No. 05-998

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUAN RESENDIZ-PONCE,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to the institution of the federal grand jury. Accordingly, NACDL and its membership, whose daily practice includes grand jury matters, are uniquely qualified to offer assistance to the Court in this case.

SUMMARY OF ARGUMENT

After contending otherwise throughout this criminal proceeding, Petitioner United States now concedes that the indictment in this matter did not charge a crime. Pet. Br. 10. In this respect, the indictment here was no indictment at all, just as a search warrant that nowhere specifies the place to be searched or the items to be seized provides no "warrant" for any search. Nonetheless, prosecutors brought Respondent Resendiz-Ponce to trial on this non-charge, over his vehement and timely objection. The court of appeals reversed on the ground that the indictment failed to charge a crime because it

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

omitted an essential element—the overt act. Thus, the issue in this case is whether proceeding to trial on the non-charge, for which Mr. Resendiz-Ponce's grand jury never found probable cause, constitutes structural error.

This Court's recent opinion in *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), governs this issue as it sets forth a clear and precise definition of structural error. Rather than the narrow position taken by Petitioner in its opening brief that "structural" errors are only those rendering the trial "fundamentally unfair," Pet. Br. 7,[2] the opinion in *Gonzalez-Lopez* makes clear that fundamental unfairness is not the "single, inflexible criterion" defining structural error. Rather, structural errors bear not only on "the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991), but also on "whether it proceeds at all." *Gonzalez-Lopez*, 126 S. Ct. at 2565. Under *Gonzalez-Lopez*, therefore, structural error more specifically exists where the error: (1) has consequences that are necessarily difficult to assess; (2) renders the succeeding criminal trial fundamentally unfair; (3) is not logically amenable to application of harmless error analysis. All three criteria are met here.

In the case of a defective indictment, any inquiry into the harmlessness of the error would require impermissible and impossible speculation by a reviewing court. Because the very language of the Fifth Amendment prohibits trials founded on an invalid indictment, any trial conducted on the basis of an indictment which fails to set forth all the elements of the crime charged is, by definition, fundamentally unfair. In addition, because Petitioner was not required to allege an essential element of the offense, Petitioner was free to shift its

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[2] Petitioner repeatedly contends, as it did in *Gonzalez-Lopez*, that only errors which satisfy the second, fundamental fairness criterion, warrant treatment as structural errors. Pet. Br. 7, 14, 15 & 22; *Gonzalez-Lopez*, 126 S. Ct. at 2562.

theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal. Such prosecutorial roaming is directly contrary to this Court's precedents, and impermissibly undermined Respondent's ability to defend his case at trial.

Historical and policy considerations further mandate a finding of structural error in this matter. Application of harmless error analysis would eviscerate the long-established and deliberate institutional bifurcation of the grand and petit juries, a bifurcation maintained for over eight centuries of Anglo-American common law. The American grand jury is unique and distinct from the petit jury, with broader powers and far greater autonomy. Prosecutorial usurpation of the grand jury's critical functions to determine probable cause and to shield putative defedants from the inconvenience, expense and opprobrium of a federal criminal trial is entirely inconsistent with the grand jury's historical importance and renders the grand jury's fundamental role superfluous. Because of the institutional bifurcation in our federal criminal justice system, subsequent conviction by a petit jury cannot cure the harm that a defective indictment causes.

Moreover, application of harmless error to a wholly invalid indictment would require the Court to overrule its own long-established precedent holding that a defendant cannot be convicted on a charge the grand jury never made against him, *Stirone* v. *United States*, 361 U.S. 212, 219 (1960), and would allow Respondent to 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).

Policy considerations also strongly support reversal of convictions founded on constitutionally deficient indictments. Rather than grant defendants a windfall, as argued by Petitioner, holding that the omission of an essential element is structural error will instead ensure: (1) that prosecutors take care to allege each of the essential elements of an offense, as

required by the Constitution; (2) that defendants timely object to facially invalid and defective indictments; and (3) that district courts exercise proper and necessary vigilance to avoid the constitutional error.

ARGUMENT

I. DEPRIVATION OF THE RIGHT TO INDICTMENT BY GRAND JURY IS STRUCTURAL ERROR.

The Court's recent opinion in *United States* v. *Gonzalez-Lopez* outlines three circumstances in which an error is termed "structural": (1) if its consequences are necessarily difficult to assess, (2) if it necessarily renders the criminal proceeding fundamentally unfair; *or* (3) if the harmless-error inquiry is irrelevant to remedying the constitutional error. 126 S. Ct. at 2564 n.4. The Court's use of the disjunctive demonstrates that each can provide an independent basis for finding a structural defect.

First, a defect is structural if it has "'consequences that are necessarily unquantifiable and indeterminate.'" *Id.* at 2564 (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993)); see also *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) ("when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Waller* v. *Georgia*, 467 U.S. 39, 46 n.4 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance").

Second, a defect is structural if it "'necessarily render[s] a trial fundamentally unfair'" and "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence … and no criminal punishment may be

regarded as fundamentally fair.'" *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) (omission in original) (internal citation omitted).

Finally, an error is structural if it is not logically amenable to harmless-error analysis. For example, if a defendant would ordinarily be prejudiced by *exercising* a constitutional right, such as self-representation, then it is impossible for a court to assess the prejudice resulting from the deprivation of that right. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis.").

