No. 17-5450

IN THE SUPREME COURT OF THE UNITED STATES

SAQUAWN HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. A Criminal Conviction Cannot Be Affirmed Based Upon An Untried Theory of Guilt.

In attempting to reconcile *Neder* with *Cole*, *McCormick*, and the wealth of authority relied upon by Petitioner, the government asserts that there are two categories of cases, the first subject to harmless error analysis and the second resulting in structural error: (1) mere instructional errors which may be harmless under *Neder*, and (2) errors that would require affirmance of a "'separate, distinct, and substantially different offense' from the one tried before the jury," BIO 10, 13, which are harmful per se. This Court has never adopted this dividing line, but more importantly, the government does not articulate how to apply it or offer any coherent explanation of how Petitioner's case does not satisfy this second category of structural errors. *See infra* Part A.2. Moreover, the government does not dispute that this case is a prime candidate for this Court to explain how *Neder* dovetails with the authorities relied on by Petitioner, even if the government's attempted reconciliation of those cases were correct. In this case, Petitioner's murder conviction was affirmed based on three additional elements that had never previously been recognized by the Court of Appeals and that were omitted from the evidence, arguments, and jury instructions in his case. If that does not constitute affirmance of a "separate, distinct, and substantially different offense," it is tough to imagine what would. While Petitioner offers the more coherent reconciliation of *Neder* and this Court's cases prohibiting "affirm[ing] a criminal conviction on the basis of a theory not presented" at trial, *Chiarella v. United States*, 445 U.S. 222, 236 (1980), regardless of the merits, this case provides an ideal vehicle for reconciling those cases.

1. Petitioner's murder conviction was affirmed based on a theory of criminal liability that was not the subject of evidence at his trial and that Petitioner had no motive or opportunity to contest as to three distinct elements. That violates this Court's holdings that an appellate court

cannot affirm a criminal conviction based on a theory not presented to any fact-finder at trial. *Id.*; *Dunn v. United States*, 442 U.S. 100, 107 (1979) ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *Rewis v. United States*, 401 U.S. 808, 814 (1971) ("[W]e need not rule on this part of the Government's theory because it is not the interpretation . . . under which petitioners were convicted."); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.").

Neder v. United States, 527 U.S. 1 (1999) did not expressly or implicitly undercut this ironclad rule. In *Neder*, a bare 5-4 majority of this Court explained that a jury instruction omitting an element of a criminal offense might be harmless error in a "narrow class of cases" where the defendant was put on notice of the "omitted element" decided by a judge, yet it "was uncontested and supported by overwhelming evidence." *Id.* at 17 & n.2. *Neder*, by its terms and by its logic, does not extend harmless error review to cases like the present one where the defendant had no notice, motive, or opportunity to defend against omitted elements, because in such cases reviewing the existing record for harmlessness is an absurd exercise. The error "pervades the entire trial," *United States v. Gonzalez-Lopez*, 548 U.S 140, 150 (2006), and the nature of the error precludes any finding of harmlessness. Where a defendant has no notice, motive, or opportunity to contest the omitted elements, an appellate court could never properly judge the effect of the error to be harmless because the defendant had no chance to present his evidence or argument on the omitted issues.

The government does not dispute that Petitioner had no notice, motive, or opportunity to contest whether he shared a "community of purpose" with the fatal shooter,[1] Robert Foreman,

[1] The government also does not dispute that Petitioner had no notice or opportunity to contest

and it cannot even begin to explain how the error of omitting that question from the entirety of his trial—from investigation to opening statements to evidence to closing arguments to jury instructions—could be intelligently reviewed for harmlessness. Does the appellate court speculate as to what evidence and argument the defendant might have presented had he been given the opportunity and a reason to do so, and if so, how does the appellate court go about ordaining what a defendant might have done in contesting an element that was irrelevant in the trial he actually received? These questions are not capable of sensible answers because this type of error, in which the defendant was deprived of every facet of a trial as to core elements of the offense, does not resemble the narrow category of mere instructional errors addressed in *Neder*. Instead, it is exactly the type of error recognized by this Court in *Chiarella*, *Dunn*, *McCormick* and *Cole* as structural: "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991).

