No. 23-928

In the Supreme Court of the United States

YUN ZHENG, AKA WENDY ZHENG, AND YAN QIU WU, AKA JASON WU, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
JAVIER A. SINHA
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a conviction for harboring an unlawfully present noncitizen under 8 U.S.C. 1324(a)(1)(A)(iii) requires proof of a specific intent to prevent law-enforcement detection.

2. Whether, even if so, the court of appeals correctly determined that the asserted error in petitioners' jury instructions was harmless.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

Miscellaneous:

In the Supreme Court of the United States

No. 23-928

YUN ZHENG, AKA WENDY ZHENG, AND YAN QIU WU, AKA JASON WU

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is available at 87 F.4th 336. The memorandum opinion and order of the district court (Pet. App. 25-37) is not published in the Federal Supplement but is available at 2022 WL 1109428.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2023. The petition for a writ of certiorari was filed on February 23, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on four counts of harboring noncitizens for

commercial gain, in violation of 8 U.S.C. 1324(a)(l)(A)(iii).[1] Yun Zheng Judgment 1; Yan Qui Wu Judgment 1. They were each sentenced to six months of imprisonment, to be followed by one year of supervised release. Yun Zheng Judgment 2-3; Yan Qui Wu Judgment 2-3. The court of appeals affirmed. Pet. App. 1-24.

1. Petitioners are a married couple who owned and operated the Tokyo Dragon Buffet, a Chinese restaurant in Kentucky. Pet. App. 3; Pet. 5. Petitioners' employees included four unlawfully present noncitizens, who worked in the restaurant's kitchen. Pet. App. 3. The noncitizens lived in the basement of petitioners' house, and petitioners transported them to and from work each day. *Ibid.* The basement had one door leading outside, which was behind the house and was not visible from the road. D. Ct. Doc. 51, at 11-13 (Jan. 12, 2022); D. Ct. Doc. 104, at 75, 99 (Nov. 16, 2022). Petitioners transported the noncitizens to the grocery store once a week, and petitioner Zheng "instructed the noncitizens that they 'should not go outside and . . . should not make any noise,' or else they could be deported." Pet. App. 4 (internal citation omitted); see *id.* at 3.

Petitioners "always paid [the noncitizens] in cash, but did not file any paperwork with the State of Kentucky or the federal government regarding their employment." Pet. App. 3. In contrast, petitioners paid their other employees "by check and paid their unemployment taxes." *Ibid.* Although petitioners maintained federal tax forms for other Tokyo Dragon employees, they maintained no such tax forms for any of

---

[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

the noncitizens. D. Ct. Doc. 104, at 131-132. And although Tokyo Dragon's payroll records listed the names and wages of Tokyo Dragon's other employees, the records did not list the names or wages of the noncitizens. *Id.* at 132-133.

One of the noncitizens, a Mexican citizen named Fidelino Francisco-Pedro, began working as a cook at Tokyo Dragon in 2015. Pet. App. 3. Petitioner Zheng did not ask to see any identification, immigration papers, or any other documents before hiring him. D. Ct. Doc. 51, at 8-9. Nor did petitioners ask Francisco-Pedro to sign any tax forms or fill out any other paperwork before he started working at the restaurant. *Id.* at 9.

Francisco-Pedro generally worked in the Tokyo Dragon kitchen six or seven days a week for 11 to 12 hours each day. Pet. App. 3-4. Petitioners "relegat[ed] him and the other noncitizens to the kitchen, which was not visible from the dining room." *Id.* at 4. Although he and the other noncitizens sometimes filled the buffet, which was in the dining area where the customers ate, he "did not interact with customers at all." *Id.* at 4-5. Francisco-Pedro testified that petitioners did not allow him to sit in the dining room where the customers would sit and eat, *id.* at 4; if he did so, petitioners would "scold [him]," and tell him that he "can't sit there. [He] must be inside." D. Ct. Doc. 51, at 68.

