No._____

IN THE
Supreme Court of the United States

CHI PING PATRICK HO, *A/K/A* PATRICK C.P. HO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner respectfully presents two issues for review, each of which warrants the involvement of this Court:

1. Whether a federal court may decline to apply the reference canon, recently reaffirmed by this Court in *Jam v. Int'l Fin. Corp.*, --- U.S. ---, 139 S. Ct. 759, 769 (2019), to the money laundering statute, 18 U.S.C. § 1956, which makes specific reference to the Foreign Corrupt Practices Act?

2. Whether an indictment may allege that a defendant violated a federal statute while also alleging that the defendant belongs to the class of persons who are exempt from prosecution under that statute?

LIST OF PARTIES

The parties involved are listed in the caption.

STATEMENT OF RELATED PROCEEDINGS

This case is a petition from the case of *Chi Ping Patrick Ho, a/k/a Patrick C.P. Ho v. United States*, 984 F.3d 191 (2d Cir. 2020).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction is available at *Chi Ping Patrick Ho, a/k/a Patrick C.P. Ho v. United States*, 984 F.3d 191 (2d Cir. 2020). App. 1–53.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit issued an opinion affirming Ho's conviction on December 29, 2020, App. 1–53. In March 2020, this Court extended the time for filing all certiorari petitions due on or after March 19, 2020, to 150 days from the date of, as relevant here, the order denying rehearing. 589 U.S. (order dated March 19, 2020). This petition is filed within 150 days of December 29, 2020.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 15, United States Code, § 78dd-2, which is part of the Foreign Corrupt Practices Act ("FCPA") provides that it shall be a crime

> ***for any domestic concern***, ... or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of payment . . . to . . . any foreign official for purposes of [improperly influencing the foreign official] . . . in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person. [Emphasis added.]

Title 15, United States Code, § 78dd-3, also part of the FCPA, provides that it shall be a crime

> for any person ***other than . . . a domestic concern*** . . . while in the territory of the United States, corruptly to make use of the mails or any

> means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, . . . or authorization of the giving of anything of value to . . . any foreign official for purposes of [improperly influencing the foreign official] . . . in order to assist such person in obtaining or retaining business for or with, or directing business to, any person. [Emphasis added.]

Title 15. U.S.C. § 78dd-2(h)(1) defines a "[d]omestic concern" as:

> (A) any individual who is a citizen, national, or resident of the United States; and
>
> (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Title 18, U.S.C. § 1956(a)(2)(A), part of the Anti-Money Laundering Act makes it a crime to transmit funds "with the intent to promote the carrying on of specified unlawful activity . . . ."

Title 18, U.S.C. § 1956(c)(7) defines "specified unlawful activity" to include "(D) . . . any felony violation of the Foreign Corrupt Practices Act."

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ...

INTRODUCTION

1. Petitioner Patrick Ho was convicted of violating 18 U.S.C. § 1956(a)(2)(A), for laundering money in furtherance of "specified unlawful activity." The indictment specified that one of the alleged specified unlawful activities underlying the money laundering charge was a violation of the FCPA, specifically §

78dd-3. When the money laundering statute was amended to include the FCPA as a specified unlawful activity, however, § 78dd-3 did not exist – it was added to the FCPA six years later. The question whether the reference to the FCPA in § 1956(c)(7)(D) included § 78dd-3 was thus squarely presented.

The Second Circuit's decision that it was included was contrary to this Court's decision in *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019), reaffirming the "reference canon," which it described as providing that "a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments." *Jam*, 139 S. Ct. at 769. The Second Circuit provided no reasonable grounds to refuse to apply the reference canon, and its refusal to do so creates considerable confusion among the lower federal courts about when the canon applies and when it does not. The confusion affects numerous federal criminal statutes, which refer to other statutes "by specific title or section number." *See, e.g.*, 18 U.S.C.A. §§ 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member), 2332b (acts of terrorism transcending national boundaries), 2516 (authorization for interception of wire, oral, or electronic communications); *see also* discussion *infra* at 14–15.

