NO. _____

In the Supreme Court of the United States

THEODORE E. OKECHUKU,

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

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QUESTION PRESENTED

Prosecutors routinely request, and district courts routinely give, instructions allowing the jury to find a crime's required scienter through "deliberate ignorance"—that the defendant purposely contrived to avoid learning that his conduct was criminal. Appellate courts recognize that these instructions risk misleading the jury into thinking they should convict for behavior that is merely reckless or even negligent. These same courts frequently hold that deliberate-ignorance instructions should not have been given. But there is a deep, three-way split regarding the circumstances under which such improper submissions merit reversal. Two circuits hold that an improper submission is harmless *per se*. Six circuits hold that it is harmless if there is "sufficient" or "substantial" evidence that the defendant had actual knowledge of criminal activity. And four circuits hold that it is harmless only if there is "overwhelming" evidence of actual knowledge. The circuits likewise differ on whether the charge's phrasing matters in determining the likelihood that an erroneous deliberate-ignorance instruction caused harm.

The question presented is:

Whether, and under what circumstances, the erroneous submission of a deliberate-ignorance instruction is harmless error.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Elechi N. Oti, Kelvin L. Rutledge, and Emmanuel C. Iwuoha were defendants in the trial court and appellants in the court of appeals.

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INTRODUCTION

This case presents an important, recurring question of prosecutorial overreach on which the courts of appeals are deeply divided. Where an element of a crime requires proving that the defendant acted knowingly, prosecutors routinely request a "deliberate ignorance" or "ostrich" instruction, informing the jury that it can find the requisite knowledge if the defendant acted deliberately to avoid acquiring actual knowledge of criminal activity. These instructions have a legitimate, if narrow, application. But they have also become a font for prosecutorial abuse through overuse.

As appellate courts, commentators, and members of this Court have observed, these instructions are notoriously difficult to parse, leading jurors to misinterpret them as diluting the crime's *mens rea*. Prosecutors often exploit this risk as an insurance policy in a doubtful case, offering the instruction to nudge jurors toward believing that even if they do not buy the prosecution's evidence that the defendant knew of criminal conduct, they should still convict for the defendant's mere negligence or recklessness—for what the defendant should have known or recklessly overlooked. E.g., *United States* v. *Jewell*, 532 F.2d 697, 706 (9th Cir. 1976) (en banc) (Kennedy, J., dissenting). Prosecutors find this advantage maximized where the instruction is submitted improperly, in circumstances where evidence of true deliberate ignorance is lacking, leading jurors to think that the instruction's only purpose *must* be to reduce the required *mens rea*.

Appellate courts regularly identify these prosecutorial abuses. They routinely hold that deliberate-ignorance instructions were improperly given under circumstances where the evidence presented only the choice "between a

version of the facts in which the defendant had actual knowledge, and one in which he was no more than negligent or stupid." *United States* v. *Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). Appellate courts routinely admonish prosecutors for engaging in such abuses, warning them that the instruction is not "a failsafe mechanism that" they may use "to relieve [themselves] of proving the *mens rea* required of a crime." Pet. App. 33a.

Yet these tongue-lashings have virtually no effect, because many circuits give prosecutors free pass after free pass, employing standards for harmless-error review of deliberate-ignorance instructions that will virtually never lead to reversal. Some circuits hold that such error is harmless *per se*. Others, including the Fifth Circuit, reject this stance as incorrect only to enact one only marginally less prosecutor-friendly, holding an improper instruction harmless whenever there is "sufficient" or "substantial" evidence of actual knowledge. Other circuits require "overwhelming" evidence of actual knowledge. And in practice, errors are found harmful, and convictions reversed, only in this final category.

This situation is made worse by the fact that in some circuits, like the Fifth Circuit, courts give no consideration to the particular phrasing of the charge in determining the likelihood that it caused harm, while others do. This difference has proven outcome-determinative as well.

This case is a compelling one for the Court to resolve both splits, because it is highly likely that the conviction of petitioner, Theodore Okechuku, resulted from the jury's misread of a deliberate-ignorance instruction. Okechuku was charged with conspiracy in connection with a pill-mill scheme through which prescription hydrocodone

was diverted for illegal resale. The key testimony connecting Okechuku to the scheme came from a highly dubious source: one of the conspiracy's ringleaders, Ignatius Ezenagu, who traded his testimony for a substantially reduced sentence.

Okechuku remarkably testified in his own defense, to explain that he owned the clinic where the pill-mill conspiracy took place, but had no knowledge of the scheme's existence. He also emphasized the measures he put in place to *prevent* improper diversion of prescribed narcotics. But the most compelling evidence of Okechuku's innocence came from the Texas Board of Medical Examiners, which conducted an investigation after his indictment. While the Board took issue with his management and prescribing practices, it nevertheless concluded he was not running an improper pill mill.

This case thus highlights the dangers of deliberate-ignorance instructions, because the instruction here played into a narrative that the Government had been developing throughout the trial: that the jury ought to convict Okechuku for being "oblivious" to the drug conspiracy—for being a bad medical-practice manager, or a bad doctor, even if he was not a drug dealer. That narrative was only helped along by the charge's troublesome phrasing, which defined deliberate ignorance in confusing terms, and when applied to the drug conspiracy charge, invited the jury to believe he could be convicted of recklessly, yet unintentionally, joining a conspiracy he knew nothing about.

It was this misuse of the instruction that led the Fifth Circuit to hold that its submission was improper. Yet the Fifth Circuit's deferential approach to harmless-error review shielded these problems from view. Following the

same standard the circuit applies in basic evidentiary-sufficiency challenges, the court credited the Government's evidence suggesting Okechuku knew of the drug conspiracy, including the crucial testimony of Ezenagu, his more culpable accuser. That testimony would never be treated as "compelling" in the circuits requiring such evidence. Nor would those courts ignore the countervailing evidence that substantially undermined the Government's case, including the conclusions of disinterested medical professionals about his innocence. Under the standards employed in other circuits, this evidence would have compelled a court to grant petitioner a new trial, particularly in light of the charge's problematic language. But in the Fifth Circuit, it meant upholding what, in practical terms, amounts to a life sentence for Okechuku. This case thus puts the rub to the distinction between the standards employed in the "substantial" and "overwhelming" circuits, and presents an opportunity to resolve multiple circuit splits on recurring issues of national significance. This Court should grant certiorari and reverse.

