No. 18-1052

In the Supreme Court of the United States

ZENAIDO RENTERIA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Venue Clause, U.S. Const. Art. III, § 2, Cl. 3, and the Vicinage Clause, U.S. Const. Amend. VI, limit the availability of a federal drug-conspiracy prosecution in a district in which an act in furtherance of the conspiracy occurred to only those co-conspirators who reasonably foresaw that act at that location.

2. Whether the statutory provision governing venue in conspiracy prosecutions, 18 U.S.C. 3237(a), limits the availability of a federal drug-conspiracy prosecution in a district in which an act in furtherance of the conspiracy occurred to only those co-conspirators who reasonably foresaw that act at that location.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 903 F.3d 326. The order of the district court (Pet. App. 21a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy to distribute at least 500 grams of methamphetamine and at least one kilogram of heroin, in violation of 21 U.S.C.

846. Pet. App. 1a. The district court sentenced petitioner to 153 months of imprisonment, to be followed by five years of supervised release. *Id.* at 15a. The court of appeals affirmed. *Id.* at 1a-13a.

1. In May 2015, Department of Homeland Security Special Agent Jeffrey Kuc participated in an undercover investigation in which he posed as a methamphetamine and heroin trafficker based in the Eastern District of Pennsylvania. Pet. App. 2a. Agent Kuc exchanged a series of phone calls with two men (known to him as Cejas and Juan) in which Kuc agreed to pay $30,000 to Cejas and Juan in exchange for their shipment of two kilograms of methamphetamine to a mailbox in Springfield, Pennsylvania. *Id.* at 2a, 10a-11a. They agreed to divide Kuc's monetary payment into two parts: Kuc would first deposit $2000 into a bank account provided by Cejas and, shortly thereafter, would pay the remaining $28,000 in cash in California, where Kuc would travel to purchase heroin and more methamphetamine. *Id.* at 2a.

On May 29, 2015, Agent Kuc received the methamphetamine shipment. Pet. App. 2a. The following day, he deposited $2000 in the agreed bank account in Philadelphia. *Ibid.*

On June 3, 2015, Agent Kuc traveled to Los Angeles, ostensibly to complete payment on the initial $30,000 drug transaction and to purchase from Cejas and Juan additional quantities of methamphetamine and heroin. Pet. App. 2a; C.A. App. 98. Shortly after his arrival, Kuc received a phone call from petitioner, who identified himself as Cejas's associate. Pet. App. 2a; C.A. App. 98-99, 235-238. Over the course of that evening and the next morning, petitioner and Kuc exchanged a series of phone calls to arrange a meeting to facilitate

Kuc's payment to complete the initial drug transaction and Kuc's purchase of additional drugs provided by petitioner. Pet. App. 2a. During those calls, petitioner demonstrated that he was aware that Kuc owed Cejas money for the earlier drug shipment, C.A. App. 99, 235, and that Kuc needed to meet early enough on June 4 to catch his flight departing from Los Angeles later that day, *id.* at 104, 106, 261-262, 272-273. Petitioner told Kuc that he was rushing to prepare for the drug transaction because "they just told me [about] this [on June 3]." Pet. App. 2a-3a.

Petitioner and Agent Kuc met at a fast food restaurant in Huntington Beach, California. Pet. App. 3a. Petitioner showed Kuc the drugs; Kuc gave officers a prearranged signal; and petitioner was arrested. *Ibid.*

2. A federal grand jury in the Eastern District of Pennsylvania indicted petitioner on one count of conspiracy to distribute at least 500 grams of methamphetamine and at least one kilogram of heroin, in violation of 21 U.S.C. 846, and one count of possession with intent to distribute at least 500 grams of methamphetamine and at least one kilogram of heroin, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A) (2012), and 18 U.S.C. 2. Indictment 1-8. Before trial, petitioner moved to transfer the case to California, but he failed to identify "the proper law or relevant facts" to support that motion, which the district court denied. Pet. App. 3a & n.2.