The United States has itself advanced Petitioner's position in prior merits briefing before this Court, where it has embraced this reconciliation of *Neder* with *Cole* and its progeny. In *United States v. Cotton*, 535 U.S. 625 (2002), the United States forcefully (and successfully) argued that the pertinent distinction that justified harmless error review in *Neder*, while the errors in *Cole*, *McCormick*, and *Dunn* were treated as structural, was the fact that, in *Neder*, "the defendant had adequate notice of the [omitted element] and opportunity to contest it." *See* Reply Brief for the United States at 8, *United States v. Cotton*, No. 01-687 (April 8, 2002). It described

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two additional omitted elements—incitement and foreseeability—that the Court of Appeals noted as essential to his liability. *See* Pet. App. 74-75 (government must show that defendant "foreseeably ... incited action by a third party who shared in the[] community of purpose [for] aiding-and-abetting liability.'"). It does contend that the Court of Appeals "found 'instructional error' based on only one omitted element," *i.e.* the "community of purpose" element, BIO 8, but that is wrong as discussed further below.

Cole as "quite different" from *Neder* because it was not "a case in which ... the defendant had notice that the fact was at issue and a meaningful opportunity to contest it." *Id.* at 13-14. The United States likewise distinguished *Dunn* as a case meriting automatic reversal because the defendant did not have "notice that the [omitted element] [was] at issue and [thus lacked] an opportunity to contest it." *Id.* at 14 n.9. This case falls squarely in that category of errors that the United States recognized as structural in its merits briefing in *Cotton*, because Petitioner lacked "notice" that the omitted elements were at issue and had no "meaningful opportunity" to contest the omitted elements at trial. *Id.* at 13-14.

2. The United States now offers a different way of harmonizing the cases. It asserts that instructional errors are always reviewed for harmless error, except that an appellate court can never "affirm a conviction based on a 'separate, distinct, and substantially different offense' from the one tried before the jury." BIO 10, 13. That is how it attempts to distinguish this Court's opinions in *Cole*, *Chiarella*, *Dunn*, and *Jackson*, along with a handful of federal appellate and state court holdings relied upon by Petitioner. BIO 10-11 n.3, 13 n.6.[2] But it makes no effort to articulate any sort of principle animating that dividing line or to explain how it might be applied, and it does little more than assert that Petitioner has not satisfied the

[2] The government offers a different distinction of *McCormick*, where this Court made clear that "[a]ppellate courts are not permitted to affirm convictions on" theories that were not "presented to the jury." 500 U.S. at 270-71 n.8. The government responds is that it "had not raised any claim of harmless error" in *McCormick*. BIO 10 n.1. That is both false and beside the point where a dissenting Justice argued that the error was harmless but the majority rejected that view in favor of a categorical rule that an appellate court may not affirm a conviction based "on legal and factual theories never tried before the jury." *Compare* 500 U.S. at 270 n.8, *with id.* at 289 n.4 (Stevens, J., dissenting) (arguing that a "harmless-error analysis" warranted affirming). Indeed, the government did in fact raise a claim of harmlessness at oral argument in *McCormick*, where in response to questioning on the topic, it parroted the harmless error argument it had made in its briefing before the Fourth Circuit Court of Appeals in the case. Transcript of Oral Argument at 39-40 (Jan. 8, 1991) ("Q: You made an argument to the effect that whatever error was made in the campaign contribution section of the instructions was harmless..."). The majority rejected that argument on its merits, and made no suggestion that it had been waived.

government's own test in this case.

