No. 23-631

In the Supreme Court of the United States

HOLLIS MORRISON GREENLAW, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that asserted errors in a jury instruction were harmless beyond a reasonable doubt.

2. Whether this Court should overrule *Neder* v. *United States*, 527 U.S. 1 (1999).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 84 F.4th 325. The withdrawn and superseded opinion of the court of appeals is reported at 76 F.4th 304.

JURISDICTION

The substituted judgment of the court of appeals was entered on October 11, 2023. A petition for rehearing en banc was denied the same day (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 8, 2023. 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 Northern District of Texas, each petitioner was convicted of conspiring to commit wire fraud

affecting a financial institution, in violation of 18 U.S.C. 1349; conspiring to commit securities fraud, in violation of 18 U.S.C. 1349; and eight counts of aiding and abetting securities fraud, in violation of 18 U.S.C. 2 and 1348. Pet. App. 2a. Petitioner Hollis Greenlaw was sentenced to 84 months of imprisonment; petitioners Benjamin Wissink and Cara Obert were sentenced to 60 months of imprisonment; and petitioner Jeffrey Jester was sentenced to 36 months of imprisonment, with each petitioner's prison term to be followed by five years of supervised release. Greenlaw Judgment 2; Wissink Judgment 2; Obert Judgment 2; Jester Judgment 2. The court of appeals affirmed. Pet. App. 1a-61a.

1. Petitioners were officers and employees of a group of funds commonly known as United Development Funding (UDF), which loaned money to land developers and home builders to facilitate the development of land into residential housing. Pet. App. 2a-3a. Greenlaw, a founding partner of the UDF entities, was president, chief executive officer, and chairman of the board for the UDF III, UDF IV, and UDF V funds, and signed all filings with the Securities and Exchange Commission (SEC); Wissink was chief operating officer of the UDF III fund and served on the investment committees for the UDF III, UDF IV, and UDF V funds; Obert was UDF's chief financial officer and signed all SEC filings; and Jester was UDF's director of asset management. *Id.* at 3a-4a n.1. The funds comprised investor money and development loans from financial institutions.[1] Gov't C.A. Br. 3. During the relevant

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[1] UDF III was a publicly registered, nontraded limited partnership that raised approximately $350 million from investors. Pet. App. 4a n.2. UDF IV was a publicly registered, nontraded real-estate investment trust (REIT) that raised approximately $49.2

period, petitioners engaged in a scheme in which they misleadingly made their funds appear profitable and attractive to future investors by transferring money out of one fund to pay distributions to the investors of another, without disclosure to their investors or the SEC. Pet. App. 2a; Gov't C.A. Br. 3.

a. The UDF entities provided loans to residential housing developers at each stage of the development process. Pet. App. 3a. In return for the loans, the relevant investment fund received liens on the land and obligations by developers to repay the loans with interest. *Id.* at 4a. The interest paid by the developers was then disbursed to the funds' investors as distributions. *Ibid.*

The UDF III fund advertised to broker/dealers and financial advisors a "general rate of return" of 9.75% per year. Pet. App. 4a. By January 2011, however, borrowers were not repaying loans quickly enough to fund distributions to investors at that rate of return; for 53 out of the 60 months between January 2011 and December 2015, UDF III had insufficient cash available in its bank accounts at the time distributions were paid. Pet. App. 4a; see Gov't C.A. Br. 5-7.

To remedy the shortfall, petitioners transferred money, by way of an advance, from the UDF IV and UDF V funds to UDF III, thereby enabling UDF III to cover the distributions, maintain a high distribution rate, and ensure that UDF III continued to appear lucrative to investors. Pet. App. 4a-5a. At trial, "[j]urors heard evidence about how UDF was able to conduct these transactions" by abusing their authority to

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million from investors through its public offering. *Ibid.* UDF V was a publicly traded REIT listed on NASDAQ that raised approximately $651 million from investors through its public offering. *Ibid.*; see Gov't C.A. Br. 4-5.

control advance requests on the various funds that had been designed to help individual developers who found themselves in need of a cash infusion. *Id.* at 5a.

