No. 22-196

In the United States Supreme Court

ADAM SAMIA, aka Sal, aka Adam Samic,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

BRIEF FOR PENNSYLVANIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT AND VIRGINIA AMICI CURIAE IN SUPPORT OF RESPONDENT

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Interest of Amici Curiae

Almost all criminal jury trials occur in the state courts. Over the past decade, the number likely exceeds half a million. Of these jury trials there have been thousands involving multiple defendants, at least one of whom gave a statement to police. Thus the *Bruton* rule has been of considerable impact.

In some jurisdictions, interpretation of *Bruton* has been inconsistent. But most States have managed to accommodate both the public interest and the confrontation rights of the accused, often by redacting co-defendant confessions in accord with this Court's instructions in *Gray v. Maryland*. This case threatens to break that balance. Petitioner's bid to require "contextual analysis," although this Court has specifically rejected it, would typically make redaction impossible. Severance would be the general rule.

The costs to the States would be high, but these are not money costs. When caseloads rise, expenditures don't keep pace. Retrials just displace new trials. Defendants wait longer for resolution of their charges, often in pre-trial detention. Victims of these multi-defendant crimes cannot move forward. And witnesses, many of whom are for good reason reluctant to testify at all, must return to court repeatedly, risking social media scorn and physical safety. The amici States therefore have an interest in the proper disposition of this case.

The amici States are Pennsylvania, Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware,

Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Virginia.

Summary of Argument

Petitioner's argument rests on an adverb error. He and his supporters use modifiers from the Court's precedents – words like "*directly*" accusatory and "*immediately*" inculpatory – as if they mean the *amount* of accusation or inculpation. So if other evidence would likely enough lead a jury to infer that a cohort's redacted confession refers to the defendant's conduct, even though it never names him, then the confession becomes "directly" accusatory. And a confession that is directly accusatory, says petitioner, violates *Bruton*.

But that is not how the *Bruton* cases use these adverbs at all. They are qualifiers, not quantifiers: they describe a particular *class* of incrimination, not its strength. In *Richardson*, and again in *Gray*, the Court held that incrimination implicating the *Bruton* rule arises from the language of the confession on its face, not from the "context" of the entire trial. While *Bruton* itself spoke of powerful incrimination, the later holdings make clear that the inquiry is categorical, not case-by-case. A confession that reveals neither identity nor the fact of redaction is, by definition, not "directly" accusatory.

Petitioner complains that such confessions may be unreliable. But as the Court recognized in *Crawford*, the Sixth Amendment contains no per se Reliability Clause. The right in question is confrontation and, absent facial incrimination, the way to enforce that provision in a joint trial is by instructing jurors to consider confessions only against their maker.

We use instructions for far harder evidentiary distinctions. We expect jurors, for example, to consider even a defendant's own, un-Mirandized confession only for impeachment purposes, and not for its substance. We expect them to consider even a defendant's own prior crimes only as to motive, and not character. These and many other instructions might by some be disregarded and, if so, to devastating effect. But the principle that juries follow the law is not merely a presumption or a proof; it is an axiom without which there could be no jury trials.

Bruton is a rare and limited departure from this principle, and petitioner would take the limits off. His "inferential" incrimination standard assumes that juries ignore instructions and that virtually all statements are too "powerful" for them to resist. Any confession, however emended, can be said to incriminate, because the statement of a co-defendant always describes the criminal activity for which the defendant is on trial, and the other evidence always establishes the defendant's participation in that activity. The actions of each can always be imputed to the other.

But even if petitioner's "surrounding context" rule could distinguish between powerful and "un"-powerful

incrimination in theory, it couldn't in practice. Petitioner says courts can discern the difference, before the trial even starts, by looking at "controllable" factors like the number of defendants and the order of witnesses. But his test is really neither cardinal nor ordinal. As he shows in discussing his own case, contextual implication depends on exactly *what* the prosecution says in its arguments and examinations, exactly *how* witnesses respond in their answers, and exactly *when* all these words are uttered. In real trials there are no advance scripts for all that.

The ineluctable if not intended outcome will be severance. The casualties will, in some cases, be other defendants, and in all cases the victims and witnesses who must run the gamut through trial and retrial. That is not a result required by the Constitution.

Argument

I. Petitioner's "surrounding context" rule is just the "contextual implication" rule that this Court rejected in *Richardson*, rejected in *Gray*, and should reject again now.

