No. 21-1576

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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7 *The Papers of John Marshall* (Charles Hobson ed. 1993) 18, 19

1 David Robertson, *Reports of the Trials of Colonel Aaron Burr* (1808) 18

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2 W. Staundforde, *Les Plees Del Coron* (1557) 15

3 Joseph Story, *Commentaries on the Constitution* (1833) 3, 5, 7

INTRODUCTION

The government advances a view of the constitutional venue right that would be unrecognizable to the Framers. According to the government, the venue right is a common law relic whose purposes have been "mooted" over time. Gov't Br. 29-30. And because the venue right has no ongoing purpose, the paramount consideration in determining a remedy should be safeguarding the government's ability to secure more convictions—a goal that retrial serves best.

That proposition ignores the historical record and defies this Court's precedent. The Framers viewed the constitutional venue right as an indispensable defense against government oppression and abuses like those threatened by the British Crown. The government does not even acknowledge that history, much less offer an account of how its proposed remedy accords with it. Instead, it admits that its approach has no real limiting principle, leaving the government unfettered power to prosecute again (and again) in new venues of its choosing. And while the government claims (at 33) it "has neither the time nor the resources" to engage in the oppression of criminal defendants, that assurance surely would not have satisfied a founding generation who experienced the abuses of the British Crown firsthand. The government's theory ultimately depends on believing the Framers would have left a constitutional right founded on *mistrust* of government solely at the "mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

The government's "historical practice" argument fares no better. The government does not actually

contest the most relevant founding-era practice: venue was submitted to the jury as an indispensable component of the government's case and a judgment of *acquittal* was entered when the government failed to carry that burden. The government does not cite a *single* federal case allowing reprosecution after a jury acquittal on venue grounds. That is no surprise. It is one of the "most fundamental rule[s]" of our constitutional order that a verdict of acquittal bars a second prosecution. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 576 (1977). The government instead relies on a common law principle under which a general verdict of acquittal would not bar reprosecution if there were a defect in the indictment. But, over a century ago, this Court decisively rejected that principle for purposes of the Fifth Amendment, because it would permit a prosecutor "bent on conviction" to pursue serial retrials. *United States v. Ball*, 163 U.S. 662, 668 (1896) (citation omitted). The government's historical practice argument thus hinges on the contention that the Framers simultaneously rejected that common law rule for purposes of the Fifth Amendment, while uncritically adopting it in an area—the venue right—where they were especially attuned to the possibility of government abuse. That contention is as "ahistorical" as they come. *See* Gov't Br. 8.

Finally, the government has no meaningful response to the basic anomaly its position creates. The government does not dispute that when a *jury* acquits for insufficient proof of venue, the government is barred from reprosecuting, yet it maintains that the result should be different when appellate judges make that very same sufficiency determination. That arbitrary distinction is squarely foreclosed by this

Court's precedent. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 11, 16 (1978); *see also* Smith Br. 39.

At bottom, the government's proposed rule rests on the view that the constitutional venue right serves no real purpose and requires no real remedy. But that is not a judgment the Framers left to the government. When the constitutional venue right is taken seriously, as it must be, its violation after the government fails to prove venue at trial demands an acquittal barring reprosecution.

The decision below should be reversed.

ARGUMENT

I. The Government Misunderstands The Purposes Of The Venue Right

The government does not dispute that the remedy for a violation of the constitutional venue right must be tailored to the right's unique purposes. *See* Smith Br. 20-21; Gov't Br. 22. Yet the government does not—and cannot—offer *any* account of how its proposed retrial remedy actually serves the interests the Framers sought to protect when they enshrined the venue right in the Constitution.

1. The government asserts that Mr. Smith is "mistaken" in stating that the Constitution's venue provisions were designed to protect against the hardship and expense of being "'dragged to a trial'" in a distant location. Gov't Br. 28 (quoting Smith Br. 25). But that is not just Mr. Smith's "suggesti[on]," *id.*—that is what this Court has repeatedly said, echoing the ratification debates themselves and Justice Story's analysis shortly after the founding. Smith Br. 7-10, 24-28; *see* 3 Joseph Story, *Commentaries on the Constitution* § 1775 (1833).

