No. 97-1985

In the Supreme Court of the United States

OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial.

2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343) and bank fraud (18 U.S.C. Section 1344) statutes.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 136 F.3d 1459.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. The petition for a writ of certiorari was filed on June 9, 1998, and was granted on October 13, 1998 (119 S. Ct. 334). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1341, 1343, and 1344 of Title 18 and Section 7206(1) of Title 26 are reproduced at Pet. App. 43a-47a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of

one count of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)); one count of conspiring to commit that offense (18 U.S.C. 1962(d)); one count of conspiring to defraud a financial institution (18 U.S.C. 371); 12 counts of bank fraud (18 U.S.C. 1344); nine counts of mail fraud (18 U.S.C. 1341); nine counts of wire fraud (18 U.S.C. 1343); 37 counts of making false statements to a financial institution (18 U.S.C. 1014); and two counts of filing false income tax returns (26 U.S.C. 7206(1)). He was sentenced to 147 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay approximately $25 million in restitution. Pet. App. 14a-20a. The court of appeals affirmed. Pet. App. 1a-13a.

1. *Land Acquisition Fraud.* Between 1984 and 1986, petitioner purchased land using shell corporations. Petitioner then immediately resold the land at much higher prices to limited partnerships that he controlled. *E.g.*, Tr. 9:27-31. Petitioner used bank loans to finance the resales. Because the loans typically amounted to 70-75% of the inflated price, the loan proceeds substantially exceeded the original cost of the land to petitioner's shell corporations. *Id.* at 84-85.

Petitioner made numerous false statements, including statements in affidavits, to conceal from lenders that he controlled the shell corporations that had first purchased the land at prices substantially lower than the inflated resale price being financed by the lenders. *E.g.*, Tr. 4:120-128. Petitioner also misrepresented to lenders that his partnerships had made significant down payments to the corporations selling the land, and he falsely denied that he was sharing in the profits of the seller corporations. *E.g.*, Tr. 1:170-171; 4:166. The lenders testified that petitioner's false statements were material to their decisions to make the loans in question. *E.g.*, Tr. 1:170-171, 186-188.

After the transactions, petitioner deposited to his personal account a check reflecting the amount by which the

loan proceeds exceeded the original purchase price of the land. *E.g.*, Tr. 2:54. In this way, petitioner obtained more than $7 million. Pet. App. 2a. Petitioner subsequently defaulted on the loans. *Ibid.*

Land Development Fraud. In 1985, petitioner obtained a $4,150,000 construction loan from Amerifirst Savings & Loan ("Amerifirst") to build condominiums on a project known as Cedar Creek. Tr. 6:77-78. To qualify for the loan, petitioner was required to make advance sales of 20 condominium units, in order to establish the marketability of the project. *Id.* at 80-83, 87. Petitioner was initially unable to meet this requirement, so he secured seven additional buyers by making their required down payments in amounts ranging from $4,000 to $8,900. Tr. 6:100-114, 176-177, 192-200, 210; 8:5-12. Petitioner also arranged to have the down payments transferred back to him from the escrow account into which they had been placed. Tr. 6:128, 161. Petitioner later defaulted on the construction loan, without repaying any of the principal. Tr. 6:116-122; 15:38-39, 43-44. Amerifirst would not have made the loan had it been aware that petitioner rather than the buyers had made the down payments on seven of the sales. Tr. 6:154-159.

Using a similar scheme, petitioner obtained a $5,400,000 loan, and unsuccessfully attempted to obtain an additional loan, from Security First Savings and Loan for development of condominiums at another project known as Southern Grove. Tr. 7:5-188; 9:118-119; 10:52-54.

Attempted Fraud on Central Bank. In 1988, petitioner attempted to obtain funds fraudulently in the course of seeking a $4,700,000 land development loan from Central Bank for a project known as the View. Petitioner had previously obtained from another lender an $847,500 land acquisition loan for the View, which was the only existing valid mortgage on the property. Tr. 9:211-212. Petitioner, however, subsequently directed his attorney to execute a false promissory note and mortgage deed on the property in

the amount of $280,000, thus bringing the apparent mortgage debt on the property to approximately $1,100,000. Tr. 9:198-204; 10:10-15 32:91-92. Unaware of the fraud, Central Bank agreed that it would advance $1,130,000 at closing to pay off the existing debt on the land. Tr. 9:198-204, 211-223. The loan fell through, however, because petitioner's lawyer refused to sign an opinion letter representing that petitioner's financial status had not changed for the worse. Tr. 9:226-227; 32:93-95.

Construction Loan Fraud. In November 1986, petitioner obtained a $6 million land acquisition loan from the United Brotherhood of Carpenters and Joiners of America ("the Union"), for a project known as Reddie Point. Tr. 10:54-56, 73. After falling behind on his payments, petitioner negotiated a consolidated $14 million loan from the Union to cover land acquisition costs and construction costs. *Id.* at 10:55-56, 70. Under this loan, petitioner could submit draw requests for work actually performed on construction at Reddie Point. Tr. 10:95-104; 11:105. Between September 1987 and March 1988, petitioner submitted numerous draw requests based on false invoices. Tr. 11:111-186; 12:3-91. The Union approved payment of the draw requests, and petitioner obtained almost $3 million unrelated to any work performed at Reddie Point. Tr. 11:13-64; 13:57-58.

Tax Offenses. Petitioner failed to report on his personal income-tax return more than $1 million in income for 1985 and more than $4 million in income for 1986. Pet. App. 2a. Those amounts represented profits from petitioner's land acquisition scheme, which petitioner had deposited in his own personal account and used for his own purposes. *E.g.*, Tr. 19:124-142; 25:122-123, 200; 26:29.

2. At trial, petitioner defended against the bank fraud, mail fraud, and wire fraud charges arising out of the land and construction loan schemes by contesting the falsity of his statements to the lenders, and by contending that he relied in good faith on the advice of his attorney and lacked an

intent to defraud lenders. See, *e.g.*, J.A. 149-155, 161-162 (opening statement); J.A. 169-173, 180-183, 188-190, 210, 218-225, 229-230, 233-236 (closing argument). Petitioner also argued that some lenders knew how he structured the transactions and used his loan draws, and knew of the falsity of certain statements and did not actually rely on them. See, *e.g.*, J.A. 178-179, 184-190, 194-195, 229 (closing argument).

Petitioner defended against the tax charges by contending that the proceeds from the land acquisition loans were not income because he intended to repay the loans, and that he had relied in good faith on the advice of his accountant and his lawyer that he need not report the proceeds as income. Pet. App. 12a-13a; J.A. 208-211, 235 (closing argument). Petitioner's attorney concluded his opening statement by emphasizing that "there's only one issue in this case * * * [a]nd that issue is did [petitioner] or anybody else have the criminal intent to defraud." J.A. 161-162.

The district court instructed the jury on the bank fraud, false statement, and tax offenses that the question of materiality was not for the jury to decide. J.A. 249, 252-253, 256. In instructing the jury on the mail fraud and wire fraud offenses, the district court did not include materiality as an element. J.A. 253-255. Petitioner objected to the district court's refusal to submit the question of materiality to the jury. J.A. 165-166. The district court subsequently found, outside the presence of the jury, that the evidence established materiality beyond a reasonable doubt on all counts at issue. J.A. 167. Petitioner did not contest that finding. *Ibid.*

3. On appeal, petitioner contended that the district court committed reversible error by refusing to submit the question of materiality to the jury. The court of appeals rejected that contention. Pet. App. 3a-13a.

In rejecting petitioner's challenge to his false statement convictions under 18 U.S.C. 1014, the court of appeals relied on *United States* v. *Wells*, 519 U.S. 482 (1997), which held that materiality is not an element of that offense. Pet. App.

3a-5a. The court further held that, under the analysis in *Wells*, materiality is not an element of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), or bank fraud (18 U.S.C. 1344). Pet. App. 6a-10a.

With respect to petitioner's tax offenses, the court of appeals held that materiality is an element of the offense of falsely subscribing to a tax return in violation of 26 U.S.C. 7206(1), and that under *United States* v. *Gaudin*, 515 U.S. 506 (1995), the district court erred in failing to submit the issue of materiality to the jury. Pet. App. 10a-11a. The court concluded, however, that the error was harmless, because "materiality was not in dispute regarding [petitioner's] tax fraud offense." *Id.* at 12a. The court explained that, under Section 7206, "a 'material matter' is any information necessary to a determination of a taxpayer's income tax liability." *Ibid.* The court further explained that "[a]n accurate reflection of income is critical to determining a taxpayer's income tax liability," and pointed out that petitioner's tax convictions "were based on his failure to report $1,372,360 in income in 1985 and $4,355,766 in income in 1986." *Ibid.* Finally, the court noted that "[petitioner] did not contest the materiality of his failing to report this income either through testimony or evidence presented during the trial, or during closing argument." *Ibid.* The court therefore concluded that the error "did not contribute to the verdict obtained." *Id.* at 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

SUMMARY OF ARGUMENT

I. A trial court's failure to submit an element of a criminal offense to the jury is constitutional error. But, like most constitutional error, it is subject to harmless-error analysis. Such an error should be found harmless when an appellate court can determine that the defendant did not dispute the element at trial, and, in light of the proof, the element was

indisputable. That is the case here with respect to the omitted materiality element in petitioner's tax offenses.

