No. 20-1709

In the Supreme Court of the United States

DAVID MING PON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals misapplied the relevant legal framework in determining that any constitutional error in limiting the scope of petitioner's surrebuttal at trial was harmless beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 963 F.3d 1207.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2020. A petition for rehearing and rehearing en banc was denied on December 11, 2020 (Pet. App. 79a). The petition for a writ of certiorari was filed on May 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on 20 counts of health care fraud, in violation of 18 U.S.C. 1347. Pet. App. 2a; Second Am. Judgment 1-2. He was sentenced to 121 months of imprisonment, to be followed by six years of supervised release. Pet.

App. 2a; Second Am. Judgment 3-4. The court of appeals affirmed petitioner's convictions and directed a limited remand for resentencing. Pet. App. 1a-78a.

1. Petitioner was an ophthalmologist with a practice in central Florida. Pet. App. 2a. He diagnosed hundreds of patients with an incurable eye disease known as wet age-related macular degeneration (WMD) and purported to treat their condition by directing a low-powered laser at their eyes. *Id.* at 2a-3a. In fact, almost none of the patients he diagnosed had WMD, see *id.* at 8a, and he billed Medicare for "photocoagulation," which his technique did not involve, *id.* at 3a-4a. All told, petitioner defrauded Medicare of approximately $7,000,000. *Id.* at 2a.

WMD is a vision-impairing disease caused by leaking blood vessels in the eye. Pet. App. 2a-3a. Left untreated, it leads to a substantial decline in quality of vision. *Id.* at 51a. Before 2006, ophthalmologists primarily treated WMD with a procedure known as laser photocoagulation. *Id.* at 4a. That procedure involved using a medical laser to seal leaking vessels through several rounds of targeted burning, which leaves behind a scar. *Id.* at 3a. Around 2006, however, ophthalmologists began to favor drug injections as the standard treatment for WMD, and rates of laser treatment declined. *Id.* at 4a. By 2010, ophthalmologists nationwide billed Medicare for laser photocoagulation in connection with only seven-hundredths of one percent of their patients. *Id.* at 6a.

Petitioner was a "significant outlier." Pet. App. 6a. In 2010, for example, he billed Medicare for laser photocoagulation for 93% of his patients, making him the highest biller for photocoagulation in the country. *Ibid.*; Presentence Investigation Report ¶ 6. He routinely

diagnosed his patients with WMD, lasered one or both of their eyes, and submitted claims to Medicare. Pet. App. 2a-3a. Between 2004 and 2011, he was a top Medicare biller for laser photocoagulation. *Id.* at 4a, 7a. And his 2010 proportion of Medicare bills charging for laser photocoagulation exceeded the average by a factor of 132. *Id.* at 6a.

Other medical professionals who examined the same patients were highly suspicious of petitioner's practices. Pet. App. 4a-6a. One doctor, for example, was taken aback to learn that petitioner had diagnosed and lasered a mutual patient with no signs of WMD. *Id.* at 4a-5a. In another instance, a highly experienced optometrist referred several of his patients to petitioner, who "diagnosed every one of them with WMD." *Id.* at 5a. After several of the patients told the optometrist that petitioner "had lasered their eyes on multiple occasions," the optometrist sent the patients to other ophthalmologists for "second opinions about the medical necessity of the suspicious laser treatments." *Ibid.* "'[O]n every occasion' the ophthalmologists found that there was no sign [petitioner] had lasered those patients' eyes in a way that would actually treat WMD or that the patients needed any laser treatment for any eye disease." *Ibid.* (first set of brackets in original). And one ophthalmologist who examined at least 30 of petitioner's patients—including one who had received laser treatments for eight months in a row, which would have been "extremely atypical" even for properly diagnosed patients—found that none had WMD. *Id.* at 6a; see *id.* at 5a-6a.

Several ophthalmologists also noticed that petitioner's patients lacked the telltale scarring that results from laser photocoagulation. Pet. App. 14a. Petitioner

claimed that this was because he had developed a special "micropulse laser technique" that could treat WMD without scarring, testifying at trial that "[h]is intention was 'to get the effect from the laser without causing a burn, coagulation.'" *Id.* at 3a-4a. That involved setting his laser to the lowest power setting and turning it on for only 15% of the exposure period. *Id.* at 2a-3a & n.2. Petitioner did not know of any other doctors who used this technique, and he never published any articles describing or touting the asserted success of such a treatment. *Id.* at 16a. As one ophthalmologist explained, the technique had "absolutely no acceptance in the ophthalmological community." *Id.* at 11a.

In 2011, the government began an investigation into possible health care fraud after a data analysis revealed how sharply petitioner's billing and asserted treatment practices diverged from those of other ophthalmologists. Pet. App. 6a. Federal investigators interviewed "approximately thirty doctors who had seen patients whom [petitioner] had diagnosed with WMD and micropulse lasered," and also obtained a warrant to seize petitioner's patient files, including photos and videos of his patients' eyes. *Id.* at 7a. An expert hired by the government to review those files determined that the vast majority of patients whom petitioner had "treated" for WMD did not "actually ha[ve] any form of macular degeneration." *Id.* at 8a. The expert concluded that petitioner "had shown a 'reckless disregard for his patients'" by subjecting their eyes to laser treatments absent any genuine medical need. *Ibid.*

2. A federal grand jury in the Middle District of Florida charged petitioner with 20 counts of health care fraud, in violation of 18 U.S.C. 1347. Indictment 8-9. Section 1347 makes it a crime to:

> knowingly and willfully execute[], or attempt[] to execute, a scheme or artifice—(1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.