PETITION FOR WRIT OF CERTIORARI

Petitioner Theodore E. Okechuku 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 Fifth Circuit's opinion (Pet. App. 1a) is published at 872 F.3d 678. Its order denying rehearing (*id.* 68a) is unpublished. The relevant excerpts from the district court proceedings (*id.* 37a–67a) are unpublished.

JURISDICTION

The Fifth Circuit issued its opinion October 3, 2017, and denied a timely rehearing petition November 8, 2017. Pet. App. 68a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the U.S. Constitution provides:

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

U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual background and the trial

Theodore Okechuku bears no resemblance to a drug dealer. Born in Nigeria, he first came to the United States in 1988 for a residency in pediatric surgery. ROA.2496, 2498, 2500–2502. He is now the patriarch of a family of five grounded, well-educated, law-abiding children (ROA.2497–2499), and was an accomplished physician, triple board-certified in general pediatrics, anesthesiology, and pediatric anesthesiology. ROA.2502–2505. He has held numerous distinguished medical positions, including as director of pediatric anesthesiology and deputy chairman at the Bronx Lebanon Hospital (ROA.2507), and instructor at the prestigious University of Texas Southwestern Medical School in Dallas. ROA.2509, 2512.

In 2003, Okechuku opened Medical Rehabilitation Clinic, originally to treat patients suffering automobile and workplace injuries. ROA.2509, 2511. Eventually Okechuku obtained a certification to provide pain-

management services at the clinic. ROA.1478–1479, 2516–2517. But the clinic was only a part-time pursuit for Okechuku. He only saw a few patients there one-to-two days a week (ROA.1827, 1868), because he spent most of his time at the University of Mississippi Medical Center, where he earned a substantial salary of $393,000 as a pediatric anesthesiologist. ROA.1067, 1078–1079, 1097, 2676. In short, Okechuku had too little to gain, and too much to lose, to run the clinic as a pill mill.

There is no question, however, that such a pill mill was operating out of the clinic. Making use of Okechuku's conflicting schedule at the University of Mississippi, Ignatius Ezenagu, the clinic's office manager, worked with a man named Jerry Reed and others to recruit people to come to the clinic, often from homeless shelters, where they would obtain prescriptions for pain medication. Pet. App. 3a. The men would pay these recruits for the prescriptions, have them filled, and then sell the pills to drug dealers. *Id.* 3a–4a. Ignatius profited thrice from the arrangement: receiving regular cash payments from Reed, ROA.1506, 1598–1599, 1607; syphoning money from legitimate clinic operations, ROA.2102–2103, 2597–2598; GE278; and selling prescriptions on his own, ROA.1525–1526, 1591–1594.

Okechuku, on the other hand, may have profited from operating the clinic, but he testified that Ezenagu, Reed, and their ilk misused the clinic without his knowledge, coaching their recruits on what they should say and do to obtain pain medication from him and the other clinic employees. ROA.1133–1135, 1474–1537, 1760, 1762–1763, 1821–1856, 1934-1964, 1997–2032. Okechuku also emphasized the protocols he had put in place to avoid improper diversion of prescription painkillers. ROA.2545, 2548;

GE11. He required patients to undergo independent testing to see if they were already using the drugs they were seeking. ROA.2552–2563. And he instructed clinic staff to be on the lookout for patients from a local homeless facility and to refuse them service. *Ibid.*

The Government's own witnesses confirmed that Okechuku followed the protocols that he had put in place (ROA.2566–2568), including by discharging patients he suspected of being homeless or abusing prescription drugs, ROA.1867, 1971–1972, 1995, 2530, 2570–2571; DE3. Okechuku also had video cameras installed at the clinic to keep tabs on operations while he was away. Pet. App. 8a n.5. And when he discovered the pill mill, and Ezenagu's involvement in it, he immediately fired his disgraced office manager. ROA.2605 Then, recognizing that his management practices had proven inadequate, Okechuku introduced a far-more stringent set of protocols to prevent diversion. ROA. 2463-2464, 2605-2609.

At trial, the defense's expert testified that Okechuku's practices did not show a physician acting outside the usual course of professional practice. ROA.2220–2391. And crucially, Okechuku's innocence was confirmed by the Texas Board of Medical Examiners, which conducted its own investigation of the clinic after Okechuku's indictment. The Board's report from that investigation (DE1) was harshly critical of Okechuku's recordkeeping and prescribing practices (ROA.1441–1442, 1793), but found no indication that Okechuku was prescribing outside the usual course of professional practice (ROA.2459), and concluded that he was not operating a "pill mill," ROA.1794, 1797, 2445–2456, 2460.

The Government's case therefore turned on whether Okechuku was a credulous dupe who let a pill-mill

scheme go unnoticed at his clinic, or a willing participant in a criminal conspiracy. And, as the Fifth Circuit noted, the "critical[]" evidence connecting Okechuku to the scheme came from Ezenagu—Okechuku's former friend and office manager. Pet. App. 31a. But Ezenagu had credibility problems. Ezenagu was alleged to be a far more central character in the scheme than Okechuku, but his testimony earned him a substantially reduced sentence: 70 months. ROA.1474. That compares with 300 months for Okechuku, Pet. App. 7a, who was eventually convicted of conspiring to unlawfully distribute narcotics and for using, carrying, and brandishing a firearm during and in relation to a drug-trafficking crime (based solely on the fact that Okechuku hired a licensed security guard to guard the clinic, which was located in a high-crime area). *Id.* at 5a. Because of Okechuku's age, this amounts to a life sentence.

II. The improper deliberate-ignorance instruction.

Because of the persuasive evidence exculpating Okechuku from any wrongdoing, the Government felt it necessary to ease its burden by requesting a deliberate-ignorance instruction. The Government made this intention plain during the charge conference. There, instead of outlining the evidence that would support the proper submission of a deliberate-ignorance theory, the Government argued that it was entitled to the instruction to undermine the "backbone" of the Defendant's case—that Okechuku was "oblivious" to what was going on around him—to explain to the jury that it could convict him even if he was. ROA.2773. The instruction submitted by the district court gave exactly that impression. It was included in a section entitled "General Definitions," as part of the general definition of "knowledge," and stated:

> The word "knowingly" as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Pet. App. 56a.