In particular, petitioners funneled funds into UDF III—even over the borrowers' objections. Pet. App. 5a; Gov't C.A. Br. 8-9, 11-12. Use of the advance requests to paper over the money transfers was evident in the emails surrounding the 53 distributions made to UDF III investors when there was insufficient money in UDF III's bank accounts. Gov't C.A. Br. 9. At trial, a Federal Bureau of Investigation (FBI) forensic accountant testified that the real source of funds for approximately $83.9 million of the distributions from UDF III was cash from other funds—with $66.8 million of that amount coming from UDF IV and UDF V. Pet. App. 5a; Gov't C.A. Br. 7 & n.1, 9-14; see Gov't C.A. Br. 7 n.5 (noting that the remaining $17.1 million came from UDF I).

The advances used to fund UDF III distributions made it appear that UDF III borrowers were successfully paying down their loans, which they were not. Pet. App. 6a. At the same time, it made UDF IV and UDF V appear to have more notes receivable—and thus more future interest payments and profitability—because they were issuing new loans. *Ibid.* UDF's SEC filings, however, represented that UDF V would not engage in investments with any of its "affiliates" and that the source of funds in UDF III would be "cash . . . from operations." *Ibid.*

Despite those statements (and similar statements made in meetings with brokers, dealers, and financial advisors), money transferred to UDF III from other UDF funds was not cash from operations. Pet. App. 6a; *id.* at 17a. And by making those transfers, petitioners

caused UDF to engage in affiliate transactions.[2] *Id.* at 6a; see *id.* at 15a-17a; Gov't C.A. Br. 21-28a.

b. In addition to fraudulently portraying the source of UDF distributions, petitioners, using UDF entities, obtained at least eight loans from financial institutions that relied on UDF's SEC filings. Gov't C.A. Br. 28a. Petitioners' misrepresentations in the SEC filings about the source of cash for distributions and undisclosed affiliate transactions bolstered the apparent financial condition of earlier funds and placed the banks at increased risk of loss. Pet. App. 6a-7a. Petitioners then used the loaned funds from the financial institutions for unauthorized purposes, such as to pay distributions and bank loans obtained by other UDF entities. *Id.* at 7a; see Gov't C.A. Br. 28-33.

c. Wissink and Jester also provided false and misleading information to UDF's outside auditor about the financial condition of a UDF borrower. Pet. App. 6a-7a. Specifically, they manipulated the borrower's financial spreadsheet by inflating its projected cash flow before providing the spreadsheet to UDF's outside auditor. *Ibid.*; Gov't C.A. Br. 14-21.

2. On October 15, 2021, a federal grand jury in the Northern District of Texas returned an indictment charging each petitioner with one count of conspiring to commit wire fraud affecting a financial institution, in

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[2] SEC regulations define an "affiliate" as one "that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, [the] issuer." 17 C.F.R. 230.144(a)(1) (emphasis omitted). "Control" means "the possession, direct or indirect, of the power to direct or cause the direction of the management and polices of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. 230.405. The jury was instructed on these definitions. Pet. App. 15a.

violation of 18 U.S.C. 1349; one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 1349; and eight counts of aiding and abetting securities fraud, in violation of 18 U.S.C. 2 and 1348. Indictment 1-3.

a. At trial, the government established the above facts through testimony from 42 witnesses and approximately 550 exhibits. Gov't C.A. Br. 4. In defense, petitioners contended that the pre-distribution advance transactions were undertaken to move the borrower-developers' projects forward; that making a loan to a "common borrower"—*i.e.*, a developer that had borrowed from more than one UDF fund—was not a prohibited affiliate transaction; and that petitioners were permitted to fund distributions from any available source. *Id.* at 35. Petitioners' expert witness testified that making new loans to a common borrower benefits the developer by paying down their debt, releasing their lien, and providing funding for development costs, but he could not explain how a loan advance that was never in the hands of the developer, or that was immediately transferred from the developer back to UDF—both of which were on exhibit here, see *id.* at 8-14, 35—advanced the developer's project. *Id.* at 35-36. Petitioners Greenlaw, Obert, and Jester also took the stand and testified that they believed the advances were routine business transactions and consistent with UDF's SEC disclosures. *Id.* at 36.

b. All of the charged counts required the Government to prove "intent to defraud," and the non-conspiracy offenses also required proof of execution of a "scheme to defraud." Pet. App. 8a-9a. Petitioners asked the district court to instruct the jury that a "'scheme to defraud' [was] a plan intended to deprive another of money or property" and that a "'specific intent to

defraud' [was] a willful, conscious, knowing intent to cheat someone out of money or property." *Id.* at 32a (brackets in original). The district court rejected that request and, in accordance with the Fifth Circuit's pattern instructions, instructed the jury that:

> A "scheme to defraud" means any plan, pattern, or course of action intended to deprive another of money or property *or* bring about some financial gain to the person engaged in the scheme . . . [and]
>
> A "specific intent to defraud" means a conscious, knowing intent to deceive *or* cheat someone.

