No. 22-196

In the Supreme Court of the United States

ADAM SAMIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Federal Defenders (NAFD) is a nationwide volunteer organization of attorneys who work for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court. Those representations include defendants prosecuted in joint trials where the introduction of a codefendant's out-of-court confession implicates the defendant's rights under the Sixth Amend-

[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae states that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amicus curiae and its counsel, made a monetary contribution to fund the preparation or submission of this brief.

ment. NAFD members therefore have experience with, and a substantial interest in, this Court's resolution of the question presented.

SUMMARY OF ARGUMENT

When the prosecution seeks to introduce a non-testifying codefendant's testimonial confession in a joint trial, the Sixth Amendment requires the trial court to apply—and requires the prosecution to heed—the fundamental principle that context matters. For at least three reasons, this Court should reaffirm that command here and vacate the judgment of the court of appeals.

A. First, this Court's precedents establish that careful attention to context is necessary to determine whether the introduction of a non-testifying codefendant's confession violates the Confrontation Clause. This Court has already recognized that aspects of a trial's context are relevant to that analysis, including the number of defendants and other alleged participants in a case, as well as the prosecutor's arguments and line of examination through which the confession is admitted. How a jury is likely to understand a confession, and whether a jury instruction to consider evidence for one purpose but not another is unreasonable under the circumstances, are necessarily contextual inquiries. By so holding here, the Court will break no new ground but rather merely confirm the prevailing interpretation of *Bruton* v. *United States*, 391 U.S. 123 (1968), and its progeny in the courts of appeals.

B. Second, the lower courts' experience shows that a requirement to analyze *Bruton* issues in light of a trial's structure and context is administrable. In the decades since *Bruton*, various courts have coalesced around several common factors relevant to the analysis, which indicates that those considerations are both workable and important.

C. Third, considering context for *Bruton* questions does not disrupt trial management or unduly limit the availability of joint trials. The procedures for raising and resolving Sixth Amendment issues are well-established, but also flexible to the needs of each case. And courts are already considering context in determining whether and how to redact proffered confessions consistent with the Confrontation Clause. This sort of analysis is nothing new. Trial courts are well-suited to direct the redaction of confessions and to enforce pretrial *Bruton* rulings, just as they have been doing for years.

ARGUMENT

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court recognized that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. As this Court held, that intolerable risk arises when, in a joint criminal trial, the prosecution seeks to introduce the out-of-court confession of a non-testifying codefendant that expressly incriminates the defendant. *Id.* at 135-136. The Sixth Amendment thus prohibits admitting such evidence, even with a limiting instruction. *See id.* at 136-137.

The Court has elaborated on the *Bruton* rule in two subsequent cases. Under *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the prosecution may introduce a confession that has been redacted so as "to omit all indication that *anyone* other than [the codefendant had] participated in the crime." *Id.* at 203. But under *Gray* v. *Maryland*, 523 U.S. 185 (1998), the prosecution may not introduce a confession that "refers directly to the 'existence' of the non-confessing defendant," even if it has been redacted to substitute a blank space or the word "deleted" for the

defendant's name. *Id.* at 192. In that situation, this Court observed, the jury will naturally still "realize that the confession refers specifically to the defendant." *Id.* at 193.

This Court should now use this case to reaffirm that *Bruton* challenges require careful analysis of a trial's context to determine how to redact a codefendant's out-of-court confession consistent with the Sixth Amendment. Even when the defendant's name is redacted, if the trial's context—including the number of defendants, the factual circumstances, or the prosecutor's questioning and arguments—effectively unmasks the defendant as the subject of a redacted confession, then it as if there was no redaction at all. The Sixth Amendment prohibits that result.

That rule flows from, and faithfully harmonizes, the Court's precedents, and the experience of the lower courts proves that a context-driven inquiry is administrable. Further, considering context will not upset current trial procedure. To the contrary, this rule is consistent with how many courts already address *Bruton* questions. And importantly, a context-matters rule best protects the core confrontation right enshrined in the Sixth Amendment by recognizing that courts must take special care to safeguard a defendant's constitutional rights when the prosecution introduces such potent evidence.

