No. 20-1709

IN THE

Supreme Court of the United States

DAVID MING PON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization with more than 1,700 members across Florida, including private attorneys, assistant public defenders, and judges. FACDL's mission is, *inter alia*, to "be the unified voice of an inclusive criminal defense community" and to "promote the proper administration of criminal justice."

Both *amici* oppose efforts to undermine the institution of the jury trial. They are participating in this case out of concern that several courts of appeals are applying a harmless-error standard that does just that—replacing the right to a constitutionally sound jury verdict with a post hoc judicial assessment of the strength of the government's evidence.

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[1] No counsel for a party authored any part of this brief, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. *Amici curiae* timely provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

An error at a jury trial is not harmless if it may have affected the jury's verdict. That sounds simple, and indeed it is. But a surprising number of lower courts have gotten the analysis fundamentally wrong: they think that an error is harmless if appellate judges conclude that the defendant was probably guilty, based on the government's evidence. That warped conception of appellate review is antithetical to the jury's role in our constitutional system. This Court should grant certiorari to make that clear.

The requirement of a unanimous verdict by lay members of the defendant's community, after live testimony and deliberation, serves "as the great bulwark" of civil and political liberties "to guard against a spirit of oppression and tyranny on the part of rulers." *Neder v. United States*, 527 U.S. 1, 19 (1999). The jury trial is integral to both the fairness and the constitutional legitimacy of government-imposed criminal punishment.

This Court has made clear that harmless-error review must not "fundamentally undermine the purposes of the jury trial guarantee." *Id.* Under no circumstances may judges impose their own view that a defendant is guilty on the jury, "regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *see also Rose v. Clark*, 478 U.S. 570, 578 (1986). Deciding whether a constitutional error is harmless, therefore, must focus on whether the error may have affected *the jury's verdict*, because the determination of guilt or innocence is for the jury. The question cannot be whether the trial judge or appellate judges think the defendant was guilty despite the constitutional error.

A judge's conclusion that a tainted verdict is supported by the prosecution's evidence, even if that evidence is voluminous, is not enough to find an error harmless and deny the defendant a constitutionally sound retrial. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) ("The question . . . is not whether the legally admitted evidence was sufficient to support the [verdict]"). Rather, harmlessness requires proof "beyond reasonable doubt" that the error at issue "did not contribute to the verdict obtained." *Id.* The lone voice of the accused can sow enough doubt for a jury to acquit, even against a barrage of countervailing testimony by his accusers. Therefore, an error can be harmless only when there is no reasonable possibility that the error affected *the jury's* view of a contested triable issue.

Lower courts have split on that principle, and the rift among circuits has only deepened since this Court dismissed the writ of certiorari on this issue in *Vasquez v. United States*, No. 11-199. One side of that split—the view of harmless error applied in this case—fundamentally undermines the protections of the jury trial. Juries are the factfinders in our constitutional system for good reason: they embody community values, they don't work full-time for the government, and they make decisions collectively, unanimously, and largely anonymously after private deliberation. Appellate judges doing harmless-error review, by contrast, sit in a very different position. Among other things, they are vulnerable to the hindsight bias that can arise from reviewing appeals only after conviction.

Petitioner David Ming Pon was convicted of healthcare fraud—a crime that requires proof beyond a reasonable doubt of specific intent to defraud—after the court wrongly precluded Dr. Pon from offering sur-

rebuttal testimony to respond to evidence of uncharged fraud introduced by the government for the first time during its rebuttal. Based on its view of how harmless error works, the Eleventh Circuit held the error harmless without assessing whether the excluded testimony might have created reasonable doubt in the jurors' minds as to Dr. Pon's intent to defraud. Indeed, it held the error harmless without addressing the defense's theory of the case at all. Instead, the court of appeals concluded that the evidence of guilt was overwhelming by weighing the "great volume of evidence" presented as to each charged count of fraud against the "miniscule" discussion of the uncharged fraud to which Dr. Pon sought to respond. Pet. App. 56a. Against this backdrop, the majority reasoned that courts need show no "special wariness" in upholding a tainted verdict based on perceived overwhelming evidence of guilt. *Id.* at 61a.

If all that matters is the strength of the government's case (assessed on paper, after a conviction), then error—even constitutional error—will routinely go uncorrected. Over time it may even be tolerated. That devalues the protections of the jury trial for both individual defendants and the criminal justice system as a whole. The Court should grant certiorari to clarify that the relative strength of the government's evidence alone cannot render a constitutional trial error "harmless" when the affected evidence bore on a contested issue at trial and a reasonable jury could have credited the defendant's evidence and acquitted.

