No. _____

IN THE

Supreme Court of the United States

JOSE MIGUEL MONTEMAYOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Nelson S. Ebaugh
NELSON S. EBAUGH, P.C.
3730 Kirby Dr., Ste. 1200
Houston, TX 77098
(713) 752-0700

Counsel for Petitioner

QUESTION PRESENTED

In *Chapman v. California*, this Court held that a constitutional error is harmless beyond a reasonable doubt if "there was [no] reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. 18, 24 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). It has been suggested by this Court—and explicitly stated by several circuits—that an appeals court must evaluate certain factors to decide whether a constitutional error was, in fact, harmless:

1. the overall strength of the government's case without the tainted evidence,
2. the government's conduct with respect to the improperly admitted evidence, and
3. the materiality of the wrongly admitted evidence.

To decide whether the error had a prejudicial effect on the jury's verdict, a court must examine the importance of the improperly admitted evidence and the government's conduct with respect to that evidence. The court then juxtaposes the error's prejudicial effect with the independent evidence of the defendant's guilt. After this comparison, a court can

declare whether the constitutional error was harmless beyond a reasonable doubt.

However, there is a split among courts about whether the *Chapman* approach is necessary. Some courts, like the court below, believe the only thing that matters is whether the government's overall case is strong without the tainted evidence.

The question presented is: Whether an appeals court can conclude that a Fourth Amendment error is harmless beyond a reasonable doubt without juxtaposing the error's prejudicial effect against the independent evidence of the defendant's guilt.

LIST OF PARTIES

In the court of appeals proceeding, three parties were involved:

1. Petitioner Jose Miguel Montemayor, who was a defendant-appellant.
2. Respondent Marin Macrin Cerda, also a defendant-appellant.
3. Respondent the United States, who acted as the plaintiff-appellee.

RELATED PROCEEDINGS

United States v. Jose Miguel Montemayor; Marin Macrin Cerda, No. 21-40162, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 19, 2022.

United States v. Cano et al., No. 7:17-cr-00588, U. S. District Court for the Southern District of Texas. The following list identifies the 22 defendants in the district court case, along with their respective defendant numbers and dates of judgment entry:

- Danny Cano (1), judgment entered September 19, 2018.
- Moises Delevi Villarreal (2), judgment entered November 20, 2017.
- Miguel Marin Cerda (3), judgment entered September 24, 2019.
- Antonio Javier Gomez (4), judgment entered December 31, 2019.
- Marlyn Gonzalez (5), judgment entered September 19, 2018.
- Marin Macrin Cerda (6) judgment entered April 9, 2021.
- Jose Miguel Montemayor (7), judgment entered April 9, 2021.
- Arturo Vargas (8), judgment entered November 13, 2018.
- Alfredo Avalos-Sanchez (9), judgment entered August 20, 2019.

- Jose Arturo Reyes-Sanchez (10), judgment entered December 30, 2019.
- Carlos Guadalupe Aquino-Pacheco (11), judgment entered December 30, 2019.
- Jorge Antonio Calvo-Ayala (12), judgment entered May 17, 2018.
- Gustavo Angel De Leon-Covarrubias (13), judgment entered December 30, 2019.
- Juan Antonio Flores (14), judgment entered March 8, 2019.
- Jose Garcia-De La Torre (15), judgment entered September 11, 2020.
- Robert Lee Rodriguez (16), judgment entered September 11, 2020.
- Francisco Javier Montemayor (17), judgment entered February 8, 2019.
- Cesar Alejandro Tovar-Guillen (18), judgment entered April 9, 2021.
- Oscar De La Cruz (19), judgment entered July 16, 2019.
- Juan Fernando Mata (20), judgment entered May 28, 2019.
- Sergio Alejandro Gallegos (21), judgment entered October 23, 2019.
- Marco Antonio Villarreal (22), judgment entered April 9, 2021.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Miguel Montemayor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 55 F.4th 1003 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-19a. The Fifth Circuit's order denying panel rehearing and rehearing en banc is unreported but is reprinted at Pet. App. 20a-22a.

JURISDICTION

The Fifth Circuit entered judgment on December 19, 2022, and denied panel rehearing and rehearing en banc on August 25, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI provides:

> 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, the harmless error statute, provides:

> 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.

STATEMENT OF THE CASE

1. The § 2703(d) orders and the Supreme Court's *Carpenter* Decision

Petitioner Jose Miguel Montemayor and his co-defendant, Marin Macrin Cerda, were members of a "rip crew"[1] whose business model was to steal drugs and money from other criminals. Pet. App. 1a.

