No.

In the Supreme Court of the United States

ZENAIDO RENTERIA, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The right to be tried in the vicinage of where a crime occurred was fundamental to English common law. When King George III suspended that right for certain crimes committed in the American colonies, the Founders charged him with unjustly transporting colonists "beyond Seas to be tried for pretended offences." The Declaration of Independence para. 21 (U.S. 1776).

The Founders deemed this right essential to individual liberty. Article III, Section 2, Clause 3 of the United States Constitution provides that "[t]he Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed." That right, however, was not alone sufficient. The Founders also secured in the Sixth Amendment the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The courts of appeals have divided as to the meaning of the vicinage protections. The Second Circuit holds that criminal venue is limited to those places that are reasonably foreseeable to a defendant. Below, the Third Circuit, joining the Fourth and Ninth Circuits, rejected a reasonable foreseeability test.

The questions presented are:

1. Whether the Constitution limits venue in criminal trials to those places where the defendant could reasonably foresee that an overt act would occur.

2. Whether 18 U.S.C. § 3237(a) limits venue in criminal trials regarding continuing offenses to those places where the defendant could reasonably foresee that an overt act would occur.

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PETITION FOR A WRIT OF CERTIORARI

Zenaido Renteria, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, 1a-13a) is published at 903 F.3d 326. The criminal judgment of the district court (App., *infra*, 14a-20a) is not published. The district court's order denying petitioner's motion to dismiss the indictment for improper venue (*id.* at 21a-24a) is not published.

JURISDICTION

The court of appeals issued its decision on September 11, 2018. On November 29, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 8, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 3 of the United States Constitution provides in relevant part:

> The Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed.

The Sixth Amendment to the United States Constitution states in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

> wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Jurisdiction for continuing offenses, including conspiracy, is provided by 18 U.S.C. § 3237(a), which states in relevant part:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

STATEMENT

At the time of the Founding, the Framers of the Constitution sought to guarantee federal criminal defendants the right to trial by jury not just in the State of the alleged offense—but in the judicial district in which it allegedly occurred.

Following unrest in the colonies, Parliament partially suspended the common law right to trial in the vicinage of where a defendant allegedly committed a crime. To facilitate prosecutions, it enacted laws providing for colonists to be transported to Britain for trial on certain offenses, including conspiracy to commit treason. In the Declaration of Independence, one of the enumerated complaints against the Crown and Parliament was "transporting us beyond Seas to be tried for pretended offences." The Declaration of Independence para. 21 (U.S. 1776).

To restore common law rights—and in reaction to these British practices—the Constitution twice safe-

guarded the rights of criminal defendants. First, Article III, Section 2, Clause 3 (the "Venue Clause") holds that "[t]he Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed." This did not satisfy the concerns of many in the Founding generation, as it allowed the federal government to transport a defendant across a State. In particular, the ratifying conventions in Virginia and North Carolina found the protection inadequate. Thus, in the Vicinage Clause, the Sixth Amendment subsequently provided for the right to trial "by an impartial jury of the State *and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend. VI (emphasis added).

The Venue and Vicinage Clauses were first addressed by Chief Justice Marshall in a series of federal prosecutions arising from the Aaron Burr conspiracy. Chief Justice Marshall confirmed the original understanding that venue is limited to those places that are reasonably foreseeable to a criminal defendant.

In recent years, however, the courts of appeals have deeply divided as to whether federal criminal venue is in fact limited to those judicial districts that are reasonably foreseeable to a defendant. Indeed, the Third Circuit below acknowledged that "[w]hether to adopt a reasonable foreseeability test to determine if venue has been laid properly in a conspiracy case" is an issue that has divided the circuits. App., *infra*, 6a-7a. While "the Second Circuit has concluded that a reasonable foreseeability test is required to establish venue," the Fourth and Ninth Circuits have disagreed. *Ibid.* The Third Circuit below joined the Fourth

and Ninth Circuits, holding that venue need not be reasonably foreseeable to a criminal defendant.

As the court below identified (App., *infra*, 10a-12a), its holding controlled the outcome of this case. That is because petitioner was prosecuted in a venue that was unforeseeable to him.

This case involves prosecution of an alleged drug distribution conspiracy. A government investigator operating in the Eastern District of Pennsylvania established phone contact with two individuals, whose phone numbers had Mexican country codes. App., *infra*, 2a. Those individuals sent drugs to the investigator, who was using an address in Pennsylvania. *Ibid.* They then directed the investigator to travel to Los Angeles, where a local contact would deliver more drugs to him. *Ibid.*

The investigator thus traveled to Los Angeles, where petitioner allegedly delivered drugs to him. App., *infra*, 2a-3a. Instead of charging petitioner in federal court in California, federal prosecutors indicted him in the Eastern District of Pennsylvania. *Id.* at 3a. But prosecutors have never alleged that petitioner had any awareness whatsoever of the earlier connection to Pennsylvania. Indeed, the court of appeals decided the case with the understanding that petitioner "himself did not act in the Eastern District of Pennsylvania or direct any of his actions there." *Id.* at 10a.

Over petitioner's objection, the district court and the Third Circuit both held that the government need not establish that a connection to the Eastern District of Pennsylvania was reasonably foreseeable to petitioner. App., *infra*, 10a-11a. All that matters, the

courts held, was whether petitioner participated in a conspiracy and, unbeknownst to him, other members of the conspiracy committed overt acts there. *Ibid.*

This Court should grant review to resolve the circuit split and restore the protections afforded by the Venue and Vicinage Clauses.

