No. 21-1576

In the Supreme Court of the United States

TIMOTHY J. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly vacated and dismissed without prejudice one of petitioner's counts of conviction, rather than directing a judgment of acquittal, after agreeing with his challenge to venue for 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 jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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)(l), 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 trade-secrets-theft conviction on venue grounds, affirmed the extortion conviction, and remanded for resentencing. *Id.* at 1a-18a.

1. Petitioner is a software engineer and avid fisherman who lived in Mobile, Alabama (in the Southern District of Alabama). Pet. App. 1a-2a. In 2018, petitioner learned of a business named StrikeLines based in Pensacola, Florida (in the Northern District of Florida), which sells on its website the coordinates for artificial reefs in the Gulf of Mexico. *Id.* at 2a, 6a. The commercial and recreational fishermen who build artificial reefs to create attractive fishing locations do not typically share their coordinates with the public. *Id.* at 2a. StrikeLines therefore identifies the coordinates that it sells by, among other things, analyzing sonar data from boats that it launches into the Gulf. *Ibid.* StrikeLines then sells the coordinates for each private reef only once. *Ibid.* The servers that host StrikeLines's website data are located in Orlando (in the Middle District of Florida). *Id.* at 2a, 6a.

In May 2018, petitioner used a web application called "Fiddler" to access StrikeLines's coordinates for private artificial reefs. Pet. App. 2a. Petitioner subsequently contacted StrikeLines's owners, informed them that he had been able to access the company's private reef coordinates through a vulnerability in its website, and provided them with photographs of the reef data he had

obtained. *Id.* at 3a, 21a. Petitioner refused, however, to disclose how he had gained access to the data. *Ibid.*

In response, StrikeLines had its web developer enhance the security of its website. Pet. App. 3a. But petitioner was able to continue to access StrikeLines's private reef data. *Id.* at 4a. Petitioner also started offering others access to StrikeLines's data on Facebook, which prompted StrikeLines's customers to complain to the company. *Id.* at 3a-4a. Petitioner subsequently informed StrikeLines's owners that he could still access the data, but he continued to refuse to disclose how he did so. *Id.* at 4a.

After StrikeLines's owners complained to petitioner, petitioner offered to remove his Facebook posts and stop interfering with StrikeLines's business in exchange for "help with one thing." Pet. App. 4a. Petitioner stated that he wanted StrikeLines's "deep grouper numbers" and that he would then help StrikeLines "fix [its] problem free of charge." *Ibid.* Communications between petitioner and StrikeLines broke down the following day, and StrikeLines's owners contacted law enforcement. *Id.* at 4a-5a.

Law-enforcement officers obtained and executed a search warrant at petitioner's residence in Mobile. Pet. App. 5a. After being advised of his *Miranda* rights, petitioner admitted that he had "infiltrate[d]" the StrikeLines's website and had written computer "code to decrypt the [website's] information." *Ibid.* Petitioner further admitted that he had accessed StrikeLines's website after StrikeLines had upgraded its security, written the Facebook posts, and shared StrikeLines's coordinates with third parties. *Ibid.*

2. A federal grand jury in the Northern District of Florida 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) (Count 3). See Superseding Indictment 1-3.

Before trial, petitioner moved to dismiss the indictment for improper venue. D. Ct. Doc. 38 (July 12, 2019). Petitioner argued that the Northern District of Florida was not a proper venue for the computer fraud and trade-secrets-theft counts because all of his alleged offense conduct occurred where he lived in the Southern District of Alabama and because the computer data that he allegedly accessed and obtained was located in the Middle District of Florida. *Id.* at 2-3, 7. Petitioner further argued that the Northern District of Florida was not a proper venue for the extortion count, on the theory that "venue must be proper with respect to each count" of a multicount indictment. *Id.* at 8. The district court denied the motion without prejudice, concluding that the indictment sufficiently 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." D. Ct. Doc. 46, at 7-8 (Aug. 5, 2019).

Petitioner renewed his venue motion at trial. Pet. App. 7a. The district court denied the motion with respect to the extortion count but otherwise reserved its ruling on venue. *Ibid.*; 12/3/2019 Tr. 158, 162. The court then submitted the case to the jury with instructions that the government must prove venue by a preponderance of the evidence. Pet. App. 7a; see 12/3/2019 Tr. 185, 221. The jury found petitioner not guilty on the

computer-fraud count but found him guilty on the trade-secrets-theft and extortion counts. Pet. App. 7a.

