No. _____

IN THE SUPREME COURT OF THE UNITED STATES

REYMUNDO ARREDONDO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

"[A] variation between pleading" in an indictment "and proof" at trial can result in a constructive amendment, thereby "destroy[ing] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212, 217 (1960). Some courts have concluded that a constructive amendment can arise only when the crime charged is defined in a different statute from the crime proved. But other courts have held that a constructive amendment occurs when the proof at trial alters an essential element of the charged offense, even if the statute pled and proved remains the same.

The question presented is:

When a criminal offense can be committed in a variety of ways, does a prosecutor constructively amend an indictment by altering the essential elements of the statute specified in the indictment?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Reymundo Arredondo and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Arredondo*, No. 21-CR-3259-LAB, U.S. District Court for the Southern District of California, Judgment issued June 10, 2022.
- *United States v. Arredondo*, No. 22-40132, U.S. Court of Appeals for the Ninth Circuit, Memorandum disposition issued October 15, 2024.

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INTRODUCTION

The Fifth Amendment's Grand Jury Clause provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. In *Stirone v. United States*, 361 U.S. 212 (1960), this Court recognized that a prosecutor can violate that right by constructively amending an indictment at trial, urging the petit jury to convict of a crime not charged. But lower courts disagree about the constructive amendment doctrine's bounds. The First, Sixth, and Eighth Circuits have concluded that constructive amendments can arise only when the prosecutor charges and proves crimes arising under different statutes. That is the approach that the Ninth Circuit majority took in this case. The Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits, however, have found constructive amendments when the indictment differently describes the offense's essential elements, even if the

statute pled and proved remains the same. Courts on both sides of the split have complained about the doctrine's fuzzy boundaries, especially given the stakes: A constructive amendment finding requires reversal, and it is therefore usually case dispositive. This case presents an excellent opportunity to resolve that entrenched split, because Mr. Arredondo fully preserved his constructive amendment claim and the split makes a dispositive difference in his case. This Court should therefore grant review.

OPINION BELOW

A divided Ninth Circuit panel affirmed Mr. Arredondo's conviction in a memorandum disposition. *See* Pet. App. A. Judge Clifton dissented. *Id*. at A8–20. Mr. Arredondo subsequently filed a petition for rehearing and rehearing en banc, which was denied. *United States v. Arredondo*, No. 22-50132, Docket No. 52.

JURISDICTION

The Ninth Circuit affirmed Mr. Arredondo's conviction on October 15, 2024. Pet. App. A. The court denied Mr. Arredondo's petition for rehearing or rehearing en banc on January 30, 2025. *United States v. Arredondo*, No. 22-50132, Docket No. 52. On April 23, 2025, Justice Kagan extended the time to file this petition until May 30, 2025. *Arredondo v. United States*, No. 24A1019. The Court has jurisdiction under 28 U.S.C. § 1254(1)(1).

STATUTORY PROVISION INVOLVED

The Fifth Amendment's Grand Jury Clause provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, 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."

STATEMENT OF THE CASE

On June 6, Reymundo Arredondo was finishing his last month in Bureau of Prisons ("BOP") custody at OceanView halfway house. That day, he woke up with nausea-inducing vertigo. He asked an OceanView employee for permission to visit the hospital. She approved the request, handed him a bus pass, and instructed him to return by 4pm.

Mr. Arredondo's bus trip was lengthy, taking nearly two hours. When he arrived, he had to wait another hour to check in. While he was sitting in the waiting room, he received a warning from an OceanView bunkmate: OceanView had put him on escape status. Panicked, Mr. Arredondo called the OceanView shift supervisor, Yesinia Chavarin. Ms. Chavarin confirmed the escape designation. She had called the hospital before Mr. Arredondo arrived, learned that he was not there, and inferred that he had violated the halfway house's instructions. Mr. Arredondo tried to explain that delay, not disobedience, had caused the problem, but she did not believe him. She ordered him to return to Oceanview as quickly as possible. He arrived before the 4pm deadline.