2. In separate counts of the indictment, Ho was charged with violating separate portions of the FCPA, section 78dd-2 and section 78dd-3. Section 78dd-2 prohibits certain actions by "domestic concerns" or their officers, employees or agents. Section 78dd-3 also prohibits certain actions but provides that it does not apply to

domestic concerns. The indictment alleged that Ho was a "domestic concern," as well as an officer, employee, and agent of a domestic concern. By its own allegations, therefore, Ho could not be charged with violating 78dd-3, and, because the indictment alleged both that Ho was a domestic concern and that he had violated 78dd-3, the indictment contained material, contradictory allegations and was therefore repugnant.

The Second Circuit rejected the argument, on the ground that the indictment complied with the longstanding "practice of pleading in the conjunctive without requiring that the government prove all possibilities at trial." App. 45. It also found that Ho had not been "confused" by the government's theory of liability under § 78dd-3, and that even if "the conjunctive language inserted error in the grand jury process, such error clearly would have been harmless." App. 47.

The Second Circuit's reasoning misses the mark, and, if permitted to stand, would render indictments effectively meaningless. To demonstrate the fundamental error, consider that under the Second Circuit's reasoning, if there were two statutes that said, respectively, "If you are over 18 and you do x, then you commit a crime," and "if you are under 18 and you do x then you commit a separate crime," the grand jury could indict a person for both, claiming in one part of the indictment that the defendant was over 18 and in another part of the indictment that the defendant was under 18. No pleading rule would permit such an absurdity, nor does the defendant's lack of confusion render the error harmless. The error goes to the heart of the

defendant's right to be indicted by a grand jury, and the repugnant indictment establishes a fatal flaw in the grand jury's deliberations.

STATEMENT OF THE CASE

A. BACKGROUND

Defendant Patrick Ho was the principal director of a not-for-profit think tank known as CEFC Limited or China Energy Fund Committee ("CEFC"), organized and headquartered in Hong Kong, whose mission included energy security and public diplomacy. *See* App. 4–5, 89. CEFC was fully-funded by China CEFC Energy Company Limited ("CEFC Energy"), a for-profit conglomerate based in Shanghai, China. *See* App. 4, 89. CEFC also funded a not-for-profit entity incorporated in Virginia, China Energy Fund Committee (USA) Inc. ("CEFC-USA"). *See id*.

Ho's job was to lead CEFC and to make contacts that could be helpful in advancing the commercial interests of CEFC Energy. *See* App. 89. In connection with his work for CEFC, he frequently visited the United Nations and had contact with high-ranking officials, including several Presidents of the General Assembly ("PGAs"). *See* App. 5.

The government alleged the existence of two "schemes": the Chad Scheme and the Uganda Scheme. The Chad Scheme was allegedly initiated in September 2014, when an official at CEFC Energy asked Ho if he had any contacts who could arrange a meeting with the President of Chad, Idriss Déby. *See* App. 5, 89–90. Through intermediaries, Ho and other representatives of CEFC Energy attended a meeting President Déby in December 2014, in Chad. *See* App. 6. A cooperating witness at the

meeting testified that cash was provided to President Déby at the meeting, and that the next day the President angrily denounced what he understood to be an effort to bribe him but accepted the money on the grounds that it was a gift to his country, not to him. *See* App. 6–7. The government sought to prove, however, that the money was a bribe from CEFC Energy to President Déby, and that the bribe was related to the company's interest in a block of undeveloped oil resources in Chad. CEFC Energy never invested in the oil block. *See* App. 90.

The Uganda Scheme allegedly began in September 2014, when Ho sought a brief meeting with the incoming PGA, Samuel Kutesa, who also held the position of Foreign Minister of Uganda through his term at the UN. *See* App. 8, 90. At the end of Kutesa's term, in September 2015, Kutesa returned to Uganda, still serving as Foreign Minister. *See* App. 90. Several months later, Kutesa's wife requested that the Chairman of CEFC Energy make a contribution to Kutesa's charity, which Ho arranged to be paid. *See* App. 9–10, 90. Around the same time, Ho arranged for a delegation of CEFC and CEFC Energy representatives to attend the inauguration of the President of Uganda, Yoweri Museveni, and meet with Ugandan officials. *See* App. 10, 90. The government sought to prove that the payment to Kutesa's charity was a bribe connected to CEFC Energy's interest in energy resources or banking in Uganda. CEFC Energy made no investments in Uganda. *See* App. 90–91.