This instruction maximized the chances that Okechuku might be convicted for being merely "oblivious." It used the troublesome phrase "deliberately closing one's eyes"—which connoted passive, unconscious avoidance as much as willful, conscious contrivance. And while the instruction had a carve-out stating that "negligent, careless, or foolish" behavior was not enough to convict, it failed to provide a similar carve-out regarding recklessness. All of this built momentum to convince the jury that recklessness was enough for a crime.

Things steamrolled, however, when this problematic definition was filtered through the conspiracy charge, which instructed the jury that Okechuku was charged with, and thus could be convicted of, "knowingly or intentionally conspiring" to unlawfully distribute hydrocodone. Pet. App. 57a. While the elements of conspiracy

were outlined elsewhere in the charge, this problematic introductory phrasing created multiple problems. When the deliberate-ignorance instruction was plugged into this troublesome language in the charge, a straight read of the instruction allowed the jury to convict Okechuku even if it found he *consciously avoided* joining it. This was bad enough, but the problematic language also helped wear down the jury's intuition to the point that it might believe Okechuku could be a member of a conspiracy without actually recognizing it—making it even more likely that the jury would misread the instruction as requiring it to convict if it found Okechuku's behavior to be reckless.

During closing arguments, the Government's argument amplified the instruction's improper purpose. The Government's main plan was to convince the jury that Okechuku actually knew of the drug conspiracy. E.g., ROA.1131-32; GE15. But the Government also left hints that the jury could convict even if he was merely negligent or reckless. The Government highlighted the supposed tension between Okechuku's contention that he provided "great care" to his patents while he had a "pill-mill going on that [he] didn't know about." ROA.2822. And it emphasized the irony that "[e]ducated, smart people" like Okechuku and his co-defendants were taken in by a scheme involving homeless people. *Ibid.* The Government likewise emphasized how Okechuku's files were "a mess and completely inadequate," ROA.2827, making use of the fact that the case concerned diversion of legitimate narcotics, and thus required consideration of the practices of a "reasonable" and "professional medical practice," ROA.2834, a standard that the Government

used to emphasize how *unreasonable* and *unprofessional* Okechuku's practice supposedly was.

The Government submitted no evidence that would fit within a permissible use of the deliberate-ignorance instruction, nor did it make any effort to explain the instruction's proper use to the jury. Indeed, the Government made no mention of the instruction at all, leaving it to the jury to figure out its meaning on its own. Thus, without ever saying so publicly, the Government significantly magnified the likelihood that the jury would water down the *mens rea* required under the conspiracy instruction and convict on a lower standard.

III. The decision below

Okechuku appealed, challenging the sufficiency of the evidence to convict him, and contending that the deliberate-ignorance instruction was incompatible with the *mens rea* that the conspiracy charge required.

The Fifth Circuit began with Okechuku's sufficiency challenge. It emphasized several times the strict rules for such evidentiary review, noting that it is "highly deferential to the verdict," requiring the court to review the "facts in the light most favorable to government," and to "accept all credibility determinations made by the jury which tend to support the verdict"—all of which obliged the court to accept the Government's evidence at face value. Pet. App. 6a, 10a n.5. The court also stressed that it could not overturn the verdict even if it might have reached a different result: "Our inquiry is limited to whether the jury's verdict is reasonable, not whether we believe it to be correct." *Id.* at 6a. The court went on to highlight that it need not exclude "every reasonable hypothesis of innocence" to uphold Okechuku's conviction,

and that the jury was entitled to "choose among reasonable constructions of the evidence." *Id.* at 9a n.5.

The court determined there was sufficient evidence to support the verdict under this highly deferential standard. The panel placed particular weight on the "critical" testimony from ringleader Ezenagu's that Okechuku knew "from day one" that Jerry Reed was bringing illegitimate patients to the clinic. Pet. App. 31a. The court also noted evidence showing that Reed and other "drug dealers" could be seen at the clinic, along with statistical evidence from the government's expert that it would be "impossible" for a "provider practicing within the normal scope of professional practice" to see as many patients as the clinic did. *Id.* at 9a, 30a.

The court then turned to whether the deliberate ignorance instruction was appropriate for Okechuku and his co-defendants. It rejected Okechuku's challenge that a deliberate-ignorance instruction is "inappropriate in a conspiracy case" as foreclosed by circuit precedent. Pet. App. 28a. But the court nevertheless found that submitting the instruction was plain error. It began here by emphasizing that a deliberate-ignorance instruction is appropriate only in exceptionally narrow circumstances: where "the record supports inferences that (1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." *Id.* at 28a–29a (citing *United States* v. *Fuchs*, 467 F.3d 889, 901 (5th Cir. 2006)).

The court then repeated the caution it had given on other occasions "'against the use of the deliberate ignorance instruction,'" *id.* at 29a (quoting *United States* v. *Mendoza-Medina*, 346 F.3d 121, 127 (5th Cir. 2003)), be-

cause of the concern that "'once a jury learns that it can convict a defendant despite evidence of a lack of knowledge, it will be misled into thinking that it can convict based on negligent or reckless ignorance rather than intentional ignorance.'" *Id.* at 29a, quoting *United States* v. *Skilling*, 554 F.3d 529, 548–549 (5th Cir. 2009)). This danger that "the jury may erroneously apply a lesser mens rea requirement"—a "should have known standard of knowledge"—meant it was appropriate only in "rare instances." *Ibid.*

The court next determined that this case fell into the large body of cases in which the instruction was "inappropriate." Pet. App. 30a. It stated its longstanding circuit rule that "[w]here the government relies on evidence of actual knowledge, the deliberate ignorance instruction is not appropriate." *Ibid.* And it reiterated that "[t]he district court should not instruct the jury on deliberate ignorance when the evidence raises only the inferences that the defendant had actual knowledge or no knowledge at all of the facts in question." *Ibid.* It then determined that because the "government has failed to cite to specific evidence in the record that demonstrates that Okechuku or his co-defendants purposefully contrived to avoid learning of the pill mill activities," a "boilerplate deliberate ignorance instruction" was improper. *Ibid.*

