No. 21-1576

# In the Supreme Court of the United States

TIMOTHY J. SMITH,
PETITIONER,

*v.*

UNITED STATES OF AMERICA

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

## BRIEF OF PROFESSOR DREW L. KERSHEN AND PROFESSOR BRIAN C. KALT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## STATEMENT OF INTEREST[1]

*Amicus* Drew L. Kershen is the Earl Sneed Centennial Professor of Law Emeritus at the University of Oklahoma College of Law, where he has been on the faculty since 1971. Professor Kershen's seminal article, *Vicinage*, published in two parts in the Oklahoma Law Review in 1976 and 1977, remains one of the most influential pieces of scholarship on the history of the venue and vicinage rights. *Vicinage*, 29 Okla. L. Rev. 801 (1976); *Vicinage—Part II*, 30 Okla. L. Rev. 1 (1977).

*Amicus* Brian C. Kalt is Professor of Law and the Harold Norris Faculty Scholar at the Michigan State University College of Law. Professor Kalt's research focuses on constitutional law and juries. Professor Kalt has written multiple articles on the Sixth Amendment, venue, and vicinage.

As legal scholars who have an interest in the proper understanding and application of the constitutional right to be tried in a proper venue, *amici curiae* submit this brief to describe the origins and historical importance of the concepts of venue and vicinage and to explain that, when the government fails to prove venue at trial, acquittal is the remedy that best vindicates the principles underlying the defendant's venue right.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* or their counsel made such a monetary contribution.

## SUMMARY OF THE ARGUMENT

The proposition that local crimes must be tried by local juries is among the bedrock principles of American criminal procedure. It ensures that local citizens—and not the government—will decide a defendant's guilt or innocence. This principle contains two distinct conceptual strands: (1) venue, which is the location of the trial itself; and (2) vicinage, which refers to the location of the jury pool. These two concepts are often conflated in modern American law, but they both have historical roots dating back centuries, and together they emphasize the importance of venue as a defendant's individual, substantive right and as a critical check on government authority.

The right to be tried in a proper venue became a flashpoint in the Revolutionary era, as the British Parliament enacted laws that provided for colonists accused of crimes to be tried thousands of miles away in England. The Founders saw these measures as serious incursions on a defendant's right to be tried in the appropriate place and by appropriate jurors—rights that they viewed as inherent to a fair trial. They therefore codified those rights in the Constitution in Article III and in the Sixth Amendment. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI.

The Founders conceived the venue right as an important means of protecting the defendant from the hardships of standing trial in a foreign place without family support, access to legal services and evidence, or knowledge of the local jury pool. Combined with the related concept of vicinage, it also serves as a critical check on government abuse: It limits prosecutors' ability to manipulate the process by subjecting defendants to a trial in whichever locations and before whichever juries the prosecution thinks are most likely to yield a conviction.

When the government fails to prove venue at trial, acquittal is the remedy that best serves the purposes of the venue right and honors its historical importance.

## ARGUMENT

### I. The Constitutional Right to Be Tried in a Proper Venue Is Foundational to the Anglo-American Legal Tradition

The right to be tried in a proper venue has a centuries-long historical pedigree. It is intertwined with the ancient principle of vicinage—the requirement that a criminal defendant be tried before a jury hailing from the place of the crime. The right to a jury of the vicinage "predates and is acknowledged in the Magna Carta, which declared that 'no freeman shall be taken or imprisoned . . . unless by the lawful judgment of his peers' and that punishment would not be 'assessed but by the oath of honest men *in the neighborhood*.'" Venue: A Legal Analysis of Where a Federal Crime May Be Tried at 21, Cong. Res. Serv. (Dec. 6, 2018), https://bit.ly/3l1E62D (emphasis in original) (quoting Magna Carta, XXXIX, XX).[2]

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[2] Magna Carta was understood at the founding and in the early republic as guaranteeing defendants a trial by jury. See 3 Joseph Story, *Commentaries on the Constitution* § 1773 (1833); 4 William Blackstone, Commentaries on the Laws of England *342–43 (1772); Francis H. Heller, *The Sixth Amendment* 14–15, 93 (1951). But at least one scholar has argued that, despite the truism in American constitutional history that a guarantee of trial by jury is rooted in Magna Carta, "[t]he links between Magna Carta and the jury trial guarantee were actually forged centuries *after* the issuance of the original document in 1215." Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury, in* Magna Carta: Muse and Mentor 139, 141 (2014), https://bit.ly/3wGNkE9. In any event, the history of the common-law jury—and the concept of vicinage—can be traced to the era of King Henry II (1154-1189), who created "juries of presentment." *Id.* at 143. Juries of presentment were composed of

