

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

ISAAC AMBE NFORMANGUM,  
Petitioner,

v.

UNITED STATES OF AMERICA  
Respondent.

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

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**CORRECTED PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

This case presents a circuit split that this Court previously granted certiorari to resolve but did not ultimately decide. *United States v. Resendiz-Ponce*, 549 U.S. 102, 116-17 (2007) (Scalia, J., dissenting).

The question presented is:

Whether the failure of an indictment to allege an essential element of a criminal offense constitutes structural error requiring automatic reversal, or instead is subject to harmless-error review.

## **LIST OF PARTIES**

Pursuant to Supreme Court Rule 14.1(b)(i) counsel states that the parties to this case in the United States Court of Appeals for the Fifth Circuit are Isaac Ambe Nformangum and the United States of America. No stock ticker symbols are associated with the parties.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Nformangum*, 2026 WL 18900 (5th Cir. 2026).
- *United States v. Nformangum*, No. 4:22-CR-367-1 (S.D. Tex).

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Isaac Ambe Nformangum petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The Fifth Circuit’s Opinion (Pet. App. 1a) is unpublished but is available at *United States v. Nformangum*, 2026 WL 18900 (5th Cir. Jan. 2, 2026).

### **JURISDICTION**

The Fifth Circuit entered judgment on January 2, 2026. Pet. App. 1a. The deadline to file a petition for a *writ of certiorari* is April 2, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **RELEVANT CONSTITUTIONAL PROVISION**

The Fifth Amendment to the United States Constitution provides, in relevant part: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. AM. V.

## STATEMENT OF THE CASE

Below, the Fifth Circuit found that although Mr. Nformangum's indictment did not properly allege the *mens rea* of 18 U.S.C. 875(c) and "failed to state an offense," the error was harmless. *Nformangum*, 2026 WL 18900, at \*5. The court explained its test on harmless error review: to consider the evidence that "would have been available to the grand jury" and to asked whether a "rational grand jury" would have indicted. *Id.*

This Court, however, has long held that courts cannot make a "subsequent guess" as to what the grand jury considered. *Russell v. United States*, 369 U.S. 749, 770 (1962). It holds that the inclusion of all essential elements of an offense in the indictment is required to ensure that the grand jury considers each element. *Id.* It is, therefore, fundamental to protect the constitutional right to an indictment by grand jury. *Id.*

In line with this precedent, the Fourth Circuit and the Ninth Circuit hold that the omission of an essential element of a crime from an indictment is structural error that requires reversal even if the error is harmless. *United States v. Qazi*, 975 F.3d 989, 992 (9th Cir. 2020); *United States v. Spruill*, 118 F.3d 221, 227 (4th Cir. 1997). Most other circuits, like the Fifth Circuit, appear to subject such omissions to harmless error review.

This Court previously granted certiorari on this issue but did not address it. *United States v. Resendiz-Ponce*, 549 U.S. 102, 116-17 (2007) (Scalia, J., dissenting). In dissent, Justice Scalia emphasized that such errors should be treated as structural, siding with the view of the Ninth and Fourth Circuits, and observed that the Court would need to resolve the issue in a future case. *Id.*

**A. District Court Proceedings.**

Mr. Nformangum was indicted for threatening to murder a United States official in violation of 18 U.S.C. § 115(a)(1)(B) and § 115(b)(4) (Count 1), and for transmitting in interstate commerce a communication with a threat to injure in violation of 18 U.S.C. § 875(c) (Count 2).

Count 1 was dismissed before trial by agreement of the parties. Count 2 alleged that Mr. Nformangum:

did knowingly and willfully transmit in interstate and foreign commerce a communication containing a threat to injure the person of another, to wit, a telephone call to the Office of United States Senator Ted Cruz in Houston, Texas, threatening to injure and kill Senator Ted Cruz, in violation of 18 United States Code, Section 875(c).

ROA.45-46.

Before trial, Mr. Nformangum moved to dismiss Count 2 because the indictment did not allege the required subjective intent for a true-threats prosecution.

ROA.184. The court denied the motion to dismiss. ROA.533.

