No. 19-208

In the Supreme Court of the United States

MARK A. BECKHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an error in the district court's jury instructions was harmless beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 917 F.3d 1059. The memorandum and order of the district court denying a motion for acquittal or a new trial (Pet. App. 21a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2019. A petition for rehearing was denied on April 15, 2019 (Pet. App. 34a). On July 3, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August 13, 2019, and the petition was filed on August 12, 2019. 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 Missouri, petitioner was convicted on one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Judgment 1. The district court sentenced petitioner to 36 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-15a.

1. a. Petitioner operated an accounting business. One of his clients was John Horseman, owner of a financial advisory firm, JM Horseman Group, LLC. Petitioner schemed for Horseman to report a series of transactions designed to generate tax losses to offset Horseman's taxes. In particular, Horseman signed subscription agreements giving him $3.3 million of common stock in Arbor Homes, Inc., and $3 million of equity in SNB Consulting, LLC. Pet. App. 2a; Gov't C.A. Br. 3-4.

Petitioner prepared and filed tax returns for Horseman and JM Horseman Group for the 2009 and 2010 years. Pet. App. 2a-3a. Horseman's 2009 and 2010 individual returns claimed $4.3 million in "nonpassive" losses from his investment in Arbor Homes. *Id.* at 2a. To claim nonpassive losses, a taxpayer must have a sufficient economic investment (or "basis") in a business entity and must materially participate in the business's activities. See *id.* at 2a-3a (citing 26 U.S.C. 469(c), 1366(d), and 26 C.F.R. 1.469-5T); Gov't C.A. Br. 5. Horseman, however, did not work for or otherwise materially participate in the activities of Arbor Homes during the relevant period. Pet. App. 2a. Horseman Group's 2010 corporate

tax return also improperly claimed $1.8 million in partnership losses from SNB Consulting, which exceeded Horseman Group's basis in that entity. *Id.* at 2a-3a.

b. The IRS conducted a civil audit of Horseman's individual and corporate tax returns. Petitioner acted as Horseman's representative during the audit, providing the IRS with authorization forms representing that petitioner was currently licensed as a certified public accountant (CPA) in Missouri. In fact, petitioner was not licensed as a CPA, which should have precluded him from acting as Horseman's representative. Pet. App. 3a.

During the audit, IRS Revenue Agent Anthony Grinstead requested information regarding Horseman's participation in Arbor Homes, seeking to verify that Horseman met the material-participation requirement for claiming nonpassive losses from Arbor Homes. Petitioner provided Agent Grinstead with Horseman's 2009 day planner, which "contained falsified entries purportedly showing that Horseman had worked several hundred hours for Arbor Homes during 2009." Pet. App. 3a.

When the IRS later discovered that petitioner was not a licensed CPA, petitioner falsely told IRS agents that his license had lapsed and he was in the process of getting it renewed. In fact, petitioner's license had been revoked in 2008, following a 2006 federal conviction for mail fraud. The IRS ultimately launched a criminal investigation of petitioner. Pet. App. 3a-4a.

2. a. A grand jury in the Eastern District of Missouri returned a superseding indictment charging petitioner with one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws, in violation of the so-called "omnibus clause" of 26 U.S.C. 7212(a); and three counts of willfully assisting

in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2). Superseding Indictment 1-6; Pet. App. 4a. Section 7212(a)'s omnibus clause prohibits "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of this title," *i.e.*, the Internal Revenue Code. 26 U.S.C. 7212(a). The indictment alleged that, as part of the Section 7212(a) offense, petitioner committed several corrupt acts, including causing Horseman's "dayplanner calendar which contained false entries relating to Arbor Homes, Inc. to be submitted to the Internal Revenue Service." Superseding Indictment 3 (¶ 10); see Gov't C.A. Br. 9.

b. On June 27, 2017, before the trial began in petitioner's case, this Court granted certiorari in *Marinello* v. *United States*, 137 S. Ct. 2327 (No. 16-1144). The question presented in the petition in that case was whether Section 7212(a)'s omnibus clause "requires that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct." Pet. at i, *Marinello*, *supra* (No. 16-1144). Petitioner moved to stay the trial in his case pending this Court's eventual decision in *Marinello*. Pet. App. 5a.

