No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID RIVERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KATIE HURRELBRINK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

When a defendant presents strong circumstantial evidence of possible vindictiveness beyond mere correlation, can a presumption of vindictiveness arise pretrial?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner David Rivera and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Rivera*, No. 19-CR-5151-AJB, U.S. District Court for the Southern District of California, Judgment issued June 4, 2021.
- *United States v. Rivera*, No. 21-50137, U.S. Court of Appeals for the Ninth Circuit, Memorandum issued July 20, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

IN THE SUPREME COURT OF THE UNITED STATES

DAVID RIVERA,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

INTRODUCTION

For decades, this Court has recognized that when prosecutors bring more severe charges to punish defendants for exercising rights, they offend due process of law. Protecting against such "vindictive prosecutions" not only affirms the rights of affected defendants. It also ensures that fear of retaliation plays no part in other defendants' decisions about whether exercise their rights. Ordinarily, defendants cannot produce direct evidence of actual vindictiveness. After all, few vindictive prosecutors would admit to acting with malintent. Thus, in rare circumstances, this Court allows defendants to raise an inference of prosecutorial vindictiveness from circumstantial evidence. If the inference is strong enough to raise the presumption, the burden shifts to the prosecution to give a reason for acting as they did. Only if the prosecutor can articulate no legitimate reason for the change in charges will the added charges be dismissed.

In *United States v. Goodwin*, however, this Court recognized that relying on circumstantial evidence is more treacherous in the pretrial context. Pretrial, defendants exercise all kinds of rights, while prosecutors have all sorts of reasons to reevaluate charges. It cannot be inferred that a prosecutor acts vindictively every time they increase changes after a defendant asserts a right. Thus, *Goodwin* rejected a defendant's attempt to derive a presumption of vindictiveness from this sequencing alone.

In *Goodwin*'s wake, the circuits have struggled to interpret its lessons for pretrial presumptive vindictiveness claims. Some courts say that the presumption can never arise. Others hold out a pretrial presumption as a theoretical possibility, but they start with a countervailing presumption of prosecutorial propriety so powerful that it can virtually never be overcome. And still others take a totality-of-the-circumstances approach, applying a presumption when a defendant offers more than a mere correlation between the rights exercise and the increase in charges and when the circumstances otherwise raise a realistic likelihood of vindictiveness.

These distinctions made the difference when it came to Mr. Rivera's vindictive-prosecution claim. On a totality-of-the-circumstances view, his case bore strong indicia of prosecutorial vindictiveness. Mr. Rivera was charged in a one-count indictment with a simple immigration offense. Court filings show that the prosecutor had reviewed all evidence relevant to choosing a charge within a few weeks of his arrest. And the parties took the case to the brink of trial before the pandemic halted the case's progress. All the while, the prosecutor maintained the

same charges, never superseding the indictment. Months later, Mr. Rivera filed a Speedy Trial Act motion, which—if accepted—could have resulted in the dismissal of his charges, his transfer to immigration custody, and his deportation, ending the prosecution. Within two weeks, the prosecutor had mooted the motion by obtaining a superseding indictment. She did so even though her office was facing a backlog of unindicted cases and, per office protocol, other cases should have received priority. The new indictment replaced Mr. Rivera's single-felony indictment with two felonies. The government has never publically[1] offered a plausible reason why the prosecutor acted as she did.

The panel ignored these specific case facts. Instead, it applied an implicit presumption of prosecutorial propriety, reasoning that "the government's charges *frequently* evolve pretrial" and "the prosecutor's assessment of the proper extent of prosecution *may not* have crystallized." *Rivera*, 2023 WL 4646110, at *1 (emphases added). This case therefore falls squarely within the circuits' post-*Goodwin* split, raising the question: When a defendant presents strong circumstantial evidence of possible vindictiveness beyond mere correlation, does the presumption of vindictiveness arise pretrial?

OPINION BELOW

The Ninth Circuit affirmed Mr. Rivera's conviction in a memorandum decision. *See United States v. Rivera*, 2023 WL 4646110 (9th Cir. 2023) (attached

[1] The government filed rebuttal evidence under seal, but despite repeated requests, neither the government nor any court has made that evidence available to the defense.

here as Appendix A). The panel then denied Mr. Rivera's petition for rehearing. *See United States v. Rivera*, No. 21-50137, Docket No. 57.

JURISDICTION

The Ninth Circuit affirmed Mr. Rivera's conviction on July 20, 2023. The court denied Mr. Rivera's petition for rehearing or rehearing en banc on October 16, 2023. *United States v. Rivera*, No. 21-50137, Docket No. 57. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

David Rivera's case arose from a December 10, 2019 encounter with Border Patrol. That day, a seismic intrusion device alerted in an area north of the U.S.-Mexico border. An infrared scope operator spotted two men on a hill about a mile and a half into the country. Upon scaling the hill, Border Patrol found Mr. Rivera lying face down. Mr. Rivera admitted that he was a Mexican citizen who illegally crossed without permission. The government's record checks revealed that Mr. Rivera was previously removed. He was arrested and charged in a one-count indictment with being a deported noncitizen "found in" the United States.