We have been here before. The Sixth Amendment rule of *Bruton v. United States*, 391 U.S. 123 (1968), bars admission of the statement of a non-testifying co-defendant if the statement names the defendant as a participant in the crime. Petitioner contends that the exclusion applies even when the statement does *not* identify the defendant, as long as the *other* evidence in the case does. Petitioner treats this position as a modern synthesis of the Court's *Bruton* precedents,

but in fact it is their antithesis. His arguments are the arguments this Court has already rightly refused.

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court expressly disapproved petitioner's "surrounding context" approach, which the Court variously referred to as "contextual implication," "evidentiary linkage," and "inferential incrimination." *Id.* at 206, 208, 209. The court of appeals had addressed Marsh's *Bruton* claim by "examining not only the face of the confession, but also all of the evidence introduced at trial." *Id.* at 206. That was improper, held this Court. A co-defendant's statement falls within the *Bruton* exclusion only if it incriminates the defendant "on its face," by identifying him. Other evidence of his guilt is not relevant. *Id.* at 208.

Yet petitioner insists that *Richardson*, which explicitly rejected contextual implication, actually *requires* it. He notes the Court's comment that the confession there was altered to "eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. He says this means, as a general rule, that all statements must be redacted that way, to remove not just the defendant's *identity*, but any reference to the *role* he played in the crime. Otherwise, petitioner says, the jury can use the other evidence in the case to link him to the confession. Linking, he says, means incrimination, and incrimination means a *Bruton* violation.

That assertion misses *Richardson*'s actual meaning. It isn't about whether a confession, when linked to other evidence, is likely to incriminate. It is about

whether that *kind* of incrimination – *inferential* incrimination – is remedied by exclusion, or by jury instructions.

The answer is plain: instructions, not exclusion. The Court was well aware that inferential incrimination is still incrimination. But it concluded that this kind of incrimination is simply not exempt from the rule that limiting instructions perform their purpose. "The very premise of our discussion is that respondent would have been harmed by Williams' confession if the jury had disobeyed its instructions." *Id.* at 208 n.3. It was one thing to reverse in *Bruton* itself, where the confession explicitly named the defendant. But, where identity is inferred from context outside the confession, the cure is a limiting instruction. "[E]vidence requiring linkage differs from evidence incriminating *on its face*," explained the Court. "[T]he calculus changes when confessions *that do not name* the defendant are at issue." *Id.* at 208, 211 (emphasis supplied).

The dissenting justices in *Richardson* surely saw what the Court was saying, and it was contrary to petitioner's reading. "Today," they acknowledged, "the Court draws a distinction of constitutional magnitude between those confessions that *directly identify* the defendant and those that rely for their inculpatory effect on … *other evidence* before the jury." *Id.* at 212 (Stevens, J., dissenting) (emphasis supplied). And they specified what was meant by "directly identified": "Today the Court … draws a line between codefendant confessions that *expressly name* the defendant and those that do not." *Id.* at 213 (emphasis supplied). As

everyone on the Court understood, the question after *Richardson* isn't whether the statement may inferentially incriminate in a particular case. The question is whether the statement "facially" incriminates, on its language alone.

And in the next case, that is exactly the question the Court addressed. In *Gray v. Maryland*, 523 U.S. 185 (1998), the Court applied just the same distinction: between statements that incriminate on their face – *i.e.*, without consulting the "surrounding context" – and statements that do not. The Court held that "obvious" redaction with X's is like the statement in *Bruton*, where the defendant was directly identified in the statement itself. The Court held that such redaction is unlike the statement in *Richardson*, which bore no signs of editing, and "became" incriminating only when linked with other, properly admitted evidence outside the statement. *Id.* at 196.

Yet petitioner insists that *Gray*, which barred redaction that is obvious on its face, actually bars redaction that is *not* obvious on its face, and which becomes incriminating only by inference from outside evidence. He notes the Court's comment that its ruling depends on "the kind of, not the simple fact of, inference." *Id.* He says this means that "inference" is back on the table.

That assertion misses *Gray*'s actual meaning. The Court was quite specific about the kind of inference that counts for *Bruton* purposes, and it is not the kind petitioner wants. The kind of inference that triggers the *Bruton* bar is the kind that is "obvious" on the face

of the statement. The Court made this point not just once, or twice, but at least ten different times.[1] Such a statement is immediately inculpatory not because of the "surrounding context," but because the jury will instantly know, from the language itself, that the statement was tampered with in order to disguise the defendant's identity. When they're confessing to a crime, no one says "I did it with deleted and blank space."