The government nonetheless asserts that the venue right must not be concerned with the hardship of trial in remote places, because the venue right does not *always* protect against that result. *See* Gov't Br. 30-31. But it makes no sense to conclude that a constitutional right does not serve a particular purpose simply because it does not do so perfectly. Under that logic, the Confrontation Clause would not serve the "ultimate goal" of "ensur[ing] reliability of evidence" because in some circumstances, unreliable evidence may be credited even after the "crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). This Court has never interpreted the Constitution that way.

The example the government offers to illustrate its point just reveals the shortcomings of its position. The government claims (at 30-31) Mr. Smith *benefited* from its violation of his constitutional rights, because it could have prosecuted Mr. Smith even further from his home in the Middle District of Florida—where Strikelines' servers were located. But the government has a "plain duty" to "determine in which [district] the offense was *most probably* committed, and bring the offender to trial there." *Haas v. Henkel*, 216 U.S. 462, 474 (1910) (emphasis added). In Mr. Smith's case, that district was unquestionably the Southern District of Alabama, where all of the offense conduct took place. The fact that the government claims it could have selected an even *worse* venue in which to try Mr. Smith simply underscores the

problem with a "remedy" that affords the government a do-over when it selects an unconstitutional venue.[1]

Finally, the government asserts (at 31) that Mr. Smith's argument that the venue right protects against oppressive expenses "proves too much" because the costs of "a first criminal trial" exist for any error. But the rights the government enumerates are not designed to prevent the hardship of the trial *itself*. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (explaining that right to counsel protects against "the danger of conviction" (citation omitted)). By contrast, the venue right *is* directly concerned with harms from the trial—specifically, those unique harms and "oppressive expenses" associated with trial in an unconstitutional venue. Story, *supra*, § 1775. That distinction is crucial. As the Framers would have understood, once a person has suffered the hardship and indignity of being shipped to London, it is no "remedy" to permit the government a do-over—the core purpose of the right has already

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[1] The government claims Mr. Smith conceded "that venue would have been proper in the Middle District of Florida." Gov't Br. 24. That is wrong. Indeed, the same briefing cited by the government explains that "*the only appropriate venue* for Count Two would be the Southern District of Alabama." JA60 (emphasis added); JA57-59 (identifying "the Southern District of Alabama" as "the correct venue"); *see also* Smith C.A. Br. 26 (similar). The government's concession argument is based on snippets of Mr. Smith's post-trial briefing taken out of context. Mr. Smith stated that the essential conduct "occurred in either" the Southern District of Alabama or the Middle District of Florida only to emphasize that "no evidence whatsoever" supported the government's preferred venue, JA39; *see also* JA60 (arguing that Northern District of Florida was not one of the "only two *possible* appropriate districts for venue" (emphasis added)).

been defeated. The only permissible remedy "tailored to the injury suffered" is one that effectively deters the government from violating the venue right *before* the hardship of an unconstitutional trial has occurred. *United States v. Morrison*, 449 U.S. 361, 364 (1981).

2. The government gives even shorter shrift to the venue provisions' purpose of preventing government overreach and abuse. It relegates those considerations to the end of its brief as a "policy-based argument" to be disregarded. Gov't Br. 33. But the Framers adopted the venue provisions specifically to prevent government abuses like those they had experienced at the hand of the British Crown. *United States v. Cabrales*, 524 U.S. 1, 6 & n.1 (1998); *United States v. Johnson*, 323 U.S. 273, 275 (1944); *see* Smith Br. 27-28. The notion that this Court should discern the proper remedy for venue violations without reference to the purposes and concerns that drove the Framers to enshrine those rights in the Constitution makes little sense.