18 U.S.C. 1347(a). The indictment alleged that petitioner had falsely diagnosed 11 patients with WMD and used those false diagnoses to submit 20 claims for reimbursement from Medicare, all based on purported photocoagulation treatments. Pet. App. 8a-9a; Indictment 8-9.

Before trial, the government moved in limine to exclude the testimony of a proffered defense expert, Giorgio Dorin, whom petitioner had retained to testify that petitioner's micropulse technique—which Dorin described as "photostimulation," in order to distinguish it from "photocoagulation"—was capable of treating WMD without scarring. Pet. App. 9a. By the end of the three-day evidentiary hearing, defense counsel acknowledged that the proffered expert testimony would involve "drawing conclusions that have not yet been scientifically tested." *Id.* at 12a. The district court determined that the witness's proposed opinion was "conjecture" and precluded him from opining on the effectiveness of petitioner's methods. *Ibid.*

The case proceeded to trial. One of the government's first witnesses was Dr. Thomas Friberg, a professor of ophthalmology and bioengineering with four decades of experience and more than 175 peer-reviewed articles. Pet. App. 7a-8a, 12a. Testifying as an expert, Dr. Friberg explained that petitioner's laser technique could not seal a leaking blood vessel, and that effective photo-

coagulation would necessarily leave a scar. *Id.* at 12a; see 9/14/15 Tr. 69 (likening petitioner's technique to "jump-start[ing] [a car] off a flashlight"). He testified that he had reviewed more than 10,000 eye images from 500 patients whom petitioner had diagnosed with WMD and that only five to ten had any form of macular degeneration. Pet. App. 7a-8a, 13a; 9/11/15 Tr. 97-100. He also reviewed with the jury hundreds of images of the eyes of the 11 patients listed in the indictment, testifying that he saw no evidence that any had either WMD or the scarring that would result from laser photocoagulation. Pet. App. 13a.

The government thereafter introduced the testimony of 11 doctors who had personally examined the patients listed in the indictment. Pet. App. 13a, 37a. Proceeding patient by patient, the doctors testified that none of the patients had WMD when petitioner diagnosed them, and none had developed the scarring that results from laser photocoagulation. *Id.* at 13a-14a, 37a. Finally, the government introduced the testimony of several patients listed in the indictment. *Id.* at 14a. Each testified about being diagnosed with WMD and later learning from other doctors that the diagnosis was false. *Ibid.*; see 9/15/15 Tr. 267, 273-274; 9/17/15 Tr. 163-165, 183, 191-192. Each further testified that, years later, they could still see well enough to drive a car, which would be inconsistent with the development of WMD. Pet. App. 14a; see 9/15/15 Tr. 269; 9/17/15 Tr. 148, 178.

Petitioner testified in his own defense. Pet. App. 15a. He asserted that he could identify and diagnose WMD in its very early stages because he could "visualize, directly visualize, the[] blood vessels" that cause WMD, and that his treatment was "miraculous" because it did

not leave a scar. *Id.* at 15a-16a. He stated that he was inspired to develop his laser technique when he attended a presentation involving a similar method, although he could not remember where or when the presentation took place. *Id.* at 15a. He did not know of anyone else using the technique, and he had not published anything describing it or encouraging its use on patients other than his own. *Id.* at 16a. Petitioner then introduced the testimony of 13 former patients, who testified that petitioner was generous and trustworthy and that their vision had improved after seeing him. *Id.* at 16a-17a.

One of those patients, J.L., who was not among the 11 patients listed in the indictment, testified that in 1994 petitioner performed surgery on each of his eyes even though J.L. could not guarantee payment. Pet. App. 22a-23a. The surgery on the right eye was successful, but J.L. lost all vision in his left eye. *Id.* at 23a. Petitioner introduced excerpts of treatment records for J.L. showing procedures that petitioner had performed on J.L.'s right eye, including laser treatments for WMD. *Ibid.* Petitioner's treatment record excerpts indicated that petitioner had also diagnosed J.L. with WMD in his left eye, but did not list any tests or procedures on the left eye. *Ibid.*; see DX 193, at 1-6. On cross-examination, the government asked J.L. whether petitioner had performed any procedures on his left eye after the unsuccessful surgery. Pet. App. 23a. J.L. replied that petitioner had performed non-invasive examinations of that eye, but no "major procedures," "injection[s]," or "dye tests." *Ibid.* On redirect examination, J.L. reiterated that petitioner had not done "any tests on [his] left eye." *Ibid.* (brackets in original).

In its rebuttal case, the government introduced evidence that between 2004 and 2015, petitioner had billed Medicare for at least 52 procedures on J.L.'s left eye, including a surgery and six angiograms (*i.e.*, dye-injection tests). Pet. App. 24a-25a. Petitioner thereafter sought permission to retake the stand in surrebuttal, arguing that he should have an "opportunity to respond" to the "impression" that he had improperly conducted and billed for treatments on a blind eye. *Id.* at 26a. The district court noted that the government's rebuttal evidence had been "very damning," and asked the parties whether, "in deference to . . . [petitioner's] Sixth Amendment right," petitioner should have the opportunity to offer an explanation. *Ibid.*; see *id.* at 142a. The court gave the parties a weekend to research the issue and then heard argument, during which neither party addressed the Sixth Amendment. *Id.* at 26a.

