No. 21-1576

In the Supreme Court of the United States

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

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the proper remedy for the government's failure to prove venue is an acquittal barring reprosecution of the offense, as the Fifth and Eighth Circuits have held, or whether instead the government may retry the defendant for the same offense in a different venue, as the Sixth, Ninth, Tenth, and Eleventh Circuits have held.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

United States v. Smith, No. 20-12667, United States Court of Appeals for the Eleventh Circuit, judgment entered January 12, 2022 (22 F.4th 1236), rehearing denied February 16, 2022.

United States v. Smith, No. 3:19cr32-MCR, United States District Court for the Northern District of Florida, motion for judgment of acquittal denied June 22, 2020 (469 F. Supp. 3d 1249), judgment entered July 9, 2020.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 22 F.4th 1236 (11th Cir. 2022). The court's order denying panel rehearing (Pet. App. 39a) is not published. The opinion of the district court denying petitioner's motion for judgment of acquittal (Pet. App. 19a-38a) is reported at 469 F. Supp. 3d 1249 (N.D. Fla. 2020).

JURISDICTION

The court of appeals entered its judgment on January 12, 2022 (Pet. App. 1a) and denied rehearing on February 16, 2022 (Pet. App. 39a). On May 10, 2022, Justice Thomas extended the time to file a petition for a writ of certiorari through June 16, 2022. Petitioner timely sought certiorari on June 16, 2022, and this Court granted the petition on December 13, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Article III, section 2, clause 3 of the United States Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

Federal Rule of Criminal Procedure 18 provides in relevant part:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.

INTRODUCTION

Criminal defendants have a right to be tried in a proper venue. That right is enumerated twice in the Constitution and was firmly established at the founding as an indispensable bulwark against government oppression. This case presents the question whether a violation of that right, after the government fails to prove venue at trial, requires acquittal, or whether the government may instead subject the defendant to retrial in new venues of its choosing. The Eleventh Circuit in this case endorsed an approach that imposes no limit on the government's power to subject criminal defendants to further—indeed, endless—proceedings in improper venues. That result is flatly incompatible with the text, purposes, and history of the Constitution's venue provisions, and it would offer virtually no protection for a right the Framers understood to be of paramount importance.

A criminal defendant's right to be tried in a proper venue is centuries older than this country, tracing back to Magna Carta. At English common law, juries were required to find that the alleged offense had been committed in the same county in which the indictment was brought, and venue was understood to be an essential part of the prosecution's case. The government's failure to prove venue would therefore result in a judgment of acquittal. In the lead-up to the American Revolution, however, the British Crown sought to suppress dissent among the American colonies by threatening to try colonists in England, depriving them of "the inestimable Privilege of being tried by a Jury from the Vicinage." William Wirt Blume, *Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev.

59, 64-65 (1944) (quoting 11 *Journals of the House of Burgesses, 1766-1769*, at 214 (John Pendleton Kennedy ed., 1906)). In light of those grave abuses, the Framers of the Constitution incorporated layered protections of the venue right—first in Article III, and then, even more robustly, in the Sixth Amendment.

An acquittal remedy for violations of those protections accords with the text, history, and purposes of the venue right, as well as this Court's precedent holding that "the remedy for denial of [a constitutional] right" must effectuate "the policies which underlie the right." *Strunk v. United States*, 412 U.S. 434, 438-40 (1973). The venue provisions were intended as a defense against the inherent hardship of being dragged to remote locations, as well as the oppression and abuse of being put before a jury of the government's own choosing. But those purposes cannot be vindicated by offering the government a do-over when it violates a defendant's venue right. To the contrary, the prospect of reprosecution *exacerbates* the initial hardship of being tried in an improper venue, while licensing the very prosecutorial forum-shopping and abuses with which the Framers were concerned.

Indeed, the necessary implication of the limitless theory the Eleventh Circuit embraced shows why it must fail: a criminal defendant improperly tried in London could have been sent to Manchester for another trial. That is plainly incompatible with the basic purposes of the Constitution's venue provisions, as the Framers understood them. A remedy that permits serial retrials in new places chosen by the government is no remedy at all. The decision below should be reversed.

STATEMENT OF THE CASE

A. Legal And Historical Background

1. The venue right traces back to Magna Carta, which declared that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgment of his equals." Magna Carta cl. XXXIX (G.R.C. Davis trans., London British Museum 1963) (1215); *id.* cl. XX (declaring that punishment would not be "imposed except by the assessment on oath of reputable men of the neighborhood"). By the early eighteenth century, notions of venue were woven into the fabric of criminal jury trials under English common law. Juries were required to find that the alleged offense had been committed in the same county in which the indictment was brought in order to return a valid conviction. *See* 2 Matthew Hale, *The History of the Pleas of the Crown*, ch. 40, at 291 (1736); 2 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 25, § 34, at 220 (2d ed. 1726).

Prior to the American Revolution, the British strayed from this longstanding principle in an effort to exert greater control over the American colonies. Specifically, in 1769, Parliament responded to unrest in Massachusetts by reviving a statute that permitted "colonists charged with treason [to] be tried in England." *United States v. Cabrales*, 524 U.S. 1, 6 n.1 (1998); *see* 35 Hen. 8, ch. 2 (1543). This was a direct response to the failed prosecutions of "riot[ers]" resisting the royal government's imposition of customs duties, which were thwarted by grand jurors sympathetic to the colonists' cause. Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 805-06 (1976). Over the next few years, Parliament enacted similar laws with respect to other offenses. *Id.* at 806-07.

Colonial governments swiftly and stridently objected to England's threat to "send[] colonists "to Places beyond the Sea, to be tried," condemning it as a deprivation of "the inestimable Privilege of being tried by a Jury from the Vicinage." *Journals of the House of Burgesses*, *supra*, at 214; *see also* Blume, 43 Mich. L. Rev. at 64-65.[1] In 1774, the American colonies—through the First Continental Congress—reiterated their objection to the prospect of being made to stand trial in England, again emphasizing that "being tried by [one's] peers of the vicinage" was a "great and inestimable privilege" bestowed by the English common law. Resolutions of Oct. 14, 1774, *reprinted in* 1 Journals of the Continental Congress 63, 69 (Gov't Printing Office 1904). And at the outset of the Revolutionary War, the Declaration of Independence likewise condemned British statutes permitting colonists to be taken "beyond Seas to be tried." The Declaration of Independence, para. 21 (U.S. 1776).[2]

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[1] Many members of Parliament also objected to the measure, deeming it "contrary to the spirit of [the British] Constitution." Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. 197, 205-06 (1909) (citation omitted). As Edmund Burke explained, such trials would leave defendants "unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 875 (1994) (quoting Edmund Burke, Letter to the Sheriffs of Bristol, *in* 2 *The Works of the Right Honorable Edmund Burke* 189, 192-93 (Little, Brown, 9th ed. 1889)).

[2] The Declaration of Independence also denounced other departures from traditional venue principles, including a statute

2. In light of this history, the Framers embedded robust venue protections in the Constitution, which "twice safeguards the defendant's venue right." *Cabrales*, 524 U.S. at 6 & n.1.[3] In the original Constitution, without significant debate or revision, the Framers adopted Article III, section 2, clause 3's requirement that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3; *see* Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 24-25 (1951).

Article III's venue protection was merely a starting point, however. During the state ratification debates, Anti-Federalists argued that the Constitution should provide *even greater* venue protections for criminal defendants. If "[j]uries from the vicinage [were] not secured," they argued, the right to a jury trial was "in reality sacrificed." 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 545 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1891) ("*Debates*")

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permitting "British soldiers who were charged in Massachusetts with capital offenses based on actions taken in suppressing riots or enforcing the revenue laws" to be tried in England. *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part and dissenting in part) (citing 14 Geo. 3, ch. 39 (1774)), *rev'd on other grounds sub nom. United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

[3] Early state constitutions in Maryland, Virginia, Massachusetts, Pennsylvania, New Hampshire, South Carolina, and Georgia had already incorporated venue and vicinage protections. *See* Blume, 43 Mich. L. Rev. at 67-78; Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 22-24 (1951).

(statement of Mr. Henry at Virginia ratification convention).

