NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALEXANDER NICHOLAUS SWEET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an indictment charging 18 U.S.C. § 2422(b) lacks constitutionally required specificity if it does not provide a criminal defendant with notice of one of the government's explicit theories of guilt.

2. Whether an indictment that fails to meet minimum constitutional standards is structural error.

RELATED PROCEEDINGS

U.S. District Court:

On May 1, 2023, judgment was entered against Petitioner Alexander Nicholaus Sweet in *United States v. Sweet*, No. 4:21-cr-00340-JFH, Dkt. 165 (N.D. Okla. May 1, 2023). On May 16, 2023, an amended judgment with respect to restitution, Dkt. 177, was entered in this same case.

U.S. Court of Appeals:

On July 9, 2024, the Tenth Circuit affirmed Mr. Sweet's conviction in a published decision, *United States v. Sweet*, No. 23-5049, 107 F.4th 944 (10th Cir. 2024). App. at A1-A13.

On September 18, 2024, the Tenth Circuit denied Mr. Sweet's petition for rehearing. App. at A14-A15.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alexander Nicholaus Sweet, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered on July 9, 2024.

OPINION BELOW

The Tenth Circuit's published decision in Mr. Sweet's case is available at 107 F.4th 944 (10th Cir. 2024) and is in the Appendix at A1-A13. The Tenth Circuit's order denying Mr. Sweet's petition for rehearing is in the Appendix at A14-A15.

JURISDICTION

The United States District Court for the Northern District of Oklahoma had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on July 9, 2024. App. at A1-A13. The Tenth Circuit denied Mr. Sweet's petition for rehearing on September 18, 2024. App. A14-A15. On December 10, 2024, this Court extended the time within which to file a petition for a writ of certiorari to January 16, 2025. App. at A16-A17. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution, U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 2422(b):

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

STATEMENT OF THE CASE

The petitioner, Mr. Alexander Sweet, was convicted by a jury on seven charges, including enticement of a minor under 18 U.S.C. § 2422(b) (count one) and several child pornography charges related to the same minor. He received a life sentence for the enticement charge, and concurrent sentences of a term of years for the other charges.

The charges stemmed from Mr. Sweet's romantic relationship with M.L.C., whom he began dating when she was 16 (the age of consent in Oklahoma), and he was in his mid-to-upper twenties. During their relationship, the couple took sexually explicit photos and made sexually explicit videos. Ultimately, the relationship culminated in an attempted marriage when M.L.C. was 17 and he was 28, shortly before Mr. Sweet was arrested.

Mr. Sweet argued on appeal that the indictment[1] lacked specificity with respect to the Section 2422(b) charge because it did not provide him with notice of the government's surprise theory at trial that he enticed M.L.C. to commit a lewd molestation on another child (as opposed to the more obvious theory, based on the other charges in the indictment, that he enticed M.L.C. to create child pornography

[1] Mr. Sweet was tried based on the superseding indictment filed on November 1, 2021. Because both the original and the superseding indictments were identical with respect to the Section 2422(b) charge, Mr. Sweet uses the term "indictment" in this petition for simplicity's sake.

with him). The Tenth Circuit recognized that Mr. Sweet was surprised by that theory at trial (a fact the trial prosecutor conceded) but held that he was not entitled to notice of it, and that the indictment met constitutional standards. In the alternative, the Tenth Circuit also, pursuant to existing circuit law, applied harmless error review and determined that any indictment error did not require reversal.

I. Mr. Sweet continues to challenge the specificity of the indictment with respect to his Section 2422(b) charge, because it did not provide him with constitutionally required notice of the government's theory of guilt.