B. INDICTMENT AND TRIAL

Ho was indicted in an indictment containing eight counts: Count 1 charged a conspiracy in violation of 18 U.S.C. § 371. App 60–64. It identified as objects of the

conspiracy two sections of the FCPA, 15 U.S.C. §§ 78dd-2 and 78dd-3. App. 60. Count 2 alleged a violation of § 78dd-2 in connection with the Chad Scheme, App. 65–66; Count 3 alleged a violation of the same statute in connection with the Uganda Scheme, App. 66–68. Count 4 alleged a violation of § 78dd-3 in connection with the Chad Scheme, App. 68–69, and Count 5 alleged a violation of § 78dd-3 in connection with the Uganda Scheme, App. 69–70. Count 6 alleged a conspiracy to engage in money laundering (18 U.S.C. § 1956(h)), App. 71–72, and Counts 7 and 8 alleged substantive money laundering charges in violation of 18 U.S.C. § 1956(a)(2)(A), with respect to the Chad and Uganda Schemes, App. 72–74.

Following a seven-day trial, on December 5, 2018, the jury returned a verdict of guilty on Counts 1 through 6 and 8, acquitting Ho on Count 7. *See* App. 12, 54. Ho was thereupon sentenced to 36 months' incarceration and a $400,000 fine. *See* App. 12. He filed a timely appeal, which raised numerous issues, including those asserted here.

C. ARGUMENTS AND RULING ON APPEAL

Money laundering and the reference canon. With respect to money laundering, Ho noted that Count 8 alleged that Ho violated 18 U.S.C. § 1956(a)(2)(A) in connection with the Uganda Scheme. App. 74, 109. Section 1956(a)(2)(A) makes it a crime to transmit funds "with the intent to promote the carrying on of specified unlawful activity . . . ." Section 1956(c)(7) defines "specified unlawful activity" to include "(D) . . . any felony violation of the Foreign Corrupt Practices Act." Count 8 identified the specified unlawful activity as "(a) the violations of the Foreign Corrupt Practices Act

charged in Counts Three and Five of this Indictment, and (b) offenses against a foreign nation (Uganda) involving bribery of a public official." App. 74.

Ho argued that the offense charged in Count 5, a violation of § 78dd-3, was not a specified unlawful activity under § 1956(c)(7) because in 1992, when Congress amended § 1956(c)(7) to add the Foreign Corrupt Practices Act as a specified unlawful activity (Pub. L. No. 102-550, § 1534, 106 Stat. 3672 (1992)), Congress was referring only to §§ 78dd-1 and 78dd-2—not § 78dd-3, which was not enacted until six years later, in 1998. *See* International Anti–Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302 (1998). Under the reference canon, Ho argued, § 1956(c)(7)'s reference to the Foreign Corrupt Practices Act meant the statute as it existed when that reference was written. App. 109–112.

The Second Circuit rejected the argument on the ground that the language of the money laundering statute was "plain" and thus resort to the reference canon was "unnecessary." App. 22. Key to the court's analysis was that the word "any" in the phrase "(D) . . . *any* felony violation of the Foreign Corrupt Practices Act" compelled the conclusion that the reference to the Foreign Corrupt Practices Act was meant to include its amendments *ad infinitum*. App. 23 ("Indeed, the use of the word 'any' – particularly when paired with the broad descriptor 'felony violation of the Foreign Corrupt Practices Act,' rather than specific prohibitions – reinforces the natural reading of the statute to refer to whatever conduct constitutes such a violation.") (citation omitted). The Second Circuit thus "reject[ed] Ho's suggestion that Congress

was obliged to specify that its reference to the FCPA expressly included subsequent amendments to the statute." App. 24.

