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 FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals' agreement with petitioner's challenge to the venue for one count of his criminal jury trial required the court to direct acquittal on that count with no possibility of retrial in the correct district, or instead could permissibly be addressed by vacatur of the conviction and dismissal without prejudice of that count.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 22 F.4th 1236. The order of the district court (Pet. App. 19a-38a) is reported at 469 F. Supp. 3d 1249.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2022. A petition for rehearing was denied on February 16, 2022 (Pet. App. 39a). On May 10, 2022, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 16, 2022, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 13, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

U.S. Const. Art. III, § 2, Cl. 3 provides:

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

U.S. Const. Amend. VI provides in pertinent part:

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

18 U.S.C. 3232 provides:

> SEE FEDERAL RULES OF CRIMINAL PROCEDURE
>
> Proceedings to be in district and division in which offense committed, Rule 18.

Fed. R. Crim. P. 18 provides:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of theft of trade secrets, in violation of 18

U.S.C. 1832(a)(1), and transmitting a threat through interstate commerce with intent to extort a thing of value, in violation of 18 U.S.C. 875(d). Pet. App. 41a. The district court sentenced petitioner to concurrent 18-month terms of imprisonment on each count, to be followed by one year of supervised release. *Id.* at 43a-44a. The court of appeals vacated the theft conviction, affirmed the extortion conviction, and remanded for resentencing. *Id.* at 1a-18a.

1. Petitioner is a software engineer and avid fisherman who lives in Mobile, Alabama. Pet. App. 2a. In 2018, he discovered StrikeLines, a company based in Pensacola, Florida. *Ibid.* StrikeLines used sonar technology to map the precise coordinates of manmade, but little-known, fishing hotspots called "artificial reefs." *Ibid.* The company then stored the data for the coordinates on servers in Orlando, Florida, and sold the coordinates to fishermen through its website. *Id.* at 2a, 6a.

After learning of StrikeLines, petitioner repeatedly used a web application to "'infiltrate[]'" the company's website and wrote computer code to "'decrypt'" and obtain the company's otherwise nonpublic reef-coordinate data. Pet. App. 5a; see *id.* at 2a, 4a-5a. Petitioner sent that computer code from his computer in Alabama to StrikeLines' servers in Orlando, which, at petitioner's command, transmitted the company's proprietary data back to petitioner's computer. *Id.* at 12a; J.A. 75.

Petitioner then posted messages on Facebook bragging that he possessed "all of StrikeLines's coordinates" and inviting users to "'direct message'" him if they wanted access. Pet. App. 3a. He also contacted StrikeLines' owners to inform them that he had the private reef coordinates that StrikeLines sold on its website, and he offered to take down his posts, stop med-

dling with its proprietary data, and fix its security problem in exchange for "one thing"—the company's "deep grouper numbers," an apparently still-protected cache of data that would reveal the best spots to dive for such fish. *Id.* at 4a. StrikeLines eventually contacted law enforcement. *Id.* at 4a-5a.

2. A grand jury in the Northern District of Florida, where StrikeLines is located, indicted petitioner for intentionally accessing a protected computer without authorization and obtaining information valued in excess of $5000, in violation of 18 U.S.C. 1030(a)(2)(C) and (c)(2)(B)(iii); theft of trade secrets, in violation of 18 U.S.C. 1832(a)(1); and transmitting a threat through interstate commerce with intent to extort a thing of value, in violation of 18 U.S.C. 875(d). J.A. 1-5.

The government later explained that it prosecuted petitioner's theft count in the Northern District of Florida because two elements of the crime—that the theft "benefit[] those other than the owner of the trade secret" and that it "injur[e] the owner of the trade secret"—resulted in effects felt by StrikeLines at its Pensacola headquarters. J.A. 49 (government's memorandum of law); see J.A. 50 n.4 (explaining that "[w]hen Congress defines the essential conduct elements of a crime in terms of their particular effects, venue will be proper where those proscribed effects are felt") (citation omitted); cf. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 279 n.2 (1999) (expressing no opinion on the effects test). The government further explained that the "trade secrets themselves" were "coordinates located in the Gulf of Mexico that physically fall within the venue of the Northern District of Florida." J.A. 50.

3. Before trial, petitioner moved to dismiss the indictment, contending that the Northern District of

Florida was not a proper venue for the computer-fraud and theft counts because his alleged crimes occurred in the Southern District of Alabama, where he lived, and in the Middle District of Florida, where the servers storing the computer data that he accessed and obtained were located. See Pet. App. 6a. He also argued that venue did not lie in the Northern District of Florida for the extortion count because venue was improper on his other two counts. *Ibid.*

Petitioner's motion relied on the constitutional provisions concerning where a criminal defendant may be tried and where the jurors that try him must reside. Article III's Venue Clause states that the defendant's "Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, Cl. 3. And the Sixth Amendment's Vicinage Clause guarantees a criminal defendant the right to 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. Rule 18 of the Federal Rules of Criminal Procedure accordingly provides that the government generally "must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18; see 18 U.S.C. 3232.

The district court denied petitioner's pretrial motion without prejudice, explaining that the indictment adequately alleged venue and that "any determination by the Court as to whether the Government's evidence is sufficient to support a finding of venue must * * * await trial." J.A. 12. Petitioner accordingly renewed his venue objection at trial. See Pet. App. 7a. The court denied that motion as to the extortion count, reserved its ruling on the other two counts, and submitted the

case to the jury with an instruction that "[i]f the Government has failed to establish proper venue for any count in the Indictment by a preponderance of the evidence, you must find the Defendant not guilty as to that count." J.A. 29; see Pet. App. 7a.

The jury found petitioner not guilty on the computer-fraud count, but guilty on the theft and extortion counts. See Pet. App. 7a. In accord with the jury's verdict, the district court thereafter denied petitioner's venue motion, *id.* at 25a-30a, 35a & n.26, and sentenced him to concurrent 18-month terms of imprisonment on each count, to be followed by one year of supervised release, *id.* at 43a-44a.

