No. 23-650

In the Supreme Court of the United States

LAURA JORDAN & MARK JORDAN, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that an instruction at odds with a later circuit decision was harmless beyond a reasonable doubt.

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

3. Whether the federal-funds corruption statute, 18 U.S.C. 666, exceeds Congress's authority under Article I of the Constitution as applied to petitioners' scheme.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is not published in the Federal Reporter but is available at 2023 WL 6878907. The withdrawn and superseded opinion of the court of appeals is available at 2023 WL 5521059. The order of the district court (Pet. App. 45a-118a) is unreported but is available at 2022 WL 3088372.

JURISDICTION

The substituted judgment of the court of appeals was entered on October 18, 2023. A petition for rehearing en banc was denied the same day (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of conspiring to commit federal-funds corruption, in violation of 18 U.S.C. 371; federal-funds corruption, in violation of 18 U.S.C. 666(a)(1)(B) (Laura Jordan) and 666(a)(2) (Mark Jordan); conspiring to defraud the United States in connection with the ascertainment, computation, assessment, and collection of federal income taxes, in violation of 18 U.S.C. 371; and willfully aiding and abetting the presentation of materially false tax returns, in violation of 26 U.S.C. 7206(2). Laura Jordan Judgment 1; Mark Jordan Judgment 1; see Superseding Indictment 28-29. Each petitioner was sentenced to 72 months of imprisonment, to be followed by three years of supervised release. Laura Jordan Judgment 2-7; Mark Jordan Judgment 2-7. The court of appeals vacated petitioners' tax-conspiracy convictions but otherwise affirmed. Pet. App. 1a-44a. On remand, the district court reimposed the same aggregate sentence on each petitioner. Laura Jordan Am. Judgment 1-7; Mark Jordan Am. Judgment 1-7.

1. a. In 2011, petitioner Laura Jordan (Laura) was elected to the city council of Richardson, Texas. Pet. App. 2a. In May 2013, she was elected mayor of Richardson after campaigning on a platform that included opposition to the construction of new apartments near existing neighborhoods. *Ibid.*

Petitioner Mark Jordan (Mark) was a commercial real estate developer. Pet. App. 2a. In 2011, one of Mark's business entities purchased 43 acres of land and two office towers, known as the Palisades, in an area adjoining the Prairie Creek neighborhood, where

Laura lived with her then-husband and children. *Id.* at 2a-3a. At the time, the area was zoned for retail and office use, townhomes, and condominiums. *Id.* at 3a.

On November 5, 2013, Mark submitted a request to a city planning commission for a zoning change that would allow construction of 750 apartment units on the property, later reducing the request to 600 units. Pet. App. 3a. The commission unanimously recommended that the city council approve the proposal. *Ibid.* But residents opposed to the request began organizing efforts to stop it. *Ibid.*

b. In the months leading up to the vote on Mark's request, "Laura and Mark were secretly meeting, exchanging personal emails and calls, and working together to obtain the rezoning." Pet. App. 3a. Those efforts began as early as May 2013, the month that Laura was elected mayor. *Ibid.* For example, in October 2013, Laura and Mark met with Scott Mitchell—a city councilmember who had vouched for Laura's anti-development stance during her mayoral campaign—to discuss the planned Palisades development. *Ibid.* Mitchell was surprised to learn that Laura favored it. *Id.* at 3a-4a; Gov't C.A. Br. 8. In addition, Mark's then-wife, Karen Jordan (Karen), discovered emails between Mark and Laura suggesting a romantic relationship. Pet. App. 4a. When confronted, Mark said that he was just flirting with the mayor to get what he wanted. *Ibid.*

On December 9, 2013, the city council approved the Palisades rezoning, with five votes—including Laura's—in favor and two opposed. Pet. App. 4a. The vote lacked legal effect, however, because the council requested a plan for phasing the construction. *Ibid.*

c. Laura's then-husband, Mike Maczka (Maczka), and Mark's former romantic partner and then-business partner, Sarah Norris, also began to suspect that Mark and Laura were having an affair. Pet. App. 4a. In mid-January 2014, Laura falsely told Maczka that she was going to Salt Lake City, for a mayoral convention; in fact, she went to Utah to meet Mark at an expensive ski resort. *Id.* at 5a; Gov't C.A. Br. 14.

On January 27, 2014, the city council approved an ordinance authorizing Mark's rezoning by the same 5-2 vote, with Laura again voting in favor. Pet. App. 5a; Gov't C.A. Br. 14. Laura did not disclose her affair or her recent travels with Mark. Gov't C.A. Br. 14.

d. In April 2014, at the conclusion of an official business trip to California, Laura met Mark, and the two stayed at luxury hotels at Mark's expense. Pet. App. 5a. When Laura returned home, Maczka confronted her with additional evidence of the affair and she asked for a divorce. *Ibid.* Around the same time, Norris discovered business credit-card purchases by Mark that related to Laura, including for restaurants, resort stays, and a flight upgrade. *Ibid.* Mark told Norris that he was only using Laura to get approval for his rezoning plan. *Ibid.* Mark later admitted the relationship to his wife, Karen, but he minimized its seriousness. *Ibid.*; Gov't C.A. Br. 17.

