Nos. 15-517 and 15-6608

In the Supreme Court of the United States

GILBERT LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

MARK KUHRT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS 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 held that giving the jury a deliberate-ignorance instruction was, at most, harmless error because the government presented substantial evidence that petitioners had actual knowledge of a multi-billion dollar fraud.

2. Whether the court of appeals correctly held that any error in excluding some subject areas of petitioner Kuhrt's expert witness testimony was harmless.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 788 F.3d 403.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2015. A petition for rehearing was denied on July 22, 2015 (Pet. App. 55a). The petitions for

[1] Unless otherwise indicated, references to the petition and petition appendix are to the petition and petition appendix filed in No. 15-517.

writs of certiorari were filed, respectively, on October 19, 2015 (Kuhrt), and on October 20, 2015 (Lopez). 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 Southern District of Texas, petitioners were convicted on nine counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349. Pet. App. 2a, 51a-52a. The district court sentenced each petitioner to 240 months of imprisonment. *Id.* at 10a, 53a. The court of appeals affirmed. *Id.* at 1a-35a.

1. Petitioners were high-level corporate accountants who played key roles in a conspiracy to conceal the multi-billion dollar Ponzi scheme run by their employer, Robert Allen Stanford. Pet. App. 2a. Between the late 1980s and early 2009, Stanford deceived the customers of the bank that he owned and operated—Stanford International Bank (SIB)—by diverting more than $2 billion in bank funds to his personal use. Gov't C.A. Br. 5. Petitioners worked for Stanford for more than a decade and helped him hide his fraud by, *inter alia*, preparing financial reports that omitted Stanford's misuse of bank funds and arranging financial transactions designed to make it appear that Stanford had repaid to SIB the funds previously funneled to him or his personally owned companies. *Id.* at 16-17, 24-26, 39-40, 46-52.

a. In 1985, Stanford opened Guardian International Bank (GIB) on the Caribbean island of Montserrat, a British Overseas Territory. Pet. App. 2a. GIB sold certificates of deposit (CDs) to customers outside of the United States and told customers that their money

was invested in liquid financial products and would not be used for loans. *Ibid.* Stanford also owned Guardian Development Corporation (GDC), a real estate company; and Stanford Financial Group (SFG), a company in Houston, Texas, that provided accounting and legal services to GDC and SIB. *Id.* at 2a-3a.

Stanford hired James Davis to work at SFG, where Davis became controller. Pet. App. 3a. GIB then moved from Montserrat to Antigua, and Davis became the Chief Financial Officer of SFG and GIB. *Ibid.* Stanford hired Jean Gilstrap to be the new controller at SFG. *Ibid.* After Davis was promoted, he learned that GIB's reported investment returns were "grossly inflated and that the missing money was being funneled into Stanford's personally owned companies." *Ibid.* "Beginning in 1992, Stanford, Davis, and Gilstrap worked together to make false revenue entries in GIB's books" to conceal the missing money. *Ibid.* Meanwhile, GIB became SIB and continued to market its CDs as "strong, safe and fiscally sound." *Ibid.* Stanford then founded Stanford Group Company (SGC) so that he could sell SIB CDs to investors inside the United States. *Ibid.*

b. In 1997, petitioners began working at SFG in Houston. Pet. App. 3a-4a; see Gov't C.A. Br. 5, 7. Lopez, a Certified Public Accountant, worked as an accounting manager and reported to Gilstrap. Pet. App. 3a. Kuhrt, who had a Masters of Business Administration degree and accounting experience, began working as a fixed assets manager and reported to Lopez. *Id.* at 3a-4a. The following year, after Gilstrap died, Lopez was named controller. *Id.* at 4a; Gov't C.A. Br. 14. Davis felt comfortable promoting Lopez because Lopez "had been aware of what was happen-

ing in the financial record keeping" and "had demonstrated his loyalty" by closing the books each month without identifying Stanford's misuse of bank funds. Pet. App. 4a; see Gov't C.A. Br. 14. Lopez and Kuhrt were later promoted, respectively, to the positions of chief accounting officer and global controller. Pet. App. 6a.

For the next decade, petitioners worked to hide Stanford's extraction of enormous sums of money from SIB—at one point, almost $1 million per day—for his personal use. Pet. App. 7a. Their efforts included the creation of fake promissory notes, fraudulent private equity "flip[s]," and fictitious capital infusions to obscure Stanford's diversion of money from SIB. *Id.* at 5a. In and around 2000, for example, Stanford's accountant (Harry Failing) worried that the Internal Revenue Service would view the large amounts of money that Stanford was receiving from SIB as taxable income and proposed creating fake promissory notes so that the money could instead be treated as a loan. *Id.* at 4a. Failing's e-mails—which Lopez received—revealed that Lopez "seemed to like th[at idea] as well." *Ibid.* By 2003, the amounts that Stanford was receiving had grown significantly, and Kuhrt devised a method—periodic "shareholder funding" reports—to keep track of the outstanding loans to Stanford. Gov't C.A. Br. 21. Kuhrt's cover e-mail transmitting the July 2003 report to Lopez (and others) reflected that Stanford had taken $20 million from the bank that month and was using the money to pay for a private jet, commercial airplanes, and real estate. *Ibid.*; see Pet. App. 5a.

