No.

In the Supreme Court of the United States

KIRK TANG YUK, AKA SEALED DEFENDANT 3,
PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor can manufacture venue in a particular district solely by bringing a cooperating witness to a favored district and having the witness identify his location during a government-arranged telephone call to his alleged co-conspirator.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Kirk Tang Yuk was the appellant in the court of appeals. Gary Thomas and Felix Parrilla were also appellants in the court of appeals but are not petitioners.

The United States of America was the appellee in the court of appeals.

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Petitioner Kirk Tang Yuk respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-57a) is reported at 885 F.3d 57. The opinion of the district court (App., *infra*, 69a-113a) is unreported and available at No. 13-cr-360, 2014 WL 7496319 (S.D.N.Y. Dec. 23, 2014).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2018. The petitioner's timely request for rehearing en banc was denied on May 25, 2018 (App., *infra*,

114a). This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, section 2 of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. Art. III, § 2, cl. 3.

The Sixth Amendment to the Constitution provides:

> 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, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

Petitioner is a 39-year-old man who grew up in St. Croix and lived in Florida until the time of his arrest. Petitioner has no ties to New York and had, in fact, never set foot in the state until he was brought to New

York to stand trial. Nevertheless, when federal prosecutors chose to indict petitioner for his alleged role in a narcotics conspiracy that operated entirely in St. Croix and Florida, they did so in the Southern District of New York.

The government's creation of venue over petitioner Tang Yuk in the Southern District of New York was not tied to any act in furtherance of the conspiracy charged in the Indictment. Rather, the court of appeals affirmed a finding of venue in this case based solely on a contact to the Southern District of New York that prosecutors within that district manufactured after arresting one of Tang Yuk's alleged co-conspirators in Queens, New York. Specifically, after his arrest, prosecutors from the Southern District of New York brought the cooperating witness into Manhattan, and then instructed him to identify his location in a final "throw away" consensual recording with Tang Yuk.

This Court forewarned in *Hyde* v. *United States* that "to extend the jurisdiction of conspiracy by overt acts may give to the government a power which may be abused." 225 U.S. 347, 363 (1912) (discussing venue). The decision of the court of appeals in this case clearly evidences a prosecutor's abuse of that power. As Judge Chin pointed out in his dissenting opinion, "[o]n the Government's theory"—and, now, under the Second Circuit's case law—"[petitioner] would have been subject to venue in South Dakota" had the government decided to make it so. App., *infra*, 68a.

Petitioner Tang Yuk petitions this Court to remedy this Constitutional violation and also to clarify an emerging disagreement among the circuits. While some cir-

cuits have tried to restrain the abuse of power by limiting the government's authority to manufacture venue, others have set no bounds and effectively permit the government to choose its preferred venue for prosecution. This Court should grant review to establish the scope of the government's power to establish venue.

A. Factual Background

Petitioner's alleged involvement in the charged conspiracy occurred in Florida, and it was clear that the overall conspiracy was limited to St. Croix and Florida. The prosecutors argued to the jury that, in the summer of 2012, Gray Thomas, Deryck Jackson, and Felix Parrilla obtained a total of 80 kilograms of cocaine in St. Croix and brought it to Miami. There was no evidence that petitioner had any role in transporting this shipment to Florida. The jury heard that Thomas, Jackson, and Parrilla divided the shipment, with Jackson receiving 27 kilograms on consignment from Thomas and Parrilla, and Jackson then giving two of his 27 kilograms to petitioner.

According to his testimony, Jackson left Miami for Queens, New York, on September 20th, with his 25 kilograms. Importantly, Jackson admitted that he never told Thomas, Parrilla, or petitioner about his trip. Tang Yuk C.A. App. 351. While travelling to Queens, Jackson passed over the Verrazano-Narrows Bridge. On the evening of September 22, 2012, the government arrested Jackson as he delivered the 25 kilograms to an associate located in a hotel room in Queens.

