No. 21-1576

IN THE
Supreme Court of the United States

TIMOTHY J. SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defendants to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL's members, who try criminal cases in court every day, are deeply affected by the breadth and scope of the prosecutorial discretion in venue selection. NACDL has a significant interest in guaranteeing criminal defendants their rights under the Venue and Vicinage Clauses of the United States Constitution, which is the central issue addressed in this brief.

SUMMARY OF ARGUMENT

The right to be tried in the state and district where an alleged crime occurred exists to protect criminal defendants. Although the venue right appears to be a significant hurdle for prosecutors, several factors—including broad statutory provisions, the rise of multi-

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[1] No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2 and 37.3, all parties received notice of *amicus curiae's* intent to file this brief.

state and cyber offenses, and a lower burden of proof—work to give prosecutors wide latitude in choice of venue. Only in those instances where a prosecutor clearly crosses the line or fails to make her case will courts find improper venue.

Current venue jurisprudence implicates the very harms the Framers sought to prevent. Overbroad discretion afforded to prosecutors in choosing venue already exposes defendants to significant costs, hardship, delay, and confusion caused by prosecutions in remote locations. Accepting the Eleventh Circuit's rule as the remedy for improper venue would only exacerbate the hardships endured by defendants and further erode the venue right. Vacatur tacitly permits prosecutorial forum shopping and increases the pressure on defendants to plead guilty rather than exercise their right to a jury trial.

Acquittal as a remedy necessarily mitigates both risks. Prosecutors are more likely to engage in forum shopping if there is no real consequence to an incorrect decision. Defendants, including innocent ones, are more susceptible to pleading guilty when faced with detention and trial in a remote location, far from home and convenient access to counsel and witnesses. This pressure becomes even greater when successfully challenging venue merely exposes them to another trial in another venue. Although adopting an acquittal remedy will not significantly diminish how favorable venue rules are for the government, it will backstop against the most egregious violations. In contrast, the Eleventh Circuit's rule incentivizes the Government to play fast-and-loose with the venue rule at the cost of considerable hardship to defendants.

ARGUMENT

I. PROSECUTORS HAVE NEAR UNFETTERED DISCRETION IN CHOOSING A TRIAL VENUE.

The Constitution's guarantees of a trial in a particular place, by a particular jury, serve "principally [as] a protection for the defendant." *United States* v. *Cabrales*, 524 U.S. 1, 9 (1998); see U.S. Const. Art. III; U.S. Const. Amendment VI. Yet, as *amicus* observes daily, these guarantees offer little defense at all. With the rise of the Digital Age, prosecutors routinely hale defendants—like Mr. Smith—across state lines to face trial for crimes when the defendant has never left his home state. But this Court has never endorsed a rule that the realities of the modern era erode the rights guaranteed by the Constitution. Cf. *Carpenter* v. *United* States, 585 U.S. __, 138 S. Ct. 2206, 2223 (2018) ("[T]he Court is obligated . . . to ensure that the 'progress of science' does not erode Fourth Amendment protections." (quoting *Olmstead* v. *United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J. dissenting), *overruled by Katz* v. *United States*, 389 U.S. 347 (1967))). Nor should it here. The Eleventh Circuit's decision, if endorsed, would render the venue right little more than a nullity.

1. As the master of the indictment, prosecutors enjoy several advantages in their selection of venue with direct effects on defendants. Typically, courts look to the "*locus delicti*" of the crime, which "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). At first glance, this appears a significant restraint. However, Congress has defined, and courts have interpreted, many offenses to have near boundless venue provisions. A continuing offense, for example, can be tried, in "any

district in which [the] offense was begun, continued or completed." 18 U.S.C. § 3237(a); see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 282 (1999). And a conspiracy occurs in any district "where an overt act" by any co-conspirator "in furtherance of the conspiracy was committed." *Whitfield* v. *United States*, 543 U.S. 209, 218 (2005); see also *Hyde* v. *United States*, 225 U.S. 347, 363 (1912). Prosecutors rarely lack options in their choice of venue.

