No. _____

In The
Supreme Court of the United States

YUN ZHENG AKA WENDY ZHENG;
YAN QIU WU AKA JASON WU,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The jury convicted Petitioners Yun Zheng (aka Wendy Zheng) and Yan Qiu Wu (aka Jason Wu) under 8 U.S.C. § 1324(a)(1)(A)(iii)—on four counts of harboring aliens for commercial gain—based on a flawed instruction that would turn much of America into criminals. That jury instruction removed the *mens rea* that the statute commands. Over Petitioners' objection, the District Court instructed the jury that those who "*tended to substantially facilitate* an alien['s] remaining in the United States illegally and to prevent government authorities from detecting his or her unlawful presence" are culpable under § 1324(a)(1)(A)(iii). But § 1324(a)(1)(A)(iii) requires a defendant's *intent* to harbor the alien—helping that alien evade detection—to be proven beyond a reasonable doubt.

Acknowledging that it was creating a 4-3-1 circuit split, the Sixth Circuit held that "harbor[ing]" does not require a defendant to act intentionally or purposefully in helping an alien evade detection. The Court of Appeals also held any error to have been harmless under *Neder v. United States*, 527 U.S. 1 (1999), even though Petitioners had contested the error and the Government's evidence was not overwhelming. This decision therefore violated *Neder* and the Court's interpretation of *Neder* in *Hurst v. Florida*, 577 U.S. 92, 102 (2016). The Sixth Circuit deepened a split in the lower federal and state courts on the harmlessness issue.

The following questions are presented:

(i) Whether a jury instruction under 8 U.S.C. § 1324(a)(1)(A)(iii), which prohibits the "harbor[ing]" of anyone who is in the United States illegally, requires the Government to

QUESTIONS PRESENTED—Continued

prove that a defendant intended to help that alien evade detection.

(ii) Whether an erroneous jury instruction misstating or omitting the correct *mens rea* can be harmless error when a defendant contests it at trial, the prosecutorial evidence adduced at trial is not overwhelming, or both.

PARTIES TO THE PROCEEDINGS

Yun Zheng (aka Wendy Zheng) and Yan Qiu Wu (aka Jason Wu) are the petitioners here.

The United States of America is the respondent here.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit:

United States v. Zheng, No. 22-5516 (6th Cir. Nov. 28, 2023) (reported at 87 F.4th 336). App. 1.

U.S. District Court for the Eastern District of Kentucky:

United States v. Zheng, Crim. Case No. 21-51-DLB-CJS (E.D. Ky. Apr. 13, 2022) (reported at 2022 WL 1109428). App. 25.

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PETITION FOR A WRIT OF CERTIORARI

Yun Zheng (aka Wendy Zheng) and Yan Qiu Wu (aka Jason Wu) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Zheng*, No. 22-5516, 87 F.4th 336 (6th Cir. 2023). App. 1.

The judgment of the United States District Court for the Eastern District of Kentucky is reported at *United States v. Zheng*, Crim. Case No. 21-51-DLB-CJS, 2022 WL 1109428 (E.D. Ky. Apr. 13, 2022). App. 25.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

An important part of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(B)(i) provides:

> Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place . . . for the purpose of commercial advantage or private financial gain[.]

The Fifth Amendment states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment states:

> 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.

INTRODUCTION

This case hinges on the scienter requirement of "harbors" within 8 U.S.C. § 1324(a)(1)(A)(iii). It asks whether the District Court should have instructed the jury that the Government must prove the defendant's intent to help a person without legal status in the United Statas evade detection. In a published opinion, a Sixth Circuit panel held that § 1324(a)(1)(A)(iii) "does not require the government to prove that a defendant" accused of harboring an undocumented immigrant "acted intentionally." *United States v. Zheng*, 87 F.4th 336, 342 (2023). In so holding, the Sixth Circuit turned a 3-3-1 circuit split into a 4-3-1 division among the courts of appeals.

Now, four courts of appeals do not require any kind of intentionality; three do; and one requires knowledge. The Sixth Circuit contravened this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), by failing to recognize a *mens rea* requirement here. This dissonance among the circuits has placed the lower courts in an untenable position. Convictions obtained today might be deemed unfounded tomorrow; prosecutors do not know how much evidence they must adduce, much less prove beyond a reasonable doubt, at trial.

On the issue of harmless-error, the Sixth Circuit exacerbated a split in the lower federal and state courts. *See Neder v. United States*, 527 U.S. 1 (1999); *Chapman v. California*, 386 U.S. 18 (1967). As Petitioners in *Greenlaw v. United States*, O.T. 2023, No. 22-10511, *cert. pending*, have stated, and as this petition

explains, a constellation of lower courts are split on whether *Neder*'s dual requirements, *i.e.*, the error be uncontested at trial and that the prosecution's evidence be overwhelming, are independent requirements or whether courts may ignore the "contested" requirement. Lower courts, like the Sixth Circuit in this case, will continue to make end-runs around the "contested" requirement unless this Court clarifies how *Neder*—*Chapman* is supposed to work.

Another virtue of this petition is that the Court can review either or both of these important issues that continue to fracture the lower courts. This Court's clarification is urgently needed to guide governmental actors as to their duties and to preserve the rights of the criminally accused.

STATEMENT OF THE CASE

A native of the People's Republic of China, Wendy Zheng came to this country seeking basic civil liberties and human rights. In the one-child policy era, the Chinese state had forced her to undergo one abortion against her will. *See* Doc. No. 94, at 65.[1] When Zheng was pregnant again, she wanted to carry the pregnancy to term. In 2009, Zheng came to America and sought asylum here. *See* Doc. No. 94, at 66–67. In April 2010, Tristan was born in the United States. *See id*. Incidentally, Tristan is now thirteen years old.

