience in laser-treating eyes. Dorin would have verified that Pon's treatment could work, and without scarring—that "if it is done early enough" "the patent's eyesight can improve even if there's no visible sign that laser was even done." Dkt. 219 at 198–199.

Dorin's independent, peer-reviewed research included articles in *Seminars in Ophthalmology*, which Friberg edited, and was supported by Murphy's clinical work. Pon relied on this research. Dkt. 230 at 200–209; Dkt. 228 at 155. Dorin, who was "not a medical doctor," was excluded on the basis that his opinions were not sufficiently accepted within the medical community. Dkt. 221 at 38, 39–44.

The government relied on testimony from doctors who use conventional WMD methods. These doctors concluded that Pon's patients lacked active WMD and scars from conventional lasers. Dkt. 224 at 14–27, 104–135, 220–230; Dkt. 225 at 39–42, 170. Most of the doctors examined, or reviewed records of, only one or two patients named in the indictment, after Pon's treatments. Three patients testified that, after Pon's treatment, other doctors told them they did not have active WMD. Dkt. 224 at 267–274; Dkt. 226 at 144–199. Further, Friberg conducted a limited "review" of

images for about 500 other patients, of which he alleged only "five [to] ten" had WMD—but without reviewing medical charts, taking a history, asking about symptoms, or examining any patient, all essential for accurate diagnosis. Dkt. 222 at 97–101.

In multiple instances, the doctors diagnosed the patients with dry macular degeneration, which often becomes WMD, or admitted the patients complained of WMD symptoms. *Id*. at 138, 104–105, 117, 135; Dkt. 226 at 216, 249–255; Dkt. 227 at 173. None of its doctor-witnesses, who rarely if ever used lasers, performed the specialized tests that Pon used to identify WMD early. *E.g.,* Dkt. 224 at 104–105; Dkt. 225 at 159. None used Pon's precision Heidelberg Spectralis® equipment, making it "possible" they would miss signs he caught. Dkt. 224 at 247–248; Dkt. 228 at 199–200. Others never performed standard tests and admitted that additional testing could reveal WMD. *E.g.,* Dkt. 224 at 245; Dkt. 225 at 170, 184. Several testified from *other* doctors' examination notes. Dkt. 224 at 234–237; Dkt. 225 at 208–209.

Pon testified for three-plus days. He told the jury he had "treated thousands of patients," virtually all of whom told him their vision improved, and of which the government challenged a small fraction. Dkt. 230 at 224, 260. He stated that he believed his diagnoses and treatments were sound for a "simple" reason: "The patients came back and told me it worked." Dkt. 228 at 187–188.

Moreover, fourteen witnesses testified that Pon successfully laser-treated them or a spouse—and dozens more were ready to testify had time permitted. Dkt. 135. Pon "always examined [them] thoroughly," was "meticulous," and did not "leave anything

unturned." Dkt. 231 at 192, 40, 173. Several were unsuccessfully treated elsewhere with anti-VEGF injections, but Pon improved their vision. *E.g.*, *id.* at 149–153, 170–178. Jack Cartwright's testimony was typical:

> When I would go in to him, a good many times my vision had gotten much worse, and after the laser treatments, it improved considerably. The much worse was that it looked like a cloud in front of my eyes that was getting closer and closer to me when I went in. Also, the distance I could see got less and less. And after the laser treatments, * * * the cloud moved away—never totally went away but it moved away—and my vision got longer.

App. 85a. Others similarly testified:

- "The laser is immediate"; "That's what saved my sight";
- "The laser * * * help[ed] my eyes much better than the injections";
- "[W]ith the laser immediately I could feel some improvement";
- "Every time he did laser in my eye, my vision improved";
- "[E]very time I've had a laser treatment, it improved my vision."

App. 98a–99a, 96a, 101a, 116a; see App. 80a–124a (excerpting all fourteen witnesses' testimony). Notably, several of these patients had been diagnosed by *other* doctors. App. 52a.

D. The error at trial

One of Pon's longstanding patients, Jerome Lewis, testified on the second-to-last day of testimony. Lewis first saw Pon after developing "diabetic retinopathy" and "both [retinas] detached." Dkt. 231 at 89–91. He woke up blind, and Pon saw him immediately even though he was "unemployed" and lacked "insurance." *Ibid*. Pon said he would "worry about the charges and everything later," did laser surgery to stop "massive bleeding," and scheduled follow-up surgeries. *Ibid*.

Pon first operated unsuccessfully on Lewis's left eye. *Id*. at 91–92. Pon then operated on Lewis's right eye. That surgery "took 14 hours" and succeeded. *Id*. at 92–94. Lewis's vision improved enough to work as a "warehouse clerk" and "roadway inspector." *Id*. at 93–95. He continued to visit Pon even after he moved and Pon referred him to closer ophthalmologists, as Lewis "only trusted him." *Id*. at 95–96.

