No. 25-160

In the Supreme Court of the United States

JULIAN OMIDI AND SURGERY CENTER MANAGEMENT, LLC, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1028A(a)(1), which prescribes additional punishment for anyone who, "during and in relation to" a listed predicate felony, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" requires proof that the defendant had no authority at all from the other person to use the other person's identification.

2. Whether the court of appeals correctly found that an allegedly erroneous jury instruction was harmless.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

United States v. *Independent Medical Services, Inc.*, No. 18-50253 (May 12, 2020)

United States v. *Omidi*, No. 18-50284 (Nov. 27, 2019)

United States v. *Omidi*, No. 21-50020 (Apr. 22, 2021)

United States v. *Surgery Center Management, LLC*, No. 21-50023 (Apr. 22, 2021)

United States v. *Independent Medical Services, Inc.*, No. 21-50051 (Mar. 30, 2021)

United States v. *Omidi*, No. 21-50179 (Oct. 29, 2021)

United States v. *Omidi*, No. 23-1959 (Jan. 16, 2025)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-23a) is reported at 125 F.4th 1283. The memorandum of the court of appeals (Pet. App. 1a-11a) is available at 2025 WL 212820.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2025. A petition for rehearing was denied on April 3, 2025 (Pet. App. 24a-26a). On June 20, 2025, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 1, 2025, and the petition was filed on that date. 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 Central District of California, petitioners Julian Omidi and Surgery Center Management (SCM) were convicted on one count of mail fraud, in violation of 18 U.S.C. 1341; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Omidi Am. Judgment 1; SCM Am. Judgment 1. Omidi was also convicted of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1), and other offenses. Omidi Am. Judgment 1. The court sentenced Omidi to 84 months of imprisonment, to be followed by three years of supervised release; SCM was sentenced to five years of probation. Omidi Am. Judgment 1-2; SCM Am. Judgment 1. The court of appeals affirmed. Pet. App. 1a-11a; *id.* at 12a-23a.

1. Omidi, through SCM and other companies, defrauded insurers into paying for medically unnecessary procedures. Pet. App. 14a-15a. "Using catchy radio jingles and ubiquitous billboard ads, Omidi urged potential patients to call 1-800-GET-THIN and 'Let Your New Life Begin.'" *Id.* at 14a. When members of the public accepted the invitation and called, consultants who lacked medical credentials scheduled them for tests and procedures regardless of medical need, in an effort to secure insurer approval for lap-band surgery and other costly treatments. *Ibid.* Omidi directed employees to falsify patient data, fabricate diagnoses, and misrepresent physician involvement in order to deceive insurers into paying for thousands of treatments. *Id.* at 15a.

Omidi hired Dr. Mirali Zarrabi to interpret the sleep studies that were typically required to obtain insurer approval for lap-band surgery. See Omidi Presentence

Investigation Report ¶¶ 23, 28, 33. But Dr. Zarrabi generally did not review or interpret the studies. See C.A. E.R. 5792, 5799-5800. Omidi knew as much but paid Dr. Zarrabi for the use of his name. *Id.* at 5809-5810, 6022.

From October 2013 through at least the first half of 2014, Omidi stopped paying Dr. Zarrabi. C.A. E.R. 6021-6022. During that time, one of Omidi's companies submitted a sleep-study claim for a patient, F.M. *Id.* at 2056. An accompanying report, bearing Dr. Zarrabi's electronic signature, falsely represented that Dr. Zarrabi had interpreted the study and concluded that F.M. suffered from sleep apnea. *Id.* at 3381-3384.

2. A federal grand jury charged petitioners and other defendants with wire fraud, mail fraud, and other offenses. First Superseding Indictment 1-42. It also charged Omidi with one count of aggravated identity theft, in violation of 18 U.S.C. 1028A. First Superseding Indictment 26. Section 1028A requires an additional two-year prison sentence for anyone who, "during and in relation to" listed predicate felonies—such as mail or wire fraud—"knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(c)(5). The Section 1028A count was based on the use of Dr. Zarrabi's name and signature in connection with the sleep-study claim for F.M. and the accompanying report, at a time when Dr. Zarrabi was not working for Omidi. Pet. App. 10a-11a.

