No. 23-959

IN THE

Supreme Court of the United States

COLIN MONTAGUE,

Petitioner,

—v.—

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

CHRISTINE H. CHUNG
CHRISTINE H. CHUNG PLLC
33 Park Place, No. 236
New York, New York 10007
(917) 685-0423

NOAM BIALE
SHER TREMONTE LLP
90 Broad Street
New York, New York 10004
(212) 202-2600

HARRY SANDICK
Counsel of Record
NADAV BEN ZUR
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
hsandick@pbwt.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors and federal public defenders, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the rights of the accused guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of practitioners who regularly defend complex and significant criminal cases in the trial courts in the U.S. Court of Appeals for the Second Circuit.

The Second Circuit held below that no facts comprising the predicate violations of the crime of operating a continuing criminal enterprise, in violation of 21 U.S.C. § 848 ("CCE"), need be alleged in the indictment. Instead, the court ruled that it suffices for the indictment to cite the statute for each alleged predicate offense. In so holding, the Second Circuit excused an indictment's failure to plead an "element," as required by this Court. *Richardson v United States*, 526 U.S. 813, 816 (1999) (each of the "continuing series of violations" is an element of a CCE charge). It expressly repudiated a contrary Third Circuit rule and

---

[1] No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. Petitioner received ten days' notice of the filing of this amicus brief, and the government has agreed to waive the ten-day notice period and consents to its filing.

affirmatively endorsed a pleading standard lower than approved in any other Circuit.

The ruling below implicates NYCDL's core mission of protecting the rights of the accused through enforcement of one of the most important safeguards of individual rights and protection from arbitrary government action: the Grand Jury Clause of the Fifth Amendment of the U.S. Constitution. NYCDL is in a unique position to explain how the indictment in this case deviated from prevailing charging practice of the U.S. Attorney's Offices in the Second Circuit in failing to allege facts and circumstances comprising the predicate violations of a CCE crime. By upholding the validity of an indictment that failed to comport with the standard that prosecutors themselves heretofore had observed, the decision below creates a new rule from an exception. That new rule will infringe the rights of many future CCE defendants. Because the new rule permits an element to be omitted from the indictment, moreover, the repercussions extend potentially to all felony cases.

Supreme Court cases decided in the last term in which the NYCDL has filed amicus briefs include *Ciminelli v. United States,* 598 U.S. 306 (2023) (unanimously invalidating Second Circuit's right-to-control theory of mail and wire fraud, following government concession of error after grant of certiorari); and *Percoco v. United States*, 598 U.S. 319 (2023) (jury instructions based on Second Circuit precedents impermissibly allowed conviction on basis that a private person could owe a duty of honest services to the public). This Court has cited NYCDL's *amicus* briefs on a range of topics. *See Kaley v. United States*, 571 U.S. 320, 340 (2014); *id.* at 353 (Roberts,

C.J., dissenting); *see also Luis v. United States*, 578 U.S. 5, 22 (2016); *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring); *United States v. Booker*, 543 U.S. 220, 266 (2005).

SUMMARY OF ARGUMENT

Of the rules mandated by the Constitution to protect the rights of the accused, none is more fundamental than that "elements" of crimes must be pled in an indictment. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974). This Court held more than twenty years ago in *Richardson* that each of the "continuing series of violations" that comprise a "continuing criminal enterprise" are "elements" of the CCE crime. 526 U.S. at 817-20. As elements, the drug crimes that are predicates to the CCE charge must be pled.

The panel majority below was wrong to have resisted this basic logic, and to hold instead that it suffices for a CCE indictment to identify the predicate violations by statutory cite. And the panel decision was so clearly wrong that it predictably created a split among the Circuits, in addition to disagreement among the *en banc* court members, five of whom dissented from the denial of rehearing *en banc*. The panel majority decision acknowledges rejecting the holding and reasoning of *United States v. Bansal*, 663 F.3d 634, 647 (3d Cir. 2011) (holding that CCE indictment "must include the facts and circumstances comprising at least three" prior offenses). More fundamentally, no Circuit has endorsed a standard for pleading the CCE crime as undemanding as the one the Second Circuit has now adopted.

