No. 23-959

IN THE
Supreme Court of the United States

COLIN MONTAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LAW OFFICE OF
STEPHEN N. PREZIOSI P.C.
Chairman of the Amicus Committee of the New York State Association of Criminal Defense Lawyers
48 Wall Street, 11th Floor
New York, NY 10005
212.960.8267
info@appealslawfirm.com

Amer S. Ahmed
Counsel of Record
Seth M. Rokosky
David Herman
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
212.351.2427
AAhmed@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 7

I. The Second Circuit's Rule Violates the Fifth Amendment's Vital Protections for Defendants Charged Under One of the Most Serious Criminal Statutes. 7

A. Indictment by an Independent and Informed Grand Jury Safeguards the Integrity of the Criminal Process. 7

B. These Protections Are Particularly Important for Those Charged with Violating the CCE Statute. 11

C. The Second Circuit's Rule Contravenes These Critical Protections. 18

II. This Case Presents an Appropriate Vehicle for Resolving This Important Issue. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998).....3, 11, 16

Apprendi v. New Jersey,
530 U.S. 466 (2000).....15

Brady v. United States,
397 U.S. 742 (1970).....10

Branzburg v. Hayes,
408 U.S. 665 (1972).....8

Chapman v. United States,
500 U.S. 453 (1991).....12

Garrett v. United States,
471 U.S. 773 (1985)..... 9, 12-14, 16-17

Hamling v. United States,
418 U.S. 87 (1974)..... 3-4, 6-7, 9-11, 18-19

Kaley v. United States,
571 U.S. 320 (2014).....5, 8-9, 15

Lafler v. Cooper,
566 U.S. 156 (2012).....10

Richardson v. United States,
526 U.S. 813 (1999)..... 4-6, 12-14, 16-18, 20

RJR Nabisco, Inc. v. European Cmty.,
579 U.S. 325 (2016).....22

Russell v. United States,
369 U.S. 749 (1962)..... 3, 9-10, 19-20

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003).....22

United States v. Bansal,
663 F.3d 634 (3d Cir. 2011) 16, 21

United States v. Calandra,
414 U.S. 338 (1974).....2, 7-8

United States v. Cianci,
378 F.3d 71 (1st Cir. 2004) 22

United States v. Edmonds,
80 F.3d 810 (3d Cir. 1996) 21

United States v. Gonzalez,
921 F.2d 1530 (11th Cir. 1991).....21

United States v. Mandujano,
425 U.S. 564 (1976).....3, 7-8

United States v. Martinez,
991 F.3d 347 (2d Cir. 2021) 22

United States v. Ogando,
968 F.2d 146 (2d Cir. 1992) 21

United States v. Pirro,
212 F.3d 86 (2d Cir. 2000) 11

United States v. Sells Eng'g, Inc.,
463 U.S. 418 (1983).....7

United States v. Thomas,
274 F.3d 655 (2d Cir. 2001) 11

Wood v. Georgia,
370 U.S. 375 (1962).....3, 8

Statutes

18 U.S.C. § 225 22

18 U.S.C. § 1962 22

21 U.S.C. § 848(b) 15

21 U.S.C. § 853(a) 15

Other Authorities

Am. Bar Ass'n, Criminal Justice Section, *2023 Plea Bargain Task Force Report* (2023) 9-10

Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 Mont. L. Rev. 1 (2001) 13

Eric S. Miller, Note, *Compound-Complex Criminal Statutes & the Constitution: Demanding Unanimity as to Predicate Acts*, 104 Yale L. J. 2277 (1995) 4, 13-14, 22

Gary Cartwright, *The Black Striker Gets Hit*, Texas Monthly (Dec. 1981) 15

H.R. Rep. No. 91-1444 (1970) 12

Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 Wm. & Mary Bill Rts. J. 1 (1992) 16, 22

Robert G. Morvillo & Bary A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 Am. Crim. L. Rev. 137 (1995) ... 5, 11, 13, 16, 23

Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?* 58 Howard L.J. 825 (2015) 8-9

Stephanos Bibas, *Pleas' Progress,* 102 Mich. L. Rev. 1024 (2004) 10

Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: the Transformation of American Criminal Law?*, 2 Wm. & Mary Bill Rts. J. 239 (1993).....12-13, 16, 22

Susan W. Brenner, *The Voice of the Community: a Case for Grand Jury Independence*, 3 Va. J. Soc. Pol'y & L. 67 (1995).....8

W. Corcoran, M. Carlson & T. Tucker, *Narcotic & Dangerous Drug Section Monograph: Criminal Prosecution Under the Continuing Criminal Enterprise Statute: Section 848 of Title 21 United States Code* (Dep't of Justice Monograph, 1982).....12