Years later, Pon diagnosed Lewis's right eye with WMD, which Pon laser-treated. *Id*. at 96–97. After Pon's counsel introduced "excerpts of [Lewis's] medical records" (Ex. 193), Lewis described his WMD symptoms—"calcium deposits" and "blurred vision," such that he "couldn't drive" or work. *Id*. at 97–107. After treatment, Lewis's "vision usually cleared up." Pon laser-treated him four times, until his vision stopped deteriorating. *Id*. at 101–103. The government described Lewis's testimony as "extremely emotional." App. 128a.

On cross-examination, the prosecutor asked about procedures done on Lewis's other eye—his blind eye. Lewis testified that it had "been a couple years" since anything had been done, and that Pon "does a regular eye check," "but no kind of major procedures." Dkt.

231 at 108; see *id.* at 119–120 (repeating this on redirect).

The government then sought to recall Agent Christian Jurs, for the purpose of showing that Pon had "billed Medicare" for "examination of Jerome Lewis' left eye." App. 125a. Pon moved to exclude this testimony, alternatively requesting surrebuttal to explain the "tests he did on Jerome Lewis' eye and why." App. 125a–126a. The indictment never mentions Lewis, yet the government insisted this evidence was relevant to "the conduct that [Pon] is on trial for and that is billing for services not rendered in connection with the patient that he is treating for [WMD]." App. 128a. The court denied Pon's motion, but agreed to consider surrebuttal later. App. 129a.

Jurs offered two new exhibits: Pon's certification to the Department of Labor that Lewis's left eye was blind, and a spreadsheet of Pon's Medicare claims for that eye. App. 130a–136a. Citing the spreadsheet—prepared overnight—Jurs testified that, over eleven years, Pon billed for 49 tests (ophthalmic ultrasounds, fluorescein angiograms, and fundus photography) and three procedures ("surgery and cryotherapy") on Lewis's blind left eye. App. 134a–136a.

During a sidebar, the court asked the government, "you're objecting to surrebuttal, Dr. Pon being given an opportunity to explain this?" App. 137a. When the government said yes, the court asked: "[I]t was on your cross-examination, was it not, that the issue of the left eye not being treated came out?" App. 138a. The government falsely replied: "it was [Pon's] redirect." *Ibid.* Noting that it was "struggling," the court asked: "this is the first time that I think Dr. Pon

has heard this testimony; would you agree?" App. 139a. The government agreed. *Ibid.*

After Jurs testified, Pon renewed his surrebuttal request. Citing the "idea of fairness tug[ging] at [it]," the court queried "whether, in deference to * * * Pon's Sixth Amendment right—and this is—it's very damning evidence—whether * * * he should be given an opportunity to offer an explanation." App. 142a. Calling the issue "important-enough" to "push our schedule back," the court delayed argument a day. *Ibid.* Ultimately, however, it denied surrebuttal (and a mistrial) on procedural grounds, stating that, by introducing Lewis's medical records, Pon "place[d] into evidence the treatment" of "[Lewis's] left eye." App. 142a–145a.

Pon then proffered evidence that his 49 tests were for "sympathetic ophthalmia," which can cause "total blindness in both eyes." App. 149a. Pon would have testified that he had seen "episodes of inflammation" in Lewis's right eye—"a clue that [sympathetic ophthalmia] could be developing." *Ibid.* Quoting the *Wills Eye Manual,* Pon explained that Lewis's vitreoretinal surgery was a common risk factor (App. 152a–153a) and that ultrasounds were especially useful in Lewis's case because "you cannot see very clearly the back of the eye" and that it was "really important to take every precaution" to protect his only good eye (App. 148a–150a). Pon also explained that the three remaining bills were for surgery and cryotherapy actually performed on Lewis's right eye. App. 154a–159a.

The jury never heard Pon's explanations for the 49 tests on Lewis's blind eye. The court permitted Pon to offer surrebuttal only on the three other bills. As Pon

testified, those procedures were done on the *right* eye, but were mistakenly listed for the left. App. 161a–166a. On cross, however, the government exploited the limited scope of Pon's testimony, asking: "[W]hat we're talking about here is just three entries out of two pages of entries, correct?" App. 168a. Pon objected, but the court simply told the government to "stay within the [prescribed] bounds." *Ibid*.

Testimony thus ended with the jury hearing "very damning evidence" (App. 142a) that Pon billed for 49 diagnostic tests on a blind eye without hearing why such tests were necessary, in a case that focused on whether he acted in good faith, and thus lacked intent to defraud. The day after closing arguments, the jury returned a guilty verdict on all counts.

E. The court of appeals' divided decision

In a published 2-1 decision, the Eleventh Circuit affirmed. The majority assumed that Pon's constitutional right to present a complete defense was violated when he was denied full surrebuttal. App. 33a–34a. Nevertheless, it deemed the error harmless under circuit precedent holding that, "'[if] the appellate court is firmly convinced that the evidence of guilt was so overwhelming that the trier of fact would have reached the same result without the tainted evidence, then there is insufficient prejudice'" to reverse. App. 35a (citation omitted).

