No. 21-1576

IN THE

Supreme Court of the United States

TIMOTHY J. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE RUTHERFORD INSTITUTE, THE CATO INSTITUTE, AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE RUTHERFORD INSTITUTE, THE CATO INSTITUTE, AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2, The Rutherford Institute, the Cato Institute, and the National Association for Public Defense ("*amici*") respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit in *United States* v. *Smith*, 22 F.4th 1236 (11th Cir. 2022). Counsel for Rutherford notified counsel of record for the parties to this case of *amici*'s intention to file this brief on July 14, 2022. While this notice was less than the ten days in advance of the due date required under this Court's Rule 37.2(a), both parties have given their consent to the filing of this brief. Additionally, respondent on July 14, 2022, sought an extension of time to file a response to August 22, 2022, and this Court granted the request on July 15, 2022. Thus, respondent will have ample time to respond to the points raised in *amici*'s brief.

As detailed below, *amici* are various public interest organizations concerned about the further erosion of the right to proper venue in criminal trials and the jury trial guarantee more generally. *Amici* wish to (1) highlight the importance of the constitutional venue and jury rights from a historical perspective, and (2) explain the need for this Court to obviate negative ramifications of the Eleventh Circuit's decision, including weakening these fundamental structural protections against abuses of government power.

Accordingly, *amici* respectfully request that the Court grant this motion for leave to file a brief as *amici curiae*.

Respectfully submitted,

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July 21, 2022

QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[*]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

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

The National Association for Public Defense ("NAPD") is an association of more than 14,000 attorneys, investigators, social workers, administrators,

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

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

The primary interest of *amici* in this case is preventing the continued erosion of the venue right enshrined in the Venue Clause of Article III and in the Sixth Amendment. *Amici* also seek to ensure that the participation of citizen juries in the criminal justice system is not further diminished and defendants maintain their right to subject prosecutions to meaningful adversarial testing. If the remedy for the government's violation of the venue right permits a defendant to be retried for the same offense, as the Sixth, Ninth, Tenth, and Eleventh Circuits have held, *amici* fear the further erosion of these fundamental constitutional rights. Under the rule adopted in these Circuits, the government faces no practical consequences from infringing on a defendant's venue right. Indeed, this rule perversely incentivizes the government always to try a defendant in the venue most favorable to its case without regard for the Venue

Clause. At the same time, providing such a hollow remedy disincentivizes the defendant from challenging improper venue and promotes the pervasiveness of plea bargaining, which further undermine the jury's role and the protections the jury offers to the rights of individual criminal defendants and to society at large. *Amici* thus write in support of petitioner's challenge to this ineffective remedy that gives such short shrift to the Constitution.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari and reverse the Eleventh Circuit's decision. In addition to the clear circuit split on the question presented, *see* Pet. 14–22, the petition presents an exceptionally important question about the right to proper venue and the jury trial guarantee more generally. This question will continue to divide courts across the country unless the Court grants review.

I. This Court's review is necessary to resolve a highly significant question about the scope of the right to proper venue. The constitutional right to be tried in the district where the crime took place has a rich historical basis dating back to the Magna Carta. This right both ensures that the jury renders a judgment that is representative of the local community where the crime allegedly occurred, and it also serves as a check on abuses of government power. This Court's review is necessary to safeguard this right in such jurisdictions as the Eleventh Circuit, where the government may violate the Venue Clause without consequence, thus also undermining the very right to a jury trial by discouraging criminal defendants from raising meritorious venue defenses.

II. This Court should grant certiorari because venue is a constitutional requirement in *every* criminal trial. Criminal defendants are entitled to clarity about the scope of their constitutional protections. Until the Court resolves the circuit split here, the venue right and jury trial right will continue to suffer from uncertainty. A criminal defendant's constitutional right to a proper venue—and, in many cases, a defendant's right to a trial by jury—will otherwise depend on the happenstance of which Circuit hosts that criminal trial. The need for national uniformity on essential constitutional guarantees provides another important reason for granting review.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE PETITION PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION ABOUT THE CONSTITUTIONAL RIGHTS TO PROPER VENUE AND A JURY TRIAL.

