No. ____

IN THE

Supreme Court of the United States

NUELITO MOREL-VARGAS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

On Petition for a Writ of Certiorari to the
Connecticut Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), this Court described the right to testify as a constitutional right that is "[e]ven more fundamental to a personal defense than the right of self-representation. . . ." Since then, lower courts have interpreted *Rock* to imply that the decision whether to testify is personal to the defendant. This Court also has held that a waiver of a fundamental constitutional right must be knowing, intelligent, and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts "indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." (Footnotes omitted; internal quotation marks omitted) *Id.* The questions presented, on which lower courts are divided, are:

1. Do the Fifth, Sixth, and Fourteenth Amendments require a canvass of the defendant prior to a constitutionally valid waiver of the fundamental, personal right to testify?

2. Is a constitutionally invalid waiver of the right to testify structural error requiring reversal, or subject to the constitutional harmless error inquiry?

PARTIES TO THE PROCEEDINGS

The petitioner is an individual, Nuelito Morel-Vargas, the defendant-appellant below. The respondent is the State of Connecticut, the state-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nuelito Morel-Vargas respectfully petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court.

OPINIONS BELOW

The Connecticut Supreme Court's decision is published at 343 Conn. 247 (2022). Pet. App. 1a-19a. The jury's guilty verdict is unreported. 21a.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on May 10, 2022. The petitioner is filing this Petition within 90 days of that judgment. Supreme Court Rules 13.1, 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), which authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." In a criminal prosecution, finality generally "is defined by a judgment of conviction and the imposition of a sentence." *Florida v. Thomas*, 532 U.S. 774, 777 (2001). The decision below qualifies as a final judgment within the meaning of that statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Whether the Fifth, Sixth, and Fourteenth Amendments require a canvass of a defendant on the right to testify prior to a valid waiver of that right is a question unresolved by this Court. Although this Court has held that the right to testify is a right more fundamental to a defendant than the right to self-representation, it has not directly addressed whether the right to testify is personal, waivable only by the defendant. This Court has suggested, however, that the right is a personal, fundamental right, and lower courts unanimously have treated the right that way.

Separately, this Court has held that a waiver of a fundamental, personal right must be knowing, intelligent, and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Since then, this Court has applied the *Zerbst* knowing and intelligent requirement to other rights. See, e.g., *id.* at 464-65 (right to counsel); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (right to plead not guilty); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (canvass required prior to guilty plea); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-79 (1942) (right to jury trial). This Court has not yet addressed what form a waiver of the right to testify must take.

As a result, lower courts have developed a well-recognized split on this question, with nearly all state high courts and federal circuits weighing in. Given the significance of the right at issue and recurring nature of this issue in all criminal trials, clarity on this question is critically important. The decision below illustrates why: courts are presuming waiver of a fundamental, personal right to testify from a defendant's silence, when a defendant is not canvassed on the record about that right. Certiorari should be granted to answer whether the Constitution requires a canvass of the defendant prior to a valid waiver of the right to testify; such question has divided lower courts and yielded the erroneous decision below.

Separately, lower courts are divided on whether an invalid waiver of the right to testify—which amounts to a complete denial of the right to testify—is structural error. Given the frequency of these claims, this Court should provide guidance to the divided lower courts on the proper review of these claims.

I. Legal Background

This Court has repeatedly recognized a defendant's constitutional right to testify. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (defendant has "ultimate authority to make certain fundamental decisions regarding the case, [such as] . . . whether to. . . testify in his or her own behalf"); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."); *Nix v. Whiteside*, 475 U.S. 157, 186 n.5 (1986) (*Blackmun, J.*, concurring) (defendant has constitutional right to testify).

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court expressed what it had previously implied: a defendant has a fundamental, constitutional right to testify,

grounded in four different ways. First, the right to testify is a fundamental part of the adversary system and, thus, guaranteed by the due process clause of the Fourteenth Amendment. *Id*. at 51. Second, the right to testify is implicit in the compulsory process clause of the Sixth Amendment. *Id.* at 52. Because a defendant has the right to present witnesses material and favorable on his behalf, then *a fortiori*, the Sixth Amendment supports the defendant's choice to testify on his own behalf. *Id*. Third, the right to testify on one's own behalf is "[e]ven more fundamental to a personal defense than the right of self-representation". Because the Sixth Amendment supports a right to waive assistance of counsel, it likewise supports a defendant's more fundamental right to testify. *Id*. Fourth, the right to testify is grounded in its corollary Fifth Amendment guarantee against compelled testimony. *Id*. Specifically, "[t]he choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege." *Id*. at 53.

Rock seemingly left unanswered, however, whether the right to testify is personal to the defendant or may be waived by counsel. Although not squarely addressed, *Rock* implied, and lower courts have unanimously agreed, that the right to testify is a fundamental constitutional right that is personal to the defendant. See *Rock*, 483 U.S. at 53 n.10 (noting that defendant has ultimate authority to make fundamental decisions about case, including whether to testify on his or her own behalf); see also, e.g., *United States v. Teague*, 953 F.2d 1525, 1531-33 (11th Cir.) (en banc) (Supreme Court "clearly and strongly indicated that the constitutional right to testify should be treated as fundamental."), *cert. denied*, 506

U.S. 842 (1992); *Brown v. Artuz*, 124 F.3d 73, 77 (2d Cir. 1997) (every circuit to consider question has held that constitutional right to testify is personal), *cert. denied*, 522 U.S. 1128 (1998); Pet. App. 6a (vast majority of state and federal courts have held that right to testify is personal constitutional right).

Whether the right to testify is a fundamental, personal right or tactical right is important because its classification determines what is required for a constitutionally valid waiver of that right. In *Zerbst*, this Court stated that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence of the loss of fundamental rights." (Footnotes omitted; internal quotation marks omitted.) 304 U.S. at 464-65. In considering the proper waiver of the fundamental right to counsel, *Zerbst* held that, "[w]hile an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id*. at 465. Then, in *Carnley v. Cochran*, another case involving waiver of the right to counsel, this Court held that "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 369 U.S. 506, 516 (1962).

This Court has treated the waiver of other fundamental constitutional rights in a similar manner. See, e.g., *Boykin*, 395 U.S. at 242-44 (reversing where trial court did not canvass prior to guilty plea); *Adams*, 317 U.S. at 277-79 (1942)

(express, intelligent consent required for waiver of jury trial); *Zerbst*, 304 U.S. at 464-65 (right to counsel); *Brookhart*, 384 U.S. at 7-8 (right to plead not guilty).