The district court denied the motion, finding that judicial economy and prejudice to the government weighed against a stay. Pet. App. 20a. The court additionally found that "a special verdict form w[ould] eliminate any need for retrial in this case" following *Marinello*. *Ibid.* The court explained that "[t]he jury w[ould] be asked whether [petitioner] committed at least one corrupt act after becoming aware of the IRS audit and what specific act he committed," which "w[ould] safeguard against

the need for a second trial regardless of [this] Court's decision in *Marinello*." *Ibid.* The district court noted that petitioner "ha[d] not contested the Government's assertion that a special verdict form eliminate[d] the potential hardship." *Ibid.*

Petitioner's case proceeded to trial. Pet. App. 5a-6a. Consistent with then-controlling precedent, *id.* at 7a, the district court instructed the jury that the elements of the charged Section 7212(a) offense were as follows:

> *One*, * * * the defendant acted with purpose to obstruct or impede the due administration of the internal revenue laws by committing one or more of the acts alleged in Count 1 [of the indictment].
>
> *Two*, the defendant's act had a reasonable tendency to obstruct or impede the due administration of the internal revenue laws. The effort need not be successful; and
>
> *Three*, the defendant acted corruptly, that is with the intent to secure an unlawful benefit either for himself or for another.

Id. at 35a. Additionally, in light of this Court's pending decision in *Marinello*, the district court provided the jury with a special-verdict form, which (1) asked the jury to determine whether petitioner had committed a corrupt act after becoming aware of the IRS audit and (2) if it determined that he had, to specify what that act was, by identifying one or more paragraphs of the indictment that "the jury unanimously agree[d] occurred after [petitioner] became aware of the existence of an Internal Revenue Service audit or proceeding." *Id.* at 37a; see *id.* at 5a-6a, 36a-37a. Petitioner objected to the court's instruction but not to the special-verdict form. *Id.* at 28a n.1.

c. The jury acquitted petitioner of the three Section 7206(2) false-tax-return charges, but it found him guilty of the Section 7212(a) obstruction charge. Pet. App. 6a. On the special-verdict form, the jury indicated that it found that petitioner had committed at least one corrupt act after learning of the IRS audit, specifically identifying the paragraph of the indictment that alleged that petitioner "submitt[ed] Horseman's day planner to the IRS." *Ibid.* (citing Superseding Indictment ¶ 10). The district court sentenced petitioner to 36 months of imprisonment. *Ibid.*

Petitioner moved for a judgment of acquittal or, in the alternative, for a new trial. Pet. App. 21a-24a. As relevant here, he sought a new trial based on the court's jury instructions on the Section 7212(a) count. *Id.* at 28a. The district court denied the motion, again determining that the special-verdict form addressed petitioner's concern that this Court's then-forthcoming decision in *Marinello* might bear on the elements necessary for a conviction under that statute. See *id.* at 28a-29a.

3. Petitioner appealed his conviction. Pet. App. 6a.

a. While petitioner's appeal was pending in the Eighth Circuit, this Court issued its decision in *Marinello*. 138 S. Ct. 1101 (2018). The Court concluded that the phrase "the due administration of [the Tax Code]," within the meaning of Section 7212(a)'s omnibus clause, "does not cover routine administrative procedures that are near-universally applied to all taxpayers." *Id.* at 1104 (citation omitted). Instead, the Court reasoned that "the [omnibus] clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit." *Ibid.* The Court held that, "to secure a conviction

under the Omnibus Clause, the Government must show (among other things)" (1) "that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action," and (2) "that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." *Id.* at 1109-1110.