3. The court of appeals affirmed in part, vacated in part, and remanded for resentencing. Pet. App. 1a-18a.

The court of appeals vacated petitioner's theft conviction, agreeing with petitioner's contention that his prosecution on that count had taken place in an impermissible venue. Pet. App. 10a-15a. The court took the view that "[t]he essential conduct element of [that offense] is that the defendant must steal, take without authorization, or obtain by fraud or deception trade-secret information." *Id.* at 11a-12a. The court noted that, in stealing the trade secrets at issue here, petitioner "remained in Mobile, which is in the Southern District of Alabama," while the data he stole "was taken from servers located in the Middle District of Florida." *Id.* at 12a. The court concluded that prosecution in the Northern District of Florida was improper "because [petitioner] never committed any essential conduct in that location." *Ibid.* The court declined, however, to resolve whether petitioner's prosecution would have been appropriate in the Middle District of Florida. See *ibid.*

Neither the Constitution, nor any statute, nor any Rule of Criminal Procedure, specifies a remedy for a trial held not in conformance with the venue or vicinage requirements. Relying on its precedent, the court of appeals explained that, in these circumstances, the appropriate remedy was "vacatur of the conviction, not acquittal or dismissal with prejudice." Pet. App. 15a; see *ibid.* ("The Double Jeopardy clause is not implicated by a retrial in a proper venue after we vacate a conviction for improper venue."). The court therefore directed the vacatur of petitioner's theft conviction and remanded for resentencing on petitioner's extortion conviction. *Ibid.*

4. The government has stated that as long as petitioner's sentence on the extortion count "approaches or equals" his original sentence on that count, "the United States has no intention to recharge petitioner on the trade-secrets-theft count in a different district." Br. in Opp. 10. Petitioner's resentencing hearing is currently scheduled for April 13, 2023. D. Ct. Doc. 148 (Feb. 6, 2023).

SUMMARY OF ARGUMENT

Both before and after the Constitution's adoption, a prosecution in the wrong venue did not preclude retrial in the right venue. Petitioner offers no sound reason to change course and require that a factually guilty defendant go free whenever an appellate court concludes that the government, district court, and jury have made a venue mistake.

A. For centuries before the founding, English courts held that a defendant may be retried following an initial trial in the wrong venue or before a jury not of the proper vicinage. Legal scholars recognized that such circumstances would constitute a mistrial, which has

never precluded subsequent prosecution. Because juries and courts could not take cognizance of crimes committed outside their territorial domain (typically a county), a prosecution in the wrong venue never placed the defendant in actual jeopardy of life or limb.

That common-law understanding carried over to this country, where courts, jurists, and legal scholars agreed that an acquittal before a court lacking that species of territorial jurisdiction was no bar to a subsequent indictment and trial in a court that did have jurisdiction. The approach that petitioner urges is thus deeply ahistorical, and petitioner makes no meaningful effort to show otherwise.

B. Consistent with historical practice, this Court's precedents on constitutional remedies support retrial as a remedy for a trial in the wrong venue. Retrial is the default remedy for nearly every prejudicial or structural constitutional trial error, including violations of the Sixth Amendment—and, specifically, its guarantee of trial before an impartial jury. A retrial free of the identified error deprives the government of any prejudicial benefit from the first trial, while at the same time protecting society's interest in trying those accused of crimes and punishing those whom a jury has found guilty.

Petitioner provides no good justification for treating the venue right any differently. He asserts that venue, listed twice in the Constitution, is of paramount importance, and that it is concerned not just with the outcome of trial, but with the process of trial. But many, if not all, constitutional rights are important, yet their deprivation does not automatically require the drastic remedy of acquittal without possibility of retrial. And that holds true for process-related rights, including

ones directly analogous to venue and vicinage—such as those addressing the composition of the jury.

Petitioner's reliance on the Speedy Trial Clause, for which dismissal without retrial is the standard remedy, is misplaced. This Court has made clear that the right to a speedy trial is fundamentally different from the other rights of an accused and thus warrants a different remedy. Precluding retrial in the context of a speedy-trial claim may be justified because the remedy for a trial that came too late should not be a second trial that would by definition come even later. In contrast, a second trial before a fresh jury in the correct district would entirely cure the taint of an earlier trial in the wrong district.

C. Petitioner suggests that the overriding purpose of the Venue and Vicinage Clauses is to avoid a defendant's "being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood," Br. 25 (citation omitted), and that a retrial in the correct district can never make a defendant whole. But the principal original purpose of the venue and vicinage requirements actually was the long-since-abandoned one of ensuring that the jury was familiar with the accused and the events surrounding the crime. Another original purpose, and the one at the center of the Framers' debates on the issue, was to allow the jurors to serve as the conscience of the community through the interpretation of law. But this Court has long since held that jurors have no right to decide questions of law in the first place.

Moreover, the Venue and Vicinage Clauses do not actually protect against the expense or inconvenience of standing trial in a faraway place. They guarantee a trial where the crime was committed, not where the defend-

ant resides, and crimes (especially over the internet) can be committed far from home. Petitioner's reliance on the costs of a first trial also proves too much. Parties incur those costs every time a judgment is reversed for prejudicial or structural error, but such sunk costs have never been deemed a sufficient reason to preclude retrial. And a venue mistake could—as in this case—result in a trial closer to a defendant's home than a permissible alternative.

Petitioner's other remaining arguments are equally flawed. Petitioner relies heavily on an analogy to a general not-guilty verdict in a case in which the issue of venue was submitted to the jury, which would preclude retrial. But this Court has long distinguished general jury verdicts from appellate reversals. Even though jury acquittals preclude retrial under principles of double jeopardy, only appellate reversals for insufficient evidence—*i.e.*, those related to factual guilt or innocence—carry that consequence.

Petitioner also suggests that only his categorical rule can meaningfully guard against government abuses, such as serial trials in a succession of improper venues. But vacatur of the conviction is ample deterrent against such bad-faith behavior; the government lacks the time and resources to deliberately risk obtaining a verdict that will simply be set aside on venue grounds and necessitate a do-over. Neither petitioner nor any amici have cited an example of a case suggesting that the government has intentionally harassed a defendant through multiple serial trials, even though a majority of courts have long rejected his categorical remedial rule.

Finally, petitioner and amici assert that allowing retrial following a reversal for improper venue would deter defendants from challenging venue or induce them

to plead rather than stand trial, but they provide no empirical support for those assertions. And even if some defendants are deterred, it would not justify imposing a drastic remedy at odds with hundreds of years of precedent and historical practice.

ARGUMENT

A VENUE ERROR REQUIRES VACATUR OF THE CONVICTION, NOT THE PRECLUSIVE ACQUITTAL OF A DEFENDANT FOUND FACTUALLY GUILTY

The remedy for a trial in the wrong venue is a trial in the right venue. Retrial is the remedy for every analogous constitutional trial error—including errors in the composition of the jury—and is the one prescribed by historical practice and this Court's precedents. Petitioner's contrary rule, which would grant factually guilty defendants a windfall preclusive judgment for venue errors, lacks textual, precedential, or logical justification. The Court should reject petitioner's rigid proposal and affirm the judgment below.