Given the unanimous agreement among lower courts and implied conclusion of this Court that the right to testify is a fundamental, personal right, it follows that, consistent with *Zerbst*, any waiver of the right must be knowing, intelligent, and voluntary. This Court has not, however, addressed what form the waiver of the right to testify must take. This question has deeply divided nearly all state supreme courts and federal circuits into essentially three camps. See *infra*, pp. 12-22. The first interprets the Constitution and *Zerbst* to require a waiver of the right to testify be expressly made by the defendant on the record through a neutral canvass. In the second camp, a majority of jurisdictions do not require a canvass. Instead, those jurisdictions presume acquiescence in the waiver of such right by: defendant's silence, defense counsel's statement of waiver, and/or defendant's failure to take the stand. Those jurisdictions justify this approach by presuming a defendant is represented by competent counsel, who has adequately informed the defendant of the contours of his fundamental right to testify, waivable only by defendant. A third view exists in jurisdictions that have held that the Constitution does not mandate a canvass on the right to testify, but that nevertheless strongly encourage or require trial courts to canvass prior to a valid waiver.

II. Factual Background

The petitioner, Nuelito Morel-Vargas, was charged with sexual assault in the first degree in violation of Connecticut General Statutes § 53a-70 (a)(1). Pet. App. 3a. The charge arose from an allegation that Mr. Morel-Vargas sexually assaulted

the complainant after driving her home from a party. *Id*. At trial, because Mr. Morel-Vargas does not speak English, he relied on an interpreter. *Id*.

Near the conclusion of its case, the state indicated that if Mr. Morel-Vargas did not present evidence, it would rest and proceed to closing arguments. Pet. App. 3a. In response, defense counsel indicated that it was unlikely that Mr. Morel-Vargas would present evidence and asked the court for "one last opportunity to briefly discuss with my client his decision to testify or not." *Id*. Counsel indicated that they "had extensive conversations about that already and I think we settled on a decision. But I just–after–we are at the point where he is now seeing everything and I just want to make sure that that is still where he's at." *Id*.

The court remained on the bench, allowing counsel to speak with Mr. Morel-Vargas. Pet. App. 3a. Defense counsel then informed the court, "I've had an opportunity to confer with my client, your Honor, thank you, and he's not going to testify." *Id*. The court responded, "Okay. Do you wish me to canvass in that regard or are you all right?" *Id.* at 3a-4a. Defense counsel said, "I think we're all right." *Id.* at 4a. No further discussion occurred, and Mr. Morel-Vargas did not testify. *Id.*

After trial, the jury found Mr. Morel-Vargas guilty. Pet. App. 4a. The trial court sentenced him to fifteen years' incarceration, execution suspended after eight years, followed by ten years of probation and the requirement of being on the sex offender registry for life. *Id.*

III. Proceedings Below

Mr. Morel-Vargas appealed from the trial court's judgment to the Connecticut Appellate Court. Pet. App. 4a. He argued, *inter alia*, that the federal Constitution

requires a criminal defendant to affirmatively waive his right to testify. *Id.* Because he did not personally waive this right, Mr. Morel-Vargas argued that his counsel's in-court representation of waiver and his own silence were insufficient, warranting reversal of his conviction. *Id.* Alternatively, Mr. Morel-Vargas argued that the Court should use its supervisory authority to create a procedural rule requiring trial courts to canvass defendants to ensure that the waiver of their right to testify is knowing, intelligent, and voluntary. *Id.*

Given the nature of the claims presented, Mr. Morel-Vargas filed a motion to transfer his case from the Connecticut Appellate Court—Connecticut's intermediate appellate court—to its court of last resort, the Connecticut Supreme Court. Pet. App. 21a. The Connecticut Supreme Court granted Mr. Morel-Vargas's motion and transferred the case to itself. *Id.*

Following briefing and argument, the Connecticut Supreme Court affirmed Mr. Morel-Vargas's convictions. Pet. App. 17a. Addressing Mr. Morel-Vargas's constitutional claim, the Court acknowledged it was resolving "significant questions concerning [the right to testify] left unanswered by *Rock*." *Id.* at 5a. Specifically, the Court had to "determine whether the right to testify is a tactical right, which defense counsel may waive on the defendant's behalf as a matter of trial strategy . . . or a personal constitutional right, which can be waived by the defendant alone." *Id.* Second, if the Court held that the right to testify is a personal right, it then had to decide "what is constitutionally required to demonstrate that a criminal defendant,

himself, knowingly, intelligently and voluntarily waived that right." *Id*. at 5a-6a. The Court addressed both inquiries.

The Court first considered whether the right to testify is a personal or tactical right. Pet. App. 6a. "[C]onsistent with the vast majority of other state and federal courts that have addressed this question," the Court concluded "that a defendant's right to testify is a personal constitutional right that can be waived only by the defendant." *Id*. The Court agreed with other courts on this point for two reasons. First, the Court noted that *Rock* described the defendant's right to testify as "even more fundamental to a personal defense than the right of self-representation". *Id*. at 7a. Because the right to self-representation, itself, is a personal constitutional right; *Faretta v. California*, 422 U.S. 806, 819-20 (1975); the Court held that *Rock* "logically implies that the decision of whether to testify is also personal to the defendant." Pet. App. 7a. Second, the Court found persuasive the discussion in *Teague*, 953 F.2d at 1532, which explained that a "criminal defendant clearly cannot be compelled to testify by defense counsel who believes it would be in the defendant's best interest to take the stand. It is only logical, as the Supreme Court has recognized, that the reverse also be true: A criminal defendant cannot be compelled to remain silent by defense counsel." Pet. App. 7a. Thus, the Court below concluded that the right to testify is a personal constitutional right. *Id*. at 8a.

The Court next considered "whether the constitution mandates the form the waiver of [the right to testify] must take." Pet. App. 8a. The petitioner argued that defense counsel's expression of waiver and defendant's silence were insufficient to

satisfy *Zerbst*. *Id*. at 8a. Consistent with a minority group of state high courts, he argued that "the constitution requires that a criminal defendant, himself, affirmatively inform the trial court, either orally or in writing, of his decision to waive his right to testify." *Id*. He asked the Court to adopt the "colloquy approach" described in *Boyd v. United States*, 586 A.2d 670, 675-76 (D.C. 1991), and require a brief canvass to ensure proper waiver of the right to testify. Pet. App. 8a.

The Court below rejected these arguments. It explained that a majority of courts "have determined that a criminal defendant's waiver of this right may be inferred from . . . the defendant's act of not taking the stand . . . or defense counsel's in-court representation that the defendant has elected not to testify, together with the defendant's coincident silence." Pet. App. 9a-10a. Consistent with those courts, the Court concluded that absent "evidence of a problem in the attorney-client relationship, the representation by defense counsel that a defendant is waiving his right to testify, together with the defendant's silence at the time of counsel's in-court representation, satisfies the constitutional requirement of a knowing, intelligent and voluntary waiver." *Id*. at 10a. According to the Court, it "may presume, in the absence of evidence to the contrary, that defense counsel provided the defendant with the information necessary to make an informed decision regarding the waiver of his right to testify." *Id*.