Despite the obvious inappropriateness of the instruction, the court concluded its submission was necessarily harmless. It began with the circuit's rule that, regardless of how the instruction is framed, "the giving of the instruction is harmless where there is substantial evidence of actual knowledge." Pet. App. 32a (citing *United States* v. *Kuhrt*, 788 F.3d 403, 417 (5th Cir. 2015)). Given that

standard's permissiveness, and the court's prior rejection of Okechuku's sufficiency challenge, the court readily found it was met. Singling out the ringleader Ezenagu once again, the court determined that his testimony constituted sufficient evidence that Okechuku and his codefendants "knew of the illegal purposes for which Jerry Reed and others used the clinic's services." *Id.* at 32a. Because the court concluded that there was sufficient evidence to sustain the conviction on an actual-knowledge basis, it concluded that the instructional error did not merit reversal. Absent from this discussion, however, was any reflection on Ezenagu's lack of credibility, or any discussion of the countervailing evidence that significantly undermined the Government's case, because the circuit's prosecution-friendly standard left the court no room to consider these concerns.

But the court went on to "emphasize once again" as it had done in cases going back decades, "that the deliberate ignorance instruction should rarely be given" because of its risk that it might "confuse the jury." Pet. App. 32a-33a (citing, e.g., *United States* v. *Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992)). It cautioned that "the instruction is not a failsafe mechanism that the government can implement to relieve itself of proving the *mens rea* requirement of a crime," and that the Government should not treat it as a "backup supplement in a case that hinges on the defendant's actual knowledge." *Id.* at 33a.

The Court then specifically admonished the Government that "while this instance of misapplying that deliberate ignorance instruction amounted to harmless error, that will not always be the case," even though its rote application of this permissive standard left no doubt that it would *virtually always* be the case. *Id.* at 33a.

Okechuku sought rehearing. He criticized the court for focusing solely on the strength of the evidence in determining whether the instruction was harmful, arguing that the panel "should have considered the impact of the instruction" *itself* "on the jury's consideration" of the case in determining its harmfulness, particularly because of the troublesome way the charge was framed. Pet. for Reh'g 6.

Okechuku noted the instruction's fatal flaw in failing to make clear that the deliberate-ignorance instruction "should not be applied in determining whether Okuchuku knowingly agreed to the conspiratorial objective." Without considering the risks posed by this particular language, Okechuku explained, "the Court cannot say that the error was harmless." *Id.* at 12–13. The court denied rehearing. Pet. App. 68a.

REASONS FOR GRANTING THE WRIT

The traditional criteria of certworthiness are all present here. There is a fully developed and entrenched split on the issue—one recognized not only by commentators and appellate courts, but by the Government itself. And the case for review is only augmented by a second split that feeds into the first. These questions are right now leading to different outcomes in similar cases across jurisdictional lines. And this case presents a compelling one for resolving both splits, as the facts of this case highlight the flaws in the more permissive harmless-error standards, which require reviewing courts to affirm even when there are serious reasons to believe the deliberate-ignorance instruction may have affected the jury's verdict.

The issue is also important. Despite admonitions from various courts, abuse of the deliberate-ignorance instruction is only increasing—proof enough that its misuse provides prosecutors with a meaningful advantage and is unlikely to be harmless. And these abuses are most common in crimes with heightened scienter requirements—such as white-collar and drug conspiracy cases—where the instruction has proven especially helpful to overzealous prosecutors in blurring the line between criminals who know crime is occurring, and negligent or reckless managers who simply ought to know better. This area of the law will only become more important with the Government's announced intention to bring greater attention to drug crimes. And in the many courts using the too-permissive standard, nothing will stem this tide of abuse until courts are forced to recognize that improper submission of these instructions is rarely harmless.

I. This case presents two distinct circuit splits over the proper standards for determining whether an improper deliberate-ignorance submission merits reversal.

This petition presents two multifaceted circuit splits over the standards for determining whether erroneous submission of a deliberate-ignorance instruction merits reversal. One split concerns how strong the evidence of the defendant's actual knowledge must be to overcome the risk that he was convicted for being merely reckless or negligent. The second concerns whether the charge itself must be considered in determining the likelihood that it caused harm. Both sets of circuit conflicts merit the Court's attention.

A. The persistent, three-way split over the evidence needed to rule out harm from an improper deliberate-ignorance instruction.

The courts of appeals have formulated three different approaches on the first of these splits. Two circuits (the Eleventh and the Sixth) hold that submission of an improper deliberate-ignorance instruction is harmless *per se*. Six circuits (the First, Third, Fourth, Fifth, Tenth, and D.C.) hold such an instruction harmless whenever there is "sufficient" or "substantial" evidence of actual knowledge. And four circuits (the Second, Seventh, Eighth, and Ninth) require appellate courts to independently scrutinize the evidence of actual knowledge and find it "overwhelming" before finding this error harmless.

1. Per-se-*harmless circuits*

The theory that an improper deliberate-ignorance instruction is "harmless *per se*" first arose in the Eleventh Circuit in *United States* v. *Stone*, 9 F.3d 934, 939 (1993). There the Eleventh Circuit recognized the in inherent dangers in these instructions, and "cautioned the district courts" against giving them when the government's case rested on actual knowledge. *Id.* at 937 (citing *United States* v. *Rivera*, 944 F.2d 1563, 1570–1571 (11th Cir. 1991)). But drawing upon this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), and applying "the presumption that juries obey the court's instructions," the Eleventh Circuit concluded that juries were *certain* to follow charge instructions on the need for evidence to convict, meaning that the jury would *without doubt* follow the path to a proper verdict. 9 F.3d at 939. The Eleventh Circuit expressly recognized that this *per-se-*

harmlessness rule had by then been rejected by at least "the Fifth, Eighth, and Ninth Circuits." *Id.* at 939.

The Eleventh Circuit has adhered to *Stone* for over two decades, refusing to find reversible error in any subsequent case. Indeed, one study suggests the circuit's *per-se*-harmlessness rule is encouraging further error. This study revealed countless instances where the Eleventh Circuit found the instruction should not have been given but nonetheless excused it as harmless. *See* Justin C. From, *Avoiding Not-So-Harmless Errors: The Appropriate Standards for Appellate Review of Willful-Blindness Jury Instructions*, 97 Iowa L. Rev. 275, 293 & n.122 (2011).