Although defendants may challenge venue through a pretrial motion to dismiss, courts generally find that stage an inappropriate "vehicle for addressing the sufficiency of the government's evidence" on venue. *United States* v. *Menendez*, 831 F.3d 155, 176 n.3 (3d Cir. 2016); see *United States* v. *Engle*, 676 F.3d 405, 415 (4th Cir. 2012). With the law on the prosecution's side, cases can proceed through the pretrial process in dubious venues.

To be sure, prosecutors must justify their chosen venue at trial. But this also is no high hurdle. Unlike other factual inquiries necessary to obtain a conviction, prosecutors need only prove venue is proper by preponderance of the evidence. See, *e.g., United States* v. *Lukashov*, 694 F.3d 1107, 1113 (9th Cir. 2012); *United States* v. *Rommy*, 506 F.3d 108, 116–17 (2d Cir. 2007); *United States* v. *Strain*, 396 F.3d 689, 692 (5th Cir. 2005); *United States* v. *Taylor*, 828 F.2d 630, 631–33 (10th Cir. 1987); *United States* v. *Massa*, 686 F.2d 526, 527–29 (7th Cir. 1982). And if a defendant fails to object to a facially faulty indictment before trial, he waives his ability to challenge venue at all. See, *e.g.*, *United States* v. *Rodriguez-Lopez*, 756 F.3d 422, 430 (5th Cir. 2014); *United States* v. *Kelly*, 535 F.3d 1229, 1234 (10th Cir. 2008); *United States* v. *Novak*, 443 F.3d 150, 161 (2d Cir. 2006); *United States* v. *Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005).

Those cases when courts find venue improper validate the reality that prosecutors, at times, choose to bring cases where venue is tenuous, or even flatly wrong. See, *e.g.*, *United States* v. *Cabrales*, 524 U.S. 1, 2 (1998) (venue improper in Missouri under money laundering statue where charged conduct took place wholly in Florida); *United States* v. *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) *(*deeming venue improper in New Jersey where defendant was located in Arkansas and accessed servers in Texas and Georgia); *United States* v. *Purcell*, 967 F.3d 159, 167 (2d Cir. 2020) (government failed to introduce evidence establishing the defendant was in the Southern District of New York at the time of the offense).

2. This modern venue jurisprudence exposes defendants to the types of harms the Framers sought to prevent. Venue protects a defendant from "the most oppressive expenses" associated with "trial in a distant state or territory." 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833); see *United States* v. *Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part) ("[venue] constitutional provisions . . . were adopted . . . primarily, to deter government abuses of power") *rev'd on other grounds sub nom. Rodriguez-Moreno*, 526 U.S. 275. A deprivation of this right results only in "delay and confusion" for the defendant, *Johnston* v. *United States*, 351 U.S. 215, 221 (1956), while exposing him to the "unfairness and hardship" of trial in a remote place, *United States* v. *Cores*, 356 U.S. 405, 407 (1958).

These concerns are even more acute today. Given venue's increasingly malleable bounds, defendants are more susceptible to prosecution in remote places than ever before. A telephone call can result in prosecution in a particular district, even if the defendant never set foot there. See *United States* v. *Gonzalez*, 683 F.3d

1221, 1223 (9th Cir. 2012). A computer whiz from Arkansas who accesses servers in Texas and Georgia may wind up on trial in New Jersey. See *Auernheimer*, 748 F.3d at 529–31. A drug sale in Baltimore by a native Marylander who's never left the state becomes a conspiracy charged outside Harrisburg because the drugs wound up in Pennsylvania. See *United States* v. *Stallings*, No. 1:14-CR-69, 2015 WL 3646296 (M.D. Pa. June 10, 2015) (mem.). When prosecutors go beyond these already expansive boundaries, they render the constitutional restraints on venue a nullity.

