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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an indictment charging a violation of 21 U.S.C § 848 is invalid if it fails to set forth facts and circumstances that establish the elements of at least three prior controlled-substance offenses.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

Amicus's concern in this case is defending the role of the grand jury as a check on government power and ensuring that modern developments in the criminal justice system—such as the increasing pervasiveness of plea bargaining—do not further erode the participation of citizen juries or deprive defendants of the right to subject prosecutions to meaningful adversarial testing.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

The Emory Law School Supreme Court Advocacy Program (ELSSCAP) assisted the Cato Institute in preparing this amicus brief. ELSSCAP, established in 2010, is the only student-run Supreme Court litigation program in the United States, producing persuasive petitions for certiorari and amicus briefs in a broad range of practice areas, including administrative law, bankruptcy law, constitutional law, criminal law, and tort law. Students work under the guidance of experienced litigators as they handle all aspects of ELSSCAP's work, giving them a unique opportunity to choose cases, write briefs, and engage in significant issues that merit being heard by the U.S. Supreme Court. The ELSSCAP members involved in preparing this brief were Clay Marsh, Kylie Doyle, Jane Onuoha, Peng Shao, Jacopo Capparelli, Rebecca Weisberger, and Brandon Sasserson.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The development and ratification of the Fifth Amendment is a testament to the Founders' belief in thorough and informed citizen participation in the criminal justice system. The Grand Jury and Due Process clauses both speak to this ideal. This Court has recognized that the "historic office" of the grand jury has been "to provide a shield against arbitrary or oppressive action," ensuring that criminal prosecutions would only be initiated after the "considered judgment of a representative body of citizens acting under oath[.]" *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion).

However, federal and state criminal proceedings have drifted drastically from this vision. Vague indictments, plea bargaining, and other bureaucratic mechanisms have reduced citizen participation and eroded the founding vision for a strong check on prosecutorial abuse. Prosecutors have "almost unlimited discretion" and "virtually absolute power." David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 CRIM. L. & CRIMINOLOGY 473, 480–81 (2016) (internal quotations omitted). What's more, commentators have noted a "growing perception" that grand juries act as "the prosecutor's sword" to be "used in furtherance of governmental goals." Note, *Restoring Legitimacy: The Grand Jury as The Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1209 (2017).

This Court has held that an indictment "must set forth each element of the crime it charges." *Almendarez-Torres v. United* States, 523 U.S. 224, 228

(1998). Upholding the indictment used in the present case would not only mean abandoning this standard but also reinforcing the perception of a subservient grand jury. Unless the Court grants certiorari and reverses the judgment below, indictments will fail to ensure that charges "reflect the judgment of a grand jury rather than only that of the prosecutor." *United States v. Gonzalez*, 686 F.3d 122, 133 (2d Cir. 2012). This case presents an apt and timely vehicle for the Court to emphasize the constitutional commitment to an "independent and informed grand jury[.]" *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

ARGUMENT

I. THE FIFTH AMENDMENT'S GRAND JURY PROVISION EXPRESSES THE FOUNDERS' COMMITMENT TO ROBUST CITIZEN PARTICIPATION IN THE CRIMINAL JUSTICE SYSTEM.

A. The Grand Jury System Is a Crucial Protection for Citizens Accused and for Checking Government Power.

The grand jury system traces its roots to twelfth-century England with the execution of the Assize of Clarendon, which empowered Henry II to charge subjects with investigating crimes in their localities. *See Russel v. United States*, 369 U.S. 749, 761 (1962); Brett Raffish, Note, *Making the Fourth Amendment "Real" in Grand Jury Proceedings*, 19 GEO. J.L. & PUB. POL'Y 529, 534 (2021). This Court has said there "is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello v. United States*, 350 U.S. 359, 362 (1956).

Initially, the aim of English grand juries was not to curb governmental power, but to assist the Crown in identifying lawbreakers. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 651–53 (2002). Over centuries, however, the grand jury came to be seen as a "useful buffer" between the state and defendant that infused an "effective community voice" into criminal proceedings. Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 69 (1995). In contrast with the current practice of American grand juries relying on a prosecutor to present evidence of wrongdoing, their English predecessors were more autonomous and proceeded on the basis of their members' own knowledge of activity in the community. *Id.* at 68–69. If what they knew led them to believe a crime had been committed, the grand jury brought charges either through their own "presentment" or an "indictment" returned at the request of a prosecutor. *Id.* at 69. By the eighteenth century, the English considered the grand jury to be a "shield that protected individuals from government oppression." *Id.* at 69.