[1] The Document Numbers (Doc. Nos.) cited in this petition pertain to the documents in the District Court record.

A few years later, Zheng's husband Jason Wu and their first child, Daniel, immigrated to the United States. *See* Doc. No. 94, at 72. The Chinese community in New York helps Chinese immigrants settle in America. Through this network, Zheng found employment at various restaurants throughout the United States, ultimately landing at the Tokyo Dragon in Alexandria, Kentucky. *See* Doc. No. 94 at 73. The owners of that restaurant at the time employed workers of Chinese descent, including Zheng and Wu, as well as three Hispanic men. *See* Doc. No. 94 at 75.

Those employers gave their employees room and board and transported them to and from work, a practice that was common among the restaurants where Zheng previously had worked. *See id*. Eventually, Zheng and Wu saved up enough money to buy Tokyo Dragon from the owners; and they maintained the same employment practices that they had learned from the restaurant's erstwhile owners. *See* Doc. No. 94 at 74, 78. Not long thereafter, the Tokyo Dragon's cook left and was replaced by his nephew, Fidelino Francisco-Pedro. *See* Doc. No. 92 at 57–58.

After they bought a new home, Zheng and Wu spent about $20,000 to refinish the basement so that the employees could have their own private rooms, a common living space, a bathroom, and a kitchen. *See* Doc. No. 94, at 81. This finished basement's exit opened to the backyard. *See* Doc. No. 94, at 109. The employees had every ability to use their cell phones, *see* Doc. No. 93, at 18; they visited a liquor store and a Mexican restaurant in Newport, Kentucky, *see* Doc. No. 93 at 21;

they sent remittances home abroad, *see id*.; and enjoyed the backyard, *see* Doc. No. 94 at 85. The employees were visible to and active in their local community (at home, at work, and out and about) as well as the world at large—so much so that Tokyo Dragon, where the cooks were often seen filling the buffet, was a regular lunch venue for local law enforcement officers. *See* Doc. No. 93, at 72; Doc. No. 94 at 32.

In November 2016, Francisco-Perez's arm was burnt in a cooking accident at Tokyo Dragon. *See* Doc. No. 92 at 83. Zheng and Wu took him to the hospital. *See id*. A nurse at the hospital contacted a hotline because she suspected that Francisco-Perez was being trafficked. *See* Doc. No. 92, at 16. On November 2, 2017, the federal government executed a search warrant at the Tokyo Dragon. *See* Doc. No. 93 at 125. The Government took custody of the aliens—Francisco-Perez, Crispin Cortes-Salinas, Miguel Raymundo Santiago, and Pedro Virbes-Juan—and placed them in a hotel. *See* Doc. No. 93 at 199–200. On September 9, 2021, a federal grand jury indicted Zheng and Wu on charges alleging harboring aliens for commercial gain and conspiracy. *See* Doc. No. 1; App. 2, 3, 4.

In relevant part, Zheng and Wu proposed that the District Court instruct the jury that "'harboring' encompasses conduct *with the intent* to substantially facilitate an alien remaining in the United States illegally and to prevent government authorities from detecting his or her unlawful presence." App. 8–9 (emphasis added). Their case was built around the fact that they did not have the requisite intent to help the

aliens evade detection. *See*, *e.g.*, Doc. Nos. 92–95. But the District Court declined to give such an instruction. App. 8–9. Instead, and over Zheng's and Wu's objection, the District Court's instruction to the jury contained this definition of "harboring":

> The term "harboring" encompasses conduct that *tended to substantially facilitate* an alien remaining in the United States illegally and to prevent government authorities from detecting his or her unlawful presence. Such facilitation may be attempted through a wide range of conduct, including, but not limited to, providing housing and employment.

App. 28–29 (emphasis added). The jury convicted Petitioners on four counts of harboring aliens for commercial gain but it acquitted them on the conspiracy count. App. 2, 3, 4. Petitioners timely appealed to the Sixth Circuit, a panel of which upheld Petitioners' convictions. App. 22. This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision has Led to an Irreconcilable 4-3-1 Circuit Split as to the Scope of "Harbor[ing]" Under 8 U.S.C. § 1324(a)(1)(A)(iii).

In his published Sixth Circuit panel opinion, Judge Mathis laid out the circuit split:

Our sister circuits take different approaches to describing "harboring." The Third, Fifth, and Eighth Circuits agree with the district court's instruction that "harboring" encompasses conduct that tends to substantially facilitate noncitizens remaining in the country illegally and prevent authorities from detecting the noncitizens' presence. *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008); *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008); *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007). The Second, Seventh, and Ninth Circuits have opined that "harboring" requires a defendant to act intentionally or purposefully. *United States v. McClellan*, 794 F.3d 743, 751 (7th Cir. 2015) (requiring intent "when the basis for the defendant's conviction under § 1324(a)(1)(A)(iii) is providing housing" to an illegal noncitizen); *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013) ("To 'harbor' under § 1324, a defendant must engage in conduct that is intended both to substantially help an unlawfully present alien remain in the United States . . . and also is intended to help prevent the detection of the alien by the authorities."); *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004); *see also* [*United States v. Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012)] (harboring means to "materially . . . assist an alien to remain illegally in the United States without publicly advertising his presence but without needing or bothering to conceal it"). And the Eleventh Circuit requires a knowing mens rea. *United States v. Dominguez*, 661 F.3d 1051, 1063 (11th Cir.