Focusing almost entirely on the government's case, the majority never analyzed how 49 unanswered fraud allegations might have affected the jury's view of Pon's credibility or intent. Stating that "the overwhelming amount of the evidence is important," the court chronicled the government's doctor testimony that the patients named in the indictment lacked

WMD or laser treatment's "telltale scarring." App. 37a, 48a. It stressed that Pon coded his services as "laser photocoagulation," which "necessarily" causes "scarring" (App. 54a)—which misstates the billing code at issue (Dkt. 1 at 8) and ignores both that the government's theory was not that Pon miscoded his treatments, but rather that he never performed them (Dkt. 231 at 127), and also that, for therapeutic advantage, Pon intentionally left no scars. Eleven times, the majority repeated the mantra that "[n]one of Pon's excluded surrebuttal evidence * * * had anything to do with [the] Patient" named in the indictment—never considering its relevance to *Pon's* credibility, intent, or defense. *E.g.*, App. 38a.

The majority wrote off Pon's testimony "that he believed the treatments he administered were helpful and medically necessary" given his "strong motivation to say that" since, "[i]f convicted, he would lose his medical license and livelihood" and "faced a prison sentence." App. 49a–50a. It brazenly asserted that "[o]nly Pon" believed his treatments "were helpful," ignoring the fourteen witnesses—including several diagnosed by *other* doctors—who verified Pon's successful treatments. *Ibid.* And it assigned no weight to the district judge's assessment that the rebuttal was "very damning." App. 142a.

Instead, the majority reasoned that Jurs's rebuttal was peripheral and filled "only eleven pages" of transcript, concluding with a paean to the "harmless error *rule*" and appellate courts' "*duty*" to "rely on overwhelming evidence of guilt to find an error harmless." App. 56a, 58a–61a. The majority did not even discuss the substance of Pon's defense, much less evaluate whether the jury's view of that defense might have changed had Jurs's 49 allegations been answered.

Judge Martin dissented, explaining that the district court had "violated Mr. Pon's constitutional right to present a complete defense," and that the error was not harmless. App. 66a. Courts, she cautioned, must be "particularly wary of invoking 'overwhelming evidence' to hold an error harmless." App. 73a. Although the majority focused on the prosecution's evidence of "misdiagnosis and unnecessary treatment," "the government had to prove more"; "it had to show Mr. Pon intended to defraud Medicare by submitting claims he knew 'were, in fact, false.'" App. 74a.

"In a case all about Mr. Pon's intent," the prosecution's case "is not so overwhelming." App. 77a. "[A] rational jury might have voted to acquit" based on Pon's testimony, corroborated by fourteen witnesses' "uniform" testimony that "Pon's laser treatment helped." App. 76a. And "[t]he case for acquittal would have been even stronger" with "his full surrebuttal" to the "highly prejudicial" and misleading rebuttal. App. 77a. The government "implied Mr. Pon had nothing to say," "when of course it knew [otherwise]." *Ibid.* The jury may have taken this as "essentially a confession to an unrelated fraud"—the "'most probative and damaging evidence'" possible. *Ibid.* (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991)).

Pon's *pro se* rehearing petition was denied.

REASONS FOR GRANTING THE PETITION

The decision below deepens an entrenched split on how appellate courts should conduct harmless-error review and conflicts with this Court's precedents. The case provides an outstanding opportunity to clarify that courts conducting such review—which disposes of more criminal cases than any other doctrine—must consider not only whether the error taints the government's "overwhelming evidence of guilt," but also its likely effect on how the jury viewed *the defense*.

I. This Court should grant certiorari to unify harmless-error analysis and require consideration of the error's potential effect on the jury's view of the defendant's case.

In 2011, this Court granted certiorari in *Vasquez* to address a circuit split over the correct harmless-error test. *Vasquez* was dismissed as improvidently granted, 566 U.S. 376 (2012), but the split remains.

A. The lower courts are intractably divided over the extent to which harmless-error review may turn on "overwhelming evidence" supporting the conviction.

1. Eight circuits apply an effect-on-the-verdict test that considers not simply "the strength of the prosecution's case," but whether the error "had a substantial and injurious effect." *Wray* v. *Johnson*, 202 F.3d 515, 526 (2d Cir. 2000); see *Cudlitz*, 72 F.3d at 999 (1st Cir.); *Virgin Islands* v. *Martinez*, 620 F.3d 321, 338 (3d Cir. 2010); *United States* v. *Ibisevic*, 675 F.3d 342, 350 (4th Cir. 2012); *Reiner* v. *Woods*, 955 F.3d 549, 557 (6th Cir. 2020); *United States* v. *Caruto*, 532 F.3d 822, 831 (9th Cir. 2008); *United States* v. *Makkar*, 810 F.3d 1139, 1148 (10th Cir. 2015); *United*

States v. *Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998).