A week after indictment, the trial prosecutor substituted her appearance for the indicting attorney's. On January 2, 2020, Mr. Rivera's attorney and government

counsel viewed Mr. Rivera's "Alien File" (or "A-File"), a comprehensive record of his immigration history. Mr. Rivera then filed pretrial motions.

The prosecutor responded to the pretrial motions on January 29, 2020. That response opened by describing all the pertinent events leading up to Mr. Rivera's apprehension—the seismic intrusion device's activation, the scope operator's observations, the agents' rush to the scene, Mr. Rivera's statements, and the results of the records checks. The prosecutor also noted that she had produced a summary of Mr. Rivera's prior convictions, which included a prior misdemeanor illegal entry under 8 U.S.C. § 1325.

On February 5, Mr. Rivera secured an April 7 trial date, with motions in limine due on March 16. At defense counsel's request, the parties viewed the A-File a second time on March 10. A grand jury convened on March 12, just four days from the motions in limine deadline. Yet the government did not supersede the indictment.

On March 20, 2020, two-and-a-half weeks before trial, progress ground to a halt. The COVID-19 pandemic had arrived. The court entered a continuance in Mr. Rivera's case to comply with a district-wide Chief Judge Order ("CJO") suspending trials. The same district-wide order suspended grand juries, preventing the U.S. Attorney's Office from obtaining indictments.

For weeks, Mr. Rivera remained in pretrial detention while the pandemic raged. Then, on May 7, 2020, he moved to dismiss his case under the Speedy Trial Act ("STA"). His motion raised novel questions about how the STA applied to

pretrial detainees during the pandemic. Thirteen days later, on May 20, 2020, the first grand jury convened since the March suspension.

At that point, the government had a serious backlog problem.[2] Between March, when grand juries were suspended, and May, when they resumed, the Southern District of California's United States Attorney's Office ("USAO") had filed a substantial number of cases, including some in which defendants were taken into custody. The STA set 30- to 60-day deadlines for indicting these cases. *See* 18 U.S.C. § 3161(b)(b). Accordingly, due to the large number of cases pending indictment and the government's inability to present them before the grand jury all at once, the government adopted a policy of prioritizing presentation of cases with looming indictment deadlines. To get through the backlog, the government returned approximately 230 indictments in reactive cases in a month, even though grand juries were not always sitting full days.

Mr. Rivera's case did not fall in the priority category. He was timely indicted pre-pandemic. And his trial was not imminent. Trials had been suspended for months, with no end in sight.

Nevertheless, on the first day that grand juries resumed, the government superseded his indictment. Like the original indictment, the superseding

---

[2] Mr. Rivera asked the Ninth Circuit to take judicial notice of the facts in this paragraph, explaining that the government did not reveal them until after the appeal was filed and arguing that they were otherwise judicially noticeable. *See Rivera*, 2023 WL 4646110, at *1 n.1. The Ninth Circuit deemed the motion moot, stating that considering them would not change the outcome. *Id.*

indictment charged Mr. Rivera with illegal reentry. But instead of indicting on a "found in" theory, the government charged him with "attempt[ing]" to reenter illegally. The superseding indictment also contained another charge: felony attempted illegal entry under the recidivist provision of 8 U.S.C. § 1325.

Shortly after returning the superseding indictment, the government filed a May 26 response to the STA motion. The legal argument's first heading proclaimed: "The Superseding Indictment Moots Defendant's Motion."

Mr. Rivera filed a vindictive prosecution motion challenging the superseding indictment. He argued that under the circumstances, superseding the indictment thirteen days after his STA motion raised a presumption of vindictiveness. The motion was denied.

Mr. Rivera appealed to the Ninth Circuit. On appeal, Mr. Rivera again pointed out that his case was legally and factually simple; that virtually no investigation occurred between his arrest and the grand jury suspension; that the prosecutor knew of all pertinent facts at least by January; and that she took the case to the brink of trial without reindicting. Yet, shortly after he filed his STA motion, the prosecutor violated her own office's policy by snagging a coveted spot on the very first post-suspension grand jury to supersede Mr. Rivera's indictment. He argued that these facts raised a presumption of vindictiveness.

In response, the government offered three explanations for why the prosecutor might have superseded. But as Mr. Rivera pointed out, each was utterly implausible. First, the government said that by replacing the "found in" § 1326

charge with an "attempt" § 1326 charge, the prosecutor eliminated the possibility that Mr. Rivera would launch a so-called "official restraint" defense. But that defense was not available on the facts of his case, because he indisputably was not under continuous surveillance from the time he crossed the border. *See United States v. Muniz-Jaquez*, 718 F.3d 1180, 1182–83 (9th Cir. 2013).