Even if the government's newfound reconciliation of the two strands of case law were correct, this case warrants reversal under the government's approach and it presents an ideal vehicle for this Court to elucidate and apply the rule the government articulates. The government does not dispute that, from the outset of trial through the evidence and jury instructions, the trial court erroneously found that the only thing the government had to establish to hold Petitioner liable for murder was that, with the requisite intent, he fired a weapon at or around the same time as the fatal shooter, Foreman. Pet. 2, 8, 12. The Court of Appeals unanimously rejected that theory of aiding and abetting liability, but recognized for the first time an entirely new form of accomplice liability that included three additional elements that were wholly omitted from the evidence, argument, and instructions at Petitioner's trial: whether (1) Petitioner shared a "community of purpose" with Foreman, (2) whether Petitioner incited Foreman's shooting, and (3) whether Foreman's intervening shooting was "foreseeable." Pet. App. 74-75. The addition of three new elements that share no similarities to any of the elements Petitioner's jury was actually instructed on clearly creates a "separate, distinct, and substantially different offense" from the one tried to Petitioner's jury, thereby satisfying the government's own proposed test.

The government offers two counterpoints.

a. First, while it does not dispute that Petitioner's convictions should be reversed if three elements were omitted from his jury instructions,[3] it contests that factual description of the Court

[3] A bare counting of omitted elements should be of little import, and the more principled approach is one that focuses not on some raw number of omitted elements but on whether the defendant had notice and an opportunity to contest the omitted element or elements. If so, as in *Neder*, then appellate courts can conduct a review for harmless error; but if not, the error requires reversal without further inquiry. But to the extent the government places importance on the raw

of Appeals' ruling. BIO 8. The government insists that the error recognized by the Court of Appeals was "based on only one omitted element," the "community of purpose" element. *Id.* That is wrong. The Court of Appeals was clear that, in addition to the omission of a "community of purpose" element, a properly instructed jury likewise was required to find that Petitioner "incited action by a third party" and did so "foreseeably," Pet. App. 74-75, and there is not a whiff of either of those elements in the jury instructions. Pet. App. 55 (recounting jury instructions). The Court stressed these two additional omitted elements throughout its opinion. Pet. App. 77 ("looking to [1] the foreseeability to the defendant that his criminal conduct [2] will incite participation by a third party [3] acting pursuant to a community of purpose"); *id.* at 73 (Petitioner "[1] reasonably knew that [his] actions [2] would incite..."); *id.* at 75 n.27 (aiding and abetting liability applies when it is "[1] reasonably certain that his or her actions [2] will incite"). The citation the government offers to support its contrary assertion simply says that omitting the "community of purpose" element from the jury instructions was error, BIO 8 (citing Pet. App.

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number of omitted elements, that test too requires reversal here. *Neder*, by its own terms, limited its harmless error analysis to cases where just one element is omitted from the jury's instructions, adopting a "harmless-error analysis [in] cases involving improper instructions on a *single element* of the offense." *Neder*, 527 U.S. at 9 (emphasis added). In his dissent, Justice Scalia decried the majority's approach, charging that "we do not know, when the Court's opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty." *Id.* at 33. But the majority disagreed, retorting that the Court's "course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." *Id.* at 17 n.2. Indeed, the United States stressed in *Neder* that it advocated for a harmless error analysis only when a single element of the offense was omitted from instructions. *See* Brief for the United States at 7 (Jan. 4, 1999) ("instructional errors that affect *only a single element*" are not structural); *id.* at 13 ("The type of error at issue here—an error in the jury instructions involving *only a single element of an offense*—bears no relation to the pervasive and fundamental errors that the Court has found intrinsically harmful."); *id.* at 22 ("[T]he instructional omission or misdescription of a *single element* does not vitiate all the jury's findings."); *id.* at 24 ("[I]nstructional errors affecting the definition of *a single element* are properly subject to a case-specific inquiry into harmlessness") (all emphases added). If the *Neder* majority accurately described itself as not being in for the full "pound" with which Justice Scalia charged it, and that the United States disavowed, then this case is an easy reversal.