> 2011). *We join with the approach used by the Third, Fifth, and Eighth Circuits.*

87 F.4th at 343 (emphasis added). Prosecutors do not know, district judges do not know, defense counsel do not know, and appellate courts do not know whether the Government has to prove intent to evade detection in these cases. Moreover, the American people do not know whether they are committing a felony by helping someone who *might* be an undocumented person, regardless whether they intend to help them evade detection.

This split has been percolating among the courts of appeals since 2011. And now, 13 years later, this fragmentation shows no sign of abating. In fact, it has been exacerbated. Nor do the courts of appeals seem to be in any hurry to harmonize their precedents. In this case, the matter of a serious circuit split was raised at oral argument and, as noted earlier, in the Sixth Circuit's opinion. *See id.*; O.A. Trans. Minutes 17:25–18:39 (www.opn.ca6.uscourts.gov/internet/court_audio/audio/10-18-2023%20-%20Wednesday/22-5516%20USA%20v%20Yun%20Zheng.mp3).

"Because the courts of appeals disagree over the scope of [§ 1324(a)(1)(A)(iii)]," the Court should "take this case to resolve [that issue.]" *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021). Until then, criminal defendants, prosecutors, and lower courts will continue to be unsure how far a § 1324 jury instruction may go—and where it must

stop—with grave uncertainty attending "harbor[ing]" convictions.

II. This Issue is Profoundly Important to Everyday Americans, District Courts, and Courts of Appeals Nationwide.

The present uncertainty casts a long shadow. In the Third, Fifth, Eighth, and now Sixth Circuits, every time federal prosecutors decide to charge a defendant with "harbor[ing]" under § 1324 without giving the jury an intentionality instruction, they operate under a substantial cloud of doubt. As backup, prosecutors offer adduce gratuitous trial evidence, so that even a conviction following a legally incorrect jury instruction might be affirmed as harmless error. After all, "[s]ociety's resources [are] concentrated at th[e] time and place" of trial "in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

On review, the courts of appeals then have every incentive to bend over backwards to shoehorn the evidence as harmless error. This is because overturning a conviction in which the Government and the courts have invested their resources is a serious and "disruptive" business, one that courts are kinetically wired to avoid if at all possible. *Herrera v. Collins*, 506 U.S. 390, 401, 417 (1993). All this extra work—not to mention altered incentives—in the service of excessive

prosecutorial and judicial caution creates systemic inefficiency.

There is not much to commend the alternative possibilities either. If it turns out that § 1324's "harbor[ing]" provision does *not* require an intentionality or knowledge instruction, then the Second, Seventh, Ninth, and Eleventh Circuits have incorrectly handcuffed the district courts within their jurisdictions as well as the U.S. Department of Justice. They would have to stop doing so.

Nor are the practical consequences negligible. As suggested earlier, the Government's interpretation turns much of America into felons. As the Seventh Circuit observed in *United States v. Costello*, 666 F.3d 1040, 1047 (2012): "[U]nder the government's . . . definition of harboring the number of violators of section 1324(a)(1)(A)(iii) might well be *two million*." *Id*. (emphasis added). The Government's position, in *Costello* as well as here, would effectively criminalize millions of Americans despite § 1324's insistence on a strictly enforceable *mens rea*. Nor is there legislative history suggesting that Congress had contemplated such a design.

III. The Sixth Circuit's Decision is Clearly Wrong and Concerning.

A. The Third, Fifth, Eighth, and Sixth Circuits Permit Those Without the Intent to Help Undocumented Aliens Evade Detection to be Convicted of "Harbor[ing]."

A wrong or missing *mens rea* is not like other mistakes. It is impossible for anyone but the triers of fact to come to their own conclusions about what a live defendant's, witnesses' and others' demeanors, deportments, assertions, and body language reveal about the truth of various matters. *Mens rea* cannot be verified or ascertained like hard documentary evidence that, as in *Neder*, shows materiality. 527 U.S. at 4, 8–20. It is not like irrefutable evidence conclusively proving an element of an offense. Intent is often proven by circumstantial evidence, determining the weight of which is only within the province of a jury. Here, the jury was denied that prerogative.

In the Third, Fifth, Eighth, and now Sixth Circuits, a person may be convicted of a real crime bearing a real custodial sentence through the elements of a shadow crime. It allows for defendants to be tried for a felony using the specious standard of "tended to substantially facilitate an alien['s] remaining in the United States illegally" to expose millions of Americans to criminal liability. The jury instruction used to convict Petitioners, like such instructions in the lower courts, approved a drastically lessened, even recumbent, *mens rea*. Under that standard, vast swathes of

innocent conduct suddenly are criminalized. And then upheld as harmless error. Regardless whether counterfactual analysis is appropriate in certain cases, it was inappropriate here. The Court should put an end to it.

The Government's basic answer to these ramifications has been: "Trust us" because we know best. Prosecutors, we are implicitly reassured by the Government, know best, and their "tremendous" prosecutorial discretion will make sure that the right people are prosecuted for the right crimes. Robert H. Jackson, *An Address: The Federal Prosecutor*, Dep't of Justice, Apr. 1, 1940, p. 1, www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf. As Justice Jackson recognized more than eight decades ago, that is not our Constitution's design.

That kind of blanket assurance to exercise limitless discretion has never permitted officialdom to escape its statutory or constitutional obligations. *See id*. at 1–5. Permitting prosecutors to write whole elements out of criminal statutes and then to have their actions affirmed as harmless error, even though defendants contest those errors at trial, is fundamentally unfair. Unsurprisingly, it dissolves the powers of the Legislature to the benefit of the Executive. The Court should not bless that unprecedented approach now.