The district court subsequently denied petitioner's venue motion. Pet. App. 25a-30a, 35a & n.26. With respect to petitioner's trade-secrets-theft conviction, the court reasoned that "venue may lie where the effects of criminal conduct are felt 'when an essential conduct element is itself defined in terms of its effects.'" *Id.* at 27a (quoting *United States* v. *Bowens*, 224 F.3d 302, 311, 313 (4th Cir. 2000), cert. denied, 532 U.S. 944 (2001)). Applying that principle, the court determined that venue is proper for a trade-secrets-theft offense "in the place where the owner of the trade secret is located and feels the loss of its trade secret"—here, the Northern District of Florida—because "the essential conduct of theft or misappropriation is necessarily defined in terms of its effects, i.e., the owner's loss of the trade secret." *Id.* at 29a-30a.

The district court sentenced petitioner to 18 months of imprisonment on the trade-secrets-theft count, to be followed by one year of supervised release. Pet. App. 43a-44a. The court also sentenced petitioner to 18 months of imprisonment on the extortion count, to be followed by one year of supervised release. *Ibid.* The court ordered the sentences for each count to run concurrently. *Ibid.*

3. On appeal, petitioner reasserted his contention that the Northern District of Florida was an improper venue for his trade-secrets-theft count, Pet. C.A. Br. 21-32, arguing that the count should have been "dismissed due to lack of venue," *id.* at 21 (capitalization and emphasis omitted), and that his conviction for trade-secrets theft should be "reversed and a judgment rendered in [his] favor," *id.* at 77. Petitioner also argued

"[i]n the alternative" that the evidence was insufficient to sustain his conviction on that count. *Id.* at 33, 77; see *id.* at 32-45. The remedy that petitioner sought on the evidentiary-insufficiency claim was not "revers[al] and a judgment * * * in [his] favor" on the trade-secrets-theft count, but instead a "judgment of acquittal" on that count. *Id.* at 77; see *id.* at 33. Petitioner later represented that, unlike evidentiary insufficiency warranting acquittal, "[p]roper venue is not a consideration going to the guilt or innocence of a defendant." Pet. C.A. Reh'g Pet. 13.

At oral argument, the court of appeals asked petitioner's counsel whether "[petitioner] could be recharged in Mobile," Alabama, "[i]f the conviction on [the trade-secrets-theft] count were vacated" on venue grounds. C.A. Oral Argument at 4:52-5:00 (Dec. 15, 2021).[1] Counsel responded, "Theoretically, I think so" but added that it was unclear whether that would occur in "reality." *Id.* at 5:04-5:09. The court then clarified its understanding that petitioner could be recharged "as a matter of law," and petitioner responded, "Yes, sir, I agree." *Id.* at 5:09-5:12.

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

The court of appeals affirmed petitioner's extortion conviction, finding that venue was proper, Pet. App. 15a, and that the evidence sufficiently established the offense, *id.* at 16a. But the court of appeals vacated petitioner's trade-secrets-theft conviction on venue grounds. *Id.* at 10a-15a.

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[1] The recording of the oral argument in the court of appeals is available at https://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/20-12667.mp3?download=1.

The court of appeals reasoned that venue is proper in any district in which the "'conduct constituting the offense'" occurred; "[t]he essential conduct element of the [trade-secrets-theft offense] is that the defendant must steal, take without authorization, or obtain by fraud or deception trade-secret information"; and that the Northern District of Florida was not a proper venue for that offense because petitioner "never committed any essential conduct in that [district]." Pet. App. 11a-12a (citation omitted). The court accordingly stated that "venue would be proper in the Southern District of Alabama, where [petitioner] was located when he took the trade secrets," while noting that it "need not decide" whether venue would also be proper in the Middle District of Florida, where the computer servers containing the trade-secret data had been located. *Id.* at 12a.

Consistent with petitioner's acknowledgment at oral argument, the court of appeals stated that "[t]he remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice." Pet. App. 15a (citing *United States* v. *Davis*, 666 F.2d 195, 202 (5th Cir. Unit B 1982)). The court added that "[t]he Double Jeopardy clause is not implicated by a retrial in a proper venue after we vacate a conviction for improper venue." *Ibid.* (citing *Haney* v. *Burgess*, 799 F.2d 661, 664 (11th Cir. 1986) (per curiam)). The court accordingly vacated petitioner's trade-secrets-theft conviction and remanded for resentencing on petitioner's extortion conviction. *Id.* at 18a.