Petitioner then moved to dismiss the indictment for lack of venue. C.A. App. 31-45 (motion and brief). Petitioner argued that the drug-conspiracy count should be dismissed because he could not have foreseen his "prosecution in [the Eastern District of] Pennsylvania for conspiracy." *Id.* at 33; see *id.* at 37-38. Petitioner

separately argued that the drug-possession count should be dismissed because his "possession and delivery occurred entirely in California" and, unlike conspiracy, drug possession is "not a 'continuing offense.'" *Id.* at 33; see *id.* at 39-44. The government agreed that the possession count should be dismissed, but maintained that venue was proper as to the conspiracy count. *Id.* at 46, 49-54.

The district court dismissed the possession count but declined to dismiss the conspiracy count. Pet. App. 21a-24a. As relevant here, the court observed that, under the venue statute (18 U.S.C. 3237(a)) governing "[c]ontinuing offenses, such as conspiracy," and the binding jurisprudence of its court of appeals, venue is proper "'in any district in which such offense was begun, continued, or completed,'" including "'wherever a co-conspirator has committed an act in furtherance of the conspiracy.'" *Id.* at 22a-23a n.1 (citations omitted). The court accordingly rejected petitioner's contention that venue is proper only in those judicial districts in which a conspiracy defendant "know[s] or reasonably foresee[s]" that "his co-conspirators have committed or would commit overt acts in furtherance of the conspiracy." *Id.* at 23a n.1.

At trial, the jury was instructed that venue "can be established in this district if a co-conspirator has committed an act in furtherance of the conspiracy [in the district] even if the defendant did not know or did not reasonably foresee that the act occurred or would occur in this district." Pet. App. 4a (quoting C.A. App. 155). The jury found petitioner guilty on the drug-conspiracy count. *Ibid.*; see C.A. App. 158.

3. The court of appeals affirmed. Pet. App. 1a-13a. As relevant here, the court determined that venue was

proper in the Eastern District of Pennsylvania. *Id.* at 5a-11a.

The court of appeals observed that the text of the Constitution's venue provisions requires that a criminal defendant be prosecuted in a State and district in which the crime was "committed," Pet. App. 5a (citations omitted), and that the venue statute for "continuing offenses, including conspiracy," similarly provides for venue "'in any district in which such offense was begun, continued, or completed,'" *id.* at 5a-6a (quoting 18 U.S.C. 3237(a)). Under those provisions, the court explained, "venue can be established wherever a co-conspirator has committed an act in furtherance of the conspiracy." *Id.* at 6a (citation omitted).

The court of appeals further explained that "neither the text of the Constitution nor of § 3237(a) requires" "a reasonable foreseeability test." Pet. App. 7a. The court observed that "the Constitution and § 3237(a) focus solely on where the offense occurred and do not even reference foreseeability." *Ibid.* And the court found no reason to "imply" such a requirement, because venue is a concept "'more akin to jurisdiction than to the substantive elements of the crime'" and "'mens rea requirements typically do not extend to the jurisdictional elements of a crime.'" *Id.* at 8a (citations omitted). The court also rejected petitioner's contention that a reasonable-foreseeability test for venue was appropriate to avoid the purported "unfairness" and "hardship" of trying a case in a remote venue, because, when a defendant is tried in a district in which the crime was actually committed, unfairness normally is "not a concern" and, in any event, the defendant can address such concerns by filing a motion under Rule 21 of the Federal Rules of Criminal Procedure, which provides for transfers based

on prejudice or inconvenience. *Id.* at 9a-10a (citations omitted).