Though the venue and vicinage rights are formally enshrined in separate constitutional provisions, for much of common-law history, given the limited means of travel then available, venue and vicinage were inextricably linked: The requirement that a jury be chosen from the area where the crime was committed (vicinage) meant that a trial in accord with the vicinage requirement was, in all likelihood, set in the place where the alleged crime occurred (venue). See Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 Wash. L. Rev. 271, 276 (2005) (*Crossing Eight Mile*); see also *United States* v. *Passodelis*, 615 F.2d 975, 977 n.3 (3d Cir. 1980); Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 805 n.4 (1976) (*Vicinage*) ("Many authors, judges, and politicians . . . have used 'venue' and 'vicinage' interchangeably.").

The venue and vicinage rights took on outsized importance during the American Revolutionary period, when colonists condemned British extradition of Americans for crimes committed in the colonies. The result was an original Constitution that codified the right to venue where the crime was committed, and a Bill of Rights that further protected the rights of vicinage. Together, these rights repudiated British abuses and stood as a critical check on the early American government.

### A. The Venue Right Has Its Roots in English Common Law and Magna Carta

In feudal England, vicinage—the geographical origin of a jury—was as much a product of necessity as of right.

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"local people from the hundreds (subdivisions of counties) and vills (subdivisions of hundreds) [who] would be called together to inform the king who had committed robbery, murder, or theft in their locality so they could be tried by the king's justices." *Ibid.*; see also *id.* at 144–45.

Under the early English jury system, jurors "decided cases based on their own knowledge, and they were therefore selected on that basis." Kalt, *Crossing Eight Mile*, *supra*, at 296. In a system in which jurors "were required, or at least presumed, to know the facts [of a case] of their own knowledge," and indeed might even investigate the facts themselves, proximity of the jurors to the place of the alleged crime was paramount. William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 60 (1944); *Zicarelli* v. *Gray*, 543 F.2d 466, 475 (3d Cir. 1976).[3] Sir Edward Coke, writing in the early 1600s, emphasized the importance of knowing "out of what neighborhood" a jury should hail, lest the jury be ill-suited to its administrative inquest. Blume, *supra*, at 60.

While a jury selected from the place of the crime was ordinarily a matter of practical necessity, commentators have understood Magna Carta to have "secured" the right to trial by a jury of the vicinage "against Royal interference." Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. 197, 198 (1909). Magna Carta decreed that punishment for crime would flow only "by the oath of trustworthy men *of the vicinity*." Magna Carta, ch. 20 (1215) (emphasis added).

The subsequent two centuries saw a gradual relaxation of the vicinage and venue requirements in English legal practice. With respect to vicinage, by the mid-1700s, the jury more closely approximated modern analogues, with jurors no longer expected to furnish their own knowledge of a matter, but instead "to obtain their knowledge only from evidence produced in open court."

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[3] Some historians have even traced the witness-as-juror paradigm to the late Roman judicial system. See Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 Law & Hist. Rev. 537, 538 (1999).

Blume, *supra*, at 60. While this evolution in the role of the jury might have presaged retirement of the vicinage requirement, vicinage persisted, just in broader geographical units. As Sir William Blackstone observed in 1768, while ancient law drew its juries "from the neighbourhood of the vill or place where the cause of action was laid," the shift toward impartial juries meant that the jury was "now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto,* or from the particular neighbourhood." 3 William Blackstone, Commentaries on the Laws of England *360.

As for venue, formalistic adherence to the requirement that a crime be tried in the place where it was committed meant that defendants could evade punishment for even heinous crimes: "it often happene[d]" that a murderer would strike his victim in one county, and "by Craft and Cautele"[4] avoid punishment by making sure that the victim died in the next county. Kalt, *The Perfect Crime*, *supra*, at 675 (quoting An Act for Trial of Murders and Felonies Committed in Several Counties, 2 & 3 Edw. 6, c. 24 (1548) (Eng.)). To address these practical problems and ensure that crimes could be properly investigated and tried, Parliament carved out certain limited exceptions to the traditional venue requirement. *Ibid.*; see Blume, *supra*, at 62–63. Despite these exceptions, traditional venue requirements persisted and applied in most circumstances. See Blume, *supra*, at 60–63.