A statement redacted that way, said *Gray*, "*facially* incriminates." *Id.* at 196 (emphasis in original). But a statement that inculpates only by inference from other evidence does not facially incriminate, and is thus "outside the scope of *Bruton*'s rule." *Id.* at 195. In case there was doubt on this point, the Court restated it in concluding its opinion: *Bruton* "does not depend, in any special way, upon the other evidence introduced in the case." *Id.* at 197. Confessions are assessed on their content, not against the "surrounding context."

The rule of *Gray*, which is the rule of *Richardson*, should remain the rule – because petitioner's pre-

[1] "an obvious blank space or symbol or word such as 'deleted,'" *id.* at 189; "an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol," *id.* at 192; "an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration," *id.*; "an obvious blank," *id.* at 193; "the obvious deletion," *id.*; "devices … so obvious," *id.* at 194; "a blank or some other similarly obvious alteration," *id.*; "[t]he blank space in an obviously redacted confession," *id.*; "an obvious blank, the word 'delete,' [or] a symbol," *id.* at 195.

ferred replacement is just circular reasoning. He says a co-defendant statement may inferentially incriminate the defendant if the "surrounding context" confirms that he participated with the co-defendant in the crime. But it always does. The prosecution always has sufficient evidence to prove the defendant's involvement, or the court would not advance the case to trial.

Under petitioner's theory, the stronger and more detailed that other evidence, the more likely the jury is to "link" it to the co-defendant's confession, despite redaction. Perversely, then, the probability of reversible error is inversely related to the strength of the prosecution's case. The more certain the defendant's guilt, the more entitled he becomes to exclude the co-defendant's statement. And yet, on petitioner's logic, the converse is also true. The sparser the case against the defendant, the more salient the statement may appear.

So the "surrounding context" standard can easily be applied by the defendant either way. If the other evidence against him is compelling, the statement becomes "inferentially incriminating"; if the other evidence against him is thin, the statement *also* becomes "inferentially incriminating." "Inferential incrimination" is inevitable.

But a purported legal test that always yields the same result is no test at all. The flaw in the proposed standard is its premise. In a joint prosecution, the "surrounding context" always suggests that the defendants on trial took part in the crime; they are the

ones sitting in the courtroom. The Sixth Amendment issue arises not from the context, but from the unconfronted evidence, which is the statement itself. The proper focus is on the content of the statement the jury will hear. That is the subject of the following section.

II. The Constitution is satisfied when neutral redaction de-identifies the defendant as a participant in the crime.

The Confrontation Clause provides that "the accused shall be afforded the right … to be confronted with the witnesses against him." When a cohort's confession is admitted only against himself and does not identify the defendant, or is redacted to remove his identity, the confessor is no longer a witness against him. That is where Sixth Amendment analysis should end.

We say "identity" rather than "name" because it is identity that constitutes the accusation. Many people are as identifiable by a particular nickname, or by specific physical characteristics, as by the name on their birth certificate. As long as such identity information is removed and the jury is properly instructed, it is not the statement that is doing the accusing. It is the independent evidence of the defendant's guilt, which must be proven beyond a reasonable doubt.

For redaction to work, of course, it must be invisible. If the jurors know the statement has been stripped of identifying information, they will know why – to mask someone's identity. The mask, as this

Court recognized in *Gray*, 523 U.S. at 193, is itself a form of identification. And identification, whether by a legal name, an a/k/a, a physical hallmark, or a self-evident redaction, is "directly accusatory," and therefore a *Bruton* violation. *Id.* at 194.

Accordingly, the redactions must be natural, and neutral. New language should blend with the old. Generic terms should be used: "We." "Another guy." "The kid I was with." In cases where redaction in verbatim, first-person form would be too awkward, the statement can be presented in the third person, through paraphrase.

These guidelines are not all that complicated. They are certainly not new. This is exactly what the Court told prosecutors to do in *Gray*. The prosecution there had redacted the co-defendant's statement to say "Me, deleted, deleted, and a few other guys." The Court explained that the statement should have been redacted to say, instead, "Me and a few other guys." *Id.* at 196. For clarity the Court then provided two contrasting examples: a proper redaction, in which the defendant's name was simply replaced with the word "someone"; and an improper redaction, which replaced the names with the phrase: [identified the names of the two other individuals]. *Id.* at 197, citing *United States v. Garcia*, 836 F.2d 385 (8th Cir. 1987), *Clark v. Maggio*, 737 F.2d 471 (5th Cir. 1984).

