No. 26-

IN THE
Supreme Court of the United States

COMET TECHNOLOGIES USA, INC., ET AL.,
Petitioners,

v.

XP POWER, LLC,
Respondent,

ADVANCED ENERGY INDUSTRIES, INC.,
Intervenor-Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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November 2, 2026

QUESTION PRESENTED

In a civil case, an appellate court must disregard any error that was harmless and, as this Court explained in *Shinseki v. Sanders*, 556 U.S. 396 (2009), the party challenging the judgment bears the burden of showing harm. But when it comes to an error in the jury instructions, the Ninth Circuit places the burden on a civil appellee defending the judgment below to prove that the error was harmless. Every other circuit to address the question places the burden on the appellant challenging the judgment to prove that the error was *not* harmless, as *Shinseki* and several other decisions of this Court dictate.

The question presented is:

Whether there is an exception for erroneous jury instructions to the otherwise uniform rule that the appellant bears the burden in a civil case to establish that an error was prejudicial.

PARTIES TO THE PROCEEDING

Petitioners are Comet Technologies USA, Inc., a Delaware corporation; Comet AG, a Swiss corporation; and Yxlon International GmbH, a German corporation. Petitioners were Plaintiffs-Appellees/Cross-Appellants below.

Respondent is XP Power, LLC, a California limited liability company. Respondent was Defendant-Appellant/Cross-Appellee below.

Intervenor-Respondent is Advanced Energy Industries, Inc.

CORPORATE DISCLOSURE STATEMENT

Comet Holding AG (a publicly held corporation) is the parent corporation of Comet AG, Yxlon International GmbH, and Comet Technologies USA, Inc. Comet Holding AG owns 100% of Comet AG, Yxlon International GmbH, and Comet Technologies USA, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the U.S. District Court for the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit:

Comet Technologies USA, Inc. v. XP Power, LLC, No. 5:20-cv-06408 (N.D. Cal.), judgment entered on March 22, 2023;

Comet Technologies USA, Inc. v. XP Power, LLC, Nos. 23-15601, 23-15709, 25-745 (9th Cir.), judgment entered on July 14, 2026.

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INTRODUCTION

Courts must disregard any errors that were harmless. 28 U.S.C. § 2111; Fed. R. Civ. P. 61. So when a civil appellant argues, as in this case, that a jury instruction was erroneous, an appellate court cannot overturn the jury verdict if the instructional error was harmless—meaning it "d[id] not affect [the appellant's] substantial rights." 28 U.S.C. § 2111. Over eighty years ago, this Court held that the party that "seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). The Court has consistently reaffirmed over the ensuing decades that the appellant has the burden to establish harm, most recently in *Shinseki v. Sanders*, 556 U.S. 396 (2009).

Ten circuits have properly followed this Court's lead. In those circuits, the appellant must establish an alleged error is prejudicial in all civil cases regardless of the issue. The burden never falls on the appellee to prove a negative—that the alleged error caused no harm. The Sixth Circuit even jettisoned its contrary approach in light of *Shinseki* given this Court's clear command that the "burden" falls "on the appellee only when the matter underlying review [is] criminal." *Shinseki*, 556 U.S. at 410.

The Ninth Circuit, however, has refused to follow *Shinseki* when it comes to civil jury instructions. The Ninth Circuit instead presumes that an erroneous jury instruction was prejudicial and places the burden on the appellee—the party defending the verdict—to prove the error was harmless. Never mind that the harmless-error statute does not contain a special

exception for jury instructions, and never mind that this Court's precedent does not either.

This petition raises whether the Ninth Circuit can continue to defy this Court's precedent by misallocating the burden for harmless error. The Ninth Circuit here erased a $40 million jury verdict based on a single errant jury instruction on one subfactor of a trade secret misappropriation claim—a subfactor where the evidence was overwhelming—all because the majority believed petitioners, as appellees, could not prove the instruction was harmless. Judge Bumatay, in dissent, believed petitioners could show harmlessness even with a misallocated burden. That makes this case an ideal vehicle because it cleanly presents the question and the answer to who bears the burden is dispositive.

The Court should thus grant the petition. Not only does the Ninth Circuit's misallocation of the harmless-error burden conflict with this Court's precedent, it also diverges from its sister circuits. This entrenched split presents an important question for all civil litigants and the judicial system. The question whether an error is harmless will arise in all civil appeals, and parties and courts should have a uniform rule on who has the burden on that question. Without intervention, the Ninth Circuit's contrary approach will continue to encourage costly retrials that would not occur in the rest of the country.

OPINIONS BELOW

The Ninth Circuit's opinion below is reported at 181 F.4th 988 and reproduced at Pet.App. 1a–26a. The Ninth Circuit issued a memorandum disposition on the same day addressing an unrelated evidentiary

issue; that decision is not reported but is reproduced at Pet.App. 58a–61a. The district court's opinion is not reported but is available at 2022 WL 4625149.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its judgment on July 14, 2026. On September 9, 2026, Justice Kagan extended the time to file a petition to and including November 2, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

"On 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.