The repugnance of the indictment. Counts 4 and 5 of the indictment charged Ho with violating § 78dd-3, with respect to the Chad and Uganda schemes, respectively. App. 68–70. That section makes it a crime, "for any person ***other than . . . a domestic concern***" to engage in certain prohibited conduct. 15 U.S.C. § 78dd-3(a)(1)(B) (emphasis added). Yet, the indictment alleges three times that Ho was a domestic concern. *See* Indictment ¶ 2 at App. 60–61 ("the defendant, and others known and unknown, being a domestic concern and an officer, director, employee, and agent of a domestic concern[,] and a stockholder thereof, . . ."), ¶ 5 at App. 65 (same), ¶ 6 at App. 66 (same). Ho argued that those allegations were fatal to Counts 4 and 5: The grand jury that found probable cause that Ho was a domestic concern could not also find probable cause that he had violated § 78dd-3, which expressly excludes domestic concerns. *See* App. 134–137.

The Second Circuit rejected Ho's argument on the ground that "[o]ur case law, which upholds the practice of pleading in the conjunctive without requiring that the government prove all possibilities at trial, undermines the view that the grand jury 'finds' each fact alleged conjunctively in a charge on which the grand jury indicts." App. 45. The Court also noted that Ho was not confused by the indictment because he "knew that the government was not alleging that he was a domestic concern, and the parties in fact stipulated that he was not a citizen, national, or resident of the United States." App. 46 (internal quotation omitted). Finally, the Court held that

any error was harmless on the grounds that the petit jury's guilty verdict demonstrated that there was probable cause to charge Ho, *see* App. 47, and because the contradiction in the indictment did not pose a greater "'theoretical potential to affect the grand jury's determination whether to indict,'" (quoting *United States v. Mechanik*, 475 U.S. 66, 70 (1986)), than would a procedural error in the grand jury, which would be rendered harmless by the trial jury's guilty verdict. *See* App. 48–49.

REASONS FOR ALLOWANCE OF THE WRIT

Two errors in this case merit this Court's attention and correction.

First, the Second Circuit failed to apply the reference canon – a venerable canon of statutory interpretation that Congress is presumed to observe. The Second Circuit's refusal to abide by the canon was unfounded and sows seeds of confusion that may arise in many cases in the federal courts. The reference canon is a clear rule that applies to multiple statutes, and the Second Circuit's refusal to abide by it places citizens and courts in the untenable position of not knowing when it applies to any of these statutes. The Court should address this issue to make clear what it said in *Jam* and had said before on multiple occasions: That when one federal statute specifically names another, the version of the statute referred to is the one extant when the reference is made.

Second, the indictment against Ho alleged three times that he was a "domestic concern," and it also charged him with two counts of violating 15 U.S.C. § 78dd-3, which expressly exempts domestic concerns. Although it is well-established that there is wide latitude as to the language indictments may use in charging crimes,

permitting contradictory allegations in an indictment renders the grand jury effectively meaningless, and undermined Ho's right to be charged by a grand jury.

A. THE DECISION BELOW IMPROPERLY REFUSED TO APPLY THE REFERENCE CANON. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFUSION AMONG THE LOWER FEDERAL COURTS ABOUT THE APPLICABILITY OF THE REFERENCE CANON.

The Second Circuit's decision in this case conflicts with *Jam v. Int'l Fin. Corp.*, --- U.S. ---, 139 S. Ct. 759, 769 (2019), which reaffirmed the longstanding reference canon, pursuant to which "a statute that refers to another statute by specific title or section number" refers to that statute "without any subsequent amendments." *Id.* The rule was previously stated by the Supreme Court in *Hassett v. Welch*, 303 U.S. 303, 314 (1938), and *Kendall v. United States*, 37 U.S. 524, 625 (1838).

The Second Circuit's refusal to apply the reference canon presents a question of exceptional importance because there are numerous statutes that refer to other statutes by title (as 18 U.S.C. § 1956 refers to the "Foreign Corrupt Practices Act"), or by section number. The Second Circuit's decision leaves the public at a loss to know whether the references are to the statutes as they existed when the reference was made (as required by the reference canon), or to some subsequent version.