As part of its investigation into the rip crew, the Government applied for three court orders under § 2703(d) of the Stored Communications Act to obtain historical cell site location information ("CSLI")[2] and tower dumps ("a download of information on all the devices that connected to a particular cell site during a particular interval"[3]). C.A. ROA.3721-40.

Federal Magistrate Judges issued the following three orders:

- October 13, 2017 2703(d) Court Order for CSLI[4]

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[1] "A 'rip crew' is a group of individuals that engages in robberies of businesses and individuals that are unlikely to report the incident to law enforcement." https://www.ice.gov/news/releases/leader-robbery-rip-crew-sentenced-26-years-prison-following-investigation-hsi-houston

[2] "Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called 'cell sites.' Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI)." *Carpenter v. United States*, 138 S. Ct. 2206, 2208 (2018).

[3] *Carpenter*, 138 S. Ct. at 2220.

[4] C.A. ROA.3748-51.

- January 8, 2018 2703(d) Court Order for Tower Dump[5]
- March 5, 2018 2703(d) Court Order for Tower Dump[6]

On June 22, 2018, this Court issued its landmark decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), holding that the "reasonable grounds" standard under § 2703(d) concerning CSLI was inadequate under the Fourth Amendment. *Id.* at 2221. The Court held that "[t]he Government must generally obtain a warrant supported by *probable* cause before acquiring such records." *Id.* (emphasis added). And the Court held that individuals have a reasonable expectation of privacy in the record of their physical movements captured by CSLI and that the acquisition of more than seven days of historical cell site location information constitutes a "search" under the Fourth Amendment. *Id.* at 2217 & n. 3. The Court declined to decide whether a tower dump is a search under the Fourth Amendment. *Id.* at 2220.

[5] ROA.3762-65.
[6] ROA.3776-79.

2. Indictment

A grand jury issued a Ninth Superseding Indictment charging the petitioner with:

- conspiracy to possess with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine (count 1);
- conspiracy to possess a firearm during and in relation to a drug trafficking offense and crime of violence (count 2);
- Hobbs Act robbery (counts 5, 7, 12, 16);
- carjacking (counts 9, 11);
- discharging a firearm during and in relation to a drug trafficking offense (counts 6, 8, 13); and
- brandishing a firearm during and in relation to a drug trafficking offense and crime of violence (counts 10, 17).

C.A. ROA.172-83.

3. Motion to Suppress

Before trial, the petitioner and his co-defendant, Cerda, moved for the suppression of evidence obtained via CSLI and the suppression of evidence obtained through tower dumps. C.A. ROA.119-24. The

Government generally conceded that *Carpenter v. United States*, 138 S. Ct. 2206 (2018) applied to the CSLI logs but contested *Carpenter*'s application to the tower dump records. C.A. ROA.132, 3721-40. The district court, however, did not reach the merits of the suppression motion because it concluded that the petitioner lacked standing to assert a Fourth Amendment violation. C.A. ROA.132-34.

Although the district court acknowledged that "one of the phones [was] apparently registered" to the petitioner, C.A. ROA.133, the district court concluded that the petitioner lacked standing to challenge the search of the CSLI or the cell tower dumps because he "declined to stipulate to ownership of any phone." C.A. ROA.133.

4. Trial

At trial, FBI Special Agent Richard Bilson testified. C.A. ROA.1659-1728. Bilson explained that he was a member of the FBI cellular analysis survey team, "a group of agents within the FBI, approximately 70 or so, that have an expertise in analyzing phone records from the cellular service providers and then taking that information and then being able to map the general location of a device historically." C.A. ROA.1659-61.

Bilson analyzed the petitioner's phone number ending in 7109. C.A. ROA.1681-87. With help from Government Demonstrative Exhibit No. 2, Bilson illustrated the route that the petitioner's phone/device took as it traveled from "Crime Scene 1" at 2401 W Covina Avenue, McAllen, Texas, to Mission, Texas, on June 6, 2017, between 7:11 a.m. and 8:40 a.m. C.A. ROA.1681; Gov't Dem. Ex. No. 2. Further, Bilson concluded that the petitioner's phone was active between 5:30:27 and 6:07:27 on June 6, 2017, near 2401 W Covina Avenue in McAllen, Texas. C.A. ROA.1687.

Bilson also performed a tower log analysis, the results of which were introduced into evidence as Government Demonstrative Exhibit No. 3. C.A. ROA.1688; Gov't Dem. Ex. No. 3. Page 2 of Exhibit No. 3 identified a phone number that ended with the numbers 9335, i.e., the petitioner's phone number. Gov't Dem. Ex. No. 3. According to Bilson, the petitioner's phone was active near 3706 South Fairmont Avenue, Pharr, Texas, on April 7, 2017, at 6:58 a.m. C.A. ROA.1688; Gov't Dem. Ex. No. 3.