This Court's cases establish a strong presumption that constitutional errors are subject to harmless-error inquiry. The Court has recognized a limited number of fundamental errors (sometimes called "structural errors") that are intrinsically harmful in all cases, such as the total deprivation of counsel or the presence of a biased judge. A defective reasonable-doubt instruction that vitiates all of the jury's findings falls within that class. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). But instructional errors that affect only a single element do not. Such errors do not represent a basic breakdown in the trial mechanism or other pervasive error that requires reversal in all cases. Rather, such errors have been repeatedly held to be reviewable in accordance with harmless-error principles. See, *e.g.*, *Rose* v. *Clark*, 478 U.S. 570 (1986); *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam).

A proper application of harmless-error principles leads to the conclusion that, when an issue is not controverted or controvertible, the jury's erroneous failure to determine it does not "contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). That is so for three reasons. First, the defendant in such a case had a full and fair opportunity to have the jury determine the crucial question of his guilt or innocence on all issues on which he raised (or could have raised) a defense. The verdict of guilty is therefore entitled to respect, because there is no reason to believe that the jury reached an unjust or inaccurate result. Second, the doctrine of harmless error protects public respect for the criminal process, which would suffer if convictions were reversed based on instructional errors that related only to undisputed and incontrovertible matters. Third, and relatedly, the consequence of reversal would not be to afford the defendant the chance to dispute the omitted element before the jury. Here, for example, petitioner surely would not contend that an understatement of millions

of dollars in taxable income is immaterial. Rather, a new trial would simply afford the defendant the chance to try for acquittal with a new jury on the same issues that he previously litigated and lost. Nothing in the Constitution requires society to bear the significant costs of a retrial simply to provide the defendant with that second bite at the apple.

Some of this Court's pre-*Chapman* cases suggest that an appellate court conducting harmless-error review cannot rely on record evidence that the instructions did not require the jury to consider. But those cases preceded this Court's decisive adoption of harmless-error review in *Chapman*, and, in any event, they involved trials in which the omitted (or misdescribed) element was subject to dispute, and reversal was therefore proper. Some of the Court's later cases contain similar indications (see *Sullivan*, *supra*; *Yates* v. *Evatt*, 500 U.S. 391 (1991)). But that reasoning stands in tension with a large body of this Court's harmless-error cases that mandate inquiry into whether the jury would have rendered the same verdict absent the constitutional error. That inquiry turns (and must turn) on what an appellate court concludes that a rational jury would have done if the error had not occurred. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986); *Crane* v. *Kentucky*, 476 U.S. 683 (1986); cf. *United States* v. *Bagley*, 473 U.S. 667 (1985). The latter form of inquiry better implements the values of harmless-error jurisprudence in this context, and should be followed here.

II. The federal crimes of mail fraud, wire fraud, and bank fraud do not contain an element of materiality. Those crimes require that the defendant devise a "scheme or artifice to defraud," but they contain no textual element of materiality. In light of the established principle that the elements of a federal criminal offense are subject to congressional definition and that the text of the statute is generally dispositive, there is no basis for importing a materiality

element where the text does not provide one. See *United States* v. *Wells*, 519 U.S. 482 (1997). That is particularly the case where, as here, this Court's decisions have never described mail fraud as requiring proof of materiality, and other federal statutes dealing with fraud do contain an explicit materiality element.

The argument to the contrary proceeds from the premise that Congress patterned the mail fraud statute (and its lineal descendants, the wire fraud and bank fraud statutes) on the common law, which, in criminal false pretenses and civil fraud cases, required proof of materiality. This Court, however, long ago rejected the argument that the mail fraud statute implicitly absorbed common-law restrictions. See *Durland* v. *United States*, 161 U.S. 306 (1896). Indeed, petitioner concedes that the common-law requirement of reliance is not an element of the offense. There is no persuasive evidence, in early mail fraud cases or legislative history, that supports a different result for materiality.

The essence of mail fraud is not that a victim be defrauded, or that it be reasonably likely that one would have been defrauded, but that the defendant devised a scheme by which he *intended* to defraud someone. The statute punishes the use of the mails with that intent, and it does not create a safe harbor for those whose schemes would not in fact succeed. Congress had good reason to make intent the key element in the offense, because that is the central factor that identifies culpability. There is no policy reason to require an extra-textual element of materiality to avoid punishing innocent behavior, and there is no ambiguity in the statute that triggers concern under the Due Process Clause or the rule of lenity. The federal fraud statutes are written broadly to protect victims and they should be enforced according to their terms.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE MATERIALITY ELEMENT OF THE TAX OFFENSE WAS HARMLESS ERROR

There is no dispute in this Court that the district court erred by instructing the jury that it could find petitioner guilty of falsely reporting his income on his tax returns, in violation of 26 U.S.C. 7206(1), without making a finding whether the false statements on the tax returns related to a "material matter."[1] J.A. 255-256. The issue in this case is whether that error compels the reversal of petitioner's convictions under Section 7206(1), even though the evidence of materiality was incontrovertible and petitioner did not dispute materiality at trial. The court of appeals correctly concluded that petitioner's Section 7206(1) convictions should be affirmed under those circumstances. Pet. App. 11a-13a.

A. An Instructional Omission Or Misdescription Of An Element Of An Offense Is Not Per Se Harmful Error

1. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also 28 U.S.C. 2111 ("On the hearing of any

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[1] Section 7206(1) provides that it is an offense to subscribe to a tax return under penalty of perjury when the taxpayer does not believe the return "to be true and correct as to every material matter." Although one court of appeals, in a 2-1 decision, has concluded that the materiality of false statements of income in a prosecution under Section 7206(1) presents a legal question for the court, see *United States* v. *Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996), the other courts of appeals that have addressed the issue have concluded that this Court's decision in *United States* v. *Gaudin*, 515 U.S. 506 (1995), requires submission of the materiality issue to the jury. See Pet. App. 11a (collecting cases). We do not press here any argument that the district court was correct in failing to submit the issue of materiality to the jury on the Section 7206(1) counts.

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."). This Court's decisions make clear that *all* errors in federal criminal proceedings are subject to the harmless-error inquiry mandated by Rule 52(a).[2] See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); *United States* v. *Lane*, 474 U.S. 438, 444-449 & n.11 (1986); cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (in plain-error case, rejecting claim that Court should carve out exception to Rule 52 for "structural errors"; Rule 52 "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. * * * Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.").

In general, in order to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings."[3] *United States* v.

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[2] If no proper objection is made in the district court, however, errors in criminal cases are reviewed on direct appeal under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993).

[3] When, as in this case, the error at issue is of constitutional dimension, see *Gaudin*, 515 U.S. at 509-510, 522-523, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the

Olano, 507 U.S. 725, 734 (1993); see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The Court has recognized, however, a narrow class of fundamental constitutional errors that are intrinsically harmful, requiring reversal under the harmless-error test even though they may have had no effect on the outcome of trial proceedings.[4] See, *e.g.*, *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)).

In several cases involving state convictions, this Court has referred to errors that are intrinsically harmful as "structural errors." See, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). More recently, the Court has suggested that this terminology has no place in cases, such as the present one, involving "direct appeals from judgments of conviction in the federal system." *Johnson*, 520 U.S. at 466. However the class of intrinsically harmful errors is denominated, the Court has emphasized that it is "very limited." *Id.* at 468. In a criminal prosecution, "if the defendant had counsel and was tried by an impartial adjudicator, there is a

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burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946).

[4] At times the Court has suggested that the harmless-error inquiry is wholly inapplicable to this class of errors. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991) (such errors "defy analysis by 'harmless-error' standards"). Given the Court's reiteration in *Johnson* that all errors in federal criminal proceedings are subject to Rule 52, 520 U.S. at 466, a more precise description is that reflected in this Court's decision in *Olano*: although all errors are subject to the harmless-error inquiry required by Rule 52, some errors are so fundamental as to be intrinsically harmful, *i.e.*, to affect substantial rights even if they have no effect on the outcome of the proceedings. 507 U.S. at 734-735.

strong presumption that any errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. See also *Fulminante*, 499 U.S. at 306 ("[M]ost constitutional errors can be harmless.").

This Court has found constitutional errors to be intrinsically harmful only where they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, 478 U.S. at 577. See also, *e.g.*, *Fulminante*, 499 U.S. at 309, 310 (errors that affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds"); *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988) ("Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("[S]ome constitutional errors * * * are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case."). The Court has found such error "only in a very limited class of cases." *Johnson*, 520 U.S. at 468. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

2. The type of error at issue here—an error in the jury instructions involving only a single element of an offense—bears no relation to the pervasive and fundamental errors that the Court has found intrinsically harmful. To paraphrase this Court's decision in *Rose*,

> [Petitioner] received a full opportunity to put on evidence and make argument to support his claim of

> innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged [materiality] instruction, the jury in this case was clearly instructed that it had to find [petitioner] guilty beyond a reasonable doubt as to every element of [subscribing to a false tax return]. * * * Placed in context, the erroneous [materiality] instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction.

478 U.S. at 579.

It therefore should not be surprising that this Court has refused to apply a rule of automatic reversal to such errors. In *Rose*, the trial court instructed the jury in a second-degree murder case that, unless the presumption was rebutted, malice is presumed solely from the fact that "a killing has occurred." 478 U.S. at 574. Although the Court assumed (*id.* at 576 n.5) that the instruction violated the defendant's constitutional right to have his guilt determined beyond a reasonable doubt by a jury, see *Sandstrom* v. *Montana*, 442 U.S. 510, 523-524 (1979), the Court held that such an error can be harmless under "*Chapman's* harmless-error standard." 478 U.S. at 582. In another unconstitutional-presumption case, *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), the trial court erroneously gave the jury instructions that "directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offense with which [the defendant] was charged," and that "relieved the State of its burden of * * * proving by evidence every essential element of [the] crime beyond a reasonable doubt." 491 U.S. at 266. The Court held that although the "instructions violated the Fourteenth Amendment," they were "subject to the harmless-error rule." *Id.* at 266. See also *Yates* v. *Evatt*, 500 U.S. 391, 404-405 (1991) (erroneous rebuttable presumptions can be harmless).