[4] "Cautele" means "caution." Kalt, *The Perfect Crime*, *supra*, at 675 & n.1; see also Middle English Dictionary, Univ. of Mich. Libr., http://bit.ly/3DpO6Jm (last visited Feb. 2, 2023) (defining "cautel" as "caution," "craftiness," or "deceit").

### B. The American Revolution Underscored the Importance of the Right to Proper Venue and a Local Jury, Which the Founders Codified in the Constitution

1. While English legal practice tolerated certain erosions of the venue and vicinage requirements, "[i]n the rebellious American colonies, the principle of local jury trial persisted more strongly." Kalt, *The Perfect Crime*, *supra*, at 676. Indeed, as tensions flared between the colonists and Great Britain in the late 18th century, the principle of local jury trial assumed visceral importance in the colonies.

The rigging of venue and jurisdiction was a core strategy of the Crown to enhance its ability to punish colonists' violations of its laws. In the 1760s, the colonists "routinely violated the navigation acts with impunity." Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. Mar. L. & Com. 323, 332 (1996). To bolster its ability to enforce its laws, in 1764, the British Parliament created a vice-admiralty court in Halifax, Nova Scotia, and conferred upon it concurrent jurisdiction over all violations of the trade or revenue laws, regardless of where an offense occurred. Thus, "customs or naval officials could carry a seized vessel to Halifax for trial even though the seizure occurred in a place as distant as Georgia or South Carolina." *Id.* at 334.

As a result, "many merchants faced the prospect of losing their property simply because they could not afford to defend it in such a remote place." *Ibid.* And even those defendants who endured the journey to plead their cases hundreds of miles away faced a daunting task: "Admiralty courts sat without juries, required heavy bonds to preserve claims to confiscated property, saddled the claimant with the costs of maintaining the action, and imposed an extraordinarily difficult burden of proof on the claimant seeking the return of confiscated property."

Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 Am. J. Legal Hist. 35, 79 (2005).

The Stamp Act, enacted the following year, represented an even more brazen manipulation of jurisdiction and venue to the Crown's advantage. Parliament vastly expanded admiralty jurisdiction, which swept even more causes of action within the jurisdiction of the vice-admiralty courts. See *ibid.* It also gave the Halifax court appellate jurisdiction over trade or revenue cases brought in vice-admiralty courts located in other colonies. Blinka, *supra*, at 79; Harrington, *supra*, at 335. While certain violations of the navigation acts could also be tried to a jury in common-law court, "Crown officers began to rely almost exclusively upon the vice-admiralty," as "colonial juries proved to be singularly uncooperative in enforcing the trade laws." Harrington, *supra*, at 336.

The Stamp Act provoked fury in the colonies and was soon repealed. In subsequent enactments in 1766 and 1767, Parliament "attempt[ed] to defuse colonial objections to the expanded jurisdiction of the Halifax vice-admiralty court" by establishing additional vice-admiralty courts in Boston, Philadelphia, and Charleston. Harrington, *supra*, at 335; Blinka, *supra*, at 79. But the colonists continued to chafe against the jurisdiction of the vice-admiralty courts, which had plainly been engineered to stack the deck in the prosecution's favor. Blinka, *supra*, at 79.

As discontent continued to roil the colonies, the British government reprised its tactic of channeling proceedings against colonial rebels to fora more friendly to the Crown—this time in the criminal context. In 1769, when Massachusetts citizens interfered with enforcement of the revenue laws, Parliament reacted by reviving 35 Henry VIII, c. 2 (1543). This long-disused, Tudor-era law permitted trials 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." Blume, *supra*, at 62 (quoting 35 Henry VIII, c. 2 (1543)).

The colonies immediately responded with "fierce . . . indignation." Connor, *supra,* at 208. As soon as it received notice of Parliament's action, on May 16, 1769, the Virginia legislature resolved that all trials for crimes committed in the colonies by residents of the colonies

> ought of Right to be had, and conducted . . . within the said Colony . . . ; and that the seizing any Person or Persons residing in this Colony … 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.