Second, the government claimed that by adding the § 1325 felony, the government gained the ability to introduce additional in-court admissions from the previous § 1325 misdemeanor case, along with new A-File documents. But the government was mistaken. The in-court admissions in question did not come from the prior § 1325 misdemeanor, but from a completely different prosecution. And under Ninth Circuit case law, prosecutors may—and routinely do—introduce relevant evidence arising out of a prior § 1325 misdemeanor prosecution without charging a § 1325 felony.

Third, the government asserted that the prosecutor could have learned something new from a March fingerprint analysis and the second, March A-File viewing. But it was highly unlikely that these events changed the prosecutor's view of the case—the fingerprint analysis only *confirmed* her belief that Mr. Rivera's fingerprints matched the documents in his A-File, and it was the *defense* who requested the second A-file viewing. More importantly, nothing she found in the A-File could explain the particular change in charges here. The A-File documents immigration *history*—prior deportations, prior prosecutors, prior admissions to foreign citizenship, and the like. It is therefore primarily used to establish that the

defendant is a non-citizen. But the difference between the charges in the original indictment (a "found in" § 1326) and the superseding indictment (an "attempt" § 1326 and a felony § 1325) had nothing to do with immigration history; no matter what charge she chose, the prosecutor would still have to prove that Mr. Rivera was a non-citizen. Rather, the difference in those charges rests almost[3] exclusively on offense *conduct*—that is, acts committed in the *present* case. AOB-32 (charting the difference in the elements). Did the person enter free from official restraint, an element of a "found in" § 1326? Did they intend to avoid detection, an element of an "attempt" § 1326? Did the crossing occur outside a port of entry, an element of § 1325(a)(1)? These are the kinds of questions that a prosecutor would ask when choosing between those charges. The A-File would not answer any of them.

Thus, Mr. Rivera had strong arguments that—on the particular facts of this case—further investigation and consideration could not explain the change in charges. Yet the Ninth Circuit panel did not resolve this dispute between the parties or point to any particular case facts to explain why the prosecutor superseded.

Instead, the panel began with the presumption that prosecutors generally have good reasons for altering their charges prior to trial. The Court noted that "the government's charges *frequently* evolve pretrial." *Rivera*, 2023 WL 4646110, at *1. And it cited this Court's decision in *United States v. Goodwin*, 457 U.S. 368, 381,

---

[3] The exception is the prior-conviction element of a § 1325 felony. But the prosecutor knew about Mr. Rivera's prior § 1325 misdemeanor in December.

384 (1982), for the proposition that courts should not presume vindictiveness when "the prosecutor's assessment of the proper extent of prosecution *may not* have crystallized." *Rivera*, 2023 WL 4646110, at *1 (simplified). From there, the court reasoned that "[r]outine trial preparation" had occurred "for less than three months" before grand juries shut down, and that "the pandemic also played into the lack of an earlier indictment." *Id.* (simplified). That was enough to defeat any presumption of vindictiveness. *Id.*

In support, the panel cited the Ninth Circuit's decision in *United States v. Kent*, 649 F.3d 906, 913 (9th Cir. 2011). *Kent* pursued a similar line of reasoning. The court in *Kent* observed that that prosecutors "add charges pretrial for any number of permissible reasons, such as coming to a new understanding of the crime or evidence." *Id.* According to the *Kent* panel, this Court demanded "deference to a prosecutor's discretion to elevate charges in light of the pretrial timing of such conduct, not just its factual context." *Id.* (simplified).

This petition follows.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for four reasons.

First, the circuits are split concerning whether and when defendants can raise a presumption of vindictiveness pretrial. The D.C., Fifth, Sixth, and Tenth Circuits apply the presumption when it is appropriate under the totality of the circumstances, bearing in mind the special features of the pretrial context enunciated in *Goodwin*. On the other side of the spectrum, the Second, Seventh, and Eleventh Circuits hold that the presumption can never arise pretrial. The Fourth

Circuit charts a middle path, employing a presumption of prosecutorial propriety whereby the court assumes the prosecutor had a good reason for their actions regardless of whether record evidence supports that belief.

The Ninth Circuit has traditionally sided with the D.C., Fifth, Sixth, and Tenth Circuits. But in the *Kent* case, a panel appeared to create an intra-circuit split by adopting a view comparable to the Fourth Circuit's. The panel in this case relied on *Kent* to apply a Fourth-Circuit-style analysis to the case facts here, presuming the prosecutor had her reasons for superseding without resolving any of the parties disputes about this particular case's facts.

Second, resolving this debate is important given the powerful interests at work on both sides of the ledger. Apply the presumption too freely and prosecutors lose their freedom to maneuver. Apply it too sparingly and defendants cannot bring the kind of litigation needed to maintain a fair, accountable, and accurate criminal system.

Third, this case is the right vehicle for resolving the split. Mr. Rivera preserved his vindictiveness claims at all stages of the proceeding. And the totality-of-the-circumstances circuits have found the presumption in circumstances analogous to Mr. Rivera's.

Fourth, the Ninth Circuit panel decision here and in *Kent* were wrong. *Goodwin* did not adopt a per se rule against a pretrial vindictiveness presumption, and the totality-of-the-circumstances approach best accommodates the competing concerns that drove the *Goodwin* decision.