The requirements of the Grand Jury Clause cannot be so dramatically diluted without permitting widespread violations of individual rights and undermining the fair administration of criminal justice. The petitioner himself was deprived of every safeguard guaranteed by the Grand Jury Clause. He was: (1) "held to answer" for the CCE charge despite the failure of the indictment to establish that a quorum of the grand jury agreed that he perpetrated the predicates to that crime; (2) forced to prepare for trial without notice of even the times and places of the supposed predicate violations, from within an alleged seven-year conspiracy; and (3) ultimately convicted and sentenced on an indictment insufficiently specific to protect him from Double Jeopardy.

The rule endorsed below will inflict the same deprivations of rights on future defendants, in CCE cases and likely beyond. In the experience of the NYCDL, and based on a review of CCE indictments returned in all districts in the Second Circuit before the decision below was rendered, prosecutors in those districts had been consistently treating predicate offenses as "elements" and thus pleading facts sufficient to comprise the predicates within the four corners of the indictment, at a minimum.

The petitioner's indictment was plainly deficient measured against this previous practice. As a result, the Second Circuit's decision to uphold the indictment's validity invites prosecutors to substantially change their charging practice, authorizing them to water down allegations in CCE indictments. That change in turn would void Grand Jury Clause protections, and potentially not only in CCE cases. If it passes constitutional muster to fail to

plead an "element" of the CCE crime, it is difficult to see why the same failure as to other felony crimes is any less constitutional.

The Second Circuit failed to invalidate a patently deficient indictment. Indeed, the petitioner is today imprisoned despite *no* valid CCE charge having been returned by his fellow citizens on the grand jury; the prosecutors instead created the charge at trial. If the Grand Jury Clause permits this result, it has no force. This Court should grant certiorari and reverse the judgment below.

ARGUMENT

I. THE DECISION BELOW CLEARLY MISAPPLIED LONGSTANDING PRECEDENTS OF THIS COURT AND THUS PREDICTABLY CREATED A SPLIT FROM A CONSENSUS AMONG OTHER CIRCUITS

As the dissents to the panel opinion and denial of rehearing *en banc* state, it should have been straightforward for the Second Circuit to apply clear and longstanding Supreme Court precedents and declare the indictment returned against the petitioner invalid. *United States v. Montague*, 67 F.4th 520, 545-46 (2d Cir. 2023) (Jacobs, J., dissenting); *United States v. Montague*, 84 F.4th 533, 533-34 (2d Cir. 2023) (Pérez, J., dissenting from denial of rehearing *en banc*). Since *Richardson*, it has been clear that each of the "continuing series" of drug offenses required as an element of the CCE crime are themselves "elements." 526 U.S. at 817-20. Of course, an indictment "must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*,

523 U.S. 224, 228 (1998); *accord Hamling*, 418 U.S. at 117 (holding that first requirement of an indictment is to "contain[] the elements of the offense charged"). Further, while "[u]ndoubtedly the language of the statute may be used in the general description of an offence ... it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, of which he is charged." *Hamling*, 418 U.S. at 117-18.

Despite this line of precedent, it is undisputed that the indictment against petitioner did not plead facts and circumstances sufficient to comprise three predicate offenses (the number of predicates agreed by the parties to be required by the CCE statute). Rather, the purported CCE count, Count One, merely tracks, in two paragraphs, the language of the CCE statute, identifying the "continuing series" of drug offenses only as violations of "21 U.S.C. §§ 841(a)(1) and 846," without further factual elaboration. Petition App. 66a. Count Two charges a single narcotics distribution conspiracy, in violation of 21 U.S.C. § 846, the general narcotics conspiracy statute. Circuit Court App. 33. No other violation of 21 U.S.C. §§ 841(a)(1) and 846 is alleged anywhere else in the indictment.

