No. 21-1576

In the Supreme Court of the United States

TIMOTHY J. SMITH,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Constitution's venue right is one of the most deeply rooted protections in all of Anglo-American law. It was of profound importance to the Framers, who well understood the threat to liberty posed by permitting the government to select the place where a prosecution is conducted without regard for where the alleged crime was committed. But whether that right is given meaningful effect now depends on which circuit a person is tried in. The courts of appeals are in acknowledged conflict over whether a violation of that right requires acquittal, or merely vacatur with a possibility of re-prosecution. And, as a broad array of *amici* attest, the venue right is no right at all if the remedy is simply to let the government prosecute again in another place of its choosing.

Indeed, the government's plans for re-prosecuting Mr. Smith are a perfect illustration: having tried Mr. Smith in an improper venue, it now intends to await sentencing on a separate count, and then initiate a new prosecution in a new venue—proper or improper—if the sentence is not to its liking. *See* BIO 10-11. That strategic use of repeated trials is precisely the kind of danger the Framers sought to prevent in enshrining robust venue protections in this Nation's charter.

The government's reading of the Constitution's venue protections cannot be reconciled with the common-law legal tradition or the historical record of this Nation's founding. Tellingly, the government does not attempt to refute that historical foundation, or deny the importance of the question presented. Instead, the government urges this Court to decline review by downplaying the circuit split, dismissing

deep confusion in the lower courts, and manufacturing illusory vehicle problems. This Court should not let uncertainty and unfairness persist. It should grant review to vindicate a bedrock constitutional right, and provide sorely needed guidance to lower courts on this issue of unquestionable importance.

ARGUMENT

I. The Question Presented Has Divided The Courts of Appeals

The question presented implicates an acknowledged circuit split, and even the government does not deny there is deep confusion in the lower courts.

1. The government recognizes the "tension" between the courts of appeals on the question presented, BIO 20, but nevertheless contends that "[n]o division of authority exists that might warrant this Court's review," BIO 19. The government's attempt to downplay the circuit split is unpersuasive.

The government does not deny that precedential opinions from the Fifth and Eighth Circuits have held that a judgment of acquittal is the appropriate remedy for a violation of the venue right at trial, while the Sixth, Ninth, Tenth, and Eleventh Circuits have permitted re-prosecution in identical circumstances. Pet. 14-15, 17-18. As other courts have acknowledged, that amounts to a clear "circuit conflict" on the question presented. *United States v. Lozoya*, 920 F.3d 1231, 1241 & n.5 (9th Cir. 2019), *superseded by* 982 F.3d 648 (9th Cir. 2020); *see also* Pet. 20.

The government's sole basis for distinguishing the Fifth Circuit's decision in *United States v. Strain*, 407

F.3d 379 (5th Cir. 2005), is that it applied a "rehearing standard." But the government fails to explain why that should matter. A published opinion resolving a rehearing petition is no less precedential than any other published opinion. *See, e.g.*, *United States v. Stone*, 960 F.2d 426, 432 (5th Cir. 1992) (opinion denying rehearing "clarified" standard); *Tango Marine S.A. v. Elephant Grp. Ltd.*, 28 F.4th 600, 601 (5th Cir. 2022) (denying rehearing and explaining "the effect of [the court's] affirmance"). In *Strain*, the Fifth Circuit held that when the government fails to prove venue at trial, it is "not entitle[d] . . . to a second chance at prosecution." 407 F.3d at 380. As the government concedes, a legal rule denying that "second chance" is incompatible with the decision below. App. 15a.

The government also suggests (at 21-22) the Fifth Circuit retreated from *Strain* in *United States v. Niamatali*, which "decline[d] to decide whether a judgment of acquittal is the only proper remedy" for improper venue because the defendant conceded that vacatur and retrial were permissible. 712 F. App'x 417, 423 (5th Cir. 2018). That unpublished decision, premised on a concession, does not undercut *Strain*. *Ochoa-Salgado v. Garland*, 5 F.4th 615, 620 (5th Cir. 2021) ("[U]nexamined reliance on a party's concession does not bind a future panel."). If anything, *Niamatali* underscores *Strain*'s continued vitality because, absent *Strain*, there would have been no reason for *Niamatali* to allude to acquittal as the "only proper remedy" and emphasize the defendant's concession.