On June 9, 2014, the city council held a third vote on Mark's rezoning plan, which now encompassed a request to add 1400 new apartment units. Pet. App. 6a; Gov't C.A. Br. 17. Over the vocal opposition of numerous residents, the council approved 1090 new units, with Laura part of the 5-2 voting majority. Pet. App. 6a; Gov't C.A. Br. 18.

e. In August 2014, Mark asked the city, on behalf of his business partnership, to be reimbursed for the construction of public infrastructure for the Palisades. Pet. App. 6a; Gov't C.A. Br. 19. Around the same time, a series of transactions ensued in which Mark withdrew money from one bank account and Laura deposited money into another bank account she recently had opened solely in her own name. *Ibid.* Mark's withdrawals often occurred close in time to Laura's deposits; sometimes, the transactions occurred within minutes of each other and at the same location. Gov't C.A. Br. 21-22.

On September 22, 2014, the city council unanimously voted to authorize negotiations with Mark and his business partners over reimbursement for construction and infrastructure expenses related to the Palisades. Pet. App. 6a; Gov't C.A. Br. 20. Mark then worked with city officials, including Laura, to reach an agreement. While he was doing so, he was providing financial benefits to Laura, including cash payments, a $40,000 check, various trips, and more than $24,000 in home renovations done by one of Mark's contractors—whom Mark asked to "keep it on the down low." Pet. App. 7a; see *id.* at 6a-7a; Gov't C.A. Br. 21-22. When Mark's wife confronted him about why he was paying for the renovations, Mark answered, "Because, Karen, we owe her. We owe her a lot. She's made us a lot of money." Pet. App. 7a; Gov't C.A. Br. 24 (citation omitted).

f. Around January 2015, Mark hired Laura to work as a leasing agent at one of his business entities, paying her an annual salary of $150,000 and a signing bonus of $15,000, even though Laura had no real estate experience and was not a licensed agent, and Mark had

paid her predecessor less than half that amount. Pet. App. 7a; Gov't C.A. Br. 25. Laura's acceptance of the job sparked media attention and led to an ethics investigation. *Ibid.* But Mark and Laura (both of whom were divorcing their spouses) failed to disclose their relationship and the stream of financial benefits Mark provided to Laura, and the investigation ultimately found no wrongdoing. Pet. App. 7a; Gov't C.A. Br. 25-28.

In approximately late April 2015, the city entered into an economic development agreement with Mark and his business partners providing for $47 million in construction and infrastructure reimbursements. Gov't C.A. Br. 28. Shortly thereafter, Laura announced that she would not run for another term as mayor. Pet. App. 8a; Gov't C.A. Br. 28.

g. Around the same time, the FBI received a tip about the transfer of money, trips, and other items of value between Mark and Laura. Pet. App. 8a. In July 2015, Mark had lunch with Norris, who was wearing a wire for the FBI. *Ibid.* While assuring her that he would never marry Laura, Mark said that his criminal defense attorney had advised him to get engaged to Laura. *Ibid.*

After learning that the FBI had discovered that he had paid for Laura's home renovations, Mark started telling people that he and Laura were getting married. Pet. App. 8a. In October 2016, however, Mark again denied to Norris that he would ever marry Laura. *Ibid.*

On May 30, 2017, the district court held a hearing as part of the grand jury's bribery investigation. Pet. App. 8a. Less than a week later, Mark and Laura ob-

tained their marriage license and were married. *Ibid.*; Gov't C.A. Br. 32.

2. a. In 2018, a grand jury returned an indictment charging petitioners with conspiracy, honest-services fraud, and bribery offenses; petitioners were convicted at trial on all but one count of honest-services fraud. Pet. App. 8a-9a. The district court granted a new trial after learning of a conversation that a court security officer had with a juror. *Id.* at 9a; see *United States* v. *Jordan*, 958 F.3d 331, 338 (5th Cir. 2020).

In December 2020, a federal grand jury in the Eastern District of Texas returned a superseding indictment charging petitioners with conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1349 (Count 1); honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346 (Counts 3-4); conspiring to commit federal-funds corruption, in violation of 18 U.S.C. 371 (Count 5); federal-funds corruption, in violation of 18 U.S.C. 666(a)(1)(B) (Laura) and 666(a)(2) (Mark) (Counts 6-7); conspiring to defraud the United States in connection with the ascertainment, computation, assessment, and collection of federal income taxes, in violation of 18 U.S.C. 371 (Count 8); and two counts each of willfully aiding and abetting the presentation of materially false tax returns, in violation of 26 U.S.C. 7206(2) (Counts 9-12). Superseding Indictment 1-32.

Following a three-week trial, the jury acquitted petitioners of the honest-services fraud charges but convicted them of the bribery and tax offenses. Laura Jordan Judgment 1; Mark Jordan Judgment 1. The district court sentenced each petitioner to 72 months of imprisonment, to be followed by three years of su-

pervised release. Laura Jordan Judgment 2-7; Mark Jordan Judgment 2-7.

b. Petitioners filed motions for judgment of acquittal and for a new trial attacking their Section 666 convictions. The district court denied the motions. Pet. App. 45a-118a.