A. Legal background.

1. The Venue and Vicinage Clauses derive from English common law, and their inclusion in the Constitution stems from the Founding generation's grievances with the Crown.

At the time of the American Revolution, English common law had for centuries recognized the right of criminal defendants to be tried in the vicinity, or county, in which the facts of a crime occurred. This "vicinage" right was widely recognized in the American colonies. William Blackstone, widely read in America in the late eighteenth century, devoted a substantial portion of his *Commentaries on the Laws of England* to a discussion of the importance and long lineage of this right. See 3 William Blackstone, *Commentaries* *359-360. Colonial governments considered it to be one of the great "Privilege[s]" of the common law. *Journals of the House of Burgesses, 1766-1769*, at 214 (Kennedy ed. 1906). See also Charter or Fundamental Laws of West New Jersey ch. XXII (1676).

But the onset of tensions between the colonists and the Crown in the late 1760s prompted Parliament to drastically shrink the vicinage right by statute. Between 1769 and 1774, in response to unrest in Massachusetts, Parliament provided for American defendants to be tried in Britain in various circumstances.

See, *e.g.*, 12 Geo. 3 c. 24; 14 Geo. 3 c. 39; 16 T. C. Hansard, *Parliamentary Debates to the Year 1803*, at 476-480, 485-510 (1813) (recommending the revival of 35 Hen. 8 c. 2 for prosecuting treasonous colonists in Britain).

Colonial assemblies and the First Continental Congress fiercely protested these acts of Parliament as "highly derogatory" of the colonists' long-standing and traditional rights. *Journals of the House of Burgesses*, *supra*, at 214; *Documents of American History* 83-84 (2d Commager ed. 1940). The colonists' outrage was so great that it figured prominently in the Declaration of Independence, where the Second Continental Congress censured the Crown and Parliament for "transporting us beyond Seas to be tried for pretended offences." The Declaration of Independence para. 21 (U.S. 1776).

2. After Independence, the Founding generation ensured that the traditional venue and vicinage protections would be safeguarded by more than just the common law. The American colonies' independence from Great Britain sparked the widespread adoption of new state constitutions to replace royal charters. In these constitutions, the nascent state governments acted to ensure that legislatures—unlike Parliament—could not abridge their citizens' venue and vicinage rights by statute and that prosecutors could not abuse their power by hauling away defendants for trials in faraway regions.

Three States—New Hampshire, Massachusetts, and Maryland—explicitly limited the venue of trials to the location where the facts of an alleged crime arose. See Mass. Const. art. XIII (1780) ("In criminal prosecutions, the verification of facts, in the vicinity

where they happen, is one of the greatest securities of the life, liberty, and property of the citizen."); Md. Const. art. XVIII (1776) ("That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people."); N.H. Const. art. I, § 17 (1784) ("In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty, and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed.").

Another two States—Virginia and Pennsylvania—adopted nearly identical vicinage clauses, directing that, "in all criminal prosecutions, the accused hath a right to * * * a speedy public trial by an impartial jury of the vicinage." Pa. Const. art. IX, § 9 (1790). See also Va. Const. § 8 (1776) (similar). And Georgia's constitution provided that "all matters of breach of the peace, felony, murder, and treason against the State" should be tried "in the county where the same was committed." Ga. Const. art. XXXIX (1777).

When the Philadelphia Convention met to draft the United States Constitution in 1787, the Framers included explicit language limiting the federal government's ability to lay venue in Article III: "The Trial of all Crimes * * * shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3.

Article III's Venue Clause did not, however, satisfy many at the subsequent state ratifying conventions. At those conventions, there was considerable criticism that Article III did not sufficiently protect criminal defendants from the powers to be exercised by the new federal government.

At the Virginia ratifying convention, Patrick Henry was especially enflamed by the adverse liberty implications of the absence of a vicinage protection. Article III's restriction of criminal venue to just the *State* in which the crime occurred was not, he contended, sufficient:

> Under this extensive provision, [the federal government] may proceed in a manner extremely dangerous to liberty: a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men?

Patrick Henry, Speech Before the Virginia Ratifying Convention (June 14, 1788), in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, at 447 (Elliot ed. 1836) [hereinafter *Elliot's Debates*].

Another convention delegate, William Grayson, also couched his opposition to Article III's Venue Clause in personal-liberty, anti-tyranny terms: "The jury may come from any part of the state. [The federal government] possess[es] an absolute, uncontrollable power over the *venue*. The conclusion, then, is[] that they can hang any one they please, by having a jury to suit their purpose." William Grayson, Speech Before the Virginia Ratifying Convention (June 21, 1788), *in* 3 *Elliot's Debates*, *supra*, at 569.

Although the Virginia Convention eventually ratified the Constitution over the concerns of several delegates, it did so on the explicit understanding that the First Congress would propose a bill of rights, which would include a stronger venue protection for criminal defendants. In fact, the Virginia Convention closed its proceedings by proposing a number of constitutional amendments, including a provision that "in all criminal and capital prosecutions, a man hath a right to * * * a fair and speedy trial by an impartial jury of his vicinage." Resolution of the Virginia Ratifying Convention (June 27, 1788), *in* 3 *Elliot's Debates*, *supra*, at 658.