A. Retrial In A Proper Venue Is The Traditional Remedy For A Venue Error

As petitioner recognizes, "the Constitution does not articulate a remedy for a violation of" either the Sixth Amendment's Vicinage Clause or Article III's Venue Clause. Br. 22 (emphasis omitted). The Vicinage Clause simply guarantees trial by "an impartial jury of the State and district" where the crime was committed, U.S. Const. Amend. VI, while the Venue Clause similarly just directs that any federal criminal trial be held "in the State" of the federal crime, U.S. Const. Art. III, § 2, Cl. 3. Nor is a remedy specified in the remaining constitutional text, any federal statute, or any federal rule. See Fed. R. Crim. P. 18 (encapsulating require-

ment to "prosecute an offense in a district where the offense was committed" without specifying remedy); see also 18 U.S.C. 3232. But before, during, and after the framing, it was well understood that those sorts of errors resulted in a relocated trial with a properly constituted jury, not complete and preclusive acquittal. See, *e.g.*, *Houston Community College System* v. *Wilson*, 142 S. Ct. 1253, 1259 (2022) ("When faced with a dispute about the Constitution's meaning or application, 'long settled and established practice is a consideration of great weight.'") (brackets and citation omitted); *Williams* v. *New York*, 337 U.S. 241, 246 (1949) (looking to "practice[s]" of "courts in this country and in England" "both before and since the American colonies became a nation").

1. Since long before the founding, English courts have held that a defendant may be retried following an initial trial in the wrong venue or before a jury not of the proper vicinage. One well known example is the late sixteenth-century decision in *Arundel's Case*, (1594) 77 Eng. Rep. 273 (K.B.); 6 Co. Rep. 14a. The defendant there was indicted for a murder that allegedly occurred in the city of Westminster, in the parish of St. Margaret. See *id.* at 274; 6 Co. Rep. at 14a-14b. The jury that found him guilty came from the city of Westminster generally, not the parish in particular. See *ibid.* The court held that the jury was incorrectly constituted, explaining that "for this cause the venue shall be rather of the parish than of the city." *Id.* at 274; 6 Co. Rep. at 14b. And as a remedy, "it was awarded that the trial was insufficient, and a new *venire facias* awarded to try the issue again." *Ibid.*

The same remedial rule remained in the English common-law throughout the eighteenth century. See

2 Matthew Hale, *The History of the Pleas of the Crown* 244-245 (First Am. ed. 1847) (Hale). Sir Edward Coke's seventeenth-century treatise explained, and cited cases illustrating, that "if the jury commeth out of a wrong place * * * and give a verdict," that would constitute "a mistryall." 1 Edward Coke, *First Part of the Institutes of the Laws of England* § 193, at *125a (1628) (Hargrave & Butler eds., 19th ed. 1832) (Coke); see *Tharold* v. *Spight*, (1623) 79 Eng. Rep. 585 (K.B.) 586; Cro. Jac. 676, 676 (declaring a "mis-trial"); Coke § 193, at *125a n.(d) (citing additional cases, including *Arundel's Case*). Commentors on Coke's Institutes likewise recognized that a venue or vicinage violation would constitute only a mistrial. See, *e.g.*, Coke § 193, at *125a n.2 (editor's note observing that "if the visne [vicinage] appeared on the record to be from a wrong place," it was "a mis-trial, and a good ground for a motion to arrest the judgment, or for reversing it by error").

The Framers would therefore have understood that the rights codified in the Venue and Vicinage Clauses were ones whose violation was amenable to a retrial. This Court has long "cited Sir Edward Coke's Institutes of the Laws of England" as an authoritative source for "the Framers' comprehension of the right as it existed at the founding." *Betterman* v. *Montana*, 578 U.S. 437, 442 (2016); see *Klopfer* v. *North Carolina*, 386 U.S. 213, 225 (1967) ("Coke's Institutes were read in the American Colonies by virtually every student of law."). And a mistrial has never precluded retrial, either in England or the United States. See, *e.g.*, *Evans* v. *Michigan*, 568 U.S. 313, 326 (2013); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.); *Rex* v. *Fowler*, (1821) 106 Eng. Rep. 937 (K.B.) 939, 4 B. & Ald. 273, 275-276; *Tharold*, 79 Eng. Rep. at 586; Cro. Jac. at 676;

see also Hale 243, 251; 2 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 36, § 15, at 379 (2d ed. 1724) (Hawkins).

2. The underlying rationale of the rule was that a court in the wrong venue had no power to try or convict on the extraterritorial crime, and thus a defendant tried in the wrong venue and "acquitted" on that ground could not raise that acquittal as a bar to a subsequent prosecution in the proper venue. As petitioner appears to acknowledge (*e.g.*, Br. 5, 31-32), "all Indictments [we]re local" in the pre-founding era, Hawkins ch. 35, § 3, at 370, and therefore if the evidence at trial revealed that a defendant's crime occurred outside the county in which the indictment lay, the defendant was to be "acquitted," *id.* ch. 25, § 34, at 220. But that "acquittal" did not entitle a defendant to rely on the plea of *autrefois acquit* to bar a subsequent prosecution for the same crime in a proper county. See *id.* ch. 35, § 3, at 370.

At the time, a tribunal was thought to lack the power to take notice of crimes committed in another venue (such as another county). As Hale observed, "the justices in the county of *B.* can only inquire touching a felony in that county," so an acquittal in county *B.* on the ground that the felony was committed in "the county of *C.*" would not preclude subsequent prosecution in county *C.* Hale 245; see Drew Kershen, *Vicinage—Part I*, 29 Okla. L. Rev. 803, 811 (1976). Likewise, "neither c[ould] the grant inquest or petit jury in the county of *D.* take notice of any felony committed in the county of *C.*" Hale 245 (emphasis omitted); see Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. Rev. 1658, 1675-1676 & n.86 (2000).