The Second Circuit's refusal to apply the reference canon on the ground that the meaning of the phrase "any felony violation of the Foreign Corrupt Practices Act," was "plain," says nothing about the ambiguity that is on the face of the statute – whether § 1956's reference to the FCPA was to the FCPA as it was when the reference was made (1992) or to the FCPA as it has been amended since. That is precisely the ambiguity that the reference canon addresses. The circuit court's conclusion that the

reference canon was "unnecessary" because the words "Foreign Corrupt Practices Act" were not ambiguous, 984 F.3d at 202, would apply whenever a statute references another statute by title. If the circuit court's logic were allowed to stand, the reference canon would have no role.

The circuit court's explanation that its interpretation of § 1956 gave expression to Congress's intent that the money laundering statute be broadly construed ignores the fact that Congress is presumed to legislate with knowledge of the statutory canons of construction. *See, e.g., McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . ."); *King v. St. Vincent's Hosp.,* 502 U.S. 215, 220 n. 9 (1991) ("We will presume congressional understanding of such interpretive principles . . . ."); *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal* Texts, 51 (describing canons of construction as "presumptions about what an intelligently produced text conveys"). Congress must be presumed to have known in 1992, when it amended § 1956 to add the reference to the Foreign Corrupt Practices Act, that its reference was to the Act as it then existed and not as it might be amended. Had Congress intended for § 1956 to incorporate amendments to the FCPA, it could easily have said so by adding the following italicized language to Title 18, U.S.C. § 1956(c)(7): "(D) . . . any felony violation of the Foreign Corrupt Practices Act *as that Act may be amended*."[1]

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[1] Congress has done so in other contexts. *See, e.g. (emphases added):* An Act to Amend Sections 4, 7, and 17 of the Reclamation Project Act of 1939, Pub. L. No. 79-39, § 2, 59 Stat. 75 (1945) (amending § 7(c) of the Reclamation Project Act of 1939 to indicate that "amendments providing for repayment of construction charges in a period of years longer than authorized by this Act, ***as it may be amended***,

The Second Circuit's reliance on the presence of the word "any" in the money laundering statute ("any felony violation of the Foreign Corrupt Practices Act") was misplaced, and if uncorrected will wreak confusion among the lower courts. The word "any" does not indicate which version of the FCPA the money laundering statute was incorporating, and it certainly does not override the clear instruction of the reference canon. By preceding and modifying the phrase "felony violation," with the word "any," in § 1956(7)(D), Congress was simply making clear that it was not referring to a particular violation of the Foreign Corrupt Practices Act, but to each of them. Had § 1956(7)(D) used the phrase "***a*** felony violation of the Foreign Corrupt Practices Act" in defining underlying unlawful activity, it might have been unclear whether Congress was referring to a particular violation. *Compare* A, *The American Heritage Dictionary* (2nd ed. 1982) ("Used before nouns and noun phrases that denote a single, but unspecified, person or thing") *with* Any ("One or some, regardless of kind, quantity, or number").

Numerous referencing statutes within Title 18 use the word "any" before referring to referenced statutes, and several of the referenced statutes have been amended since being referenced. *See, e.g.*, 18 U.S.C. §§ 1956 (referring to "**any** felony violation of section 15 of the Food and Nutrition Act of 2008 [7 U.S.C.A. § 2024]," which has been amended multiple times since the reference) (emphasis added); 2332b

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shall be effective only when approved by Congress."); Pub. L. No. 78-328, § 9, 58 Stat. 269 (1944), An Act to Amend Section 451 of the Tariff Act of 1930, and for other purposes ("Any company or any agent or broker guilty of violating any of the provisions of this Act shall be subject to the provisions of sections 3 and 36, respectively, and ***as may be amended***, of Chapter II, Public, Numbered 824, Seventy–sixth Congress, known as the Fire and Casualty Act, approved October 9, 1940 (54 Stat. 1066 and 1079 . . .)").

(referring to, among other statutes, "**any** violation of . . . section . . . 844(f)(1)," which has been amended since the reference) (emphasis added); 2516 (referring to, among other statutes, "**any** offense which is punishable under . . . section 1030 (relating to computer fraud and abuse)," which has been amended multiple times since the reference) (emphasis added). The decision below leaves the interpretation of these and other statutes highly uncertain, which is precisely the opposite of the purpose underlying the reference canon.