ARGUMENT

I. A Minority of Circuits Have Misconstrued this Court's Harmless-Error Standard to Elevate Judges' Perceptions of Guilt.

The well-established standard for harmless error in criminal cases is whether there is certainty "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). This Court's precedent makes clear that the relevant "doubt" is not over whether the defendant is guilty in the *judges*' minds, but over whether the *jury* might have harbored reasonable doubt at trial, and therefore acquitted, absent the error. *See Kotteakos v. United States*, 328 U.S. 750, 764 (1946) ("The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting"). If doubt about the jury's verdict exists, the appropriate remedy is a new jury trial. In reviewing for harmless error, "it is not the appellate court's function to determine guilt or innocence" or to "speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* at 763. "Those judgments are exclusively for the jury." *Id.*

Under this standard, judges' role in assessing harmlessness is not to reweigh the government's evidence in the absence of the error, but only to make the threshold assessment of whether the error affected a disputed issue that was material to the jury's verdict. Thus, this Court has found that the omission of an essential element from a jury charge was harmless because the element was "uncontested" and supported by "uncontroverted evidence." *Neder*, 527 U.S. at 16-18. The Court reasoned that upholding the tainted verdict

in such a case "does not fundamentally undermine the purpose of the jury trial guarantee" because the defendant "did not, and apparently could not, bring forth facts contesting the omitted element." *Id.* at 18-19. It made clear that the same error would not be harmless "where the defendant *contested* the omitted element and *raised evidence sufficient to support a contrary finding*." *Id.* at 19 (emphasis added).

Some lower courts, including the Eleventh Circuit in this case, have substantially departed from this jury-protective standard for harmless error by upholding tainted jury verdicts based solely on the reviewing judges' assessment of the government's evidence of guilt. Here, for example, the excluded evidence was plainly relevant to the contested question of Dr. Pon's intent to defraud. The court of appeals deemed the error harmless based on the "overwhelming" weight of the evidence supporting Dr. Pon's guilt, without ever asking whether the jury could have reached the opposite conclusion if it had credited Dr. Pon's case over the government's. This was consistent with Eleventh Circuit precedent that an error can be harmless based on nothing more than the "weight of the other [admissible] evidence against [the defendant]." *United States v. Baptiste*, 935 F.3d 1304, 1314 (11th Cir. 2019).

The Eleventh Circuit is not the only court to misconstrue the harmless-error standard in this way. Pet. 23-25, 26. To take just one example, consider the case of a defendant whose theory was that he was merely a drug user, not (as charged) a dealer responsible for more than $1 million in drug sales. *United States v. Garcia-Lagunas*, 835 F.3d 479, 486 (4th Cir. 2016). He argued that his squalid living conditions corroborated his story, especially given the alleged co-conspirators'

lavish lifestyles. *Id.* at 486, 504. The government challenged his defense with a rank ethnic generalization—introducing testimony and arguing in closing that his impoverished living conditions were consistent with the habits of "Hispanic drug traffickers," who (the government argued) generally sent their proceeds to their native countries—even though there was no evidence that the defendant sent any money anywhere. *Id.* at 486, 488. The government eventually conceded on appeal that this unsupported ethnic generalization was not only error but constitutional error. *Id.* at 487. And that error bore directly on the defendant's defense.

Yet, over a pointed dissent, *id.* at 501-06 (Davis, J., dissenting), the majority nonetheless found the government's repeated use of this race-based generalization to be harmless in light of the circumstantial evidence and testimony of several convicted drug dealers who pleaded guilty and testified for the government, which the majority said the jury *could* have credited. Indeed, crediting government testimony, the panel majority announced its own view that the evidence "demonstrate[d] that [the defendant] was a drug dealer." *Id.* at 490.

The Fourth Circuit majority exemplified the incorrect approach that is gaining purchase in some courts of appeals: it did not address or consider the possibility that in the absence of the tainted evidence, the jury might have alternatively chosen *not to credit* the government's evidence and acquitted the defendant on that basis. The defendant got no relief from a glaring constitutional error, based on two appellate judges' reading of the paper record to *permit* crediting the government's case. That is emblematic of the problems

with the side of the circuit split on which Dr. Pon finds himself.

II. Error That Taints a Jury Trial Can Warrant a New Jury Trial Even Where the Government's Other Evidence Would Be Strong If Credited.

