No. 21-7624

In the

Supreme Court of the United States

WILFREDO LEE LOPEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Reply Brief for Petitioner

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Introduction

Both the Majority and Dissenting opinions in the Ninth Circuit agreed that Wilfredo Lopez's conviction under 18 U.S.C. § 2422(b) could not be sustained based on the predicate offense charged in the indictment. But the Ninth Circuit Majority nonetheless sustained the conviction by taking two erroneous steps. First, the Majority expanded a circuit split by holding that § 2422(b) does not include an element requiring the Government to charge and prove a particular predicate offense. Second, the Majority concluded that because the predicate offense is not an element of § 2422(b), the Court of Appeals could affirm Lopez's conviction based on a different predicate offense than the one that was named in the indictment and based upon which the jury reached its verdict. Each step of this analysis was legally erroneous and of exceptional importance.

The Government opposes certiorari, but its arguments underscore the need for review. As to the first question presented—whether the predicate offense is an element of § 2422(b)—the Government does not dispute the importance of resolving the circuit split, nor does it defend the Ninth Circuit Majority's holding. The Government instead obfuscates the issue, attempting to re-litigate the appeal based on factual claims the Ninth Circuit already rejected. And with respect to the second question presented—as to

the scope of the Fifth Amendment grand jury right—the Government takes the stunning position that a constructive amendment of an indictment violates the Fifth Amendment only when done by a trial court, not a court of appeals. To that end, the Government argues that a court of appeals can affirm a conviction even if it concludes that there was insufficient evidence supporting the charge presented to the grand jury, so long as the reviewing court thinks there was sufficient evidence to sustain some other charge of the court's choosing. The fact that the Government believes that the caselaw is so unsettled that it can take this position underscores the need for this Court to clarify the law and defend the Fifth Amendment's guarantees. As the Honorable Mark J. Bennett concluded in his dissenting opinion in this case:

> In our criminal justice system, "[t]he Fifth Amendment's grand jury requirement establishes the 'substantial right to be tried only on charges presented in an indictment returned by a grand jury.'" *United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001) (quoting *United States v. Miller*, 471 U.S. 130, 140 (1985)). It is entirely within the government's control as to the charges in the indictment it presents to the grand jury for its consideration. The government made its choice here and did not prove the offense the grand jury charged. . . . In contravention of the Constitution, [the

> Majority] has taken on the role of the prosecutor (in its charging decision) and the grand jury (in performing its mandatory role under the Fifth Amendment).

App. 78 (citations cleaned up). This Court should grant review to correct these weighty errors and clarify these important points of law.

Argument

I. The Government does not dispute the importance of resolving the circuit split defining the elements of § 2422(b), but it tries to avoid certiorari with factual arguments the Ninth Circuit has already rejected

Lopez's first question presented asks this Court to resolve a circuit split regarding the elements of the federal enticement charge, § 2422(b). Pet. 11-24. In response, the Government argues that this case is not a proper vehicle for this issue, claiming that Lopez's conviction would be affirmed regardless of which side of the circuit split this Court adopts. Opp. 7-13. But the Government's factual claims have already been rejected by the Ninth Circuit, which explicitly took sides in the circuit split because it was outcome-determinative on appeal. At the least, this Court should resolve the circuit split, clarify the elements of the charge, and remand for the Ninth Circuit to determine whether its errors were harmless.

i. Section 2422(b) criminalizes attempting to entice a minor to engage in "sexual activity for which any person can be charged with a

criminal offense." 18 U.S.C. § 2422(b). The Petition showed that the circuit courts are divided on whether the "can be charged with a criminal offense" language creates an element requiring the Government to charge and prove a particular predicate offense that the proposed sexual activity would violate, or whether the predicate offense is merely a necessary *means* of satisfying an element of § 2422(b), such that the specific predicate need not be listed in an indictment or agreed upon unanimously by a jury. Pet. 12-17 (describing circuit split). In this case, the Ninth Circuit Majority joined the Sixth and Eleventh Circuits—in opposition to the Seventh Circuit—in holding that the predicate offense is *not* an element of § 2422(b). App. 29, 34. The first question presented asks this Court to resolve the circuit split, and, more broadly, clarify the oft-confused distinction between the elements of an offense and the means of satisfying those elements. Pet. 22-24.

