No. 18-1052

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutory and Constitutional Provisions

REPLY BRIEF FOR PETITIONER

The government's position in this case, if accepted, would eviscerate the protections afforded by the Constitution's Venue and Vicinage Clauses. The government does not identify any evidence indicating that petitioner had a basis to foresee a connection between his conduct and the Eastern District of Pennsylvania. Rather, in the government's view, a criminal defendant may be prosecuted anywhere in the country that an alleged co-conspirator acts, even if that location is not foreseeable to the defendant.

This Court's review is warranted. This case is an ideal vehicle for review: If there is any meaningful constitutional or statutory limit to criminal venue in conspiracy cases, reversal is required. Additionally, the Second Circuit's venue law is materially different than that applied below. Prosecutors would not have brought this sort of prosecution in the Second Circuit because binding precedent forbids it.

The government leads with the merits, but that is no reason to deny review. The government is also wrong; it must demonstrate a genuine connection between the defendant herself and the forum. The government has failed to do so here.

The government, moreover, does not explain *why* it chose to prosecute petitioner on the other side of the continent from his home and the place of his alleged crime. Petitioner was the sole defendant. (The government nominally indicted "Juan," whose identity the government does not know, presumably to bolster venue.) Prosecutorial convenience is no reason to set aside constitutional rights—rights that the Revolutionary War was fought to secure.

A. This is an ideal vehicle to resolve a question of tremendous importance.

There is no evidence—none—suggesting that petitioner could have reasonably foreseen a connection to the Eastern District of Pennsylvania. See, *e.g.*, Pet. 13 & n.1, 17-18, 28. If there is any constitutional or statutory limit on the scope of criminal venue in conspiracy cases, reversal is necessary.

Rather than disagree with our central showing, the government suggests that petitioner may have known that conduct would occur *somewhere* outside of Los Angeles. See BIO 17-18. The government maintains that petitioner knew he was completing a transaction with agent Kuc, and that Kuc planned to subsequently travel by airplane. *Ibid.* The government takes this evidence to establish that petitioner "reasonably should have known that his drug conspiracy involved drugs sold outside of the Central District of California." BIO 18.

But the mere allegation that petitioner knew that Kuc was leaving Los Angeles provides no basis to tether this alleged crime *to the Eastern District of Pennsylvania*. The jury was told in clear terms that the government need not make any such showing. See Pet. 15. And petitioner's objection to venue in the Eastern District of Pennsylvania was unquestionably preserved at every stage. See Pet. 14-16. The government acknowledges as much. See BIO 3-6.

This case thus squarely presents the question whether there is any meaningful constitutional or

statutory limitation on the power of prosecutors to select venue in conspiracy cases.[1]

B. The disagreement among the circuits warrants review.

The government recognizes that "the Second Circuit has long indicated that a reasonable-foreseeability requirement may exist under certain circumstances." BIO 6. See also BIO 15 ("The Second Circuit * * * has indicated that it views foreseeability as a component of venue in certain cases."). That much is undeniable: *United States* v. *Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003), adopted a reasonable foreseeability test for criminal venue. See BIO 15-16. The court below—like many courts before it—expressly recognized the conflict among the circuits. See Pet. 17. See also *United States* v. *Johnson*, 510 F.3d 521, 527 (4th Cir. 2007) (The "circuits" "are split" on "the question of whether there [is] a foreseeability requirement for establishing venue.").

The government's principal response is that the Second Circuit has not reversed a conviction on the basis of the *Svoboda* rule, and thus it is not clear whether the Second Circuit "would adhere" to *Svoboda*'s holding if it "turned out to be outcome-determinative." BIO 16. There are several problems with this contention.

To begin with, the *Svoboda* venue rule is prophylactic. In light of *Svoboda*, it is highly unlikely that

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[1] No prior case has cleanly presented this issue. In *Gonzalez* v. *United States*, No. 12-6578, the government maintained that the venue *was* reasonably foreseeable. In *Ebersole* v. *United States*, No. 05-6945, the defendant did not appear to make *any* venue argument in the court of appeals.

federal prosecutors within the jurisdiction would employ the sort of adventurous venue theory used here. The proper question is whether any court in the Second Circuit has ever *approved* of venue in circumstances comparable to those here. We have found no such case—and the government fails to identify one.