Journals of the House of Burgesses of Virginia, 1766-1769, at 214 (Kennedy ed., 1906). Other American colonies promptly approved Virginia's resolution. Blume, *supra*, at 65; 1 Cambridge History of The British Empire 668 (1929). On May 17, 1769, the day after issuing its resolution, the Virginia Legislature sent an address to the King, stating:

> [W]e cannot, without Horror, think of the new, unusual, and permit us, with all Humility, to add, unconstitutional and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in any other Manner than by the ancient and long established Course of Proceeding . . . .

Journals of the House of Burgesses of Virginia, 1766-1769, at 215–16 (Kennedy ed. 1906).

Parliament was unmoved. In succeeding years, it passed additional acts permitting the transport of colonists overseas for trial, indicating the royal government's continued suspicion that American colonial courts would not enforce its criminal laws to its satisfaction. See 12 Geo. III, c. 24 (1772) (allowing persons charged with destroying the King's dock yards, magazines, ships, ammunition, and stores "in any place out of [the King's] realm," to be indicted and tried "in any shire or county within this realm" or "where such offense shall have been actually committed"); 14 Geo. III, c. 39 (1774) (permitting persons accused of murder or other capital offenses in Massachusetts Bay to be tried in England or an adjoining province).

The colonists continued to protest the British assault on the right to be tried in a proper venue before a local jury—a right that they understood to be "one of the greatest securities of life, liberty and happiness," Mass. Bill of Rights, Art. XIII, "the slightest[] surrender [of which] involved them in ruin and made them slaves to the King and Parliament," Connor, *supra* at 209; see also *id.* at 208 (citing North Carolina's resolution "[t]hat trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject . . . a right handed down to us from the earliest ages, confirmed and sanctified by Magna Carta itself"; and South Carolinian William H. Drayton's protest against the 1774 Act; and the Virginia legislature's declaration that "the cause of Massachusetts Bay [was] the cause of all").

In its October 1774 Address to the People of Great Britain, the Continental Congress stated:

> In all these colonies, justice is regularly and impartially administered and yet, by construction of some and the direction of other acts of Parliament, offenders are to be taken by force, together with all such persons as may be pointed out as witnesses and

> carried to England, there to be tried in a distant land by a jury of strangers and subject to all the disadvantages that result from want of friends and of witnesses and want of money.

Connor, *supra*, at 208. Shortly thereafter, the First Continental Congress resolved that the colonies "[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. The Continental Congress specifically enumerated 12 Geo. III, c. 24 (1772) and 14 Geo. III, c. 39 (1774), discussed above, among the "infringements and violations of the rights of the colonists," the repeal of which "is essentially necessary, in order to restore harmony between Great-Britain and the American colonies." I Journals of the Continental Congress 1774-1789 (Library of Congress ed. 1904).

Likewise, Thomas Jefferson, in the first draft and the final text of the Declaration of Independence, specifically cited the "transport[] [of colonists] beyond Seas to be tried for pretended offences" as one of the colonies' 27 grievances. I The Papers of Thomas Jefferson, 1760-1776, at 243-247 (Julian P. Boyd ed. 1950); see The Declaration of Independence para. 21 (U.S. 1776).

2. The specter of being forced to stand trial in faraway territories—and in fora designed to favor the Crown—had loomed so large in the struggle for independence that when it came time to create their own government, the former colonies enshrined robust venue protections in their founding instruments. Many of the nascent states—New Hampshire in 1784, Georgia in 1777 and 1789, Maryland in 1776, and Massachusetts in 1776 and 1780—codified explicit venue requirements in their state constitutions. See Blume, *supra*, at 68–70, 72–73; Connor, *supra*, at 209. The constitutions of other states—New Jersey and North Carolina in 1776 and New York in

1777—were less precise, but codified the jury right in a manner that may have included an implied vicinage right as well. Kalt, *Crossing Eight Mile*, *supra*, at 301 n.106.