Section 666 of Title 18 provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> * * *
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more;
>
> * * *
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. 666(a)(1)(B). A parallel provision prohibits the making or offering of such a corrupt payment to a state, local, or tribal official. 18 U.S.C. 666(a)(2). The "circumstance" triggering Section 666(a)'s application is "that the organization, government, or agency re-

ceives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b).

Petitioners argued that Section 666 requires the government to prove *quid pro quo bribery*, but that jury instructions allowed conviction for after-the-fact gratuities, and that the evidence proved only the latter. Pet. App. 76a (citation omitted); see *id.* at 76a-89a. The district court disagreed that Section 666 criminalizes only *quid pro quo* bribery. *Id.* at 82a. And the court found that "even if § 666 did not extend to gratuities, the Government presented evidence that established beyond a reasonable doubt [petitioners'] 'specific intent to give or receive something of value in exchange for an official act'"—*i.e.*, a bribe, rather than a gratuity. *Ibid.* (quoting *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999)).

The district court explained that, even if its jury instructions "were legally erroneous" by permitting conviction under a gratuities theory, the error was harmless. Pet. App. 82a. The court found "'beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *Ibid.* (quoting *United States* v. *Cessa*, 785 F.3d 165, 186 (5th Cir. 2015), cert. denied, 577 U.S. 993 (2015)); see *id.* at 88a. Among other things, the court observed that "[t]his was a bribery case"; that the government had "centered its theory of prosecution on quid pro quo bribery" "[f]rom the outset"; and that there was "ample evidence establish[ing]" such bribery "beyond a reasonable doubt." *Id.* at 83a, 88a.

In their post-trial motions, petitioners contended, for the first time, that the bribery counts should be

dismissed with prejudice on the theory that, as applied to their conduct, Section 666 exceeds Congress's authority under Article I of the Constitution. Gov't C.A. Br. 64. Specifically, petitioners' theory was that their conduct did not implicate any federal interest, a theory premised on the assertion that the conduct related solely to a local zoning issue and did not put any federal funding at risk. *Id.* at 64-65.

The district court found that petitioners' Article I claim was untimely under Fed. R. Crim. P. 12(b)(3), and that they had not shown good cause to excuse the untimeliness. Pet. App. 68a-73a. The court further observed that, even if not forfeited, petitioners' claim was foreclosed by this Court's decision in *Sabri* v. *United States*, 541 U.S. 600, 602, 606 (2004). See Pet. App. 73a-75a.

3. In an unpublished, per curiam decision, the court of appeals affirmed petitioners' convictions on the bribery and substantive tax counts but vacated their convictions on the tax-conspiracy count, as to which the government had acknowledged insufficient evidence. Pet. App. 1a-44a; Gov't C.A. Br. 81.

a. After the district court's decision, the Fifth Circuit took the view in *United States* v. *Hamilton*, 46 F.4th 389, 391 (2022), that Section 666 covers only *quid pro quo* bribery. The court of appeals in this case, in turn, emphasized that "*Hamilton* did not go so far as to say that payments are not bribes as long as you make them after an initial vote." Pet. App. 17a. The court explained that *Hamilton* instead "adopted" the view that the word "'reward'" in Section 666 "is included 'to prevent a situation where a thing of value is not given until after an action is taken.'" *Ibid.* (quoting *Hamilton*, 46 F.4th at 397). Thus, even on its view,

"the term reward serves to clarify 'that a bribe can be promised before, but paid after, the official's action.'" *Id.* at 18a (quoting *United States* v. *Fernandez*, 722 F.3d 1, 23 (1st Cir. 2013)).

Applying *Hamilton* to this particular case, the court of appeals found that petitioners' Section 666 convictions were supported by sufficient evidence of a *quid pro quo* bribery agreement to exchange monetary payments and other things of value for official action. Pet. App. 13a-18a. In large part, petitioners argued that "only [Laura's] first [city council] vote mattered," *id.* at 15a, but that Mark's payments to Laura came "after the final vote," *id.* at 14a, and thus constituted only gratuities. The court disagreed, observing that "[t]he record reflects evidence of ongoing communications between Mark and Laura long before the first vote that clearly indicate they were working together to get the [Palisades] project approved." *Id.* at 17a.

The court of appeals also observed that after the first vote—and while providing benefits to Laura—"Mark kept asking for more" from the city. Pet. App. 17a. "He bought additional land, sought approval of more apartments, requested reimbursements, and used his influence over Laura to advance his pecuniary interests." *Ibid.* And the court pointed to evidence showing that "Mark told multiple people he was merely using Laura to get what he wanted"; that "multiple people * * * warned Mark about his inappropriate involvement with the mayor to get his zoning passed and his attempts to cover it up"; and that Mark had told his then-wife Karen "that he owed Laura (money, renovations, etc.) because she made them a lot of money." *Id.* at 16a.

b. The court of appeals also found the evidence of bribery compelling enough to show that the jury instructions' noncompliance with *Hamilton* was harmless. Pet. App. 18a-21a.