The error in the present case meets all three criteria, especially the first (unquantifiable and indeterminate) and third (not logically amenable to harmless error analysis), thus, it "unquestionably qualifies as 'structural error.'" *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993).

A. An Indictment's Failure To State An Offense Has Consequences That Are Necessarily Unquantifiable, Indeterminate And Not Logically Amenable To Harmless Error Analysis.

The prejudice caused by the error in this case is "unquantifiable and indeterminate," *Sullivan*, 508 U.S. at 281-82, and not properly reviewed under a harmless error analysis. The error here occurred in the grand jury context, where the proceedings are ex parte and secretive. As a result, a reviewing court is incapable of assessing what a grand jury did or did not do. Indeed, a reviewing court can have no confidence that it was error at all because the grand jury might deliberately have declined to find probable cause for an overt act and therefore removed that element from the indictment. While remote, this possibility demonstrates the absolute inability of a reviewing court to assess what a grand jury did or did not do. "[T]here is no *object*, so to speak,

upon which harmless-error scrutiny can operate." *Id.* at 280. Thus, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction," we cannot be sure that the error leading to the indictment's insufficiency did not affect the "*very existence* of the proceedings to come." *Vasquez*, 474 U.S. at 263 (emphasis added).

While it may be presumed that a grand jury proceeding transpires with all due regularity (see *United States* v. *Johnson*, 319 U.S. 503, 512-13 (1943); see also *United States* v. *Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in judgment)), where there is "particularized proof of irregularities in the grand jury process," this "presumption of regularity … may be dispelled." *Id.* A violation of the Indictment Clause's requirement that an indictment must be "returned by a legally constituted and unbiased grand jury [and] *valid on its face*," *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (internal footnote omitted) (emphasis added), is precisely the brand of "particularized proof" that overcomes any presumption of regularity.

Like an illegally constituted and possibly biased grand jury, such as those at issue in *Vasquez* or *Ballard* v. *United States*, 329 U.S. 187 (1946), an indictment that omits an essential element of the offense represents an intolerable encroachment on the grand jury's structural protections. That is, the indictment's patent failure to meet the Fifth Amendment's requirements could not have been caused by anything other than an irregularity in the proceedings. The error is strong proof that the grand jury either did not find probable cause as to the omitted element or did not even consider facts relevant to the element. Part of the difficulty in reviewing insufficient indictments, therefore, is in determining the nature of the violation.

On this point, Petitioner attempts to characterize *Vasquez* as involving an "'isolated exception[]' to the harmless error rule" that turned solely on race discrimination in the grand jury. Pet. Br. 20 (alteration in original) (citing *Bank of Nova*

Scotia v. *United States*, 487 U.S. 250, 256 (1988)). But this is an incomplete reading of *Bank of Nova Scotia*. The Court does not say that *Vasquez* itself is an isolated exception, but that it is a*mong a class of cases that are exceptions* to the general rule that most constitutional errors are subject to harmless error analysis. Indeed, *Vasquez* "exemplifies" cases "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 257 (1988).[3] Accordingly, *Bank of Nova Scotia* should not be read to stand for the proposition that *Vasquez* is the *only* type of grand jury error that is structural, as Petitioner suggests. Pet. Br. 19. See NAFD *Amicus* Br. 10-18.

B. The Error In This Case Is Structural Because It Renders The Trial Fundamentally Unfair.

An indictment that fails to state an offense is also structural error because it "necessarily render[s] a trial fundamentally unfair [and] deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence … and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9 (internal citations omitted) (omission in original). In a federal criminal case, proceeding to trial on an indictment that is so deficient that it

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[3] The Court's opinion in *Bank of Nova Scotia* v. *United States*, 478 U.S. 250 (1988), observes that demonstrated irregularities in the grand jury process are in fact structural errors, although the Court did not categorize them as such at the time. According to *Bank of Nova Scotia*, such errors signify that "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, *allowing the presumption* of prejudice." *Id.* at 257 (emphasis added). Consequently, "any inquiry into harmless error [requires] unguided speculation," *id.*, and such speculation cannot be the foundation for logical analysis.

fails to charge a crime renders the subsequent criminal trial "fundamentally unfair," as this Court has used that term.

Here, the claim of fundamental unfairness relies not upon the Fifth Amendment's general guarantee of Due Process, but upon its specific and emphatic guarantee 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. While it is true that this Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, 'beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation,'" *Medina* v. *California*, 505 U.S. 437, 443 (1992) (alteration omitted), the question presented in this case concerns one of the more specific guarantees that the Framers articulated[4] in that the language of the Indictment Clause contains its own remedy—"no person shall be held to answer" absent an indictment. The omission of a required element from the indictment is a "defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 802 (1989). The indictment in this case fails to state an offense and therefore

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[4] The origins of the Indictment Clause stretch back to the Magna Charta. According to Sir Edward Coke, the core meaning of the term "by the law of the land" was "indictment or presentment of good and lawful men," *i.e.*, the grand jury. Edward Coke, *The Second Parts of the Institutes of the Laws of England* *50-51. *See also* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1783 n.50 (Boston: Hillard, Gray & Co. 1833). Early editions of Chancellor Kent's *Commentaries on American Law* are even more emphatic: "The words by the *law of the land*, as used in *magna charta*…are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words." 2 James Kent, *Commentaries on American Law* 13 (New York: Clayton & Van Norden, 2d ed. 1832) (citations omitted); *see also* Akhil Reed Amar, *The Bill of Rights* 97 n.62 (1998).

warrants the remedy specified in the Indictment Clause, the right not to be tried.