The jury found petitioners guilty on all counts. D. Ct. Doc. 1578 (Dec. 16, 2021). The district court sentenced Omidi to 84 months of imprisonment, including 24 months for aggravated identity theft count. Omidi Am. Judgment 1-2. The court sentenced SCM to five years of probation. SCM Am. Judgment 1.

3. The court of appeals affirmed in an unpublished memorandum addressing most of petitioners' claims, Pet. App. 1a-11a, and a published opinion addressing an additional issue, *id.* at 12a-23a. In the unpublished memorandum, the court of appeals (*inter alia*) rejected Omidi's challenges to his Section 1028A conviction, *id.* at 10a-11a, and petitioners' objection to the jury instructions, *id.* at 5a.

Omidi first argued that insufficient evidence supported his conviction. Pet. App. 10a. The court of appeals reviewed that sufficiency challenge for plain error because Omidi had failed to raise it at the close of evidence. *Ibid.* And the court rejected the challenge, finding that "a rational trier of fact could conclude" that Omidi's use of Dr. Zarrabi's signature "was at the 'crux' of the scheme to defraud." *Ibid.*

Omidi also argued that the district court had erred by instructing the jury that the government was not required to prove that Omidi had stolen Dr. Zarrabi's identity. Pet. App. 11a. The court of appeals rejected that challenge as well, explaining that it was foreclosed by its earlier decision in *United States* v. *Osuna-Alvarez*, 788 F.3d 1183 (9th Cir.), cert. denied, 577 U.S. 913 (2015), which had recognized that Section 1028A applies "regardless of whether the means of identification was stolen" from the owner. *Id.* at 1185; see Pet. App. 11a.

Petitioners also claimed the district court had erred by instructing the jury that the government could prove their intent to defraud (an element of mail and wire fraud) by showing their reckless indifference to the truth or falsity of their statements. Pet. App. 5a. The court of appeals declined to decide whether the jury instruction was erroneous, instead finding that any error

"would be harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud." *Ibid.*

ARGUMENT

Omidi contends (Pet. 8-18) that he did not violate 18 U.S.C. 1028A because Dr. Zarrabi consented to Omidi's use of his means of identification. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This case also would be an unsuitable vehicle to consider the question presented. The Court has repeatedly denied petitions for a writ of certiorari raising similar issues.[1] The Court should follow the same course here.

Omidi, along with SMC, also contends (Pet. 17-23) that the court of appeals erred by applying harmless-error review when considering their challenge to the jury instructions on mail and wire fraud. The court's decision was correct and does not conflict with any decision of this Court or another court of appeals. This case also would be a poor vehicle for addressing that issue. This Court has repeatedly denied petitions for writs of certiorari alleging a conflict in the lower courts regarding the application of the harmless-error

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[1] See *Gagarin* v. *United States*, 141 S. Ct. 2729 (2021) (No. 20-7359); *Gatwas* v. *United States*, 140 S. Ct. 149 (2019) (No. 18-9019); *Perry* v. *United States*, 582 U.S. 905 (2017) (No. 16-7763); *Bercovich* v. *United States*, 577 U.S. 1062 (2016) (No. 15-370); *Osuna-Alvarez* v. *United States*, 577 U.S. 913 (2015) (No. 15-5812); *Rodriguez-Ayala* v. *United States*, 577 U.S. 843 (2015) (No. 14-10013); *Otuya* v. *United States*, 571 U.S. 1205 (2014) (No. 13-6874). The same issue is presented in the pending petition for a writ of certiorari in *Parviz* v. *United States*, No. 25-201 (filed Aug. 15, 2025).

standard to instructional errors.[2] The Court should likewise deny certiorari here.

1. Omidi's challenge to his Section 1028A conviction does not warrant further review.

a. Section 1028A requires an additional two-year term of imprisonment for anyone who, "during and in relation to" a predicate felony, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). Omidi does not meaningfully dispute that he "use[d]" a "means of identification of another person" "during and in relation to" a predicate felony. *Ibid.* But he claims (*e.g.*, Pet. 8) that he acted with "lawful authority," on the theory Dr. Zarrabi allegedly consented to Omidi's use of the doctor's identifying information.