The Court has also approved application of the harmless-error doctrine to instructions that erroneously describe elements of the offense. In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the trial court erroneously instructed the jury that to find the defendant guilty in an obscenity case, it had to find that the material at issue lacked value under "community standards," as opposed to the "reasonable person" standard required by the First Amendment. *Id.* at 499-501. This Court nevertheless concluded that the unconstitutional misdescription of the element could be harmless "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the [defendant's material]." *Id.* at 503.

The Court has applied the same approach to omissions of features of a criminal offense. In *California* v. *Roy*, 519 U.S. 2, 3 (1996) (per curiam), the state trial court erroneously omitted to instruct the jury that it could convict the defendant as an aider and abetter only if it found that the defendant had the "intent or purpose" of aiding the principal's crime. *Id.* at 3 (emphasis omitted). The defendant ultimately sought federal habeas relief based on the instructional deficiency, and this Court held that "[t]he case before us is a case for application of the 'harmless error' standard." *Id.* at 5.[5] The Court therefore remanded the case for further proceedings to determine whether the error was harmless. *Id.* at 6.

The analysis in *Roy* is particularly relevant to this case. In *Roy*, the jury was not instructed that it needed to make a finding as to the existence of an intent to aid the principal. 519 U.S. at 3. As the Court pointed out, that error could with equal reason be "characterized as a misdescription of an

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[5] Because the defendant in *Roy* raised his claim in federal habeas proceedings, the claim was subject to the harmless-error standard enunciated in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), rather than to the stricter standard applicable to constitutional claims of error raised on direct appeal. See *Brecht*, 507 U.S. at 637. See also note 3, *supra*.

element of the crime," *i.e.*, the element of *mens rea*, or as the "omission" of an element of the crime, *i.e.*, the element of intent to aid the principal. *Id.* at 5 (internal quotation marks omitted). *Roy* illustrates that whether an instructional error takes the form of a "misdescription" of a broadly drawn element or as an "omission" of a narrowly drawn one turns on nothing more than the particular way in which a given set of instructions happens to divide the offense into elements and sub-elements. For example, the tax offense at issue here requires that the defendant subscribe to a tax return "which he does not believe to be true and correct as to every material matter." 26 U.S.C. 7206(1). Two leading jury-instruction treatises treat that requirement as a single element, of which materiality is a part, rather than treating materiality as an element in its own right. See 2 E. Devitt et al., *Federal Jury Practice and Instructions: Criminal* § 56.15, at 1019 (4th ed. 1990); 3 L. Sand et al., *Modern Federal Jury Instructions* ¶ 59.03, at 59-45, 59-50 (1998). As in *Roy*, therefore, the error in this case can easily be viewed as a misdescription of an element rather than the complete omission of one. Cf. *Johnson*, 520 U.S. at 469 ("The failure to submit materiality to the jury * * * can just as easily be analogized to improperly instructing the jury on an element of the offense."). In any event, as petitioner acknowledges (Br. 19), the difference between a misdescription and an omission is simply a matter of form, and the two forms of error are properly treated as identical in inquiring into harmlessness.

3. Relying on *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986), as well as several earlier decisions of this Court, petitioner contends that "[a]n incomplete jury verdict" can never be harmless. Br. 15, 17, 25 (citing *Cabana*, *United Bhd. Of Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947), and *Bollenbach* v. *United States*, 326 U.S. 607, 613-614 (1946)). In *Pope*, however, this Court expressly over-

ruled *Cabana* and earlier of its cases that could have been viewed as supporting petitioner's broad claim:

> To the extent that cases prior to *Rose* [v. *Clark*, 478 U.S. 570 (1986)] may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, *e.g.*, *Cabana*, * * *, after *Rose*, they are no longer good authority.

481 U.S. at 504 n.7.

More generally, the cases decided before *Chapman* are inapposite, because it was not until *Chapman* that the Court clearly rejected the argument that *all* constitutional errors are categorically immune from harmless-error review. See *Chapman*, 386 U.S. at 42 (Stewart, J., concurring) (until *Chapman*, Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'") (collecting cases). Consequently, the pre-*Chapman* decisions cited by petitioner lack the necessary "strong presumption" that a constitutional error can be rendered harmless if it does not contribute to the verdict obtained. *Rose*, 478 U.S. at 579.[6]

Furthermore, although the pre-*Chapman* cases cited by petitioner contain broad language, the element that was omitted or misdescribed in each case was contested and possibly outcome-determinative. See, *e.g.*, *Carpenters*, 330 U.S. at 408-409, 411-412 ("the necessity * * * for an instruction [on agency issue] is apparent" because, given parties' varying degrees of involvement in charged conduct, "the verdict might have resulted from the incorrect instruction," and, even with respect to defendants who did not object at trial, reversal was required because "[t]he erroneous charge was on a vital phase of the case"); *Bollen-*

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[6] We discuss below the post-*Chapman* cases upon which petitioner relies. See pp. 22-26, *infra*.

bach, 326 U.S. at 613-614 (where erroneous instruction in response to the jury's question on "a basic issue" in the case resolved a seven-hour jury deadlock within five minutes, "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous [instruction] given them as a guide"). Reversal in such circumstances is entirely consistent with our submission in this case, because an elemental omission or misdescription may be found harmless only where the reviewing court can conclude beyond a reasonable doubt that the error at issue did not affect the outcome of the proceedings, *i.e.*, where "the error complained of * * * [did not] contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

B. The Failure To Instruct The Jury On The Materiality Requirement Of The Tax Offense Was Harmless Because Materiality Was Undisputed And Supported By Incontrovertible Evidence

1. The district court's failure to instruct the jury on the materiality requirement of the tax offense was harmless error that did not "contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, because materiality was undisputed and supported by incontrovertible evidence. At trial, the government introduced evidence that petitioner failed to report on his personal income-tax return more than $1 million in income for 1985 and more than $4 million in income for 1986. Pet. App. 12a. Petitioner's defense at trial was that he reasonably believed that the unreported sums were not income. See J.A. 208-211, 235 (closing argument). Petitioner did not dispute that the unreported sums exceeded $5 million, and that if they were income they were material to a determination of the income tax he owed.[7] The evidence

[7] Specifically, petitioner introduced no evidence even arguably suggesting that his failure to report more than $5 million in income could be viewed as immaterial, and at no point in the proceedings has he suggested that acquittal could conceivably be proper on that ground. It is true, as

that petitioner failed to report such substantial income incontrovertibly demonstrates that the false statements on petitioner's 1985 and 1986 tax returns were material to a determination of his income-tax liability. See, *e.g.*, *United States* v. *Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989) ("any failure to report income is material") (citing cases).[8]

The harmless-error doctrine is rooted in the principle that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Van Arsdall*, 475 U.S. at 681. The doctrine reflects the further principle that "public respect for the criminal process" is promoted "by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Ibid.* Under those principles, the failure to submit the requirement of materiality to the jury was harmless error in this case. The trial in this case determined petitioner's guilt or innocence of the tax offenses. By its verdict of guilty, the jury necessarily found (1) that petitioner signed an income-tax return under penalty of perjury; (2) that on this return petitioner falsely reported his income in 1985 and 1986; (3) that the petitioner knew his statements were false; and (4) that petitioner made the statements purposely. See

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petitioner observes (Br. 22-23), that petitioner's failure to dispute the issue of materiality did not relieve the government of its obligation to prove materiality to the jury beyond a reasonable doubt. That observation, however, establishes no more than that the failure to instruct the jury on materiality in this case was error. The present issue is whether that error was harmless, and petitioner's failure to contest materiality is quite relevant to that issue.

[8] In general, a statement is material if it has "a natural tendency to influence, or [is] capable of influencing" the victim. *Gaudin*, 515 U.S. at 509. A number of the courts of appeals, including the court below, employ a particularized definition of "materiality" applicable to the offense of falsely subscribing to a tax return under 26 U.S.C. 7206(1). See Pet App. 12a ("Under § 7206(1), a 'material matter' is any information necessary to a determination of a taxpayer's income tax liability.") (citing cases).

J.A. 256. Further, the record evidence that petitioner failed to report over $5 million in income incontrovertibly establishes what the district court expressly found (J.A. 167) and what petitioner could not and did not dispute: that petitioner's massive misstatement of income was material to a calculation of his income-tax liability. See, *e.g.*, *United States* v. *Uchimura*, 125 F.3d 1282, 1287 (9th Cir. 1997) (jury's failure to determine materiality of defendant's substantial understatement of income on tax return did not justify reversal in plain-error case; "surely [the] omitted income was necessary to a determination of whether income tax was owed"), cert. denied, 119 S. Ct. 151 (1998).

A holding that the instructional error in this case does not mandate reversal would promote public respect for the criminal process, by giving effect to the underlying fairness of petitioner's trial. As this Court has recognized in conducting plain-error review of a forfeited claim of instructional error, where a trial judge fails to submit the element of materiality to the jury, but the element is "essentially uncontroverted at trial" and is supported by "overwhelming" evidence, the forfeited error does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 469-470 (internal quotation marks omitted). "Indeed, it would be the reversal of a conviction such as this which would have that effect. 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Ibid.* (quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)).