Petitioner nowhere acknowledges *Gray*'s instructions for proper redaction. But he has numerous complaints about the practice nonetheless.

His primary protest is that only "role" redaction, not identity redaction, is sufficient to prevent incrimination by inference. Redaction, he says, must remove any reference to the fact that the defendant even exists. That's legally wrong, as discussed above: *Richardson* rejected the use of inferential incrimination period, whether the inference is based on a role-redacted statement or an identity-redacted statement. And we also know from *Gray* that role-redaction isn't required, because otherwise that opinion could have been short and sweet: "deleted" and "blank space" reveal the existence of someone; that is not allowed; case closed.

But petitioner's claim about role-redaction isn't just legally wrong; it's also *factually* wrong. Role redaction *doesn't* prevent inferential incrimination. *Richardson* shows that. The victim identified Marsh, the defendant, and testified that Marsh took part in every stage of the crime. The co-defendant's confession, even after removing any reference to Marsh's existence, "largely corroborated [the victim's] account." 481 U.S. at 202-04. Marsh later chose to take the stand, in an effort to explain away the confession; but she did that precisely because *the link to her was already evident*. Even before she testified, the jurors knew full well how the crime went down, and that Marsh was intimately involved. Had they wished to violate their instructions, they could easily have inferred that everything the confessor said about his own actions also applied to her. All they needed in order to make that inference was the victim's testimony and the co-defendant's redacted statement.

And what was true in *Richardson* is always true. The evidence against the defendant will always correlate with the content of the confession, no matter how it is redacted, because both are describing the same events. In some cases there will be more overlap; in some cases less; in some cases there will even be contradictions. But in every case a jury could (but for its instructions) use the confession either to validate corresponding testimony or to "fill in the blanks" for any points not covered by the other evidence. No form of redaction can prevent that and under *Bruton* it doesn't have to. All it has to do is de-identify in order to avoid *facial* incrimination.

But, says petitioner, identity redaction doesn't accomplish that. Even the most neutral, generic redactions, he claims – like "the other guy" – will still be obvious to the jury. He contends that any such phrase will "jump out" as artificial because officers would have asked the suspect who the other guy was and the suspect would have answered. Pet. Br. at 30.

If only that were the case. It would be preferable if perpetrators always identified their accomplices, but reality is otherwise. Sometimes criminals commit crimes with "friends of friends" whose names they don't even know. And even when they do know, they are often unwilling to say so – whether from fealty to a code, or fear of retaliation. It is the same with civilian witnesses. Jurors live in the real world; they have heard the words "stop snitching." They realize that people who talk to the police often get hazy when it comes to naming names.

Petitioner says that neutral redaction is still bad because it conceals the defendant's identity, but not the total *number* of participants in the crime. Pet. Br. at 34-35. Whatever that number may be, though, an identity-redacted confession is not directly accusatory, and raises no *Bruton* issue. "Three other guys" could be any three guys in the world. The only way the prosecution can convict the defendant is by proving, through evidence outside the redacted statement, that he was one of those three.

That's not sufficient, asserts petitioner. He says numbers are incriminating because jurors need only lift their eyes to see three accused people sitting at the defense table. But that is true in any trial, even against a single defendant. If jurors can count to three, they can surely count to one. They know, merely by lifting their eyes, that police and prosecutors have determined the defendant is guilty, and that they must have their reasons for that determination. That reality raises concerns that judges must of course address, in every trial. But not by invoking *Bruton*.

Petitioner says that neutral redaction is bad in another way. Redaction, he claims, gives the prosecution "free reign" to unmask the edits by explicitly arguing that "the other person" in the confession is the defendant. Pet. Br. at 33-34. But of course it doesn't – any more than suppression of an illegally seized gun gives the prosecution free reign to tell the jury about the gun. If the judge has ordered redaction to remove the fact that the confession named the defendant, the prosecution is of course not permitted to tell the jury that the confession named the defendant.

But that's apparently not petitioner's real claim. His real claim is apparently that the prosecution shouldn't be able to talk about the *other* evidence that serves to identify the defendant, because then the jury might "infer" that he was "the other guy" in the confession. That suggestion is insupportable. The prosecution has every right to present proper evidence of the defendant's guilt, and to lay that evidence out both in its opening and in its closing. All it cannot do is ask the jury to convict the defendant *based on the co-defendant's confession*, any more than it can ask the jury to convict the defendant based on any other evidence that is not admissible against him.