Omidi's construction of the statute is unsound. The word "authority" means "[p]ower derived from or conferred by another; the right to act in a specified way, delegated from one person to another; official permission, authorization." *Oxford English Dictionary* (3d ed. Dec. 2022). And "lawful" means "[a]ccording or not contrary to law, permitted by law." *Oxford English Dictionary* (3d ed. Mar. 2021). Thus, "lawful authority" is a right or permission to act that is not contrary to law.

Lawful authority is not the same thing as consent. A defendant lacks lawful authority if he uses a means of identification without consent *or* if he uses it with consent but the conferral of that consent violates the law. In other words, a defendant who obtains a means of

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[2] See *Jordan* v. *United States*, 144 S. Ct. 2717 (2024) (No. 23-650); *Zheng* v. *United States*, 144 S. Ct. 2604 (2024) (No. 23-928); *Greenlaw* v. *United States*, 144 S. Ct. 2518 (2024) (No. 23-631); *McFadden* v. *United States*, 581 U.S. 904 (2017) (No. 16-679); *Caroni* v. *United States*, 579 U.S. 929 (2016) (No. 15-1292).

identification with another person's permission still lacks "lawful authority" to use it in an unlawful manner. Omidi's contrary interpretation reads the word "lawful" out of the statute.

There is also no merit to Omidi's apparent suggestion (Pet. 8) that the phrase "of another person" requires a showing that the other person withheld consent. Omidi used Dr. Zarrabi's identifying information, and Dr. Zarrabi is plainly "another person." Dr. Zarrabi's status as "another person" does not turn on whether he consented.

b. Omidi errs in arguing (Pet. 12-14) that the decision below conflicts with this Court's interpretation of Section 1028A in *Dubin* v. *United States*, 599 U.S. 110 (2023). In *Dubin*, the Court expressly declined to "reach the proper interpretation of 'without lawful authority.'" *Id.* at 128 n.8. Instead, it held that, to satisfy Section 1028A's requirement that the misuse of another person's means of identification occur during and in relation to a predicate felony, the government must prove that the misuse "is at the crux of what makes the underlying offense criminal, rather than merely an ancillary feature." *Id.* at 114. And here, the court of appeals found that the government had satisfied that requirement: because Dr. Zarrabi's signature "misled insurers into believing a physician was involved in the billed service," "a rational trier of fact could conclude the identity theft was at the 'crux' of the scheme to defraud." Pet. App. 10a.

Omidi emphasizes (Pet. 12-13) this Court's observation that Section 1028A's caption, "Aggravated identity theft," "shed[s] light" on the provision's text. *Dubin*, 599 U.S. at 120-122. But as the Court explained, the phrase "identity theft" encompasses "unlawful taking

and use of another person's identifying information for fraudulent purposes." *Id.* at 123 (quoting *Black's Law Dictionary* 894 (11th ed. 2019) (*Black's*)); see *id.* at 128 n.6 (noting that "[s]tealing" can, of course, include situations where something was initially lawfully acquired" (citing *Black's* 1710) (brackets omitted). It thus mirrors the textual requirement that a defendant lack "lawful authority" to use another person's identifying information to commit a specified form of fraud.

Omidi also invokes (Pet. 14) this Court's observation that the government had "claimed that a defendant would not violate § 1028A(a)(1) if [he] had permission to use a means of identification to commit a crime." *Dubin*, 599 U.S. at 128 n.8. But in the passage of the government's brief that the Court paraphrased, the government did not suggest that consent automatically amounts to "lawful authority" in the context of using personal identification to commit a crime. See Gov't Br. at 31, *Dubin*, *supra* (No. 22-10). Instead, the government stated that the requirement that the defendant act "'without lawful authority'" excludes "a defendant who has *valid* permission to use someone else's means of identification." *Ibid.* (emphasis added) (quoting 18 U.S.C. 1028A).

