No. 23-928

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

REPLY BRIEF

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INTRODUCTION

The Immigration and Nationality Act ("INA") is a multifaceted statute carrying severe penalties for citizens and noncitizens alike. Respondent identifies no sound basis to delay this Court's review of whether, under an INA provision—namely, 8 U.S.C. § 1324(a)(1)(A)(iii)—"harbor[ing]" requires the Government to prove to a jury beyond a reasonable doubt that the defendant acted intentionally in helping an alien evade detection. The serious, longstanding, and profound 4-3-1 split among the courts of appeals on this question imperils the liberties of tens of millions of people.

In addition, lower federal *and* state courts are hopelessly divided as to whether an appellate court may conduct a harmless-error analysis where the error complained of was "contested." *Neder v. United States*, 527 U.S. 1, 9, 12–13, 16–17 (1999); *see also Hurst v. Florida*, 577 U.S. 92, 102 (2016) (characterizing *Neder* as standing for the proposition "that the failure to submit an uncontested element of an offense to a jury may be harmless."). Numerous courts are overlooking the "uncontested" requirement of *Neder* and *Hurst*. To harmonize harmless error with the Sixth Amendment right to a jury trial, the Court should settle this issue.

ARGUMENT

I. The 4-3-1 Split Among the Courts of Appeals about the Meaning of "Harbor[ing]" Warrants this Court's Urgent Clarification.

For 17 years, the courts of appeals have been badly fractured on this issue—a deep and mature 4-3-1 split (as the Sixth Circuit recognized)—and there is no realistic prospect of their coming to a consensus anytime soon. Pet. App. 12–13. Respondent unpersuasively tries to paper over the split but prolonging this division does its work in U.S. Attorneys' Offices nationwide no favors at all. Pet. 9–11; Opp. 11–15. And the decision below, which approved the "tended to substantially facilitate" jury instructions—a commonplace staple of the harboring charge across numerous districts—is clearly wrong because Respondent's interpretation is inconsistent with the text and structure of § 1324(a)(1)(A)(iii). Pet. 12–24.

The canon of *noscitur a sociis* (along with the dictionary definitions and other indicators of ordinary, public and contemporary meaning) insist that helping an undocumented person evade detection is a necessary predicate of "harbor[ing]" under § 1324(a)(1)(A)(iii). *See id.*; *United States v. Vargas-Cordon*, 733 F.3d 366, 381 (2d Cir. 2013). The jury must be so instructed. Furthermore, the intentionality requirement as to the conduct of harboring was never eliminated by any statutory amendment. Pet. 18. And nothing in § 1324(a)(1)(A)(iii)'s statutory or legislative history supports Respondent's reading. *See id*. In essence, prosecutors may not use shortcuts "as

substitutes for laws passed by the people's representatives." *West Virginia v. EPA*, 597 U.S. 697, 753 (2022) (Gorsuch, J., concurring). Precisely to avoid convictions like Petitioners', Alexander Hamilton chastised "arbitrary methods of prosecuting pretended offenses[] and arbitrary punishments upon arbitrary convictions" as "the great engines of judicial despotism." THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The stakes could not be higher. Since there are at least 11 million persons living unlawfully in the United States today, *tens* of millions of Americans are exposed to criminal liability under the Sixth Circuit's interpretation.[1] Without an intentionality-based jury instruction, a loyal, longtime customer to a local grocer who happens to be undocumented, a local restaurateur who for many years has been selling food to someone undocumented, or a friend who habitually gives an undocumented person a ride to work remain exposed to felonious liability. So the due process concerns that § 1324(a)(1)(A)(iii) implicates are in serious tension with the Government's anti-intentionality interpretation. Pet. 19–21.