Petitioners worked on a number of other transactions designed to make it appear that Stanford was

paying off the purported "loan[s]" that he received from SIB or otherwise to conceal the effect of Stanford's fraud on SIB's solvency. Pet. App. 5a. In 2004, petitioners carried out the first of two private equity "flip[s]," a "sham transaction" in which Stanford used $132 million of SIB depositors' money to buy assets from another one of his companies and then "sold" those assets back to SIB at a claimed value of $385 million. *Ibid.*; see Gov't C.A. Br. 24. The transaction made it appear on paper that Stanford had injected money into SIB to service his loan interest and pay down some of the principal. Pet. App. 5a. SIB trumpeted the legitimate portion of the transaction in its annual report (as did Kuhrt in self-reporting his accomplishments from that period); but neither revealed that the bulk of the transaction ($310 million) served the illegitimate purpose of making it appear that Stanford was repaying part of the more than $550 million that he had taken from SIB. *Id.* at 5a-6a & n.2; Gov't C.A. Br. 24-25.

In March 2008, petitioners participated in a second private equity flip after Kuhrt expressed concern that SIB's equity-to-asset ratio was too low to satisfy Antiguan regulators. Pet. App. 7a; Gov't C.A. Br. 39. The transaction—on which Lopez worked with a legal team—served both to raise that ratio and to show a payment by Stanford against what he owed the bank. Pet. App. 7a.

By early 2008, however, the economy was in recession, and Stanford sought "[t]o quell investor fears" by announcing capital infusions that would raise SIB's equity to $1 billion. Pet. App. 8a; Gov't C.A. Br. 38. In October 2008, Kuhrt told Rolando Roca, a budget analyst at SFG in Houston, to forward to the bank's

accountant in Antigua an entry showing $200 million in revenue. Pet. App. 6a, 8a. Roca asked Kuhrt for the supporting documentation, but Kuhrt told Roca to "just forward" the entry on, causing Roca to believe that Stanford had already funded the capital contribution with cash. *Id.* at 8a (brackets omitted); Gov't C.A. Br. 44. Stanford, however, never funded the contribution. Pet. App. 8a. Soon after, when Lopez asked Davis where the bank would get the capital to match Stanford's public statements, Davis told Lopez that "the emperor has no clothes"—*viz.*, that Stanford did not actually have the money to inject into the bank. *Ibid.* Davis and Lopez then agreed that they would have to make an accounting entry showing the investments despite the fact that they were illusory. *Ibid.*; Gov't C.A. Br. 46.

To fund the desired capital infusion, petitioners worked with Davis to revalue a piece of land in Antigua that Stanford had recently purchased, inflating the value to $3.2 billion, more than 50 times the purchase price of $63.8 million. Pet. App. 8a. Petitioners planned to use the $3.2 billion to fund the earlier $200 million accounting entry, which had not been funded; to fund another desired contribution of $541 million; to offset "loans" to Stanford that, according to Kuhrt's December 2008 "shareholder funding" reports, were nearing $2 billion; and to put aside $733 million for Stanford's personal account. *Id.* at 8a-9a; Gov't C.A. Br. 47-48, 53.

c. At the same time that they conducted transactions that facilitated Stanford's fraud, petitioners worked to conceal that fraud from the bank's customers, auditors, and regulators. Evidence presented at trial showed that petitioners were aware of (and re-

sponsible for) inaccuracies in various annual reports, audit reports, and filings before Antigua's Financial Services Regulatory Commission (FSRC). Pet. App. 4a-7a. Lopez (as the highest-ranking accountant in Stanford's companies) and Kuhrt (as the senior most accountant reporting to Lopez) were responsible for the content and accuracy of SIB's annual reports, which inflated SIB's investment figures and did not disclose that Stanford was diverting significant amounts of money to his personally held companies. *Id.* at 4a. Those inaccuracies were not attributable to mere oversight: in 2004, petitioners met with Davis in Memphis and discussed with him whether the amounts diverted to Stanford should be disclosed in SIB's annual report. *Id.* at 5a; Gov't C.A. Br. 22. Although petitioners and Davis believed that the diverted funds should be reported, they all agreed not to disclose the missing money. Pet. App. 4a; Gov't C.A. Br. 22-23.