Complaints about the insufficiency of Article III's venue protections for criminal defendants also played a role in the North Carolina ratifying convention's initial *rejection* of the Constitution. One delegate argued that defendants could still be hauled away at great distances within one State and therefore that "the trial ought to be limited to a district or certain part of the state." Joseph M'Dowall, Speech Before the North Carolina Ratifying Convention (July 28, 1788), *in* 4 *Elliot's Debates*, *supra*, at 150. Another argued that stricter limits on the federal government's venue power were necessitated by the Crown's pre-revolutionary abuses of the power to lay venue. Samuel Spencer, Speech Before the North Carolina Ratifying Convention (July 29, 1788), *in* 4 *Elliot's Debates*, *supra*, at 154.

At the end of its proceedings, the North Carolina convention passed a resolution announcing that the State would not ratify the Constitution until a "declaration of rights" and "amendments to the most ambiguous and exceptionable parts" of the document were

laid before Congress and the States. Resolution of the North Carolina Ratifying Convention (Aug. 1, 1788), *in* 4 *Elliot's Debates*, *supra*, at 242. The convention then drafted a proposed declaration of rights, which included the right to a "fair and speedy trial by an impartial jury of [the accused's] vicinage." *Id.* at 243.

The First Congress ultimately adopted a nearly word-for-word copy of the Virginia and North Carolina conventions' proposed vicinage provision as part of the Sixth Amendment, providing for a "speedy and public trial, by an impartial jury of the State *and district* wherein the crime shall have been committed." U.S. Const. amend. VI (emphasis added). Following the amendment's ratification, North Carolina joined the Union.

Rhode Island also ratified the Constitution following the adoption of the Bill of Rights. The Rhode Island ratifying convention indicated that part of its motivation to join the Union was the Bill of Rights' expanded protection of criminal defendants' vicinage rights. Ratification by the Rhode Island Convention (June 16, 1790), *in* 1 *Elliot's Debates*, *supra*, at 334.

3. Federal courts twice addressed the reach of permissible venue in 1807. Both cases arose in the context of the Aaron Burr treason conspiracy, and Chief Justice Marshall issued both decisions.

In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the federal government apprehended two men in the Orleans Territory and accused them of aiding Burr in a conspiracy against the interests of the United States that stretched between "New-York[] and the western states and territories." *Id.* at 118, 125, 133. The de-

fendants allegedly acted in furtherance of the conspiracy by delivering ciphered letters in New Orleans (see *id.* at 120, 132-133), yet they were sent to Washington, D.C. for indictment and trial (*id.* at 135). See generally Charles F. Hobson, *The Aaron Burr Treason Trial*, Fed. Judicial Ctr., 3 (2006), perma.cc/QS6G-9ZBD.

The Chief Justice, writing for the Court, held that venue was improper in Washington, D.C., because Congress had provided a federal tribunal in the district in which the defendants had specifically acted—the Orleans Territory. *Bollman*, 8 U.S. (4 Cranch) at 136. The Court thus held that government should have laid venue in the Orleans Territory: "[T]hat no part of this crime was committed in the district of Columbia is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district." *Id.* at 135.

In *United States* v. *Burr*, 25 F. Cas. 55 (C.C. Va. 1807), the government tried former Vice President Burr in the District of Virginia for allegedly leading the treasonous conspiracy. Chief Justice Marshall, riding circuit, presided.

The indictment asserted that Burr organized and was present at an assemblage of men in western Virginia, at Blennerhassett's Island, and that the purpose of this conspiracy was to advance a plot to conquer New Orleans and form an independent nation in the American West. *Burr*, 25 F. Cas. at 87-88, 90. At trial, Burr proved that he was not present in Virginia at the time of the alleged assembly. *Id.* at 169-170. He therefore claimed that venue in Virginia was unconstitutional. *Id.* at 116. In response, the government

contended that venue was proper if a conspiracy existed, Burr led or participated in the conspiracy, and acts in furtherance of the conspiracy were committed in Virginia, regardless of Burr's specific knowledge. *Id.* at 130.

Chief Justice Marshall rejected the government's expansive view of permissible venue, referencing "the constitutional provision that the offender 'shall be tried in the state and district wherein the crime shall have been committed.'" *Burr*, 25 F. Cas. at 170. He compared Burr's situation with that of a hypothetical leader of a rebellion that had spread to multiple States in the Union:

> If a rebellion should be so extensive as to spread through every state * * * , it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed * * * to presume that [the] chief of the rebel army was legally present at every such overt act. If * * * the chief * * * should be prosecuting war at one extremity of our territory, say in New Hampshire; if this chief should be there captured and sent to the other extremity for the purpose of trial; if his indictment * * * should allege that he had assembled some small party *which in truth he had not seen*, and had levied war by engaging in a skirmish in Georgia at a time when, in reality, he was fighting a battle in New Hampshire; if such evidence would support such an indictment by the fiction that he was legally present, though really absent, *all would ask to what purpose*

> *are those provisions in the constitution, which direct the place of trial* * * * ?

Ibid. (emphasis added). Rather, venue is satisfied either by conduct in the district or by knowingly causing others to perform acts there. *Id.* at 177.