During that hearing, petitioner provided a proffer of the surrebuttal testimony that he sought to introduce. Pet. App. 26a-27a. Petitioner proffered that the surgery described in the billing records was in fact performed on J.L.'s right eye, and that he thought it necessary to examine J.L.'s left eye "periodically" to ensure that J.L. was not developing sympathetic ophthalmia—a condition that might have led to blindness in the right eye. *Id.* at 27a. Petitioner did not, however, proffer any explanation for why he had billed Medicare for six angiograms on J.L.'s left eye notwithstanding J.L.'s testimony that petitioner had not performed any such procedures. *Ibid.*

The district court granted petitioner's request to present surrebuttal in part. Pet. App. 28a. It allowed petitioner to testify about the billed surgery but not about any non-surgical procedures or his claimed justi-

fications. *Ibid.* On cross-examination, petitioner admitted that the billings for the surgery were "just three entries out of two pages of entries," and that they amounted to less than $3000, as compared to the $16,441 in billing for other services on J.L.'s left eye. *Ibid.* During closing argument, the government focused on the patients listed in the indictment. *Ibid.* It did not address any of the billings for services on J.L.'s left eye, and it mentioned J.L. only as one of many patients petitioner had falsely diagnosed with WMD. *Ibid.*; 9/28/15 Tr. 83. Defense counsel, in his closing argument, emphasized that petitioner had performed surgery on J.L. without any guarantee of payment, and stated, with respect to the diagnostic tests on J.L.'s left eye, that there was "absolutely nothing wrong with doing those tests and billing Medicare for it." Pet. App. 29a; see *id.* at 28a-29a. The district court thereafter instructed the jury that petitioner was "on trial only for the specific crimes charged in the indictment" and that they were to determine only whether petitioner was "guilty or not guilty of those specific crimes." *Id.* at 29a.

The jury found petitioner guilty on all counts. Pet. App. 29a. After calculating an advisory guidelines range of 121 to 151 months, which included an enhancement for providing false testimony, 3/13/17 Sent. Tr. 14, the district court sentenced petitioner to concurrent terms of 121 months of imprisonment on each count, to be followed by six years of supervised release, Second Am. Judgment 3-4.

3. The court of appeals affirmed petitioner's convictions and directed a limited remand for resentencing. Pet. App. 1a-78a. As relevant here, petitioner argued that the district court abused its discretion by limiting the scope of his surrebuttal. *Id.* at 22a; Pet. C.A. Br.

27-34. The court of appeals declined to grant relief, determining that any error in limiting the scope of petitioner's surrebuttal was harmless beyond a reasonable doubt. Pet. App. 26a-61a.

As an initial matter, the court of appeals observed that although petitioner asserted "both trial error and constitutional error," it was "far from clear" that petitioner had preserved a constitutional challenge to the district court's partial limitation of his surrebuttal. Pet. App. 30a. The court of appeals noted that while petitioner had argued in the district court that he should be permitted to offer surrebuttal, he "did not even mention in passing to the district court the constitutional issue" he sought to raise in the court of appeals. *Id.* at 31a. The court of appeals acknowledged that the district court had itself wondered aloud whether surrebuttal might be warranted in light of petitioner's Sixth Amendment right, but that statement alone, the court of appeals explained, "probably [wa]s not enough to preserve the Sixth Amendment issue for appeal." *Id.* at 32a; see *id.* at 31a-32a. The court of appeals ultimately declined to resolve the preservation issue, however, because it found that even "assum[ing]" the district court's limitation on petitioner's surrebuttal amounted to preserved constitutional error, "that error was harmless beyond a reasonable doubt." *Id.* at 33a-34a; *id.* at 36a (explaining that "a holding that a constitutional error is harmless necessarily means that it is also harmless if it happens to be nonconstitutional error").

First, the court of appeals catalogued the "overwhelming" evidence relating to each of the 11 patients listed in the indictment. Pet. App. 37a; see *id.* at 37a-49a. The court observed that multiple medical professionals had testified about each patient, explaining—

often with diagnostic images and medical records—that none had shown any sign of either having suffered from WMD or having received laser photocoagulation. See *id.* at 37a-49a. It further observed that the evidence was largely uncontroverted: petitioner had presented no other medical professional "to testify that any one of the eleven patients actually had WMD at the time he purportedly treated them for it or had the scarring that would necessarily have resulted from the laser photocoagulation treatment he billed Medicare for performing"; petitioner had offered no evidence (other than his own testimony) that WMD could be laser-treated without scarring; and petitioner had acknowledged that although he billed Medicare for laser photocoagulation, his treatment did not cause scarring. *Id.* at 48a; see *id.* at 48a-49a; see also *id.* at 4a (recounting petitioner's testimony that "[h]is intention was 'to get the effect from the laser without causing a burn, coagulation'").