ARGUMENT

Petitioner contends (Pet. 25-34) that the court of appeals erred by vacating his trade-secrets-theft conviction, asserting that its agreement with his claim of improper venue instead required a judgment of acquittal.

Petitioner further contends (Pet. 14-22) that the courts of appeals are divided over whether a judgment of acquittal must be entered when the government fails to prove venue. The court of appeals' judgment is correct, and its decision does not implicate a division of authority that might warrant review. Review in this particular case would be unwarranted in any event, because petitioner affirmatively disclaimed on appeal the position that he asserts in this Court. The interlocutory posture of this case and the remedial nature of petitioner's claim further counsel against the Court's review at this time. The petition should be denied.

1. As a threshold matter, this Court's review is unwarranted for at least two reasons.

a. First, the venue-remedy question that petitioner presents is not properly before the Court. Although petitioner requested that the court of appeals direct the entry of a "judgment of acquittal" to remedy *other* asserted errors, he sought only the "dismissal" of his trade-secrets-theft count on venue grounds. See pp. 5-6, *supra*. Petitioner then specifically confirmed to the court of appeals at oral argument that if the trade-secrets-theft count were dismissed on venue grounds, the government could, "as a matter of law," recharge him on that count. See p. 6, *supra*. Because the court of appeals applied the venue remedy that petitioner himself represented to be correct, petitioner's current challenge to that remedy is not properly before this Court.

The court of appeals' citation of prior precedent to illustrate that "[t]he remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," Pet. App. 15a (citing *United States* v. *Davis*, 666 F.2d 195, 202 (5th Cir. Unit B 1982)), does not

excuse petitioner's representation.[2] This Court has excused litigants from the normal obligation to challenge circuit precedent in the case under review if the litigant *both* (1) had previously challenged that precedent "in 'the recent proceeding upon which the lower courts relied for their resolution of the issue'" *and* (2) "'did not concede in the current case the correctness of that precedent.'" *United States* v. *Vonn*, 535 U.S. 55, 58 n.1 (2002) (quoting *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992)). But here, petitioner affirmatively agreed that "as a matter of law" he could be recharged in another district in which venue is proper. See p. 6, *supra*.

b. Second, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to district court "is not yet ripe for review by this Court"); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). The court of appeals ordered the case remanded to district court for resentencing. Pet. App. 18a. And once petitioner is resentenced and a final judgment is entered, petitioner may appeal and assert his current contentions—together with any other claims that may arise on remand—in a single certiorari petition. See

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[2] Decisions by Unit B panels of the former Fifth Circuit are binding precedent both in the Fifth Circuit, *Empower Texans, Inc.* v. *Geren*, 977 F.3d 367, 372 & n.2 (5th Cir. 2020); *Douglass* v. *United Servs. Auto. Ass'n*, 79 F.3d 1415, 1422 n.8 (5th Cir. 1996) (en banc), and in the Eleventh Circuit, *Ruiz* v. *Wing*, 991 F.3d 1130, 1141 n.8 (11th Cir. 2021).

Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

No sound reason exists to depart from the Court's practice of denying certiorari in criminal cases that arise in interlocutory postures. Indeed, interlocutory review would be particularly unwarranted here. The district court originally sentenced petitioner to concurrent 18-month terms of imprisonment for petitioner's extortion and trade-secrets-theft convictions. Pet. App. 43a. After the court of appeals vacated the trade-secrets-theft conviction and remanded, the Probation Office determined in a new Presentence Investigation Report that the advisory Sentencing Guidelines range for petitioner's extortion conviction is 12-18 months, D. Ct. Doc. 145 ¶ 93 (Aug. 18, 2022), and the government has argued that the district court should impose the same 18-month term of imprisonment that it previously imposed for that count, D. Ct. Doc. 139, at 4 (Aug. 1, 2022).

That sentence remains appropriate, particularly because the district court can properly consider petitioner's conduct concerning the vacated trade-secrets-theft conviction as "relevant conduct" for determining the proper sentence for his extortion conviction. See *United States* v. *Siegelman*, 786 F.3d 1322, 1332 (11th Cir. 2015) (discussing Sentencing Guidelines § 1B1.3), cert. denied, 577 U.S. 1092 (2016). And so long as the district court imposes a guidelines-range term of imprisonment that approaches or equals the original 18-month term, the question presented to this Court would have no practical effect for petitioner because the United States has no intention to recharge petitioner on the trade-secrets-theft count in a different district.