Because the first indictment was "laid in an improper County, the Defendant could not be found guilty upon

it, and consequently was in no Danger of his Life." Hawkins ch. 35, § 3, at 370. A venue-based acquittal therefore did not "Bar * * * a subsequent Indictment in the proper County." *Ibid.*; see Hale 245 (explaining that the plea of *autrefois acquit* did not apply when a defendant was acquitted of a robbery "in the county of *B.* and * * * acquitted" and then later "indicted in the county of *C.*"); Hale 255 n.1 ("An acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county."); cf. *Vaux's Case*, (1591) 76 Eng. Rep. 992 (K.B.) 994; 4 Co. Rep. 44a, 45a (defendant could be "again indicted and arraigned" when original indictment was "insufficient").

For example, in *Rex* v. *Welsh*, (1827) 168 Eng. Rep. 1231 (Crown); 1 Mood. 175, a jury in Southwark was directed to acquit the defendant on larceny charges when it became apparent that the felony had been committed in London. *Id.* at 1231; 1 Mood. at 175-176. After being reindicted for the same act at the Old Bailey (by a London grand jury), the defendant attempted to plead *autrefois acquit*. *Id.* at 1231; 1 Mood. at 176. The Recorder overruled that plea, explaining that the Southwark court of quarter sessions had "limited jurisdiction" and "had not the power" to "summon a jury" to try the defendant's London crime. *Ibid.* The ruling was reserved, and the judges later unanimously agreed "that the plea was properly overruled." *Id.* at 1232; 1 Mood. at 177-178.

3. The same principles were incorporated into the legal practices of the United States. In an early decision in the civil context, this Court instructed that "the remedies in the courts of the United States[] are to be" administered "according to the principles of common

law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles"—*i.e.*, England. *Robinson* v. *Campbell*, 16 U.S. (3 Wheat.) 212, 222-223 (1818); cf. *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1032 (2020) (accepting premise that deeply rooted common-law principles likewise inform permissible criminal rules, but finding common law "messy" and indeterminate there). That practice was also followed in the context of remedies for an erroneous criminal venue.

As Justice McLean observed in 1839, it had been "laid down in all the authorities, that if the court have not jurisdiction, * * * or the jury have not been legally summoned, the defendant, though tried, cannot be considered as having been in jeopardy." *United States* v. *Keen*, 26 F. Cas. 686, 690 (C.C.D. Ind.); see *United States* v. *Jackalow*, 66 U.S. (1 Black) 484, 486-488 (1861) (treating venue as jurisdictional and ordering new trial); 4 William Blackstone, *Commentaries on the Laws of England* 368-369 (1769) (explaining that even after trial, a defendant may "offer any exceptions to the indictment" and, "if the objections be valid, the whole proceedings shall be set aside, but the party may be indicted again"); cf. 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816) (Chitty) ("[I]t is now settled that a legal acquittal in any court whatsoever, *having competent jurisdiction to try the charge*, will be sufficient to preclude any subsequent proceedings before every other tribunal.") (emphasis added).

Chief Justice Marshall, during Aaron Burr's trial in Virginia for levying war against the United States, noted the common-law rule that failure to prove venue leads to "acquittal" in that defective venue. See *United States* v. *Burr*, 25 F. Cas. 187, 196 (C.C.D. Va. 1807) (cit-

ing Hawkins ch. 25, § 35). And after Burr's acquittal, Chief Justice Marshall wrote a letter to Justice Cushing in which, after grappling with the issue, he expressed the view that Burr probably could "be again indicted in Kentucky" for treasonous acts committed therein, though he also expressed concerns with that legal rule. Letter from John Marshall to William Cushing (June 29, 1807), reprinted in 7 *The Papers of John Marshall* 60, 61 (Charles Hobson ed. 1993). Justice Story subsequently took a similar legal view, relying without any evident reservation on *Arundel's Case* (among other authorities) as support for the proposition that "there are cases where there may be a new trial; as in cases of a mis-trial *by an improper jury*." *United States* v. *Gibert*, 25 F. Cas. 1287, 1302 (D. Mass. 1834) (emphasis added).

Over the course of the nineteenth century, other American courts and legal scholars solidified the proposition that an "acquittal" because of a lack of venue did not bar a subsequent prosecution for the same crime in a proper venue. See *Holmes* v. *Oregon & California R. Co.*, 9 F. 229, 239 (C.C.D. Or. 1881) (recognizing that a judgment of acquittal from the wrong county would not bar a subsequent prosecution in the proper county); Francis Wharton, *A Treatise on the Criminal Law of the United States*, Bk. 1, ch. VII(3), at 139 (1846) ("An acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county."); Chitty 454 (explaining that the plea of *autrefois acquit* could not bar reprosecution in a different "county" because "one indictment must be bad, since the offence will be proved to be beyond the jurisdiction of the grand jury"); cf. *Ball* v. *United States*, 163 U.S. 662, 669 (1896) ("An acquittal before a court having no jurisdiction is, of course, like all the proceedings in

the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."). State courts likewise endorsed that rule. See, *e.g.*, *Campbell* v. *People*, 109 Ill. 565, 571 (1884); *Methard* v. *State*, 19 Ohio St. 363, 367 (1869).

4. The proposition continued to prevail throughout the twentieth and twenty-first centuries. Modern understandings of "jurisdiction," as applied to venue and vicinage, have moved away from treating them as matters of subject-matter jurisdiction, see Kershen, *Vicinage—Part II*, 30 Okla. L. Rev. 1, 42 (1977), and instead moved toward treating them as waivable rights (like personal jurisdiction), see *Singer* v. *United States*, 380 U.S. 24, 35 (1965); cf. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). All the while, courts have continued to recognize that retrial remains an appropriate remedy for a deprivation of those rights.

Federal courts of appeals, for example, have widely recognized that an appellate reversal for failure to prove venue at trial does not bar a new prosecution in a proper locale. See, *e.g.*, *United States* v. *Brennan*, 183 F.3d 139, 149, 151 (2d Cir. 1999); *United States* v. *Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019); *United States* v. *Hernandez*, 189 F.3d 785, 792 & n.5 (9th Cir. 1999), cert. denied, 529 U.S. 1028 (2000); *Wilkett* v. *United States*, 655 F.2d 1007, 1012 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); *Haney* v. *Burgess*, 799 F.2d 661, 662 (11th Cir. 1986) (per curiam); *United States* v. *White*, 887 F.2d 267, 272 n.5 (D.C. Cir. 1989) (R.B. Ginsburg, J.). Petitioner cites one case each from the Fifth and Eighth Circuits that he views as suggesting otherwise, see Pet. 15-17, but his view of them is mistaken, see Br. in Opp. 19-22.