Next, the court of appeals turned to the "strong evidence" that petitioner had "incorrectly diagnosed and improperly 'treated' not just the eleven patients listed in the indictment but also hundreds of other patients." Pet. App. 49a. Dr. Friberg, for example, had testified that only one or two percent of the 500 patients whose charts he had reviewed had any sort of macular degeneration. *Ibid.* Other doctors corroborated that testimony. *Ibid.* And almost every doctor who testified—including petitioner—testified that untreated WMD results in a substantial decline in quality of vision. *Id.* at 51a. Yet petitioner had continued to see some patients after he had stopped laser treatments; for those patients, he "would have known that the WMD he had diagnosed in them did not progress even though they were not receiving any treatment for it, which had to

mean there was no WMD to begin with and [petitioner] knew it." *Ibid.*

The court of appeals acknowledged petitioner's testimony that he believed that his diagnoses were correct and that his treatment was helpful and medically necessary. Pet. App. 49a. But the court explained that the jury was entitled to discredit that testimony, based on its observation of petitioner's demeanor over more than three days on the stand and his substantial incentive to lie because conviction would cause him to lose his medical license and his livelihood. *Id.* at 50a. Surveying additional record evidence, the court observed that in the rare case where petitioner was treating "patients of his who actually had WMD" and "whose WMD diagnoses were corroborated by another doctor," petitioner used the drug injections that "had become the most widely used, accepted treatment for WMD." *Id.* at 51a. "For other patients, ones for whom there was no evidence of WMD but he billed as if there were, [petitioner] didn't use drug injections as a WMD treatment or he used it only rarely." *Id.* at 51a-52a.

The court of appeals also catalogued the extensive evidence that petitioner's laser technique could not treat WMD. Pet. App. 52a-54a. And it pointed to evidence in the record that petitioner had filled out some patients' charts with WMD diagnoses and planned diagnostic tests before even seeing those patients. *Id.* at 54a-55a. Petitioner had sought to counter that evidence by noting instances in which he had modified the pre-filled charts after the fact in order to reflect that he had only performed tests on one eye (rather than both eyes, as the pre-filled charts had indicated), but the government had established that in nearly half of the examples petitioner himself had identified, he had billed Medicare

for performing tests on both eyes notwithstanding the modified charts. *Id.* at 55a. Finally, the court observed that notwithstanding petitioner's claim at trial to have discovered a "miraculous treatment," petitioner had done "absolutely nothing to present, publish, or even talk with other doctors about what he thought of as a cure for the leading cause of irreversible blindness in older people." *Id.* at 56a.

Summarizing its review of the trial, the court of appeals observed that "[a]ll of this great volume of evidence we have just recounted was presented before and was completely unrelated to and uninfluenced by the exclusion of any of [petitioner's] proposed surrebuttal evidence." Pet. App. 56a. The court noted that the evidence concerning J.L.'s left eye was "miniscule" in relation to "the totality of the evidence": J.L. was one of 34 witnesses who testified at trial (one of 15 witnesses who testified for petitioner), and all of the testimony concerning billing for J.L.'s left eye took up only 26 of more than 2000 pages of trial transcript. *Ibid.* The court of appeals further noted that the district court had instructed the jury to consider only whether petitioner was guilty of the crimes charged in the indictment, and the court of appeals presumed that the jury followed that instruction. *Id.* at 56a-57a. The court of appeals emphasized that it had "no doubt, much less a reasonable doubt," that "the jury would still have found [petitioner] guilty as charged" even in the absence of the assumed error. *Id.* at 57a.

The court of appeals then detailed its adherence to this Court's precedent in its review of the evidence. Pet. App. 57a-61a. The court recognized its obligation not to "become in effect a second jury to determine whether the defendant is guilty," *id.* at 57a (quoting *Neder* v.

United States, 527 U.S. 1, 19 (1999)), as well as its duty to "consider the trial record as a whole and to ignore errors that are harmless," *id.* at 59a (quoting *United States* v. *Hasting*, 461 U.S. 499, 509 (1983)); see *ibid.* (citing *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), and *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). The court also noted that both this Court and the court of appeals had previously "rel[ied] on overwhelming evidence of guilt to find an error harmless." *Id.* at 60a (citing, *inter alia*, *Neder*, 527 U.S. at 17).

Finally, after affirming petitioner's convictions, the court of appeals directed a limited remand to allow the district court to restructure petitioner's sentence so that the term of imprisonment on each count fell within the statutory maximum. Pet. App. 64a-65a. Judge Martin concurred in part and dissented in part, taking the view that the district court violated petitioner's Sixth Amendment right to present a defense by limiting his surrebuttal and that the error was significant enough to the consideration of petitioner's mens rea that it was not harmless. *Id.* at 68a-78a.

ARGUMENT

Petitioner contends (Pet. 20-36) that the court of appeals misapplied the harmless-error standard by failing to consider how any error in limiting his surrebuttal would have affected the jury's view of the defense case. In fact, the court of appeals properly reviewed the entire trial record and correctly determined that any error did not have a prejudicial effect on the jury's verdict. That factbound determination, based on this Court's well-established harmless-error standard, does not create a conflict with any decision of this Court, another court of appeals, or state court that would warrant further review. This Court has previously denied petitions

for a writ of certiorari raising similar questions concerning the harmless-error standard. See *Oliver* v. *United States*, 138 S. Ct. 57 (2017) (No. 16-8051); *Leaks* v. *United States*, 576 U.S. 1022 (2015) (No. 14-1077); *Runyon* v. *United States*, 574 U.S. 813 (2014) (No. 13-254); *Gomez* v. *United States*, 571 U.S. 1096 (2013) (No. 13-5625); *Demmitt* v. *United States*, 571 U.S. 952 (2013) (No. 12-10116); *Ford* v. *United States*, 569 U.S. 1031 (2013) (No. 12-7958); *Acosta-Ruiz* v. *United States*, 569 U.S. 1031 (2013) (No. 12-6908). The same result is warranted here.[1]

1. The court of appeals correctly determined that any error in limiting petitioner's surrebuttal was harmless beyond a reasonable doubt.

a. Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see 28 U.S.C. 2111. Harmless-error doctrine "focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). Outside the narrow category of structural errors, see *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999), the court of appeals must conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734

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[1] Petitioner observes (Pet. 20) that this Court granted certiorari on a similar question in *Vasquez* v. *United States*, 565 U.S. 1057 (2011) (No. 11-199), but dismissed the writ of certiorari as improvidently granted after oral argument, 566 U.S. 376 (2012) (per curiam). Consistent with that disposition, this case implicates no conflict warranting review.