The Founders described the right to a jury trial as "the heart and lungs" of liberty. *United States* v. *Haymond*, 139 S. Ct. 2369, 2375 (2019) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). As "the grand bulwark" of English liberties, Blackstone believed that other liberties remained secure only so long as the jury trial right "remains sacred and inviolate, not only from all open attacks" but "also from all secret machinations, which may sap and undermine it." 4 W. Blackstone, Commentaries on the Laws of England 372 (1769); *see also Jones* v. *United States*, 526 U.S. 227, 244–48 (1999) (surveying the importance of the jury at the common law).

Central to the jury trial guarantee is the right to proper venue for that trial. Tracing back to the Magna Carta, the venue right has a rich historical basis and is enshrined in two separate constitutional provisions. The question now before this Court: What should the *remedy* be for violations of the venue right? Absent review, the government may continue to run roughshod over this fundamental right without meaningful consequence in the Eleventh Circuit and other jurisdictions. The Court should grant the petition to prevent the venue right from becoming a mere parchment barrier and to halt further erosion of the jury trial right.

A. The Constitutional Right to Proper Venue Has Been a Fundamental Aspect of English and American Criminal Procedure for Centuries.

The venue right is rooted in centuries of English tradition. Building on that history, Article III and the Sixth Amendment establish the constitutional right to proper venue. The venue provisions exist to check government abuses and ensure that the jury represents the community where the alleged criminal conduct took place.

The notion that criminal judgment should be rendered by the community where the crime allegedly took place traces back to the Magna Carta. Article 39 of the Great Charter provides that "no freemen shall be taken or imprisoned" except "by lawful judgment of *his peers* or by the law of the land." (emphasis added). And Article 20 prohibits the imposition of certain punishments "except by the oath of honest men *of the neighborhood*." (emphasis added). In the centuries

following the Magna Carta, legal commentators repeatedly emphasized the requirement that jurors come from the neighborhood or county (the vicinage) where the crime allegedly occurred. *See* Matthew Hale, The History and Analysis of the Common Law of England 252–53 (1713) (stating that the jury must "be of the Neighbourhood of the Fact to be inquired, or at least of the County or Bailywick"); 1 Sir Edward Coke, The First Part of the Institutes of the Laws of England *155b (1628) (explaining that jurors "ought to be dwelling most neere to the place where the question is moved").

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

By the 18th century, although jurors no longer relied upon their own knowledge to render judgment, the vicinage requirement remained intact. *See* Blume, *supra*, at 60–61. As Blackstone observed, the local sheriff was obliged to present a panel of jurors "of the visne or neighbourhood, which is interpreted to be of the county where the fact is committed." Engel, *supra*, at 1677 (quoting 4 Blackstone, *supra*, at 346). This reflects the principle that representatives of the community in which the crime was committed are necessary for the jury to fulfil its function. In addition, "the vicinage presumption provides a neutral venue rule that limits the government's ability to select a forum inconvenient or hostile to the defendant." *Id.* at 1660.

English treatment of colonial Americans turned this settled practice on its head. As James Madison wrote in Federalist No. 51, "[a] dependence on the people is, no doubt, the primary control on the government." Control on the government in the criminal realm manifests itself in the constitutional guarantee to a trial by jury in the community in which the crime occurred. The need for such control against the arbitrary use of governmental power was plain to the Founders: At the time, the British Crown authorized removal of colonial criminal defendants to stand trial in foreign lands, often without the right to a jury. *See* Bernard Bailyn, The Ideological Origins of the American Revolution 108–09 (Enlarged ed., The Belknap Press of Harvard University Press 1992) (discussing the use of juryless vice-admiralty courts). A colonial defendant thus faced an almost certain conviction in a distant jurisdiction before a sole judge sitting at the pleasure of the King of England. *Id.* Such trials also deprived defendants of the benefit of having their own

