

No. 26-

IN THE
Supreme Court of the United States

FRANK PARASMO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Neder v. United States*, 527 U.S. 1 (1999), this Court held that where a jury was erroneously instructed on an element of the charged offense, a reviewing court may deem the error harmless if it “concludes beyond a reasonable doubt that the omitted element was *uncontested* and supported by overwhelming evidence.” *Id.* at 17 (emphasis added).

The circuits have developed two conflicting approaches to applying *Neder* in cases where the element at issue was *contested*. Some courts, including the divided Second Circuit panel below, weigh the evidence on the disputed element themselves and deem an error harmless if they deem the government’s evidence sufficiently strong. Other courts ask only whether the defendant’s evidence could rationally support acquittal, without weighing it against the government’s evidence. The confusion has led to irreconcilable decisions regarding harmless error, and, as Judge Robinson explained in dissent below, has led to a clear circuit split regarding the harmlessness of jury instructions that violate this Court’s decision in *Ruan v. United States*, 597 U.S. 450 (2022). The question presented is:

Where a jury convicts a defendant after being erroneously instructed on an element of the offense that the defendant plausibly contested, do this Court’s precedents and the Sixth Amendment permit an appellate court to find the error harmless based on the court’s assessment of the strength of the government’s evidence?

PARTIES TO THE PROCEEDING

Frank Parasmó, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the Second Circuit:

United States v. Parasmó, No. 23-6555 (2d Cir.
May 19, 2026) (reported at 176 F.4th 220)

U.S. District Court for the Eastern District of New
York:

United States v. Parasmó, No. 2:19-cr-1 (E.D.N.Y.
Jan. 30, 2023) (not reported)

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Frank Parasmo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's decision is reported at 176 F.4th 220. Pet. App. 1a-44a. Petitioner did not seek rehearing or rehearing en banc. The district court's Memorandum and Order Denying Petitioner's Motion for a Judgment of Acquittal or, Alternatively, for a New Trial is not reported but is available at 2023 WL 1109649. Pet. App. 47a-108a.

JURISDICTION

The Second Circuit entered judgment on May 19, 2026. Pet. App. 45a-46a. On August 11, 2026, Justice

Sotomayor granted a 30-day extension of the period for filing this petition to September 16, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * .

U.S. Const. amend. VI.

Section 401 of the Controlled Substances Act, as amended, provides, in relevant part:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841(a).

Rule 52(a) of the Federal Rules of Criminal Procedure provides, in relevant part:

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Fed. R. Crim. P. 52(a).

INTRODUCTION

This Court should grant certiorari to resolve a longstanding disagreement among appellate courts over the proper approach to harmless error in cases where the defendant contested an element on which the jury was erroneously instructed. In *Neder v. United States*, 527 U.S. 1 (1999), this Court held that

where a jury was erroneously instructed on an element that the defendant did *not* contest, a reviewing court may deem the error harmless so long as the government's evidence was "overwhelming." *Id.* at 17.

Appellate courts are divided over how to apply *Neder* in cases where the defendant *did* contest the element on which the jury was erroneously instructed. Some courts—including the sharply divided panel below—understand *Neder* to apply the same harmless standard regardless of whether the defendant contested the element. These courts weigh the evidence themselves and deem any error harmless so long as the court finds that the government's evidence sufficiently outweighs the defendant's evidence. *E.g.*, Pet. App. 11a-18a. By contrast, other courts hold that the Sixth Amendment bars appellate courts from usurping the jury's role by weighing the government's evidence against the defendant's on a disputed element. Those courts instead ask only whether the record contains enough evidence from which a jury could "rationally" reach a "contrary finding" regarding the disputed element. *E.g.*, *United States v. Brown*, 202 F.3d 691, 701 (4th Cir. 2000) (citation omitted). If so, the instructional error cannot be deemed harmless, regardless of the strength of the government's case.

The decision below throws this conflict into sharp relief. A divided panel of the Second Circuit split from the Fourth, Fifth, Tenth, and Eleventh Circuits in its approach to harmless error in cases involving convictions obtained in violation of this Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022). In *Ruan*, this Court invalidated jury instructions that allowed a jury to convict physicians

for overprescribing controlled substances based on an objective-intent standard, holding instead that Section 401(a) of the Controlled Substances Act, 21 U.S.C. § 841(a), requires the government to prove beyond a reasonable doubt that the defendant acted with subjective criminal intent. 597 U.S. at 454. Until the Second Circuit’s decision below, the circuits had consistently refused to find *Ruan* errors harmless where the defendant plausibly contested his subjective intent at trial.

But in this case, a divided Second Circuit panel deemed a *Ruan* error harmless even though the jury instruction “misinformed the jury as to the *only* element of the charged offense” the defendant contested—“his subjective intent”—and even though the dissent explained that there was “ample evidence from which the jury could have concluded that” the “government failed to prove” that the defendant “subjectively believed he was acting as a dealer not a doctor.” Pet. App. 31a, 33a. As the dissent explained, the majority’s decision was “squarely at odds with considered decisions of other circuits in similar cases.” Pet. App. 41a.

The majority’s approach contravenes this Court’s precedent and tramples the Sixth Amendment’s jury-trial guarantee. Where, as here, a defendant contests an element on which the jury was erroneously instructed, an appellate court cannot deem the error harmless merely because it believes the government’s evidence is strong. Under the Sixth Amendment, “a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers *regardless of how overwhelming the evidence may seem to a judge.*” *Erlinger v. United States*, 602 U.S.

821, 842 (2024) (emphasis added) (quotation marks, citation, and brackets omitted). Instead, harmless review must focus on whether the defendant plausibly disputed the element. That is why *Neder* itself noted that courts should not find an error harmless “where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.” 527 U.S. at 19. The Second Circuit’s decision contravenes that command and exceeds the guardrails *Neder* placed on harmless-error review to ensure it remains faithful to the Sixth Amendment.