Under this approach, courts assess "the closeness of the case," yet "the strength of the Government's case does not, in itself, resolve the 'closeness' question." *Ibisevic*, 675 F.3d at 354. Courts ask whether the case was "close" in light of the "government's case" *and* the "evidence supporting [the] defense." *United States* v. *Bailey*, 696 F.3d 794, 805 (9th Cir. 2012). This entails considering the defendant's "testimony on his own behalf." *United States* v. *Ofray-Campos*, 534 F.3d 1, 28 (1st Cir. 2008). In *United States* v. *Johnson*, 617 F.3d 286, 298 (4th Cir. 2010), for example, the court held an error not harmless after assessing both "the government's case" and "the fact that [the defendant] testified in his own defense as well as called numerous witnesses to support his innocence."

The circuits that take this approach recognize that an error was likely harmful if it "'bears on an issue that is plainly critical to the jury's decision,' such as the defendant's credibility" if "central to her defense." *United States* v. *Jean-Baptiste*, 166 F.3d 102, 108 (2d Cir. 1999). Likewise, an error was likely harmful if "material to the establishment of [a] critical fact," "emphasized in arguments to the jury," or not "corroborated and cumulative." *Wray*, 202 F.3d at 526.

Indeed, many circuits examine the error's harmfulness in light of key disputed issues. As then-Judge Gorsuch wrote for the Tenth Circuit, "[w]hen an error deprives a defendant of 'important evidence relevant to a sharply controverted question going to the heart of [the] defense, * * * substantial rights [are] affected.'" *Makkar*, 810 F.3d at 1148. Errors are also important if they "directly undermin[e] the plausibility of [the]

defense." *Gov't of Virgin Islands* v. *Davis*, 561 F.3d 159, 167 (3d Cir. 2009). In assessing the error's harmfulness, whether "overwhelming" evidence establishes "several elements" of an offense matters little when "the central point of contention" is disputed. *United States* v. *Stewart*, 907 F.3d 677, 691 (2d Cir. 2018); see *id.* at 688 (considering "the presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue").

Similarly, the Ninth Circuit has explained that "a constitutional error that goes directly to the defendant's credibility usually is not harmless where the defendant's theory of the case is plausible, even if it is not particularly compelling." *Caruto*, 532 F.3d at 832. Several circuits agree. *United States* v. *Shannon*, 766 F.3d 346, 359 (3d Cir. 2014) (error harmful where defendant's "credibility was likely important to the outcome" and "was undermined" by error); *United States* v. *Edwards*, 792 F.3d 355, 358 (3d Cir. 2015) (same); *United States* v. *Morris*, 988 F.2d 1335, 1341–42 (4th Cir. 1993) (same where "the case depended upon credibility"); *United States* v. *Lozada-Rivera*, 177 F.3d 98, 107 (1st Cir. 1999) (same where error "destroyed [defendant's] credibility"). Where "credibility is the key to the case," even "less than a page of transcript" can be "devastating." *Cudlitz*, 72 F.3d at 1000.

These circuits likewise consider other telltale signs that the error may have affected the verdict, including whether "[t]he district court recognized" the issue's importance (*Morris*, 988 F.2d at 1341–42), whether the prosecution acknowledged the evidence's significance (*Makkar*, 810 F.3d at 1148), or whether the evidence was emphasized "during closing argument" or the "jury's conduct" (*Reiner*, 955 F.3d at 557).

At bottom, these circuits "'demand[] a panoramic, case-specific inquiry considering, among other things, the centrality of the tainted material, its uniqueness, its prejudicial impact, the uses to which it was put during the trial, the relative strengths of the parties' cases, and any telltales that furnish clues to the likelihood that the error affected the factfinder's resolution of a material issue.'" *United States* v. *Carrasco*, 540 F.3d 43, 55 (1st Cir. 2008) (citation omitted). As the D.C. Circuit has explained, any other approach is "'inconsistent with'" defendants' "'right to have juries, not appellate courts, render judgments of guilt or innocence.'" *Cunningham*, 145 F.3d at 1394 (citation omitted).

2. By contrast, other courts conducting harmless-error analysis rely on the strength of the prosecution's case to the exclusion of other important factors. While courts in every circuit have considered the strength of the government's case in finding errors harmless, the Fifth and Eighth Circuits, among others, frequently rely solely on "overwhelming evidence" of guilt. *E.g.*, *United States* v. *Staggers*, 961 F.3d 745, 760 (5th Cir. 2020) (finding "error was harmless, because there was overwhelming evidence of [defendant's] guilt"); *United States* v. *Ramos-Rodriguez*, 809 F.3d 817, 824 (5th Cir. 2016); *United States* v. *Erickson*, 610 F.3d 1049, 1054 (8th Cir. 2010); see also, *e.g.*, *United States* v. *Garcia-Lagunas*, 835 F.3d 479, 501–506 & n.5 (4th Cir. 2016) (Diaz, J., dissenting) (criticizing majority for "fundamental error" of relying on "'overwhelming evidence of guilt alone'" (citation omitted)); *United States* v. *Nash*, 482 F.3d 1209, 1222 (10th Cir. 2007) (McKay, J., dissenting) (criticizing majority for relying on "its laundry list of properly admitted evi-

dence—much of it contested[—]to establish Defendant's guilt," and for ignoring "the most significant part of the standard," the error's likely "prejudicial effect * * * on the jury").

