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 THE RUTHERFORD INSTITUTE, THE CATO INSTITUTE, AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

The Constitution requires that the government prove venue. When the government fails to meet this constitutional requirement, should the proper remedy be (1) acquittal barring reprosecution of the offense, as the Fifth and Eighth Circuits have held, or (2) giving the government another bite at the apple by permitting the government to retry the defendant for the same offense in a different venue, as the Sixth, Ninth, Tenth, and Eleventh Circuits have held?

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INTEREST OF *AMICI CURIAE*[*]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982, the Institute (1) provides free legal assistance to individuals whose constitutional rights have been threatened or violated and, (2) educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on constitutional rights.

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice, founded in 1999, focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The National Association for Public Defense ("NAPD") is an association of more than 14,000 attorneys, investigators, social workers, administrators, and other professionals who fulfill constitutional mandates to deliver public defense representation throughout all U.S. states and territories. NAPD

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[*] Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

members advocate for clients in jails, courtrooms, and communities, and are experts in the theory and practice of effective defense to people who are charged with crimes but who cannot afford to hire counsel. NAPD members work in federal, state, county, and municipal jurisdictions as full-time, contract, and assigned counsel, litigating juvenile, capital, and appellate cases through a diversity of traditional and holistic practice models. NAPD plays an important role in advocating for defense counsel and the clients they serve, and is uniquely situated to speak to issues of fairness and justice in criminal legal systems and of the critical importance of the jury's role in checking government power.

The primary interest of *amici* in this case is preventing the continued erosion of the venue right enshrined in the Venue Clause of Article III and in the Sixth Amendment. *Amici* also seek to promote meaningful adversarial testing of criminal prosecutions through the participation of lay juries in the criminal justice system. *Amici* fear the erosion of this adversarial crucible if the remedy for the government's violation of the venue right permits the government to retry a criminal for the same offense—even after jeopardy has attached—as the Sixth, Ninth, Tenth, and Eleventh Circuits have held. The latter rule imposes on the government zero adverse consequences of violating a defendant's venue right, thus perversely incentivizing the government to cherry-pick favorable venues without regard for the Venue Clause. At the same time, such a hollow remedy disincentivizes the defendant from challenging improper venue, instead promoting plea bargaining, thus undermining the lay jury's role in checking government power and safeguarding the rights of individual criminal defendants.

Amici thus write in support of petitioner's challenge to this ineffective remedy that gives such short shrift to the Constitution.

SUMMARY OF ARGUMENT

I. The constitutional venue right enjoys a rich history dating back to Magna Carta. Under English common law, venue was a matter of substance, and the law required criminal trials to take place in the county where the crime allegedly occurred. Courts at common law honored the venue requirement, even at the cost of freeing accused criminals. When Parliament began encroaching upon these common-law rights in the colonies, colonists responded with outrage and listed those encroachments as a grievance in the Declaration of Independence. The Constitution now safeguards the venue right in Article III and the Sixth Amendment, ensuring that the trial jury renders a judgment that is representative of the local community where the crime allegedly occurred, and also acts as a check on the abuses of government power.

II. The Eleventh Circuit's remedy cripples this important right to proper venue and further weakens the related constitutional right to a jury trial, "the only rules of criminal procedure" that were "important enough to the Founders" to be "included in both the original Constitution and Bill of Rights." *United States* v. *Brown*, 898 F.3d 636, 638 (5th Cir. 2018) (citation and internal quotation marks omitted). By freeing the government to retry the accused in *any* venue without a limiting principle, the Eleventh Circuit's rule incentivizes the government to forum shop for the venue most advantageous to its prosecution without regard for Article III and the Sixth Amendment. This correspondingly disincentivizes criminal

defendants to mount venue challenges, inasmuch as a successful challenge would not spare a defendant an additional round of prosecution. Thus, the Eleventh Circuit's approach puts additional pressure on the accused to accept plea bargains, further eroding the right to a jury trial in general and "denigrat[ing] the significance of the jury's role as a link between the community and the penal system." *Spaziano* v. *Florida*, 468 U.S. 447, 462 (1984) (citations omitted), *overruled on other grounds by Hurst* v. *Florida*, 577 U.S. 92 (2016).