A. This Court's precedent establishes that whether the introduction of a non-testifying codefendant's out-of-court confession violates the Sixth Amendment requires a contextual inquiry

This Court's trilogy of cases regarding admission of a non-testifying codefendant's out-of-court confession—*Bruton*, *Richardson*, and *Gray*—illustrates how the Confrontation Clause applies along a spectrum of cases involving various types and degrees of redaction. *Bruton* and *Richardson* are the bookends to that spectrum:

Bruton prohibits an unredacted confession that refers to a defendant by name. 391 U.S. at 135-136. And *Richardson* approves the most protective type of redaction that eliminates *all* reference to the defendant's existence. 481 U.S. at 211. *Gray* then refined the analysis and began providing guidance for other kinds of cases in the middle space. *See* 523 U.S. at 192, 195-196.

This case picks up where *Gray* left off, falling between *Gray* and *Richardson* on the spectrum. But the sum of this Court's precedents already establishes four guiding principles for analyzing *Bruton* questions.

1. First, this Court clarified in *Gray* that the introduction of a codefendant's out-of-court confession can violate the Sixth Amendment even if that confession does not name the defendant. 523 U.S. at 195-196. The Sixth Amendment is still implicated when a confession, "despite redaction, obviously refer[s] directly to someone, often obviously the defendant, and which involve[s] inferences that a jury ordinarily could make immediately." *Id.* at 196. *Gray* thus necessarily rejected a four-corners approach that focuses exclusively on the confession itself. *See id.* at 195-196.[2]

Second, *Gray* recognized that whether a codefendant's confession violates the Sixth Amendment requires a case-specific determination, noting that "in some

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[2] *Richardson*, too, cannot be read to endorse a four-corners approach, both on its own terms and in light of *Gray*. Although *Richardson* suggested that any "evidence introduced later at trial" is "linkage" that is irrelevant under the Sixth Amendment, the only such "linkage" at issue was "*the defendant's* own testimony." 481 U.S. at 208 (emphasis added). Further, *Richardson*'s reasoning necessarily must be limited to what *a defendant* does at trial, given the Court's recognition that *a prosecutor's* conduct can negate a *Bruton* instruction. *Richardson*, 481 U.S. at 211.

instances the person to whom the blank [in a confession] refers may not be clear," 523 U.S. at 194, but in others, it might. *Gray* explained that, in addition to how a confession is redacted, other aspects of a trial can affect how "transparent" is the out-of-court confession, including the number of defendants and whether "the trial indicates that there are more participants than the confession has named." *Id.* at 195-196.

Third, this Court has twice confirmed that the relevant context includes the prosecutor's arguments and the line of examination through which the confession is introduced. In *Richardson*, the prosecutor impermissibly "sought to undo the effect of the limiting instruction by urging the jury to use [the codefendant's] confession in evaluating [the defendant's] case." 481 U.S. at 211. Likewise, in *Gray*, the prosecution "blatantly link[ed] the defendant to the deleted name" through its questioning, which "eliminated all doubt" about the person to whom the confession referred. 523 U.S. at 193, 194.

Fourth, *Richardson* establishes a limiting principle for a context-based analysis: when a prosecutor properly redacts a confession, *the defendant* cannot generate a Sixth Amendment problem by introducing evidence that, viewed in connection with the redacted confession, inculpates himself. 481 U.S. at 208-209.[3]

2. These principles reflect how multiple lower courts have understood this precedent. *See*, *e.g.*, *Foxworth* v. *St. Amand*, 570 F.3d 414, 430, 433 (1st Cir. 2009) (*Gray* "refined and extended the *Bruton* rule … Under this regime, an inquiring court must judge the efficacy of redaction on

[3] In rare cases, it is conceivable that a defendant could need to introduce certain evidence for a valid purpose that nonetheless would be inculpatory with respect to the codefendant's redacted confession. In that circumstance, a severance would be especially appropriate.

a case-by-case basis, paying careful attention to both a statement's text and the context in which it is offered.") (citation omitted), *certified question on other grounds answered*, 929 N.E.2d 286 (Mass. 2010); *United States* v. *de Leon-De La Rosa*, 17 F.4th 175, 194 (1st Cir. 2021) ("[L]anguage is always used in context, as *Gray* instructs us to remember in assessing whether a *Bruton* violation occurred."); *United States* v. *Straker*, 800 F.3d 570, 596 (D.C. Cir. 2015) ("Evaluations of [the] effectiveness [of redactions under the Confrontation Clause] are necessarily contextual."); *United States* v. *Hoover*, 246 F.3d 1054, 1059 (7th Cir. 2001) ("Very little evidence is incriminating when viewed in isolation; even most confessions depend for their punch on other evidence. To adopt a four-corners rule would be to undo *Bruton* in practical effect."); *United States* v. *Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008) ("[A] defendant's confrontation right is violated when the court admits a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt.").