In the Eighth Circuit, for example, "[e]vidence erroneously admitted in violation of the Confrontation Clause is harmless beyond a reasonable doubt as long as the remaining evidence is overwhelming." *United States* v. *Taylor*, 813 F.3d 1139, 1149–1150 (8th Cir. 2016). These circuits have also relied on overwhelming evidence in "declin[ing]," for example, "to give * * * any weight" to a defendant's testimony deemed "self-serving." *United States* v. *Skilling*, 638 F.3d 480, 484 (5th Cir. 2011); see *United States* v. *Elliott*, 89 F.3d 1360, 1369 (8th Cir. 1996) (relying solely on "the weight of the government's massive case").

Similarly, the majority below observed that Eleventh Circuit precedent "is thick with decisions" finding errors harmless based on "overwhelming evidence." App. 61a (collecting cases). In one telling case, that court relied on its "long line of precedent" holding that "overwhelming evidence of guilt suffices to demonstrate" harmless error in brushing off an error admitting evidence that a "key [defense] witness[]" had accepted a bribe from the defendant to give perjured testimony. *United States* v. *Baptiste*, 935 F.3d 1304, 1308, 1314 (11th Cir. 2019). In so holding, the court considered neither the prejudice of undermining a "key [defense] witness" nor the inference of guilt that a jury might draw from evidence that a defendant suborned perjury. *Ibid.* Here, the majority never considered, among other things, whether leaving 49 fraud allegations unanswered bore on the "plainly critical" issues of "the defendant's credibility" or intent (*Jean-Baptiste*, 166 F.3d at 108) or undercut the plausibility

of "the defendant's theory of the case" (*Caruto*, 532 F.3d at 832). That is predictable under a rule holding that "there is insufficient prejudice" to reverse where the government's case, viewed "without the tainted evidence," is "so overwhelming." App. 35a (citation omitted).

3.a. State courts too are divided. Many state high courts expressly reject reliance on overwhelming evidence of guilt at the expense of other factors informing the verdict's reliability. In New York, for example, "'however overwhelming may be the quantum and nature of the other proof, the error is not harmless * * * if 'there is a reasonable possibility that * * * the [error] may have contributed to the conviction.'" *People* v. *Hardy*, 824 N.E.2d 953, 957–958 (N.Y. 2005) (quotations omitted). Similarly, in Florida, "'[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict.'" *Ventura* v. *State*, 29 So. 3d 1086, 1089 (Fla. 2010) (per curiam).

The Texas Court of Criminal Appeals likewise "reject[s]" the "'overwhelming evidence of guilt' test," directing courts to consider "the source of the error, the nature of the error, whether or to what extent it was emphasized by the State," "its probable collateral implications," "how much weight a juror would probably place upon the error," and "whether declaring the error harmless would encourage the State to repeat it with impunity." *Higginbotham* v. *State*, 807 S.W.2d 732, 734–735 (Tex. Crim. App. 1991). Montana and New Mexico's high courts agree. See *State* v. *Mercier*, 479 P.3d 967, 977 (Mont. 2021) ("'overwhelming evidence' absent the tainted evidence in favor of guilt will

not alone suffice"); *State* v. *Tollardo*, 275 P.3d 110, 122 (N.M. 2011) ("improper for 'overwhelming evidence" of guilt "to serve as [the] main determinant of whether an error was harmless").

3.b. Other state courts, in contrast, rely on the presence of overwhelming evidence. Under Washington's "'overwhelming untainted evidence' test," courts "look to the untainted evidence to determine if it was so overwhelming that it necessarily leads to a finding of guilt." *State* v. *Lui*, 315 P.3d 493, 511 (Wash. 2014). In New Hampshire, if "properly admitted evidence" is "of overwhelming weight," the government has "met its burden to prove" constitutional errors harmless. *State* v. *Wall*, 910 A.2d 1253, 1262 (N.H. 2006). Likewise, in North Carolina, error is harmless if "the independent non-tainted evidence is 'overwhelming.'" *State* v. *Peterson*, 652 S.E.2d 216, 222 (N.C. 2007). Colorado and Connecticut law are similar. *Bartley* v. *People*, 817 P.2d 1029, 1034 (Colo. 1991); *State* v. *Shifflet*, 508 A.2d 748, 752 (Conn. 1986).

In sum, the lower courts remain hopelessly divided.

B. Applying the correct harmless-error standard would likely alter the outcome here.

Having relied on its view of the "great volume of evidence" (App. 56a), the majority below ignored numerous factors that eight circuits and numerous state courts consider. And applying proper harmless-error analysis would likely alter the outcome here.