With many of the framers being trained in English common law, the grand jury system was brought to the American colonies and generally accepted as "a basic guarantee of individual liberty[.]"*Mandujano*, 425 U.S. at 571. Before the Revolution, grand juries in the colonies vigorously investigated potential criminal charges and scrutinized the conduct of public officials. Brenner, *supra*, at 70.

Many citizens found jury service to be an effective method of protesting British tyranny, especially by refusing to return charges sought by Crown officers. CLAY C. CONRAD, JURY NULLIFICATION: THE

EVOLUTION OF A DOCTRINE 45 (2013). For example, in 1765, Boston jurors refused to indict the instigators of the Stamp Act riots. RICHARD YOUNGER, PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1934–1941 28 (1963). In 1768, jurors openly defied stern instructions from Massachusetts Bay Chief Justice Thomas Hutchinson to return an indictment against editors of the *Boston Gazette* for libeling Governor Francis Bernard. *Id*. Integral to this independent ethos were popular conceptions of natural law and rights which implied that "a well-intentioned citizen should be able to derive a just and perfectly legal result without too much supervision, instruction, or interference from the bench." *Id.* at 45. A commentator has quoted John Adams as stating that "the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature as they have, through the legislature, in other decisions of government." *Id*. (quoting Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964)).

This system survived the Revolution and its functioning changed little until well into the nineteenth century. Brenner, *supra*, at 70–71. Against this backdrop of ordinary Americans using the grand jury system to check their government's power, James Madison included the grand jury requirement in his first draft of the Bill of Rights. *See* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 165–67 (1977). The purpose of adding the provision was to protect citizens "against unfounded accusations, whether it come from [the] government, or [is] prompted by partisan passion or private enmity." *Ex parte Bain*, 121 U.S. 1, 11 (1887). "Its adoption in our Constitution as the sole method for preferring charges

in serious criminal cases shows the high place it held as an instrument of justice." *Costello*, 350 U.S. at 362.

B. The Due Process Clause Reinforces the Grand Jury's Role in Checking Government Power.

While the Petition does not explicitly present a Due Process Clause argument, under any theory of that Clause's original meaning, a defendant must be provided notice through presentment or indictment by a grand jury before being denied "life, liberty, or property"; this Court should note the ways that the Due Process Clause and grand jury right are mutually reinforcing. U.S. CONST. amend. V. There are at least three distinct theories related to the original meaning of "due process" as it was used when the Fifth Amendment was drafted. Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 450 (2022). The first, known as the "Fair Procedures Theory," posits that the term means legal procedures that are fair and procedurally just. *Id.* The second theory, known as the "Legal Procedures Theory," holds that "the phrase mean procedures that are required and/or permitted by positive law." *Id.* The sub-variant of this theory associated with Justice Scalia states that procedures must comply with the positive law in 1791 when the Fifth Amendment was framed and ratified. *Id.* The third theory, the "Process Theory," holds the clause is limited has a "precise and restricted meaning: the Clause is limited to legally required 'process' in what is today a narrow and technical sense of the word." *Id.* at 450–51. This theory argues that "due process" refers to "[t]he formal commencement of any legal action; the mandate, summons, or writ by which

a person or thing is brought into court for litigation." *Id*. at 451.

All of these theories support the conclusion that a defendant in a criminal case is entitled to notice through constitutionally proper presentment or indictment. U.S. CONST. amend. V. This Court has explicitly expressed such sentiment. Relatedly, the Sixth Amendment makes clear the defendant has a right to be "informed of the nature and cause of the accusation[.]" *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Thomas, J., concurring) (quoting U.S. CONST. amend. VI). This constitutional protection hinges on "determining which facts constitute the 'crime'—that is, which facts are the 'elements' or 'ingredients' of a crime." *Id*.

As the dissenters below correctly recognized, that determination must reflect "the judgment of a grand jury rather than only that of the prosecutor." *United States v. Montague*, 67 F.4th 520, 546 (2d Cir. 2023) (Jacobs, J., dissenting) (citation omitted). Otherwise, courts are left to "speculate as to whether a grand jury *might* have returned an indictment in conformity with the available evidence[.]" *Id*. (citation omitted). The Due Process Clause reinforces that the grand jury system guarantees a substantial role for citizens in the administration of the criminal-justice system.