II. ACQUITTAL NECESSARILY DISCOURAGES FORUM SHOPPING AND ALLEVIATES UNFAIR LEVERAGE IN PLEA BARGAINING.

A. Vacatur Incentivizes Prosecutorial Forum Shopping.

1. Acquittal as a remedy for a prosecutor's failure to make her showing tempers these risks. Not only is it consistent with the Framers' conception of the venue right, Pet. Br. at 7–9, it is also good policy. The Court has long expressed reservations about the dangers of forum shopping. See *Travis* v. *United States*, 364 U.S. 631, 633 (1961) ("[V]enue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." (citation omitted)); cf. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 447 (2004) ("This rule . . . serves the important purpose of preventing forum shopping . . . ."); however, a rule that does not impose meaningful consequences on prosecutors for their strategic choices encourages increasingly tenuous decisions.

A prosecutor can, and often does, steer criminal prosecutions to her chosen venue. Sometimes, this requires little more than a tweak to the indictment. Just as identical conduct may violate multiple provisions of

federal law, see *Blakely* v. *Washington*, 542 U.S. 296, 311 (2004) ("[G]iven the sprawling scope of most criminal codes . . . there is already no shortage of *in terrorem* tools at prosecutors' disposal."), so too can identical conduct require that a court conduct a wholly different venue analysis depending on the charge in the indictment.

Take as a hypothetical an individual who, in filling out his passport application, falsely indicates he is an American citizen, even going so far as to append a doctored birth certificate to the application as proof. The individual submits the application to his local post office just outside San Francisco, which receives the application and routes it to the National Passport Center in Portsmouth, New Hampshire. [2] Sensing fraud, the prosecutor may proceed in a number of ways: (1) she could charge the individual for making a material false statement, see 18 U.S.C. § 1001 (prohibiting "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . mak[ing] any materially false . . . statement"); or (2) she could indict the individual for the lesser known crime of passport fraud, see 18 U.S.C. § 1542 ("mak[ing] any false statement in an application for passport with intent to induce or secure the issuance of a passport"); or (3) she could charge both.

For the defendant, the ramifications of the prosecutor's choice are profound and dictate where the trial

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[2] In Fiscal Year 2019 alone, the National Passport Center in New Hampshire processed 7.1 million passport applications—39 percent of all passport applications processed nationwide. *See* Office of Inspector General, ISP-C-20-27, *Compliance Follow-Up Review: Targeted Review of Leadership and Management at the National Passport Center* 1 (2020).

can take place. Under § 1001, a substantial majority of courts have held that making a false statement gives rise to venue both in the district the statement was made as well as the district where the effect of the statement was felt. See, *e.g.*, *United States* v. *Clark*, 728 F.3d 622, 623–24 (7th Cir. 2013); *United States* v. *Coplan*, 703 F.3d 46, 79–80 (2d Cir. 2012); *United States* v. *Oceanpro Indus., Ltd.*, 674 F.3d 323, 329 (4th Cir. 2012); *United States* v. *Guillory*, No. 21-18, 2022 WL 1478977, at *2 (E.D. La. May 10, 2022); *United States* v. *Brennan*, 452 F. Supp. 3d 225, 230 (E.D. Pa. 2020); *United States* v. *Zweig*, No. 16-cr-00208-WHO-1, 2017 WL 3895708, at *5 (N.D. Cal. Sept. 5, 2017); *United States* v. *Baker*, No. A-13-CR-346-SS, 2014 WL 722097, at *4 (W.D. Tex. Feb. 21, 2014). But see *United States* v. *John*, 477 F. App'x 570, 572 (11th Cir. 2012); *United States* v. *Smith*, 641 F.3d 1200, 1207 (10th Cir. 2011) ("[T]he *locus delecti* [of an offense under § 1001] is where the defendant makes the false statement."). Courts construe venue more narrowly for offenses under § 1542, which lacks any materiality requirement. *United States* v. *Salinas*, 373 F.3d 161, 169 (1st Cir. 2004); cf. *United States* v. *Gu*, 8 F.4th 82, 88 (2d Cir. 2021) (violation of § 1542 complete when the passport application and supporting materials are submitted for review). This restrains prosecutors from seeking a passport fraud indictment in a district other than "the place of the false statement." *Salinas*, 373 F.3d at 169. But a smart prosecutor can avoid these constraints by simply charging the broader offense.