86), it in no way suggests this was the only omitted element. The citations above make clear, to the contrary, that three elements were omitted from the instructions.

Moreover, the government does not suggest that the omission of a single element cannot satisfy its test for structural error, i.e., that one omitted element might affect a "substantial" change to the charged offense. In both *McCormick* and *Cole*—as with virtually every case Petitioner relies upon—just one element was omitted from the jury instructions: in *McCormick*, it was the omission of a quid pro quo element from the jury instructions for a Hobbs Act violation, 500 U.S. at 274; in *Cole*, it was the omission of a "force or violence" element found in section 1 of the Arkansas anti-strike-violence Act but absent from section 2. 333 U.S. at 198-99 (section 2 requires an "unlawful assemblage," but a section 1 offense requires "force or violence" that the jury was not instructed on). The government does not explain how omitting a "community of purpose" element from Petitioner's trial does not, standing alone, constitute a substantial change in the offense just as in *Cole* and *McCormick*.

b. Second, the government contends that Petitioner's convictions were not affirmed based on a "separate, distinct, and substantially different offense" than the one he was tried on because the Court of Appeals described both as versions of "aiding-and-abetting" liability. BIO at 11. That superficial label cannot possibly matter, much less be of dispositive significance. The theory of liability affirmed by the trial court does not remotely resemble the one actually tried to the jury; the theory of liability put to the jury required a mere coincidence of action between Petitioner and Foreman, whereas the theory upon which Petitioner's convictions were affirmed required three newly announced additional elements that do not resemble anything at issue at trial. That the Court of Appeals happened to describe its newly-minted theory of vicarious liability as aiding-and-abetting liability does not alter the fact that adding three new

elements creates a "separate, distinct, and substantially different" offense from the one tried.

For instance, in *Cole* and *McCormick*, the theory of liability affirmed by the appellate court might have been broadly characterized as the same crime as the one put to the jury. In *Cole* it was a violation of Arkansas' anti-strike violence statute that was both put to the jury and affirmed on appeal, and in *McCormick* it was a violation of the Hobbs Act both put to the jury and affirmed on appeal. What makes an offense affirmed on appeal "separate and distinct" from the one presented at trial—if there is any content to this test the government proposes—must be the omission or material alteration of its essential elements. Perhaps what the government means, then, is that appellate courts cannot affirm a conviction based on different *statutory* elements than what was tried at trial, but are free to affirm based on different *common law* elements when a theory of vicarious liability—such as conspiracy or aiding and abetting liability—are at issue.[4] It offers no support or rationale for that unprincipled position, and it plainly contravenes this Court's holdings that appellate courts cannot affirm convictions for the exact same offense when tried "on the basis of a theory not presented to the jury." *Chiarella*, 445 U.S. at 236. That view would also contravene this Court's clear holdings that an appellate court cannot affirm on a common-law theory of liability, such as *Pinkerton* conspiracy liability, unless that theory was properly instructed to the jury. *See Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949) ("A verdict on [a conspiracy] theory requires submission of [that theory] to the jury."); *see also United States v. Brown*, 823 F.2d 591, 599 (D.C. Cir. 1987) ("The Supreme Court has stated specifically that the *Pinkerton* doctrine will not support a conviction unless the court has given the jury a *Pinkerton* instruction."); *Wilson-Bey v. United States*, 903 A.2d 818,

[4] The government's use of scare quotes to subtly impugn Petitioner's use of the phrase "theory of liability," BIO 11, hints at such a baseless distinction, though the phrase comes from this Court's on-point pronouncements on this issue. *See Chiarella*, 445 U.S. at 234 (refusing to entertain "such a new and different *theory of liability*" on appeal) (emphasis added).

842 (D.C. 2006) (en banc) (same).