This discrepancy between this Court's articulated standard for harmless error and the standard applied by the court below (and the courts that agree with it) is not merely semantic. The mere fact that a reviewing judge views the properly admitted trial evidence to be overwhelming cannot negate the harm of losing the right to an untainted jury trial. First, a judge's post hoc evaluation of evidence cannot give a criminal conviction the same constitutional legitimacy that a procedurally sound jury trial does. Second, judges reviewing a trial record after a conviction are likely to overestimate the soundness and inevitability of the guilty verdict.

A. The Jury Trial Safeguards More than Accurate Fact-finding in Individual Cases.

As one of the only protections expressly guaranteed by both the 1787 Constitution and the Bill of Rights, U.S. Const. Art. III, § 2, cl. 3; *id.* amend. VI, the criminal jury trial serves a unique role in safeguarding individual liberty from government power. The jury "has never been efficient, but it has always been free." *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). The "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government" and "as a defense against arbitrary law enforcement." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The jury trial serves these purposes in

part by "mak[ing] available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). These fundamental purposes of the jury trial are reflected in the structural features of the jury (many of them incorporated into the constitutional guarantee).

First, juries are drawn from the same community as the accused, and meant to represent a cross-section of that community. This bestows legitimacy on a jury verdict imposing criminal punishment as representative of the collective conscience of the community, capturing its common-sense morals, values, and experiences. *Taylor,* 419 U.S. at 530.

Second, juries are physically present at trial to witness the demeanor of the witnesses and the defendant and to assess the weight and credibility of testimony based on their common sense and practical experience. "A fundamental premise of our criminal trial system is that the *jury* is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (plurality opinion).

Third, the jury, for the most part, renders its decisions with anonymity and secrecy: the jurors' identities are largely unpublicized; their deliberations and reasoning are shielded from public view; and a verdict of acquittal is unreviewable. These features insulate jurors from public second-guessing and reproach for their decisions.[2] They also introduce "a slack into the enforcement of law, tempering its rigor by the mollifying

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[2] Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 Case W. L. Rev. 165, 174 (1989).

influence of current ethical conventions." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (L. Hand, J.).

Fourth, jury verdicts must be unanimous. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). This serves to safeguard the "beyond a reasonable doubt" standard for conviction by allowing doubt in the mind of any single juror to preclude a guilty verdict. It also ensures that criminal punishment deprives an individual of life or liberty only by a consensus of community members, rather than a bare majority. *Id.* at 1396-97.

These structural features are critical in enabling one of the jury's key prerogatives: the power to acquit even when others might consider the government evidence weighty. Throughout history, this function of the jury trial has served a critical role in protecting both individual liberties and the separation of powers in a constitutional democracy. For example, in the colonial era, a Pennsylvania jury acquitted Quakers William Penn and William Mead of speaking to an unlawful assembly in violation of the Conventicle Act, which forbade religious assemblies of more than five people outside the auspices of the Church of England. The acquittal stood against both the weight of the testimony supporting the charges and coercion from the trial judge to render a guilty verdict.[3] More recently, in 2019, a federal jury in Arizona acquitted Scott Warren,

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[3] Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, at 236-49 (1985), https://repository.law.umich.edu/books/4/ (discussing *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670)); 6 T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 951 (1816).

a member of the humanitarian group, "No More Deaths," on two counts of harboring unauthorized migrants. At his trial, the two federal agents who arrested Warren testified that they saw him talking to the migrants and gesturing toward areas of the desert where they were less likely to be arrested by Border Patrol.[4]

The constitutional significance of jury acquittals in the face of strong government evidence is not limited to instances of so-called "jury nullification," where the verdict reflects moral disagreement with the law imposed. Even in cases involving mundane charges, acquittals can serve to defend core constitutional protections when the jury chooses to credit a defendant's narrative over that of the government, or to express mistrust toward the institutions and processes underlying the prosecution's case.

Appellate review by judges, however unbiased and empirically reliable, cannot provide the safeguards of a jury trial. Judges are not ordinary members of the defendant's community. They do not hear live testimony and need not render their decisions shortly after confronting both the defendant and his accusers. Their decisions are not anonymous, secret, or free from review: their reasoning must be articulated, and their determinations are subject to scrutiny by both other judges and the public. They need not reach a unanimous decision after deliberation: the certainty of two judges can overcome the doubt of the third, as it did in Dr. Pon's case.