Thus, this Court should grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

V. The circuits disagree about how to evaluate pretrial presumptive vindictiveness claims.

The vindictive prosecution doctrine springs from the principle that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (simplified). Thus, "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Id.* (simplified). Our criminal legal system entrusts judges and prosecutors with great discretion to pick charges and control sentences—power that creates "opportunities for vindictiveness" against defendants. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). These same actors sometimes have a "stake in discouraging" defendants from exercising their rights, as some rights exercises will "require increased expenditures of prosecutorial resources" and could result in "a defendant's going free." *Id.* When judges and prosecutors succumb to this temptation, they break the Constitution's promise of a fair and just criminal adjudication.

A defendant can vindicate this due process right if they can show "actual vindictiveness," that is, if they can offer direct evidence that a judge or prosecutor acted maliciously. *Goodwin*, 457 U.S. at 380. Yet, the prospect of proving retaliation is a daunting one, as "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." *North Carolina v. Pearce*, 395 U.S. 711, 725 n.20 (1969), *overruled in other part by Alabama v. Smith*, 490 U.S.

794 (1989). Requiring this elusive evidence would therefore spawn two problems. First, aggrieved defendants would virtually never be able to obtain relief for retaliatory behavior. *See id*.

Second, acts that appear vindictive could have ripple effects in the criminal system generally, discouraging defendants from exercising rights for fear of triggering a retaliatory response. *Id*. at 725–26. This could happen purposely. Given the high standard of proof, it would be easy to act boldly enough to send defendants a message, but not so boldly as to get caught. Even when government actors did not mean to send that signal, however, suspicious circumstances—intersecting with a complete lack of accountability—could nevertheless sew reasonable fears that retaliation has occurred. *See id*.

In light of these concerns, this Court has defined narrow circumstances that will raise a rebuttable presumption of vindictiveness. In *Pearce*, this Court held that when a judge imposes a higher sentence after a defendant's successful appeal, "the reasons for his doing so must affirmatively appear." 395 U.S. at 726. The Court emphasized that this presumption is rebuttable. A judge who acted properly can dispel the charge of vindictiveness by explaining the change in sentence. *See, e.g.,* T*exas v. McCullough,* 475 U.S. 134, 143 (1986) (finding that a judge's explanation rebutted the presumption). But if the judge cannot justify their decision by reference to "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," then the presumption will stand. *Pearce*, 395 U.S. at 726.

The Court extended the presumption of vindictiveness to prosecutors in *Blackledge*. There, a prosecutor replaced a misdemeanor charge with a felony charge shortly after a defendant exercised his right to a new trial. 417 U.S. at 22–23. Because those circumstances, too, "pose[d] a realistic likelihood of 'vindictiveness,'" the rebuttable presumption was equally applicable there. *Id.* at 27.

D. In *Goodwin*, the Court distinguished pretrial presumptive vindictiveness claims from post-trial presumptive vindictiveness precedent.

Pearce and *Blackledge* therefore provided some measure of accountability when government action appears retaliatory. But in a series of cases that followed, this Court confronted vindictiveness claims that threatened interests on the other side of the scale. The claims at issue there arose in a meaningfully different procedural posture from *Pearce* and *Blackledge*. In *Pearce*, the judge increased the sentence after sentencing the defendant once. Likewise, in *Blackledge*, the prosecutor increased the charges after trying the case once. It is reasonable to think in such circumstances that the prosecutor or judge would have decided on the proper charge or sentence before the original trial or sentencing. *See Goodwin*, 457 U.S. at 381–82, 376–77. Thus, if these actors suddenly change their minds when a defendant successfully exercises their rights, it is at least worth asking for a non-vindictive explanation. *See id.*

Goodwin arose from a different procedural posture. In that case, a defendant was initially brought up on misdemeanor assault charges. *Id.* at 370. He absconded. *Id.* Upon his arrest three years later, his case was assigned to a magistrate court prosecutor, who lacked authority to try felonies or seek grand jury indictments. *Id.*

at 370–71. The defendant refused trial before the magistrate and demanded a jury trial in district court. *Id.* at 371. His case was duly transferred to a prosecutor with felony indictment authority. *Id.* The prosecutor reviewed the case and, within six weeks, indicted the defendant on felony charges. *Id.*

This change in charges arose before any trial had taken place. As the Court explained, that distinction made a major difference, as pretrial charging decisions differ significantly from post-trial ones. *Id.* at 381–82. On the one hand, it is a "routine" and "integral part of the adversary process" for pretrial defendants to invoke a wide variety of rights, like pleading not guilty, seeking bond, or filing motions. *Id.* at 381. On the other hand, prosecutors may change their views about the appropriate charge as they familiarize themselves with the case or as they negotiate with defense counsel. *Id.* at 381–82. These processes unfold simultaneously. *Id.*

Thus, in many instances, a prosecutor will increase charges after the defendant exercises a right. *Id.* If this correlation were all it took to raise a presumption of vindictiveness, prosecutors would find themselves perpetually explaining changes in charges. *Id.* Worse, they would be incentivized to err on the side of overcharging, rather than face the risks of becoming embroiled in vindictiveness litigation when adding charges down the line. *Id.* at 378 n.10, 382 n.14.