The flaw in all these arguments is their premise. Petitioner contends, throughout his brief, that the jury must never be "allowed" to make any improper inferences from a co-defendant's confession. The problem is that *Bruton* was never designed to do all that work itself. It addresses, as petitioner acknowledges, only a specific "*kind* of, not the simple *fact* of, inference." *Gray*, 523 U.S. at 196. The rest is a matter for the same mechanisms we use with every other type of potentially prejudicial evidence, as discussed in the section below.

III. Even a properly redacted statement may (like many other forms of evidence) permit some risk of an improper inference; that is why we have jury instructions.

"Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a

witness 'against' a defendant *if the jury is instructed to consider that testimony only against a codefendant*." *Richardson*, 481 U.S. at 206 (emphasis supplied).

The reminder is especially relevant here. Petitioner would overrule *Richardson* and *Gray* and require exactly the "evidentiary linkage" the Court has previously rejected. He would do so on the claim that co-defendant statements, even when properly redacted in accordance with *Gray*, are so *incomparably* incriminating that they must be made a unique exception to the ordinary rule.

But that claim falls flat. Courts rely on limiting instructions all the time to distinguish between proper and improper uses of the same piece of evidence. They do it in enforcing constitutional rights; they do it to implement evidentiary rules; they do it for proofs with at least as much potential for prejudicial misuse as the statements in question here.

The most striking example, for present purposes, is *co-defendant confessions themselves*. In *Tennessee v. Street*, 471 U.S. 409 (1985), the prosecution introduced a co-defendant's confession to rebut the defendant's claim that his own statement had been fabricated by police, modeled on his cohort's. "If the jury had been asked to infer that Peele's confession proved that respondent participated in the murder, then the evidence would have been hearsay," said the Court, "and because Peele was not available for cross-examination, Confrontation Clause concerns would have been implicated. The jury, however, was pointedly instructed by the trial court 'not to consider the

truthfulness of [Peele's] statement in any way whatsoever.'" *Id.* at 414-15. The limiting instruction did the trick, even for a completely *unredacted* co-defendant confession.

Petitioner never mentions *Street*. He may consider it too old, and no longer good law. But it was decided after *Bruton*, so the Court was surely mindful of the "powerfully incriminating" possibilities of co-defendant confessions, yet still found jury instructions sufficient. In fact in *Richardson* itself, the Court cited *Street* as an exemplar of the efficacy of instructions. 481 U.S. at 207. And since then the Court has reaffirmed *Street* yet again – in its most recent and comprehensive treatment of the constitutional provision at issue here. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

But instructions don't just suffice for co-defendant statements; they work even for a defendant's *own confession*. In *Harris v. New York*, 401 U.S. 222 (1971), the prosecution used the defendant's un-Mirandized confession, in which he freely admitted selling drugs, to rebut his trial testimony, in which he flatly denied it. The jury, however, was instructed by the trial judge to consider the statement only for impeachment, and not to consider it in deciding on the defendant's guilt of the crimes he had confessed to. This Court found no Fifth Amendment violation: the limiting instruction eliminated it.

These are far from the only constitutional fair trial rights that depend entirely on jury instructions. We exhort jurors to bring their everyday common

sense into the courtroom, and then we tell them they can't consider the defendant's failure to testify in answer to the charges against him. We enjoin them not to look at media coverage, and then we send them home with their smartphones. We expect them to convict only upon proof beyond a reasonable doubt – and yet the concept, so vital, is so abstruse that even trying to define it may be dangerous. No one would say these instructions are easy. But still we count on the jury to carry them out.

The same is the subtext of an entire range of evidentiary rules. There is a proper purpose, and an improper purpose, and all that separates them is the limiting instruction. The rape shield bars evidence of the victim's sexual predisposition, but permits jurors to consider prior sexual behavior relative to injury or consent. Fed. R. Evid. 412. A witness's religion is never relevant to her credibility, but may be used to show bias. Fed. R. Evid. 610. Unsworn prior inconsistent statements are fine, for impeachment; but do not think about counting them as "substantive" evidence. Fed. R. Evid. 801(d)(1)(A). Even a defendant's prior record of similar crimes is admissible to show opportunity or intent – but certainly not as evidence of his propensity to commit such a crime. Fed. R. Evid. 404(b). And a special rule exists for joint trials, so that any type of evidence against just one defendant, however powerful it may be, is not considered against any other defendant. Fed. R. Evid. 105.

