No. 23-959

IN THE SUPREME COURT OF THE UNITED STATES

COLIN MONTAGUE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF CLAUSE 40 FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

Clause 40 Foundation is a non-profit, non-partisan organization. Its mission is to honor, preserve, and promote the due-process rights guaranteed by the Constitution. Clause 40 has a particular interest in ensuring procedural fairness in the criminal justice system and in ensuring the accountability of government actors in that system. Clause 40 and its sibling organization—the Due Process Institute—have appeared as *amicus curiae* in many cases before this Court and the Courts of Appeals.

This case—which concerns the sufficiency of the factual allegations in a federal grand jury indictment—implicates both the Fifth and Sixth Amendments to the Constitution. Clause 40 writes to protect those constitutional rights.

SUMMARY OF ARGUMENT

Fair notice is fundamental to due process. Before a criminal defendant can stand trial, he must first be indicted by a grand jury. That procedural safeguard grew out of centuries of historical practice. From its common-law roots in England to the present, the grand jury indictment has provided a criminal defendant with notice of the charges against him, allowed the grand jury to make a determination that there was sufficient evidence that the defendant

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[1] Counsel of record for all parties received notice of *amici's* intent to file this brief at least 10 days before the due date. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

committed the alleged crime, and framed the alleged facts for trial before a petit jury.

The indictment at the core of Colin Montague's prosecution served none of these crucial functions. As set out in his petition, Montague was charged with engaging in a continuing criminal enterprise ("CCE"). To prove a charge of CCE, the government had to establish—as separate elements of the offense—that Montague violated the federal drug laws on at least three occasions. However, the indictment in this case was "barebones;" it merely listed the statutory sections that the government alleged that Montague had violated. App'x at 18. (Jacobs, J., dissenting). Language to explain or describe the violations was nowhere to be found. The barebones nature of the indictment forced the district court to instruct the petit jury that to convict, it would need to look to facts outside the indictment.

The Second Circuit nonetheless held that the indictment was constitutionally valid, reasoning that it was enough that the indictment closely tracked the statutory language. The Second Circuit's decision lies in serious tension with the main purpose underlying the grand jury indictment as a tool of criminal practice: to give criminal defendants fair notice of the charges brought against them. This Court should review—and then reverse—the Second Circuit's decision and reassert the functional importance of a grand jury indictment as a cornerstone of due process.

ARGUMENT

I A GRAND JURY INDICTMENT MUST DESCRIBE THE CHARGED CONDUCT.

"The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J.). The procedure at the center of this case is twofold. The Fifth Amendment requires that federal prosecutions begin with a grand jury indictment. For an indictment to issue, the grand jury must find—based on the facts presented—that probable cause exists as to each element of the charged offense. The indictment must then allege each element of the charged office.

A. The Historical Development of the Grand Jury Clause.

The history of that procedure informs the current appeal. The enshrinement of the grand jury as a constitutional element of criminal practice "reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166." *Russell* v. *United States*, 369 U.S. 749, 761 (1962). That said, the grand jury's beginnings do not resemble its current form. In fourteenth century England, the accusatory jury—or "le graunde inquest"—sought to identify criminals based on the jurors' own knowledge, private complaints, or accusations from representatives of the Crown. Wayne R. LaFave et al., *Criminal Procedure*, 3 Crim. Proc. § 8.2(a) (4th ed. 2023) (detailing the grand jury's English origins).

Over time in England, however, the grand jury evolved from "an instrument of the Crown" to a "reliable, independent power guarding the rights of

the English people." Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941* 7 (Steven M. Herbst ed., Tactical Civics 2022) (1963). The grand jury eventually came "between the Crown and accused subjects as a protection against unwarranted accusation." Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 409 (2006). It reached the point that "[a]bsent a grand jury indictment, English courts were powerless to try a defendant for certain serious crimes, irrespective of the wishes of the Crown." *Id.*; *see also Ex parte Wilson*, 114 U.S. 417, 423 (1885) ("By the law of England, informations by the [A]ttorney [G]eneral, without the intervention of a grand jury, were not allowed . . . .")