In short, the *Bruton* trilogy already provides the framework for a context-matters rule, including foundational principles that the trial court must apply and that the prosecution must abide.

B. The lower courts' experience shows that analyzing *Bruton* issues in light of a trial's context is an administrable rule

To reaffirm that trial context is critical in a *Bruton* analysis, this Court does not need to develop a new test out of whole cloth. In the 55 years since *Bruton*, and the 25 years since *Gray*, lower courts have been analyzing proffered confessions in light of the structure and context of trial, and those decisions are instructive. Indeed, the fact that courts have consistently identified similar factors

illustrates both the importance and workability of those factors.

1. Courts consider the number of defendants, how many participants the confession or evidence identifies, and the complexity of the facts

Consistent with this Court's suggestion in *Gray*, 523 U.S. at 195, several courts have resolved *Bruton* issues by considering the number of defendants on trial and how many other alleged criminal participants are identified by the confession or other evidence.

Depending on the factual complexity in a given case, the number of defendants and other actors can make an important difference to how the jury understands a confession. Some cases "may involve numerous actors and events, such that no compelling inference can be drawn that a symbol or neutral pronoun refers to a specific defendant." *Foxworth*, 570 F.3d at 433. But others "may involve few actors and events, such that a symbol or neutral pronoun becomes transparent." *Ibid.*; *see also, e.g.*, *Straker*, 800 F.3d at 599 (where "evidence identified more than a dozen different men involved in the crimes" it was "unlikely that the jury would readily link a statement's mention of a 'person' or 'guy' to a specific defendant").

In *United States* v. *Hernandez*, 330 F.3d 964 (7th Cir. 2003), for example, the indictment accused 21 individuals of drug and conspiracy offenses. *Id.* at 967-968. Of the eight defendants who went to trial, one had confessed to being a member of the "Project Kings" as a gang enforcer and stated that the gang had taken "disciplinary action … against 'Latin Kings.'" *Id.* at 972. The Seventh Circuit rejected the argument that "Project Kings" and "Latin Kings" were "overly obvious" references to the other seven defendants. *Id.* at 974. Citing the number of individuals in the indictment and the size and complexity of the

gang overall, the court found that those terms were not "'obvious stand-ins' for the co-defendants." *Ibid.*

For similar reasons, the Third Circuit found no Sixth Amendment violation in *Priester* v. *Vaughn*, 382 F.3d 394 (2004), which involved a multi-car drive-by shooting and a confession that replaced the names of several individuals, including the defendant, "with phrases such as 'the other guy.'" *Id.* at 396. The court observed that "[t]here were at least fifteen perpetrators in various cars involved in the shooting"; the redacted statement was "unclear as to the people in the first car, in the second car, who was shooting when and from which car"; and the substitute phrases lacked "any innuendo" that identified the defendant. *Id.* at 399-401.

By contrast, the Third Circuit found the Sixth Amendment *was* violated in a pair of cases analogous to petitioner's here.

In the first, the defendant (Vazquez) and one codefendant (Santiago) were tried together for murder. *Vazquez* v. *Wilson*, 550 F.3d 270, 271 (3d Cir. 2008). Santiago confessed to police that he had been driving with the defendant and another person (Rivera) when the defendant shot the victim. *Id.* at 272-273, 281. The defendant later testified that Rivera had fired the fatal shot. *Id.* at 273-274. Santiago did not testify but sought to introduce his unredacted confession to show that he had immediately cooperated with police. *Id.* at 274. But the defendant argued that even a redacted confession would identify him given the full context of the case. *Ibid.*