What happened in the next 25 minutes is subject to dispute. When he walked in, Ms. Chavarin was seated behind a check-in window in the building's lobby. To the left of the check-in window was a metal detector. Residents entering the facility would sign in and pass under the metal detector to access the rest of the building. According to Ms. Chavarin, Mr. Arredondo signed back in, went through the metal

detector, and entered the facility. But per Mr. Arredondo, Ms. Chavarin would not let him through. He stayed on the side of the metal detector closest to the door and talked to Ms. Chavarin from there.

Both parties remembered an emotional confrontation in the lobby. Mr. Arredondo showed Ms. Chavarin his hospital bracelet, and he told her that an unfounded escape charge would impact both him and his children. When she still would not believe him, he started to cry. After about 25 minutes of back and forth, Mr. Arredondo left OceanView. According to Ms. Chavarin, Mr. Arredondo announced he was leaving, grabbed his phone, and walked out. In Mr. Arredondo's telling, however, he did not go willingly. Ms. Chavarin told him that he could not be there and he had to leave.

Four months later, U.S. Marshals arrested Mr. Arredondo on a hiking trail by his mom's house, where he was then living. He was charged with escaping from federal custody. The indictment charged Mr. Arredondo under the general escape statute, 18 U.S.C. § 751, as well as an escape provision specific to residential treatment centers, 18 U.S.C. § 4082. The body of the indictment stated that he had

> escape[d] . . . by willfully failing to remain within the extended limits of his confinement and willfully failing to report as directed to a federally contracted facility[.]

This language closely tracked 18 U.S.C. § 4082(a). That statute provides:

> The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape[.]

Defense counsel soon learned from the prosecutor that he would not accuse Mr. Arredondo of escaping on the way to the hospital, as Ms. Chavarin had. Instead, the prosecutor would try Mr. Arredondo for leaving the facility and not returning to it as directed after his confrontation with Ms. Chavarin. At a bill of particulars hearing, the prosecutor identified that confrontation's end as the primary "factual dispute" between the parties. "The United States is submitting when he returned to [OceanView], he was specifically told, no, we did place you on escape status, but come in now, sign in now," the prosecutor said. "It is the United States' contention, and we intend to prove at trial, he was absolutely never told you cannot come in."

With this information in hand, Mr. Arredondo's counsel crafted a defense strategy. The indictment charged that Mr. Arredondo willfully failed to remain within the "extended limits" of his confinement or to return "as directed" to Oceanview. But on Mr. Arredondo's account, he adhered to the only "limits" given to him by halfway house staff, because—per their instructions—he went to the hospital and returned to Oceanview by 4pm. After he returned, Ms. Chavarin did not "direct[]" him to come into the halfway house but "directed" him to leave. And no one else from BOP ever gave him contrary "direct[ions]," imposed any further "limits," or otherwise reversed Ms. Chavarin's decision. Under those circumstance, he did the only thing he could: Having been kicked out of Oceanview and with nowhere else to live, he went to a relative's home to await further instructions. On his account, then, he did not violate the terms of the indictment.

At trial, Mr. Arredondo's defense team put on a compelling case that his version of the confrontation—not Ms. Chavarin's—was more credible. Ms. Chavarin had given several, mutually inconsistent accounts of the events leading up to the confrontation, all of which conflicted with Mr. Arredondo's phone records. In contrast, defense investigation tended to corroborate Mr. Arredondo's account about the delays on the way to the hospital. The limited security footage of Mr. Arredondo's and Ms. Chavarin's encounter at OceanView also supported his version, as it seemed to show Ms. Chavarin blocking Mr. Arredondo's access to the metal detector. Finally, Ms. Chavarin admitted that OceanView staff started packing up Mr. Arredondo's personal property before he arrived, suggesting that she did not intend to let him stay. The defense case was convincing enough that, at sentencing, the trial judge himself would opine that the jury likely did not believe Ms. Chavarin's story beyond a reasonable doubt.