1. The error here bore on issues "plainly critical to the jury's decision" (*Jean-Baptiste*, 166 F.3d at 108): Pon's credibility and intent. As other circuits recognize, "a constitutional error that goes directly to the

defendant's credibility usually is not harmless." *Caruto*, 532 F.3d at 832. And this case was "all about Mr. Pon's intent." App. 77a (Martin, J., dissenting).

Indeed, Pon spent three-plus days testifying to his lack of fraudulent intent and "explaining in granular detail how he diagnosed and treated patients" (App. 75a), inspired by presentations of leading opthalmologists and ever-growing research. *Supra* at 8–10. Even if the jury believed Pon's Medicare billings were improper, it could acquit if it reasonably doubted that he intended to defraud Medicare. Pon's good faith was the theme of his closing. Dkt. 234 at 133–163. And the jury did not have to take "Pon's word for it"—fourteen witnesses gave "uniform" testimony "that the lasers improved their (or her spouse's) vision." App. 76a. The government's case as to Pon's good faith, by contrast, rested on the disputed premise that patients who received laser treatment for WMD necessarily had "scarring"—when the defense's case rested on a new procedure that produced no scars.

2. Nor can there be any doubt that the error was "material." *Wray*, 202 F.3d at 526. The prosecution thought the case close enough to require rebuttal, even risking a mistrial with dicey legal tactics. Faced with Lewis's "extremely emotional testimony," the government insisted its rebuttal went to the heart of the case: "the conduct that the defendant is on trial for"—"billing for services not rendered." App. 128a. (Even if true, this would have been "other acts" evidence of dubious admissibility.) The government misrepresented the record to obtain that rebuttal and to limit Pon's surrebuttal, and then "exploited" that limitation to create an impression it knew was false. App. 71a (Martin, J., dissenting); *ibid.* ("I question the propriety of this argument by the government when it

knew Mr. Pon had an explanation for the other entries the court forbade him from testifying about."). True, the prosecution did not double-down on this false impression in its closing. But it did not have to; it had twisted the knife minutes earlier. Indeed, it is "difficult * * * to imagine why" the government would have "taken the trouble to present" rebuttal testimony and "oppose[] the introduction" of Pon's surrebuttal "but for its extraordinary power to persuade." *Makkar*, 810 F.3d at 1148 (Gorsuch, J.).

3. Jurs's rebuttal was unquestionably prejudicial. As Judge Martin observed, it "created the impression" that Pon either billed "for treatments he never provided" or for "dozens of useless treatments on a blind eye." App. 77a. When Pon could not respond, the jury may have taken his silence as "a confession to an unrelated fraud" (*ibid.*)—"probably the most probative and damaging evidence" possible (*Fulminante*, 499 U.S. at 296). And this damning testimony was the last the jury heard—leaving them "thinking Mr. Pon was a crook." App. 77a (Martin, J., dissenting). The "clear implication" was that Pon "fraudulently billed Medicare not only for diagnosing and treating nonexistent wet macular degeneration, but for other procedures as well." App. 70a. Such propensity evidence can be extraordinarily "prejudicial." *Old Chief* v. *United States*, 519 U.S. 172, 181 (1997).

4. Finally, the trial judge's contemporaneous assessment powerfully confirms the error's importance. He called the rebuttal "very damning" *after* witnessing the full trial. App. 142a. When weighing whether to allow surrebuttal, he thought the issue "important-enough" to "push our schedule back." *Ibid.* Many courts would, from the vista of a cold appellate record,

defer to the trial judge's view of evidence. See *Fulminante*, 499 U.S. at 297; *United States* v. *Awadallah*, 436 F.3d 125, 134 (2d Cir. 2006). Indeed, we are not aware of any other case where an appellate court has deemed harmless an error involving evidence that the trial judge called damning. Yet the majority's myopic focus on the government's "overwhelming evidence" caused it to neglect the trial judge's assessment—and virtually everything else about the defense.

II. The Eleventh Circuit's "overwhelming evidence" standard conflicts with this Court's precedents.

The decision below also conflicts sharply with this Court's harmless-error precedents, which strike a balance between the defendant's right to a jury trial and concerns about reversing judgments based on "hypertechnicalit[ies]." *Kotteakos* v. *United States*, 328 U.S. 750, 759 n.14 (1946). The Court strikes that balance by asking whether the error potentially "contribute[d] to the verdict obtained." *Chapman*, 386 U.S. at 24. Errors that "make [the defendant's] version of the evidence worthless, can no more be considered harmless than" a "coerced confession." *Id*. at 25–26.