Along those lines, the misstated *mens rea* in the jury instruction is the difference between the innocent being convicted of a "harbor[ing]" offense and their going free. Without an intentionality instruction, a loyal, longtime customer to a mom-and-pop shop grocer, a

local restaurateur who for many years has been selling someone vital medical products, or a friend who habitually gives someone a ride to work are now exposed to criminal liability.

That is because "tended to substantially facilitate an alien['s] remaining in the United States illegally" could apply to so many people whom—and to so much conduct which—the statute is not designed to, and does not, criminalize. And it undermines the jury's duty to dispense with fact-finding in accordance with law by misleading it about the *mens rea* it should apply and how broadly it should define "harbor[ing]." *See*, *e.g.*, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (expressing "[t]he rule that juries are presumed to follow their instructions.").

B. The Second Circuit's *Vargas-Cordon* Analysis is Generally Helpful.

In *Vargas-Cordon*, the Second Circuit correctly started out by observing that the meaning of this "harbor[ing]" provision is to be found in the statutory text itself. 733 F.3d at 380–81. As § 1324 does not provide a statute-specific definition of "harbor," the "ordinary, contemporary, common meaning" of this provision must govern. *Perrin v. United States*, 444 U.S. 37, 42

(1979). To that end, the dictionary sources can be a most helpful and often definitive guide.[2]

The original predecessor to this provision was adopted in 1917. Around then, dictionaries included some element of evasion from detection as an indispensable element of "harboring." *See*, *e.g.*, Black's Law Dictionary 561 (2d ed. 1910) (defining "to harbor" as "[t]o receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same"); Black's Law Dictionary 876 (3d ed. 1933) ("To receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same."). This seemed to be par for the course for many decades since. *See*, *e.g.*, Webster's Third New Int'l Dictionary 1031 (1961) (defining "harbor" as "(1) to give shelter or refuge to: to take in [and] (2) to receive clandestinely and conceal (a fugitive from justice)"). The dictionary understanding of "harbor" leaves little doubt that the public, ordinary, and contemporary meaning of that usage in § 1324 requires intentional evasion from detection.[3]

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[2] Petitioners disagree with the Second Circuit's inference in *Vargas-Cordon* that the dictionary understanding here is not "unambiguous." 733 F.3d at 381.

[3] By the early part of this millennium, at least Black's Law Dictionary seemed to drop the evasion-from-detection requirement from the definition of "harboring" but that is of little consequence—for it is the statutory provision's public, ordinary, and

Next, the canon of *noscitur a sociis*—regrettably missing from the Sixth Circuit's statutory analysis here—confirms that evasion from detection is an essential predicate of the "harbor[ing]" offense. *Vargas-Cordon*, 733 F.3d at 381; *see* App. 1, *et seq*. "The placement of 'harbors' in 8 U.S.C § 1324(a)(1)(A)(iii) . . . does indeed suggest that the term is intended to encompass an element of concealment." *Id*. That is because " 'harbors' appears in subparagraph (A)(iii) as part of a list of three proscribed actions: 'conceals, harbors, or shields from detection.' " *Id*. "[H]arbors," in this statutory provision, is sandwiched between "conceals" and "shields from detection"—and the latter two "carry an obvious connotation of secrecy and hiding." *Id*. It would be awkward to deduce that the middle term—"harbors"—somehow does not. This is why, as the Second Circuit deduced, "*noscitur a sociis* would . . . suggest that 'harbors,' as the third and only other term in subparagraph (A)(iii), also shares this connotation, which easily fits into its ordinary meaning." *Id*. (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.")).

That is not all. Just as it is fair to attribute some form of linguistic concord to the laws Congress creates, it is also appropriate to attribute structural concord to them. That is why the Second Circuit observed that "[t]he broader structure of § 1324(a) further supports reading 'conceals, harbors, or shields from detection' as

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contemporary meaning that controls. *See* Black's Law Dictionary 784 (9th ed. 2004) (defining "harboring" as "[t]he act of affording lodging, shelter, or refuge to a person").

sharing a common 'core of meaning' centered around evading detection." *Id*. (citing *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 289 n.7 (2010)).

In particular, "Subsection 1324(a)(1)(A) is divided into four subparts, each of which proscribes a particular type of action." *Id*. "The first reaches anyone who brings an alien into the United States outside of a specified entry point." *Id*. (citing 8 U.S.C. § 1324(a)(1)(A)(i)). Next, "[t]he second [subpart] applies to anyone who 'transports, or moves' an unlawfully present alien in furtherance of that alien's violation of the law." *Id.* (citing 8 U.S.C. § 1324(a)(1)(A)(ii)). The final subpart "applies to anyone who 'encourages or induces' an alien to enter the United States unlawfully." *Id.* (citing 8 U.S.C. § 1324(a)(1)(A)(iv)).

An obvious inference follows. "Each [of these] subpart[s]" to § 1324(a)(1)(A)(iv), it is clear, "focuses on a single kind of act, and those that use different terms to describe the act use near-synonyms with a clear overlap in meaning: 'transports' and 'moves' for § 1324(a)(1)(A)(ii), or 'encourages' and 'induces' for § 1324(a)(1)(A)(iv)." *Id.* at 381–82. Structurally, the unitary and indivisible core of each subpart further supports the inference that "harbors" requires evasion from detection. *See id*. And there is no evidence that Congress effectuated a contrary result.