The district court denied both defendants' motions to sever and admitted Santiago's redacted confession, which replaced the defendant's and Rivera's names with "my boy" or "the other guy" more than twenty times. 550 F.3d at 274, 281. The court allowed Santiago's counsel to

establish that Santiago had identified the two individuals in the car. *Id.* at 274. And during closing argument, the prosecutor identified Rivera as "the man who's not the shooter." *Id.* at 275. But those arguments by counsel and the prosecutor merely underscored what the jury was already "almost certain to conclude"—Santiago had identified the defendant as the shooter. *Id.* at 281. Although the confession was redacted, the circumstances offered no other conclusion; "there were only two possible shooters under Santiago's statement," "Rivera was not on trial," and the state argued that the defendant, not Rivera, was the shooter. *Ibid.*[4]

The number of defendants was similarly critical to the Third Circuit's analysis in *Eley* v. *Erickson*, 712 F.3d 837 (2013). After the trial court denied defendant Eley's motion to sever, he was tried with codefendants Eiland and Mitchell for murder and robbery. *Id.* at 841, 854. Among other statements, Eley challenged Eiland's confession to a cellmate that he was the one who had shot the victim, but that "[i]t was the other two's idea." *Id.* at 854, 858. Although that statement did not name Eley, it "expressly referred to the existence of exactly three people," which, the court found, "could not have been lost on the jury" because "the Commonwealth emphasized shortly before introducing the confession" that "there were exactly 'three defendants' sitting at the defense table." *Id.* at 859.

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[4] *Vazquez* is an example of a case in which a limiting instruction was very likely insufficient to prevent the jury from drawing the obvious inference that the confession referred to the defendant. Although the jury received the proper limiting instruction, it submitted this question during deliberation: "Are we supposed to not consider Santiago's statement that [defendant] was the shooter?" 550 F.3d at 275. The court answered by repeating the limiting instruction; the jury then acquitted Santiago and convicted the defendant. *Ibid.*

The Third Circuit thus found in *Eley* "an even more compelling case for habeas relief than in *Vazquez*," where the jury had to decide whether Santiago's statement implicated the charged defendant or the absent Rivera. 712 F.3d at 860. In Eley's case, the inference was even clearer: the "confession expressly implicated exactly three people in the crimes and exactly three defendants appeared at the joint trial." *Id.* at 860-861.

State courts have conducted similar analyses. In *Jefferson* v. *State*, 198 S.W.3d 527 (Ark. 2004), for example, the Arkansas Supreme Court found a Sixth Amendment violation in the joint robbery trial of the defendant (Jefferson) and his codefendant (Starr). *Id.* at 529. The third alleged participant (Foster) pleaded guilty before trial. *Id.* at 530. The trial court admitted Starr's pre-trial statement to police that implicated Jefferson and Foster, but it was redacted to replace Jefferson's name with "he" or "some other guy." *Id.* at 530-531, 533. Nonetheless, the court held, "the jury easily could have drawn" the inference that Starr's statement "obviously directly referred to Jefferson," because the prosecution made clear that three individuals were involved and conceded that Foster had been the shooter. *Id.* at 536; *see also, e.g.*, *State* v. *Medina*, 48 P.3d 1005, 1012 (Wash. Ct. App. 2002) (finding "references to 'the guys' and a 'guy'" did not impermissibly implicate two of the three defendants, in part, because "there were approximately six individuals involved"); *Neal* v. *State*, 806 So.2d 1151, 1156 (Miss. Ct. App. 2002) (admission of statement violated the Sixth Amendment "because there were only two people on trial" and therefore "the subject" "obviously" referred to the defendant).

In short, courts understand that the number of defendants and other participants involved in a case is an especially relevant factor that must inform the Sixth

Amendment inquiry. Jurors can count; they know how to put two and two together. In some instances, this aspect of a trial may reveal such clear, immediate, and powerfully damaging inferences that a juror "need only lift his eyes to … counsel table" to understand to whom the redacted confession refers. *Gray*, 523 U.S. at 193.

2. Courts consider the frequency and type of redactions

Lower courts have also correctly observed that the way a confession is redacted, and the number of substituted phrases, can affect how the jury understands the confession.