One evening in November of 2016, Francisco-Pedro "severely" burned his hand in hot oil in the Tokyo Dragon kitchen. D. Ct. Doc. 51, at 31-32; D. Ct. Doc. 104, at 232, 234; see Pet. App. 26. Zheng told him that she could not take him to a doctor because he was "an illegal." D. Ct. Doc. 51, at 33. Zheng explained that, were she to take Francisco-Pedro for medical treat-

ment, "it's possible that" government authorities would "deport [him] or the police [would] take [him]." *Ibid.*

Two days after he was injured, petitioners nonetheless took Francisco-Pedro to the hospital. Pet. App. 35. At the hospital, Zheng was "controlling," refusing to leave Francisco-Pedro alone with hospital employees and insisting on speaking for him. D. Ct. Doc. 104, at 235. One hospital employee noted that Francisco-Pedro seemed "scared, worried," and "in a lot of pain." *Id.* at 234. Zheng "kept staring at [Francisco-Pedro]," and the hospital employee believed that Zheng "want[ed] to * * * scare" Francisco-Pedro or otherwise "make him feel uncomfortable." *Id.* at 236.

Francisco-Pedro refused to answer the hospital staff's questions while Zheng was in the room, and a nurse asked Zheng to step outside. D. Ct. Doc. 51, at 36-38; D. Ct. Doc. 104 at 236, 237-239. Francisco-Pedro then explained to the hospital staff that he had been injured in petitioners' restaurant, but that petitioners had not wanted to bring him to the hospital because "the E.R. would ask questions and * * * [the authorities] would deport him." D. Ct. Doc. 104, at 240.

2. a. Petitioners were charged with one count of conspiring to harbor noncitizens for commercial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and (a)(1)(A)(v)(I), and four counts of harboring noncitizens for commercial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Indictment 1-4. Section 1324(a)(1)(A)(iii) prescribes criminal liability for anyone who, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection * * * such alien in any place." 8 U.S.C. 1324(a)(1)(A)(iii).

Before trial, petitioners submitted proposed jury instructions that would have defined the term "harboring" as "encompass[ing] conduct with the intent to substantially facilitate an alien remaining in the United States illegally and to prevent government authorities from detecting his or her unlawful presence," with a further additional requirement that "the government must prove that [petitioners] harbored the alien(s) with the intent to assist the alien's attempt to evade or avoid detection by law enforcement." D. Ct. Doc. 40, at 5-6 (Jan. 6, 2022); see Pet. App. 8.

The district court declined to give those instructions, instead instructing the jury that "[t]he term 'harboring' encompasses conduct that tended to substantially facilitate an alien remaining in the United States illegally and to prevent government authorities from detecting his or her unlawful presence." D. Ct. Doc. 105, at 148 (Nov. 16, 2022); see *id.* at 146-148; see also Pet. App. 28-29; D. Ct. Doc. 95, at 21-24 (Aug. 12, 2022) (explaining that petitioners' requested additions were unwarranted).

The jury returned guilty verdicts against petitioners on the four harboring counts, and not-guilty verdicts on the conspiracy count. Pet. App. 4. Petitioners moved for a judgment of acquittal on the harboring counts or, alternatively, a new trial. Pet. App. 25; see D. Ct. Doc. 64 (Jan. 27, 2022). They argued that the jury instructions on "harboring" conflicted with circuit precedent that required the government to prove that the defendants "intended to conceal the aliens' presence from government authorities." D. Ct. Doc. 64, at 5; see *id.* at 4-5. The district court rejected petitioners' argument and denied the motion. Pet. App. 25-33.

3. The court of appeals affirmed. Pet. App. 1-23.

The court of appeals first explained that the district court had properly instructed the jury on the meaning of "harboring," which "does not require the government to prove that a defendant acted intentionally." Pet. App. 10; see *id.* at 8-17. The court observed that "[t]he prior version of the statute * * * required the government to prove that a defendant 'willfully or knowingly' harbored or attempted to harbor an illegal noncitizen from detection. But under the current statute, Congress attached a 'knowing or in reckless disregard' mens rea to the 'fact that an alien has come to, entered, or remains' unlawfully in the United States." *Id.* at 9 (citations omitted). And the court reasoned that Congress expressly "removed the statutory requirement that a person willfully or knowingly conceal, harbor, or shield a noncitizen from detection" and thus petitioners' interpretation of the statute "would have added a specific intent requirement that is not evident in the statute." *Id.* at 10.