These considerations drove this Court to reject "an inflexible presumption of prosecutorial vindictiveness in a pretrial setting." *Id.* at 381. And in the case before

the Court, no such presumption was warranted. First off, "the timing of the prosecutor's action in th[e] case suggest[ed] that a presumption of vindictiveness [was] not warranted." *Id.* "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution," the Court explained. "An initial decision should not freeze future conduct." *Id.* And in the case at bar, the Court observed that timing was the petitioner's "only evidence"; he proved only "that the additional charge was brought at a point in time after his exercise of a protected legal right." *Id.* at 382 n.15.

Second, "[t]he nature of the right asserted by the respondent confirms that a presumption of vindictiveness is not warranted in this case." *Id.* at 382. Any criminal case has the potential to go to trial; this is an ordinary and expected part of the criminal process, unlikely to provoke a prosecutor's ire. *See id.* Thus, "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." *Id.* at 382–83.

Ultimately, the Court agreed that retaliation in these circumstances was *possible*. But the presumption of vindictiveness arises only in those circumstances that pose "a realistic likelihood" of vindictiveness. *Id*. at 384 (quoting *Blackledge*, 417 U.S. at 27). "The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted." *Id*. Thus, while the

defendant was free to offer evidence of actual vindictiveness, no presumption of vindictiveness would help him on his way. *Id.*

E. Post-*Goodwin*, the circuits adopted differing approaches to pretrial vindictiveness claims.

After *Goodwin*, the courts of appeals struggled to determine when, if ever, pretrial changes in charges raised a presumption of vindictiveness. They reached different conclusions.

iv. The D.C. Circuit, Fifth Circuit, Sixth Circuit, and Tenth Circuit concluded that courts should consider the totality of the circumstances, while bearing in mind the pretrial context's particularities.

Following *Goodwin*, the D.C. Circuit, Fifth Circuit, Tenth Circuit, and Sixth Circuit adopted a totality-of-the-circumstances approach that recognizes the special features of the pretrial context. These circuits recognized that a pretrial change in charges "is less likely to be deemed vindictive" than a post-trial change. *United States v. Brown*, 298 F.3d 392, 405 (5th Cir. 2002). But for these courts, the "lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not *alone* give rise to a presumption in the pretrial context." *United States v. Meyer*, 810 F.2d 1242, 1246 (D.C. Cir.), *reh'g en banc granted, opinion vacated*, 816 F.2d 695 (D.C. Cir. 1987), and *opinion reinstated on reconsideration sub nom. Bartlett on Behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) (emphasis added).

As long as the defendant offers evidence over and above the sequence of events, however, the court will consider whether the circumstances are "sufficient to

show a realistic likelihood of vindictiveness." *Id*. In other words, "in those pretrial situations which are genuinely distinguishable from *Goodwin* and *Bordenkircher,*" these courts "look at the totality of the objective circumstances to decide whether a realistic possibility of vindictive prosecution exists." *United States v. Raymer*, 941 F.2d 1031, 1040–41 (10th Cir. 1991); *see also United States v. Johnson*, 91 F.3d 695, 698 (5th Cir. 1996) (noting that the Fifth Circuit "examines the prosecutor's conduct in light of the entire proceedings to determine whether it gives rise to a presumption of vindictiveness"); *United States v. LaDeau*, 734 F.3d 561, 567 (6th Cir. 2013) (observing that when assessing pretrial vindictiveness, "each situation will necessarily turn on its own facts").

Raising a pretrial presumption of vindictiveness in these circuits is therefore difficult but achievable. For instance, in *LaDeau*, the court presumed vindictiveness when a prosecutor indicted on a mandatory-minimum charge long after the initial indictment but shortly after the defendant successfully suppressed key evidence. 734 F.3d at 568. The court reasoned that the defendant's success required the government to "restart its prosecution from square one in order to prevent [the defendant] from 'going free'—almost exactly the sort of burden that *Blackledge* identified as supporting a presumption of prosecutorial vindictiveness." *Id*. at 570.

Notably, courts who take this totality-of-the-circumstances approach do not simply assume that any prosecutor who increased charges must have newly discovered or reevaluated facts or law. Rather, they look to the facts of the particular case to see if that hypothesis rings true. In *Meyer*, for instance, the D.C.

Circuit readily agreed that "government officials often make their initial charging decisions prior to gaining full knowledge or appreciation of the facts" or "analyzing thoroughly a case's legal complexities." 810 F.2d at 1246–47. But the case before the court "appear[ed] to present few problems of this kind; not even the government contest[ed] the simplicity and straightforwardness of either the conduct involved in this case or the law relating to that conduct." *Id.* This heightened "the suspicion . . . that the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendants chose to exercise their constitutional right to trial." *Id.*

Thus, in these circuits, a defendant can raise a presumption of vindictiveness when, under the totality of the circumstances and taking into account the pretrial context's particularities, there is a realistic likelihood of vindictiveness.

v. The Second, Seventh, and Eleventh Circuits concluded that that no presumption of vindictiveness can arise pretrial.