ii. The Government does not dispute that there is an important circuit split regarding the elements of § 2422(b), nor does it dispute that the split is ripe for this Court's review. *See* Opp. 7-13. Instead, the Government attempts to re-litigate factual claims that were already rejected by the Ninth Circuit. Specifically, the Government argues that the circuit split is not outcome determinative here because "the indictment did name a specific predicate 'criminal offense': first-degree criminal sexual conduct, in

violation of 9 Guam Code Ann. § 25.15(a)(1) (2013)," and the jury instructions similarly listed that predicate. Opp. 8 (emphasis in original). Consequently, the Government argues, this "Court's resolution of the first question presented in the petition would therefore have no bearing on the correctness of the indictment and jury instructions in petitioner's case." Opp. 8.

But the Government ignores the fact that the Ninth Circuit Majority concluded there was insufficient evidence to sustain Lopez's conviction based on the predicate offense that was actually listed in the indictment, and it therefore explicitly waded into the circuit split in deciding to affirm the conviction. The Majority stated that the predicate listed in the indictment was "inapt." App. 35 (Majority Opinion). The Majority explained that the "the only potential predicate offense in the indictment was 9 G.C.A. § 25.15(a)(1), which criminalizes the completed sexual penetration of a minor under fourteen." App. 33 (Majority Opinion). However, Lopez's conviction could not be sustained based on the predicate listed in the indictment since "[i]t is undisputed that Guam would have lacked jurisdiction to prosecute an offense taking place exclusively within [Anderson Air Force Base], and the evidence adduced at trial indicated Lopez proposed to meet 'Brit' only at locations within [the base]." App. 33 (Majority Opinion). Thus, there was

no evidence Lopez attempted to entice a minor to engage in sexual activity for which he could "be charged with a criminal offense" under the predicate listed in the indictment. *See* App. 33. Or, as the Ninth Circuit Dissent put it, "Lopez could not have committed and did not commit the crime with which he was charged in the indictment. Per force, the government presented insufficient evidence of his guilt." App. 49 (Dissenting Opinion).

Because the conviction could not have been affirmed based on the predicate listed in the indictment, the Ninth Circuit Majority was able to affirm the conviction only after concluding that the predicate is not an element of § 2422(b). To reach an affirmance, the Ninth Circuit Majority first explicitly "join[ed] several other circuits in holding Section 2422(b) does not require the Government to allege a specific predicate offense." App. 29 & n.7 (noting circuit split and siding with the Sixth and Eleventh Circuits). The Majority then reasoned that "Because Section 2422(b) does not contain a predicate offense requirement . . . the indictment's citation to Guam's First Degree Criminal Sexual Conduct statute was mere surplusage." App. 34. The Majority then affirmed the conviction based on a different predicate offense than the one named in the indictment. App. 31, 40 (affirming conviction because "The indictment proposed that the Government might prove Lopez attempted to entice a minor to engage in 'sexual activity for

which a person can be charged with a criminal offense' by reference to one Guam statute . . . . But the Government proved at trial that Lopez's proposed conduct would have been unlawful under another Guam statute[.]").

The Ninth Circuit thus explicitly took sides in the circuit split as an essential step in its decision to affirm the conviction based on a different predicate offense than the one named in the indictment. The Government raises several factual arguments about why the evidence adduced at trial was sufficient to sustain the conviction based on the predicate offense that was in fact listed in the indictment. Opp. 8-13. But the Government raised these same claims in its opposition to Lopez's appeal to the Ninth Circuit. App. 68-75 (Ninth Circuit Dissent addressing Government's arguments); *see also* United States' Answering Brief at 18-22, *United States v. Lopez*, 4 F.4th 706 (9th Cir. 2021) (No. 19-10027), 2020 WL 3621090, at *18-*22 (government brief arguing for affirmance on factual grounds). And, as addressed above, the Ninth Circuit did not affirm the conviction based on these factual claims. The Majority instead concluded that the predicate named in the indictment was "inapt" and affirmed the conviction based on a different, uncharged predicate. App. 35, 40. For its part, the Ninth Circuit Dissent thoroughly debunked the Government's factual claims, showing why

the conviction could not be sustained based on the predicate named in the indictment. App. 68-75.