In nonetheless upholding the validity of the CCE charge, the panel majority expressly rejected what it called a "facts-and-circumstances test"—that the indictment must "describe three violations constituting a continuing series of violations," and not merely recite the statutory provisions purportedly violated. *Montague*, 67 F.4th at 529. It also did not apply or discuss this Court's precedents. Instead, it

viewed the outcome of petitioner's case to be a "straightforward application" of a prior Second Circuit case, *United States v. Flaharty*, 295 F.3d 182 (2d Cir. 2002), which in its view upheld an indictment that was not "meaningfully different." *Montague*, 67 F.4th at 530, 531 n.3.

It is indisputable that the Second Circuit rule announced below is irreconcilable with the Third Circuit's precedent in *United States v. Bansal*, 663 F.3d at 647 ("an indictment must include the facts and circumstances comprising at least three felonies," although those facts and circumstances need not be pled in "the CCE count itself"); *Montague*, 67 F.4th at 529-30 (deeming petitioner's reliance on *Bansal* unavailing); *id.* at 531 n.3 (acknowledging that *Bansal* "adopted a facts and circumstances test").

In addition, while the panel majority attempted to wave away the difference between its ruling and those of other Circuits—positing that sister Circuits had decided conditions "sufficient" rather than "necessary" to validly pleading a CCE crime, 67 F.4th at 531 n.3[2]—it is inescapable that the Second Circuit

---

[2] Under this reasoning, Circuit splits would be become vanishingly rare, absent the issuance of advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (describing the rule against advisory opinions as the "oldest and most consistent thread in the federal law of justiciability"). Moreover, while the reliance on the necessary/sufficient distinction implies that courts must limit any prior precedent strictly to its facts, the panel majority opinion inconsistently criticizes the dissenting opinion for looking to the indictments at issue when interpreting prior Second Circuit holdings regarding the sufficiency of those indictments. *Montague*, 67 F.4th at 531 n.2 (faulting the dissent for looking to "the underlying indictments" instead of simply "accept[ing] the reasoning" of those decisions).

adopted below a pleading rule for CCE crimes less demanding than approved in any other Circuit.

Specifically, while at least one Circuit has declined to decide whether the facts and circumstances sufficient to plead three predicate violations must be pled *in the CCE count itself*, *United States v. Staggs*, 881 F.2d 1527, 1531 (10th Cir. 1989) (*en banc*), there is consensus among Circuits other than the Second that to validly charge the CCE crime, the facts and circumstances comprising at least three predicate violations must be pled somewhere within the four corners of the indictment. *Id.* at 1530-31 & n.4 (upholding CCE convictions because indictment charged at least three predicate violations in a narcotics conspiracy count and in overt acts pled in that count; indictment thus "afforded adequate notice when read as a whole"); *United States v. Soto-Beniquez*, 356 F.3d 1, 26 (1st Cir. 2003) (while noting that it is preferable for CCE offenses to be charged in the CCE count, "incorporat[ing] by reference predicate offenses charged elsewhere in the indictment" provides fair notice); *United States v. Moya-Gomez*, 860 F.2d 706, 752 (7th Cir. 1988) (criticizing failure of CCE count to specify violations but holding that six separate narcotics charges gave "actual notice of the predicate acts" for the CCE charge); *United States v. Becton*, 751 F.2d 250, 256 (8th Cir. 1984) (upholding CCE conviction despite failure of CCE count to specify predicates, where "other counts ... gave... notice of the underlying felonies [to the CCE crime]").

Accordingly, Circuits other than the Second Circuit are agreed that facts and circumstances alleging at least three predicate violations must be pled in a CCE indictment. To be sure, some of those

decisions decline to require that those facts and circumstances must be pled within the CCE count itself, or do not require the government to specify in the indictment *which* of the three or more violations are those on which the prosecution will rely at trial to prove the CCE crime. However, the consensus rule in Circuits other than the Second Circuit is that the indictment must do something the indictment here did not: namely, put the defendant on notice of a "menu" inclusive of three or more violations, described factually, within the four corners of the indictment.