The Second, Seventh, and Eleventh Circuits took a different path after *Goodwin*. These circuits concluded that pretrial decisions are subject to the opposite of a vindictiveness presumption: No matter the circumstances, "a prosecutor's pretrial decisions, including the choice to seek increased or additional charges, are presumed valid." *United States v. Falcon*, 347 F.3d 1000, 1004–05 (7th Cir. 2003); *see also United States v. Sanders*, 211 F.3d 711, 716 (2d Cir. 2000) ("[A] prosecutor's pretrial charging decision is presumed legitimate[.]").

In these circuits, the presumption of prosecutorial propriety is irrebuttable except through evidence of actual vindictiveness. *See United States v. Davis*, 854

F.3d 1276, 1291 (11th Cir. 2017). Thus, "in order to be successful on a claim of prosecutorial vindictiveness, a defendant must affirmatively show through objective evidence that the prosecutorial conduct at issue was motivated by some form of prosecutorial animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication." *United States v. Bullis*, 77 F.3d 1553, 1559 (7th Cir. 1996).

In short, in these circuits, a pretrial "presumption of prosecutorial vindictiveness does not exist[.]" *United States v. White*, 972 F.2d 16, 19 (2d Cir. 1992).

vi. The Fourth Circuit created a virtually irrebuttable background presumption of prosecutorial propriety pretrial.

The Fourth Circuit also deems prosecutors' pretrial charging decisions to be "presumptively lawful." *United States v. Wilson*, 262 F.3d 305, 315 (4th Cir. 2001). But unlike the Second, Seventh, and Eleventh Circuits, the Fourth Circuit has not outright prohibited pretrial presumptive vindictiveness claims; it will at least review circumstantial evidence to determine whether the defendant has established a presumption of vindictiveness. *See id.*

This evaluation, however, occurs "against the background presumption that charging decisions of prosecutors are made in the exercise of broad discretion and are presumed to be regular and proper." *United States v. Jackson*, 327 F.3d 273, 294 (4th Cir. 2003). In other words, the court will assume that the prosecutor had a good reason for acting as they did. Because circumstantial evidence cannot, by definition, directly refute the notion that a prosecutor acted from a justifiable motive, this

presumption is virtually always determinative. The Fourth Circuit has said so directly, noting that a presumption of vindictiveness "will rarely, if ever, be applied to prosecutors' pretrial decisions." *United States v. Villa*, 70 F.4th 704, 711 (4th Cir. 2023) (simplified). In *Jackson*, for instance, the Fourth Circuit refused to draw any adverse inference from the fact that the prosecutor's actions violated internal Justice Department policies, noting, "[o]ur jurisprudence in this area rests on the basic precept that a prosecutor's charging decision is presumptively lawful." 327 F.3d at 294–95 (simplified).

Thus, in the Fourth Circuit, the presumption of vindictiveness can theoretically arise, but the competing presumption of prosecutorial propriety is nearly impossible to overcome.

F. The Ninth Circuit has generally adhered to the totality-of-the-circumstances view, but the *Kent* case relied upon here implicitly adopted the Fourth Circuit's presumption of prosecutorial propriety.

This case arose in the Ninth Circuit. As a rule, the Ninth Circuit has followed the "totality of the circumstances" view. *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980) ("[W]hether the facts give rise to the appearance of vindictiveness is dependent upon the totality of the circumstances surrounding the prosecutorial decision at issue."). Like the mode of analysis adopted in the D.C. Circuit and the Fifth, Sixth, and Tenth Circuits, the Ninth Circuit's inquiry has typically targeted whether the "circumstances establish a reasonable likelihood of vindictiveness." *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017). Accordingly, the Ninth Circuit has occasionally found that a presumption of

vindictiveness arose pretrial. *See, e.g.,* A*damson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988), *abrogated in other part by Walton v. Arizona*, 497 U.S. 639 (1990) (en banc); *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978); *see also United States v. Jenkins*, 504 F.3d 694, 699–700 (9th Cir. 2007) (finding a presumption based on charges brought during trial, before conviction).

The Ninth Circuit veered from this course, however, in *United States v. Kent*, 633 F.3d 920 (9th Cir. 2011). The *Kent* panel initially issued an opinion adopting the Second, Seventh, and Eleventh Circuit's view that the presumption cannot arise pretrial. Citing *Goodwin*, the *Kent* panel observed that "prosecutors may add charges pretrial for any number of permissible reasons, such as coming to a new understanding of the crime or evidence." 633 F.3d at 927. According to the panel, *Goodwin* had "urged deference to a prosecutor's discretion to elevate charges in light of the pretrial 'timing' of such conduct, not just its factual context." *Id*. "Thus," the panel concluded, "defendants challenging pretrial charging enhancements cannot avail themselves of a presumption of vindictiveness." *Id*.