FBI Task Force Officer Adam Palmer also testified concerning the petitioner's two phone numbers. C.A. ROA.2029-75. While reviewing a cast analysis prepared by Bilson, Palmer explained that the petitioner's

phone number ending in 7109 "was found saved in the contacts of various co-conspirators." C.A. ROA.2038. Palmer also identified the petitioner's phone number ending in 7109 next to the entry "Mik" on Government Exhibit 2D, entitled Phone Examination Preview Report Properties. C.A. ROA.2038, 2359-61.

While examining the Phone Examination Preview Report Properties (for Roberto Rodriguez's extraction), Government Exhibit 2F, Palmer identified a contact saved as "Miki" associated with the number ending in 9335. C.A. ROA.2048, 2362-65. Palmer testified that his office obtained subscriber records indicating that the phone number ending in 9335 belonged to the petitioner. C.A. ROA.2048-49. When Palmer obtained tower records relating to a carjacking in Las Milpas, he learned that the petitioner's phone number ending in 9335 was in that area at the time of the carjacking. C.A. ROA.2070.

Palmer explained that the information on page 20 of Government Exhibit No. 2 was location data for the petitioner's phone number ending in 7109. C.A. ROA.2046. Palmer asked Bilson to analyze how often the phone number ending in 7109 connected with a tower next to the petitioner's residence because the FBI "wanted to know where that phone

went to sleep every day and woke up." C.A. ROA.2047. The results of Bilson's analysis aligned with the FBI's determination of the petitioner's residence. C.A. ROA.247. Although the FBI associated the phone number ending in 7109 with the petitioner, the phone number ending in 7109 was not registered to the petitioner. C.A. ROA.2060.

In closing argument, the government emphasized that the cellphone evidence tied the petitioner to the offenses set forth in counts 11, 12, 13, and 16. C.A. ROA.2186, 2191, 2192. In fact, the government twice mentioned the petitioner's phone in connection with count 16. C.A. ROA.2191-2192. The jury convicted the petitioner on all counts against him. C.A. ROA.21, 298-307.

5. Sentence

The district court imposed an aggregate sentence of 1,008 months against the petitioner. C.A. ROA.398; *see also* C.A. ROA.2280-82.

6. Proceedings before the Fifth Circuit

Among other issues raised in his opening brief, the petitioner challenged the district court's conclusion that he lacked standing to file his suppression motion. Pet. App. 4a-6a. In sum, the petitioner argued that "the district court did not need an unequivocal statement from [him]

that he claimed an ownership interest in the phones to evaluate the standing issue." In fact, the petitioner did not need to "affirmatively present evidence of his legitimate expectation of privacy." *United States v. Castellanos*, 716 F.3d 828, 846 (4th Cir. 2013) (cleaned up)). Instead, he could "simply point to specific evidence in the record which the government has presented and which establishes his standing." *Castellanos*, 716 F.3d at 846. Moreover, the petitioner's attorney even admitted that one of the phone numbers was registered to Montemayor.

In a published opinion, the court below remarked that the petitioner had presented it with a "difficult question of the intersection between a defendant's Fourth and Fifth Amendment rights" and noted that the issue "apparently has yet to 'be explored in our precedent.'" Pet. App. 6a. But the court below never reached the merits of the petitioner's claim that he had standing to challenge the search of the CSLI or the cell tower dumps. Pet. App. 6a. Instead, the court below concluded that the denial of the suppression motion did not prejudice the petitioner because there was "substantial evidence" in the record to support the convictions under counts 11, 12, 13, and 16 without the evidence obtained via CSLI or the cell-tower dumps:

> Montemayor presents an argument that apparently has yet to be explored in our precedent. We pretermit addressing this difficult question of the intersection between a defendant's Fourth and Fifth Amendment rights because the denial of the motion to suppress did not prejudice defendants. There is substantial evidence in the record to support the convictions under Counts Eleven, Twelve, Thirteen, and Sixteen, without the evidence obtained via CSLI or the cell-tower dumps. The jury credited the testimony of numerous members of the rip crew who participated in the carjackings and home invasion that predicate these counts. Thus, no reversible error occurred in denying the motion to suppress.
>
> Pet. App. 6a.

The court below denied panel rehearing and rehearing en banc. Pet. App. 20a-22a. In the order denying rehearing and rehearing en banc, the panel admitted that it "certainly could have made a fuller explanation of our finding of harmlessness." Pet. App. 21a. Because "a plethora of evidence was introduced that was more than sufficient for the jury to find guilt beyond a reasonable doubt," the panel "conclude[d] the jury would have found [the petitioner] guilty beyond a reasonable doubt even had the evidence been suppressed." Pet. App. 21a-22a.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's decisions, as well as the decisions of other courts.