Davis and Kuhrt were likewise responsible for filing reports with the FSRC that detailed the bank's investments. Pet. App. 7a. Davis would send one type of those reports, the IB5 reports, to Kuhrt, who would update the previous quarter's report and submit it. *Ibid.* Davis knew that Kuhrt reviewed the reports because Kuhrt had once caught and corrected an error on an IB5 report. *Ibid.* None of the submitted IB5 reports referred in any way to the money Stanford was diverting. *Ibid.*

Petitioners also repeatedly rebuffed inquiries from other employees that could have exposed Stanford's fraud. Budget analyst Roca, who reported to Kuhrt, was reprimanded for allegedly asking too many questions about Stanford's companies. Pet. App. 6a; Gov't

C.A. Br. 31. When Fran Casey, an internal auditor who reported indirectly to Lopez, tried to gather information on SIB's assets and revenue, Kuhrt and others did not provide it. Gov't C.A. Br. 32. Casey's May 2006 draft audit report stated that only eight percent of SIB's assets could be verified and that only two percent of the income statement accounts could be verified. Pet. App. 6a. Lopez became "extremely angry" when he saw the report and said that the report could not be issued in that form. *Id.* at 6a-7a. The report was ultimately issued without the statements about the eight percent and two percent verification rates. *Id.* at 7a. And when Stanford's Antigua-based auditor (C.A.S. Hewlett) died in January 2009, petitioners resisted suggestions that they replace Hewlett—whom Kuhrt had analogized to a "rubber stamp," *id.* at 6a (brackets omitted); Gov't C.A. Br. 54—with a reputable outside accounting firm.

Within weeks of Hewlett's death, Kuhrt made statements that confirmed to Roca that Stanford's claimed capital contributions had not been funded, Gov't C.A. Br. 57-59; that no financing alternatives were being explored because "[i]t's over," *id.* at 60; and that Roca need not fear a reported investigation by the Securities and Exchange Commission because "[t]hey can't prove anything," *id.* at 61 (brackets in original); see Pet. App. 9a. In February 2009, shortly after the last of those exchanges, the government raided Stanford's offices in Houston, Miami, and Memphis. Pet. App. 9a; Gov't C.A. Br. 63. Davis began cooperating with the government one month after the raids and later pleaded guilty to three felony charges. Pet. App. 2a n.1. He testified at Stanford's separate trial, at the conclusion of which Stanford was

convicted of charges arising from the Ponzi scheme and sentenced to 110 years of imprisonment. *Id.* at 9a.

2. In June 2012, petitioners were charged in a superseding indictment with ten counts of wire fraud and one count of conspiracy to commit wire fraud for their roles in covering up the scheme. Pet. App. 9a; Gov't C.A. Br. 66. They pleaded not guilty and proceeded to trial, at which the government presented evidence in the form of e-mails, spreadsheets, and testimony by Davis, Roca, Casey, other Stanford employees, and victims of the scheme. Pet. App. 16a-17a.

a. As part of their defense, petitioners sought to introduce expert testimony from two certified public accountants—Richard Jones in Kuhrt's defense, and Dr. Bala Dharan in Lopez's. Pet. App. 20a. The district court granted in part the government's pretrial motion to exclude specific areas of expert testimony, ruling that the experts could not testify to petitioners' roles and responsibilities, to what the petitioners subjectively knew or believed, or whether that knowledge or belief was reasonable. *Id.* at 20a-21a. The court permitted testimony about common practice in the industry and said that it would evaluate on a question-by-question basis testimony about a hypothetical person in petitioners' positions. *Id.* at 21a.

During trial, the government moved to preclude Jones from testifying about several additional topics. Pet. App. 21a. After a hearing outside the presence of the jury, the district court denied the motion as to some areas of testimony, but barred Jones from testifying about whether disclosure of a shareholder loan was required and whether the exhibits showed any payment of interest on the purported $1.7 billion loan to Stanford. The court also excluded testimony about

"the actual knowledge or belief of either [petitioner]," and testimony about whether petitioners' subjective beliefs were reasonable. *Id.* at 22a. As a result, "Jones did not testify about whether Kuhrt was responsible for, or required to disclose, the shareholder loan." *Ibid.* Jones did testify, however, about whether posting capital contributions before their funding is common in the industry. *Id.* at 22a-23a.