As Judge Jacobs noted in his dissent to the decision below, *Montague*, 67 F.4th at 547-48, *United States v. Flaharty*, which the panel majority viewed to govern the outcome of this case, says nothing different. The question presented in *Flaharty* was whether the indictment must "specify the violations that constituted the 'series' necessary" for a CCE conviction. 295 F.3d at 197; *see also Bansal*, 663 F.3d at 647 (describing *Flaharty* to hold that "although an indictment must contain three [violations] that could support a CCE conviction, it need not specify which of those [violations] will ultimately be used to maintain the CCE conviction"). In claiming either that *Flaharty* governed this case, or that *Flaharty* somehow itself represented a departure from the consensus among Circuits, the panel majority simply misread that precedent.

The decision below was clearly erroneous and upset a clear consensus rule among the Circuits.

II. THE RULING BELOW VOIDS THE PROTECTIONS OF THE GRAND JURY CLAUSE IN CCE CASES AND POTENTIALLY IN ALL FELONY CASES

Each of the Grand Jury Clause's protections are voided by the Second Circuit's departure from the consensus among other Circuits. As discussed above, the very reason the other Circuits have settled on the rule that predicate violations must be pled as either separate counts or as acts, even if not within the CCE count itself, is to ensure that the indictment is constitutional.

To lower the pleading standard to require only citation to statutory law violates the constitutional limit. It threatens to upend a practice of pleading facts and circumstances that now prevails, even in the Second Circuit itself, where many of the country's CCE prosecutions are commenced, *see* Pet. Br. at 21 (citing sources of statistics). Moreover, if the Constitution is deemed to tolerate the failure to plead an element of the CCE crime, it is difficult to see why it would not likewise excuse prosecutors from omitting elements of other felony crimes from indictments.

A. The Pleading Rule Adopted Below Vitiates All Protections Of The Grand Jury Clause

While it is nowhere addressed by the panel majority decision below, the first of the three purposes of the Grand Jury Clause is to protect against arbitrary prosecution by ensuring that the grand jury—and not the prosecutor—is the accuser. "[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 of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). The grand jury is the "means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity." *Id.* at 218 n.3.

In this case, however, the indictment fails to demonstrate that any quorum of the grand jury agreed on any set of facts sufficient to comprise three predicate violations of the CCE crime. The Grand Jury Clause dictates that no person can be "held to answer for a capital, or otherwise infamous, crime," U.S. CONST. amend. V, unless, as the Court described it nearly 150 years ago, a grand jury "consisting of not less than sixteen nor more than 23 good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex parte Bain*, 121 U.S. 1, 11 (1887), *overruled in part on other grounds by Cotton v. United States*, 535 U.S. 625, 631 (2002) ("Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.").

The face of petitioner's indictment does not establish that the grand jury found "good reason" for the CCE charge for the simple reason that the indictment alleges no facts comprising the predicates of that charge. Grand jury consensus that probable cause existed to believe that an accused committed a CCE crime *is* made clear, by contrast, when the indictment comports with the consensus rule among other Circuits: *i.e.*, if the indictment, anywhere within

its four corners, alleges qualifying predicates in separate counts or in overt acts tantamount to those predicates.

The defect in petitioner's indictment is not, moreover, constructive amendment of an otherwise valid charge, as in *Stirone*, where the indictment alleged a violation of the Hobbs Act by importation of sand but the trial proof proved the exportation of steel, 361 U.S. at 213-14, or in *Bain*, where the indictment specified that a false bank report was intended to deceive the Comptroller of the Currency but the prosecution was allowed to strike the specification of the deceived party at trial, 121 U.S. at 4-5.