B. Factual background.

In May 2015, Homeland Security Investigations Agent Jeffrey Kuc posed as a drug trafficker located in southeastern Pennsylvania. App., *infra*, 2a. Kuc established phone contact with two men who identified themselves as "Juan" and "Cejas"; their phone numbers indicated a Mexican country code. *Ibid.* These individuals sent Kuc two kilograms of methamphetamine to a mailbox in Springfield, Pennsylvania. *Ibid.* Kuc made a partial payment for these drugs via a bank deposit. *Ibid.* Juan and Cejas directed Kuc to travel to California to make final payment for those drugs and to purchase additional drugs. *Ibid.*

On June 3, 2015, Kuc traveled to Los Angeles, California. App., *infra*, 2a. Once there, Cejas directed Kuc to his local "contact." *Ibid.* Kuc and petitioner spoke by phone that night, and they met the next day. *Ibid.* Petitioner "expressed that he was rushing to prepare for the transaction, explaining, 'they just told me this yesterday.'" *Id.* at 2a-3a. After Kuc and petitioner met outside a fast food restaurant, agents arrested petitioner. *Id.* at 3a.[1]

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[1] Kuc's phone calls and in-person meeting with petitioner were recorded, and the government entered transcriptions into evidence. Kuc never mentioned anything with respect to Pennsylvania to petitioner. See, *e.g.*, C.A. App. 234-238, 248-250, 251-253, 260-263, 271-275, 278-280, 281-284, 285-287, 287-289.

C. Proceedings below.

Rather than indicting petitioner in California, the government prosecuted him in the Eastern District of Pennsylvania. It charged him with conspiracy to distribute narcotics, in violation of 21 U.S.C. § 846 (Count One), and possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Two). App., *infra*, 3a. The government relied (see *id.* at 5a) on the continuing offense venue provision of 18 U.S.C. § 3237(a), which provides for venue in the district in which a defendant's alleged offense was "begun, continued, or completed."[2]

1. Petitioner moved to dismiss both counts for improper venue. App., *infra*, 3a. The government conceded that Count Two—possession with intent to distribute—should be dismissed on that ground. *Id.* at 21a n.1.

As for the conspiracy count, petitioner "contend[ed] that venue is improper * * * because it was not foreseeable that he could be charged in the Eastern District of Pennsylvania for his involvement in the conspiracy." App., *infra*, 23a n.1. The district court found that "this argument lacks merit," whether framed as a statutory or constitutional question, because the Third Circuit does not "impose a requirement that it must have been known or reasonably foreseeable to the defendant that his co-conspirators

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[2] The government also nominally indicted "Juan." The government acknowledged that it does not know "Juan's" real identity; it thus indicted "Juan LNU," for "last name unknown." See D. Ct. Dkt. No. 1. Needless to say, the government never arrested "Juan," and this case proceeded solely against petitioner.

have committed or would commit overt acts in furtherance of the conspiracy in any given district to establish venue in that district with respect to that defendant." *Ibid*.

To the contrary, the district court concluded that "venue can be established 'wherever a co-conspirator has committed an act in furtherance of the conspiracy.'" App., *infra*, 23a n.1. Venue was thus proper "even if [petitioner] never set foot in this district or lacked actual knowledge that an overt act occurred or would occur in this district." *Ibid*.

At the close of the trial, the district court instructed the jury on venue accordingly:

> The government does not need to prove that the defendant himself was present in this district, instead [venue] can be established in this district if a co-conspirator has committed an act in furtherance of the conspiracy here even if the defendant did not know or did not reasonably foresee that the act occurred or would occur in this district.

App., *infra*, 3a-4a.

A jury convicted petitioner, and the district court sentenced him to 153 months' imprisonment and five years' supervised release. App., *infra*, 4a.

2. The court of appeals affirmed. See App., *infra*, 1a-13a.

Because petitioner "himself did not act in the Eastern District of Pennsylvania or direct any of his actions there," the court recognized that the controlling question is whether there is a "reasonable fore-

seeability requirement to establish venue in conspiracy cases under [Section] 3237(a)." App., *infra*, 10a. The court acknowledged a circuit conflict on this point: "Although the Second Circuit has concluded that a reasonable foreseeability test is required to establish venue, the Ninth Circuit has rejected the test in the context of [Section] 3237(a), and the Fourth Circuit has rejected it in the context of a similar venue statute, 15 U.S.C. § 78aa." *Id*. at 6a-7a.

Agreeing with the Ninth Circuit, the court of appeals concluded that it "need not adopt a reasonable foreseeability test because neither the text of the Constitution nor of [Section] 3237(a) requires it." App., *infra*, 7a. Both the statute and the Constitution, the court asserted, "focus solely on where the offense occurred and do not even reference foreseeability." *Ibid*. The court additionally reasoned that the "Constitution's venue provisions" principally protect against "unfairness," and it concluded that it is not unfair to try a defendant in the district where a crime was committed. *Id*. at 9a-10a.

In addition to affirming the district court's denial of petitioner's motion to dismiss for improper venue, the court of appeals also affirmed the venue-related jury instruction that disclaimed a foreseeability requirement. App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

The Court should grant further review: The circuits are divided, the issue is important, and the decision below is irreconcilable with the Constitution's essential protections for venue in criminal proceedings.