The only other circuit to expressly adopt the *per-se*-harmlessness rule appears to be the Sixth, which expressly "register[ed] [its] disagreement with the Ninth Circuit," in doing so. *United States* v. *Mari*, 47 F.3d 782, 786 (1995). Following the pattern laid out in *Stone*, the Sixth Circuit "admonish[ed] the district courts against giving the deliberate ignorance instruction indiscriminately," because of its dangerous tendency to mislead. *Id.* at 787. Yet in the same breath, it held that giving its pattern deliberate-ignorance instruction under *any* circumstance is "harmless as a matter of law," *id.* at 783, declaring for all time its intention to treat an improper submission as "mere surplusage," *id.* at 786.

2. "Substantial" or "sufficient" evidence circuits

Six circuits hold that the erroneous submission of a deliberate-ignorance instruction is harmless whenever there is "substantial" or "sufficient" evidence of actual

knowledge—enough to survive a sufficiency-of-the-evidence challenge.

The Fifth Circuit's approach is typical. In *Mendoza-Medina*, 346 F.3d at 132–134, after determining that submission of a deliberate-ignorance instruction was improper, the court expressly rejected the Government's invitation to "establish a bright-line rule that whenever the evidence does not support the deliberate ignorance instruction there can be no harm," *id.* at 134, thereby registering its disagreement with the *per-se* rule. The court determined that "[w]e cannot assume that in every instance in which the evidence does not support the deliberate ignorance instruction the jury will disregard it," *ibid*, because such instructions "possess[] a danger of confusing the jury," and might lead it to convict "on a lesser negligence standard—that defendant *should* have been aware of the illegal conduct," *id.* at 132.

The rule the Fifth Circuit adopted, however, remained almost equally forgiving, excusing "an error in giving the deliberate ignorance instruction [as] harmless where there is substantial evidence of actual knowledge." *Ibid.* (internal quotations omitted). And the Fifth Circuit has since clarified that "substantial evidence" is merely enough evidence to sustain the verdict against a sufficiency-of-the-evidence attack. *United States* v. *Jones*, 664 F.3d 966, 979 (2011).

Five other circuits have adopted this same approach: rejecting a per-se-harmlessness rule, but still making the standard extraordinarily forgiving, ignoring the error whenever there is "sufficient" or "substantial" actual-knowledge evidence. E.g., *United States* v. *Garcia-Pastrana*, 584 F.3d 351, 379 n.36 (1st Cir. 2009) ("[A]ny such error was harmless because *** the evidence was

sufficient to support their direct knowledge."); *United States* v. *Patela*, 578 Fed. App'x 139, 144 (3d Cir. 2014) (error in "instruct[ing] the jury on willful blindness *** would have been harmless" where defendant did "not directly challenge the **sufficiency of the evidence** proving his actual knowledge"); *United States* v. *Leahy*, 445 F.3d 634, 654 n.15 (3d Cir. 2006), *abrogated on other grounds*, *Loughrin* v. *United States*, 134 S. Ct. 2384 (2014)) (**sufficiency** standard); *United States* v. *Lighty*, 616 F.3d 321, 378–379 (4th Cir. 2010) ("Harmless error will be found where there is **sufficient** evidence in the record of actual knowledge on the defendant's part."); *United States* v. *Anaya*, 727 F.3d 1043, 1060 (10th Cir. 2013) (finding error harmless because of "**substantial** evidence of [defendant's] knowing and voluntary" conduct); *United States* v. *Alston-Graves*, 435 F.3d 331, 342 (D.C. Cir. 2006) ("[E]rror in giving the deliberate ignorance instruction is *** harmless where there is **substantial** evidence of actual knowledge."). Reversals under this standard are exceedingly rare because, to prevail, defendants must win not one sufficiency challenge, but two, under both an actual-knowledge and deliberate-ignorance approach.

3. "Overwhelming Evidence" Circuits

In stark contrast, four circuits require "overwhelming evidence" of actual knowledge before improper submission of a deliberate-ignorance instruction can be ignored. *United States* v. *Macias*, 786 F.3d 1060 (2015), the Seventh Circuit's recent reversal in this context, is illuminating. Macias was charged with participating in a drug conspiracy by driving large sums of money across the border. He testified that he did not know the money was drug-related, believing it to be the proceeds from smuggling immigrants into the country. *Id.* at 1061. Much

of the government's case (like the Government's case here) rested on statistical evidence: It introduced expert testimony that the amount of money involved "greatly exceeded the sums involved in human smuggling." *Ibid.* The Seventh Circuit recognized that this might be enough for a sufficiency challenge: "The jury *could have* inferred from this that Macias knew he was working for drug smugglers." *Ibid.* (emphasis added). But the court concluded this evidence was not "overwhelming." *Id.* at 1063. And laying bare the same logic that guided the Government's thinking in this case, the court recognized that it was because the government "obviously *** lacked confidence that it could 'sell' such an inference to the jury" that it "pressed for the ostrich instruction." *Id.* at 1061. The court declined to find harmless error and reversed.

The Seventh Circuit's "overwhelming evidence" standard has led to reversals on other occasions. *E.g.*, *United* States v. *Ciesiolka*, 614 F.3d 347, 354–355 (2010) (warning that instruction can "improperly *** relieve the government of its burden of proof" by "enabl[ing] the jury to convict *** because it conclude[s] that [the defendant] was suspicious and indifferent" rather than possessing the required *mens rea*); *United States* v. *L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009) (reversing corporate prosecution and warning that instruction can "significantly 'water down' the willfulness requirement *** to a degree that cannot be considered harmless").