To the extent labels matter, as the government suggests, the Court of Appeals' theory of liability is more properly understood as a watered-down version of conspiracy liability, not aiding-and-abetting liability at all. As the dissent below pointed out, the question of "community of purpose" is foreign to aiding and abetting liability and sounds conspicuously like a diluted conspiratorial agreement: "The effect [of the majority's theory] is to uphold [Petitioner] and Tann's convictions on a theory that they were Foreman's co-conspirators rather than a theory that they were his aiders and abettors." Pet. App. 223 (Glickman, J., dissenting); *see also id.* at 222 ("My colleagues' theory substitutes 'community of purpose' for the conspiratorial agreement that is the *sine qua non* of *Pinkerton*."); *see also Iannelli v. United States*, 420 U.S. 770, 774 n.8 (1975) (describing "community of purpose" as part of "the theory upon which conspiracies are punished") (quoting *Gebardi v. United States*, 287 U.S. 112, 121-22 (1932)).

In short, on its own terms *Neder* is limited to a "narrow class of cases" where the defendant had notice of the omitted element and thus had the motive and opportunity to contest it, but failed to do so. 527 U.S. at 17 & n.2.[5] This case falls well beyond those bounds and the Court of Appeals' opinion runs directly contrary to this Court's holdings that appellate courts "cannot affirm a criminal conviction on the basis of a theory not presented to the jury."

[5] The government puts heavy yet mistaken reliance on this Court's unanimous per curiam opinion in *California v. Roy*, 519 U.S. 2 (1996), to combat Petitioner's reading of *Neder*. The government misreads *Roy*, as perhaps most plainly evidenced by the fact that each of the four dissenting Justices in *Neder* joined the per curiam opinion in *Roy*. *Roy* was a state habeas case, and the Court expressly noted that the defendant did not claim "that the error at issue here is of the 'structural' sort that 'defies analysis by harmless error standards,'" *id.* at 5, so the Court expressly did not opine on that question, contrary to the government's representations. BIO 11. The gravamen of *Roy*, far afield from the issue presented here, was that the *Chapman* harmless-error framework does not apply to claims raised in a state habeas petition, and that in such cases, courts must instead apply "a significantly less strict 'harmless error' standard in cases on collateral review." *Id.* at 4 (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

Chiarella, 445 U.S. at 236. Even if the government were correct that all instructional errors are subject to harmless error review save for those that involve a "separate, distinct, and substantially different offense from the one tried before the jury," BIO 10, then this case also satisfies that standard. In either event, this case is an ideal vehicle to reconcile the competing views of *Neder* and the Court of Appeals' outlier position along with the United States' mistaken and newly contrived reading of *Neder* demonstrates the need for such a reconciliation.

3. The government asserts that "Petitioner does not contest the court of appeals' determination that, if harmless-error analysis applies, the error was in fact harmless." BIO 12. That is false. The petition was clear that aside from his primary position that there is no harm analysis to conduct when this type of error occurs, Petitioner also maintains that the "D.C. Court of Appeals' single page of harm analysis commit[ed] critical and obvious errors," and that it was "wrong to conclude that the jury's verdict somehow evinced a finding that Foreman was a co-conspirator of, or shared a 'community of purpose' with, Petitioner," *i.e.*, that it was wrong to conclude that the error was harmless. Pet. 14 n.4; *see also* Pet. 4 ("The premise of [the Court of Appeals' harm analysis]—that the jury's verdict drew some conclusion about Foreman's participation in the charged conspiracy—is unfounded…"). Indeed, as explained in the petition, "[t]here was no evidence" about whether "Petitioner incited Foreman, shared a community of purpose with him, or should have foreseen his actions." Pet. 11.[6]

That the government strategically chose to forgo a *Pinkerton* theory of conspiracy liability on the murder charge, despite pursuing such a theory of liability on various other charges that did not involve Foreman, destroys any argument that the error was harmless. Had the government sought to hold Petitioner liable for Foreman's killing of Taylor via a conspiracy

[6] Foreman did not testify at trial, for instance, so his reasons for joining the affray were entirely unclear and any arguments about them speculative.