Petitioner contended in the court of appeals that, in light of *Marinello*, the district court's instruction to the jury on the elements of Section 7212(a) was erroneous. Pet. App. 7a. Specifically, petitioner asserted that the instruction improperly omitted the elements requiring a "nexus" with, and "knowledge of," a "currently-pending or reasonably foreseeable proceeding," that this Court had identified in *Marinello*. *Ibid.*; see Pet. C.A. Br. 17-20. Petitioner argued that the special-verdict form did not cure the instructional error because the form did not specifically instruct the jury that it was required to apply the "beyond a reasonable doubt" standard to the special interrogatories. Pet. C.A. Br. 20, 24.

The government acknowledged that the general instruction on Section 7212(a) was erroneous because it had not identified those two elements specified in *Marinello*. Pet. App. 7a; Gov't C.A. Br. 18. The government contended, however, that the error was harmless for two independent reasons. First, the jury's responses on the special-verdict form—combined with the district court's repeated instructions on the "beyond a reasonable doubt" standard—indicated that the jury actually found a nexus between defendant's corrupt conduct and a known IRS audit beyond a reasonable doubt. Gov't C.A. Br. 18-27. Second, even if the special-verdict form

did not cure the instructional error, the error was still harmless in light of the overwhelming evidence at trial of a nexus between defendant's conduct and a pending IRS audit. *Id.* at 15, 27-28.

b. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals agreed with the government that the error in the instruction on Section 7212(a) was harmless beyond a reasonable doubt. Pet. App. 7a-10a. The court explained that an instructional error is harmless "if the evidence supporting the jury's verdict is so overwhelming that no rational jury could find otherwise." *Id.* at 7a (citing *Neder* v. *United States*, 527 U.S. 1, 18-19 (1999)).

The court of appeals then "f[ou]nd that failure to instruct the jury on [the *Marinello*] elements was harmless" because "no rational jury could find reasonable doubt as to either of the two *Marinello* elements." Pet. App. 9a. As to the nexus requirement, the court determined that "[t]he IRS indisputably obtained the day planner as a functional part of the audit during the audit." *Id.* at 8a. The court reasoned that, "if [petitioner] provided the IRS with the planner, that would be an act that has a nexus in time, causation, and logic to the pending IRS audit." *Ibid.* The court found that "the government presented uncontroverted evidence that [petitioner] gave Agent Grinstead the day planner—evidence that [petitioner] did not attempt to dispute." *Ibid.* In particular, the court noted that "Agent Grinstead testified that he received Horseman's planner from [petitioner] at an in-person meeting on January 19, 2012, while conducting the audit," and that petitioner "never contradicted this testimony, arguing only that he acted as Horseman's representative in his contacts with the IRS." *Ibid.* As to the requirement that a defendant "act with knowledge or a

reason to know of a pending or imminent IRS proceeding, such as an IRS audit," *id.* at 9a, the court "f[ound] that the evidence overwhelmingly show[ed] [petitioner] knew of a currently-pending IRS audit at the time he gave Agent Grinstead Horseman's day planner." *Ibid.*

Because the court of appeals determined that the instructional error was harmless beyond a reasonable doubt as to both of the additional elements that *Marinello* had identified, the court found it unnecessary to address the government's independent argument that "the special verdict form properly cured the instructional error." Pet. App. 9a-10a.

ARGUMENT

Petitioner contends (Pet. 23-26) that the court of appeals erred in determining that the error in the district court's jury instructions was harmless beyond a reasonable doubt in the circumstances of this case. The court of appeals' fact-specific application of this Court's harmless-error precedents is correct and does not warrant further review. Petitioner errs in contending (Pet. 14-23) that the decision below implicates a conflict among the courts of appeals on the proper interpretation of this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which applied harmless-error principles to a jury instruction that erroneously omitted an offense element. The Court has repeatedly denied petitions asserting such a conflict. See *Odom* v. *Adger*, 138 S. Ct. 2689 (2018) (No. 17-1558); *McFadden* v. *United States*, 137 S. Ct. 1434 (2017) (No. 16-679); *Caroni* v. *United States*, 136 S. Ct. 2513 (2016) (No. 15-1292). The same result is warranted here. In any event, this case would be an unsuitable vehicle to address any such issue. Petitioner did not present any argument on the issue, or cite *Neder*, in his briefing in the

court of appeals. And any dispute over the correct interpretation of *Neder* would have no effect on the outcome of this case for multiple reasons. Further review is not warranted.