Even if the district court imposes a lower sentence on remand, the United States may elect not to recharge

petitioner. And if it did, the remedial nature of petitioner's venue-remedy claim illustrates that the claim could be presented when petitioner's feared injury is imminent, as opposed to speculative. Petitioner contends that the Sixth Amendment makes venue "a constitutionally imposed *element* of every offense" and, if the government fails to prove that element, the government cannot retry the defendant in a district with proper venue. Pet. 25-26, 31. That contention could be presented if petitioner is in fact charged again for trade-secrets theft through a motion to dismiss on double-jeopardy grounds, a denial of which would be immediately appealable as a "final decision," *Richardson* v. *United States*, 468 U.S. 317, 320-322 (1984), and which could thereby reach this Court.

2. In any event, the court of appeals correctly determined that dismissal of petitioner's trade-secrets-theft conviction was the proper remedy for a venue defect.

a. Article III's Venue Clause provides that the "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. The Sixth Amendment's Vicinage Clause affords defendants the related but more specific right to a trial by "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. Those provisions defining where a prosecution may be brought do not require that a prosecution filed in the wrong district be remedied by a judgment of acquittal that forecloses subsequent prosecution in a proper venue.

By its very nature, venue governs only the locations where the prosecution of a criminal offense may be properly pursued *after* the offense has been committed. As a result, venue—unlike an actual element of an

offense—plays no role in defining what conduct constitutes a crime. The courts of appeals have thus consistently recognized that venue is not an "element" of an offense akin to those that define the crime. See, *e.g.*, *United States* v. *Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998); *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008); *United States* v. *Perez*, 280 F.3d 318, 330 (3d Cir.), cert. denied, 537 U.S. 859 (2002); *United States* v. *Griley*, 814 F.2d 967, 973 (4th Cir. 1987); *United States* v. *Muhammad*, 502 F.3d 646, 652 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008); *United States* v. *Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1989); *United States* v. *Stickle*, 454 F.3d 1265, 1271-1272 (11th Cir. 2006); see also, *e.g.*, *United States* v. *Lee*, 966 F.3d 310, 320 n.2 (5th Cir.) (stating that venue is not "an element of the offense or an issue that goes to guilt"), cert. denied, 141 S. Ct. 639 (2020); *United States* v. *Carreon-Palacio*, 267 F.3d 381, 390-391 (5th Cir. 2001) (explaining that "[v]enue differs from traditional offense elements" and that the description of venue as "an element of the offense" is correct only "in the narrow context of what must be proven in order for a conviction to pass constitutional muster").

Evidence relevant to venue—"unlike the substantive facts which bear on guilt or innocence in the case"—will never "prove or disprove the guilt of the accused." *Wilkett* v. *United States*, 655 F.2d 1007, 1011 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). As petitioner himself observed below (Pet. C.A. Reh'g Pet. 13), "venue is not a consideration going to the guilt or innocence of a defendant." That core characteristic of venue has several consequences for a defendant's assertion of his venue right at trial, three of which are instructive here.

First, although the government always has the burden of proving to a jury the true elements of a criminal offense, a jury finding on venue is not required in every case. Instead, venue becomes a jury question only if it is genuinely "in issue." *United States* v. *Fahnbulleh*, 752 F.3d 470, 477 (D.C. Cir. 2014) (quoting *United States* v. *Haire*, 371 F.3d 833, 840 (D.C. Cir. 2004), vacated on other grounds, 543 U.S. 1109, judgment reinstated, No. 02-3009, 2005 WL 3279991 (D.C. Cir. 2005) (per curiam), cert. denied, 546 U.S. 1131 (2006)), cert. denied, 574 U.S. 921 (2014), and 574 U.S. 1202 (2015); see, *e.g.*, *Perez*, 280 F.3d at 333-336 (discussing different methods for determining if venue is "in issue"); see also *United States* v. *Jackalow*, 66 U.S. (1 Black) 484, 487 (1862) (stating that a venue determination that turns on the disputed "place" of the offense conduct near a state border requires "application of the evidence" and "belongs to the jury"). Venue is "in issue" only if the defendant objects to venue before the jury's verdict and/or timely requests a jury instruction on the question. See, *e.g.*, *United States* v. *Cordero*, 668 F.2d 32, 44 (1st Cir. 1982) (Breyer, J.); *United States* v. *Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980); *United States* v. *Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014); *United States* v. *Carbajal*, 290 F.3d 277, 288-289 & n.19 (5th Cir.), cert. denied, 537 U.S. 934 (2002); *United States* v. *Nwoye*, 663 F.3d 460, 466 (D.C. Cir. 2011); 2 Charles Alan Wright et al., *Federal Practice and Procedure* § 306 (4th ed. 2009 & Supp. 2022); see also *United States* v. *Miller*, 111 F.3d 747, 751 (10th Cir. 1997) (explaining that "failure to instruct on venue, *when requested*, is reversible error" unless the "jury of necessity finds an illegal act within the trial jurisdiction") (emphasis added).