Section 2422(b) makes it a crime for someone to use "the mail or any facility or means of interstate or foreign commerce" to "knowingly persuade[], induce[], entice[], or coerce[]" a person under 18 "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." In other words, the statute criminalizes a defendant's knowing efforts to convince a minor to engage in unlawful sexual activity. The first question presented in this petition is whether it is sufficient for an indictment charging Section 2422(b) to simply parrot the text of the statute—without providing any factual detail about the alleged sexual activity the defendant convinced, or attempted to convince, the minor to engage in.

Mr. Sweet argued to the Tenth Circuit that his indictment was constitutionally

deficient because it failed to provide any such factual detail,[2] and as a result, he was surprised at trial by the government's theory that he enticed M.L.C. to molest another child. By failing to provide any information about this theory of the case, the indictment did not meet its requirements under either the Fifth or Sixth Amendments—to ensure (1) the government's theory of the case was "in the minds of the grand jury at the time they returned the indictment," *Russell v. United States*, 369 U.S. 749, 770 (1962); *see* U.S. Const. amend. V, and (2) the criminal defendant was "informed of the nature and cause of the accusation" against him, U.S. Const. amend. VI; *see Russell*, 369 U.S. at 761.

In *Russell*, this Court established a "core of criminality" test for determining whether an indictment is specific enough to meet constitutional standards. Under that test, an indictment must include factual detail beyond the basic text of the statute, if assessing the "core of criminality" under the statute "depends . . . crucially" on "a specific identification of fact." 369 U.S. at 764. In other words, if the core act criminalized by the statute could be legal or illegal depending on an ancillary question of fact, then the indictment must allege some detail about that ancillary fact.[3]

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[2] The only factual specifics included in this count of the indictment were (1) an almost two-year date range, (2) the federal district in which the crime was allegedly committed, and (3) the identity of the alleged victim (M.L.C.). There was no information provided about the alleged unlawful sexual activity.

[3] In *Russell*, the statute at issue criminalized the refusal to answer questions when summoned by a congressional subcommittee if those questions were "pertinent

Here, the core act criminalized by Section 2422(b) is the act of convincing a minor, not the underlying sexual activity itself. But simply speaking to a minor, or even convincing a minor to do *something*, is not, itself, illegal. That is particularly true when, as here, the minor was in a long-term relationship with the defendant and could lawfully engage in certain sexual conduct with him under state law. Instead, whether a defendant's communications with a minor were legal or illegal depends on what, if anything, the defendant was trying to persuade the minor to do—*i.e.*, whether he knowingly persuaded the minor to engage in unlawful sexual activity. That ancillary fact—what sexual activity is at issue—is essential to the determination of guilt under Section 2422(b); therefore, under *Russell*, it must be specified in the indictment.

In ruling against Mr. Sweet, the Tenth Circuit misapprehended this Court's decision in *Russell*. It concluded that because the core act criminalized by Section 2422(b) is the "persuasion and the attempt to persuade," as opposed to "the

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to the question under inquiry." 369 U.S. at 751 n.2. The core act criminalized by that statute was the refusal to answer pertinent questions. *See id.* at 751 n.2, 764. The indictments listed the specific questions that the defendants refused to answer, and asserted, using the statutory language, that those unanswered questions were "pertinent to the question then under inquiry." *Id.* at 752. But the indictments were nonetheless deficient because they did not name the "subject under inquiry." *Id.* at 766. That mattered because simply refusing to answer subcommittee questions was not, itself, a crime. *Id.* at 755. Instead, whether the defendants' refusals crossed the line of criminality depended on the relationship of the unanswered questions to the subject matter under inquiry. *Id.* Even though the subject matter of the congressional hearing was not *itself* the "core of criminality" under the statute, that ancillary fact was essential to the determination of guilt.

performance of the sexual acts themselves," App. at A8, the indictment did not need to include any detail regarding the underlying unlawful sexual act(s). That was erroneous because the panel assumed that the necessary specificity under *Russell*'s core-of-criminality test attaches to the core act criminalized by a statute—when instead, *Russell* demands greater specificity as to any *ancillary* facts that determine whether the core act is legal or illegal in a particular case.