From the beginning, proposals for the federal Constitution likewise expressly protected a criminal defendant's right to be tried in a proper venue. The Pinckney, Hamilton, New Jersey, and Patterson Plans all featured venue provisions. See III Max Farrand, Records of the Federal Convention of 1787, at 600, 615–16, 626 (1911) ("All Criminal offenses, (except in cases of impeachment), shall be tried in the State where they shall be committed . . . ."). Unsurprisingly given the historical context and the prominence of the venue grievance in the Declaration of Independence itself, "little debate was engendered by this venue proposal at the Constitutional Convention." Kershen, *Vicinage*, *supra*, at 808. Article III, section 2, clause 3 of the U.S. Constitution thus enshrines constitutional limitations on venue. See The Federalist No. 84, at 510-11 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (recognizing Article III's venue clause as one of "various provisions in favor of particular privileges and rights" in the Constitution that adopts and "equally secure[s]" those rights under common law).

3. For the founding generation, however, Article III did not go far enough. At the state ratifying conventions, states consistently faulted the federal Constitution for failing to include the right to a trial before a local jury. See I J. Elliot, The Debates in the Several State Conventions On The Adoption of the Federal Constitution (1836), at 327–29 (New York), 334–35 (Rhode Island); II J. Elliot, The Debates in the Several State Conventions On The Adoption of the Federal Constitution (1836), at 109–14 (Massachusetts), 450 (Pennsylvania); III J. Elliot, The Debates in the Several State Conventions On The Adoption of the Federal Constitution 658 (1836) (Virginia);

IV J. Elliot, The Debates in the Several State Conventions On The Adoption of the Federal Constitution 243 (1836) (North Carolina). Those state ratification debates ultimately led the first Congress to adopt the Bill of Rights, including the Sixth Amendment, which expressly codifies the right to a local jury.

While the rights to proper venue and local jury are thus enshrined in separate constitutional provisions, there is no question that the Founders saw the two rights as closely related. Underlying the constitutional history was the general assumption that vicinage would follow venue and vice versa—*i.e.*, if venue was set, jurors would be chosen from the surrounding area, and if the vicinage was based on a particular geographical area, then the trial would be held within that same area. Kershen, *Vicinage*, *supra*, at 830–31.[5] Put differently, "[b]y insisting on a right to a jury of the vicinage the colonists hoped to escape the hardship and danger of standing trial in some distant colony or in England." Blume, *supra*, at 65.

4. The text of the Sixth Amendment reflects the Founders' wariness of the potential for government abuse and manipulation of venue in an additional respect: It provides federal defendants the right to a speedy, 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*." U.S. Const. amend. VI (emphasis added).

The precise history of the "previously ascertained" clause is unclear. See *Zicarelli* v. *Dietz*, 633 F.2d 312, 321

[5] Of course, the assumption was not always correct. For example, in Virginia, the General Court met in the state capital to try cases punishable by loss of life or limb, but the jurors were nonetheless chosen from the vicinity of the crime. Kershen, *Vicinage*, *supra*, at 831-32. Nonetheless, the intention was that a stringent venue right would safeguard the defendant's right to a local trial before a jury of his peers.

(3d Cir. 1980) ("[D]iligent research into the leading sources of Sixth Amendment analysis has disclosed no discussion or reference to the 'previously ascertained' clause."); *United States* v. *Louwsma*, 970 F.2d 797, 801 (11th Cir. 1992) (similar). Yet what can be gleaned from the historical context is that conferees of the 1789 joint Committee "needed some assurance that the districts [in which vicinage was proper] would not be readjusted arbitrarily to meet the circumstances of a particular case." *Zicarelli*, 633 F.2d at 323.

Manipulation of criminal venue by the Crown was precisely what colonists had so vigorously protested in the years preceding the Revolution. It was therefore imperative that the Sixth Amendment divest Congress of any power to assign criminal venue after the fact—and, by extension, to divest prosecutors of any ability to pressure Congress for a more convenient venue. "[A]lthough free to alter and revise the size of judicial districts," Congress could not be allowed to "constitute or reconstitute a district to affect a criminal case after commission of the alleged offense." *Ibid.* Prosecutors bringing charges are bound on the subject of venue by legislation enacted before a crime's commission. "If 'previous' just means previous to the trial rather than previous to the crime, then the Previous Ascertainment Clause would be rendered almost meaningless." Kalt, *The Perfect Crime*, *supra*, at 682.

As discussed above, concerns regarding the venue and vicinage rights were a hallmark of the American Revolution, leading the Founders to twice codify them in the Constitution. From the colonies' declarations and state constitutions to the adoption of the Sixth Amendment, the history makes clear that the Founders repeatedly sought (and fought) to prevent government abuse and manipulation of venue.