The Court has observed the pernicious effects of such an error. Where an indictment fails to include all the elements of what the prosecution must prove at trial, "the indictment…[leaves] 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." *Russell*, 369 U.S. at 768. "At every stage in the ensuing criminal proceeding [the defendant] was met with a different theory, or by no theory at all" regarding the omitted element. *Id*. Further, where a criminal prosecution is allowed to proceed upon an indictment that omits such elements, it "enables [a defendant's] conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Id*. at 766.

From the outset, Respondent's trial counsel complained of those effects here. As noted, at the pre-trial hearing on the motion for dismissal, counsel implored the District Court to order the prosecution to articulate what overt act or acts it intended to prove, to no avail. JA 20.

In sum, in light of deprivation of a specific constitutional guarantee, the Constitution's articulation of a remedy for such a deprivation and the pernicious effects of such a deprivation, the Court should hold that the error that occurred here is structural. To hold otherwise, as explained in the ensuing section, would effect a fundamental change in the criminal process.

II. CONSTITUTIONAL GRAND JURY ERROR REQUIRES A COURT TO DISMISS AN INDICTMENT WHEN THE DEFENDANT PROPERLY PRESERVES A TIMELY OBJECTION TO SUCH ERROR.

The indictment in this case was insufficient constitutionally to bring Respondent to trial. Because Respondent diligently pursued his objection to this constitutional error, this Court's precedent mandates dismissal of the indictment.

Constitutional grand jury errors violate one or more of the three requirements of the Indictment Clause, as laid out in *Costello*.[5] 350 U.S. at 363. There, Justice Black held that "[a]n indictment returned by a [1] legally constituted and [2] unbiased grand jury … [3] if valid on its face, is enough to call for trial of the charge on the merits." *Id*. (internal footnote omitted).[6] In contrast, non-constitutional grand jury errors may occur during the grand jury process, but these would not violate the three requirements of the Indictment Clause.

A. Properly Preserved Constitutional Grand Jury Error Results In Reversal.

In every case in which a defendant preserved his or her timely objection to constitutional grand jury error, this Court has adhered to a strict rule of mandatory reversal. See *Vasquez*, 474 U.S. at 256 (racial discrimination in the composition of the grand jury); *Russell*, 369 U.S. at 771-72

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[5] Indeed, in the present case Petitioner agrees that the facial invalidity of the indictment was a "*constitutional* grand jury error[]." *See*, *e.g.*, Pet. Br. 20.

[6] Labeling violations of the *Costello* requirements as "constitutional grand jury error" indicates, *inter alia*, the narrow effect of our suggested holding. Of course, this Court need not consider whether violations in these three areas are the sole constitutional errors that can occur in the grand jury proceedings. Rather, it is sufficient to say that the present case implicates only the requirement of facial validity.

(omission of an essential fact from an indictment); *Stirone*, 361 U.S. at 219 (constructive amendment of the indictment without the grand jury); *Batchelor* v. *United States*, 156 U.S. 426, 432 (1895) (indictment set forth general allegations but did not allege all essential elements with sufficient specificity); and *Strauder* v. *West Virginia*, 100 U.S. 303, 304 (1879) (racial discrimination in the composition of the grand jury), *abrogated on other grounds by Taylor* v. *Louisiana*, 419 U.S. 522 (1975). This rule of mandatory reversal is supported by the need to protect the constitutional values underlying the Indictment Clause and the grand jury institution itself.

Like *Russell*, *Stirone*, and *Batchelor*, the present matter implicates the constitutional requirement that an indictment be facially valid. The prosecution in this case violated this requirement in two ways, each of which mandates reversal under this Court's precedents. First, the indictment failed to state an offense, which is reversible under *Russell*. Second, the prosecution constructively amended the indictment to obtain conviction, which is reversible under *Stirone*.

The three primary criteria for testing the sufficiency of the indictment are: (1) whether it "contains the elements of the offense charged"; (2) whether it "fairly informs a defendant of the charge against which he must defend"; and (3) whether it "enables him to plead an acquittal or conviction in bar of future prosecution for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). These criteria serve to uphold the threefold constitutional function of the facial validity requirement. See, *e.g.*, 24 James W. Moore et al., *Moore's Federal Practice* § 607.02[2][a] (3d ed. 2006). *First*, the facially valid indictment enforces the Indictment Clause's command 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. *Second*, it implements the Sixth Amendment's "apprisal" requirement that "[i]n all criminal prosecutions, the

accused shall enjoy the right to … be informed of the nature and cause of the accusation." *Id.*, amend. VI. *Third*, it protects the accused from reprosecution for the same offense in furtherance of the Fifth Amendment's double jeopardy provision. *Id*. As this Court recognized in *Russell* and *Stirone*, a reviewing court must dismiss a facially invalid indictment—at least where the accused makes a timely objection to this error—because it necessarily deprives the defendant of at least one of these three constitutional guarantees.

