No. 16-679

IN THE

Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. Certiorari Is Warranted To Decide Whether Overwhelming Evidence Of An Omitted Element Is Always Sufficient To Prove Harmless Error.

The Government does not dispute that it made no conscious effort to prove – and petitioner had no reason to try to *dis*prove – petitioner's knowledge of the chemical structural similarity between his products and controlled substances, given that the district court had held before trial that the Government need only prove petitioner intended his substances for human consumption. The United States nonetheless defends the Fourth Circuit's conclusion that the error was harmless because, in the court's view, evidence put on to prove other elements overwhelmingly established petitioner's knowledge of chemical structural similarity. BIO 13. Contrary to the Government's assertions, that holding conflicts with the law of other circuits over the meaning of this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), a conflict this Court can and should resolve in this case.

A. The Lower Courts Are Divided.

The petition explained that a number of circuits and state supreme courts have rejected the view that the omission of an element from a jury instruction is harmless so long as trial evidence overwhelmingly proves the omitted element. Pet. § I.B. The Fifth and D.C. Circuits, for example, have refused even to consider whether the evidence was overwhelming when the omission deprived a defendant of the incentive or opportunity to disprove a fact that, at the

time of trial, was completely irrelevant to the Government's case. *Id*. 17-20, 22. And at least two state courts have joined the Fifth Circuit in holding that overwhelming evidence is insufficient when the element was contested. *Id*. 22-23.

The Government nonetheless claims that all of these courts are applying the same legal test, reaching different results only because they have confronted "variations in facts and trial records." BIO 21. Not so.

1. a. The Government admits that in *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016), the Fifth Circuit rejected prosecutors' claim that the instructional error was rendered harmless by "ample evidence" of the omitted element. BIO 22. It insists, however, that this was because the court found the proof less than overwhelming, given that "the reliability of the government's evidence in *Stanford* was contested." BIO 22. While it is true that the court noted this aspect of the proof in a footnote,[1] it was only a passing comment en route to the court's actual holding, which was that the Government's claim of overwhelming evidence *need not be evaluated at all* because "it is one thing for the government to look back now that the Court has provided the proper framework and pick out evidence that fits into that framework; it is another to assume that the jury focused on the same evidence, without the benefit of that framework." 823 F.3d at 835. The court went on to explain that the "government misses the point in focusing only on the evidence actually presented at

[1] *See* 823 F.3d at 835 n.17.

trial," as it "ignores the possibility that [the defendant] might have done more to counter the evidence if he had known that it mattered for the verdict." *Id*. at 837. The court held, instead, that the "error is not harmless unless proof of the missing element was inherent in proof of one of the others." *Id*.

The Government does not deny that the omission of the same mens rea element in this case had the same record-distorting effect. But it says that *Stanford* is distinguishable because the Fifth Circuit discussed the distortion of the record in a portion of the opinion addressing a "denial of the right to present a complete defense" claim, whereas petitioner raised the same objection solely as a reason to find the instructional error non-harmless. BIO 22-23.

Even if such differences in labeling were important, the Government's description of *Stanford* is wrong. To start, even disregarding the section of *Stanford* the Government says is addressing a different issue, the Fifth Circuit made the same point in the section indisputably addressing whether the instructional error was harmless. *See* 823 F.3d at 835. In addition, the court of appeals recognized that Stanford's "right to present a complete defense" argument was really just "the inverse of [his] claim that the jury instructions were inadequate" due to omission of the element. 823 F.3d at 836 n.21. That is, the court explained that "complete defense" claims "typically involve the court's excluding certain testimony or evidence rather than a contention that the defendant would have changed his trial strategy if he had known a particular element was required." *Id*. at 836. For that reason, the court returned to its

analysis of *Neder*'s harmless error standard rather than apply the "complete defense" precedents developed in cases actually presenting such claims. *Id*. at 836-37. Moreover, the conclusion of its analysis was not that Stanford was denied his constitutional right to present a complete defense, but rather that "[i]t follows that the error was not harmless." *Id*. at 838; *see also id*. at 837 ("The error is not harmless unless proof of the missing element was inherent in proof of one of the others.").

The Government acknowledges that in this case petitioner made the same basic objection that the district court's misconstruction of the statute's elements deprived him of any reason to dispute his knowledge of chemical structural similarity. BIO 23. The only difference is that petitioner raised it as part of his argument about why the instructional error was not harmless, using the analytical framework the Fifth Circuit ultimately concluded was better suited for the problem.

b. The Government barely attempts to address the D.C. Circuit's similar holding in *United States v. Sheehan*, 512 F.3d 621 (D.C. Cir. 2008). *See* BIO 23. It asserts, without elaboration, that the court "applied the *Chapman* standard to the particular claims, facts, and circumstances of the case," such that the disparate result in that case and this one is "attributable to differences in those claims, facts, and circumstances." BIO 23. To the contrary, the difference in outcome is attributable to the courts' conflicting legal rules regarding the role of overwhelming evidence in omitted element cases. Unlike the Fourth Circuit below, the D.C. Circuit refused even to consider the weight of the evidence

supporting the omitted mens rea element in *Sheehan*, explaining that "it is impossible to assess the 'weight' of the evidence in this case, because appellant was prevented from advancing a defense on her knowledge and intent." 512 F.3d at 632. It held as a matter of law that "[e]rror cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." *Id*. at 633 (citation omitted). And it specifically distinguished *Neder* on the ground that in that case, the "defendant was 'heard' on the issue" of materiality (because the issue was decided by the judge, rather than excluded from the case altogether, *see* Pet. 15) and because "the defendant in *Neder* did not contest the issue of materiality." 512 F.3d at 633.