The government's suggestion that the Second Circuit could one day discard the *Svoboda* rule as nonbinding dictum is flatly at odds with the several dozen decisions relying on *Svoboda* as a binding statement of venue law. The government focuses (BIO 16) on the footnote in *United States* v. *Kirk Tang Yuk*, 885 F.3d 57 (2d Cir. 2018), stating that the *Svoboda* rule was adopted "without extensive analysis." *Id.* at 69 n.2. Curiously, the government omits the next sentence of the court's opinion: "Nonetheless, we are bound to examine this factor in assessing whether the venue of these prosecutions was proper as to each defendant." *Ibid.*

Indeed, there is no serious question that, in the Second Circuit, criminal venue is limited to those places that are "reasonably foreseeable" to a defendant. See, *e.g.*, *United States* v. *Abdullaev*, 761 F. App'x 78, 83 (2d Cir. 2019) (for criminal venue to attach by virtue of a co-conspirator's "act in furtherance of the charged offense" that occurred in the district, it must be "foreseeable" to the defendant "that such an act would occur in the district of venue") (quoting *Svoboda*); *United States* v. *Shyne*, 388 F. App'x 65, 71 (2d Cir. 2010) (same); *United States* v. *Whittingham*, 346 F. App'x 683, 685 (2d Cir. 2009) (same); *United States* v. *Royer*, 549 F.3d 886, 894 (2d Cir. 2008) (same); *United States* v. *London*, 148 F. App'x 19, 23 (2d Cir. 2005) (same); *United States* v.

Geibel, 369 F.3d 682, 696 (2d Cir. 2004) (same); *United States* v. *Lange*, 834 F.3d 58, 69 (2d Cir. 2016) ("foreseeable"); *United States* v. *Riley*, 638 F. App'x 56, 62 (2d Cir. 2016) ("reasonably foresee"); *United States* v. *Davis*, 689 F.3d 179, 186 (2d Cir. 2012) ("reasonably foreseeable"); *United States* v. *Rommy*, 506 F.3d 108, 123 (2d Cir. 2007) (venue requires "that the overt act's occurrence in the district of venue have been reasonably foreseeable to a conspirator").

The lower courts in that circuit likewise understand this rule to govern. See, *e.g.*, *United States* v. *Greebel*, 2018 WL 3900496, at *56 (E.D.N.Y. 2018) (relying on *Svoboda* rule); *United States* v. *Gross*, 2017 WL 4685111, at *37 (S.D.N.Y. 2017) (same); *United States* v. *Kubitshuk*, 2017 WL 3531553, at *3 (S.D.N.Y. 2017) (same); *United States* v. *Miller*, 2012 WL 1435310, at *8 (D. Vt. 2012); *United States* v. *Butler*, 2010 WL 1692882, at *7 (E.D.N.Y. 2010) (same); *United States* v. *Riley*, 2014 WL 53440, at *4 (S.D.N.Y. 2014) ("[T]he Second Circuit's focus was on whether the defendant could 'reasonably foresee' that an act in furtherance of the charged offense would occur in the Southern District.") (quoting *Svoboda*); *United States* v. *Parrilla*, 2014 WL 7496319, at *12 (S.D.N.Y. 2014) ("[T]he Second Circuit has repeatedly indicated that acts in furtherance of the conspiracy occurring in a given district must have been known or reasonably foreseeable to other members of the conspiracy to establish venue in a given district with respect to a particular defendant."); *United States* v. *Alvarez*, 2012 WL 4794442, at *3 (S.D.N.Y. 2012) ("[I]t must be foreseeable to defendant that some act would occur in the district of venue.").

The government's other contention—that *Svoboda*'s rule might not apply to petitioner (BIO 16-17)—is deeply mistaken. The government takes *United States* v. *Rutigliano*, 790 F.3d 389, 399 (2d Cir. 2015), to require a defendant to "argue[] that his prosecution in the contested district will result in a hardship to him, prejudice him, or undermine the fairness of his trial." The government is wrong for at least three reasons.

