QUESTIONS PRESENTED FOR REVIEW

In *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), the Court explained that "[i]n the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts." The Court made it clear that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *Id.* (citation omitted). *Vasquez* thus recognizes two grand jury functions: (1) probable cause determination and (2) the exercise of discretion -- akin to that of a prosecutor -- to decide whether a prosecution should go forward. The district court here rejected *Vasquez*, and provided the grand jurors with instructions that addressed only the former attribute -- probable cause determination -- and which led the grand jury to believe it lacked the discretion to decide whether a prosecution *should* go forward. Two questions are presented:

1. Is the grand jury obligated to indict in every case where there is probable cause or does it possess the discretion not to indict described in *Vasquez*?

2. If the district court erred, is the error structural because, in contrast to errors that go to probable cause determination, such as those before the Court in *United States v. Mechanik*, 475 U.S. 66 (1986), a reviewing court cannot know how a grand jury would exercise its discretion to choose not to indict?

IN THE SUPREME COURT OF THE UNITED STATES

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CESAR MASCORRO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Petitioner Cesar Mascorro respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 2, 2012.

OPINIONS BELOW

On February 2, 2012, a three-judge panel of the Ninth Circuit entered a Memorandum disposition[1] affirming the petitioner's convictions for transporting undocumented aliens in violation of 8 U.S.C. § 1324.

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[1] The Memorandum is unpublished, but may be found at *United States v. Mascorro*, 2012 WL 313604 (9th Cir. Feb. 2, 2012). A copy is attached as Appendix A.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... .

STATEMENT OF THE CASE

A. Statement of Facts.

On January 25, 2010, Petitioner, accompanied by three passengers, drove a white Ford Focus to the San Clemente checkpoint on Interstate-5 in the northern portion of San Diego County. He was stopped and referred to secondary inspection. He initially proceeded toward secondary, but then drove away from the checkpoint. He was pursued, and he soon exited the freeway, pulled over, and briefly attempted to flee on foot. He was arrested. His three passengers were undocumented aliens whom he had picked up on a wet and freezing night as they were attempting to waive down passing vehicles. His defense was that he merely acted to help the three stranded migrants rather than with the purpose of furthering their unlawful presence in the United States.

After a jury trial, the jury returned guilty verdicts on two counts of transporting aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). Petitioner was sentenced to concurrent 20-month terms, plus three years of supervised release.

B. Proceedings and Disposition in the District Court.

Petitioner filed various pretrial motions, including, *inter alia*, a motion to dismiss the indictment due to erroneous grand jury instructions.

A district court judge (not the trial judge) impaneled the June 2008 grand jury and provided it with a set of instructions loosely based on the model instruction at issue in *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005) (en banc) (*Navarro-Vargas II*). The instructions began with a very narrow description of the grand jury's singular purpose: "The purpose of the grand jury is to determine whether there's sufficient evidence to justify a formal accusation against a person; that is, to determine whether there's probable cause to believe that a person committed a crime." ER 7.[2]

Reinforcing the notion that the grand jury has a single task -- probable cause determination -- the instructions advise the grand jurors that they "should" return an indictment when that sole test has been met.

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[2] "ER" refers to Petitioner's Excerpt of Record filed in the Court of Appeals. The relevant portion of the ER is attached as Appendix B.

> [Y]our task is to determine whether the government's evidence, as presented to you, is sufficient to cause you to conclude that there's probable cause to believe the person being investigated committed the crime under investigation. To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged.

ER 23.

Even if the grand jurors believe that a particular federal statute is unwise, they are forbidden from taking those views into account in executing their duties as grand jurors.

> You're not to judge the wisdom of the criminal laws enacted by Congress; that is, whether or not there should or should not be a federal law designating certain activity as criminal it to determined and has been determined by Congress and not by you. This isn't a referendum on the criminal laws. Like them or not, it's your duty to conscientiously apply the facts to the laws that Congress has given and then make an honest decision.

ER 11. Thus, the grand jurors have no discretion to choose not to indict because application of a particular law is unwise given the facts of the particular case.

The instructing district court also forbade the grand jurors from taking into account the punishment for an offense in choosing whether to indict: "When deciding whether or not to indict, you should not consider punishment in the event of conviction. That is not a factor for a grand jury to consider in determining whether probable cause exists." [ER 11]. Thus, the grand jurors were told (1) that their sole

"purpose" is probable cause determination; (2) that they "should" indict if that sole test was satisfied; (3) that they could not consider their judgment of the wisdom of the application of any federal statute to a particular fact pattern; and (4) that punishment considerations are not a factor to consider in performing that singular function. In short, the grand jury that indicted Petitioner was instructed that it had no other role than probable cause determination.