The court of appeals further found that, even if the district court erred in declining to give petitioners' requested instruction, any error was harmless because "[t]he jury would have found [petitioners] guilty even under their proposed instruction." Pet. App. 17. The court of appeals observed that "[t]he government presented overwhelming evidence that [petitioners] harbored illegal noncitizens and intended to assist them in avoiding detection by law enforcement," including that petitioners housed the noncitizens in their basement; told them to not make much noise; transported the noncitizens to the restaurant daily; kept the noncitizens in the kitchen where they could not be seen by the public; paid the noncitizens only in cash; and did not file any

federal or state paperwork about them. *Ibid.*; see *id.* at 17-18.

The court of appeals rejected petitioners' argument that any error in the jury instructions could not have been harmless, which was premised on the theory that "(1) they introduced evidence contesting [the harboring] element, and (2) the evidence against them was not overwhelming." Pet. App. 19. The court explained that petitioners' "denial of an intent to engage in wrongdoing 'does not dispose of the harmless-error question,'" which instead requires a reviewing court to "consider the record as a whole to determine whether any instructional error was harmless beyond a reasonable doubt." *Ibid.* (quoting *Rose* v. *Clark*, 478 U.S. 570, 584 (1986)). And, "[h]aving conducted that examination," the court determined "'beyond a reasonable doubt that the jury verdict would have been the same absent' the alleged instructional error in this case." *Ibid.* (quoting *Neder* v. *United States*, 527 U.S. 1, 19 (1999)).

ARGUMENT

Petitioners contend (Pet. 12-35) that the district court erroneously instructed the jury regarding the meaning of "harbor[ing]," as used in 8 U.S.C. 1324(a)(1)(A)(iii), and that the court of appeals erred both in upholding the jury instructions and finding any error in the instructions harmless. Those contentions lack merit, and petitioners do not allege any conflict in the courts of appeals warranting this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioners first renew the contention (Pet. 12-24) that a defendant does not commit the offense of harboring an unauthorized noncitizen in violation of 8 U.S.C. 1324(a)(1)(A)(iii) unless he acts with the specific intent to help the noncitizen evade detection. The court of ap-

peals correctly rejected that contention, and any disagreement in the courts of appeals does not warrant this Court's review, nor would this case provide an appropriate vehicle for the Court to address it.

a. Under 8 U.S.C. 1324(a)(1)(A)(iii) and (1)(B)(i), it is a crime for a defendant to conceal, harbor, or shield from detection a noncitizen for profit when the defendant knows, or is in reckless disregard, that the noncitizen is illegally in the United States. The basic criminal prohibition covers any person who, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection * * * such alien in any place." 8 U.S.C. 1324(a)(1)(A)(iii). And petitioners were convicted of an aggravated version of that offense, applicable when the defendant commits the offense "for the purpose of commercial advantage or private financial gain." 8 U.S.C. 1324(a)(1)(B)(i).

The court of appeals correctly rejected petitioners' argument that conviction for their crime required additional proof that the defendant acted with the specific intent to help a noncitizen evade detection. See Pet. App. 22. As the court explained (Pet. App. 9-10), Congress expressly defined the mental state required for the offense of harboring unlawfully present noncitizens: Section 1324(a)(1)(A)(iii) applies to any person who "conceals, harbors, or shields from detection" an alien "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." 8 U.S.C. 1324(a)(1)(A)(iii).

The court of appeals properly refused to engraft onto the statute the additional requirement that the defendant have intended to help the noncitizen evade detection. As the court recognized, "under the current stat-

ute, Congress attached a 'knowing or in reckless disregard' mens rea to the 'fact that an alien has come to, entered, or remains' unlawfully in the United States," and petitioners' "requested instruction would have added a specific intent requirement that is not evident in the statute." Pet. App. 9-10 (citation omitted). The statute nowhere suggests that the government must prove, in addition to the statutory elements, that a defendant had a specific intent to help the noncitizen evade detection.