Even if his characterization of those cases were correct, however, the Eighth Circuit decision is unreasoned, see *United States* v. *Greene*, 995 F.2d 793, 801 (1993), and the Fifth Circuit decision relied on the proposition that venue is "a constitutionally-imposed *element* of every crime," *United States* v. *Strain*, 407 F.3d 379, 380 (2005) (per curiam) (emphasis added)—a proposition that petitioner no longer defends, compare Pet. 25-28 and Cert. Reply Br. 11, with Pet. Br. 38, and that even the Fifth Circuit appears to have abandoned, see *United States* v. *Lee*, 966 F.3d 310, 320 n.2 ("[V]enue [is] not * * * an element of the offense or an issue that goes to guilt."), cert. denied, 141 S. Ct. 639 (2020). The venue and vicinage rights place an additional requirement on a prosecution; they are not themselves part of the crime.

Although not bound by Article III or the Vicinage Clause, most state courts, including in States whose constitutions include similar venue or vicinage provisions, have agreed that an improper venue does not preclude subsequent prosecution in the correct venue. See, *e.g.*, *Ward* v. *State*, 77 Ark. 19, 19 (1905); *People* v. *Anderson*, 47 Cal. 4th 92, 120 (2009), cert. denied, 559 U.S. 941 (2010); *Powell* v. *State*, 132 Fla. 659, 660 (1938); *Grier* v. *State*, 275 Ga. 430, 431 (2002); *Derry* v. *Commonwealth*, 274 S.W.3d 439, 444-445 (Ky. 2008); *Fabian* v. *State*, 284 So. 2d 55, 56 (Miss. 1973); *State* v. *Johnson*, 156 N.H. 148, 157-158 (2007); *State* v. *Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990);* see also 1 Joel Prentiss Bishop, *Bishop On Criminal Law*, § 1053, at 777 (9th

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* As far as the government can tell, Wisconsin is the only State whose courts have expressly held that reversal of a conviction for improper venue precludes a retrial. See *State* v. *Schultz*, 329 Wis. 2d 424, 431 (Wis. App. 2010).

ed. 1923) ("If the acquittal is by reason of the indictment being brought in the wrong county, it will not bar fresh proceedings in the proper county.").

5. Although petitioner extensively recounts the history of the venue and vicinage *rights* (*e.g.*, Br. 3-10, 21-28, 31-36), he does not address any of the history with respect to remedies. That history, however, illuminates not only the retrial-permissive understanding of the Framers—and the generations of courts and scholars both before and after—but also the rationale that underlay it. And that rationale identifies double-jeopardy principles—the set of principles that include the plea of *autrefois acquit*—as the lens through which this issue has been viewed, litigated, and produced a rule contrary to the one petitioner advocates. See pp. 14-15, *supra*; see also, *e.g.*, *United States* v. *Scott*, 437 U.S. 82, 87 (1978) (explaining that the Double Jeopardy Clause had its origin in the three common-law pleas of *autrefois acquit, autrefois convict*, and pardon).

In his petition for a writ of certiorari, petitioner's principal argument was that a failure to establish venue "should produce * * * acquittal and preclusion of a subsequent prosecution under the Double Jeopardy Clause." Pet. 26. And although his opening brief now asserts that the Court should adopt his position "regardless of whether the Double Jeopardy Clause would, standing alone, bar reprosecution," Br. 44, double-jeopardy-like concerns, such as the asserted hardships and unfairness of multiple trials, continue to animate his argument, see, *e.g.*, Br. 24-30, 35-40. Indeed, he relies specifically on double-jeopardy precedents to urge that a "fail[ure] to prove venue" be treated the "same" as "insufficiency of the evidence." Br. 39 (citing, *inter alia*, *Burks* v. *United States*, 437 U.S. 1, 11 (1978)).

History and logic thus both point to the Double Jeopardy Clause as the closest remedial analogue to the Venue and Vicinage Clauses, and "under the Double Jeopardy Clause," Pet. 26, a venue-based "acquittal" was effective only in the original incorrect venue of prosecution—not in a correct one. The Venue and Vicinage Clauses define procedural prerequisites that are distinct from the "crime" itself. U.S. Const. Amend VI; see U.S. Const. Art. III, § 2, Cl. 3 ("Crimes"). And it would be quite anomalous to read Article III and the Sixth Amendment's collective *silence* as to remedies as creating a constitutional prohibition on reprosecution in circumstances where the specific and express protection in the Double Jeopardy Clause would allow it. Cf. *Albright* v. *Oliver*, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring in the judgment).

B. This Court's General Precedents On Constitutional Remedies Support Retrial As The Remedy For Trial In An Improper Venue

Although this Court has not directly decided the question presented here, its general remedial jurisprudence illustrates that retrial in a proper venue is an appropriate remedy for a venue error. As a general matter, it "has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events." *United States* v. *Ewell*, 383 U.S. 116, 121 (1966). That remedy "den[ies] the prosecution the fruits of its transgression," *United States* v. *Morrison*, 449 U.S. 361, 366 (1981), while protecting the "societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial," *Ewell*, 383 U.S. at 121. "It would be a high price indeed for society to pay were every accused granted immunity

from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). Nothing about the Vicinage or Venue Clauses requires society to pay that price whenever a vicinage or venue error occurs.

1. Acquittal without possibility of retrial is not required when an appellate court finds a violation of the Vicinage Clause. This Court has instructed that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. The Court's "approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances." *Id.* at 365. Accordingly, this Court has recognized that the remedy for nearly every claim of prejudicial or structural Sixth Amendment error—including violations of some of the most fundamental guarantees in our criminal justice system—is a new trial without that error, not acquittal with no possibility of retrial.

For example, when a defendant is "totally denied the assistance of counsel at his criminal trial," in complete violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the cure is to reverse the conviction and permit the government "to proceed with a new trial" at which the defendant will have counsel's assistance. *Morrison*, 449 U.S. at 364-365. Similarly, when "the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is * * * to order a new trial if the evidence has been wrongfully admitted and the defendant convicted." *Id.* at 365 (citing *Gilbert* v. *Cali-*

fornia, 388 U.S. 263 (1967), *United States* v. *Wade*, 388 U.S. 218 (1967), and *Massiah* v. *United States*, 377 U.S. 201 (1964)).