Applying its interpretation of the federal Constitution to the present case, the Court concluded that "defense counsel's in-court representation that the defendant waived his right to testify, together with [Mr. Morel-Vargas's] coincident silence,

was sufficient to satisfy the constitutional requirement for a valid waiver of [his] right to testify." Pet. App. 14a. In support, the Court explained that defense counsel had "extensive conversations" with Mr. Morel-Vargas about whether to testify, Mr. Morel-Vargas was present when defense counsel waived the right to testify, and Mr. Morel-Vargas—who required an interpreter throughout the proceedings—"did not express any disagreement or concern with counsel's representation, must less any desire to the contrary." *Id*. at 13a. Thus, the Court concluded that the record was "devoid of any indication that the defendant's silence was the product of anything other than a knowing, intelligent and voluntary waiver." *Id*. at 14a. Because the Court held that the Constitution did not require a canvass, it did not reach the defendant's argument that failure to canvass is structural error.

Despite concluding that the federal Constitution does not require an on-the record waiver by the defendant, personally, of the right to testify, the Court nevertheless used its supervisory authority to require a canvass in future criminal trials. Pet. App. 14a. The Court recognized that "in the majority of cases, a canvass of the defendant is the best practice." *Id*. at 15a. Citing to several state high courts that require a canvass, the Court noted that canvassing is "the best means of demonstrating the defendant's state of mind," "facilitates any appellate review or collateral challenge by placing the defendant's waiver on the record," and often saves "the court and defense counsel considerable time at any postconviction proceeding." *Id*. The Court, therefore, exercised its supervisory authority to "require a trial court, when presiding over a criminal trial, to either canvass the defendant

prior to his waiver of his right to testify or, alternatively, to inquire of defense counsel directly to determine whether counsel has adequately advised the defendant regarding the waiver of his right to testify." *Id*. It clarified that the option of a "judicial inquiry of defense counsel shall be used, however, only when defense counsel advises the trial court that counsel believes that a direct canvass carries the risk of inadvertently interfering with a decision made by the defendant after extensive conversations with counsel regarding trial strategy." *Id*.

REASONS FOR GRANTING THE PETITION

I. Whether the Constitution requires a canvass on the right to testify merits this Court's review

The question of whether the Constitution requires a canvass for a valid waiver of the right to testify "does not seem to be an easy one." *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990), cert. denied, sub nom. *Duluc Del Rosario v. United States*, 502 U.S. 826 (1991). This Court has never addressed this question, leaving unresolved what procedural safeguards are required to protect and vindicate the right. As a result, nearly all lower courts have weighed in and adopted disparate approaches to the waiver issue. Certiorari is needed to resolve this split and provide a clear answer on this important issue.

A. This case deepens an acknowledged and entrenched conflict.

Federal courts of appeals and state high courts are deeply divided over whether the Constitution requires a canvass for a valid waiver of the right to testify. Absent guidance from this Court, lower courts in nearly all jurisdictions have resolved this federal constitutional question in at least three different ways.

One group follows what is known as the "colloquy" or "canvass" approach: they require an on-the-record canvass on the right to testify for any waiver of that right to be constitutionally valid. *Boyd*, 586 A.2d at 675-76. By contrast, a second group follow what is known as the "demand rule" approach, where reviewing courts presume waiver of the right to testify, absent a defendant objecting or making known at trial that he wishes to testify. *Id*. at 676. A third group has landed somewhere in the middle: those jurisdictions have held that the Constitution does not require a canvass but nevertheless, encouraged or required a canvass. At bottom, lower courts are divided about whether the trial court or defense counsel must advise a defendant on the right to testify, and whether the Constitution requires a canvass or waiver can be inferred from a defendant's silence, counsel's statement of waiver, and/or a defendant's failure to take the stand. The decision below falls within this third group: Connecticut held that the Constitution does not require a canvass, yet created a procedural rule requiring a canvass. Thus, the decision below deepened an acknowledged and entrenched conflict.

1. Lower courts are split and have adopted three different approaches to the canvass issue.

Beginning with the Colorado Supreme Court, eight state supreme courts have held that a canvass is required prior to a constitutionally valid waiver of the right to testify ("canvass" approach). See *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991) (canvass required to ensure defendant's failure to take stand is result of knowing and voluntary decision by defendant); *People v. Curtis*, 681 P.2d 504, 514-15 (Colo. 1984) (holding that *Zerbst* procedural safeguards apply to waiver of

right to testify and thus, requiring canvass), *holding modified by People v. Blehm*, 983 P.2d 779, 792 (Colo. 1999) (re-affirming *Curtis*, but modifying review of claim to be addressed in post-conviction proceedings); *Tachibana v. State*, 900 P.2d 1293, 1303, 1303 n.6 (Haw. 1995) (requiring canvass under Hawaii Constitution because question unresolved by United States Supreme Court); *State v. Ray*, 427 S.E.2d 171, 174 (S.C. 1993) (knowing and voluntary waiver of constitutional right must be established by colloquy); *Momon v. State*, 18 S.W.3d 152, 161-62 (Tenn. 1999) (federal Constitution requires trial court to canvass defendant in every trial where defendant does not testify to ensure waiver of right to testify is knowing, voluntary, and intelligent); *State v. Neuman*, 371 S.E.2d 77, 81-82 (W. Va. 1988) (requiring canvass); *State v. Weed*, 666 N.W.2d 485, 499 (Wis. 2003) (same); *Sanchez v. State,* 841 P.2d 85, 88-89 (Wyo. 1992) (noting "widely divergent views" on treatment of right to testify and following courts that require colloquy).

These courts interpret *Zerbst* to impose a "serious and weighty responsibility" on trial courts to determine whether there has been an intelligent and competent waiver by the accused. *Curtis*, 681 P.2d at 514. Consistent with *Zerbst*, courts require a canvass on the right to testify to ensure a defendant's failure to take the stand was the result of a knowing and voluntary decision made by the defendant. *LaVigne*, 812 P.2d at 222; see also *Curtis*, 681 P.2d at 514 (defendant "must be aware that he has a right to testify, he must know of the consequences of testifying, and he must be cognizant that he may take the stand notwithstanding the contrary advice of counsel"). Thus, courts have held that canvasses are required "to ensure

that waiver of a fundamental constitutional right is intelligent and knowing, to preclude postconviction disputes between defendant and counsel over the issue, and to facilitate appellate review." *Id*. at 515.