William Jue, Comment, *The Continuing Financial Crimes Enterprise & Its Predicate Offenses: A Prosecutor's Two Bites at the Apple*, 27 Pac. L. J. 1289 (1996).....22-23

IN THE

Supreme Court of the United States

No. 23-959

COLIN MONTAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE*

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a not-for-profit corporation founded in 1986 with a subscribed membership of

* No counsel for a party authored this brief in whole or in part, and no entity or person other than NYSACDL, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of NYSACDL's intent to file this brief.

more than 1,000 defense attorneys, including private practitioners, public defenders, and law professors. NYSACDL works to ensure that criminal defendants receive all the protections to which state and federal law entitle them, and it has an active legislative committee that advocates for important changes impacting criminal defendants. NYSACDL also puts out the magazine *Atticus*, which addresses current issues confronting the criminal-defense community, and its *amicus* committee presents appellate arguments in both state and federal courts, addressing important issues that impact criminal defendants.

Consistent with its values and experience, NYSACDL maintains that the Fifth Amendment, including the right to indictment by an informed and independent grand jury, must be preserved as a safeguard of individual liberty. NYSACDL offers this brief to urge this Court to grant review on the issue of whether an indictment charging a federal Continuing Criminal Enterprise ("CCE") offense must set forth facts and circumstances that establish the elements of at least three prior controlled-substance offenses, and to reaffirm the importance of constitutionally sufficient indictments for prosecutions under that statute.

SUMMARY OF ARGUMENT

I. The right to an indictment by a grand jury is a critical protection for criminal defendants.

A. The Founders provided in the Fifth Amendment that federal prosecution for serious crimes "can only be instituted by 'a presentment or indictment of a Grand Jury.'" *United States v. Calandra*, 414 U.S. 338, 343 (1974). That requirement is met only where the indictment sufficiently apprises the defendant of

the offense charged. *See Hamling v. United States*, 418 U.S. 87, 117 (1974).

1. The "considered judgment" of the grand jury is "a basic guarantee" that helps ensure the fairness of criminal prosecutions. *United States v. Mandujano*, 425 U.S. 564, 571 (1976). It serves the "invaluable function" of "standing between the accuser and the accused . . . to determine whether a charge is founded upon reason," preventing baseless charges and protecting against unwarranted harms arising at the outset of a case. *Wood v. Georgia*, 370 U.S. 375, 390 (1962). An indictment also makes it possible to prepare a defense and fairly negotiate a guilty plea, where appropriate, and shields the defendant from unfair surprises by preventing the prosecution from "shift[ing] its theory of criminality" in the case. *Russell v. United States*, 369 U.S. 749, 766, 768 (1962).

2. To fulfill these purposes, the indictment must fairly inform the defendant and the court of the charges so they can properly define the issues and prepare for trial. It is unfair to put an individual on trial while leaving him guessing at the Government's theory until it gets worked out at the jury charge. If the defendant can be convicted only upon a finding of certain elements by a petit jury beyond a reasonable doubt, those elements must first be set forth upon a finding of probable cause by the grand jury in the indictment.

Accordingly, at minimum, the indictment must "set forth each element of the crime" (*Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998)), fairly inform the defendant of the charges (*Hamling*, 418 U.S. at 117), and permit him to seek dismissal, where appropriate, based on prior prosecutions (*ibid.*).

It is not enough to include mere "references to statutory citations." Rather, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, *without any uncertainty or ambiguity*, set forth *all the elements* necessary to constitute the offence." *Ibid.* (emphases added) (quotation marks omitted). Moreover, the indictment "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence." *Ibid.*

B. These protections are particularly important for those charged with violating the CCE statute. Recognizing the statute's immense scope, and the serious penalties it carries, Congress and this Court have required prosecutors to sufficiently prove to jurors that the defendant committed at least three predicate acts underlying the alleged CCE offense.

1. The CCE statute is the strongest statutory weapon in the arsenal of the federal drug prosecutor. It vests prosecutors with great latitude to exercise discretion in bringing charges and, if left unchecked, would empower prosecutors to bring broad-ranging indictments of great complexity, tying together matters unrelated in conduct and time, without affording defendants the ability to prepare a defense.

a. For example, the statute permits prosecutors to charge numerous prior crimes to demonstrate a "series of violations" of federal drug laws. And predicate "violations" cover "many different kinds of behavior of varying degrees of seriousness." *Richardson v. United States*, 526 U.S. 813, 819 (1999). Prosecutors thus regularly "engage in a scattershot approach to prosecuting [a CCE], presenting evidence of as many predicate acts as possible." Eric S. Miller, Note,

Compound-Complex Criminal Statutes & the Constitution: Demanding Unanimity as to Predicate Acts, 104 Yale L. J. 2277, 2283 (1995). Unless jurors are made to focus on the details, this "increases the likelihood" of hidden "disagreement among the jurors about just what the defendant did, or did not, do," and "significantly aggravates the risk" that jurors will fail to focus on the facts underlying the alleged series, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Richardson*, 526 U.S. at 819.