The square split over harmless error in *Ruan* cases is reason enough to grant certiorari. But that split is symptomatic of broader disagreement over how to evaluate instructional errors for harmless. Courts and scholars have highlighted “significant inconsistency” among the circuits in how to evaluate whether “the failure to instruct on an element of a crime” is harmless. *United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring). Since *Neder*, some courts have repeatedly made the same mistake as the panel below, concluding that an instructional error is harmless based on the perceived strength of the government’s evidence—even where the element was hotly contested at trial and the record contains evidence supporting the defendant’s position. Other courts, by contrast, refuse to weigh the evidence on a disputed element themselves. This Court’s intervention is needed to restore uniformity and vindicate the Constitution’s safeguards for the jury-trial right.

This case is an ideal vehicle. The legal question is squarely presented, and the facts illustrate the problems with the Second Circuit’s approach.

Petitioner Dr. Frank Parasma is an 80-year-old doctor who practiced medicine for more than four decades. *See* Pet. App. 121a-122a. At his trial, he introduced extensive evidence of his good faith, including the fact that he “ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain-inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients’ pain, including prescribing medications *other than* a controlled substance.” Pet. App. 35a (Robinson, J., dissenting). But the government told the jury that this evidence was irrelevant, emphasizing in its closing argument that Dr. Parasma’s prescriptions had to be reasonable, and the standard “is *not subjective*.” Pet. App. 39a (citation omitted). The jury instructions reinforced the point, instructing the jurors that they must convict if they found the prescriptions to be objectively unreasonable. *See* Pet. App. 11a (majority op.). Even under these erroneous instructions, the jury issued a split verdict, indicating that the issue was close.

The Second Circuit unanimously found that the jury instructions were “defective” under *Ruan*, Pet. App. 3a, but two judges nonetheless proceeded to weigh the evidence themselves and find the error harmless. As a result, unless this Court steps in, this 80-year-old physician will go to prison based on a finding of guilt by a divided panel of appellate judges rather than the unanimous jury the Constitution guarantees.

This Court should grant certiorari and reverse.

STATEMENT

A. Legal Background

Section 401(a) of the Controlled Substances Act makes it unlawful “for any person knowingly or intentionally” “to manufacture, distribute, or dispense * * * a controlled substance” “[e]xcept as authorized.” 21 U.S.C. § 841(a). In *Ruan*, this Court addressed the mens rea applicable to prosecutions of physicians charged with prescribing controlled substances in excess of their authorization under Section 401(a). The Court held that Section 401 imposes a subjective, rather than objective, standard of intent regarding whether the prescription was “authorized.” Thus, “once a defendant meets the burden of producing evidence that his or her conduct was ‘authorized,’ the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.” *Ruan*, 597 U.S. at 457.

To convict a physician as a drug dealer, *Ruan* thus holds that the government must prove that the physician “*subjectively knew*” or intended “that his prescriptions fell outside the scope of his prescribing authority.” *Id.* at 455. Because prescriptions of controlled substances can be entirely lawful, the Court explained that requiring subjective intent plays a “crucial” role in separating “innocent” prescriptions from criminal misconduct. *Id.* at 459 (quotation marks and citation omitted).

Before *Ruan*, many circuits, including the Second Circuit, approved instructions that required juries to convict if they concluded the physician’s prescribing practices were objectively unreasonable, even if the physician did not subjectively act with criminal

intent. *E.g.*, *United States v. Singh*, 390 F.3d 168, 186 (2d Cir. 2004). After *Ruan*, defendants convicted under such instructions have sought acquittal or a new trial. The critical question in each case is whether the instructional error was harmless.

This Court has held that errors in jury instructions related to an element of the charged offense are susceptible to harmless-error review. In *Neder*, this Court explained that an appellate court may deem an instructional error harmless if the court concludes “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” 527 U.S. at 15 (citation omitted). *Neder* held that “where a reviewing court concludes beyond a reasonable doubt that the omitted element *was uncontested* and supported by overwhelming evidence,” then “the erroneous instruction is properly found to be harmless.” *Id.* at 17 (emphasis added). By contrast, “where the defendant *contested* the omitted element and raised evidence sufficient to support a contrary finding,” a reviewing court “should not find the error harmless.” *Id.* at 19 (emphasis added).

B. Factual Background

1. Dr. Frank Parasmo is a physician who practiced internal medicine in Long Island for over four decades. *See* Pet. App. 121a-122a. He is 80 years old.

Dr. Parasmo prescribed no opioids to many of his patients. *See* Pet. App. 112a-123a (testimony of pain patients who were prescribed no prescription medication). But some of Dr. Parasmo’s patients suffered from severe chronic pain stemming from conditions such as traumatic brain injuries following a significant car accident and degenerative disk disease requiring lumbar surgery. Pet. App. 35a-37a

(Robinson, J., dissenting). Between 2014 and 2015, Dr. Parasmó prescribed oxycodone and hydrocodone to a number of these patients. Pet. App. 3a-4a (majority op.).

In 2019, a grand jury indicted Dr. Parasmó on 35 counts of unlawfully distributing oxycodone and hydrocodone under Section 401 of the Controlled Substances Act. Pet. App. 4a. Each count corresponded to a prescription written for a specific patient. The government's theory was that Dr. Parasmó distributed opioids to some of his patients without genuine medical need. Pet. App. 110a.

The trial evidence painted a far more complex picture than the government's theory suggested. Dr. Parasmó's practice bore none of the hallmarks of a so-called "pill mill": It did not involve any "prescription without examination, fake patients, cash payments, lines of people waiting to get into the mill, [or] cash kickbacks from a pharmacy." Pet. App. 34a (Robinson, J., dissenting). In fact, "in treating individual patients, Dr. Parasmó ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain-inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients' pain, including prescribing medications *other than* a controlled substance." Pet. App. 35a. Thus, many of Dr. Parasmó's patients testified that Dr. Parasmó did *not* prescribe them pain medication and instead pursued other treatments. *See* Pet. App. 112a-123a.