A second group of state supreme courts and federal courts of appeals have held that the Constitution does not require a canvass, and instead, infer waiver by defendant's silence and defense counsel's actions ("demand rule" approach). Nine federal courts of appeals have declined to require a canvass. See *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (declining to require canvass because it could influence defendant to waive constitutional right not to testify); *Brown,* 124 F.3d at 79 (no duty to canvass); *United States* v. *Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995) (same); *United States* v. *McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (same); *United States v. Webber*, 208 F.3d 545, 551-53 (6th Cir.) (no canvass because when "tactical decision is made not to have the defendant testify, the defendant's assent is presumed"), *cert. denied*, 531 U.S. 882 (2000); *United States v. Ehrmann*, 421 F.3d 774, 783 (8th Cir. 2005) (no duty to canvass), *cert. denied*, 546 U.S. 1122 (2006); *United States v. Martinez*, 883 F.2d 750, 757 (9th Cir. 1989) (split decision that court has no duty to canvass), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991); *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983) (holding, pre-*Rock*, that Constitution does not require canvass), *cert. denied*, 465 U.S. 1036 (1984); *United States v. Ortiz*, 82 F.3d 1066, 1070-71 (D.C. Cir. 1996) (rejecting "demand rule" approach but concluding trial court does not have duty to canvass).

Notably, however, is the uncertainty in the Second, Fourth, and Ninth Circuits. The Second Circuit has called into question the propriety of *Brown*, which did not reach the question of whether a defendant who does not object at trial waives the right to testify. *Chang v. United States*, 250 F.3d 79, 82-83 (2d Cir. 2001). *Chang* refused to find waiver from a defendant's silence, but did not address whether a canvass is required. *Id.* at 84. *Chang* noted that "[a] defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right, and we see no reason to impose what would in effect be a penalty on such a defendant." *Id.* It does not appear that the Second Circuit has reconsidered the canvass question since issuing *Chang*.

The Fourth Circuit also has expressed disagreement with its earlier decision that a court has no duty to canvass. Compare *Sexton v. French*, 163 F.3d 874, 881 (4th Cir. 1998) ("Some courts, including this one, perhaps unwisely, have concluded that the trial court does not have a *sua sponte* duty to conduct a colloquy with the defendant at trial to determine whether the defendant has knowingly and intelligently waived the right to testify."), *cert. denied*, 528 U.S. 855 (1999), with *McMeans*, 927 F.2d at 163 (no duty to canvass). Finally, the Ninth Circuit's split decision in *Martinez* is often cited as a discussion of the "canvass" and "demand rule" approaches. Compare *Martinez*, 883 F.2d at 760 (arguing why courts have no duty to canvass), with *Martinez*, 883 F.2d at 761-68 (*Reinhardt, J.*, *dissenting*) (arguing why canvass is required and waiver cannot be inferred from silence).

Similarly, twenty-one state high courts do not require a canvass on the right to testify. See *State v. Gulbrandson*, 906 P.2d 579, 598 (Ariz. 1995) (although canvass may be "prudent" in appropriate case, canvass not generally required), *cert. denied*, 518 U.S. 1022 (1996); *People v. Enraca*, 269 P.3d 543, 563 (Cal.) (no duty to canvass unless court becomes aware of conflict), *cert. denied*, 568 U.S. 865 (2012); *People v. Smith*, 680 N.E.2d 291, 303 (Ill.), *cert. denied*, 522 U.S. 920 (1997); *Phillips v. State*, 673 N.E.2d 1200, 1202 (Ind. 1996) (no duty to canvass represented defendants); *State v. Reynolds*, 670 N.W.2d 405, 411-13 (Iowa 2003); *State v. Breeden*, 304 P.3d 660, 673 (Kan. 2013); *Lynch v. Commonwealth*, 642 S.W.3d 647, 657 (Ky. 2022); *State v. Shaw*, 969 So. 2d 1233, 1246 (La. 2007) (absent extraordinary circumstances, no duty to canvass); *Morales v. State*, 600 A.2d 851, 853–54 (Md. 1992) (no duty to canvass represented defendants); *Commonwealth v. Lee*, 134 N.E.3d 523, 541 (Mass. 2019); *State v. Abel*, 498 P.3d 199, 203 (Mont. 2021); *State* v. *Johnson*, 904 N.W.2d 714, 728 (Neb. 2017); *State v. Smith*, 588 S.E.2d 453, 463 (N.C. 2003), *cert. denied*, 542 U.S. 941 (2004); *Ratliff v. State*, 881 N.W.2d 233, 237 (N.D. 2016); *State v. Bey*, 709 N.E.2d 484, 497 (Ohio), *cert. denied*, 528 U.S. 1049 (1999); *Brennan v. Vose*, 764 A.2d 168, 171–72 (R.I. 2001); *Wilcox v. Leapley*, 488 N.W.2d 654, 658–59 (S.D. 1992) (relying on pre-*Rock* decision to decline to require canvass); *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005), *cert. denied*, 546 U.S. 1181 (2006); *State v. Mumley*, 571 A.2d 44, 45 (Vt. 1989) (where defendant acquiesces in advice of competent counsel not to take stand and fails to assert right to testify at or before trial, he is deemed to have waived it),

cert. denied, 496 U.S. 939 (1990); *State* v. *Thomas*, 910 P.2d 475, 478-79 (Wash. 1996) (can infer waiver of right to testify from defendant's conduct of not taking stand); *Pueblo v. Santiago Acosta*, 121 P.R. Dec. 727 (1988).

Courts declining to interpret the Constitution to require a canvass on the right to testify do so for several reasons. Courts begin from a presumption that competent counsel will advise a defendant on the contours and personal nature of the right. See, e.g., Pet. App. 10a (courts "may presume, in the absence of evidence to the contrary, that defense counsel provided the defendant with the information necessary to make an informed decision regarding the waiver of his right to testify"). Some of these courts, following the "demand rule" approach, hold that the right to testify must be asserted to be recognized. See, e.g., *Siciliano*, 834 F.2d at 30. And courts view trial counsel, not the court, as having the burden of advising clients on their right to testify: specifically, many courts have expressed a concern that a judicial canvass may intrude on the attorney-client relationship or improperly influence a defendant's decision. See, e.g., *Martinez*, 883 F.2d at 760. From these rationales, courts following the "demand rule" approach presume a valid waiver of the fundamental right to testify, absent a defendant's expression of a desire to testify or asserted conflict with counsel. *Id*. (defendant's silence provides sufficient basis to infer right to testify has been waived).

Furthering the conflict, a third group of federal courts of appeals and state high courts, including Connecticut, does not interpret the Constitution to require a canvass, but nevertheless recommends or requires a canvass on the right to testify.