Id. at 32a-33a (citing 5th Cir. Pattern Jury Instructions (Crim. Cases) § 2.57 (2019)). Petitioners objected, asserting that the disjunctive phrasing did not require the jury to find that petitioners intended to deprive UDF investors of money or property. *Id.* at 33a; see Pet. 10; Gov't C.A. Br. 99. The district court overruled petitioners' objections. Pet. App. 32a-33a.[3]

c. The jury found petitioners guilty on all counts. Pet. App. 2a. The district court sentenced Greenlaw to

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[3] Petitioners err in suggesting (Pet. 2) that the district court's decision on jury instructions informed its decision to "grant[] the prosecution's pretrial motion in limine to prevent petitioners from demonstrating at trial that none of their investors lost any money or property." The court's decision on the motion in limine instead rested on the clear principle that "whether [petitioners] did *in fact* cause a loss is not indicative of their intent," ROA 4167 (emphasis added); see Pet. App. 24a (finding similarly); see, *e.g.*, *Shaw* v. *United States*, 580 U.S. 63, 67 (2016) (explaining that similar bank-fraud statute "demands neither a showing of ultimate financial loss nor an intent to cause financial loss"). And contrary to petitioners' characterization (Pet. 2), the Government consistently argued that petitioners sought to deprive investors and banks of money or property. See, *e.g.*, ROA 10,045-10,046, 10,048-10049.

84 months of imprisonment, Wissink and Obert to 60 months of imprisonment, and Jester to 36 months of imprisonment. *Id.* at 7a. The district court subsequently denied petitioners' motion for a new trial, in which they reasserted their objections to the jury instructions. *Id.* at 32a n.12.

3. The court of appeals affirmed. Pet. App. 1a-61a.

a. The court of appeals first rejected petitioners' challenge to the sufficiency of the evidence supporting their convictions. Pet. App. 8a-31a. Petitioners argued that the government failed to prove that they made material misrepresentations and that they acted with the intent to deprive investors of money or property, see *id.* at 10a, but the court highlighted the evidence of both.

As to material misrepresentations, the court of appeals found "overwhelming evidence showing that the cash used to pay UDF III's investors was not cash from operations as purported in its annual and quarterly SEC filings," but instead money siphoned from other funds. Pet. App. 13a. The court cited the FBI forensic accountant's analysis that "the source of the money—over $66 million of the UDF III distributions—was solely cash from investors in UDF IV and UDF V." *Ibid.* It also cited "emails from several UDF employees explaining that the purpose of the money movement was to afford UDF III's distributions," rather than to pay a common developer's loan. *Id.* at 14a. And the court explained that the misrepresentations were material because "[t]he undisclosed advances allowed [petitioners] to mask UDF III's true financial health from the investing public," which "believed that [it] w[as] buying into a more successful fund." *Id.* at 14a.

The court of appeals also found that the evidence "strongly support[ed] a determination that UDF V's

statements" in its SEC filings that it would not engage in affiliate transactions were materially false. Pet. App. 17a; see *id.* at 15a-18a. The court observed that "the defining factor in determining whether [UDF V's transfer of money to UDF III] constituted affiliate transactions"—and was thus the type of transaction in which petitioners were purporting not to engage—"was control, and evidence revealed that UDF fully controlled the transaction on each end." *Id.* at 16a. And the court found "even evidence of instances where [petitioners] initiated an advance on the part of a developer who expressly requested that UDF stop the practice." *Id.* at 17a.

As to the mens rea requirement, the court of appeals accepted that the focus of the "scheme to defraud" and "intent to defraud" elements "must be * * * property interests," citing "recent Supreme Court cases [that] have brought" this established principle "to the forefront." Pet. App. 19a; see *id.* at 20a (discussing *Kelly* v. *United States*, 140 S. Ct. 1565, 1571-1572 (2020), and *Shaw* v. *United States*, 580 U.S. 63, 72 (2016)). Accordingly, "the Government was required to prove that the scheme was one in which [petitioners] intended to deprive the investors of money or property through misrepresentations, thereby wronging the investors' property rights." *Id.* at 21a.