In closing, then, the prosecutor changed his strategy. He continued to argue to the jury that they should believe Ms. Chavarin's account of the OceanView confrontation, not Mr. Arredondo's. But in addition, the government told the jury that they could convict based on other conduct. "[H]e made a choice not to contact the Bureau of Prisons, even after choosing to leave," the prosecutor said. "He made the choice not to contact anyone – anyone from the authorities. He made the choice not to return to the halfway house after June 6th." The prosecutor repeated the point in rebuttal. "[T]here's so many relevant points in time after June 6th," he said. "Each day after June 6th the defendant makes the choice not to contact the

authorities . . . . When he makes the choice not to return to the halfway house, all of those are important." The defense objected but was overruled.

The case was submitted to the jury. After deliberating for over two hours, the jury submitted a question: "Is the charge of escape being considered today solely for June 6th? Or is it for every day after, until the end of sentencing or apprehension?" The court replied that escape was a continuing offense, "which means that an escapee can be held liable for the knowing and willful failure to return to custody even after his initial departure." The court's answer omitted the limiting language from the indictment (remaining within "extended limits" and reporting "as directed") on which the defense theory turned. Shortly after, the jury returned a guilty verdict.

At sentencing, the district court opined that "there was doubt as to what led to the so-called escape on the date it was charged," as reflected in the jury's note. And the court acknowledged that the "instruction" given in response to that note "proved fatal . . . to the defense," because it indicated that if Mr. Arredondo "stayed out without good reason afterwards, he was still guilty of the offense." But the court believed that it had instructed the jury correctly, and the jury had properly convicted. Given Ms. Chavarin's role in creating the situation, however, the district court found the escape relatively mitigated and imposed only a probationary sentence.

Mr. Arredondo appealed, arguing among other things that the prosecutor's arguments and the judge's note constructively amended the indictment. A Ninth

Circuit panel affirmed in a split decision. Pet. App. A. The majority focused on the general escape statute, 18 U.S.C. § 751, which was referenced in the indictment and which this Court interpreted in *United States v. Bailey*, 444 U.S. 394 (1980). Citing *Bailey*, the majority noted that escape is a "continuing offense," meaning that Mr. Arredondo could be convicted for conduct that occurred after June 6. Pet. App. A6. And under *Bailey*, "failure to return"—not just failure to return as directed—"is part of the escape offense, not a distinct crime." *Id*. The panel therefore distinguished Mr. Arredondo's case from those in which the prosecutor charged and proved "different offenses." Pet. App. A7 n.2. Here, the "indictment correctly charged [Mr.] Arredondo with 'escape,' not a different offense." *Id*.

Judge Clifton filed a lengthy dissent. Pet App. A8-A21. In Judge Clifton's view, that escape is a continuing offense made no difference. "[F]or there to have been a 'continuing offense," he reasoned, "there must have been an 'offense' in the first place." Pet. App. A19. As the government conceded, however, Mr. Arredondo did not commit an escape on his way to the hospital. *Id*. And after he returned to the halfway house, he did not commit any of the acts set out in the indictment and specified in 18 U.S.C. § 4082: He "c[ould not] have 'willfully fail[ed] to remain within the extended limits of his confinement' if he was ordered to leave. And since no one sought him out or directed him to return thereafter, he did not 'willfully fail[] to report *as directed*' to OceanView." *Id*. Accordingly, "[h]is conviction on this basis did not match the charge laid out in the indictment and thus amounts to a constructive amendment." *Id*.

SUMMARY OF THE ARGUMENT

The majority and dissenting opinions in Mr. Arredondo's case reflect a broader split among the courts of appeals about the bounds of the constructive amendment doctrine. The First, Sixth, and Eighth Circuits have concluded that a constructive amendment arises only when the statute under which the defendant is indicted differs from the statute under which they are convicted. But the Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits have construed the doctrine more capaciously, finding a constructive amendment when the proof at trial modifies an essential element of the offense as it was described in the indictment. In these circuits, a constructive amendment can arise even when the statute charged and proved remain the same.