After the opinion issued, the defendant moved for panel rehearing. During the rehearing process, the panel presumably discovered that its holding directly contradicted post-*Goodwin* circuit precedent. *See Adamson*, 865 F.2d at 1019 n.8 ("[T]he presumption can arise from pretrial prosecutorial conduct."). It therefore deleted the sentence categorically prohibiting pretrial presumptions of vindictiveness. *United States v. Kent*, 649 F.3d 906, 909 (9th Cir. 2011). But the panel left the reminder of its reasoning intact. *Id.*

So amended, *Kent* can be read to adopt something like the Fourth Circuit's presumption of prosecutorial propriety. Rather than looking to the case's "factual context," *Kent* counsels "deference to a prosecutor's discretion to elevate charges in light of the pretrial 'timing' of such conduct." *Id.* at 913. And like the Fourth Circuit, *Kent* relied on a generalized assumption that "prosecutors may add charges pretrial for any number of permissible reasons, such as coming to a new understanding of the crime or evidence." *Id.* So understood, *Kent* creates an intra-circuit split, siding with the Fourth Circuit instead of the D.C., Fifth, Sixth, and Tenth Circuits.

That is how the panel applied *Kent* in this case. As explained above, the parties hotly disputed whether—on these particular case facts—it was realistic to believe that some legitimate change in circumstance explained the change in charges. But the panel did not engage with any of those particular case facts. Instead, the panel relied on generic assumptions that "the government's charges *frequently* evolve pretrial," and that the "the prosecutor's assessment of the proper extent of prosecution *may not* have crystallized." *Rivera*, 2023 WL 4646110, at *1. Thus, the panel in Mr. Rivera's case presumed that the prosecutor must have had a good reason for acting as she did, a standard that aligns with the Fourth Circuit's view.

VI. Resolving this debate is important, as the wrong test threatens to disrupt the balance between protecting prosecutorial discretion and shielding defendants' exercise of fundamental rights.

Resolving the debate among the circuits is important. The Court's precedents lay out the stakes. On the one hand, prosecutorial discretion is a bedrock feature of

our criminal system. If prosecutors lose the power "to determine the extent of the societal interest in prosecution," then "governmental action that is fully justified as a legitimate response to perceived criminal conduct" will be stymied. *Goodwin*, 457 U.S. at 373, 382.

On the other hand, the freedom to assert rights without fear of reprisal is a bedrock feature of due process. Losing that freedom jeopardizes all other rights. In 2018, the National Association of Criminal Defense Lawyers ("NACDL") documented the costs when defendants forgo pretrial and trial litigation for fear of receiving a more severe sentence. National Association of Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018). As NACDL pointed out, many officially sanctioned features of our system—including mandatory-minimum sentences, guidelines provisions, and charge bargaining—ensure that defendants who exercise rights receive far higher sentences than those who do not. *Id*. at 5–8. As a result, our criminal system has become far less accurate, transparent, and fair. Unsupported or false charges, government misconduct, and violations of constitutional and statutory law rarely come to light because of the major—sometimes excruciating—penalties inflicted on those who litigate their cases. *Id*. at 9–10. The state's coercive power is so great that over 1 in 10 people later exonerated by DNA evidence were found to have pled guilty, fearing the costs of standing up to the state. *Id*. at 10.

Of course, when these costs flow from a constitutionally permissible source, like plea bargaining, then the task of weighing them against benefits falls to

legislatures; it is a policy matter, not a constitutional one. But when they flow from an unconstitutional source—like vindictiveness—they cannot be abided.

Yet, in at least four circuits (and sometimes in the Ninth Circuit), defendants are either de jure or de facto prohibited from using circumstantial evidence to show that this kind of retaliation has occurred. It is at least worth asking the question whether these courts correctly understood *Goodwin* to mandate that result.

VII. This case is the right vehicle to resolve this issue.

This case is a proper vehicle for resolving this circuit split. Mr. Rivera's vindictive prosecution claim was preserved and thoroughly litigated at the trial and appellate levels. And there is little question that the panel's refusal to apply a totality-of-the-circumstances approach affected his case. As noted above, the D.C. Circuit in *Meyer* accepted the very argument that this panel refused to entertain: that in the particular circumstances of this case, no factual or legal development could explain why the prosecutor increased the charges. 810 F.2d at 1246–47.

If the panel had entertained that question, it would have found in Mr. Rivera's favor. This case was extraordinarily simple, both legally and factually. When choosing among possible immigration charges—that is, a "found in" § 1326, an "attempt" § 1326, or a felony § 1325—the only facts that mattered involved (1) the circumstances of Mr. Rivera's entry and apprehension, and (2) Mr. Rivera's prior convictions. The government had full information about these facts from the beginning of the case and performed no further investigation about them. The only other relevant dimension to the case was whether Mr. Rivera was a noncitizen, but

the government would have to prove that "alienage" element no matter which charge it picked.