In all of these situations, jury instructions are not merely incidental; *everything* depends on them. With-

out limiting instructions, the distinctions drawn by the rules would be literally meaningless.

But none of that matters here, says petitioner; on this one thing, juries cannot be trusted. No instruction will dissuade them from entering the path of inference and using it to convict the defendant based on evidence they were warned not to consider. Co-defendant statements, we are told, are "uniquely" prejudicial, even when they have been properly redacted to remove any language identifying the defendant as a participant.

But this "uniqueness" claim is overblown. A redacted confession is not more prejudicial than an *unredacted* confession, yet the unredacted confession is admissible with limiting instructions under *Street*. A redacted confession is not more prejudicial than the defendant's *own* confession, which is admissible with limiting instructions under *Harris*. And it is hard to imagine any evidence more damaging to a defendant than a lengthy recitation of prior crimes that match the current offense, yet these are admissible too, with limiting instructions.

Still, say petitioner and his amici, a co-defendant's statement is different, because it may be "unreliable." Criminals, they contend, sometimes try to shift blame to their cohorts. Yes, they do sometimes, and sometimes they don't. Some confessions are more reliable, and others less.

But the purpose of a limiting instruction here is not to temper the jury's consideration of potentially

unreliable evidence. If it were, then the instruction to be given would be a *cautionary* instruction, such as corrupt source, not a limiting instruction. Limiting instructions are often needed most in precisely those situations where the evidence *is* reliable. Voluntary but un-Mirandized confessions are not untrustworthy; prior inconsistent statements are frequently more credible than trial testimony; prior crimes evidence is often highly probative.

So the reason for limiting instructions when a co-defendant gives a statement is not that the statement lacks inherent indicia of reliability. The reason for the instruction is that the Confrontation Clause applies. As *Crawford* teaches, reliability vel non is irrelevant. 541 U.S. at 63. No matter how reliable the co-defendant's confession may be, no matter how thoroughly it is corroborated by other evidence, it remains inadmissible against the defendant unless the co-defendant chooses to take the stand.

When he doesn't, and instructions are given, they are no different than most other limiting instructions, and no less effective. We tell the jury it can consider certain evidence for one purpose but not another, no matter how tempting it might be to intermingle them. The temptation is not greater for identity-redacted confessions than it is for other kinds of evidence such as powerful impeachment material, or records of prior crimes. If anything it is *less*, because in these other cases, no "inference" is necessary. The improper purpose is apparent on the face of the evidence; we just tell jurors to put it aside. If they can do it there they can do it here.

IV. Petitioner's "modest" proposal is a false promise.

But, suggests petitioner, why take the chance? Why rely on neutral redaction and limiting instructions when we can conduct a pretrial hearing at which the trial court will assess, *inter alia,* the prosecution's arguments to the jury, its questions to witnesses, and the content of its evidence? The court can then decide, in advance, whether to let the prosecution use the statement at all.

Petitioner says this is a "modest price to pay" in order to effectuate his "surrounding context" approach to *Bruton* analysis. Pet. Br. at 17. He and his colleagues assure us that the process will mostly be "simple." In any event, they say, it will be needed in only a relatively "few" cases. And it is the only way, they assert, to achieve "basic fairness." None of those claims are correct.

a) application will not be "simple"

Petitioner says this pretrial "surrounding context" review would be "a common-sense and administrable rule." Pet. Br. at 4. His amicus says it would generally be a "simple" undertaking. Former Judges Br. at 7.

But a glance at petitioner's application of the process to his own case shows that this is false. Petitioner employs "surrounding context" to mean not just the total number of defendants, but the phrasing of any questioning related to the confession, the exact

answers to those questions, the substance of all the other evidence in the case-in-chief, the order of its presentation, and the prosecution's "theory of the case," as expressed in the specific language of its opening and closing arguments. He quotes punctiliously from particular passages throughout the trial transcript to make his points. Pet. Br. at 39-44.

Petitioner asserts that all such material can, somehow, be reviewed *before trial* – and without requiring the prosecution to have "precisely mapped out" what it will do and say as the case progresses. Pet. Br. at 39. But petitioner's amicus is more realistic, admitting that the judge would have to "review[] drafts of the prosecution's proposed questions." Former Judges Br. at 7. And it's not just the questions: there would have to be "drafts" of everything – the questions, the answers, the opening and closing arguments. Only that kind of "drafting" could come close to duplicating the *post*-trial review that petitioner engages in for himself.