c. The courts of appeals that have considered the question presented have "universally" agreed that a defendant can violate Section 1028A(a)(1) even if he "used another person's means of identification with the other person's consent or permission." *United States* v. *Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir.), 577 U.S. 913 (2015); see *United States* v. *Ozuna-Cabrera*, 663 F.3d 496, 501 (1st Cir. 2011), cert. denied, 566 U.S. 950 (2012); *United States* v. *Otuya*, 720 F.3d 183, 189 (4th Cir. 2013), cert. denied, 571 U.S. 1205 (2014); *United*

States v. *Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013); *United States* v. *Retana*, 641 F.3d 272, 275 (8th Cir. 2011); *United States* v. *Hurtado*, 508 F.3d 603, 607 (11th Cir. 2007), cert. denied, 553 U.S. 1094 (2008), abrogated on other grounds by *Flores-Figueroa* v. *United States*, 556 U.S. 646 (2009); see also *United States* v. *Carrion-Brito*, 362 Fed. Appx. 267, 273 (3d Cir. 2010).

Contrary to Omidi's contention (Pet. 8-12), the Seventh Circuit's decision in *United States* v. *Spears*, 729 F.3d 753 (2013) (en banc), does not conflict with that consensus, but instead addressed a different issue. The defendant in *Spears* made a counterfeit handgun permit for a client, containing the client's name and birthdate, and the client used that permit to attempt to buy a gun. See *id.* at 754. The defendant "acknowledge[d] that he lacked 'lawful authority' to sell counterfeit permits," arguing instead (*inter alia*) that he did not "transfer" "a means of identification of another person" within the meaning of the statute. *Id.* at 755. The Seventh Circuit agreed, taking the view that a defendant does not "transfe[r]" "a means of identification of another person" by giving it to the putative identity-theft victim himself. *Id.* at 757-758 (citation omitted); see *id.* at 755-758.

"*Spears* is purposefully silent as to the meaning of 'without lawful authority,' as that element was conceded on rehearing." *United States* v. *Mahmood*, 820 F.3d 177, 189 (5th Cir. 2016). The Seventh Circuit instead "expressly limited its holding and discussion to the meaning of 'another person'" in the context of a transfer of a means of identification. *Ibid.* And the Seventh Circuit has itself described *Spears* as simply "holding that manufacturing a false means of identification for a customer using the customer's own identifying infor-

mation does not violate § 1028A." *United States* v. *Zheng*, 762 F.3d 605, 609 (2014). And petitioner does not identify any instance in which the Seventh Circuit has applied *Spears* to a case like this one, where the defendant is charged with using (rather than transferring) another person's identifying information.

d. In any event, this case is an unsuitable vehicle for addressing the question presented. First, Omidi forfeited any challenge to his aggravated-identity-theft conviction by failing to press it in his opening appellate brief and by raising it for the first time in his reply brief. See Gov't C.A. Supp. Br. 5-6. Though the court of appeals did not address Omidi's forfeiture—perhaps because circuit precedent foreclosed his claim—the government would be entitled to argue for affirmance "on any ground permitted by the law and the record." *Dahda* v. *United States*, 584 U.S. 440, 450 (2018) (citation omitted).

Second, Omidi also forfeited his challenges to the Section 1028A conviction in district court. The court of appeals determined that Omidi forfeited his challenge to the sufficiency of the evidence, see Pet. App. 10a—a determination Omidi does not contest here. Omidi also forfeited his current challenge to the jury instructions on "without lawful authority." He objected in district court to the instruction that "[t]he government need not establish that the means of identification of another person was stolen," D. Ct. Doc. 1361, at 61-62 (Sept. 14, 2021), but on the ground that it was redundant with another instruction, see *id.* at 62—not on the ground that the statute requires proof that the defendant used another person's means of identification without that person's consent. Omidi's challenges to the Section 1028A conviction are therefore reviewable only for plain error,

a standard he cannot satisfy given the lack of appellate precedent supporting his position. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (explaining that the plain-error standard requires a showing that the error was "clear" or "obvious").