The court of appeals noted that the Second Circuit had stated a reasonable-foreseeability test, but the court observed that the Second Circuit's decisions had failed to "explain[] why reasonable foreseeability is required" and have acknowledged their own failure to offer any "'extensive analysis'" in support. Pet. App. 8a-9a (citation omitted). The court accordingly agreed with the other courts of appeals that have declined to conclude that an otherwise-proper venue for a conspiracy trial is implicitly precluded unless a defendant reasonably foresees acts in furtherance of the conspiracy there. *Id.* at 7a & nn.15-16. And because petitioner's co-conspirators "sent methamphetamine to [Agent] Kuc" and "directed phone calls to him" in the Eastern District of Pennsylvania, the court upheld the venue in this case. *Id.* at 10a-11a.

ARGUMENT

Petitioner contends (Pet. 22-32) that the Constitution's venue provisions and 18 U.S.C. 3237(a) impose a "reasonable foreseeability" limitation on the general permissibility of a drug-conspiracy prosecution in a district where an overt act in furtherance of the conspiracy occurred. The court of appeals correctly rejected that argument. And although the Second Circuit has long indicated that a reasonable-foreseeability requirement may exist under certain circumstances, petitioner cites—and we have identified—no decision in which it has applied those statements to set aside venue in any criminal case. This Court has accordingly denied review in prior cases on the issue presented here, notwithstanding the narrow (and longstanding) disagreement between the Second Circuit and other courts of appeals

suggested by such statements. See *Gonzalez* v. *United States*, 568 U.S. 1214 (2013) (No. 12-6578); *Ebersole* v. *United States*, 546 U.S. 1139 (2006) (No. 05-6945). No reason exists for a different result in this case. The petition for a writ of certiorari should be denied.

1. The Constitution and the venue statute governing conspiracy offenses, 18 U.S.C. 3237(a), both provide that venue is proper in any district in which the underlying crime is committed. Because the crime of conspiracy is a continuing offense committed through the overt acts of any co-conspirator in furtherance of the conspiracy, venue is proper in any district in which those acts occur. Petitioner's contrary contentions (Pet. 19-32) lack merit.

a. Article III's Venue Clause provides that the "Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, Cl. 3. The Sixth Amendment's Vicinage Clause similarly affords defendants the right to "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. The Constitution thus "twice safeguards the defendant's venue right," *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998), and in each constitutional provision the Founders specified that venue is proper in a district in which the crime was "committed." See also Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed.").

Consistent with that text, this Court's decisions explain that venue is properly determined "from the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales*, 524 U.S. at 7 (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)). When the crime in question is conspiracy—a continuing

offense by multiple offenders—the crime may extend beyond a single district. See *Hyde* v. *United States*, 225 U.S. 347, 359-367 (1912); Pet. App. 5a-6a. This Court has therefore "long held that venue [in a conspiracy prosecution] is proper in any district in which an overt act in furtherance of the conspiracy was committed." *Whitfield* v. *United States*, 543 U.S. 209, 218 (2005); see *Hyde*, 225 U.S. at 367 (holding that "the overt acts [themselves] give jurisdiction for trial," regardless "where the conspiracy is formed").

As the court of appeals recognized, neither the Venue Clause nor the Vicinage Clause makes any reference to what a defendant anticipates or foresees. Pet. App. 7a-8a. Each provision's text instead focuses directly on the location or locations where the offense in question actually occurred. *Ibid.* That focus reflects that "[t]he constitutional requirement is as to the locality of the offense" and not other factors, such as "the personal presence of the offender." *Travis* v. *United States*, 364 U.S. 631, 634 (1961) (quoting *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76 (1908)).

b. Notwithstanding the absence of any governing text imposing a reasonable-foreseeability requirement, petitioner contends (Pet. 22-28) that the history of the Framing and two decisions authored by Chief Justice Marshall suggest that the Constitution implicitly includes such a requirement. That contention lacks merit.