counsel, access to character witnesses and other relevant witnesses, and the support of their family and community. *See* Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 808–09 (1976). Even if the Crown shipped the accused to England and granted the accused a jury trial, the accused was "a stranger before a prosecutor and a jury," who "could possibly view their role simply as vindicating the government's allegations, as opposed to doing justice for both the accused and the administration of law." *Id.*; *see also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 875 (1994) (noting Edmund Burke's protest that a colonial defendant brought to England to stand trial was "unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence" (quoting Edmund Burke, Letter to the Sheriffs of Bristol, in 2 The Works of The Right Honorable Edmund Burke 189, 192 (Little, Brown, 9th ed. 1889))). Illustrating the Founders' outrage at the Crown's deprivation of their venue and jury rights, the First Continental Congress declared that the colonists were "entitled . . . to the great and inestimable privilege of being tried by their *peers of the vicinage*." *Duncan* v. *Louisiana*, 391 U.S. 145, 152 (1968) (citation omitted) (emphasis added).

Consistent with that history, the proper venue for criminal trials is an issue that "has been fundamental since our country's founding." *United States* v. *Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014). Indeed, "[t]he proper place of colonial trials was so important to the founding generation that it was listed as a grievance in the Declaration of Independence." *Id.*; *see* Declaration of Independence ¶ 21 (1776) (objecting

to "transporting us beyond Seas to be tried for pretended offences"). To prevent their newly formed republic from suffering such evils, the Founders ensured that "[t]he Constitution twice safeguards the defendant's venue right"—once in Article III, § 2, cl. 3, and again in the Sixth Amendment. *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998).[1]

The history of both constitutional provisions reveals the critical importance of the venue right. Although Article III, Section 2 of the Constitution instructs that "[t]he Trial of all Crimes . . . shall be held in *the State* where the said Crimes shall have been committed," U.S. Const. art. III, § 2, cl. 3 (emphasis added), many states feared that this insufficiently safeguarded the right to a local criminal trial. Virginia and North Carolina passed resolutions calling for a Bill of Rights that specifically recognized a right to trial by an impartial jury of the defendant's vicinage. Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 33–34 (1994). New York urged an amendment guaranteeing "an impartial Jury of the County where the crime was committed." *Id.* at 34. Other states also emphasized the need for more robust venue protections. *See id.*

This sparked vigorous debate between Federalists and Anti-Federalists about the role of the jury. On the

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[1] "Strictly speaking the former constitutional provision [U.S. Const. art. III, § 2, cl. 3] is a venue provision, since it fixes the place of trial, while the latter [U.S. Const. amend. VI] is a vicinage provision, since it deals with the place from which the jurors are to be selected. This technical distinction has been of no real importance." 2 Charles Alan Wright & Peter J. Henning, Fed. Prac. & Proc. Crim. § 301 (4th ed.) (footnote omitted); *see United States* v. *Royer*, 549 F.3d 886, 893 n.8 (2d Cir. 2008).

one hand, the Federalist-controlled Senate resisted requiring federal criminal trials to occur in the county where the crime allegedly occurred, because it feared that local juries would promote disunion by shielding local rebels from federal prosecution through nullification. On the other hand, the House insisted on the importance of local juries, in part as a check on centralized governmental power. *See* Abramson, *supra*, at 28–29, 34–35. This debate culminated in the existing text of the Sixth Amendment—"[t]he language of the Sixth Amendment requiring criminal trials to be tried before a jury that hailed not only from the state where the crime occurred but also from the district within the state was a genuine compromise that both supporters and opponents of local juries could accept." *Id.* at 35.

In short, the venue provisions in the Constitution come from a rich English tradition of rendering criminal judgment in the community affected by the alleged crime. *See* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. Cal. L. Rev. 1533, 1551 (1993) ("[T]he lasting legacy of the venue and vicinage requirements is that the jury will represent the community most affected by the crime and will therefore serve as the conscience of the community."). The constitutional venue requirements also play a critical role in preventing the government from forum shopping—as the Crown threatened to do by sending colonial Americans overseas—by cherry-picking what the government deemed as the most favorable venue for trial. *See* Engel, *supra*, at 1660.