Article III's guarantee of a trial "in the State" failed to adequately address two significant concerns. *First*, Article III's venue right left a defendant "liable to be dragged to a distant county," "deprived of the support and assistance of friends, to be tried by a strange jury" without "property to carry his witnesses to such a distance." 2 *Debates*, *supra*, at 400 (statement of Mr. Tredwell at New York ratification convention); *see also id.* at 109-10 (statement of Mr. Holmes at Massachusetts ratification convention) (objecting that if "a person shall not have a right to insist on a trial in the vicinity where the fact was committed," he may "be incapable of making such a defence as he is, in justice, entitled to" due to "distance"). *Second*, if jurors could "come from any part of the state," then federal prosecutors "c[ould] hang any one they please, by having a jury to suit their purposes." 3 *Debates*, *supra*, at 569 (statement of Mr. Grayson at Virginia ratification convention); *see also* 2 *Debates*, *supra*, at 109-10 (statement of Mr. Holmes at Massachusetts ratification convention) (objecting that absent a more specific venue right, a person may be tried by "a jury who *may be* interested in his conviction").

To allay these concerns, the Bill of Rights reinforced Article III's venue protections through the Sixth Amendment, which guarantees "the accused" the right to trial "by an impartial jury of the State *and district* wherein the crime shall have been

committed." U.S. Const. amend. VI (emphasis added).[4]

3. Recognizing the critical importance of venue to the Framers, this Court has explained that the Constitution's venue provisions are not "matters of mere procedure." *Travis v. United States*, 364 U.S. 631, 634 (1961). Instead, those provisions serve at least two "important substantive ends" that align with the concerns expressed in the ratification debates. *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part and dissenting in part), *rev'd on other grounds sub nom. United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

First, the venue provisions protect an accused from "the unfairness and hardship to which trial in an environment alien to the accused exposes him." *United States v. Johnson*, 323 U.S. 273, 275 (1944); *see also United States v. Cores*, 356 U.S. 405, 407 (1958) (similar). The right is thus grounded in the recognition that—regardless of the ultimate outcome in a case—a defendant suffers inherent harm in "being dragged to trial in some distant state away from . . . friends, and witnesses, and neighbourhood," where he may be forced to incur "oppressive expenses" in the course of trial. 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833).

Second, the venue protection guards against prosecutorial abuse by limiting the government's

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[4] Early drafts of the Sixth Amendment used the term "vicinage," not "district." Kershen, 29 Okla. L. Rev. at 826. But because "vicinage" was subject to varying interpretations, the Framers instead chose to provide for a jury drawn from a "definite geographical area"—a "district" drawn by Congress. *Id.*

ability to forum-shop and jury-shop, and minimizing the government's power to wield the threat of prosecution in a far-off place as a tool in plea negotiations. In other words, the venue requirement prevents "the appearance of abuses, if not . . . abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Johnson*, 323 U.S. at 275; *see Palma-Ruedas*, 121 F.3d at 861 (Alito, J., concurring in part and dissenting in part) (explaining that venue right serves "to deter governmental abuses of power"). Absent the venue right, an accused may "be subjected to the verdict of mere strangers, who may feel no common sympathy, or may even cherish animosities, or prejudices against" him, and may be unable to "procur[e] the proper witnesses to establish his innocence." Story, *supra*, § 1775. The "choice of the government to prosecute" in a favorable forum thus creates a significant "opening to oppression." *Hyde v. United States*, 225 U.S. 347, 386-87 (1912) (Holmes, J., dissenting) (describing risks of government's power to prosecute all conspirators in venue where any overt act took place).

B. Factual And Procedural Background

1. Petitioner Timothy J. Smith lives in Mobile, Alabama; works as a software engineer; and is an avid fisherman. Pet. App. 2a. Mr. Smith boats, scuba dives, and fishes in the Gulf of Mexico for 1,200 to 1,500 hours a year. *Id.* On April 3, 2019, he was indicted in the Northern District of Florida for (1) accessing a computer without authorization in violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(2)(C), (c)(2)(B)(iii); (2) theft of trade secrets, *id.* § 1832(a)(1); and (3) extortion, *id.* § 875(d). JA1-3; JA6-7 & n.1.

Those counts were based on allegations that Mr. Smith improperly accessed the website of StrikeLines, a two-person business based in Pensacola, Florida. Pet. App. 2a-3a. StrikeLines collects the coordinates of artificial fishing reefs, including "private" reefs, in the Gulf of Mexico. *Id.* at 2a. Private reefs are artificial reefs that fishermen have paid to place for commercial or recreational use; fishermen generally do not share the locations of such reefs to prevent others from overfishing their spots. *See id.*; JA98-99. Despite the owners' desire to keep their reefs private, StrikeLines uses "boats equipped with sonar" and publicly accessible sonar data to identify the reefs and then sells their coordinates to other fishermen for profit, charging between $190 and $199. Pet. App. 2a; *id.* at 20a & n.2; JA71. Because fishermen "pay a lot of money to have [private] reefs put out," JA40-41, the sale of private reef coordinates is a "major controversy" in the fishing community, JA98.

From Mobile, Alabama, Mr. Smith viewed StrikeLines' website, and using a web application, he was able to obtain the reef coordinates available for sale on the website. Pet. App. 2a-3a. As StrikeLines' website developer explained, Mr. Smith could access the coordinate data because StrikeLines' website did not require a password. JA73-74. It displayed the coordinates using Google Maps—which transmits data to all visitors' web browsers, making the information publicly accessible. JA72-73; JA76-77. Mr. Smith informed StrikeLines' owners that he was able to access the coordinate data and that the material remained publicly accessible even after StrikeLines changed its website. Pet. App. 2a-3a.

Mr. Smith did not seek to profit from this access. *See* JA117. Instead, in a Facebook post, Mr. Smith explained that StrikeLines was "using high dollar scanning equipment [to find] these reefs and then resell[] [them] for personal gain." JA40-41. The post stated that "several of [Mr. Smith's] friends [had] dozens . . . of [artificial reef locations that were] for sale or [that had] been sold by [StrikeLines]" and that, "[w]ithout getting into all of the rights and wrongs" of the business model, he "would like to give anyone who has paid to have [artificial reefs] put out [the opportunity] . . . to look and see what reefs [StrikeLines] has for sale or has sold in the past so you will have the option to have your spots moved." JA41; *see also* Pet. App. 3a-4a. The post invited fishermen who had placed artificial reefs at their own expense to "direct message" Mr. Smith to cross-check their reefs' coordinates against those sold or advertised for sale. *See* JA41; JA99.

Citing customer complaints, StrikeLines' owners asked Mr. Smith to remove his social media posts. Pet. App. 4a. Mr. Smith said he would "delete the post" and "fix [StrikeLines'] problem free of charge," and indicated that he was interested in obtaining deep-water grouper coordinates. JA87; Pet. App. 4a. StrikeLines initially told Mr. Smith they "appreciate[d] that offer" and discussed grouper coordinates and potential coding projects with him. JA87-88. But when communications broke down between the parties, StrikeLines' owners contacted law enforcement in Florida "almost immediately," JA90, claiming that Mr. Smith had unauthorized access to data transmitted by StrikeLines' website.

During this course of events, Mr. Smith never set foot in Pensacola. Pet. App. 12a.

2. The government nevertheless chose to prosecute Mr. Smith in the Pensacola Division of the Northern District of Florida. Before trial, Mr. Smith moved to dismiss the CFAA and theft-of-trade-secrets counts for lack of venue. JA6-7. He argued that venue was improper because he remained in the Southern District of Alabama at all times during the relevant events, and the website's servers in Orlando, Florida, stored the reef coordinates in the Middle District of Florida. JA10 & n.3; Pet. App. 12a. Accordingly, no part of either offense "was committed" in the Northern District of Florida where StrikeLines is based. Fed. R. Crim. P. 18; *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (requiring courts to "identify the conduct constituting the offense . . . and then discern the location of the commission of the criminal acts").