Venue is a constitutional requirement in *every* criminal trial. *See United States* v. *Miller*, 111 F.3d 747, 749 (10th Cir. 1997) ("[V]enue is a right of constitutional dimension, [which] has been characterized as an element of every crime." (citation and quotation marks omitted)). The government should not be permitted to treat it as a second-class right, secure in the knowledge that it has more than one bite at the apple if it encroaches upon a defendant's venue right. This Court should reverse the Eleventh Circuit, thus preserving the prominence of the constitutional venue right that the Founders intended.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO PROPER VENUE HAS BEEN A FUNDAMENTAL ASPECT OF ENGLISH AND AMERICAN CRIMINAL PROCEDURE FOR CENTURIES.

The Founders described the right to a jury trial as "the heart and lungs" of liberty. *United States* v. *Haymond*, 139 S. Ct. 2369, 2375 (2019) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). As "the

grand bulwark" of English liberties, Blackstone believed that other liberties remained secure only so long as the jury trial right "remains sacred and inviolate, not only from all open attacks" but "also from all secret machinations, which may sap and undermine it." 4 W. Blackstone, Commentaries on the Laws of England 372 (1769). Central to the jury trial guarantee is the right to proper venue for that trial. The venue right is rooted in centuries of English tradition. Building on that history, Article III and the Sixth Amendment establish the constitutional right to proper venue. These provisions check government abuses and ensure that the trial jury fairly represents the community where the alleged crime occurred.

A. The Right to Proper Venue Has Its Roots in Ancient English Common Law.

The venue right finds its roots in Magna Carta. Article 39 of the Great Charter provides that "no freemen shall be taken or imprisoned" except "by lawful judgment of his peers or by the law of the land." Article 20 likewise prohibits the imposition of certain punishments "except by the oath of honest men of the neighborhood." Accordingly, the common law evolved to require that "venue" for a criminal trial "must be laid in the county where the offence is alleged to have arisen." 1 Joseph Chitty, A Practical Treatise on the Criminal Law 157 (1819); *id.* at 146 ("At common law, the venue should always be laid in the county where the offence is committed."); Archbold, Pleading and Evidence in Criminal Cases 25 (1871) ("The general common law rule upon the subject is, that the venue in the margin should be the county in which the offence was committed."); *see also* Blackstone, *supra*, at

346 (explaining that jurors must be drawn from "the county" where the crime allegedly occurred).

The venue rule was no mere procedural formality. In English common law, "venue was always regarded as a matter of substance." Chitty, *supra*, at 146; *see* Archbold, Practice, Pleading and Evidence in Criminal Cases 64 n.1 (Waterman's ed. 1853) (describing venue as "a matter of substance") [hereinafter "Archbold, Waterman's Ed."]; *cf. Rex* v. *F. O'Connor*, 114 Eng. Rep. 1153, 1160 (1843) (explaining the common law rule that "[t]he objection on the score of omitting a local venue is not merely technical, but is real and important; for the allegation of material facts as occurring in the county is not only that which alone authorizes the grand jury to entertain the bill of indictment, and generally empowers the Court to proceed against the offenders, but is also the sheriff's warrant to summon the petty jury who must pass between the Crown and the prisoner"). Venue was "an essential ingredient in the evidence" that the prosecutor must put forward; accordingly, it "d[id] not lie on the prisoner to disprove the commission of the offence in the county in which [venue] [wa]s laid." Chitty, *supra*, at 146; *see also Rex* v. *Parkes & Brown*, 2 Leach 776, 787–88 (1796) (discharging the prisoner because of insufficient evidence that the crime occurred in the charged county). And because of the substantive nature of the venue requirement, a higher court could review judgments for want of venue, even when "no objection was made in the court below." *Frank* v. *State*, 40 Ala. 9, 12 (1866) (citing "1 Archb. Crim. Pl. (Waterman's Notes,) p. 64, note 1; 2 Hale, 180; Hawk. Pl. Cr. b. 2, c. 25, § 34").

Courts at common law honored the venue rule even if it meant freeing an accused criminal. It was well-settled that when an "offence was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished." Chitty, *supra*, at 146; *see* 2 W. Hawkins, A Treatise of the Pleas of the Crown 301–02 (1824) ("[I]t seems to be agreed, that if upon 'not guilty' pleaded it shall appear, that [the offence] was committed in a county different from that in which the indictment was found, the defendant *shall be acquitted*." (emphasis added)); Archbold, Waterman's Ed., *supra*, at 75 ("[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*." (emphasis added)); 1 Sir Matthew Hale, The History of the Pleas of the Crown 651 (1736) ("If the offense riseth in two counties, then it is dispunishable."). So, for example, "if a man had died in [a] county of a stroke in another, it seems to have been the more general opinion, that regularly the homicide was indictable in neither of them, because the offence was not complete in either, and no grand jury could inquire of what happened out of their own county." Hawkins, *supra*, at 302.[1]