(1993). The requirement of prejudice ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed without justification. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

The test is an objective one, asking whether "a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. It requires "weigh[ing] the probative force of th[e] evidence" to determine whether an error was sufficiently "unimportant in relation to everything else" that its absence would not have altered the verdict. *Yates* v. *Evatt*, 500 U.S. 391, 403-404 (1991); see *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986). Where the error at issue is of constitutional dimension, the reviewing court may find it harmless only if the government demonstrates "beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]." *Yates*, 500 U.S. at 405 (applying *Chapman* v. *California*, 386 U.S. 18 (1967)). Where the error is nonconstitutional, it is evaluated under the less demanding standard articulated in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict," *id.* at 776; see *Brecht* v. *Abrahamson*, 507 U.S. 619, 631-632 & n.7, 637-638 (1993) (explaining that "claims of nonconstitutional error" are judged under the *Kotteakos* standard).

b. The court of appeals correctly applied the harmless-error standard in determining that any error in limiting petitioner's surrebuttal was harmless beyond a reasonable doubt.

The court of appeals correctly articulated the standard of review. See Pet. App. 34a-35a (requiring the government to establish "beyond a reasonable doubt that

the error complained of did not contribute to the verdict obtained") (quoting *Chapman*, 386 U.S. at 22); *id.* at 35a ("[T]o say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.") (quoting *Yates*, 500 U.S. at 403); *id.* at 57a (recognizing that the reviewing court must not "become in effect a second jury to determine whether the defendant is guilty") (quoting *Neder*, 527 U.S. at 19). Rather than identifying any clear announcement of an incorrect standard, petitioner's argument in this Court instead centers on the assertion (Pet. 32-34) that the court of appeals misapplied that standard by focusing too closely on the strength of the government's case. But this Court "rarely grant[s]" a petition for a writ of certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, petitioner is mistaken, as the court of appeals faithfully applied this Court's precedents. First, in assessing whether the assumed error "contribute[d] to the jury's guilty verdict," Pet. App. 57a, the court of appeals properly considered the strength of the government's case, see Pet. 4 (conceding that "[t]he strength of the government's case is *relevant* to harmless-error review"). The court conducted its "own reading of the record" and considered the weight of the evidence "apart from" the error. *Harrington* v. *California*, 395 U.S. 250, 254 (1969); see *Schneble* v. *Florida*, 405 U.S. 427, 430-431 (1972) (finding assumed constitutional error harmless under *Chapman* where "the independent evidence of guilt" was "overwhelming" and the "preju-

dicial effect" of the error was "insignificant by comparison"); see also *Milton* v. *Wainwright*, 407 U.S. 371, 372, 377-378 (1972) (declining to reach the merits of petitioner's argument that his confession was improperly admitted at trial because the Court found "overwhelming evidence of guilt fairly established in the state court * * * by use of evidence not challenged here," rendering any error "harmless"). The court found the government's evidence not only "overwhelming," Pet. App. 37a, but also "unrelated to and uninfluenced by the exclusion of any of [petitioner's] proposed surrebuttal evidence," *id.* at 56a; see *id.* at 37a-53a.

Contrary to petitioner's suggestion (Pet. 1), the court of appeals also expressly considered the effect of the assumed error on the jury's view of the defense case. As petitioner acknowledges (Pet. 33), the court specifically addressed the jury's perception of petitioner's credibility. Pet. App. 49a-50a. The court observed that "[o]nly [petitioner had] testified that his WMD diagnoses were correct, and that he believed the treatments he administered were helpful and medically necessary." *Id.* at 49a. And as the court recognized, the jury was entitled to discredit that testimony—"as it undoubtedly did"—based on petitioner's "interest in the outcome of the trial," his demeanor on the stand during three days of testimony, and the "overwhelming" circumstantial evidence of his knowledge that his patients did not have WMD and that his technique did not treat it. *Id.* at 50a-51a. Indeed, as the court of appeals observed, the testimony of several *defense* witnesses confirmed that petitioner "used drug injections to treat WMD largely, if not only, for those patients whose WMD diagnoses were corroborated by another doctor." *Id.* at 51a.