In *United States* v. *Williams*, 429 F.3d 767 (8th Cir. 2005), for instance, the confession at issue had "more than forty instances where [the defendant's] name was replaced with the word 'someone.'" *Id.* at 773. Although the Eighth Circuit ultimately did not need to resolve the Sixth Amendment issue, the court observed that the "kind and degree" of the redactions made it obvious that the defendant's name had been removed. *Id.* at 774. The "replacements were not seamlessly woven into the narrative … and the neutral pronoun 'someone' may have lost its anonymity by sheer repetition." *Ibid.* Under those circumstances, "[i]t may well have been clear to the jury that the statement had obviously been redacted and that the 'someone' of the statement was defendant." *Ibid.* (citation omitted).

Similarly, the contrast between anonymized and named individuals may be an obvious tell. In a case before the Oregon Court of Appeals, the court found that the terms "the person" and "the individual" clearly referred to the defendant because everyone else "in the confession [was] named with one conspicuous exception," and the unnamed person's "anonymity [was] reemphasized with

every use of some antecedentless pronoun or generic term." *State* v. *Johnson*, 111 P.3d 784, 788 (2005).

By contrast, the Fifth Circuit held that the Confrontation Clause was not violated by an officer's accidental use of the plural pronoun "they" during his trial testimony recounting a declarant's statement, even though the government had agreed to omit all plural references so as not to implicate the dozen other defendants. *United States* v. *Ramos-Cardenas*, 524 F.3d 600, 603-604, 607-608 (2008). Among other reasons, the court noted that the officer made this error only twice and corrected himself. *Id.* at 608. And given the nature of the charges against the other defendants, and the substance of the officer's testimony, the officer's use of "they" did not implicate specific individuals. *Ibid.* The court observed, however, that "[r]epeated use of an indefinite pronoun, may, in some circumstances, give rise to a Confrontation Clause violation." *Id.* at 609 n.6.

3. Courts consider the strength of the inferences from a confession, and how those inferences relate to other evidence

In determining whether it is possible to redact a confession consistent with the Confrontation Clause, and to what degree it must be redacted, lower courts account for the inferences that may arise from a redacted confession and how those inferences relate to the rest of the prosecution's case. *See, e.g.*, *United States* v. *Nash*, 482 F.3d 1209, 1219 (10th Cir. 2007) ("[O]ur judgment is informed by the context in which the *Bruton* statement was admitted, how it was used at trial, and how it compares to the properly admitted evidence.") (citation omitted).

The Sixth Circuit's decision in *United States* v. *Macias*, 387 F.3d 509 (2004) is a helpful example. The redacted confession at issue referred to the defendant as

"subject two," but it described subject two's residence as being located in the same area where the evidence showed that the defendant lived. *Id.* at 514. In the context of the whole trial, "the description of subject two was sufficiently specific that it could have referred only to [the defendant]," and therefore "was incriminating on its face." *Id.* at 519. The statement was thus "comparable to *Bruton*" in how it affected the rest of the evidence. *Id.* at 518. As the Sixth Circuit observed, the statement "transformed the government's case into a direct evidence case … rendering it largely unnecessary for the jury to infer [the defendant's] involvement in the conspiracy based on the circumstantial evidence." *Ibid.*

Although it is "not always easy" to analyze whether a redacted confession still obviously implicates the defendant, trial courts have experience making this "delicate determination" and recognize that it "requires case-by-case consideration rather than a brightline rule." *United States* v. *Green*, 648 F.3d 569, 575 (7th Cir. 2011). *Green* was an edge case that fell "close to that subtle line," but the Seventh Circuit carefully compared precedent and ultimately found that the substitute term "straw buyer" in an out-of-court confession did not violate *Bruton*. *Ibid.* The court reasoned, in part, that the evidence necessary to identify the defendant as the "straw buyer" was "farther removed" than in other cases, although the court considered the case "very close to the *Bruton* line." *Id.* at 576.

Considering how certain evidence relates to other evidence, how the jury is likely to receive information at trial, and how relevant are any inferences that the jury might draw from the evidence presented at trial is nothing new. Criminal trials constantly require that kind of analysis, and courts are as capable of making those determinations in the *Bruton* context as in any other. *E.g.*, *United States*

v. *Gibson*, 875 F.3d 179, 195 (5th Cir. 2017) (finding no Sixth Amendment violation where "several inferential leaps" were necessary for the jury to connect a statement about a hospital entity to specific defendants in a charged conspiracy); *United States* v. *Lung Fong Chen*, 393 F.3d 139, 150 (2d Cir. 2004) (finding no Sixth Amendment violation where "substantial evidence was necessary to link defendants … with [challenged] statements").