Nor is the Government's request a small thing. Writing for a Seventh Circuit panel, Judge Posner regarded what is effectively the Government's position here as effectuating "a profound change in the legal

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[1] *See* Migration Policy Inst.: Profile of the Unauthorized Population: United States, www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited May 9, 2024).

status of aliens in the United States." *United States v. Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012). That panel observed:

> The number of illegal aliens in the United States was estimated at 10.8 million in 2010. No doubt thousands, perhaps many thousands, of persons are involved in concealing, shielding from detection, or harboring—under unexceptionable understandings of these terms—aliens whom they know to be illegal. The government's lawyer conceded at oral argument that under the government's broader definition of harboring the number of violators of section 1324(a)(1)(A)(iii) might well be two million. Did Congress intend such a leap when it added harboring to the list of offenses in that subsection? Illegal aliens were a smaller fraction of the American population then. But still—is it likely that Congress intended that parents whose child invites an immigrant classmate who, as they know, is illegally in the country to a sleepover might be branded as criminals even if he didn't accept the invitation, since the statute criminalizes attempts?

Id. (cleaned up). Congress ordinarily would not "hide" the "elephant[]" of massive, easy-to-occur criminalization in the "mousehole[]" of "harbor[ing]." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). The *Costello* panel also said:

> . . . [A]lthough generally it is not a crime to be an illegal alien . . . , an illegal alien becomes a criminal by having a wife, also an illegal alien,

> living with him in the United States; if they have children, born abroad and hence illegal aliens also, living with them, then each parent has several counts of criminal harboring, on the government's interpretation of the statute.

666 F.3d at 1047. Presumably, Congress would not create this "paradox[]" so blithely. *Id*. Until this Court clarifies what "harbor[ing]" entails, federal courts and prosecutors as well as countless individuals nationwide will continue to operate under the cloud of uncertainty.

II. By Ignoring the "Uncontested" Requirement of Harmless Error, the Sixth Circuit Deepened Another Longstanding Split Among the Lower Courts.

A. This Split is Deep and Damaging.

Neder characterized as "narrow" its rule that a jury instruction error may be harmless only when *both* (1) the defendant fails to "contest" the omitted element and (2) the evidence of the defendant's culpability is "overwhelming." 527 U.S. at 15–17. But the Sixth Circuit in this case, by breaking from many federal courts of appeals and state courts, has disregarded *Neder*'s "uncontested" requirement.

Moreover, *Neder* also held that even if the omitted element had gone uncontested at trial, the error still is not harmless unless the Government shows that there was no evidence at trial "that could rationally lead to

a contrary finding with respect to the omitted element." *Id*. at 20 (cleaned up). Certain important points should be addressed:

1. Respondent is inaccurate in saying that there is "no [certworthy] division of authority" among the federal and state courts as to "the contours of *Neder*'s harmless-error standard." Opp. 21–23. For the reasons given in the pending certiorari petition and reply brief in *Greenlaw v. United States* as well as those given in the certiorari petition here, the Sixth Circuit's approach deepens such a division and violates *Neder* and its successor case, *Hurst*. O.T. 2023, No. 22-10511 (*Greenlaw*), Pet. 23–29, Reply. Br. 7–12; O.T. 2023, No. 23-928 (*Zheng*), Pet. 7–10.

2. *Hurst* embodies the perils of harmlessness analysis since, on remand, the Florida Supreme Court, rejecting the view of a dissent of this Court, found the error had not been harmless. 577 U.S. at 103 (Alito, J., dissenting); *see Hurst v. State*, 202 So.3d 40, 68–69 (Fla. 2016).

3. Another case departing from the Sixth Circuit's approach is the First Circuit's decision in *United States v. Zhen Zhou Wu*, 711 F.3d 1, 20 (1st Cir. 2013) ("Here, the defendants *did* contest the prosecution's [evidence of an omitted element], thus making this case different from *Neder*.").

4. Respondent misapprehends the Fourth Circuit's position by citing its 2000 decision

(*United States v. Brown*, 202 F.3d 691). Opp. 22. That same Circuit's 2022 decision in *United States v. Legins*, 34 F.4th 304, 322–23, insists on "overwhelming and uncontroverted evidence" before a harmlessness inquiry may proceed. Pet. 34–35; *Greenlaw* Reply Br. 8 n.6.

5. Respondent is mistaken in saying here, as it was in *Greenlaw*, that the Fourth Circuit in *Legins* "noted that its approach comports with that of other courts of appeals." Opp. 22; *see Greenlaw* Opp. 21. The Fourth Circuit in *Legins* cited other appellate decisions only to suggest that those courts had "applied harmless-error analyses to errors under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)"—not to adopt "the specific harmless-error analyses of those courts." *Greenlaw* Reply. Br. 8 n.6.