The decision below both conflicts with this Court's precedents and deepens an entrenched split over how appellate courts should conduct harmless-error review of a constitutional error. This case also 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 the government's independent evidence of guilt but also whether the error affected the jury's verdict.

A. The decision below directly conflicts with this Court's precedent.

In its per curiam order denying panel rehearing and rehearing en banc, the court below claimed that the standard for harmlessness is "whether the trier of fact would have found the defendant guilty beyond a reasonable doubt if the evidence had been suppressed." Pet. App. 21a. (quoting *United States v. Willingham*, 310 F.3d 367, 372 (5th Cir. 2002)). In other words, the court below applied what has been called the "overwhelming untainted evidence" test. *E.g., State v. Elwell*, 199 Wash. 2d 256, 270, 505 P.3d 101, 109 (2022). But the overwhelming untainted

evidence test is not the test for harmless error as outlined by this Court in *Chapman v. California*, 386 U.S. 18 (1967). *Cf. United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring in the judgment) ("A federal appellate court should not find harmless error merely because it believes that the other evidence is 'overwhelming.'").

In *Chapman*, this Court held that when the prosecution in a criminal prosecution is the "beneficiary" of a "trial error" of constitutional magnitude, the prosecution must demonstrate that "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman,* 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

It has been suggested by this Court—and explicitly stated by several circuits—that an appeals court must evaluate certain factors to decide whether an error of constitutional dimension was harmless:[7]

[7] "By distilling . . . Supreme Court precedents, we conclude that the Supreme Court has found the following factors to be relevant in determining whether the erroneous admission of a confession was harmless error [:] (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly

1. the overall strength of the government's case without the tainted evidence,
2. the government's conduct with respect to the improperly admitted evidence, and
3. the materiality of the wrongly admitted evidence.

The court then juxtaposes the error's prejudicial effect with the overall strength of the government's case without the tainted evidence. *E.g., Schneble v. Florida*, 405 U.S. 427, 430 (1972) ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the [purported error] is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.").

"[T]ime and again," this Court has explained that the prejudicial effect of the error "is the core of assessing harmless error." *Anthony v.*

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admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence." *Zappulla v. New York*, 391 F.3d 462, 468 (2d Cir. 2004) (citations omitted); *see also United States v. Mills*, 138 F.3d 928, 939 (11th Cir.), *opinion modified on reh'g*, 152 F.3d 1324 (11th Cir. 1998) (The Supreme Court has noted five factors to consider in such harmless-error analysis: (1) how important the witness's testimony was to the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case." (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Louisiana, 143 S. Ct. 29, 35 (2022) (Sotomayor, J., dissenting from the denial of certiorari, joined by Jackson, J.) (citing *Yates v. Evatt*, 500 U. S. 391, 408 (1991) (harmless-error analysis requires determining whether the error "contributed to the jury's verdict"); *Arizona v. Fulminante*, 499 U. S. 279, 296 (1991) (analyzing harmless error by asking whether the error "contribute[d] to [the defendant's] conviction"); *Harrington v. California*, 395 U. S. 250, 254 (1969) (harmless-error analysis "must be based on our own reading of the record and on what seems to us to have been the probable impact of the [error] on the minds of an average jury"); *Chapman*, 386 U. S., at 23–24 ("An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless"); *Fahy v. Connecticut*, 375 U. S. 85, 86–87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction")).

Here, the Fifth Circuit's opinion applying the overwhelming untainted evidence test conflicts with this Court's precedent, which

requires the government to demonstrate "there is [no] reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 24.

B. The decision below deepens a split over whether the overwhelming untainted evidence test or Chapman's effect-on-the-verdict test applies to suppression errors.

The decision by the court below not only contravenes this Court's precedents but also exacerbates a critical and mature circuit split regarding the proper standard for assessing harmless error in the context of a suppression error—a split that this Court should resolve.

Most circuits rely on the stringent *Chapman* standard to evaluate whether a harmless error occurred in the context of evidence suppression. The First, Second, Third, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits adhere to the Chapman standard, providing that a suppression error is deemed harmless only if it is clear beyond a reasonable doubt that the error did not contribute to the conviction. *United States v. Nicholson*, 24 F.4th 1341, 1354 (11th Cir. 2022); *United States v. Pendergrass*, 995 F.3d 858, 874 (11th Cir. 2021); *United States v. Job*, 871 F.3d 852, 865 (9th Cir. 2017); *United States v. Russian*, 848 F.3d 1239, 1248 (10th Cir. 2017); *United States v. Bailey*, 743 F.3d 322, 342 (2d Cir.