The statutory history of Section 1324(a)(1)(A)(iii) reinforces the dictates of its text. As the court of appeals observed, "[t]he prior version of the statute—found in the Immigration and Nationality Act of 1952—required the government to prove that a defendant 'willfully or knowingly' harbored or attempted to harbor an illegal noncitizen from detection." Pet. App. 9 (citing 8 U.S.C. 1324(a)(3) (1952)). But "in passing the Immigration Reform and Control Act of 1986, Congress removed the statutory requirement that a person willfully or knowingly conceal, harbor, or shield a noncitizen from detection." *Id.* at 9-10. Thus, "even though the statute does not define 'harbor,' the statute's history indicates that Congress does not require the government to prove that a defendant acted intentionally, as [petitioners] argue." *Id.* at 10.

b. Petitioners' contrary arguments lack merit.

Petitioners err in contending (Pet. 15) that the "dictionary understanding of 'harbor' leaves little doubt that the public, ordinary, and contemporary meaning of that usage in § 1324 requires intentional evasion from detection." In fact, contemporaneous dictionaries suggest that the plain meaning of "harbor" is simply to afford refuge or shelter. See *Webster's New Interna-*

tional Dictionary of the English Language 1137 (William Allan Neilson et al. eds., 2d ed. 1958) (defining "harbor" as "[t]o afford lodging to; to entertain as a guest; to shelter; to receive; to give a refuge to; to contain; to indulge or cherish (a thought or feeling)") (emphasis omitted); *The American College Dictionary* 550 (C. L. Barnhart & Jess Stein eds., 1959); *Webster's New Collegiate Dictionary* 376 (2d ed. 1958). Although that was not the invariant definition, see *Black's Law Dictionary* 847 (4th ed. 1951) (citing an 1847 case interpreting the Fugitive Slave Act of 1793, Act. of Feb. 12, 1793, ch. 7, 1 Stat. 302, to suggest that harboring might encompass "receiv[ing] * * * a person for the purpose of so concealing him" (citing *Jones* v. *Van Zandt*, 46 U.S. (5 How.) 215, 227 (1847)), the weight of the dictionaries does not support petitioners' construction of the text. See Pet. App. 11 ("[D]ictionary definitions do not shed much light on the mens rea required to 'harbor' an illegal noncitizen.").

Petitioners assert (Pet. 16-18) that the structure of Section 1324(a)(1)(A) and the canon of *noscitur a sociis* support their interpretation of the word "harbor." That assertion is unsound. The other clauses of Section 1324(a)(1)(A) address different types of action (see 8 U.S.C. 1324(a)(1)(A)(i)-(v)) regarding noncitizens, and provide little evidence of the meaning of the word "harbor" in Section 1324(a)(1)(A)(iii). And even if the other words in Section 1324(a)(1)(A)(iii) itself—"conceals" and "shields from detection"—were construed to incorporate petitioners' specific-intent requirement, that would not import the requirement into "harbors," which has a different definition and does independent work.

Nor can petitioners find support (Pet. 18-22) for their reading of "harbors" in the general principle that

mens rea is a fundamental aspect of criminal law. The statute itself expressly defines the mental state required: the defendant must act "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." 8 U.S.C. 1324(a)(1)(A)(iii). Thus, "to the extent the presumption in favor of scienter applies, the mens rea for harboring would be 'knowing or conscious disregard' because that is the general scienter in the subject statute." Pet. App. 16.

Finally, petitioners' suggestion (Pet. 21-22) that their reading of the word "harbor" is necessitated by the doctrine of constitutional avoidance is misplaced. The straightforward interpretation of the statute raises no substantial constitutional questions.

c. Petitioners assert (Pet. 7-10) that the courts of appeals are divided over the scope of "harbor[ing]" under 8 U.S.C. 1324(a)(1)(A)(iii). But any such disagreement is narrower than petitioners suggest and does not warrant this Court's review.

Petitioners acknowledge that the Third, Fifth, and Eighth Circuits have recognized—in accord with the decision below—that "'harboring' encompasses conduct that tends to substantially facilitate noncitizens remaining in the country illegally and prevent authorities from detecting the noncitizens' presence." Pet. 8 (quoting Pet. App. 12). Petitioners assert (*ibid.*) that the Second, Seventh, and Ninth Circuits require intentional or purposeful action, while the Eleventh Circuit requires a knowing mens rea. But nothing suggests that petitioners' case would have come out differently in any of those courts of appeals.