II. DEVELOPMENTS IN THE CRIMINAL JUSTICE SYSTEM HAVE ERODED THE FOUNDERS' VISION.

The grand jury's constitutional role is even more important in a system driven by pleas and not trials. Today's system of plea-driven mass adjudication and a steadily diminishing role for jury trials stands in stark contrast to the guardrails the Founders painstakingly

designed. One striking example of this dynamic is the extraordinary power American prosecutors wield from start to finish in a criminal proceeding. Then-Attorney General Robert H. Jackson famously noted that prosecutors have "more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 31 CRIM. L. & CRIMINOLOGY 3, 3 (1940). A prosecutor can "order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of facts, can cause the citizen to be indicted and held for trial." *Id.* Jackson said that these immense powers "seem necessary," but cautioned that while "the prosecutor at his best is one of the most beneficial forces in our society, when he acts from malice or other base motives, his is one of the worst." *Id.*

The precise nature of the power that prosecutors wield can be hard to define. It has been said that "power" can commonly be understood either in terms of "*influence*—controlling the actions that other people take—or in terms of *outcomes*—controlling what happens to other people." Sklansky, *supra*, at 482. Either way, a significant element of prosecutors' power is deployed through various recommendations they can make to others in the criminal justice system. "The prosecutor gets law enforcement officers to investigate, magistrates to issue warrants, grand juries to indict, defendants to plead guilty (or, if necessary, trial juries to convict), and judges to imprison." *Id.* at 483.

The most common way a prosecutor wields this influence—in a process unknown to the Founders—is through plea bargaining, which has transformed our constitutionally prescribed "system of trials" into an

ad hoc "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000). Guilty pleas supply the overwhelming majority of federal criminal convictions. In 2021, the U.S. Sentencing Commission found that 98.3% of federal convictions came as a result of guilty pleas. U.S. SENT'G COMM'N, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 11 (2021).[2] These statistics, paired with a prosecutor's singular control of "life, liberty, and reputation," illustrate that many criminal defendants—regardless of factual guilt—feel pressured to plead guilty, as the risk of going to trial is far too great. Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014).[3] The proportion of factually innocent defendants who cave to this pressure is unknown, but Judge Rakoff notes that "of the approximately three hundred people that the Innocence Project and its affiliated lawyers have proven were wrongfully convicted of crimes of rape or murder that they did not in fact commit, at least thirty, or about 10 percent, pleaded guilty to those crimes." *Id.*

Plea bargaining has become an extraordinarily effective tool for securing convictions because prosecutors remain at a distinct advantage throughout the process. They "possess a wide array of levers that they can—and routinely do—bring to bear on defendants to persuade them to waive their right to trial and simply plead guilty." Clark Neily, *A Distinct Mirror: American-Style Plea Bargaining Through the*

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[2] Available at https://bit.ly/3Mv0ud0.

[3] Available at https://bit.ly/3KC6EHa.

Eyes of a Foreign Tribunal, 27 GEO. MASON L. REV. 719, 730 (2020). Some of these levers include threating defendants with increased penalties if they insist on going to trial,[4] threatening to add charges to increase a potential sentence,[5] extensive (and sometimes inappropriate) use of pre-trial detention,[6] withholding exculpatory evidence during plea negotiations,[7] threatening to use uncharged or acquitted conduct to enhance sentencing,[8] and even threatening to prosecute a defendant's family members.[9] Prosecutors have many "weapons to bludgeon defendants into effectively coerced plea bargains." Rakoff, *supra* (discussing mandatory-minimum sentencing in particular).

Prosecutors' untoward influence extends into the grand jury room as well. Attendance at grand jury proceedings is strictly limited to the prosecutor, jurors, court reporter, and witness currently being questioned. Andrew D. Leipold, *Why Grand Juries Do*

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[4] NAT'L ASSOC. OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://bit.ly/38IF8KG.

[5] *Id*. at 50.

[6] Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1351–56 (2014); Tami Abdollah, *Study: Federal Magistrates, Prosecutors Misunderstand Bail Law, Jailing People Who Should Go Free*, USA TODAY (Dec. 7, 2022), https://bit.ly/4asjVzk.

[7] Michael Nasser, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3613 (2013).

[8] WILLIAM R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE 75 (2018).

[9] *Id*.