Three federal courts of appeals have adopted this approach. See *Jordan v. Hargett*, 34 F.3d 310, 314–15 (5th Cir. 1994) (agreeing with 11th Circuit that canvass not required, but acknowledging that uncertainty surrounding waiver of right to testify could be avoided by signed waiver form or canvass), *on reh'g en banc*, 53 F.3d 94 (5th Cir. 1995); *Hartsfield v. Dorethy*, 949 F.3d 307, 315 (7th Cir.) (even though "we do not require judges to question defendants regarding their desire to testify," we certainly prefer it), *cert. denied*, 141 S. Ct. 270 (2020); *United States* v. *Anderson*, 1 F.4th 1244, 1257 (11th Cir. 2021) (canvass not required but is prudent and promotes judicial economy). And despite the Eleventh Circuit's recent decision in *Anderson*, its previous split en banc decision in *Teague*, 953 F.2d 1525, is often cited for its deep divide on the issue. *Teague* held that the right to testify is personal, declined to require a canvass on the right, and concluded that the appropriate vehicle for claims that the waiver was invalid is a claim of ineffective assistance of counsel. Compare *Id.* at 1532-33, 1533 n.8, 1534, with *id.,* at 1541-45 (*Clark J.*, concurring in part, dissenting in part) (explaining that on-the-record waiver should be required for fundamental, personal right to testify).

Additionally, ten state and U.S. territory high courts do not require but recommend a canvass on the right to testify. See *Reynolds v. State,* 99 So. 3d 459, 484 (Fla. 2012) (no duty to canvass, but "advisable"), *cert. denied*, 568 U.S. 1251 (2013); *Barron v. State*, 452 S.E.2d 504, 505 n.2 (Ga. 1995) (although not required, "better practice" is to canvass); *State v. Ford*, 82 A.3d 75, 79 (Me. 2013) (canvass is "best practice"); *State v. Walen*, 563 N.W.2d 742, 751–52 (Minn. 1997) (declines to

require canvass but notes that placing waiver on-the-record will save time and post-conviction resources); *Shelton v. State*, 445 So. 2d 844, 847 (Miss. 1984) (pre-*Rock* decision noting suggestion for trial courts to canvass defendant was strong but not mandatory); *Phillips v. State*, 782 P.2d 381, 382 (Nev. 1989) (canvass not required but recommended to "eliminate any question" that defendant knew he had constitutional right); *State v. Savage*, 577 A.2d 455, 473 (N.J. 1990) ("better practice" for trial court to canvass to "best ensure defendant's constitutional rights are fully protected."); *Moore v. State*, 443 P.3d 579, 587 (Ok. Crim. App. 2019) ("best practice unquestionably is" is to canvass and "time it takes to do so is a small price to pay for a clean and complete record."); *Boyd*, 586 A.2d at 678 (does not reach whether trial court has sua sponte duty to canvass, but advises trial courts to canvass "in order to avoid issues on appeal and collateral attacks."); *Guam v. Kitano*, 2011 Guam 11, ¶ 49 (Guam July 29, 2011) ("strongly encourag[ing]" trial courts to obtain through "neutral colloquy an on-the-record waiver from every criminal defendant who does not testify"). Separately, Connecticut has interpreted the Constitution not to require a canvass but nevertheless, used its supervisory authority to require trial courts to canvass in future trials. Pet. App. 14a-16a. The dichotomy of suggesting but not requiring a canvass results in inconsistent treatment of the fundamental right to testify.

Because of the deep split of federal courts of appeals and state high courts, there are several conflicts between a state high court and federal court of appeals for the circuit that includes that state. The Second Circuit now conflicts with

Connecticut's use of supervisory authority to require a canvass. Compare *Brown,* 124 F.3d at 79 (no canvass required), with Pet. App. 14a-16a. The Fourth Circuit conflicts with state high courts in South Carolina and West Virginia. Compare *McMeans*, 927 F.2d at 163 (canvass not required), with *Ray*, 427 S.E.2d at 174, and *Neuman*, 371 S.Ed.2d at 81-82 (canvass required). The Sixth Circuit conflicts with Tennessee. Compare *Webber*, 208 F.3d at 551-53 (canvass not required), with *Momon*, 18 S.W.3d at 161-62 (canvass required). The Seventh Circuit conflicts with Wisconsin. Compare *Hartsfield*, 949 F.3d at 315 (prefers but does not require canvass), with *Weed*, 666 N.W.2d at 499 (canvass required). The Ninth Circuit conflicts with Alaska and Hawaii. Compare *Martinez*, 883 F.2d at 757 (canvass not required), with *LaVigne*, 812 P.2d at 222, and *Tachibana*, 900 P.2d at 1303, n.6 (canvass required). And finally, the Tenth Circuit conflicts with Colorado and Wyoming. Compare *Janoe*, 720 F.2d at 1161 (canvass not required), with *Curtis*, 681 P.2d at 514-15, and *Sanchez,* 841 P.2d at 88-89 (canvass required). These intra-circuit splits subject defendants to inconsistent procedural protections of the fundamental right to testify. Whether a defendant is apprised of this right depends on the jurisdiction where he or she is tried. And because of these conflicting rules, the outcome of a case involving a challenge to a waiver to the right to testify will depend on the happenstance of which court system hears that challenge.

2. The canvass issue is a well-recognized, unresolved, and entrenched conflict among lower courts.

Lower courts consistently agree that this issue remains unaddressed by this Court. See, e.g., Pet. App. 5a (*Rock* "left unanswered" questions of whether right to

testify is personal and, if so, what is constitutionally required to waive that right); *Lynch*, 642 S.W.3d at 655–56 (noting that this Court has "been wholly silent on whether or when it is appropriate for a trial court to engage in direct colloquy with a defendant, or what measures a trial court should take to ensure that defendant's right to testify is satisfied"); *Jenkins v. Bergeron*, 824 F.3d 148, 153 (1st Cir.) (same), *cert. denied*, 137 S.Ct. 405 (2016).

Additionally, as lower courts have acknowledged, there is a deep and mature conflict over whether the Constitution requires a canvass on the right to testify. See e.g., *Lynch*, 642 S.W.3d at 655–56 (Footnotes omitted.) ("Lower federal courts disagree as to precisely what procedure trial courts are to follow. And, state courts take even more disparate approaches as to when a trial court must step in to protect a defendant's right to testify, and even then what the trial court is obligated to do to defend that right."); *Jordan*, 34 F.3d at 315 n.4 ("courts are not in uniform agreement on whether such a colloquy from the trial court is advisable"). Connecticut's decision interpreting the federal Constitution not to require a canvass deepens this pre-existing conflict among lower courts.

Given that nearly all state courts of last resort and federal circuits have considered whether a canvass is constitutionally required, this issue has been fully developed and does not require any further percolation below.

B. The canvass issue presents a recurring and important question of federal constitutional law.

Resolution of whether the Constitution requires courts to canvass a defendant, or what procedure trial courts are to follow to ensure that a defendant's

right to testify is satisfied will impact every criminal trial. Defendants, defense counsel, prosecutors, and courts need to know what is required to constitute a valid waiver of this right. Indeed, the number of high courts that have considered and disagreed about this issue demonstrates beyond dispute that the question presented regularly confronts state and federal courts across the country.