In *United States* v. *Vargas-Cordon*, 733 F.3d 366 (2013), the Second Circuit stated that "[t]o 'harbor' un-

der § 1324, a defendant must engage in conduct that * * * is intended to help prevent the detection of the alien by the authorities." *Id.* at 382. But the Second Circuit later explained in *United States* v. *George*, 779 F.3d 113 (2015), that "where active concealment is proved, it will be the rare case in which a defendant will not have intended the achieved result." *Id.* at 120. And rather than circumscribing the statute's scope, the court described the mens rea requirement as "ensur[ing] that the prohibition on 'harboring' is not cabined more narrowly than warranted." *Ibid.* It is thus far from clear that the Second Circuit would have reached a different result here, where the evidence plainly showed that petitioners actively concealed their noncitizen workers.

It is likewise far from clear that the Seventh Circuit would do so. In *United States* v. *McClellan*, 794 F.3d 743 (2015), the Seventh Circuit stated that "when the basis for the defendant's conviction under § 1324(a)(1)(A)(iii) is providing housing to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities." *Id.* at 751. But the court found facts similar to the facts here—specifically, that the defendant knew that employees in his restaurant's kitchen "did not have legal status, that he instructed them not to punch in in the same manner as other employees, and that he provided them with housing to help compensate them for the otherwise low wages that he was paying them"—sufficient for conviction. *Id.* at 750; see *id.* at 751.

In doing so, the Seventh Circuit relied on its prior decision in *United States* v. *Costello*, 666 F.3d 1040 (2012), where it explained that a restaurant owner

providing housing, employment, and low wages to noncitizens—but without making any further effort to conceal or shield those noncitizens from detection—would constitute a "perfect case of harboring." *Id.* at 1049; see *id.* at 1045. *Costello* observed that "[t]he owner is harboring these illegal aliens in the sense of taking strong measures to keep them here," even if he makes "no effort at concealment or shielding from detection," because he does not expect any law-enforcement inquiries. *Id.* at 1045; see *id.* at 1049. "It is nonetheless harboring in an appropriate sense," the court explained, "because the illegal status of the alien is inseparable from the decision to provide housing—it is a decision to provide a refuge for an illegal alien *because* he's an illegal alien." *Id.* at 1045.

Petitioners cite *United States* v. *You*, 382 F.3d 958 (2004), cert. denied, 543 U.S. 1076 (2005), for the proposition that the Ninth Circuit defines harboring to "require[] a defendant to act intentionally or purposefully." Pet. 8 (citation omitted). But the Ninth Circuit has not required an instruction, as petitioners claim is necessary, that harboring requires that a defendant acted with the intent to conceal the noncitizens from law-enforcement detection. Rather, the Ninth Circuit requires an instruction that "the defendants intended to violate the law." *You*, 382 F.3d at 966. And the Ninth Circuit has subsequently made clear that while "[o]ne way to demonstrate such an intention is to prove that the defendant sought to prevent immigration authorities from detecting an illegal alien's presence, * * * that is not the only way." *United States* v. *Tydingco*, 909 F.3d 297, 304 (9th Cir. 2018). Thus, a defendant can be guilty of harboring in the Ninth Circuit "even though she does not intend to prevent detection." *Ibid.*

Finally, petitioners cite (Pet. 8-9) *United States* v. *Dominguez*, 661 F.3d 1051, 1063 (2011), cert. denied, 566 U.S. 1034 (2012), for the proposition that the Eleventh Circuit holds that a defendant is guilty of harboring only if he does so knowingly. But the question in *Dominguez* did not concern the defendant's mental state. Instead, it was whether the evidence sufficiently supported the conclusion that the defendant "substantially facilitated" the noncitizens' remaining in the United States illegally. *Ibid.* And the knowledge aspect of the court's discussion simply acknowledged that the word "harbor" does not encompass accidental or even undirected conduct. See *ibid.* (repeating jury instruction that "[t]o 'conceal, harbor or shield from detection' includes any knowing conduct by the defendant tending to substantially facilitate an alien's escaping detection thereby remaining in the United States illegally") (citation omitted). Petitioners have not shown that such acknowledgment conflicts with the decision below; nor has the Eleventh Circuit adopted petitioners' proposed reading of "harbor" as requiring a specific intent to prevent law-enforcement detection.