The indictment in this case involves the precise error that this Court held to be reversible in *Russell*. The defendants in *Russell* were indicted for refusing to answer questions when summoned before a congressional subcommittee, in violation of 2 U.S.C. § 192. A federal grand jury returned an indictment that failed to specify the "nature of the 'question then under inquiry' to which the questions addressed to defendant[s] [were] alleged to be relevant." *Russell*, 369 U.S. at 753 n.5 (quoting a "typical" motion to dismiss). The defendants filed a timely objection to this omission. *Id.* at 752-53. In reviewing the objection, this Court determined that the subject under inquiry was an essential element of a violation of 2 U.S.C. § 192. *Id.* at 771. Because the grand jury failed to return an indictment on this essential element, this Court reversed the conviction. *Id.* at 771-72, 767 (holding that the indictment failed: (1) "to inform the defendant of the nature of the accusation against him;" and (2) to limit an individual's criminal liability "to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.") (internal citation omitted).

In this case, Petitioner concedes that the indictment does not contain all of the essential elements for the offense charged, and that the error was constitutional. Pet. Br. 10. Indeed, the grand jury charged Respondent with only four of the five essential elements of the offense of attempted reentry,

8 U.S.C. § 1326. *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc). Under this indictment, therefore, Petitioner brought Respondent to trial upon charges of (1) being a non-U.S. citizen, who (2) had the conscious desire to reenter the United States without the permission of the Attorney General (3) after having been previously deported from the United States and who (4) did not actually receive the Attorney General's consent to return. This charge, standing alone, is not a federal criminal offense. Not only does this indictment fail to allege the elements of the offense set forth by the Ninth Circuit in *Gracidas-Ulibarry*, but it also completely fails to allege any *actus reus* whatsoever. The indictment in this case thus fails to meet the standards for facial validity set out by this Court in *Hamling*, 418 U.S. at 117.

Moreover, because the district court erroneously permitted Respondent's trial to proceed despite the indictment's failure to state an offense, the prosecution was forced to constructively amend the indictment in order to obtain a conviction. But as this Court has recognized, constructive amendment of an indictment violates an individual's "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. This violation "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error," and requires reversal. *Id.* Consequently, the indictment in this case also suffers from the same defect mandating reversal in *Stirone*. *Id.* (prosecution adduce evidence of alleged improper interference with products not specified in the indictment).

It is a settled principle of law that constructively amended indictments are reversible without inquiry into the weight of evidence presented to the petit jury. See 24 Moore, *supra* § 607.06[1] at 607-43 ("Constructive amendment of the indictment may deprive the defendant of the Fifth Amendment guarantee to indictment by a grand jury and is

reversible error per se."). "[W]here trial evidence has amended the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment, the variance violates the defendant's substantial right to be tried only on charges returned by a grand jury." *United States* v. *Lee*, 359 F.3d 194, 208 (3d Cir.) (citations and alterations omitted), *cert. denied*, 543 U.S. 955 (2004). "If, on the other hand, the variance does not alter the elements of the offense charged, [courts] focus upon whether or not there has been prejudice to the defendant." *Id.* (citations omitted, alterations in original).

Here the indictment necessarily broadened the basis for conviction—in that the grand jury's indictment provided *no basis* for conviction. As a result, the prosecution violated Respondent's "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. Therefore, because Respondent properly preserved his objection to such a deprivation of a substantial right, reversal is the only appropriate remedy.

B. In Contrast, *Unobjected-To* Constitutional Grand Jury Error Is Subject To Plain-Error Analysis And Thus Does Not Require Reversal In Every Case.

In cases where constitutional grand jury error occurs, yet the defendant fails to file a timely objection (or did not properly preserve this objection on appeal), this Court has reviewed such violations under a plain-error analysis. See *United States* v. *Cotton*, 535 U.S. 625, 628-29 (2002) (affirming conviction despite omission from indictment of an *Apprendi* sentence-enhancing fact); *Davis* v. *United States*, 411 U.S. 233 (1973) (not reversing conviction despite racial discrimination in composition of the grand jury); *Silber* v. *United States*, 370 U.S. 717, 717-18 (1962) (per curiam) (dismissing indictment due to omission of an essential fact

from the indictment);[7] *Ballard*, 329 U.S. at 189 (dismissing indictment due to sex discrimination in the composition of the grand jury). In each of these cases—and despite the fact that such constitutional defects ordinarily require reversal—the outcome depended on such factors as whether the "error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Respondent in this case, far from sleeping on his rights, filed a timely objection and properly preserved his objection on appeal. Thus, a plain-error analysis is inappropriate here.

C. A Finding That An Error Is Not "Plain" Within Meaning Of Rule 52(b) Does Not Imply That The Error Is Not Also Structural.

Petitioner relies upon this Court's statement that structural errors "*necessarily* render a [criminal] trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986) (emphasis added), to support the proposition that if an error is not "plain" under Rule 52(b), then that error cannot also be structural. See Pet. Br. 22. But this Court explicitly rejected Petitioner's contention because it would "creat[e] a single, inflexible criterion, inconsistent with the reasoning of our precedents." *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4. As discussed above, it is readily apparent that Petitioner's myopic conception of structural error is incorrect.