The court of appeals determined that the evidence "strongly supports a finding" that petitioners "intended to conduct a scheme to deprive investors of their money." Pet. App. 21a; see *id.* at 21a-27a. Among other things, the court cited evidence that petitioners "purposefully advertised a desired rate of return to brokers and continued to solicit investors" for UDF III "despite knowing that UDF III did not have enough money to

sustain its current investors"; "purposefully did not invest UDF IV and UDF V investors' money into the business" (the investors' purpose in providing that money) "or otherwise use the money to further fund developer's projects"; "were aware that they needed to use new investor money to fund their distributions or risk deterring current investors from selling stock and new investors from buying stock"; "used bank loans for unapproved purposes"; and manipulated developers' cash-flow statements before submission to UDF's outside auditor to support the impression that UDF III was supported by their financial health rather than by money siphoned from other funds. *Id.* at 21a-22a. The evidence also showed that the "operation was dependent on each [petitioner]," *id.* at 22a-23a, and that petitioners "exposed investors to risks and losses that, if publicly disclosed, would have decreased [UDF's] value and investment power," *id.* at 25a & n.10.

The court of appeals thus rejected as "unpersuasive" petitioners' contention that they engaged in "normal business transactions that benefitted the investors." Pet. App. 23a. The court also explained that, contrary to petitioners' argument, "the fraud convictions [we]re not undermined by the fact that the Government did not present evidence showing that investors incurred monetary loss," because the "success of the scheme is immaterial" to intent. *Id.* at 24a (citing *Shaw*, 580 U.S. at 67). And the court made clear that the government had presented an "avalanche" and "mountain" of evidence showing that petitioners engaged in a fraudulent scheme to obtain money from investors. *Id.* at 23a, 27a.[4]

[4] The court of appeals also rejected petitioner Jester's argument that the evidence failed to prove he acted with the requisite knowledge to support his convictions, Pet. App. 10a, 27a-31a, as well

b. The court of appeals next addressed petitioners' argument that the district court erroneously instructed the jury on the "intent to defraud" and "scheme to defraud" elements. Pet App. 32a. The court concluded that the "intent to defraud" instruction misstated the law because it permitted conviction if the jury found that petitioners "merely exhibited a 'conscious, knowing intent to deceive . . . someone,'" as opposed to requiring an intent to deprive the victim of money or property by means of deception. *Id.* at 34a-36a; see *id.* at 36a ("Because deception, alone, will not suffice, the intent to 'deceive or cheat' instruction was erroneous."). But the court found that even so, and even assuming a further error in the "'scheme to defraud'" instruction, the asserted instructional errors were harmless. See *id.* at 38a-39a.

As explained in an amended panel decision accompanying the denial of a petition for en banc review—in which petitioners had claimed the panel's original opinion had erroneously substituted the "lower" standard applicable to sufficiency claims in place of the more rigorous harmless-error standard, Pets. C.A. Reh'g Pet. vi —the court of appeals made clear that, under "[e]stablished jurisprudence," "the relevant question of our harmless[ness] analysis is whether the record 'is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Pet. App. 38a (quoting *Neder* v. *United States*, 527 U.S. 1, 18 (1999)); see *id.* at 32a. And the court made clear that here, "[h]aving thoroughly examined the record in this case," the court was "convinced that a rational jury would have found [petitioners] guilty absent the

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as several of petitioners' other claims, see *id.* at 39a-60a, which petitioners do not renew in this Court.

erroneous instruction," citing circuit precedent holding that the error in a jury instruction was harmless "because multiple pieces of 'overwhelming' evidence proved guilt under a valid instruction." *Id.* at 38a-39a (citing *United States* v. *Skilling*, 638 F.3d 480, 483-488 (5th Cir. 2011), cert. denied, 566 U.S. 956 (2012)).

The court of appeals explained that it was "'certain beyond a reasonable doubt'" that a properly instructed jury would have found that petitioners "met the 'scheme to defraud' and 'intent to defraud' elements." Pet. App. 39a (citation omitted). And it declined to set aside petitioners' convictions "[b]ecause any error 'did not contribute to the verdict obtained.'" *Ibid.* (quoting *Neder*, 527 U.S. at 15).