The district court denied the motion. JA17. It found Mr. Smith's venue challenge to be "premature," accepting the government's argument that it "need[ed]" an opportunity "to prove venue through presentation of the evidence at trial." JA11. That evidence, the court reasoned, would facilitate resolution of "underlying factual issues that need to be decided at trial by a jury." JA12. The court also explained that "[n]othing in [its] Order prevents Smith from challenging the adequacy of the venue evidence at trial." JA12 n.7.

3. Mr. Smith thus went to trial in Pensacola for offenses he allegedly committed while in Mobile. As Mr. Smith had contended from the outset, JA68, the evidence at trial failed to show that he engaged in any conduct relevant to the CFAA and theft-of-trade-secrets counts in the Northern District of Florida. Rather, he used a computer in Mobile, Alabama (in

the Southern District of Alabama), to interact with the server that hosted StrikeLines' website in Orlando, Florida (in the Middle District of Florida). JA74-75.

At the close of the government's case, Mr. Smith moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). JA98. As relevant here, Mr. Smith challenged the sufficiency of the government's venue evidence for the CFAA and theft-of-trade-secrets counts. JA100. The government responded that venue "is a question for the jury" and pointed to evidence of StrikeLines' presence in the Northern District of Florida. JA103-04; JA108. The district court reserved a ruling on the motion. JA104.

The district court instructed the jury that the government bore the burden of proving by a preponderance of the evidence that venue was proper in the Northern District of Florida as to each count of the indictment. Pet. App. 7a; JA28-29; JA112-13. The district court explained to the jury that "[i]f the Government has failed to establish proper venue for any count in the Indictment by a preponderance of the evidence, you must find the Defendant not guilty as to that count." JA29; *see also* JA113. The jury returned a general verdict finding Mr. Smith not guilty of violating the CFAA but guilty as to theft of trade secrets and extortion. JA32-33.

4. After the jury returned its verdict, and because the district court had reserved ruling on Mr. Smith's motion for a judgment of acquittal on the trade-secrets charge, the district court requested supplemental briefing regarding venue for that count. JA35; JA115. In his supplemental brief, Mr. Smith reiterated that venue was improper in the Northern District of Florida because the essential conduct

elements for the theft-of-trade-secrets offense all occurred in Alabama. JA56 (citing, *inter alia*, *Cabrales*, 524 U.S. at 7); *see also* JA59-61. Because the government had failed to present sufficient evidence of venue for that count, Mr. Smith argued, the proper remedy was a judgment of acquittal. JA54 (citing *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam); *United States v. Greene*, 995 F.2d 793, 802 (8th Cir. 1993)).[5]

The government, in contrast, contended that venue was proper in the Northern District of Florida because StrikeLines was located within the district and "felt injury" there and the coordinates themselves "physically fall within" the district. JA49-50. The court denied Mr. Smith's motion for judgment of acquittal, finding venue proper because StrikeLines was a resident of the Northern District of Florida and thus felt the effects of the offense in that district. Pet. App. 29a-30a.

At sentencing, the court noted that there was no evidence of "actual loss" to StrikeLines. JA117; *see also* JA91. It varied downward from the Guidelines range to sentence Mr. Smith to eighteen months of imprisonment and one year of supervised release. Pet. App. 43a-44a.[6]

5. Mr. Smith appealed his convictions, arguing, among other things, that the district court had erred in denying his motion for a judgment of acquittal on

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[5] Mr. Smith advanced the same arguments in renewing his post-verdict motion for judgment of acquittal under Rule 29. JA38-39.

[6] At sentencing, the district court "speculat[ed]" that "the jury found [Mr. Smith] not guilty" on the CFAA count "because of the venue issue." JA116-17.

the venue issue. The Eleventh Circuit agreed with Mr. Smith, holding that the Northern District of Florida was an improper venue for the theft-of-trade-secrets count. Pet. App. 15a, 18a. In doing so, the Eleventh Circuit rejected the district court's "effects" test, and looked instead to the "essential conduct elements" of the offense, none of which had been committed in the Northern District of Florida, where Mr. Smith was prosecuted. Pet. App. 11a-12a; *see also id.* at 14a ("The government points to no evidence that the trade secrets were taken from or transported through the Northern District of Florida . . . ."). The Eleventh Circuit did not resolve "whether venue would be proper in the Middle District of Florida," where the servers that stored StrikeLines' data were located. *Id.* at 12a.

Although Mr. Smith prevailed on his venue objection, the Eleventh Circuit held that the only "remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," Pet. App. 15a, rejecting Mr. Smith's request for entry of a judgment of acquittal on his theft-of-trade-secrets count, Pet'r C.A. Br. 77. To reach that conclusion, the court relied on its decision in *Haney v. Burgess*, 799 F.2d 661, 664 (11th Cir. 1986) (per curiam), which held—on federal habeas review of a state court proceeding—that "retrial in a proper venue after [a court] vacate[s] a conviction for improper venue" is permissible because the Double Jeopardy Clause "is not implicated by" the government's failure to prove venue. Pet. App. 15a. *Haney*, which did not involve the federal constitutional venue right, premised that conclusion on the view that venue is a mere "question of procedure," more akin to "trial error" than

insufficiency of the evidence. 799 F.2d at 663-64 (citation omitted).[7]

SUMMARY OF ARGUMENT

The Eleventh Circuit's holding that a violation of the venue right permits reprosecution cannot be reconciled with the text, history, and purposes of the venue right, or this Court's remedial jurisprudence. That holding provides no meaningful deterrent for violations of the venue right, and it would allow the government to subject a defendant to serial retrials, without limitation, after failing to prove venue the first time around. The Framers could not have intended that result, and this Court should firmly reject it. Only acquittal meaningfully effectuates the constitutional venue right.

I. The text of Article III and the Sixth Amendment and the historical provenance and purposes of the venue right strongly support acquittal as the proper remedy when the government fails to prove venue at trial. In the wake of British threats to force American colonists to stand trial in England, the Framers twice enshrined the venue right in the Constitution. Article III mandates that "[t]he Trial of all Crimes . . . shall be held in the State" where the crime was committed, and the Sixth Amendment requires a "jury of the State and district wherein" the crime was committed. U.S. Const. art. III, § 2, cl. 3;

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[7] The Eleventh Circuit affirmed the extortion conviction and remanded for resentencing. Pet. App. 18a. That resentencing has not yet occurred, but the government has already indicated it will rely on evidence related to failed counts of the indictment to seek a sentence "that approaches or equals" the 18-month sentence previously imposed for two counts of conviction. BIO 10.

U.S. Const. amend. VI. The ratification debates reveal—and this Court has confirmed—that the core purposes of those provisions are to prevent the hardship of trial in a remote location, and to minimize government forum-shopping and abuses. *See, e.g.*, *Johnson*, 323 U.S. at 275.

But allowing the government a do-over when it violates a defendant's venue right does not vindicate those purposes. Like the analogous Sixth Amendment speedy trial right, the preconviction focus of the venue right on minimizing hardship and anxiety in the trial *process* demands a remedy that spares the defendant further harm from a subsequent trial. Acquittal is the only remedy that appropriately effectuates the venue right as conceived by the Framers and serves "the policies which underlie" that right, as this Court's Sixth Amendment jurisprudence requires. *Strunk*, 412 U.S. at 440 (citation omitted).

Furthermore, founding-era practice requiring the government to prove venue at trial—and the jury to find the defendant not guilty if venue was not proven—confirms that a violation of the venue right was traditionally remedied through an acquittal. Modern practice likewise reflects the same longstanding approach. Juries are regularly instructed to *acquit* if the government fails to carry its burden on venue, and that result should not differ when a conviction is found invalid on appeal because of the government's failure to carry its burden of proving venue. In all circumstances, acquittal is the natural consequence of the government's failure of proof at trial.

II. Neither the Eleventh Circuit nor the government has provided any adequate justification for concluding that the exclusive remedy for a

violation of the venue right is vacatur and potential retrial. The inescapable consequence of the Eleventh Circuit's position is that defendants may be subject to *unlimited* retrials in new venues. But the Eleventh Circuit reached that conclusion based on inapposite case law, without any consideration of the constitutional stature or historical roots of the venue right. And the government's arguments provide no support for the Eleventh Circuit's unbounded rule. Although the government insists that vacatur adequately vindicates the venue right and discourages venue violations, it has no explanation as to why that is so. Reprosecution neither remedies the initial harms of being made to stand trial in an unconstitutional location, nor prevents the government abuses with which the right is concerned.