6. Respondent incorrectly criticizes Petitioners' pointing out the intra-Sixth Circuit tension as to the status of the "uncontested" requirement. Opp. 22 (citing *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014)). The Government confuses the *Miller* court's observation about "considerable evidence" raising reasonable doubt about the defendants' culpability with a fictitious negating of the "uncontested" requirement. 767 F.3d at 594–97. The former shows that the Government's evidence was not overwhelming; *Miller* did not, however, reject the "uncontested" requirement. In any event, the ostensible discord between *Miller* and this case shows there is at least significant intra-Sixth Circuit confusion.

7. Respondent's contention about Judge Lipez's and Judge Torruella's concurring opinions in *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014), is also unconvincing. Opp. 23. A decade ago, when encountering Judge Lipez's conclusion that the First Circuit's prevailing harmlessness jurisprudence is inconsistent with those of the Second, Fourth, Ninth, and Eleventh Circuits, and also some other First Circuit decisions, Judge Torruella never disputed that *other* Circuits had departed from the prevailing First Circuit approach—he said only that he had "not encountered any 'significant inconsistency' in *First Circuit* cases applying the harmless-error test." *Compare* 772 F.3d at 304–07 (Lipez, J., concurring), *with id*. at 326 (Torruella, J., concurring) (emphasis added).

8. The Government states that "the jury [in this case] was instructed on alternative theories of guilt." Opp. 20–21. That is of little consequence since, first, the harboring provision requires that a jury instruction contain *both* intentionality *and* helping an undocumented person evade detection and, second, no theory of guilt contained in the jury instructions here had any intentionality *mens rea* at all.

9. The harmless-error issue is of profound importance to the rule of law to ensure that the lower courts do not ignore *Neder* and *Hurst*. The Government hopes this Court declines to grant review because of what Respondent regards as a "fact-bound" harmless-error issue. Opp. 19–20. But the facts here emphasize the significance of the harmless-error

> question presented. And there were so many facts presented at trial supporting the lack of Petitioners' intent that the "tended to substantially facilitate" instruction simply cannot be harmless error. Pet. 27–29; Pet. App. 8–9.

Therefore, the presence of the harmless-error issue is an important reason that certiorari *is* appropriate here: Lower courts should not be encouraged to insulate their decisions from this Court's review merely by conducting incorrect harmless-error analyses. That would frustrate this Court's role at the apex of the federal judiciary. *See Marbury v. Madison*, 5 U.S. 137, 173 (1803).

B. This Case Typifies the Longstanding Problems of Harmless Error Warranting this Court's Review.

The larger constitutional context in which harmless error is reposed should be addressed. Those concerns bedevil this case as well as numerous others caught in this imbroglio.

At best, harmless error is an uneasy judicial antidote to violations of a criminal defendant's rights. *See* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309, 314 (2002) [Cooper, *Harmlessness*]. It suffers from significant tension with the Sixth Amendment right to a jury trial—particularly, the right to have any fact that

"expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" to be found by that jury beyond a reasonable doubt. *See*, *e.g.*, *Apprendi*, 530 U.S. at 477, 494.[2] Four years ago, this Court explained that "no person could be found guilty of a serious crime unless 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his *equals* and *neighbors*, *indifferently chosen*, and superior to all suspicion.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769)) (emphases added). After all, appellate (or any) judges are not laypersons reflecting the cross-sectional wisdom of the community—a vital "bulwark" against governmental tyranny. 4 William Blackstone, Commentaries *342; *see also id.* at *343.

That brings us to *Neder*. Together, *Neder*'s two requirements constitute a unitary formulation, whereby *each* element is an essential prerequisite to a valid harmless-error inquiry. So, where either of those two guardrails is dispensed with, the tension between extreme and untrammeled forms of harmless-error analyses, such as the kind that occurred here, and the Sixth Amendment becomes intolerable. Therefore, much of

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[2] Over the years, the Court has applied *Apprendi*'s rule to *Ring v. Arizona*, 536 U.S. 584 (2002) (capital punishment generally); *Blakely v. Washington*, 542 U.S. 296 (2004) (plea bargains); *United States v. Booker*, 543 U.S. 220 (2005) (sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (criminal fines); *Alleyne v. United States*, 570 U.S. 99 (2013) (mandatory minimums); and *Hurst* (Florida capital punishment scheme).

the Government's characterization of its evidence as "overwhelming" becomes redundant. Opp. 19–20. And the Sixth Circuit's failure to follow the *Neder–Hurst* formulation also turned appellate review in this case into a Sixth Amendment-free zone. It is not, however, an isolated occurrence.