A. The circuits are divided.

As the court of appeals expressly recognized (App., *infra*, 6a-7a), the circuits are divided on whether foreseeability imposes an outer limit to proper venue in criminal cases. That division of authority is long-standing and oft-recognized. See, *e.g.*, *United States* v. *Gonzales*, 683 F.3d 1221, 1226-1227 & n.5 (9th Cir. 2012) ("There is a split in the circuits regarding whether the government must prove the defendant intended the act that furnishes venue in the district, or at least show that the act was foreseeable." (quoting 2 Charles Alan Wright et al., *Federal Practice and Procedure* § 307)); *United States* v. *Shusterman*, 2014 WL 6835161, at *9 (N.D. Md. 2014) (noting that the "[c]ircuits have split on this issue").

1. The Second Circuit holds that venue in a criminal case is limited to those places that are reasonably foreseeable to a defendant.

In *United States* v. *Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003), the Second Circuit held that venue is "proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue." In that circuit, this reasonable foreseeability test governs conspiracy cases; the "law * * * asks that the overt act's occurrence in the district of venue have been reasonably foreseeable to a conspirator." *United States* v. *Rommy*, 506 F.3d 108, 123 (2d Cir. 2007).

If the Second Circuit's reasonable foreseeability standard controlled, petitioner's prosecution in the Eastern District of Pennsylvania was improper. There

is no evidence whatever that petitioner was aware of—or had any reason to foresee—the occurrence of unlawful acts in Pennsylvania.

2. The Third, Fourth, and Ninth Circuits have rejected the reasonable foreseeability standard.

Here, the Third Circuit stated that neither the Constitution nor 18 U.S.C. § 3237(a), the continuing offense venue statute, "explicitly provide[s] for a reasonable foreseeability requirement." App., *infra*, 8a. Without considering the full meaning of the constitutional provisions, the court "decline[d] to adopt a reasonable foreseeability requirement to establish venue in conspiracy cases." *Id*. at 10a.

In so holding, the court cited (App., *infra*, 7a-8a & nn.15, 22) the Ninth Circuit's decision in *United States* v. *Gonzales,* 683 F.3d 1221 (9th Cir. 2012). There, the Ninth Circuit explicitly dismissed any consideration of foreseeability, reasonable or otherwise: "Simply put, Section 3237(a) does not require foreseeability to establish venue for a continuous offense." *Id.* at 1226. In *Gonzales*, the defendant's only contacts with the venue were phone calls with a confidential informant located there, even though the defendant was not aware of the informant's location. *Ibid*. Venue was proper, notwithstanding the defendant's lack of knowledge. *Id*. at 1226-1227.

The court below also aligned with the Fourth Circuit's decision in *United States* v. *Johnson*, 510 F.3d 521 (4th Cir. 2007). There, in the context of the similar and "unmistakably broad" venue provision of 15 U.S.C. § 78aa, the Fourth Circuit rejected a reasonable foreseeability test. *Id*. at 527-528. That court evaluated the constitutional venue provisions (*id*. at 523-

534) and rejected the reasonable foreseeability test all the same (*id*. at 527-528).

B. The extent of permissible criminal venue is an important question that warrants resolution.

This division among the circuits warrants prompt resolution.

1. To begin with, there is no disputing that the Founders regarded venue protections as essential to individual liberty. The selection of venue for a criminal trial is more than a "mere[] matter[] of formal legal procedure." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). "Proper venue in criminal proceedings was a matter of concern to the Nation's founders." *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998). It serves as a "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States* v. *Cores*, 356 U.S. 405, 407 (1958).

However, while "the concept of a right to trial in the vicinage was so highly regarded as to appear twice in the Constitution," this Court "has yet to articulate a coherent definition of the underlying policies." *United States* v. *Reed*, 773 F.2d 477, 480 (2d Cir. 1985). The lower courts are therefore in disarray as to the question presented given the absence of concrete guidance.

The results are sprawling venue theories divorced from the original understanding of the constitutional protections. This case is a prime example—petitioner had no involvement whatsoever with conduct touching on the Eastern District of Pennsylvania, and the

government has never attempted to prove that a connection to that forum was reasonably foreseeable to him. Indeed, it is entirely unclear why the government dragged petitioner across the entire country for trial. A federal court was readily available in the place where he allegedly committed the crime. The government cannot claim any efficiency rationale: It does not know the identity of petitioner's alleged co-conspirators, and petitioner was the sole defendant at trial.

Elsewhere, the government has taken similar shortcuts, using venues that are expedient to prosecutors rather than foreseeable to the defendant. The Fourth Circuit's decision in *Johnson* is illustrative. There, the Nevada-based defendant was charged with filing a fraudulent document with the Securities and Exchange Commission (SEC). 510 F.3d at 523. The defendant conceded that venue would have been proper in the District of Columbia, where the defendant knew the SEC was located. *Id.* at 525.

The government nonetheless prosecuted the defendant in the Eastern District of Virginia—for the sole reason that, unbeknownst to the defendant, the SEC had chosen to locate some of its computer servers in Alexandria, Virginia. *Johnson*, 510 F.3d at 523, 526. The Fourth Circuit held that this was enough for venue: "[C]ausing the transmission of the Form 10-Q to the Eastern District of Virginia will suffice to sustain venue in that district." *Id.* at 525. The Fourth Circuit, like the court here, held that whether this venue was reasonably foreseeable to the defendant was immaterial. *Id.* at 526-527.