The evidence made clear that Jackson never shared his plans to go to New York with petitioner. Jackson

testified at trial that he affirmatively kept from petitioner any information about his sale of additional cocaine in New York. Tang Yuk C.A. App. 470, 506. Jackson stated that he "didn't tell [petitioner] where [he] w[as] going, that [he] w[as] going to New York." *Id.* at 506. The intercepted recordings further confirmed petitioner's lack of knowledge about Jackson's whereabouts. For example, in a call on September 20, 2012, petitioner asked Jackson if he had dropped his wife Lizette off at work, indicating that he believed that Jackson was at home in Florida. Gov't C.A. Supp. App. 214-219. Simply put, there was nothing to suggest that petitioner knew, or should have known, that Jackson intended to travel to New York City to sell cocaine.

Even after Jackson began making consensually recorded calls to petitioner in order to enhance his value to the prosecutors, he continued to keep his whereabouts hidden. In a September 27, 2012 consensual call, Jackson refused to tell petitioner where he was when asked. Gov't C.A. Supp. App. 159-161.

It was only in his final consensually recorded call—made for the purpose of manufacturing venue—that Jackson revealed to petitioner that he was in "New York." During the October 4, 2012 call, Jackson informed petitioner that he was in New York "wrap[ping] up." Petitioner responded by simply saying "[d]o your thing, man. It ain't nothing." Importantly, Jackson admitted during cross-examination that the agents in this case instructed him to reveal to petitioner that he was in New York. Jackson testified that "[he] was instructed to say that I'm in New York, sir * * * . To bring the word New York out, yes, sir." Tang Yuk C.A. App. 509. Three

was no evidence offered at trial to establish that petitioner would have known Jackson's whereabouts in New York without this consensual recording.

B. The District Court Proceedings

The government brought charges against petitioner and the co-defendants in the Southern District of New York. Initially, prosecutors sought to establish venue by establishing that Jackson crossed the Verrazano-Narrows Bridge in transporting cocaine from Florida to his destination in Queens.[1] However, after Jackson testified that he had never informed any of the defendants that he was going to New York and the evidence did not establish that the petitioner or his co-defendants could have foreseen Jackson's trip, the government abruptly switched course and argued instead that Jackson's consensual call from the United States Courthouse in Manhattan was itself sufficient to establish venue in the Southern District of New York.

The jury convicted each of the defendants of engaging in a criminal conspiracy to distribute and possess with intent to distribute cocaine.

C. Court Of Appeals Proceedings

Petitioner appealed his conviction, arguing, inter alia, that venue was improper in the Southern District of New York. The majority upheld petitioner's conviction.

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[1] In *United States* v. *Ramirez-Amaya*, 812 F.2d 813 (1987), the Second Circuit established that traveling across the Verrazano-Narrows Bridge establishes venue in both the Eastern and Southern Districts of New York because, while the bridge connects two land masses in the Eastern District, "the waters within the Eastern District" are concurrently within the Southern District. 28 U.S.C. 112(b).

While expressing skepticism that Jackson's drive across the Verrazano-Narrows Bridge was reasonably foreseeable to petitioner and the co-defendants, it held that "in view of Jackson's post-arrest conversations with [co-defendant and petitioner], we find that the jury was entitled to conclude that it was reasonably foreseeable to [co-defendants and petitioner] that an overt act in furtherance of the conspiracy would be taken in the Southern District of New York." App., *infra*, 19a-20a. In other words, the court of appeals upheld the jury's venue finding with respect to petitioner based solely on the October 4, 2012 consensual call made at the direction of prosecutors as part of Jackson's effort to become a cooperating witness.

In dissent, Judge Chin correctly pointed out that the single telephone call on which the majority relied in affirming the conviction was "entirely contrived by the Government." App., *infra*, 64a. He pointed out that Jackson was apprehended in Queens and brought into the Southern District of New York only after his arrest by agents of the government. He also recognized that the government instructed Jackson to make the October 4th call for the explicit purpose of establishing venue in the Southern District. It is fair to conclude based on Jackson's actions before and after his arrest, that absent the government's intent to manufacture venue, petitioner would never have known that Jackson went to New York to sell drugs, nor would Jackson have contacted petitioner from the Southern District of New York. As Judge Chin noted, if the government could establish venue through these tactics in the Southern District of New York, they could do so anywhere in the United States. *Id.* at 68a.