But trials are not TV shows. There is no roomful of writers crafting a screenplay to be acted out before the jury. Things happen – especially in short-staffed cases on crowded state dockets. Civilian witnesses often fail to appear at the appointed time. Experts are away on other business. Police officers are called out on emergencies. Judges do not say: "Take your time. We'll put the jury on ice." They say: "Next witness."

When those witnesses do get to the stand, they seldom testify exactly as anticipated, no matter how well prepped. And when all its witnesses are done, and

the prosecution rests, it never knows for sure what will happen next. Will the defendant call witnesses? Will he testify himself? Or will the defense rest? Final decisions on these matters are often reserved until after the case-in-chief, because defense lawyers know that the actual evidence many times differs from the expected evidence.

As a result, pretrial review of the "surrounding context" is a contradiction in terms. The context, says petitioner, means the complete record, but the record doesn't exist yet. This Court has already recognized as much in *Richardson*. "*Bruton* can be complied with by redaction" before trial, held the Court, but only "[i]f limited to facially incriminating confessions." Once "extended to confessions incriminating by connection" with other evidence, however, "that [is] not possible." An assessment "in light of the all the evidence" could be done only "at the end of each trial," 481 U.S. at 208-09 – not before it even begins.

b) cases will not be "few"

Petitioner and his allies, though, suggest we need not worry too much about how to conduct these pretrial hearings, because we won't need very many. *Bruton* issues, they claim, just don't come up that often. One amicus believes there are "relatively few" joint trials, "much less" joint trials involving confessions. NACDL Br. at 20. Another says only 2% of federal criminal cases even get to trial, because the rest plead. N.Y. Lawyers Br. at 21.

But that statistic leaves something out: the state courts. The Court Statistics Project of the National Center for State Courts reports that, "[b]etween 2012 and 2021, an average of 98.5% of U.S. Court cases were filed in state courts. Only 1.5% were filed in federal courts."[2]

Most of these 98.5% of all cases, of course, were not criminal and did not result in jury trials. But the Center supplies relevant information on that point. The Court Statistics Project has compiled a decade-worth of data. From 2012 to 2021, the number of criminal jury trials in the reporting states – which was less than half of the states – was 338,066.[3]

Most of these 338,000 criminal jury trials, of course, were not joint trials. But this Court has supplied relevant information on that point, in the *Richardson* case. In the five years previous to that decision, reported the Court, joint trials accounted for almost one third of federal criminal trials. 481 U.S. at 209. There is no obvious reason the rate would be

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[2] https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads, last visited March 2, 2023.

[3] https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal, last visited March 2, 2023.

The total represents data from approximately twenty states; the other 30, including large jurisdictions such as Illinois, Pennsylvania, and New York, supplied no data for most of this period. The actual number of criminal jury trials in state courts was therefore likely over 500,000, even with many fewer trials in 2020 and 2021 due to the pandemic.

significantly lower in state court, but even assuming it is much lower, say 10%, then the number of state criminal trials involving multiple defendants was, for the pre-pandemic period in the reporting states, approximately 34,000.

Some of these 34,000 joint trials, of course, did not involve confessions. But petitioner's partners supply relevant information on that point. An amicus reports that data demonstrate "the sheer ubiquity of confessions," with studies showing that 65% to 80% of criminal suspects make statements to police. N.Y. Lawyers Br. at 8 n.2. Even assuming the actual rate is much lower, say 50%, then the total number of jury trials involving multiple defendants and confessions, during the relevant period in the reporting states, was at least 17,000. And that number is artificially low, given the limited state dataset and the conservative assumptions applied. The true national figure would of course be much higher.

That is a significant number of *Bruton* cases: more than a "few," and certainly enough to warrant a genuinely workable way to apply the Court's precedent. Identity redaction of the confession "on its face," *Richardson*, 481 U.S. at 208; *Gray*, 523 U.S. at 196, provides such a method. Pretrial "surrounding context" review does not.

c) results will not be "fair"

Ultimately, says petitioner, it doesn't really matter whether it would be difficult to manage his rule. What matters is "basic fairness," which he says can be secured only by adoption of his proposed constraints on the use of confessions in joint trials. Pet. Br. at 31. But the unfairness actually runs the other way.