4. Courts consider the prosecution's questioning and arguments

Since *Richardson* and *Gray*, lower courts have continued to recognize that a prosecutor's questioning and arguments regarding an out-of-court confession can violate the Sixth Amendment—either in connection with other evidence or standing alone.

This Court's precedents establish that the Constitution does not permit the prosecutor to unmask the defendant as the individual implicated in a confession. *Gray*, 523 U.S. at 193; *Richardson*, 481 U.S. at 211; *see, e.g.*, *Brown* v. *Superintendent Greene SCI*, 834 F.3d 506, 517 (3d Cir. 2016) ("[A] prosecutor's inadmissible use of a confession during closing arguments runs afoul of *Bruton*."); *United States* v. *Peterson*, 140 F.3d 819, 822 (9th Cir. 1998) ("[T]he prosecutor's closing argument that Peterson was 'person X,' an argument which would be clearly prohibited under *Gray*, further compounded the constitutional violation."); *Schwartz*, 541 F.3d at 1353 ("[T]he inference was made inevitable … when the prosecutor expressly made that connection for the jury in his closing argument.").

But directly identifying the defendant as the person referred to in a redacted confession is not the only way for a prosecutor to violate the Confrontation Clause. Courts have recognized that a prosecutor's statements violate the

Constitution just the same when they clearly point to the defendant in context. *E.g.*, *Brown*, 834 F.3d at 517-518.

In *Brown*, the non-testifying codefendant (Garcia) confessed before trial that defendant Lambert had shot the victim, got into Garcia's car afterwards, and then Garcia drove them to Garcia's house; at trial, Lambert's name was redacted and replaced with the "guy." 834 F.3d at 510. During closing argument, however, the prosecutor "revealed that Garcia took Lambert to his house" after the incident. *Id.* at 518. She stated, in part: "If Garcia had not been part of what happened, how easy would it have been for him to drop Lambert off, go home … [But] he takes Lambert to his house … and he says the guy I'm with brings the gun into my house …." *Id.* at 510. By placing Lambert in Garcia's car and at his house, the prosecutor "conveyed a message—that Lambert was the person whose name was withheld in the redacted confession—as clearly as" if she had expressly identified him as the "guy." *Id.* at 518; *see also United States* v. *Davis*, 534 F.3d 903, 915 (8th Cir. 2008) (acknowledging that "a *Bruton* violation occurs 'when the unnamed defendant is *tied directly* to the confession in the manner and context in which the confession is presented'") (citation omitted).

A prosecutor can also convey the same message by introducing evidence *before* the redacted confession that "impermissibly prim[es] the jury to implicate" the defendant later. *Wynn* v. *United States*, 241 A.3d 277, 284-285 (D.C. Ct. App. 2020). Likewise, the prosecutor can "eradicate[]" any doubt the jury might have after hearing the redacted confession by following it up with a question about whom the confession led law enforcement to investigate or arrest. *E.g.*, *Davis* v. *State*, 528 S.E.2d 800, 805-806 (Ga. 2000); *see also State* v. *McDonald*, 771 S.E.2d 840, 844 n.3 (S.C. 2015) (similar).

In sum, as these and other courts have recognized, there would be "no point in redacting and sanitizing otherwise inculpatory statements" if those protections "could be deliberately and directly undone by lawyer commentary." *Brown*, 834 F.3d at 517 (citation omitted). The Sixth Amendment cannot be so easily diminished.

* * *

Particularly in criminal matters, trial and appellate courts are accustomed to resolving legal issues in light of the full context and unique circumstances of each trial, and they are well-suited to identify the relevant considerations in each case. *See, e.g.*, *Turner* v. *United States*, 137 S. Ct. 1885, 1893 (2017) (considering "the withheld [*Brady*] evidence 'in the context of the entire record'") (citation omitted); *Ohio* v. *Clark*, 576 U.S. 237, 249 (2015) (observing that the primary-purpose test requires "evaluat[ing] challenged statements in context"); *Greer* v. *Miller*, 483 U.S. 756, 765-766 (1987) ("When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important 'as an initial matter to place the remark in context.'") (citation and original alterations omitted); *United States* v. *Park*, 421 U.S. 658, 674 (1974) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.") (citation omitted).