The court of appeals explained that "[e]rroneous jury instructions are harmless if a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Pet. App. 21a (brackets in original; citation omitted). "In other words," the court continued, "a reviewing court asks whether the record contains evidence that could rationally lead to an acquittal with respect to the valid theory of guilt." *Ibid.* (citation, brackets, and internal quotation marks omitted). And the court of appeals made clear that in doing so, the reviewing court "construe[s] the evidence and make[s] inferences in the light most favorable to the defendant.'" *Id.* at 12a (citation and internal quotation marks omitted).

The court of appeals then found "beyond a reasonable doubt that [petitioners] would have been convicted even under [a *Hamilton*-compliant] instruction." Pet. App. 20a. The court observed that "the jury was told repeatedly that it was a quid pro quo case, and the evidence clearly supported a quid pro quo." *Id.* at 21a. The court noted Laura's argument that "the question of quid pro quo bribery [was] contested," citing her reliance on evidence "that she supported the Palisades development before meeting Mark." *Ibid.* The court, however, was "not persuaded that this evidence, when viewed against all the other evidence in the voluminous record, would lead a rational jury to acquit even given [a *Hamilton*-compliant] quid pro quo instruction." *Ibid.*

c. Finally, the court of appeals found "no merit" in petitioners' contention that the asserted absence of a direct connection to federal funds rendered Section 666 is unconstitutional as applied to them. Pet. App. 29a; see *id.* at 25a-29a. The court observed that in *Sabri* v. *United States*, this Court held that Section 666(a)(2) "is a valid exercise of congressional authority under Article I of the Constitution," *id.* at 28a (quoting *Sabri*, 541 U.S. at 602), and that the "threshold" requirement that the state, local, or tribal entity received $10,000 in federal funds "satisfies Article I without any requirement that the federal money be directly connected as an element to the offense," *id.* at 29a. The court recognized that "*Sabri* involved a facial challenge," but observed that this Court "gave clear indications that an as-applied challenge would not have fared any better." *Ibid.* (citing *Sabri*, 541 U.S. at 609).

4. On January 9, 2024, the district court issued amended judgments in light of the vacatur of petitioners' tax-conspiracy convictions. The court reimposed the same total sentence on each petitioner. Laura Jordan Am. Judgment 1-7; Mark Jordan Amended Judgment 1-7.

ARGUMENT

Petitioners contend (Pet. 11-34) that the court of appeals erred in its application of the harmless-error standard to this case; that this Court should overrule its decision in *Neder* v. *United States*, 527 U.S. 1 (1999); and that, as applied to their conduct, 18 U.S.C. 666 exceeds Congress's powers under the Spending Clause and the Necessary and Proper Clause.[1] As a thresh-

[1] The first two questions presented in the petition are also presented in *Greenlaw* v. *United States*, petition for cert. pending, No.

old matter, the first two questions presented presuppose the correctness of a circuit decision about the scope of Section 666 that could be abrogated by this Court's decision on the same issue in *Snyder* v. *United States*, No. 23-108 (oral argument scheduled for Apr. 15, 2024). But regardless of the outcome of *Snyder*, petitioners' contentions lack merit and do not warrant this Court's review.

1. Petitioners first urge (Pet. 11-26) this Court to review the court of appeals' application of the harmless-error standard to the jury instructions viewed as erroneous in this case. Review of that question is not warranted because the court of appeals correctly applied the harmless-error standard articulated by this Court, and its decision does not conflict with the decision of any other court of appeals. This Court has previously denied petitions for writs of certiorari alleging a conflict in the lower courts regarding the application of *Neder*'s harmless-error standard. See *McFadden* v. *United States*, 581 U.S. 904 (2017) (No. 16-679); *Caroni* v. *United States*, 579 U.S. 929 (2016) (No. 15-1292). The same result is warranted here.

a. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). Similarly, 28 U.S.C. 2111 provides that, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Harmless-error doctrine "focus[es] on the underlying fairness of the

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23-631 (filed Dec. 8, 2023), and *Zheng* v. *United States*, petition for cert. pending, No. 23-928 (filed Feb. 23, 2024).

trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). That focus ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed without justification. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The requirement that errors must "affect substantial rights" to warrant reversal requires, outside the narrow category of "structural errors," *Neder*, 527 U.S. at 7, 14, that courts conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)).

Because the harmless-error inquiry is designed to separate errors that mattered from errors that do not justify the high costs of a retrial, appellate courts review the record—"in typical appellate-court fashion," *Neder*, 527 U.S. at 19—to form a judgment whether, absent the error, the ultimate outcome likely would have been the same. In assessing the likelihood that an error was harmless, courts employ an objective standard that considers the effect of the error on an average, reasonable jury "in relation to all else that happened." *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). Where (as here) the deemed error is constitutional, the reviewing court may conclude that it is harmless only when it is "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