The venue rule served primarily two important purposes. *First*, in an era when jurors could also serve as witnesses, the law regarded jurors as best suited to

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[1] Although venue can be proper in multiple states or districts as long as some essential conduct of the charged offense occurred in each, the history of common law demonstrates that venue cannot be proper in just *any* district because venue is an essential matter of substance, which the government must prove to avoid having a defendant acquitted.

render judgment on crimes allegedly committed within their community because of their familiarity with local affairs. *See* 1 Sir Edward Coke, The First Part of the Institutes of the Laws of England *125a (1628) (explaining that trials occur in vicinity of crime because "the inhabitants whereof may have the better and more certaine knowledge of the fact"); *see also* William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 60–61 (1944) ("So long as jurors were expected to decide cases from their own knowledge or from information furnished by some of their own number, it was, of course, impossible for the jurors of one county to try a crime committed in another county or outside the country."). *Second*, "as representatives of the community," local jurors delivered "the judgment of the people" affected by the alleged misconduct. Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. Rev. 1658, 1675 (2000) (citation omitted).

B. American Constitutional Protections for the Venue Right Derive from English Common Law and Parliamentary Mistreatment of the Colonists.

Prior to the American Revolution, as tensions grew between the Colonies and England, the English Parliament began encroaching upon colonists' right to trial in the venue where the crime allegedly occurred. *See generally* Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 805–07 (1976). During late 1768 and early 1769, Parliament debated whether to revive the Treason Act 1543—"which permitted trial for treason committed outside the 'realm' to be held 'before such commissioners, and in such shire of the realm, as shall be

assigned by the King's majesty's commission"'—so that it could be used against the colonists. *Id.* Parliamentary opponents of that proposal highlighted the "cruelty and injustice of dragging an individual three thousand miles from his family, his friends, and his business" so that "he might be put to peril of his life before a panel of twelve Englishmen, in no true sense of the word his peers." Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Penn. L. Rev. 197, 206 (1909).

Despite this opposition, Parliament approved the use of the Treason Act by an overwhelming vote, *see* Blume, *supra*, at 63–64, prompting immediate outrage from the Colonies. Upon learning of the Parliamentary approval of the use of the Treason Act, Virginia responded with the following resolution:

> *Resolved*, That it is the Opinion of this Committee, that all Trials for Treason, Misprison of Treason, or for any Felony or Crime whatsoever, committed and done in this his Majesty's said Colony and Dominion, by any Person or Persons residing therein, ought of Right to be had, and conducted in and before his Majesty's Courts, held within the said Colony, according to the fixed and known Course of Proceeding; and that the seizing any Person or Persons, residing in this Colony, suspected of any Crime whatsoever, committed therein, and sending such Person, or Persons, to Places beyond the Sea, to be tried, is highly derogatory of the Rights of British subjects; as thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as

> the Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused.

Id. at 64. In a message to the King, the Virginia legislature contended that sending colonists to England for trial was "unconstitutional and illegal," and described with horror the notion that someone could be "dragged from his native Home, and his dearest domestick Connections, thrown into Prison" in "a distant Land, where no Friend, no Relation, will alleviate his Distresses, or minister to his Necessities; and where no Witness can be found to testify his Innocence." *Id.* at 64–65; *see* Kershen, *supra*, at 806. Other American colonies also expressed their disapproval with Parliament. Blume, *supra*, at 65 (explaining "the Virginia Resolves were promptly approved by the assemblies of the other American colonies").

Parliament nevertheless kept encroaching upon the colonists' right to trial in a proper venue. The Dockyards, etc., Protection Act 1772, provided that persons "charged with destroying" "the King's dock yards, magazines, ships, ammunition," and supplies outside the "realm" could be tried either where the crime had been committed or in *any* "'shire or county within this realm.'" Blume, *supra*, at 63 (quoting 12 Geo. III, c. 24 (1772)). Another act provided that, "for certain capital crimes in Massachusetts when the person who was charged with the alleged crime had been engaged in suppressing a riot or enforcing the revenue laws," "the trial could be held in England or in an adjoining province if 'an indifferent trial cannot be had within' Massachusetts." Kershen, *supra*, at 807 (citation omitted).