2. The United States has no better response to the decisions refusing to find harmless error unless the omitted element was uncontested or the jury necessarily must have found the element in the context of ruling on other charges.

The Government first claims that Idaho treats the contested nature of an omitted element as only a "consideration." BIO 27. That assertion hardly reconciles the cases, though, as the contested nature of an element is completely irrelevant under the Fourth Circuit's overwhelming evidence test. *See* Pet. App. 14a. In any event, the Government's assertion relies on precedent – *State v. Lilly*, 122 P.3d 1170, 1172 (Idaho 2005), *see* BIO 27 – that was superseded by *State v. Perry*, 245 P.3d 961 (Idaho 2010), which undertook to clarify appellate review standards in light of confusion in the cases. *See Perry*, 245 P.3d at 971. The result of that consideration was a holding that made the

defendants' failure to contest an element a prerequisite to finding harmless error, not simply a consideration. *See id*. at 976 (omission harmless when "evidence supporting a finding on the omitted element is overwhelming *and* uncontroverted") (emphasis added). Subsequent Idaho Supreme Court decisions have uniformly used that formulation of the test. *See, e.g.*, *State v. Nichols*, 326 P.3d 1015, 1026-27 (Idaho 2014); *State v. Hochrein*, 303 P.3d 1249, 1257 (Idaho 2013).

Indeed, in *State v. Draper*, 261 P.3d 853 (Idaho 2011), the Idaho Supreme Court rejected a harmless error defense *solely* because the element was contested. *See id.* at 869 ("As this case does not satisfy the requirement pronounced in *Neder* – that 'the omitted element was uncontested' – we are unable to find the instructional error to be harmless.").

The Government likewise fails to explain away the Connecticut Supreme Court's unambiguous adoption of the same rule in *State v. Velasco*, 751 A.2d 800 (Conn. 2000). The Government notes that the court found the evidence in that case was not overwhelming, and insists that this means the case "offers little guidance on how the court would conduct the harmless-error analysis in the face of overwhelming evidence of guilt." BIO 27. But the court could not have made its holding clearer – "*Neder*," it held, "require[s] *both* that the evidence be overwhelming *and* uncontested. 751 A.2d at 815 (emphasis added). Unsurprisingly, the Connecticut courts treat this articulation as establishing the governing standard in that state. *See State v. Fields*, 24 A.3d 1243, 1252 (Conn. 2011); *State v. Kirk R.*, 857

A.2d 908, 919-20 (Conn. 2004); *State v. Montgomery*, 759 A.2d 995, 1022 (Conn. 2000); *State v. Abraham*, 99 A.3d 1258, 1262 n.3 (Conn. App. Ct. 2014); *State v. Price*, 767 A.2d 107, 113 (Conn. App. Ct. 2001).[2]

Finally, the Government largely ignores the Fifth Circuit's holding in *Stanford* that omission of an element "is not harmless unless proof of the missing element was inherent in proof of one of the others." 823 F.3d at 837; *see also id*. at 836 ("As we have noted, to evaluate harmlessness, the court[] in *Neder* . . . asked whether proof of the missing element was an inherent part of the proof at trial."); *id*. at 832 (in *Neder*, "the missing element was logically encompassed by a guilty verdict and was not in fact contested"); *id*. (explaining that the "proof of the element missing from the instruction was inherent in proof of the overall conviction, so the jury could not have failed to find the element"). While it is perhaps possible to read the holding as limited to cases, like *Stanford*, in which the omission prevented a defendant from developing a defense, the case remains irreconcilable with the law of the Fourth Circuit.[3]

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[2] The Government suggests (BIO 25) that the Ninth Circuit has adopted the same rule, with an exception for *Apprendi* errors. BIO 25.

[3] The Government points (BIO 24) to the Fifth Circuit's earlier decision in *United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011), but that case involved no risk of distortion to the trial record because the defendant was on notice of the Government's multiple theories of liability and had an incentive to dispute each. *See id*. at 481-82.

3. The Government does not dispute the recurring importance of the proper role of overwhelming evidence in harmless error review in omitted element cases. Nor does it deny that this Court has previously granted certiorari to examine the closely related question whether harmless error review generally should take into account an error's likely effect on jury deliberations or only the weight of the evidence. *See* Pet. § I.C (discussing cert. grant and dismissal in *Vasquez v. United States*, No. 11-199). The Court should not pass up the opportunity to provide that needed guidance in this case.