b. At the charge conference, the government proposed that the district court include alongside the definition of the term "knowingly" the Fifth Circuit's pattern instruction on "deliberate ignorance." Pet. App. 38a. The government argued that the instruction was warranted in light of petitioners' testimony that, although they had received the bank's reports to Antiguan regulators omitting mention of Stanford's billion-dollar-plus loans, petitioners had not looked at the reports to learn the relevant information. *Id.* at 40a-41a, 44a, 49a. Petitioners objected to the proposed instruction, arguing that it was not supported by the evidence and that, if the district court gave the instruction, it should be worded differently than the pattern instruction. *Id.* at 44a-47a. The court overruled those objections and instructed the jury that it "may find that a defendant had knowledge of a fact if [it found] that the defendant deliberately closed his eyes to what would otherwise have been obvious to him." D. Ct. Doc. 1139, at 21 (Nov. 19, 2012). The instruction cautioned that, while the defendant's knowledge "cannot be established merely by demonstrating that [he] was negligent, careless, or foolish, knowledge can be inferred if [he] deliberately blinded himself to the existence of a fact." *Ibid.*

c. The jury found petitioners guilty of nine counts of wire fraud and one count of conspiracy to commit wire fraud; it acquitted petitioners on one other count of wire fraud. Pet. App. 9a. The district court sentenced each petitioner to 240 months of imprisonment, below the term of life imprisonment recommended by the advisory Sentencing Guidelines. *Id.* at 10a.

3. The court of appeals affirmed. Pet. App. 1a-35a. As relevant here, the court rejected petitioners' contention that the district court had committed reversible error in giving a deliberate-ignorance instruction to the jury. *Id.* at 18a-20a.[2] The court of appeals explained that a deliberate-ignorance "instruction is not a backup or supplement in a case that hinges on a defendant's actual knowledge" and that, under circuit precedent, such an instruction is appropriate only when "a defendant 'claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference.'" *Id.* at 19a (quoting *United States* v. *Brooks*, 681 F.3d 678, 701 (5th Cir. 2012), cert. denied, 133 S. Ct. 836, 133 S. Ct. 837, and 133 S. Ct. 839 (2013)). Because the government's theory in this case was that petitioners "were criminally liable based upon their actual knowledge of the fraud and their efforts to further the fraud," the court stated that the district court "arguably [committed] error" in giving "the deliberate ignorance instruction." *Id.* at 19a-20a.

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[2] The court of appeals also rejected petitioners' arguments that the government violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by striking a Hispanic juror based on race; the evidence was insufficient to support their convictions; and their below-Guidelines sentences were procedurally and substantively unreasonable. Pet. App. 10a-18a, 29a-34a. Petitioners do not renew those arguments in this Court.

"Even assuming *arguendo*" that the instruction was improper, however, the court of appeals concluded that any error was harmless. Pet. App. 20a. The court explained that the giving of a deliberate-ignorance "instruction is harmless where there is substantial evidence of actual knowledge." *Ibid.* The court observed that, in another case, it had held an error in giving a deliberate-ignorance instruction to be harmless "because there was ample evidence of actual knowledge of the illegal conduct." *Ibid.* (citing *United States* v. *Mendoza-Medina*, 346 F.3d 121, 134-135 (5th Cir. 2003), cert. denied, 540 U.S. 1156 (2004)). Because the evidence in this case similarly showed that petitioners "were actual participants in the illegal activity," the court concluded that any error in giving the instruction was harmless. *Ibid.*

The court of appeals also rejected petitioners' argument that the district court had reversibly erred in barring their accounting experts from testifying about certain topics. Pet. App. 20a-29a. The court of appeals explained that the disputed testimony concerned, in pertinent part, "the roles, responsibilities, and reasonable beliefs of persons in a similar position to [petitioners] and [petitioners] themselves." *Id.* at 25a. And the court stated "that the district court should have permitted some of the expert testimony on these topics." *Ibid.*; cf. *id.* at 26a (suggesting that the court was "assuming [error] *arguendo*"). But the court of appeals held that any error was harmless. *Id.* at 25a-27a. It rejected Kuhrt's argument that his expert's testimony "could have definitely established that Kuhrt did not know, nor should he have known, of Stanford's and Davis's multi-billion dollar frauds." *Id.* at 26a (internal quotation marks omitted). The court

explained that the experts could have testified, "at most, * * * about what a typical person in [petitioners'] positions would have likely known, based upon common practice in the industry." *Ibid.* Because Kuhrt's expert could not have "provided any new information on [his] *actual* role[] and responsibilities within SIB," and because the government had "presented ample evidence as to what [petitioners] *actually* did in *this* case," the court determined that any error in limiting the testimony "was harmless." *Id.* at 26a-27a.

ARGUMENT

Petitioners contend (Pet. 13-31; Kuhrt Pet. 18-28) that the court of appeals erred in concluding that any error in giving a deliberate-ignorance instruction to the jury was harmless. Petitioner Kuhrt separately contends (Kuhrt Pet. 28-39) that the district court improperly excluded testimony from his expert witness. Those contentions lack merit and do not warrant further review.