The same retrial remedy attends various jury-related errors: conviction by a non-unanimous jury, see *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1408 (2020); an undersized jury, see *Ballew* v. *Georgia*, 435 U.S. 223, 239 (1978) (plurality opinion); *id.* at 245 (White, J., concurring in the judgment); *id.* at 246 (Powell, J., concurring in the judgment); a jury selected from a locally unrepresentative venire, see *Glasser* v. *United States*, 315 U.S. 60, 87 (1942); and a jury that included a racially biased juror, see *Peña-Rodriguez* v. *Colorado*, 580 U.S. 206, 228 (2017). The retrial remedy is likewise applicable to the denial of other Sixth Amendment rights that are adjacent to the right to a jury trial, like confrontation rights, see *Richardson* v. *Marsh*, 481 U.S. 200, 209 (1987), and the right to a public proceeding, see *Waller* v. *Georgia*, 467 U.S. 39, 49-50 (1984); see also *Morrison*, 449 U.S. at 364-365 (collecting Sixth Amendment examples).

The retrial remedy additionally applies to various non-Sixth Amendment trial rights based in the Constitution, including rights regarding racially biased exclusion of jurors. See *Batson* v. *Kentucky*, 476 U.S. 79, 99 & n.24 (1986); see also, *e.g.*, *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (*Miranda* violation); *Alderman* v. *United States*, 394 U.S. 165, 187 (1969) (Fourth Amendment violation); *Grunewald* v. *United States*, 353 U.S. 391, 424 (1957) (violation of Fifth Amendment right against self-incrimination). In all of the aforementioned cases, the remedy is to provide a new trial free of the identified error. Indeed, sometimes the remedy "appropriate to the violation" is not even a full new trial,

but simply a redo of the specific proceeding in which the error arose, to avoid granting a "windfall for the defendant" that is "not in the public interest." *Waller*, 467 U.S. at 50.

Like the remedies for the rights listed above, the remedy for having been tried by a jury from the wrong district should be a trial by a jury from the right district. The Vicinage Clause guarantees trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. A retrial would provide exactly that. Vacatur of the conviction, with the possibility of a retrial, is thus precisely "tailored to the injury suffered from the constitutional violation" without providing the defendant a windfall or otherwise "infring[ing] on competing interests," such as "society's interest in the administration of criminal justice," *Morrison*, 449 U.S. at 364; see *Waller*, 467 U.S. at 50, in conformance with this Court's general analytical approach to constitutional remedies.

2. The same is true for a violation of the Venue Clause. As an initial matter, this case technically involves only a violation of the Vicinage Clause. In the district court, petitioner recognized that venue would have been proper in the Middle District of Florida, where the StrikeLines servers were located, J.A. 39 (asserting that "venue was proper" in "the Middle District of Florida"); J.A. 64 (similar), and the court of appeals declined to address that issue, Pet. App. 12a. If venue was proper in the State's Middle District, then petitioner's trial in the State's Northern District necessarily was "held in the State where the said Crimes shall have been committed," U.S. Const. Art. III, § 2, Cl. 3, thereby satisfying the Venue Clause. The lower courts did not decide otherwise. Cf. *Cutter* v. *Wilkinson*, 544

U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioner himself recognizes that the two clauses are an intertwined package, and simply refers throughout his brief to the Sixth Amendment and Article III as providing a single, undifferentiated "venue right." As this case illustrates, because a jury generally must come from the district in which the court holding the trial convenes, see 28 U.S.C. 1861 and 1863(b), any requirement that a jury come from a particular district would, as a practical matter and absent unusual circumstances, also require that the trial be held in the same district. In that sense, although they are theoretically distinct, the venue and vicinage requirements have long been "inextricably linked" as a practical and legal matter. Kershen et al. Amici Br. 4; cf. *United States* v. *Anderson*, 328 U.S. 699, 703 (1946) (describing "the Sixth Amendment's command that *trials shall be* in the 'State and district wherein the crime shall have been committed'") (emphasis added). Accordingly, there is no good reason—and petitioner provides none—to interpret the Venue Clause to have a broader remedial scope than the Vicinage Clause.

3. Petitioner likewise provides no sound basis to treat the venue and vicinage rights differently from all of the constitutional trial rights for which retrial is an appropriate remedy. He suggests (Br. 20) that because the Constitution "protects the venue right twice over" (in both the Venue and Vicinage Clauses), the issue has "paramount importance." But many, if not all, constitutional rights are of paramount importance, yet the deprivation of those rights does not necessarily require any particular remedy, much less the drastic remedy that petitioner urges for violation of venue rights. The venue

right may have some built-in redundancy, but even the Vicinage Clause's later-enacted, more restrictive ("State and district") version does not specify a remedy. If the Framers in fact intended to override the common law by requiring any violation to result in a complete and preclusive acquittal, the language that they chose twice over was a very obscure way to convey that intent—and it apparently escaped the notice of Justice Story, Justice McLean, and other contemporary legal authorities. See pp. 16-17, *supra*.

Petitioner suggests (Br. 24-25, 28) that venue and vicinage have a different, process-based rather than outcome-based, focus that distinguishes them from the many rights whose violation allows for retrial. But the vicinage right, which requires the jury to have a certain characteristic (namely, that it comprise jurors residing in a particular district) is directly analogous to other constitutional rights requiring the jury to have certain demographic characteristics, such as the rights guaranteeing selection from a fair cross-section of the community, see *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975); free of an unwarranted and structurally biased qualification requirement, see *Glasser*, 315 U.S. at 87; and without exclusion of potential jurors based on race, see *Batson*, 476 U.S. at 99. Those rights likewise "'serve multiple ends,' only one of which [i]s to protect individual defendants." *Georgia* v. *McCollum*, 505 U.S. 42, 48 (1992) (citation omitted) (discussing *Batson*). And the appropriate remedy for a trial before a jury that lacks one or more of the guaranteed characteristics is a trial before a jury that has those characteristics.

4. Petitioner's reliance (Br. 28-29) on the Sixth Amendment's Speedy Trial Clause—as to which "dismissal of an indictment" without retrial "must remain

* * * 'the only possible remedy,'" *Strunk* v. *United States*, 412 U.S. 434, 439-440 (1973) (quoting *Barker* v. *Wingo*, 407 U.S. 514, 522 (1972))—is misplaced. The Court has made clear that the "right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker*, 407 U.S. at 519. Accordingly, in the specific context of remedies, the Court has expressly distinguished the guarantee of a speedy trial from "some of the other guarantees of the Sixth Amendment," such as "a public trial, an impartial jury, notice of charges, or compulsory service," the denial of which "can ordinarily be cured by providing those guaranteed rights in a new trial." *Strunk*, 412 U.S. at 439.