Before the bench trial, the parties submitted a joint stipulation of evidence. According to the stipulation, on June 26, 2022, Nformangum left a voice message at the Houston office of Senator Rafael Edward “Ted” Cruz, in which he stated:

Okay. Hello and good afternoon, Senator Rafael. This is one of the many Afro-American constituents of who you are representing here in Texas. As you currently serve from the senate, I have just read the Texas Republican Party's platform for this current 2020 where it is apparent that your many colleagues intend to have the Voting Rights Act appealed and not reauthorized. Every last one of your Republican colleagues to sign off on that platform is to be found in—is to be found and killed, be it by a bullet to the face or by the smashing of a brick in your skull. It is a civic duty of every American citizen or resident to see to it that every last one of your colleagues is to be killed, be it by finding you in a public space or by trailing you to your very—by your very public homes, the address of which are public knowledge. You and every one of your colleagues is to be shot dead, found and killed. You sick pieces of human scum will not have the f'ing audacity to address this any further and to strip us of our rights like you did our grandparents so many years ago. You will be found and killed, as a civic duty of every American to do so. F you. F you, Rafael, you piece of human scum.

ROA.395. The parties stipulated that the voicemail message traveled in interstate commerce, that Mr. Nformangum admitted to law enforcement agents that he left the voicemail, and that he described his actions as “reckless.” ROA.395.

At the conclusion of evidence and argument, the district court found Mr. Nformangum guilty of Count 2. ROA.627. He was sentenced to one year of probation. ROA.410.

## **B. Appeal**

On appeal, Nformangum argued that the indictment was defective and should have been dismissed because it failed to properly allege the *mens rea* required by 18 U.S.C. § 875(c). He acknowledged that the Fifth Circuit applies harmless error review to such claims but argued that such defects are “structural” and should not be subject to harmless error review. This argument was consistent with the view of the Fourth Circuit, the Ninth Circuit, and Justice Scalia’s dissenting opinion in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007).

The Fifth Circuit agreed that the indictment did not allege the *mens rea* for 18 U.S.C. § 875(c), and “failed to state an offense.” *Nformangum*, 2026 WL 18900, at \*5. Nonetheless, it considered what “would have been available” to the grand jury and asked whether a “rational grand jury” would have indicted. *Id.* at \*6. Based on this standard, the court found the error harmless. *Id.* at \*6.

## **REASONS FOR GRANTING THE PETITION**

### **A. Circuits are split on whether the failure to allege an essential element of an offense in the indictment is harmless or structural error.**

Grand juries are a constitutionally mandated “buffer or referee” between the people and the government. *United States v. Williams*, 504 U.S. 36, 47 (1992). This Court has long held that:

To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

*Russell*, 369 U.S. at 770. Today, however, most circuits have adopted a harmless error standard that permits courts to make the very type of “subsequent guess” prohibited by *Russell*. Only the Fourth and Ninth Circuits prohibit this guesswork and treat the omission of an essential element from the indictment as a “structural error.” These circuits require reversal regardless of the error’s effect on the verdict.

Accordingly, this case presents a circuit split. As Justice Scalia explained, “the full Court will undoubtedly have to speak to the point.” *Resendiz-Ponce*, 549 U.S. at 117. This is the case to do so.

### **B. The Fourth and Ninth Circuits apply structural error.**

In the Fourth and Ninth Circuits, the failure to properly allege an essential element in the indictment is structural error. *United States v. Du Bo*, 186 F.3d 1177,

1180 (9th Cir. 1999); *United States v. Spruill*, 118 F.3d 221, 227 (4th Cir. 1997). The sole Justice of this Court who has addressed this issue agreed. *Resendiz-Ponce*, 549 U.S. at 117 (2007) (Scalia, J., dissenting) (“I would find the error to be structural”).