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[4] Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, Time (Nov. 21, 2019), https://time.com/5732485/scott-warren-trial-not-guilty/.

B. The Retrospective Weighing of Trial Evidence After Conviction Raises Concerns About Hindsight Bias.

Judges reviewing a trial error for harmlessness or prejudice have in front of them a trial record that ends in a conviction. In that context, as now-Judge Bibas has explained, tendencies toward hindsight bias may skew perceptions in favor of the existing verdict. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 Utah L. Rev. 1, 2-3 & n.7.

These tendencies, which appear across a wide range of contexts, include "inevitability bias," which makes it hard for those looking back after a final result to imagine a different outcome, and "confirmatory bias," which leads people to interpret new evidence as confirming their initial judgments and to discount contrary evidence and inferences. *Id.* at 2-3. For example, in studies where clinicians were asked to rate the probability of various diagnoses in deceased patients who exhibited various symptoms, those who were given the patient's autopsy reports rated the autopsy diagnoses as more probable than those who did not see the reports. *Id.* at 2 & n.7 (collecting studies). Historians have similarly recognized a tendency towards determinism, which causes those studying events in retrospect to "perceive the logic of the events, which unfold themselves in a regular order, according to a recognizable pattern, with an alleged inner necessity, so that we get the impression that it really could not have happened otherwise."[5] In patent law, courts have acknowledged

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[5] Georges Florovsky, *The Study of the Past*, *in* 2 *Ideas of History* 351, 364 (R.H. Nash ed., 1969).

the need to avoid hindsight bias that may lead judges to view patented inventions as obvious based on the perceived inevitability of the way in which the inventor arrived at her solution to a problem in the prior art.[6]

These biases make it particularly difficult to persuade judges that certain errors in a criminal trial ending in conviction could have changed its outcome, particularly if—contrary to this Court's precedent and consistent with Eleventh Circuit law—the judge's harmless-error inquiry extends beyond merely assessing the error for pertinence to contested issues, and involves substantive evaluation of the strength of evidence.

III. Basing Harmless Error on Judges' Perception of "Overwhelming Evidence" Erodes the Institution of the Jury Trial in Practical Ways.

Part of the systemic function of judicial review should be to deter errors in future cases by ensuring justice in particular cases. As Judge Bibas has suggested in another context, reversals teach judges and counsel what not to do and prompt them to do better in the future.[7] But a liberal "overwhelming evidence" standard for harmless error undermines both of the mechanisms by which judicial review deters future errors. And because nearly every error is subject to review for harmlessness, *Neder*, 527 U.S. at 8, this erosion of judicial review threatens to become pervasive.

When the strength of the government's evidence can be sufficient to render virtually any error harmless, prosecutors and trial judges have less incentive to

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[6] *Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966).

[7] Bibas, *supra*, at 6.

avoid error and misconduct when their case is otherwise strong. They may never even learn after the fact that the error was an error: This harmless-error standard also encourages appellate courts to avoid deciding the merits of close or difficult issues involving trial errors in favor of affirming the conviction based solely on the strength of the government's other evidence, depriving trial courts, prosecutors, and defense attorneys of future guidance.

Finally, an ultimate result of the liberal standard for harmless error is the further dilution of the value of a jury trial for criminal defendants in a system where such trials are already a rare occurrence. Today, fewer than five percent of convictions are obtained following a jury trial as a result of a confluence of factors pressuring defendants to plead guilty.[8] An "overwhelming evidence" standard for harmless error contributes to these pressures by depriving defendants of the basic protections of a procedurally sound trial when the evidence against them is sufficiently strong. The resulting practical extinction of jury trials undermines the critical role of citizen participation in the health and legitimacy of a criminal justice system in a functioning democracy.

* * * * *

As Justice Scalia wrote for the Court in another Sixth Amendment context, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford v. Washington*, 541 U.S. 36, 62

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[8] Jay Schweikert, Cato Institute, *The Demise of the Jury Trial*, https://www.cato.org/commentary/demise-jury-trial (Jan. 16, 2018).

(2004). The comparison was intended to highlight the absurdity of dispensing with jury trials. But the rule applied by the Eleventh Circuit, and the courts that agree with it, goes most of the way down just that absurd path. It dispenses with a *new* jury trial, one justified by constitutional error at the first one, because the appellate judges think the defendant obviously guilty. In our constitutional system, guilt is determined by the jury. Those who suffered constitutional error at their first trial are no *less* entitled to that protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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