These Parliamentary acts further ignited the furor of the colonies. The Continental Congress described the Dockyards, etc., Protection Act as an "infringemen[t] and violatio[n] of the rights of the colonists," who were "entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage." Blume, *supra*, at 65. Thomas Jefferson excoriated these acts of "parliamentary tyranny," arguing that they "stripped" a colonist of "his privilege of trial by peers, of his vicinage," because he would be "removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof" to be "tried before judges predetermined to condemn." Thomas Jefferson, Draft of Instructions to the Virginia Delegates in the Continental Congress (1774). Similarly, the Provincial Congress of North Carolina passed a resolution affirming that "trial by juries of the vicinity, is the only lawful inquest that can pass upon the life of a British subject, and it is a right handed down to us from the earliest ages, confirmed and sanctified by Magna Carta itself." Connor, *supra*, at 198. In short, the colonists embraced their right to "trial by jury of the vicinage" and "understood that any, *the slightest*, surrender of it involved them in ruin and made them slaves to the King and Parliament." *Id.* at 208–09 (emphasis added).

Accordingly, one of the grievances in the Declaration of Independence was that the King was "transporting" colonists "beyond Seas to be tried for pretended offences." Declaration of Independence ¶ 21 (1776); *see also* Kershen, *supra*, at 807. After the Declaration and before the Constitutional Convention, several of the original thirteen states adopted state

constitutions which expressly addressed the question of venue for criminal trials. *See* Kershen, *supra*, at 807. Thereafter, the Founders ensured that "[t]he Constitution twice safeguards the defendant's venue right"—once in Article III, § 2, cl. 3, and again in the Sixth Amendment. *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998).

The history of both constitutional provisions further demonstrates the importance of the venue right to the Founders. Although Article III, Section 2 of the Constitution instructs that "[t]he 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, many states feared that this provision insufficiently safeguarded the right to a local criminal trial. Virginia and North Carolina passed resolutions calling for a Bill of Rights that specifically recognized a right to trial by an impartial jury of the defendant's vicinage. Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 33–34 (1994). New York urged an amendment guaranteeing "an impartial Jury of the County where the crime was committed." *Id.* at 34. Other states also emphasized the need for more robust venue protections. *See id.*

This sparked vigorous debate between Federalists and Anti-Federalists about the role of the jury. On the one hand, the Federalist-controlled Senate resisted requiring federal criminal trials to occur in the county where the crime allegedly occurred, because it feared that local juries would promote disunion by shielding local rebels from federal prosecution through nullification. On the other hand, the House insisted on the

importance of local juries, in part as a check on centralized governmental power. *See* Abramson, *supra*, at 28–29, 34–35. Anti-Federalists praised jurors as the "sentinels and guardians" of "the people." Akhil Reed Amar, The Bill of Rights 84 (1998) (quoting *Letters from the Federal Farmer (IV)*). This debate culminated in the existing text of the Sixth Amendment—"[t]he language of the Sixth Amendment requiring criminal trials to be tried before a jury that hailed not only from the state where the crime occurred but also from the district within the state was a genuine compromise that both supporters and opponents of local juries could accept." Abramson, *supra*, at 35.

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In sum, the venue provisions in the Constitution stem from a rich English tradition of rendering criminal judgment in the community affected by the alleged crime. *See* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. Cal. L. Rev. 1533, 1551 (1993) ("[T]he lasting legacy of the venue and vicinage requirements is that the jury will represent the community most affected by the crime and will therefore serve as the conscience of the community."). The Founders expressly incorporated meaningful venue protections in the Constitution in response to "parliamentary tyranny" that deprived colonists of their venue right. The constitutional venue requirements also play a critical role in preventing the government from forum shopping—as the Crown threatened to do by sending colonial Americans overseas—by cherry-picking what the government deemed as the most favorable venue for trial. *See* Engel, *supra*, at 1675.

II. THE REMEDY ADOPTED BY THE ELEVENTH CIRCUIT UNDERMINES THE VENUE AND JURY RIGHTS.

The Eleventh Circuit's rule (as well as those of the Sixth, Ninth, and Tenth Circuits) enfeebles the constitutional right to proper venue in at least three ways, thus defying the Founders' clear intent. *First,* a remedy of permitting the government to retry the matter in the correct venue—thus granting the government successive bites at the apple—is no remedy at all. The Eleventh Circuit's approach frees the government to keep retrying defendants in different venues, without any meaningful consequences, thus creating a perverse incentive for the government to ignore—or even deliberately violate—the constitutional right to proper venue. *Second*, by the same token, the Eleventh Circuit's remedy strips criminal defendants—powerless to avoid serial prosecutions for the same offense—of any incentive to challenge the government's choice of venue. *Third,* the Eleventh Circuit's rule imposes additional pressure on criminal defendants to accept a plea bargain, notwithstanding having a legitimate venue argument. In short, the Eleventh Circuit's approach doubly rewards the government: Increasing its bargaining power in plea negotiations and reducing the number of jury trials, thereby diminishing citizen participation in the criminal justice system and weakening the jury-trial right.