B. The Government's Merits Arguments Only Emphasize The Need For Review.

The Government's defense of the decision below is also telling – although it claims that the Fourth Circuit and others are properly applying the basic *Chapman* standard to omitted element cases, it can never quite bring itself to openly embrace the position that overwhelming evidence alone is sufficient to prove harmless error, even when the defendant had no incentive to present evidence on the element given the trial court's misconstruction of the statute. *See* BIO 17-21 (discussing only whether element must be uncontested).

Instead, the Government acknowledges that "[h]armless-error doctrine 'focus[es] on the underlying fairness of the trial," BIO 14 (second alteration in original) (citation omitted), and on whether an error "affected the outcome of the district court proceedings," *id*. 15 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). But it never attempts to explain how a trial could be fair, or an error could leave a verdict unaffected, if it effectively

prevents the defendant from submitting evidence on a central element in the case that becomes relevant only after the trial is over.

II. The Court Should Correct The Fourth Circuit's Evasion Of This Court's Holding In *McFadden*.

The Court should also grant review to resolve whether the Government may establish a defendant's mens rea under the "knowledge-of-identity" theory this Court adopted in its prior decision in this case simply by pointing to evidence that the defendant knew the names and effects of the ingredients in his products. Pet. § II.

The Government does not deny that other circuits have flatly rejected the claim that the knowledge of chemical structural similarity can be proven simply by pointing to evidence that the defendant knew the name and effects of the ingredients in his products. *See* BIO 30-31; Pet. 31-33. Instead, the Government attempts to deny that the court of appeals relied solely on such evidence. BIO 28-29. But it fails to show that the court relied on anything else.

The Government first says the court pointed to petitioner's knowledge about the "composition of his products." BIO 29 (quoting Pet. App. 20a). But the court simply pointed to evidence that petitioner knew the names of the components of his mixtures, not the chemical structures of those substances. *See* Pet. App. 20a.

The Government points to the court's statement that petitioner knew that certain ingredients would serve as a "replacement" for a controlled substance.

BIO 29. But as the Government admits, the point of substituting one ingredient for another would be to recreate the same *effect* as the original – in other words, to "produce products that would get people high." BIO 30. Inferring a defendants' knowledge of structural similarity from his belief that two substances have similar physiological *effects* is precisely the presumption other courts have recently and emphatically rejected, citing to testimony from the Government's own scientists, who have pointed out, for example, that Aspirin and Tylenol can be substituted for one another but do not have similar chemical structures. *See* Pet. 32-33.

The Government next points to the court of appeal's statements that petitioner could "identify[] the number or type of ingredients in some" of his products, and "compared the resulting substances to controlled substances." BIO 29 (citing Pet. App. 20a). But, again, the identification referred to was by name, not structure. *See* Pet. App. 20a. Likewise, the "comparison" was to the *effects* of controlled substances, not their chemical structure, *see id*., which is hardly surprising given petitioner's lack of a science degree.

Finally, the Government suggests there was compelling proof of knowledge of structural similarity in the fact that "petitioner understood the nature of the chemicals he was using and knew enough about their structures to effectively mix them." BIO 30. The court of appeals did not rely on this argument, for good reason: it is ridiculous. One can make a cake without knowing anything about the chemical structure of flour and butter, and can figure out how to substitute honey for sugar without knowing

whether they are substantial similar in their chemical structure. Thus, the Government did not attempt to prove the chemical similarity of MDPV and "Alpha" by dumping ingredients in a bowl and demonstrating that they were capable of being "effectively mix[ed]." BIO 30. It presented scientists with chemical charts and spectrograph results. Pet. 5-6.

So despite its hand waving, the Government is unable to point to anything in the opinion relying on petitioner's knowledge of anything other than ingredients' names and effects. It does not dispute that the Fifth, Seventh, and Tenth Circuits have rejected prosecutors' attempts to substitute knowledge of name and effect for knowledge of chemical structural similarity. BIO 30-31. And it does not deny that prosecutors will point to the Fourth Circuit's harmless error decision in this case as a roadmap for adequately proving knowledge of structural similarity in future cases. *See* BIO 30. When followed, that precedent will all but eliminate the burden this Court established for the Government in Analogue Act cases. *Cf. McFadden v. United States*, 135 S. Ct. 2298, 2307-08 (2015) (Roberts, C.J., objecting to knowledge-of-identity theory as already too lax).

Finally, even if the Court does not believe the case warrants full briefing and argument, it should seriously consider summary reversal. This Court has an interest in ensuring that the practical consequences of its decisions are not effectively undone for the prevailing litigant by a court of

appeals' unjustifiable application of harmless error review on remand.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2017

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[4] Although the case has been remanded for resentencing, the Government does not claim the remand proceedings will moot or shed any light on the questions presented in this petition. *See* BIO 13-14; ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) (interlocutory posture may present "no obstacle to review" when a court of appeals has "decided an important issue, otherwise worthy of review, and Supreme Court intervention [could] serve to hasten or finally resolve the litigation").