A proper analysis considers *all* relevant factors—not just the perceived strength of the government's case—giving deference to the jury's role. Indeed, in *Vasquez*, the government admitted that "where a trial error *prevents* the defendant from presenting evidence to the jury," harmless-error analysis "requires an assessment of the likelihood that the omitted evidence would have altered the verdict." U.S. Br. 29 n.7 (No. 11-199). And where appellate courts fail to consider whether errors might have undermined the jury's belief in *the defense's case*, they are reduced to "appellate

speculation about a hypothetical jury's action." *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993). "The Sixth Amendment requires more." *Ibid.*

A. The "most important element" of the jury trial right is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Id.* at 277. Thus, harmless-error analysis asks "what effect [the error] had upon the guilty verdict." *Id.* at 279. Proper harmless-error review targets "the basis on which 'the jury *actually rested* its verdict.'" *Ibid.* (citation omitted).

"The inquiry," therefore, "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." *Ibid.* Rather than sitting as "a second jury," courts must "ask[] whether the record contains evidence that could rationally lead to a contrary finding." *Neder* v. *United States*, 527 U.S. 1, 19 (1999). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765.

Time and again, this Court and its Justices have rejected "overemphasis" on "overwhelming evidence." *Chapman*, 386 U.S. at 23. As *Kotteakos* explained, a reviewing court's view of the defendant's "guilt or innocence" cannot be "the sole criteria for reversal or affirmance"—"[t]hose judgments are exclusively for the jury." 328 U.S. at 763. The question is whether "the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Simply put, a court "should not find harmless error merely because it believes that the other evidence is 'overwhelming.'"

United States v. *Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring in the judgment).

When this Court has relied on "overwhelming evidence" to find an error harmless, therefore, it has typically done so based on "uncontested" evidence. *Neder*, 527 U.S. at 17. In *Hasting*, it was deemed harmless to permit a prejudicial prosecutorial remark where the government's case was "unanswered." 461 U.S. at 512. And even when the Court has relied on "'overwhelming evidence' of guilt," it has admonished "against giving [it] too much emphasis" (*Harrington* v. *California*, 395 U.S. 250, 254 (1969) (citing *Chapman*, 386 U.S. at 23))—and it has reversed harmless-error findings based on supposedly overwhelming evidence. *Fulminante*, 499 U.S. at 297; *Chapman*, 386 U.S. at 25.

Because courts may not simply focus on the prosecution's "overwhelming evidence," proper harmless-error analysis requires considering "a host of factors." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986). In analyzing Confrontation Clause violations, the Court considers not only "the overall strength of the prosecution's case," but also "'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [and] the extent of cross-examination otherwise permitted.'" *Olden* v. *Kentucky*, 488 U.S. 227, 233 (1988) (citation omitted). In reviewing coerced confessions, the Court asks whether "the trial court and the State recognized" the error's importance, whether the confession was "cumulative," and the effect of the confession on the jury's view of other evidence, including the defendant's "character." *Fulminante*, 499 U.S. at 297–300. "The

crucial thing is the impact of the thing done wrong on the [jurors'] minds" in "the total setting." *Kotteakos*, 328 U.S. at 764. This requires "consider[ing] all the ways that error can infect the [trial]." *Brecht* v. *Abrahamson*, 507 U.S. 619, 642 (1993) (Stevens, J., concurring).

B. No such analysis occurred below. The majority essentially asked whether the error here harmed the government, when the whole point of the doctrine is whether it harmed the defendant. The majority proclaimed a "'*duty*'" to "rely on overwhelming evidence of guilt to find an error harmless * * * without displaying special wariness." App. 59a–61a (quoting *Hasting*, 461 U.S. at 509). Calling its precedent "thick with decisions" finding "serious errors" harmless "because of overwhelming evidence of guilt," the court declared: "We do that here." App. 61a. But as the dissent recognized, when "invoking 'overwhelming evidence' to hold an error harmless," courts "should be particularly wary." App. 73a.

The majority committed a fundamental legal error in failing to analyze how the error likely affected the jury's perception of Pon's credibility and intent—the heart of his defense. In analyzing only whether *the government's* case was "uninfluenced by the exclusion of any of Pon's proposed surrebuttal" (App. 56a), the court substituted its judgment for the jury's. Indeed, the majority never *mentioned* that the error bore on "Pon's intent" or how, on that point, the error was—in the district court's words—"very damning." App. 77a (Martin, J., dissenting). Likewise, it ignored the government's assertion that Jurs's testimony went to "the conduct the defendant [was] on trial for" (App. 128a)—confirming it deemed the testimony critical. The majority's "overwhelming evidence" test (App. 61a) thus

caused it to neglect the "host of factors" informing whether the error "'contribute[d] to the verdict.'" *Van Arsdall*, 475 U.S. at 684, 680 (citation omitted).

The majority referenced Pon's defense only to point out that the jury might have doubted "that he believed the treatments he administered were helpful and medically necessary"—since, "[i]f convicted," he "faced a prison sentence" and loss of his "livelihood," and thus had "strong motivation" to lie. App. 49a–50a. By that reasoning, no defendant should ever be believed. But errors may not be deemed harmless because appellate judges believe the defendant is insincere—let alone where fourteen witnesses support his defense. Reviewing courts may not "look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [they] think the defendant was guilty. * * * [J]uries alone" bear "that responsibility." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945).