The canvass issue also is of fundamental legal significance: the lack of consistent protection of a fundamental, personal right grounded in the Fifth, Sixth, and Fourteenth amendments—regardless of where a defendant is tried—undermines the impetus of the right to testify. See *Lynch*, 642 S.W.3d at 655-56 (lower courts disagree and follow disparate approaches about procedure to protect right to testify). As *Rock* explained, the right to testify is fundamental to a defendant's personal defense, rooted in the Fifth, Sixth, and Fourteenth Amendments. 483 U.S. at 51-53. This Court's guidance on what the Constitution requires to ensure a knowing, intelligent, and voluntary waiver of this right is, thus, an important and recurring question of federal law.

Legal scholars also have recognized the important and recurring nature of this issue, acknowledging that issues delineating the contours and proper protection of the right to testify have remained unsettled. See, e.g., *Criminal Law - Right to Testify - Seventh Circuit Holds That Defendant's Waiver of the Right to Testify Was Valid Despite District Court's Failure to Engage in an on-the-Record Colloquy Regarding the Decision*, 121 HARV. L. REV. 1660, 1668 (2008). To be sure, "courts have now had two decades to determine how to enforce the right announced in *Rock*,

and the system they have developed fails to do so in a way that is doctrinally or practically justified." *Id.* The absence of guidance from this Court on the contours of the right has led to "[y]ears of insufficient protection of a fundamental, personal right, coupled with instances . . . of hindering defendants' receipt of the most effective representation, [which] offer hard evidence of the inadequacy of the current regime." *Id.* Given the importance of the issue, the recurring nature of the issue, and the split of lower courts, "the time is ripe for serious reconsideration of proposals for on-the-record waiver of the right to testify." *Id.*

C. This case presents a proper vehicle to resolve the canvass issue.

The facts and procedural posture of this case make it a proper vehicle to determine what procedures the Constitution requires to protect a defendant's right to testify. The canvass issue comes to this Court on direct review. It arose at trial when counsel waived the defendant's right to testify and declined the trial court's invitation to canvass. Pet. App. 3a-4a. The issue was then fully addressed in a published decision from the Connecticut Supreme Court. *Id.* at 4a-16a. Finally, the question presented is outcome-determinative. If this Court concludes that the Constitution requires a personal canvass of the defendant prior to a valid waiver of the right to testify, reversal of the decision below would be required.

D. The decision below was incorrect.

Connecticut joined jurisdictions that have incorrectly held that the Constitution does not require a canvass prior to the valid waiver of the right to testify. The jurisdictions that have followed the "demand rule" approach—not requiring a canvass and inferring a valid waiver from a defendant's silence—are in

tension with this Court's precedent. The same is true for jurisdictions that suggest, but do not require a canvass. See *Boyd*, at 677 (demand rule approach is "fatally flawed" and fails to treat right to testify as fundamental, personal right). Such jurisdictions eschew this Court's precedent that protects of fundamental, personal rights, by requiring a waiver of such rights to be knowing, intelligent, and voluntary, and precluding courts from inferring waiver from a silent record.

This Court has repeatedly held that a waiver of a fundamental right must be knowing, intelligent, and voluntary, and is not to be presumed from a silent record. See, e.g., *Boykin*, 395 U.S. at 242-43; *Zerbst*, 304 U.S. at 464. Additionally, reviewing courts must indulge every reasonable presumption *against* waiver of fundamental constitutional rights and cannot presume acquiescence in the loss of such fundamental rights. *Id.* But jurisdictions following the demand rule approach do just that; those courts *presume* counsel advised the defendant of the personal nature of the right to testify and do so from a record that is devoid of any affirmative input from the defendant. See, e.g., Pet. App. 10a (holding that it "may presume, in the absence of evidence to the contrary, that defense counsel provided the defendant with the information necessary to make an informed decision regarding the waiver of his right to testify"). According to these jurisdictions, courts may infer from a defendant's silence acquiesce in the waiver of his right to testify. *Id*. at 13a-14a (holding that waiver was constitutionally valid because "[t]he record in this case is devoid of any indication that the defendant's silence was the product of anything other than a knowing, intelligent and voluntary waiver").

That approach is irreconcilable with this Court's waiver jurisprudence in the context of other fundamental rights. See, e.g., *Zerbst*, 304 U.S. at 465 (waiver of fundamental right to counsel "should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear on the record"); *Carnley*, 369 U.S. at 516 (regarding waiver of right to counsel, "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."); *Boykin*, 395 U.S. at 242-44 (applying *Carnley* record prerequisite to determination of whether guilty plea is voluntarily made); *Brookhart*, 384 U.S. at 7-8 (right to plead not guilty); *Adams*, 317 U.S. at 277-79 (express, intelligent consent required for waiver of jury trial).

When describing voluntariness of a guilty plea, for example—which involves the waiver of fundamental rights against compulsory self-incrimination, to a jury trial, and to confront one's accusers—*Boykin* held that courts "cannot presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243. In so concluding, *Boykin* explained the importance of creating a record of waiver: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id*. at 243-44. *Boykin* further noted that, "[w]hen the judge discharges that function, he leaves a record adequate for any review that may be later sought . .

. and forestalls the spin-off of collateral proceedings that seek to probe murky memories." (Citations omitted; footnotes omitted.) *Id.* at 244. Those principles equally apply to ensuring a valid waiver of the right to testify, a right which this Court has included in the same category of personal rights as the right to counsel and right to a jury trial. *Barnes*, 463 U.S. at 751 ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

Additionally, the demand rule approach "ignores basic realities faced by defendants" including that many "are unaware that they have a constitutional right to testify which no one, not even their lawyer, may take away from them." *Boyd*, at 677. The approach improperly prioritizes the presumption of competent counsel over this Court's repeated assertions that waiver *cannot* be presumed from a silent record and that the record must affirmatively demonstrate that the waiver was knowing, intelligent, and voluntary. It improperly requires defendants to interject into proceedings and speak out of turn to express a desire to testify, conduct which is "quickly reprimanded," and can lead to "ban[ishment] from the courtroom". *Id.* But "[a] defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right . . . ." *Chang*, 250 F.3d at 84.

At bottom, many of the common concerns expressed by jurisdictions declining to require a canvass are "overstated." See, e.g., *Boyd*, at 679-80 (refuting disadvantages of canvass requirement); *Martinez*, 883 F.2d at 765-67 (*Reinhardt, J., dissenting*) (same). Indeed, the burden of a neutral canvass "would be relatively

minimal" to safeguard this fundamental right. *Boyd*, at 679; see also *Weed*, 666 N.W.2d at 499 (state conceded that canvass would not additionally burden courts).