Dr. Parasmó's defense centered on his subjective good faith. He pointed to evidence showing that he believed the prescriptions were medically warranted, that he was acting within the bounds of his

professional judgment, and that even if some prescriptions were ill-advised, he never knowingly or intentionally prescribed outside the usual course of medical practice. *See, e.g.*, Pet. App. 124a-125a. While the prosecution emphasized that some of Dr. Parasmó's patients exhibited signs of abuse, Dr. Parasmó countered with evidence that while "he was aware of and concerned about the signs that his patients were abusing or misdirecting their medications, he subjectively believed, in good faith, that his prescriptions were appropriate to manage his patients' pain arising from genuinely serious medical conditions, and that he was taking reasonable steps to address the possibility that patients were abusing the controlled substances." Pet. App. 31a-32a (Robinson, J., dissenting). He proffered evidence that it was not medically appropriate to cut off patients addicted to opioids, even in the face of red flags, given the risk that patients would suffer withdrawal without proper tapering, would seek opioids through alternate sources if immediately cut off, or would replace opioids with illegal narcotics. Pet. App. 111a, 125a (citing CDC guidance explaining that "[c]linicians should not dismiss patients from care based on a urine drug test result").

Although Dr. Parasmó's subjective good faith was the cornerstone of his trial defense, the district court's jury charge instructed the jury that it was irrelevant. At the government's urging, and over defense objection, the court adopted instructions informing the jury that a conviction was required if the jury concluded that the prescriptions were "outside the bounds of professional medical practice and not for a legitimate medical purpose." Pet. App. 7a (citation omitted). The government's closing argument

reinforced that Dr. Parasmó's subjective good faith was not a defense, noting that Dr. Parasmó's belief in the legitimacy of his prescriptions "has to be reasonable, and is *not subjective*." Pet. App. 39a (Robinson, J., dissenting) (citation omitted). The jury returned a split verdict. It convicted Dr. Parasmó on 32 counts but acquitted on three. Pet. App. 4a (majority op.).

2. Many family members of Dr. Parasmó's "victims" and other patients testified or wrote letters on his behalf at sentencing, explaining that he had helped his patients through the debilitating ordeal of chronic pain and addiction. Pet. App. 128a-131a. For example, Deborah Wreckter (Count 35) explained that she had previously suffered from an "unruly cocaine addiction" to manage her chronic pain, but that "[w]ith [Dr. Parasmó's] help," she was able to treat her pain "the correct way, without using any illegal substances," and that she "would not be alive today without that man." Pet. App. 136a. Joseph Ascalia, the son of Mary Roland (Counts 28-30), explained that his mother had suffered from "appalling" pain "for the last 20 years" because "[s]he can't get treatment. She can't get surgery. * * * [S]he just sits there and suffers in pain," so Dr. Parasmó's treatment was a lifeline. Pet. App. 129a. Another patient described how Dr. Parasmó "took [him] off all the powerful" pain medication he had been prescribed by a different physician and helped him reclaim his life. Pet. App. 140a-141a. Another described how Dr. Parasmó "weaned [her] from" opioids that had been prescribed by a different physician. Pet. App. 139a-140a. Still another stated that "Dr. Parasmó saved my life," explaining that he "guided [her] through

detoxification, treatment, rehabilitation, and recovery” from addiction. Pet. App. 140a.

Patients referred to Dr. Parasmó as “a blessing,” “dedicated,” “compassionate,” “trustworthy,” and “courteous.” Pet. App. 135a (quotation marks omitted). Many highlighted the house calls he made to visit aging patients who could not travel. Pet. App. 135a, 139a. Others noted simply: “[W]e love him.” Pet. App. 135a (quotation marks omitted). The trial court remarked at sentencing, “I have never received as many letters [in support of a defendant] as I have received in this case.” Pet. App. 128a. The trial court sentenced Dr. Parasmó to three years’ imprisonment and three years of supervised release. Pet. App. 131a-132a.

3. Less than a year after Dr. Parasmó’s conviction, this Court unanimously held in *Ruan* that the Controlled Substances Act imposes a subjective rather than objective standard of intent. Under *Ruan*, to send a physician to prison as a drug dealer, the government must prove beyond a reasonable doubt that the defendant “knowingly or intentionally acted in an unauthorized manner.” 597 U.S. at 457; *see id.* at 479 (Alito, J., concurring in the judgment) (“a doctor who acts in subjective good faith in prescribing drugs is entitled to invoke the CSA’s authorization defense”). Relying on *Ruan*, Dr. Parasmó sought acquittal or a new trial.

The district court denied relief, and the Second Circuit affirmed. Pet. App. 2a, 107a-108a. The Second Circuit unanimously held that the jury instructions were “defective” under *Ruan* because they “incorrectly instructed the jury to apply an objective – rather than a subjective – standard of intent.” Pet. App. 3a; *see* Pet. App. 31a-32a

(Robinson, J., dissenting). A majority of the panel, however, concluded that the error was harmless.

The majority “beg[a]n” with the government’s evidence “regarding the generally accepted standards of medical practice”—that is, evidence regarding whether the challenged prescriptions were *objectively* reasonable. Pet. App. 12a. It then cited five examples of Dr. Parasmó prescribing opioids to patients who showed red flags suggesting drug abuse or addiction and concluded that this and other evidence “would compel a reasonable jury to conclude that Parasmó subjectively understood that his prescription practices fell outside the usual course of professional practice.” Pet. App. 13a-17a. The majority then brushed aside the contrary defense evidence as reflecting “a highly selective view of the record.” Pet. App. 18a-23a. The majority did not address the harmlessness of each count of conviction, even though the evidence as to each differed. Nor did the majority address the fact that the jury acquitted Dr. Parasmó on multiple counts even under the defective instructions, or explain how those acquittals could be reconciled with its view that no reasonable jury could have acquitted under the correct standard of intent. *See* Pet. App. 44a (Robinson, J., dissenting).