Resolving this split is a matter of great importance. For decades, courts have bemoaned the lack of clarity in this area, especially given that whether a deviation constitutes a constructive amendment is case dispositive—it results in *per se* reversal. This case is the right vehicle to decide this pressing issue. The constructive amendment claim was fully preserved. And the outcome turns on whether one focuses on the statute, as the majority did, or the indictment's description of the essential elements, as the dissent did.

Finally, the Ninth Circuit panel majority was wrong in taking the First, Sixth, and Eighth Circuit's view. *Stirone* itself shows that constructive amendments can arise even when a defendant is charged and convicted under the same statute. That makes sense. The statute-only approach to constructive amendments would let a prosecutor pursue a completely different theory of guilt from the one presented to

the grand jury and provided to the defendant. That would undermine the grand jury's gatekeeping role and the indictment's notice function.

This Court should therefore grant the petition.

REASONS FOR GRANTING THE PETITION

I. The circuits disagree about how to define a constructive amendment.

The constructive amendment doctrine has its roots in the constructional function of the grand jury system. "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law." *United States v. Mandujano*, 425 U.S. 564, 571 (1976). "Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgement of a representative body of citizens acting under oath and under judicial instruction and guidance." *Id.* . In keeping with that function, the Fifth Amendment's Grand Jury Clause guarantees a "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller*, 471 U.S. 130, 140 (1985). It follows that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone*, 361 U.S. at 217.

In *Stirone*, this Court recognized that a prosecutor can violate that principle by offering proof at trial that varies from the charged offense, thereby effectively (or "constructively") amending the indictment without grand jury approval. The Hobbs Act indictment in *Stirone* accused a union leader of interfering with the importation of sand into the state of Pennsylvania, thereby affecting interstate commerce. *Id.* at

214. But during the trial, the Government also offered evidence that the union leader affected interstate commerce by interfering with steel shipments from Pennsylvania to other states. *Id*. The trial court's instructions allowed the jury to convict under either theory. *Id*.

This Court held that the trial evidence, in tandem with the jury instruction, constructively amended the indictment. *Id*. at 217. The government's steel-based theory added "a new basis for conviction" to the sand-based indictment, a difference that was "neither trivial, useless nor innocuous." *Id*. "Deprivation of such a basic right" as the grand jury guarantee "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error," the Court said. *Id*. Because such deviations destroy "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury," reversal was required. *Id*. The Court therefore reversed the conviction and remanded for retrial. *Id*.

Not every deviation from the indictment is a constructive amendment, however. When gaps between indictment and proof do not change the nature of the charge, they are considered mere "variance[s]." *Kotteakos v. United States*, 328 U.S. 750, 756 (1946). Accordingly, when "[a] variance [i]s not prejudicial" to the defendant in some way, then it is "not fatal" to the conviction's integrity. *Berger v. United States*, 295 U.S. 78, 84 (1935). Because the rule against variances is "more of a due process rule than is the flat fifth amendment prohibition against being tried on an indictment which a grand jury never returned," *United States v. Crocker*, 568

F.2d 1049, 1059 (3d Cir. 1977), courts may uphold convictions when deviations from the indictment work no prejudice, *see Berger*, 295 U.S. at 84.

Since *Stirone*, the courts of appeals have continued to enforce the rule that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," 361 U.S. at 217, while analyzing mere variances under ordinary harmless error standards. But the circuits have struggled to define what the "charges . . . in the indictment" precisely are. *Id*. Must the proof at trial track the *conduct* laid out in the indictment? Or is it enough that the trial evidence makes out a crime under the *statute* charged in the indictment, even if the indictment described the crime differently? On this question, the circuits have split.

A. The First, Sixth, and Eighth circuits ask only whether the government convicted the defendant under a different statute from the one charged in the indictment.