theory of liability, that would have put to the jury the questions of whether Foreman was a conspirator of Petitioner's and whether his shooting was a reasonably foreseeable act in furtherance of the conspirators' communal purpose, *Pinkerton v. United States*, 328 U.S. 640, 644 (1946). Of course, if the government had anything approaching overwhelming evidence on those points it would have proceeded on a conspiracy theory of liability;[7] it did not do so because the evidence did not support it. As to the omitted element of foreseeability, the government urged the jury in closing arguments to ignore that question because, again, its evidence was scant: "There is *no requirement, none, just like the judge told you*, that you had to *foresee* that someone else would jump in and help you.... *We don't have to prove that.*" Tr. 6/02/09 a.m. at 65 (emphasis added).

There was every reason to think the jury would have acquitted Petitioner had the omitted elements been put to it, and it certainly cannot be said "beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The only basis the Court of Appeals gave for concluding that the error here was harmless was plainly wrong: it reasoned that the "jury's finding on the conspiracy count" showed that it had found the requisite "community of purpose" between Petitioner and Foreman. Pet. App. 86-87. But as explained in the petition, Foreman's case was

[7] The government misstates the record when it contends that it "argued to the jury ... that Foreman was a member of the charged conspiracy." BIO 4 (citing Pet. App. 53-54 & n.17). That is largely beside the point because the government never sought to have a conspiracy theory of liability instructed to the jury on the murder charge, but it is also wrong as a matter of fact, and the footnote in the Court of Appeals' opinion that the government cites to accurately states that this was a representation made to "the court" outside the jury's presence. Pet. App. 54 n.17; *see also* Tr. 5/14/09 p.m. at 66 (discussing jury instructions outside jury's presence). As indicated in the petition, Petitioner would contest that he and Foreman were part of the same "crew" or any type of conspiracy at any retrial were that issue actually presented. *Contra Neder*, 527 U.S. at 15 ("Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality" at retrial).

severed from Petitioner's well before trial and there was thus no question at trial, no evidence,[8] and no jury finding regarding whether Foreman was a part of the alleged conspiracy in this case. In fact, in Foreman's severed proceedings, the government ultimately dropped every allegation of gang affiliation and every theory of vicarious liability, and Foreman was convicted of second-degree murder as a principal without any suggestion that he acted in concert with anybody else, much less Petitioner. *See United States v. Robert Foreman*, No. 2007-CF1-22899 (D.C. Sup. Ct.) (Judgment and Commitment Order, June 4, 2010).

There is no cause for this Court to delve into these factual issues because this case presents a straightforward legal issue: whether the error of omitting three elements of a criminal offense from every stage of trial might ever be deemed harmless. Whatever disagreements there are between the government and Petitioner on that question, it is unquestionably a significant one and this is an ideal vehicle to address it in a case with high stakes.

B. Federal Statute Dictates That En Banc Review Be Granted In This Case.

A federal statute controls when cases are reheard en banc in the D.C. Court of Appeals.

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[8] Aside from the Court of Appeals' mistaken assertion that the jury verdict included some finding that Foreman was part of the charged conspiracy, Pet. App. 86-87, the government points to a single page of the Court of Appeals' opinion as "further discussing trial evidence demonstrating community of purpose." BIO 12 (citing Pet. App. 76). A review of that page will reveal nothing but a conclusory assertion that the circumstances of the shooting itself showed some community of purpose between Petitioner and Foreman; such speculation stacked upon circumstantial evidence could hardly be considered overwhelming proof that the error was harmless beyond a reasonable doubt under *Chapman*, 386 U.S. at 24. The Court of Appeals also got the circumstantial evidence wrong, and the government parrots its clear factual error when it states that "other gang members," not just Foreman, joined Petitioner and Tann in the Harrison shooting. BIO 3; Pet. App. 11. That is false. As the government made clear in closing, "[t]here were *three* shooters, *based on the ballistics, definitely* three shooters." Tr. 6/2/09 a.m. at 42-43 (emphasis added). The Court of Appeals' contrary assertion mistakenly relied upon firearms examiner Robert Harvey's testimony that there "could have been more" than three shooters, Pet. App. 51 n.16, but that testimony was about an entirely different incident (the Terrence Jones shooting). Tr. 12/17/08 a.m. at 84, 108. The forensic evidence was clear, as the government stressed, that there were three shooters in the Harrison incident. Tr. 6/2/09 a.m. at 42-43.