The Government's vehicle argument thus misses the mark. The Ninth Circuit explicitly waded into the circuit split because the conviction could not be affirmed based on the predicate offense listed in the indictment. To the extent the Government believes that the Ninth Circuit could have affirmed the conviction on narrower factual grounds, that is no reason for this Court to avoid review. The Court should, at the least, clarify the legal standard and remand for the Ninth Circuit to determine whether its errors were harmless. *See Wilson v. Seiter*, 501 U.S. 294, 306 (1991) (remanding for "reconsideration under the appropriate standard" even though "any error on the point may have been harmless"); *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (mem.) (Gorsuch, J., concurring) ("When this Court identifies a legal error, it routinely remands the case so the court of appeals may resolve whether the error was harmless in light of other proof in the case.").

II. The Government's sweeping claims about the limits of the grand jury right demonstrate that review is necessary to clarify and safeguard the Fifth Amendment

The second question presented asks this Court to clarify that the Ninth Circuit Majority violated the Fifth Amendment by sustaining Lopez's conviction based on a different predicate offense than the one that was in fact specified in the indictment and upon which Lopez was convicted at trial. Pet. 25-36. The Government does not defend the Ninth Circuit Majority's flawed conclusion that its decision amounted to a non-prejudicial variance, as opposed to an unconstitutional constructive amendment of the indictment. *See* Pet. 28-34 (addressing Majority's reasoning). The Government instead takes the more sweeping position that no Fifth Amendment violation occurs when a court of appeals decides that there was insufficient evidence to sustain a conviction based on the charge named in the indictment but affirms the judgment of conviction based on a different charge of its choosing. Opp. 13. The fact that the Government believes the caselaw is unsettled enough to permit it to advocate this far-reaching limitation on the Fifth Amendment grand jury right underscores the need for this Court to clarify the law. This Court should grant review to reassert the primacy the Constitution places on grand jury proceedings and the limits on a reviewing court's power to alter the crime charged.

i. Under the Fifth Amendment, a court may not "change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *Stirone v. United States*, 361 U.S. 212, 216 (1960) (quoting *Ex parte Bain*, 121 U.S. 1, 10 (1887)). Instead, the court must accept the charges in the indictment and "decide whether they are sufficient in law to support a conviction." *Russell v. United States*, 369 U.S. 749, 768 (1962).

Here, the Ninth Circuit Majority affirmed the conviction based on a different predicate offense than the one named in the indictment. The Majority justified this decision based on its conclusion that the predicate is not itself an element of § 2422(b), reasoning that the charged predicate was surplusage that the Court of Appeals could excise from the indictment. App. 38-40. But regardless of which side of the circuit split this Court adopts—whether the predicate is an element of § 2422(b) or a necessary means of satisfying an element—the predicate is relevant and material to the charge; indeed, there is no dispute that a § 2422(b) conviction requires proof that the defendant's proposed sexual activities would have violated some predicate offense. Pet. 12-13. The predicate is thus not a superfluous detail that is "unnecessary to and independent of the allegations of the offense

proved." *United States v. Miller*, 471 U.S. 130, 136 (1985); Pet. 28-34. By affirming the conviction based on a different predicate offense than the one named in the indictment, the Majority constructively broadened the indictment. *See Miller*, 471 U.S. at 136; Pet. 8 & n.2. (showing that the Majority's chosen predicate requires proof of distinct elements from the charged predicate). As the Ninth Circuit Dissent put it, the Majority's "amendment not only changes the charging terms of the indictment, but changes them materially, as Lopez did not commit the offense with which he was actually charged." App. 60.