Judge Robinson dissented on the harmlessness question. Unlike the majority, she began by explaining that where the defendant contested the element on which the jury was erroneously instructed, the only question is whether the evidence “all flows in one direction” to favor the government. Pet. App. 34a (Robinson, J., dissenting) (citation and brackets omitted). Citing *Neder*, Judge Robinson stressed that “where an element of an offense is contested,” an appellate court “should be extremely

wary of treating the failure to require the jury to make a finding as to that element as a harmless error.” Pet. App. 32a; *see* Pet. App. 41a-44a.

Applying these principles, she easily concluded that the government failed to prove harmlessness beyond a reasonable doubt. She noted that the district court’s instruction “misinformed the jury as to the *only* element of the charged offense that Dr. Parasmo contested—his subjective intent.” Pet. App. 31a (Robinson, J., dissenting). Thus, the error “invited the jury to convict *even if* it accepted Dr. Parasmo’s view of the case.” Pet. App. 32a. She concluded there was “ample evidence from which the jury could have concluded that the government failed to prove beyond a reasonable doubt that Dr. Parasmo subjectively believed he was acting as a dealer not a doctor.” Pet. App. 33a. She noted that, “in treating individual patients, Dr. Parasmo ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain-inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients’ pain, including prescribing medications *other than* a controlled substance—all behaviors suggestive of a good faith effort to help his patients.” Pet. App. 35a. In response to the majority’s assertion that she relied on a “highly selective” view of the record, Pet. App. 38a (quoting Pet. App. 19a (majority op.)), Judge Robinson explained that “we *should* focus on the evidence that supports Parasmo’s defense” rather than solely looking to the government’s evidence, Pet. App. 38a.

Judge Robinson added that the panel’s decision was “squarely at odds with considered decisions of other circuits in similar cases.” Pet. App. 41a

(Robinson, J., dissenting). She emphasized that multiple other circuits have rejected harmlesslessness in similar *Ruan* cases, including the Tenth and Eleventh Circuits in cases involving stronger evidence of guilt than this one. Pet. App. 41a-43a (citing *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023); *United States v. Duldulao*, 87 F.4th 1239 (11th Cir. 2023) (reviewing for plain error)). In reaching a different conclusion here, the majority “took the central contested factual issue in this case away from the jury” and “undermined the fundamental fairness of [the] trial.” Pet. App. 44a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve profound confusion in the circuits about the proper harmless-error inquiry in cases where the jury was erroneously instructed about an element that the defendant contested at trial. That confusion has given rise to a clear circuit split in the context of *Ruan* errors. But the disagreement extends beyond *Ruan* to all cases involving harmlesslessness review of erroneous jury instructions regarding a contested element. The issue is exceptionally important, this case is an excellent vehicle, and the decision below is wrong—both under this Court’s precedent and under the Sixth Amendment. This Court’s review is warranted.

I. COURTS OF APPEALS HAVE ADOPTED TWO DIFFERENT APPROACHES TO HARMLESS-ERROR REVIEW OF INSTRUCTIONAL ERRORS.

Since this Court decided *Neder*, the courts of appeals have adopted two different approaches to harmless-error review in cases where the jury was

erroneously instructed on an element of the offense that the defendant disputed at trial.

In *Neder*, the defendant was convicted of fraud based on jury instructions that omitted the element requiring the jury to find that the misstatements at issue were material. The defendant in *Neder*, however, never disputed materiality. As the Court explained, “[t]he evidence supporting materiality was so overwhelming * * * that Neder did not argue to the jury—and does not argue here—that his false statements” were immaterial. 527 U.S. at 16. In those circumstances, where “the omitted element was uncontested and supported by overwhelming evidence,” *Neder* held that the “erroneous instruction is properly found to be harmless.” *Id.* at 17. *Neder* recognized, however, that the same conclusion would not apply “where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.” *Id.* at 19. In those circumstances, the court “should not find the error harmless.” *Id.*

Courts cannot agree over how to apply *Neder* in cases where the jury was erroneously instructed on an element the defendant contested at trial. Some hold that, even when an element was contested, the reviewing court may weigh the disputed evidence and affirm if it concludes that the government’s evidence on that element was “overwhelming.” Others, by contrast, hold that a court should focus on whether there is sufficient evidence in the record to support the defendant’s position with respect to the contested element. Those different approaches have produced a square circuit split regarding how to review *Ruan* errors for harmlessness. That split over *Ruan* is symptomatic of broader disarray in the circuits that only this Court can resolve.

**A. The Courts Of Appeals Are Split 4-1 On
How To Evaluate The Harmlessness Of
Ruan Errors.**

As Judge Robinson explained, the circuits are split over how to evaluate the harmlessness of *Ruan* errors. The Fourth, Fifth, Tenth, and Eleventh Circuits apply a *contested-evidence approach* that focuses on whether the defendant contested the intent element with evidence that could rationally have led to acquittal. The Second Circuit, by contrast, applies a *government-evidence approach* that focuses on whether the government's evidence persuasively establishes guilt. These two approaches have led to irreconcilable decisions that can be explained only by the difference in the standards the courts apply.