2014); *United States v. Mullikin*, 758 F.3d 1209, 1211 (10th Cir. 2014); *United States v. Brinson-Scott*, 714 F.3d 616, 622 (D.C. Cir. 2013); *United States v. Barnes*, 713 F.3d 1200, 1207 (9th Cir. 2013); *United States v. Green*, 698 F.3d 48, 53 (1st Cir. 2012); *United States v. Brownlee*, 454 F.3d 131, 148 (3d Cir. 2006); *United States v. Carnes*, 309 F.3d 950, 963 (6th Cir. 2002); *United States v. Salimonu*, 182 F.3d 63, 71 (1st Cir. 1999); *United States v. Martinez- Cigarroa*, 44 F.3d 908, 911 (10th Cir. 1995); *United States v. Walton*, 10 F.3d 1024, 1032 (3d Cir. 1993); *United States v. de la Jara*, 973 F.2d 746, 752 (9th Cir. 1992).

To be sure, these circuits also consider the strength of the evidence as a factor when evaluating harmlessness. *E.g., Job*, 871 F.3d at 865, *Salimonu*, 182 F.3d at 71; *Pendergrass*, 995 F.3d at 874; *Bailey*, 743 F.3d at 342; *Brinson-Scott*, 714 F.3d at 622. But for these circuits, the strength of the evidence is ordinarily neither the sole nor the primary factor. *Cf. Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007) ("The Supreme Court has indicated that . . . whether the error had an actual impact on the outcome [is the proper inquiry], and not . . . whether a hypothetical new trial would likely produce the same result . . . ."); *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000) (noting "the harmlessness of an error

is distinct from evaluating whether there is substantial evidence to support a verdict").[8]

In fact, the core factor is ordinarily the prejudicial effect that the improperly admitted evidence had on the verdict. *Cf. Martinez- Cigarroa*, 44 F.3d at 911 ("In performing [the harmless error] analysis, we ask '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.'" (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); *see also Gov't of Virgin Islands v. Davis*, 51 V.I. 1179, 1189, 561 F.3d 159, 165 (3d Cir. 2009); *United States v. Ofray-Campos*, 534 F.3d 1, 22 (1st Cir. 2008); *United States v. Korey*, 472 F.3d 89, 96 (3d Cir. 2007); *Wilson v. Mitchell*, 498 F.3d at 503; *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998).

[8] *But see Bailey*, 743 F.3d at 342 ("A number of factors properly inform [the harmless error] determination. '[M]ost critical' is the strength of the prosecution's case absent the erroneously admitted evidence. Also relevant are the materiality of the evidence to critical facts in the case and the prosecutor's actions with respect to the evidence at issue." (citations omitted)).

These circuits consider the factors below, among others, to decide whether an error of constitutional dimension was harmless:[9]

1. the overall strength of the government's case without the tainted evidence,
2. the government's conduct with respect to the improperly admitted evidence, and
3. the materiality of the wrongly admitted evidence.

[9] *E.g. Pendergrass*, 995 F.3d at 874; *see also United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013) ("The harmfulness of an improperly admitted statement must be evaluated in the context of the trial as a whole and depends upon a host of factors, including the strength of the government's case, the degree to which the statement was material to a critical issue, the extent to which the statement was cumulative, and the degree to which the government emphasized the erroneously admitted evidence in its presentation of the case." (cleaned up)); *United States v. Orozco–Acosta*, 607 F.3d 1156, 1161–62 (9th Cir. 2010) ("In evaluating whether a Confrontation Clause violation is harmless, [this court] considers a variety of factors," including: '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, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)); *United States v. Sepulveda*, 15 F.3d 1161, 1182 (1st Cir. 1993) ("[A] harmlessness determination demands 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. Mahar*, 801 F.2d 1477, 1504 (6th Cir. 1986) ("Applying [*Chapman*'s effect-on-the-verdict] test in the instant case, we conclude, in light of the incriminating nature of the statements contained in Exhibit 22A and the government's emphasis on such statements during closing and closing rebuttal argument, as reviewed above, that the admission of Exhibit 22A was not harmless beyond a reasonable doubt.").

A court assesses the error's prejudicial effect by considering the government's conduct and the materiality of the wrongly admitted evidence. *E.g., Pendergrass*, 995 F.3d at 874. The court then juxtaposes the error's prejudicial effect with the overall strength of the government's case—excluding the improperly admitted evidence. *E.g., id.* ("To assess [harmless error], we examine the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of defendant's guilt." (cleaned up)); *see also United States v. Glass*, 128 F.3d 1398, 1403 (10th Cir. 1997) ("To hold an error of constitutional dimension harmless, we must conclude 'the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the [purported error] is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.'") (quoting *Schneble v. Florida*, 405 U.S. 427, 430 (1972)).