The Ninth Circuit has likewise endorsed an "overwhelming evidence" standard: "If the record accommodates a construction of events that supports a guilty verdict, but it does not compel such a construction, then reversal is necessary." *United States* v. *Sanchez-Robles*, 927

F.2d 1070, 1075 (9th Cir. 1991) (internal quotation omitted). The Ninth Circuit's skepticism about deliberate-ignorance instructions can be traced to then-Judge Kennedy's influential dissent in *Jewell*, 532 F.2d at 705–706, and his circuit opinion reversing a conviction on this ground in *United States* v. *Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (1985). As Justice Kennedy put it, when the evidence is insufficient to support deliberate ignorance but the instruction is given anyway, "the jury might impermissibly infer guilty knowledge on the basis of mere negligence." *Ibid.* The Ninth Circuit has reversed convictions on several occasions, where it could not "say that the evidence against" the defendant "was so overwhelming as to compel a guilty verdict." *Sanchez-Robles*, 927 F.2d at 1075; see also, e.g., *United States* v. *Aguilar*, 80 F.3d 329, 331–334 (9th Cir. 1996) (en banc) (finding error not harmless even after rejecting defendant's sufficiency challenge).

The Eighth Circuit has likewise adopted the overwhelming-evidence standard, e.g., *United States* v. *Covington*, 133 F.3d 639, 645 (1998), and reversed convictions under it. Most notably in *United States* v. *Barnhart*, 979 F.2d 647 (1992), a case involving complicated financial fraud, the court expressly recognized that the jury could have found the defendant guilty for "fail[ing] to discover (and prevent) [another wrongdoer's] *** execution of the scheme," given the complicated accounting standards at issue. *Id.* at 653. *Barnhart* found that the evidence came down to a "credibility determination" between the defendant and the other wrongdoer who testified against him, and in clear conflict with more permissive circuits, it held that while that testimony had to be credited for evidentiary-sufficiency purposes, it would not be blindly ac-

cepted in the instructional-error context. *See id.* at 653 & n.1.

The Second Circuit has consistently endorsed the same standard. See, e.g., *United States* v. *Quinones*, 635 F.3d 590, 595 (2011) ("Any error in giving a conscious avoidance instruction is harmless where there is 'overwhelming evidence' that the defendants possessed the requisite knowledge.") (quoting *United States* v. *Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

* * *

There is undoubtedly a square, fully developed, three-way circuit split on this issue. The circuits have noted their disagreement, and commentators have as well. *See* From 291–297 (outlining "the circuit split over the standards for harmless-error review of willful-blindness instructions"). Even the Government has twice acknowledged the existence of this split, despite quibbling about its precise contours. BIO 25–27, *Geisen* v. *United States*, No. 10-720; BIO 16–18, *Lopez* v. *United States*, Nos. 15-517, 15-6608.

This split is also fully developed and entrenched. Every circuit has weighed in. The issue has arisen in hundreds of cases over the past decades, and the view in most circuits has remained unchanged. The petitioner in *Lopez*, No. 15-517 even sought rehearing on *this very question*, but the court nonetheless denied review. Nothing will be gained from further percolation.

This standard is also highly likely to make a difference in many cases, as vividly demonstrated by the contrast between the result in this case and those in *Macias* and *Barnard*. Those courts saw similar evidence—both statistical and testimonial—but came to different conclu-

sions: Those defendants got new trials, while Okechuku's conviction was affirmed.

This is as complete and well-developed as any split gets, especially on a question as naturally fact-specific as harmless-error review. The time is right to grant certiorari to resolve this conflict.

B. The second split on whether the charge's phrasing impacts the likelihood of harm.

In addition to the conflict over the evidence needed to overcome the likelihood of harm from an improper deliberate-ignorance instruction, the circuits also diverge on whether the charge itself must be considered in determining its likelihood for causing harm.

1. At least two circuits make consideration of the charge an explicit part of the harmless-error analysis. In the Tenth Circuit, it is one half of a two-part harmlessness inquiry, the first being the "wording of the instruction given," along with whether "other instructions negate any adverse effects of the erroneous deliberate ignorance instruction;" the second being "the quantum of evidence against the defendant." *United States* v. *Barbee*, 968 F.2d 1026, 1033 (10th Cir. 1992).[1]

[1] The Tenth Circuit has since softened its stance on the strength of the evidence needed to rule out harmful error—moving from the "overwhelming" evidence category into a more lenient category, *United States* v. *Hanzlicek*, 187 F.3d 1228, 1236 (1999), but the circuit has retained concern about the charge language in evaluating harm. See *United States* v. *Berry*, 717 F.3d 823 (2013) (citing *Barbee* and focusing on language in instruction both in deciding that the instruction was proper and in determining that it mitigated against any potential harm).

In the Eleventh Circuit, the inclusion of specific language—beyond "the proper legal standards" for a deliberate-ignorance instruction—is necessary to enjoy the circuit's *per-se* harmlessness rule. *See United States* v. *Garcia-Benites*, 702 Fed. App'x 818, 824 (2017) (per curiam) ("We presume the jury did not convict 'on a deliberate ignorance theory for which there was insufficient evidence' *so long as* *** the instruction *** did not apply if there was insufficient evidence to prove deliberate ignorance beyond a reasonable doubt'") (quoting *Stone*, 9 F.3d at 941–942, emphasis added).

Beyond influencing the formulation of legal standards, courts' consideration of charge language has also influenced results in specific cases. It led, for instance, to the Tenth Circuit's reversal in *United States* v. *Hilliard*, 31 F.3d 1509 (1994), under circumstances remarkably similar to this case. *Hilliard* involved a bank executive who was convicted of bank fraud for improper practices relating to certain inter-bank transfers over anticipated tax liabilities—practices he had been warned against by the relevant civil regulatory body, the Federal Home Loan Bank Board. *Id.* at 1511–1512. The court concluded that a deliberate ignorance instruction was improper because the bank executive's knowledge—or lack thereof—of his potential civil liability did not bear on the scienter required for bank fraud. *Id.* at 1514–1516. And in analyzing whether the error merited reversal, the court emphasized that the charge language followed the law. *Id.* at 1516–1517. But it was still "troubled by the absence of any limiting instructions concerning evidence of civil regulatory violations," because the absence of that carveout allowed the jury to draw improper inferences from the regulator's warnings about the bank executive's

knowledge. *Id.* at 1517. The court concluded the instruction was not harmless, and reversed.

The Fifth Circuit, by contrast, is insensitive to the ways in which specific charge language affects the problematic inferences to be drawn from an improper deliberate-ignorance instruction. The harmlessness inquiry in the Fifth Circuit is framed solely in terms of the strength of the evidence, even when challenges to the charge language have been raised. *United States* v. *Kuhrt*, 788 F.3d 403, 416–417 (5th Cir. 2015). And the Fifth Circuit refused to consider the language of the charge in this case in determining its harmfulness.