1. The Tenth Circuit's decision in *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023), exemplifies the contested-evidence approach. That case, like this one, involved a Controlled Substances Act conviction where the jury was erroneously instructed to apply an objective, rather than subjective, standard of intent. *Id.* at 1315-17. The court held that the error was not harmless, focusing on the evidence the *defendant* adduced in his defense. The court explained that the defendant's "intent was in dispute throughout his trial and was the centerpiece of his defense." *Id.* at 1319. It noted that requiring the court "to now essentially retry the case on appeal and opine on what verdict the jury would have reached if it had been properly instructed asks too much of an appellate court," particularly "where [it] would be determining [the defendant's] subjective intent on a cold record." *Id.* Given that the defendant plausibly disputed his intent, the court explained that it "should not assume the responsibility of making a finding on a contested

issue of fact” even though “[t]he government *may* be able to present circumstantial evidence that [the defendant] knowingly or intentionally acted in an unauthorized manner.” *Id.* at 1320-21.

The Fourth Circuit took the same approach in *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2024). There, the court rejected the government’s argument that the *Ruan* error was harmless, explaining that the “defense provided evidence that could rationally have led to a contrary finding on each of the unlawful-distribution counts.” *Id.* at 251-252. Even though the defendant’s evidence of good faith “wasn’t particularly convincing, as weighed against the prosecution’s evidence,” the court explained that “copious evidence of a defendant’s guilt does not necessarily make an instructional error harmless.” *Id.* at 251. It therefore declined to assume the jury’s role by weighing the evidence itself.

The Fifth Circuit took a similar approach in rejecting harmless error in *United States v. Qureshi*, 121 F.4th 1095 (5th Cir. 2024). The government there claimed that the *Ruan* error was harmless by pointing to trial evidence suggesting that the defendant subjectively intended to overprescribe—including evidence that “[p]eople lined up outside [the clinic] before it opened, money was exchanged in the parking lot,” the “clinic only accepted cash, not insurance, for pain patients,” the clinic’s “intake form asked patients if they were undercover officers,” and a sample of patient files suggested that “ninety-six percent of visits resulted in Norco and Soma prescriptions, and all these prescriptions were for the highest available doses.” *Id.* at 1106. The court nonetheless found the error harmful because the defendant’s “knowledge was contested at trial,” the defendant’s intent was a

focus of the closing arguments, and “assessing the weight of this evidence” involves factfinding and credibility determinations that must be undertaken by a jury. *Id.* at 1107.

The Eleventh Circuit followed suit in yet another *Ruan* case. See *United States v. Duldulao*, 87 F.4th 1239 (11th Cir. 2023). Unlike this case, *Duldulao* involved a classic pill mill—where clinic staff falsified medical records, patients were “shooting up” in the parking lot, the clinic barely had any medical equipment, doctors spent almost no time with patients, and untrained front desk staff wrote prescriptions for controlled substances for doctors to sign after cursory patient visits. *Id.* at 1247-48 (quotation marks omitted). Despite this evidence, and despite the fact that the defendant had not preserved the issue, the Eleventh Circuit reversed in the plain-error posture because it “lack[ed] confidence that the outcome” of the trial would have been the same “but for the erroneous jury instruction.” *Id.* at 1259. As the court explained, reversal was warranted because the defendants disputed their subjective bad faith, the government’s trial presentation emphasized that subjective intent was unnecessary, and “the jury’s split verdict” even under the erroneous instructions “illustrate[d] that the jury viewed this case as a close call—not a slam dunk.” *Id.* at 1259-61.

2. The Second Circuit below applied a different approach and therefore reached a different conclusion. The Second Circuit did not ask whether the subjective intent element was “contested” or whether the defendant “raised evidence sufficient to support a contrary finding.” *Neder*, 527 U.S. at 19. Instead, the majority “beg[a]n” by evaluating the strength of *the government’s* evidence that Dr.

Parasmo prescribed opioids to patients who exhibited red flags suggesting addiction or abuse. Pet. App. 12a. From there, the court concluded that “overwhelming” evidence supported the guilty verdict. Pet. App. 18a.

The majority did not mention the contrary evidence that Dr. Parasmo relied on to demonstrate his good faith until the section of the decision responding to the dissent. Pet. App. 18a-23a. Even then, the majority did not ask whether “intent was in dispute throughout” the trial or whether it was “the centerpiece of his defense,” *Kahn*, 58 F.4th at 1319—the inquiry at heart of the approach taken by the Fourth, Fifth, Tenth, and Eleventh Circuits. Instead, the majority criticized the dissent for relying on a “highly selective view of the record,” and then proceeded to discuss all the government evidence that—in the majority’s view—outweighed Dr. Parasmo’s evidence of good faith. Pet. App. 19a-23a.

3. These cases do not reflect applications of the same legal standard to different facts. The facts in *Kahn*, *Smithers*, *Qureshi*, and *Duldulao* differ from the facts of this case only in that they involved substantially *stronger* government evidence of guilt. Instead, the different outcomes in these cases can be explained only by the application of different legal standards. The Second Circuit majority did exactly what the four other circuits refused to do: It “weighed” the defendant’s evidence “against the prosecution’s,” *Smithers*, 92 F.4th at 251, and waved aside indications that the jury viewed Dr. Parasmo’s case as a “close call”—including the jury’s decision to acquit on multiple counts, *Duldulao*, 87 F.4th at 1259. By contrast, in the Fourth, Fifth, Tenth, and Eleventh Circuits, even “copious evidence of a defendant’s guilt

does not necessarily make an instructional error harmless,” *Smithers*, 92 F.4th at 251; those courts instead focus only on whether the defendant plausibly disputed intent.

B. This Split Is Symptomatic Of The Different Approaches Courts Have Adopted To Applying *Neder*.

This split in *Ruan* cases reflects broader disarray in the circuits regarding how to conduct harmless-error review where the jury was erroneously instructed on a contested element.