1. Petitioners argue (Pet. 15-31; Kuhrt Pet. 18-27) that the court of appeals applied an incorrect standard for determining whether a deliberate-ignorance instruction that lacks an adequate evidentiary basis constitutes harmless error; they argue that review is warranted to resolve a conflict in the circuits on that issue. This Court has repeatedly denied review of petitions claiming the identical circuit conflict alleged here. See *Geisen* v. *United States*, 563 U.S. 917 (2011) (No. 10-720); *Hernandez-Mendoza* v. *United States*, 562 U.S. 1257 (2011) (No. 10-6879); *Kennard* v. *United States*, 551 U.S. 1148 (2007) (No. 06-10149); *Ebert* v. *United States*, 534 U.S. 832 (2001) (No. 00-9596); *Ebert* v. *United States*, 529 U.S. 1005 (2000) (No. 99-

6789). There is no reason for a different result in this case. In any event, the court of appeals' decision is correct, and the purported conflict does not require this Court's attention. Moreover, this case is an unsuitable vehicle for addressing the question petitioners present because the court of appeals did not decide whether the district court erred in giving the instruction and petitioners would not prevail even under the harmless-error standard that they advocate.

a. The court of appeals held that, even if the district court erred in giving a deliberate-ignorance instruction, that error was harmless because the government presented substantial evidence to support petitioners' convictions on an actual-knowledge theory. Pet. App. 20a. That conclusion was correct.

"[T]he crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge." *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) (citation and internal quotation marks omitted); see *Kansas* v. *Carr*, No. 14-449 (Jan. 20, 2016), slip op. 15-16; *Zafiro* v. *United States*, 506 U.S. 534, 540-541 (1993); *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). Under that principle, a reviewing court must presume that the jury followed the district court's instructions and, if no evidence of deliberate ignorance existed, the jury would not have convicted petitioners by finding they were deliberately ignorant. See, *e.g.*, *United States* v. *Stone*, 9 F.3d 934, 938 (11th Cir. 1993), cert. denied, 513 U.S. 833 (1994). Accordingly, if the deliberate-ignorance instruction was not warranted on the facts, then giving the instruction was harmless because a properly instructed jury would have rejected it and instead relied on an alternative theory supported by the evidence.

That is precisely the logic of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991). In *Griffin*, the Court rejected the defendant's claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." *Id.* at 56. As the Court explained, it is "settled law * * * that a general jury verdict [i]s valid so long as it [i]s legally supportable on one of the submitted grounds—even though that g[i]ve[s] no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. The Court distinguished between a jury instruction that misstates the law and one that merely presents one theory of conviction (out of several) that is not supported by the evidence. The Court explained:

> When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59 (emphasis omitted); see *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("We reasoned [in *Griffin*] that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence.").

Here, petitioners principally claim that the deliberate-ignorance instruction was unsupported by

the evidence presented at trial.[3] But under *Griffin*, the submission to the jury of the deliberate-ignorance theory—even if the evidence at trial had been insufficient to support that theory—would not warrant reversal. See *Stone*, 9 F.3d at 937-942; see also *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994). Accordingly, given that petitioners' convictions can be upheld under an actual-knowledge theory, the court of appeals correctly determined that any error involving the deliberate-ignorance instruction was harmless.

b. Petitioners contend (Pet. 15) that a three-way division exists among the courts of appeals over the appropriate harmless-error standard. Petitioners, however, overstate the degree and significance of any remaining disagreement on this issue.

i. Most courts of appeals to consider the question have held that instructing the jury on deliberate ignorance when there is insufficient factual support for the charge is harmless if the instruction is legally correct—*e.g.*, the instruction permits the jury to rely

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[3] Petitioners suggest (Pet. 3-4, 30) that the instruction in this case, drawn from the Fifth Circuit's pattern instruction, insufficiently "state[d] the subjective element of deliberate ignorance" in light of this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB, S.A.*, 563 U.S. 754 (2011) (*Global-Tech*). But the court of appeals rejected that contention (Pet. App. 18a n.4), and petitioners do not raise it as a separate question presented. Nor is it fairly included in the questions presented. See Sup. Ct. R. 14.1(a). In any event, this Court has recently and repeatedly denied petitions for certiorari claiming that *Global-Tech* altered the standard for deliberate ignorance (or willful blindness) in criminal cases, see, *e.g.*, *Salman* v. *United States*, No. 15-628 (Jan. 19, 2016) (limiting grant of certiorari to Question 1; Question 2 raised deliberate-ignorance issue); *Bourke* v. *United States*, 133 S. Ct. 1794 (2013) (No. 12-531), including in cases arising out of the Fifth Circuit, see, *e.g.*, *Brooks* v. *United States*, 133 S. Ct. 839 (2013) (No. 12-218).