The prosecutions here and in *Johnson* are not outliers. Federal prosecutors employ tenuous venue theories with some frequency. See, *e.g.*, *United States* v.

Seko, 2016 WL 1586557, at *1 (E.D. Va. 2016) (venue turned on location of computer servers over which emails were transmitted).

At present, the permissibility of these theories turns on the happenstance of jurisdiction. The Court should grant review to bring nationwide uniformity to this oft-recurring and important question of federal criminal law.

2. The expansion of federal criminal law has rendered the Constitution's venue safeguards all the more necessary.

In recent years, the scope of conspiracy law has continued to enlarge, with federal prosecutors employing novel theories. That is, conspiracy statutes often are "vague and elastic, fitting whatever a prosecutor needs in a given case." *Ocasio* v. *United States*, 136 S. Ct. 1423, 1445 (2016) (Sotomayor, J., dissenting). This has the effect of an "invasion of state sovereign functions." *Id*. at 1439 (Thomas, J., dissenting). This problem goes beyond conspiracy and speaks to "a deeper pathology in the federal criminal code," where prosecutors wield what many describe as "too much leverage." *Yates* v. *United States*, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting).

These concerns are magnified when, as here, a defendant is dragged from one coast to the other for trial. The Court should thus resolve the reach of permissible venue—and impose the constitutionally-required limitations on the discretion of federal prosecutors.

C. Criminal venue requires reasonable foreseeability.

For the government to properly lay venue in a criminal action, it must—at bare minimum—demonstrate that the venue was one that was reasonably foreseeable to the defendant at the time of the alleged conduct at issue. This conclusion stems directly from the Constitution's twin limitations on venue. And it is likewise the proper construction of 18 U.S.C. § 3237(a).

1. The Constitution limits criminal venues to those that are reasonably foreseeable.

At the Founding, the Venue and Vicinage Clauses were understood to provide a robust limitation on the government's power to lay venue far from the location in which a defendant acted when he committed a crime. In particular, the Founders understood that venue is limited to only those places in which a defendant commits a crime—or where he or she could reasonably foresee the commission of criminal conduct properly attributable to him.

a. Chief Justice Marshall identified this meaning of the Venue and Vicinage Clauses shortly after their adoption. In two cases, defendants alleged to have participated in conspiracies that stretched across multiple States challenged the venue of their criminal trials on the basis that they did not personally commit acts in the district in which they were tried. In both cases, the defendants prevailed.

In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), two defendants were accused of aiding Aaron Burr in a treasonous conspiracy that stretched across multiple States. Although they had been apprehended in

New Orleans (see *id.* at 135-136), they were transported to Washington, D.C. for trial (*id.* at 135). See generally *The Aaron Burr Treason Trial*, *supra*, at 3.

The Court held that venue was improper. *Bollman*, 8 U.S. (4 Cranch) at 135. Notwithstanding the broad reach of the alleged conspiracy across the United States (*id.* at 134), the defendants had committed acts in furtherance of the conspiracy in the Orleans Territory and had been apprehended there. See *id.* at 136. Since Congress had created a federal judicial district there, the Court held that venue should have been laid there. *Ibid.*

Burr himself was tried for his role in leading the alleged conspiracy in *United States* v. *Burr*, 25 F. Cas. 55 (C.C. Va. 1807). He was sent to Richmond, Virginia for trial, even though he had been apprehended in the Mississippi Territory and had not acted at all in Virginia. *Id.* at 169-170. See generally *The Aaron Burr Treason Trial*, *supra*, at 4. The government advanced a novel theory for laying venue: In order for venue to be proper in Virginia, all it had to show was that Burr led or participated in a conspiracy and that Burr's co-conspirators had acted in furtherance of the conspiracy in Virginia, with or without his knowledge (*Burr*, 25 F. Cas. at 130)—a theory of venue nearly indistinguishable from the one the government has advanced here.

Chief Justice Marshall, riding circuit, rejected the government's theory. Such a broad exercise of the government's venue-laying power, he explained, would violate the limitations of Article III and the Sixth Amendment. *Burr*, 25 F. Cas. at 170. He took particular issue with the implication that the Venue and Vicinage Clauses permitted the government to lay venue

in a district in which co-conspirators had acted without the defendant's knowledge or foresight. Illustrating this concern through an analogy, the Chief Justice described a hypothetical rebel leader who was waging war in New Hampshire while part of his army, "which in truth he had not seen," waged war in Georgia without his knowledge. *Ibid.* Under such circumstances, he wrote, if the rebel leader was captured in New Hampshire and sent to Georgia for trial solely by virtue of his co-conspirators' actions there, "all would ask to what purpose are those provisions in the [C]onstitution, which direct the place of trial." *Ibid.*

Chief Justice Marshall thus understood that the Constitution's limitations on venue precluded trying a defendant based solely on the acts of co-conspirators that were not reasonably foreseeable to the defendant.