The government has no real answer to Mr. Smith's contention that a retrial remedy would license government abuses—including serial retrials in improper venues. It suggests that statutory limitations periods *might* bar reprosecution in some cases, and that bureaucratic hurdles and time and resource constraints will lead the government to exercise its prosecutorial discretion judiciously. Gov't Br. 33-34. Yet the Framers, who rebelled against a royal government that changed the rules of prosecution on a dime, would take little comfort in the government's assurances. Indeed, they drafted two constitutional provisions meant to "leave as little as possible to mere discretion," upon a subject "so vital

to the security of the citizen." Story, *supra*, § 1775. As this Court has explained, the Constitution "does not leave [citizens] at the mercy of *noblesse oblige*," and constitutional concerns are not resolved simply because the prosecution "promise[s] to use" its power "responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

The government's assurances ring particularly hollow in this case. If the government "ha[d] neither the time nor the resources to" "risk having a guilty verdict set aside on venue grounds," Gov't Br. 33, it is hard to imagine why the government brought its case in the Northern District of Florida, instead of the Southern District of Alabama, where all of the offense conduct took place, and why—when Mr. Smith argued vigorously before trial that venue was improper—the government insisted the case go to the jury anyway. Nor is there any reason to think this case is an outlier. *See* Rutherford Br. 17-20 (collecting additional examples of cases brought in facially questionable venues).

The government's suggestion that it might decide "not to retry a defendant even once" is equally empty. Gov't Br. 33. Again, it points to this case, but even in this case, which surely is not the most serious offense on the federal government's criminal docket, the government *still* has not disavowed its intent to retry Mr. Smith. *Id.* Instead, the government has suggested it will retry him if he does not receive a sentence to the government's liking on a separate count. BIO 10-11.[2] That strategic use of repeated

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[2] The government has expressed its intent to use the vacated trade-secrets count to increase Mr. Smith's sentence on

trials is just the type of government overreach that puts pressure on defendants to forgo their jury trial rights altogether and plead guilty. *See* NACDL Br. 11-14.

Ultimately, even the government seems to recognize that a rule with *no* limit on the government's power to serially retry a defendant would be intolerable. It eventually concedes that a court may grant acquittal "in extraordinary circumstances." Gov't Br. 34. But if the government's own rule produces a result even the government cannot stomach, there is every reason to think the Framers, who were acutely concerned with venue abuses, would reject it out of hand.[3]

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the extortion count. BIO 10. This Court's resolution of the question presented in this case may bear on the propriety of that sentencing position and the proper disposition of the extortion count. *See* Pet. I, *McClinton v. United States*, No. 21-1557 (June 10, 2022) (seeking review of constitutionality of sentencing based on acquitted conduct); *see also* Sentencing Guidelines for U.S. Courts, 88 Fed. Reg. 7180, 7224-25 (Feb. 2, 2023) (proposing limits on consideration of acquitted conduct at sentencing); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (describing sentencing based on acquitted conduct as "a dubious infringement" of the right "to a jury trial"); *Jones v. United States*, 574 U.S. 948, 949-50 (2014) (Scalia, J., dissenting from denial of certiorari) (similar).

[3] Given the government's concession, this Court should at a minimum vacate the Eleventh Circuit's holding that "[*t*]*he* remedy for improper venue is vacatur of the conviction, not acquittal." Pet. App. 15a (emphasis added).

II. The Government's Defense Of Its Retrial Rule Lacks Any Grounding In History Or Precedent

The government's affirmative attempts to justify its retrial rule merely confirm that acquittal is the appropriate remedy.