The Eleventh Circuit's approach offers no remedy at all for a constitutional right the Framers understood to be fundamental to ordered liberty and the fair administration of criminal justice. The decision below should be reversed.

ARGUMENT

I. The Government's Failure To Prove Venue Requires Acquittal

Although the venue right was critically important to the Framers, this Court has never addressed the appropriate remedy for a violation of the venue right. In the absence of relevant precedent, this Court should look to the text, history, and purposes of the constitutional venue provisions; the core remedial principles reflected in this Court's jurisprudence; and historical and modern practice in implementing the venue right. Here, all of those tools of interpretation

point firmly in favor of acquittal when the government fails to prove venue at trial.

A. The Text, History, And Purposes Of The Venue Right Require A Remedy Of Acquittal After The Government Fails To Prove Venue

The text of the Constitution makes clear that the venue right is of paramount importance to our Nation's system of criminal justice. That text protects the venue right twice over, mandating in Article III that "[t]he Trial of all Crimes . . . shall be held in the State" where the crime was committed, and providing in the Sixth Amendment that the "accused" has a right to trial by a "jury of the State and district" where the crime was committed. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI. The historical context that led to the adoption of those guarantees confirms their essential purpose as a safeguard against government overreach. Given the centrality of the venue right at the founding, the Framers would not have intended, or expected, the promise of the venue right to mean only that criminal defendants may be subject to serial retrials in improper venues. And such a rule would be flatly incompatible with this Court's Sixth Amendment jurisprudence requiring remedies that meaningfully vindicate the underlying policies of the right.

1. This Court has long recognized that "the views of the Framers and their contemporaries," and the historical context and purposes of constitutional rights, guide the proper interpretation of the Constitution. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (citing *Myers v. United States*, 272 U.S. 52 (1926)); *see also Crawford*

v. Washington, 541 U.S. 36, 42-53 (2004) (interpreting Confrontation Clause in light of historical context and "principal evil at which" the Clause "was directed"); *NLRB v. Noel Canning*, 573 U.S. 513, 524, 534 (2014) (giving "significant weight" to historical practice and Framers' intent with respect to the "essential purposes" of constitutional provision).

Here, the relevant historical background reveals the underlying purposes of the constitutional venue right. The venue right originated in the English common law and had long been viewed as a fundamental component of the jury trial right. But the Framers elevated that right to an even higher stature in American law when they twice enshrined it in the Constitution. As Chief Justice Marshall explained, the requirement of proper venue is "the stronger in the United States, where it is affirmed by the constitution itself." *United States v. Burr*, 25 F. Cas. 187, 196 (C.C.D. Va. 1807). And the Framers did not include that right reflexively, but in reaction to the British Crown's efforts to subjugate American colonists by eviscerating the right. *See United States v. Cabrales*, 524 U.S. 1, 6 & n.1 (1998); *supra* 5-6 (describing colonial objections to abuses of venue right).

In light of that experience, the Framers saw the venue right as an important and independent protection against government oppression, as well as an indispensable component of the jury trial right. Article III's inclusion of the venue protection was uncontroversial because "the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists," Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the*

Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 871 (1994), and guaranteeing the venue right was seen as key to achieving that goal. *See supra* 7-9. But the Framers went further in promising an "accused" a trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Through that additional, more robust protection, the Framers sought to further preclude government forum-shopping and shield criminal defendants from unnecessary hardship. *See supra* 7-9. The venue right was thus "important enough to the Founders that it," "along with the related right to trial by jury[,] are the only rules of criminal procedure included in both the original Constitution and Bill of Rights." *United States v. Romans*, 823 F.3d 299, 325 (5th Cir.) (Costa, J., concurring specially), *cert. denied*, 137 S. Ct. 195 (2016). Together, Article III and the Sixth Amendment enshrined the venue right as a bedrock principle of American criminal law and a fundamental defense against the types of abuses threatened by the British Crown.

2. Despite the venue right's unquestionable importance to the Framers, and the layered protections of Article III and the Sixth Amendment, the Constitution does not articulate a *remedy* for a violation of that right, just as it is silent on remedy for essentially every other constitutional right. The Framers drafted the Constitution and Bill of Rights with the understanding that the federal courts would safeguard the enumerated rights, guided by the foundational rule that "where there is a legal right, there is also a legal remedy." 3 William Blackstone, *Commentaries on the Laws of England* 23 (1772); *see also Ashby v. White* (1703) 92 Eng. Rep. 126, 136

(K.B.) (Holt, C.J.) ("[I]t is a vain thing to imagine, there should be a right without a remedy . . . .").

That background principle was well-known to the Framers, *see, e.g.*, *The Federalist No. 43* (James Madison) ("[A] right implies a remedy . . . ."), and was reflected in deliberations over the Bill of Rights. James Madison explained to Congress that "incorporat[ing]" individual rights "into the constitution" through the Bill of Rights would ensure that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." 1 Annals of Cong. 457 (1789). As Madison explained, the courts would act as "an impenetrable bulwark against every assumption of power in the legislative or executive" and would "be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." *Id.* In other words, the Framers expected the judiciary to provide meaningful remedies for the rights safeguarded in the Constitution and Bill of Rights.[8]

This Court has incorporated that same foundational principle into its Sixth Amendment jurisprudence. As the Court has explained, "the

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[8] This Court has repeatedly affirmed that expectation, recognizing that "it has been the rule from the beginning" that courts will provide meaningful remedies "where federally protected rights have been invaded." *Bell v. Hood*, 327 U.S. 678, 684 & n.6 (1946) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803)); *see also, e.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (deeming it "a monstrous absurdity . . . that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 481 (1855) (applying the "[*u*]*bi jus ibi remedium*" maxim).

remedy for denial of [a constitutional] right" must account for the harms imposed on the defendant and effectuate "the policies which underlie the right." *Strunk v. United States*, 412 U.S. 434, 438-40 (1973). "Cases involving Sixth Amendment deprivations" are thus "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). This Court has long sought to meaningfully redress constitutional violations, while rejecting rules that "risk[] the evisceration" of the right. *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985) (upholding exclusion of evidence obtained in violation of Sixth Amendment right to counsel).

3. Both the Framers' expectations and this Court's precedent thus require an effective remedy for violations of the venue right. The text, history, and purposes of the venue right strongly support the conclusion that acquittal is the only appropriate remedy for such violations.

First, as the plain text of Article III and the Sixth Amendment reflects, the venue right is concerned not only with the *outcome* of trial but also with the *process* by which an accused is subject to "trial." *See* U.S. Const. art. III, § 2, cl. 3 (specifying where "Trial . . . shall be held"); U.S. Const. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."). The guarantee, then, is not simply that a defendant will not be *convicted* outside the appropriate district, but also that he will not suffer the hardship and unfairness of undergoing *trial* outside the state and

district in which the offense was committed, regardless of the result. The right is therefore violated whenever a trial in an improper venue occurs, not just when a jury in that district returns a guilty verdict.

This focus on process makes sense, because the Framers were acutely aware of British threats to try American colonists overseas. *See supra* 5-10. As the ratification debates underscore, the central goal of the venue right was to protect the accused from "needless hardship . . . by prosecution remote from home and from appropriate facilities for defense." *United States v. Johnson*, 323 U.S. 273, 275 (1944); *see also United States v. Cores*, 356 U.S. 405, 407 (1958) (Venue "is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."). As Mr. Tredwell lamented, without a sufficiently protective venue right, an accused is "liable to be dragged to a distant county, two or three hundred miles from home, deprived of the support and assistance of friends." 2 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 400 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1891) ("*Debates*") (statement of Mr. Tredwell at New York ratification convention); *see also supra* 7-8. The Framers thus crafted the Constitution's venue provisions "to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood," and subjected to "the most oppressive expenses" in procuring his defense. 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833).