At bottom, therefore, petitioners have failed to identify any circuit that would clearly reach a different result in this case, or any meaningful number of cases. Indeed, particularly where, as here, the government proves the aggravating circumstance in Section 1324(a)(1)(B)(i), there will be no question that the defendant acted with an intent to conceal the noncitizen from law-enforcement detection. That is because the aggravating circumstance of acting "for the purpose of" financial gain will generally involve or evince an intent to conceal the noncitizen from detection. 8 U.S.C. 1324(a)(1)(B)(i); cf. *United States* v. *Barajas-Montiel*,

185 F.3d 947, 953 (9th Cir. 1999) (noting that "[c]ases in which a defendant knowingly transported an alien without permission to enter into the United States, and did so for financial gain, but did not intend to violate the immigration laws, would be rare"), cert. denied, 531 U.S. 849 (2000).

d. In any event, this case would be a poor vehicle in which to address the issue. Even if the court of appeals erred in declining to give petitioners' preferred instruction, the court correctly determined that any error in this case was harmless. See pp. 19-21, *infra*. This Court would need to reverse *both* the court of appeals' plain-meaning definition of "harbor," *and* its determination of harmlessness, for petitioners to obtain relief.

2. Petitioners accordingly urge (Pet. 24-35) this Court to review the court of appeals' application of the harmless-error standard to the jury instructions in this case. Review of that question is not warranted because the court of appeals correctly applied the harmless-error standard articulated by this Court, and its decision does not conflict with the decision of any other court of appeals. This Court has previously denied petitions for writs of certiorari alleging a conflict in the lower courts regarding the application of the harmless-error standard applied in *Neder* v. *United States*, 527 U.S. 1 (1999). See *McFadden* v. *United States*, 581 U.S. 904 (2017) (No. 16-679); *Caroni* v. *United States*, 579 U.S. 929 (2016) (No. 15-1292). The same result is warranted here.[2]

---

[2] The second question presented is also presented in *Greenlaw* v. *United States*, petition for cert. pending, No. 23-631 (filed Dec. 8, 2023), and *Jordan* v. *United States*, petition for cert. pending, No. 23-650 (filed Dec. 13, 2023). Petitioners adopt in passing (Pet.

a. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). Similarly, 28 U.S.C. 2111 provides that, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Harmless-error doctrine "focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). That focus ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed without justification. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The requirement that errors must "affect substantial rights" to warrant reversal requires, outside the narrow category of "structural errors," *Neder*, 527 U.S. at 7, 14, that courts conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)).

Because the harmless-error inquiry is designed to separate errors that mattered from errors that do not justify the high costs of a retrial, appellate courts review the record—"in typical appellate-court fashion,"

---

25) the *Greenlaw* and *Jordan* petitioners' further request that this Court overrule its decision in *Neder*, *supra*. Even if that is adequate to preserve the issue, for the reasons described in the government's briefs in opposition in *Greenlaw* and *Jordan*, no sound reason exists to overrule *Neder*, and the issue does not warrant this Court's review.

Neder, 527 U.S. at 19—to assess whether, absent the error, the ultimate outcome likely would have been the same. In evaluating the likelihood that an error was harmless, courts employ an objective standard that considers the effect of the error on an average, reasonable jury "in relation to all else that happened." *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). Where (as here) the asserted error is constitutional, the reviewing court can determine that it is harmless if it finds "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

As petitioners acknowledge (Pet. 26), this Court's decision in *Neder* held that the constitutional-error test applies to the omission of an element of the offense from the jury instructions. 527 U.S. at 8-15; see *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam). In doing so, *Neder* observed that the Corut "ha[d] often applied harmless-error analysis to cases involving improper instructions on a single element of the offense." *Neder*, 527 U.S. at 9; see *id.* at 9-10 (citing cases). And in applying the constitutional harmless-error test to the case before it, the Court reviewed the record evidence and found the instructional error there—the omission of an instruction on the materiality of Neder's false statements about his income to a determination of his tax liability—to have been harmless. The Court's review focused on the strength of the evidence supporting materiality, noting that the evidence "was so overwhelming * * * that Neder did not argue to the jury * * * that his false statements of income could be found immaterial." *Id.* at 16. "In this situation," the Court stated, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncon-

tested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17.