Because it is simply impossible to dispute the materiality of petitioner's failure to report $5 million in income on his tax returns, petitioner, if granted a retrial on the Section 7206(1) counts, surely would not use that trial as an opportunity to seek to persuade the jury that he should be acquitted on that basis. Rather, he seeks a retrial on those counts to obtain a second chance with a jury on the elements as to which the

jury at the first trial was properly instructed, and properly found petitioner guilty. Nothing in the Constitution requires that petitioner be given that unwarranted opportunity.

2. Petitioner nevertheless contends (Br. 14-15) that his conviction must be reversed because (he asserts) for a reviewing court to affirm a conviction by relying on incontrovertible evidence introduced against a defendant on an uncontested element would be tantamount to entering a directed verdict of guilty on an offense. Petitioner's contention is incorrect.

a. Petitioner's analogy to a directed verdict is inapt. If a trial court were to direct a verdict of guilty on an offense, the defendant's constitutional right to have the jury determine guilt would be completely abrogated. See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). The complete deprivation of that basic right is comparable to the other "fundamental and pervasive" constitutional errors that the Court has found to be intrinsically harmful. *Van Arsdall*, 475 U.S. at 681. "Where that right [to a jury trial] is *altogether* denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578 (emphasis added).

The situation in this case is quite different. Petitioner received a fair trial, full jury consideration of his defense, and a formal jury verdict under instructions that specified the proper burden of proof and correctly defined every element except one that he did not contest and could not conceivably have contested. The error in the case is not that the wrong entity judged petitioner guilty; rather, it is that the entity that judged him guilty did so under incorrect instructions. It is true that the error "alter[ed] the terms under which the jury considered [petitioner's] guilt or innocence, and therefore * * * theoretically impair[ed] [his] interest in having a jury decide his case." *Rose*, 478 U.S. at 582 n.11. But the same is true of "other errors that may

have affected either the instructions the jury heard or the record it considered—including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness." *Ibid.* The defendant's Sixth Amendment right to a jury trial does not "forbid[] a reviewing court to decide the impact of [such errors] on the outcome" of the trial. *Ibid.*[9]

b. Petitioner relies heavily (Br. 14-17, 21, 25-29) on this Court's holding in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), that a constitutionally defective reasonable-doubt instruction can never be harmless. The holding of *Sullivan* is entirely consistent with our submission in this case. The erroneous reasonable-doubt instruction in *Sullivan* "vitiate[d] *all* the jury's findings." 508 U.S. at 281 (emphasis in original). It therefore fits within the narrow category of constitutional errors that "are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Van Arsdall*, 475 U.S. at 681. In contrast, the instructional omission or misdescription of a single element does not "vitiate[] *all* the jury's findings," *Sullivan*, 508 U.S. at 281, and the holding of

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[9] There is no novelty in the conclusion that a complete deprivation of the right to jury trial on an offense is necessarily harmful, while errors that have a less pervasive impact on the jury's consideration of an offense may be harmless. This Court has recognized in other contexts that the *degree* of a constitutional error can determine whether the error can ever be harmless. See *Satterwhite*, 486 U.S. at 256-257 (although "Sixth Amendment violations that *pervade the entire proceeding*" cannot be harmless, case-specific inquiry into harmlessness is appropriate "where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial") (emphasis added); compare *Gideon*, 372 U.S. 335 (total denial of counsel mandates reversal in all cases), with *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (ineffective assistance of counsel requires showing of "reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt").

Sullivan does not draw into question this Court's cases establishing that such an error can be harmless. See pp. 14-16, *supra*.

Petitioner also relies (Br. 25-26), however, on a particular line of reasoning utilized in *Sullivan*. In holding that constitutionally defective reasonable-doubt instructions are necessarily harmful, the Court in *Sullivan* explained that, when such an error occurs, "there has been no jury verdict within the meaning of the Sixth Amendment," and therefore "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." 508 U.S. at 280. Petitioner argues that this reasoning should be extended to cases, such as this one, in which the jury is erroneously instructed on an element of an offense. That extension of *Sullivan* would be unwarranted.

The verdict of a jury in a criminal case is the product of the evidence placed before the jury and the instructions given to the jury about relevant legal principles, including the burden of proof, the elements of the charged offense, and the proper assessment of evidence. Whenever there is a constitutional error involving any of those components—evidentiary or instructional—it could be said that the resulting verdict is not the kind of verdict required by the Constitution, and thus that there is essentially no verdict upon which to conduct an inquiry into harmlessness.[10] The

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[10] That figure of speech can be applied equally to evidentiary and instructional errors. For example, in a case in which the defendant was unconstitutionally prohibited from presenting some or all of the admissible evidence in his defense, one could say that the jury's verdict of guilty was no verdict at all, in the sense the Constitution requires, because the Constitution presupposes a verdict of guilt based not only on the government's evidence but also on the constitutionally admissible defense evidence. Cf. J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. Rev. 819, 848 (1994) ("Put another way, the verdict is no more valid when the jury finds guilt beyond a reasonable doubt

availability of that figure of speech, however, is not a sufficient basis upon which to conclude that a given error is automatically harmful. To the contrary, "there is a strong presumption" that constitutional errors "alter[ing] the terms under which the jury considered the defendant's guilt or innocence," *Rose*, 478 U.S. at 579, 582 n.11, can be harmless, and only a "limited category" of "fundamental and pervasive" errors are automatically harmful, *Van Arsdall*, 475 U.S. at 681-682.

Sullivan reflects the judgment that the failure to instruct a jury properly on the requirement of guilt beyond a reasonable doubt is error so fundamental and pervasive that it "vitiates" the jury's entire verdict in way that forecloses any case-specific inquiry into harmless error. 508 U.S. at 281. That judgment is fully consistent with this Court's repeated holding that instructional errors affecting the definition of a single element are properly subject to a case-specific inquiry into harmlessness.

C. Harmless-Error Review Of Undisputed And Incontrovertible Omitted Elements Does Not Exceed The Proper Role of An Appellate Court

Petitioner contends that the absence of a jury finding on materiality forecloses affirmance in this case, because "[t]he [harmless-error] inquiry * * * is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was surely unattributable to the error." Br. 11-12 (quoting *Sullivan*, 508 U.S. at 279 (emphasis supplied by petitioner)). He further argues (Br. 28) that appellate courts are not constitutionally competent to conduct harmless-error review based on what the jury would have found absent the error. There is support in some of this

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without considering admitted evidence likely to have affected its level of doubt, than when the jury finds guilt despite possibly having reasonable doubts.").

Court's instructional error cases for the conclusion that, in conducting harmless-error review, it is never appropriate to determine what a jury would necessarily have found in the absence of an error, as distinguished from what the jury actually did find despite that error. But other lines of this Court's harmless-error jurisprudence authorize just such an inquiry. We submit that the proper resolution of this tension is to hold that an appellate court can find an instructional omission harmless when it can conclude beyond a reasonable doubt that the element was uncontroverted and established by overwhelming proof, such that the jury verdict would have been the same absent the error.

1. In *Sullivan*, 508 U.S. at 280, the Court stated that an error cannot be deemed harmless where "[t]he most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error." In this case, the jury did enter a verdict of guilty beyond a reasonable doubt on the tax offenses, and that verdict would surely not have been different if the jury had been required to make a finding on materiality. *Sullivan* suggests, however, that the absence of a direct finding of materiality by the jury is necessarily fatal, because "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action."[11] *Ibid.*

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[11] *Sullivan* does acknowledge that a reviewing court may affirm, despite an error affecting the jury's finding on an element of an offense, if "no rational jury could find" what the jury found on the elements properly submitted to it "without also finding" for the government on the improperly instructed element. 508 U.S. at 281 (internal quotation marks omitted). In such circumstances, the Court explained, the jury's findings are "functionally equivalent to finding the [improperly instructed] element." *Ibid.* As we explain *infra*, note 14, the jury's findings in this case on the properly instructed elements of the tax offense are in the same sense "functionally equivalent" to a finding of materiality.

Similarly, in *Yates* v. *Evatt*, the Court stated that, in conducting harmless-error review of an erroneous burden-shifting presumption, reviewing courts must limit their consideration of the record to evidence that the jury could and would have considered under the instructions it received on the element in question. 500 U.S. at 405-406, 409. A logical extension of that reasoning would mean that harmless-error review in light of the record evidence is virtually impossible when the jury instructions entirely omit an element, because the jury instructions would not have authorized consideration of the evidence, insofar as it was relevant to that element, at all.

Neither *Sullivan* nor *Yates* involved the failure to instruct the jury on an element of an offense that was undisputed and incontrovertible. But the approach reflected in those cases does provide support for petitioner's claim that his convictions on the tax offenses cannot properly be affirmed on the ground that he would certainly have been convicted at trial if the jury had been instructed on materiality. There is, however, a substantial body of contrary authority from this Court, holding that it can be appropriate to affirm a conviction on the ground that the defendant would certainly have been convicted at trial if the error at issue had not occurred. See, *e.g.*, *Hasting*, 461 U.S. at 510-511 ("The question a reviewing court must ask is this: absent [the constitutional error at issue,] is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"). For reasons discussed below, this Court should adhere to that principle in the present setting. And under that approach, petitioner's tax convictions should properly be affirmed, because there can be no doubt that the jury would still have found petitioner guilty if it had been instructed on the undisputed element of materiality.