Here, there is no assurance that the grand jury found petitioner to have committed *any CCE crime at all*; the grand jury was not asked to vote on, or agree upon, facts and circumstances comprising the required predicate violations. The charge against petitioner was not amended at trial. It was *created* at trial, and the creator of the charge was the prosecutor, not the grand jury.

The Grand Jury Clause is devoid of meaning if this result is tolerable. *Cf. Schad v. Arizona*, 501 U.S. 624, 651 (1991) (Scalia, J., concurring) ("[w]e would not permit ... an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday"). Society at large, no less than the petitioner, has lost the assurance enshrined in the Constitution that bias, partisanship, or other arbitrariness or overzealousness will not be the cause of government leveling a felony charge. *Russell v. United States*, 369 U.S. 749, 761 (1961) ("The constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury has first intervened reflects

centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166.").

The rule adopted by the Second Circuit likewise deprives accused persons, as it did the petitioner, of the second of the protections of the Grand Jury Clause: notice sufficient to prepare for trial. "Actual notice" of facts and circumstances sufficient to comprise the predicate violations has been an express rationale for the consensus rule adopted by Circuits other than the Second. *See* discussion *supra* at 7-8. But here, a "continuing criminal enterprise" of seven years' duration was alleged, without facts describing even three instances of drug distribution, or conspiracy or conspiracies to distribute drugs, within that seven-year span that would serve as the prosecution's linchpins for proving the CCE crime at trial.

It defies reality to posit that citing to the statutes that outlaw the purported predicates (here, 21 U.S.C. §§ 841(a)(1) and 846) provides the notice guaranteed by the Constitution—notice sufficient to enable preparation of an effective trial defense. Factual "uncertainty and ambiguity" are inherent to the "generic terms," *Russell*, 360 U.S. at 765, in the drug distribution or drug conspiracy statutes that typically serve as predicates for a CCE charge. A mere citation to the narcotics distribution statute or narcotics conspiracy statute fails to provide to defendants and their counsel the basic information of dates or duration, location, purported co-conspirators, type of drug, or quantity of drug. As paradigms of instances in which stating "the words of the statute" will fail to "apprise the defendant, with reasonable certainty, of the nature of the accusation against him," CCE

predicates should be deemed crimes that, whenever pled, "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Id.* (citing *United States v. Hess*, 124 U.S. 483, 487 (1888); *Pettibone v. United States*, 148 U.S. 197, 202-04 (1893); *Blitz v. United States*, 153 U.S. 308, 315 (1894); *Keck v. United States*, 173 U.S. 434, 437 (1899); *Morrissette v. United States*, 342 U.S. 246, 270 n.30 (1952)). The panel majority profoundly derogated the rights of accused persons in holding otherwise.

Finally, the third protection afforded by the Grand Jury Clause—the elimination of the risk of Double Jeopardy—is also vitiated by the pleading rule adopted by the Second Circuit. Because there are innumerable ways and means by which the defendant may be said to have engaged in conduct constituting a CCE predicate, in the absence of specification in the indictment of the facts and circumstances comprising the predicate violations, a prosecutor can easily put a defendant in jeopardy twice. For example, an indictment as generic as the one charging the petitioner does not enable a defendant to fend off a second prosecution in which the prosecutors might claim that he or she engaged in distributing drugs on a single date within the period of the CCE originally charged. The prosecutor can claim that the instance of drug distribution did not serve as one of the three CCE predicates found by the grand or petit jury in, respectively, charging or convicting the defendant in the first prosecution, and nothing in the CCE indictment establishes that the claim is either founded or unfounded.

The ruling below renders Grand Jury Clause protections meaningless.

B. The New Pleading Rule Risks A Wholesale Deprivation Of Rights

It is far from a theoretical prospect that the decision below opens the door to the deprivation of the constitutional rights of many defendants beyond petitioner.