1. NO MEANINGFUL REMEDY. — The Eleventh Circuit's rule renders the government unaccountable for violating a defendant's venue right. The only consequence for such a constitutional violation in the Eleventh Circuit (and the other Circuits that follow this approach) is that the government must reprosecute

the accused, for the same offense. Worse, the Eleventh Circuit's rule generally gives the government broad discretion to select the venue of reprosecution, even if the new venue remains improper. *See, e.g.*, *United States* v. *Kaytso*, 868 F.2d 1020, 1021–22 (9th Cir. 1988) (rejecting application of criminal collateral estoppel to a second prosecution of a defendant for the same offence in the same district where the government previously failed to prove venue). The logical extension of the Eleventh Circuit's rule is that the government is free to keep retrying the accused, in one venue after another, into perpetuity without limitation.

Thus, the Eleventh Circuit's holding below—far from holding the government accountable for violations of constitutional magnitude—actually *incentivizes* the government to continue violating the constitutional venue right without consequence. Under the Eleventh Circuit's approach, the worst that can happen to the government upon failing to prove venue—even if the government cherry-picks a favorable, but incorrect, venue in bad faith to disadvantage the defendant's ability to mount a defense and summon key witnesses—is merely having to retry the accused somewhere else. *Cf. United States* v. *Johnson*, 323 U.S. 273, 279 (1944) (Murphy, J., concurring) ("Very often the difference between liberty and imprisonment . . . depends upon the presence of character witnesses," but "[t]he inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use" and "they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations."). In short, the Eleventh Circuit's remedy is no remedy at all: Its

practical effect is that the government will be able to violate with impunity the constitutional right to proper venue.

The government, for its part, has mischaracterized the venue right as a "convenience" for a criminal defendant, instead of a fundamental right the Framers carefully enshrined in Article III and the Sixth Amendment. To wit, the government previously argued to this Court that "[t]he venue right is animated primarily by considerations of convenience for the defendant." Brief for the United States in Opposition at 7, *Knox* v. *United States*, No. 08-569 (U.S. Jan. 30, 2009), 2009 WL 1030530, at *7 (citing *United States* v. *Cores*, 356 U.S. 405, 407 (1958)); *see also* Brief in Opposition 18 ("BIO") (mischaracterizing petitioner's argument as merely "asserti[ng] that the constitutional venue right directly protects against the possibility of prosecution in an inconvenient location"). The government is flatly incorrect. Neither *Cores*, nor any other Supreme Court case, has ever held that the fundamental venue right's primary purpose is mere convenience. To the contrary, and consistent with the common-law heritage of the venue right, the Court has explained: "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed," because "[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *Cores*, 356 U.S. at 407.[2]

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[2] For example, in *Travis* v. *United States*, the Court held that venue was constitutionally improper in Colorado where "Congress has so carefully indicated the locus of the [alleged] crime"

Instead of merely focusing on a defendant's "convenience," as explained above, the venue right acts as a check against governmental abuses of power, ensuring that trial juries comprise representatives of the local community where the conduct allegedly took place. *See United States* v. *Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part) (observing that the abuse of government power against which the venue right protects was "one of the precipitating factors of the American Revolution" (citing Blume, *supra*, at 63–67)), *rev'd on other grounds sub nom. United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999).[3] Adopting the Eleventh Circuit's holding would serve to endorse the government's attempts to trivialize the venue right as a mere vehicle for convenience—thus giving prosecutors incentive to prioritize issues where errors run the risk of an acquittal and subordinating questions of venue to the back burner. *But see United States* v. *Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014) (characterizing the right to venue as "fundamental since our country's founding" and further observing that venue "was so important to the founding generation that it was listed as a grievance in the Declaration of Independence").

Over a century ago, while holding that the Constitution permits a conspiracy to be prosecuted in any

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in the District of Columbia, even though Colorado was "the residence of [the accused]" and "might offer conveniences and advantages to him which a trial in the District of Columbia might lack." 364 U.S. 631, 634, 636 (1961) (reversing conviction).

[3] That the Framers tied the venue right to the *locus delicti* of the crime and not the residence of the accused further demonstrates that mere convenience was not the Framers' primary concern when they wrote this right into the Constitution.

district in which an overt act in its furtherance is committed, this Court nonetheless recognized "the strength of the apprehension that to extend" permissible venue in such manner "may give to the government a power which may be abused." *Hyde* v. *United States*, 225 U.S. 347, 363 (1912). A century of cases since then demonstrate the validity of this concern.