1. Rather than engage with the venue right's acknowledged purposes, the government posits two alternate "original purpose[s]" of "requiring local trials." Gov't Br. 29. The first is the "antiquated" one whereby jurors resolved disputed questions of fact based on their own knowledge. *Id.* But that purpose has no relevance here, because, as the government concedes, it was abandoned well before the Framers chose to incorporate the venue right into the Constitution, and thus plainly was not the reason they did so. *See* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. Rev. 1658, 1675 & n.84 (2000); Gov't Br. 29. The second purpose the government suggests is to permit the jury to serve "as the conscience of the community," a purpose the government contends was "mooted" by this Court's decision in *Sparf v. United States*, 156 U.S. 51, 105-06 (1895), that the jury does not have a freestanding right to decide what the law is. Gov't Br. 29-30.[4]

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[4] The idea that the value of "community participation in the determination of guilt and innocence" has been "mooted" is wrong on its own terms. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (explaining that "[f]ear" of the government's "unchecked power" "found expression" in "community participation" in criminal trials); *see also United States v. Gaudin*, 515 U.S. 506, 511-14 (1995) (describing *Sparf*'s narrow ruling and emphasizing that jury must still apply law to facts to render "ultimate verdict").

The government thus implies that because the venue right serves *no* ongoing purpose, the Court can revert to a supposed "default remedy" of retrial. Gov't Br. 8, 21-24. But the government cannot obtain its preferred remedy simply by denigrating the present value of the venue right. Neither the government, nor the courts, are free to "reassess whether [a constitutional right] is 'important enough' to retain." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020); *see also* Rutherford Br. 22-23 (refuting idea that venue right is "a mere technicality relegated to second-class status").

Nor is there any such thing as a "default remedy." Rather, this Court has specifically stated that a remedy must be "tailored to the injury suffered from the constitutional violation" and informed by the policies underlying the right. *Morrison*, 449 U.S. at 364; *Strunk v. United States*, 412 U.S. 434, 438-40 (1973). It has thus endorsed differing remedies depending on the purposes of the right. *See, e.g.*, *Betterman v. Montana*, 578 U.S. 437, 444 (2016) (explaining that dismissal with prejudice is appropriate remedy for violation of speedy trial right given "major evils" with which right is concerned (citation omitted)); *cf. Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 1910 (2017) (explaining that certain errors that "always result[] in fundamental unfairness," like denial of counsel, require "'automatic reversal'" (citation omitted)). The government's invocation of a "default remedy" is just an effort to duck the central inquiry mandated by this Court's precedent.

2. Instead of examining what remedy would be tailored to the specific purposes of the venue right, the government resorts to inapposite analogies to other

constitutional rights. To do so, it first decouples the "Venue Clause" in Article III and the "Vicinage Clause" of the Sixth Amendment, and contends this case "involves only a violation of the Vicinage Clause." Gov't Br. 24. It then argues that, as to the *vicinage* right—*i.e.*, the right to have a jury drawn from a certain place—retrial is the proper remedy, because the vicinage right is akin to other jury-composition rights. *See id.* at 24, 26; *see also id.* at 27 (distinguishing speedy trial right on this basis).

The government's maneuver is just a veiled concession that its retrial remedy is *not* "tailored to the injury suffered from" a violation of the *venue* right. *Morrison*, 449 U.S. at 364. In any event, the government ultimately concedes that venue and vicinage are "'inextricably linked'" because the "requirement that a jury come from a particular district" also requires "that the trial be held in the same district," and a violation of the venue right will virtually always lead to a violation of the vicinage right. Gov't Br. 25 (citation omitted). The government's laborious efforts to separate vicinage and venue thus get it nowhere.

Even if one could consider the vicinage right in isolation, it is fundamentally different than the jury-composition rights the government analogizes it to. Unlike a non-unanimous jury, a jury selected from a locally unrepresentative venire, or a jury with a racially biased juror, Gov't Br. 23, trial in an improper venue is a direct result of the prosecutor's *own* choice. Acquittal is a critical counterweight to that vast discretionary power. The alternative of ordering a new trial in a new venue—again, of the government's choosing—both fails to impose any meaningful consequence for the government's initial violation and

opens the door to a repeat of the constitutional violation in a way that is far less likely in other contexts.