1. The court of appeals determined that, although the parties agreed that the district court's jury instruction on the elements of a violation of Section 7212(a)'s omnibus clause was erroneous in light of this Court's subsequent decision in *Marinello* v. *United States*, 138 S. Ct. 1101 (2018), any error was harmless beyond a reasonable doubt and therefore did not warrant reversal of his conviction. Pet. App. 7a-10a. That determination is correct and does not warrant further review.

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." *Ibid.* 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 of the narrow category of "structural errors," see *Neder*, 527 U.S. at 7-8, 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, the task of an appellate court is to review the record to assess an error's likely effect on the outcome of a trial. "[I]n typical appellate-court fashion," *Neder*, 527 U.S. at 19, appellate courts review the record to ascertain 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 error is constitutional, the reviewing court may conclude that it is harmless only when it is "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).

In *Neder*, this Court applied *Chapman*'s harmless-error test to hold that the omission of an offense element from the jury instructions may be found harmless beyond a reasonable doubt. 527 U.S. at 8-20. The Court explained that *Chapman*'s test applies to errors in jury instructions, including the omission of an element from the instructions. *Id.* at 8-15. It also emphasized that courts must apply the harmless-error standard articulated in *Chapman* in a "case-by-case" manner. *Id.* at 14.

Applying that test, the Court in *Neder* reviewed the record evidence and determined that the omission of an element—the materiality of a defendant's false state-

ments about his income to a determination of his tax liability, in a prosecution for filing a false tax return in violation of 26 U.S.C. 7206(1)—was harmless. 527 U.S. at 16-20. The Court's analysis focused on the strength of the evidence of the omitted element, observing that the evidence of materiality "was so overwhelming * * * that [the defendant] did not argue to the jury * * * that his false statements of income could be found immaterial." *Id.* at 16. In particular, the Court cited evidence that the defendant had failed to report substantial income on his tax returns, which "incontrovertibly establishes that [his] false statements were material to a determination of his income tax liability." *Ibid.* The Court stated that, "[i]n this situation, 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. The court of appeals in this case correctly applied the same analysis in determining that the omission from the district court's jury instructions of the two elements subsequently identified by this Court in *Marinello* was harmless. Pet. App. 7a-10a. Invoking *Neder*, the court of appeals explained that an instructional error "is harmless beyond a reasonable doubt if the evidence supporting the jury's verdict is so overwhelming that no rational jury could find otherwise." *Id.* at 7a (citing *Neder*, 527 U.S. at 18-19); see *ibid.* (instructional error is harmless where a court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error" (quoting *Neder*, 527 U.S. at 19)).

Applying that test, the court of appeals determined that "overwhelming evidence" showed "a nexus" between petitioner's actions and the IRS audit. Pet. App. 8a. The court explained that, "[b]ecause the IRS indisputably obtained the day planner as a functional part of the audit during the audit, if [petitioner] provided the IRS with the planner, that would be an act that has a nexus in time, causation, and logic to the pending IRS audit." *Ibid.* And the court found that "the government presented uncontroverted evidence that [petitioner] gave Agent Grinstead the day planner—evidence that [petitioner] did not attempt to dispute." *Ibid.*