The CCE statute's complexity requires such detail in an indictment to guide the grand jury in considering the evidence and determining probable cause. The grand jury must state with clarity the conduct involved and how it all fits together to constitute a CCE offense. Otherwise, the defendant cannot adequately prepare his defense, and the Court cannot properly determine what is in or out as evidence.

b. The CCE statute also vests prosecutors with immense coercive power because its penalties are severe. Even before trial, the defendant faces the stigma of being branded a "kingpin," and a prosecutor may impose great harm by seeking a restraining order to "freeze [the] indicted defendant's assets," even those that may be necessary to obtain counsel. *See Kaley v. United States*, 571 U.S. 320, 322-23 (2014). Such power can allow prosecutors to "virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences" under the statute. Robert G. Morvillo & Bary A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 Am. Crim. L. Rev. 137, 137 (1995).

2. Because the CCE statute vests prosecutors with great power, Congress drafted textual

limitations to ensure that it is wielded fairly and constitutionally. To permit criminal defendants to contest alleged predicate acts before a jury, Congress made a CCE a separate crime with separate penalties, requiring the government to plead and prove each alleged predicate act as an element of a CCE offense. Recognizing that intent, and "serious unfairness" that would result from permitting jurors to disagree about the means for the alleged CCE offense, this Court in *Richardson* held that the statute requires juror unanimity as to which predicates will constitute the "continuing series" for the offense. 526 U.S. at 820, 824.

C. The Second Circuit's rule contravenes these critical protections. The court concluded that a CCE indictment need not state the facts and circumstances of predicate offenses; instead, it need only include "references to statutory citations" for those predicates. But that is a far cry from setting forth each element and thus "fairly inform[ing] a defendant of the charge." *Hamling*, 418 U.S. at 117. In holding otherwise, the Second Circuit ignored the fundamental role that the grand jury plays in safeguarding a defendant's rights, especially in the unique CCE context.

II. This Court should grant certiorari because the case presents a clean vehicle to review the question presented, and the Second Circuit's reasoning threatens deleterious effects on other prosecutions. "There can be no doubt of the circuit split here: the panel majority twice reject[ed] [Third Circuit precedent] by name," and the indictment was bereft of *any* facts and circumstances regarding the alleged predicate acts. 63a. Moreover, the decision has dangerous implications "outside of the CCE context," such as RICO and the financial "kingpin" statute. 61a.

ARGUMENT

I. THE SECOND CIRCUIT'S RULE VIOLATES THE FIFTH AMENDMENT'S VITAL PROTECTIONS FOR DEFENDANTS CHARGED UNDER ONE OF THE MOST SERIOUS CRIMINAL STATUTES.

The Fifth Amendment protects the right of every criminal defendant charged with a serious offense to presentment or indictment by a grand jury. That critical right serves a number of fundamental purposes that safeguard the fairness of the criminal process. That is particularly true in the context of the CCE statute. The Second Circuit's ruling ignores and undermines these critical protections.

A. Indictment by an Independent and Informed Grand Jury Safeguards the Integrity of the Criminal Process.

"The grand jury has always occupied a high place as an instrument of justice in our system of criminal law." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983). "[T]he Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Calandra*, 414 U.S. at 343. That requirement is met only where the indictment is sufficiently detailed to apprise the defendant of the offense charged. *Hamling*, 418 U.S. at 117.

1. The "considered judgment" of the grand jury is "a basic guarantee" that helps ensure the fairness of the criminal process. *Mandujano*, 425 U.S. at 571.

The grand jury is the primary security against "hasty, malicious and oppressive persecution"; it "serves the invaluable function" of "standing between

the accuser and the accused . . . to determine whether a charge is founded upon reason." *Wood*, 370 at 390. The grand jury protects defendants from "arbitrary" government action (*Mandujano*, 425 U.S. at 571), and "unfounded criminal prosecutions" (*Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972)).