Any other approach besides the *Chapman*' effect-on-the-verdict test 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).

Transitioning to the minority approach, the Fourth, Fifth, Seventh, and Eighth Circuits have strayed from *Chapman*'s effect-on-the-verdict test by focusing on the independent strength of the prosecution's case, disregarding the actual impact that the suppressed evidence may have had on the jury's verdict. *E.g., United States v. Ivey*, 60 F.4th 99, 111 (4th Cir. 2023), *cert. denied*, No. 22-7784, 2023 WL 6378334 (U.S. Oct. 2, 2023) ("The Government has met [its] burden [to show harmlessness] in this case by providing overwhelming evidence of Appellant's involvement in the incident at Club Nikki's."); *United States v. Shelton*, 997 F.3d 749, 773 (7th Cir. 2021) ("We may affirm if the error did not substantially influence the verdict because other untainted incriminating evidence is overwhelming . . . ." (citation omitted)); *United States v. Figueroa-Serrano*, 971 F.3d 806, 813 (8th Cir. 2020) (holding the "error [in failing to grant the suppression motion] was harmless . . . in light of the 'overwhelming independent evidence' of Figueroa-Serrano's guilt.'"); *United States v. Jenkins*, 850 F.3d 912, 920 (7th Cir. 2017) ("The court must ask: '[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" (citations omitted)); *United States v. Thomas*, 664 F.3d 217, 223 (8th Cir. 2011)

("The admission of statements obtained in violation of *Miranda* may constitute harmless error where there remains overwhelming independent evidence as to the defendant's guilt." (citation omitted)); *United States v. Willingham*, 310 F.3d 367, 372 (5th Cir. 2002) (if district court erred in denying the motion to suppress, error was harmless in light of other overwhelming evidence establishing guilt); *United States v. Aucoin*, 964 F.2d 1492, 1499 (5th Cir. 1992) (if district court erred in denying the motion to suppress, error was harmless in light of the "overwhelming evidence of guilt"); *United States v. Hall*, 587 F.2d 177, 182 (5th Cir. 1979) ("if it was error to deny the motion to suppress and error again to admit in evidence the fruits of the warrantless search, such errors were harmless in view of the other overwhelming evidence which established guilt beyond any doubt").

The Fifth and Eighth Circuit share a unique method in using the harmless error rule, not even mentioning the *Chapman* decision in their application of the rule to suppression cases. Their shared perspective appears to stem from *United States v. Packer*, 730 F.2d 1151 (8th Cir. 1984), a case in which the Eighth Circuit adopted the Fifth Circuit's stance by citing two Fifth Circuit decisions to conclude that "[t]he

admission of statements obtained in violation of *Miranda* may constitute harmless error when there remains overwhelming independent evidence as to the defendant's guilt." *Id.* at 1157 (citing *Harryman v. Estelle*, 616 F.2d 870, 875–77 (5th Cir. 1980) (en banc) and *Null v. Wainwright*, 508 F.2d 340, 343 (5th Cir. 1975)). In short, the Fifth and Eighth Circuits apply the overwhelming untainted evidence test.

Likewise, the Seventh Circuit does not mention the *Chapman* decision in applying the harmless error rule to suppression cases. To support the proposition that the standard of harmlessness in a suppression case is whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," the Seventh Circuit cites *Neder v. United States*, 527 U.S. 1 (1999), which set forth this harmlessness standard in the context of an instructional error. *See Shelton*, 997 F.3d at 773 (quoting *Neder*, 527 U.S. at 18); *Jenkins*, 850 F.3d at 920 (quoting *Neder*, 527 U.S. at 18). But according to the Seventh Circuit, the *Neder* Court rephrased the harmless-error standard of review for all constitutional errors, including suppression errors, to be whether it is "clear beyond a reasonable doubt that a rational

jury would have found the defendant guilty absent the error." *See United States v. Johnson*, 65 F.4th 932, 944 (7th Cir. 2023).

Although the Fourth Circuit explicitly mentions the *Chapman* standard in its decisions, it does not follow the standard in its analysis. *E.g., Ivey*, 60 F.4th at 111; *United States v. Reed*, 780 F.3d 260, 269 (4th Cir. 2015). For example, in *Ivey*, the Fourth Circuit acknowledged *Chapman* as the relevant standard. But the Fourth Circuit then neglected to examine whether the suppression error contributed to the verdict. Instead, it simply concluded that "[t]he Government has met [its] burden [to show harmlessness] in this case by providing overwhelming evidence of Appellant's involvement in the incident . . . ." *Ivey*, 60 F.4th at 111.