This scenario is more than a mere hypothetical. Following the events of September 11th, the United States Attorney's Office for the District of New Hampshire, which has jurisdiction over the National Passport Center, placed a renewed emphasis on prosecuting passport related offenses. See Testimony of the

U.S. Dep't of Just., Mark S. Zuckerman, Assistant United States Attorney for District of New Hampshire, https://bit.ly/3Ygx9cn (March 17, 2004), Until that point, the State Department routinely referred fraudulent applications to the United States Attorney's Office in the district the application was mailed. *Id.* at 3. But this was to no avail as the local offices tended to decline the cases. The District of New Hampshire soon filled this gap and encouraged "the State Department to refer as many passport fraud cases as possible" to that office. *Id.* at 4. But New Hampshire had no sooner become a hotspot for the passport-fraud defense bar than the First Circuit stepped in to put an end to the practice. See *Salinas*, 373 F.3d at 168 (finding venue improper in New Hampshire where defendant's false statement occurs in another district because the statute "creates a classic point-in-time offense")

Yet prosecutors never abandoned New Hampshire as a venue; it just stopped charging defendants under § 1542 entirely. Of course, prosecutors could have brought both charges in the district where the statement was made. Instead, "the government avoid[ed] the venue problem associated with passport fraud prosecutions by simply reindicting the underlying conduct as a § 1001 violation or, post-*Salinas*, initially indicting conduct that would be chargeable as passport fraud as a § 1001 violation instead." *United States* v. *Muratoski*, 413 F. Supp. 2d 8, 10 (D.N.H. 2005); see also *United States* v. *Mamadou*, No. 04-CR-225-1-SM, 2005 WL 984349 (D.N.H. April 27, 2005); *United States* v. *Elie,* No. 04-CR-222-SM, 2005 WL 1356077 (D.N.H. June 7, 2005); *United States* v. *White*, No. 04-CR-219-01-SM, 2005 WL 2093029 (Aug. 26, 2005). Even today, nearly two decades after *Salinas*, New Hampshire remains the epicenter for prosecutions of

all passport related crime. See *United States* v. *Pires*, 574 F. Supp. 3d 38, 39–40 (D.N.H. 2021).

2. Adopting the Eleventh Circuit's rule invites prosecutors to engage in even more creative endeavors because it fails to associate any consequence with incorrect choices. The right to a trial in a particular place does not protect only against adjudication by a foreign jury; it protects against facing the foreign jury at all. See *Cores*, 356 U.S. at 407 ("The 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."). Thus, a prosecutor infringes that right when she forces a defendant to stand trial in an improper court—often in a remote place, away from friends, family, and community. Only acquittal upon the prosecutor's failure to prove her case serves as an adequate remedy.

To be sure, prosecutors may have legitimate reasons to choose one forum over another. But an incorrect or careless choice violates a defendant's venue rights. This Court recognizes that *actual* abuse is not the only problem; rather, even "the *appearance* of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution" that cautions against unfettered discretion by the prosecution. *United States* v. *Johnson*, 323 U.S. 273, 275 (1944) (emphasis added); cf. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). An acquittal remedy protects against both. First, it discourages the very delay and confusion the *Johnston* Court cautioned against. And, second, it prevents the appearance of a system that "allow[s] its government to try the same individual for the same crime until it's happy with the result." *Gamble* v.

United States, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J. dissenting).