"For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained." *Calandra*, 414 U.S. at 351. And the grand jury ensures that prosecutors are able to bring charges only upon a finding of probable cause and with the approval of their peers. *See, e.g.*, Susan W. Brenner, *The Voice of the Community: a Case for Grand Jury Independence*, 3 Va. J. Soc. Pol'y & L. 67, 70 (1995) ("In several famous instances, American grand juries refused to return charges sought by British authorities."); Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?* 58 Howard L.J. 825, 826 (2015) (noting a grand jury's refusal to indict police officer Darren Wilson).

The grand jury also protects against unwarranted infringements upon liberty that an indictment alone can bring at the very outset of the case, "with all the economic, reputational, and personal harm that entails." *Kaley*, 571 U.S. at 329. "If the person charged is not yet in custody, an indictment triggers issuance of an arrest warrant." *Ibid.* (quotation marks omitted). Alternatively, it eliminates his "right to a prompt judicial assessment of probable cause." *Ibid.* And the Government may immediately seek to freeze assets that "would be subject to forfeiture upon conviction." *Id.* at 322. These "grave consequences" are permitted only because the grand jury "gets to say . . .

whether probable cause exists to think that a person committed a crime." *Id.* at 328-30.

The Fifth Amendment's protections also make it possible for the defendant to prepare to meet the charges at trial. A proper indictment "fairly informs" him so he can assess their sufficiency (*Hamling*, 418 U.S. at 117), and, when warranted, plead a prior acquittal or conviction as a defense under the doctrines of collateral estoppel or double jeopardy (*Russell*, 369 U.S. at 764; *see Garrett v. United States*, 471 U.S. 773, 798-99 (1985) (O'Connor, J., concurring)).

As the case progresses, the indictment protects against unfair surprises, preventing the prosecution from "fill[ing] in the gaps of proof" with conjecture or "shift[ing] its theory of criminality." *Russell*, 369 U.S. at 766, 768. "To allow the prosecutor . . . to make a subsequent guess as to what was in the minds of the grand jury . . . would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Id.* at 770.

Similarly, proper indictments facilitate informed judicial decisionmaking as the case moves forward. The indictment "inform[s] the trial judge what the case involves, so that, as he presides and is called upon to make rulings of all sorts," including as to whether the facts alleged are legally sufficient to withstand dismissal, "he may be able to do so intelligently" and fairly. *Id.* at 768-69 (quotation marks omitted).

Finally, the grand jury helps ensure that guilty pleas occur where there is, at minimum, probable cause. *See* Fairfax, Jr., *supra*, at 828 & n.16. In modern practice, "[p]lea bargaining has become the primary way to resolve criminal cases." *See* Am. Bar

Ass'n, Criminal Justice Section, *2023 Plea Bargain Task Force Report*, at 6 n.2 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; *see Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting the "reality that criminal justice today is for the most part a system of pleas, not a system of trials").

Because of their vast discretion, prosecutors often "overcharge" to gain bargaining "leverage" and raise the threat of harsh sentences. Stephanos Bibas, *Pleas' Progress,* 102 Mich. L. Rev. 1024, 1039 (2004). And defendants plead guilty in "the hope or assurance of a lesser penalty." *Brady v. United States*, 397 U.S. 742, 752 (1970). The probable cause requirement helps ensure that such bargaining is appropriately calibrated and more likely to lead to just and fair outcomes. *See* Am. Bar Assoc., *supra*, at 18.

2. In light of those multifaceted concerns, the defendant and the court need specifics in indictments to define the issues that are appropriately in the case and prepare for trial on the charges. It is unfair to put a person on trial for a serious offense while leaving him guessing at the Government's theory until it gets worked out at the jury charge. If the defendant can be convicted only upon a finding of certain elements by a petit jury beyond a reasonable doubt, those elements must be set forth upon a finding of probable cause by the grand jury in the indictment.

When sufficient, an indictment apprises the defendant "with reasonable certainty[] of the nature of the accusation" (*Russell*, 369 U.S. at 766 (quotation marks omitted)); permits him to prepare a defense (*see Hamling*, 418 U.S. at 117); and obviates any need to "speculate as to whether a grand jury *might* have

returned an indictment in conformity" with the prosecution's evidence. *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001) (en banc).

An indictment therefore must "set forth each element of the crime" (*Almendarez-Torres*, 523 U.S. at 228), "fairly" inform the defendant of the charges (*Hamling*, 418 U.S. at 117), and enable him to seek dismissal, where appropriate, by pleading a prior "acquittal or conviction" for the same offense (*ibid.*).