ARGUMENT

Petitioners contend (Pet. 14-36) that the court of appeals erred in its application of the harmless-error standard to this case, and that this Court should overrule its decision in *Neder* v. *United States*, 527 U.S. 1 (1999). Petitioners' contentions lack merit and do not warrant this Court's review.[5]

1. Petitioners first urge (Pet. 14-30) this Court to review the court of appeals' application of the harmless-error standard to the jury instructions that the court of appeals determined or assumed to be erroneous 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

[5] The questions presented in the petition are also presented in *Jordan* v. *United States*, petition for cert. pending, No. 23-650 (filed Dec. 13, 2023), and *Zheng* v. *United States*, petition for cert. pending, No. 23-928 (filed Feb. 23, 2024).

court of appeals. This Court has previously denied petitions for writs of certiorari alleging a conflict in the lower courts regarding the application of *Neder*'s harmless-error standard. 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.

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," *Neder*, 527 U.S. at 19—to form a judgment whether, absent the error, the ultimate outcome likely would have been the same. In assessing 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 deemed error is constitutional, the reviewing court may conclude that it is harmless only when it is convinced "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. 15), this Court's decision in *Neder* held that the constitutional-error test applies to instructional errors like the ones that the court of appeals deemed or assumed to have occurred here. 527 U.S. at 8-15; see *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam). In doing so, the Court observed that it "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, reasoning that this 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 uncontested 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. 28) that under *Neder*, an appellate court is precluded from finding instructional error harmless where the defendant contested the omitted or misdefined element and "there is *any* evidence in the record" that could lead to an acquittal. 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' assertion that *Neder* allows for a harmless-error finding only for errors relating to uncontested issues is misplaced. 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 *Fulminate*, 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 in petitioners' particular case. Pet. App. 32a, 38a-39a.

The court of appeals correctly identified the relevant question on harmless-error review by using language that tracked *Neder*, framing the inquiry as turning on whether "a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Pet. App. 32a (citation omitted); see *Neder*, 527 U.S. at 18-19. The court's alternative phrasing of the harmless-error inquiry—whether the error did not "contribute to the verdict obtained"—likewise accords with *Neder*. Pet. App. 38a (citation omitted); see *Neder*, 527 U.S. at 15. The court of appeals then stated that, "[h]aving thoroughly examined the record in this case," it was "convinced that a rational jury would have found [petitioners] guilty absent the erroneous instruction" by finding that petitioners "met the 'scheme to defraud' and 'intent to defraud' elements." Pet. App. 38a-39a

(citation omitted). The court concluded that petitioners' convictions could stand "[b]ecause any error 'did not contribute to the verdict obtained.'" *Ibid.* (quoting *Neder*, 527 U.S. at 15).

Petitioners' contrary arguments largely reflect fact-bound disagreements with the decision below that 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 principally contend (Pet. 18) that the court of appeals failed to conduct a "meaningful assessment" of the evidence. See Pet. 17. That argument lacks merit. Before addressing petitioners' jury-instruction challenge, the court conducted a detailed review of the evidence in the facts section of its opinion (Pet. App. 3a-7a) and its discussion of the sufficiency of the evidence (*id.* at 8a-27a). The court had already found that the government presented an "avalanche" (*id.* at 23a) and "mountain" (*id.* at 27a) of evidence that petitioners intended to deprive investors of money or property through deception. It did not need to cut and paste, or otherwise replicate, its discussion in the harmless-error section of its opinion.

The court of appeals had already discussed, for example, the evidence of petitioners' use of undisclosed advances to fund UDF III distributions, use of bank loans for unapproved purposes, and manipulation of a developer cash-flow statement before submission to UDF's outside auditor, as well as evidence individually tying petitioners to the fraudulent scheme. *Id.* at 21a-23a. Addressing a defense to the charges, the court had already explained that "[i]t does not matter that UDF IV and UDF V had collateral on the loans that it transferred to UDF III" because petitioners "exposed

investors to risks and losses that, if publicly disclosed, would have decreased [UDF's] value and investment power." *Id.* at 25a. And elsewhere, the court reviewed the testimony provided by petitioners Obert, Greenlaw, and Jester in their own defense at trial. *Id.* at 5a-6a. The harmless-error section of the opinion, which made clear that the court's "thorough[]" examination of the record left it "convinced that a rational jury would have found [petitioners] guilty absent the erroneous instruction[s]," *id.* at 38a-39a, should thus be taken at face value. Cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) ("An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading.").