For example, in *Auernheimer*, "[d]espite the absence of any apparent connection to New Jersey," the government indicted the defendant in that district in order to add an allegation that the defendant's violation of the Computer Fraud and Abuse Act also "occurred in furtherance of a violation of New Jersey's computer crime statute," which allowed the government "[t]o enhance the potential punishment from a misdemeanor to a felony." 748 F.3d at 531. Thus, although venue in New Jersey was constitutionally improper because that state "was not the site of [any] essential conduct element" of the charged offenses, *id.* at 534–35, the government nonetheless prosecuted the accused in New Jersey, perhaps seeking to increase its leverage in plea negotiations. *See, e.g.*, *Peugh* v. *United States*, 569 U.S. 530, 545 (2013) ("We have previously recognized . . . that a defendant charged with an increased punishment for his crime is likely to feel enhanced pressure to plead guilty." (citing *Carmell* v. *Texas*, 529 U.S. 513, 534 n.24 (2000), and *Weaver* v. *Graham*, 450 U.S. 24, 32 (1981))); *United States* v. *Goodwin*, 457 U.S. 368, 380–82 (1982) (permitting the prosecutor to bring a felony charge after the accused refused to plead guilty to a misdemeanor).

Similarly, in *United States* v. *Walden*, the government charged defendants in the District of South Carolina for multiple "violations of 18 U.S.C. [§] 2113 (entering a bank to rob it)," even though some of the alleged bank robberies occurred in Tennessee. 464 F.2d 1015, 1016–17, 1019–20 (4th Cir. 1972). The government in that case argued that "it had a choice of venue" as to the substantive bank robbery offenses committed in Tennessee based on defendants' "conspiratorial and/or accessorial activity" in South Carolina. *Id.* at 1019. The appellate court rejected that argument as an attempt at "forum shopping" and held that "defendants are entitled to a judgment of acquittal on those [Tennessee bank robbery] counts." *Id.* at 1016, 1020. The Fourth Circuit warned that "venue is not mere formalism" and "[t]he Sixth Amendment may not be ignored" because "[t]he right to a trial before a jury of the vicinage is fundamental" to our system of justice. *Id.* at 1020.

In *United States* v. *Provoo*, the Second Circuit reversed a treason conviction obtained in New York, holding that venue under 18 U.S.C. § 3238 was proper only in Maryland. The U.S. Army first apprehended the defendant in Maryland, before bringing him and discharging him from service in New York based on "the wish of the Department of Justice." 215 F.2d 531, 537–39 (2d Cir. 1954).[4] In subsequent proceedings in

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[4] Section 3238 at the time provided that "[t]he trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." *Provoo*, 215 F.2d at 537 (quoting 18 U.S.C. § 3238 (1952)). The court was "concerned only with the term 'found,'"

Maryland, the district court found that the government elected to prosecute the accused in New York because it believed the District of Maryland was "an undesirable place for [the government] to proceed in cases of treason," fearing that the government "do[es] not get cooperation from the U. S. Attorney or the District Judge" in Maryland. *In re Provoo*, 17 F.R.D. 183, 190 (D. Md.), *aff'd sub nom. United States* v. *Provoo*, 350 U.S. 857 (1955) (per curiam). The court concluded that "[t]he government must have known that venue in New York was at least doubtful, in view of" precedent from this Court, but still made "a deliberate choice" to "caus[e] Provoo to be taken under guard" there "for the supposed advantage of proceeding in New York rather than in Maryland," and "grant[ed] defendant's motions to dismiss the indictment." *Id.* at 195, 202–03.

Venue was constitutionally improper in each of these cases.[5] Yet, the government tried the accused in the wrong districts anyway, hoping to gain a prosecutorial advantage. Absent a meaningful remedy that "h[olds] [the government] responsible for the effects of its [venue] election," *Provoo*, 17 F.R.D. at 202, by attaching a Double Jeopardy bar, nothing prevents the government from continuing to do so in the future.