As petitioners acknowledge (Pet. 17), this Court's decision in *Neder* held that the constitutional-error test applies to instructional errors like the one that the

court of appeals deemed to have occurred here. 527 U.S. at 8-15; see *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam). In doing so, the Court observed that it "ha[d] often applied harmless-error analysis to cases involving improper instructions on a single element of the offense." *Neder*, 527 U.S. at 9; see *id.* at 9-10 (citing cases). And in applying the constitutional harmless-error test to the case before it, the Court reviewed the record evidence and found the instructional error—there, the omission of an instruction on the materiality of Neder's false statements about his income to a determination of his tax liability—to have been harmless. The Court's review focused on the strength of the evidence supporting materiality, reasoning that this evidence "was so overwhelming * * * that Neder did not argue to the jury * * * that his false statements of income could be found immaterial." *Id.* at 16. "In this situation," the Court stated, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17.

b. Petitioners err in suggesting that, under *Neder*, an appellate court is precluded from finding instructional error harmless where the defendant contested the omitted or misdefined element and "there is *any* evidence in the record" that could lead to an acquittal. Pet. 26; see Pet. 12-13, 19. The Court in *Neder* noted that the error was harmless in that case because the "omitted element [wa]s supported by uncontroverted evidence." 527 U.S. at 18. But in making its harmlessness determination, the Court relied on cases con-

sidering the erroneous admission or exclusion of evidence and explained that the ultimate harmless-error inquiry is "essentially the same" across those different types of constitutional errors, asking whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ibid.* And the Court emphasized that the ultimate determination on harmless error is often intensely record-dependent and requires a "case-by-case approach." *Id.* at 14; see *id.* at 19.

Petitioners' assertion that *Neder* allows for a harmless-error finding only for errors relating to uncontested issues is misplaced. The erroneous admission of evidence may be harmless even where, for example, it was "in violation of the Fifth Amendment's guarantee against [compelled] self-incrimination," 527 U.S. at 18 (citing *Arizona* v. *Fulminate*, 499 U.S. 279 (1991))—such as an unlawfully extracted confession that a defendant's trial strategy necessarily contests, see *Fulminate*, 499 U.S. at 295-302. The "case-by-case approach," *Neder*, 527 U.S. at 14, is not a one-size-fits-all formula that forecloses a harmless-error finding in circumstances that are not identical to those in *Neder*. Instead, uncontested and overwhelming evidence on an omitted or misdefined element "simply provides one way in which the government may establish harmless error." *United States* v. *Freeman*, 70 F.4th 1265, 1282 (10th Cir. 2023). An error should not be deemed harmless "where the defendant contested the [disputed] element *and* raised evidence sufficient to support a contrary finding," *Neder*, 527 U.S. at 19 (emphasis added), but would be harmless if the record shows that a contested element would have come out the same way irrespective of the instructional error.

c. Here, the court of appeals correctly articulated and applied *Neder*'s harmless-error standard in petitioners' particular case. Pet. App. 18a-21a.

The court of appeals correctly identified the relevant question on harmless-error review by using language that tracked *Neder*, framing the inquiry as turning on whether "a court, after a thorough examination of the record, is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Pet. App. 21a (citation omitted); see *Neder*, 527 U.S. at 18-19. The court's alternative phrasing of the harmless-error inquiry—"[i]n other words, * * * whether the record contains evidence that could rationally lead to [an acquittal] with respect to the [valid theory of guilt]"—likewise tracked *Neder*. Pet. App. 21a (citation and internal quotation marks omitted; brackets in original); see *Neder*, 527 U.S. at 19.

The court of appeals then correctly found that, in the circumstances of this case, the deemed instructional error was harmless in light of the evidence "in the voluminous record" that "clearly" established the existence of a *quid pro quo* bribery agreement between petitioners to exchange Laura's support for Mark's rezoning requests for a stream of financial benefits. Pet. App. 21a. That evidence included, for example, Mark's statement to Norris that he was using Laura to get approval for his rezoning plan; Laura's attempt to get another city councilmember to support the plan; the pattern of transactions beginning shortly after Mark sought the city's reimbursement for construction and infrastructure costs, in which Mark withdrew cash from a bank account and Laura deposited cash into her newly opened account; the other financial benefits that

Mark provided Laura around that time, including a $40,000 check and approximately $24,000 in home renovations; and Mark's admission to Karen that he "owe[d]" Laura "a lot" because Laura had "made [them] a lot of money." *Id.* at 7a; see pp. 2-7, 11, *supra*. In view of all of that evidence, and the government's presentation of the case to the jury as involving a *quid pro quo*, the court of appeals correctly found "beyond a reasonable doubt" that the jury's verdict would have been the same if it had been required to find a *quid pro quo* as a prerequisite to a guilty verdict. Pet. App. 20a; see *id.* at 20a-21a.

Petitioners' contrary arguments largely reflect fact-bound disagreements with the decision below that do not warrant this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Principally, petitioners contend (Pet. 12, 19) that, contrary to the court of appeals' explicit statement, see Pet. App. 12a, it viewed the evidence in the light most favorable to the government when conducting harmless-error review. Specifically, they assert that the district court applied an incorrect harmless-error standard; that the court of appeals' "agree[ment]" with the district court shows that it abandoned the *Neder*-based approach that it had described; and that the court of appeals necessarily failed to view the evidence in the light most favorable to them. Pet. 12, 19 & n.21. But even assuming that petitioners' characterization of the district court's analysis is correct, the court of appeals simply agreed with the district court's ultimate determination, Pet. App. 20a, based on a proper harmless-error inquiry in which it found that, "when viewed against all the other evi-

dence in the voluminous record," the evidence Laura cited would not "lead a rational jury to acquit even when given the correct quid pro quo instruction." *Id.* at 21a.