Given these aims, the Framers would not have viewed a second trial in a new venue as a meaningful

remedy for a violation of the venue right. There is no way to unwind the hardship and expense of first being tried in a location wholly unrelated to the crime. And affording the government the option to reprosecute merely threatens to *multiply* those hardships through a new trial, while failing to meaningfully deter violations in the first place. *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020) (explaining that the jury trial right, "mentioned twice in the constitution," should not "be reduced to an empty promise").

Second, the venue right was meant to ensure fair and unbiased convictions by limiting the government's ability to select a favorable forum. But, just as vacatur with the prospect of a new trial cannot remediate the hardships to a defendant of a first trial in an improper venue, it likewise fails to meaningfully guard against government overreach.

As discussed above, the venue right was included in the Constitution after the British sought to try American colonists overseas in order to obtain convictions they could not secure in the colonies. Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 805-06 (1976). Consistent with that history, the ratification debates reflect great concern that if jurors "may come from any part of the state," then federal prosecutors "can hang any one they please, by having a jury to suit their purpose." 3 *Debates*, *supra*, at 569 (statement of Mr. Grayson at Virginia ratification convention); 2 *Debates*, *supra*, at 109-10 (statement of Mr. Holmes at Massachusetts ratification convention) (objecting that absent a more specific venue right, a person may be tried by "a jury who *may be* interested in his conviction"); *see also, e.g.*, Story, *supra*, § 1775 (emphasizing that the right protects against being subject to the verdict of those "who may even cherish

animosities, or prejudices against" the accused). The venue right was thus designed to prevent prosecutorial gamesmanship and abuse by "limit[ing] the government's ability to select a forum inconvenient or hostile to the defendant." Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. Rev. 1658, 1660 (2000).

But allowing the government to retry a defendant in a new venue—or worse yet, to pursue serial retrials of a defendant in improper venues—does not cure the core injustice that drove the Framers to incorporate the venue right into the Constitution. The British Crown surely would not have been dissuaded from trying American colonists in London simply because it might be required to conduct a retrial in Manchester. Nor would the Framers have understood the constitutional venue right to leave that option to the government. *Cf. Crawford*, 541 U.S. at 42-53 (interpreting Confrontation Clause by reference to the "principal evil at which" the Clause "was directed"); *United States v. Palma-Ruedas*, 121 F.3d 841, 862 (3d Cir. 1997) (Alito, J., concurring in part and dissenting in part) (rejecting as contrary to the Framers' expectations a substantive venue analysis that would have permitted prosecution of "an American colonist in England on a charge of treason" through mere parliamentary wordsmithing). They rightly recognized that prosecution in a place of the government's choosing is a dangerous tool, and unequivocally constrained that power, with the understanding that the federal judiciary would act to safeguard that judgment.

In short, the Framers would not have contemplated a remedy that allows for serial retrials in improper venues, subject only to the government's

good faith. Such an approach is inconsistent with the historical roots of the right and would severely undermine its purposes. Only an acquittal barring reprosecution vindicates the foundational purposes of the constitutional venue provisions.

4. The Framers' intent with respect to the venue provisions fully aligns with the core remedial principles this Court has articulated. The Court has long made clear that when violations of Sixth Amendment rights inflict harms independent of the ultimate jury verdict in the case, they cannot be remedied by a new trial. In particular, the Court has held that violations of the Sixth Amendment Speedy Trial Clause create such independent harms, for which "the only possible remedy" is dismissal with prejudice. *Strunk*, 412 U.S. at 440 (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)). Although that remedy means that "a defendant who may be guilty of a serious crime will go free," "such severe remedies are not unique in the application of constitutional standards." *Id.* at 439 (citation omitted). In the speedy trial context, dismissal with prejudice is appropriate because the right is designed to protect against the disruption of daily life, and the "uncertainties" and "stress," that result from "facing public trial"—harms caused by delay, regardless of whether the trial ultimately results in conviction or acquittal. *Id.*

As this Court explained in *Betterman v. Montana*, the "sole remedy" of dismissal thus "fits the preconviction focus of the Clause." 578 U.S. 437, 444 (2016). By its terms, the Speedy Trial Clause shields "the *accused*," who is entitled to a presumption of innocence, from undue hardship during the prosecutorial process. *Id.* at 443 (quoting U.S. Const.

amend. VI). In other words, the Clause "implements" the "bedrock" presumption of innocence by "prevent[ing] undue and oppressive incarceration prior to trial" and "minimiz[ing] anxiety and concern accompanying public accusation." *Id.* at 442 (alterations in original) (first quoting *Reed v. Ross*, 468 U.S. 1, 4 (1984); and then quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)); *see Barker*, 407 U.S. at 532 (similar). These goals of the speedy trial right are especially critical to those "ultimately found to be innocent," *Betterman*, 578 U.S. at 444 (quoting *Barker*, 407 U.S. at 532-33), but they apply equally to those found guilty, *see, e.g.*, *Strunk*, 412 U.S. at 440 (setting aside judgment of conviction and dismissing indictment).

Similar policies inform the venue right, which protects the accused, including those who will ultimately be acquitted, from the undue hardship and unfairness of standing trial in a location wholly unrelated to the crime. As discussed above, the Framers intended the venue right to mitigate the burdens associated with the trial *process* itself, in addition to ensuring the integrity of the ultimate conviction. *See supra* 7-8. Thus, just as a violation of the Speedy Trial Clause can only be remedied by precluding further prosecution, a failure to prove venue requires acquittal to vindicate the preconviction purposes of the venue right and deter violations at the outset.

This conclusion is only strengthened by the other purposes of the venue right. As the history indicates, the venue right was also intended as a shield against government oppression, and was considered an essential component of the jury trial right itself. *See supra* 5-6; *see also* Story, *supra*, § 1775 (explaining

that, "upon a subject, so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion"). By selecting an improper venue and proceeding to trial in that venue, the prosecution is empowered to remove a defendant from his support systems; impose additional expenses associated with travel, lodging, and transporting witnesses; and place him before a potentially hostile jury. When the government does so, jury trials cease to act as a defense against "the hand of oppression," 3 *Debates*, *supra*, at 545-46, and become a *tool* of oppression. Indeed, in combination, the consequences of an incorrect choice of venue may lead a defendant to forgo his jury trial right—and his venue right—altogether. *See United States v. Calderon*, 243 F.3d 587, 590 (2d Cir.) ("Having entered a valid plea, [defendant's] objection as to venue is waived."), *cert. denied*, 533 U.S. 960 (2001).

Those concerns are exacerbated, not mitigated, by offering the rare defendant who persists in asserting his rights the "remedy" of a second prosecution. After all, that remedy simply affords the government a do-over, with all the same power that produced the initial violation, and often, greater familiarity with the defense's case and an even stronger bargaining position. Such a remedy thus wholly fails to serve "the policies which underlie" the constitutional venue right. *Strunk*, 412 U.S. at 439-40.

B. Founding-Era Practice Confirms That Acquittal Is The Appropriate Remedy

Alongside the Framers' intent and purposes in adopting the venue right and this Court's longstanding remedial principles, contemporaneous practice in the early Republic is also entitled to

"significant weight" when construing constitutional rights. *Noel Canning*, 573 U.S. at 524, 534; *see also, e.g.*, *Ramos*, 140 S. Ct. at 1399-400 (looking to "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" to discern whether the Sixth Amendment jury trial guarantee requires unanimity). Here, that practice—rooted in the common law tradition—makes clear that the constitutional venue right was effectuated through acquittal when the government failed to bear its burden of proof on venue at trial.

1. At common law, venue generally required trial in the county in which the crime was committed. The issue of venue was integrated directly into criminal proceedings from the outset. The indictment was required to plead specific facts regarding venue. And, as Sir Matthew Hale—the noted seventeenth-century jurist whose writings were influential to both Blackstone and the Framers—explained, where the evidence at trial revealed that the defendant had been indicted in one county for an offense "committed in another county, regularly he ought to be found not guilty." 2 Matthew Hale, *The History of the Pleas of the Crown*, chs. 25, 40 at 180, 291 (1736); *see also* 2 William Hawkins, *A Treatise of the Pleas of the Crown* ch. 25, § 34, at 220 (2d ed. 1726) ("[I]f upon Not guilty pleaded it shall appear that [the offense] was committed in a County different from that in which the Indictment was found, the Defendant shall be acquitted.").