B. The Remedy Adopted by the Eleventh Circuit Undermines the Venue Right.

The Eleventh Circuit's rule (as well as those of the Sixth, Ninth, and Tenth Circuits) enfeebles this important constitutional right in at least three ways, thus defying the Founders' clear intent. *First,* a remedy of merely vacating the conviction with no Double Jeopardy bar grants the government a second bite at the apple. The Eleventh Circuit's approach frees the government to keep retrying defendants in different venues without any meaningful consequences, thus creating a perverse incentive for the government to ignore—or even deliberately violate—the constitutional right to proper venue. *Second,* by the same token, the Eleventh Circuit's remedy gives criminal defendants—powerless to avoid serial prosecutions for the same offense—no incentive to challenge the government's choice of venue. *Third,* the Eleventh Circuit's rule creates additional pressure on criminal defendants to accept a plea bargain, even if the accused has a legitimate venue argument. In short, the Eleventh Circuit's approach doubly rewards the government: Increasing its bargaining power in plea negotiations and reducing the number of jury trials, thereby diminishing citizen participation in the criminal justice system and weakening the jury-trial right.

1. NO MEANINGFUL REMEDY. — The Eleventh Circuit's rule renders the government unaccountable for violating a defendant's venue right. The only consequence for such a constitutional violation in the Eleventh Circuit is that the government must re-prosecute the accused for the same offense. Even worse, the Eleventh Circuit generally leaves the decision of

where to retry the accused entirely up to the government, thus giving the government broad discretion potentially to select another improper venue that it may believe is still more favorable than the one required by the Constitution—or even the *same* venue already found to be improper. *See, e.g.*, *United States* v. *Kaytso*, 868 F.2d 1020, 1021–22 (9th Cir. 1988) (rejecting application of criminal collateral estoppel to a second prosecution of a defendant for the same offence in the same district where the government previously failed to prove venue). The logical extension of the Eleventh Circuit's rule is that the government is free to keep retrying the accused, in one venue after another, into perpetuity without limitation.

Thus the Eleventh Circuit's holding below—far from holding the government accountable for violations of constitutional magnitude—actually *incentivizes* the government to continue engaging in such violations without consequence. Put another way, to the extent the government believes that a remote venue exists that would disadvantage the defendant's ability to mount a defense and summon key witnesses, the government is free to select that venue, secure in the knowledge that the only consequence of failing to prove venue at trial would be retrying the accused somewhere else. *See United States* v. *Johnson*, 323 U.S. 273, 279 (1944) (Murphy, J., concurring) ("Very often the difference between liberty and imprisonment . . . depends upon the presence of character witnesses," but "[t]he inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use" and "they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations."). In short,

the Eleventh Circuit's remedy is no remedy at all: Its practical effect is that the government will be able to violate with impunity the constitutional right to proper venue.

The Eleventh Circuit's rule further rewards the government's efforts to mischaracterize the venue right as a "convenience" for a criminal defendant, instead of a fundamental right the Framers carefully enshrined in Article III and the Sixth Amendment. To wit, the Government previously argued to this Court that "[t]he venue right is animated primarily by considerations of convenience for the defendant." Brief for the United States in Opposition at 7, *Knox* v. *United States*, No. 08-569 (U.S. Jan. 30, 2009), 2009 WL 1030530, at *7 (citing *United States* v. *Cores*, 356 U.S. 405, 407 (1958)). The Government is wrong. Neither *Cores*, nor any other Supreme Court case, has ever held that the fundamental venue right's primary purpose is mere convenience. Rather, as explained above, the venue right acts as a check against governmental abuses of power, ensuring that trial juries comprise representatives of the local community where the conduct allegedly took place.[2] The Eleventh Circuit's holding will encourage and embolden the government's attempts to trivialize the venue right as a mere vehicle for convenience—thus giving prosecutors incentive to prioritize issues where errors run the risk of an acquittal, thus subordinating questions of venue to the back burner. *But see Auernheimer*, 748 F.3d at 532 (characterizing the right to venue

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

as "fundamental since our country's founding" and further observing that venue "was so important to the founding generation that it was listed as a grievance in the Declaration of Independence").