Petitioner's argument on this point cannot be squared with this Court's decisions in *Vasquez* and *Davis*. *Vasquez* held

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[7] Although the defendant in *Silber* filed a timely pre-trial objection to the insufficiency of the indictment, he did not preserve this objection on appeal. The Court stated that an appellate court "'may, of [its] own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" 307 U.S. at 718 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). As such, it is clear that this Court reviewed that case for plain error.

that racial discrimination in the selection of a grand jury is a "systemic flaw in the charging process" and thus "requires … continued adherence to a rule of mandatory reversal." 474 U.S. at 264. The defendant in *Vasquez* objected to the constitutional error before trial and properly preserved the objection on appeal. *Id*. at 256, 261. *Davis* poses an instructive contrast. There, this Court faced the precise error it found to be reversible in *Vasquez*, but the defendant did not object to the constitutional error until three years after his conviction. *Davis*, 411 U.S. at 235. The Court held that the "waiver standard expressed in Rule 12(b)(2) governs an *untimely* claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review." *Id*. at 242 (emphasis added). Under the waiver standard now expressed in Fed. R. Crim. P. 12(b)(3), therefore, the defendant's failure to make a timely objection to the *Vasquez* error precluded reversal absent a showing of cause.[8]

When contrasted to *Vasquez*, *Davis*'s result suggests that a defendant's failure to object can be dispositive on the question whether a structural error requires reversal. That is, while a court *must* reverse upon reviewing a preserved objection to structural error, "[i]n the context of such unobjected-to error, the mere deprivation of substantial rights

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[8] This finding is consistent with this Court's holdings in various grand jury discrimination cases. *See, e.g., Francis* v. *Henderson*, 425 U.S. 536 (1976) (defendant raised grand jury discrimination claim six years after conviction; Court denied relief on exhaustion grounds); *Tollett* v. *Henderson*, 411 U.S. 258 (1973) (defendant raised grand jury claim twenty-one years after conviction; Court held that claim was foreclosed because petitioner had pleaded guilty pursuant to competent legal advice); *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963) (petitioners raised grand jury discrimination claim four years after their trial and the Court held that Rule 12(b)(2) waiver provisions applied and that petitioners failed to show cause); *accord Hollis* v. *Davis*, 941 F.2d 1471 (11th Cir. 1991) (defendant's failure to make timely objection to grand jury composition in state trial court constituted waiver despite Court's holding in *Vasquez*).

'does not, without more' warrant reversal." *Neder*, 527 U.S. at 34 (quoting *Olano*, 507 U.S. at 737) (Scalia, J., dissenting). This result cuts strongly against Petitioner's argument that structural errors always require reversal because they render the criminal proceedings "fundamentally unfair" in every case. Pet. Br. 21-23.

The Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), therefore does not aid Petitioner's cause. The indictment in *Cotton* was adequate, facially, to initiate prosecution, only for a lesser offense. In that case, the defense failed to raise an objection and therefore exposed the defedant to a trial and to evidence that the drug quantity at issue was larger than that indicated by the indictment. Not so here, where the indictment was, as Petitioner's concedes, facially *invalid* and where the defense raised a timely objection to the indictment, which should have prevented a trial from going forward at all.

Moreover, although the error here and the error in *Cotton* implicate defects in the indictments' *apprisal* function, the error in the present case also reflects fault in (or the complete absence of) the grand jury's *screening* function. Where this later "screening" function is directly implicated, no logical means of discerning what happened in the grand jury exists. The grand jury's failure to find probable cause for the commission of an overt act suggests that either (1) the grand jury never viewed evidence of probable cause on the element, or (2) the grand jury refused to find probable cause on the element. In either case, Respondent was deprived of the screening process to which he is guaranteed by the Constitution. Accordingly, the omission in this case "impugned the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Hobby* v. *United States*, 468 U.S. 339, 345 (1984).

D. Non-Constitutional Grand Jury Errors, Such As Those In *Mechanik* And *Bank Of Nova Scotia,* Are Subject To Harmless-Error Review.

In contrast, non-constitutional grand jury errors are subject to harmless-error analysis. See *Bank of Nova Scotia*, 487 U.S. 250 (various violations of Fed. R. Crim. P. 6); *Mechanik*, 475 U.S. 66 (where two agents testified in tandem before the grand jury, in violation of Fed. R. Crim. P. 6(d)); *United States* v. *Lane*, 474 U.S. 438 (1986) (misjoinder of defendants in the indictment in violation of Fed. R. Crim. P. 8(b)); *Hobby* v. *United States*, 468 U.S. 339 (1984) (racial discrimination in the selection of a grand jury foreperson); [9] *Berger* v. *United States*, 295 U.S. 78 (1935) (not reversing conviction despite *technical* variance between the indictment and proof at trial). Non-constitutional grand jury errors are those that occur during the grand jury proceedings, but which do not violate the broader constitutional requirement that the indictment be "returned by a legally constituted and unbiased grand jury [and] valid on its face." *Costello*, 350 U.S. at 363 (internal footnote omitted).

Non-constitutional grand jury errors are subject to harmless-error review because they are not so intrinsically harmful that they "compromis[e]" the "structural protections of the grand jury," *Bank of Nova Scotia*, 487 U.S. at 257, or that the error "impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." *Hobby*, 468 U.S. at 345. Consequently, this Court has held that such errors require reversal only where they had "substantial influence" on the outcome of the grand

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[9] Although the defendant in *Hobby* pursued his claim under the Equal Protection Clause of the Fourteenth Amendment, this error was non-constitutional with respect to the Fifth Amendment. Unlike the claims involved in *Vasquez* and *Ballard*, the Court deemed the role of the foreperson to be largely ministerial and constitutionally insignificant in relation to the defendant's rights under the Indictment Clause. *Hobby*, 468 U.S. at 345

jury proceeding. *Bank of Nova Scotia*, 487 U.S. at 256. Thus, this Court applies a more rigorous standard in reversing non-constitutional grand jury errors, in part because these procedural errors implicate an individual's constitutional right only tangentially, if at all.