b. Petitioners err in suggesting (Pet. 25) that under *Neder*, an appellate court is precluded from finding instructional error harmless unless "the defendant * * * failed to contest" the omitted element at trial "*and* the prosecutorial evidence" was "overwhelming." The Court in *Neder* noted that the error was harmless in that case because the "omitted element [wa]s supported by uncontroverted evidence." 527 U.S. at 18. But in making its harmlessness determination, the Court relied on cases considering the erroneous admission or exclusion of evidence and explained that the ultimate harmless-error inquiry is "essentially the same" across those different types of constitutional errors, asking whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ibid.* And the Court emphasized that the ultimate determination on harmless error is often intensely record-dependent and requires a "case-by-case approach." *Id.* at 14; see *id.* at 19.

Petitioners accordingly err in asserting (Pet. 25-28) that *Neder* allows for a harmless-error finding only for errors relating to uncontested issues. As *Neder* makes clear, the erroneous admission of evidence, for example, may be harmless even where it was "in violation of the Fifth Amendment's guarantee against [compelled] self-incrimination," 527 U.S. at 18 (citing *Arizona* v. *Fulminate*, 499 U.S. 279 (1991))—such as an unlawfully extracted confession that a defendant's trial strategy necessarily contests, see *Fulminante*, 499 U.S. at 295-302. The "case-by-case approach," *Neder*, 527 U.S. at 14, is

not a one-size-fits-all formula that forecloses a harmless-error finding in circumstances that are not identical to those in *Neder*. Instead, uncontested and overwhelming evidence on an omitted or misdefined element "simply provides one way in which the government may establish harmless error." *United States* v. *Freeman*, 70 F.4th 1265, 1282 (10th Cir. 2023). While an error should not be deemed harmless "where the defendant contested the [disputed] element *and* raised evidence sufficient to support a contrary finding," *Neder*, 527 U.S. at 19 (emphasis added), it would be harmless if the record shows that a contested element would have come out the same way irrespective of the instructional error.

c. Here, the court of appeals correctly articulated and applied *Neder*'s harmless-error standard to petitioners' particular case. Pet. App. 17-19.

The court of appeals correctly identified the relevant question on harmless-error review by using language that tracked *Neder*, framing the inquiry as whether the court, considering the "record as a whole," could "'conclude beyond a reasonable doubt that the jury verdict would have been the same absent' the alleged instructional error in this case." Pet. App. 19 (quoting *Neder*, 527 U.S. at 19). And, "[h]aving conducted that examination," the court found that "any instructional error was harmless beyond a reasonable doubt." *Ibid.*

Petitioners' contrary arguments are largely premised on their fact-bound disagreements with the decision below, which do not warrant this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioners contend (Pet. 28) that they "facilitated the aliens' visibility and open living as members of the local community" and

"treated these aliens exactly as they would treat any other employees." But as the court of appeals recognized, petitioners did precisely the opposite.

"The government presented overwhelming evidence that [petitioners] harbored illegal noncitizens and intended to assist them in avoiding detection by law enforcement." Pet. App. 17. That evidence included that petitioners housed the noncitizens in their basement; told them to not make much noise; warned the noncitizens that they could be deported if they were discovered; largely kept the noncitizens in the restaurant's kitchen where they could not be seen by the public; paid the noncitizens only in cash even though they paid their other employees by check; and did not file any federal or state paperwork regarding the noncitizens even though petitioners did so for their other employees. *Id.* at 17-19. And, as the jury found, petitioners did it all with the purpose of personal profit. See 8 U.S.C. 1324(a)(1)(B)(i).

Nor does "the fact that the jury acquitted [p]etitioners on the conspiracy charge suggest[]" that the jury "did not believe that [p]etitioners *intended* to help the aliens evade detection." Pet. 29. The fact that the jury found petitioners not guilty of conspiracy suggests only that it carefully considered and rejected the evidence regarding that count, not that it necessarily questioned whether petitioners intended to help the noncitizens evade detection; indeed, the jury instructions did not require such an intent for conviction of the conspiracy offense. See D. Ct. Doc. 56, at 18-20.

At all events, review is especially unwarranted here because the jury was instructed on alternative theories of guilt—specifically, that petitioners "conceal[ed]" the noncitizens or "shield[ed] [them] from detection."