The Fourth and Ninth Circuits adhere strictly to the grand jury clause: a defendant may be convicted only on the facts and elements considered by the grand jury. *Du Bo*, 186 F.3d at 1179; *Spruill*, 118 F.3d at 227. If an essential element of the crime is missing or erroneously stated in the indictment, the grand has not performed its constitutional function. *Du Bo*, 186 F.3d at 1179. Following this Court’s instruction in *Russell*, these courts refuse to “guess” what the grand jury would have done. *See United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979) (quoting *Russell*, 369 U.S. at 770). They reject harmless error review, even in the face of proper jury instructions, or a later finding that the missing element is satisfied beyond a reasonable doubt. *Spruill*, 118 F.3d at 227.

### **C. Other circuits apply harmless error review.**

Other circuits apply harmless error review. *United States v. Mojica-Baez*, 229 F.3d 292, 309-10 (1st Cir. 2000); *United States v. Lee*, 833 F.3d 56, 69 (2d Cir. 2016); *United States v. Stevenson*, 832 F.3d 412, 426 (3d Cir. 2016); *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004); *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); *United States v. Allen*, 406 F.3d 940, 945 (8th Cir. 2005); *United States v. Leonard*, 4 F.4th 1134, 1144 (11th Cir. 2021).

Under this approach, the conviction is upheld, provided the error on the indictment did not affect the verdict and the indictment overall provided sufficient notice to prepare a defense. *See e.g. Leonard*, 4 F.4th at 1145. These courts are willing to infer that the grand jury would have indicted based on evidence later presented at trial. *Id.* Or, as here, based on what “would have been available” to the grand jury. *Nformangum*, 2026 WL 18900, at \*6.

**D. The issue is squarely presented by this case.**

This issue is squarely presented by this case. Mr. Nformangum presented the issue to the Fifth Circuit, arguing that the error in the indictment was structural. *See United States v. Nformangum*, 24-20515 (5th Cir. June 2, 2025), Brief for Appellant (D.E. 35) at 20-21. The Fifth Circuit recognized that the indictment did not allege the *mens rea* of 18 U.S.C. § 875(c) and “failed to state an offense” but nonetheless affirmed under harmless error review. *Nformangum*, 2026 WL 18900, at \*5-6.

**E. This issue calls for this Court’s intervention.**

The circuit split presents an “important matter” that calls for intervention by this Court. U.S. SUP. CT. R. 10(a). Grand juries are a fundamental safeguard against arbitrary prosecution. *Williams*, 504 U.S. at 47 . When an indictment omits an essential element, especially *mens rea*, the grand jury cannot fulfill its constitutional

role to find probable cause for each element of an alleged crime. Yet outside of the Ninth and Fourth Circuits defendants are deprived of this fundamental protection by judicial guesswork in violation of *Russell*, 369 U.S. at 770.

**F. The failure to present an essential element to the grand jury not amenable to harmless error review.**

In *Neder v. United States*, this Court found that a district court’s jury instruction omitting an essential element of the offense was subject to harmless error review. 527 U.S. 1, 8 (1999). Some courts have extended *Neder* to indictments that fail to charge essential elements. *See e.g. Mojica-Baez*, 229 F.3d at 311.

That is mistaken. *Neder* relied on the procedural safeguards of a jury trial—the right to counsel, an impartial judge and jury, and proof of beyond a reasonable doubt—which allow meaningful review for harmlessness. *Neder*, 527 U.S. at 9.

Grand jury proceedings lack those safeguards. They are conducted without judicial supervision and there is no right to counsel. *Williams*, 504 U.S. at 48. The proceedings, moreover, are conducted secretly. *Id.* at 51. As a result, there is no basis to meaningfully assess harmlessness. As this Court has stated, where “[t]here is no object,” upon which harmless-error scrutiny can operate, such review is impossible. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

This case illustrates the problem. The Fifth Circuit acknowledged that the indictment “fail[ed] to state an offense” but nevertheless speculated about what “*would* have been available” to the grand jury. *Nformangum*, 2026 WL 18900, at \*5-

6 (emphasis added). That is precisely the “subsequent guess” that this Court has forbidden. *Russell*, 369 U.S. at 770. It allowed conviction on “facts not found by, and perhaps not even presented to, the grand jury.” *Id.*

Therefore, the failure to charge an essential element “affect[s] the framework” of the entire proceeding and is therefore structural error. *Neder*, 527 U.S. at 8.

### **CONCLUSION**

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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