The court of appeals additionally determined "that the evidence overwhelmingly show[ed] [petitioner] knew of a currently-pending IRS audit at the time he gave Agent Grinstead Horseman's day planner" because petitioner gave Agent Grinstead the planner in the context of responding to the audit. Pet. App. 9a. The court pointed to evidence that, "[o]n December 1, 2011—over a month before his meeting with Agent Grinstead—[petitioner] undisputedly submitted falsified power of attorney forms allowing him to act as Horseman's representative throughout the audit"; that petitioner "then proceeded to actually act on Horseman's behalf during the audit"; and, "[s]ignificantly," that petitioner "provided Agent Grinstead with the planner in response to a request for information undisputably made *as part of the audit*." *Ibid.* Based on this evidence, the court concluded "that no rational jury could find reasonable doubt as to either of the two *Marinello* elements." *Ibid.*

c. Petitioner contends (Pet. 23-26) that the court of appeals misapplied *Neder* by determining that the omission of the two elements was harmless without find-

ing that the evidence on each element was both overwhelming and uncontroverted. He asserts (Pet. 24) that, with respect to the nexus element, the court "determined that the evidence was uncontroverted—but not that it was overwhelming." Conversely, as to the element that a defendant know or have reason to know of a pending or imminent IRS proceeding, petitioner argues (*ibid.*) that the court "concluded the evidence was overwhelming—but not that it was uncontroverted." Petitioner did not argue in his briefing in the court of appeals that *Neder* required that court to find that the evidence as to each element was both overwhelming and uncontroverted. Indeed, petitioner did not cite *Neder* at all. See Pet. C.A. Br. 28-29; Pet. C.A. Reply Br. 11-15, 19-21. The court of appeals, in turn, did not specifically address that issue. In any event, petitioner's contentions lack merit.

Petitioner's premise that *Neder* articulated a categorical rule requiring that evidence of an element omitted from the jury instructions must always be *both* overwhelming *and* uncontroverted rests on a misreading of that decision. The Court in *Neder* determined that the erroneous omission of an element from the jury instructions was harmless in that case based on its review of the evidence. 527 U.S. at 16-20. In conducting its analysis, the Court emphasized two points. First, relying on cases considering the erroneous admission or exclusion of evidence, the Court held that the ultimate harmless-error inquiry is "essentially the same" across those different types of constitutional errors: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* at 18. Second, the Court explained that that ultimate inquiry is often intensely record-dependent and requires a

"case-by-case approach." *Id.* at 14; see *id.* at 19. In any such inquiry, factors that are significant or determinative in one case may be insignificant in a different case. Applying that case-by-case approach, the Court determined that the trial evidence in *Neder* itself established that "no jury could reasonably find that [the defendant's] failure to report substantial amounts of income on his tax returns was not" material. *Id.* at 16.

The Court's description of the "overwhelming" strength and "uncontested" nature of the evidence of the omitted element in that particular case, *Neder*, 527 U.S. at 17, accordingly cannot be understood as setting forth a rigid, two-part rule for assessing harmlessness in every instructional-error case. That language instead reflects the Court's reasoning for determining that, in the specific circumstances of *Neder* itself, a reasonable jury could not have acquitted had it been properly instructed on the omitted element. Indeed, the Court's descriptions of the evidence of materiality as overwhelming and uncontested were intertwined. It stated that "[t]he evidence supporting materiality was so overwhelming, in fact, that [the defendant] did not argue to the jury—and d[id] not argue [in this Court]—that his false statements of income could be found immaterial." *Id.* at 16.

The court of appeals here addressed the same ultimate inquiry as this Court in *Neder*: whether a "rational jury could find reasonable doubt as to" the elements omitted from the instruction. Pet. App. 9a. And the court of appeals answered that question applying the same type of case-specific review of the trial evidence. See *id.* at 8a-10a. The court found it "indisputabl[e]" that the IRS had received Horseman's day planner "as a functional part of the audit during the audit"—

which would satisfy *Marinello*'s nexus requirement in a prosecution of petitioner if petitioner were the person who had provided it. *Id.* at 8a. And the court explained that the government had presented direct testimony that it was petitioner who delivered the day planner in-person to an IRS agent—testimony that petitioner "did not attempt to dispute." *Ibid.* That the court did not explicitly use the word "overwhelming" in describing that specific evidence is not properly understood as reflecting an implicit conclusion that the evidence fell short of what *Neder* might require.