Petitioner challenged these instructions as unconstitutionally limiting grand jury discretion. Specifically, he contended that a grand jury receiving such instructions could not possibly exercise the robust discretion vested in that body as described in *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). Petitioner argued that the instructional errors were structural, and required dismissal of the indictment. The district court denied the motion without explanation. [ER 51-52].

C. <u>The Ninth Circuit Court of Appeals Affirmed Petitioner's Convictions</u>.

Petitioner appealed to the Ninth Circuit Court of Appeals, raising the same issues pressed in the district court. The Court of Appeals issued an unpublished Memorandum finding that the instructions were not unconstitutional and affirming Petitioner's convictions. *See* Appendix A. Although the Memorandum offered no reasoning, it cited *United States v. Caruto*, 663 F.3d 394, 398-99 (9th Cir. 2011);

United States v. Cortez-Rivera, 454 F.3d 1038, 1040-41 (9th Cir. 2006); and *Navarro-Vargas II*, 408 F.3d at 1187.

As to Petitioner's claim that the grand jury charge informed the grand jurors that their sole "purpose" is probable cause determination and undercut their discretion not to indict because they were instructed that they "should" indict if their sole test -- probable cause determination -- was satisfied, the *Navarro-Vargas II* majority rejected each claim. *See* 408 F.3d at 1204-06. As to the latter, it suggested that the term "should" was not mandatory, even though it was used in grand jury instructions:

> The language of the model charge does not state that the jury 'must' or "shall" indict, but merely that it "should" indict if it finds probable cause. As a matter of pure semantics, it does not "eliminate discretion on the part of the grand jurors," leaving room for the grand jury to dismiss even if it finds probable cause.

Id. at 1205 (quoting *United States v. Marcucci*, 299 F.3d 1156, 1159 (9th Cir. 2002) (per curiam)). *But see id.* at 1211 (noting that the term "should" also has a mandatory meaning and arguing that "[t]he 'should' and 'shall' distinction is a lawyer's distinction, not a difference most lay people sitting as grand jurors would be likely to understand.") (Hawkins, J., dissenting).

For its part, the *Marcucci* majority reasoned that the instructions do not mandate that grand jurors indict upon every finding of probable cause because the term "should" means "what is probable or expected." *See* 299 F.3d at 1164. Thus,

the *Navarro-Vargas II* and *Marcucci* courts believe that grand jurors who are being "instruct[ed] ... on the law which governs [their] actions and [their] deliberations as grand jurors," ER 6-7, will interpret the term "should" as connoting some sort of prediction -- i.e., "what is probable or expected" -- rather then in the mandatory -- i.e., "govern[ing]" -- sense. Neither *Marcucci* nor *Navarra-Vargas II* addressed the frequent use of the word "should" in the mandatory sense in the grand jury charge. *See, e.g.*, ER 13 (invocation of Fifth Amendment rights "should play no part in your determination of whether an indictment should be returned.").

The *Navarra-Vargas II* majority conceded that the language of the instruction suggested that the grand jury had a singular function of probable cause determination. *See* 408 F.3d at 1206 ("the terms 'purpose' and 'task' are singular, conveying that the grand jury has one purpose"). Nonetheless, it suggested that generic instructions regarding the independence of the grand jury and the "room [left] for [the grand jury] to refuse to indict" left by the "should" instruction were sufficient to overcome that plain language. *See id.*

Similarly, *Navarro-Vargas II* held that it was permissible for grand jurors to be told that they could not consider the wisdom of any law passed by Congress. *See id.* at 1202-04. It offered no basis for that conclusion other than its view that "we cannot say that the grand jury's power to judge the wisdom of the laws is so firmly

established that the district court must either instruct the jury on its power to nullify the laws or remain silent." *See id.* at 1204. *Navarro-Vargas II* did not identify a source of authority for creating rules of grand jury procedure simply because a district court perceives no "firmly established," *see id.*, contrary rule.

Finally, *Caruto*, 663 F.3d at 398-99, and *Cortez-Rivera*, 454 F.3d at 1040-41, held that it was permissible to instruct the grand jury that it "should not consider punishment in the event of conviction," ER 11, because the "permissiveness [of the term 'should'] 'le[ft] room—albeit limited room—for a grand jury to consider punishment' and thus preserved the grand jury's historical prerogative." *Caruto*, 663 F.3d at 399 (quoting *Cortez-Rivera*, 454 F.3d at 1041) (brackets in original). Indeed, it invoked the same meaning of the term "should" as that employed in *Navarro-Vargas II* and *Marcucci*. *See Caruto*, 663 F.3d at 399. The Memorandum did not address the fact that the very next sentence of the instruction stated that punishment "is not a factor for a grand jury to consider in determining whether probable cause exists," ER 11, an instruction that makes a "permissive" reading of the term "should" very unlikely indeed.