Three circuits—the Fifth, Sixth, and Eighth—hold that the grand jury clause requires only that the government prove an offense arising under the charged statute. *See United States v. Katana*, 93 F.4th 521, 531 (1st Cir. 2024) ("[T]o succeed on a constructive amendment argument under our precedent, a defendant generally must show that the proceedings altered the indictment with respect to a statutory element of the offense.") (cleaned up); *United States v. Stephens*, 888 F.3d 385, 388 (8th Cir. 2018) ("[A] constructive amendment changes the charge, while the evidence remains the same; a variance changes the evidence, while the charge remains the same."); *United States v. Budd*, 496 F.3d 517, 522 (6th Cir. 2007) (observing that the difference between a variance and a constructive amendment is whether the government pled and proved "two alternative crimes or merely two

alternative methods by which the one crime could have been committed") (cleaned up).

These circuits start from the premise that the constructive amendment analysis "focuse[s] not on particular theories of liability but on the *offenses* charged in an indictment." *United States v. Katana*, 93 F.4th 521, 531 (1st Cir. 2024) (simplified). Because offenses are defined by statute, not by a charging document, these courts "look to statutory elements in response to claims by defendants that 'the crime charged' has been changed." *Id.* at 531. Thus, as long as the elements found by the jury "corresponded with the elements of [the charged offense], properly identified the case by number, [and] properly identified that the case involved [the defendant]," the jury has not "convict[ed] [the defendant] on any offense different from or in addition to that set forth in the indictment." *United States v. Stephens*, 888 F.3d 385, 388 (8th Cir. 2018)

On this theory, no constructive amendment occurs when the government charges and proves the same crime, but against different victims. For example, in *United States v. Orrego-Martinez*, the defendant alleged constructive indictment because the indictment identified one set of fraud victims, while the government's proof at trial involved a different set of victims. 575 F.3d 1, 7 (1st Cir. 2009). The First Circuit reject that argument, on the grounds that the defendant "mistakenly assume[d] that the indictment needed to identify the defrauded or misled victim." *Id.* Because "the indictment need not specify the intended victim" to charge the

crime set forth in the statute, no constructive amendment could arise based on the victims' identities. *Id.*

A constructive amendment also does not arise in these circuits when the government charges and proves two different acts criminalized in the same statute. For instance, in *United States v. Suarez*, the indictment charged the defendant with converting money through "deception," while the instructions allowed the jury to convict of a type of conversion more "akin to embezzlement." 263 F.3d 468, 478–79 (6th Cir. 2001). The Sixth Circuit noted that the charged "statute punishes he who 'embezzles, steals, obtains by fraud or otherwise without authority knowingly converts . . .,'" meaning that "the language of conversion covers a multitude of offenses, including embezzlement." *Id.* at 479. Because "under the statute, embezzlement is not a crime *alternative* to the one charged, but simply another of a number of types of knowing conversion," no constructive amendment occurred. *Id.*

These cases, then, all boil down to the same rule: "[W]hen the statutory violation remains the same," there can be "no constructive amendment." *Katana*, 93 F.4th at 536 (cleaned up).

B. The Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits sometimes find constructive amendments even with the indicted and tried charges arise under the same statute.

Most circuit courts, however, take a more capacious view of the constructive amendment doctrine. The Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits all recognize constructive amendments even when the indictment and trial involve an offense arising under the same statute. These courts articulate the

doctrine's boundaries somewhat differently. *See, e.g.,* U*nited States v. Dove,* 884 F.3d 138, 146 (2d Cir. 2018) (holding that a constructive amendment "occurs when the evidence presented at trial alters the essential elements of the charges specified in the indictment"); *United States v. McKee*, 506 F.3d 225, 230 (3d Cir. 2007) (holding that a constructive amendment arose because the defendant proved "conduct not charged in the indictment"). But roughly, they will find a constructive amendment when the proof at trial lays out a "factual basis that effectively modifies an essential element of the offense charged or permits the government to convict the defendant on a materially different theory or set of facts than that with which she was charged." *United States v. Hoover*, 467 F.3d 496, 500–01 (5th Cir. 2006).