Regarding the issue of prosecutorial incentives, *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000), is in-

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which "mean[s] the district 'in which the defendant is first apprehended or arrested or taken into custody, under charges later found in the indictment.'" *Id.*

[5] Petitioner provides other examples where the government chose to prosecute defendants in districts where venue was "tenuous" at best. Pet. Br. 46 n.17.

structive here. In *Apprendi*, the Court held unconstitutional New Jersey's statutory procedure permitting prosecutors to charge defendants (and obtain convictions) on second-degree offenses, but seek punishments based on first-degree offenses. That statutory scheme allowed "a jury to convict a defendant of a second-degree offense . . . beyond a reasonable doubt," but then permitted "a judge to impose punishment identical to that New Jersey provide[d] for crimes of the first degree based upon the judge's finding, by a preponderance of the evidence," that the defendant had a "'purpose' . . . 'to intimidate.'" *Id.* at 491 (citation omitted). New Jersey's scheme, the Court found, gave the government little incentive to shoulder the larger burden of proving a first-degree offense beyond a reasonable doubt, when proving a lesser offense was easier and less risky, with the government still able to seek the same first-degree murder penalty at sentencing. *See id.* at 484 ("[T]he defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.").

Similarly, the Eleventh Circuit's rule gives the government every incentive to ease its own burden by cherry-picking the most favorable venue possible—even at the risk of a venue choice that is erroneous and unconstitutional—secure in the knowledge that the only consequence of an adverse venue finding is simply reprosecuting a defendant in a different venue.

The government's Brief in Opposition illustrates the harms of the Eleventh Circuit's deeply flawed remedy. While the government promises that it "has no intention to re[-]charge petitioner on the trade-secrets-theft count in a different district," BIO 10, the

government explicitly conditions its promise on petitioner receiving a sentence "that approaches or equals the original 18-month term" he already received, *id.* Under the Eleventh Circuit's rule, the government enjoys essentially unfettered discretion to reprosecute the accused and seek the same sentence previously imposed in the shadow of a constitutional violation. *But cf. Gamble* v. *United States*, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting) ("A free society does not allow its government to try the same individual for the same crime until it's happy with the result.").

Moreover, mere promises by the government to exercise its discretion in a responsible way hardly amount to meaningful protection of a fundamental constitutional right, nor a check with any bite against the government's violation of that right. The Constitution "protects against the Government; it does not leave [this Court] at the mercy of *noblesse oblige*" or permit this Court to "uphold an unconstitutional [rule] merely because the Government promised to use it responsibly." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). That is even more so here, where the Eleventh Circuit's remedy actually incentivizes continued constitutional violations.

The government's arguments further betray its longstanding view that the venue right is a mere technicality relegated to second-class status. For example, the government contends that the remedy for violating the venue right is simply a new trial, just like "any number of trial errors." BIO 18–19. This harkens back to the government's argument from *Provoo*: "[V]enue is a technical matter, unimportant to the defendant in this case" and "the decision to bring the

prosecution in [an improper venue] was an error, similar to an error made by a judge in the trial of a case which brings about a reversal and a new trial." 17 F.R.D. at 201. The government was wrong in 1955, and it is wrong now: the constitutional right to venue is not a second-class constitutional provision; to the contrary, this right is "so important to liberty of the individual that it," together with the jury right, "appears in two parts of the Constitution" and "ranks very high in our catalogue of constitutional safeguards." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 16 (1955); *cf. Gilbert* v. *California*, 388 U.S. 263, 278–79 (1967) (Black, J., concurring in part and dissenting in part) ("[T]here is nothing in the Constitution to justify considering the [Sixth Amendment's] right to counsel as a second-class, subsidiary right."); *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (protesting that Fourth Amendment rights "are not mere second-class rights").

Just as the *Apprendi* Court abolished prosecutorial incentives to ignore "constitutional protections of surpassing importance: . . . 'the right to a speedy and public trial, by an impartial jury,'" 530 U.S. at 476–77, so too here the Court should eliminate the perverse incentives that the Eleventh Circuit's remedy bestows upon the government. The Framers feared "that the jury right could be lost not only by gross denial, but by erosion," *id.* at 483 (quoting *Jones* v. *United States*, 526 U.S. 227, 248 (1999)); similarly here the Eleventh Circuit's approach to venue will subject that right to unwarranted erosion.

2. DISINCENTIVIZING DEFENDANTS FROM CHALLENGING VENUE. — The Eleventh Circuit's remedy

weakens the venue right by stripping criminal defendants of any upside to challenging venue. The best case for a defendant successfully challenging venue is a government do-over.