SUMMARY OF ARGUMENT

In *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), the Court explained that "[i]n the hands of the grand jury lies the power to charge a greater offense or a lesser

offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts." The Court made it clear that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *Id.* (citation omitted). *Vasquez* thus recognizes two grand jury functions: (1) probable cause determination and (2) the exercise of discretion -- akin to that of a prosecutor -- to decide whether a prosecution should go forward.

The instructions here effectively eliminated the latter function: the grand jurors were told that they had only one task -- probable cause determination -- and that they were obliged to indict if that single-factor test was satisfied. Similarly, they were flatly prohibited from considering the wisdom of applying the criminal law to the facts before them and from considering the punishment that might result from a charging decision. Perhaps that is all that the Fifth Amendment guarantees, but the Court said otherwise in *Vasquez*. The Court of Appeals has thus "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Moreover, the basis for the Court's holding in *Vasquez* was that the structural protections of the grand jury were compromised by the racial discrimination in the selection of the grand jury in that case: no one could know how a properly selected

grand jury would have exercised its broad, quasi-prosecutorial discretion in evaluating "the need to indict." *Vasquez*, 474 U.S. at 264. Similarly, a reviewing court can no more know when a grand jury would exercise its discretion not to indict than such a court can anticipate when a prosecutor would decline to pursue a potential criminal case. The error is thus structural based "on the difficulty of assessing the effect of [it]." *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). The Court should therefore also grant the petition to determine whether the error was structural.

ARGUMENT

I.

BY INSTRUCTING THE GRAND JURY THAT IT WAS OBLIGED TO INDICT WHENEVER THERE WAS PROBABLE CAUSE, AND THAT IT COULD CONSIDER NEITHER THE WISDOM OF THE LAW IN QUESTION, NOR THE POTENTIAL PUNISHMENT IN THE EVENT OF INDICTMENT, THE DISTRICT COURT VIOLATED THE FIFTH AMENDMENT BY PREVENTING THE GRAND JURY FROM FULFILLING THE DISCRETIONARY ROLE DESCRIBED IN *VASQUEZ*.

A. The Grand Jury Has Broad Discretion to Refuse to Indict Even If There Is Probable Cause.

"[T]he grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not." *Vasquez*, 474 U.S. at 263. Rather, as the Court explained, the grand jury enjoys broad charging discretion:

> In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained."

Id. (quoting *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). *Accord Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (The grand jury "controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime."); *Navarro-Vargas II*, 408 F.3d at 1200 (following *Vasquez*).

Vasquez thus establishes that the grand jury performs two discrete functions: (1) probable cause determination and (2) the exercise of quasi-prosecutorial[3] discretion to decide whether a prosecution should go forward.

The Ninth Circuit has adopted *Vasquez*'s explication of grand jury discretion. *See Navarro-Vargas II*, 408 F.3d at 1200. *Accord id.* at 1211-12 (Hawkins, J., dissenting) ("the majority agrees that a grand jury has the power to refuse to indict someone even when the prosecutor has established probable cause that this individual

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[3] *See United States v. Navarro-Vargas*, 367 F.3d 896, 900 (9th Cir. 2004) (Kozinski, J., dissenting) (*Navarro-Vargas I*) (observing that "the function [] performs is most accurately described as prosecutorial"). *Accord* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1299-1309 (2006).

has committed a crime."); *Navarro-Vargas I*, 367 F.3d at 899 (Kozinski, J., dissenting). Several other courts and jurists have reached similar conclusions. *See, e.g.*, *Gaither v. United States*, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969); *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965) (Wisdom, J., concurring); *Natwig v. Webster*, 562 F. Supp. 225, 230 n.2 (D.R.I. 1983); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979); *Application of Jordan*, 439 F. Supp. 199, 202-04 & n.5 (S.D.W.V. 1977); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1222 (D.D.C. 1974).

The grand jury's freedom to decline to return an indictment even in a "case where a conviction can be obtained," *Vasquez*, 474 U.S. at 263, is fundamental to its role as a protector of the people from the power of the Executive.

> By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.

Cox, 342 F.2d at 189-90 (Wisdom, J., concurring). The grand jury thus acts as the "conscience of the community," *Gaither*, 413 F.2d at 1066 & n.6, in determining, on a normative basis, whether a prosecution *should* go forward. "That a grand jury may *legitimately* perform a quasi-equitable function is implicit in its role as 'an

irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are at once merged.'" *Ciambrone*, 601 F.2d at 629 n.2 (Friendly, J., dissenting) (quoting *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910) (L. Hand, J.)) (emphasis added).[4] Therefore, as the Court has recognized, the grand jury has the authority to refuse to authorize a prosecution that it believes, for whatever reason, is unwarranted. *See Vasquez*, 474 U.S. at 263.[5]

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[4] *Vasquez* cited Judge Friendly's *Ciambrone* dissent with favor. *See* 474 U.S. at 263.