Similarly, the court of appeals determined the evidence was such that "no rational jury could find [petitioner] was unaware of a pending IRS proceeding—the audit—at the time the IRS received the day planner." Pet. App. 9a. The court cited a variety of evidence, including the "undisputed[]" fact that petitioner had "submitted falsified power of attorney forms allowing him to act as Horseman's representative throughout the audit," and other facts the court found "undisputabl[e]." *Ibid.* That the court did not separately describe each of those facts as uncontested does not demonstrate that the court applied a standard inconsistent with *Neder*.

Petitioner thus is left to argue (Pet. 24) that the court of appeals misapplied the *Neder* standard to the particular facts and evidence in this case. He asserts (*ibid.*) that the jury found that the government had failed to prove that petitioner himself was involved in "falsifying the day planner" or that petitioner "knew it contained false entries." But those factual disputes go to whether petitioner acted "corruptly," an element on which the jury was correctly instructed. Thus, even assuming arguendo that those assertions are correct, they do not cast doubt on either of the elements at issue: whether

petitioner's conduct had a nexus with an IRS proceeding, and whether he knew or had reason to know of that proceeding. In any event, petitioner's factbound disagreement with the court of appeals' analysis of the specific evidence in this case does not warrant further review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. a. Petitioner contends (Pet. 14-21) that review is warranted to resolve a conflict concerning the proper interpretation of *Neder*. That is incorrect.

Petitioner relies heavily (Pet. 14-17) on *United States* v. *Pizarro*, 772 F.3d 284 (1st Cir. 2014), which found that an erroneous instruction that omitted an element was harmless because "the omitted element * * * [was] both uncontested and supported by overwhelming evidence." *Id.* at 299. As petitioner acknowledges, the court expressly reserved judgment on the question petitioner raises of whether *Neder* should be read invariably to require that evidence at trial of an omitted element was both overwhelming and uncontested. *Id.* at 298. In a separate, concurring opinion, Judge Lipez (who also authored the panel opinion) expressed uncertainty as to whether *Neder*'s language characterizing the evidence in that case as uncontested and overwhelming "was merely descriptive of the circumstances in *Neder* itself or also prescriptive for any finding of harmlessness where an element was omitted." *Id.* at 303; see *id.* at 303-312. That separate opinion does not establish a conflict with the decision below, which is consistent with the actual panel decision in *Pizarro*. See also *id.* at 313 (Torruella, J., concurring) (explaining that "*Neder* simply applied the standard constitutional harmless-error rule articulated nearly fifty years ago in

[*Chapman*] to a jury instruction that omitted an element of an offense").

Petitioner next cites (Pet. 17-18) *United States* v. *Stanford*, 823 F.3d 814 (5th Cir.), cert. denied, 137 S. Ct. 453 (2016), which found that an instruction's omission of an element (the defendant's knowledge) was not harmless error. See *id.* at 828-835. Like the court of appeals here, the Fifth Circuit recognized that, consistent with *Neder*, an instruction's erroneous omission of an element may be harmless "where proof of the element missing from the instruction was inherent in proof of the overall conviction, so the jury could not have failed to find the element." *Id.* at 832. The government argued that the error in *Stanford* was harmless beyond a reasonable doubt based on a special interrogatory the district court had given the jury. *Id.* at 828. The court rejected that argument, concluding that the special interrogatory did not render the erroneous instruction harmless because the district court had "instruct[ed] the jurors that it [wa]s only for the benefit of the court, and d[id] *not* recite the burden of proof before the interrogatory (but *d[id]* recite the burden of proof before each of the actual counts)." *Id.* at 834 (emphases added). That case-specific conclusion is not inconsistent with the court of appeals' decision in this case.