It is not enough, as the Second Circuit concluded in this case, merely to include "references to statutory citations." Rather, the words of the statute must "themselves fully, directly, and expressly, *without any uncertainty or ambiguity*, set forth *all the elements* necessary to constitute the offence." *Hamling*, 418 U.S. at 117 (emphases added) (quotation marks omitted). Moreover, the indictment "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence." *Id.* at 117-18; *see United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000) (indictment cannot "'charge the offence in the same generic terms as in the definition; but it must . . . descend to particulars.'" (quoting *United States v. Cruikshank*, 92 U.S. 542, 544 (1875)).

B. These Protections Are Particularly Important for Those Charged with Violating the CCE Statute.

Beginning in the 1970s, Congress responded to public pressure by arming prosecutors with "ever more powerful weapons in the so-called War on Crime." Morvillo & Bohrer, *supra*, at 137. The CCE statute was integral to those efforts, but Congress and this Court have sought to safeguard the rights of criminal defendants under the statute, in part by requiring

that prosecutors demonstrate to jurors that the defendant committed at least three predicate acts.

1. In 1970, Congress revised "the entire structure of criminal penalties" for drug offenses and created an entirely new offense for those convicted of engaging "in a continuing criminal enterprise," or CCE. H.R. Rep. No. 91-1444, at 4570, 4572, 4575 (1970). The statute "departed significantly from common-law models and prior drug laws." *Richardson*, 526 U.S. at 821 (quotation marks omitted). Among other things, it "made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." *Garrett*, 471 U.S. at 783 (quotation marks omitted). The law was "carefully crafted" and "aimed at a special problem"—"designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." *Id.* at 781; *see Chapman v. United States*, 500 U.S. 453, 467 (1991) (calling the CCE law a "drug 'super-kingpin' statute").

The Department of Justice has described the CCE as "the strongest statutory weapon in the arsenal of the federal drug prosecutor." W. Corcoran, M. Carlson & T. Tucker, *Narcotic & Dangerous Drug Section Monograph: Criminal Prosecution Under the Continuing Criminal Enterprise Statute: Section 848 of Title 21 United States Code* (Dep't of Justice Monograph, 1982). The statute empowers prosecutors to exercise "'virtually unlimited discretion' in bringing charges" (Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: the Transformation of American Criminal Law?*, 2 Wm. & Mary Bill Rts. J. 239, 297 & n.332 (1993)), and, if left unchecked, would permit broad-ranging indictments of great complexity, tying together matters unrelated in conduct and time without affording the ability to prepare before trial. *See*

Morvillo & Bohrer, *supra*, at 138 ("[C]ourts have largely acquiesced in the government's charging practices and virtually ignored the prosecutors' increased and sometimes abusive use of the grand jury.").

a. For example, the statute permits prosecutors to charge defendants with, and present evidence of, numerous prior crimes to demonstrate the required "series of violations" of federal drug laws. *See Garrett*, 471 U.S. at 786. As a result, the Government in a single proceeding can now seek to prove that a suspected "kingpin" has been involved not only in the substantive CCE offense, but also in a number of prior violations that qualify under the statute as predicate offenses. *Richardson*, 526 U.S. at 819; *see Garrett*, 471 U.S. at 785; Brenner, *supra*, at 256, 260.

The CCE statute is extremely broad, with predicate "violations" covering "many different kinds of behavior of varying degrees of seriousness." *Richardson*, 526 U.S. at 819. "The two chapters of the Federal Criminal Code setting forth drug crimes contain approximately 90 numbered sections, many of which proscribe various acts that may be alleged as 'violations' for purposes of the series requirement." *Ibid.*; *see* Miller, *supra*, at 2284 ("[T]he variety of crimes eligible as predicates is astounding.").

Prosecutors thus regularly "engage in a scattershot approach to prosecuting [a CCE], presenting evidence of as many predicate acts as possible with the hope of convincing the jury that the defendant committed at least the requisite number" to constitute a "series." *See* Miller, *supra*, at 2277, 2283; *accord* Brian M. Morris, *Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases*, 62 Mont. L. Rev. 1, 30-31 (2001).

Unless jurors are made to focus on the details of alleged offenses, the breadth of potential predicates "increases the likelihood" of hidden "disagreement among the jurors about just what the defendant did, or did not, do," and "significantly aggravates the risk" that jurors will fail to focus on the facts underlying the alleged series, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Richardson*, 526 U.S. at 819; *see* Miller, *supra*, at 2303, 2280, 2282-84 (warning that the CCE statute invites "patchwork verdict[s]"). That is as true of grand jurors as it is of petit jurors.