For that reason, the government's suggestion throughout its brief that its proposed remedy is "retrial in a proper venue" with a "jury drawn from the correct district," Gov't Br. 9, 11, 21, 27, is incorrect. Its proposed remedy is retrial in a new, but not necessarily proper, venue *chosen by the prosecutor*—with nothing but the prosecutor's own grace to ensure that it is, in fact, "proper." Such a remedy is drastically out of step with the Framers' fears of unchecked government power.

3. Ultimately, the government's primary argument in favor of its retrial remedy is that, regardless of the harms imposed by a venue violation, retrial is appropriate because acquittal would give "guilty defendants a windfall." *Id.* at 11; *see also id.* at 22, 24, 35. The government cannot point to *any* historical evidence suggesting the Framers' overriding concern was preserving government convictions, rather than protecting against government abuses.

But, in any event, an acquittal when the government fails to prove its case is not a windfall; it's standard practice. *See infra* 20. And it is particularly odd to describe acquittal as a windfall in the venue context because defendants are required to raise the issue of venue *before* trial if the defect is apparent in the indictment, just as Mr. Smith did here. Doing so gives the government an opportunity to correct its error and to avoid the risk of acquittal. When the government instead urges that the case must proceed to trial in the unconstitutional venue, and then fails to carry its burden, it is the *government* that gets a

windfall by obtaining a second opportunity to try its case.

And the government's assertion (at 8, 35) that acquittal is still too high a cost because defendants tried in an improper venue have already been "found guilty" by an "impartial jury" incorrectly presumes that the venue and vicinage rights have no bearing on the partiality of the jury or the validity of the verdict. That too is a proposition the Framers would surely have disputed. *See* Smith Br. 26-27 (describing discussion in ratification debates and Justice Story's *Commentaries* regarding fear of conviction by biased juries).

III. The Government Identifies No Historical Practice That Supports Its Retrial Rule

Contemporaneous practice at the founding confirms that acquittal is the appropriate remedy for a failure to prove venue. The government does not dispute the most important historical practice at issue: that venue was traditionally submitted to the jury and the government's failure to prove venue required *acquittal*. Gov't Br. 16-19. And it does not cite *any* federal case allowing reprosecution after a jury verdict of acquittal on venue grounds. Instead, the government asserts that the Framers "would . . . have understood" that retrial was permissible based on a common law doctrine that this Court has long held was *not* incorporated into the Constitution. *Id.* at 12-19. That argument is wrong, and it provides an exceedingly weak basis to adopt a rule at odds with the clear purposes of the venue right.

1. As an initial matter, the government's premise that common law doctrines prevailing in England provide the exclusive means of discerning the

Framers' intent is a particularly poor fit for analyzing the venue right. As scholars have recognized, the strength of the protection provided by venue principles in England waxed and waned over time. Scholars' Br. 4-6. By enshrining the venue right in the Constitution, the Framers repudiated a version of those rights that had been subject to manipulation and abuse by the British Crown. *See id.* at 7-14. There is no reason to think the Framers nevertheless effected a wholesale adoption of common law remedies—even where those remedies would license government abuses. *See United States v. Gaudin*, 515 U.S. 506, 516 (1995) (rejecting purported historical practice that was contrary to the "understanding consistent with [the] principle[s]" of the Fifth and Sixth Amendments).

2. In any event, the government's historical practice argument fails on its own terms. The government points repeatedly to the common law principle that a prosecution founded on a defective indictment could not yield a preclusive acquittal. Gov't Br. 15-18. But that principle was contested at common law and rejected in this country.