Petitioner's contention (Pet. 25-26; see Pet. 5-10) that the Framers wished to prohibit prosecutions in venues "unconnected" from the defendant's conduct, Pet. 26, simply begs the question presented. The rule that a conspirator may be prosecuted in any district where an act in furtherance of the conspiracy occurred is consistent with the principle petitioner identifies. "At

common law the venue in conspiracy could be laid in any county in which it could be proven that an overt act was done by any one of the conspirators in furtherance of their common design." *Hyde*, 225 U.S. at 365 (citation omitted); see, *e.g.*, *State* v. *McElroy*, 46 A.2d 397, 399-400 (R.I. 1946) (citing founding-era English decisions and early State decisions; concluding that "for well over one hundred years it has been held by ample and practically uniform authority that at common law a conspiracy indictment * * * could properly be brought in any county where an overt act was committed in furtherance of the conspiracy"). Petitioner identifies no historical evidence that the Framers intended the Constitution's venue provisions to alter the traditional understanding of venue in conspiracy cases.

The two decisions on which petitioner relies (Pet. 22-24) are inapposite. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.), this Court determined only that venue will not lie in a district where "no part of th[e] crime was committed." *Id.* at 135. *Bollman* does not suggest that a district in which a conspiracy offense *is* committed would nevertheless be an improper venue for prosecution if the defendant would not have reasonably foreseen that his co-conspirators would commit part of the offense there. And *United States* v. *Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693), a reporter-written record of multiple events at Aaron Burr's treason trial, addressed a failure of proof of the facts alleged in a particular indictment, and established no rule about venue in conspiracy cases like this one.

In *Burr*, the government charged Aaron Burr with two counts of treason arising from his alleged presence at a gathering on Blennerhassett's Island in Virginia during which he and the other participants allegedly

"levied war" against the United States and thereafter traveled south to seize New Orleans by force. 25 F. Cas. at 169; see *id.* at 87-89 (reproducing indictment). After the trial testimony showed that Burr actually was "not present" in Virginia for the charged conduct, *id.* at 159; see *id.* at 169-170, Burr moved mid-trial to suppress upcoming testimony about his purported actions taken either outside of Virginia or subsequent to the alleged overt act of treason, arguing that such additional testimony from "135 witnesses" could "have no bearing on the case." *Id.* at 113; see *id.* at 115 (renewing "object[ion] to the evidence" in the absence of "testimony in support of what [the prosecution alleged as] the overt acts"); *id.* at 115-159 (reproducing arguments on the "motion to arrest the evidence"). Chief Justice Marshall, presiding at the circuit court, issued an opinion (*id.* at 159-180) granting Burr's motion and suppressing as "irrelevant" testimony about Burr's "conduct or declarations elsewhere, and subsequent to the transaction on Blennerhassett's Island," until after the government had presented requisite "proof of the overt act [of treason in Virginia] by two witnesses." *Id.* at 180.

In his trial-court opinion, the Chief Justice reasoned that the particular allegations in the indictment, as written, allowed for a treason conviction only upon proof that Burr was "present at the [gathering]" or was at least "near enough to cooperate" and "assist" his confederates. *Burr*, 25 Fed. Cas. at 172; see *id.* at 172-173, 177. In finding that the indictment did not permit the government to advance a different theory of treason based on other non-alleged acts involving a remotely located defendant, the trial court did not lay down any general constitutional rule about venue. See *id.* at 172

("The whole treason laid in this indictment is the levying of war in [Virginia]; and the whole question to which the inquiry of the court is now directed is whether the prisoner was legally present at that fact. I say this is the whole question; because the prisoner can only be convicted on the overt act laid in the indictment."). Its evidentiary decision concerned not whether the Constitution's venue-related provisions contain an atextual reasonable-foreseeability requirement for conspiracy cases, but rather whether the indictment in Burr's case allowed the government to admit evidence about Burr's other conduct on the "fiction that [he] was legally present" at the events alleged. *Id.* at 170. The Chief Justice thus made clear that his opinion did not address other types of non-alleged acts potentially constituting "conspiracy to levy war" and instead addressed only the particular charge of treason in the case, which he understood to require proof that the accused himself participate in the alleged overt act of levying war. *Id.* at 177. In short, nothing in the decision resolved a question of venue, as confirmed by the fact that, after the decision, Burr's prosecution was not dismissed for improper venue but instead proceeded to a jury verdict on the merits that found Burr not guilty. *Id.* at 180-181.