### C. Post-Founding Jurisprudence Has Embraced and Reinforced the Venue Right

So fundamental is the right to proper venue—and so unthinkable its breach—that Justice Story, writing in 1833, postulated, "There is little danger, indeed, that congress would ever exert their power in such an oppressive, and unjustifiable a manner" as to require that a defendant be "dragged to a trial in some distant state." 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833). Yet despite this presumed impossibility, the Founders, by including Article III's venue provision, sought to "leave as little as possible to mere discretion"—especially when the "security of the citizen" was at stake. *Ibid.*

In the years after the Founding, Congress fortified the constitutional venue right. For the first eighty-nine years of the constitutional republic, the venue right laid down in Article III assured defendants that federal crimes would be tried in the place of their commission.[6] Drew L. Kershen, *Vicinage—Part II*, 30 Okla. L. Rev. 1, 12 (1977) (*Vicinage II*) (noting "legislative silence with respect to criminal venue prior to 1878"). Because this provision required only that trial occur "in the *State* where the said Crimes shall have been committed," U.S. Const. Art. III, § 2, cl. 3 (emphasis added), there was uncertainty about which judicial district within a multi-district state provided the proper venue. Near the turn of

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[6] Moreover, in capital cases, Congress decreed that "the trial shall be had in the county where the offense was committed," so long as could be done "without great inconvenience." Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88. This requirement remains to this day. See 18 U.S.C. § 3235. In 1793, Congress also authorized the circuit courts to hear special sessions for criminal cases "at any convenient place in the district, nearer to the place where the offences may be said to be committed, than the place or places, appointed by law for the ordinary session." Act of Mar. 2, 1793, ch. 22, § 3, 1 Stat. 334.

the century, Congress relieved some of this uncertainty by assigning criminal proceedings to the district of an alleged offense's commission. See, *e.g.*, Act of July 12, 1894, ch. 132, 28 Stat. 102.

Nonetheless, confusion persisted, and in 1910, Congress convened a Special Joint Committee on the Revision of Law to clarify the conflicting rules that had developed. Upon the Committee's recommendation, Congress enacted Section 53 of the Judicial Code of 1911, establishing uniform criminal venue as proper in the district *and* division of a crime's commission. Act of Mar. 3, 1911, ch. 231, § 53, 36 Stat. 1101.

Upon the promulgation of the Federal Rules of Criminal Procedure in 1946, criminal venue was governed by Rules 18 through 21. See Kershen, *Vicinage II*, *supra*, at 16. Rule 18 borrowed and restated the command of Section 53 of the Judicial Code of 1911, that trial be held in both the district *and* division of the alleged crime's commission. See *ibid.* Rules 19, 20, and 21 provided for departures from this district-and-division requirement when transferring between divisions in the same district (Rule 19); when the defendant preferred to be tried in the district of his arrest, if the indictment was pending in a different district (Rule 20); or when the venue compelled by Rule 18 posed too great a risk of prejudice to the defendant, and a new venue was "in the interest of justice" (Rule 21). See *id.* at 16–17.

Importantly, each of the Rule 18 exceptions described in Rules 19, 20, and 21 could be invoked only upon the *defendant's* motion. As the Notes of the 1944 Advisory Committee make clear, this was in keeping with the venue requirements protected by the Constitution. Rules 18 through 21, the Notes explain, were drafted "[w]ithin the framework of the . . . constitutional provisions" on venue contained in Article III and the Sixth Amendment. Fed. R. Crim. P. 18, advisory committee's note to 1944

enactment. With an eye toward the purposes undergirding these constitutional requirements, the venue Rules sought to "reliev[e] [a defendant] of whatever hardship may be involved" in defending against prosecution in a distant venue. Fed. R. Crim. P. 20, advisory committee's note to 1944 enactment. And waiver of Rule 18's default venue requirement belonged exclusively to the defendant, as the Rules "[did] not extend the same right [of transfer] to the prosecution." Fed. R. Crim. P. 21, advisory committee's note to 1944 enactment. These Rules make clear that proper venue is a matter of right for the defendant, secure from prosecutorial manipulation.