A review of CCE indictments filed in the districts within the Second Circuit supports the anecdotal experience of the NYCDL membership: before the decision below was rendered, prosecutors in each of those districts observed the practice of pleading facts and circumstances comprising the CCE predicate violations. The decision below thus newly greenlights a lowering of pleading standards that will affect the constitutional rights of many.

In the memories and experience of the NYCDL members, prosecutors in the Second Circuit have long observed the rule for pleading a CCE crime that was the consensus among Circuits before the decision below was rendered: at the least, to plead facts and circumstances comprising three CCE predicates, either within the CCE count itself, or within the four corners of the indictment.

To supplement this anecdotal information, NYCDL additionally undertook to review CCE indictments returned in all districts within the Second Circuit in the last decade. For this purpose, the NYCDL used primarily PACER to identify indictments in which CCE was charged, supplementing these searches with Westlaw research.

The review supported NYCDL's experience. In all districts in which the searched databases identified CCE cases, for the past decade,[3] the U.S. Attorney's Offices have followed the rule of identifying at least three predicate violations of any CCE charge by specifying facts and circumstances comprising those predicate violations. For example, in the Eastern District of New York, the strict practice of prosecutors appeared to be to identify CCE "Violations" as such, and within the CCE count itself, with each "Violation" identified by statutory cite and by facts and circumstances.[4] In the Northern District of New York, the CCE count often incorporated by explicit reference the other counts or overt acts constituting the CCE predicate violations.[5]

In *all* districts found to have charged the crime, prosecutors appeared to follow a common charging practice—one of alleging, at a minimum, the facts and circumstances comprising three predicate violations, somewhere within the four corners of the indictment.

---

[3] It cannot be guaranteed that the search identified *every* CCE case brought, but it did not identify CCE cases brought in the Districts of Vermont, Connecticut or the Northern District of New York within the ten-year time period, for example.

[4] *E.g.*, Indictment, *United States v. Usaga-David, et al.*, No. 14-cr-625 (E.D.N.Y.), ECF No. 1 (Dec. 14, 2014) (Count One); Superseding Indictment, *United States v. Saracay-Lopez, et al.*, No. 20-cr-228 (E.D.N.Y.), ECF No. 262 (June 21, 2023) (Count Three).

[5] *E.g.*, Indictment, *United States v. Woods, et al.*, No. 08-cr-676 (N.D.N.Y.), ECF No. 1 (Nov. 6, 2008) (Count Nine); Indictment, *United States v. Realza, et al.*, No. 12-cr-140 (N.D.N.Y.) ECF No. 1 (Mar. 21, 2012) (Count One). The search was expanded in this district to include the decade from 2004 to 2014 because it had not identified cases in the subsequent decade.

The typical scenario was the pleading of additional narcotics conspiracy or narcotics distribution counts (frequently in more than three additional counts), or the pleading of acts constituting instances of drug distribution (as overt acts or in introduction or background sections of the indictment).

The bare-bones CCE charge against petitioner was deficient vis-à-vis both this consensus practice and the other indictments identified through the review. Even in the Western District of New York, where petitioner was indicted, numerous other CCE indictments returned in the last decade alleged facts and circumstances comprising at least three predicate acts.[6] While it is not possible to know the prosecutors' reasons, the departure from the usual practice of pleading facts and circumstances comprising three predicate CCE violations reduced the possibility that the federal grand jury might fail to return an indictment—as had the state grand jury that had originally investigated the petitioner's purported crimes. *Montague*, 67 F.4th at 526.