In any event, as Chief Justice Marshall later explained, "[i]t would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of [a provision] expressly provide, shall be exempted from its operation." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). The Constitution's venue provisions expressly encompass all offenses "committed" within a district, with no "reasonable foreseeability" exception.

2. Petitioner relatedly contends (Pet. 28-32) that the venue statute for continuing offenses, 18 U.S.C. 3237(a), itself imposes such a foreseeability test. That is likewise incorrect.

Just as the Constitution permits venue in any district in which an act in furtherance of a conspiracy was committed, Section 3237(a) provides that venue in a conspiracy prosecution will lie in any district in which the "offense was begun, continued, or completed." 18 U.S.C. 3237(a). Like the Venue and Vicinage Clauses, the text of this provision contains no foreseeability requirement. See Pet. App. 7a; *United States* v. *Gonzalez*, 683 F.3d 1221, 1226 (9th Cir. 2012) ("Simply put, section 3237(a) does not require foreseeability to establish venue for a continuous offense."), cert. denied, 568 U.S. 1214 (2013). Cf. *United States* v. *Johnson*, 510 F.3d 521, 527 (4th Cir. 2007) (declining "the invitation to judicially engraft a mens rea requirement onto a venue provision [15 U.S.C. 78aa (2000)] that clearly does not have one").

Petitioner contends (Pet. 30-31) that Section 3237(a)'s legislative history reflects that Congress intended that statute to require foreseeability, despite the absence of such a requirement in any statutory text. Petitioner reasons (*ibid.*) that Section 3237(a) was enacted in response to this Court's decision in *United States* v. *Johnson*, 323 U.S. 273 (1944), which had held that the lack of a "specific venue provision[]" in the Federal Denture Act of 1942 indicated that Congress did not exercise its full constitutional authority to permit "trial in any district through which [offending] goods were shipped." *Id.* at 276. Petitioner then asserts (Pet. 31) that Congress must have intended to create an implicit foreseeability requirement in Section 3237(a).

The conclusion petitioner asserts does not follow from his premise, and it is incorrect. Nothing in *Johnson* discusses foreseeability. And as explained by the congressional reports that petitioner cites, Section 3237(a) was enacted to "remove[] all doubt as to the venue of continuing offenses and make[] unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts." H.R. Rep. No. 152, 79th Cong., 2d Sess., Pt. 2, at A146 (1946); accord H.R. Rep. No. 152, 79th Cong., 1st Sess. A151 (1945).[1] In other words, Section 3237(a) merely clarified that continuing offenses presumptively may be prosecuted in any district in which any part of the offense has occurred.

Petitioner suggests (Pet. 29-30) that Section 3237(a) must incorporate a reasonable-foreseeability requirement because under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), a defendant is substantively liable for a co-conspirator's separate crimes in furtherance of a conspiracy only when those separate crimes are reasonably foreseeable. See *id.* at 647-648. That argument erroneously seeks to apply principles governing *substantive* liability—*i.e.*, the set of crimes for which a defendant may be punished based on his participation in the conspiracy—to the separate question of what suffices to establish venue for the conspiracy offense itself. As the court of appeals recognized, venue is "more akin to jurisdiction than anything else," and "co-conspirator liability [is a] significantly different concept[]" that does

[1] Petitioner's citations (Pet. 30-31) to "H.R. Rep. 2200, at A146" and "H.R. Rep. No. 31,900, at A161" presumably refer to the reports above, which accompanied H.R. 2200, 79th Cong., a bill to revise Title 18 of the United States Code.

not implicate "the same law." Pet. App. 10a n.33 (citation omitted); see also *Gonzalez*, 683 F.3d at 1226 ("[V]enue is similar in nature to a jurisdictional element, and typically lacks any sort of explicit knowledge or foreseeability prerequisite.") (quoting *Johnson*, 510 F.3d at 527) (brackets in original); *Johnson*, 510 F.3d at 527 ("We are especially reluctant to imply a foreseeability requirement in light of the fact that it 'is well settled that mens rea requirements typically do not extend to the jurisdictional elements of a crime.'") (quoting *United States* v. *Cooper*, 482 F.3d 658, 664 (4th Cir. 2007)).