Not (and Cannot) Protect the Accused, 80 CORNELL L. REV. 260, 266 (1995). The suspect enjoys no right to testify in his own defense and cannot bring counsel with him into the grand jury room when summoned to testify. *Id*. During grand jury proceedings, prosecutors have no obligation to offer evidence that could be exculpatory or favorable to the suspect. *Id*. at 267; *United States v. Williams*, 504 U.S. 36 (1992). The rules of evidence do not apply, so prosecutors are free to ask leading questions and pursue extraneous matters that would be deemed irrelevant at trial. Leipold, *supra*, at 267. The suspect is also barred from presenting any evidence of his own. *Id*. Lower evidentiary standards and the prosecutor's discretion over what evidence is presented ensure that grand juries "hear only what the prosecution wants them to hear—the most inculpatory version of the facts possible, regardless of whether that version is based on evidence that will be considered at trial." *Id*. at 267–68 (internal citations omitted). "It can fairly be said that the prosecutor holds all the cards before the grand jury." *Commonwealth v. Walczak*, 979 N.E.2d 732, 752 (Mass. 2012) (Lenk, J., concurring).

As a result of prosecutors' unilateral selection of the information presented to grand juries, there is real doubt about how well the grand jury serves its historical screening function in modern times. *See Restoring Legitimacy*, *supra*, at 1210. According to an analysis of federal prosecutions from the Bureau of Justice Statistics, grand juries declined to indict the suspect in just *eleven* out of 162,351 cases in 2010. *Id*.[10]

[10] *See also* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 11–12 (2013).

It has become a near article of faith among scholars that the grand jury has become a "rubber stamp" for the prosecution. Leipold, *supra*, at 269. One prosecutor has been quoted as saying "[i]f you gave [grand jurors] a napkin, they'd sign it." *Id.* (citing Richard L. Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893, 914–15 n.144 (1974)). While this Court has frequently extolled the value of grand jury proceedings,[11] it has also lamented that "[t]he grand jury may not always serve its historical role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

The criminal justice system can ill afford to have the institution of the grand jury further weakened. The broad and largely unchecked discretion of prosecutors already engenders myriad abuses. "[O]verwork, political pressure, laziness, and malice can prompt a prosecutor to bring ill-conceived charges against innocent people or excessive charges against those who have committed lesser crimes." Leipold, *supra*, at 268. With an ever-increasing reliance on plea bargaining—and with jury trials increasingly marginalized—the grand jury is left as the main avenue for community input in the criminal justice system. *Restoring Legitimacy*, *supra*, at 1208. Yet the grand jury's traditional role has been substantially

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[11] *See, e.g., Wood*, 370 U.S. at 390; *Williams*, 504 U.S. at 47 ("[T]he whole theory of [the grand jury's] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."); *Hoffman v. United States*, 341 U.S. 479, 485 (1951) ("[T]he most valuable function of the grand jury [is] . . . to stand between the prosecutor and the accused.") (quoting *Hale v. Henkel*, 201 U.S. 43, 59 (1906)).

diluted, and compensatory protections "have not developed elsewhere in the system to fulfill the grand jury's traditional functions." *Id.* Instead, the system continues to depend on the increasingly notional procedural protections of trials "that rarely materialize." *Id.*

A meaningful step to correct course and harmonize our efficiency-driven system with the citizen-centric one described and prescribed by the Founders would be to grant certiorari in this case and adopt the Third Circuit's approach. This would clarify that "a [continuing criminal enterprise—"CCE"] indictment is subject to the same pleading rules as any other indictment." *Montague*, 67 F.4th at 546 (Jacobs, J., dissenting). This Court has determined that at least three drug-related felonies are necessary to any CCE offense. *Richardson v. United States*, 526 U.S. 813 (1999). The Third Circuit has therefore straightforwardly held that the indictment "must include the facts and circumstances comprising at least three [violations]." *United States v. Bansal*, 663 F.3d 634, 647 (3d Cir. 2011). As Judge Jacobs notes in his dissent below, the petitioner's indictment does not even allege discrete violations, "it merely gestures at some unknown number of prior crimes." *Montague*, 67 F.4th at 547 (Jacobs, J., dissenting). Judge Jacobs further observed that, as laypeople, grand jurors "would not know one numbered offense from another." *Id.* "If instead of 21 U.S.C. §§ 841(a)(1) and 846, the indictment had cited 18 U.S.C. §§ 47(b) and 1082, the grand jury would have indicted Montague for polluting a watering hole and operating a gambling ship upon the high seas." *Id.*

Robert Jackson said "people who really wanted the right thing done—wanted crime eliminated" gave prosecutors immense power. Jackson, *supra*, at 3. However, at the same time, they "wanted the best in our American traditions preserved." *Id.* The independent grand jury is an indispensable part of our constitutional heritage. The grand jury continues to function as a sword against crime. Reestablishing its role as a shield against government abuse requires ensuring that its members are fully informed and empowered, as the Petitioner seeks.

CONCLUSION

For these reasons and those given by the Petitioner, certiorari should be granted and the judgment reversed.

Respectfully submitted,

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