STATEMENT OF THE CASE

A. XP Misappropriates Comet's Trade Secrets.

Petitioners (collectively, "Comet") are leaders in critical components used to manufacture silicon computer chips, which are used in the electronic devices we use every day. Comet makes a radio frequency ("RF") generator, which creates power for the chambers used to make the chips, and the accompanying matching network, which receives that power and conditions it to control plasma. Pet.App. 5a n.2. This plasma in turn etches silicon wafers into semiconductors. *Id.*; *see also* 3 C.A. E.R. 182–83. Developing these technologies requires solving intricate problems of electrical engineering, materials science, and precision manufacturing. Each product embodies thousands of design files, testing data,

calibration specifications, and manufacturing instructions that reflect years of iterative experimentation. Pet.App. 50a–53a. All in, Comet invested more than $100 million, along with the work of nearly 100 engineers over the course of decades, to develop its RF products. 6 C.A. E.R. 1015; 2 C.A. E.R. 66. And it has carefully guarded this proprietary information. 6 C.A. E.R. 968. Unsurprisingly, Comet's innovative RF technologies involve a host of trade secrets.

This case arises from Respondent XP Power, LLC's ("XP") misappropriation of those trade secrets. XP had traditionally sold AC/DC and DC/DC power supplies. It watched Comet's continued success in the lucrative RF market and saw an opportunity. XP first tried to enter the market by acquiring a competitor, Comdel Inc., in 2017. But soon after the acquisition, XP learned that Comdel's technology was outdated.

Rather than invest the years and millions of dollars needed to update Comdel's technology, XP set out to take a "turnkey match design" from Comet. Pet.App. 6a; 3 C.A. E.R. 191–92. It did so by poaching Comet's employees who took Comet's files with them. Pet.App. 4a. XP first recruited three senior RF engineers from Comet, including Comet's research and development director. 3 C.A. E.R. 190–94. XP placed these poached engineers in a newly created group to develop RF product lines. 3 C.A. E.R. 194. While at Comet, all three had been entrusted with Comet's highly sensitive confidential information, including information relating to proprietary

"products" and "research and development strateg[ies]." Pet.App. 4a.

XP's scheme was captured in real time on a recorded call. While still employed at Comet, one of the engineers called XP and offered a "crew" that could deliver a product design that was "turnkey"—meaning already done. Pet.App. 6a. The XP executive on the call recorded it and circulated the recording internally with a pointed instruction: "[P]lease keep this recording strictly confidential. You will see why." 3 C.A. E.R. 193. (Because of his recruiting responsibilities, the Ninth Circuit called this executive a headhunter. Pet.App. 6a; *see also* 3 C.A. E.R. 191.) XP's leadership understood what this conversation meant and proceeded to hire the "crew" from Comet to obtain the "turnkey" design. Pet.App. 6a; 3 C.A. E.R. 192; 6 C.A. E.R. 1016.

The poached engineers brought thousands of Comet's proprietary files to XP. In the weeks leading up to their coordinated resignations in 2018, the engineers downloaded and copied thousands of confidential data files onto external hard drives. Pet.App. 4a; 3 C.A. E.R. 198, 224; 2 C.A. E.R. 139. One of those engineers went further still and took a virtual copy of his Comet laptop, capturing "every single bit of information that was on his laptop that had been accumulated while he worked at Comet." 3 C.A. E.R. 199; 1 C.A. Supp. E.R. 18. The stolen materials included Comet's computer-aided-design files, system architecture documents, test results, prototype data, manufacturing specifications, and the underlying rationale for Comet's design choices for its RF products.

XP put the poached employees and stolen information to use. Armed with Comet's trade secrets, XP produced a complete development plan for its next-generation product lines and a complete sensor design in just *nine days*—work that had taken Comet years. Pet.App. 4a.

Promptly after the engineers left, Comet notified XP that the engineers had stolen Comet's trade secrets. 4 C.A. E.R. 596; 1 C.A. Supp. E.R. 21, 23. Despite that notice—and despite its own CEO's conclusion that the engineers had done "something wrong"—XP continued using the stolen materials for years and made no changes to its internal operations. 1 C.A. Supp. E.R. 20; 4 C.A. E.R. 601–03.

B. A Jury Awards Comet $40 Million In Damages For XP's Misappropriation.

In 2020, Comet sued XP for trade secret misappropriation in violation of the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1836 *et seq*., and the California Uniform Trade Secrets Act ("UTSA"), Cal. Civ. Code § 3426 *et seq*. The district court had jurisdiction under 28 U.S.C. § 1331 and 18 U.S.C. § 1836(c). Pet.App. 8a. The case proceeded to a six-day jury trial. Pet.App. 4a–6a; 6 C.A. E.R. 1126–30.