Considering the preceding, it is crucial to underscore the adverse consequences resulting from the existing disparity in harmless error analysis in the context of a suppression case. "Defendants frequently move to suppress evidence on Fourth Amendment grounds." *Davis v. United States*, 564 U.S. 229, 257 (2011) (Breyer, J., dissenting, joined by Ginsburg, J.). And this Court has held that the "Fourth Amendment's meaning" should not "'vary from place to place.'" *Virginia v. Moore*, 553

U.S. 164, 172 (2008). Yet a criminal defendant in Texas and a criminal defendant in Maine face different harmless error standards in a suppression case. That is not just a problem for criminal defendants; it is also a problem for prosecutors and courts, compelling wasteful litigation and potentially resulting in disparate outcomes for similarly situated defendants based solely on geographic location. This Court's intervention is thus necessary to return uniformity to this area of the law.

II. The question presented is exceptionally important and recurring.

The harmless-error doctrine is "almost certainly the most frequently-invoked doctrine in all criminal appeals." Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2119 (2018); *see also* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001) (the doctrine is "probably the most cited rule in modern criminal appeals"). Further, harmless-error review is "one of the most significant tasks of an appellate court, as well as one of the most complex." Roger J. Traynor, The Riddle of Harmless Error 80 (1970).

Yet the harmless-error doctrine has "remain[ed] surprisingly mysterious" and challenging for lower courts to apply consistently. Epps,

supra, at 2120. Worse yet, "there are worrying signs that reviewing courts are currently bungling" harmless-error analyses, and some courts now find constitutional errors harmless "with remarkable frequency." Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1793-94 (2017); *see also id.* at 1793 n.10 (collecting empirical studies); *Anthony v. Louisiana*, 143 S. Ct. 29, 35-36 (2022) (Sotomayor, J., dissenting from the denial of certiorari, joined by Jackson, J.) (state appellate court "failed to apply" the proper standard and focused instead on "the sufficiency of the evidence"). Such profligate use of the harmless-error doctrine reduces constitutional rights to protections in name only—"ghosts that are seen in the law but are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922).

Petitioner's case throws into relief "how malleable harmless error is in practice and how powerful a tool it can be for a court that wishes to affirm . . . a decision below," Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 7 (2002).

III. This case is an excellent vehicle for resolving the question presented.

Except for the Federal Circuit, all circuits have spoken on the standard for assessing harmless error in the context of a suppression error. In fact, the question has been percolating for decades.

As early as 1980, then-Judge Thomas Clark offered a strong dissent against the en banc majority's view in *Harryman v. Estelle*, 616 F.2d 870, 875–77 (5th Cir. 1980) (en banc). In that case, the majority held that the harmless error standard for constitutional error requires the reviewing court to "decide whether, absent the so-determined unconstitutional effect, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt." *Harryman*, 616 F.2d at 876. Judge Clark contended that this approach misconstrued the precedents set by this Court, as it effectively turns the appellate court into the "thirteenth juror," usurping the jury's fundamental role of verdict determination. *Id.* at 884 (Clark, J., dissenting). He argued that while the amount of untainted evidence is relevant, "overwhelming independent evidence of the guilt of the accused is not enough, under *Fahy* and *Chapman*, for a finding of harmless constitutional error." *Id.* at 886. Ultimately, Judge Clark argued that the

Fifth Circuit "should confine [itself] to answering the question: Was there a reasonable possibility that the inadmissible evidence contributed to the conviction?" *Id.* at 887.

Here, the court below applied a "substantial evidence" standard of harmlessness to a suppression error in a published decision. Pet. App. 6a. Upon recognizing this shortfall, the panel issued an order acknowledging that it "certainly could have made a fuller explanation of [its] finding of harmlessness." Pet. App. 21a. In its order, it referenced *United States v. Willingham*, 310 F.3d 367 (5th Cir. 2002) as precedent for the applicable standard of harmlessness, yet this, too, does not accord with the requirements of the stricter *Chapman* standard. Pet. App. 21a.

To resolve the question presented, the Supreme Court only needs to establish the proper standard of harmlessness and then remand to the Fifth Circuit for further proceedings. *United States v. Young*, 470 U.S., 1, 30–31 (1985) (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J., Blackmun, J.) ("When we detect legal error in a lower court's application of the plain-error or harmless-error rules, . . . , the proper course is to set forth the appropriate standards and then

remand for further proceedings. We have followed this procedure in countless cases.").