That lower courts have coalesced around several manageable factors to resolve *Bruton* challenges underscores that those factors are not only relevant but plainly significant. Those decisions, spanning myriad factual circumstances, illustrate that courts can apply a context-matters rule reliably, consistently, and effectively—as they have been doing for many years.

C. Considering trial context in *Bruton* challenges will not disrupt the jury system

1. Procedures for resolving *Bruton* issues are well-established

The substance of a context-matters rule is not new, nor is the procedure. A holding by this Court in this case that a trial court must consider the full context to evaluate the impact of a redacted confession will clarify, not disrupt, what is already fairly commonplace in the lower courts.

In a case involving a non-testifying codefendant's confession that inculpates another defendant, the caselaw establishes four general options for addressing Confrontation concerns. If the prosecutor (1) tries the defendant separately; or (2) declines to introduce the confession at the joint trial, then *Bruton* is not implicated. But if the prosecutor both pursues a joint trial and seeks to introduce the confession, then the trial court must determine whether the confession can be redacted consistent with the Confrontation Clause at all, and if so, to what degree it must be redacted. Specifically, the court must determine whether, under the circumstances of the case, the Sixth Amendment (3) requires the prosecutor to redact the confession to omit all references to the inculpated defendant's existence, as in *Richardson*; or (4) permits the prosecutor to do something less and substitute the defendant's name with neutral pronouns or phrases, as suggested in *Gray*. The structure and context of a trial—including the factors above—inform whether and what degree of redaction is constitutionally sufficient.

In practice, these questions are typically raised in a motion to sever—whether by the prosecution or the defense—or a motion in limine. *E.g.*, *Vazquez*, 550 F.3d at 274, 281. And the prosecution, being familiar with its own case, is able to foresee these issues and has ample

opportunity to raise the possibility of a Confrontation Clause problem to resolve the issue before trial or before introducing particular evidence. *Cf. United States* v. *Ceballos*, 789 F.3d 607, 615 (5th Cir. 2015) (discussing prior case where the "government [had] announced during a pretrial proceeding that it intended to introduce an incriminating written statement" and "offered to introduce a redacted version") (citation omitted); *United States* v. *Moore*, 651 F.3d 30, 85 (D.C. Cir. 2011) (observing that, before the relevant witnesses were called, the "prosecutor advised the district court that [part of its case] might cause a potential" *Bruton* issue).

Once raised, courts have adopted different procedures for resolving these issues, including holding a pre-trial "*Bruton* hearing" to consider the evidence and possible solutions. *E.g.*, *Holland* v. *Attorney Gen. of N.J.*, 777 F.2d 150, 152 (3d Cir. 1985) ("[T]he court held a *Bruton* hearing, and ruled that references to [the defendant] could be effectively excised."); *United States* v. *Padilla-Galarza*, 990 F.3d 60, 76 (1st Cir. 2021) ("[A]t a pretrial conference, prompted by the appellant's severance motion … the prosecutor spelled out the government's planned procedure for handling [the] confession."). By way of example, the district court in *United States* v. *Javell*, 695 F.3d 707 (7th Cir. 2012), "ordered the government to submit a *Bruton* statement detailing exactly what they intended to introduce at trial," held a hearing, and then further redacted the proposed statement. *Id.* at 710, 713 (affirming admission).

After a court rules on the degree of a redaction, the prosecution must take measures necessary to comply, such as carefully managing its witness examinations to avoid reanimating a *Bruton* problem—which a diligent prosecutor should be able to do. *Cf. Padilla-Galarza*, 990

F.3d at 75 (discussing how the prosecutor instructed witness appropriately and "conducted the remainder of the examination in accordance with her assurance" to the court to "take care to 'lead [the witness] through [the] questions [to] avoid the *Bruton* issue"). This is not a new or unreasonable expectation.

For instance, in "an attempt to avoid a *Bruton* problem" in *United States* v. *Coleman*, 349 F.3d 1077 (8th Cir. 2003), the prosecutor substituted the word "someone" for the defendant's name, and then led the testifying agent through questions by "only [asking] for a yes or no answer." *Id.* at 1085. Assuming the redaction is otherwise constitutionally sufficient, such structured questioning is just one of several ways that a prosecutor might control the admission of the confession. Because the prosecution alone has control over the preparation of its witnesses and the presentation of its case, it is reasonable—indeed, necessary—for the prosecution to bear the responsibility to ensure that it introduces evidence in a way that avoids a Confrontation Clause problem.