In any event, even under *Pinkerton*, all that is required for liability to attach is that the *acts* of a co-conspirator furthering the conspiracy be reasonably foreseeable, see Pet. 30, not that the particular *locations* at which those acts occur be foreseeable. Petitioner has not contended—and could not properly contend—that, for example, he could not reasonably foresee that his co-conspirators had contacted Agent Kuc and had delivered to Kuc the very drugs for which petitioner met Kuc to receive payment.

3. a. Contrary to petitioner's submission (Pet. 17-18), the court of appeals' venue decision does not implicate a division of authority warranting this Court's review. The Third Circuit in this case, like the Ninth Circuit, determined that neither the Constitution nor Section 3237(a) contains an implicit foreseeability requirement. Pet. App. 7a & n.15; *Gonzalez*, 683 F.3d at 1226-1227. The Fourth Circuit has made the same determination with respect to a similar venue provision. *Johnson*, 510 F.3d at 526-529 (construing 15 U.S.C. 78aa (2000), now 15 U.S.C. 78aa(a)). Other courts of appeals have likewise held—with no mention of foreseeability—

that a co-conspirator's act in furtherance of a conspiracy is sufficient to establish venue, even if the defendant had no knowledge of that act.[2]

The Second Circuit, by contrast, has indicated that it views foreseeability as a component of venue in certain cases. In *United States* v. *Svoboda*, 347 F.3d 471 (2d Cir. 2003), cert. denied, 541 U.S. 1044 (2004), the court stated 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." *Id.* at 483. *Svoboda* did not squarely hold that venue would be improper elsewhere, but instead upheld the venue in that case as proper. See *id.* at 484. And although the Second Circuit has repeated *Svoboda's* formulation in multiple decisions, those decisions, like *Svoboda*, do not actually find venue improper on the ground that it was not reasonably foreseeable that an act furthering the offense would occur in the district of prosecution. See, *e.g.*, *United States* v. *Kirk Tang Yuk*, 885 F.3d 57, 69, 71-76 (2d Cir.), cert. denied, 139 S. Ct. 342 (2018); *United States* v. *Lange*, 834 F.3d 58, 69, 71 (2d Cir. 2016), cert. denied, 137 S. Ct. 677, and 137 S. Ct. 685 (2017); *United States* v. *Miller*, 808 F.3d 607, 615, 622-623 (2d Cir. 2015); *United States* v. *Davis*, 689 F.3d 179, 186-190

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[2] See, *e.g.*, *United States* v. *Hull*, 419 F.3d 762, 768-769 (8th Cir. 2005) (finding venue proper even if defendant was not "even aware" of drug sales in district of prosecution because "an overt act in furtherance of conspiracy took place" there), cert. denied, 547 U.S. 1140 (2006); *United States* v. *Schlei*, 122 F.3d 944, 975 (11th Cir. 1997) (finding an overt act in furtherance of conspiracy "sufficient to confer jurisdiction" on the venue of prosecution even though the defendant was "unaware" of that act), cert. denied, 523 U.S. 1077 (1998).