Finally, the government claims that *Strain* only held that "acquittal *may* be the proper result." BIO 21 (quoting *Strain*, 407 F.3d at 380). The government

misreads *Strain*, which held that acquittal *is* "the proper result" for failure to prove venue. 407 F.3d at 380. But even if *Strain* left open whether such a failure requires—or merely permits—acquittal, *Strain*'s remedy still represents a wholly distinct legal rule rejected by other circuits. No other circuit has ever suggested that courts have discretion over the appropriate remedy for failure to prove venue, and that rule directly conflicts with the Eleventh Circuit's holding in this case that "[*t*]*he* remedy for improper venue is vacatur." App. 15a (emphasis added). Either way, this Court's review is needed.[1]

The government's attempt to downplay *United States v. Greene*, 995 F.2d 793, 802 (8th Cir. 1993), similarly fails. The government suggests (at 22) it is "unclear" whether a future panel would "consider itself bound" by *Greene*, but it points to nothing suggesting the Eighth Circuit has abandoned *Greene*. An opinion does not need to have extensive reasoning to be binding, and the result in *Greene* is flatly incompatible with the Eleventh Circuit's rule. A district court in the Eighth Circuit would certainly not be free to permit a re-trial, in light of *Greene*. And the result is that a constitutional right of first-order

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[1] *United States v. Davis* does not alter the conflict. 666 F.2d 195 (5th Cir. Unit B 1982); *contra* BIO 21. The Fifth Circuit's decision in *Strain* clearly supersedes *Davis*. The *Strain* panel was well aware of *Davis* when it observed that the Fifth Circuit "ha[d] never squarely addressed" the "appropriate remedy for failure to prove venue." 407 F.3d at 379; *see United States v. Strain*, 396 F.3d 689, 695 & n.7 (5th Cir. 2005) (original opinion citing *Davis* twice). *Strain* thus reflects the Fifth Circuit's considered judgment about the absence of binding prior circuit precedent on that issue. *See Thomas v. Tex. Dep't of Crim. Just.*, 297 F.3d 361, 370 n.11 (5th Cir. 2002).

importance turns on geographic happenstance, and is vulnerable to forum-shopping. This is the quintessential circumstance in which this Court's review is needed to secure nationwide uniformity.

2. That is especially so because the reality on the ground is even worse than the split might suggest. In practice, defendants' venue rights may turn not just on the circuit in which they are prosecuted, but on the set of jury instructions the court employs, or whether it is a court or a jury that deems venue evidence inadequate. Pet. 19-22 & n.7. Such haphazard treatment of a core constitutional protection is untenable.

Tellingly, the government does not deny that district courts are taking inconsistent and conflicting approaches to the venue right. Instead, the government dismisses that substantial confusion because district court decisions are "not binding precedent." BIO 23 n.6 (citation omitted). That perfunctory response displays no solicitude for defendants' constitutional rights and asks this Court to abdicate its role in ensuring consistent application of the law in the lower courts. *See Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari because of importance of "uniformity among federal courts"); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 646 & n.9 (1981) (granting certiorari on "important constitutional issues" in light of "conflicting results" in appellate and district courts).

This Court's guidance is needed to resolve the circuit conflict and dispel the significant confusion surrounding the consequences of the government's failure to prove venue.

II. This Case Provides An Excellent Vehicle

Notwithstanding the circuit split, the government urges this Court to deny review based on vehicle considerations, but the concerns it raises are illusory.

1. The question presented is properly before this Court. Mr. Smith sought a judgment of acquittal in both courts below. Dkts. 82, 89; Pet'r C.A. Br. 77.[2] Both courts passed on Mr. Smith's venue challenge, and the Eleventh Circuit expressly rejected a remedy of acquittal for the venue defect. That is sufficient.