Comet presented both factual and technical evidence of XP's misappropriation to the jury. Comet's factual evidence included the "proverbial smoking gun" of the recorded call where XP learned that the poached Comet engineers offered the "turnkey" product, which XP later obtained. Pet.App. 6a. Comet also presented technical experts, who testified to the existence and details of Comet's trade secrets.

As relevant here, Comet presented evidence that its trade secrets were not "readily ascertainable through proper means"—i.e., that its trade secrets could not be easily discovered by looking to publicly available sources, such as buying the product and reverse engineering it. 18 U.S.C. § 1839(3)(B). Comet's experts testified that the trade secrets comprised a large amount of information that could not be derived from merely inspecting the product. Pet.App. 50a–53a; 6 C.A. E.R. 967. For example, some of the stolen files explained the rationale behind Comet's design choices and important manufacturing variation and performance data that Comet obtained through proprietary testing. Pet.App. 23a, 50a–53a; *see also* 3 C.A. E.R. 209, 273–74. Comet's products containing two trade secrets were not even available for purchase by the time of the theft, making it impossible to procure the products and reverse engineer them. Pet.App. 23a.

During the trial, Comet voluntarily dismissed its California UTSA claim to streamline the issues for the jury, which led to an error in the jury instructions. *See* Pet.App. 5a–6a. The district court had planned to instruct the jury that whether Comet's trade secrets were "readily ascertainable by proper means" was an affirmative defense that XP had to prove—an instruction that XP had originally requested. Pet.App. 9a–11a. Comet had objected to that instruction all along because it was "not an affirmative defense instruction under the DTSA" and was "duplicative" of other instructions. 1 C.A. Supp. E.R. 129 n.35. Under the California UTSA, ready ascertainability is an affirmative defense that the defendant must prove. Pet.App. 10a. But under the

DTSA, ready ascertainability is an element of the plaintiff's claim, requiring the plaintiff to prove that its trade secrets were *not* readily ascertainable by proper means. Pet.App. 10a–14a.

After Comet dismissed its California UTSA claim, the district court asked the parties how the change in claims would affect the jury instructions. XP abandoned its originally requested instruction and argued that ready ascertainability was an element of proving a trade secret, for which Comet should have the burden. Comet again argued that this jury instruction was duplicative, unnecessary, and should be removed entirely. Pet.App. 10a–11a.

The district court rejected both requests and retained the original instruction without material modification. Pet.App. 11a. The court then gave the parties a final "chance to make sure I don't make any errors before we instruct the jury." 6 C.A. E.R. 979. It reminded the parties that XP had asked for the instruction and sought confirmation that XP still wanted the instruction. *See* 6 C.A. E.R. 981. XP's counsel responded: "Yes. We do, and we believe it's appropriate under the DTSA," even though the instruction placed the burden of proof on XP to prove ready ascertainability. *Id.* As XP had originally proposed, the final instructions assigned XP the burden of proof on that issue. 1 C.A. E.R. 26–27.

The jury returned a verdict for Comet, awarding it $40 million for XP's theft. That amount included $20 million in compensatory damages and an additional $20 million in punitive damages. Pet.App. 7a. In support of its punitive damages award, the jury found that XP had misappropriated

Comet's trade secrets willfully and with malice. *Id.*; 2 C.A. E.R. 122.

The district court also entered a permanent injunction to protect Comet from future harm if XP continued to use or disclose the stolen secrets. Pet.App. 7a–8a. The court later awarded Comet more than $17 million in attorney's fees. Pet.App. 8a. It also denied XP's motion for a new trial or remittitur. 1 C.A. E.R. 2–5.

C. The Ninth Circuit Vacates The Jury's Verdict After Placing The Burden On Comet To Prove An Instructional Error Was Harmless.

XP appealed, arguing that the district court had erroneously instructed the jury on ready ascertainability. On July 14, 2026, a divided Ninth Circuit panel reversed and remanded for a new trial. Pet.App. 3a, 26a. The majority (Judge Hamilton, sitting by designation from the Seventh Circuit, and Judge Nelson) first held that the district court had erroneously instructed the jury that XP had the burden to prove that Comet's trade secrets were readily ascertainable. Pet.App. 9a. As Comet had warned in the district court, the jury was erroneously instructed that XP bore the burden of proving Comet's trade secrets were readily ascertainable when, under the DTSA, Comet had the burden to prove its trade secrets were not readily ascertainable. Pet.App. 10a–11a, 49a; *see also* 1 C.A. Supp. E.R. 129 n.35.