B. Acquittal Corrects an Imbalance at the Bargaining Table.

Requiring acquittal also reduces the guilty plea's gravitational pull in the criminal justice system. The plea bargaining process is "almost always the critical point for a defendant" in today's criminal justice system, *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012); see *Padilla* v. *Kentucky*, 559 U.S. 356, 373 (2010), as the government obtains almost all of its convictions via a guilty plea, see U.S. Sent'g Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 56 (2021) (98.3% of convictions in federal court result from a guilty plea). Given this reality, a prosecutor's choice of where and how to seek an indictment weighs greatly on a defendant's path through the system. Rachel E. Barkow, *The Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law*, 61 Stan. L. Rev. 869, 878 (2009) ("the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence"); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 400–15 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").

Even absent the preferred choice of venue, prosecutors have a stockpile of tools that tips the scales to their advantage. They possess "inherent information-gathering advantages," such as subpoena power and the "[general] respect for government authority," "greater financial and staff resources," and "tactical advantages." *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9

(1973). Moreover, significant aspects of the plea bargaining process take place without judicial oversight. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361–62 (1978) (rejecting judicial supervision over prosecutorial charging tactics that increase pressure to plead guilty). The cards are therefore stacked against defendants from the start, *Wardius*, 412 U.S. at 475 n.9; see *Lafler* v. *Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

When a prosecutor *does* proceed in an improper venue, it unfairly increases the pressure on a defendant to plead guilty for the very reasons that animated the Framers' concerns: it exposes defendants to the "unfairness and hardship involved when . . . [being] prosecuted in a remote place." *Cores*, 356 U.S. at 407. Vacatur of a conviction after trial does little to remedy this imbalance. Even the defendant absolutely certain of the prosecution's error lacks little incentive to raise a challenge as he will more likely than not face prosecution once more. Indeed, prosecutors may condition their plea offer on the defendant's waiver of all issues. Cf. *United States* v. *Calderon*, 243 F.3d 587, 590 (2d Cir. 2001) (a defendant's objection as to venue is waived upon entering a valid plea). So too may a defendant accept a plea to ensure a lower sentence. Post-trial sentences in federal court are "at least *double* the sentence imposed in cases where the defendant pled guilty, and . . . in cases involving mandatory minimum sentences, recidivist enhancements, or once-mandatory guidelines, the post-trial sentence can be much longer." Janeanne Murray, *Ameliorating the Federal Trial Penalty through a Systematic Judicial "Second Look" Procedure*, 31 Fed. Sentencing R. 279, 280

(2019); see also National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 6 (2018). Thus, defendants may waive their venue challenges to avoid the punitive nature of post-trial sentencing.

Even defendants who prevail once may face increased pressure to enter a plea upon a subsequent prosecution. The "agency costs, psychological pitfalls, and structural flaws" bridling the trial process would only be compounded by having to face them twice, in at least two different venues no less. See Stephanos Bibas, *Plea Bargaining's Role in Wrongful Convictions*, 157–62 (2014) [hereinafter "Bibas"]. Having already faced one jury, which presumably found the other elements of the offense sufficient, a defendant may prefer the certainty of a plea. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2509–12 (2004) (examining factors contributing to criminal defendant risk preferences). They are therefore more likely to join the 98.3% of federal convictions obtained through guilty pleas than exercise their right to a jury trial. Federal Sentencing Statistics Report, *supra*, at 56.

This incentive structure, or lack thereof, is especially concerning when considering the prospect of the innocent defendant pleading guilty. Nearly seventeen percent of wrongful convictions overturned have been based on guilty pleas. See Basic Patterns, Nat'l Registry of Exonerations http://bit.ly/3HtiR1l (last visited Jan. 19, 2023); Bibas, at 157–62. Even in white-collar prosecutions where defendants may have more abundant resources than the average criminal defendant, "trials carry enormous risk, and *even if innocent*, the best route may be to proceed with a finding of guilt or deferred prosecution." Ellen S. Podgar, *White Collar*

Innocence: Irrelevant in the High Stakes Risk Game, 85 Chi.-Kent L. Rev. 77, 79, 87 (2010) (emphasis added).

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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