Revisions to the Rules on venue were made in the 1960s, 1970s, 1980s, and 2000s.[7] These were, in some instances, purely technical or stylistic. But even when revisory committees made substantive changes to the Rules, these amendments were careful to "not offend the venue or vicinage provisions of the Constitution," Fed. R. Crim. P. 18, advisory committee's note to 1979 amendment, and paid due regard to the "convenience of the parties and witnesses and the interests of justice." Fed. R. Crim. P. 21, advisory committee's note to 2010 amendment.

In parallel with these legislative enactments, the courts over the years have acknowledged the historical underpinnings of the constitutional right to be tried in a proper venue.[8] This Court has recognized that the

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[7] Rule 18 was amended to eliminate the division requirement after a series of Supreme Court cases decided there was no constitutional right to trial within a specific division. Fed. R. Crim. P. 18, advisory committee's note to 1966 amendment. But the district requirement remained intact.

[8] Unlike other provisions of the Sixth Amendment, the requirement that a defendant be tried by a jury "of the State and district wherein the crime shall have been committed," U.S. Const. amend.

Founders drafted Article II, section 2, clause 3, fully "[a]ware of the unfairness and hardship to which trial in an environment alien to the accused exposes him," and further "underscore[d] the importance of this safeguard" in the Sixth Amendment. *United States* v. *Johnson*, 323 U.S. 273, 275 (1944); see also *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998) ("Proper venue in criminal proceedings was a matter of concern to the Nation's founders"); *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (instructing courts to operationalize the venue requirement by "discern[ing] the location of the commission of the criminal acts"). In light of this history, this Court has repeatedly confirmed that "[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure," but rather are issues that "touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests." *Johnson*, 323 U.S. at 276; see also *Travis* v. *United States*, 364 U.S. 631, 634 (1961).

Numerous federal courts of appeals have similarly remarked upon the constitutional venue right's historical importance. See, *e.g.*, *United States* v. *Coplan*, 703 F.3d 46, 76–77 (2d Cir. 2012); *United States* v. *Medina-Ramos*, 834 F.2d 874, 875–76 (10th Cir. 1987); *United States* v. *Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004); see also *United States*

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VI, has not been incorporated against the states by the Fourteenth Amendment. But this should not be understood as the Court disclaiming that requirement as "fundamental to the American scheme of justice," *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 148–50 (1968)). Indeed, Founding-era concerns animating the Sixth Amendment's vicinage provision teach quite the opposite. See pp. 6–15, *supra*. Regardless, the standard practice across the states is to set venue in the political subdivision or state judicial district in which the crime was committed. See 4 W. LaFave, J. Israel, N. King & O. Kerr, *Criminal Procedure* § 16.1(c) (4th ed. 2015).

v. *Romans*, 823 F.3d 299, 325 (5th Cir. 2016) (Costa, J., concurring specially) (observing that the venue right "was important enough to the Founders that it—rather than the right to confront witnesses, or the right against self-incrimination, or even the right to due process—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"). And as the Third Circuit has put it, "[t]hough our nation has changed in ways which it is difficult to imagine that the Framers of the Constitution could have foreseen, the rights of criminal defendants which they sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded." *Passodelis*, 615 F.2d at 976.

## II. Acquittal Vindicates the Historical Purposes of the Right to a Local Trial

Venue and vicinage have been integral components of the American judicial system since before the Founding. The federal Constitution and Bill of Rights, as well as numerous state constitutions and the Federal Rules of Criminal Procedure, codify robust protections for a criminal defendant's right to be tried in a proper venue.

Given the importance of the venue right to the nation's founding, the Founders would have expected the right to be guaranteed through meaningful remedies. See *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 163 (1803) ("Where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.") (citing 3 William Blackstone, Commentaries *23). Yet the decision below held that the appropriate post-trial remedy for a failure to prove venue is vacatur of the conviction, leaving the government free to begin proceedings anew elsewhere. Pet. App. 13a-15a. That approach treats the failure to prove venue as a mere procedural default, whereas the Founders viewed it as a substantive individual right and a core component of a fair

trial. Allowing a re-trial after the government has failed to prove venue thus invites the very abuses that the Founders feared and is difficult to reconcile with the Founders' vigorous protection of the right to proper venue.