[5] The academic community overwhelmingly supports *Vasquez*'s recognition that the grand jury both conducts probable cause determinations and performs a quasi-prosecutorial, discretionary function. *See, e.g.,* Roger A. Fairfax, *Grand Jury Discretion and Constitutional Design*, 93 Cornell L. Rev. 703, 722 (2008) ("[P]robable cause is merely an evidentiary standard and not a framework for the grand jury's defining purpose."). *Accord Grand Jury 2.0: Modern Perspectives On the Grand Jury*, 57-58, 104 n.135, 117-19, 255, 258 (Roger A. Fairfax ed., Carolina Academic Press 2010); Hon. Michael Daly Hawkins, *The Federal Grand Jury: Fish, Fowl, or Fair-Weather Game?*, 33 Okla. City U. L. Rev. 823, 827-35 (2008); Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. at 1299-1309; K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 Cap. Def. J. 61, 76 (2004); Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L.J. 323, 331-34 (2004); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 2 (2002); Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution*, 40 Ariz. L. Rev. 1305, 1361-62 (1998); 1 Sara S. Beale et al., *Grand Jury Law and Practice* § 1:6, at 1-32 (2d ed. 1997); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183-84 (1991). *See also* George D. Edwards, *The Grand Jury*, 35-36 (1906) (describing grand juries rejecting cases in which there was

The discretion exercised by the grand jury is therefore analogous to that vested in the prosecutor. *See Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) (the grand jury's function "is most accurately described as prosecutorial").[6] *Accord Navarro-Vargas II*, 408 F.3d at 1200 ("[T]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'") (quoting *Butz v. Economou*, 438 U.S. 478, 510 (1978)); *id.* at 1213 (Hawkins, J., dissenting). As one commentator has observed, "[i]t is because the grand jury serves accusatory and investigative functions that a prosecutorial analogy is more apt." Kuckes, 94 Geo. L.J. at 1286. In light of the strength of the prosecutorial analogy, the effect of the instructions -- which is to cabin grand jury discretion -- contravenes both *Vasquez* and the judicial tradition of non-interference with charging decisions. *See generally United States v. Jacobo-Zavala*, 241 F.3d 1009, 1014 (8th Cir. 2001) (United States Attorney's decision to dismiss

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probable cause because the grand jury viewed the offenses as not serious enough to merit prosecution).

[6] *See also Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) ("There's no reason grand juries cannot or should not make . . . political judgments [as prosecutors do] about which laws deserve vigorous enforcement and which ones do not, in deciding whom to indict, and on what charges."); Kuckes, 94 Geo. L.J. at 1307 ("[B]y viewing the indicting grand jury as a democratic force within the prosecutorial function, the grand jury's 'shield' and 'sword' functions are not distinct and competing functions, but part of the same integrated role – the exercise of discretionary authority to approve or decline criminal prosecutions.").

charges because the penalties were too severe was not subject to judicial review). *See also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (observing that charging decisions "generally rest[] entirely in [the prosecutor's] discretion") (quotation omitted).

B. The Historical Record Supports *Vasquez*'s Explication of the Grand Jury Institution.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). *See also id.* at 576 ("the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning") (citation, internal quotations, and brackets omitted). The historical evidence of the institution's development in both England and this country's colonial period demonstrates that the people, at the time of the Framing, would have valued the grand jury's role in providing protection from the Executive by acting as the "conscience of the community," *Gaither*, 413 F.2d at 1066 n.6, and as an important guarantor of personal freedoms. *See generally* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 308 (1995).

The people at that time certainly would have been aware of the celebrated case of an English grand jury resisting the Crown in 1681 with respect to the Earl of Shaftesbury and Stephen Colledge. *See id.* at 281-82, 308. In those cases, the grand jury withstood significant pressure from the courts and the Crown, and refused to indict Shaftesbury and Colledge on charges that were politically motivated. *Id.* at 281-82. This refusal was perceived as a "turning point in the relationship between grand jury and government." *Id.* at 281. *Accord* 1 Sara S. Beale et al., *Grand Jury Law and Practice*, § 1:2, at 1-10 (2d ed. 1997).