on deliberate ignorance only if the evidence shows such ignorance beyond a reasonable doubt, and it explains that deliberate ignorance requires more than negligence—and the evidence is sufficient to prove guilt on an actual-knowledge theory. See *United States* v. *Lighty*, 616 F.3d 321, 378-379 (4th Cir.), cert. denied, 562 U.S. 1118 (2010), and 132 S. Ct. 451 (2011); *United States* v. *Ayon Corrales*, 608 F.3d 654, 657-658 (10th Cir. 2010); *United States* v. *Leahy*, 445 F.3d 634, 654 n.15 (3d Cir.), cert. denied, 549 U.S. 1071 (2006); *United States* v. *Alston-Graves*, 435 F.3d 331, 341-342 (D.C. Cir. 2006); *United States* v. *Mari*, 47 F.3d 782, 786-787 (6th Cir.), cert. denied, 515 U.S. 1166 (1995); *Stone*, 9 F.3d at 938-939. Those courts have generally reasoned, in accord with *Griffin*, that if the evidence is insufficient to support a theory of deliberate ignorance but is sufficient to support a finding of actual knowledge, then the jury "must not have convicted the defendant on the basis of deliberate ignorance" but rather "on the basis of [the defendant's] positive knowledge." *Mari*, 47 F.3d at 785 (emphasis omitted).

Petitioners suggest (Pet. 17-19) that the courts of appeals that have adopted that reasoning are themselves divided over whether the erroneous instruction is harmless *per se* or harmless only when the evidence of actual knowledge is "substantial," see Pet. App. 20a, or "sufficient," *Ayon Corrales*, 608 F.3d at 658. But as petitioners elsewhere appear to recognize, the various formulations used by these courts are in substance the same. See Pet. 2 (calling the substantial-evidence formulation used by the court below "only a hair's breadth less permissive" than a per se rule); Pet. 18 (describing that formulation as "almost equally forgiving"). Indeed, under the standard that petition-

ers describe as a *per se* rule, the reviewing court will find the error harmless only when the evidence is sufficient "to convict [the defendant] * * * on the basis of actual knowledge." *United States* v. *Kennard*, 472 F.3d 851, 858 (11th Cir.) (applying *Stone*, 9 F.3d at 937-940), cert. denied, 551 U.S. 1148, and 552 U.S. 981 (2007); see *United States* v. *Ekpo*, 266 Fed. Appx. 830, 833 (11th Cir.) (same; holding error harmless where "there [wa]s sufficient evidence to support a conviction based on actual knowledge"), cert. denied, 555 U.S. 895 (2008).

Petitioners correctly point out (Pet. 19-23) that four other courts of appeals have applied a slightly different harmless-error standard in some of their decisions. The Eighth Circuit in *United States* v. *Barnhart*, 979 F.2d 647 (1992), stated that instructing a jury on deliberate ignorance does not constitute harmless error if the evidence of actual knowledge, although sufficient to support the jury's finding, is not overwhelming. See *id.* at 652-653 & n.1; see also *United States* v. *Covington*, 133 F.3d 639, 644-645 (8th Cir. 1998) (following *Barnhart*, but finding the error in giving deliberate-ignorance instruction to be harmless where evidence of actual knowledge was overwhelming). The Ninth Circuit reached the same conclusion in several decisions. See *United States* v. *Mapelli*, 971 F.2d 284, 287 (1992); *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1075-1076 (1991), disapproved on other grounds by *United States* v. *Heredia*, 483 F.3d 913 (9th Cir.) (en banc), cert. denied, 552 U.S. 1077 (2007). And some recent decisions of the Second and Seventh Circuits have also applied an overwhelming-evidence standard. *United States* v. *Quinones*, 635 F.3d 590, 595 (2d Cir.), cert. denied,

132 S. Ct. 830 (2011); *United States* v. *Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015). The earliest of these decisions express a concern that, absent evidence to support a deliberate-ignorance instruction, juries may incorrectly employ a negligence or recklessness standard. See, *e.g.*, *Barnhart*, 979 F.2d at 652; *Mapelli*, 971 F.2d at 287.

ii. For the reasons given above, the standard stated in decisions such as *Barnhart*, *Mapelli*, *Macias*, and *Quinones* is incorrect. But review is unwarranted because the extent of any remaining disagreement reflected in these decisions is limited and unlikely to be outcome determinative in most cases (including this one, see pp. 23-24, *infra*).