The government does not dispute that the Eleventh Circuit squarely decided the question presented, and it acknowledges (at 8) that the Eleventh Circuit relied on "prior precedent" in deciding the remedy issue. The government nevertheless contends that certiorari is not warranted because Mr. Smith's counsel "concede[d]" the "correctness" of that precedent at oral argument. BIO 6, 8-9 (citation omitted). The exchange it cites does not support that contention. The court asked whether, "[i]f the conviction on this count . . . were *vacated*," Mr. Smith "could be recharged in Mobile." C.A. Oral Arg. 4:52-5:12 (emphasis added). Counsel's

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[2] The government argues that Mr. Smith asked for "acquittal" for "*other* asserted errors," while requesting only "'revers[al] and a judgment rendered in [his] favor'" for the venue error. BIO 5, 8 (second alteration in original) (citation omitted). But, given that Mr. Smith challenged the denial of his "post-verdict motion for judgment of acquittal for lack of proper venue," Pet'r C.A. Br. 26, a request for "judgment rendered in [his] favor" *was* a request for acquittal. In any event, this Court's "practice 'permit[s] review of an issue not pressed so long as it has been passed upon.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original) (citation omitted).

affirmative answer reflected the question's premise that vacatur was the appropriate remedy. It did not concede the correctness of that premise or of circuit precedent. Nor was counsel obligated to devote precious oral argument time to an issue the panel appeared poised to decide against him. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (explaining that extensive argument is not required where it "would be futile" given circuit precedent).

2. The government also argues that the case's "interlocutory posture" counsels against review, citing Mr. Smith's impending resentencing on another count. BIO 9-10. That is no reason for delay. Resentencing on the extortion count will not aid this Court's review, and it would make no sense to require Mr. Smith to await the sentence on the extortion count before challenging the Eleventh Circuit's vacatur of the theft-of-trade-secrets count. Indeed, doing so would force Mr. Smith to take a duplicative appeal to the Eleventh Circuit on the very venue arguments the Eleventh Circuit already resolved. Far from adopting the bizarre approach the government proposes, this Court routinely grants certiorari in this type of procedural posture. *Van Buren v. United States*, 141 S. Ct. 1648, 1653-54 & n.1 (2021); *Smith v. United States*, 568 U.S. 106, 107-09 & n.1 (2013); *United States v. Skilling*, 554 F.3d 529, 595 (5th Cir. 2009), *aff'd in part, vacated in part*, 561 U.S. 358 (2010).

The government's plans for re-prosecuting Mr. Smith only confirm the need for review. The government states (at 10) that it has "no intention" to re-prosecute Mr. Smith "so long as" he receives a high-end guidelines sentence that "approaches or equals

the original 18-month term."[3] The government suggests (at 11) that Mr. Smith should therefore wait to see if he is re-charged and then file a "motion to dismiss on double jeopardy grounds" when his "feared injury is imminent."

But Mr. Smith has *already suffered* a constitutional injury under Article III and the Sixth Amendment, and his arguments regarding the proper remedy for that injury are ripe now. If Mr. Smith were re-prosecuted in another district, he likely could not obtain review of those arguments until after he endures a second trial, if at all. *Cf. United States v. MacDonald*, 435 U.S. 850, 863 (1978) (denials of motions to dismiss based on Sixth Amendment speedy trial right are not immediately appealable); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) ("interpret[ing] the collateral order exception 'with the utmost strictness' in criminal cases" (citation omitted)). The government's suggestion that he could obtain interlocutory review of a *separate* constitutional violation under the Fifth Amendment is no reason to deny certiorari on the question presented here.

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[3] If this Court grants review, its decision on the proper remedy for failure to prove venue at trial may present questions regarding the appropriate disposition of—or sentence on—the extortion count. *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (describing sentencing based on acquitted conduct as "a dubious infringement" of the right "to a jury trial"); *see also Jones v. United States*, 574 U.S. 948, 949-50 (2014) (Scalia, J., dissenting from denial of certiorari) (similar). But resolution of the question presented is necessarily antecedent to a determination about any potential impact on separate counts.