II. Mr. Sweet preserved the argument, currently foreclosed in the Tenth Circuit, that a constitutionally deficient indictment is structural error for which harmless error review is not available.[4]

The second question in this petition is whether the Tenth Circuit erred in applying harmless error review to Mr. Sweet's specificity of the indictment claim, because a constitutionally deficient indictment is structural error.[5] [6] Although the

[4] Mr. Sweet does not concede, for purposes of any future proceedings (including post-conviction proceedings), that the indictment error was harmless under the harmless-error standard.

[5] A *constitutionally* deficient indictment—like the one here, which undisputedly resulted in Mr. Sweet's surprise at trial—is meaningfully different than an indictment that only contains "minor and technical" errors that do not undermine a criminal defendant's constitutional rights. *See Russell*, 369 U.S. at 763.

[6] Moreover, in applying the harmless error analysis, the Tenth Circuit also unnecessarily and erroneously held that the exact unlawful sexual activity is a means and not an element of Section 2422(b), *see* App. at A8-A9—an issue for which there is an existing circuit split. *Compare United States v. Jockisch*, 857 F.3d 1122 (11th Cir. 2017); *United States v. Hart*, 635 F.3d 850 (6th Cir. 2011); *United States v. Lopez*, 4 F.4th 706 (9th Cir. 2021) *with United States v. Mannava*, 565 F.3d 412 (7th Cir. 2009). The Seventh Circuit has the better of the argument. *See Mannava*, 565 F.3d at 415 (jurors must be unanimous as to the sexual activity because, otherwise, "the government could charge

Tenth Circuit applies harmless-error review in this context, *see United States v. Doe*, 572 F.3d 1162, 1175 (10th Cir. 2009), Mr. Sweet reserved the right to raise this argument before this Court, *see* Tenth Circuit Case No. 23-5049, Doc. No. 70 (Appellant's Reply Br. at 9 n.2). This Court has previously granted certiorari to address whether a specific type of indictment error is structural error (in that case, the failure to state an element of the offense), but ultimately did not decide the question and instead ruled on other grounds. *United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007).

This Court has differentiated between typical constitutional "trial error," which is subject to harmless error review, and "structural" errors, which necessitate automatic reversal when preserved. Typical trial errors occur "during presentation of the case to the jury," such that "their effect may 'be quantitatively assessed in the context of other evidence presented'" to the jury. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)). In contrast, structural errors "affec[t] the framework within which the trial proceeds." *Id.* at 149. Such structural errors "defy analysis by 'harmless-error standards'" because they affect the "entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 309.

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a defendant with violating the federal statute by violating 12 state statutes" and a defendant "could be properly convicted even though with respect to each of the 12 state offenses 11 jurors thought him innocent and only one thought him guilty").

There are "at least three broad rationales" for finding an error to be structural, any one of which may independently, or in combination with others, demonstrate that an error is structural. *Weaver v. Massachusetts*, 582 U.S. 286, 295-96 (2017). Specifically, an error may be structural if: (1) "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "the effects of the error are simply too hard to measure"; and/or (3) "the error always results in fundamental unfairness." *Id.* All three rationales independently and collectively demonstrate that a constitutionally deficient indictment like the one in Mr. Sweet's case is a structural error.

First, an indictment serves several important functions beyond protecting a criminal defendant from erroneous conviction. It must "set[] forth the elements of the offense charged, put[] the defendant on fair notice of the charges against which he must defend, and enable[] the defendant to assert a double jeopardy defense." *United States v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir. 2000). By doing so, it helps safeguard a defendant's Fifth and Sixth Amendment due process, grand jury, and notice rights.