Second, as petitioner acknowledged below, the government need only "prove venue * * * by a preponderance of the evidence." Pet. C.A. Reh'g Pet. 15. Every court of appeals with jurisdiction over criminal cases has recognized that principle. See *United States* v. *Salinas*, 373 F.3d 161, 163 (1st Cir. 2004); *Rommy*, 506 F.3d at 119 (2d Cir.); *Perez*, 280 F.3d at 330 (3d Cir.); *United States* v. *Robinson*, 275 F.3d 371, 378 (4th Cir. 2001), cert. denied, 535 U.S. 1006, and 535 U.S. 1070 (2002); *Lee*, 966 F.3d at 320 & n.2 (5th Cir.); *United States* v. *Crozier*, 259 F.3d 503, 519 (6th Cir. 2001), cert. denied, 534 U.S. 1149, and 534 U.S. 1171 (2002); *Muhammad*, 502 F.3d at 652 (7th Cir.); *United States* v. *Johnson*, 462 F.3d 815, 819 (8th Cir. 2006), cert. denied, 549 U.S. 1298 (2007); *United States* v. *Pace*, 314 F.3d 344, 349 (9th Cir. 2002); *United States* v. *Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000), cert. denied, 532 U.S. 951 (2001); *United States* v. *Little*, 864 F.3d 1283, 1287 (11th Cir. 2017); *United States* v. *Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004).[3]

Third, and most relevant here, a failure of proof on venue does not implicate the Double Jeopardy Clause. When a criminal defendant "choos[es] to seek termination of the proceedings against him on a basis unrelated

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[3] Petitioner states that "many [state] jurisdictions" require venue to be proven beyond a reasonable doubt and that the Model Penal Code (for state criminal law) follows that approach, Pet. 27 & n.10, but petitioner does not contend that those non-federal sources reflect a federal constitutional requirement. Article III concerns the "judicial Power of the United States," U.S. Const. Art. III, § 1, and every federal court of appeals to have addressed whether the Sixth Amendment's Vicinage Clause applies to the States (through the Fourteenth Amendment) has held that it does not, see *Stevenson* v. *Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004), cert. denied, 543 U.S. 1191 (2005).

to factual guilt or innocence of the offense of which he is accused," he "suffers no injury cognizable under the Double Jeopardy Clause" if he is later retried for the offense. *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978); see *Evans* v. *Michigan*, 568 U.S. 313, 318-320 (2013). And a defendant who seeks to terminate his prosecution based on improper venue does exactly that: he seeks termination of the proceedings against him on a basis that, as petitioner argued below, is wholly unrelated to his "guilt or innocence." Pet. C.A. Reh'g Pet. 13. A dismissal without prejudice, not a judgment of acquittal, is therefore the appropriate remedy for a venue defect. At least eight courts of appeals have reached that conclusion with varying degrees of explanation. See Pet. 17-18 & n.6.[4]