Finally, even if Connecticut's interpretation of the Constitution were correct, the deep fracture among the lower courts would warrant review. For all of those reasons, review of this question is warranted and appropriate.

II. Whether an invalid waiver of the right to testify is structural error merits this Court's review

Although Mr. Morel-Vargas argued below that an invalid waiver of the right to testify is structural error; see Defendant's Br., pp. 7; Defendant's Reply Br., pp. 7-10; the court below did not reach this issue because it held that waiver could be inferred from a silent record. Resolution of this question nevertheless is warranted by this Court because it is an important, recurring issue that has split the lower courts. Additionally, this case presents a proper vehicle for this Court to consider and resolve the entirety of the constitutional protections and remedy for violations of the right to testify.

As previously argued, the right to testify in one's own defense is "fundamental" to our system of criminal justice. *Rock,* 483 U.S. at 52. This is because the right is essential to maintaining a defendant's autonomy; if the accused is deprived of "an opportunity to be heard," we cannot say he has been afforded his "day in court." *Id.* at 51 (emphasis omitted). Yet lower courts are divided over whether a denial of this right (e.g., constitutionally invalid waiver of the right) is structural error. This Court should use this case to resolve this conflict. Jurisdictions that have held that a violation of the right to testify can be harmless

are incorrect: the error is structural because the right to testify is "not designed to protect the defendant from an erroneous conviction," but protects a defendant's autonomy and dignity interests. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017). Additionally, harmless error analysis is inappropriate because the effects of such error are impossible to measure. *Id.*

A. The second question presented has split lower courts.

Lower courts and legal scholars have recognized that this Court has yet to address whether the denial of the right to testify is a structural error. See, e.g., *Lynch*, 642 S.W.3d at 654 n.3 (collecting cases addressing issue); *Arthur v. United States*, 986 A.2d 398, 414 (D.C. 2009). Absent guidance from this Court, lower courts are intractably divided. See Kenneth Duvall, *The Defendant Was Not Heard . . . Now What?: Prejudice Analysis, Harmless Error Review, and the Right to Testify*, 35 HAMLINE L. REV. 279, 305 (2012) (enough courts split that "Supreme Court should decide to take up the issue and settle it").

Some jurisdictions have held that a trial court's complete denial of the right to testify is structural error, not amenable to harmless error inquiry. See, e.g., *State v. Rivera*, 741 S.E.2d 694, 705-07 (S.C. 2013). *Rivera* concluded that the right to testify is "fundamental" and "transcends a mere evidentiary ruling." *Id.* at 707. Specifically, *Rivera* held that, "[a]n accused's right to testify is either respected or denied; its deprivation cannot be harmless. . . . As such, the error is structural in that it is so basic to a fair trial that [its] infraction can never be treated as harmless error." (Citations omitted; internal quotation marks omitted.) *Id.*

This view is shared by other jurisdictions, including, for example, *State v. Dauzart,* 769 So.2d 1206, 1210 (La. 2000) ("[D]enial of the accused's right to testify is not amenable to harmless-error analysis."); *State v. Rosillo,* 281 N.W.2d 877, 879 (Minn. 1979) ("right to testify is such a basic and personal right that its infraction should not be treated as harmless error"); accord *Wright v. Estelle,* 572 F.2d 1071, 1080-84 (5th Cir.) (en banc) (*Godbold, J., dissenting*) (rejecting application of harmless error analysis to claim that defendant was denied right to testify), *cert. denied,* 439 U.S. 1004 (1978). Additionally, the D.C. Court of Appeals determined that it was unnecessary to resolve this question but nevertheless noted that, because the right to testify is fundamental, harmlessness analysis is "entirely misplaced. . . . To apply such an outcome-determinative analysis at worst denigrates the position of the individual with respect to his own defense and trial and at best exhibits an unthinking paternalism toward criminal defendants." (Citation and quotation marks omitted.) *Arthur*, 986 A.2d at 415.

By contrast, however, other jurisdictions have held that a trial court's complete denial of the right to testify is a "trial error" amenable to harmless error inquiry. See, e.g., *Momon*, 18 S.W.3d at 166-67. *Momon* focused only on the denial of the right to testify resulting in missing testimony of the defendant. *Id.* (analogizing denial of right to testify to denial of defendant's right to cross-examination because "[i]n both instances, the defendant is being deprived of a denial of the right to present evidence to the jury"). Such violation, the court held, merely involves exclusion of evidence that can be "quantitatively assessed in the context of other

evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.*

Other courts of appeals and state high courts share this view, including: *State v. Nelson*, 849 N.W.2d 317, 323-27 (Wis. 2014), *cert. denied*, 575 U.S. 935 (2015); *State v. Sevigny*, 722 N.W.2d 515, 522 (N.D. 2006); *Quarels v. Commonwealth*, 142 S.W.3d 73, 82 (Ky. 2004); *People v. Allen*, 187 P.3d 1018, 1038-39 (Cal. 2008); *Tachibana*, 900 P.2d at 1307; *Sanchez*, 841 P.2d at 88-89; *Ortega v. O'Leary,* 843 F.2d 258, 262 (7th Cir.), *cert. denied,* 488 U.S. 841 (1988); *United States v. Leo*, 941 F.2d 181, 195 (3d Cir. 1991); *Martinez v. Ylst,* 951 F.2d 1153, 1157 (9th Cir. 1991).

Notably, these decisions all were released pre-*Weaver*, a decision that materially impacted the structural error-harmless error dichotomy. Compare *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (trial errors subject to harmless error analysis are those that "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented"), with *Weaver*, 137 S.Ct. at 1908 (expanding structural error doctrine, explaining that "[t]here appear to be at least three broad rationales" as to "why a particular error is not amenable to [harmless error] analysis"). Without the benefit of *Weaver*, these jurisdictions, instead, relied on *Fulminante*, and thus, failed to account for a category of structural errors identified in *Weaver*: where the violated right sought to protect something other than erroneous conviction. See, e.g., *Nelson*, 849 N.W.2d at 326 ("while autonomy is an important constitutional value . . . *Fulminante* makes no mention of the purpose of the right or the interests it serves.

Rather, it defines structural error by only two characteristics, the timing of the error and its capacity for assessment.").

Nevertheless, some jurisdictions reviewing the denial of the right to testify for harmless error have acknowledged that it is a high standard, difficult for the state to meet. See, e.g. *Martinez,* 951 F.2d at 1157 (noting that "it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt"); *Graves v. United States*, 245 A.3d 963, 972-73 (D.C. 2021) (explaining that when weighing harm from denial of right testify, "judicial scale tips heavily in favor of finding prejudice"); *Sanchez*, 841 P.2d at 88 (because of "speculative nature" of review of this type of error, court expects "there will be relatively few cases in which the reviewing court can confidently assert that the denial of the right to testify was so insignificant as to constitute harmless error beyond a reasonable doubt").