Following circuit precedent that makes the Ninth Circuit an outlier, the majority placed the burden on Comet, as appellee, to prove that the instructional error was harmless. Pet.App. 16a–17a ("The party

defending the judgment bears the burden of showing that the jury more likely than not would have reached the same result if it had been properly instructed.") (citing *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009)). It did so over Comet's objection that the Ninth Circuit's allocation of the harmless-error burden to appellees conflicts with this Court's precedent. *See* Comet CA9 Br. 50 n.5.

The majority held that Comet did not meet that burden. Pet.App. 16a–17a. It did so while acknowledging that the jury's findings regarding XP's misappropriation, willfulness, and damages were "all supported by sufficient evidence," and that "there was ample evidence" that "XP [had] engaged in egregious misconduct." Pet.App. 17a, 19a. The majority concluded, however, that there was conflicting expert evidence on ready ascertainability, so a properly instructed jury could decide the issue differently. Pet.App. 17a–18a, 25a. The majority thus remanded for a new trial with the corrected jury instruction. Pet.App. 17a, 19a.[1]

Judge Bumatay dissented. Although he agreed that the jury was erroneously instructed, Judge Bumatay concluded that "the wealth of undisputed evidence introduced at trial easily establishes" that the error was harmless—even with the burden on Comet. Pet.App. 49a. For ready ascertainability, Comet presented evidence that its "trade secrets were

[1] In a separate non-precedential memorandum, a different majority (Judges Nelson and Bumatay) affirmed the district court's evidentiary rulings excluding XP's untimely unclean-hands evidence under Federal Rule of Evidence 403. Pet.App. 3a n.1, 58a–61a. Judge Hamilton dissented. Pet.App. 61a–64a.

sophisticated and composed of voluminous data files" of "highly technical schematics and confidential testing results," such that Judge Bumatay concluded the "only reasonable inference the jury could draw was that these trade secrets were not readily ascertainable." Pet.App. 50a. XP's own expert "did not contest" that the poached engineers brought over "information that would not have been otherwise available to a competitor." Pet.App. 53a. And the jury's award of $20 million in punitive damages for XP's willfulness underscores that "the question was not close." Pet.App. 56a.

The majority's decision wiped away a $40 million jury verdict, a permanent injunction, and more than $17 million in attorney's fees—all because of a single jury instruction that XP had originally proposed over Comet's objection but that the majority required Comet to prove was harmless error. Pet.App. 3a, 17a, 26a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to clarify which party has the burden regarding harmless error for jury instructions in civil cases. Review is needed because the Ninth Circuit's misallocation of the burden to the party defending the judgment below squarely conflicts with this Court's precedent and every other circuit to address the question. The question presented is undoubtedly important for all civil appeals, as an appellate court must consider whether any error is harmless in all cases. And if the Ninth Circuit is allowed to create a special exception for jury instructions, it will encourage courts to craft their own special exceptions for other issues. This

Court should instead reaffirm the uniform rule that the burden falls on a civil appellant to prove that an error it raises on appeal was not harmless.

I. THE NINTH CIRCUIT'S ALLOCATION OF THE HARMLESS-ERROR BURDEN CONFLICTS WITH THIS COURT'S PRECEDENT.

It is already well established who has the burden to show harmless error in a civil case: "This Court has said that *the party that seeks to have a judgment set aside* because of an erroneous ruling carries the burden of showing that prejudice resulted." *Shinseki*, 556 U.S. at 409 (emphasis added; quotations omitted). This was not a novel innovation at the time this Court decided *Shinseki*. Since the 1940s, this Court has consistently held that the burden falls on the appellant in a civil appeal to establish an alleged error is prejudicial rather than harmless. *See, e.g.*, *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 36 (1963) (per curiam); *United States v. Borden Co.*, 347 U.S. 514, 516–17 (1954); *Market Street Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 562 (1945); *Palmer*, 318 U.S. at 116.

Applying that well-established principle, *Shinseki* rejected a Federal Circuit framework that presumed an error is prejudicial and required the party defending the judgment to show otherwise. 556 U.S. at 409–11. When the Department of Veterans Affairs ("VA") sent a veteran a deficient benefits notice, the Federal Circuit's framework "presume[d]" the error was prejudicial and "require[d] reversal unless the VA c[ould] show" that it was not. *Id.* at

404. This Court repudiated that framework placing the burden on the VA (as appellee) regarding prejudicial error, rather than on the veteran who challenged the denial of his benefits on appeal.

It makes no difference that *Shinseki* involved an administrative appeal. The Court made plain that this correct allocation of the burden on the appellant was one and the same for harmless error in civil cases. For starters, the prejudicial-error analysis "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Id.* at 406. And the Court's reasoning for placing the burden on the challenger to show prejudicial error derived from "*our general case law governing application of the harmless-error standard*." *Id.* at 407 (emphasis added). By "requir[ing] the VA, not the claimant, to explain why the error was harmless," the Federal Circuit's allocation contravened the rule in "ordinary civil appeals" that the appellant has the burden to show an error was harmful. *Id.* at 409–11. In short, this Court has already established the rule that a civil appellant has the burden to show an error he challenges on appeal is harmful.