This leads to the inference that "Congress did not intend the inclusion of 'harbors' in § 1324(a)(1)(A)(iii) to make that subsection, and that subsection alone,

simultaneously cover the two distinct acts of keeping from the authorities an alien's presence and simply offering the alien a place to stay." *Id.* at 382. For these reasons, the Second Circuit treated as indispensable the Government's burden to prove the defendant's intent to help an alien evade detection. *See id.* at 373, 382–83.

True, the statutory amendments to this law did restructure it in significant ways. But it is not true that Congress removed the scienter requirement altogether. The fact that the Immigration Reform and Control Act of 1986 ("IRCA") made it a felony for anyone to harbor an alien while "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States" does not mean that the Government need not prove beyond a reasonable doubt that the defendant had the intent to help an alien evade detection. § 1324(a)(1)(A)(iii), (a)(1)(B)(i); *but see* App. 7–8, 10–12. That is because IRCA did nothing to touch the default scienter requirement as to the defendant's *conduct* of helping aliens evade detection.

Reinforcing all this is the transitive quality of scienter on which this Court has insisted in its *Rehaif* line of precedent. 139 S. Ct. at 2194, 2195–97. Indeed, a far clearer statement than switching some adverbs around would have been expected of Congress, in 1986, to make such a significant transition away from the prevailing statutory framework and doctrinal understanding. As this Court repeatedly has noted, "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one

[part] of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *see also Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994). Here, Congress left intact the intent requirement as an element of harboring—*i.e.*, evasion of detection.

The Government seemed to suggest, at the Sixth Circuit, that requiring scienter as to the defendant's awareness of the alien's status implicitly removed the *mens rea* requirement as to the defendant's conduct. Br. for the United States 14–15. But that does not account for the fact that the latter is a given in criminal law. *See Rehaif*, 139 S. Ct. at 2196 (recounting the "basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will.'") (quoting 4 W. Blackstone, Commentaries on the Laws of England 21 (1769)). It does not need to be spelled out over and over in a statute.

To maintain otherwise would presuppose, without evidence, that the obvious *mens rea* requirement as to conduct somehow was something Congress wanted to change. But that, again, would be a significant lift—for due process reasons mentioned soon but also for fundamental fairness reasons more broadly—that Congress would not have made so cavalierly. Congress did not eviscerate that *mens rea* requirement when it simply moved some verbs around. After all, Congress is not in the business of "hid[ing] elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). This sensible canon of interpreting the statutory text "is a tool for discerning . . . the

text's most natural interpretation." *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

Nor did IRCA's removal of the employment exemption change anything. Congress adds or removes exemptions for any number of reasons, including to avoid superfluousness or out of abundance of caution (lest one kind of exemption be construed as rejecting other exemptions). Determining why Congress changes some things in old laws and leaves other things intact is a highly speculative (and perilous) endeavor that courts rightly are reluctant to indulge. *See Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. 453, 490 (2018) (Thomas, J., concurring) ("[E]ven if courts could discern Congress' hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment.").

All this is bolstered by the fact that *Rehaif* has a provenance that is as old as it is deep. It is not just the common-law tradition that supported the *mens rea* backdrop that *Rehaif* adopted. As suggested earlier, *Rehaif*'s underpinnings apply here with vigor: Due process and fundamental fairness. Convicting someone of a felony without proving beyond a reasonable doubt that their unlawful action was performed intentionally would cause serious due process problems. *Mens rea* in the jury instruction for this "harbor[ing]" provision is especially important because without it, this statute would criminalize a whole host of entities in violation of due process—due to vagueness, overbreadth or the lack of notice. *See*, *e.g.*, *Sessions v. Dimaya*, 138 S. Ct.

1204, 1225–30 (2018) (Gorsuch, J., concurring in part and concurring in judgment); *Johnson v. United States*, 576 U.S. 591, 595–601 (2015). And it would be egregiously unfair for many reasons, including the fact that it would deny us all fair notice. As Justice Gorsuch recently explained the historical provenance of fair notice in the Anglo-American tradition:

> Criminal indictments at common law had to provide "precise and sufficient certainty" about the charges involved. 4 W. Blackstone, Commentaries on the Laws of England 301 (1769) (Blackstone). Unless an "offence [was] set forth with clearness and certainty," the indictment risked being held void in court. *Id*., at 302 (emphasis deleted); 2 W. Hawkins, Pleas of the Crown, ch. 25, §§ 99, 100, pp. 244–245 (2d ed. 1726) ("[I]t seems to have been anciently the common practice, where an indictment appeared to be [in]sufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it").

Dimaya, 138 S. Ct. at 1225 (opinion concurring in judgment).

As far as due process is concerned, the constitutional-avoidance canon becomes relevant. As this Court repeatedly has stated, "[u]nder the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*,

583 U.S. 281, 286 (2018). Part of the reason is to avoid any constitutional clashes in the future; it is partly to preserve scarce judicial resources by avoiding a statutory interpretation that turns out to be constitutionally infirm; and partly it is so because Congress presumably does not enact unconstitutional legislation. Here, Congress could not have made such a major shift away from the historical norm and fundamental fairness in criminal proceedings without clearly saying so. For all these reasons, the absence of a clear statement from Congress means that the Government is obligated prove the defendant's intent to harbor aliens—help them evade detection—beyond a reasonable doubt.