These cases, moreover, are unusually compelling evidence of the original understanding of the Constitution's venue provisions. The trial of Burr, who not three years earlier had been Vice President, attracted national attention. It was closely followed by President Jefferson, the political elite, and the public at large. See *The Aaron Burr Treason Trial*, *supra*, at 3, 5, 34-39. And Burr's lawyers included Philadelphia Convention delegates Edmund Randolph (also the first U.S. Attorney General) and Luther Martin. *Id.* at 4-5. That the Chief Justice invoked the public's understanding of the Venue and Vicinage Clauses in a high-profile case so close in time to the ratification of the Constitution and the Sixth Amendment and so closely watched by those who had played a major role in the Founding gives his opinion substantial weight as a statement of the meaning of these provisions.

b. Additionally, the text and broader historical context of the Venue and Vicinage Clauses support a reasonable foreseeability limitation on the government's power to lay venue.

One of the colonists' chief disputes with the Crown and Parliament was the enactment of laws providing for trial in Britain—where prosecutors could gain an advantage—for acts committed in the colonies. Indeed, this was among the reasons the Founders cited for declaring independence.

Following the Revolution, several States constitutionalized the right of an individual defendant to a trial near where the facts of a crime occurred to preclude legislatures and courts from replicating the British practice of laying venue in places far from where the facts needed to litigate an individual defendant's case would be obtained. See Pa. Const. art. IX, § 9 (1790); N.H. Const. art. I, § 17 (1784); Mass. Const. art. XIII (1780); Ga. Const. art. XXXIX (1777); Md. Const. art. XVIII (1776); Va. Const. § 8 (1776).

The bitter experience of the Crown's abuse of venue was of such significance that the Philadelphia Convention included a limitation on venue in the United States Constitution in 1787. See U.S. Const. art. III, § 2, cl. 3. Yet this provision only protected a defendant's right to a trial in the *State* where a crime occurred. *Ibid.* Delegates to the state ratifying conventions decried this provision's insufficient protection of the localism value in venue selection that the colonies had fought for in the Revolution and recognized in their state constitutions. See, *e.g.*, Samuel Spencer, Speech Before the North Carolina Ratifying Convention (July 29, 1788), *in* 4 *Elliot's Debates*, *supra*, at

154. Article III still permitted an individual to be carried hundreds of miles from the location in which a defendant allegedly committed any act in furtherance of a crime. Joseph M'Dowall, Speech Before the North Carolina Ratifying Convention (July 28, 1788), *in* 4 *Elliot's Debates*, *supra*, at 150. Thus, the Sixth Amendment was born out of the proposals of the Virginia and North Carolina ratifying conventions.

Read against this historical background, Article III and the Sixth Amendment preclude the United States from laying venue in criminal cases in districts unconnected from the defendants' own conduct. The text of Article III provides that criminal trials "shall be held in the State *where* the said Crimes shall have been *committed*." U.S. Const. art. III, § 2, cl. 3 (emphasis added). Likewise, the Sixth Amendment provides that "*the accused* shall enjoy the right to a * * * trial, by an impartial jury of the State and district *wherein* the crime shall have been *committed*." U.S. Const. amend. VI (emphasis added). The text of these provisions inescapably directs focus on the place where the accused himself acted.

c. This reasonable foreseeability limitation is consistent, moreover, with the Court's venue jurisprudence.

In identifying the effect of the Venue and Vicinage Clauses, the Court has repeatedly underscored the necessary tie between the *defendant* and the venue. In *Johnson*, the Court recognized that, "[b]y utilizing the doctrine of a continuing offense, Congress may * * * provide that the locality of a crime shall extend over the whole area through which force propelled by *an offender* operates." 323 U.S. at 275 (emphasis added).

While the reach of venue may be broad, it is bound by the *offender's* own conduct.

So too in *Johnston* v. *United States*, 351 U.S. 215 (1956). There, the Court explained that "the place of the crime * * * is determined by *the acts of the accused* that violate a statute." *Id.* at 220 (emphasis added). It is the defendant's acts—and not acts of a third party—that govern the venue analysis. See also *Travis* v. *United States*, 364 U.S. 631, 634 (1961) ("for venue purposes," a crime is deemed "to have been committed wherever *the wrongdoer* roamed" (emphasis added)).

The core question, accordingly, is whether the *defendant's* conduct gives rise to a connection between the district of prosecution and the crime at issue. In circumstances where alleged criminal conduct within a particular district was neither committed by the defendant nor reasonably foreseeable to him or her, the Venue and Vicinage Clauses preclude a criminal trial there.[3]

United States v. *Hyde*, 225 U.S. 347 (1912), is not to the contrary. There, the Court held that defendants who acted primarily in California and Oregon but who directed co-conspirators to commit acts in furtherance of the conspiracy in the District of Columbia could be properly tried in the District of Columbia. *Id.* at 356-357. There was no doubt that the defendants foresaw

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[3] Some courts have applied varying formulations of a substantial contacts test when undertaking this analysis. See, *e.g.*, *United States* v. *Reed*, 773 F.2d 477, 481 (2d Cir. 1985); *United States* v. *Cofield*, 11 F.3d 413, 417 (4th Cir. 1993); *United States* v. *Chappell*, 854 F.2d 190, 193 (7th Cir. 1988); *United States* v. *Goldberg*, 830 F.2d 459, 466 (3d Cir. 1987); *United States* v. *Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986).

actions in the District of Columbia: The offense involved furnishing fraudulent information to the General Land Office, which the defendants knew was located in the District of Columbia. *Id*. at 351-352, 360. In fact, the Court specifically declined to address the "the extent of the agency between conspirators" to support venue. *Id*. at 359. This case, however, presents that question and thus requires its resolution.

d. Petitioner prevails under this proper standard. He squarely raised the issue below, and, under a reasonable foreseeability standard, he would have prevailed.