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[4] See, *e.g.*, *United States* v. *Brennan*, 183 F.3d 139, 149, 151 (2d Cir. 1999) (reversing conviction and dismissing charge for improper venue; noting that "a United States Attorney in a district where venue could properly be laid may consider undertaking a new prosecution"); *Auernheimer*, 748 F.3d at 541 (3d Cir.) (reversing district court's venue determination and vacating defendant's conviction); *United States* v. *Jefferson*, 674 F.3d 332, 369 (4th Cir.) (vacating conviction on venue grounds), cert. denied, 568 U.S. 1041 (2012); *United States* v. *Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019) (holding that "dismissal without prejudice is appropriate" because a "dismissal on venue grounds does not qualify as an 'acquittal' for double jeopardy purposes"); *United States* v. *Hernandez*, 189 F.3d 785, 792 n.5 (9th Cir. 1999) (concluding that "a judgment of acquittal is [not] the appropriate remedy in the case of improper venue" because venue does not concern guilt or innocence), cert. denied, 529 U.S. 1028 (2000); *Wilkett*, 655 F.2d at 1012 (10th Cir.) (holding that defendant "can be retried in the district where the crime was committed" because a prior dismissal on venue grounds "brings about the termination of the [earlier] proceedings on a basis other than adjudication of guilt or innocence"); *Haney* v. *Burgess*, 799 F.2d 661, 663-664 (11th Cir. 1986) (per curiam) (following *Wilkett*); *United States* v. *White*, 887 F.2d 267, 272 n.5 (D.C. Cir. 1989).

b. Petitioner contends (Pet. 25-29) that "venue is a constitutionally imposed *element* of every offense" and, for that reason, "the government's failure to bear its burden on venue should produce the same result as it would for any other element—acquittal and preclusion of a subsequent prosecution under the Double Jeopardy Clause," Pet. 25-26. For the reasons just explained, his contention rests on an unsound premise. In addition, the conclusion he draws from that premise is unsound. One offense is not the same as another under the Double Jeopardy Clause so long as the elements of one are not a subset of the elements of the other. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). And that would be true even under petitioner's approach: a crime charged in district A would have an "element" of commission in district A; a crime charged in district B would have an "element" of commission in district B.

Petitioner contends (Pet. 26, 29-32) that a judgment of acquittal must be entered if venue is improper because, he argues, the venue right is analogous to the constitutional right to a speedy trial, the violation of which can warrant a dismissal with prejudice. See *Strunk* v. *United States*, 412 U.S. 434, 439-440 (1973). That is incorrect. The reason why a violation of the Speedy Trial Clause can result in dismissal with

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The Ninth Circuit has observed that if a jury renders a general verdict of not guilty after being instructed on the government's burden to establish venue, "jeopardy would attach" because one would be unable to determine the basis for the verdict. *United States* v. *Ghanem*, 993 F.3d 1113, 1130 (9th Cir. 2021). The court therefore recommends "using a special-verdict form requiring a venue finding separate from substantive guilt" to prevent defendants from "attempting to win an acquittal" though a late request for "a venue instruction." *Id.* at 1131. That observation suggests no "confusion" (Pet. 19) about the proper remedy for venue defects.

prejudice is that the violation cannot be "cured by providing th[e] guaranteed right[] in a new trial": once the constitutionally permissible pretrial period has been exceeded, a defendant's reindictment and a new trial will exacerbate the constitutional injury by extending further that period's already unconstitutionally long duration. *Id.* at 439.[5] A right to trial in a proper venue, by contrast, is vindicated by dismissing charges or vacating a conviction if venue is improper. Retrial in a proper venue is then consistent with a defendant's right to trial in such a venue.

Petitioner asserts (Pet. 29) that questions of venue are "not merely matters of formal legal procedure," *United States* v. *Johnson*, 323 U.S. 273, 276 (1944), and cites (Pet. 32-33) *Johnson* as announcing the "core purposes of the venue right." But *Johnson*'s observations do not speak to *constitutional* venue requirements. *Johnson* recognized that "Congress may, to be sure," broadly define proper venue for an offense to "extend over the whole area through which force propelled by an offender operates." 323 U.S. at 275. Yet despite that broad constitutional authority, the Court noted that "*Congress* has not been unmindful" of factors concerning "the fair administration of criminal justice and public confidence" that may be implicated if a statutory

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[5] The Court later clarified that the Speedy Trial Clause does *not* apply to delays between a defendant's conviction and sentencing. *Betterman* v. *Montana*, 578 U.S. 437, 440-441 (2016). In doing so, the Court stated that the "sole remedy" for a speedy-trial violation —"dismissal of the charges—fits the preconviction focus of the [Speedy Trial] Clause" and that "[*i*]*t would be an unjustified windfall*" to "remedy sentencing delay by vacating validly obtained convictions." *Id.* at 444 (emphasis added; citations omitted). Petitioner's reliance on that passage (Pet. 31) does not support his position.

venue provision "opens the door to needless hardship to an accused" and "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Id.* at 275-276 (emphasis added).