In some cases, the trial court might conclude that "the statements [cannot] be sufficiently redacted … without substantially compromising their evidentiary value." *United States* v. *Campbell*, 986 F.3d 782, 803-804 (8th Cir. 2021) (affirming grant of the government's severance motion), *cert . denied*, 142 S. Ct. 751 (2022), and *cert. denied*, 142 S. Ct. 784 (2022). Even so, that finding does not necessarily foreclose trying the defendants jointly; the prosecutor might simply decide to forego offering the statement in order "to preserve a joint trial." *United States* v. *Damra*, 621 F.3d 474, 482 (6th Cir. 2010); *see also United States* v. *Field*, 756 F.3d 911, 913 (6th Cir. 2014) ("Explaining it faced a *Bruton* problem, the government moved to dismiss the charges against [one of the

defendants] without prejudice."). And importantly, even if the prosecutor successfully sought severance (or made that choice from the outset), she need not try *every defendant* separately. In a large joint trial, it may be possible to peel off only the affected defendant's case and leave the rest of the joint trial intact.

Because courts routinely oversee this process to protect defendants' rights and efficiently manage trials, they are well-equipped to address unexpected testimony that might compromise pretrial *Bruton* rulings and redactions. In rare cases, a mistrial may be the only constitutionally permissible response when the violation is "so prejudicial [that] an admonition would have been useless." *Macias*, 387 F.3d at 522. But that is far from the typical case. Clear pre-trial rulings, diligent witness preparation, and careful redactions and case management—that is, what courts and parties already strive for in proceedings across the country—will minimize the risk of significant errors at trial. Other "slip-ups" in testimony may be minor and not raise impermissible inferences about the redacted confession at all. *E.g.*, *Ramos-Cardenas*, 524 F.3d at 608-609. And in all events, *Bruton* errors are still subject to harmless error review. *See Harrington* v. *California*, 395 U.S. 250, 254 (1969).

Simply put, the caselaw does not reveal "significant practical difficulties arising out of [courts'] administration" of a context-based rule. *Gray*, 523 U.S. at 197. To the contrary, the procedural paths for resolving *Bruton* issues are well-established and flexible.

2. Considering context gives effect to the Sixth Amendment without unduly constraining prosecutors' ability to pursue joint trials

This Court has recognized that, when the prosecution pursues a joint trial and seeks to introduce a non-

testifying codefendant's confession, the court must diligently protect the defendant's Sixth Amendment confrontation right. *Bruton*, 391 U.S. at 135-136. At the same time, the Court has identified important interests that joint trials serve. *Richardson*, 481 U.S. at 209-210. Not only is a context-matters rule the more faithful application of the Confrontation Clause than the four-corners approach, it also harmonizes the Court's precedent to impose symmetrical responsibilities on the parties and balance adversarial interests.

A requirement to consider trial context does not meaningfully limit the prosecution's procedural paths to trial—if it does at all. And if in some cases the circumstances require the prosecution to use the most protective redaction or pursue a separate trial, then that is a feature, not a bug, of the Sixth Amendment's confrontation guarantee.

By contrast, a bright-line rule that ignores how a jury will likely understand certain evidence would permit the sort of practical deprivations of confrontation that the Sixth Amendment forbids. The prosecution is nearly always the party that reaps the benefits of a joint trial. As such, the trial court may impose on the prosecution, through appropriate orders, the corresponding responsibility to manage constitutionally intolerable risks to the defendant. The system's interests in joint trials—even when substantial—end where the Constitution's protections begin.

At the same time, a defendant has nothing to gain from a context-grounded approach other than what the Constitution promises. If the prosecution complies with the trial court's *Bruton* rulings, then the defendant cannot obtain a mistrial or other strategic advantage by implicating himself in the redacted confession. Accordingly, both sides have every incentive to fully flesh out *Bruton* issues

before trial and manage their cases pursuant to that plan. This Court can trust lower courts to continue overseeing that process; they have proven well-equipped to do so.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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