Third, the evidence does not support Omidi's contention that he acted with Dr. Zarrabi's consent. See Gov't C.A. Supp. Br. 11-17. The evidence at most supports the view that Dr. Zarrabi permitted the use of his signature when he was paid for that use. See C.A. E.R. 6009-6014. It also establishes that, between late 2013 and at least the latter half of 2014, Dr. Zarrabi was not involved in Omidi's scheme because Omidi had not paid him. See *id.* at 6021-6022. Thus, regardless of whether Omidi initially used Dr. Zarrabi's name with his consent, he lacked Dr. Zarrabi's consent to use his name in connection with the specific claim covered by the Section 1028A charge. See *Dubin*, 599 U.S. at 122 n.6 ("'Stealing' can, of course, include situations where something was initially lawfully acquired.") (brackets omitted).

2. Petitioners' contention that the court of appeals should not have applied harmless-error review to their challenge to the mail-fraud and wire-fraud instructions likewise does not warrant this Court's review.

a. A federal statute provides that, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111. And Federal Rule of Criminal Procedure 52 states that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). The statute and rule are subject to a

narrow exception for "structural" errors, which warrant automatic reversal without analysis of harmlessness. See, *e.g.*, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that the omission of an element from the jury instructions is not a structural error and is subject to harmless-error analysis. See *id.* at 8-15. In doing so, the Court observed that it has "often applied harmless-error analysis to cases involving improper instructions on a single element of the offense." *Id.* at 9; see *id.* at 9-10 (citing cases). Consistent with *Neder*, the court of appeals in this case found "beyond a reasonable doubt" that the asserted instructional error was harmless. Pet. App. 5a (citation omitted).

Petitioners err in contending (Pet. 18) that an instructional error can be harmless only if the defendant "did not contest the element before the jury." In making its harmlessness determination, *Neder* relied on cases considering the erroneous admission or exclusion of evidence and explained that the ultimate harmless-error inquiry is "essentially the same" across those different types of constitutional errors, asking whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18.

The Court emphasized that the ultimate determination on harmless error is often intensely record-dependent and requires a "case-by-case approach." *Neder*, 527 U.S. at 14; see *id.* at 19. While an error should not be deemed harmless "where the defendant contested the [disputed] element *and* raised evidence sufficient to support a contrary finding," *id.* at 19 (emphasis added), it would be harmless if the record shows that a

contested element would have come out the same way irrespective of the instructional error. The court of appeals conducted that inquiry here, and it found that "any [instructional] error would be harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud." Pet. App. 5a.

b. Courts of appeals have declined to limit harmless-error review of instructional errors to cases where the defendant failed to contest the affected element. See *United States* v. *Jackson*, 196 F.3d 383, 385-386 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000); *United States* v. *Boyd*, 999 F.3d 171, 179-182 (3d Cir.), cert. denied, 142 S. Ct. 511 (2021); *United States* v. *Brown*, 202 F.3d 691, 701 (4th Cir. 2000); *United States* v. *Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022); *United States* v. *Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999), cert. denied, 530 U.S. 1261 (2000)). Contrary to petitioners' suggestion, no court of appeals has adopted a contrary rule.

Petitioners err in invoking (Pet. 19) the First Circuit's decision in *United States* v. *Wu*, 711 F.3d 1, cert. denied, 571 U.S. 890 (2013). There, the court stated that the case before it differed from *Neder* because the defendant "*did* contest" the relevant element. *Id.* at 20. And the court applied the standard and found that the error was not harmless because the government had not proved "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Ibid.* (ellipsis omitted). It is therefore not clear that a future panel of that court would be bound to dispense with the normal harmless-error inquiry merely because the defendant contested the omitted element, regardless of whether the element's omission had any appreciable effect on the outcome. And petitioners likewise err in relying on *United States* v. *Boyd*, in which the Third

Circuit found an error harmless notwithstanding that it was contested at trial. 999 F.3d at 179-182.

Petitioners' suggestion (Pet. 19-20) of internal inconsistency in the Second, Ninth, and Tenth Circuits provides no basis for further review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). And each of those circuits has precedent that rejects petitioner's approach. See *Monsanto* v. *United States*, 348 F.3d 345, 350 (2d Cir. 2003) (noting circuit precedent that the omission of an element can be harmless even if the element was "controverted"); *United States* v. *Freeman*, 70 F.4th 1265, 1282 (2023) (10th Cir.) ("[W]e reject Freeman's assertion that, pursuant to *Neder*, the omission of an element in the jury instructions cannot be harmless if the element was contested at trial"); *Saini*, 23 F.4th at 1155 ("[W]hether Saini contested the omitted element is not determinative. Our harmless error inquiry instead focuses on what the evidence showed regarding Saini's intent to defraud and whether we can conclude beyond a reasonable doubt 'that the jury verdict would have been the same absent the error.'") (quoting *Neder*, 527 U.S. at 17).