The government's case was not *independent of* Pon's credibility. It turned on whether he credibly testified that he actually performed the challenged laser treatments, believing—as his patients confirmed—that they worked. Pon and his patients were either correct about that, or they were not, and Pon either believed in his treatments or he did not. But the facts were not "uncontested" (*Neder*, 527 U.S. at 17); there was "[evidence] contradicting the [government's] testimony" on the "material points." *Olden*, 488 U.S. at 233. For every doctor the government offered, Pon offered patients who confirmed his treatments worked —easily providing "enough evidence to support an acquittal." App. 74a (Martin, J., dissenting). Yet Jurs's suggestion that there was no reason to treat a blind eye made Pon look like a "crook." App.77a.

As Judge Martin explained, the government's rebuttal "created the impression" that Pon either billed "for treatments he never provided" or for "dozens of useless treatments on a blind eye." *Ibid*. But the majority dismissed the error by asserting that it involved conduct outside the indictment, ignoring the government's assertion that Jurs's rebuttal addressed "the conduct the defendant is on trial for." App. 128a. This Court should grant review and confirm that courts must analyze whether trial errors undermined *the defense*—not just whether they left *the prosecution's* "overwhelming evidence" untainted.

III. This case is an excellent vehicle to address the question presented.

This case is an ideal vehicle to clarify harmless-error review. The majority opinion and dissent provide substantial, contrasting views on the "overwhelming evidence" test. The majority unabashedly "rel[ies] on overwhelming evidence of guilt," "without displaying special wariness" (App. 61a), brushing off Judge Martin's warning "to be particularly wary of invoking 'overwhelming evidence' to hold an error harmless" (App. 73a). *Vasquez*'s three-paragraph analysis, by contrast, never mentioned the "overwhelming evidence" test, let alone defended it. 635 F.3d 889, 898 (7th Cir. 2011).

As explained above (at 26–29, 32–34), moreover, the majority did not seriously consider other harmless-error factors. It mentioned the district court's view that the rebuttal was "very damning" only in its "procedural facts" (App. 26a) and never acknowledged the centrality of credibility in a case "all about Mr. Pon's intent." App. 77a (Martin, J.). The closest the majority came to considering the error's prejudice was

counting pages: "Agent Jurs' rebuttal" filled "only eleven." App. 56a. But "the ultimate measure of testimonial worth is quality and not quantity"—"[t]he touchstone is always credibility." *Weiler*, 323 U.S. at 608.

IV. This Court's guidance on harmless-error review is vital to criminal defendants.

As "probably the most cited rule in modern criminal appeals," the harmless-error standard is critical. William M. Landes, et al., *Harmless Error*, 30 J. of Legal Studies 161, 161 (2001).

A. Relying on appellate judges' view of supposedly overwhelming evidence risks usurping the jury's role and the defendant's jury-trial right. Judges "may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. As Justice Scalia observed, "absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt*." *Neder*, 527 U.S. at 32 (dissenting op.).

The jury trial right is "a fundamental reservation of power in our constitutional structure"—one "meant to ensure [juries'] control in the judiciary." *Blakely* v. *Washington*, 542 U.S. 296, 305–306 (2004). Over-reliance on the government's case usurps juries' role by inviting appellate courts to make "independent conclusion[s] of guilt." Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1340 (1994).

B. Commentators across the spectrum agree that appellate courts are institutionally ill-suited to weigh trial evidence. "[M]any events of trial pass without

casting so much as a shadow upon the printed transcript," and appellate courts "cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1193 (1995). "The difference between trying a case on the district level court and merely reading the briefs on appeal is only a little less marked than the difference between watching *Gone With the Wind* and reading the *TV Guide* description of it." Alice M. Batchelder, *Some Brief Reflections of a Circuit Judge*, 54 Ohio St. L.J. 1453, 1453 (1993). As then-Judge Gorsuch noted, harmless-error doctrine is not "license for rank speculation"; "[w]hen it comes to the loss of liberty, it is better to know on remand than guess on appeal." *Henry*, 852 F.3d at 1209 n.3.

C. Moreover, over-reliance on the government's evidence incentivizes prosecutors to use questionable tactics, knowing they can be excused as harmless. Here, the prosecutor falsely told the district court that Pon's "redirect" introduced the matter to be covered by the government's rebuttal. App. 138a. Relying on that false premise, the court limited Pon's surrebuttal (App. 144a (matter arose "on redirect")) and the court below called this "incorrect[]" but harmless. App. 25a.

Worse, the prosecution "exploit[ed]" the limitation on cross—"play[in]g up the fact that Mr. Pon only had an explanation for 'just three entries out of [52]'" when "it knew [he] had an explanation for the other entries that the court forbade him from testifying about." App. 71a (Martin, J., dissenting). Incentivizing such misconduct undermines "public respect for the criminal process." App. 34a.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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