The tradition begun in the Shaftesbury and Colledge cases continued in colonial America. In 1734, in the case of John Peter Zenger, grand juries refused to indict Zenger on seditious libel charges despite strong evidence of guilt. *See Navarro-Vargas II*, 408 F.3d at 1192. *See also* 4 Wayne LaFave et al., *Criminal Procedure* § 15.3(c) (2d ed. 1999) (observing that "most of the celebrated instances of grand jury refusals to indict involved cases in which the evidence was sufficient, but the grand jury simply refused to permit an unjust prosecution"). Similarly, during the Revolutionary War, grand juries frequently refused to indict in tax collection cases in which merchants were accused of avoiding import and export payments. *See* Leipold, 80 Cornell L. Rev. at 285. *See also Navarro-Vargas II*, 408 F.3d at 1192 ("colonial grand juries resisted the king's representatives in America"). "The

Revolutionary War experience helped lay the groundwork for the inclusion of the grand jury guarantee in the Fifth Amendment." *Id.*

There is little doubt that at the time the Fifth Amendment was adopted -- the relevant time frame under *Heller* -- the people were well acquainted with the full scope of the grand jury's protective power. *See* Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, 25-30, 33-34 (1963). *Accord Navarro-Vargas II*, 408 F.3d at 1198-99 (the grand jury institution reached the apex of its influence and utility in the pre-revolutionary colonial period); *Fields v. Soloff*, 920 F.2d 1114, 1117 (2d Cir. 1990) ("Just prior to the American Revolution, [grand juries] became vigilant in insulating from prosecution colonists who had violated unpopular British laws."); Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power*, 17-18 (1975). In particular, "[t]he Framers were well aware that colonial grand juries communicated dissent to the central royal authorities and checked those individuals making, interpreting, and enforcing colonial laws." *See* Fairfax, 93 Cornell L. Rev. at 725.

Based on the colonial experience, the protective powers set forth in *Vasquez* were perceived by the Framers as valued attributes. *See* Kuckes, 94 Geo. L.J. at 1302 (the grand jury's discretion not to indict was "arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand

jury clause be included in the Bill of Rights'") (quoting LaFave et al., *Criminal Procedure* § 15.2(g)). At that time, the grand jury served, "as James Wilson put it, [as] a 'great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered.'" *See Navarro-Vargas II*, 408 F.3d at 1191-92 (quoting Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, 85 (1998)). *Accord Grand Jury 2.0: Modern Perspectives On the Grand Jury*, 119-20. Because in interpreting the Fifth Amendment the Court must "place [itself] as nearly as possible in the condition of the men who framed that instrument," *Ex parte Bain*, 121 U.S. 1, 12 (1887), the Court should conclude that the Framers did not conceive of the grand jury as the toothless entity described in the grand jury charge, an institution that cannot serve as a "great channel of communication" because one side of the conversation has been muzzled. In short, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," *Heller*, 554 U.S. at 636, and the obsequious grand jury posited by the district court here is one of them.

C. Because the Court of Appeals Has Approved Instructions That Prevent Grand Juries From Fulfilling the Role Described in *Vasquez*, the Court Should Grant the Petition.

The Court of Appeals approved the instant grand jury charge based upon its view that the charge could be read in a manner that does not conflict with *Vasquez*.

See Caruto, 663 F.3d at 398-99; *Navarro-Vargas II*, 408 F.3d at 1202-06.[7] But neither *Caruto* nor *Navarro-Vargas II* hold that the instruction could not reasonably be read differently.

The Court of Appeals' approach is mistaken: when confronted with a potentially unconstitutional jury instruction, the Court instructs that a reviewing court must ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). There is certainly a reasonable likelihood that a jury would not adopt the unlikely reading of the grand jury charge's use of the term "should" as posited by the Court of Appeals: "[t]he word 'should' is used 'to express a duty [or] obligation.'" *See Navarro-Vargas II*, 408 F.3d at 1211 (Hawkins, J., dissenting). *See also id.* at 1210-11 ("The instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence."). Indeed, the Court of Appeals' reading of the term "should" is particularly unlikely in light of the district court's explanation that it was fulfilling its "responsibility to instruct you on the law which governs your actions and your deliberations as grand jurors." ER 6-7. A group

[7] The Eleventh Circuit has stated that it agrees with *Navarro-Vargas II*, but it provided no reasoning of its own. *See United States v. Knight*, 490 F.3d 1268, 1272 (11th Cir. 2007).

of citizens receiving, from a judge, a set of *instructions* intended to "*govern[]* your actions and your deliberations as grand jurors," *see id.* (emphasis added), is far more likely to interpret "should" as creating an obligation than as "express[ing] 'what is probable or expected,'" as *Marcucci*, 299 F.3d at 1164, and *Navarro-Vargas II*, 408 F.3d at 1205, would have it.