2. This insensitivity to the consequences from specific charge language has special consequences in conspiracy cases that has led to still more division among the circuits. The Second Circuit has long recognized that there are limits on the ways deliberate-ignorance instructions may be used in conspiracy cases—even when evidence justifying submission of such an instruction exists. That circuit holds that a deliberate-ignorance instruction may be permissible to show the defendant's "knowledge of the conspiracy's unlawful goals," but not to show "intent to participate in a conspiracy," *United States* v. *Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000), recognizing the inherent contradiction in the idea that a person could "consciously avoid participating in a conspiracy and be a member of the conspiracy." *United States* v. *Mankani*, 738 F.2d 538, 547 & n.1 (2d Cir. 1984).

The Second Circuit's distinction has been adopted by the First, Sixth, Seventh, and Eleventh Circuits. *United States* v. *Brandon*, 17 F.3d 409, 453 n.75 (1st Cir. 1994) (affirming conviction because willful-blindness instruction "had to do with the finding that 'defendant acted

knowingly' and not with a finding that defendant willfully joined the conspiracy"); *United States* v. *Warshawsky*, 20 F.3d 204, 211 (6th Cir. 1994) (affirming because deliberate-ignorance instruction was offered to prove defendants' "knowledge of the aims of the conspiracy," not to prove the existence of an agreement); *United States* v. *Kehm*, 799 F.2d 354, 362 (7th Cir. 1986) (citing the Second Circuit distinction with approval); *United States* v. *Willner*, 795 F.3d 1297, 1316 (11th Cir. 2015) ("agree[ing] with the other circuits that have drawn this distinction").

Yet the Fifth Circuit has rejected these limits on the permissible uses of deliberate-ignorance instructions in conspiracy cases, on the theory that "[t]o the extent that the instruction is merely a way of allowing the jury to arrive at the conclusion that the defendant knew the unlawful purpose of the conspiracy, it is hardly inconsistent with a finding that the defendant intended to further the unlawful purpose." See Pet. App. 28a, (quoting *United States* v. *Inv. Enters.*, 10 F.3d 263, 269 (5th Cir. 1993)). The Fifth Circuit has thus rejected challenges to charges, like this one, that allow the instruction to be applied to determine if the defendant had joined the conspiracy. The Fifth Circuit is joined in this conclusion by the Third Circuit. *United States v. Wert-Ruiz*, 228 F.3d 250, 255 n.3 (2000) (allowing conspiracy conviction if defendant "willfully blinded himself to the fact that a criminal conspiracy existed") (internal quotation omitted).

The logical inconsistency permitted in these circuits only increases the risk of harm from an improperly submitted deliberate-ignorance instruction. Such instructions larded with contradictions unmoor jurors from their instincts that it ought to be hard to unintentionally join a criminal conspiracy, thereby making the next logical leap

to convicting for mere recklessness that much easier. It also means that in certain circuits instructions are permitted to stand that would be illegal in other circuits, even if given with evidentiary support.

II. The standards applied below are wrong and important to correct.

Certiorari is particularly warranted because the standards applied below are plainly incorrect and essential to correct. The Fifth Circuit's stance that improper deliberate-ignorance instructions are excused whenever the record contains some evidence of actual knowledge is fundamentally incompatible with the basic concept of harmless error. Because submission of an erroneous deliberate-ignorance instruction improperly relieves the government of its burden of proving the requisite scienter beyond a reasonable doubt, *Ciesiolka*, 614 F.3d at 354, it is a violation of Due Process, *Sandstrom* v. *Montana*, 442 U.S. 510, 521 (1979), that that is harmless only if it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" regardless of the erroneous submission. *United States* v. *Hasting*, 461 U.S. 499, 510–511 (1983). The only way to achieve that level of certainty—to be sure beyond a reasonable doubt that the improper submission caused no harm—is to demand evidence that would *compel* the jury to conclude the defendant had knowledge of the criminal conduct. Demanding anything less will always leave doubt over whether the jury was properly guided by that evidence, or improperly influenced by the erroneously given instruction.

The Fifth Circuit is likewise wrong to eschew consideration of the charge language itself in determining whether it caused harm. That is simply not the way this Court looks at error. When the Court confronts error

that may have distorted the jury's consideration of the case, it takes that that distortion into account in the harmless-error analysis. For example, when considering the harm that results when a court unconstitutionally excludes defense evidence from a case, this Court did not simply ask whether the properly admitted evidence is so overwhelming as to compel a conviction. Rather, it determined "the correct inquiry is whether, assuming that the damaging potential of the [excluded evidence] were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986).

The standard applied in the *per-se* harmless circuits is still worse. Their never-reverse stance pushes this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), and the presumption that juries follow instructions, way too far. The defendant in *Griffin* was convicted of a conspiracy with two objects: (1) defrauding the IRS, and (2) defrauding the DEA. The jury was instructed that it could convict if Griffin had participated in either object, and it then convicted Griffin on a general verdict. Thereafter, one of the objects (defrauding the DEA) was found to lack sufficient evidence. This Court nonetheless affirmed the general verdict, holding that the jury could be presumed to have disregarded the conspiracy object for which evidence was lacking. *Id.* at 57–60. *Griffin* thus holds that courts should assume that a jury faced with two theories for conviction—one supported by the evidence, the other not—will always be guided by the instructions to convict under the proper theory.

That rule may work for pure evidentiary-sufficiency questions. Juries are institutionally "well equipped to analyze the evidence," *Griffin*, 502 U.S. at 60—that is the

foundation of our entire jury trial system—so trusting them to work through the evidence, guided by the court's instructions, usually works fine. But extending that rule to deliberate-ignorance instructions, *Stone,* 9 F.3d at 938–941, makes absolutely no sense. An erroneously submitted deliberate-ignorance instruction is not simply lacking in evidence—it is no mere empty vessel. It is a time bomb, an instruction that is inherently dangerous whenever given, and one that invites, if not compels, legally incorrect inferences when improperly given. A conscientious jury seeking to follow the court's instructions, but lacking actual evidence of deliberate ignorance, will be *forced* into using the instruction to reduce the required *mens rea*, leading to the exact problem Justice Kennedy observed in *Jewell* and *Pacific Hide*. It is thus an error of law, and *Griffin* makes clear, when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." 502 U.S. at 59. (emphasis added). The presumption that juries will follow legally correct instructions thus falls thus apart when the instructions permit legally incorrect inferences, or are legally incorrect themselves, as in this case.