The Ninth Circuit, however, has disregarded this Court's precedent when it comes to an erroneous jury instruction. The Ninth Circuit often (but not always) appears to follow the established rule of allocating the burden for harmless error to the appellant for all other types of civil errors. *See BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F.4th 1231, 1243–44 (9th Cir. 2021). But after concluding a jury instruction is erroneous, the Ninth Circuit "presume[s] prejudice"

and then shifts the burden to the appellee to "demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Id.* at 1243; *Clem*, 566 F.3d at 1182. The Ninth Circuit followed that allocation here by putting the burden on Comet to prove the instructional error was harmless. Pet.App. 14a–26a.

This approach and the desire to create special rules for certain types of errors are indistinguishable from the Federal Circuit's approach this Court rejected in *Shinseki*. Like the Ninth Circuit, the Federal Circuit also presumed prejudice and placed the burden on the party who won below to prove otherwise. *Shinseki*, 556 U.S. at 409. And just as the Ninth Circuit has created a special rule for instructional errors, the claimants in *Shinseki* advocated for "the creation of a special rule" that gave the VA (as appellee) "the burden of proving that a notice error did *not* cause harm." *Id.* at 410. The Court declined to create a special exception because its precedent "placed such a burden on the appellee only when the matter underlying review was criminal." *Id.* There is thus a square conflict between the Ninth Circuit's approach and this Court's precedent, which this Court should fix.

II. THE CIRCUITS ARE DIVIDED OVER WHO BEARS THE BURDEN FOR HARMLESS ERROR.

The Ninth Circuit's disregard for this Court's precedent is not the only reason to grant review. The Ninth Circuit's approach also diverges from that of its sister circuits—a split that is both entrenched and acknowledged. The Ninth Circuit alone places the

burden on the appellee defending a civil judgment to prove that an instructional error was harmless, while the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, District of Columbia, and Federal Circuits place the burden on the appellant challenging the civil judgment to prove the error was harmful, including for erroneous jury instructions.

The Ninth Circuit is crystal clear that it places the burden on the appellee, as "the party defending the judgment," to prove an instructional error was harmless. Pet.App. 14a, 16a; *see also Chinaryan v. City of L.A.*, 113 F.4th 888, 903 (9th Cir. 2024); *Sidibe v. Sutter Health*, 103 F.4th 675, 685 (9th Cir. 2024); *BladeRoom*, 20 F.4th at 1243; *Gantt v. City of L.A.*, 717 F.3d 702, 707–08 (9th Cir. 2013); *Sanders v. City of Newport*, 657 F.3d 772, 781–82 (9th Cir. 2011); *Clem*, 566 F.3d at 1182. Indeed, the majority here overturned a jury verdict because "Comet has not convinced us that the [instructional] error was harmless," over Judge Bumatay's dissent that Comet had carried its burden. Pet.App. 9a.

By contrast, every other court of appeals to address the burden places it on the appellant to show an error was *not* harmless, including for errors in the jury instructions. In these circuits, "the tie goes to the verdict" in a civil case without exception. *A.K. ex rel. Kocher v. Durham Sch. Servs., L.P.*, 969 F.3d 625, 630 (6th Cir. 2020).

The **Sixth Circuit** offers the leading articulation of the majority rule, which rightly tracks this Court's holding in *Shinseki*: "[T]he party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice

resulted." *Id.* at 629–30 (quoting *Shinseki*, 556 U.S. at 409, 411; alterations omitted). Although the Sixth Circuit had previously placed the burden on the appellee, it abandoned this contrary rule, explaining that "the rule does not survive *Shinseki*." *Id.* The Sixth Circuit thus deliberately discarded, in light of *Shinseki*, the very rule the Ninth Circuit continues to follow.

Nine other circuits likewise place the burden on the party challenging a civil judgment to show that an error was harmful, without any exception for erroneous jury instructions:

First Circuit: "In a civil case, the party asserting error bears the burden of demonstrating that the error was harmful." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997); *Thomas & Betts Corp. v. New Albertson's, Inc.*, 915 F.3d 36, 52–53 (1st Cir. 2019) (applying rule to instructional error).

Second Circuit: "In civil cases, the burden falls on the appellant to show that the error was not harmless." *Warren v. Pataki*, 823 F.3d 125, 138 (2d Cir. 2016); *Woods v. START Treatment & Recovery Ctrs.*, 864 F.3d 158, 165, 169 (2d Cir. 2017) (applying rule to instructional error).

Third Circuit: "[A]s this is a civil case, it is [the appellant's] burden to show that the District Court's error was harmful." *Morgan v. Covington Twp.*, 648 F.3d 172, 180 (3d Cir. 2011).