This confusion is widely acknowledged. Judges have highlighted “significant inconsistency” among the circuits in how to evaluate whether “the failure to instruct on an element of a crime” is harmless. *Pizarro*, 772 F.3d at 303 (Lipez, J., concurring). As a result of this confusion, circuit courts have taken “inconsistent positions on whether a defendant’s contest of an omitted element, even one supported by overwhelming evidence, renders the omission non-harmless.” *Id.* at 304. Scholars “tend to agree that there are two very different approaches that judges use in determining harmless error,” including under *Neder*. Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1062 (2005). As one scholar recently put it, the harmless-error doctrine “is a confusing mess.” Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2158 (2018); *see id.* at 2156-57 (noting the “troubling” trend by which reviewing courts “broadly search the record by asking whether independent evidence of guilt taken alone *could* support the conviction” (quotation marks and citation omitted)).

Outside of the *Ruan* context, some courts clearly apply the same approach Judge Robinson applied below. The Fourth Circuit has explained, for example, that in cases involving a disputed element, a court may only ask whether the record contains enough evidence from which a jury could “rationally” reach a “contrary finding” regarding the disputed element. *Brown*, 202 F.3d at 701 (citation omitted). The Sixth Circuit has concluded that an instructional error regarding the defendant’s motive was not harmless because “motive played a starring role at trial, and the defendants presented evidence” to support their position. *United States v. Miller*, 767 F.3d 585, 594 (6th Cir. 2014) (Sutton, J.). And, in a case much like this one where the jury was erroneously instructed to apply an objective rather than subjective standard of intent, the Ninth Circuit explained that the “‘basic misconception of an essential element of the crime charged’ generally ‘compels reversal of the conviction,’” and that because the defendant disputed the element, how to weigh the evidence on subjective intent was “for the factfinder to decide.” *United States v. Wallen*, 874 F.3d 620, 632, 634 (9th Cir. 2017) (citations omitted).

But other appellate decisions clearly apply the approach embraced by the panel majority below. The Third Circuit, for example, has interpreted *Neder* to allow reviewing courts to “probe for ‘overwhelming evidence’ in the trial record” in evaluating the harmlessness of instructional errors. *United States v. Boyd*, 999 F.3d 171, 180 (3d Cir. 2021). The Eleventh Circuit, on remand from this Court’s decision in *Neder* itself, held that whether the defendant “contested materiality may be considered but is not the pivotal concern,” and that harmlessness turns on whether

the government’s evidence is “overwhelming.” *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999). Other decisions follow suit. *See United States v. Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022) (holding that whether the defendant “contested the omitted element is not determinative,” and the relevant question is instead whether the government’s evidence “was overwhelming”); *United States v. Soto-Beníquez*, 356 F.3d 1, 48 (1st Cir. 2003) (“the determinative question is whether the evidence overwhelmingly establishes” the missing element).

Some circuits have acknowledged the two different tests for harmlessness under *Neder* and have expressed confusion about which test applies. *See, e.g., Kahn*, 58 F.4th at 1318 (referring to two different approaches to instructional error); *Monsanto v. United States*, 348 F.3d 345, 350 (2d Cir. 2003) (Calabresi, J.) (noting “some tension between the harmless-error analysis in *Neder*” and circuit precedent focusing on the weight of the government’s evidence but continuing to follow circuit precedent); *United States v. Perez-Ruiz*, 353 F.3d 1, 18 & n.3 (1st Cir. 2003) (“we sometimes have treated the presence of ‘overwhelming evidence’” regarding the omitted element “as a proxy for harmlessness,” whereas in other cases, “a somewhat different paradigm” applies). And in many circuits, different panels apply different approaches.¹

¹ Compare *United States v. Bailey*, 270 F.3d 83, 89 (1st Cir. 2001); *Miller*, 767 F.3d at 594; *Wallen*, 874 F.3d at 632-633; *Duldulao*, 87 F.4th at 1261 (cases from the First, Sixth, Ninth, and Eleventh Circuits applying contested-evidence approach), with *Soto-Beníquez*, 356 F.3d at 48; *United States v. Campbell*, 122 F.4th 624, 632 (6th Cir. 2024); *Saini*, 23 F.4th at 1164;

Accordingly, confusion over how to apply *Neder* exists both across and within the circuits. This kind of confusion is especially important for this Court to address. In any given harmless-error case, it is not clear which standard the panel will apply, depriving both defendants and the government of consistency and predictability. More than 25 years after *Neder*, there is no prospect that the circuits will resolve the inconsistency themselves. Only this Court can restore uniformity.

II. THE DECISION BELOW IS WRONG.

The Second Circuit's approach to reviewing instructional errors for harmless-error conflicts with this Court's precedent and the Sixth Amendment.

A. The Second Circuit's Approach Contravenes This Court's Precedent.

In *Neder*, this Court addressed how appellate courts should conduct harmless-error review in cases where the jury was improperly instructed on an element of the charged offense. The Court explained that “an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair.” *Neder*, 527 U.S. at 9. A court may deem such an error harmless only if it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Id.* at 18.

As the Court explained, application of the harmless-error standard turns on whether the defendant disputed the element subject to the erroneous instruction. An instructional error may be

Neder, 197 F.3d at 1132-33 (cases from the First, Sixth, Ninth, and Eleventh Circuits applying government-evidence approach).

deemed harmless “where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested* and supported by overwhelming evidence.” *Id.* at 17 (emphasis added). Thus, where an element was “*uncontroverted*,” such that the defendant “could not[] bring forth facts” to contest it, an error is harmless if the government’s evidence is sufficiently strong to support a finding of guilt beyond a reasonable doubt. *Id.* at 18-19 (emphasis added). But a different analysis is warranted where the defendant “contested” the element at trial. *Id.* at 19. In such cases “where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding,” the reviewing court “should not find the [instructional] error harmless.” *Id.*

Neder does not mean that reviewing courts must deem an error harmful whenever the defendant disputed the element at issue. Instead, there must be “evidence upon which a jury could have reached a contrary finding.” *Brown*, 202 F.3d at 701. If the record contains such evidence, however, the harmless-error inquiry is at an end, and the court may not deem an error harmless merely because it believes the government’s evidence is stronger.