Moreover, in addition to safeguarding a defendant's Fifth and Sixth Amendment rights, "an important corollary purpose to be served" by the notice requirement is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *Russell*, 369

U.S. at 768 (quotations omitted). That "corollary purpose" is of particular importance when it comes to Section 2422(b). Given the statute's breadth and largely inchoate nature, one can imagine many instances in which a defendant's communications with a minor are right on the line between legal and illegal speech. What distinguishes the crime of enticement from merely controversial speech is the *purpose* of that speech—*i.e.*, what it was the defendant was trying to persuade the minor to do (if anything). Knowing what the government believes the intended unlawful sexual activity to be, then, is a critical aspect of determining whether each of the government's theories of the case even amounts to a crime, and thus whether a criminal defendant should be subjected to trial proceedings at all.

Second, the effects of a constitutionally deficient indictment are too hard to measure because the indictment affects every stage of the process—from the grand jury proceedings; to pretrial investigation and motion practice; to the defendant's decision whether to go to trial or to negotiate a plea deal; to trial strategy; and to sentencing (particularly if a count should have been dismissed in the first place). As such, simply looking at the error in the context of the other evidence presented to the jury at trial does not, and cannot, answer the question of prejudice to the defendant. The issue is not simply whether the government put forward sufficient evidence to convict the defendant at trial, but also whether and how the indictment error affected the defense team's investigation and strategy leading up to trial and during it.

Finally, in a case like Mr. Sweet's, in which the indictment clearly failed to meet constitutional standards (as evidenced by the fact that both parties agreed during the trial proceedings that he was surprised by the government's molestation theory of enticement at trial), the indictment error results in fundamental unfairness. A criminal defendant is entitled to notice of the events he will be asked to answer for in court. U.S. Const. amend. VI. It is unquestionably unfair if, instead, he is forced to respond on the fly to a new theory of the case, without any prior opportunity to assess whether to plead guilty in light of that theory; to address the theory in his opening statement; to subpoena witnesses; and/or to prepare an effective cross-examination.

REASONS FOR GRANTING THE WRIT

I. Whether an indictment charging 18 U.S.C. § 2422(b) must include some basic factual detail about the underlying sexual activity alleged is an important question of federal law.

This Court should grant Mr. Sweet's petition for certiorari as to the first question presented because the requisite specificity of a Section 2422(b) indictment is an important question of federal law. That is true for several reasons.

First, as a general matter, the specificity requirement safeguards multiple constitutional rights. This Court has explained that an indictment's specificity "[brings] to bear" the Fifth Amendment's grand jury requirement, the Fifth Amendment's due process clause, and the Sixth Amendment's notice requirement. *Russell*, 369 U.S. at 761. That a single error (failing to include the necessary specifics in

an indictment) could undermine at least three constitutional rights necessarily makes defining the contours of that error an important question of federal law.

Second, and more specifically, it is especially important that an indictment be detailed enough to safeguard a defendant's Fifth and Sixth Amendment rights when the defendant is charged under a broad criminal statute. *See Russell*, 369 U.S. at 765 ("It is an elementary principle of criminal pleading, that where the definition of an offence . . . includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms."). And Section 2422(b) is one of the broadest. In fact, as the Tenth Circuit has interpreted it, Section 2422(b) can be violated with pure speech, so long as that speech is aimed at persuading a minor to engage in unlawful sexual activity. *See United States v. Flechs*, 98 F.4th 1235, 1245 (10th Cir. 2024) (statute criminalizes the attempt to persuade a minor, and does not require the defendant to make even a sexual proposal); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019) (statute does not require "the follow-up intent to perform the act after persuasion").

There may well be good policy reasons for Section 2422(b)'s breadth. But that breadth also makes it easily manipulable by the government. Because it is impossible to glean from the mere text of the statute what a person is being asked to answer for in court—or even how many different theories the government intends to raise in court—a barebones indictment permits the government "to roam at large" and "shift

its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell*, 369 U.S. at 768.