At common law, a grand jury indictment served three main purposes. *See* H.L. McClintock, *Indictment by a Grand Jury*, 26 Minn. L. Rev. 153, 159 (1942). The first was jurisdictional. The indictment had to state facts that showed that the accused was guilty of a crime that was within the court's "power to punish." *Id.* The second was informational. The indictment had to inform the defendant of the "nature of the charges against him." *Id.* The third was protective. The conduct charged in the indictment "form[ed] a record from which it [could] be determined whether a subsequent proceeding [would be] barred by the former adjudication." *Id.*

When the grand jury concept traveled to the American colonies, it kept the protective character of the more recent English grand jury and worked as a "screen between accusations and convictions." Mark Kadish, *Behind the Locked Door of an American*

Grand Jury: Its History, Its Secrecy, and Its Process, 24 Fla. St. U. L. Rev. 1, 10 (1996). "In several famous instances, American grand juries refused to return charges sought by British authorities." Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol'y & L. 67, 70 (1995). In fact, at the end of the colonial period, the grand jury was "an indispensable part of the government in each American colony." Richard D. Younger, *supra*, at 29. For example, in New York in 1727, the state legislature enacted a law that prohibited a criminal trial except on presentment of a grand jury. *Id.* And in the post-revolutionary period, indictment by a grand jury as an antecedent to facing criminal charges had become a "cherished right." *Id.* at 47. The framers of the Constitution were also "imbued with the common-law estimate of the value of the grand jury as part of the system of criminal jurisprudence." *Ex parte Bain*, 121 U.S. 1, 12 (1887) (*overruled on other grounds*).

To that end, several state ratifying conventions demanded a constitutional amendment that would guarantee no person could be tried for a capital offense unless previously indicted. This amendment was proposed at the very first session of Congress in 1789. *See* Richard D. Younger, *supra*, at 50-51. As a result, the grand jury's role in the administration of criminal justice was guaranteed in the Fifth Amendment. No trial could be held on a "capital, or otherwise infamous crime," the Fifth Amendment declared, unless it was preceded by a presentment or indictment of a grand jury. U.S. Const. amend. V.

The Fifth Amendment was intended to preserve both the grand jury as an adjudicatory body that

determined whether there was sufficient evidence that the accused was guilty of the specific crime for which he was to later stand trial, and the indictment as a pleading. *See* H.L. McClintock, *supra*, at 159. The former was of "much greater importance"—although neither could be substantially impaired without a constitutional violation. *Id.* The two functions go hand in hand. It cannot be assured that the grand jury has properly performed its adjudicatory task of determining that there is sufficient evidence to charge a person with a crime if the indictment does not specify the factual basis for the charged crime in sufficient detail.

And so, the content of the indictment itself is an important procedural guardrail. On that point, the Fifth and Sixth Amendments converge. The Sixth Amendment guarantees criminal defendants the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. To serve its constitutional purpose, then, an indictment must include enough factual allegations to give the defendant notice of the charges against him, and it must assure him that the "prosecution will proceed on the basis of facts presented to the grand jury." *United States* v. *Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979).

B. The Grand Jury in Modern Practice.

This Court has implemented the grand jury's historical purposes. As this Court explained in *Wood* v. *Georgia*, the grand jury "serves the invaluable function in our society of standing between the accuser and the accused." 370 U.S. 375, 390 (1962). The Grand Jury Clause's protections have also been worked into the Federal Rules of Criminal Procedure. A federal criminal defendant must be prosecuted via

indictment for any offense that carries a potential sentence of more than one year. *See* Fed. R. Crim. P. 7(a)(1). The indictment then "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." Fed. R. Crim. P. 7(c)(1).

This Court's decision in *Russell* v. *United States*, 369 U.S. 749 (1962) is the starting point for how indictments in modern practice fulfill their constitutional function. Per the Court, the discussion must begin with the "Fifth and Sixth Amendments to the Constitution." *Id.* at 761. The Fifth Amendment's relevance on that front is plain. Still, "[o]f like relevance," the *Russell* Court emphasized, is Sixth Amendment's guaranty that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.'" *Id.* at 761.

The Court started with the baseline requirements of federal grand jury indictments. An indictment must do more than charge an offense in the same language as the statute; the indictment "must descend to particulars." *Id.* at 765 (citing *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875)). The statute's language can of course "be used in the general description of an offense," but that general language must also, the Court made clear, be accompanied by "a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Id.* at 765.

Russell involved prosecutions under a statute that criminalized a failure to answer questions posed by a congressional committee that were pertinent to the subject matter under inquiry. The indictments there

identified the questions that the three defendants refused to answer, but they did not identify the subject matter that the committee was investigating. The indictments only alleged that the non-answered questions were "pertinent to the question then under inquiry." *Id.* at 752. That failure, the Court held, rendered them constitutionally inadequate. The Court reasoned that when "guilt depends so crucially on the specific identification of fact . . . an indictment must do more than simply repeat the language of the criminal statute." *Id.* at 764.

The *Russell* Court then distilled the broad policies underscoring that determination. These policies largely match up with the purposes that grand jury indictments historically served at common law.