ii. In response, the Government does not defend the Majority's flawed reasoning—it does not defend the erroneous claim that the predicate named in the indictment is mere surplusage. But the Government offers an even more sweeping view of a reviewing court's power to alter the crime charged. Specifically, the Government argues that a constructive amendment of the indictment violates the Fifth Amendment only when the amendment occurs during trial proceedings: as the Government puts it, "[t]his Court has found that a violation of the Grand Jury Clause of the Fifth Amendment may occur when an indictment specifies particular facts underlying an element of a charged offense, the government proves different facts at trial to establish that element, and the jury may have found guilt on

that distinct basis." Opp. 13. But, the Government argues, there is "no authority for [Lopez's] contention that a court of appeals can constructively amend an indictment by denying a sufficiency-of-the-evidence claim." Opp. 13.

That is, the Government argues that no Fifth Amendment violation occurs when a court of appeals decides that there was insufficient evidence to sustain a conviction based on the charge named in the indictment but affirms the judgment of conviction based on a different charge of its choosing. The Ninth Circuit Dissent warned that the Majority "has taken on the role of the prosecutor (in its charging decision) and the grand jury (in performing its mandatory role under the Fifth Amendment)." App. 78. The Government apparently does not disagree that the Majority took on these roles; it simply believes those roles are within the powers of the courts of appeals.

The Government's position here is not only wrong, but it is dangerously so. First, it directly conflicts with *Cole v. State of Ark.*, 333 U.S. 196 (1948), where this Court held that a reviewing court may *not* affirm a conviction based on a different charge than the one presented in an indictment. Specifically, the Court reversed a conviction after a state supreme court had affirmed it based on a different charge than the one named in the indictment and based upon which the defendant proceeded to trial. *Id.* at 200-202.

This Court concluded, "petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law." *Id.* at 202. The Government's position here directly conflicts with *Cole*, as the Government claims that a court of appeals does not err when it affirms a conviction based on a different charge than the one presented in trial court. Opp. 13.

Moreover, the Government's position here would alter the limits this Court has placed on a reviewing court's powers to evaluate the sufficiency of evidence. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court emphasized that "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Id.* at 314 (citing *Cole*). Consequently, a court of appeals may review a conviction to determine whether the "historic facts" presented at trial were sufficient to lead a rational jury to conclude that every element of the charged offense was proven beyond reasonable doubt. *Id.* at 318. Crucially, "[t]hese standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Id.* at 314.

The Government's position in this case turns *Jackson* on its head. Instead of limiting the courts of appeals' sufficiency review to an assessment

of whether the "historical facts" support a conviction under the crime charged, the Government would permit the courts of appeals to review those historical facts against other charges of the courts' choosing. That is, the Government would violate *Jackson*'s "axiomatic" principle and instead allow a judgment of conviction to stand based on a "charge not made or upon a charge not tried." *Id.*

iii. The Ninth Circuit's decision is startling in its willingness to alter the crime charged, not only after the grand jury returned the indictment, but even after the petit jury returned a conviction. And the Government's briefing offers an even more sweeping view of the powers of the courts of appeals, arguing that the Fifth Amendment places no limit on a reviewing court's ability to affirm a conviction based on a different charge than the one named in the indictment. The Government does not dispute that, as the Dissent put it, "Lopez could not have committed and did not commit the crime with which he was charged in the indictment." App. 49 (Ninth Circuit Dissent). But the Government apparently believes the conviction can nonetheless stand, based on the Majority's view that there was sufficient evidence to sustain a different charge. This Court should grant review to affirm that a reviewing court must assess whether a defendant properly stands convicted of the crime charged in the indictment; it may not affirm a

conviction by "chang[ing] the charging part of an indictment to suit its own notions of what it ought to have been." *Stirone*, 361 U.S. at 216.

Conclusion

For the foregoing reasons, Lopez respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: September 7, 2022

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