8 U.S.C. 1324(a)(1)(A)(iii); see D. Ct. Doc. 56, at 21 (Jan. 13, 2022); *United States* v. *Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982) (observing that the statute "by its express terms may be violated in any one of several ways—by harboring, *or* by concealing, *or* by shielding from detection *or* by attempting to do any of these."). Although the court of appeals found it unnecessary to reach that ground for affirmance, the government may "defend its judgment on any ground properly raised below." *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted); see Gov't C.A. Br. 24-25.

d. Petitioners contend (Pet. 33-35) that federal and state courts are divided on the contours of *Neder*'s harmless-error standard. There is no such division of authority that would warrant this Court's review.

Petitioners suggest (Pet. 33) that the courts of appeals disagree as to whether *Neder* requires that an omitted or misdefined element be uncontested before the appellate court may find that the error was harmless. According to petitioners, the Fourth Circuit and—at least until this case—the Sixth Circuit preclude a harmlessness determination where the defendant contested the element in question, Pet. 34-35 (citing *United States* v. *Legins*, 34 F.4th 304, 322 (4th Cir.), cert. denied, 143 S. Ct. 266 (2022); *United States* v. *Miller*, 767 F.3d 585, 594 (6th Cir. 2014)), whereas the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits—as well as the Sixth Circuit panel here—do not, Pet. 34 (citing *United States* v. *Jackson*, 196 F.3d 383, 385-386 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000); *United States* v. *Boyd*, 999 F.3d 171, 179-182 (3d Cir.), cert. denied, 142 S. Ct. 511 (2021); *United States* v. *Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022); *Freeman*, 70 F.4th at

1281-1283 (10th Cir.); *United States* v. *Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999), cert. denied, 530 U.S. 1261 (2000)). That is incorrect.

Contrary to petitioners' suggestion, the Fourth and Sixth Circuits do not require that an omitted or misdefined element be uncontested in order to be harmless. To the contrary, shortly after *Neder* was decided, the Fourth Circuit recognized that, "if the defendant contested the omitted element, *Neder* mandates a second inquiry" into "whether the 'record contains evidence that could rationally lead to a contrary finding with respect to that omitted element.'" *United States* v. *Brown*, 202 F.3d 691, 701 (2000) (quoting *Neder*, 527 U.S. at 19); accord *United States* v. *McFadden*, 823 F.3d 217, 225 (4th Cir. 2016), cert. denied, 581 U.S. 904 (2017). Indeed, the Fourth Circuit decision on which petitioners rely noted that its approach comports with that of other courts of appeals. *Legins*, 34 F.4th at 322.

Similarly, in the older Sixth Circuit decision that petitioners cite, the court did not refuse to find a jury-instruction error harmless based on the mere fact that the defendant had contested the element in question. Instead, after extensively analyzing the record, the court determined that the defendants had presented "considerable evidence" that would have permitted "a reasonable jury to find" in their favor on the contested element. *Miller*, 767 F.3d at 597. That determination reflects the facts of the case, not a difference in the inquiry.[3]

---

[3] Thus, contrary to petitioners' assertion (Pet. 33-34), the Sixth Circuit's decision in this case does not create an intracircuit division of authority. And even if it did, such intracircuit disagreement would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Finally, petitioners rely (Pet. 35) on Judge Lipez's concurring opinion in *United States* v. *Pizarro*, 772 F.3d 284 (1st Cir. 2014), which perceived intra- and inter-circuit divisions over how *Neder* has been applied, see *id.* at 304-306, and advanced the proposition that errors should be viewed harmless under *Neder* only where the element omitted from the jury instructions "is supported by overwhelming evidence" and the element was "uncontested"—meaning that "the defendant did not argue that a contrary finding on the omitted element was possible," *id.* at 310-311 (Lipez, J., concurring). But a second concurring judge in *Pizarro* disagreed with that assessment of the state of the law, finding "very little—if any—inconsistency" in *Neder*'s application. *Id.* at 313; see *id.* at 324-325 (Torruella, J., concurring). And no court of appeals has narrowed *Neder*'s harmless-error inquiry in the fashion advocated by Judge Lipez; a concurring opinion itself cannot create a conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
JAVIER A. SINHA
Attorney

APRIL 2024