C. This Statute's Ordinary, Public, and Contemporary Meaning Supports Petitioners.

As the Second Circuit's textual analysis in *Vargas-Cordon* generally shows, the ordinary, public, and contemporary meaning of the statute imposes on the Government the burden of proving beyond a reasonable doubt that a defendant intended to help aliens evade detection. *See generally* 733 F.3d at 380–83; Part III-B, *supra.*

Here, as in many other cases the courts confront, "[t]he policy may be debatable but the law is clear." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018). Fundamentally, the question must be: Who in our constitutional system gets to decide this policy?

The right to opt for this policy, like most measures, lies within the preserve of the political branches. *See generally* Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1909 (2014) ("Consistent with Madison's observations, we often remark that the Constitution's separation of powers protects liberty. We say that structure protects liberty."); JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 3–4 (2022) ("Even federal and state judges [as well as prosecutors] can trespass across inexact boundaries into places [where] they don't belong.").

This Court has remarked that "it's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." *Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 277 (2018) (cleaned up). *See also Sandifer v. United States Steel Corp.*, 571 U.S. 220, 227 (2014). The Court has also stated that "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). That characterization fits this statute perfectly. And should the current § 1324(a)(1)(A)(iii) prove to be inadequate and "[i]f further [legislative changes] are needed, they are up to Congress" to provide. *Cyan, Inc. v. Beaver County*

Employees Retirement Fund, 138 S. Ct. 1061, 1078 (2018). This is because, as Alexander Hamilton long ago assured the newly-independent Nation, federal courts are empowered to exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961).

No second thoughts in the face of legislative inertia or systemic inefficiency can arrogate to the courts the uniquely legislative prerogative to write the intentionality requirement out of § 1324(a)(1)(A)(iii) or to dilute the definition of "harbor[ing]." That is because the Constitution does not place the courts in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693, 700 (1976).

Finally, the absence of intentionality in the jury instruction was squarely presented and was preserved throughout the proceedings. And it is preserved here. There are no procedural concerns, and the issues are cleanly presented to the Court.

IV. The Harmless-Error Issue Here Has Been Dividing the Lower Courts for Decades.

A. The Error Here Was Not Harmless.

The Sixth Circuit held that any error in this case was harmless. App. 19. With respect, the nature of the

error here highlights why harmlessness is impossible. A misstated or omitted *mens rea* in a case with competing defense evidence that goes, at the very least, toe to toe with the prosecution's evidence should not be held harmless by the appellate courts, especially not where the defendants so contested at trial. After all, in 2016 this Court characterized *Neder* as having held "that the failure to submit an *uncontested* element of an offense to a jury may be harmless." *Hurst v. Florida*, 577 U.S. 92, 102 (emphasis added). Under this Court's precedents, here the misstated *mens rea* "vitiates all the jury's findings." *Neder*, 527 U.S. at 10–11.

Currently, the Court has before it the petition for a writ of certiorari in *Greenlaw v. United States*, *supra*. O.T. 2023, No. 22-10511. That petition has arrived from the Fifth Circuit. It asks the Court to "overrule *Neder* and treat jury instructions that omit or misdefine an element as structural error." *See* Greenlaw, Pet. for Cert. ii. Petitioners agree with that position for their own cases and believe that *Neder* and the somewhat-contradictory body of precedent it invoked should be overruled or at least curtailed. 527 U.S. at 9–10 (collecting cases).

Petitioners also believe, however, that the Court need not go that far in order to hold the erroneous jury instruction here to have been harmful. Even under *Neder*, the defendant had to have failed to contest the error at trial *and* the prosecutorial evidence had to have been overwhelming. 527 U.S. at 17. Neither condition is met here. Petitioners strenuously objected to the erroneous jury instruction and their case was built

around their lack of intent. App. 8–9. Moreover, the Government's evidence was not overwhelming, as discussed below.

First, though, it is important to understand what this Court did hold in *Neder*. The Court faced *Neder* as a sequel to its unanimous 1993 opinion in *Sullivan v. Louisiana*, 508 U.S. 275. In *Sullivan*, the Court had held that "a constitutionally deficient reasonable-doubt [jury] instruction" cannot be harmless error. *Id*. at 276. Reasonable doubt was fundamental to due process and without an accurate reasonable-doubt instruction, every aspect of the trial was tainted because the jury's very function was compromised. *Id*. at 278 ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."). The verdict obtained, therefore, was not the result of an impartial jury's discharging its historic office. *See id*. at 281 ("Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [a structural error], the jury guarantee being a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.") (cleaned up).

Neder was different, said the Court's opinion in that case—over the dissent of Justice Scalia (*Sullivan*'s author) and two other Justices. The trial flaw in *Neder* was that the jury instruction had omitted an element of the offense. 527 U.S. at 8–9. But the defendant had not contested that issue and the Government's evidence was deemed to be "overwhelming." *Id*. at 9, 12–13, 16–17. Each of these two requirements

independently had to be satisfied before an error could be regarded as harmless. And an appellate court could find harmlessness on the basis of the cold, hard facts (borne out by documented evidence) that went to materiality—the erroneous aspect of *Neder*. *See id*. at 8–15. Unlike in *Sullivan*, the *Neder* Court stressed that it could not be said that "all the jury's findings" in Ellis Neder's case were "vitiate[d]" by the materiality error. *Id*. at 10–11.

Those unique dimensions do not exist here or in the vast majority of comparable jury instructions. Here, for instance, the jury instruction effectively "vitiate[d] all the jury's findings" about Petitioners' conduct because it corrupted the *mens rea* lens through which the jury would consider the core of the case and it drastically expanded the definition of the crime of "harbor[ing]." That flaw crashed the "framework" in which the trial proceeded. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). It therefore collapsed, indeed obliterated, the difference between innocent and culpable conduct. And it caused a serious tension with longstanding constitutional principles.