The court further considered the probable effect of petitioner's proffered surrebuttal testimony, noting that petitioner failed to explain in his proffer why J.L. would have testified that petitioner had never performed an angiogram on his left eye if petitioner had, in fact, performed the six angiograms on that eye for which petitioner had billed Medicare, or why petitioner needed to examine J.L.'s left eye as often as he did. See Pet. App. 27a. It considered the significance of the assumed error in relation to "the totality of the evidence," noting that the government's rebuttal testimony on the issue consumed roughly "one half of one percent" of the trial. *Id.* at 56a. It considered the parties' closing arguments, noting that the government did not address the issue. *Ibid.* And it considered the jury instructions, noting that the district court instructed the jury to decide only whether petitioner was guilty of the crimes charged in the indictment. *Id.* at 56a-57a. In short, the court evaluated the effect of the assumed error "in relation to everything else the jury considered on the issue in question," *id.* at 35a (quoting *Yates*, 500 U.S. at 403), and correctly came away with "no doubt, much less a reasonable doubt, that if the district court had not partially limited [petitioner's] surrebuttal evidence about J.L., the jury would still have found [petitioner] guilty as charged," *id.* at 57a. Even if the court of appeals might have been even more explicit about its consideration of the entire record, its highly fact-bound application of this Court's harmless error precedents, see *id.* at 57a-61a, does not warrant further review.

2. Petitioner asserts (Pet. 20-26) that federal and state appellate courts are divided about how to apply the harmless-error standard. He contends (Pet. 20, 23) that some courts apply an "effect-on-the-verdict" test,

whereas others "rely solely on 'overwhelming evidence' of guilt." But the various formulations of the harmless-error test that petitioner identifies do not establish a division among appellate courts; rather, they reflect application of this Court's harmless-error precedents to disparate situations.

a. As petitioner appears to recognize (Pet. 23), even the federal courts that he describes as adopting an effect-on-the-verdict test routinely consider the strength of the government's evidence in determining an error's effect on a verdict. Petitioner relies (Pet. 20), for example, on *Wray* v. *Johnson*, 202 F.3d 515 (2000), in which the Second Circuit applied the "substantial and injurious effect" test set forth in *Kotteakos*. *Id.* at 525 (citations omitted). But in *Wray* itself, the Second Circuit observed that "the strength of the prosecution's case is probably the single most critical factor in determining whether error was harmless." *Id.* at 526 (citation and internal quotation marks omitted). And the Second Circuit has since relied on overwhelming evidence to conclude that errors were harmless. See, *e.g.*, *United States* v. *Delgado*, 971 F.3d 144, 155 (2020) (finding assumed error harmless "because there was overwhelming evidence presented at trial concerning [the defendant's] possession of firearms").

Petitioner's reliance (Pet. 20-21) on decisions of the First, Third, Fourth, Sixth, Ninth, Tenth, and D.C. Circuits is similarly misplaced. Petitioner cannot show that any of those courts would refuse to find an error harmless where, as here, the properly admitted evidence was so overwhelming that there is no reasonable basis for doubting that the jury would have found the defendant guilty in the absence of the error. Instead, the decisions he cites were cases in which the reviewing

court found less than overwhelming proof. See *United States* v. *Cudlitz*, 72 F.3d 992, 999-1000 (1st Cir. 1996); *Virgin Islands* v. *Martinez*, 620 F.3d 321, 338 (3d Cir. 2010), cert. denied, 562 U.S. 1219 (2011); *United States* v. *Ibisevic*, 675 F.3d 342, 353 (4th Cir. 2012); *Reiner* v. *Woods*, 955 F.3d 549, 560-561 (6th Cir. 2020); *United States* v. *Caruto*, 532 F.3d 822, 832 (9th Cir. 2008); *United States* v. *Cunningham*, 145 F.3d 1385, 1395-1396 (D.C. Cir.), cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999).[2] Each of the relevant courts has elsewhere relied on "overwhelming" evidence to find an error harmless. See, *e.g.*, *United States* v. *Dunbar*, 553 F.3d 48, 59-60 (1st Cir. 2009); *United States* v. *Boyd*, 999 F.3d 171, 180-182 (3d Cir. 2021); *Bereano* v. *United States*, 706 F.3d 568, 579 (4th Cir. 2013); *United States* v. *Hardy*, 228 F.3d 745, 751 (6th Cir. 2000); *United States* v. *Lague*, 971 F.3d 1032, 1040-1042 (9th Cir. 2020), cert. denied, 141 S. Ct. 1695 (2021); *United States* v. *Garcia*, 757 F.3d 315, 318 (D.C. Cir. 2014).[3]

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[2] The same is true of other cases that petitioner cites (Pet. 21-23) from the same circuits. See *United States* v. *Carrasco*, 540 F.3d 43, 53 (1st Cir. 2008); *United States* v. *Ofray-Campos*, 534 F.3d 1, 27-29 (1st Cir.), cert. denied, 555 U.S. 1020 (2008), and 555 U.S. 1140 (2009); *United States* v. *Lozada-Rivera*, 177 F.3d 98, 107 (1st Cir. 1999); *United States* v. *Stewart*, 907 F.3d 677, 689-691 (2d Cir. 2018) (per curiam); *United States* v. *Jean-Baptiste*, 166 F.3d 102, 108-110 (2d Cir. 1999); *United States* v. *Edwards*, 792 F.3d 355, 358 (3d Cir. 2015); *United States* v. *Shannon*, 766 F.3d 346, 359 (3d Cir. 2014); *Virgin Islands* v. *Davis*, 561 F.3d 159, 166 (3d Cir. 2009); *United States* v. *Johnson*, 617 F.3d 286, 295-296 (4th Cir. 2010); *United States* v. *Bailey*, 696 F.3d 794, 804-805 (9th Cir. 2012); see also *Shannon*, 766 F.3d at 355 (noting that constitutional errors "may be held harmless beyond a reasonable doubt in cases where there is overwhelming evidence against the defendant") (citation omitted).