2. The claim that it is never permissible to look to whether the jury's verdict would have been the same in the absence of the challenged error cannot logically be squared

with this Court's cases holding that the unconstitutional exclusion of defense evidence can be harmless. For example, it can be harmless error for a trial court to violate the Confrontation Clause by erroneously denying the defendant an opportunity to elicit impeaching testimony on cross-examination of a prosecution witness. *Van Arsdall*, 475 U.S. at 680-684. See also, *e.g.*, *Coy* v. *Iowa*, 487 U.S. 1012, 1021-1022 (1988) (denial of right to face-to-face confrontation of witness can be harmless); *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986) (unconstitutional exclusion of evidence relating to reliability of defendant's confession can be harmless error). In such cases, the jury that actually decided the case never heard the excluded evidence, and thus it is impossible to determine the actual effect of the error on that jury. Rather, the inquiry necessarily must be whether it is clear beyond a reasonable doubt that a rational jury would have found guilt had the excluded evidence been placed before it.

A similar harmless-error analysis must occur when the jury hears evidence that the Constitution demands be excluded. A reviewing court cannot be certain whether the jury actually relied on the unconstitutionally admitted evidence or instead on the properly admitted evidence. But harmless-error review can ask whether the verdict is the same as that which would have resulted in the absence of the inadmissible evidence. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 231 (1973) (admission of confessions of non-testifying co-defendants, in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), harmless because independent evidence of guilt was overwhelming); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972) (admission of defendant's unlawfully obtained confession harmless because jury "was presented with overwhelming evidence of * * * guilt"); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972) (*Bruton* violation harmless because "minds of an average jury would not have found the State's case significantly less persuasive" in absence of co-defendant's confession) (internal quotation

marks omitted); *Harrington* v. *California*, 395 U.S. 250, 253-254 (1969) (same).[12]

Those forms of harmless-error inquiry are essentially like the inquiry required in the present case: in each situation, the reviewing court must determine how a reasonable jury *would have* rendered its verdict absent error. When the reviewing court can be confident beyond a reasonable doubt that the error would not have altered the jury's verdict, the error should be held harmless. Where that degree of confidence does not exist, reversal is appropriate.

There is therefore no merit to petitioner's claim (Br. 28) that it is outside the judicial province and competence to inquire into what a reasonable jury would have done absent an error. In addition to the contexts discussed above, the Court has directed that such an inquiry be conducted in other settings as well. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667, 684 (1985) (prosecutor's failure to disclose exculpatory evidence violates Due Process Clause if "there is a reasonable probability" that, had the evidence been disclosed, "the result of the trial would have been different"); *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (Sixth Amendment claim of ineffective assistance of counsel requires showing of "reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt"). Indeed, in the plain-error context, this Court has made clear that where the evidence is undisputed and incontrovertible, the failure to submit an element to the jury cannot have affected the verdict and does not warrant reversal. In *Johnson*, 520 U.S. at 470, the Court held that, where the defendant does not properly object at trial, a reviewing court may find that the unconstitutional failure to

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[12] Although petitioner implies (Br. 27) that this line of authority was overruled by *Sullivan*, that is incorrect. Nothing in the unanimous opinion in *Sullivan* suggests—implicitly or otherwise—that the Court was overruling any of its prior decisions. See 508 U.S. at 276-282.

submit materiality to the jury does not call into question the fairness, integrity, or public reputation of judicial proceedings provided that proof of materiality was "overwhelming" and "essentially uncontroverted."

Petitioner also errs in suggesting (Br. 16) that the inquiry into what a reasonable jury would have done in the absence of an error is inherently more likely to call for impermissible speculation than is the inquiry into whether an error in fact had an effect on the actual jury. Because a reviewing court is normally unable to "retrace the jury's deliberative process," *Pope*, 481 U.S. at 503 n.6, the inquiry into the effect of an error on the actual jury necessarily collapses into the reviewing court's judgment of the likely effect of the error on a reasonable jury. That judgment can in many cases be substantially more difficult than the conclusion in the present case that no reasonable jury could have found petitioner's failure to report over $5 million in income immaterial. See, *e.g.*, *Milton*, 407 U.S. at 372-373 (in light of overwhelming evidence, affirming defendant's conviction notwithstanding erroneous admission of confession by defendant).

3. This Court has, in fact, endorsed harmless-error review for instructional errors where the jury did not itself make a finding on an omitted or misdescribed element. In *Pope*, the jury was erroneously instructed that it could convict the defendant of an obscenity offense if it found that the materials at issue lacked value under a community standard, rather than under the objective "reasonable person" standard required by the First Amendment. 481 U.S. at 499-501. There was no reason in *Pope* to believe that the jury had considered whether the materials at issue were objectively valueless, much less that it made a finding on the point. *Id.* at 503 n.6. The Court nevertheless held that the conviction in *Pope* should properly be affirmed "if a reviewing court concludes that no rational juror, if properly instructed, could find value" in the material at issue. *Id.* at

503. See also *id.* at 503 n.6 (conviction should be affirmed if "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same").

Similarly, in *Rose*, the jury was improperly instructed to presume malice simply from the fact that a killing had occurred. 478 U.S. at 574. Although the jury was also told that this presumption was rebuttable, there was no reason to believe that the jury's guilty verdict reflected an independent finding of malice properly defined, rather than a finding that a killing had occurred and that the consequent inference of malice had not been rebutted. See *Pope*, 481 U.S. at 503 n.6 (*Rose* was not "based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice"). Despite the absence of a proper finding on the element of malice, the Court held that the error could be harmless if, in the circumstances of the case, the jury's finding that the defendant committed the killing "conclusively establish[ed] [intent], so that no rational jury could find that the defendant committed the [killing] but did not *intend* to cause injury."[13] *Rose*, 478 U.S. at 580-581.

Pope and *Rose* do differ from this case in that the jury here did not deliberate on the materiality element at all, while the jury in those cases did deliberate on the element at

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[13] There is a passage in *Rose* stating that constitutional errors may be found harmless if the "reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." 478 U.S. at 579. That passage could be understood to suggest that a constitutional error is harmless whenever the reviewing court determines that the evidence at trial was sufficient to support the defendant's conviction. The Court has subsequently disavowed that specific passage, see *Yates*, 500 U.S. at 403 n.8, while making clear that *Rose* remains good law. See, *e.g.*, *Johnson*, 520 U.S. at 469 (relying on *Rose*); *Sullivan*, 508 U.S. at 279-281 (same).

issue, albeit under inadequate instructions. See, *e.g.*, *Rose*, 478 U.S. at 580 n.8 (noting that, in that case, the element was not entirely removed from the jury). But that distinction cannot constitute a watershed in harmless-error analysis. In *Pope*, for example, harmless-error review entailed consideration of what the jury would have found on the improperly presented element *if* it had deliberated on the issue; there was no jury finding on the relevant "reasonable person" standard at all. Nor does that distinction explain *Rose*. It is possible to understand *Rose* as involving a somewhat different form of harmless-error analysis than that at issue here, *i.e.*, an analysis that permits affirmance when, given the jury's findings on the matters it did consider, no rational jury could have failed to find the omitted or misdescribed element. See *Rose*, 478 U.S. at 580-581; *Sullivan*, 508 U.S. at 280-281. That analysis differs only in form, however, from a case in which the jury makes no findings on a particular issue or element.[14] In either instance, a reviewing court must ask what a rational jury would have done based on the evidence at issue in the case, even though the jury did not make a proper finding on an element of an offense.

Acceptance of petitioner's broad thesis that such a question is always impermissible would have sweeping consequences for this Court's jurisprudence. Petitioner's view

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[14] In *Rose* itself, for example, the question was whether the jury's findings on the circumstances of the killing were such that no rational jury that found the killing could have failed to find malice (*i.e.*, intent to inflict serious bodily injury). The extrapolated finding on malice is not one that the jury necessarily made (since the instructions did not require it to do so), but is one that it rationally should have made had it considered the issue. The same is true in this case. No jury that found that petitioner falsely understated his income on his tax returns (by millions of dollars) could rationally have found that those misstatements were immaterial. Thus, affirmance would be proper in this case even under the more restrictive "functional equivalence" test that this Court endorsed in *Sullivan*, 508 U.S. at 280-281.

(Br. 29) that "appellate courts [cannot be given] even the slightest latitude to review the record to 'fill the gaps' in a jury verdict, as 'minor' as those gaps may seem," would mandate reversal not only for total omissions of an element, such as the pre-*Gaudin* omission of materiality in this case. It would also mandate reversal for virtually any error in defining the elements of the offense. After all, any mis-description that rises to the level of constitutional error would appear necessarily to defeat the jury's ability to render a finding on the issue. And given the complexity of many federal crimes and the severe time pressures under which trial courts must often formulate jury instructions, the category of reversals required would be large indeed. Even the logical extrapolation from jury findings endorsed in *Rose* and *Sullivan* would be barred under petitioner's approach.

That would not be the only ramification of petitioner's theory. Taken to its logical conclusion, petitioner's premise (Br. 12) that courts may not inquire into what a rational jury would have done in the absence of the error would require reconsideration of the many cases in which this Court has directed that precise method of harmless-error analysis. See pp. 26-29, *supra*. In each of those cases, there is (as here) a general jury verdict, but the verdict may be tainted by constitutional error in ways that cannot be empirically known. Harmless-error inquiry in those contexts necessarily must decide, not what the jury actually did, but what a rational jury would have done based on the record at issue.