These fundamental deficiencies worked to deprive Petitioners—and others like them—of their Sixth Amendment and due process rights to have all elements of their guilt found by an impartial jury beyond a reasonable doubt. On top of it all, Petitioners did vigorously contest the jury instruction on account of this *mens rea* and proposed the correct one. *See* Doc. No. 95, at 12-19. The Sixth Circuit in this case circumvented the "uncontested" requirement of *Neder* by simply

"consider[ing] the record as a whole." App. 19. Yet *Neder* permits no such shortcuts. And the Government's evidence about Petitioners' culpability was not, in any sense, overwhelming.

Just a brief recap of the defense evidence should suffice to show that the Government's evidence was far from overwhelming. Petitioners facilitated the aliens' visibility and open living as members of the local community. In ways too numerous to recount, Petitioners did the exact opposite of helping the aliens evade detection—the aliens openly worked at Petitioners' restaurant and one of them was taken for a medical visit; the aliens lived in a house (with non-tinted windows) owned by Petitioners; the aliens moved property into the residence; they had freedom of movement inside and outside of their living area and often visited local bars, restaurants, and shops; they possessed and used their personal cell phones; they had access to a bicycle for their general usage; they were repeatedly viewed by the local law enforcement officers who patronized the restaurant; they socialized at the house by hosting parties in the backyard, which was not obstructed from view by any fence or other structure; and in general, they were visible to the neighbors, local law enforcement, and the community as a whole. *See*, *e.g.*, Doc. Nos. 92, 93, 94, 95. In other words, Petitioners treated these aliens exactly as they would treat any other employees. *See id*. Moreover, the fact that the jury acquitted Petitioners on the conspiracy charge suggests that the jury believed that Petitioners never agreed to "harbor" the aliens, which also indicates that the jury likely

did not believe that Petitioners *intended* to help the aliens evade detection. App. 4.

Moreover, as in another recent case—*United States v. Kahn* in the Tenth Circuit—here too "intent was in dispute throughout [the] trial and was the centerpiece of [the] defense. A jury, properly instructed, must address whether the government carried its burden to establish [Petitioners'] intent beyond a reasonable doubt." 58 F.4th 1308, 1319 (2023). Perhaps, as Petitioners believe, the evidence here is enough to warrant an acquittal under the correct jury instruction; perhaps not. But "[f]or [any appellate] court to now essentially retry the case on appeal and opine on what verdict the jury would have reached if it had been properly instructed asks too much of an appellate court." *Kahn*, 58 F.4th at 1319.

Determining Petitioners' "subjective intent on a cold record" would be particularly inappropriate. *Id*. This means that "apply[ing] the correct instructions" is, and should remain, "the jury's prerogative" under the Sixth Amendment. *Id*.; *see also Ring v. Arizona*, 536 U.S. 584, 610 (2002) (overruling contrary determination of *Walton v. Arizona*, 497 U.S. 639 (1990), and following *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *Apprendi*, 530 U.S. at 477 (recognizing defendant's Sixth Amendment right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt").

That is precisely why jury trials, under the Sixth Amendment, exist. That is also why this Court, in

Neder, proclaimed that the bulwark of a jury trial in our constitutional system cannot be dispensed with unless the error at issue was "uncontested" *and* the Government's evidence establishing culpability was "overwhelming." 527 U.S. at 17. Besides this, unless "the guilty verdict actually rendered in [a] trial was *surely* unattributable to the [alleged] error," determining guilt or innocence should be up to the jury. *Sullivan*, 508 U.S. at 279 (emphasis added). "That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Kahn*, 58 F.4th at 1320.

The emphasis that this Court has placed on the jury trial right are particularly consequential. In cases such as this one, the credibility and evidentiary determinations that a fair cross-section of the community empaneled into the jury box can make is a unique crown jewel in our system. *See*, *e.g.*, *Ring*, 536 U.S. at 607; *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). This is why, here, it would be inappropriate to balance away the jury trial right, something the Sixth Amendment's ratifying generation declined to do.

Insisting on jury unanimity in federal and state criminal trials, four years ago the Court in *Ramos v. Louisiana* observed that "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148–50 (1968)). In fact, this view occupies an ancient and exalted pedigree in

this Court's annals. More than a century ago, the Court had recognized a criminal defendant's "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons." *Thompson v. Utah*, 170 U.S. 343, 351 (1898). And the Court has noted that the Sixth Amendment confers on criminal defendants the right to "a trial by jury as understood and applied at common law, . . . includ[ing] *all the essential elements* as they were recognized in this country and England when the Constitution was adopted." *Patton v. United States*, 281 U.S. 276, 288 (1930) (emphasis added).

"So . . . the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal [and state] courts," noted this Court in *Ramos*. 140 S. Ct. at 1397. The unanimity requirement reveals the importance of the jury trial right itself, just as the jury trial right serves to ensconce the unanimity requirement. And all of it would be meaningless if appellate judges could uphold a conviction despite the wrong *mens rea* and the inaccurate definition of the crime having been given to the jury, all on the basis of a contested error and non-overwhelming prosecutorial evidence. Even if the practical fears of an upsurge in do-over trials are constantly being balanced with the Sixth Amendment's jury trial right, that delicate balance should not be radically relegated to a Sixth Amendment-free zone—one where even *Neder*'s modest guardrails have been obliterated.