The prosecutorial incentives inherent in the statutory scheme the Court considered in *Apprendi* v. *New Jersey* are instructive here. In *Apprendi*, the Court held unconstitutional New Jersey's procedure that permitted "a jury to convict a defendant of a second-degree offense . . . beyond a reasonable doubt" but then permitted "a judge to impose punishment identical to that New Jersey provided for crimes of the first degree based upon the judge's finding, by a preponderance of the evidence" that the defendant had a "'purpose' . . . 'to intimidate.'" 530 U.S. 466, 491 (2000) (citation omitted). Such a statutory scheme provided the government with little incentive to shoulder the larger burden of proving a first-degree offense beyond a reasonable doubt, when proving a lesser offense was easier and less risky, with the government still able to seek the same first-degree murder penalty at sentencing. *See id.* at 484 ("[T]the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached").

Similarly, the Eleventh Circuit's rule here incentivizes the government to ease its burden by cherry-picking the most favorable venue possible with little risk, secure in the knowledge that it may re-prosecute a defendant upon a finding of a venue violation. Just as the *Apprendi* Court abolished prosecutorial incentives to ignore "constitutional protections of surpassing importance: . . . 'the right to a speedy and public trial, by an impartial jury,'" 530 U.S. at 476–77, so too

here the Court should eliminate the perverse incentives that the Eleventh Circuit's remedy bestows upon the government. The Framers feared "that the jury right could be lost not only by gross denial, but by erosion," *id.* at 483 (quoting *Jones*, 526 U.S. at 248); similarly here the venue right can suffer from unwarranted erosion.

2. DISINCENTIVIZING DEFENDANTS FROM CHALLENGING VENUE. — The Eleventh Circuit's remedy weakens the venue right by stripping criminal defendants of any upside to challenging venue. The best case for a defendant successfully challenging venue is a government do-over.

Indeed, the Eleventh Circuit's remedy has no limiting principle; nothing prevents the government from repeatedly retrying criminal defendants for the same offense into perpetuity. *See Owen* v. *City of Independence*, 445 U.S. 622, 651 n.33 (1980) ("[W]ithout a meaningful remedy aggrieved individuals will have little incentive to seek vindication of [the government's] constitutional deprivations . . . ."). Moreover, questions of venue are often not resolved until trial. *See United States* v. *Hardaway*, 999 F.3d 1127, 1130 (8th Cir. 2021) ("To go beyond the face of the indictment, and challenge the sufficiency of the government's evidence on venue, [defendant] was required to proceed to trial and put the government to its burden of proof"), *cert. denied*, 142 S. Ct. 1169 (2022); *United States* v. *Snipes*, 611 F.3d 855, 866 (11th Cir. 2010) ("As with resolving other important elements contained in a charge, a jury must decide whether the venue was proper"). Under the Eleventh Circuit's approach, therefore, if the government again chooses an

improper venue, a criminal defendant would be required to go through yet another trial in an improper venue to vindicate her venue rights. This further disincentivizes venue challenges, thereby eroding this right. After all, there can be no right without an effective remedy to secure it. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Surely this is not what the Framers intended.

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

Bereft of any check on its obligation to prosecute crimes in the correct venue, the government is unfettered in its ability to prosecute cases in venues that are both incorrect and more favorable to the prosecution. This not only puts a thumb on the government's side of the scale in plea negotiations, it also results in a self-perpetuating constitutional violation: By accepting a plea deal, a defendant virtually guarantees that the government's violation of his venue right will go unchallenged in court.