For example, Lord Hale took the view that subsequent reprosecution was permitted only when a judgment in a defendant's favor was given "for the insufficiency of the indictment," while a disposition that went "to the matter of the verdict" would be "a perpetual discharge." *See United States v. Ball*, 163 U.S. 662, 667 (1896) (discussing *Vaux's Case*, (1591) 76 Eng. Rep. 992 (K.B.)). That is the same principle Mr. Smith proposes in this case. *See* Smith Br. 46-47 (explaining that acquittal remedy "applies only where" the government "insists on proceeding" to trial in an unconstitutional venue). And the government's

own sources acknowledge authority providing that when there is an acquittal in one county, that acquittal "may be pleaded in Bar of a subsequent Indictment in another County for the same" offense. 2 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 35, § 3, at 370 (2d ed. 1726) (citing 2 W. Staundforde, *Les Plees Del Coron* 105 (1557)); *see also United States v. Keen*, 26 F. Cas. 686, 688 (C.C.D. Ind. 1839) (explaining that "[a] construction of [a common law] maxim drawn from inference" and which is "somewhat doubtful" "can afford but little aid to a correct understanding of the constitution").

But more fundamentally, whatever the precise contours of the common law rule, this Court has decisively rejected the notion that reprosecutions *after acquittal* are permissible under the Constitution. *See Ball*, 163 U.S. at 666-69. In *Ball*, this Court held that, regardless of the English rule, under the Constitution, "a general verdict of acquittal" bars a second prosecution, no matter the purported defects in the first indictment. *Id.* at 669. In doing so, *Ball* cited approvingly to Justice Livingston's dissent in *People v. Barrett*, which explained that the common law rule would permit "the prosecutor, if he be dissatisfied, and bent on conviction . . . to tell the court that his own indictment was good for nothing, that it has no *venue*, or is deficient in other particulars; and that therefore, he has a right to a second chance of convicting the prisoner." *People v. Barrett*, 1 Johns. 66, 74 (N.Y. Sup. Ct. 1806) (Livingston, J., dissenting).

The government's argument depends on that rejected contention—that a prosecutor may collaterally attack his own indictment to justify a new prosecution, even after a defendant has been

acquitted. But this Court has described the principle that a prosecutor cannot reindict following an acquittal as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 576 (1977); *Evans v. Michigan*, 568 U.S. 313, 320 (2013) (collecting cases "instruct[ing] that an acquittal due to insufficient evidence precludes retrial"). Accepting the government's theory here would mean that the Framers intended to adopt a common law rule that they unequivocally *rejected* for purposes of the Fifth Amendment as the remedy for violations of the venue right. That position cannot be squared with the Framers' recognition that the venue right was particularly susceptible to governmental abuse. And, tellingly, the government does not point to any federal decision, even before *Ball*, applying its defective-indictment rule to permit retrial after a venue acquittal.

3. For similar reasons, the government's assertion that a venue violation "would constitute only a mistrial" at common law is inapposite. Gov't Br. 12-13. The government's cited sources, including *Arundel's Case*, involve circumstances where a jury was drawn from the wrong place and the defendant brought a motion to arrest judgment after *conviction*, not an effort to reprosecute following *acquittal*. *Arundel's Case*, (1593) 77 Eng. Rep. 273, 273-74 (K.B.); *see also, e.g.*, *Tharold v. Spight*, (1623) 79 Eng. Rep. 585, 585-86 (K.B.) (involving motion "in arrest of judgment, that it is a mis-trial" where civil jury was drawn from wrong village); *see also United States v. Sisson*, 399 U.S. 267, 280-81 (1970) (explaining that arrest of judgment does not permit challenges to the evidence, but only to errors evident on the "face" of the

record, like an improper indictment). Those cases do not implicate the situation here, where the government has taken the question of venue to a jury and failed to satisfy its burden of proof. That scenario has *always* resulted in acquittal, not mistrial, at common law and in the early Republic—as even the government acknowledges. Gov't Br. 14.

4. The government also notes that at common law, venue had jurisdictional stature, such that proceedings in an improper venue were a nullity and did not preclude reprosecution under double jeopardy principles. Gov't Br. 14, 16. But that premise *cannot* have been incorporated into the Constitution, because the jurisdiction of the federal courts is defined by Article III and Congress, not by English common law principles. And the government obviously does not believe that venue is a matter of jurisdiction in the United States. *See id.* at 24 (arguing that Mr. Smith conceded venue); *see also id.* at 18; *Patton v. United States*, 281 U.S. 276, 298 (1930) (holding that Article III, section 2's jury trial right "is not jurisdictional"). Double jeopardy principles premised on a lack of jurisdiction thus have no bearing on the proper remedy for the government's failure to prove venue at trial.