Johnson accordingly stated that venue questions, "are not *merely* matters of formal legal procedure" and "raise deep issues of public policy in the light of which *legislation* must be construed." *Johnson*, 323 U.S. at 276 (emphases added). And the Court concluded that if federal legislation "equally permits" a reading that allows "the underlying spirit of the constitutional concern for trial in the vicinage to be respected," that construction should normally be adopted, "even though [it is] not commanded" by the Constitution's venue provisions. *Ibid.*; accord *Travis* v. *United States*, 364 U.S. 631, 634 (1961) (invoking *Johnson*'s discussion on the "constru[ction]" of "venue provisions in Acts of Congress"); see *United States* v. *Cores*, 356 U.S. 405, 407 (1958) (similar). That tie-breaking principle for statutory construction has no application to petitioner's remedial claim here, and *Johnson* overall belies his assertion that the constitutional venue right directly protects against the possibility of prosecution in an inconvenient location. See 323 U.S. at 275-276.

Petitioner's observation (Pet. 30, 32) that the venue right "is violated whenever an accused is made to stand trial in a constitutionally improper venue" and that such a trial "may" hinder a defendant's "ability to present an effective defense" is accordingly not relevant to the proper remedy for a venue violation. Many actions that violate trial rights have the potential to hinder a defendant's defense, but such violations are remedied (if not harmless) by requiring a new trial, not by entering a

judgment of acquittal. Petitioner separately argues (Pet. 33) that improper venue can give rise to an appearance of abuse and damage "public confidence in the justice system." But that policy consideration likewise applies to any number of trial errors, and any perception of unfairness is sufficiently redressed by correcting the error and dismissing the relevant charges or vacating the relevant convictions.

Finally, petitioner asserts (Pet. 30) that the venue right "can only be meaningfully secured when the government is discouraged from initiating prosecutions in the wrong venue, through the threat of acquittal." That is incorrect. Venue violations, like violations of other trial rights, are amply discouraged by, as here, vacatur of a conviction that rests on an impartial jury's finding of guilt beyond a reasonable doubt. Moreover, there is no reason to conclude that the prosecutors here acted improperly in bringing the prosecution where the victim —whose (intangible) trade secrets were stolen and with whom petitioner communicated to extort a thing of value—was located.

3. Petitioner errs in asserting (Pet. 14-22) that the courts of appeals are divided over the question presented because "[t]he Fifth and Eighth Circuits *require* entry of a judgment of acquittal when the government has failed to prove venue at trial," Pet. 14 (emphasis added). No division of authority exists that might warrant this Court's review.

a. In *United States* v. *Strain*, 396 F.3d 689 (2005), the Fifth Circuit reversed the denial of a Rule 29 motion for acquittal based on its conclusion that the trial evidence was insufficient to establish venue. *Id.* at 693-697. In its conclusion, the court stated, "we reverse the [district court's] ruling, vacate the judgment and

remand to the district court for entry of a judgment of acquittal." *Id.* at 697. The court subsequently rejected the government's rehearing petition, which had argued that the proper remedy was to dismiss the conviction "without prejudice." *United States* v. *Strain*, 407 F.3d 379, 379 (2005) (per curiam). The court stated that the Fifth Circuit had not "squarely addressed the question whether, or under what circumstances, acquittal may be an appropriate remedy for failure to prove venue." *Ibid.*

The Fifth Circuit also stated that although multiple courts of appeals had dismissed charges without prejudice for failure to prove venue, "none of the circuits has held that dismissal is the *sole* appropriate remedy for lack of venue." *Strain*, 407 F.3d at 380 & n.* (emphasis added). The court therefore considered such decisions "largely irrelevant" to the question presented by the rehearing petition, *i.e.*, "whether acquittal *may* be the proper result" when the government fails to prove venue. *Id.* at 380 (emphasis added). The court then noted that its prior decisions reflect that venue is a "constitutionally-imposed element of every crime," though "not an element [of an offense] in the traditional statutory sense." *Ibid.* The court ultimately found no reason to grant rehearing to reconsider its disposition directing a judgment of acquittal. *Ibid.*

Although the denial of rehearing in *Strain* potentially suggests some tension with decisions concluding that dismissal without prejudice is warranted, see p. 15 & n.4, *supra*, *Strain*'s application of a rehearing standard to deny rehearing does not appear to reflect a disposition that should control future cases. The Fifth Circuit does not appear to have ever cited *Strain*'s per curiam rehearing denial in the 17 years since it was issued.