Petitioners err in asserting (Pet. 20) that the court of appeals conducted only a "perfunctory assessment" of the evidence they offered allegedly showing a lack of *quid pro quo* bribery. Before addressing petitioners' claim of instructional error, the court conducted a detailed review of the evidence in the facts section of its opinion (Pet. App. 2a-8a) and its discussion of the sufficiency of evidence (*id.* at 13a-18a). The court had already explained, for example, that the "problem" with Laura's argument that all four city council votes would have passed without her support was that "Laura met with other city council members ahead of the first vote to try to get them on board," and that petitioners had been forced at one point to "ditch[]" their "plan" to have Laura vote against Mark to avoid the appearance of a conflict of interest because "they realized they needed her vote." *Id.* at 15a. The court also addressed petitioners' assertions about the timing of particular payments by observing "that a bribe can be promised before, but paid after the official's action." *Id.* at 18a (quoting *United States* v. *Fernandez*, 722 F.3d 1, 23 (1st Cir. 2013)); see *id.* at 16a-18a. And the court permissibly "conclude[ed] beyond a reasonable doubt that [petitioners] would have been convicted even under the correct instruction." *Id.* at 20a; see *id.* at 20a-21a; see also *id.* at 12a.

d. Petitioners contend (Pet. 21-26) that federal and state courts are divided over the contours of *Neder*'s harmless-error standard. There is no such division of authority that would warrant this Court's review.

Petitioners suggest (Pet. 21-23) that the courts of appeals disagree as to whether *Neder* requires that an omitted or misdefined element be uncontested before the appellate court may find that the error was harmless. According to petitioners, the Fourth and Sixth Circuits preclude a harmlessness determination where the defendant contested the element in question, Pet. 21-22 (citing *United States* v. *Legins*, 34 F.4th 304, 322 (4th Cir.), cert. denied, 143 S. Ct. 266 (2022); *United States* v. *Miller*, 767 F.3d 585, 594 (6th Cir. 2014)), whereas the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits do not, Pet. 23 (citing *United States* v. *Jackson*, 196 F.3d 383, 385-386 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000); *United States* v. *Boyd*, 999 F.3d 171, 179-182 (3d Cir.), cert. denied, 142 S. Ct. 511 (2021); *United States* v. *Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022); *Freeman*, 70 F.4th at 1281-1283 (10th Cir.); *United States* v. *Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999), cert. denied, 530 U.S. 1261 (2000)). That is incorrect.

The Fourth and Sixth Circuits do not require that an omitted or misdefined element be uncontested to be harmless. To the contrary, shortly after *Neder*, the Fourth Circuit recognized that, "if the defendant contested the omitted element, *Neder* mandates a second inquiry" into "whether the 'record contains evidence that could rationally lead to a contrary finding with respect to that omitted element.'" *United States* v. *Brown*, 202 F.3d 691, 701 (4th Cir. 2000) (quoting *Neder*, 527 U.S. at 19); see *United States* v. *Smithers*, 92 F.4th 237, 251 (4th Cir. 2024); *United States* v. *McFadden*, 823 F.3d 217, 225 (4th Cir. 2016), cert. denied, 581 U.S. 904 (2017). Indeed, the Fourth Circuit decision on which petitioners rely noted that its approach com-

ports with that of other courts of appeals. *Legins*, 34 F.4th at 322. Similarly, in the Sixth Circuit decision that petitioners cite, the court did not decline to hold a jury instruction error harmless based on the mere fact that the defendant had contested the element in question. Instead, after extensively analyzing the record, the court determined that the defendants had presented "considerable evidence" that would have permitted "a reasonable jury to find" in their favor on the contested element. *Miller*, 767 F.3d at 597. That determination reflects the facts of the case, not a difference in the inquiry.[2]

Petitioners' assertion (Pet. 24) of a further division between the Second and Fourth Circuits is also misplaced. Petitioners observe that, when reviewing harmlessness under *Neder*, the Second Circuit asks "whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element" and, if so, "whether the jury would nonetheless have returned the same verdict," *Jackson*, 196 F.3d at

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[2] In a footnote, petitioners cite various state court decisions in support of the asserted division of authority. See Pet. 22 n.22. As a threshold matter, a state court's adoption of a more stringent approach to harmless error than the one described in *Neder* would not conflict with the uniform *Neder*-based approach of the federal courts of appeals. Cf. *Danforth* v. *Minnesota*, 552 U.S. 264, 266 (2008) (concluding that state courts may "give broader effect to new rules of criminal procedure than" this Court has prescribed for federal courts). In any event, several of those decisions recognize that an error may be harmless if the defendant contested the omitted element. See *State* v. *Bunch*, 689 S.E.2d 866, 869 (N.C. 2010); *Wegner* v. *State*, 14 P.3d 25, 30 (Nev. 2000). And in at least one case, the court simply noted, as a factual matter, that the element was "essentially uncontested." *State* v. *McDonald*, 99 P.3d 667, 670 (N. Mex. 2004).