D.C. Code § 11-705(d).[9] It provides that "rehearing before the court in banc may be ordered by a majority of the judges of the court in regular active service,"[10] and in the next sentence explains that the court sitting en banc "shall consist of the judges of the court in regular active service." *Id.* The government does not dispute that the phrase "judges of the court in regular active service," as it appears in both clauses of this federal statutory provision, must exclude recused and disqualified judges if the statute is to be coherent. Pet. 23-24 (citing Fed. R. App. P. 35 (Advisory Committee Notes to 2005 Amendment), and *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 903 (4th Cir. 1983) (en banc)). On the critical question of how best to interpret this federal statute, the government thus concedes that the Court of Appeals erred in denying the rehearing petition, because a majority of active and non-disqualified judges voted to "grant the petitions for rehearing," Pet. App. B. While the government correctly points out that the D.C. Court of Appeals is empowered to deviate from the Federal Rules of Appellate Procedure, it is not at liberty to contravene a federal statute when doing so. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

Even if the D.C. Court of Appeals could, by rule, contravene an on-point federal statute, it has not done so here. The government makes two incorrect assertions in contending the contrary: (1) the D.C. Court of Appeals "prescribed or adopted modifications" to Federal Rule 35 when it initially enacted D.C. Rule 35, and (2) "[b]ecause the District of Columbia Court of Appeals had already branched off from Federal Rule of Appellate Procedure 35 before it was enacted in 2005 … [the Court] is [not] bound to follow that amendment." BIO 15. It is wrong

[9] As explained in the petition, while codified in the D.C. Code, this provision was enacted by Congress. Pub. L. No. 91-358, 84 Stat. 473 (1970).

[10] That the word "may" implies discretion is of no moment here, where 4 of the 7 eligible judges voted to exercise that discretion, Pet. App. B (noting four judges "would grant the petitions for rehearing"), but were precluded from doing so.

on both counts. When initially enacted, D.C. Rule 35 mirrored Federal Rule 35 and the two rules were substantively identical.[11] The government is thus wrong to assert that the D.C. Court of Appeals "branched off" from Federal Rule 35 prior to the 2005 amendments; it, in fact, adopted the substance of Federal Rule 35 wholesale and it has never taken action to depart from it.

In any event, the D.C. Court of Appeals has certainly never taken any action to "prescribe[] or adopt[] modifications" to the 2005 version of Federal Rule 35 after it was promulgated by this Court and approved by Congress, and the government does not suggest that it has. D.C. Code § 11-743. The government nonetheless suggests that the Court of Appeals, *sub silentio* and preemptively, modified the 2005 version of Federal Rule 35 because it "had already branched off" from it. Such preemptive rejection of new Federal rules is not permitted by section 11-743, as the D.C. Court of Appeals has itself recognized. In providing that the Federal Rules of Appellate Procedure govern in the D.C. Court of Appeals absent some express modification, section 11-743 plainly applies to new and amended versions of the Federal Rules as well. The D.C. Court of Appeals has adopted that understanding and made clear that amendments to the Federal Rules automatically apply in the D.C. courts absent express rejection or modification. *See Flemming v. United States*,[12] 546 A.2d 1001, 1005 (D.C. 1988) ("By deciding not to modify the Federal Rule, the Superior Court did not 'adopt' a rule of its own but merely allowed the Federal Rule to take effect by operation of [law].").[13]

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[11] The only difference between Federal Rule 35 and D.C. Rule 35 when initially promulgated was replacing the phrase "circuit judges" with the word "judges" in the D.C. Rule.