This case highlights that problem well, and it is therefore a strong vehicle for this Court's review. Mr. Sweet was ambushed at trial with a particularly abhorrent allegation that he enticed his minor girlfriend to commit a lewd molestation on another child. That theory of enticement was not hinted at in the indictment, nor was it discussed in pretrial filings (such as the government's trial brief and proposed jury instructions, which listed the government's other theories). The government candidly admitted Mr. Sweet had "no notice" of that theory at trial. App. at A5, A8. Yet the government was permitted to repeatedly argue to the jury that it could convict him of enticement under that theory. And then on appeal, the government was free to "shift" away from that theory and disavow it as, at most, a nonprejudicial error in light of the alternative theories it presented at trial. Certiorari is warranted because the Tenth Circuit's decision clearly "enables [Mr. Sweet's] conviction to rest on one point and the affirmance of the conviction to rest on another." *Russell*, 369 U.S. at 766.

Third, the Tenth Circuit's decision in this case is particularly concerning with respect to the Sixth Amendment's notice requirement, because it holds that only *partial* notice is required under that Amendment. By doing so, the decision drains the notice requirement of any real force in a significant part of the country.

Specifically, the Court of Appeals recognized that Mr. Sweet did not have any notice of the government's lewd molestation theory of enticement. *See* App. at A8 (noting that Sweet was "surprise[d] when M.L.C. testified about the lewd molestation"). But it held that the indictment was sufficient because Mr. Sweet received notice of the government's *other* theories of enticement (through the other counts in the indictment). *Id.* (stating that "here," there were "many instances of unlawful sexual activity" that Mr. Sweet "was on notice of"). The Sixth Amendment, however, cannot be satisfied with such partial notice. And if left uncorrected, the decision will allow the government to end run around the Amendment in many other cases, because the government will be permitted to provide defendants with notice of its weaker theories and wait until trial to ambush them with its stronger ones.

Fourth, the outcome of the Tenth Circuit's decision in Mr. Sweet's case conflicts with common practice in other circuits, in which Section 2422(b) indictments often provide detail about the alleged unlawful sexual activit(ies). *See Jockish*, 857 F.3d at 1124 (indictment listed three Alabama statutes); *Lopez*, 4 F.4th at 713 (indictment listed a Guam statute); *United States v. Thompson*, 11 F.4th 925, 927 (8th Cir. 2021) (indictment listed an Arkansas statute); *United States v. Taylor*, 640 F.3d 255, 260, 264 (7th Cir. 2011) (indictment listed two Indiana statutes); *United States v. Bolen*, 136 F. App'x 325, 329 (11th Cir. 2005) (indictment specified sexual activity was "child molestation"); *United States v. Hicks*, 457 F.3d 838, 840 n.2 (8th Cir. 2006)

(indictment listed three Missouri statutes). If this Court were to grant certiorari and reverse the Tenth Circuit's decision, it would help ensure that Tenth Circuit practice aligns with the practice in other circuits, and that criminal defendants across the nation are provided with the same protection of their Fifth and Sixth Amendment rights regardless of the districts in which they are charged.

Finally, Section 2422(b) carries an especially harsh statutory maximum of life imprisonment. That is severe even among federal sex offenses involving minors. *See, e.g.*, 18 U.S.C. §§ 2251(a), (e) (production of child pornography, statutory maximum of 30 years); 18 U.S.C. § 2243(a) (sexual abuse of a minor, statutory maximum of 15 years). And it is the sentence Mr. Sweet received in this case, while still a young man in his twenties. Requiring adequate specificity in a Section 2422(b) indictment ensures that the government has met its constitutional grand jury, due process, and notice obligations before an individual faces the possibility of spending the remainder of his life in federal custody.

II. Whether a constitutionally deficient indictment is structural error is an important question of federal law on which the courts of appeals are divided.

In addition, this Court should also grant Mr. Sweet's petition on his second argument—that a constitutionally deficient indictment is structural error—because it

is an important question of federal law, for which there is an existing circuit split with respect to at least some aspects of it.