Unless the Court grants review and confirms that there are meaningful consequences for violating the venue right, the government will be free to ignore that right, knowing that if it gets caught it will at worst receive a do-over.

Allowing the government to retry criminal defendants after violating their constitutional venue rights

also diminishes the jury trial right more generally by encouraging more defendants to take plea deals.

As this Court has recognized, the jury trial right "remains one of our most vital barriers to governmental arbitrariness." *Reid* v. *Covert*, 354 U.S. 1, 9–10 (1957). Critically, the venue provisions in the Constitution "were incorporated" in an effort "to preserve the role of the jury in representing the community whose interests were at stake." Levenson, *supra*, at 1549. At the time of this country's founding, the jury trial was understood not just to be a fair means of deciding guilt or innocence, but also as an independent institution designed to give the community a central role in the administration of criminal justice. Yet this community role is further threatened by the additional pressure a defendant prosecuted in a distant venue faces to accept a plea bargain.

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

across the penal landscape and driven our vanquished jury into small pockets of resistance").

No panacea exists for the jury's vanishing role in our criminal justice system; it is a deep, structural problem far exceeding the bounds of any one case or doctrine. But the least we can do to avoid further discouraging defendants from exercising their right to a jury trial is to prevent the government from employing the threat of prosecution in an improper venue and a weak remedy for that constitutional violation as extra leverage to force a plea deal.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE ISSUES PRESENTED IN THE PETITION FREQUENTLY RECUR.

Because of the venue right's constitutional underpinnings, every Circuit requires the government to prove venue in every case where it is challenged. Thus, the question of the proper remedy for a venue violation has the potential to arise in every criminal case. Yet many of the courts of appeals are divided on this question and the confusion in the district courts is even more pronounced. *See* Pet. 20–21. Uncertainty in application of the venue right leads to disparate results in the criminal justice system: A criminal defendant's constitutional rights should not depend on the Circuit in which they happen to be tried. Accordingly, the Court should resolve this circuit split and settle this foundational issue once and for all.

To the extent that the Government claims that intervention by the Court is unnecessary because the problem seldom occurs, the Government would be wrong for at least three reasons. *First,* as explained above, and as petitioner notes, there is potential for a

venue issue to arise in every criminal case. *See* Pet. 23; *see also*, *e.g.*, *United States* v. *Miller*, 111 F.3d 747, 749 (10th Cir. 1997) ("[V]enue is a right of constitutional dimension, [which] has been characterized as an element of every crime." (citation and quotation marks omitted)). Even if the government can demonstrate that this issue does not often come to the attention of the courts, that may simply be the result of the self-perpetuating quality of this particular constitutional violation, as discussed above in the context of plea bargaining. In other words, any perceived rarity here may simply be the result of selection bias because the problem itself limits how often courts have a chance to address it.

Second, and more importantly, any alleged scarcity of the constitutional violation does not diminish its importance. Because of common-law history—including the British Crown abusing the justice system by shipping colonial defendants to England for trial—the Framers viewed venue rights as fundamental. *See Johnson*, 323 U.S. at 275 (observing that after "the Framers wrote into the Constitution" the venue right, "[a]s though to underscore the importance of this safeguard, it was reinforced by the [Sixth Amendment]"). Indeed, the abuse of government power against which the right protects was "one of the precipitating factors of the American Revolution." *United States* v. *Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part) (citing Blume, *supra*, at 63–67), *rev'd on other grounds sub nom. United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999); *see* Bailyn, *supra*, at 108–09. Thus, *any* violation of such a critical right should be intolerable.

Third, to the extent that the issue of constitutional venue seldom arises in some Circuits, this is likely because defendants have little incentive to challenge venue if the only remedy is giving the government a do-over. Thus the Court should resolve the issue now, and not wait for the issue to percolate in the lower courts when the lack of a meaningful remedy limits and hamstrings any such percolation.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant review and reverse the decision below.

Respectfully submitted,

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