Petitioner says it is unjust that a defendant must face the possibility of inferential incrimination merely because he happens to be tried together with his accomplices. But that does not just "happen." It happens because he was shown upon probable cause to have acted in concert with others to commit a criminal act. If, as is often the case, he is less culpable than his cohort, or the evidence against him is less strong, he may well benefit from being tried jointly rather than apart. In any case, the limited purpose for which a confession may be introduced at a joint trial is no more unjust to him than the limited purpose for which other evidence may be introduced. The prosecution does not receive a "windfall" because it offers evidence that the rules permit it to use.

The only windfall here would be to petitioner. *Richardson* and *Gray* rejected contextual implication precisely because it would blow wide open the very limited exception, crafted in *Bruton*, to the cardinal rule of the criminal justice system: that juries follow instructions. Petitioner wants to reverse that rule and establish a contrary presumption that, if jurors *can* draw an improper inference from a confession, they

will draw that inference, duty be damned. The effect of such a rule (as petitioner and his supporters no doubt know) would be a surge in severance orders and a spate of separate trials.

Petitioner says that's acceptable, because a loss of joint trials would just be a loss of "efficiency." To further play down this concern, he places the word "efficiency" inside quotation marks, as if to imply that penny-pinching prosecutors are just trying to save a buck. Pet. Br. at 31. But of course it's not about the money; it's about the squandering of scarce justice resources. The effects will fall on everyone, including the accused.

When multiple participants in the same criminal offense are tried separately, the winners are few, and random. Earlier-tried defendants, as this Court noted in *Richardson*, will be without the advantage of prior transcripts that map out the prosecution's case and the weaknesses of its witnesses. 481 U.S. at 210. Later-tried defendants may get lucky if witnesses become unavailable, but they will sit in jail for many extra weeks and months waiting their turn. Other defendants on the docket will also be denied their timely day in court. And the public will bear the risk of inconsistent justice when different defendants are tried on different evidence before different fact finders for the same crimes. *Id.*

And then there are the victims and witnesses, who hold no place in petitioner's analysis. Multi-defendant offenses are often more serious and more violent than the norm; that is why conspiracy is a crime. These are

frequently gang- and drug-related cases, sometimes sex crimes. Trial transcripts wind up posted on social media. Witnesses are without recourse; in most cases there is no "federal witness protection program" promising a new life in a new locale. Often it is possible to do no more than relocation to a different neighborhood, and then only for a few weeks or months.[4]

It is struggle enough to bring witnesses into court for one trial in such circumstances, let alone for

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[4] "[W]itness intimidation is pervasive and increasing.... Prosecutors estimate that witness intimidation plays a role in 75 to 100 percent of violent crime committed in gang-dominated neighborhoods.... The time between a suspect's arrest and trial is the most dangerous; repeated and lengthy trial delays expand the opportunities available to a motivated intimidator." *Witness Intimidation*, U.S. Dep't of Justice, Community Oriented Policing Services, at 5, 9 (2006), https://cops.usdoj.gov/ric/Publications/cops-p112-pub.pdf.

"Police in many cities … describe chronic difficulties with witnesses who refuse to step forward and witnesses who change their testimony at the last minute." Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, 39 J. Legal Stud. 399, 400 (2010).

Witness intimidation is common in "major urban areas [such as] Baltimore, Philadelphia, Newark, Chicago, Oakland and Los Angeles," but also occurs "with surprising frequency in communities such as Portland, Santa Fe, Pottstown, Buffalo, Denver, Charleston and Chattanooga.... [I]ntimidation pervades serious and violent felonies, domestic violence and gang crimes" but "also occurs in lesser felony, misdemeanor and even traffic cases." Margaret O'Malley, *Witness Intimidation in the Digital Age*, The Prosecutor, at 15 (2014), https://pceinc.org/wp-content/uploads/2015/06/Witness-Cooperation-and-Intimidation-Witness-Intimidation-In-the-Digital-Age.pdf.

reruns. When accomplices are tried together, victims can at least be given some assurance that the ordeal will be done and the perpetrators, if proven guilty beyond a reasonable doubt, punished. No such promises can be made when witnesses must testify at many trials in seriatim.

Multiple trials, therefore, multiply uncertainties for defendants, danger and distress to witnesses, and pressures on the justice system. These are not consequences that add up to "basic fairness." Petitioner's arguments should be rejected.

Conclusion

For these reasons, the State amici curiae respectfully request that this Court affirm the court of appeals and reaffirm its prior holdings on facial versus inferential incrimination.

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