Petitioner's submission should be rejected. Although the jury instructions in this case did not produce a finding on materiality for the tax offenses, they did require findings on all of the elements on which petitioner could have based, and did base, his defense, and they resulted in a general verdict of guilty. Reversal based on the jury's failure to consider an issue on which there was, and could be, no dispute, serves no sufficient purpose, for the verdict would have been the same absent the error. The error was therefore harmless, and

petitioner's convictions on the tax offenses should be affirmed.[15]

II. MATERIALITY IS NOT AN ELEMENT OF THE FEDERAL MAIL FRAUD, BANK FRAUD, AND WIRE FRAUD STATUTES

A. The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Have No Textual Requirement of Materiality

1. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Thus, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Applying that principle, this Court recently held in *United States* v. *Wells*, 519 U.S. 482 (1997), that the crime of "knowingly mak[ing] any false

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[15] Because the court of appeals found that materiality was not an element of the offenses of mail fraud, wire fraud, and bank fraud, Pet. App. 6a-9a, it did not reach the question whether any error in the instructions on those counts was harmless. The United States argued below that the failure to submit materiality to the jury on the numerous fraud counts was harmless, if error, because proof of materiality was overwhelming and petitioner did not dispute materiality at trial. Gov't Second Supp. C.A. Br. 16-34. Petitioner contended that proof of materiality as to those charges was neither overwhelming nor undisputed. See Pet. C.A. Supp. Reply Br. 10-18, 21. The court of appeals did not resolve those fact-intensive issues. If the Court were to hold that materiality is an element of the fraud offenses, it would be appropriate to remand the case for further proceedings on the issue of harmless error. The precise scope of any such proceedings would turn in part on the Court's ruling in this case on the harmlessness of the error on the tax offenses. Such proceedings would in any event present the question whether any error on the fraud offenses was harmless in light of the jury's findings on the elements properly submitted to it. See Gov't Supp. C.A. Br. 9-10; Gov't Second Supp. C.A. Br. 20-21, 23-24, 27, 31, 34.

statement or report" to a federally insured financial institution, 18 U.S.C. 1014, contains no materiality requirement. The cornerstone of that holding was the Court's observation that "[n]owhere does [the statute] * * * say that a material fact must be the subject of the false statement or so much as mention materiality." 519 U.S. at 490.

What was true of Section 1014 in *Wells* is equally true of the statutes at issue here, which require that the defendant devise or intend to devise a scheme or artifice to defraud, but do not require that the artifice or scheme employ *material* falsehoods.[16] See 18 U.S.C. 1341, 1343, 1344.

The absence of an explicit requirement of materiality in the mail fraud, wire fraud, and bank fraud statutes is particularly telling because Congress has enacted other statutes punishing fraudulent conduct that do contain express materiality requirements. See, *e.g.*, 21 U.S.C. 843(a)(4)(A) (furnishing of "false or fraudulent material information" in documents required under federal drug abuse laws); 26 U.S.C. 6700(a)(2)(A) (statement with respect to investment tax benefits that person "knows or has reason to know[] is false or fraudulent as to any material matter"). In

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[16] The mail fraud statute was enacted in 1872 as part of the recodification of the postal laws. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The wire fraud statute, which was enacted in 1952, parallels in relevant part the language of the mail fraud statute. See 18 U.S.C. 1343. The bank fraud statute, which was enacted in 1984, was modeled on the mail fraud and wire fraud statutes. S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983). Although the bank fraud statute is worded slightly differently from the other two provisions, using the phrase "executes, or attempts to execute" in place of "having devised or intending to devise," we agree with petitioner (Br. 30-31 n.13) that the three provisions should be interpreted consistently. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987) (applying "same analysis" to mail fraud and wire fraud statutes because they "share the same language in relevant part"). For ease of reference, we refer in this brief to the requirements of the provisions using the precise wording of the mail fraud statute, upon which the other two provisions were modeled.

light of Congress's express inclusion of a materiality requirement in other fraud statutes, the absence of the term "material" from the mail fraud, wire fraud, and bank fraud statutes "speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

2. Just as there is no mention of materiality in the statutory text, so too there is no mention of materiality in this Court's decisions describing the elements of mail fraud. In construing the mail fraud statute in 1895, the Court noted that "three matters of fact must be charged in the indictment and established by the evidence":

> (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the post office establishment * * *. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.

Stokes v. *United States*, 157 U.S. 187, 188-189 (1895).

Congress amended the mail fraud statute in 1909,[17] deleting the second element of the offense set forth in *Stokes*, and expanding the prohibited "scheme[s] or artifice[s]" to include expressly those "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. Shortly after that amendment, the Court again enumerated

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[17] The original 1872 mail fraud statute was first amended in 1889 to make express provision for certain specific schemes of the period that are not relevant here. See Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873. Much of the language added in 1889 was deleted "in 1948 in an amendment (Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763) designed to remove surplusage without changing the meaning of the statute. See H.R. Rep. No. 304, 80th Cong., 1st Sess., A100 (1947)." *McNally* v. *United States*, 483 U.S. 350, 357 n.6 (1987).

the elements of mail fraud, and again made no mention of materiality:

> [T]he elements of an offense under [the mail-fraud statute] are (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and, (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment.

United States v. *Young*, 232 U.S. 155, 161 (1914); see also *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) (same).

B. The Mail Fraud, Wire Fraud, and Bank Fraud Statutes Do Not Incorporate All Of The Elements Of A Common-Law Cause Of Action

1. Petitioner contends (Br. 32-38) that, despite the absence of any mention of materiality in the mail fraud, wire fraud, and bank fraud statutes, this Court should impute such a requirement because materiality is an element of the common-law tort of fraudulent misrepresentation and of the crime of false pretenses. It is true that civil common-law actions founded on fraudulent misrepresentations typically "require[] a *material* misrepresentation or omission." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996); see also *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (a "misrepresentation must be of something material"); 1 J. Story, *Commentaries on Equity Jurisprudence* § 195, at 220 (13th ed. 1886) (in court of equity, fraud requires material misrepresentation). Similarly, the substantive crime of obtaining money or property by false pretenses typically requires proof of materiality. See, *e.g.*, *Woodbury* v. *State*, 69 Ala. 242, 245-246 (1881); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.7(b)(4), at 386 (1986). It is also true that courts generally "presume that Congress incorporates the common-law meaning of the terms it uses if those terms . . .

have accumulated settled meaning under . . . the common law and the statute does not otherwise dictate." *Wells*, 519 U.S. at 491 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992)). Thus, if the language of the mail fraud, wire fraud, and bank fraud statutes indicated that Congress had codified the crime of false pretenses or one of the common-law torts sounding in fraud, petitioner might have a persuasive argument that the statutes should be interpreted to include all of the common-law elements of the crime or tort at issue, including materiality.

The language of the provisions at issue demonstrates, however, that Congress did not enact a common-law tort sounding in fraud or the crime of false pretenses. The mail fraud statute, for example, extends broadly to those who use the mails "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. As this Court held over 100 years ago, the phrase "scheme or artifice to defraud" reaches well beyond those actions sustainable at common law or under the crime of false pretenses. See *Durland* v. *United States*, 161 U.S. 306 (1896). In *Durland*, a defendant challenged his conviction under the mail fraud statute on the ground that "the statute reaches only such cases as, at common law, would come within the definition of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future." *Id.* at 312. In construing the phrase "any scheme or artifice to defraud" for the first time, the Court held that "[t]he statute is broader than is claimed. Its letter shows this." *Id.* at 313. Accord *McNally* v. *United States*, 483 U.S. 350, 356 (1987) (under *Durland*, the phrase "scheme or artifice to defraud" is "to be interpreted broadly insofar as property rights are concerned").

In determining the scope of the statute, the *Durland* Court did not, as petitioner suggests (Br. 42-43) simply look

to the common-law meaning of "fraud." Rather, it looked to "the letter of the statute" and "the evil sought to be remedied." 161 U.S. at 313. In so doing, the Court concluded that it is "the intent and purpose" of the defendant, rather than the precise nature of the misrepresentation, that is central to the offense of mail fraud: "It was with the purpose of protecting the public against *all such intentional efforts to despoil*, and to prevent the post office from being used to carry them into effect, that this statute was passed." *Id.* at 313-314 (emphasis added).

Durland establishes that the mail fraud statute is not a codification of the common law of fraud or the crime of false pretenses. What is required under the mail fraud statute is not that someone actually be defrauded, but rather that the defendant use the mails in connection with a scheme that he has devised, or intends to devise, through which he *intends* to defraud someone.[18] See, *e.g.*, *United States* v. *Stewart*, 872 F.2d 957, 960 (10th Cir. 1989) ("It is well established * * * that an offense under § 1341, unlike common law fraud, does not require successful completion of the scheme to defraud."); *United States* v. *Groves*, 122 F.2d 87, 90 (2d Cir.) (argument that mail fraud statute cannot be "more extensive than the common-law action for deceit * * * must fail [because] * * * the statute is not limited to what would give rise to a civil action"), cert. denied, 314 U.S. 670 (1941); *United States* v. *Loring*, 91 F. 881, 887 (N.D. Ill. 1884) (Mail fraud "need not * * * be a fraud either at common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money."); M. Taylor, *The Law of*

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[18] As this Court has explained, the words "'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). The words also extend to schemes to defraud others of "the intangible right of honest services." 18 U.S.C. 1346.