Fourth Circuit: "[T]he party seeking reversal normally must explain why the erroneous ruling caused harm." *Dorman v. Annapolis OB-GYN Assocs.,*

P.A., 781 F. App'x 136, 142 (4th Cir. 2019) (quoting *Shinseki*, 556 U.S. at 410).

Fifth Circuit: "The party asserting the error has the burden of proving that the error was prejudicial." *Westport Ins. Corp. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 117 F.4th 653, 665–66, 667–68 (5th Cir. 2024); *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230, 241 (5th Cir. 2014) (applying rule to instructional error); *see also Dresser-Rand Co. v. Virtual Automation*, 361 F.3d 831, 842 (5th Cir. 2004) (burden on appellant for "any errors" in civil case).

Seventh Circuit: "[A]n appellant" challenging an instruction must show an "error likely confused or misled the jury causing prejudice to the appellant," even for a "patently incorrect" instruction. *Kuberski v. REV Recreation Grp.*, 5 F.4th 775, 779–80 (7th Cir. 2021); *Lange v. City of Oconto*, 28 F.4th 825, 840 (7th Cir. 2022) (applying rule to instructional error).

Eighth Circuit: For evidentiary rulings in a civil case, "the burden of showing prejudice rests on that party" challenging the ruling. *Gill v. Maciejewski*, 546 F.3d 557, 562–63 (8th Cir. 2008); *Flanigan v. Burlington N. Inc.*, 632 F.2d 880, 889–90 (8th Cir. 1980) (applying rule to instructional error).

D.C. Circuit: In a civil case, "the party claiming error … bears the burden of demonstrating harmfulness." *Xereas v. Heiss*, 987 F.3d 1124, 1134 (D.C. Cir. 2021); *Huthnance v. District of Columbia*, 722 F.3d 371, 383 (D.C. Cir. 2013) (applying rule to instructional error).

Federal Circuit: "[T]o warrant a new trial, [the appellant] must show that the erroneous jury

instruction was in fact prejudicial." *Ecolab, Inc. v. Paraclipse, Inc.*, 285 F.3d 1362, 1374 (Fed. Cir. 2002).

Courts and commentators alike acknowledge this split and the Ninth Circuit's baffling refusal to follow this Court's precedent when it comes to errors in jury instructions. In abandoning its contrary rule, the Sixth Circuit recognized that "only the Ninth Circuit seems still to apply the rule that the beneficiary of an error in a civil case bears the burden of showing the absence of harm." *Kocher*, 969 F.3d at 630 n.4. Legal commentators have highlighted the split too: "In general, the party claiming error has the burden of showing that the error affected its substantial rights. The Ninth Circuit, however, has expressly held that prejudice is presumed, such that the court may disregard the error as harmless only if the court concludes that the error *probably did not* affect substantial rights." 2 Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary* § 61:6 (2026 ed.) (footnote omitted); *see also* Bennett E. Cooper, *Federal Appellate Practice: Ninth Circuit* § 18:13 (2026 ed.). The Ninth Circuit alone thus refuses to take *Shinseki* at its word.

This split will not resolve itself. Indeed, the Ninth Circuit has continued to apply its outlier rule, despite acknowledging that this Court and other circuits have ruled otherwise. *See* Pet.App. 14a; *BladeRoom*, 20 F.4th at 1243 (shifting the burden to the appellee "because Ninth Circuit precedent instructs us to do so," despite recognizing that "for the ordinary civil appeal, 'the party seeking reversal' bears the burden," and that the Sixth Circuit reads *Shinseki* to require that allocation) (citations

omitted). And the Ninth Circuit has now stood behind its outlier position in at least fourteen decisions post-*Shinseki*.[2] Further percolation is thus unnecessary, and the Court should resolve the split now. Either the Ninth Circuit is right that every other circuit has somehow missed *Shinseki*'s unspoken exception for instructional errors or it isn't. The lower court decisions over which party has the burden regarding harmless error cannot be reconciled.

III. THE NINTH CIRCUIT'S ALLOCATION OF THE HARMLESS-ERROR BURDEN TO APPELLEE IS WRONG.

As this Court and every other circuit to address the question have explained, the burden is properly allocated to the party asserting the error to show that it is harmful. "In ordinary civil appeals," it is the "appellant [who] point[s] to rulings by the trial judge that the appellant claims are erroneous." *Shinseki*, 556 U.S. at 410. And as "the party seeking reversal,"