Petitioner filed a timely petition for rehearing en banc, which the court of appeals denied. App., *infra*, 114a.

REASONS TO GRANT THE PETITION

I. THE COURTS OF APPEALS ARE SPLIT AS TO WHETHER PROSECUTORS MAY MANUFACTURE VENUE IN A JURISDICTION OF THEIR CHOOSING

The Constitution twice limits the venue in which an indictment may be brought. The Sixth Amendment of the Constitution requires all criminal prosecutions to be in the "district wherein the crime shall have been committed." U.S. Const. Amend VI. And Article III provides that "Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. It is well settled that in prosecutions alleging continuing crimes, like conspiracy, "the locality of [the] crime shall extend over the whole area through which force propelled by an offender operates." *United States* v. *Cores*, 356 U.S. 405, 408 (1958) (quoting *United States* v. *Johnson*, 323 U.S. 273, 275 (1944)). However, the courts of appeals are split as to whether the government can manufacture venue by causing the crime to extend into a favored district.

The concept of "manufactured venue" was first addressed by the Second Circuit in *United States* v. *Myers*, 692 F.2d 823 (1982), cert. denied, 461 U.S. 961 (1983). In that case, the court left open the possibility of dismissing for improper venue "if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue."

Id. at 847 n.21. Similar concerns about government overreach date back to the case in this Court that established proper venue for a charge of conspiracy, when the Court was apprehensive of the possibility that "to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused." *Hyde* v. *United States*, 225 U.S. 347, 363 (1912).

In *United States* v. *Sitzmann*, the District of Columbia Circuit recently considered whether the government may manufacture venue and recognized the divergent approaches of different circuits. 893 F.3d 811, 823 (2018). The court noted that some circuits categorically "have rejected the concept of manufactured venue or 'venue entrapment.'" *Ibid.* (quoting *United States* v. *Valenzuela*, 849 F.3d 477, 488 (1st Cir. 2017)). On the other hand, other courts hold that a defendant's challenge to manufactured venue can succeed in cases "involving 'extreme' law enforcement tactics." *Ibid.* (quoting *United States* v. *Kuok*, 671 F.3d 931, 938 (9th Cir. 2012)).

The circuit split reflects the extent to which the lower courts are struggling to balance constitutional limits on trial in foreign districts against the broad authority provided to prosecutors to investigate and prosecute a case. Only this Court can resolve that open question and should do so by prohibiting manufactured venue in cases such as this one.

A. The First, Fourth, And Seventh Circuits Have Rejected The Concept Of Manufactured Venue

Three circuits have rejected arguments that venue is improper when it is manufactured by the government. Each of these courts has analyzed the issue as one of

"venue entrapment." In *Valenzuela*, 849 F.3d 477, for example, the defendant argued that venue was improper because defendant committed an overt act in furtherance of the conspiracy only after the government drove the defendant into the district. The First Circuit disagreed, explaining that "it is hard to understand what the underlying logic for 'venue entrapment' would be, since entrapment in criminal law is designed to avoid punishment for an otherwise innocent person whose alleged offense is the product of the creative activity of government officials, not to avoid punishment for a defendant involved" in a conspiracy. *Id.* at 488 (citations and quotation marks omitted).

The Fourth and Seventh Circuits employed similar reasoning. When faced with an argument that "the government manipulated events to draw the defendants into a venue where they otherwise never would have gone" by way of a controlled delivery set up by the DEA, the Fourth Circuit explained that "substantive concerns of criminal law bear little relationship to a procedural concept such as venue." *United States* v. *Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995). But see *Travis* v. *United States*, 364 U.S. 631, 634 (1961) (holding "questions of venue are more than matters of mere procedure"). The court therefore concluded that, "if the predisposition to commit the crime exists, it hardly matters for entrapment purposes where the acts are carried out." *Al-Talib*, 55 F.3d at 929. The Seventh Circuit likewise rejected a defendant's plea that venue should be limited to prevent prosecutors form manipulating venue to the defendant's detriment. *United States* v. *Rodriguez-Rodriguez*, 453 F.3d 458, 462 (2006). Citing the example of undercover agents setting the location of a drug deal, the court asserted that orchestrating venue is not forbidden,

"provided only that the activity falls short of entrapment." *Ibid.*

B. The D.C., Ninth, And Eleventh Circuits Have Accepted That Venue May Be Improper If Based On Extreme Law Enforcement Tactics

At least three circuits, on the other hand, leave open the possibility that a situation may arise in which government actions improperly manufacture venue and thus the case cannot be tried in the district of the government's choosing. Rather than look at whether the government "entrapped" the defendant to commit an overt act in the district, these courts analyze whether the government's actions causing the connection to the district are outrageous or extreme.