Notwithstanding the court of appeals' express description of the standard that it was applying, petitioners insist (*e.g.*, Pet. 17-18) that the court was in fact applying another. Petitioners assert (*ibid.*) that an asserted error in the original opinion's standard of review should be imputed to the amended opinion as well. But the withdrawn opinion has no legal effect, and petitioners do not contest that in the operative opinion, the court correctly recited the beyond-a-reasonable-doubt standard for harmless constitutional error. Pet. App. 32a. And far from suggesting that any error carried over to the amended opinion, the circumstances instead suggest that the panel recognized a need either to correct a mistaken impression about what it had done, or (assuming an error)[6] undertake the inquiry again under

[6] The particular error that petitioners assert—a failure to draw inferences in their favor (Pet. 17-18)—is far from evident even in the withdrawn opinion. In that opinion, the light-most-favorable-to-the-government standard appeared only in the panel's discussion of the

the correct standard. Neither scenario suggests an error in the amended opinion itself.

Petitioners also contend (Pet. 19-20) that the court of appeals could not find the instructional errors harmless in light of the trial testimony of petitioners Greenlaw, Obert, and Jester and the length of jury deliberations. Those fact-bound contentions lack merit. When discussing petitioners' trial testimony in an earlier portion of its opinion, the court of appeals noted, for example, that Jester's testimony hurt, rather than helped, him because it revealed his knowledge that inflated cashflow projections were "going to an independent auditor that w[as] going to rely upon it for its audit of the financial statements." *Id.* at 29a.

Jester's e-mails likewise contradicted his claim of innocence: "Jester suggested that distributions" to investors "could be funded from a UDF loan" rather than normal cashflows "and told a UDF asset manager to 'remember to fix this once we finalize some of the new deals.'" Pet. App. 29a. Furthermore, "as UDF's auditor explained at trial, the[] advances made it appear as though UDF IV and UDF V had more notes receivable because it was issuing new loans, and it also made it appear as though UDF III's loans were getting paid down successfully, when they were not." *Id.* at 6a. Based on that and other evidence, the court of appeals correctly found that the record as a whole "[wa]s clear beyond a reasonable doubt that a rational jury would have found [petitioners] guilty absent the error." *Id.* at 38a-39a (quoting *Neder*, 527 U.S. at 18).

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sufficiency of the evidence, not its discussion of instructional error. Compare 76 F.4th at 318, 322-326 (withdrawn and superseded panel opinion), with *id.* at 328-332.

Nor does the fact that the jury "deliberated for around 12 hours before reaching a verdict" (Pet. 19) in a case involving roughly 30 hours of testimony foreclose a determination of harmless error. The jury received considerable evidence notwithstanding the compressed trial schedule; the government's case alone consisted of testimony from 42 witnesses and approximately 550 exhibits. Gov't C.A. Br. 4. The length of deliberations reflects that the jury carefully considered all of the evidence in the case, not that it necessarily found petitioners' intent to defraud to be a close question.

d. Petitioners contend (Pet. 21-26) that federal and state courts are divided over 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. 23-29) 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 and Sixth Circuits preclude a harmlessness determination where the defendant contested the element in question, Pet. 23 (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 do not, Pet. 25 (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.

The Fourth and Sixth Circuits do not require that an omitted or misdefined element be uncontested to be harmless. To the contrary, shortly after *Neder*, 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 (4th Cir. 2000) (quoting *Neder*, 527 U.S. at 19); see *United States* v. *Smithers*, 92 F.4th 237, 251 (4th Cir. 2024); *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 Sixth Circuit decision that petitioners cite, the court did not decline to hold 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.[7]

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[7] In a footnote, petitioners cite various state court decisions in support of the asserted division of authority. See Pet. 23-24 n.11. As a threshold matter, a state court's adoption of a more stringent approach to harmless error than the one described in *Neder* would not conflict with the uniform *Neder*-based approach of the federal courts of appeals. Cf. *Danforth* v. *Minnesota*, 552 U.S. 264, 266

Petitioners' assertion (Pet. 26) of a further division between the Second and Fourth Circuits is also misplaced. Petitioners observe that, when reviewing harmlessness under *Neder*, the Second Circuit asks "whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element" and, if so, "whether the jury would nonetheless have returned the same verdict," *Jackson*, 196 F.3d at 386, whereas the Fourth Circuit omits the second step, see *Brown*, 202 F.3d at 701 n.19. But any disagreement has no bearing on this case: The court of appeals did not address the separate steps articulated by the Second Circuit, and petitioners could not satisfy the first step. In addition, petitioners have not identified any decision in which the Second Circuit found an error to be harmless where the evidence was sufficient to support acquittal, but the court of appeals determined that the jury would have found guilt anyway.[8]