5. Tellingly, the government cites no federal case that actually applies the rule it contends is supported by "hundreds of years of precedent and historical practice." Gov't Br. 11. It touts (at 16-17, 26) two opinions—authored by Justices McLean and Story—as its key support, but both of those cases involve the unrelated question whether a convicted capital defendant could be awarded a new trial on his own motion under the Double Jeopardy Clause. Justice McLean and Justice Story disagreed on the answer to

that constitutional question, and in doing so, both considered common law principles related to a defendant's ability to attack a conviction for errors on the face of the proceedings, such as defects in the indictment or an improperly drawn jury. *Keen*, 26 F. Cas. at 690; *United States v. Gibert*, 25 F. Cas. 1287, 1298 (C.C.D. Mass. 1834). But neither remotely answers the question at issue here—whether an acquittal for failure to prove venue carries preclusive effect.

The only founding-era federal proceeding cited by the government that begins to approach the question presented cuts *against* the government's arguments. The government relies on a letter Chief Justice Marshall wrote before Aaron Burr's treason and misdemeanor trials, in which he expressed substantial doubt as to whether Burr could be indicted again in Kentucky if he were acquitted in Virginia. Gov't Br. 17 (citing Letter from John Marshall to William Cushing (June 29, 1807), *reprinted in* 7 *The Papers of John Marshall* 60-61 (Charles Hobson ed. 1993)); *see also* 1 David Robertson, *Reports of the Trials of Colonel Aaron Burr* 429-30 (1808) (swearing the jury for Burr's treason trial on August 17, 1807).

While Chief Justice Marshall surmises in the letter that "perhaps" an acquittal would not bar an indictment elsewhere, what he did *after* Burr's seriatim treason and misdemeanor trials undercuts the government's claims of settled practice. When the government sought to commit Burr for trial on charges of levying war and providing the means for a military expedition in another district, Burr advanced "a preliminary defence . . . in the nature of a plea of autrefois acquit." *United States v. Burr*, 25 F. Cas.

201, 202 (C.C.D. Va. 1807). Chief Justice Marshall considered Burr's plea a "new and important question[]" about "constitutional" law which should be brought "before the supreme court." *Id.* at 202-03. He thus declined to resolve the issue, instead considering the government's commitment motion "*as if no verdict had been rendered* for either of the parties" and deferring the issue to the court to which Burr was committed. *Id.* (emphasis added).[5] Chief Justice Marshall surely would not have hedged in this way had the government's retrial rule truly been "incorporated into the legal practices of the United States." Gov't Br. 15.

Indeed, Chief Justice Marshall recognized what the government ignores—the question presented is one of *constitutional* law, to be decided in accordance with the principles of our founding charter. The inapposite and unsettled common law principles the government invokes do not justify a remedy that severely undermines the core purposes of the venue right, especially when the Framers' firsthand experience with venue abuses led them to make that right "the stronger in the United States," by "affirm[ing]" it in "the constitution itself." *United States v. Burr*, 25 F. Cas. 187, 196 (C.C.D. Va. 1807).

IV. The Government's Distinction Between Jury Acquittals And Judicial Acquittals Is Baseless

The government's retrial rule makes no more sense as a matter of modern practice and doctrine

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[5] Although Burr was committed to Ohio, "[t]he government did not pursue this prosecution," and Burr was, "for all practical purposes," "a free man." 7 *The Papers of John Marshall*, *supra*, at 5, 164 n.20.

than it does as a matter of history and purpose. The government does not dispute anywhere in its brief that juries are routinely instructed to acquit when the government fails to prove venue, that a jury *must* acquit when the government fails to prove venue, and that those acquittals bar reprosecution. *See* Smith Br. 37-39; Gov't Br. 31-33. Instead, the government urges this Court to treat *appellate* findings that the government failed to prove venue differently from jury verdicts reaching the same conclusion. Gov't Br. 31-33. That argument is flatly inconsistent with this Court's precedent.