The Court of Appeals' reading is even more unlikely in light of the instructions' frequent use of the term "should" in an unambiguously mandatory sense. *See, e.g.,* ER 13 (invocation of Fifth Amendment rights "should play no part in your determination of whether an indictment should be returned."). Similarly, the grand jury was told that "[w]hen deciding whether or not to indict, you should not consider punishment in the event of conviction. That is not a factor for a grand jury to consider in determining whether probable cause exists." *Id.* at 11. No grand jury could read that instruction as "permissive" as to consideration of punishment[8] when punishment is "not a factor" in what even *Navarro-Vargas II* agrees is -- under the instructions -- the grand jury's sole function, probable cause determination. *See Navarro-Vargas II*, 408 F.3d at 1206 (acknowledging that "the terms 'purpose' and 'task' are singular, conveying that the grand jury has one purpose"). Indeed, a

[8] *See Caruto*, 663 F.3d at 399.

Marcucci/Navarro-Vargas[9] reading of this instruction would be bizarre -- why would an instructing court tell grand jurors to govern their deliberations by keeping in mind that "[w]hen deciding whether or not to indict, [it is probable or expected that you will] not consider punishment in the event of conviction?" [ER 11]. But, again, even if the Court of Appeals' readings were plausible, a contrary reading is reasonably likely, and that is sufficient to demonstrate that the instructions are unconstitutional. *See McNeil*, 541 U.S. at 437.

The Court of Appeals' strained readings of the term "should" are essential to its approach, because, under *Vasquez*, grand jurors plainly have the right to choose not to indict: "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *Vasquez*, 474 U.S. at 263. Similarly, the grand jury plainly has the right to consider punishment because "[i]n the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts." *Id.*[10] The Court should grant the petition because the Court

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[9] *See Marcucci*, 299 F.3d at 1164. *Accord Navarro-Vargas II*, 408 F.3d at 1205.

[10] *See also* 2 *The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit: 1790-1794*, 183 (Maeva Marcus ed., 1990) (grand jury charge of Justice Wilson, May 23, 1791) (advising grand jurors of the available penalties for offenses they may consider).

of Appeals' crabbed reading of the grand jury charge effectively negates the ability of the grand jury to function as described in *Vasquez*.

Finally, the Court of Appeals doesn't contend that the prohibition on consideration of the wisdom of the applicable law can be read as "permissive." It simply held that the grand jurors' right to do so was not sufficiently well-established. *See Navarro-Vargas II*, 408 F.3d at 1204. *But see id.* at 1213 (Hawkins, J., dissenting) ("The grand jury must have the power to consider the wisdom of a law because it performs what is undeniably a prosecutorial function."). It did not, however, identify the source of the district court's authority to forbid the grand jurors from taking that into account, a fatal omission in light of the Court's recognition that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one..." *United States v. Williams*, 504 U.S. 36, 50 (1992). As Judge Kozinski observed with respect to the prohibition on consideration of the wisdom of the law, there is "no source of authority for the district court to impose such a limitation on grand jury. The instruction thus violates ... *Williams*, 504 U.S. [at] 50 ..., in that it imposes an impermissible rule of grand jury procedure." *Navarro-Vargas I*, 367 F.3d at 899 (Kozinski, J., dissenting).

In short, the question of grand jury discretion is squarely presented. The Court should grant the petition and resolve the question of the scope of grand jury discretion

under the Fifth Amendment. *See* Sup. Ct. R. 10(c). *See also* Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. at 1271 (contending that the "Court has not clearly explained the conceptual function served by the grand jury when it indicts.").

II.

THE ERROR IS STRUCTURAL BECAUSE A REVIEWING COURT CANNOT KNOW HOW A GRAND JURY WOULD EXERCISE ITS DISCRETION TO CHOOSE NOT TO INDICT.

The district court's instructions forbid the grand jurors from performing the role described in *Vasquez*. That error is structural. *See Navarro-Vargas II*, 408 F.3d at 1214, 1216-17 (Hawkins, J., dissenting). *Accord Navarro-Vargas I*, 367 F.3d at 903 (Kozinski, J., dissenting). It is impossible to know how a properly instructed grand jury -- one that did not consist of grand jurors who believe that they are obligated to indict in every case in which there is probable cause -- would evaluate "the need to indict" in a particular case. *See Vasquez*, 474 U.S. at 264. Indeed, grand jurors who are not misled as to the scope of their discretion may even exercise the grand jury's inherent investigative power, leading them to uncover still more facts that may affect their assessment of the case. *See United States v. Sells Engineering*, 463 U.S. 418, 423 (1983) (the grand jury "has always been extended extraordinary power of investigation and great responsibility for directing its own efforts . . ."). No

one can say what investigations may be prompted, nor can anyone know what facts would be developed. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

The grand jury's ability to apply its community perspective to the facts, and its potential to bring new facts to light by way of its self-directed investigations, "bear[] directly on the 'framework within which the [grand jury's screening function] proceeds.'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). The end result is similar to that in *Gonzalez-Lopez*. There, in analyzing the deprivation of the defendant's right to choice of counsel, the Court observed that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* Here, we cannot know "what different choices [the grand jury] would have made" with respect to its screening or investigative functions had it not been misled as to the scope of its discretion, nor can "the impact of those different choices" be "quantif[ied]." *See id.* The error is structural.