(2d Cir. 2012), cert. denied, 568 U.S. 1183 (2013); *United States* v. *Royer*, 549 F.3d 886, 894-895 (2d Cir. 2008), cert. denied, 558 U.S. 934, and 558 U.S. 935 (2009); *United States* v. *Rommy*, 506 F.3d 108, 123-125 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008); *United States* v. *Geibel*, 369 F.3d 682, 695-698 (2d Cir.) (vacating certain counts of conviction on different venue grounds), cert. denied, 543 U.S. 999 (2004), and 544 U.S. 979 (2005). Petitioner himself identifies no decision in which the Second Circuit has found venue improper based on a lack of foreseeability, see Pet. 17 (citing *Svoboda* and *Rommy*), and we are aware of no such decision. As such, it is far from clear that a future Second Circuit panel would adhere to that court's prior statements about foreseeability in a case in which it turned out to be outcome-determinative.

That is particularly so because the Second Circuit has recognized that it articulated a foreseeability inquiry "without extensive analysis," *Kirk Tang Yuk*, 885 F.3d at 69 n.2, and has significantly limited its application. The test appears to have derived from a "'substantial contacts'" inquiry, *Davis*, 689 F.3d at 186 (stating that "there must be some 'sense of [venue] having been freely chosen' by the defendant") (quoting *United States* v. *Reed*, 773 F.2d 477, 481 (2d Cir. 1985)) (brackets in original), but the court has "alternately applied and ignored" its "substantial contacts" test, *United States* v. *Coplan*, 703 F.3d 46, 80 (2d Cir. 2012), cert. denied, 571 U.S. 819 (2013). And more recently, it has clarified that the test applies "only if 'the defendant argues that his prosecution in the contested district will result in a hardship to him, prejudice him, or undermine the fairness of his trial.'" *United States* v. *Rutigliano*,

790 F.3d 389, 399 (2d Cir. 2015) (quoting *Coplan*, 703 F.3d at 80).

Petitioner does not suggest that any prejudice or unfairness arose from his prosecution in the Eastern District of Pennsylvania. Any such issues might have been the subject of a change-of-venue motion, see Fed. R. Crim. P. 21(a) and (b), but as the court of appeals explained, petitioner did not develop a proper record in the district court to support one. See Pet. App. 3a n.2 (stating that petitioner "did not include the proper law or relevant facts" to support his motion to change venue and therefore did not appeal its denial).[3] It is therefore unclear whether, on this record, a Second Circuit panel would apply the foreseeability requirement discussed in its prior decisions. See, *e.g.*, *Rutigliano*, 790 F.3d at 400 (declining to address substantial contacts because defendants could not establish burden, prejudice, or unfairness); *United States* v. *Naranjo*, 14 F.3d 145, 147-148 (2d Cir.) (similar), cert. denied, 511 U.S. 1095 (1994). In short, petitioner has not shown that this case implicates a conflict of authority that might warrant this Court's review.

b. In any event, this case would not be a suitable vehicle for considering the questions presented, because a decision by this Court in petitioner's favor on either question would not result in a venue-based dismissal. Even if a "reasonable foreseeability" requirement existed, venue was proper in this case. Petitioner knew that Agent Kuc was meeting him to complete the earlier

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[3] Petitioner indicated only that he wished to be "near his family and supporters for trial" and that "it [would] be easier to prepare a defense if he [were] closer to home and where the arrest was made." Mot. to Transfer 3. Petitioner later attempted to buttress this argument on appeal. See Pet. C.A. Reply Br. 4 n.2.

drug transaction by paying the balance for those drugs and that Agent Kuc was returning by plane with the additional drugs that petitioner intended to sell to him. See p. 3, *supra*. As the government argued below, petitioner therefore reasonably should have known that his drug conspiracy involved drugs sold outside of the Central District of California. See C.A. App. 52-53; Gov't C.A. Br. 29. A defendant under these circumstances can claim no unfair surprise at being subjected to trial in another district. See, *e.g.*, *United States* v. *Hull*, 419 F.3d 762, 768 (8th Cir. 2005) (upholding venue where defendant "assumed the risk" that co-conspirator would act in furtherance of the conspiracy in district of prosecution), cert. denied, 547 U.S. 1140 (2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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