First, and most obviously, the indictment was supposed to—but did not— "inform the defendant of the nature of the accusation against him." *Id.* at 767. In fact, as the Court in *Russell* explained, the indictments at issue did the opposite; they "left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Id.* at 768. In other words, the government's theory of prosecution was not tied to the grand jury's indictment.

The Court noted that a bill of particulars could not cure that defect. *Id.* at 770. For a defendant to face trial under the statute at issue in *Russell*, a grand jury had to make a determination about what the question under inquiry in the congressional proceedings was. To this Court, it was not satisfactory "[t]o 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." *Id.* Such a lapse

"would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Id.*

Second, the indictment requirement was designed "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." *Id.* (quoting *Cruikshank*, 92 U.S. at 558). As the *Russell* Court saw it, the rule that an indictment was required to set out the factual basis for an offense was designed to benefit not just the defendant but also the court, "making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." *Id.* at 769.

The upshot is that to be constitutionally sound, a grand jury indictment must describe the facts that constitute each element of a charged offense. As Professor LaFave put it, "the charging instrument must include a satisfactory response to the questions of "who * * *, what, where, and how." Wayne R. LaFave et al., *Criminal Procedure*, 5 Crim. Proc. § 19.3(c) (4th ed. 2023). It is only then that one can be certain the grand jury used those alleged facts to make a determination that probable cause exists with respect to each element of the charged offense, and a petit jury can then decide whether actual guilt under the indictment's allegations has been proven.

The grand jury indictment bolsters a criminal defendant's ultimate right to a jury trial. A sufficient indictment means that the "factual predicate of the indictment is identical to that of the conviction." *United States* v. *Daniels*, 281 F.3d 168, 179 (5th Cir. 2002) (quoting *United States* v. *Arlen*, 947 F.2d 139, 144 (5th Cir. 1991)). Working together, the grand and

petit juries form a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the [government]." *Duncan* v. *State of La.*, 391 U.S. 145, 151 (1968).

C. The Grand Jury Clause's Requirements Apply to the CCE Statute (and Other Statutes that Have Predicate Offenses).

The rules governing the sufficiency of an indictment apply equally to charges that involve predicate offenses. If an element of a charged offense is a predicate act, that predicate act—like any other element of a criminal offense—must be charged in the indictment. *See United States* v. *Kingrea*, 573 F.3d 186, 191-92 (4th Cir. 2009) (holding that an indictment for conspiracy that omitted an element of a predicate offense violated the Fifth Amendment right to be tried upon charges found by the grand jury, which could not be cured by a trial court instruction incorporating the missing element).

In *Richardson* v. *United States*, 526 U.S. 813 (1999), this Court charted the elements of the CCE offense at issue here. The statute imposes a mandatory prison term of at least twenty years if a person engaged in a CCE. This Court held that to convict under the statue, a jury must find that the defendant committed three separate violations of the federal drug laws. *Id.* at 813. Each individual crime makes up a separate element of the offense (as opposed to proving a "series" of offenses as a single element).

Richardson has a necessary impact on the indictment as a charging instrument and on the grand jury as an adjudicatory body in CCE cases. Because *Richardson* specifically held that each of the three

required predicate offenses is a separate element of the offense, that means in turn that the grand jury must find there is probable cause supporting each predicate offense. Therefore, the resulting indictment must describe the facts surrounding each predicate offense—the same facts that must be then proven to a petit jury to sustain a conviction. The only way to square *Richardson* with this Court's prior—and repeated—pronouncements regarding the sufficiency of indictments is to require that the facts surrounding the individual crimes that make up the CCE be alleged in the indictment.

II THE SECOND CIRCUIT'S OPINION UNDERMINES THE PURPOSES OF THE GRAND JURY CLAUSE.

The Second Circuit took a different view. The rule that the Second Circuit crafted can be distilled as follows: to adequately allege a violation of the CCE statute, an indictment need only "track the language of the statute." *See* App'x at 10a. Then, according to Second Circuit, and "only if necessary," it "must state the approximate time and place of the offense." *Id.*

Montague's indictment did both, the panel held. The indictment first "'alleged that the continuing series of felonies were violations of §§ 841(a)(1) and 846." App'x at 10a. And it stated "the time frame and location at which the enterprise was conducted" (*i.e.*, between 2008 and 2014 in the Western District of New York). *Id.* To the panel, nothing more was needed.