Petitioners cite (Pet. 20-21) Judge Lipez's concurring opinion in *United States* v. *Pizarro*, 772 F.3d 284 (1st Cir. 2014), which perceived intra- and inter-circuit conflicts over the application of *Neder*, see *id.* at 304-306, and opined that instructional errors should be deemed harmless under *Neder* only if the omitted element "is supported by overwhelming evidence" and the element was "uncontested," in the sense that "the defendant did not argue that a contrary finding on the omitted element was possible," *id.* at 310-311. But a

second concurring judge in *Pizarro* disagreed with that assessment of the state of the law, finding "very little—if any—inconsistency" in *Neder*'s application. *Id.* at 313 (Torruella, J., concurring); see *id.* at 324-325. And no court of appeals has narrowed *Neder*'s harmless-error inquiry in the fashion advocated by Judge Lipez.

c. In all events, this case would be a poor vehicle for considering petitioners' contention. First, petitioners did not raise their current view about appellate review of jury-instruction omissions in the court of appeals, and the court accordingly did not consider it. Petitioners instead accepted the applicability of harmless-error analysis, observing that, "[t]o sustain Omidi's convictions in this case, the government must * * * show that [the instruction] was harmless beyond a reasonable doubt." Pet. C.A. Br. 36; see *id.* at 18 (accepting harmless-error standard). This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it ordinarily does not consider contentions that were "not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

Second, the court of appeals reached the question of harmlessness only because it assumed "arguendo" that the district court erred by instructing the jury that the government could prove petitioners' intent to defraud by showing their reckless indifference to the truth or falsity of their representations. Pet. App. 5a. Petitioners do not meaningfully contest authority—including from the court below—supporting the correctness of that instruction. See, *e.g.*, *Cooper* v. *Schlesinger*, 111 U.S. 148, 155 (1884) ("[T]he jury were properly instructed that a statement recklessly made, without knowledge of its truth, was a false statement knowingly

made, within the settled rule."); *United States* v. *Lloyd*, 807 F.3d 1128, 1164 (9th Cir. 2015) (describing circuit precedent "reasoning that in a mail-fraud prosecution, one who acts with reckless indifference as to whether a representation is true or false is chargeable as if he had knowledge of its falsity") (citation and internal quotation marks omitted), cert. denied, 583 U.S. 895 (2017).

Furthermore, the district court separately instructed the jury that, to obtain convictions for mail and wire fraud, the government also had to prove that petitioners "knowingly participated in or devised a scheme or plan to defraud." 12/10/21 Trial Tr. 8608-8611; see D. Ct. Doc. 1563, at 32, 34 (Dec. 16, 2021). The court also instructed the jury that "[a]n act is done 'knowingly' if the defendant is aware of the act and does not act through ignorance, mistake or accident." 12/10/21 Trial Tr. 8616; see D. Ct. Doc. 1563, at 46. Given those separate instructions, even if it could infer a specific intent to defraud from petitioners' reckless indifference to the falsity of their representations to insurers, the jury would have understood that it could find them guilty only if they knowingly participated in or devised the fraudulent scheme. See *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994) (explaining that jury instructions are sufficient when, "taken as a whole," they "correctly convey" the relevant "concept") (brackets and citation omitted).

d. Petitioners separately argue (Pet. 23-26) that harmless-error review should not apply to their claim that the district court's instructions had constructively amended or varied the indictment. But the court of appeals determined that "neither constructive amendment nor variance occurred here," Pet. App. 6a, and petitioners have not asked this Court to review that determination, see Pet. i (questions presented). Nor would

any factbound assertion of error warrant this Court's review. See Sup. Ct. R. 10. Because the court of appeals found no error, the Court has no occasion to consider whether such a hypothetical error would be subject to harmless-error analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2025