In *United States v. Wozniak*, for instance, the indictment charged a cocaine- and methamphetamine-related conspiracy, while the conspiracy proved at trial involved marijuana. 126 F.3d 105, 109–10 (2d Cir. 1997). The Second Circuit found a constructive amendment, because the drug type went to the "core of criminality to be proven at trial." *Id*. at 109. The court agreed that the statute did not require the government to specify the controlled substance involved in the conspiracy, meaning that "the indictment could have charged Wozniak generally with offenses involving controlled substances . . . without mention of any specific drug." *Id*. at 109–110. But because the government chose to return a narrow indictment specifying meth and cocaine, the defendant was not "aware that the court would allow a conviction under this indictment based solely on marijuana evidence." *Id*. at 110. Thus, even though the charges of indictment and conviction arose under the same statute, this

divergence created a constructive amendment. *Id.*; *see also United States v. Narog*, 372 F.3d 1243, 1249 (11th Cir. 2004) (reaching the same conclusion, when the indictment charged methamphetamine but the jury instructions extended to any controlled substance).

Likewise, in *United States v. Hoover*, a false-statements indictment charged one falsehood, while the government proved a different falsehood at trial. 467 F.3d 496, 502 (5th Cir. 2006). The Fifth Circuit held that the divergence constituted a constructive amendment. *Id.* The court agreed that the statute "only requires that the government prove that the defendant knowingly made a false statement," and "the [jury] instruction did not modify any element of the offense." *Id.* at 501–02. But because "the government cho[se] to specifically charge the manner in which the defendant's statement [was] false, the government should [have been] required to prove that it is untruthful for that reason." *Id.* at 502.

Other courts have found constructive amendments when the government proved "theories of fraud" not charged in the indictment, *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002); where the government convicted based on association with an unspecified criminal enterprise, rather than the particular crime family identified in the indictment, *United States v. Leichtnam*, 948 F.2d 370, 377–78 (7th Cir. 1991); and where the "nature of the tax" specified in a tax-evasion indictment differed from the tax identified at trial, *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008); *see also United States v. McKee*, 506 F.3d 225, 230–31 (3d Cir. 2007) (reaching similar conclusion in tax evasion case). In each of these cases, the

indictment and the trial involved the same statute. But the difference in the theory of conviction sufficed to constructively amend the indictment. That view decisively departs from the statute-only orientation followed in the Fifth, Sixth, and Eighth Circuits.

II. Courts have long emphasized this question's importance, bemoaning that this case-dispositive concept is so ill defined.

Mr. Arredondo is far from the first to identify the uncertainty in this area. Circuit courts on both sides of the split agree: "There is considerable confusion as to what constitutes a constructive amendment of an indictment[.]" *United States v. Weiss*, 752 F.2d 777, 787 (2d Cir. 1985). Courts have described the boundary line between constructive amendments and mere variances as "far from clear," *Haines v. Risley*, 412 F.3d 285, 291 (1st Cir. 2005); "sketchy," *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002); "blurred," *United States v. Antonakeas*, 255 F.3d 714, 722 (9th Cir. 2001); and "shadowy at best," *Hunter v. New Mexico*, 916 F.2d 595, 599 (10th Cir. 1990). Even within circuits, lower courts' "constructive amendment jurisprudence has resulted in . . . apparently divergent results." *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007) (cleaned up).

Not only do courts concur on the need for guidance. They also agree that misidentifying constructive amendments has serious ramifications. That is because, "[w]hile the distinction between a variance and a constructive amendment is sketchy, the consequences of each are significantly different." *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002). From a constitutional perspective, "a constructive amendment is more dangerous because it actually modifies an

essential element of the offense charged." *Hunter*, 916 F.2d at 599. And from a remedies perspective, "variances are subject to the harmless error rule and require a showing of prejudice to the defendant," while "constructive amendments are generally considered prejudicial *per se*." *Weiss*, 752 F.2d at 787.

In short, as courts have been saying for decades, the boundaries of the constructive amendment doctrine are both ill-defined and case dispositive. These features combine to make this question worthy of certiorari.