[3] Petitioner also cites (Pet. 20-21) *United States* v. *Makkar*, 810 F.3d 1139 (2015), in which the Tenth Circuit did not address the

Petitioner's claim (Pet. 23-25) that the Fifth, Eighth, and Eleventh Circuits "rely on the strength of the prosecution's case to the exclusion of other factors" is similarly overstated. Although those courts—like others—often rely on the strength of the government's evidence in assessing whether an error is harmless, they have also explained that the strength of incriminating evidence is just one factor that the court may consider in evaluating harmlessness. In *United States* v. *Jones*, 930 F.3d 366 (2019), for example, the Fifth Circuit made clear that its harmlessness inquiry "focuse[d] on the evidence that violated [the defendant's] confrontation right, not the sufficiency of the evidence remaining after excision of the tainted evidence." *Id.* at 379 (citation and internal quotation marks omitted). The court listed several relevant "factors" that a court must consider in assessing harmlessness, at least in connection with a violation of the Confrontation Clause, and emphasized that in all events, the government "must show no reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 379 n.5 (citation and internal quotation marks omitted).

Similarly, in *United States* v. *Street*, 548 F.3d 618 (2008), the Eighth Circuit determined that a district court's refusal to grant a mistrial was not harmless "[g]iven the closeness of the case, its novel facts, and the

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strength of the government's evidence. See *id.* at 1147-1148. But as petitioner recognizes (Pet. 23), that court elsewhere has relied on "overwhelming" evidence to find a constitutional error harmless beyond a reasonable doubt. *United States* v. *Nash*, 482 F.3d 1209, 1219 (10th Cir.), cert. denied, 552 U.S. 1084 (2007); see *United States* v. *Denezpi*, 979 F.3d 777, 784 (10th Cir. 2020) (holding that any error in admitting testimony was harmless given the "overwhelming" evidence of guilt), petition for cert. pending, No. 20-7622 (filed Mar. 26, 2021).

vital importance of [the defendant's] credibility to his defense." *Id.* at 629. And just as the Eleventh Circuit in this case recognized that a harmlessness determination under *Chapman* requires a finding that the error was "unimportant in relation to everything else the jury considered on the issue in question," Pet. App. 35a (quoting *Yates*, 500 U.S. at 403), it has elsewhere explained that where an evidentiary challenge "implicates a constitutional right," the court of appeals must analyze several "factors" in assessing "whether the 'minds of an average jury' would have found the prosecution's case less persuasive if the erroneously admitted evidence had been excluded," *United States* v. *Gari*, 572 F.3d 1352, 1362-1363 (2009) (citation omitted), cert. denied, 555 U.S. 959 (2010).

Thus, like this Court, each circuit has articulated the harmless-error standard to include consideration of both the effect of the error and, relatedly, the weight of the remaining evidence. That some decisions focus more on the error's effect, and others more on the weight of the evidence, reflects different facts in different cases. It does not reflect a conflict that warrants this Court's review.

b. To the extent that they might reflect an approach meant to follow the federal harmless-error standard, the state cases that petitioner cites (Pet. 25-26) similarly do not illustrate a conflict warranting this Court's review. In *Ventura* v. *State*, 29 So. 3d 1086 (Fla. 2010) (per curiam), for example, the Supreme Court of Florida faulted the lower court for finding harmless error based only on that court's assessment that the evidence in the record supported a finding of guilt, as opposed to inquiring "whether there [wa]s a reasonable possibility that the constitutional error affected the verdict." *Id.*

at 1091. Nothing in that decision suggests that a court applying a harmless-error standard may not consider the overall strength of the evidence that supports the jury's verdict in determining the ultimate question of prejudice.

The same is true of the other state courts that, according to petitioner (Pet. 25), "reject reliance on overwhelming evidence of guilt at the expense of other factors." Each of those courts in fact appears to permit consideration of the strength of the overall evidence in a case so long as such consideration is in service of answering the ultimate question of prejudice. See, *e.g.*, *State* v. *Mercier*, 479 P.3d 967, 977 (Mont. 2021) (explaining that although overwhelming evidence "will not alone suffice to uphold a conviction," harmlessness still "must 'be determined on the basis of the remaining evidence'" and reflect "'the importance of the [evidence at issue] in the prosecution's case'") (citations omitted); *State* v. *Tollardo*, 275 P.3d 110, 123 (N.M. 2012) ("Of course, evidence of a defendant's guilt separate from the error may often be relevant, even necessary, for a court to consider, since it will provide context for understanding how the error arose and what role it may have played in the trial proceedings; but such evidence, as discussed above, can never be the singular focus of the harmless error analysis."); *People* v. *Best*, 979 N.E.2d 1187, 1189 (N.Y. 2012) ("A constitutional error may be harmless where evidence of guilt is overwhelming and there is no reasonable possibility that it affected the outcome of the trial."); *People* v. *Hardy*, 824 N.E.2d 953, 957-958 (N.Y. 2005) (confirming that an assessment of whether an error might have contributed to the conviction includes a review of the evidence in the entire record); *Snowden* v. *State*, 353 S.W.3d 815, 819 (Tex. Crim.

App. 2011) (noting the "proper role that the existence of overwhelming evidence may play in the determination whether an error can truly be said to have contributed to the conviction or punishment in a given case"); *Higginbotham* v. *State*, 807 S.W.2d 732, 734 (Tex. Crim. App. 1991) (en banc) ("[T]he impact of the error cannot be properly evaluated without examining its interaction with the other evidence.").