Petitioner's contention (Pet. 18) that the Fifth Circuit departed from *Neder* and other circuits because (he asserts) it did not refer to the "overwhelming" and "uncontested" criteria is incorrect. The court specifically noted (*inter alia*) *Neder*'s holding that the evidence was "'so overwhelming'" that "the missing element was logically encompassed by a guilty verdict and was not in fact contested." *Stanford*, 823 F.3d at 832 (quoting *Neder*, 527 U.S. at 16). The panel simply determined

that the error in *Stanford* itself was not similarly rendered harmless, even in light of the special interrogatory that had been provided to the jury.

Petitioner also cites (Pet. 18-19) *United States* v. *Guerrero-Jasso*, 752 F.3d 1186 (9th Cir. 2014), in which the district court had erroneously enhanced the defendant's sentence for illegally reentering the country based on a removal date that was neither admitted by the defendant nor found by a jury. In concluding that the error was not harmless, the Ninth Circuit noted that the evidence of the defendant's removal date was not "uncontroverted." *Id.* at 1194. The court did not suggest, however, that an instructional error can never be harmless unless the evidence of an omitted element is uncontroverted. Rather, the court concluded that the defendant had presented a "meaningful" challenge to the government's evidence of removal and that the court could not "say beyond a reasonable doubt that a jury would necessarily have relied on" the government's evidence. *Id.* at 1194-1195. That conclusion does not conflict with the court of appeals' reasoning and result in this case.

Petitioner next points (Pet. 19) to the Eleventh Circuit's decision on remand in *Neder* following this Court's decision, see *United States* v. *Neder*, 197 F.3d 1122 (1999), cert. denied, 530 U.S. 1261 (2000), but it also does not establish a conflict. This Court had identified an additional error in the instructions in that case—involving whether materiality is an element not only of the tax-fraud statute under which the defendant was charged but also of various other federal fraud statutes under which she was charged—but remanded for the Eleventh Circuit to determine in the first instance whether that additional error was harmless. See *Neder*, 527 U.S. at 20-25. On remand, the court of appeals

found that that additional error was also harmless under the standard this Court had articulated. See 197 F.3d at 1124, 1128-1134. In doing so, the Eleventh Circuit noted that this Court "did not hold that omission of an element can never be harmless error unless uncontested." *Id.* at 1129. That reading of *Neder* is correct, see pp. 14-15, *supra*, and does not conflict with the decision below or other decisions that petitioner identifies.

Petitioner additionally discusses (Pet. 19-20) *United States* v. *Needham*, 604 F.3d 673 (2d Cir.), cert. denied, 562 U.S. 955 (2010), abrogated on other grounds by *Taylor* v. *United States*, 136 S. Ct. 2074 (2016). The Second Circuit in that case concluded that an instruction that "foreclosed any jury determination on [a] jurisdictional element" was not harmless. *Id.* at 679. Petitioner focuses (Pet. 19) on the Second Circuit's observation in reaching that conclusion that an instructional error may be harmless even if the evidence of an omitted element was "controverted." *Needham*, 604 F.3d at 679 (citation omitted). In that situation, the Second Circuit examines "(a) whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element, and, if there was, (b) whether the jury would nonetheless have returned the same verdict of guilty." *Ibid.* (quoting *United States* v. *Jackson*, 196 F.3d 383, 386 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000)). But that articulation of the standard is not inconsistent with other courts' application of the *Chapman* harmless-error standard to determine whether "the result would have been the same absent the error." *Guerrero-Jasso*, 752 F.3d at 1193 (citation and internal quotation marks omitted).

Finally, petitioner notes (Pet. 20-21) the Fourth Circuit's decision in *United States* v. *Brown*, 202 F.3d 691