The D.C. Circuit specifically labeled this as an issue of due process, explaining that a situation may arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction." *United States* v. *Spriggs*, 102 F.3d 1245, 1251 (1996) (quoting *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973)), cert. denied, 522 U.S. 831 (1997). The court continued that it may find a "fatal impropriety where 'the key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue.'" *Ibid.* (quoting *United States* v. *Myers*, 692 F.2d 823, 847 n.21 (2d Cir. 1982)). The court did not have to decide this issue, however, as it found that the contacts in the district, though initially orchestrated by the government, were "integral to the alleged conspiracy." *Ibid.*

The Ninth and Eleventh Circuits similarly recognize a potential defense based on manufactured venue. In *United States* v. *Kuok*, the court reasoned that the defense, if viable, would apply only in cases involving "'extreme' law enforcement tactics." 671 F.3d 931, 938 (9th Cir. 2012) (quoting *United States* v. *Bagnariol*, 665 F.2d 877, 898 n.15 (9th Cir. 1981)). Finding that the actions on which the government relied to establish venue were not "extreme" because they were taken by officers located at the base of the undercover investigation, the court left to another day a decision on the viability of manufactured venue. *Ibid.*

In *United States* v. *Dabbs*, the Eleventh Circuit also focused on the intent of the government agents. 134 F.3d 1071 (1998). There, the appellants argued that "the government improperly orchestrated [contact with the district] for the purpose of creating venue." *Id.* at 1078. After deciding that appellants had waived their right to challenge venue, the court explained that a venue challenge would nevertheless fail because defendant "voluntarily entered" into an illegal arrangement with an entity in the district. *Ibid.* In addressing the appellants' manufactured venue challenge, the court declined to decide whether manufactured venue would be viable in other circumstances because "appellants fail[ed] to show that the government orchestrated the undercover operation in order to create venue." *Id.* at 1079 n.10.

C. The Second Circuit Recognizes The Need For A Defense Of Manufactured Venue As A Matter Of Public Policy

As noted above, the Second Circuit first raised the argument of manufactured venue in *United States* v. *Myers*, when it acknowledged constitutional concerns

may arise if "the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue." 692 F.2d 823, 847 n.21 (1982). In several subsequent opinions, the court continued to acknowledge that the doctrine of manufactured venue may be a necessary defense when public policy concerns ought to preclude trying the case in a particular forum.[2]

For example, in *United States* v. *Rutigliano*, the court recognized that a manufactured venue defense could operate as a "safeguard against bias and inconvenience" in the prosecution of a continuing offense. 790 F.3d 389, 398-399 (2d Cir. 2015) (quoting *United States* v. *Rowe*, 414 F.3d 271, 277 (2d Cir. 2005)) (internal quotation marks omitted). The court explained that "[t]he concern over a distant district is critical, as the provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *Ibid.* (quoting *United States* v. *Spriggs*, 102 F.3d 1245, 1251 (D.C. Cir. 1996)) (alteration in original). Nonetheless, in *Rutigliano*, the court declined to vacate the conviction because the evidence suggested defendant was not "lured to a faraway land" by the government. 790 F.3d at 399. Nor was there evidence to conclude that the government sought out the district or obtained any unfair advantage based

[2] In this vein, if venue is to be based on the act of a co-conspirator, the Second Circuit requires that the "occurrence in the district of venue [must] have been reasonably foreseeable" to the defendant. *United States* v. *Rommy*, 506 F.3d 108, 123 (2007), cert. denied, 552 U.S. 1260 (2008); see also *United States* v. *Davis*, 689 F.3d 179, 186 (2d Cir. 2012) (holding "there must be some sense of venue having been freely chosen by the defendant." (internal quotation marks omitted)), cert. denied, 568 U.S. 1183 (2013).

on the district, or "that the 'convenience of the parties' or the 'interest[s] of justice' was subverted by prosecution" in the district. *Ibid.* (quoting Fed. R. Crim. P. 21(b)) (alteration in original).