Far too often, appellate "[j]udges . . . attempt to discern the process of how a reasonable jury would decide a case based on little more than their own prior observations of juries—which typically exclude jury deliberations—and their sense of how *they themselves* would go about deciding the case." Cooper, *Harmlessness*, *supra*, at 331 (emphasis added). Among the numerous issues overlooked by appellate judges are: How jurors form impressions about witnesses or particular pieces of evidence; how jurors weigh competing pieces of evidence; the manner in which jurors apply particular burdens of proof; how jurors determine whether there was harm and who was harmed; how jurors reconcile competing motives; what value jurors place on different kinds of confessions or statements against interest; what actually motivates their verdicts; how juries address cultural and sub-cultural norms; to what extent jurors are able to disregard tainted evidence; and so on. *See id*. at 329–32.[3]

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[3] *See*, *e.g.*, Nicholas Epley & Adam Waytz, *Mind Perception*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 498 (Susan T. Fiske et al. 2010); James S. Uleman & Laura M. Kressel, *A Brief History of Theory and Research on Impression Formation*, in OXFORD HANDBOOK OF SOCIAL COGNITION 53 (Donal E. Carlston ed.); David Dunning, *Motivated Cognition in Self and Social Thought*, in APA

Viewed in this light, harmless error was never designed to be a blank check of the kind it has become today (and was in this case). *See id*. at 313–24. Historically, "[n]ineteenth century appellate courts routinely reversed trial court decisions for highly technical errors that could not reasonably have been thought to have affected outcomes." *Id*. at 314 (citing ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13–14 (1970)); *see also* TRAYNOR, HARMLESS ERROR, *supra*, at 3 ("There was a time in the law, extending into [the twentieth] century, when no error was lightly forgiven."); Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1174 (1995) (observing that minor procedural errors traditionally resulted in reversal). Things have swung too far in the opposite direction—and some balance is long overdue.

Other criticisms of harmless error have also been leveled. For example, scholars have pointed out the

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HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY 777 (Eugene Borgida & John A. Bargh eds. 2015); Margaret Bull Kovera & Lora M. Levett, *Jury Decision Making*, in 2 APA HANDBOOK OF FORENSIC PSYCHOLOGY 271 (Brian L. Cutler & Patricia A. Zapf eds. 2015); Joel D. Lieberman, *The Psychology of Jury Instructions*, in 1 JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 129 (Joel D. Lieberman & Daniel A. Krauss eds. 2009); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 Annu. Rev. Law Soc. Sci. 307 (2013); Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 Psychol. Pub. Pol'y & L. 381 (1997); Luke M. Froeb & Bruce H. Kobayashi, *Naive, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 J.L. Econ. & Org. 257 (1996).

anomaly between how nonconstitutional errors are treated compared to constitutional ones. *See*, *e.g.*, John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 Hous. L. Rev. 59, 96–101 (2016). In addition, it has been suggested that this Court should instruct "*all* reviewing courts (whether they are conducting direct or collateral review) to set aside a judgment tainted by any error (whether constitutional or not) unless they conclude that it is 'highly probable' that the error did not affect the judgment." John M. Greabe, *Criminal Procedure Rights and Harmless Error: A Response to Professor Epps*, 118 Colum. L. Rev. Online 118, 133 (2018); *see also* TRAYNOR, HARMLESS ERROR, *supra*, at 49–51. Given the Court's thoughtful approach to the Sixth Amendment in its *Apprendi* line of jurisprudence, this petition presents the Court with an excellent vehicle to explore these avenues.

CONCLUSION

Our Nation has waited long enough for answers to the consequential issues this petition presents. James Madison could just as easily have been addressing the judiciary when he urged that "you must . . . oblige [the government] to control itself." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). The petition for a writ of certiorari should be granted.

Respectfully submitted,

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