As an initial matter, two of the circuits that in the past failed to apply *Griffin*—the Eighth and Ninth Circuits—have more recently reevaluated their cases. In *United States* v. *Hernandez-Mendoza*, 611 F.3d 418 (2010), cert. denied, 562 U.S. 1257 (2011), the Eighth Circuit retreated from its analysis in *Barnhart* and effectively overruled *Barnhart* because *Barnhart* had failed to consider and apply this Court's decision in *Griffin*. *Id.* at 418-419. Similarly, the Ninth Circuit decisions purportedly in conflict with the decision below do not mention *Griffin*, and do not reject its application. And the Ninth Circuit in a more recent unpublished decision has applied *Griffin* in evaluating the harmlessness of a deliberate-ignorance instruction unsupported by the evidence. *United States* v. *Daly*, 243 Fed. Appx. 302, 309, cert. denied, 552 U.S. 1070 (2007), and 552 U.S. 1211 (2008). In addition, the en banc Ninth Circuit has rejected the view that giving a deliberate-ignorance instruction "risks lessening the state of mind that a jury must find to something akin

to recklessness or negligence," and has concluded that where (as here) the jury is instructed that it may not convict based on a finding that the defendant was merely careless, "[r]ecklessness or negligence never comes into play, and there is little reason to suspect that juries will import these concepts, as to which they are not instructed, into their deliberations." *United States* v. *Heredia*, 483 F.3d 913, 923-924, cert. denied, 552 U.S. 1077 (2007). That en banc pronouncement so far undermines the reasoning of *Mapelli* and *Sanchez-Robles* that any nominal division of authority created by those decisions is illusory.

The cited decisions from the Second and Seventh Circuits (Pet. 20-21, 22-23) also do not establish a conflict warranting this Court's review. In its earliest post-*Griffin* decision on this issue, the Second Circuit expressed agreement with what is now the majority rule—*i.e.*, that the erroneous instruction will be harmless when the evidence is sufficient to prove the defendant's actual knowledge—and identified the "overwhelming" evidence of actual knowledge in that case as an additional reason for its harmlessness determination. *Adeniji*, 31 F.3d at 63-64. Although in subsequent decisions the Second Circuit has proceeded directly to ask whether the evidence of actual knowledge was overwhelming, see *Quinones*, 635 F.3d at 595; *United States* v. *Ferrarini*, 219 F.3d 145, 154, 158 (2000), cert. denied, 532 U.S. 1037 (2001), petitioners identify no decision in which that court has found that the evidence was sufficient to support guilt under an actual-knowledge theory but reversed a conviction because such evidence was not "overwhelming."

It is true that, in *Macias*, the Seventh Circuit recently reversed a conviction after determining that

the evidence of the defendant's actual knowledge "was sufficient but not overwhelming." 786 F.3d at 1063. But the court in *Macias* expressed concern that the deliberate-ignorance instruction given there could have been confusing to the jury because two clauses in the instruction were "in tension with one another." *Id.* at 1061. The court also emphasized that the government had raised a harmless-error argument in a single sentence in its brief, causing the court to dismiss that argument as a "pure, unsubstantiated conclusion, entitled to zero weight." *Id.* at 1063. Moreover, in decisions predating *Macias*, the Seventh Circuit had found erroneous deliberate-ignorance instructions to be harmless under the majority rule—that is, where the government presented "sufficient evidence" of the defendant's actual knowledge. *United States* v. *Salinas*, 763 F.3d 869, 881 (2014); *United States* v. *Malewicka*, 664 F.3d 1099, 1110 (2011).[4] It is thus unclear that the Seventh Circuit will continue to employ an overwhelming-evidence stand-

[4] Petitioners cite (Pet. 20-21) two other decisions in which the Seventh Circuit has reversed convictions under an overwhelming-evidence standard. But in one of those decisions, the improper deliberate-ignorance instruction was one of two erroneous instructions on the defendant's mental state. See *United States* v. *L.E. Myers Co.*, 562 F.3d 845, 855 (2009). And in both cases, the Seventh Circuit applied the higher standard under the apparent belief that the instructional error was constitutional in nature, requiring the government to prove harmlessness beyond a reasonable doubt. See *ibid.* (citing *Neder* v. *United States*, 527 U.S. 1, 18 (1999)); see also *United States* v. *Ciesiolka*, 614 F.3d 347, 355 (2010) (same). In any event, any analytical tension among the Seventh Circuit's decisions is for that court to resolve in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

ard and, even if it does, that that standard will make a difference in all but exceptional cases.

c. In any event, this case does not present a suitable vehicle for determining the proper approach to the harmless-error issue, for two reasons.