Review is, therefore, warranted to resolve this deep split of jurisdictions.

B. A constitutionally invalid waiver of the right to testify is structural error.

An invalid waiver of the right to testify results in the complete denial of the right to testify. Such constitutional error is not amenable to harmless-error analysis for two reasons. First, the right to testify safeguards a defendant's dignity and autonomy, two interests not assessed by a harmless-error analysis. Second, the harm that results from this error cannot be measured.

In *Chapman v. California,* 386 U.S. 18 (1967), this Court rejected the previously held proposition that all federal constitutional trial errors require

reversal. *Chapman* also recognized, however, that some constitutional rights are "so basic to a fair trial" that violations of those rights "can never be treated as harmless error." *Id.* at 23. Then, *Fulminante* held that trial errors amenable to harmless error analysis are those that "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented . . . ." 499 U.S. at 307-08.

In *Weaver*, this Court expanded on *Chapman* and *Fulminante*. *Weaver* explained that "[t]here appear to be at least three broad rationales" as to "why a particular error is not amenable to [harmless error] analysis". 137 S.Ct. 1908. The first category involves when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* Included in this category is a defendant's "right to conduct his own defense, which, when exercised, usually increases the likelihood of a trial outcome unfavorable to the defendant." *Id. Weaver* explained that such right "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* For this category of errors, "[b]ecause harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error." *Id.* The second category identified is for violations of constitutional rights where "the effects of the error are simply too hard to measure." *Id.*, at 1908. Included in this category is, "for example, when a defendant is denied the right to select his or her own attorney." *Id.* In such instance, "[b]ecause the government will, as a result, find it almost impossible to show that

the error was harmless beyond a reasonable doubt . . . the efficiency costs of letting the government try to make the showing are unjustified." (Citation and internal quotation marks omitted.) *Id*. The third category is where the error always results in fundamental unfairness. *Id*.

1. The right to testify is designed to protect a defendant's dignity and autonomy, not to protect from an erroneous conviction.

Among the constitutional rights not amenable to harmless error analysis are those designed to protect "the dignity and autonomy of the accused." *McKaskle v. Wiggins,* 465 U.S. 168, 176-77, 177 n.8 (1984) (right to self-representation protects "dignity and autonomy" of defendant and is not amenable to harmless error analysis); *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (trial court's violation of Sixth Amendment autonomy is structural). Because harmless error analysis is designed to ensure a criminal trial "reliably serve[d] its function as a vehicle for determination of guilt or innocence," a constitutional right grounded in protecting a defendant's autonomy is not properly subject to that analysis. (Citation and internal quotation marks omitted.) *Fulminante,* 499 U.S. at 310. Put differently, harmless error analysis is a results-focused inquiry, inapplicable to violations of rights that do not protect against a wrongful conviction.

In a post-*Weaver* decision, *McCoy* considered whether defense counsel's concession of guilt at the guilt phase of a capital trial over the defendant's objection was structural error. 138 S. Ct. at 1507. *McCoy* explained that the Sixth Amendment grants to a defendant personally the right to make his defense, which includes the autonomy to "decide that the objective of the defense is to assert

innocence." *Id.* at 1508. Because of the autonomy interest at issue, that right belongs in the category of rights reserved solely to the defendant, which includes the right to testify. *Id*. Declining to apply ineffective assistance of counsel jurisprudence to review of the error, *McCoy* further noted that such error did not involve counsel's competence, but rather, a client's autonomy. *Id*. at 1510-11. Thus, this Court held that "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *Id.*, at 1511.

Like the rights to self-representation and to make a defense, the denial of the right to testify is a "[v]iolation of a defendant's Sixth Amendment-secured autonomy [and] ranks as error of the kind our decisions have called 'structural.'" *McCoy*, at 1511. The right to testify is similarly personal, grounded in a defendant's dignity, autonomy, and right "to conduct his own defense." *Id*. Because the right to testify protects interests other than to protect him from a wrongful conviction—i.e., rights to dignity and autonomy over his defense—a denial of the right to testify is not subject to harmless error inquiry. Further, *Rock* held that the right to testify is "*even more fundamental* to a personal defense than the right to self-representation." (Emphasis added.) 483 U.S. at 52. As such, and because this Court has held that a denial of the lesser fundamental right to self-representation is structural error, it naturally follows that the denial of the right to testify also is structural error. See *Momon*, 18 S.W.3d at 170 (*Barker, J.*, concurring in part, dissenting in part) ("If denial of the right of self-representation is not subject to harmless error analysis,

how can this Court then insist that denial of the *more fundamental* right of a defendant to testify is somehow less worthy of protection?").

Additionally, jurisdictions incorrectly treat a violation of the right to testify merely as a "trial error" resulting only in deprivation "of the right to present evidence to the jury." *Momon*, at 167. This is a fundamental misconception because a defendant is not merely another defense witness. *Id*. ("the most important witness for the defense in many criminal cases is the defendant himself"). These jurisdictions also fail to appreciate that a denial of the right to testify does not merely deprive a defendant of presenting evidence to the jury; rather, it deprives the defendant of the autonomy to present his defense. *Rock*, 483 U.S. at 52 (noting that, more fundamental than right to self-representation "is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness."). Thus, violations of the right to testify are not amenable to harmless error analysis.

2. The effects of a denial of the right to testify are impossible to measure.

This Court has recognized in a related context the impossibility of evaluating the impact of proposed testimony of a defendant. *See Luce v. United States*, 469 U.S. 38 (1984). *Luce* held that rulings about the admissibility of certain evidence during a defendant's testimony are not preserved for appellate review unless a defendant testifies. *Id.* at 43. This Court reasoned that actual testimony is necessary because "the precise nature of the defendant's testimony" is "unknowable when . . . the

defendant does not testify." *Id.* at 41. Thus, any attempt to evaluate the harm caused by an allegedly improper ruling would be "wholly speculative." *Id*. In the context of the denial of the right to testify, it is impossible to review or assess how the jury may have viewed the defendant's testimony. Thus, the effects of the denial of the right to testify are impossible to measure and the error is structural.

C. The question of harm is recurring and important.

Whether the complete denial of the right to testify is structural error will arise not only for claims of an invalid waiver of the right to testify, but also for claims involving interference with the right to testify. As demonstrated by the volume of jurisdictions to have already considered this question, it remains a recurring and unresolved issue. This question also is important. The right to testify is "fundamental" to our criminal justice system and protects the autonomy of defendants and provides "a right to be heard." *Rock*, 483 U.S. at 51-52. Thus, the question of whether this type of error is amenable to harmless error analysis is important to protect the right and to the administration of criminal justice. Such question warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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