Postal Frauds & Crimes 184 (1931) ("scheme" to defraud requires only "the formation of a plan, device, or trick to perpetrate a fraud on another," not actual obtaining of money or property by fraud).[19]

2. Thus, for example, one of the elements of common-law fraud and of false pretenses was reliance by the victim on the defendant's false representation. See *Smith*, 38 U.S. (13 Pet.) at 39; Restatement (Second) of Torts §§ 525, 531, 537 (1977); 1 J. Story, *Commentaries* §§ 191, 195, at 204, 220; 2 J. Bishop, *Commentaries on the Criminal Law* § 461, at 253-254 (5th ed. 1872). As petitioner concedes, however (Br. 36 n.18), reliance is not an element of mail fraud, wire fraud, or bank fraud.[20] See, *e.g.*, *United States* v. *Griffith*, 17 F.3d 865, 875 (6th Cir.) ("detrimental reliance is not one of the two elements of wire fraud"), cert. denied, 513 U.S. 850 (1994); *Stewart*, 872 F.2d at 960 ("[U]nder [the mail fraud statute,] * * * the government does not have to prove actual reliance upon the defendant's misrepresentations.").

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[19] Because the mail fraud, wire fraud, and bank fraud statutes extend to "scheme[s] or artifice[s]" *intended* to defraud, and are not limited to completed frauds or the actual obtaining of money or property by false pretenses, petitioner's argument is not advanced by his citation (Br. 32-37) of numerous cases holding that materiality is required to make out the elements of the crime of false pretenses or of various common-law tort or contract doctrines sounding in fraud.

[20] Similarly, although a civil action for fraud could not succeed without proof of damage, the mail fraud, wire fraud, and bank fraud statutes impose no such requirement. Compare *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir.) (L. Hand, J.) ("civilly, of course, the mail fraud statute would fail without proof of damages, but that has no application to criminal liability"), cert. denied, 286 U.S. 554 (1932), and *United States* v. *McKay*, 45 F. Supp. 1007, 1012 (E.D. Mich. 1942) ("at common law damage to the victim is an essential element * * * [b]ut under the Mail Fraud Statute a showing of loss to the victim is not in any way essential"), with 1 J. Story, *Commentaries* § 203, at 227 (victim of civil fraud "must have been misled to his prejudice or injury").

There is no more reason to impute a materiality requirement into the phrase "scheme or artifice to defraud" than there is to impute a requirement of reliance or damages. As *Durland* makes clear, the essence of mail fraud, wire fraud, and bank fraud is the intent to defraud, and a person thus cannot commit those crimes without at least *intending* that his fraudulent scheme cause the victim to part with money, property, or some other interest. There is no basis to impose the additional requirement that the scheme the defendant devised or intended to devise was objectively material, *i.e.*, in fact had "a natural tendency to influence, or [was] capable of influencing" the victim. *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995).

3. Relying on an analogy to the law of criminal attempt, petitioner suggests (Br. 36 n.18) that a requirement of materiality should be read into the statutes at issue even though reliance concededly should not. Petitioner's analogy is misplaced. The mail fraud statute, for example, applies by its terms to those who "devise[] or intend[] to devise" a scheme or artifice to defraud, and who use the mails "for the purpose of executing such scheme or artifice or attempting to do so." 18 U.S.C. 1341. That language is fully applicable to a defendant who intends to defraud someone, and who uses the mails in an effort to advance his scheme, but whose scheme turns out in the particular circumstances to lack the natural tendency to influence, or the capability of influencing, the intended victim. Nothing in the language of the mail fraud provision requires that the defendant's scheme amount to attempted fraud or false pretenses. The scope of the provision in that respect therefore does not properly turn on principles derived from the law of criminal attempt.[21]

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[21] The wording of the wire fraud statute is identical in pertinent respects to that of the mail fraud statute. See 18 U.S.C. 1343. The bank fraud statute is worded slightly differently, see 18 U.S.C. 1344; see also

In any event, when a defendant intends to defraud another but devises a scheme that in the circumstances turns out to be immaterial to its intended victim, he is properly viewed as having attempted to commit fraud or false pretenses. It is no defense to a charge of criminal attempt that the means the defendant chose to commit the completed offense turned out in the circumstances to be inadequate. See, *e.g.*, Model Penal Code § 5.01 cmt. 3(a), at 311-312 (1985) (discussing, *inter alia*, case in which defendant attempted to kill using poison incapable of producing death). See generally *United States* v. *Hsu*, 155 F.3d 189, 202-203 & n.19 (3d Cir. 1998) (weight of federal authority follows Model Penal Code approach to principles of criminal attempt). Nor should it be a defense to a charge of attempted fraud that the defendant's deceptive scheme, though intended to defraud, turned out in the circumstances to be incapable of deceiving, or unimportant to, the intended victim. Cf. Model Penal Code § 5.01 cmt. 3(c), at 318 n.92 (defendant who sought to suborn perjury properly guilty of attempted subornation even if false testimony sought turned out to be immaterial; criticizing contrary view reflected in early state decision as resting on incorrect view that materiality is matter of law). Put differently, a defendant who intends to defraud but uses inadequately deceptive means is properly viewed as guilty of attempted fraud for the precise reason that petitioner identifies (Br. 36 n.18): if the scheme had worked as intended, the defendant would have defrauded his victim.

4. Although petitioner claims (Br. 45) that "during the critical period when the mail fraud statute was adopted and revised, the statute was understood by this Court and by the lower courts * * * to include the established element of materiality," that claim is incorrect.

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note 16, *supra*, but its essential focus on the formation of a "scheme" is the same.

Far from endorsing a materiality requirement, this Court in *Durland* held that the mail fraud statute extended beyond the common law of false pretenses, and was intended to protect against all "intentional efforts to despoil" through use of the mails. 161 U.S. at 313-314. And in the three cases in which it has listed the elements of mail fraud, the Court has never mentioned a requirement of materiality. See *Pereira*, 347 U.S. at 8; *Young*, 232 U.S. at 161; *Stokes*, 157 U.S. at 188-189.

The handful of lower-court cases cited by petitioner (Br. 42-45) are not to the contrary. Several make clear that material misrepresentations are sufficient to make out a mail fraud violation, but do not hold that materiality is required. See, *e.g.*, *Harris* v. *Rosenberger*, 145 F. 449, 453 (8th Cir. 1906). Others are ambiguous at best. See, *e.g.*, *Brooks* v. *United States*, 146 F. 223, 227 (8th Cir. 1906) (mail fraud statute contemplates "any scheme * * * provided only it was designed and reasonably adapted to deceive and defraud"; "[i]f the intent and purpose is to deceive and defraud the unwary, it matters not what form the project is made to take"). And others address issues distinct from materiality, notwithstanding petitioner's effort to recast them as cases that in essence impose a requirement of materiality. See, *e.g.*, *Harris*, 145 F. at 455 (addressing so-called "puffing" exception, discussed p. 46, *infra*). See also *United States* v. *Fay*, 83 F. 839, 839 (E.D. Mo. 1897) (cited in amicus American Council of Life Insurance, et al. (ACLI) Br. 29) (imposing requirement, discussed pp. 47-48, *infra*, that scheme be "reasonably adapted to deceive persons of ordinary prudence").

What is most noteworthy about the cases cited by petitioner is that not one of them expressly holds that materiality is an element of mail fraud. Petitioner's failure to locate even a single early case containing such an express holding is strong evidence that the mail fraud statute was not understood to impose such a requirement. In fact, the sole early

case we have located that expressly decided the question holds that materiality is not an element of mail fraud. *McCarthy* v. *United States*, 187 F. 117, 118 (2d Cir. 1911).[22] Thus, contrary to petitioner's assertion, the early history of the mail fraud statute refutes rather than supports the claim that materiality is an implied element of the mail fraud, wire fraud, and bank fraud statutes.

C. There Is No Persuasive Policy Justification For Imputing A Materiality Requirement To The Mail Fraud, Wire Fraud, And Bank Fraud Statutes

1. There is no persuasive policy justification for grafting a materiality requirement onto the mail fraud, wire fraud, and bank fraud statutes. Contrary to the contention of amicus ACLI (Br. 24-25), each of the statutes contains a distinctive intent requirement that effectively narrows the scope of deceptive conduct reached by the statute. The mail fraud and wire fraud statutes reach only "scheme[s] or artifice[s]" to "defraud" or to "obtain[] money or property" by deceptive means. 18 U.S.C. 1341, 1343. Similarly, the bank fraud statute punishes only "scheme[s] or artifice[s]" to

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[22] In *McCarthy*, the defendant requested an instruction that the jury was required to find "that material false and fraudulent representations are contained in the case." 187 F. at 118 (internal quotation marks omitted). The district court rejected the proposed instruction, explaining that the jury "must find that there was an intent to deceive, and unless the misrepresentations were material, amounted to something, it would be absurd to find that they were intended to deceive; but that is for the jury to say, rather than for me to charge." *Ibid.* (internal quotation marks omitted). The district court instead instructed the jury that the question it had to consider was whether "these defendants planned and intended, or tried to plan, a method by which they could use the mails * * * so these people would be deceived or misled into paying or sending money for some article of value to these defendants under ideas not justified by the facts as they actually existed." *Ibid.* The court of appeals affirmed, holding that the district court's instructions were "entirely in accord with *Durland* * * * and all that defendants were entitled to ask." *Ibid.*

"defraud a financial institution" or to "obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution" by deceptive means. 18 U.S.C. 1344. Those requirements limit the scope of the statutes to schemes that the defendant subjectively intends would defraud a victim, or would enable the defendant to obtain money or property from the victim by deceptive means. See generally *Durland*, 161 U.S. at 313 (under the mail fraud statute, "the significant fact is the [defendant's] intent and purpose"). A person who engages in deceptive conduct solely for a purpose other than to defraud or obtain money or property (*e.g.*, to keep a private matter confidential) would fall outside the scope of the statutes.[23]