For these reasons, this case presents an excellent vehicle to address the Fifth Circuit's deviation from the *Chapman* standard.

IV. The Fifth Circuit's decision is wrong.

First, the decision below is wrong because it applies the overwhelming untainted evidence test, rather than *Chapman*'s effect-on-the-verdict test, to a suppression error. As mentioned above, this approach effectively turns the appellate court into the "thirteenth juror," usurping the jury's fundamental role of verdict determination. *Harryman*, 616 F.2d at 884 (Clark, J., dissenting). Although the amount of untainted evidence is relevant, "overwhelming independent evidence of the guilt of the accused is not enough, under *Fahy* and *Chapman*, for a finding of harmless constitutional error." *Id.* at 886. Instead, the Fifth Circuit "should confine [itself] to answering the question: Was there a reasonable possibility that the inadmissible evidence contributed to the conviction?" *Id.* at 887.

Second, the court below applied a harmlessness standard developed initially for non-constitutional errors. The harmlessness standard in

United States v. Willingham, 310 F.3d 367 (5th Cir. 2002) used in the decision below traces back to Fifth Circuit cases construing the harmlessness of an evidentiary error, a non-constitutional error.

The *Willingham* decision quotes the following standard of harmlessness from the Fifth Circuit's decision in *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992): "In the context of suppression of evidence, the test for harmless error is 'whether the trier of fact would have found the defendant guilty beyond a reasonable doubt [if the evidence had been suppressed].'" *Willingham*, 310 F.3d at 372 & n. 6. In *Aucoin*, the Fifth Circuit adopted a harmlessness test from an even earlier case, *United States v. Moody*, 923 F.2d 341, 352 (5th Cir. 1991),[10] that framed the test as follows: "[T]he test for harmless error in this context is 'whether the trier of fact would have found the defendant guilty beyond a reasonable doubt with the . . . [contested] evidence [excluded]'." *Moody*, 923 F.2d at 352 (quoting *United States v. Gomez*, 900 F.2d 43, 45 (5th Cir. 1990)).

But the *Moody* decision addressed the harmlessness of an evidentiary error rather than a constitutional error. The case dealt with the improper admission of testimony about communications between

[10] *Aucoin*, 964 F.2d at 1499.

Moody and his bankruptcy attorney, which Moody argued was privileged. *Moody*, 923 F.2d at 352. This situation presented an evidentiary question: whether such testimony should have been excluded because it breached the attorney-client privilege—a protective rule of evidence rather than a constitutional mandate. *Id.*

In *Moody*, the Fifth Circuit considered whether this error in the evidentiary ruling—admitting potentially privileged communication—was harmless. *Id.* at 352-353. The court explained that evidentiary error was harmless "unless a substantial right of the party is affected . . . . ," citing Fed. R. Evid. 103(a)(1),[11] the rule for measuring the harmlessness of an evidentiary error that is non-constitutional. *See, e.g., United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir. 1999) ("A non-constitutional error, such as a decision whether to admit or exclude evidence, is considered harmless 'unless a substantial right of [a] party is affected.'" (quoting Fed. R. Evid. 103(a) (1999))).

The *Moody* Court also quoted from a Fifth Circuit case, *United States v. Gomez*, 900 F.2d 43 (5th Cir. 1990), a case about a non-

[11] *Moody*, 923 F.2d at 352.

constitutional error arising from an evidentiary ruling,[12] to set forth the following harmlessness standard for non-constitutional errors: "[T]he test for harmless error in this context is 'whether the trier of fact would have found the defendant guilty beyond a reasonable doubt with the . . . [contested] evidence [excluded]'." *Moody*, 923 F.2d at 352 (quoting *Gomez*, 900 F.2d at 45).

In conclusion, the *Moody* Court held that even if the contested testimony were privileged, the admission of such testimony was harmless because "a substantial right was not affected . . . [and] Moody would have been found guilty beyond a reasonable doubt even if the evidence in issue had been excluded." *Moody*, 923 F.2d at 353. In other words, the *Moody* Court may have combined the harmless error test for non-constitutional errors and the harmless error test for constitutional errors into one standard. Accordingly, the *Willingham* standard of harmlessness is far more lenient than the stringent *Chapman* standard.

For these reasons, the Fifth Circuit's opinion cannot stand.

[12] *Gomez*, 900 F.2d 44-45.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Nelson S. Ebaugh
Nelson S. Ebaugh
NELSON S. EBAUGH P.C.
3730 Kirby Drive, Suite 1200
Houston, Texas 77098
(713) 752-0700

Counsel for Petitioner

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