As explained in Montague's petition, the Second Circuit's rule conflicts with the Third Circuit's opinion in *United States* v. *Bansal*, 663 F.3d 634, 647 (3d Cir. 2011). Beyond that, the Second Circuit's rule severely undermines the grand jury indictment as a procedural

safeguard. This case neatly illustrates how the indictment's deficiencies failed its basic purposes:

(1) Montague lacked notice of the charges against him. Because the indictment did nothing more than list the statutes that were allegedly violated as part of the CCE, Montague could not have known—until trial—what alleged conduct in particular the government believed was criminal. In short, the indictment contained no explanation of the who, what, where, and how. Montague thus had no assurance that the government would proceed at trial based on the facts presented to the grand jury.

(2) Because of that lack of detail, the government was not tied to a factual basis in the indictment. As in *Russell*, that deficit "left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." 369 U.S. at 768.

(3) That lack of detail has still another consequence. The petit jury necessarily had to find extra-indictment facts to convict under the CCE statute. In fact, the district court instructed the jury that the government needed to prove three or more violations of the federal drug laws. But the violations, the district court continued, did not have to be acts "mentioned in the indictment at all." App'x at 8. Unlike a complaint in a civil case, a defective indictment cannot be conformed to the proofs at trial. Still, that is what happened here.

(4) And finally, because the petit jury had to look outside the indictment for facts to sustain a conviction, it is impossible to know whether there was symmetry between the conduct that the grand jury

indicted on and the conduct on which the petit jury based the conviction. A criminal defendant is entitled to the dual protection of both a finding from a grand jury and a petit jury (under different standards) that there was sufficient evidence that he in fact committed every element of the charged offense. A criminal defendant should not be in a position in which he is "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.

III THE DECISION BELOW WILL IMPROPERLY MAGNIFY PROSECUTORS' LEVERAGE IN PLEA BARGAINING.

The issues posed by the Second Circuit's ruling are not limited to this specific case. Those issues will have systemic implications on prosecutorial power, notably in the area of plea bargains.

About 98.3% of convictions in federal court come from pleas. U.S. Sent'g Comm'n, *2021 Annual Report and Sourcebook for Federal Sentencing Statistics* 56 (2021). Ideal or not, this is "a world where most cases end in plea agreements." *United States* v. *Taylor*, 596 U.S. 845, 857 (2022). Plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system," *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). And "[t]he plea bargain is the ultimate source of this ever-increasing prosecutorial power." Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 N.W. U. L. Rev. 1429, 1430 (2017). "No serious observer disputes" that prosecutors hold the cards and "drive sentencing . . . in the United States

criminal justice system." Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 Wake Forest L. Rev. 677, 677–78 (2016); Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 Loy U. Chi. L.J. 327, 329 (2014) (describing how prosecutors use charging and sentencing power to pressure defendants to plead guilty and cooperate).

Most threatening to due process and fairness, perhaps, is that prosecutors may "deliberately overcharge to obtain a desirable plea agreement," Ellen S. Podgor, *Raceing Prosecutors' Ethics Codes*, 44 Harv. C.R.-C.L. L. Rev. 461, 462 (2009), which they do "[i]n most cases . . . because of the bargaining leverage it provides." Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 Tul. L. Rev. 1237, 1254 (2008).

While plea bargaining is a practical necessity to the functioning of the U.S. criminal justice system, a corollary is that it penalizes defendants who choose to exercise their right to a jury trial. Data shows that the "trial penalty"—more severe punishment for defendants found guilty after insisting on their right to a trial—is plain: prison-time is both more likely and sentences much longer for defendants convicted at trial than for those who take pleas. *See* Ram Subramanian et al., *Vera Inst. of Just., In the Shadows: A Review of the Research on Plea Bargaining* at 40 (2020) (showing that incarceration is almost thrice as likely after trial, with a sentence on average 57 percent longer).

Although there is no panacea for plea bargaining abuses, a key safeguard against unfairly overcharging defendants is the requirement that charges be

supported by sufficient *facts* establishing the elements of each crime, and that the defendant and counsel have knowledge of those facts via a well-pled indictment. The rule crafted by the Second Circuit in Montague's case would allow prosecutors to charge a CCE—an offense that carries with it a minimum sentence of twenty years—simply by citing the statutory sections of the predicate offenses that were allegedly committed, without alleging any facts pertaining to predicate conduct itself. This flies in the face of recent precedent and the essential historical underpinnings of the grand jury system. And it allows for unbridled prosecutorial discretion to overcharge defendants with a CCE based on vague allegations of predicate conduct. This is not what the Constitution requires and what this Court has prescribed time and again.

CONCLUSION

Because of the critical importance of the grand jury and indictment processes to due process and principles of fairness, as shown through their historical foundations and set forth in the Fifth and Sixth Amendments, it is essential that this Court consider and resolve the dissonance created by the Second Circuit's decision in Montague's case. This Court should grant the petition.

Respectfully submitted,

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