2. These common law practices were carried forward into criminal practice in the early days of the Republic. As at common law in England, venue in the early Republic was regarded as a fact that must be alleged in the indictment and presented to and

decided by the jury, with the burden of proof on the government. It was thus understood that "it does not lie on the prisoner to disprove the commission of the offence in the county in which it is laid, but it is an essential ingredient in the evidence on the part of the prosecutor, to prove that it was committed within it." 1 Joseph Chitty, *Practical Treatise on the Criminal Law* 177 (3d Am. ed., 1836).

In 1822, for example, Justice Story, addressing the defendant's argument that "there is no proof, that the crime was committed within the district," instructed the jury that "this is a fact to be established, at least by prima facie or presumptive proof by the prosecutor, and that the onus probandi rests on the government." *United States v. Britton*, 24 F. Cas. 1239, 1241 (C.C.D. Mass. 1822). Consistent with that practice, this Court held in 1862 that venue must be presented to and decided by the jury, emphasizing that "application of the evidence in the ascertainment" of the state boundary "belong[ed] to the jury." *United States v. Jackalow*, 66 U.S. (1 Black) 484, 487-88 (1862) ("All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like, should be submitted to [the jury] under proper instructions to find the fact.").

The natural corollary of submitting the question of venue to the jury was, of course, that the jury could acquit if the government failed to carry its burden to prove venue. *See, e.g.*, 1 John Archbold, *A Complete Practical Treatise on Criminal Procedure, Pleading, and Evidence in Indictable Cases* 75 (Thomas W. Waterman ed., 6th ed. 1853) ("[I]f it appear in evidence that the prisoner is on his trial in a wrong

jurisdiction, and that the court has not cognizance of the offence, he must be acquitted.").[9]

For example, in the trial of Aaron Burr in 1807 for "setting on foot" a military expedition against Spain, Chief Justice Marshall noted the common law rule that the government's failure to prove venue to the jury results in acquittal, remarking that "[t]his rule is the stronger in the United States" because it is guaranteed by the Constitution. *Burr*, 25 F. Cas. at 196 (citing Hawkins, *supra*, ch. 25, § 35).[10]

Likewise, in *United States v. Wilson*, the jury was instructed that it must "acquit" if it had a "reasonable doubt" as to whether "the carrier of the mail [was]

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[9] Jury practice is the relevant touchpoint for assessing original meaning because at the founding, criminal cases were generally resolved through a final jury verdict, and appellate review in criminal cases was not statutorily available until well after the founding. *See United States v. Scott*, 437 U.S. 82, 88 (1978) (explaining that at the time of the founding, "most criminal prosecutions proceeded to final judgment," "neither the United States nor the defendant had any right to appeal an adverse verdict," and "[t]he verdict in such a case was unquestionably final, and could be raised in bar against any further prosecution for the same offense"); *see also* David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518, 521 (1990).

[10] Based in part on that rule, Marshall excluded the government's evidence of Burr's separate conduct outside of Virginia, emphasizing that such evidence alone could not suffice to establish the crimes alleged to have occurred in the district of Virginia. *Burr*, 25 F. Cas. at 196-97. In light of that ruling, the government recognized the insufficiency of its evidence and asked the court to discharge the jury. But Marshall ruled that "the jury could not, in this stage of the case, be discharged without mutual consent" and submitted the case to the jury, which returned a verdict of "Not guilty." *Id.* at 201.

robbed of the mail at the time and place referred to." 28 F. Cas. 699, 710 (C.C.E.D. Pa. 1830). And in *United States v. Wright*, the court entered judgment for the defendant on a jury's special verdict finding specific facts as to the places in which the alleged acts had occurred and finding the defendant "not guilty" to the extent those facts did not show that the crime was "considered as in the county of Washington." 28 F. Cas. 790, 791 (C.C.D.D.C. 1822); *see also United States v. Plympton*, 27 F. Cas. 578, 578 (C.C.D.D.C. 1833) (verdict of not guilty after court "instructed the jury that the facts proved did not show an uttering in this county").[11] Acquittal was thus the standard result of the government's failure to prove venue, and

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[11] A failure to prove venue in the state courts likewise required acquittal. *See, e.g.*, *People v. Harris*, 4 Denio 150, 151-52 (N.Y. Sup. Ct. 1847) ("The public prosecutor must show an offense committed in the county where the indictment was found, or the accused will be entitled to an acquittal."); *People v. Gleason*, 1 Nev. 174, 178 (1865) ("If a prosecuting attorney submits his case to a jury, without having proved the offense was committed in the county where it is alleged to have been, we cannot see anything for the jury to do but to acquit."); *State v. Rhoda*, 23 Ark. 156, 159 (1861) (affirming denial of State's request for new trial following jury verdict of not guilty because "the venue not having been clearly proven as alleged," the State was not entitled to a new trial); *Lawless v. State*, 72 Tenn. 173, 180, 182 (1879) (holding that defendant was entitled to jury instructions charging "that the jury must be satisfied 'beyond a reasonable doubt' by the proof that the crime was committed in the proper county before they can convict"); *see also Commonwealth v. Call*, 38 Mass. 509, 514-15 (1839) (granting new trial where jury's special verdict wholly failed to answer venue question, but making clear that if jury had found venue not proven, "it would have been effectual to discharge the prisoner and would be tantamount to a verdict of acquittal").

the de facto "remedy" for a violation of the constitutional venue right.

It was also well-recognized that a jury verdict of acquittal precluded reprosecution for the same crime. As Justice Story explained in 1833, under the Double Jeopardy Clause, "a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him." Story, *supra*, § 1781; *see also, e.g.*, *Wilson*, 28 F. Cas. at 712 (charging the jury that "[i]f your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case"); *cf. Evans v. Michigan*, 568 U.S. 313, 318 (2013) (reiterating longstanding rule that "an acquittal precludes retrial" and is "unreviewable" "whether a judge directs a jury to return a verdict of acquittal, or forgoes that formality by entering a judgment of acquittal herself" (citation omitted)). The original understanding of the venue right at the time of the founding would thus have included the understanding that if the government failed to prove venue, and the jury returned a verdict of not guilty, the accused could not be tried again.[12]

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[12] While a handful of state cases from the nineteenth century suggest that proceedings in an improper venue would not bar retrial under state double-jeopardy guaranties, *see, e.g.*, *Conley v. State*, 11 S.E. 659 (Ga. 1890), those cases cast no light on the proper remedy for a violation of the federal constitutional venue right. Rather, they generally rest on (1) the common law notion that there "is no jeopardy if the indictment on the former trial" is defective, *id.* at 660, a principle this Court has long rejected under the federal Double Jeopardy Clause, *see United*

Contemporaneous practice, grounded in the common law approach and designed to implement the even "stronger" constitutional rule, *Burr*, 25 F. Cas. at 196, thus reflects the original understanding that acquittal was the appropriate result for a failure to prove venue at trial. And that result aligns with the Framers' expectation that the venue right would provide a meaningful defense against government oppression. The history and tradition surrounding the constitutional venue right thus point firmly in favor of acquittal as the appropriate remedy for a violation of the right.

C. Current Jury Trial Practice Further Confirms That Acquittal Is The Appropriate Remedy

Current criminal trial practice continues to reflect the key historical features of the venue right outlined above, and it confirms that acquittal is the appropriate result when the government fails to bear its burden to prove venue.