Lack of clarity regarding predicate offenses alleged in the indictment also could hinder defendants' ability to plead collateral estoppel from prior acquittals. *See Garrett*, 471 U.S. at 798 (O'Connor, J., concurring) ("Any acquittal on a predicate offense would of course bar the Government from later attempting to relitigate issues in a prosecution under § 848."). And defendants may have a valid double jeopardy claim if the indictment does not make clear that the continuing series of violations occurred "after an earlier conviction for a predicate offense." *Id.* at 799.

Specificity is important to ensure that the Government has chosen "three or more specific violations" and framed its CCE prosecution around them, so it can guide jurors in considering the evidence. *Richardson*, 526 U.S. at 826 (Kennedy, J., dissenting). The grand jury must state with clarity what conduct is alleged and how it all fits together to constitute the alleged CCE. *See, e.g.*, *id.* at 831 (Government must, at the outset, isolate predicate offenses "and then relate all the other parts of the CCE definition" to those offenses). Otherwise, the defense cannot adequately

prepare to meet the charges, and the Court cannot properly determine what is in or out as evidence.

b. Prosecutors wield immense coercive power because the statute's penalties are among the most severe known to modern federal law. They include a minimum of twenty years' incarceration, potential life imprisonment, a large fine, and forfeiture not only of the proceeds of drug offenses, but also any interest in or property affording a source of control over the alleged enterprise. *See* 21 U.S.C. §§ 848(b), 853(a).

Even before trial, a prosecutor may seek a restraining order to "freeze [the] indicted defendant's assets . . . if they would be subject to forfeiture upon conviction." *Kaley*, 571 U.S. at 322. Such an order "prevents a defendant from spending or transferring specified property, including to pay an attorney for legal services." *Id.* at 323. Meanwhile, the defendant faces grave charges and the public opprobrium of being branded a "kingpin," with all the "economic, reputational, and personal harm" that such allegations entail. *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) ("Prosecution subjects the criminal defendant both to the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction." (quotation marks omitted)); *see, e.g.*, Gary Cartwright, *The Black Striker Gets Hit*, Texas Monthly, https://www.texasmonthly.com/true-crime/the-black-striker-gets-hit/ (Dec. 1981) ("The months of suspicion and hostile publicity almost wrecked Lee's law career. . . . 'Even after the charges were dismissed, there was still the stigma.'").

These powerful tools have given prosecutors great leverage in some cases to "virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences" without a jury hearing

evidence from the defense. Morvillo & Bohrer, *supra*, at 137; *see* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 Wm. & Mary Bill Rts. J. 1, 17 (1992) ("Broad and vaguely defined offenses, combined with horrendous sentencing possibilities, give the prosecution the power to make an offer which the defense cannot refuse." (quotation marks omitted)); Brenner, *supra*, at 298 (noting that prosecutors can use statutes like CCE to "construct charges that provide a significant incentive for plea bargaining"). It is critical for defendants to understand the charges so they can act appropriately in the lead-up to trial.

2. Because the CCE statute vests prosecutors with great power, Congress included textual limitations so prosecutors will wield that club fairly and constitutionally, including by designating predicate offenses as elements that "must appear in the indictment." *United States v. Bansal*, 663 F.3d 634, 647 (3d Cir. 2011).

In the legislative debate over the CCE, Congress considered two distinct statutory structures. The first approach was "the imposition of longer *sentences* upon those convicted first of the basic [drug] crime and then shown" during sentencing to be "dangerous offenders." *See Garrett*, 471 U.S. at 782-84 (emphasis added) (quotation marks omitted). This would have allowed prosecutors to omit prior drug offenses from the indictment and then address them later, if at all, at sentencing. *See Almendarez-Torres*, 523 at 226 (recidivism not an "element" that must be charged). This approach drew objections that defendants should be permitted to contest allegations regarding prior offenses at trial. *See Richardson*, 526 U.S. at 820.

The second approach—which Congress enacted—made the CCE a separate crime with separate penalties. This "increased procedural protections for defendants" by requiring the government to plead each predicate offense as a distinct *element* of the new crime and prove each of them beyond a reasonable doubt. *Richardson*, 526 U.S. at 819-20; *see id.* at 826 (Kennedy, J., dissenting); *see also, e.g.*, *Garrett*, 471 U.S. at 784 ("[I]f you are going to prove a man guilty, you have to come into court and prove every element of the continuing offense." (quoting 116 Cong. Rec. 33631 (1970) (remarks of Rep. Eckhardt)).