This is due in no small part to the fact that the due process of law secured by the Fifth Amendment is, at the very least, the right to be tried in accordance with the positive law of the jurisdiction. Along with the right to have notice and the opportunity to be heard by an impartial adjudicator—here, the jury—that protection has been a vital safeguard guaranteed to individuals on trial for their life, limb, or liberty. A consistent thread running through this Court's decisions is that due process was "undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna [Carta]." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1856). Among others, the illustrious English jurist Lord Coke had so maintained. *Id*. (citing 2 Inst. 50). Relying on the Magna Carta, America's pre-Framing colonial constitutions "generally contained the words, 'but by the judgment of his peers, or the law of the land.'" *Id*. So did the Northwest Ordinance. *Id*.

At the time of the Constitution's Framing and soon thereafter during the adoption of the Fifth Amendment, due process generally had that same meaning. It meant that the defendant had the right to hear "regular allegations," *id.* at 280; to enjoy the "opportunity to answer," *id*.; to have "a trial according to some settled course of judicial proceedings" and the pertinent statute(s) and rules, *id*.; and to not be tried "without notice," *id*. at 278, or "without offense" (against the law—thereby covering the earlier prohibition of there being a law the defendant is alleged to have violated), *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829). As already suggested, this Court has inferred

from some of these principles the prohibition against vague, and thus indeterminate, laws. *See*, *e.g.*, *Dimaya*, 138 S. Ct. at 1225–30 (opinion of Gorsuch, J.); *Johnson*, 576 U.S. at 595–601.

The constitutional requirement that the defendant be duly charged and convicted by a jury of one's peers of violating all the elements of an actual offense created by an actual law is beyond dispute. This is a bedrock principle of criminal trials in this country. And the defendant's right is the government's duty. So that positive law-created right—here, Petitioners' right to avoid being convicted unless their intent was the same as that which the actual offense prohibited by Congress requires (in other words, the government's duty)—is undermined when the Government's evidence was not overwhelming and the pivotal issue of intent was contested. Stripped of its legal cognate under due process and the Sixth Amendment, *i.e.*, being proven to the jury beyond a reasonable doubt, this deficiency works a classic constitutional violation.

B. The Lower Courts Are Split on the Harmlessness Analysis.

The lower courts would greatly benefit from further elucidation about whether an erroneous *mens rea* in the jury instruction can be harmless where the defendants have so contested or the prosecution's evidence is not overwhelming. For decades, the lower courts have been divided over this consequential question; and they have been unable to coalesce around an answer.

One group of courts—the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits and at least one panel of the Sixth Circuit (in this case)—holds that *Neder*'s "uncontested" requirement should not be taken at face value. *See Greenlaw* Pet. for Cert., O.T. 2023, No. 22-10511, at 25 (citing *United States v. Freeman*, 70 F.4th 1265, 1281–83 (10th Cir. 2023); *United States v. Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022); *United States v. Boyd*, 999 F.3d 171, 179–82 (3d Cir. 2021); *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (*Neder II*); *United States v. Jackson*, 196 F.3d 383, 385–86 (2d Cir. 1999)); *see id.* ("Those courts believe that appellate courts should declare that the error is harmless because of perceived 'overwhelming' evidence of guilt (based on the properly-defined element, despite being omitted or improperly defined at trial), notwithstanding that the defendant[] had 'contested' the element at trial and offered at least some defensive evidence."); App. 19 (stating that regardless of the "uncontested" requirement, "we must consider the record as a whole to determine whether any instructional error was harmless beyond a reasonable doubt").

In contrast, another group of courts—notably, the Fourth Circuit and at least one panel of the Sixth Circuit, along with a whole host of state courts—insist that both the "overwhelming evidence" and "uncontested" requirements must be satisfied before an error may be deemed harmless. *See Greenlaw* Pet. for Cert., *supra*, at 23 (citing *United States v. Legins*, 34 F.4th 304, 322 (4th Cir. 2022); *United States v. Miller*, 767

F.3d 585, 594 (6th Cir. 2014)); *id*. at 23 n.11 (citing *State v. Draper*, 261 P.3d 853, 869 (Idaho 2011); *State v. Bunch*, 689 S.E.2d 866, 869 (N.C. 2010); *United States v. Upham*, 66 M.J. 83, 87 (U.S. Ct. App. Armed Forces 2008); *State v. Price*, 767 A.2d 107, 113 (Conn. App. 2001); *State v. McDonald*, 99 P.3d 667, 670 (N.M. 2004)); *see also People v. Aledamat*, 447 P.3d 277, 290 (Cal. 2019) (Liu, J., concurring in part and dissenting in part) (observing that the California Supreme Court insists on *both* the "overwhelming evidence" and "uncontested" requirements). *See also Hurst*, 577 U.S. at 102 (treating the "uncontested" requirement as a prerequisite of harmlessness).

The dissonance is not just across federal circuits and state courts. As Judge Lipez of the First Circuit observed, there is also significant *intra*-circuit dissonance on this issue, as the Sixth Circuit examples have already exhibited. *See United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring); *compare* App. 19 *with Miller*, 767 F.3d at 594 (demonstrating intra-Sixth Circuit tension).

Under this Court's decisions in *Neder* and *Hurst*, Petitioners' convictions were far from harmless and should be reviewed by this Court. The Court could also grant certiorari to reconsider and limit or overrule the *Neder* line of precedent to the extent it permits harmless-error analyses for misstated or omitted elements of an offense.

CONCLUSION

This petition presents the Court with two serious questions deeply dividing the lower courts and going to the heart of the rule of law in our Nation. Contrary to the dictates of Congress, the Government has sought to weaponize this immigration statute to endanger the liberties of millions of law-abiding, innocent people. The Court should grant certiorari.

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