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[2] *See* Pet.App. 1a–26a; *Sidibe*, 103 F.4th at 685, 687–88; *Fierro v. Smith*, 39 F.4th 640, 651–52 (9th Cir. 2022); *BladeRoom*, 20 F.4th at 1243–44; *Coston v. Nangalama*, 13 F.4th 729, 735 (9th Cir. 2021); *Tekoh v. Cnty. of L.A.*, 985 F.3d 713, 725 (9th Cir. 2021), *rev'd on other grounds sub nom. Vega v. Tekoh*, 597 U.S. 134 (2022); *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 869 (9th Cir. 2020); *Shorter v. Baca*, 895 F.3d 1176, 1190 (9th Cir. 2018); *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017); *Chess v. Dovey*, 790 F.3d 961, 977 (9th Cir. 2015); *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014); *Gantt*, 717 F.3d at 707; *Sanders*, 657 F.3d at 781; *Clem*, 566 F.3d at 1182; *see also Chinaryan*, 113 F.4th at 903 (applying the same burden allocation to an erroneous grant of summary judgment); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1174–75 (9th Cir. 2011) (applying it to a legal error in a bench trial).

the appellant "normally must explain why the erroneous ruling caused harm." *Id.* That is because the appellant "will likely be in a position at least as good as, and often better than, the opposing party to explain how he has been hurt by an error." *Id.* Put more simply, it makes good sense to require the party saying there was an error to prove that the error inflicted some harm.

The harmless-error statute, in turn, does not contemplate a series of different harmless-error rules for different types of errors. Congress provided that an appellate 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. This congressional command establishes a uniform harmless-error rule for civil cases that applies regardless of the type of error involved.

The origins of the harmless-error rule likewise support uniformly placing the burden on the appellant. The requirement that harmless errors be disregarded arose as a reaction to courts too hastily overturning judgments for any sort of error. *See Kotteakos v. United States*, 328 U.S. 750, 760 (1946). As this Court explained, "[w]e have … come a long way from the time when *all trial error was presumed prejudicial* and reviewing courts were considered 'citadels of technicality.'" *McDonough Power*, 464 U.S. at 553 (citation omitted; emphasis added). When Congress enacted the predecessor statute addressing harmless errors, it specifically contemplated that the burden should be "cast upon the party seeking a new trial" to "show[] that any technical errors that he may

complain of have affected his substantial rights." H.R. Rep. No. 913, 65th Cong., 3d Sess., 1 (1919). Yet the Ninth Circuit's rule returns to a scheme of presuming prejudice for any instructional error and requiring the appellee to overcome it to avoid a retrial. That allocation cannot be squared with the reasons why the harmless-error rule exists in the first place.

The Ninth Circuit has offered no compelling rationale for placing the burden on civil appellees to disprove harmless error for jury instructions. Beyond suggesting without support that an errant jury instruction is an "abnormal" error in a civil case, the Ninth Circuit has offered two primary justifications for its departure from this Court's precedent. *BladeRoom*, 20 F.4th at 1244.

First, the Ninth Circuit says *Shinseki* does not command how the harmless-error burden must be allocated in a civil case because it arose from the prejudicial-error standard for a veteran's administrative proceeding. *Id.* But as explained, *see* p. 13, *supra*, the entire rationale of *Shinseki* was that the Federal Circuit needed to apply "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases," and *Shinseki* relied on a long line of this Court's cases applying the harmless-error rule in civil appeals. 556 U.S. at 406–07, 409. Other circuits have thus had no trouble recognizing that *Shinseki* establishes who bears the harmless-error burden in civil cases, including for instructional errors. *See Kocher*, 969 F.3d at 630 n.4. Citing *Shinseki*, this Court likewise recently reiterated that administrative proceedings must follow "the same kind of harmless-error rule that courts ordinarily apply in civil cases."

Bufkin v. Collins, 604 U.S. 369, 374 (2025). The Ninth Circuit cannot evade *Shinseki*'s reasoning by limiting its reach to administrative proceedings. *See Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) ("[J]ust as binding as [a] holding is the reasoning underlying it.").

Second, the Ninth Circuit misreads *Shinseki*'s reference to "ordinary" civil cases as implying a category of "extraordinary" civil cases, which allows it to flip the burden to appellees. That creative interpretation takes what *Shinseki* meant by "ordinary" out of context. *Shinseki* used the word "ordinary" to refer to the mine-run of civil cases as opposed to civil cases arising from administrative proceedings, not to set aside an undefined group of "abnormal" civil cases for different treatment. *See, e.g.*, 556 U.S. at 406–07 (applying "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases" to administrative review); *id.* at 410–11 (placing the harmless-error burden on the appellee "only when the matter underlying review was criminal," because "in the ordinary civil case that is not so"). Those ordinary civil cases already had a well-established pedigree of placing the burden on the appellant to explain how it has been harmed by an error. *Id.* at 409 (collecting cases).