Petitioner argues that constitutional and non-constitutional grand jury errors should be reviewed alike. Pet. Br. 17-20. This argument fails because it does not reflect the "heightened regard [this Court has] for constitutional protections." *Lane*, 474 U.S. at 446 n.9, in the grand jury context. Constitutional errors such as those in *Vasquez*, *Russell*, *Stirone* and *Ballard* have warranted automatic reversal or treatment as "structural errors." As a comparison of the constitutional and non-constitutional error cases makes clear, the nature of the grand jury error directly informs whether any such defect may be reviewed for harmless error. Thus, Petitioner's argument that the omission of an overt act from an indictment is no different from non-constitutional error and therefore subject to harmless error review is untenable.

III. APPLICATION OF HARMLESS ERROR ANALYSIS WOULD EVISCERATE THE LONG ESTABLISHED INSTITUTIONAL BIFURCATION OF THE GRAND AND PETIT JURIES.

In the context of a constitutionally deficient indictment, undertaking a harmless error analysis requires examination and retroactive application of materials presented to the petit jury (under a separate standard of proof and for separate purposes) to the unknown and unknowable events before an entirely separate and earlier constituted grand jury. Petitioner claims that the higher standard of proof under which the petit jury considers such evidence guarantees that, once found by the petit jury, any omitted fact would necessarily have been found by any rational grand jury. Petitioner is correct about the inevitable results of the application of a harmless error analysis, but this result entirely ignores the separate role and

function of the grand jury in our intentionally bifurcated criminal process.

A. The Institutional Bifurcation Of The Grand And Petit Juries Is Grounded In More Than Eight Centuries Of Anglo-American Jurisprudence.

Grand juries have long held a dual role of investigative and protective functions; neither of which are entirely determined by the evidence presented to that body by the prosecutor. In the early 11th century, the first grand juries were fearsome accusatory bodies of laymen authorized to assist the Crown as quasi-prosecutors and established to increase the number of prosecutions. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 4-5 (2002). Eventually, however, the grand jury earned a dual reputation as a protector of the innocent from unfounded charges. *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1190 (9th Cir.), *cert. denied*, 126 S. Ct. 736 (2005); 1 Sara Sun Beale et al., *Grand Jury Law and Practice* § 1:2 (2d ed. 2001). In 1352, King Edward III promulgated a statute that allowed a defendant to challenge the inclusion of any member of a trial jury who had also served on the grand jury. I Pollock & Maitland, *The History of English Law* 649 (2d ed. 1923). That statute required a complete bifurcation between the two institutions allowing for independent evaluation of evidence against the accused by two independent bodies. Beale, *supra*, § 1:2.

The American colonies adopted the grand jury in the early 1600's.[10] *Id.* at § 1:3. The Founders believed that the grand jury was "so essential to basic liberties that they provided in the Fifth Amendment that federal prosecutions for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *United States* v. *Calandra*, 414 U.S. 338,

[10] According to Beale, grand juries existed as early as 1625 in Virginia, 1635 in Massachusetts, 1637 in Maryland, 1640 in Rhode Island and 1643 in Connecticut. Beale, *supra* § 1:3.

343 (1974). Moreover, consensus suggests that the federal grand jury "was intended to operate substantially like its English progenitor." *Costello*, 350 U.S. at 362. William Blackstone, whose views of the common law were highly influential at the time of the founding,[11] envisioned the grand jury as a shield for the protection of individual liberty. Gregory T. Fouts, Note, *Reading Grand Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L. J. 323, 324 n.34 (2004). The *Commentaries* highlight the significance of the grand jury as a wholly separate evaluator of evidence, and its importance in maintaining an independent perspective in determining whether an indictment should be returned, even where probable cause may exist to do so. See NAFD *Amicus* Br. ___

From the perspective of those seeking to include the grand jury clause in the Bill of Rights, the grand jury's discretion as to whether to indict at all was arguably its most important feature. 4 Wayne R. LaFave et al., *Criminal Procedure* § 15.2(g) (2d ed. 2006). This screening function of the American grand jury debuted in 1793, when three successive grand juries refused to indict publisher John Peter Zenger for libel against the Governor of New York. *Navarro-Vargas*, 408 F.3d at 1192, 1199. Likewise, colonial grand juries refused to indict editors of the Boston Gazette for libel against the Governor of Massachusetts, as well as the leaders of the Stamp Act Rebellion. Simmons, *supra*, at 11-12.