The Second Circuit's reliance on the word "any" is also contrary to *Kendall v. United States*, in which this Court announced the reference canon. The statute at issue in that case was the Act of February 27, 1801, which created the circuit court for the District of Columbia. The relevant provision of that Act, section 3, provided that "'said court and the judges thereof shall have ***all*** the powers by law vested in the circuit courts and the judges of the circuit courts of the United States'" (quoted in *Kendall v. U.S.*, 37 U.S. at 622 (emphasis added)). The *Kendall* Court found that the phrase "all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States" referred to the powers conferred by the Act of February 13, 1801, which created the other circuit courts, as that Act existed on February 27, 1801, even though the Act of February 13, 1801, was subsequently repealed. *See Kendall v. U.S.*, 37 U.S. at 625. The Court established and applied the reference canon:

> [A]doption [by reference] has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any

> certainty as to what was the law; and would be adopting prospectively, all changes that might be made in the law. And this has been the light in which this Court has viewed such legislation. [*Id*.]

Kendall applied the reference canon to a referencing statute that referenced "all the powers." There is no difference in this context between "all" and "any," and the circuit court's refusal to use the reference canon on account of the word "any" in section 1956 is contrary to *Kendall*.

Post-reference amendments to numerous referenced federal criminal statutes have expanded the statutes, raising the question whether the operation of the referencing statutes has been affected. *See, e.g.*, 18 U.S.C.A. §§ 841(f)(1) (expanded by amendment after initial reference in section 2332b to penalize the destruction not only of property owned or possessed by "the United States, or any department or agency thereof," but also of property owned or possessed by "any institution or organization receiving Federal financial assistance"); 1028(a)(6) (expanded by amendment after initial reference in section 2516 to proscribe the possession of stolen or unlawfully obtained identification documents not only "of the United States," but also of "a sponsoring entity of an event designated as a special event of national significance"); 1030(a)(7) (expanded by amendment after initial reference in section 2516 to cover not only the "threat to cause damage to a protected computer," but also the "threat to obtain information from a protected computer without authorization" and extortionate demands for "money or other thing of value in relation to damage to a protected computer"). If the decision below is allowed to stand, courts and

litigants in cases involving any of these statutes will not know whether the reference canon applies, and thus which versions of the referenced statutes are implicated.

Lower courts would benefit from guidance from this Court on the correct application of the reference canon. *Jam* addressed the difference between statutes of "general reference" and statutes of "specific reference," explaining that when a referencing statute refers to a general subject, the referencing statute adopts the law on that subject as it exists whenever a question under the statute arises, but when a referencing statute refers to another statute by title or section number it "in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted . . . ." 139 S. Ct. at 769. Some courts, including the circuit court in this case, have not observed the distinction between statutes of general and specific reference, and have held that even referencing statutes that refer to referenced statutes by the referenced statutes' names or section number are statutes of general reference. *See, e.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1352 (5th Cir. 1980) (reading the Outer Continental Shelf Lands Act as "a general reference statute", despite its express reference to "the provisions of the Longshoremen's and Harbor Workers' Compensation Act"); *Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Labor v. Peabody Coal Co.*, 554 F.2d 310, 323 (7th Cir. 1977) (describing a referencing statute as general even though "the referenced law was referred to by specific section numbers"); *see also E.E.O.C. v. Chrysler Corp.*, 546 F. Supp. 54, 74 (E.D. Mich. 1982) (holding that a "facially specific reference" in the Age Discrimination in Employment Act of 1967 "actually operates as a general one"). Some courts have eschewed the

reference canon. *See United States v. Bankoff*, 613 F.3d 358, 370 n. 11 (3d Cir. 2010) (declining to "determine in this case whether Congress intended for [18 U.S.C.] § 115 to incorporate the 1996 amendment to § 1114").

Accordingly, the uniform administration of justice calls for the continued application of the reference canon, and additional guidance from this Court on its correct invocation and application, given the number of statutes that implicate the canon.

B. THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT FACIALLY REPUGNANT INDICTMENTS MAY NOT STAND.

In connection with its allegations related to § 78dd-2, the indictment alleges three times that Dr. Ho was a "domestic concern." The indictment reads: "The Grand Jury [further] charges . . . the defendant, ***being a domestic concern*** and an officer, director, employee, and agent of a domestic concern and a stockholder thereof . . . ." (Indictment ¶¶ 2, 5, 6 at App. 60, 65, 66) (emphasis added). Yet, the indictment also charges Dr. Ho under Counts 4 and 5 with violating § 78dd-3, which expressly applies to "person[s] ***other than . . . a domestic concern***." 15 U.S.C. § 78dd-3(a)(1)(B) (emphasis added).

Upholding an indictment that alleges a fact that exempts a defendant from a crime but charged the defendant for committing that crime renders the defendant's Fifth Amendment right not to be "held to answer" for a felony except upon an indictment a nullity. *See* U.S. Const., amend. V. For example, if one statute said: "If you are over 18 and you do x, then you commit a crime," and another statute said "if

you are under 18 and you do x, then you commit a separate crime," the grand jury could not indict a person for both. Such an indictment would establish that the grand jury – either on account of confusion, or poor instruction – had not fulfilled its function of protecting the defendant against oppressive prosecutions. *See, e.g., United States v. Williams*, 504 U.S. 36, 47 (1992) ("[T]he whole theory of [the grand jury's] function is that it . . . serv[es] as a kind of buffer or referee between the Government and the people."); *United States v. Dionisio*, 410 U.S. 1, 16–17 (1973) (grand jury's task is to "clear the innocent, no less than to bring to trial those who may be guilty." (footnote omitted)). But that is exactly what this grand jury did. The grand jury found that Dr. Ho was a "domestic concern," (Indictment ¶¶ 2, 5, 6 at App. 60, 65, 66), precluding it from also charging him as a "person other than . . . a domestic concern," as required by § 78dd-3.

Courts have repeatedly found internally inconsistent indictments to be repugnant and, on that basis, dismissed counts of an indictment, reversed convictions, or ordered the Government to decide which of multiple incompatible counts to pursue. *See United States v. Cantrell*, 612 F.2d 509, 510–511 (10th Cir. 1980) (reversing conviction on two counts of indictment because internally inconsistent indictment alleged that defendant transported firearms from Missouri to Kansas, and also received the same firearms in Kansas on the same dates); *see also Lehman v. United States*, 127 F. 41, 45 (2d Cir. 1903) ("It is essential that the charge should not be repugnant or inconsistent with itself, for the law will not permit of absurdity and contradiction in legal proceedings. Repugnancy consists in two

inconsistent allegations which destroy the effect of each other.") (internal citation omitted); *United States v. Conde*, 309 F. Supp. 2d 510, 511 (S.D.N.Y. 2003) (finding indictment to be "inconsistent, and therefore defective" and dismissing one count of indictment on that basis); *United States v. Eason*, 434 F. Supp. 1217, 1221 (W.D. La. 1977) (ordering the Government "to elect" which of three contradictory and incompatible counts it would pursue); *United States v. Cisneros*, 26 F. Supp. 2d 24, 52 (D.D.C. 1998) ("A count of an indictment is 'repugnant' and must be dismissed if there is a 'contradiction between material allegations' in the count.") (quoting *United States v. Briggs*, 54 F. Supp. 731, 732 (D.D.C. 1944), and citing *Cohen v. Wilhelm*, 63 F.2d 543, 545 (3d Cir. 1933)); 11A Cyclopedia of Fed. P. § 42:42 (3d ed. 2019) ("An indictment is defective if it contains logically inconsistent counts.") (citing *Lehman* and *Conde*).

Relying on a footnote in *United States v. Powell*, 469 U.S. 57, 69 n. 8 (1984), numerous lower courts have found that logically inconsistent guilty verdicts violate due process.[2] The same holds true here, but with even greater force. This Court