III. This case is the right vehicle to resolve this issue.

This case is a proper vehicle to resolve the split between the circuits. Below, Mr. Arredondo contended that the Ninth Circuit had taken the majority position, finding constructive amendments even when the charge proved at trial arose under the statute listed in the indictment. But the panel disagreed, instead adopting the minority view. The panel appreciated Mr. Arredondo's argument that "the indictment here specified that he . . . disobeyed an instruction to return." Pet. App. A4. But the panel reasoned that "failure to return"—not just failure to return as directed—"is part of the escape offense, not a distinct crime." Pet. App. A5. The panel also distinguished other relevant precedents on the ground that here, the "indictment correctly charged [Mr.] Arredondo with 'escape,' not a different offense." Pet. App. A6 n.2. Because Mr. Arredondo was charged with escape and convicted of escape, the panel held that no constructive amendment had occurred. Pet. App. A4-A6.

Under the majority position, however, Mr. Arredondo would have a strong constructive amendment claim. First, the panel did not deny that the conduct

described in the indictment (i.e., failure to return as directed and failure to remain within the limits of his confinement) was narrower than the conduct proved at trial (i.e., failure to return generally, irrespective of directions).

Second, the dissent—taking a conduct-based approach to the indictment—believed that a constructive amendment had occurred. In Judge Clifton's view, if the government had limited itself to the charged conduct, the jury would very likely have found that Mr. Arredondo "had not escaped in the first place," whether on June 6 or any time thereafter. Pet. App. A at 21.

Third, Mr. Arredondo's case presents this question cleanly, avoiding some of the constructive amendment doctrine's hardest line-drawing problems. Courts that take the majority position sometimes struggle to distinguish between limiting language that modifies an essential element of the offense and mere surplusage that does not affect the crime charged. *See Miller*, 471 U.S. at 137 (distinguishing constructive amendments and surplusage in the indictment). But here, the indictment's limiting language closely tracks 18 U.S.C. § 4082, a statute clarifying that particular offense conduct at halfway houses constitutes an escape in the meaning of the general escape statute, 18 U.S.C. § 751. Because Congress itself defined and differentiated the escape conduct in § 4082, indictment language identifying that conduct cannot be dismissed as mere surplusage. This case would therefore give this Court options for how much to resolve. The Court could decide the case broadly, adopting an overarching test to help define constructive amendments' bounds. But the Court could also decide the case narrowly, addressing

the limited question of whether a constructive amendment can arise when the conduct charged and proved arises under the same statute. Either way, this Court's ruling would likely be dispositive for Mr. Arredondo.

On a final note, Mr. Arredondo raised the constructive amendment issue both in written filings the night before trial and by objecting contemporaneously. Because this issue is fully preserved and squarely implicates the split above, this case is a proper vehicle for clarifying the bounds of constructive amendments.

IV. This Ninth Circuit panel was wrong to hold that only a conviction under an uncharged statute can create a constructive amendment.

Finally, this Court should take this case because the Ninth Circuit was wrong to side with the minority position, holding that only a statutory mismatch can create a constructive amendment. This follows both from precedent and from the Grand Jury Clause's animating principles.

As to precedent, *Stirone* itself is fatally inconsistent with the minority approach. Most obviously, the offenses indicted and tried in *Stirone* both arose out of the same statute: the Hobbs Act. 361 U.S. at 213. But a constructive amendment nevertheless occurred, because the indictment alleged a theory involving imports of sand while the trial evidence proved a theory involving exports of steel. *Id.* at 217–219. The divergence in *Stirone* therefore did not involve a statutory change, but a change in the government's theory of how the defendant's actions affected interstate commerce. *Id.*

Just as importantly, the Court reached that conclusion even though the interstate commerce element did not necessarily have to be pled and proved with

particularity. The Court "assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." *Id*. at 218. But "when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another." *Id*. The Court reasoned that the interstate commerce element is not "surplusage," but "is critical" to the government's jurisdiction. *Id*. And given the more specific indictment, "we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel . . . had been interfered with." *Id*. at 219. In other words, this Court recognized that the statute itself did not necessarily require any particular kind of interstate commerce, and the indictment therefore did not necessarily need to specify the commerce type. But because the indictment in the case did specify the type of commerce, the government was bound by that particular accusation. For both reasons, *Stirone* cannot be squared with a statute-only approach to constructive amendments