In sum, given the prevailing practice of the last decade, the ruling below is a flawed tail certain to wag the very sizeable dog of the numerous future CCE prosecutions. The newly endorsed pleading shortcut invites prosecutors to obtain CCE indictments based on more generic allegations, fewer allegations upon which grand jurors must agree, and thus the

---

[6] *E.g.*, Superseding Indictment, *United States v. Walker, et al.*, No. 18-cr-237 (W.D.N.Y.), ECF. No. 84 (Nov. 13, 2019) (Count One); Indictment, *United States v. Aleman-Colon*, No. 20-cr-78 (W.D.N.Y.), ECF No. 1 (June 3, 2020) (Count One); Superseding Indictment, *United States v. Elston, et al.*, No. 15-cr-200 (W.D.N.Y.), ECF No. 258 (Aug. 10, 2017) (Count One).

presentation of lower quality proof. Prosecutors cannot reasonably be expected to resist this invitation. Nor, more fundamentally, is it permissible for the task of guaranteeing the constitutional protection to be left in the prosecutor's discretion. Prosecutorial zeal is precisely the evil against which framers intended the Grand Jury Clause to be the bulwark. *Bain*, 121 U.S. at 12 (grand jury secures the citizenry "against hasty, malicious, and oppressive public prosecutions" and sentiment that there may be "no danger" from "any form of executive power" does not diminish its need).

The decision below frees prosecutors from complying with the Grand Jury Clause in a manner they themselves deemed appropriate for many years. A logical consequence is the lowering of pleading standards in the Second Circuit and, at a minimum, in other Circuits that have not ruled on the question presented here.

C. The Logic Of The Decision Below Is Not Easily Limited To CCE Cases

In addition to being wrongly decided and consequential for CCE prosecutions, the decision below threatens to undermine the rights of those charged with other felony crimes as well.

The decision below by its terms creates a pleading exception for CCE crimes only, but the logic of the exception is difficult to limit to CCE charges. The panel majority opinion does not meaningfully engage with the constitutional principles at stake—instead relying on the erroneous claim that its holding was dictated by a prior Second Circuit opinion, *Flaharty*. As a result of this evasion, the decision below excuses

the failure to plead an element, without putting forward any reason that its holding should be limited to the elements of the CCE crime.

One of two consequences follows. The first is that the CCE crime is indeed an exception to the rule that elements of crimes must be pled, despite the absence of any rationale for the distinction. Among the other troubling implications is the disproportionate deprivation of the constitutional rights of minority defendants. In NYCDL's experience, and based on available statistics, defendants in CCE cases are overwhelmingly from racial minorities. U.S. Sentencing Comm'n, 2022 Annual Report and Sourcebook of Sentencing Statistics, at Table D-2 ("Race of Drug Trafficking Offenders," including in CCD crimes) (reporting that 74.0% of such offenders are non-white, and 42.7% are Hispanic). Treating CCE as the only crime for which all elements need not be pled creates both the appearance and the reality that it is constitutionally permissible for minority defendants to be charged on less evidence, receive less notice, and be targeted more easily in duplicative prosecutions.

The alternative is that the Second Circuit's ruling erodes the pleading of elements generally. To take just one example, if a CCE crime can be charged without pleading facts and circumstances of the predicate violations, it is difficult to see why facts increasing statutory mandatory minimum sentences need be pled. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (an element is "any fact," other than a prior conviction, that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed"); *id.* at 501 (Thomas, J., concurring) (any fact

defined by the legislature to impose or increase punishment is an element that must be alleged and found by a jury). Under this Court's precedents, moreover, whatever the crime, courts are not the arbiters of whether the elements need or need not be pled in an indictment. There is no hierarchy of elements. Breaching this fundamental tenet potentially affects the charging of all elements of all felony crimes.

CONCLUSION

The petition for certiorari should be granted.

Dated: April 3, 2024

Respectfully submitted,

HARRY SANDICK
Counsel of Record
NADAV BEN ZUR
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
hsandick@pbwt.com

CHRISTINE H. CHUNG
CHRISTINE H. CHUNG PLLC
33 Park Place, #33
New York, NY 10007
(917) 685-0423

NOAM BIALE
SHER TREMONTE LLP
90 Broad Street
New York, NY 10004
(212) 202-2600

Counsel for Amicus Curiae New York Council of Defense Lawyers