[12] *Flemming* concerned an analog to section 11-743 that dictates that the Federal Rules of Civil Procedure apply in the D.C. Superior Court. *See* D.C. Code § 11-946.

[13] In the immediate aftermath of the 2005 amendments to Federal Rule 35, the D.C. Court of Appeals—recognizing that amended Rule 35 would automatically go into effect—temporarily stayed it pending further review. Order (D.C. Dec. 8, 2005), *at* www.dccourts.gov/sites/default/files/2017-06/Ordfedrappproc.pdf ("[T]he amendments to the General Rules of this Court, which would otherwise be effected by the amendments to the Federal Rules of Appellate

This Court need not enter this procedural thicket, of course, because a clear and express federal statute governs the issue and mandates that en banc review be granted in this case in light of the 4-3 "majority of the judges of the court in regular active service" who exercised their discretion to grant such review. D.C. Code § 11-705(d). The government does not dispute that Petitioner's interpretation of that federal statute is correct, nor does it offer any argument that the D.C. Court of Appeals might, by rule, contravene it.

Finally, the government suggests that this is a poor vehicle because the D.C. Court of Appeals may yet reconsider the issue of its own accord. BIO 15. That might be a reason to hold the Petition if it raised just this second question presented, but it is no reason to deny review. It has now been more than eight months since Petitioner sought some clarification of the Court of Appeals order denying en banc review, and if, as now seems exceedingly likely,[14] the Court of Appeals denies reconsideration Petitioner will not have an opportunity to seek this Court's review at that time. *See* Sup. Ct. R. 13.1 (time for seeking certiorari runs from "entry of the judgment"). The better course is to grant review on both questions presented now.

Procedure ... [are] stayed ... pending the completion of this Court's review of the amendments or until further order of this Court."). But that stay expired long ago. *See Johnson v. United States*, 647 A.2d 1124, 1125 (D.C. 1994) (en banc) (stay of Federal Rules amendment for one year would "be contrary to the statute" dictating that the Federal Rules apply unless expressly rejected or modified). Even assuming that the review of the 2005 amendments took more than a decade, and that a stay to allow for such a lengthy review was somehow consistent with section 11-743, it is beyond question that the D.C. Court of Appeals completed its review of the 2005 amendments no later than 2016 when the Court of Appeals issued a notice stating that it had completed a comprehensive review of past amendments to the Federal Rules of Appellate Procedure and left Rule 35(a) untouched. *See* Notice at 1, No. M-255-16 (D.C. June 24, 2016); Order (D.C. Oct. 11, 2016), *at* www.dccourts.gov/sites/default/files/2017-06/M-257-16.pdf. It appears, from this history, that the 2005 amendments to Federal Rule 35 have not been expressly acted upon based upon a pure oversight, but by operation of federal statutory law, the result is that Federal Rule 35 governs in the D.C. Court of Appeals.

[14] Four months ago, Petitioner filed a motion for "Prompt Resolution of [the] Pending Motion to Reconsider" (July 11, 2017) with the D.C. Court of Appeals, explaining the then-impending Petition for Certiorari to be filed with this Court. If the Court of Appeals were going to grant reconsideration, it very likely would have indicated as much by now.

Respectfully submitted,

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November 13, 2017

CERTIFICATE OF SERVICE

Samia Fam, a member of the Bar of this Court and the Counsel of Record for Petitioner, hereby avers that on November 13, 2017, she sent one copy of foregoing Reply Brief of Petitioner in Support of the Petition for the Writ of Certiorari to:

Jeffrey B. Wall
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by placing these documents in properly addressed envelopes with fully prepaid first-class postage affixed thereon, and depositing the envelopes with the United States Postal Service.

Electronic copies of these documents were also delivered at the following e-mail addresses: supremectbriefs@usdoj.gov; Elizabeth.Trosman@usdoj.gov

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