First, this is an important question of federal law because a structural error, by its very definition, is one that so affects the framework of a trial proceeding that the trial "cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Fulminante*, 499 U.S. at 310. Failing to recognize a structural error as such thus runs the risk that a person whose entire trial proceedings were fundamentally unreliable still may not receive relief, because it is not easily apparent from a review of the evidence presented at trial how that unreliability may have affected the proceedings as a whole. In fact, this Court previously recognized the importance of this question when it granted certiorari on a related question in *Resendiz-Ponce*, even though that case was ultimately decided on other grounds. 549 U.S. at 103-04.

Second, the circuits are divided about whether constitutionally deficient indictments are structural error, at least with respect to indictments that are deficient for failing to state an element of an offense. On one side of the split, the Ninth Circuit has held that such a deficient indictment is structural error, at least when timely objected to, because it impacts the Fifth Amendment's grand jury requirement. As that Court has explained, failing to enforce the grand jury requirement under the guise of harmless error review would inappropriately permit courts to "guess as to what was in the minds of the grand jury at the time they returned the indictment."

United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999); *see United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005). In other words, "[r]efusing to reverse" when the grand jury right has not been complied with "would impermissibly allow conviction on a charge never considered by the grand jury." *Id.* at 1180. *See also Omer*, 395 F.3d at 1089; *United States v. Qazi*, 975 F.3d 989, 991 (9th Cir. 2020). Although the Ninth Circuit's cases focus on indictments that are deficient because of the failure to allege an element, as opposed to indictments that are insufficiently specific, the reasoning strongly supports Mr. Sweet's argument here: that an indictment that is too unspecific to provide any notice of a government's theory of the case also raises the distinct possibility that the government presented a theory of the case to the grand jury which significantly diverged from its theory at trial. *See Russell*, 369 U.S. at 768.

In contrast, a number of other circuits have applied harmless error review to similar indictment errors, but those circuits' analyses are flawed and, in any event, do not meaningfully address or obviously apply to the type of error alleged by Mr. Sweet. *See, e.g.*, *United States v. Stevenson*, 832 F.3d 412, 426–27 (3d Cir. 2016); *United States v. Dentler*, 492 F.3d 306, 310 (5th Cir. 2007); *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002); *United States v. Maez*, 960 F.3d 949, 958 (7th Cir. 2020); *Doe*, 572 F.3d at 1175; *United States v. Leonard*, 4 F.4th 1134, 1144 (11th Cir. 2021). For example, several of those circuits have erroneously analogized the failure to allege an element in an indictment with the omission of an element in a jury instruction, in light

of this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999) that the latter type of error is not structural. *See Stevenson*, 832 F.3d at 427; *Doe*, 572 F.3d at 1174-75 (citing *United States v. Prentiss*, 256 F.3d 971, 983-84 (10th Cir. 2001) (en banc), *overruled in part on other grounds as recognized by Doe*); *see also Dentler*, 492 F.3d at 310 (citing *United States v. Robinson*, 367 F.3d 278, 286-87 (5th Cir. 2004)); *Leonard*, 4 F.4th at 1144 (citing to *United States v. Sanchez*, 269 F.3d 1250, 1273 (11th Cir. 2001)). But those two types of claims are meaningfully distinct: The first involves an error that affects the entire framework of the proceedings from start to finish, such that the prejudice to the defendant is near-impossible to assess. *See supra* at 9-11. The second is a classic trial error specifically occurring in the "presentation of the case to the jury," *Gonzalez-Lopez*, 548 U.S. at 148—and even then, only with respect to a discrete part of the jury's verdict, the impact of which an appellate court is well-positioned to assess, *Neder*, 527 U.S. at 10-11, 19 (appellate courts can "ask[] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element").

Certiorari is accordingly warranted to resolve the division among the circuits on this important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to both questions presented.

Respectfully submitted,

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