The American grand jury remains a unique governmental institution, not "textually assigned … to any of the branches described in the first three Articles [of the Constitution]." *United States* v. *Williams*, 504 U.S. 36, 47 (1992). The grand jury's independence from the three branches derives from its

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[11] While the last volume of Blackstone's Commentaries was published in 1769 in England, in 1772, 1000 copies were in circulation in the United States, and there were already 1400 advance orders for the first American issue. Beale, *supra* §1:4 n.4.

intended function "as a kind of buffer or referee between the Government and the people." *Id.* (citing *Stirone*, 361 U.S. at 218, *Hale* v. *Henkel*, 201 U.S. 43, 61 (1906)). Concomitant with its institutional independence is an ability to conduct its operations "free from technical rules." *Costello*, 350 U.S. at 362. Unlike a court, the jurisdiction of which is "predicated upon a specific case or controversy," the grand jury "can investigate merely on suspicion that the law [has been] violated." *Williams*, 504 U.S. at 48 (internal quotation marks omitted) (quoting *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 297 (1950)). A grand jury may return an indictment entirely on the basis of hearsay evidence, *Costello*, 350 U.S. at 363, or it may refuse to return a proffered indictment without articulation of any reason for doing so. Bruce H. Schneider, *The Grand Jury: Powers, Procedures and Problems*, 9 Colum. J.L. & Soc. Probs. 682, 728 (1973).

Given the breadth of it powers and the lack of any precise standard of decision making, the grand jury is now, and always has been, a far different body from the petit jury. Its lack of constraint, especially in performing its protective or screening function, therefore precludes inferences regarding what a "rational" grand jury inevitably would have done. See *Russell*, 369 U.S. at 770 ("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.") Application of harmless error analysis based upon evidence presented to the petit jury is therefore an exercise that bridges what history has long kept separate.

B. *Neder* Does Not Reach This Case.

To avoid the conclusion that the error in this case was structural, Petitioner relies on *Neder* v. *United States*, which is inapposite. In *Neder*, the Court concluded that that the omission of an offense element from a jury instruction was amenable to harmless error analysis. 527 U.S. at 19-20. The

error occurred in the presentation of the case to the petit jury, and the Court refused to reverse the conviction on account of the overwhelming evidence supporting the jury's verdict. *Id.* at 18. *Neder* did not involve a facially invalid indictment, but rather "'simply…error in the trial process itself,'" *Id.* at 8 (quoting *Fulminante*, 499 U.S. at 310), regarding who would decide the question of materiality. Accordingly, the error could be logically assessed in the context of the rest of the evidence presented to the jury during the course of the trial and did not constitute structural error. See *id.* at 18.

Petitioner contends that it "necessarily follows" from *Neder* "that the omission of an offense element from a federal indictment is not structural error either." Pet. Br. 13. But this assertion ignores the Court's very recent recognition that *Neder* governs constitutional errors "at trial alone." See *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2551 (2006). Moreover, it ignores entirely the eight centuries of common law, discussed above, distinguishing the grand jury as a unique institution that is formally and functionally distinct from the petit jury. Most fundamentally, a grand jury proceeding "is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343. Indeed, as a result of both the grand jury's institutional independence from the other branches of government and the special procedural rules governing grand jury practice, the grand jury hears a much different story than that which the petit jury hears at trial. It cannot therefore be assumed that the evidence presented to a petit jury was the same as, over even substantially similar to, that presented to the grand jury. *Neder* is therefore wholly inapposite.

C. If Insufficient Indictments May Be Cured By A Subsequent Petit Jury Verdict, Such Constitutional Violations Will Always Be Deemed Harmless.

By definition, harmless-error review occurs only at the appellate level. Therefore, if the trial judge erroneously

denies a defendant's objection to an insufficient indictment, this constitutional error will only reach an appellate court if the defendant has been convicted of the crime. Petitioner suggests that a constitutional grand jury error "is harmless where the petit jury subsequently is properly instructed and finds that the element in question has been proved beyond a reasonable doubt." Pet. Br. 36. Under this rule, subjecting an individual to criminal prosecution based upon a facially invalid indictment will *always* be considered harmless on review. That is, because the defendant in every case will have been convicted by the time a court applies harmless-error analysis, the petit jury's findings will have "cured" the grand jury's omission in every case. This result necessarily "robs the Fifth Amendment of much of its protective value to the private citizen." *Costello*, 350 U.S. at 364 (Burton, J., concurring), and is incompatible with this Court's holdings in *Russell*, 369 U.S. at 772 (omission of an essential fact from an indictment is reversible per se), and *Stirone*, 361 U.S. at 219 (constructive amendment of the indictment without the grand jury is reversible per se).

IV. PETITIONER'S POLICY CONSIDERATIONS ARE BOTH MISPLACED AND INCONSISTENT WITH THE LAW.

A. Rather Than Granting Respondent A Windfall, Holding That The Error Is Structural Will Ensure That Windfalls Are Avoided.

Petitioner suggests that holding that the omission of an essential element of the indictment is structural error "would effectively grant defendants a windfall." Pet. Br. 9. Petitioner ignores the reality that the error here (and in all such cases) could have been corrected by the prosecutions prompt return to the grand jury to seek a sufficient indictment, see *Crist* v. *Bretz*, 437 U.S. 28, 37, 38 n.15 (1978), or by greater vigilance on the part of the district court.