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[2] *See, e.g.*, *Buehl v. Vaughn*, 166 F.3d 163, 178 n. 11 (3d Cir. 1999) ("[T]he Supreme Court has expressly reserved decision on the question whether this rationale applies to cases where the jury returns inconsistent guilty verdicts, and we have stated that logically incompatible guilty verdicts may not stand."); *United States v. Maury*, 695 F.3d 227, 265–66 (3d Cir. 2012) (reiterating that "*Powell*'s exception" applies to "those *convictions* [that] are mutually exclusive—or, put differently, where the defendant was convicted of two crimes, at least one of which he could not have committed," in other words, where "a conviction as to one of the crimes . . . negate[s] an element of the other.") (emphasis in original); *Masoner v. Thurman*, 996 F.2d 1003, 1005 (9th Cir. 1993) (recognizing that inconsistent guilty verdicts present "grounds for reversal . . . where a defendant is convicted of mutually exclusive offenses, such that the defendant could have been guilty of one or the other, but not both."); *United States v. Moody*, 923 F.2d 341, 346 (5th Cir. 1991) ("Permitting a jury to return convictions on inconsistent, or mutually exclusive, counts arguably requires that a new trial be granted"); *United States v. Ruiz*, 386 F. App'x 530, 533 (6th Cir. 2010) ("In crafting the [*Powell*] exception, the Court contemplated a situation in which a defendant receives two guilty verdicts that are logically inconsistent, for example if a jury convicted a defendant of both larceny and embezzlement based on the same underlying conduct."). Even before *Powell*, presaging this Court's reasoning, an array of

observed in *Powell* that the danger of illogical verdicts by trial juries is mitigated by the fact that an appellate court conducts an independent review of the sufficiency of the evidence as to each count of conviction. *See* 469 U.S. at 67 ("A criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of evidence undertaken by the trial and appellate courts. . . . This review should be independent of the jury's determination that evidence on another count was insufficient."). No such review of the grand jury's deliberations is possible.

The well-established rule that indictments may "plead[] in the conjunctive without requiring that the government prove all possibilities at trial," which the Second Circuit relied on here, App. 45, does not rescue the indictment because the rule is not a *carte blanche* that would allow the grand jury to make any findings – even logically inconsistent ones (the defendant is over 18/the defendant is under 18; the defendant is a domestic concern/the defendant is not a domestic concern). Contrary to the Second Circuit's suggestion, the indictment did not merely "track[ ]"

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circuit courts had vacated convictions that were logically incompatible. *See, e.g.*, *Thomas v. United States*, 314 F.2d 936, 939 (5th Cir. 1963) (vacating as mutually exclusive convictions for smuggling marijuana into the United States and failing to pay transfer tax, where one conviction was predicated on the defendant having acquired marijuana outside the United States, while the other "was necessarily predicated" on his "having obtained the marihuana within the United States"); *United States v. Bethea*, 483 F.2d 1024, 1029–30 (4th Cir. 1973) (requiring new trial because guilty verdicts for failure to keep draft board advised of current address and failure to report for induction were mutually exclusive, because one offense required the defendant to have provided a valid address, while the other depended on his not having done so). Since *Powell*, other courts have done the same. *See United States v. Torres-Concepcion*, Criminal No.; 08-213 (CCC), 2010 WL 11505917, at *2 (D.P.R. Mar. 16, 2010) (dismissing robbery count after defendant pled guilty to extortion because "it is factually impossible for the evidence to establish that he committed both regarding the same property, victim, and occasion.").

the statutory language in § 78dd-2, *see* App. 45, but confirmed that the grand jury had *found* that Dr. Ho was a "domestic concern," *see* Indictment ¶¶ 2, 5, 6 at App. 60, 65, 66 ("the defendant, being a domestic concern"), before also charging him under § 78dd-3, which expressly exempts domestic concerns.

The Second Circuit's holding that any error in the indictment was harmless because it did not pose a greater "'theoretical potential to affect the grand jury's determination whether to indict,'" *id.* at 212 (quoting *United States v. Mechanik*, 475 U.S. 66, 70 (1986)), than would a procedural error in the grand jury, which would be rendered harmless by the trial jury's guilty verdict, ignores the difference between (a) a procedural error, such as the presence of an unauthorized person in the grand jury room, which does not imply any defect in the grand jury's deliberation, and (b) a defect in the indictment that renders it repugnant, and thus evidences such a defect. Ho had a right not to be tried on a repugnant indictment, and he timely asserted that right before his trial. The trial jury's verdict did not diminish Ho's indictment-based right.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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