III. The Question Presented Is Exceptionally Important And The Eleventh Circuit's Rule Is Wrong

1. The government does not dispute that the question presented is important and recurring. Nor could it. Venue is a potential issue in every criminal case that goes to trial, it has become increasingly salient over time as criminal conduct spans across numerous districts, and the divergent remedy rules between circuits mean the difference between liberty and potential incarceration for criminal defendants. *See* Pet. 22-24. Those considerations alone warrant review. Sup. Ct. R. 10(c).

2. The government nonetheless claims this Court's review is unnecessary because the Eleventh Circuit's vacatur rule is correct.

According to the government, venue is a mere procedural right that can be "vindicated by . . . vacating a conviction if venue is improper." *See* BIO 11-19. That is a non-sequitur. A re-trial offers virtually no relief at all to a defendant subjected to a constitutionally deficient trial. Under the majority rule, "the government is free to keep retrying the accused, in one venue after another, into perpetuity without limitation." *Amici* Br. of Rutherford Inst., Cato Inst., and Nat'l Ass'n for Public Defense ("*Amici* Br.") 12.

That rule is flatly inconsistent with how the Framers understood the venue right, and the government offers no historical account to support it. The Framers surely would not have accepted a remedy that would permit a criminal defendant improperly tried in London to be shipped back to Boston—or even sent to Manchester—for yet another

trial, with no remedy other than temporary avoidance of imprisonment. Pet. 30; *Amici* Br. 7-8.[4]

Indeed, although the government suggests (at 18) the "constitutional venue right" was concerned only with tainted *convictions* and does not "directly protect[] against the possibility of prosecution in an inconvenient location," the history demonstrates the opposite. As this Court observed in *United States v. Johnson*, the "Framers wrote into the Constitution" the venue protections in light of "the unfairness and hardship to which trial in an environment alien to the accused exposes him." 323 U.S. 273, 275 (1944).[5] In other words, the venue right is concerned not just with fair convictions, but also with the government-inflicted harms from the *trial itself*. *See, e.g.*, Story, *supra*, § 1775 (explaining that venue right was intended to "secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood"). That is why the government's effort to distinguish violations of the speedy trial right fails. Just as a new trial exacerbates, rather than cures, a speedy trial violation, BIO 17, vacatur and retrial likewise do nothing to cure the initial hardship of being made to stand trial in a distant location untethered to the alleged crime, Pet. 30-32.

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[4] *See* Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 807-11, 815-28 (1976); 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833).

[5] The government dismisses *Johnson* as "not speak[ing] to *constitutional* venue requirements," but rather to issues of statutory construction. BIO 17-18. But *Johnson*'s resolution of the statutory question turned on "the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding [venue]." *Johnson*, 323 U.S. at 275.

Nor does a vacatur remedy protect against government abuses of power. Rather, it allows the government to strategically choose where to bring prosecutions, knowing it will receive a do-over if it fails to prove venue. *See Amici* Br. 14-15. In doing so, it systematically deters defendants from bringing meritorious venue challenges, while providing prosecutors enormous leverage to coerce guilty pleas through the threat of serial retrials. *See id.* at 15-20. That critically undermines the constitutional venue right.

These concerns are not mollified by the government's argument that venue is unrelated to "guilt or innocence." The government states (at 12) that, for this reason, the courts of appeals have "consistently recognized that venue is not an 'element' of an offense." But that is false—which is precisely why this Court's review is needed. In *Strain*, the Fifth Circuit emphasized that venue *is* "a constitutionally-imposed element of every crime." 407 F.3d at 380. That is because the government bears the burden of proving venue "in order for a conviction to pass constitutional muster." *United States v. Carreon-Palacio*, 267 F.3d 381, 390-91 (5th Cir. 2001). And, just as a failure to prove any other element requires acquittal, the government's failure to prove venue also requires acquittal.[6] That commonsense result is the only one that provides any

[6] The government points (at 13-15) to various ways in which federal courts have implemented venue protections, but existing law on the procedural contours of the venue right lacks any grounding in the Constitution or this Court's case law and thus casts little—if any—light on the nature of that right.

meaningful remedy for violations of this constitutional right of fundamental importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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