(2008) (concluding that state courts may "give broader effect to new rules of criminal procedure than" this Court has prescribed for federal courts). In any event, several of those decisions recognize that an error may be harmless if the defendant contested the omitted element. See *State* v. *Bunch*, 689 S.E.2d 866, 869 (N.C. 2010); *Wegner* v. *State*, 14 P.3d 25, 30 (Nev. 2000). And in at least one case, the court simply noted, as a factual matter, that the element was "essentially uncontested." *State* v. *McDonald*, 99 P.3d 667, 670 (N.M. 2004).

[8] Petitioners' focus (Pet. 26-27) on *Saini*, *supra*, is similarly misplaced. Whatever error petitioners might perceive in that Ninth Circuit case, the court of appeals in their case did not state or imply that, in conducting its harmless-error analysis, it viewed the evidence in the light most favorable to the verdict. And as petitioners acknowledge, the court below recently explained that in applying harmless-error review to instructional errors, it "construe[s] the evidence and make[s] inferences in the light most favorable to the defendant." Pet. 21 (quoting *United States* v. *Jordan*, No. 22-40519,

Petitioners also rely (Pet. 25-26, 29) on a concurring opinion by Judge Lipez 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 305-306 (Lipez, J., concurring), 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.

2. Petitioners alternatively urge (Pet. 30-36) this Court to overrule *Neder* and hold that the omission or misdefinition of an offense element in jury instructions is structural error. See *Neder*, 527 U.S. at 30-40 (Scalia, J., concurring in part and dissenting in part). This Court's review of that request is not warranted.

No sound reason exists to overrule *Neder*'s holding. Reviewing the omission or misdefinition of an element in jury instructions for harmlessness under *Chapman*'s framework for constitutional errors has not proven unworkable. Contrary to petitioners' contention, there

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2023 WL 6878907, at *5 (5th Cir. Oct. 18, 2023) (per curiam), petition for cert. pending, No. 23-650 (filed Dec. 13, 2023) (brackets in original)).

is no meaningful disagreement in the federal courts of appeals over *Neder*'s application. See pp. 20-23, *supra*.

Moreover, the reasons for applying harmless-error review to jury-instruction error have not changed since *Neder*. "'[M]ost constitutional errors can be harmless.'" *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 306). And as this Court explained in *Neder*, an instructional error like the one asserted here "differs markedly from the constitutional violations [the Court has] found to defy harmless-error review," which involve "a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Ibid.* (quoting *Fulminante*, 499 U.S. at 310). "Such errors 'infect the entire trial process,' and 'necessarily render a trial fundamentally unfair,'" whereas "an instruction that omits [or misdefines] an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9 (citation and emphasis omitted).

Petitioners contend (Pet. 33-34 & n.16) that the argument for treating the omission or misdefinition of an offense element as structural error has grown stronger in light of post-*Neder* decisions that "demonstrate[] [this Court's] commitment to 'the Sixth Amendment right to a jury trial [as] fundamental to the American scheme of justice.'" Pet. 33-34 (quoting *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020)) (third set of brackets in original). But the Court in *Neder* explained that, where the harmless-error standard is satisfied (*i.e.*, the record does not "contain[] evidence that could rationally lead to a contrary finding with respect to the omitted element"), applying the harmless-error rule fully

comports with the Sixth Amendment. 527 U.S. at 19; see *id.* at 17 n.2, 19-20.

Petitioners also argue (Pet. 35) that "when a trial court fails to properly instruct the jury on an element of the offense and the jury convicts, it is impossible to know how the defense would have proceeded differently at trial," and that this uncertainty supports treating the jury instruction error as structural. That argument is unsound. The same alleged uncertainty could result from a district court's "erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination," or its "erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment"; but such errors "are both subject to harmless-error analysis." *Neder*, 527 U.S. at 18. In each scenario, an appellate court is fully capable of undertaking a holistic review of the record to determine if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ibid.*

Finally, even assuming that the Court might decide *Neder* differently if presented with the question *de novo* today, stare decisis considerations would compel adherence to the quarter century of precedent that follows *Neder*. That doctrine, which "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," "demands special justification" for casting aside a prior decision. *Gamble* v. *United States*, 587 U.S. 678, 691 (2019). No such justification exists here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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