Petitioner's alleged actions occurred solely in California: To the extent he entered any conspiracy, it was based in California and involved California conduct. The court of appeals recognized that petitioner "himself did not act in the Eastern District of Pennsylvania or direct any of his actions there." App., *infra*, 10a. Indeed, the government presented no evidence that petitioner could have reasonably foreseen a connection to that district. What is more, the government was absolved of this requirement by virtue of the erroneous jury instruction, an issue that petitioner preserved for review and challenges here. *Id*. at 12a.

If the Venue and Vicinage Clauses retain any practical force, they must apply here.

2. Section 3237(a) limits venue to those places that are reasonably foreseeable.

The proper construction of the venue statute, 18 U.S.C. § 3237(a), yields the same result.

a. To demonstrate that petitioner committed a conspiracy "offense against the United States" that was "begun, continued, or completed" in the Eastern

District of Pennsylvania (18 U.S.C. § 3237(a)), the government had to prove that the conduct occurring in that district was reasonably foreseeable to him.

In previously construing the reach of Section 3237(a), the Court has held that "[t]he *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales*, 524 U.S. at 6-7.

Here, petitioner is alleged to have participated in a conspiracy to distribute narcotics. App., *infra*, 3a. There is no allegation that petitioner *himself* engaged in any overt act relating to this conspiracy in the Eastern District of Pennsylvania. *Id.* at 10a. Whether acts of alleged co-conspirators touching on that district may be attributed to him turns on reasonable foreseeability.

This stems from the basics of conspiracy liability that the Court articulated in *United States* v. *Pinkerton*, 328 U.S. 640 (1946). While *Pinkerton* held that a person participating in a conspiracy may be held liable for the substantive acts of his co-conspirators (*id.* at 647), the Court also established certain essential limitations. Under *Pinkerton*, co-conspirator liability does not extend to offenses that were not "done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which *could not be reasonably foreseen* as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-648 (emphasis added).[4]

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[4] Indeed, *Pinkerton*, decided in 1946, predated the 1948 enactment of Section 3237(a) by a mere two years. When Congress

Thus, for the acts of alleged co-conspirators in the Eastern District of Pennsylvania to be properly attributable to petitioner—which is necessary for the government's venue theory—the government must prove that these overt acts were reasonably foreseeable to petitioner. Absent such proof, the minimum requirements of Section 3237(a) are not satisfied. In this way, Section 3237(a) adopts a reasonable foreseeability requirement in the context of conspiracy liability.

b. Section 3237(a)'s manifest purpose also favors this construction.

Section 3237(a) was enacted in direct response to *United States* v. *Johnson*, 323 U.S. 273 (1944). See H.R. Rep. No. 2200, at A146 (1946) ("The last paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in *United States* v. *Johnson*.").

In *Johnson*, the Court had held that, in the context of the Federal Denture Act, venue was not proper in the location where a defendant knowingly sent a denture product. 323 U.S. at 276-278 ("In the Federal Denture Act Congress did not make provision for trial in any district through which the goods were shipped."). The Court noted that, for venue to be proper in such circumstances, Congress had previously adopted special venue provisions, such as those in the Elkins Act. *Id.* at 277.

Section 3237(a) was designed to change this default. In cases of such shipment, it provides for venue

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adopted Section 3237(a), it did so against the backdrop of *Pinkerton*. See 62 Stat. 683, 826 (1948).

in both the place where the good is sent and its destination. See H.R. Rep. No. 2200, at A146; H.R. Rep. No. 31,900, at A161 (1946).

Congress thus designed Section 3237(a) to apply in circumstances where the defendant could reasonably foresee that his or her conduct included an overt act in the venue of prosecution. In *Johnson*, it was the sending of a good to the particular district. This history confirms that Section 3237(a) is consistent with the requirement of reasonable foreseeability. Congress did not intend to render defendants to stand trial in venues that they could not foresee.

c. Section 3237(a) should additionally be understood to limit venue to those places that are reasonably foreseeable to a defendant so as to avoid conflict with constitutional safeguards.

That is precisely the tact the Court took in *Johnson*. It construed the scope of criminal venue there to ensure compliance with the constitutional protections. As the Court explained, "[i]f an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Johnson*, 323 U.S. at 276. See also *Zadvydas* v. *Davis*, 533 U.S. 678, 708 (2001).

If Section 3237(a) were read to permit the government to lay venue in the Eastern District of Pennsylvania for petitioner's conspiracy charge, despite his inability to foresee a connection to that district, then "all would ask to what purpose are those provisions in the constitution, which direct the place of trial." *Burr*,

25 F. Cas. at 170 (Marshall, C.J.). Rather, Section 3237(a) turns on alleged conduct within the district attributable *to the defendant*. While conspiracy liability may satisfy that necessary attribution requirement, *Pinkerton* limits attribution to only conduct that is reasonably foreseeable to a defendant. In the context of conspiracy, then, the government may claim venue based on the acts of a co-conspirator only when those acts are reasonably foreseeable to the defendant. This interpretation of the statute ensures that it does not transgress core constitutional safeguards.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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