Similarly, in *United States* v. *Naranjo*, the court addressed an assertion that prosecutors wrongfully manufactured venue by making calls from the district to the defendant. 14 F.3d 145, 147-148 (2d Cir. 1994). The court specifically considered the "important public policy concerns that might forbid trying a defendant in a particular district," including "unfairness or hardship" on the defendant or a malicious attempt by the government to prosecute her in a venue "more favorable to its case." *Ibid.* The court ultimately did not rule in favor of appellant, because, among other things, she continued to reach out to a government agent while knowing that the agent was calling from the district. *Ibid.*; see also *United States* v. *Rommy*, 506 F.3d 108, 127 (2d Cir. 2007) (declining to "conclusively decide the continued vitality of the manufactured venue doctrine" because defendant "selected the district as the destination objective of the charged conspiracy"), cert. denied, 552 U.S. 1260 (2008).

II. The Different Applications Of The Manufactured Venue Doctrine Are Outcome Determinative, Including In This Case

Regardless of what view this Court takes with respect to the manufactured venue doctrine, it should grant review to decide on a single approach and standardize the breadth of the government's power to prosecute a conspiracy. Petitioner's case illustrates how the split in authority applying the doctrine of manufactured

venue can be outcome determinative for criminal defendants.

If the petitioner's facts arose in the First, Fourth, or Seventh Circuit, the court would very likely deny any defense based on manufactured venue. See *United States* v. *Valenzuela*, 849 F.3d 477, 489 (1st Cir. 2017) ("We therefore join the other circuits in rejecting the manufactured venue doctrine."); *United States* v. *Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995) ("There is no such thing as 'manufactured venue' or 'venue entrapment.'"). Yet such a ruling, dictated by the broad language of binding cases, would be entirely untethered from the reasoning in those cases. In each of those cases, a conspirator willingly took actions in a district. See, *e.g.*, *Valenzuela*, 849 F.3d at 488-489 (co-conspirator, though driven by government agent, participated in a critical meeting in the district); *Al-Talib*, 55 F.3d at 928 (finding that defendant's acts independent of government's sting operation were sufficient to find venue). The same is not true here. The cooperating witness was brought into the district only after arrest. And petitioner showed no interest in being a part of a conspiracy to sell drugs in the Southern District of New York (nor, frankly, did the cooperating witness). In fact, the evidence demonstrated that petitioner responded to the cooperating witness' statement that he was wrapping things up in New York by simply saying "[d]o your thing, man. It ain't nothing." App., *infra*, 7a.

Conversely, if a similar case arose in the D.C., Ninth, or Eleventh Circuits, the court would have addressed the extreme nature of the prosecutors' conduct. Because the evidence demonstrated that the government orchestrated the call on October 4, 2012 from Manhattan for the

specific purpose of creating venue over petitioner in the Southern District of New York, courts in these circuits would have likely dismissed the case. The government's intent to create venue in this case distinguishes it from the cases discussed *supra*. For example, in *United States* v. *Spriggs*, the court declined to find manufactured venue when the defendants' contacts to the district, including cash pickups related to the conspiracy, were "integral to the alleged conspiracy." 102 F.3d 1245, 1251 (D.C. Cir. 1996); see also *United States* v. *Dabbs*, 134 F.3d 1071, 1079 n.10 (11th Cir. 1998) ("The appellants fail to show that the government orchestrated the undercover operation in order to create venue."). *United States* v. *Kuok*, 671 F.3d 931 (9th Cir. 2012), where the court found the government activity was not extreme because it occurred at the base of the government's operation, would not dictate a different outcome. There, the government's action—receiving money in exchange for the sale of an illicit item—served to establish the crime and was not designed merely to establish venue. *Id.* at 938. In contrast, the call placed by the cooperating witness in this case was not otherwise important to the government's investigation of petitioner, but was instead orchestrated solely to create venue.