386, whereas the Fourth Circuit omits the second step, see *Brown*, 202 F.3d at 701 n.19. But any disagreement has no bearing on this case: The court of appeals did not address the separate steps articulated by the Second Circuit, and petitioners could not satisfy the first step. In addition, petitioners have not identified any decision in which the Second Circuit found an error to be harmless where the evidence was sufficient to support acquittal, but the court of appeals determined that the jury would have found guilt anyway.[3]

Petitioners also rely (Pet. 23-24, 26) on a concurring opinion by Judge Lipez in *United States* v. *Pizarro*, 772 F.3d 284 (1st Cir. 2014), which perceived intra- and inter-circuit divisions over how *Neder* has been applied, see *id.* at 305-306 (Lipez, J., concurring), and advanced the proposition that errors should be viewed harmless under *Neder* only where the element omitted from the jury instructions "is supported by overwhelming evidence" and the element was "uncontested"—meaning that "the defendant did not argue that a contrary finding on the omitted element was possible," *id.* at 310-311 (Lipez, J., concurring). But a second concurring judge in *Pizarro* disagreed with that assessment of the state of the law, finding "very little—if any—inconsistency" in *Neder*'s application. *Id.* at 313; see *id.* at 324-325 (Torruella, J., concurring). And no court of appeals has narrowed *Neder*'s harmless-error

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[3] Petitioners' focus (Pet. 25) on *Saini*, *supra*, is similarly misplaced. Whatever error petitioners might perceive in that Ninth Circuit case, the court of appeals in their case made clear that it construes the evidence in the light most favorable to the defendant when reviewing an instructional error for harmlessness. Pet. App. 12a.

inquiry in the fashion advocated by Judge Lipez, and a concurring opinion itself cannot create a conflict.

2. Petitioners alternatively urge (Pet. 27-31) this Court to overrule *Neder* and hold that the omission or misdefinition of an offense element in jury instructions is structural error. See *Neder*, 527 U.S. at 30-40 (Scalia, J., concurring in part and dissenting in part). This Court's review of that question is not warranted.

No sound reason exists to overrule *Neder*'s holding. Reviewing the omission or misdefinition of an element in jury instructions for harmlessness under *Chapman*'s framework for constitutional errors has not proven unworkable. Contrary to petitioners' contention, there is no meaningful disagreement in the federal courts of appeals over *Neder*'s application. See pp. 20-24, *supra*.

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

Petitioners contend (Pet. 30-31 & n.26) that the argument for treating the omission or misdefinition of an offense element as structural error has grown stronger in light of post-*Neder* "decisions that elevated the Sixth Amendment right to a jury trial in our constitutional order." Pet. 30. But the Court in *Neder* explained that, where the harmless-error standard is satisfied (*i.e.*, the record does not "contain[] evidence that could rationally lead to a contrary finding with respect to the omitted element"), applying the harmless-error rule fully comports the Sixth Amendment. 527 U.S. at 19; see *id.* at 17 n.2, 19-20.

Petitioners also contend (Pet. 31) that "when a trial court fails to properly instruct the jury on an element of the offense and the jury convicts, it is impossible to know how the defense would have proceeded differently at trial," and that this uncertainty supports treating the jury instruction error as structural. That argument is unsound. The same alleged uncertainty could result from a district court's "erroneous admission of evidence in violation of the Fifth Amendment guarantee against self-incrimination," or its "erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment"; but such errors "are both subject to harmless-error analysis." *Neder*, 527 U.S. at 18. In each scenario, an appellate court is fully capable of undertaking a holistic review of the record to determine if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ibid.*

Moreover, even assuming that the Court might decide *Neder* differently if presented with the question de novo today, *stare decisis* considerations would compel adherence to the quarter century of precedent that

follows *Neder*. That doctrine, which "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," "demands special justification" for casting aside a prior decision. *Gamble* v. *United States*, 587 U.S. 678, 691 (2019) (citations omitted). No such justification exists here.

3. Finally, petitioners contend (Pet. 32-35) that Section 666 exceeds Congress's Article I authority as applied to them, on the theory that their corrupt conduct did not put "at risk" any money, "local or federal."[4] Further review of that contention is unwarranted.

a. Section 666 prohibits corrupt payments to, or the acceptance of corrupt payments by, "state, local, and tribal officials of entities that receive at least $10,000 in federal funds." *Sabri* v. *United States*, 541 U.S. 600, 602 (2004). Section 666 thus "extend[s] federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." *Id.* at 607 (quoting *Salinas* v. *United States*, 522 U.S. 52, 58 (1997)). As this Court has recognized, the statutory language reflects "Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs." *Fischer* v. *United States*, 529 U.S. 667, 678 (2000).

In *Sabri* v. *United States*, this Court rejected the contention that Section 666 exceeds Congress's Article I power because it does not "require proof of connection with federal money as an element of the offense." 541 U.S. at 605. The Court explained that "Congress

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[4] Petitioners do not appear to dispute that the $5000 threshold in Section 18 U.S.C. 666(a)(1)(B) and (2) was met. See Pet. 32-35.

has authority under the Spending Clause to appropriate federal moneys to promote the general welfare." *Ibid.* And Congress has "corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Ibid.* (citation omitted).