That distinction reflects the outlier nature of the speedy-trial right. Precluding retrial in the unique context of a speedy-trial claim may be "the only possible remedy," *Barker*, 407 U.S. at 522, on the ground that an appropriate remedy for a trial that came too late cannot be a second trial that would come even later. The remedy of a second trial would not "neutralize the taint" of the original constitutional violation, and would therefore not be "appropriate in the circumstances." *Morrison*, 449 U.S. at 365. In contrast, a second trial before a fresh jury drawn from the correct district would neutralize the taint of an earlier trial before a jury drawn from the wrong district; the second jury's deliberations would not be improperly influenced or prejudiced by anything in the original proceedings.

This Court also has explained that "the unsatisfactorily severe remedy of dismissal" without retrial is warranted for speedy-trial claims because of the "amorphous quality of the right." *Barker*, 407 U.S. at 522; see *id.* at 521 (explaining that the "most important[]" differ-

ence is that "the right to speedy trial is a more vague concept than other procedural rights"). The vicinage requirement, however, contains no amorphous language like "speedy," but more straightforwardly requires a jury to be drawn from a particular district or districts "ascertained by law." U.S. Const. Amend. VI; cf. U.S. Const. Art. III, § 2, Cl. 3. While the speediness of a trial may be a concept that wanes even more with the further passage of time until a new trial, a trial in a district "ascertained by law" remains just as (if not more) determinable and "possible," *Barker*, 407 U.S. at 522, after a court identifies the original district as improper.

C. Petitioner's Remaining Arguments Lack Merit

Petitioner raises additional arguments, most of which are policy-based. None justifies an outlier approach to venue errors.

1. The purposes of the venue right do not favor the outlier remedy of a preclusive acquittal

Petitioner argues (Br. 24-26) that the "purposes of the venue right" counsel against the normal remedy of "a second trial in a new venue." But he is mistaken in suggesting that "the Constitution's venue provisions" were principally crafted "'to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood,' and subjected to 'the most oppressive expenses' in procuring his defense." Br. 25 (citation omitted); see Br. 30 (similar). And in any event, a venue error does not necessarily produce more "hardship and expense" than any other initial erroneous trial would—indeed, the error may actually reduce them.

a. The principal original purpose of requiring local trials was the antiquated one whereby "jurors were expected to resolve the disputed questions of fact upon the basis of their own knowledge of the crime, or upon information they could easily provide as residents of the area where the crime was committed." Kershen, 29 Okla. L. Rev. at 813; see Coke § 193, at *125a ("[E]very tryall shall be out of that towne, parish, or hamlet, * * * within which the matter of fact issuable is alledged, which is most certaine and nearest there unto, the inhabitants whereof may have the better and more certaine knowledge of the fact."); 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 622 (2d ed. 1898) (Milsom ed. 1968) ("Indeed it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court."). Any requirement that jurors possess that kind of personal knowledge or undertake such an investigation has long since been abandoned, even though the venue and vicinage requirements remain. See Engel, 75 N.Y.U. L. Rev. at 1675 & n.84.

Another original purpose of requiring local trials—and the subject of the "most important disagreement" among the Framers in this context—was to enable the jury to "serve as the conscience of the community." Kershen, 30 Okla. L. Rev. at 85. That concept included "not simply [the jury's] interpreting the law" to apply to the facts, but the jury's potential "to disregard clearly applicable law" with which it disagreed. *Id.* at 85 & n.442. Some, like Madison, feared that jurors "would act upon local passions and prejudices to acquit defendants accused of crime by the new sovereign entity, the United States government," while others, like

Patrick Henry, forthrightly "praised" that possibility. *Id.* at 86. The Sixth Amendment, along with the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (which defined the judicial districts referred to in the Vicinage Clause), were a compromise intended to balance those competing visions. See Kershen, 30 Okla. L. Rev. at 86. That compromise, however, was largely mooted when this Court held that jurors have no right to decide questions of law in the first place, see *Sparf* v. *United States*, 156 U.S. 51, 105-106 (1895); see also *United States* v. *Gaudin*, 515 U.S. 506, 513 (1995) (discussing *Sparf*); Kershen, 30 Okla. L. Rev. at 87 ("[T]he ruling in *Sparf* * * * particularly undermined the concept of vicinage.").

b. In any event, petitioner is wrong in asserting that improper venue necessarily exacerbates trial-related hardships and expenses as compared to any other erroneous first trial. The Vicinage and Venue Clauses each require trial where the "crime" (Vicinage Clause) or "Crimes" (Venue Clause) "shall have been committed." U.S. Const. Amend. VI; U.S. Const. Art. III, § 2, Cl. 3; see Fed. R. Crim. P. 18 ("where the offense was committed"). But "there is no principle of constitutional law which entitles one to be tried in the place of his residence." *Haas* v. *Henkel*, 216 U.S. 462, 473 (1910); see *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964).

A crime can be committed far from home, see *Haas*, 216 U.S. at 475-476 (collecting examples), especially a crime (like petitioner's) that is committed over the internet. Moreover, petitioner—like many defendants—may well have suffered *less* "expense and hardship incident to a trial," *id.* at 473, from the venue mistake than he would have had he experienced some other error remediable by a new trial. As a result of that mistake, he

was tried in Pensacola—roughly an hour's drive from Mobile, where he lived—rather than some 500 miles away in Orlando, where he has acknowledged that venue would have been proper. Of the six witnesses who testified at trial, five were from the Pensacola area and the sixth was petitioner himself. And it is largely happenstance that the servers on which the data was stored—a place where petitioner maintained that trial would be proper—were in Orlando, relatively close to his home; they could easily have been in Northern Virginia, the Bay Area, or even outside the country. Cf. U.S. Const. Art. III, § 2, Cl. 3 (permitting Congress to determine the venue for crimes "not committed within any State.").

Petitioner's argument also ultimately proves too much. It is always impossible to unwind the hardships and expenses of a first criminal trial that ended in a judgment later reversed or vacated on appeal because of constitutional trial error, irrespective of the error. Yet in nearly every instance of such error, the appropriate remedy is a new trial free from the error, not a judgment of acquittal with no possibility of retrial. See pp. 22-24, *supra*. That holds true "even though the [constitutional] violation may have been deliberate." *Morrison*, 449 U.S. at 365. The sunk cost of the initial trial—which may, as here, have been *lessened* by a venue mistake—is therefore not itself a sufficient reason to preclude a retrial.