This Court has long held that a judicial acquittal—including an appellate reversal for insufficiency of the evidence—bars a subsequent prosecution to the same degree as a jury acquittal. *See, e.g.*, *Evans*, 568 U.S. at 328-29; *Smith v. Massachusetts*, 543 U.S. 462, 466-67 (2005); *Burks v. United States*, 437 U.S. 1, 11, 16 (1978); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam). Any other rule would create a "purely arbitrary distinction" between those defendants for whom the insufficiency of the government's evidence was identified on appeal, and those who obtained a correct determination from the jury itself or from the trial court. *Burks*, 437 U.S. at 11. This case illustrates that anomaly. The government agreed that if the jury found insufficient proof of venue, it should return a verdict of acquittal, barring reprosecution. *See* JA29; JA110 (government requesting instruction that jury "must find the Defendant not guilty" if the government "has failed to establish proper venue"). But it now argues that because the jury *erred* in its determination, the government is entitled to a second chance. There is

simply no reason for a constitutional remedy to turn on that arbitrary happenstance.

The government attempts to justify its position by arguing that a reversal for insufficient proof of venue is a reversal on grounds "*other* than the insufficiency of the evidence to support the verdict." Gov't Br. 32 (quoting *United States v. Scott*, 437 U.S. 82, 90-91 (1978)). But that cannot possibly be right. A reversal for insufficient proof of venue is, *by definition*, a reversal for "insufficiency of the evidence to support the verdict." That follows inescapably from the fact that the jury cannot return a valid verdict of guilt unless it finds that the government has presented sufficient evidence of venue. *See, e.g.*, JA29. And that is why the standard vehicle for challenging venue after trial is a motion for a judgment of acquittal on the ground that "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

The government's only basis for its counterintuitive argument is that venue does not relate to "factual guilt or innocence." Gov't Br. 32 (quoting *Scott*, 437 U.S. at 87). But this Court has always referred to "factual guilt or innocence" synonymously with the government's ability to present evidence sufficient to sustain a conviction. *See, e.g.*, *Martin Linen*, 430 U.S. at 572 (asking whether government's evidence was "legally insufficient to sustain a conviction"); *Evans*, 568 U.S. at 319 (explaining that an acquittal is any "ruling by the court that the evidence is insufficient to convict" (citation omitted)); *Burks*, 437 U.S. at 15 (describing "evidentiary insufficiency" as a ruling "that the

government has failed to prove its case").[6] That is why courts have held that a failure to prove a jurisdictional element results in acquittal barring reprosecution, even though the question whether, *e.g.*, a bank engages in interstate commerce, does not go to a defendant's inherent culpability any more than venue does. *See, e.g.*, *United States v. Bravo-Fernández*, 913 F.3d 244, 250-51 (1st Cir. 2019) (explaining that "the failure to offer any actual proof of [certain] relatively obvious jurisdictional facts has repeatedly proved fatal to criminal prosecutions" and directing entry of judgment of acquittal).

If venue were not a valid basis for a preclusive acquittal, it would make no sense to submit the issue to the jury, with instructions to acquit for failure to prove venue. But that is what courts have always done, since before the founding. And that is exactly what happened in this case. In fact, everyone *agrees* the jury should have acquitted on venue grounds and that such an acquittal would bar reprosecution. There is no principled basis for affording the Eleventh Circuit's correction of that error any lesser effect.

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[6] *Scott* illustrates the distinction. There, the Court held that a dismissal based on prejudice from preindictment delay did not bar reprosecution. 437 U.S. at 95, 100-01. Those grounds had nothing to do with the sufficiency of the government's evidence, and a jury plainly could not have acquitted on that basis.

CONCLUSION

The Eleventh Circuit's judgment should be reversed.

Respectfully submitted,

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