Meanwhile, the state courts that petitioner describes (Pet. 26) as "rely[ing] on the presence of overwhelming evidence" have all explained that the fundamental question is whether "the appellate court is assured beyond a reasonable doubt that the jury verdict cannot be attributed to the error." *State* v. *Lui*, 315 P.3d 493, 511 (Wash.) (en banc), cert. denied, 573 U.S. 933 (2014); see *Hagos* v. *People*, 288 P.3d 116, 119 (Colo. 2012) (en banc) (explaining that errors of constitutional dimension require reversal "if 'there is a reasonable *possibility* that the [error] might have contributed to the conviction'") (quoting *Chapman*, 386 U.S. at 24) (brackets in original); *State* v. *Peterson*, 652 S.E.2d 216, 224 (N.C. 2007) (assessing whether the verdict was "unattributable to the error") (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993)), cert. denied, 552 U.S. 1271 (2008); *State* v. *Wall*, 910 A.2d 1253, 1261 (N.H. 2006) ("It is well settled that the erroneous admission of evidence may be harmless if the State proves, beyond a reasonable doubt, that the verdict was not affected by the admission."); *State* v. *Shifflett*, 508 A.2d 748, 765 (Conn. 1986) ("[T]he test is whether 'there is a reasonable possibility that the improperly admitted evidence contributed to the conviction.'") (quoting *Schneble*, 405 U.S. at 432). Thus, as with the federal courts, any individual decisions in which state courts emphasize one particular

aspect of harmless-error analysis reflect its particular relevance to that decision—not a general divergence of approaches that would warrant this Court's review.

3. Even if the question presented otherwise warranted further review, this case would not be a suitable vehicle in which to address it. Before even engaging in its harmless-error inquiry, the court of appeals made two threshold assumptions in petitioner's favor: first, that the district court erred by limiting petitioner's additional surrebuttal testimony, and second, that petitioner preserved a constitutional objection to that ruling. Pet. App. 33a-34a. In fact, the district court did not err, and petitioner did not preserve a constitutional objection. Accordingly, resolution of the question presented would not be outcome determinative. At minimum, assessing the validity of the court of appeals' assumptions would complicate this Court's review.

To begin, the district court neither abused its discretion nor violated the Sixth Amendment by limiting petitioner's surrebuttal. Petitioner claimed that surrebuttal was his opportunity to explain why he had repeatedly billed Medicare for services on J.L.'s left eye. Pet. App. 26a, 140a. But petitioner himself had introduced J.L.'s testimony, revealing that J.L. was blind in his left eye, *id.* at 125a, as well as medical records concerning petitioner's treatment of J.L., *id.* at 144a, which indicated that petitioner had diagnosed J.L. with WMD in his left eye and planned to conduct an angiogram on that eye, see DX 193, at 5. Petitioner had the opportunity to explain his billing when he introduced all of that evidence. 9/22/15 Tr. 101, 103. Because he declined that opportunity (and later failed to object when the government asked J.L. about treatment to his left eye), the district court reasonably rejected petitioner's argument

that the government had introduced a "new issue" warranting broad surrebuttal. Pet. App. 145a; see *id.* at 144a-145a.

Furthermore, as the court of appeals observed, petitioner's proffered surrebuttal testimony was not responsive to key aspects of the government's rebuttal. See Pet. App. 27a. Petitioner did not, for example, explain why he needed to conduct various procedures on J.L.'s left eye as often as he did (sometimes multiple times per day), or why J.L. had testified that petitioner had never performed an angiogram on his left eye when petitioner had billed for six angiograms on that eye. *Ibid.* The district court therefore reasonably determined that a narrow surrebuttal—focused on countering the misimpression that petitioner had conducted surgery on J.L.'s left eye—would both protect petitioner's right to present a defense and avoid undue delay and juror confusion regarding treatments and billings that were not charged in the indictment and that petitioner had not indicated that he could explain. See *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (noting that the Sixth Amendment right to present a complete defense is "subject to reasonable restrictions"); *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976) (noting that district courts enjoy "broad power," within constitutional limits, to "control the scope of rebuttal testimony" and preclude "cumulative, repetitive, or irrelevant testimony").

Moreover, even assuming that the district court erred in limiting petitioner's surrebuttal, petitioner did not preserve a constitutional objection to that ruling. To preserve a claim of error, a party must "inform[] the court" of the party's objection "and the grounds for that objection." Fed. R. Crim. P. 51(b). Here, petitioner

"never once mentioned the Sixth Amendment or argued to the district court that the limitation violated that or any other constitutional provision." Pet. App. 31a. And as the court of appeals explained, the district court's passing reference to petitioner's "Sixth Amendment right" was insufficient to preserve the issue, which was not "decided, litigated, or explicitly resolved on the merits." *Id.* at 32a; see *id.* at 31a-32a. Thus, petitioner's constitutional claim is properly reviewable, if at all, only for plain error, see Fed. R. Crim. P. 52(b); *Puckett* v. *United States*, 556 U.S. 129, 135 (2009), and his nonconstitutional claim is subject to the less demanding "substantial and injurious effect" standard set forth in *Kotteakos*, see Pet. App. 34a-36a. Petitioner neither contends that plain-error relief would be appropriate on his current constitutional claim, nor addresses whether the strength of the government's case may be more or less relevant under different standards of review. But those issues could well be dispositive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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