Still more fundamentally, a core contradiction lies at the heart of both the "*per-se*" and "substantial evidence" standards. The circuits employing both standards recognize the inherent dangers in deliberate-ignorance instructions. Yet these circuits view such instructions as either always harmless or at least harmless whenever a conviction could be sustained on an actual-knowledge theory—mere surplusage. An instruction cannot be both completely harmless and inherently dangerous at the

same time. And prosecutors' love for these instructions shows that the latter notion is clearly the better one.

Indeed, the implicit message that the more forgiving circuits are sending to prosecutors—that even flagrant abuse of the deliberate-ignorance instruction will virtually always be tolerated—fosters terrible incentives. Prosecutors will always want to press for a deliberate-ignorance instruction, especially when their case is weak. The only thing that could hold them back is the fear that the conviction they might win could be reversed. Removing that risk makes abuse routine. For example, since adopting its *per-se*-harmlessness rule, the Eleventh Circuit has repeatedly faced erroneous instructions that prosecutors requested and received, but it has done nothing about it. From at 293 & n.122. And other evidence suggests "[t]he use of willful blindness instructions has increased dramatically in recent years." Shawn D. Rodriguez, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror*, 30 U. Pa. J. Int'l L. 691, 720–722 (2008). As one commentator explains, "the most logical explanation for the frequency with which prosecutors request willful-blindness instructions in the Eleventh Circuit"—and elsewhere—is that they "apparently believe they can gain an advantage at trial by requesting inappropriate willful-blindness instructions." From at 299. If the permissive standards employed in other circuits are not overturned, this trend will only continue.

Further, it is clear that the standard makes a difference, and some defendants are being sent to prison, based on the circuit in which they stand trial. This is clear from the disparate results in similar cases outlined above. But it is also vividly illustrated in microcosm

through the Tenth Circuit's experience. In the early 1990s, the Tenth Circuit applied the "overwhelming evidence" standard and reversed at least two convictions in cases where deliberate-ignorance instructions were erroneously given, including one where the jury might have "convict[ed] a defendant who merely should have known about the criminal venture." See *Hilliard*, 31 F.3d at 1517; see also *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1412–1413 (10th Cir. 1991). In 1999, however, the Tenth Circuit moved to a more lenient standard. See *Hanzlicek*, 187 F.3d at 1236 (10th Cir. 1999). It has not reversed since. The message is unavoidable: The standard matters.

That is not only unfair to wrongfully convicted defendants who are subject to harmless-error standards they can never overcome, it also affects the integrity of the courts. It is embarrassing to believe that prosecutors would explicitly ask for an instruction for an obviously impermissible purpose—to sow the very kind of confusion that courts have repeatedly identified. But that is exactly what the Government did in this case, and what prosecutors keep on doing around the country. That is precisely the kind of issue that merits this Court's attention, which is why commentators have called on the Court to address it. From at 331.

Further, this is an issue that is likely to come up in many kinds of cases. As commentators have noted, these instructions are especially enticing in white-collar criminal prosecutions, because these cases involve "heightened mental-state requirements," which defendants will virtually always contest. From at 300. Indeed, "willful-blindness instructions have played a prominent role in many recent high profile white collar prosecutions, in-

cluding the trials of Jeffrey Skilling, Kenneth Lay, Bernard Ebbers, and Conrad Black." Brune & Edelstein, *Jury Instructions: Key Topics in Federal White Collar Cases*, Champion, Sept./Oct. 2012 at 26–27. For similar reasons, deliberate-ignorance instructions also figure prominently in many drug-conspiracy cases—an issue that only takes on added importance in the context of the Department of Justice's recent promise to increase drug prosecutions for low-level offenders by "charg[ing] and pursu[ing] the most serious, readily provable offenses" in all cases. Department of Justice, Memorandum for all Federal Prosecutors (May 10, 2017), <https://goo.gl/1gXEoq>. That will lead to more uses, and abuses, of deliberate-ignorance instructions, and more convictions upheld under circumstances where the instructions may have caused real harm. The error below is thus plainly important enough to merit this Court's intervention.

III. This case is a compelling vehicle to decide these issues.

This case presents the ideal vehicle to address this issue. It arises in the general setting in which erroneous use of the instructions is likely to be harmful—a drug conspiracy where the key evidence connecting the defendant to the crime was the testimony of an informant trading his testimony for a lower sentence. The jury would not have been compelled to believe this troublesome testimony. It could have easily convicted Okechuku for being a bad doctor or business manager, guided along by a deliberate-ignorance instruction without any legitimate application to the case. And the particular language of the charge only increased the likelihood that this would happen. This case also comes from one of the cir-

cuits employing a lesser standard under which both of these problematic aspects of the case were shielded from view. This case therefore presents an opportunity to resolve several separate splits together and correct an erroneous application of the harmless-error standard. It also presents an attractive set of facts through which to mark the boundaries between the right and wrong approach.

While the Court has declined to take up these issues in the past, this petition presents a superior vehicle to the those that were denied. Denials have occurred only twice for paid, publicly available petitions. One occurred while the Court was shorthanded after Justice Scalia's passing. *Lopez*, No. 15-517. And both previous denials came in cases with serious vehicle problems: In *Lopez*, review was hampered by the fact that the court of appeals did not actually decide whether the instruction was given in error; it merely addressed harmless error, *arguendo*, as an alternative reason to reject the defendant's challenge. BIO 25, *Lopez* v. *United States*, No. 15-517. In the other denial, the issue was the second question presented, and logically dependent on the Court first granting and reversing on the first, which was splitless and factbound. BIO 15, *Geisen* v. *United States*, No. 10-720.

This case presents no similar vehicle problems. The Court here found plain error on the issue presented, and the petition perfectly highlights multiple splits that can be resolved together. This case is thus a strong vehicle through which to resolve these splits and correct the errors below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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