Neder’s harmless standard protects against the risk that appellate judges will weigh the evidence themselves rather than accounting for how reasonable jurors could assess the evidence. This Court long ago explained that an appellate judge “must judge others’ reactions [to an error] not by his own, but with allowance for how others might react” to the error—an “important difference, but one easy to ignore when the sense of guilt comes strongly from the record.” *Kotteakos v. United States*, 328 U.S. 750,

764 (1946). As Judge Traynor famously warned, “[a]ll too often an appellate court confuses review by applying the substantial evidence test to determine whether an error is harmless,” which happens when the “court considers only the evidence in support of the judgment and ignores erroneous matter.” Roger J. Traynor, *The Riddle of Harmless Error* 28 (1970) (footnote omitted). The “problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant’s guilt,” an approach that “is dangerously seductive, for our natural inclination is to view an error as harmless whenever a defendant’s conviction appears well justified by the record evidence.” Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1170 (1995). *Neder* protects against that risk by requiring courts to focus on the sufficiency of the defense evidence rather than simply weighing the evidence themselves.

The decision below contravenes these principles. It ignores the threshold question in *Neder*—whether the issue was “contested,” 527 U.S. at 19—and instead applies the analysis *Neder* adopted for evaluating harmlessness in cases where the element was *uncontested*. The court canvassed the government’s evidence, found that evidence “overwhelming,” and concluded that any reasonable jury would therefore agree. *See* Pet. App. 11a-18a. It did not assess the effect of the instructional error on each count of conviction, even though the evidence of each count differed. Instead, it cited five examples, from which it extrapolated that any jury would have necessarily convicted on all 32 counts. Pet. App. 13a-17a. It did not attempt to reconcile that conclusion

with the fact that the jury acquitted Dr. Parasmó on multiple counts even under the defective instructions. Pet. App. 44a (Robinson, J., dissenting). And when Judge Robinson, in dissent, pointed to the defense evidence supporting Dr. Parasmó's subjective good faith, the majority dismissed it as a "highly selective view of the record." Pet. App. 19a (majority op.). The brusque dismissal of the defense evidence as "selective" confirms that the majority did not adhere to *Neder*—which *requires* courts to focus on the evidence supporting innocence rather than the government's evidence. Pet. App. 38a (Robinson, J., dissenting).

B. The Second Circuit's Approach Violates The Sixth Amendment.

The approach to harmless error adopted by the Second Circuit below transgresses the limits on judicial factfinding imposed by the Sixth Amendment.

The Sixth Amendment provides that in criminal prosecutions, "the accused shall enjoy the right" to a trial "by an impartial jury." U.S. Const. amend. VI. The right to a "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The jury serves as "a fundamental reservation of power in our constitutional structure" for the people to exercise "control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). The jury-trial guarantee derives from the common law, under which, as Blackstone explained, the jury was the "*palladium*" that preserved the "liberties" of the people and which must remain "sacred and inviolate * * * from all open attacks." 4 William Blackstone, Commentaries *342-344.

The Sixth Amendment, “in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt.” *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (plurality op.). Above all, the Sixth Amendment prohibits judges from finding criminal guilt. “[I]t is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged.” *Sparf v. United States*, 156 U.S. 51, 105 (1895); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977) (“a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, * * * regardless of how overwhelmingly the evidence may point in that direction” (internal citations omitted)).

That is true regardless of how strong the evidence of guilt may seem to a judge. “[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.” *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). “In a free society respectful of the individual, a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers *regardless of how overwhelming the evidence may seem to a judge.*” *Erlinger*, 602 U.S. at 842 (emphasis added) (quotation marks, citation, and brackets omitted).

Neder’s limits on harmless-error review were necessary to ensure compliance with the Sixth Amendment. Justice Scalia, joined by Justices Souter and Ginsburg, dissented in part in *Neder* on the ground that “*the Constitution does not trust judges to*

make determinations of criminal guilt” and that it violates the Constitution to affirm a defendant’s sentence merely “*because we judges can tell that he is unquestionably guilty.*” 527 U.S. at 31-32 (Scalia, J., concurring in part and dissenting in part); *see also id.* at 27 (Stevens, J., concurring in the judgment) (largely agreeing with Justice Scalia). This Court in *Neder* responded to these concerns by emphasizing that its rule would *not* allow reviewing courts to “become in effect a second jury to determine whether the defendant is guilty.” *Id.* at 19 (majority op.) (citation omitted). Instead, “in typical appellate-court fashion,” a reviewing court may only ask “whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” *Id.*

The Second Circuit’s approach to harmless error makes no effort to comply with these limits and rests on the very judicial factfinding that *Neder* disclaimed. When an appellate court holds an instructional error harmless because *it* conducts an independent assessment of the evidence and finds the government’s evidence on a disputed element “overwhelming,” Pet. App. 18a, the court does not review the jury’s verdict, but rather makes an independent factual determination that the defendant is guilty. That is no different than a directed verdict, and it performs precisely the function the Sixth Amendment entrusts to the jury. *Neder* permitted narrow harmless-error review of instructional errors only because the Court made clear that it was *not* permitting this approach.

C. The Instructional Error In This Case Was Not Harmless.

Under the proper approach to harmless error in cases where the jury was erroneously instructed on an element, the reviewing court may not balance the evidence itself, but rather may ask only whether the defendant plausibly disputed his guilt. Under that approach, the Second Circuit's harmless finding is obviously wrong.

The trial court's instruction "misinformed the jury as to the *only* element of the charged offense that Dr. Parasmó contested—his subjective intent." Pet. App. 31a (Robinson, J., dissenting). The government's closing argument reinforced that Dr. Parasmó's subjective good faith was irrelevant, noting that Dr. Parasmó's belief in the legitimacy of his prescriptions "has to be reasonable, and is *not subjective*." Pet. App. 39a (Robinson, J., dissenting) (citation omitted). But Dr. Parasmó's entire case turned on his subjective good faith. Given the erroneous instructions, the jury was required to convict Dr. Parasmó "*even if* it accepted Dr. Parasmó's view of the case." Pet. App. 32a.