First, this analysis in *Rutigliano* relates to the Second Circuit's "substantial contacts" test for venue, which is separate from the "reasonable foreseeability" requirement of *Svoboda*. In one section of *Rutigliano*, the court considered whether the conduct could "reasonably be foreseen" by the defendant. 790 F.3d at 396-398. The court then detailed the evidence supporting that conclusion, all without addressing prejudice. *Ibid.*

Then, in a separate section, the court of appeals identified an additional, alternative argument: "Defendants argue that, even if the continuing offenses for which they were convicted occurred in the Southern District of New York, venue is nevertheless improper because their conduct did not have 'substantial contacts' with the Southern District." *Rutigliano*, 790 F.3d at 399. It was to this argument that the court required a contention of prejudice. *Ibid.* Indeed, if this conclusion were dispositive of the reasonable foreseeability analysis, the pages of discussion on that earlier point would have been meaningless.

Nor would it make sense to require a showing of prejudice in the face of a properly preserved argument that the government prosecuted a defendant in an improper venue. The government points to no law of this Court (or any other) establishing such a re-

quirement. And this would create a test that the government would always win, as improper venue is an issue apart from the fairness of the trial. Ultimately, it is the "specific venue provision[]" that "giv[es] jurisdiction to prosecute." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). See also BIO 13-14. When preserved, a venue error must be corrected.

Second, and in any event, this issue is a question subsequent to the issues presented by the petition—whether *any* foreseeability analysis is required in the context of conspiracy. The court here held that no such analysis is required. That conclusion is wrong—and it is important for this Court to address it.

Third, petitioner *did* argue prejudice below. Accordingly, even if a defendant must assert prejudice to make a *Svoboda* challenge, petitioner has done so.

Before the trial court, petitioner asserted that trial in California was proper "so that he may be near his family and supporters for trial and because it will be easier to prepare a defense if he is closer to home and where the arrest was made." D. Ct. Dkt. No. 18, at 3. Having recognized that petitioner made this argument (see BIO 17 n.3), the government fails to identify what more it believes petitioner should have done to preserve his argument.

C. Criminal venue is limited to those judicial districts reasonably foreseeable to the defendant.

The bulk of the government's opposition focuses on the merits. See BIO 7-14. But, given a broadly recognized circuit conflict on an issue of substantial practical importance, this Court's review is warranted regardless. The government itself recognizes this point with some frequency. In *Lamar, Archer &*

Cofrin, LLP v. *Appling*, No. 16-1215, for example, the government urged the Court to grant certiorari, notwithstanding the government's contention that the lower court's decision was correct. See U.S. Cert. Amicus Br. 8. In any event, petitioner is very likely to prevail.

1. The Constitution's Venue and Vicinage Clauses require a connection between the *defendant*'s own conduct and the venue. In the context of an alleged criminal conspiracy, this limits venue to only those places where a defendant acts (or directs his actions) and where a defendant may reasonably foresee his co-conspirators acting.

First, the constitutional text requires a connection between the "accused" and the venue where the crime is "committed." See Pet. 26. That is, the Sixth Amendment's Vicinage Clause 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). For this reason, the Court has understood the Constitution to allow jurisdiction wherever the "*offender* operates." *Johnson*, 323 U.S. at 275 (emphasis added). In addressing the constitutional language (BIO 8), the government disregards the text incompatible with its position.

The government replies that our rule—which requires a meaningful connection between the defendant herself and the venue of prosecution—"simply begs the question," asserting that the action of a co-conspirator may qualify. BIO 8-9. Not so. It is not plausible for the government to contend that an "accused" has "committed" a crime in a particular venue when the act in question was committed by someone else, and when the defendant could not reasonably

foresee that the third party would commit a crime there. That is why attribution of a third party's acts to a defendant requires, in all respects, some measure of foreseeability. See *United States* v. *Pinkerton*, 328 U.S. 640, 647-648 (1946). This supplies the "'sense of venue having been freely chosen' by the defendant." *Davis*, 689 F.3d at 186.