2. A vacatur on venue grounds is unlike a general verdict

In arguing that the court of appeals should have barred a retrial based on the venue error, petitioner relies heavily (Br. 31-40) on an analogy to the preclusive effect of a general verdict by the jury in a case where

venue has been put at issue. See *Jackalow*, 66 U.S. (1 Black) at 487 (holding that "the ascertainment" of "a material fact in the determination of the extent of the jurisdiction of a court * * * belongs to the jury"). But as explained above, see pp. 12-21, *supra*, the preclusive effect of a jury acquittal, even when resulting from legal error, is grounded in double-jeopardy principles that are inapplicable to a venue-based "acquittal." Cf. *Scott*, 437 U.S. at 98. Moreover, even as a matter of double-jeopardy law, general verdicts are treated differently from appellate reversals.

"When a conviction is overturned on appeal, 'the general rule is that the Double Jeopardy Clause does *not* bar reprosecution.'" *Bravo-Fernandez* v. *United States*, 580 U.S. 5, 18 (2016) (emphasis added; brackets and citation omitted); see *Scott*, 437 U.S. at 88-89; *Ball*, 163 U.S. at 671-672. Petitioner errs in suggesting (Br. 39) that the exception to that rule—"appellate reversals for insufficiency of the evidence"—should apply to the appellate reversals for improper venue that are at issue here. To the contrary, this Court has recognized that the "successful appeal of a judgment of conviction, on any ground *other* than the insufficiency of the evidence to support the verdict, * * * poses no bar to further prosecution on the same charge." *Scott*, 437 U.S. at 90-91 (emphasis added) (citing *Burks*, *supra*). And the Court has made clear that the requisite "insufficiency" does not arise "where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence," *id.* at 87—which would logically include venue-based grounds.

While petitioner asserts that such a distinction is "arbitrary," Br. 39 (quoting *Burks*, 437 U.S. at 11), this Court has not found it to be. Instead, the Court has em-

phasized that a "defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of the word." *Scott*, 437 U.S. at 98 n.11. It is thus permissible to try him again, and such a retrial does not "present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *Id.* at 91 (citation omitted).

3. The standard retrial-permissive remedy does not encourage government abuse

Petitioner nevertheless makes the policy-based argument that only his categorical rule against retrial can "meaningfully guard against government overreach," Br. 26, and prevent the government from "pursu[ing] serial retrials of a defendant in improper venues," Br. 27. But vacatur of a conviction is already ample deterrent against any bad-faith prosecution in a particular venue; the government has neither the time nor the resources to deliberately risk having a guilty verdict set aside on venue grounds, thereby requiring a new prosecution in a new district. Nor is it clear that a new prosecution would always be possible. Cf. 18 U.S.C. 3282(a) (default five-year limitations period for non-capital offenses), 3288-3289 (specifying time limits on the filing of a new indictment following dismissal of an earlier indictment). Particularly because a retrial in a different venue would generally require the cooperation of a separate U.S. Attorney's Office, prosecutors have every incentive to select a correct venue at the outset when bringing charges against a defendant.

Furthermore, as a practical matter, the government will often decide not to retry a defendant even once. Cf.

Br. in Opp. 10. And although the specter of "serial retrials" in multiple incorrect venues suffuses petitioner's brief, see Br. 4, 17, 20, 40, 43, he and amici have yet to identify a single instance of the government's having pursued them, even though (as petitioner acknowledges, see Br. 43 n.16; Pet. 17-18 & n.6) many circuit courts have long rejected his categorical rule.

Moreover, the question in this case is whether the Constitution *compels* petitioner's categorical remedy of acquittal without possibility of retrial in every case in which an appellate court determines that venue was improper. Rejecting petitioner's position and affirming the judgment below would not necessarily forbid a court from imposing that remedy in extraordinary circumstances, where appropriate.

4. Encouragement of more venue claims is neither an empirical nor legal reason for an outlier remedy

Petitioner and his amici assert that if the ordinary remedy for a trial in the wrong venue allows for a new trial in the right venue, defendants might lack sufficient incentive to challenge venue in the first place, see Pet. Br. 46; Rutherford Inst. et al. Amici Br. 23-25, and perhaps even lack sufficient incentive to proceed to trial rather than seek a plea bargain, see Rutherford Inst. et al. Amici Br. 25-27; National Association of Criminal Defense Lawyers Amicus Br. 11-14. But they provide no empirical support for those assertions, and anecdotal experience (as in this case) suggests that defendants are not deterred from raising claims of error in an effort to obtain a second bite at the apple.

In any event, even if a meaningful disincentive existed, it would not justify mandating a remedy at odds with hundreds of years of precedent and historical practice, see pp. 11-28, *supra*. Indeed, as this Court has ob-

served in the double-jeopardy context, the draconian remedy petitioner urges could prove counterproductive: "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial * * * if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *Tateo*, 377 U.S. at 466; see *Bravo-Fernandez*, 580 U.S. at 19.

Even if he deems it beneficial for him, petitioner's approach gives short shrift to the latter concern, particularly the "societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial." *Ewell*, 383 U.S. at 121. Notwithstanding this Court's admonishment that constitutional remedies "should not unnecessarily infringe on competing interests," *Morrison*, 449 U.S. at 364, petitioner's proposed remedy clearly would. Requiring acquittal with no possibility of retrial every time the government, trial court, and jury together make even a good-faith mistake as to venue "would be a high price indeed for society to pay." *Tateo*, 377 U.S. at 466. At the same time, that drastic remedy would grant a "windfall for the defendant," *Waller*, 467 U.S. at 50, whom an impartial jury necessarily has found guilty of the underlying conduct.

Complete legal exoneration of such a defendant is too steep a cost when the alternative is simply the possibility of a new trial, at which the defendant would know the government's evidence, theory, and witnesses, and would almost certainly be better prepared to contest the government's case. At that new trial in a proper

venue, the government will once again have to convince a federal "jury of twelve [citizens], impartially selected, [to] unanimously concur in the guilt of the accused" beyond a reasonable doubt. *Gaudin*, 515 U.S. at 510 (1995) (citation and emphasis omitted). That jury will serve "as the great bulwark" against "oppression and tyranny on the part" of the government, *id.* at 511 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873)), and thereby see that justice is done. That remedy suffices in almost every case of prejudicial constitutional trial error; it does the same here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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