Thus, the only question *Neder* permitted the Second Circuit to consider is whether Dr. Parasmó raised sufficient evidence to plausibly dispute that he acted with criminal intent. The panel majority never asked this question. If it had, the answer would have been inescapable.

As Judge Robinson explained, there was "ample evidence from which the jury could have concluded that the government failed to prove beyond a reasonable doubt that Dr. Parasmó subjectively believed he was acting as a dealer not a doctor." Pet.

App. 33a (Robinson, J., dissenting). This included the fact that the jury acquitted him on some counts even under erroneous instructions, Pet. App. 44a; that his practice “did not bear the typical hallmarks of a pill mill,” Pet. App. 34a; that he prescribed no pain medication to many patients; that there was no “prescription without examination, fake patients, cash payments, lines of people waiting to get into the mill, [or] cash kickbacks from a pharmacy,” Pet. App. 34a; and that he “ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain-inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients’ pain, including prescribing medications other than a controlled substance—all behaviors suggestive of a good faith effort to help his patients,” Pet. App. 35a. Judge Robinson proceeded to cite illustrative examples of Dr. Parasma’s prescriptions, explaining that “in each instance, Dr. Parasma tried to treat the patient’s underlying condition and to find alternative ways to control their pain.” Pet. App. 37a.

In the face of this defense evidence, the contrary evidence upon which the panel majority relied takes on an entirely different light. The majority cited evidence that Dr. Parasma prescribed opioids “to patients who displayed numerous red flags,” including patients who were “struggling with opioid addiction.” Pet. App. 24a-25a. But Dr. Parasma supplied evidence “that, though he was aware of and concerned about the signs that his patients were abusing or misdirecting their medications, he subjectively believed, in good faith, that his prescriptions were appropriate to manage his patients’ pain arising from genuinely serious medical

conditions, and that he was taking reasonable steps to address the possibility that patients were abusing the controlled substances.” Pet. App. 31a-32a. That is, he sought to manage their pain and resolve their underlying medical conditions while attempting to taper them off medication, all without cutting them off immediately, which could cause them to go into withdrawal, obtain prescriptions through other sources, or substitute prescription medication for illegal narcotics. Pet. App. 111a, 125a. In each case, “Dr. Parasmó tried to treat the patient’s underlying condition and to find alternative ways to control their pain.” Pet. App. 37a (Robinson, J., dissenting).

Balancing this disputed evidence to assess Dr. Parasmó’s criminal culpability is a quintessential jury function that cannot be undertaken by a panel of appellate judges on a cold record. That does not mean Dr. Parasmó would necessarily be acquitted. But this Court’s precedent and the Sixth Amendment demanded that the question of his guilt be decided by a jury of his peers rather than a divided panel of appellate judges.

III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE.

1. The question presented is exceptionally important. “Harmless error is one of the most frequently discussed issues in criminal appeals.” Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. Chi. L. Rev. 511, 575 (2004). Judges have called harmless error “‘one of the most important doctrines in appellate decisionmaking,’ and posited that harmless-error principles may determine the outcome of more criminal appeals than any other doctrine.” Solomon, *supra*, at 1054 (citation omitted). It is

critical that courts approach this task in conformity with the law and by applying uniform rules.

The issue is especially important because failure to properly apply harmless-error review trenches on the Sixth Amendment. “[T]he founders saw representative government and trial by jury as ‘the heart and lungs’ of liberty.” *Erlinger*, 602 U.S. at 829 (quoting Letter from Clarendon to William Pym (Jan. 27, 1766), in 1 Papers of John Adams 164, 169 (Robert J. Taylor ed., 1977)). Allowing appellate judges to make determinations of guilt on disputed elements infringes that right. Judge Lipez urged this Court to review the issue because “the Sixth Amendment right to a jury trial is at stake.” *Pizarro*, 772 F.3d at 303 (Lipez, J., concurring).

Ensuring that harmless review of instructional errors remains faithful to the Sixth Amendment is especially important in the context of *Ruan* errors. By requiring proof that a physician acted with criminal intent, this Court in *Ruan* prevented the government from criminalizing the practice of medicine for physicians who make innocent errors of judgment but act in good faith. *Ruan* was tailor-made for cases like this one, where “Dr. Parasma was confronted with a real patient suffering from severe chronic pain alongside red flags suggesting the possibility, or even likelihood, that they were misusing their medications” and responded by trying “to treat the patient’s underlying condition and to find alternative ways to control their pain.” Pet. App. 36a-37a (Robinson, J., dissenting). The panel’s decision below effectively nullifies *Ruan* by allowing reviewing courts to affirm erroneous convictions based on their own assessment of guilt.

2. This case is an excellent vehicle. Dr. Parasmó's subjective intent was "the *only* element of the charged offense that Dr. Parasmó contested." Pet. App. 31a (Robinson, J., dissenting). This case therefore isolates the question of how to conduct harmless-error review of instructional errors where the element was disputed. The majority and dissenting opinions apply different legal standards, and the choice of legal standard is outcome-determinative.

There is a broad consensus that harmless error is a "confusing mess." Epps, *supra*, at 2158. But this Court has not had a suitable vehicle to address the harmless-error standard for more than two decades. Given the disarray among the circuits, the emergence of a split in the specific context of *Ruan* errors ensures that this Court would have an opportunity to address the harmless-ness issue in the context of a concrete split, with different circuits following different analytical frameworks and therefore reaching different bottom-line conclusions. That, in turn, will avoid any impediment to this Court "clarify[ing] the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *Pizarro*, 772 F.3d at 303 (Lipez, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 16, 2026