The First Circuit recognized this disconnect in *Katana*, 93 F.4th at 532. "The offense charged in *Stirone*, a violation of the Hobbs Act, was the same offense on which the government presented evidence and on which the district court instructed the jury," the First Circuit noted. *Id*. The First Circuit has therefore interpreted *Stirone* to be "a prejudicial variance case, rather than a constructive amendment case." *Id*. This may seem like a facially plausible interpretation, as *Stirone* itself did not use the term "constructive amendment." The courts of appeals came up with

that denomination later on, using it to describe an informal amendment to the indictment effectuated at trial. *Id*. at 530–31.

But as this Court later clarified, *Stirone* was a constructive amendment case: It held that "trial evidence had 'amended' the indictment by broadening the possible bases for conviction from that which appeared in the indictment." *Miller*, 471 U.S. at 138 (emphasis omitted). *Stirone*'s reasoning makes that conclusion inescapable. First and foremost, a constructive amendment is—by definition—a divergence between pleading and proof that violates the Fifth Amendment's Grand Jury Clause. *United States v. Daraio*, 445 F.3d 253, 260–61 (3d Cir. 2006). Fatal variances, by contrast, do not violate the Grand Jury Clause. They violate due process. *Id.* at 261. *Stirone* held that the divergence in that case violated the Fifth Amendment's grand jury guarantee. 361 U.S. at 219. By definition, then, the error in *Stirone* must have been a constructive amendment—it could not have been a mere fatal variance.

Second, constructive amendments require *per se* reversal, while variances receive ordinary harmless error review. *See United States v. Stuckey*, 220 F.3d 976, 981 (8th Cir. 2000); *United States v. Barrow*, 118 F.3d 482, 488–89 (6th Cir. 1997). *Stirone* expressly held that harmless error review did not apply to the divergence in that case. The Court reasoned that "[w]hile there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." 361 U.S. at 217. "Deprivation of such a basic right" was therefore "far

too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id*. Because the divergence was not a "variance" that could be "dismissed as harmless error," *id*., it must have been a constructive amendment. For both reasons, *Stirone* is a constructive amendment case, which—by the First Circuit's admission—cannot be squared with the minority position.

The purposes behind the Grand Jury Clause point in the same direction. First, the clause ensures that a defendant will not be "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell v. United States*, 369 U.S. 749, 770 (1962). But the minority position raises that very real possibility. A narrow indictment reveals with particularity questions asked and answered by that grand jury. For example, when a grand jury indicts a defendant only for distributing methamphetamine, there is no reason to think that it also found probable cause for a totally different act: marijuana distribution. *See Wozniak*, 126 F.3d at 109–10. Indeed, there is no reason to believe that a prosecutor even presented marijuana distribution evidence. *See id.* at 111. On the minority view, however, the prosecutor is free to give the grand jury evidence of one drug transaction, then take the defendant to trial on a completely different drug transaction—so long as both transactions arise under the same statute. To let prosecutors "change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes" would be to

forget "the great importance which the common law attaches to an indictment be a grand jury." *Russell*, 369 U.S. at 770–71 (cleaned up).

Second, notice to defendants is "among the important concerns underlying the requirement that criminal charges be set out in an indictment." *Miller*, 471 U.S. at 135. The defense must know ahead of time what "offense was charged and would need to be defended against," as well as what charges are "bar[red] [in] subsequent prosecutions." *Id.* But when it comes to defending a criminal case, *how* a defendant supposedly violated a statute is just as important as *what* statute they violated. Faced with some of the indictments described *supra*, Section I.A, a defendant would reasonably believe that he could defeat the charge by showing that he did not defraud a particular victim (*Orrego-Martinez*), did not convert money through deception (*Suarez*), or did not receive a direction to report to a halfway house (here). To bait those defenses, only to switch to a different theory, violates the right to fair notice.

This Court should therefore grant this petition to bring the circuits into conformity with this Court's case law and the purposes of the Grand Jury Clause.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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s/ Katie Hurrelbrink

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