Federal courts uniformly recognize that the government bears the burden of proving venue to the

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States v. Ball, 163 U.S. 662, 671 (1896); or (2) specific statutory rules providing that the court lacked jurisdiction in the absence of proper venue, *see, e.g.*, *State v. George*, 8 Rob. 535, 539 (La. 1844) (noting that, if the jury returned a special verdict, failure to prove venue would not bar reprosecution in the proper parish because the first tribunal "would have been without jurisdiction" under state statutes), *overruled on other grounds by State v. Bill*, 15 La. Ann. 114 (1860). Even in state court proceedings, however, in the mine run of cases the result of instructing the jury to acquit for failure to prove venue was a general verdict of acquittal barring reprosecution. *See, e.g.*, *Rhoda*, 23 Ark. at 158 (involving general jury acquittal after instruction that State "was bound to prove" venue); *supra* at 34 n.11.

jury if venue is in issue.[13] Consistent with that rule, juries are routinely instructed to acquit if the government fails to prove venue. *See, e.g.*, *United States v. Maxwell*, 2021 WL 5999410, at *19 (S.D.N.Y. Dec. 19, 2021) (instructing jury that if "you find that the Government has failed to prove the venue requirement as to a particular offense, then you must acquit [defendant] of that offense, even if all the other elements of the offense are proven"); Court's Preliminary Instructions to the Jury as to Dennis Reinaldo Peralta (Jury Instructions) at 18, *United States v. Sealed*, No. 1:18-cr-00011 (M.D. Ala. Mar. 27, 2019), ECF No. 481 ("If the Government fails to prove venue, then you must find the Defendant not guilty.").[14] Such instructions align with longstanding

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[13] *See* 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 307 (4th ed. 2022) (explaining that "venue is a fact that must be proved at trial"); *see also, e.g.*, *United States v. Moran-Garcia*, 966 F.3d 966, 969 (9th Cir. 2020); *United States v. Petlechkov*, 922 F.3d 762, 770 (6th Cir. 2019); *United States v. Tang Yuik*, 885 F.3d 57, 71 (2d Cir.), *cert denied*, 139 S. Ct. 342 (2018); *United States v. Snipes*, 611 F.3d 855, 866 (11th Cir. 2010), *cert. denied*, 563 U.S. 1032 (2011); *United States v. Hamilton*, 587 F.3d 1199, 1206 (10th Cir. 2009), *cert. denied*, 560 U.S. 978 (2010); *United States v. Perez*, 280 F.3d 318, 330 (3d Cir.), *cert. denied*, 537 U.S. 859 (2002); *United States v. Scott*, 270 F.3d 30, 34 (1st Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Bowens*, 224 F.3d 302, 308 (4th Cir. 2000), *cert. denied*, 532 U.S. 944 (2001); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991); *United States v. Massa*, 686 F.2d 526, 527 (7th Cir. 1982); *United States v. Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979); *Green v. United States*, 309 F.2d 852, 856-57 (5th Cir. 1962).

[14] *See also, e.g.*, S2 *Modern Federal Jury Instructions – Criminal: Sixth Circuit Pattern Jury Instructions* § 3.07 (2023 Lexis) (stating that for jurors "to return a guilty verdict on the

practice since the founding, which was itself grounded in the common law. *See supra* 21-22, 31-35. These features of venue have led many courts of appeals to describe venue as an "element" of every federal crime. *See, e.g.*, *United States v. Snipes*, 611 F.3d 855, 865 (11th Cir. 2010); *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005); *United States v. Miller*, 111 F.3d 747, 752 (10th Cir. 1997); *United States v. Massa*, 686 F.2d 526, 527 (7th Cir. 1982).

Indeed, although the courts of appeals have now split on the appropriate *appellate* resolution for a finding of insufficiency of the evidence on venue, no one disputes that a general verdict of acquittal on venue *at trial* would bar reprosecution. And some courts have expressly recognized that principle as protective of the constitutional venue right. As the Eleventh Circuit explained in *Snipes*, for example, "the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial." 611 F.3d at 867. The Eleventh Circuit found that right sufficiently

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conspiracy charge, the government must convince you that" venue has been proven); S1 *Modern Federal Jury Instructions – Criminal: Third Circuit Pattern Jury Instructions* § 3.09 (2023 Lexis) (similar); S1 *Modern Federal Jury Instructions – Criminal: Fifth Circuit Pattern Jury Instructions* § 1.20 (2023 Lexis) (similar); 1 *Modern Federal Jury Instructions – Criminal* ¶ 3.01 (2022) (instructing jury to "acquit" if government fails to prove venue); *Baldeo v. United States*, 2018 WL 1116570, at *7 (S.D.N.Y. Feb. 26, 2018) (noting that "the jury was instructed that if it could not find venue in SDNY, it must acquit"); *United States v. Fakih*, 2006 WL 1997479, at *3 (S.D.N.Y. July 18, 2006) (same); Instructions to the Jury at 35, *United States v. Smith*, No. 5:08-cr-272-C (W.D. Okla. Oct. 15, 2009), ECF No. 34 (similar); *United States v. Georgacarakos*, 988 F.2d 1289, 1294 (1st Cir. 1993) (similar).

protected in *Snipes* because "the district court fully instructed the jury that venue is an element of the offense and that Snipes *must be acquitted* if the government failed to establish venue by a preponderance of the evidence." *Id.* (emphasis added).

That same rationale also requires acquittal when a *court* determines the government has failed to prove venue. Under this Court's well-established case law, there is no basis for treating "juries that acquit pursuant to their instructions" any differently than "judicial acquittals." *Evans*, 568 U.S. at 328-29; *see also Smith v. Massachusetts*, 543 U.S. 462, 466-67 (2005) (explaining that this Court has "long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict"); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam) (holding that a directed verdict of acquittal by the trial court "was final, and could not be reviewed" (citation omitted)). The same is true for appellate reversals for insufficiency of the evidence. *Burks v. United States*, 437 U.S. 1, 11 (1978). In all circumstances, the government's proof is insufficient to sustain a conviction, and the defendant is entitled to an acquittal that bars reprosecution. Any other result would create a "purely arbitrary distinction" that turns on the decisionmaker, not the proof presented at trial, and would be flatly incompatible with this Court's precedent. *Id.*; *see also Evans*, 568 U.S. at 328-30.

Indeed, this case illustrates the anomaly produced by awarding only vacatur on appeal, while instructing the jury to acquit at trial. With the government's

assent, the jury was instructed to find Mr. Smith "not guilty" "[i]f the Government has failed to establish proper venue for a count." JA29; *see also* JA110; JA113-14. As the district court noted, the jury's acquittal on Count I may well have been for failure to prove venue, consistent with that instruction. JA116-17. But the Eleventh Circuit nevertheless held on appeal that acquittal was *not* the appropriate result of its *own* conclusion that the government had failed to prove venue on Count II. That distinction makes no sense. The verdict of acquittal as to Count I indisputably bars reprosecution, and there is no reason the result should differ for Count II based on the identity of the decisionmaker.

II. The Eleventh Circuit's Rule Is Misguided

The Eleventh Circuit's holding in this case—that "[*t*]*he* remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," Pet. App. 15a (emphasis added)—lacks any grounding in the text, history, or purposes of the Constitution or this Court's Sixth Amendment jurisprudence, and it would fatally undermine the constitutional venue right.

1. Without any recognition of the practical effects of its rule, the Eleventh Circuit held that vacatur is the only appropriate remedy for the government's failure to prove venue at trial. But that rule means that defendants can be subject to serial retrials in improper venues, without limitation, no matter the degree of bad faith or government overreach involved. Such a rule would surely have been anathema to the Framers.

The Eleventh Circuit reached that result with only two sentences of analysis. Pet. App. 15a. In doing so,

the Eleventh Circuit relied on two court of appeals decisions, neither of which considered the historical and constitutional underpinnings of the constitutional venue right in determining the appropriate remedy, and neither of which justifies the Eleventh Circuit's exclusive vacatur remedy.

First, the Eleventh Circuit cited *United States v. Davis*, 666 F.2d 195 (5th Cir. Unit B 1982), but there, the court granted vacatur without any discussion of the appropriate remedy. *See* Pet. App. 15a; *Davis*, 666 F.2d at 202. That decision provides no support for the Eleventh Circuit's holding. To the contrary, it exemplifies the unreasoned approach that many courts have taken to this constitutional question.

Second, the Eleventh Circuit cited *Haney v. Burgess*, 799 F.2d 661 (11th Cir. 1986), but that case did not even consider the Article III and Sixth Amendment venue provisions. In *Haney*, a defendant whose Alabama state-court conviction was reversed for improper venue was reindicted, prompting him to file a federal habeas petition arguing that the Double Jeopardy Clause barred a second prosecution. *Id.* at 662. The Eleventh Circuit denied relief. *Id.* at 664. Without mentioning the constitutional venue right, the court reasoned that "[v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused." *Id.* at 663 (citation omitted). Accordingly, in the court's view, permitting reprosecution would not give the government "the proverbial 'second bite at the apple'" or resemble "the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Id.* at 664 (citations omitted).