Contrary to the government's suggestion (BIO 9), *United States* v. *Hyde*, 225 U.S. 347 (1912), does not advance its position. There, the Court specifically reserved the question of "the extent of the agency between conspirators" that is required to establish venue. *Id.* at 359. *That* question—unaddressed by *Hyde*—is at issue here. We argued as much earlier (Pet. 27-28), and the government does not respond.[2]

Second, Chief Justice Marshall's decision in the *Burr* case unmistakably adopts the argument that

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[2] *State* v. *McElroy*, 46 A.2d 397 (R.I. 1946), is irrelevant. There, three individuals conspired to burn down a cottage located in Washington county, Rhode Island. *Id.* at 398. McElroy discussed the plan with his co-conspirator while in a taproom in Providence county. *Id.* at 401. McElroy later drove his co-conspirator to the cottage, waited for him to set the fire, and then drove him away from the scene of the crime. *Ibid.*

McElroy maintained that the conspiracy charge was improperly tried in Washington county; in his view, the state was obligated to prosecute him in Providence county because the conspiracy began there. *McElroy*, 46 A.2d at 399. The Rhode Island Supreme Court disagreed. *Id.* at 400. The question of reasonable foreseeability was not at issue. Because the object of the conspiracy was to burn down a cottage in Washington county, it was foreseeable to McElroy that overt acts would occur there. Additionally, McElroy himself committed overt acts in that county: He scouted the cottage, drove the arsonist to it, and then drove the escape car. *Id.* at 401. Nothing in *McElroy* considers—much less rejects—our argument.

we advance. While the government attempts to distinguish the context (BIO 10-11), it does not respond to Chief Justice Marshall's actual legal analysis.

There, it was "contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island," and he was in fact "at a great distance, and in a different state," Burr was nonetheless "legally present" because of his participation in the conspiracy. *United States* v. *Burr*, 25 F. Cas. 55, 170 (C.C.D. Va. 1807). According to Chief Justice Marshall, it was therefore "necessary to inquire whether in this case the doctrine of constructive presence can apply." *Ibid.* The argument by the prosecutor—no different than that by the government here—was "that a person may be concerned in a treasonable conspiracy, and yet be legally as well as actually absent while some one act of the treason is perpetrated." *Ibid.*

Through an extended analogy (see Pet. 12-13), Chief Justice Marshall rejected this conclusion based on the Constitution's Venue and Vicinage Clauses. *Burr*, 25 F. Cas. at 170. He envisioned a nationwide conspiracy to cause a rebellion. *Ibid.* Even the "chief" of that rebellion could not be viewed as "legally present at every overt act committed in the course of that rebellion." *Ibid.* If it were otherwise, "all would ask to what purpose are those provisions in the constitution, which direct the place of trial." *Ibid.*

Thus, in addressing the scope of evidence that would support the charge as indicted, Chief Justice Marshall squarely addressed the reach of criminal venue. This understanding of the Constitution's venue provisions is incompatible with the prosecution here.

2. Likewise, Section 3237(a) limits venue to those places reasonably foreseeable to a criminal defendant. The government cannot deny the governing principle: "The *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Cabrales*, 524 U.S. 1, 6-7 (1998).

It is undisputed that petitioner himself did not act in or direct conduct to the Eastern District of Pennsylvania. Thus, the government's venue argument must rest on imputing a third party's venue-establishing conduct to petitioner. *Pinkerton* identifies the base requirement for imputation in the criminal context—reasonable foreseeability. See 328 U.S. at 647-648.

The government acknowledges, as it must, that imputation of *substantive* liability for a co-conspirator's overt acts requires reasonable foreseeability. BIO 13-14. The government simply asserts that the same standard does not arise when the government seeks to impute overt acts from one individual to another for purposes of establishing the venue for a conspiracy charge. *Ibid*. The government has no principled basis to make this distinction. As the government itself acknowledges, venue is an inquiry separate from substantive liability. BIO 13-14. To reasonably assert that the "*locus delicti*" for petitioner is in Pennsylvania—that is, that *petitioner* committed a crime in Pennsylvania—venue-specific imputation is required. Per *Pinkerton*, reasonable foreseeability is the proper standard.

This interpretation also avoids rendering Section 3237(a) unconstitutional (see Pet. 31-32), and it ensures that Section 3237(a) continues to do all the

work that Congress intended when enacting it (see Pet. 30-31).

CONCLUSION

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

Respectfully submitted.

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