The Eleventh Circuit's remedy has no limiting principle. Nothing prevents the government from repeatedly retrying criminal defendants for the same offense into perpetuity. And the government has recognized this opportunity—its promise to not re-charge petitioner "in a different district," BIO 10, even if accepted, does not foreclose the possibility that the government will re-charge petitioner in the *same* district, which it is free to do under the Eleventh Circuit's flawed rule. *See Owen* v. *City of Independence*, 445 U.S. 622, 651 n.33 (1980) ("[W]ithout a meaningful remedy aggrieved individuals will have little incentive to seek vindication of [the government's] constitutional deprivations . . . ."). Moreover, questions of venue are often not resolved until trial. *See United States* v. *Hardaway*, 999 F.3d 1127, 1130 (8th Cir. 2021) ("To go beyond the face of the indictment, and challenge the sufficiency of the government's evidence on venue, [defendant] was required to proceed to trial and put the government to its burden of proof"), *cert. denied*, 142 S. Ct. 1169 (2022); *United States* v. *Snipes*, 611 F.3d 855, 866 (11th Cir. 2010) ("As with resolving other important elements contained in a charge, a jury must decide whether the venue was proper."); *see also* Pet. Br. 13–14 (describing the district court's refusal to resolve petitioner's venue challenge until after trial). Under the Eleventh Circuit's approach, therefore, if the government again chooses an improper venue, a criminal defendant would be required to undergo a successive full-blown trial in that venue—and endure all the stress and expense that

goes with it—with no available remedy other than the possibility of forcing the government to seek yet another do-over upon a venue violation. Practically speaking, this gives defendants very little incentive to mount a venue challenge, amounting to a toothless remedy. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Surely this is not what the Framers intended.

3. MORE PLEA BARGAINS; FEWER TRIALS. — By removing incentives for criminal defendants to bring venue challenges, the Eleventh Circuit's approach increases prosecutorial leverage in plea negotiations. This outcome not only effectively nullifies the constitutional venue right—surely against the wishes of the Framers—it undermines the very right to trial by jury.

Without any meaningful check on its constitutional obligation to prosecute crimes in the correct venue, the government enjoys carte blanche to prosecute cases in venues that are both incorrect and more favorable to the prosecution. This not only puts a thumb on the government's side of the scale in plea negotiations, it also results in a self-perpetuating constitutional violation: A plea bargain virtually guarantees that the government's erroneous venue selection will go unchallenged in court and untested in the adversarial process. By encouraging more defendants to take plea deals, therefore, the Eleventh Circuit's rule diminishes the jury trial right more generally.

As this Court has recognized, the jury trial right "remains one of our most vital barriers to governmental arbitrariness." *Reid* v. *Covert*, 354 U.S. 1, 9–10 (1957); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) ("[T]he inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice . . . ."). Critically, the venue provisions in the Constitution "were incorporated" in an effort "to preserve the role of the jury in representing the community whose interests were at stake." Levenson, *supra*, at 1549; *see also* Engel, *supra*, at 1694–95 ("The Sixth Amendment's crime-committed formula emphasizes trying the accused before jurors drawn from the community in which the crime was committed" in order "to secure the jury best able to reach an accurate verdict . . . ."). At the time of this country's founding, the jury trial was understood not just to be a fair means of deciding guilt or innocence, but also as an independent institution designed to give the community a central role in the administration of criminal justice. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 568–69 (1980) (plurality opinion) ("[The] great right . . . of trial by jury . . . provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage . . . shall pass their sentence upon oath against him . . . ." (quoting Address to the Inhabitants of Quebec (Oct. 26, 1774), reprinted in 1 Journals of the Continental Congress, 1774–1789, at 107 (1904))); *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."). Excessive

incentives to enter into plea bargains only undermine the role of the community in the criminal justice system.

The risk of exacerbating the pressure defendants face to plead guilty is especially acute today, as plea bargaining has almost entirely displaced jury trials as the primary means of criminal adjudication. As of 2021, 98.3% of all convictions in federal court were obtained through guilty pleas. U.S. Sentencing Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics 56 (2021); *see also Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012) (noting that plea bargaining has transformed the country's robust "system of trials" into a "system of pleas"); Carissa Byrne Hessick, Punishment Without Trial: Why Plea Bargaining Is a Bad Deal 8 (2021) ("Ours is a system of pressure and pleas, not truth and trials."); George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

Although adding bite to the remedy for venue violations will not, by itself, solve the issue of the jury's vanishing role in our criminal justice system, it would amount to a significant step toward restoring balance to a criminal defendant's decision whether to challenge a potentially unconstitutional venue selection. Already "[a]lmost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea" and waiver of the right to a jury trial. *United States* v. *Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). This Court should not permit violations of a defendant's venue right to be added to that long list.

CONCLUSION

The judgment of the court of appeals should be reversed.

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