This Court in *Richardson* therefore held that the CCE statute requires juror unanimity as to which predicate offenses constitute the continuing series for a CCE. *See* 526 U.S. at 824. The Court explained that treating each violation as a separate element "is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law." *Id.* at 819. Moreover, the statute's "breadth" argues against treating violations as mere means (where jurors may disagree) instead of elements (where they may not); it would have tested "constitutional limits" to permit a CCE conviction where jurors disagreed about the means by which a defendant engaged in a "series of violations," at least where (as here) it would risk "serious unfairness" and lack historical support. *Id.* at 819-20.

The dissenting opinion in *Richardson* confirmed that the Court "of necessity alters the manner in which the Government must frame its indictment and design its trial strategy." *Id.* at 826 (Kennedy, J., dissenting). Because "[t]he elements of the offenses charged must be set forth in the indictment," the Government in a CCE case "must choose three or more

specific violations and allege those" in the indictment. *Ibid.* (emphasis added); *see id.* at 831 (explaining that the Court in *Richardson* appeared to require "the Government at the outset to isolate just three or more violations and then relate all the other parts of the CCE definition to just these offenses.").

C. The Second Circuit's Rule Contravenes These Critical Protections.

Undermining these critical protections, the Second Circuit held that a CCE indictment need not state any facts and circumstances regarding the predicate offenses. Instead, the indictment need only include "references to statutory citations" for those predicates and then state the time and location in which the overall enterprise was conducted. 59a; *see* 10a.

But that is a far cry from the balance Congress struck when drafting the CCE statute, which was to require proof beyond a reasonable doubt of each alleged element of a CCE offense, reflecting the imperatives to "fairly inform[] a defendant of the charge against which he must defend," *Hamling*, 418 U.S. at 117, and require grand jurors to find probable cause as to the commission of the requisite predicate acts.

The indictment in this case did not set forth *any* series of alleged drug offenses, much less allege that the defendant's conduct satisfied their elements during the operative time period.[1] 59a. "All the grand jury found was probable cause to believe that Montague 'undert[ook]' unspecified 'violations of' statutes

[1] The indictment charged Montague with one count of narcotics conspiracy under 21 U.S.C. §846, and engaging in a "Continuing Criminal Enterprise in that he did violate . . . Sections 841(a)(1) and 846, which violations were part of a continuing series of violations of said statutes." 4a.

with unspecified elements—that's it." *Ibid.* That cannot be enough, because it permits grand jurors to refrain from determining whether the Government has sufficiently demonstrated how a CCE was committed and leaves that issue to be sorted out much later—precisely the slippery slope Congress rejected when it classified predicate offenses as *elements* of the crime.

The Second Circuit acknowledged the "commonsense rule" that citations to legal statutes cannot substitute a factual element in an indictment. 60-61a. Departing from that rule, however, it reasoned that, in a CCE case, disclosing facts and circumstances about predicate acts "would not necessarily provide more information to the defendant." 14a. But that ignores the fundamental role that indictments play, especially in the unique CCE context.

"[T]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently." *Russell*, 369 U.S. at 771 (quotation marks omitted). "To serve that function, the grand jury must know and agree to the charge the prosecutor puts before it, and the indictment is what gives the necessary assurance that the grand jury did so." 59a (quotation marks omitted). See *supra* at 7-9. The decision below provides no such assurance.

Moreover, an indictment must, at the outset, be returned with such particularity that the defendant can prepare to meet the charges and, where appropriate, seek dismissal on the law or plead a prior acquittal or conviction for the same offense. *Hamling*, 418 U.S. at 117. *See supra* at 9. The Second Circuit's rule would

hinder defendants' ability to adequately assess the charges and take such action.[2]

Finally, an indictment informs the court and the parties of what the grand jury actually considered, so the prosecution can properly move forward without sandbagging the defendant. *Russell*, 369 U.S. at 770; *see Richardson*, 526 U.S. at 826 (Kennedy, J., dissenting) (treating predicate acts as elements affects "the manner in which the Government must *frame its indictment* and *design its trial strategy*." (emphases added)). "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the . . . grand jury was designed to secure." *Russell*, 369 U.S. at 770. The Second Circuit's rule does not account for that basic protection.

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THIS IMPORTANT ISSUE.

This Court should grant certiorari because this case presents a clean vehicle to review the question presented, and the Second Circuit's reasoning threatens deleterious effects on other criminal prosecutions.