Finally, under Second Circuit precedent, policy considerations *should* have precluded a finding of venue. The majority below appears to recognize that the government cannot "stretch the boundaries of criminal venue too far" by manufacturing venue in a district that, absent government action, would not have been chosen by or foreseeable to the defendant. App., *infra*, 57a. Nonetheless, the majority goes on to create venue over petitioner in the Southern District of New York without any real evidence of a conscious choice or awareness.

As Judge Chin articulates in his dissent, the government—who brought the cooperating witness to Manhattan and instructed him to inform petitioner that he was in New York—could have caused this call to come from any district in the United States. "There is nothing in the record to suggest that Jackson would have gone into the SDNY—let alone called the defendants and disclosed his location as 'New York'—on his own." App., *infra*, 64a.

The majority goes so far as to "acknowledge the [dissent's concern with government overreach] and the closeness of this case," App., *infra*, 20a n.3, but in response offers justifications for venue which go beyond those identified by any other court, and which should not be permitted to justify government overreach. For instance, the majority suggests that the conspiracy "was not so local" because it took place between the Southern District of Florida and the District of the Virgin Islands and "span[ned] more than 1,000 miles." *Ibid.* Under this theory, any multi-state conspiracy would permit venue anywhere in the United States. The Panel also notes that the cooperating witness voluntarily drove through the Southern District of New York prior to the "government's active involvement in New York." *Ibid.* However, as the majority concedes, such travel likely was not foreseeable to petitioner. Allowing one co-defendant's trip across the Verrazano Bridge to establish venue over petitioner would therefore depart from prior Second Circuit law requiring that an overt act be "reasonably foreseeable" to each defendant charged. See, *e.g.*, *United States* v. *Rommy*, 506 F.3d 108, 123 (2007), cert. denied, 552 U.S. 1260 (2008). This Court should grant review to establish that courts may not rely on such flawed reasoning to justify trying defendants in a venue preferred by the government.

III. The Issue Presented Is Important, And This Case Provides An Opportunity To Resolve The Conflict

The Constitution protects a defendant from "the unfairness and hardship to which trial in an environment alien to the accused exposes him." *United States* v. *Johnson*, 323 U.S. 273, 275 (1944). This Court's precedent clearly permits a charge of conspiracy to be tried in any district in which an overt act in furtherance of the conspiracy occurred, whether or not the defendant himself has traveled to the district. But constitutional bounds remain. See *Travis* v. *United States*, 364 U.S. 631, 634 (1961) ("We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." (citing *United States* v. *Johnson*, 323 U.S. at 275)).

Indeed, under this Court's precedent, decisions about venue raise fundamental concerns of fairness and public policy. *Travis*, 364 U.S. at 634 ("[Q]uestions of venue are more than matters of mere procedure. 'They raise deep issues of public policy in the light of which legislation must be construed.' " (quoting *Johnson*, 323 U.S. at 276)); *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998) ("Proper venue in criminal proceedings was a matter of concern to the Nation's founders. Their complaints against the King of Great Britain, listed in the Declaration of Independence, included his transportation of colonists 'beyond Seas to be tried.' "); *United States* v. *Cores*, 356 U.S. 405, 407 (1958) ("The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.").

This case provides clear facts that would permit this court to address such an issue of exceptional importance because the government manufactured venue in a district where a defendant had no contact and never sought to commit any crime simply by bringing a cooperating witness there and having him call the defendant and identify his whereabouts *with the sole purpose of establishing venue*. Such tactics are not only unconstitutional but also create practical harm in a defendant's ability to properly defend against criminal charges. It also allows prosecutors to bring an indictment in any district of their choosing, based on the government's preferences in jury composition, sentencing tendencies, or any other factor entirely irrelevant to the commission of the charged offense.

As Judge Chin properly forewarned, if prosecutors are permitted to manufacture venue based solely on a single call by a cooperating witness, there is no limit to where a defendant can be prosecuted. He correctly concluded, "That cannot be the law." App., *infra*, 68a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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