Even more importantly, the prosecutor brought this case to the brink of trial, coming within four days of her motions in limine deadline and a few weeks of the trial date. Thus, this case is not much different from one where the prosecutor actually went to trial, as in *Pearce* or *Blackledge*. In either circumstance, one would expect that the prosecutor had settled on the proper charge.

Finally, the prosecutor secured the superseding indictment in a manner that violated her own office's charging priorities. That move benefitted her only because it allowed her to moot Mr. Rivera's Speedy Trial Act motion.

These circumstances strongly suggest that the prosecutor obtained the more severe indictment because Mr. Rivera exercised his rights. In the D.C., Fifth, Sixth, and Tenth Circuits, the prosecutor would at least be required to provide a nonvindictive reason for acting as she did. Thus, Mr. Rivera's case lies at the heart of the split between the circuits.

VIII. The Ninth Circuit's decision was wrong, because the totality-of-the-circumstances approach best interprets *Goodwin* and honors the balance of interests at play in these cases.

Finally, this Court should grant certiorari because the Ninth Circuit panels here and in *Kent* were wrong to deviate from the totality-of-the-circumstances approach. Neither a complete ban on the pretrial presumption, nor an insurmountable presumption of prosecutorial propriety properly interprets *Goodwin* or weighs the competing interests motivating this Court's vindictive prosecution jurisprudence.

Begin with *Goodwin*. If the Court wanted to communicate that no presumption could ever arise pretrial, the Court would have said so. But *Goodwin* says no such thing. Instead, though this Court "declined to adopt a *per se* rule applicable in the pretrial context that a presumption will lie whenever the prosecutor 'ups the ante' following a defendant's exercise of a legal right," it "also declined to adopt a *per se* rule that in the pretrial context no presumption of vindictiveness will ever lie." *Meyer*, 810 F.2d at 1246. Instead, the Court in *Goodwin* reversed only after reviewing the circumstances in the case, specifically, (1) the timing, (2) the nature of the right asserted, and (3) the defendant's failure to bring forward any evidence other than timing to support his claims. *Goodwin*, 457 U.S. at 381–82 & n.15. That is the same kind of analysis that the D.C., Fifth, Sixth, Tenth Circuits, and (until recently) Ninth Circuits carry out.

The totality-of-the-circumstances approach also best balances the competing interests that animate the presumption. On the defendants' side of the scale, the Second, Fourth, Seventh, and Eleventh Circuits make it impossible or virtually impossible to vindicate defendants' interests pretrial. Thus, this "basic" due process right has no or effectively no remedy in these circuits. *Bordenkircher*, 434 U.S. at 363. Under the totality-of-the-circumstances approach, in contrast, defendants can vindicate their rights in unusual but appropriate circumstances.

On the government's side of the scale, the D.C., Fifth, Sixth, and Tenth Circuit's totality-of-the-circumstances approach pose little threat to prosecutorial discretion. The D.C. Circuit gave two relevant reasons why no "dangerous policy

consequences" flow from the totality-of-the-circumstances approach. *Meyer*, 810 F.2d at 1248. First, any time the presumption arises, it is necessarily "limited to the precise circumstances of th[at] case; in other cases, with different facts, the presumption may not lie." *Id*. This case-by-case approach allows judges to invoke the presumption in unusual, individual circumstances, without causing major ripple effects in the system at large.

Second, and more importantly, "even when a court uses a presumption, the government has the opportunity to rebut it; thus, the initial charging decision 'binds' the government only to the extent that the government has no legitimate and articulable reason for changing that decision." *Id*. This is critical. The presumption of vindictiveness may sound heavy-handed, but it in fact imposes a relatively minimal burden on prosecutors. All they must do is give an objectively reasonable explanation for acting as they did. Ordinarily, this will be easy to accomplish; prosecutors should have rational, explicable reasons for acting as they do. Indeed, courts often reject vindictiveness claims at the rebuttal stage, even after the presumption has been raised. *See, e.g.,* U*nited States v. Safavian,* 649 F.3d 688, 694 (D.C. Cir. 2011); *United States v. Garza-Juarez*, 992 F.2d 896, 907–08 (9th Cir. 1993).

But if the circumstances are highly suggestive of vindictiveness, as required to raise the presumption, and if the government cannot give any believable explanation for its actions, as required to rebut the presumption, then chances are good that the prosecutor's actions were actually undertaken vindictively. Thus, though the presumption of vindictiveness has sometimes been described as a

prophylactic rule, *e.g.*, *Jenkins*, 504 F.3d at 700, it stands to reason that it will in most cases detect *actual* vindictiveness.

In short, then, the totality-of-the-circumstances approach lets courts infer vindictiveness from strong circumstantial evidence—while setting the bar high enough to protect prosecutorial independence. That strikes the right balance between competing interests. Thus, this interpretation of *Goodwin* is not only the right one, but also the just one.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: January 12, 2024

/s/ Katie Hurrelbrink

KATIE HURRELBRINK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner