No. 13-9026

IN THE
Supreme Court of the United States

LARRY WHITFIELD,
Petitioner,
v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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BRIEF FOR AMICUS CURIAE THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Center on the Administration of Criminal Law (the "Center") is dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's

[1] Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amicus curiae or its counsel contributed money or services to the preparation or submission of this brief. All parties have consented to the filing of this brief.

litigation component aims to use its empirical research and experience with criminal justice practices to assist courts in important criminal cases. To that end, the Center has filed numerous briefs on behalf of the government and defendants in both state and federal courts. The Center's focus on government practices in criminal cases and on the exercise of prosecutorial power and discretion, its research-based approach, and its diversity of work make it the first and only organization of its kind.

The Center submits this brief out of concern that the government's boundless construction of 18 U.S.C. § 2113(e) erases statutory distinctions, conflicts with legislative intent, and would lead to substantial injustice throughout the country. Countless state high courts have reached these conclusions through years of experience and reasoning rooted in this Court's precedents. The Center is well-suited to provide this context to the Court.

SUMMARY OF ARGUMENT

State courts have long grappled with defining the bounds of criminal liability for kidnapping. In particular, numerous state courts have assessed when independent criminal liability will arise by virtue of forced movements or confinements during the commission of a distinct underlying crime, such as robbery. Widespread agreement now exists among the states that insubstantial movements or confinements, especially those that are incidental to the underlying crime, should not give rise to separate liability.

This Court should draw on the collective wisdom of these state courts in construing 18 U.S.C. § 2113(e). The reasoning behind these decisions is largely applica-

ble here, especially because many of the interpretive tools used by the state courts to construe their respective kidnapping statutes are tools regularly used by this Court. Applying these tools to § 2113(e) demonstrates that it should be read to exclude from its reach insubstantial or incidental movements that occur during a bank robbery.

First, the language of criminal statutes must be read in the context of their associated penalty schemes. Doing so ensures that when Congress distinguishes between a base offense and an aggravated offense, the distinction is preserved. If the bar to liability under an aggravated offense is brought too low, it effectively collapses the distinction that Congress has drawn. For that reason, federal and state courts seek to avoid construing aggravated offenses like § 2113(e) so broadly as to make them virtually coextensive with the base offense. To do otherwise would turn almost every mine-run bank robbery into a violation of § 2113(e). Moreover, Congress is generally presumed to incorporate into criminal statutes a proportionality between the punishment and the culpability of the prohibited conduct. Interpreting § 2113(e) to cover *de minimis* and incidental movement would eliminate the proportionality that Congress incorporated into this statutory scheme.

Second, statutory language must be read in its historical context. State courts have relied on this Court's decision in *Chatwin* v. *United States*, 326 U.S. 455 (1946), which narrowly construed the Federal Kidnapping Act, notwithstanding its broad language, in light of the historical problems that Congress was trying to solve. The history and circumstances surrounding the passage of § 2113(e) share much with the Federal Kidnapping Act. That history illustrates that Congress

was concerned with conduct far more severe than *de minimis* or incidental movements.

Third, courts seek to strike a balance between legislatures' power to define crimes and prosecutors' discretion in charging them. Courts recognize that a critical part of maintaining this balance is ensuring that crimes are not construed so broadly as to allow prosecutors to seek disparate punishments for similar conduct. Given the significant difference between the penalties for violations of § 2113(a) and § 2113(e), broadly construing the latter would provide prosecutors with significant discretion, and thus leverage in our criminal justice system that relies so heavily on plea-bargaining, that Congress did not intend.

In sum, a broad construction of § 2113(e) would eviscerate Congress' carefully-drawn distinctions, unmoor the statute from its historical and legislative purpose, and unfairly lead to disparate punishments for similar conduct. State courts across the country have learned these lessons through decades of experience. This Court should apply their reasoning here.

ARGUMENT

I. THE EXPERIENCE OF STATE HIGH COURTS SUPPORTS THE CONCLUSION THAT INCIDENTAL OR INSUBSTANTIAL MOVEMENTS DO NOT TRIGGER § 2113(e) LIABILITY

In interpreting 18 U.S.C. § 2113(e), this Court should look to the collective wisdom of the numerous state courts that have confronted similar questions and concluded that forced movement or confinement during the commission of a crime does not give rise to a separate and more harshly punished offense if it is insubstantial or incidental to the commission of the underlying offense.

Similar to § 2113(e), myriad states have kidnapping statutes that punish, among other things, forced movement (or confinement) of bystanders that occurs during the commission of other crimes. Interpreting those statutes for decades, state high courts have grappled with a question little different from the one presented here: If, in the commission of a crime such as robbery, forced movement of a bystander occurs, when does such movement rise to the level of a separate offense for kidnapping? In assessing that question, the collective wisdom of a large and diverse set of state courts accords with Whitfield's interpretation of § 2113(e). For conduct in the commission of an underlying crime to rise to the level of a distinct kidnapping violation, the conduct must constitute more than an insubstantial forced movement or movement incidental to the underlying crime. The reasoning behind these State court decisions is highly instructive and should inform the Court's resolution of the question currently before it.

As the New York Court of Appeals explained, "[i]t is unlikely that" restraints or movements that "are incidents to other crimes … were intended by the Legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping." *People* v. *Levy*, 204 N.E.2d 842, 844 (N.Y. 1965). Similarly, the California Supreme Court limited its state's kidnapping-to-commit-robbery statute, holding that the legislature intended to reach movements "*only* if the movements (1) are not merely incidental to the commission of the robbery *and* (2) substantially increase the risk of harm beyond that inherent in the crime of robbery." *In re Earley*, 534 P.2d 721, 725 (Cal. 1975). The California Supreme Court further explained that movement will generally be insufficient "when in the course of a rob-

bery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure." *People* v. *Daniels*, 459 P.2d 225, 238 (Cal. 1969); *see also Levy*, 204 N.E.2d at 844 (overturning conviction for kidnapping that allegedly occurred in the course of a robbery because "the case now before us is essentially robbery and not kidnapping").

Other examples of states declining to interpret statutes to reach insubstantial or incidental conduct abound. *E.g.*, *State* v. *Rich*, 305 N.W.2d 739, 745 (Iowa 1981) ("[W]e conclude that our legislature … intended the terms 'confines' and 'removes' to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse."); *see also State* v. *Salamon*, 949 A.2d 1092, 1119 (Conn. 2008) (collecting cases from various states where courts determined that legislature did not intend to punish conduct as kidnapping where it was "merely incidental to the commission of a separate, underlying crime"); 3 Wayne R. LaFave, *Substantive Criminal Law* § 18.1(b), at 11 (2d ed. 2003) (same).[2]

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[2] To be sure, state courts have set forth varying standards for the requisite forced movement. But the different standards amount only to different paths to the same result. For example, *State* v. *Buggs*, 547 P.2d 720, 731 (Kan. 1976), rejected California's requirement that movement increase the risk of harm. Nevertheless, it required, *inter alia*, that the movement not be "slight, inconsequential, and merely incidental to the other crime." *Id.* Ultimately, "[t]he basic question to which each of these tests is directed is whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime." *State* v. *Trujillo*, 289 P.3d 238, 250 (N.M. Ct. App.), *cert. granted* 297 P.3d 122 (N.M. 2012); *infra* Part B.2.; *see also Government of Virgin Islands* v. *Berry*, 604 F.2d 221, 227 (3d Cir. 1979) (surveying various states' tests).

Moreover, unlike here, where the most natural reading of "accompany" favors Whitfield (Pet Br. 15-19), many of the state statutes at issue in these cases could be read literally to encompass any instance of forced movement or confinement and thus are no narrower than § 2113(e).[3] *See, e.g.*, *Rich*, 305 N.W.2d at 742 ("'either confines a person or removes a person from one place to another'" (quoting Iowa Code § 710.1 (1979))); *State* v. *Ripley*, 626 S.E.2d 289, 293 (N.C. 2006) ("'confine, restrain, or remove from one place to another, any other person … for the purpose of … [f]acilitating the commission of any felony'" (quoting N.C. Gen. Stat. § 14-39(a) (2005); emphasis omitted)); *Garza* v. *State*, 670 S.E.2d 73, 75 (Ga. 2008) ("'steals away any person … and holds such person against his will'" (quoting Ga. Code Ann. § 16-5-40 (Supp. 2006))), *superseded in part by statute as stated in State* v. *Clements*, 715 S.E.2d 59, 66 n.6 (Ga. 2011).[4]

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[3] This is not a coincidence. The legislative history demonstrates that Congress understood § 2113(e) to be a "kidnapping" during a bank robbery provision. *See* H.R. Rep. No. 73-1461, at 1 (1934) ("If murder or kidnaping be committed in connection therewith the penalty shall be imprisonment from 10 years to life, or death if the jury shall so direct"); S. Rep. No. 73-537, at 1 (1934) ("A heavy penalty is imposed on anyone who commits a homicide or kidnaping in the course of such unlawful act" (internal quotation marks omitted)); *see also* Pet. Br. 29 & n.10. Indeed, because the Federal Kidnapping Act was limited to kidnappings across state lines, *see* Pub. L. No. 72-189, 47 Stat. 326 (1932), and because of the limited jurisdiction of federal courts, it makes sense that Congress would proscribe kidnappings during bank robberies within § 2113.

In any event, the state kidnapping jurisprudence is instructive regardless of how § 2113(e) is labeled.

[4] State statutes generally supplanted the common-law crime of kidnapping. *See* Note, *A Rationale of the Law of Kidnapping*, 53 Colum. L. Rev. 540, 541 (1953) ("Every jurisdiction today has

Despite this breadth, courts have frequently found that legislatures did not intend for the provisions, including terms like "confines," "carries," or "removes," to be given their broadest, or even literal, meaning. *See Mobley* v. *State*, 409 So. 2d 1031, 1034 (Fla. 1982) (noting that "[m]ost courts have reasoned that the legislatures did not intend for the statutes to be literally applied"). Otherwise, conduct that has "long been treated as integral parts of other crimes," such as walking a bank employee from her desk to the vault during a robbery, without more, could be punishable under the sweep of a forced movement statute, and that cannot be what legislatures intended. *Levy*, 204 N.E.2d at 844; *People* v. *Lombardi*, 229 N.E.2d 206, 208 (N.Y. 1967) (reversing conviction even though underlying conduct "comes literally within the terms of the kidnapping statute").[5] Put differently, forced movement and confinement prohibitions, like § 2113(e), "will sweep within [their] scope conduct that is decidedly wrongful but that should be punished as some other crime." *Garza*, 670 S.E.2d at 76 (internal quotation marks and citation omitted).

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kidnapping legislation."); *see also, e.g.*, *Ripley*, 626 S.E.2d at 292 (observing that legislature "abandoned the traditional common law definition of kidnapping for an element-specific definition"); *Daniels*, 459 P.2d at 232 (noting that legislature had "rejected the common-law definition of kidnaping and redefined it").

[5] *See also State* v. *Innis*, 433 A.2d 646, 655 (R.I. 1981) (declining to "apply the wording of the statute in a literal manner" while reversing conviction); *State* v. *Goodhue*, 833 A.2d 861, 868 (Vt. 2003) (rejecting "literal interpretation of the statutory language" as not "sensible or just" in reversing conviction); *People* v. *Bridges*, 612 P.2d 1110, 1112 (Colo. 1980) (reversing conviction even though underlying conduct was "perhaps technically within the language of the statute"), *rejected in part on other grounds by People* v. *Lowe*, 660 P.2d 1261, 1266 (Colo. 1983), *abrogated on other grounds by Callis* v. *People*, 692 P.2d 1045, 1050 & n.7 (Colo. 1984).

Indeed, in at least 15 states, high courts have nullified convictions on the ground that the forced movement or confinement was merely incidental to a separate, underlying crime (with some states doing so multiple times). In each of these cases, the language of the statute could have been read to encompass the respective victim's movement or confinement. But in each case, the high court ruled that the conviction could not stand.[6]

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[6] The states from which those decisions arose are California, Colorado, Connecticut, Florida, Georgia, Kansas, Iowa, Michigan, Minnesota, Nevada, New York, North Carolina, Rhode Island, South Dakota, and Vermont. *See Daniels*, 459 P.2d at 228-238 [Cal.]; *People* v. *Williams*, 471 P.2d 1008, 1011-1014 (Cal. 1970); *People* v. *Mutch*, 482 P.2d 633, 638-639 (Cal. 1971); *People* v. *Timmons*, 482 P.2d 648, 649-651 (Cal. 1971), *overruled in part as stated in In re Earley*, 534 P.2d 721, 727 (Cal. 1975); *People* v. *Adame*, 482 P.2d 652, 652-653 (Cal. 1971); *People* v. *Ungrad*, 482 P.2d 653, 653-654 (Cal. 1971); *People* v. *Killean*, 482 P.2d 654, 655 (Cal. 1971); *People* v. *Smith*, 482 P.2d 655, 656 (Cal. 1971); *People* v. *Adams*, 482 P.2d 657, 657-658 (Cal. 1971); *People* v. *Hunter*, 482 P.2d 658, 659 (Cal. 1971); *People* v. *Coleman*, 482 P.2d 660, 660 (Cal. 1971); *People* v. *Norman*, 482 P.2d 661, 662 (Cal. 1971); *People* v. *Morrison*, 482 P.2d 663, 663-664 (Cal. 1971); *In re Crumpton*, 507 P.2d 74, 75-76 (Cal. 1973); *Bridges*, 612 P.2d at 1112-1117 [Colo.]; *Salamon*, 949 A.2d at 1102-1122 [Conn.]; *State* v. *Sanseverino*, 949 A.2d 1156, 1164-1168 (Conn. 2008), *overruled in part by State* v. *DeJesus*, 953 A.2d 45, 58 (Conn. 2008), *and superseded in part by State* v. *Sanseverino*, 969 A.2d 710 (Conn. 2009); *Walker* v. *State*, 604 So. 2d 475, 476-477 (Fla. 1992); *Garza*, 670 S.E.2d at 74-79 [Ga.]; *State* v. *Cabral*, 619 P.2d 1163, 1165-1166 (Kan. 1980); *State* v. *Ransom*, 722 P.2d 540, 545-547 (Kan. 1986); *State* v. *Hays*, 883 P.2d 1093, 1102-1104 (Kan. 1994); *State* v. *Mead*, 318 N.W.2d 440, 441-445 (Iowa 1982); *State* v. *Marr*, 316 N.W.2d 176, 177-180 (Iowa 1982); *People* v. *Adams*, 205 N.W.2d 415, 418-424 (Mich. 1973); *State* v. *Smith*, 669 N.W.2d 19, 30-33 (Minn. 2003), *overruled in part on other grounds by State* v. *Leake*, 699 N.W.2d 312, 323 (Minn. 2005); *Levy*, 204 N.E.2d at 843-845 [N.Y.]; *Lombardi*, 229 N.E.2d at 208-209 [N.Y.]; *People* v. *Cassidy*, 358 N.E.2d 870, 872-874 (N.Y. 1976); *People* v. *Cain*, 556 N.E.2d 141, 144 (N.Y. 1990); *Wright* v. *State*,

This Court too has found that statutory terms should not necessarily be given their broadest meanings. In *Abuelhawa* v. *United States*, 556 U.S. 816, 820 (2009), for example, this Court rejected the government's construction of a term by its "literal sweep," observing that "because statutes are not read as a collection of isolated phrases, *a word in a statute may or may not extend to the outer limits of its definitional possibilities*." (emphasis added; internal quotation marks, citation, and alterations omitted). A year earlier, the Court overturned a conviction under the Armed Career Criminal Act because it concluded that, *even assuming the defendant's conduct fell within the literal scope of the statute*, Congress did not intend for such conduct to be covered. *Begay* v. *United States*, 553 U.S. 137, 141-143 (2008).

This principle applies with particular force when the question is the existence of a *de minimis* exception, because such exceptions are often presumed. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). Section 2113(e) contains no "contrary indication" on this score.

Finally, some of these state court decisions came after experience under a different regime, namely the one urged by the government here. In these states,

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581 P.2d 442, 443-444 (Nev. 1978); *State* v. *Irwin*, 282 S.E.2d 439, 445-446 (N.C. 1981); *Ripley*, 626 S.E.2d at 290-294 [N.C.]; *Innis*, 433 A.2d at 652-655 [R.I.]; *State* v. *Reiman*, 284 N.W.2d 860, 873-874 (S.D. 1979); *Goodhue*, 833 A.2d at 868-869 [Vt.].

kidnapping statutes were at points interpreted to cover any amount of movement or confinement, no matter how minimal or incidental to some other crime. After experience with this virtually boundless interpretation, though, the relevant high courts determined that it could not have been what their legislatures intended. As such, the courts started moving towards a "more enlightened, modern approach." *Salamon*, 949 A.2d at 1116-1118.

For example, the relevant California statute had been interpreted in the 1950s to cover "forcibly moving the victim any distance whatever," "no matter how short or for what purpose," because "'[i]t is the fact, not the distance, of forcible removal which constitutes kidnaping in this state.'" *Daniels*, 459 P.2d at 238 (quoting *People* v. *Chessman*, 238 P.2d 1001, 1017 (Cal. 1951), *overruled by Daniels*, 459 P.2d at 238). Much like the government's position here (Br. Opp. 13-14), this prior precedent relied on the lack of an express distance requirement in the statute and emphasized that if this result "is regarded as too harsh, the remedy is for the Legislature to redefine kidnaping." *People* v. *Wein*, 326 P.2d 457, 466 (Cal. 1958), *overruled by Daniels*, 459 P.2d at 238. But citing a "current of common sense" and decades of experience, *Daniels* overruled that precedent in favor of the not incidental and substantiality requirements. 459 P.2d at 229, 238.[7] This Court should

[7] *See also Garza*, 670 S.E.2d at 76, 78 (basing its decision to limit the scope of the kidnapping statute on what the "Court ha[d] witnessed" and ultimately interpreting the statute to prohibit conduct that "is in the nature of the evil the kidnapping statute was originally intended to address—i.e., movement serving to substantially isolate the victim from protection or rescue," as opposed to "merely a criminologically insignificant circumstance attendant to some other crime" (internal quotation marks omitted)).

draw on these experiences and reject the government's equally boundless view.

II. Section 2113(e) Does Not Reach Incidental Or Insubstantial Movements

Section 2113(e) shares many of the characteristics of the state statutes for which state courts have excluded insubstantial or incidental conduct. In particular, (1) § 2113's graduated penalty scheme; (2) the historical context surrounding the passage of the statute; and (3) the risk of disparate treatment all favor a measured interpretation of § 2113(e).

A. The Culpability Of Prohibited Conduct And Associated Penalties Under § 2113 Should Be Commensurately Graduated

Section 2113's graduated penalty scheme warrants recognition of a *de minimis* or incidental conduct exception. *See* Pet. Br. 21-23.

Federal and state courts alike have long considered the applicable penalty scheme in construing the scope of criminal statutes. This interpretive tool can be used here in two different ways—to assess the distinction between § 2113(e) and the base offense as well as to assess the proportionality of culpability and punishment. Both point toward § 2113(e) excluding *de minimis* or incidental movement from its reach.

First, when Congress has distinguished between levels of culpability within a statute, those distinctions should be preserved. If the threshold for a defendant to move from a base offense to an aggravated offense is made too low, it effectively collapses the statutory gradations, thereby disserving Congress's purpose. This Court has admonished against an overly-broad inter-

pretation of an aggravated offense because it leads to liability under the aggravated provision in "nearly every [instance]" of the base offense. *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), *superseded by statute as stated in United States* v. *O'Brien*, 560 U.S. 218, 232-233 (2010) (internal quotation marks and alterations omitted). Such interpretations, the Court explained, "eras[e] the line that the statutes, and the courts, have tried to draw." *Id.* (internal quotation marks omitted); *see also Abuelhawa*, 556 U.S. at 821-822 (rejecting broad reading of statute that "would for practical purposes skew the congressional calibration of … penalties"); *United States* v. *Collins*, 313 F.3d 1251, 1254 (10th Cir. 2002) ("[T]he provision makes a distinction between possession and use; the provision must not be interpreted such that this distinction collapses, rendering part of the provision a nullity.").[8]

This principle finds ample support in state experience as well. State courts have vigorously patrolled the boundaries between forced movement (or confinement) and underlying crimes. Indeed, the comparable severity of kidnapping penalties relative to penalties for an underlying crime where no kidnapping is involved has been perhaps the most important factor driving state courts' conclusions that their legislatures did not intend to reach incidental or insubstantial movements. *See, e.g.*, *Rich*, 305 N.W.2d at 745 ("[B]ecause of the substantial disparity between sentences the legislature intended the kidnapping statute to be applicable only to those situations in which confinement or removal definitely

[8] This principle takes on added significance where the penalties between the statutory subsections in question are markedly different, as is the case with § 2113(a) and § 2113(e). *Compare* 18 U.S.C. § 2113(a) (sentencing range of zero to twenty years) *with* 18 U.S.C. § 2113(e) (sentencing range of ten years to life in prison).

exceeds that which is merely incidental to the commission of sexual abuse."); *Goodhue*, 833 A.2d 861, 868 (Vt. 2003) (concluding that "literal application of the statutory language" was not legislature's intent in light of "significant difference" in penalties between kidnapping with intent to commit sexual assault and sexual assault); *Garza*, 670 S.E.2d at 77 (rejecting prior "expansive construction of asportation" on the ground that it "effectively eviscerates the distinction between kidnapping and false imprisonment, …. fails to justify the dramatic distinction in penalties between the two offenses, and simply cannot represent what the Legislature intended in enacting the current kidnapping statute."); *Salamon*, 949 A.2d at 1118 (overruling prior precedent that included incidental movement because it effectively "merged" gradations installed by the legislature); *State* v. *Stouffer*, 721 A.2d 207, 215 (Md. 1998) ("We recognize the problem … that a literal reading of the kidnapping law could have the effect of transforming a host of lesser-punished sex and street crimes into 30-year eligible kidnappings, and we do not believe that the Legislature ever intended for [the kidnapping statute] to be read in that broad a fashion."). In this case, as Whitfield has argued, the government's proposed construction would swallow up mine-run bank robberies and escape attempts into the aggravated forced-accompaniment offense, because nearly every bank robbery in violation of § 2113(a) might include some forced movement of victims. *See United States* v. *Reed*, 26 F.3d 523, 527-528 (5th Cir. 1994) ("Within the context of a bank robbery, there will often be movement within the bank by a bank employee—movement orchestrated by the robber. This orchestration will no doubt sometimes occur in concert with the movement of the robber himself. To conclude such circumstances are an aggravating accompaniment

would likely convert numerous ordinary … bank robberies to aggravated bank robberies with only the faintest of distinctions"); *accord* Pet. Br. 22. Congress could not have intended that almost every violation of subsection (a) also amount to a violation of subsection (e), with its far more severe penalties. This attempt to collapse the distinction between § 2113(a) and § 2113(e) should not be allowed.

Second, Congress should be presumed to act with the "salutary objective[] of promoting sentences proportionate to the gravity of the offense." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009) (internal quotation marks omitted). Congress would not intend, therefore, for significant increases in required statutory minimums to turn on trivial movements, or happenstance untethered to culpability. State courts likewise have sought to ensure that punishments for forced movements during the commission of another crime are commensurate with the culpability of the defendant's conduct. *See, e.g.*, *Garza*, 670 S.E.2d at 76 ("[I]s it reasonable to believe that the Legislature intended the mere fact of a victim's movement from one point to another within the situs of the robbery to justify another ten-years-to-life sentence in addition to the ten years to life prescribed for armed robbery?"); *State* v. *Innis*, 433 A.2d 646, 655 (R.I. 1981) ("To apply the wording of the statute in a literal manner would run the risk of kidnapping convictions based on trivial changes in location having no bearing on the evil at hand." (internal quotation marks omitted)); *In re Crumpton*, 507 P.2d 74, 76 (Cal. 1973) (holding that legislature did not intend liability to be "based on movement of the victim that is criminologically insignificant"). Whitfield persuasively explains how the same proportionality concerns apply here. *See* Pet. Br. 31-34.

B. The Historical Context Of § 2113(e) Illustrates Congress's Focus On Specific, Severe Conduct

The historical context of the Federal Bank Robbery Act also illustrates that Congress was *not* targeting *de minimis* or incidental movement through § 2113(e). *See* Pet. Br. 27-30.

As this Court has explained, historical context is an important tool in construing a kidnapping statute. In *Chatwin* v. *United States*, 326 U.S. 455, the Court recounted the genesis of the Federal Kidnapping Act. *Id.* at 462. A close cousin of the Federal Bank Robbery Act, the Kidnapping Act also was passed in a "background of organized violence," when kidnappings for ransom "had become an epidemic in the United States." *Id.*

The *Chatwin* Court proceeded to reverse a conviction where the underlying facts "reveal[ed] a situation quite different from the general problem to which the framers of the Federal Kidnapping Act addressed themselves." 326 U.S. at 462. The Court recognized that a "loose construction" of the language could encompass the defendant's conduct, but held that "the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy … . Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity."[9] *Id.* at 464.

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[9] State courts have continually relied on *Chatwin* in construing their own kidnapping statutes. *See, e.g.*, *Levy*, 204 N.E.2d at 844-845 (reversing conviction because movement was incidental and under *Chatwin* not "in the nature of true kidnapping"); *Mead*, 318 N.W.2d at 445 (similar); *Berry*, 604 F.2d at 226 (relying on

State courts have likewise looked to the historical context in which kidnapping statutes were passed to inform their interpretation of such statutes.[10] *See, e.g.*, *Ripley*, 626 S.E.2d at 291. Indeed, courts have specifically connected the historical context to the determination that the statute should have a narrowed scope. The Supreme Court of Georgia, for example, detailed the historical background of its kidnapping statute, before explaining that state courts had lost sight of that background and "ha[d] come to expand the concept of kidnapping so drastically from its origins as to encompass movements as slight as stepping from one room of an apartment into another." *Garza*, 670 S.E.2d at 76. The court then narrowed the scope of the statute to avoid such results. *Id.* at 77-78; *see also, e.g.*, *Salamon*, 949 A.2d at 1114-1115 (discussing "historical backdrop" of statute and noting that "[a]mong the evils that … statutory prohibitions against kidnapping sought to address were the isolation of a victim from the protections of society and the law and the special fear and danger inherent in such isolation").

Here, as Whitfield recounts in detail, § 2113(e) was enacted in response to particularly serious conduct by John Dillinger and others. *See* Pet. Br. 27-30. The Court should not allow a statute enacted in that context

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Chatwin to reverse kidnapping conviction as incidental movement under Virgin Islands law).

[10] A number of these state kidnapping statutes were enacted at the same time as the Federal Kidnapping Act and the Federal Bank Robbery Act. *See, e.g.*, *Innis*, 433 A.2d at 652 (discussing how applicable version of statute had been enacted in 1932); *see also* Note, 53 Colum. L. Rev. at 540 (discussing how "wave of kidnappings" in the late 1920s and early 1930s prompted "state legislatures to make sweeping changes in the kidnapping laws").

to be expanded to reach *de minimis* or incidental movement that is far removed from its original intent.

C. Congress Did Not Intend To Cede Prosecutors The Power To Charge Nearly Every Mine-Run Bank Robbery Under § 2113(e)

Finally, the existence of prosecutorial discretion does not militate towards a broad reading of § 2113(e). Just the opposite. Under the government's definition of § 2113(e), prosecutors would have the option to pursue the severe sanctions afforded by that provision selectively for mine-run bank robberies, leading to potentially disparate punishment for similar conduct. At a minimum, prosecutors could use the threat of a mandatory minimum sentence to force plea bargaining. *Cf. Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) (observing that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system" (internal quotation marks omitted)); *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2371 (2012) (Breyer, J., dissenting) (discussing how prosecutor in such plea-bargaining system, "perhaps armed with statutes providing for mandatory minimum sentences, can become the ultimate adjudicator"). Given the widely disparate penalties between § 2113(a) and § 2113(e), this is no small tool for prosecutors; it is a sledgehammer.

When possible statutory enhancements for kidnapping are involved, state high courts have recognized that legislatures did not intend to give prosecutors this power. *See Rich*, 305 N.W.2d at 745 ("[W]e do not believe the legislature intended to afford the prosecution a choice of two penalties of such a disparate nature for the typical crime of sexual abuse"); *Goodhue*, 833 A.2d at 868 (similar); *Garza*, 670 S.E.2d at 77 (rooting decision partly "in the desirability of avoiding arbitrary and

selective enforcement of criminal laws" and observing that "experience reveals numerous instances of abusive prosecution under expansive kidnapping statutes for conduct that a rational and mature penal law would have treated as another crime" (internal quotation marks omitted)); *People* v. *Miles*, 245 N.E.2d 688, 695 (N.Y. 1969) ([T]he *Levy-Lombardi* rule was designed to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal."); *Salamon*, 949 A.2d at 1118 (observing that prior loose construction in Connecticut precedent "[u]nfortunately … has afforded prosecutors virtually unbridled discretion to charge the same conduct either as a kidnapping or as an unlawful restraint despite the significant differences in the penalties that attach to those offenses"); *Mobley*, 409 So. 2d at 1035 (discussing how high courts have reasoned in this context "that a narrow construction of the statutes was necessary to prevent the abuse of prosecutorial discretion").

What is more, this Court has held that "prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes." *Abuelhawa*, 556 U.S. at 823 n.3 ("Of course, Congress legislates against a background assumption of prosecutorial discretion, but this tells us nothing about the boundaries of punishment within which Congress intended the discretion to be exercised").

In § 2113, Congress created a purposeful distinction between more typical bank robberies and those involving meaningful forced movements of victims. Preserving Congress's chosen scheme depends on § 2113(e) requiring more than *de minimis* or incidental movement. Otherwise, the statutory gradations are ceded to prosecutors, who would be free to decide in virtually every case whether to charge a given bank robbery as an ag-

gravated offense. But defining federal offenses is firmly in Congress's exclusive domain and this Court should resist any interpretation that transfers that power to prosecutors. After all, as the adage goes, the punishment should fit the crime, not the prosecutor's bargaining leverage.

* * *

At the state level, "the direction of the criminal law has been to limit the scope of the kidnapping statute, with its very substantially more severe penal consequences, to true kidnapping situations and not to apply it to crimes which are essentially robbery … and in which some confinement or asportation occurs as a subsidiary incident." *Lombardi*, 229 N.E.2d at 208 (internal quotation marks omitted). In interpreting § 2113(e), this Court should follow the same "direction" and find that the provision does not reach *de minimis* movements that are incidental to a bank robbery.

CONCLUSION

For the foregoing reasons, as well as those presented by Whitfield, this Court should hold that incidental or insubstantial movements are insufficient to trigger application of § 2113(e). Under that standard, Whitfield's conviction under § 2113(e) should be overturned.

Respectfully submitted.

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AUGUST 2014