While the foregoing analysis demonstrates that the error here is structural, Petitioner wishes to emphasize that *Vasquez* itself compels that result. While

Vasquez is often cited as standing for nothing other than a structural error rule in racial discrimination cases, the *Vasquez* opinion does not support that narrow view. The *Vasquez* court was challenged to provide an analytical basis for the Court's preexisting rule that racial discrimination in grand juror selection was structural error. Indeed, the State asked it to overrule its previous cases establishing the structural error analysis in the racial discrimination context; the State argued that Hillery's "conviction after a fair trial [under the more demanding beyond a reasonable doubt standard] . . . purged any taint attributable to the indictment process." 474 U.S. at 260.[11] In other words, if the grand jury's sole function was probable cause determination, as the lower court indicated, any error in that determination would be subsumed within the unbiased petit jury's verdict under the beyond a reasonable doubt standard.[12]

Vasquez explained why the Court was not "persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions." 474 U.S. at 263. Its explanation definitively rejects the district court's conception of the grand jury as fulfilling no role other than determining

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[11] *Vasquez*'s grand jury analysis is binding because it is necessary to the decision *and* part of an "explication[] of the governing rules of law." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

[12] *See infra* at 26-31 (addressing why the Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986), is inapposite).

probable cause and returning indictments whenever that standard is satisfied: the grand jury need not indict at all, even where a conviction can be had, and it may choose to charge lesser or fewer offenses. *See id.* Harmless error analysis was impossible: "even if a grand jury's determination of probable cause is confirmed by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id. Vasquez* thus found that the error was structural because racial discrimination was pernicious *and* because the grand jury's broad discretion prevents a reviewing court from ever knowing whether an unbiased and properly constituted grand jury would have exercised its discretion differently: "we simply cannot know that *the need to indict* would have been assessed in the same way by a grand jury properly constituted." *Id.* at 264 (emphasis added).[13] Just as the *Vasquez* court could not know how a properly

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[13] The *Vasquez* dissenters agree that the passage cited by Petitioner is a holding of *Vasquez*:

> The Court nevertheless decides that discrimination in the selection of the grand jury potentially harmed respondent, because the grand jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible to know whether this discretion would have been exercised differently by a properly selected rand jury.

474 U.S. at 275 (Powell, J., dissenting).

constituted grand jury would have exercised its discretion, a court cannot know how a grand jury that was told it was obligated to indict upon every showing of probable cause would have assessed the "need to indict," *see id.*, in a particular case. The error here is structural because of "the difficulty in assessing the effect of the error." *See Gonzalez-Lopez*, 548 U.S. at 149 n.4.

The Court's decision in *Mechanik*, 475 U.S. 66, does not support application of harmless error analysis in this context. In *Mechanik*, the Court addressed violations of Fed. R. Crim. P. 6(d) that went only to the grand jury's probable cause determination function. As to such an error, the Court held that "the petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the rule violation." 475 U.S. at 67. Because the constitutional violation at issue here goes to the grand jury's discretionary power to decline to indict, *Mechanik*'s analysis of the grand jury's duty to determine probable cause is inapposite.

Mechanik's analysis flowed from the specific interest advanced by Rule 6(d): the integrity of the grand jury's evaluation of probable cause.

> The Rule protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to

> indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Mechanik, 475 U.S. at 70. The Court recognized that both the grand and petit juries were called upon the evaluate the strength of the case presented against the defendants, albeit under different standards of proof. As the Court observed, "the petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted." *Id.* at 67. Because the grand jury's probable cause determination was, in effect, confirmed (at a higher standard of proof), the Court easily concluded that the Rule 6(d) violation was harmless. *Id.*

The symmetry upon which the Court relied in *Mechanik* does not extend to the grand jury's discretionary function. The quasi-prosecutorial discretion not to indict is vested in the grand jury, *see Vasquez*, 474 U.S. at 263, while petit juries are properly instructed that they may not exercise similar discretion. *See generally Navarro-Vargas II*, 408 F.3d at 1198 (collecting cases). Thus, while a reviewing court may easily glean from a petit jury verdict of guilt that the grand jury properly found probable cause, a petit jury verdict provides no information on how a grand

jury might have exercised its discretion not to charge the defendant in the first place (or to charge a lesser offense). Because of this asymmetry in the function of the two bodies, any analogy to *Mechanik* fails.

Morever, Petitioner raises a constitutional claim, and the Court has not applied *Mechanik*–which involved not a constitutional claim but rather a violation of Fed. R. Crim. P. 6[14]–in that context. *See generally Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57 (1988). In *Bank of Nova Scotia*, the Court explained that a more searching review was required for some grand jury errors. *See id.* In discussing cases that constituted an exception to application of the harmless error rule, the Court stated that cases exemplified by *Vasquez* "are ones 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." *Id. Vasquez*, for its part, explained that the reason why "the structural protections of the grand jury [were] so compromised" in that case was that no one could know how a properly selected grand jury would have exercised its broad, quasi-prosecutorial discretion in evaluating "the need to indict." *Vasquez*, 474 U.S. at 264. Thus, *Vasquez*'s approach comes comfortably within the *Bank of Nova Scotia* paradigm.

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[14] *See* 475 U.S. at 69.

Nor is the reasoning of *Vasquez* limited to cases involving discrimination in the selection of the grand jury's members. While a footnote in *Mechanik* correctly asserts that *Vasquez* rested, at least in part, on "precedent directly applicable to the special problem of racial discrimination," and that "racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future," 475 U.S. at 70 n.1, the cited passage from *Mechanik* does not purport to describe, let alone reject, the entirety of the *Vasquez* analysis.[15]

In fact, the Court in *Vasquez* was asked to overrule the directly applicable precedent mentioned in *Mechanik*, and it declined to do so based on its analysis of the full range of the grand jury's discretion. *See* 474 U.S. at 263-64. *Vasquez* thus held, and *Mechanik* did not question, that mandatory reversal was required because of both the discrimination *and* the grand jury's discretion to determine "the nature or very existence of the proceedings." *See id.* at 263. That analysis is fully consistent with the Court's post-*Mechanik* decision in *Bank of Nova Scotia*, as well as more recent

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[15] Indeed, that very footnote emphasized that *Mechanik* involved a mere rule violation, not the sort of constitutional claim at issue here, an error that goes to the ability of the grand jury to perform its constitutional function. Immediately thereafter, *Mechanik* observed that "[n]o long line of precedent requires the setting aside of a conviction *based on a rule violation* in the antecedent grand jury proceedings, and the societal interest in deterring *this sort of error* does not rise to the level of the interest in deterring racial discrimination." *Mechanik*, 475 U.S. at 70 n.1 (emphases added, citations omitted).

cases describing the circumstances under which a structural error analysis is appropriate. *See, e.g., Gonzalez-Lopez*, 548 U.S. at 150.[16] Because no court can know how a grand jury would exercise the discretion described in *Vasquez*, an error affecting the exercise of that discretion is structural based "on the difficulty of assessing the effect of [it]." *See id.* at 149 n.4.

At bottom, the error here is structural not because of *Vasquez*'s recognition that racial discrimination was a serious constitutional violation, but because the error forbids the grand jurors from fulfilling their constitutional role as explicated in *Vasquez*. *Vasquez* explained the extent of grand jury discretion, and in particular, the grand jury's power to choose not to indict or to indict on less serious charges. *See* 474 U.S. at 263-64. While *Vasquez* involved a racial discrimination claim, there is no logical basis for concluding that *Vasquez*'s description of grand jury discretion was in any way informed by the nature of the error urged by Mr. Hillery. In other words, the grand jury's attributes are fixed; they do not vary based upon the claim made. Grand jury discretion is therefore a given, regardless of the error asserted. The question presented is, how does the asserted error affect the exercise of that discretion? Here, the error is structural because (1) Petitioner was entitled to a grand jury possessing the discretion described in *Vasquez*, and (2) the erroneous instructions

[16] Additionally, the Court's reaffirmance of *Vasquez* in *Campbell* post-dates *Mechanik*. *See Campbell*, 523 U.S. at 399.

here directly suppressed that discretion, compromising "the structural protections of the grand jury." *See Bank Of Nova Scotia*, 487 U.S. at 256-57. That error leaves a reviewing court in a position where it cannot know how a properly instructed grand jury might have exercised its discretion. *See generally Gonzalez-Lopez*, 548 U.S. at 149 n.4 (finding structural error based "on the difficulty of assessing the effect of [it].”). The Court should grant the petition and determine the breadth of *Mechanik*'s application.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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