The only abnormal cases that *Shinseki* identified as deserving special treatment are *criminal* appeals. *Id.* at 410–11. The "good reason" for this exception is that, when "the Government seeks to deprive an individual of his liberty," it should have "to explain why an error should not upset the trial court's determination." *Id.* Plus, the heightened burden of

beyond a reasonable doubt that applies in criminal cases "justifies a rule that makes it more difficult for the reviewing court to find that an error did not affect the outcome of a case." *Id.* None of that reasoning applies to a civil instructional error, which is simply a run-of-the-mill error like any other in "the ordinary civil case." *Id.* at 411. This Court should correct the Ninth Circuit's misallocation of the harmless-error burden.

IV. THE ALLOCATION OF THE HARMLESS-ERROR BURDEN IS AN IMPORTANT ISSUE, AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS IT.

A civil litigant is guaranteed "a fair trial but not a perfect one, for there are no perfect trials." *McDonough Power*, 464 U.S. at 553 (citation omitted). When there is an error at trial, civil litigants should have a uniform rule for which party will have the burden to show on appeal whether the error mattered. That uniformity should encompass the burden for errors in jury instructions. Far from being arcane or rare, alleged errors in the jury instructions are among the most frequently litigated issues in civil appeals. It is thus important to settle the burden for showing harmless error on such a common civil appellate issue nationwide.

Letting the Ninth Circuit's misallocation of the harmless-error burden linger will only encourage further contrived exceptions. If courts of appeals are allowed to carve out a special burden-shifting exception for one category of trial error, nothing will stop them from crafting others, perhaps under the Ninth Circuit's guise that they are supposedly

abnormal. This Court has already declined to create such "a special rule" for a particular category of civil error, recognizing that only criminal cases necessitate different rules. *Shinseki*, 556 U.S. at 410–11. Allowing the Ninth Circuit's exception to stand would invite it (and the two circuits that have not expressly weighed in on the issue) to create even more exceptions, leading to exactly the patchwork of ad hoc, error-specific rules that *Shinseki* meant to curb.

Clarifying who has the burden for harmless error is also not an academic exercise, but rather an important question for civil litigants, practitioners, and the Judiciary. Because the Ninth Circuit presumes all errors in civil jury instructions are prejudicial, it increases the likelihood of retrial—and therefore increases the burden on litigants and the judicial system. The many costs to the judicial system from retrials should not be overlooked: "Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials." *McDonough Power*, 464 U.S. at 553. Consider the costs of the trial here—it spanned six days, had 23 witnesses testify, presented 257 exhibits spanning tens of thousands of pages, and cost Comet over $17 million to litigate. *See* D.Ct. Dkt. 350-1, 356-1, 358-1, 364-1, 370-1, 395-1 (trial logs); D.Ct. Dkt. 394-1 (joint admitted trial exhibits); D.Ct. Dkt. 585 (fee award to Comet). Yet the Ninth Circuit presumed prejudice from a single jury instruction about ready ascertainability—one subfactor of what it means to be a trade secret—and then mandated a retrial after requiring Comet to disprove that presumed prejudice.

This case is an ideal vehicle to resolve the allocation of the burden for harmless error. Comet expressly told the Ninth Circuit that its precedent conflicts with this Court's guidance. *See* Comet CA9 Br. 50 n.5. The majority still placed the burden on Comet to prove that the instructional error was harmless. Pet.App. 14a; *see generally* Pet.App. 14a–26a (requiring "the party defending the judgment [to] show[] that the error was more probably than not harmless") (citation omitted).

Who had the burden mattered in this case. Indeed, Judge Bumatay dissented on the ground that the error here was harmless even with the burden erroneously placed on Comet. Pet.App. 49a. As he explained, "the wealth of undisputed evidence introduced at trial easily establishes that 'it [was] more probable than not that the jury would have reached the same verdict had it been properly instructed.'" *Id.* (citation omitted). Comet "more than met its burden" on ready ascertainability by presenting "overwhelming—and largely uncontested—evidence that these trade secrets were sophisticated and composed of voluminous data files filled with highly technical schematics and confidential testing results." Pet.App. 49a–50a. That is, the trade-secret evidence contained information that could not be derived from merely inspecting the product. That evidence ranged from "thousands of pages and files" covering "the design process," "the system architecture, layouts, schematics, test results, simulation," to calibration data revealing "what kind of manufacturing variation … there is going to be between units," to fabrication drawings specifying "the materials used and their precise thicknesses."

Pet.App. 50a–53a. On this record, "the only reasonable inference the jury could draw was that these trade secrets were not readily ascertainable." Pet.App. 50a. As Judge Bumatay highlighted, "[b]urdens of persuasion are … tie-breakers." Pet.App. 54a (citation omitted).

Yet the Ninth Circuit had the tie-breaker go to the appellant, while the other circuits would have given the tie to the jury's verdict. Misallocating the burden in that way was dispositive here. The Court should grant this petition to correct the Ninth Circuit's mistake and clarify that, before a retrial can be ordered, appellate courts must place the burden on civil appellants to prove an error in the jury instructions harmed them.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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November 2, 2026