"There can be no doubt of the circuit split here: the panel majority twice reject[ed] [Third Circuit precedent] by name." 63a. In holding that a CCE

---

[2] Although the Second Circuit speculated that notice concerns could have been addressed through a bill of particulars, it acknowledged that a request for a bill of particulars "cannot save an invalid indictment." 14a (quoting *Russell*, 369 U.S. at 770). A bill of particulars does not serve the same Fifth Amendment purposes as does an indictment, and a district court is not required to grant one in any event. In fact, Montague sought a bill of particulars and requested information about predicate acts, but the district court denied his request. *Ibid.*

indictment need not plead any facts and circumstances whatsoever of predicate acts underlying a CCE offense, the Second Circuit openly split with the Third Circuit's holding that "an indictment must include the facts and circumstances comprising at least three felonies." *Bansal*, 663 F.3d at 647. Whether or not federal defendants are notified of alleged facts and circumstances comprising their alleged predicate acts now may turn simply on whether they were charged in, say, New Jersey, or across the Hudson River, in New York. This case is an ideal vehicle to resolve that split because the indictment was bereft of *any* facts and circumstances regarding the alleged predicate acts. 63a.

More fundamentally, "[t]his case involves a question of exceptional importance: does an indictment for a crime with predicate offenses as necessary elements require *any* factual detail regarding those predicate offenses?" 58a. Because the Second Circuit did not explain why CCEs warrant less stringent pleading rules and offered no limiting principle to its holding, its erroneous decision is likely to be applied "outside of the CCE context" to other statutes that incorporate a series of predicate acts as elements of statutory offenses that carry severe penalties. 61a.

For example, the CCE statute's "cousin," RICO (*United States v. Ogando*, 968 F.2d 146, 148 (2d Cir. 1992)), which was enacted "at roughly the same time" and for essentially the same purpose (*United States v. Edmonds*, 80 F.3d 810, 836 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part)), has "very similar" requirements and statutory structure (*United States v. Gonzalez*, 921 F.2d 1530, 1537 (11th Cir. 1991)).

Like the CCE statute, RICO seeks to prosecute "kingpins" of enterprises by making it an offense to, among other things, commit a series of predicate acts (*see* 18 U.S.C. § 1962), the elements of which are elements of a RICO offense (*see United States v. Martinez*, 991 F.3d 347, 357 (2d Cir. 2021)). Like liability under the CCE statute, RICO liability is extremely broad, with predicate acts encompassing "dozens" of offenses (*RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 330 (2016)), and penalties being "severe," including lengthy sentences and potential forfeiture (*Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411-12 (2003) (Ginsburg, J., concurring)).

For virtually the same reasons as the CCE statute, RICO is a "powerful weapon that can cause mischief if abused by an overzealous prosecutor" (*United States v. Cianci*, 378 F.3d 71, 112 (1st Cir. 2004) (Howard, J., concurring in part and dissenting in part)), and poses a substantial risk of harming defendants through overbroad indictments and "patchwork verdicts" (Miller, *supra*, at 2282-83; *see* Brenner, *supra*, at 297-98 (RICO gives prosecutors "virtually unlimited" discretion and adds leverage during plea bargaining); Marcus, *supra*, at 17 n.89 ("[T]he existence of a RICO threat has substantially affected the way that criminal charges are drawn, bargained over, and tried." (quotation marks omitted)).

So too the "Continuing Financial Crimes Enterprise statute" (CFCE), or "Financial Crime Kingpin Statute," 18 U.S.C. § 225, a "white-collar analogue" to the CCE statute. William Jue, Comment, *The Continuing Financial Crimes Enterprise & Its Predicate Offenses: A Prosecutor's Two Bites at the Apple*, 27 Pac. L. J. 1289, 1290. (1996); *see* Brenner, *supra*, at 255

("[P]ropositions that apply to RICO and CCE will also apply to CFCE."). That statute is a "near mirror image of its drug-related predecessor" (Morvillo & Bohrer, *supra*, at 149), and punishment is "severe," with a potential life sentence (Jue, *supra*, at 1294).

The Second Circuit's ruling that an indictment need only reference statutory provisions, rather than the facts and circumstances surrounding predicate violations, opens the door to prosecutors in the various circuits reprising the same barebones strategy in RICO and CFCE cases, where the consequences would be no less harmful. Review by this Court is critical to safeguard defendants' rights in prosecutions under these and other similarly sweeping statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAW OFFICE OF
STEPHEN N. PREZIOSI P.C.
Chairman of the Amicus Committee of the New York State Association of Criminal Defense Lawyers
48 Wall Street, 11th Floor
New York, NY 10005
212.960.8267
info@appealslawfirm.com

Amer S. Ahmed
Counsel of Record
Seth M. Rokosky
David Herman
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
212.351.2427
AAhmed@gibsondunn.com

Counsel for Amicus Curiae

April 3, 2024