Respondent's supposed "windfall" in this case is the direct result of the prosecution's intransigence with respect to the sufficiency of its indictment and the district court's refusal to grant Respondent's timely motion. Both events occurred against the backdrop of binding circuit precedent clearly establishing the requirement for charging an overt act, *Gracidas-Ulibarry*, 231 F.3d at 1196, as well as circuit precedent holding that an omission of an overt act from an indictment on this charge is structural error. *United States* v. *Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Throughout the lower court proceedings, the prosecution persistently argued that the indictment was sufficient, see Brief for Appellee at 9-10, *United States* v. *Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005) (No. 04-10302), and refused to offer additional information regarding the overt act it intended to prove at trial, despite Respondent's repeated efforts to force the prosecution to do so. JA 20. Respondent's efforts validate his contention that this information was vital to the defense of his case.[12] It was not until Petitioner sought Certiorari to this Court that it abandoned its argument that the indictment was sufficient. See Pet. for Cert. 9 n.3 (explaining that Petitioner does not seek review of the Ninth Circuit's holding that the indictment failed to allege an overt act).

B. Petitioner's Position Removes Any Incentive For The District Court's To Rule Upon Pre-Trial Motions To Dismiss An Indictment.

Petitioner's position fails to account for the perverse incentives that would follow if the Court were to apply harmless error analysis here. Unless the Court deems the error structural, trial judges would have no motivation to rule

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[12] Here, the record contradicts Petitioner's assertion that Respondent "made no effort before trial to determine the specific 'overt act' on which the government intended to rely (*e.g.*, by filing a motion for a bill of particulars)." Pet. Br. 27. But even setting Respondent's repeated objections aside, "it is a settled rule that a bill of particulars cannot save an invalid indictment." *Russell*, 369 U.S. at 770.

on pre-trial motions to dismiss the indictment. Rather, logic suggests that judges would simply permit all such cases to proceed to trial. If the petit jury convicts the defendant, the subsequent conviction would "substitute" the grand jury's hypothetical determination of probable cause under the government's proposed harmless error regime. Cf. *Neder*, 527 U.S. at 38-39 (Scalia, J., dissenting) (asserting that "confirming" speculation does not disturb the allocation of power between the judge and the jury, but that "substituting" speculation does). If the petit jury instead acquits the defendant, the verdict would moot the significance of the pre-trial motion. And because trial judges would not have an incentive to dismiss constitutionally defective indictments, defendants in turn would not have an incentive to raise such motions.

Conversely, a structural error holding here will preserve the integrity of the grand jury's function in legitimizing charges and subsequent trials. While all defendants are presumed to be innocent, the reality is that a petit juror may be influenced by a grand jury's determination of probable cause. Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence* 3 Va. J. Soc'y Pol'y & L. 67, 122 (1995). Particularly in complicated trials, the jury may assume that "'there must be something to the charges,'" otherwise the grand jury would not have returned the indictment. *Id.* In the words of the former Chief Judge of New York, the public "assumes that where there is smoke in the form of an indictment, there is fire in the form of guilt." Sol Wachtler, *Grand Juries: Wasteful and Pointless*, N.Y. Times, Jan. 6, 1990, sec. 1 at 25. Although a petit jury is always susceptible to such an assumption, the consequences are especially profound in the event of a defective indictment, particularly if a grand jury would not have found that there was probable cause to support omitted essential element. In such a case, the entire trial proceeds on the basis of charges that should not have been brought without the consent of the grand jury

finding to which a defendant is constitutionally entitled. In effect, the petit jurors are inclined "giv[e] credence to a process void of the substantive content attributed to it." Brenner, *supra*, at 122-23.

In the event that a petit jury is not prejudiced by a defective indictment and declines to convict a defendant at trial, the ramifications may still be severe. See, *e.g.*, *Williams*, 504 U.S. 36 at 63 (Stevens, J., dissenting) ("'[W]hile in theory a trial provides the defendant with a full opportunity to contest and disprove charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo.'"); *United States* v. *Serubo*, 604 F.2d 807, 817 (3d. Cir. 1979); and Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect The Accused*, 80 Cornell L. Rev. 260, 268 (1995) ("In the public's mind an indictment often carries a presumption of guilt; it can cause economic harm and damage to [one's] reputation even if the defendant is later acquitted at trial."). The accused may suffer disastrous effects from which he may never recover—even if acquitted. See, *e.g.*, Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. Rev. 1297, 1299 (2000) (arguing that even if the defendant is acquitted or the charges are dismissed, "the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused"). "[D]ismissal of an indictment may be virtually the only effective way" to ensure that defendants are protected from "abuse of the grand jury process." *Serubo*, 604 F.2d at 817.

C. Petitioner's Position Is Inconsistent With Fed. R. Crim. P. 52.

By enacting Rule 52, Congress established two distinct approaches for addressing preserved and waived errors in order to encourage defendants to raise objections timely, and to prevent windfalls. See *Olano*, 507 U.S. at 744 ("It is this

distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless error and plain-error review, and also every incentive to the defendant to raise objections at the trial level."). Applying harmless error analysis to the error here would frustrate the purpose of Rule 52 by eviscerating this distinction. Petitioner's contention that "'there is no simple way … to restore the defendant to the position in which he would have been had the indictment been dismissed before trial,'" Pet. Br. 37, only bolsters Respondent's position. Holding that the error is structural will allow future defendants avoid the "'inconvenience, expense, and opprobrium'" caused by a trial on a fatally flawed indictment. *Id.* Such a determination will encourage prosecutors to take care in drafting indictments, defendants to raise errors in timely fashion where they occur, and judges to dismiss facially invalid indictments so that the prosecution may correct errors before expending government resources on a trial.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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