First, petitioners' claim is based on the premise that the deliberate-ignorance instruction lacked a sufficient factual basis. The court of appeals did not decide that issue; it "assum[ed] *arguendo*" that the district court had erred in giving the instruction. Pet. App. 20a. But as the government explained in its brief in the court of appeals, the district court acted within its discretion in giving the instruction based on petitioners' testimony admitting that they received reports that contained information going to the heart of Stanford's fraud but claiming that they had chosen not to review the information in the reports. See Gov't C.A. Br. 110-123. That testimony gave rise to an inference that petitioners were subjectively aware of a high probability of illegal conduct but purposefully avoided learning of such conduct. *Id.* at 122; see Pet. App. 19a (listing those criteria as the prerequisites for a deliberate-ignorance instruction). And the possibility that the jury could also have found from the evidence that petitioners had actual knowledge of the fraud did not preclude the district court from giving the instruction. A court may do so when "the evidence supports both actual knowledge and deliberate ignorance." *United States* v. *Espinoza*, 244 F.3d 1234, 1244 (10th Cir. 2001) (citation omitted); see *Malewicka*, 664 F.3d at 1109 ("The government is not precluded from presenting evidence of both an actual knowledge theory and a conscious avoidance theory."); *Heredia*, 483 F.3d at 923 ("A party may present alter-

native factual theories, and is entitled to instructions supporting all rational inferences the jury might draw from the evidence."). Because the district court did not commit error at all in instructing the jury on deliberate ignorance, this case is not an appropriate vehicle for reaching the harmless-error issue that petitioners present. Cf. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (declining to reach harmlessness issue on which review was granted after finding no error).

Second, review is unwarranted because any error would be harmless even on the standard most favorable to petitioners. The most favorable standard asks whether the evidence at trial of actual knowledge was overwhelming. See, *e.g.*, *Quinones*, 635 F.3d at 595-596 (finding error in giving deliberate-ignorance instruction harmless where evidence of guilt was overwhelming); *Covington*, 133 F.3d at 645 (same). That is the case here, because the evidence overwhelmingly supports petitioners' actual knowledge. See pp. 2-8, *supra*; see also Pet. App. 15a (calling evidence of Kuhrt's guilt "ample"); Pet. App. 29a (describing "ample evidence that [petitioners] participated directly in the fraud"). Contrary to petitioners' suggestion (Pet. 2-3, 30-31), that evidence was not limited to testimony by cooperating witness Davis; in addition to documentary evidence, the government presented compelling testimony from employees who worked under petitioners, such as auditor Casey and budget analyst Roca. Pet. App. 14a-17a; see Gov't C.A. Br. 94-96 (listing 16 incriminating portions of trial testimony, 15 of which came from witnesses other than Davis). Moreover, the jury found petitioners guilty of both substantive counts of wire fraud and conspiracy to

commit wire fraud. The latter convictions required the jury to find not only that petitioners joined a criminal agreement knowing its unlawful purpose, but that they "joined in it willfully, that is, with the intent to further the unlawful purpose." D. Ct. Doc. 1139, at 24. A jury that found from the trial evidence that petitioners intended to further the unlawful purpose of the conspiracy is likely to have concluded from the same evidence that petitioners actually knew what that purpose was. Cf. *Covington*, 133 F.3d at 645 ("[T]he risk of conviction for negligent or reckless behavior is particularly low when * * * there is a conviction for conspiracy requiring proof of a conspiratorial agreement.").

2. Petitioner Kuhrt separately renews his contention (Pet. 28-39) that the district court reversibly erred in excluding a portion of his expert's proposed testimony, and he suggests that the testimony would have been admissible under decisions of the Second Circuit permitting "pattern" testimony in securities and narcotics cases. Pet. 36 (citing, *inter alia*, *United States* v. *Russo*, 74 F.3d 1383, 1388-1389 (2d Cir.), cert. denied, 519 U.S. 927 (1996)). But the decision below cannot conflict with that line of Second Circuit authority because, as Kuhrt elsewhere recognizes (Pet. 37), the court of appeals here did not hold that the expert testimony at issue had been properly excluded. Rather, the court suggested "that the district court should have permitted some of the expert testimony on" the disputed topics, but held that any error was harmless given the "ample evidence" of Kuhrt's guilt. Pet. App. 25a, 27a, 29a.

Kuhrt's challenge to that harmlessness determination is a fact-bound question that does not warrant

this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In any event, that challenge lacks merit. This case was not, as Kuhrt asserts (Pet. 38-39), a "credibility contest" between petitioners and cooperating witness Davis. See Pet. App. 15a-16a (rejecting Kuhrt's contention that Davis's testimony was the only evidence of guilt on the conspiracy charge). Nor would the excluded areas of expert testimony have swayed the jury toward Kuhrt's defense. As the court of appeals explained, that testimony could at most have spoken to "what a typical person in [petitioners'] positions would have likely known, based upon common practice in the industry." *Id.* at 26a. But "[w]hat [petitioners] *actually* knew, and whether they were *actually* responsible for SIB financials or annual reports," were factual questions that the jury would have resolved based on the "ample evidence" the government presented "as to what [petitioners] *actually* did in *this* case." *Id.* at 26a-27a. Any error in excluding some limited areas of testimony from Kuhrt's accounting expert was therefore harmless.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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