(2000), but it likewise does not demonstrate a developed conflict. Citing *Neder*, the panel in *Brown* observed that, if an erroneously omitted "element was uncontested and supported by overwhelming evidence, the harmless error inquiry ends, and [an appellate court] must find the error harmless." *Id.* at 700-701 (footnote omitted). The court held that the particular error in that case was not harmless based on the panel's review of the record. See *id.* at 701-703. In a footnote, the panel expressed its "belie[f]" that the Second Circuit's articulation of the harmless-error test is incorrect insofar as it might allow a finding of harmlessness when sufficient evidence supports the defendant on the omitted element, but the reviewing court finds that the jury would in fact have returned the same verdict if properly instructed. See *id.* at 701 n.19 (citing *Jackson*, 196 F.3d at 385-386). The Fourth Circuit agrees with the Second Circuit and other courts, however, that even where an omitted element is contested, an instructional error may be harmless if the "record contains [no] evidence that could rationally lead to a contrary finding with respect to that omitted element." *Id.* at 701 (citation omitted). And that is the case here, where the court of appeals determined that "no rational jury could find" the omitted elements had not been proven. Pet. App. 9a.

b. Petitioner briefly suggests (Pet. 21) that review is warranted to clarify the continuing "vitality" of *Neder* "in light of more recent precedent." The decisions petitioner cites, however, do not cast doubt on *Neder*, or indeed even mention that decision. See Pet. 21-23 (citing *United States* v. *Haymond*, 139 S. Ct. 2369 (2019), *Alleyne* v. *United States*, 570 U.S. 99 (2013), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). Those cases each

addressed the constitutionality of statutes that authorized additional punishment based on judicially found facts. See *Haymond*, 139 S. Ct. at 2374; *Alleyne*, 570 U.S. at 103-104, 117; *Apprendi*, 530 U.S. at 468-469, 491-492. In contrast, *Neder* and the decision below addressed the appropriate remedy for erroneous jury instructions. *Haymond*, *Alleyne*, and *Apprendi* do not bear on that question and do not warrant further review here.

3. Even if the question petitioner presents otherwise warranted review, this case would be an unsuitable vehicle in which to address it for multiple reasons.

First, as noted above, see p. 14, *supra*, the particular question petitioner now raises concerning the proper interpretation of *Neder* was "not raised or resolved in the lower courts." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (brackets and citation omitted). This Court ordinarily does not address such issues absent "unusual circumstances." *Ibid.* (citation omitted); see, *e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 397-398 (2015). Petitioner has not identified any such circumstances.

Second, even assuming arguendo that petitioner were correct in reading *Neder* as requiring that the evidence of an omitted element be both "overwhelming" and "uncontested," Pet. 15, 24, that standard would not affect the outcome of this case. As discussed above, see pp. 15-16, *supra*, the court of appeals' opinion makes clear the panel's view that the evidence showing both that a nexus with an actual or imminent IRS proceeding existed and that petitioner knew or had reason to know of such a proceeding was overwhelming and incontrovertible. Labels aside, the court of appeals conducted

precisely the case-specific analysis that *Neder* prescribed and reached the determination that, on the particular facts of this case, the error was harmless.

Third, independent of the court of appeals' own assessment of the evidence of those two elements under *Neder*, the special-verdict form employed by the district court rendered the instructional error harmless. See Gov't C.A. Br. 18-28. The district court adopted that procedure precisely to ensure a valid jury verdict irrespective of the outcome of *Marinello*. Pet. App. 20a. Rather than delaying petitioner's trial by many months to await this Court's then-forthcoming decision in *Marinello*, which would prejudice the government and disserve judicial economy, the district court adopted the special-verdict form to ensure that petitioner would not be convicted without a jury finding that petitioner "committed at least one corrupt act after becoming aware of the IRS audit and what specific act he committed." *Ibid.* The court noted that petitioner "ha[d] not contested the Government's assertion that a special verdict form eliminate[d] the potential hardship to [petitioner] that form[ed] the basis of his motion to stay" the trial. *Ibid.*

The jury's responses on the special-verdict form indicate that the jury actually found a nexus between defendant's conduct and a pending IRS proceeding, as required by *Marinello*. The jury answered "Yes" to the question whether petitioner had committed "at least one corrupt act after becoming aware of the existence of an Internal Revenue Service audit or proceeding." Pet. App. 36a. It further specified (by citing the specific paragraph of the indictment) that the corrupt act consisted of petitioner's "submitting Horseman's day planner to the IRS." *Id.* at 6a. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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