Haney's double-jeopardy holding does not support the Eleventh Circuit's decision in this case. As an

initial matter, because *Haney* involved a federal habeas petition challenging *state* court proceedings, it is not clear that the federal constitutional venue right was implicated at all.[15] *Haney* thus considered the Fifth Amendment double-jeopardy issue without affording venue's constitutional status any separate weight.

In any event, *Haney*'s conclusion that reprosecution after a failure to prove venue would not result in "oppressive practices," because venue is a mere "question of procedure," is a non-sequitur. As described above, allowing the government to reprosecute a defendant after failing to prove venue *does* permit precisely the types of "oppressive practices" with which the constitutional venue right was concerned, because it allows the government to use the threat of prosecutions in unfavorable or far-off jurisdictions to assert leverage and governmental power over defendants. *Haney*'s rationale affords the government a second bite at the apple when it fails to make out its case and subjects a defendant to the uncertainty and stress of a second prosecution. Those concerns are why this Court has consistently emphasized that "questions of venue" are of fundamental, substantive importance, *not* "matters of mere procedure." *Travis v. United States*, 364 U.S. 631, 634 (1961); *see also Palma-Ruedas*, 121 F.3d at 861 (Alito, J., concurring in part and dissenting in part) (venue right serves "important substantive ends"). Because *Haney* is both inapposite and wrong,

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[15] This Court has not yet decided whether the Sixth Amendment venue right is incorporated against the States. *See Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004), *cert. denied*, 543 U.S. 1191 (2005).

it cannot support the Eleventh Circuit's decision in this case.

In short, the Eleventh Circuit imposed a draconian rule that allows defendants to be subject to unlimited serial retrials without any serious engagement with the text, purposes, and history of the Constitution's venue provisions, and without even the most cursory assessment of the practical implications of its rule.[16]

2. In its brief in opposition to Mr. Smith's certiorari petition, the government, like the Eleventh Circuit, offered virtually no defense of a serial retrial rule. Instead, it largely reprised *Haney*'s threadbare reasoning. Its arguments suffer from the same defects.

First, the government contended that because venue "plays no role in defining what conduct constitutes a crime," failure to prove venue does not trigger the Double Jeopardy Clause, and thus, the government's failure to prove venue at trial should

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[16] The decisions of other circuits that have adopted a vacatur remedy likewise fail to provide any basis for that rule. They do little more than cite each other and reiterate the same double-jeopardy rationale articulated in *Haney*, without any analysis of the constitutional venue provisions. *See, e.g.*, *Petlechkov*, 922 F.3d at 771 (citing *Haney*, 799 F.2d at 663-64; *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988)); *Kaytso*, 868 F.2d at 1021 (finding no double-jeopardy bar because venue "is wholly neutral; it is a question of procedure" (citing *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982))); *Wilkett*, 655 F.2d at 1011 (same). In fact, the Ninth Circuit has permitted reindictment even in the *same* district in which the government first failed to bear its burden of proof, without any recognition of the extraordinary potential for abuse from such a rule. *Kaytso*, 868 F.2d at 1021.

not result in acquittal. BIO 11-12, 15 (citing *United States v. Scott*, 437 U.S. 82, 98-99 (1978)).

Like the Eleventh Circuit's rationale, that argument conflates the question of the proper remedy for a violation of the Article III and Sixth Amendment venue provisions with a separate substantive question under the Fifth Amendment. But Article III and the Sixth Amendment provide independent constitutional rights that must be separately vindicated, regardless of whether the Double Jeopardy Clause would, standing alone, bar reprosecution.

In any event, the government's constrained view of the scope of the Double Jeopardy Clause lacks merit. Proof of proper venue is constitutionally required to obtain a valid conviction, and this Court has long recognized that where "the Government's evidence" is "legally insufficient to sustain a conviction," double-jeopardy protection attaches. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). Just as federal courts routinely instruct the jury to acquit if the government's venue evidence cannot sustain a conviction, *see supra* 36-38, a court's determination that the government's proof was insufficient should likewise constitute an acquittal. *Evans*, 568 U.S. at 328-29.

Second, echoing *Haney*'s rationale, the government contends that venue is a procedural right that can be "vindicated by . . . vacating a conviction if venue is improper" and that venue violations "are amply discouraged" by a vacatur remedy. BIO 17-19. But, just as *Haney* wrongly assumes reprosecution would not result in "oppressive practices" because venue is merely procedural, the government's

argument likewise rests on the false premise that vacatur is sufficient to effectuate the right.

The opposite is true. As discussed above, a retrial offers no meaningful relief to a defendant subjected to trial in an unconstitutional location. *See supra* 24-30. And a remedy that allows for reprosecution invites government abuse by allowing the government to strategically choose where to bring prosecutions, knowing it will receive a free do-over if it fails to prove venue. The government can thus try a defendant in its chosen location, and, under the Eleventh Circuit's rule, if the defendant successfully presses his venue objection post-trial or on appeal, he wins only the chance to be retried again in a new venue, with no assurance the venue will be proper, and no assurance that a new venue objection will not produce the *same* result yet again.

That prospect is not hypothetical. Broad substantive venue rules often offer federal prosecutors a range of locations with a facially plausible claim to venue. *See, e.g.*, *Hyde v. United States*, 225 U.S. 347, 363 (1912) (holding that government may prosecute conspiracy in any district where overt acts occurred, while recognizing that rule "may give to the government a power which may be abused"); *cf. United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand, J.) (warning that "[t]he oppression against which the Sixth Amendment is directed could easily be compassed by" broad definition of accessory liability). In *Romans*, for example, the government was permitted to try "members of a large-scale Indianapolis drug ring, with life sentences on the line, in Sherman, Texas," because two members of the conspiracy had driven through the Eastern District of Texas (along with six

other districts). 823 F.3d at 325 (Costa, J., concurring specially); *id.* at 324-25 (expressing concerns about "the vitality of the vicinage right" in light of "expansive federal criminal law" and broad venue rules).

Under the Eleventh Circuit's rule, the government may opt to prosecute in a borderline (and ultimately unconstitutional) jurisdiction not just once, but repeatedly, without consequence.[17] That prospect systemically deters defendants from bringing meritorious venue challenges, while providing prosecutors with enormous leverage to coerce guilty pleas through the threat of repeated retrials. Such a system undermines the constitutional purposes of the venue right and risks rendering the right a dead letter.

By contrast, requiring acquittal for failure to prove venue appropriately ensures the government will prioritize the constitutional venue right over considerations of prosecutorial strategy or convenience. Because defendants are required to

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[17] Venue case law reflects that the government often elects to prosecute in a place where the claim for venue is tenuous on its face. *See, e.g.*, *United States v. Smith*, 641 F.3d 1200, 1208-09 (10th Cir. 2011) (finding venue lacking where government brought charges in the Western District of Oklahoma based on allegedly false statements made by the defendant at his home in Minnesota); *United States v. Strain*, 396 F.3d 689, 691 (5th Cir. 2005) (explaining that venue would plainly have been proper in the District of New Mexico, but finding insufficient evidence of venue in the Western District of Texas, where defendant merely received a phone call); *Davis*, 666 F.2d at 200 (finding insufficient evidence of venue for possession of drugs where defendants did not "actually or constructively" possess the drugs in the Middle District of Georgia and drugs "never physically entered" that district).

raise the issue of venue before and at trial in order to preserve a venue objection, *see, e.g.*, 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 306 (4th ed. 2022), the government is generally on notice of a potential constitutional defect in the proceedings. The acquittal remedy thus applies only where, as in this case, the government purposefully insists on proceeding in a venue that it knows may be unconstitutional and that is ultimately found to be unconstitutional. *See* JA11; JA67-69; JA103-04. There is no harm whatsoever to discouraging such a strategy. To the contrary, doing so is necessary to safeguard a fundamental right deeply rooted in this Nation's history.

CONCLUSION

The Eleventh Circuit's judgment should be reversed.

Respectfully submitted,

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