And the fact that the Fifth Circuit has since "decline[d] to decide whether a judgment of acquittal is the only proper remedy" when the government fails to prove venue, *United States* v. *Niamatali*, 712 Fed. Appx. 417, 423 (2018) (per curiam) (unpublished), suggests that *Strain*'s disposition is not binding for future cases. Cf. *id.* at 420, 423 (twice citing *Strain*'s original opinion without citing *Strain*'s decision on rehearing). In addition, well before *Strain*, the Fifth Circuit had "reversed and remanded to vacate [a count of conviction]," rather than directing a judgment of acquittal, where the court concluded that the government had failed to prove venue. *Davis*, 666 F.2d at 202 (5th Cir. Unit B); cf. p. 9 n.1, *supra*. To the extent that *Strain* and earlier precedent conflict, the earlier precedent would control. *United States* v. *Texas Tech Univ.*, 171 F.3d 279, 285 n.9 (5th Cir. 1999) ("Where two panel decisions conflict, the prior decision constitutes the binding precedent."), cert. denied, 530 U.S. 1202, and 530 U.S. 1203 (2000).

Even if *Strain*'s rehearing decision were binding on subsequent panels, the Fifth Circuit did not, as petitioner asserts, "*require* entry of a judgment of acquittal," Pet. 14 (emphasis added). The court merely determined that the "narrow question raised by the [rehearing] petition" was "whether acquittal *may* be the proper result" and that rehearing was unwarranted in part because the Fifth Circuit had "never squarely addressed the question whether, or under what circumstances, acquittal may be an appropriate remedy." *Strain*, 407 F.3d at 379-380 (emphasis added). Even assuming that acquittal "may" be a proper result in some cases in which the government fails to prove venue, that does not suggest it is "the sole appropriate remedy for lack of venue." *Id.* at 380. And since *Strain*, the Fifth

Circuit has vacated or set aside criminal convictions, without indicating that acquittal would be required on remand, when it has determined that the evidence was insufficient to prove venue. See, *e.g.*, *United States* v. *Lanier*, 879 F.3d 141, 149, 152 (5th Cir.) (vacating convictions), cert. denied, 139 S. Ct. 247 (2018); *id.* at 147-149 (twice citing *Strain*'s original opinion without citing *Strain*'s decision on rehearing); *United States* v. *Thomas*, 690 F.3d 358, 371-372 (5th Cir. 2012) (reversing convictions), cert. denied, 568 U.S. 1037 (2012), 568 U.S. 1178, and 569 U.S. 912 (2013); *id.* at 368, 371 (repeatedly citing *Strain*'s original opinion but not *Strain*'s decision on rehearing). In short, *Strain* does not reflect a division of authority relevant to the proper disposition in this case.

b. The Eighth Circuit in *United States* v. *Greene*, 995 F.2d 793 (1993), concluded that the evidence was insufficient to prove venue for one count of conviction. *Id.* at 800-801. The court added, without elaboration, that it was "remand[ing]" the case "for the entry of a judgment of acquittal" on that count. *Id.* at 801; see *id.* at 795, 802 (repeating disposition). That disposition does not suggest that acquittal is always required, and *Greene* itself contains no indication that the parties disputed that disposition. Furthermore, in the nearly 30 years since *Greene*, the Eighth Circuit appears never to have cited or followed that particular aspect of *Greene*, embodied solely in its one-sentence disposition. It is thus unclear whether a future Eighth Circuit panel would consider itself bound to order the disposition announced in *Greene* if the issue were properly presented for its decision.[6]

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[6] Like petitioner (Pet. 20), the defendant in *United States* v. *Lozoya*, 920 F.3d 1231 (9th Cir. 2019), rev'd, 982 F.3d 648 (9th Cir.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2020) (en banc), cert. denied, 142 S. Ct. 128 (2021), "observe[d]" that *Strain* and *Greene* reflect "a circuit conflict," and the panel noted as much in following its own precedent on the issue. *Id.* at 1241 n.5. Petitioner additionally purports (Pet. 21-22) to identify conflicting results in certain district court decisions. But it is settled that a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). District court decisions therefore reflect no conflict of authority warranting this Court's review. See Sup. Ct. R. 10(a).