The Court acknowledged that "not every bribe or kickback offered or paid to agents of governments covered by [Section] 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant." *Sabri*, 541 U.S. at 605-606. But "this possibility portends no enforcement beyond the scope of the federal interest." *Id.* at 606. Rather, corruption involving the recipients of substantial amounts of taxpayer dollars affects a federal interest even if it does not directly affect funds traceable to the federal fisc, because "[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value." *Ibid.*

b. Although the defendant in *Sabri* styled his challenge to Section 666(b) as "facial," 541 U.S. at 604, this Court's analysis and holding foreclose petitioners' as-applied challenge. Petitioners contend (Pet. 33) that *Sabri* "turned on the effect a bribe *might* have on federal funds in cases in general," and that Section 666 cannot be constitutionally applied "where *no money*, local or federal, was implicated by a state or local officials' bribery scheme." But even assuming (as the

government did below) that petitioners' scheme regarding zoning did not put money at risk, petitioners are mistaken: "bribed officials" remain "untrustworthy stewards of federal funds" even when the bribe is not connected to the expenditure of particular funds. *Sabri*, 541 U.S. at 606.

As this Court held, it is "enough" for constitutional purposes that in Section 666, Congress "condition[ed] the offense on a threshold amount of federal dollars defining the federal interest." *Sabri*, 541 U.S. at 606. Indeed, although *Sabri* involved a facial challenge to Section 666, the Court indicated that an as-applied challenge would have failed as well because "the acts charged against Sabri himself were well within the limits of legitimate congressional concern." *Id.* at 609. Those acts were similar to the conduct by petitioners in this case. Sabri was a real-estate developer who bribed a city councilman to obtain "various regulatory approvals." *Id.* at 603; see *id.* at 602-603. In describing this conduct, the Court did not address whether the grants Sabri had sought were in fact awarded, or whether the city lost, or risked losing, any money as a result of the scheme. See *id.* at 602-603, 609; see also *id.* at 604 (noting that government had argued that "Sabri's alleged actions related to federal dollars," but that the lower courts did not address that argument).

Petitioners do not suggest that the court of appeals' decision conflicts with the decision of any other court of appeals. Instead, petitioners quote this Court's statement in *Fischer* v. *United States*, that Section 666 should not be interpreted in a manner that "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." 529 U.S. at 681; see Pet. 34. But *Fischer* involved the distinct

question of whether hospitals, as organizations participating in the Medicare program, receive "benefits" within the meaning of Section 666(b)—and the Court held that they do. 529 U.S. at 669, 681-682. And in doing so, the Court recognized that "the Government has a legitimate and significant interest in prohibiting financial fraud and acts of bribery being perpetrated upon Medicare providers," because such acts "threaten the program's integrity." *Id.* at 681. Applying Section 666 to petitioners' conduct—which undisputedly involved an entity (the city) that receives a level of funding that the Court found constitutionally sufficient in *Sabri*—comports with both *Sabri* and *Fischer*.

c. In any event, this case would constitute a poor vehicle to review petitioners' Article I challenge to Section 666 because petitioners failed to timely raise their claim, instead waiting until after their second trial to do so. Although the court of appeals did not decide the threshold question of claim preservation, petitioners' claim is thus subject to review, at most, for plain error.

Federal Rule of Criminal Procedure 12(b)(3) provides that "defenses, objections, and requests" that allege "a defect in the indictment or information" "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B). That includes, but is not limited to, claims alleging that the indictment "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). Failure to raise a Rule 12(b)(3) claim before trial renders it untimely, but a court "may consider" the untimely claim if the party raising it "shows good cause." Fed. R. Crim. P. 12(c)(3).

Here, the district court correctly determined that petitioners' claim, which petitioners raised for the first time in a post-trial motion following their second trial, was untimely and that they failed to show good cause for not raising it sooner. Pet. App. 72a-73a. Therefore, to the extent petitioners' claim is reviewable, it should be reviewed only for plain error. See *United States* v. *Vasquez*, 899 F.3d 363, 372-373 (5th Cir. 2018), cert. denied, 139 S. Ct. 1543 (2019); see also *United States* v. *Guerrero*, 921 F.3d 895, 897-898 (9th Cir. 2019) (per curiam) (citing cases from several circuits declining to review untimely Rule 12(b)(3) claims, even for plain error, absent showing of good cause, and adopting same rule), cert. denied, 140 S. Ct. 1300 (2020).

On plain-error review, petitioners bear the burden to establish (1) error that (2) was "clear or obvious," (3) "affected the defendant's substantial rights," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles* v. *United States*, 585 U.S. 129, 134-135 (2018) (citation omitted); see *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). Particularly given this Court's decision in *Sabri*, petitioners cannot establish that Section 666's application to this case constituted a "clear or obvious" constitutional violation (or any violation at all). *Rosales-Mirelas*, 585 U.S. at 134. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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