In drafting the U.S. Constitution, the Founders sought to prevent the federal government from engaging in the same abuses that the British Crown had inflicted on the colonists. A rule under which vacatur is the only consequence of a failure to prove venue gives the government unlimited chances to run and re-run its prosecution. The prospect of a criminal defendant being dragged from courthouse to courthouse to stand trial until the government proves both guilt and venue would have been anathema to the Founders.

The Founders enshrined the venue right in the Constitution and the Bill of Rights as a direct response to the English government's threats to try rebels and dissidents in distant fora. See pp. 8–14, *supra*. They understood the venue right not only as protecting criminal defendants from the "unfairness and hardship" of being tried in a foreign location, *United States* v. *Johnson*, 323 U.S. 273, 275 (1944), but also as part of the "important *substantive* protections against government abuse," *United States* v. *Palma-Ruedas*, 121 F.3d 841, 862 (3d Cir. 1997) (Alito, J., concurring in part and dissenting in part). See pp. 8–14, *supra*. The Founders sought to prevent the government from manipulating venue at the expense of the criminal defendant's right to a fair trial. See pp. 8–12, *supra*. Giving the government unlimited opportunities to prove venue contradicts each of these purposes.

Seriatim trials magnify the hardship on individual defendants. The Founders explained the "misery" of standing trial in a distant land, far from family, friends, and familiar legal counsel. Journals of the House of Burgesses of Virginia, 1766-1769, at 215-16 (Kennedy ed.

1906). They also sought to prevent the expense of trial with foreign legal counsel, an expense that would multiply with every new venue. These burdens only increase with re-trials. The prospect of being subjected to the hardships of yet another trial is cold comfort to a defendant who has successfully shown that the prosecution has failed to carry its burden of proving venue.

Allowing the government to re-try a defendant after failing to prove venue also invites—rather than checks—prosecutorial abuse. The Eleventh Circuit's rule presents no barrier to the government trying a defendant in different venues seriatim, until it finally meets its burden of proving venue. Indeed, the rule is particularly susceptible to abuse because the question of venue will often arise on a motion for a judgment of acquittal—*before* the case is submitted to the jury. If the government were to receive unhelpful testimony from a witness, or if it sensed that the jury was not favorably disposed to its case, it could omit its venue evidence in the hopes of another attempt. Whether or not such abuses might be likely in the absence of such a rule, the constitutional right to proper venue shields against them.

Vacatur with allowance for retrial is thus no check at all on the government, which could simply use the first trial to sharpen its evidentiary presentation for the second. As this Court has recognized, allowing the Government to re-prosecute a case deficient in venue is "like permitting a party to take advantage of his own wrong." *United States* v. *Ball*, 163 U.S. 662, 668 (1896). "If this practice be tolerated, when are trials of the accused to end?" *Ibid.* "[W]hether convicted or acquitted, [the accused] is equally put in jeopardy at the first trial." *Id.* at 669; 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."). The

gamesmanship that the Eleventh Circuit's rule would allow is impossible to square with the Founders' antipathy to the manipulation through which the Crown sought to secure convictions against colonial dissenters.

Concerns about government abuses are heightened in the context of venue because venue selection is squarely within the prosecutor's discretion. See Daniel Stepanicich, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. Pa. J. Const. L. 1507, 1525–26 (2016) (detailing practice of prosecutorial discretion in administrations of Presidents Washington and Jefferson). In other words, it is *the government* that decides where to indict a criminal case. If, after choosing a venue, the government fails to gather evidence sufficient to demonstrate the selection of venue was proper, that failing lies at the feet of the government alone.

From its own failure, the government should not be allowed "another opportunity to supply evidence which it failed to muster in the first proceeding." *United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980) (simplified). Nor should the defendant suffer additional "embarrassment, expense and ordeal . . . in a continuing state of anxiety and insecurity, as well as [the] enhanc[ed] . . . possibility that even though innocent he may be found guilty." *Yeager* v. *United States*, 557 U.S. 110, 117–18 (2009) (quoting *Green* v. *United States*, 335 U.S. 184, 187–88 (1957)). The defendant has no part to play in that failure and often (as in this case) affirmatively objected to the government's venue selection on constitutional grounds.

The Founders considered the right to a proper venue to be fundamental. Rather than denigrate the significant protection that the Founders provided for this right, the Court should hold that acquittal is the proper remedy for a violation of it.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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