The subjective intent required by the three provisions at issue would rarely exist (or be capable of being proven) when the deceptive conduct was trivial in character. *Cf. Wells*, 519 U.S. at 499 ("A statement made 'for the purpose of influencing' a bank will not usually be about something a banker would regard as trivial."); *Kungys* v. *United States*, 485 U.S. 759, 780-781 (1988) ("Obviously, it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have a natural tendency to influence the decision regarding immigration or naturaliza-

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[23] Amicus ACLI notes that the Department of Justice, in a report excerpted in the Congressional Record, suggested that materiality is an element of mail fraud. Br. 13 n.3 (citing 140 Cong. Rec. H10,773 (daily ed. Oct. 4, 1994)). The cited excerpt is focused principally on the point that a proposed bankruptcy fraud statute, patterned after the mail fraud and wire fraud statutes, would be narrow in scope because it would require "*proof beyond a reasonable doubt of a specific intent to defraud*." *Ibid.* The passing reference to materiality in the excerpt contained no citation to authority, *ibid.*, and more careful analysis has led us to the contrary conclusion.

tion benefits was nonetheless made with the subjective intent of obtaining those benefits.").[24]

But there are sound reasons for Congress to criminalize the conduct proscribed by the mail fraud, wire fraud, and bank fraud statutes, without requiring full-blown proof, and a jury finding, on whether a particular scheme was "capable of influencing" the victim. *Gaudin*, 515 U.S. at 509 (defining materiality). The statutes at issue reflect the judgment that those persons who intentionally set out to deceive others to obtain money or property warrant punishment even if their deceptions turn out in a given instance to be poorly adapted to visiting actual harm upon the intended victim. See *Kungys*, 485 U.S. at 780. To deviate from the statutory text of the mail fraud, wire fraud, and bank fraud statutes by imposing an additional materiality requirement would therefore decriminalize a type of wrongdoing that Congress was entitled to deter and punish through criminal sanctions. As this Court explained in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938):

> It does not lie with one knowingly making false statements with intent to mislead * * * to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information [provided to obtain a loan] be given in good faith and not falsely with intent to mislead.[25]

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[24] Although amicus ACLI contends (Br. 7) that "[i]n *Kungys*, [485 U.S. at 780], the Court described the effect of removing the element of materiality as 'draconian,'" the Court in *Kungys* actually concluded that the absence of a materiality requirement "does *not* produce draconian results." 485 U.S. at 780 (emphasis added).

[25] See also, *e.g.*, Model Penal Code § 5.01 cmt. 3(b), at 316 n.88 (noting concern that defendant "who tries to commit a crime by what he later learns to be inadequate methods will recognize the futility of his course of action and seek more efficacious means").

2. Amicus ACLI objects (Br. 22) that the failure to impute a materiality requirement to the statutes at issue would criminalize "a wide range of innocuous acts." Amicus's concern is unwarranted.

Amicus ACLI first argues (Br. 25, 27-28; see also Pet. Br. 43-44) that a materiality requirement is necessary to ensure that "puffing" or "seller's talk" is not rendered criminal. This Court long ago left open the question whether the mail fraud statute applies to "[m]ere puffing," *i.e.*, "the mere exaggeration of the qualities" possessed by an article in commerce. *United States* v. *New South Farm & Home Co.*, 241 U.S. 64, 71 (1916). Although the courts adopting an exception for "puffing" have on occasion suggested that "puffing" is immaterial, see, *e.g.*, *Harris*, 145 F. at 455, the exception is far more often justified on other grounds.[26] The conclusion that the mail fraud, wire fraud, and bank fraud statutes contain no materiality requirement therefore does not necessarily imply that the "puffing" exception is invalid.

Amicus ACLI further contends (Br. 29-30) that a materiality requirement is necessary to prevent prosecution of defendants who make "implausible misrepresentations" that would deceive only a gullible victim. That is not an argument that favors adoption of a materiality requirement. Prosecutions of those who seek to defraud the naive or

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[26] See, *e.g.*, *United States* v. *Gay*, 967 F.2d 322, 329 (9th Cir.) ("'Puffing' concerns expressions of opinion, as opposed to the knowingly false statements of fact which the law proscribes."), cert. denied, 506 U.S. 929 (1992); *United States* v. *Rabinowitz*, 327 F.2d 62, 80-81 (6th Cir. 1964) (reversing mail fraud conviction on ground that evidence showed "sales talk" and "exaggerations" but no "intent to deceive"); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.7(b)(5), at 388-389 ("seller's talk" or "puffing wares" sometimes treated as "exaggerated expression of opinion" rather than "misrepresentation of fact which will qualify for false pretenses"); 2 J. Bishop, *Commentaries on the Criminal Law* § 454, at 248-249 (expressions of opinion about wares during bargaining do not amount to false pretenses).

gullible lie at the heart of both the crime of false pretenses and the mail fraud and wire fraud statutes: "Although at one time there was some authority that, for false pretenses, the lie had to be one calculated to deceive a reasonable man, the almost-universal modern rule is that the gullibility or carelessness of the defendant is no defense, since the criminal law aims to protect those who cannot protect themselves." 2 W. LaFave & A. Scott, *Substantive Criminal Law*, § 8.7(i)(1), at 403 (footnote omitted); 2 J. Bishop, *Criminal Law* § 433, at 355 (9th ed. 1923). See, *e.g.*, *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (under mail fraud statute, rejecting argument that "no fraudulent scheme existed because no reasonable person would have believed [the] misrepresentations"); *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.) (same; citing cases), cert. denied, 446 U.S. 919 (1980); *O'Hara* v. *United States*, 129 F. 551, 555 (6th Cir. 1904) (under mail fraud statute, "[t]he objection that on its face the scheme was impossible of execution, and therefore should have deceived no one, is without merit"); M. Taylor, *The Law of Postal Fraud & Crimes* 189 (same). If a materiality requirement would tend to shift the focus from whether the defendant *intended* to defraud the victim to whether his actions would have had a natural tendency to defraud a reasonable and prudent victim, that consequence is one more reason to reject the imputed materiality element as inconsistent with the purposes of the federal fraud statutes.[27]

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[27] Although the weight of authority supports the conclusion that it is no defense to a charge of mail fraud that the scheme at issue would not have deceived a reasonably prudent person, some courts of appeals have erroneously espoused the contrary view. See, *e.g.*, *United States* v. *Brown*, 79 F.3d 1550, 1558 (11th Cir. 1996). The disagreement among the courts of appeals, however, does not in reality involve a question of materiality, *i.e.*, whether a misrepresentation is important enough to influence another's actions. Rather, the disagreement is about whether the basic federal fraud offenses create a safe harbor for misrepresenta-

3. Amicus ACLI argues (Br. 6-7, 20; see also Pet. Br. 45-46), that the failure to require materiality under the mail fraud, wire fraud, and bank fraud statutes would draw into question case law holding that materiality is required under several other provisions. The cited provisions differ substantially from the mail fraud, wire fraud, and bank fraud statutes, however, and the conclusion that materiality is not an element of those statutes would not necessarily lead to a similar conclusion under different provisions. For example, 11 U.S.C. 523(a)(2)(A) requires proof of "actual fraud." And there is already a substantial body of case law from this Court addressing the distinctive issues of materiality that arise under the securities laws, including Rule 10b-5, which prohibits, in connection with the purchase of securities, "any device, scheme, or artifice to defraud," 17 C.F.R. 240.10b-5(a), *and* "any untrue statement of a *material* fact," 17 C.F.R. 240.10b-5(b) (emphasis added). See, *e.g.*, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 230-241 (1988); *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 444-464 (1976); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 152-154 (1972).[28]

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tions, even those that concern relevant and significant matters and therefore are material, when they are insufficiently plausible to deceive a reasonably prudent person (or would be subject to refutation in the exercise of due diligence). Recognizing that criminals often focus their efforts to defraud on the most vulnerable victims, most courts have properly refused to recognize such a safe harbor.

[28] Nor is there merit to amicus ACLI's contention (Br. 18-21) that a materiality requirement must be read into the mail fraud, wire fraud, and bank fraud statutes in order to prevent undue imposition of civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Because any injury suffered by a civil RICO plaintiff must be "by reason of" racketeering activity proscribed by 18 U.S.C. 1962 (see 18 U.S.C. 1964(c)), several courts of appeals require the plaintiff to prove reliance in a civil RICO action predicated on mail fraud, wire fraud, or bank fraud. See, *e.g.*, *Chisolm* v. *TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) (in "decid[ing] * * * to impose a reliance requirement in the civil RICO context," court is "fully aware that no

4. Finally, neither the rule of lenity nor the Due Process Clause requires that an element of materiality be imputed to the mail fraud, bank fraud, and wire fraud statutes. The rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Wells*, 519 U.S. at 499 (internal quotations omitted). "Read straightforwardly, [the mail fraud, wire fraud, and bank fraud statutes] reveal[] no ambiguity, [and their] *mens rea* requirements narrow the sweep of the statute[s.] * * * [T]his is not a case of guesswork reaching out for lenity." *Ibid.*

There is also no merit to petitioner's due process argument. Br. 48-49. A reasonable person would certainly have fair notice that the mail fraud, wire fraud, and bank fraud statutes contain no materiality requirement, given the language of the statutes, which make no mention of materiality, and the decisions of this Court, which have repeatedly listed the elements of mail fraud without mentioning materiality. See *Pereira*, 347 U.S. at 8; *Young*, 232 U.S. at 161; *Stokes*, 157 U.S. at 188-189. See also *Durland*, 161 U.S. at 313-314.

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analogous rule exist[s] in criminal RICO prosecutions involving mail fraud"). Thus, the elements that are required in a civil RICO case may be distinct from the elements that are required in a criminal prosecution under a predicate statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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