No. 17-1110

In the Supreme Court of the United States

PAUL A. SLOUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient evidence proved that petitioners were subject to the district court's jurisdiction under the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. 3261(a)(1), 3267(1)(A)(iii)(II).

2. Whether the district court committed reversible error in declining to instruct the jury on venue where the relevant facts were uncontested.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rules:

Statutes and rules—Continued: Page

Miscellaneous:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-136a) is reported at 865 F.3d 767.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2017. A petition for rehearing was denied on November 6, 2017. The petition for a writ of certiorari was filed on February 5, 2018. 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 District of Columbia, petitioners Paul A. Slough, Evans S. Liberty, and Dustin L. Heard were convicted on multiple counts of voluntary manslaughter, in violation of 18 U.S.C. 2, 1112, and 3261(a)(1); multiple counts of attempted manslaughter, in violation of 18 U.S.C. 2, 1113, and 3261(a)(1); and one count of using

and discharging a firearm in relation to a crime of violence, in violation of 18 U.S.C. 2, 924(c), and 3261(a)(1). Each was sentenced to 30 years plus one day in prison, to be followed by five years of supervised release. C.A. App. 556-560, 564-568, 572-576. Petitioner Nicholas Slatten was convicted of first-degree murder, in violation of 18 U.S.C. 1111 and 3261(a)(1). He was sentenced to life imprisonment. C.A. App. 549-550. The court of appeals affirmed the convictions of petitioners Slough, Liberty, and Heard but remanded for resentencing. Pet. App. 3a-4a. The court vacated petitioner Slatten's conviction and remanded for a new trial. *Id.* at 4a.

1. Petitioners are former employees of Blackwater Worldwide Security (Blackwater) who opened fire on Iraqi civilians and injured or killed at least 31 of them. Pet. App. 3a, 13a.

In 2007, Blackwater contracted with the State Department to provide security for U.S. personnel in Iraq. Pet. App. 4a. On September 16, 2007, petitioners were dispatched as part of a four-vehicle, 19-man Blackwater convoy, called "Raven 23," to help evacuate a diplomat under another Blackwater team's protection. *Id.* at 4a-5a. The convoy stopped at the south end of Nisur Square, a crowded traffic circle in downtown Baghdad, and together with Iraqi police, brought all traffic to a halt. *Id.* at 5a.

A number of witnesses then heard two distinct "pops" or shots from the convoy, followed by a woman screaming for her son. Pet. App. 5a, 46a. Two Iraqi police officers ran to the fired-upon car, a white Kia, and saw that the young man driving it had been shot in the forehead. *Ibid.* They signaled to Raven 23 to hold its fire. *Id.* at 5a. The Kia then rolled slowly forward because, as one officer testified, the driver "was killed, and

he did not have control of the car." *Id.* at 46a-47a (citation omitted). The evidence at trial showed that petitioner Slatten, Raven 23's "sniper" and best marksman, had fired the first shots that killed the Kia driver and set the car in motion. *Id.* at 46a-50a.

At that point, the Blackwater convoy opened fire on the Kia and launched multiple grenades. Pet. App. 5a-6a. Members of Raven 23 continued to shoot indiscriminately to the south of Nisur Square, hitting victims as they sought cover or tried to escape. *Id.* at 6a. Some shooting continued in other directions as well. *Ibid.* As one witness described it, "they shot everything[:] they shot the cars, they shot the people, they shot the trees, they shot the asphalt, the road, they shot the sidewalk." C.A. App. 751; *id.* at 1550 (testimony that "people [were] trying to shield their children" and were "just huddled down trying not to get shot"). In one instance, petitioner Slough repeatedly fired his machinegun into a man who had already been felled. *Id.* at 871-873 (testimony that "the bullets were * * * coming out from his body and hitting the sidewalk"; "[h]is body was shaking violently"). Petitioner Heard also fired "savagely" and "indiscriminately." *Id.* at 742-744. And petitioner Liberty fired blindly out his porthole on "full auto" while driving. *Id.* at 2161-2162.

The 31 or more civilian victims killed or wounded in the fusillade ranged in age from 10 to 77 and included men, women, and children from all walks of life. See Gov't C.A. Br. 18-27. None was an insurgent or threatened the Blackwater convoy. *Id.* at 27; see Pet. App. 49a (noting the "overwhelming evidence * * * that there was no incoming fire directed at the convoy"). The American first responders, including two decorated military colonels, who went to Nisur Square expecting

to find evidence of a two-way confrontation saw instead vestiges of a unilateral, "grossly excessive use of force." C.A. App. 2706; Gov't C.A. Br. 30 (testimony describing scores of American-made shell casings; cars riddled with bullets, many shot from behind as they were apparently fleeing; multiple "well aimed" shots to windshields; brain matter in cars and on the street) (citation omitted). A number of Raven 23 guards felt similarly. As one put it, "it's the most horrible botched thing I've ever seen in my life." C.A. App. 1147-1148 (Matt Murphy); accord *id.* at 1550-1552, 1607-1608 (Adam Frost); *id.* at 1652-1653, 1670-1671 (Mark Mealy); *id.* at 2802-2803 (Dustin Hill). When the group took their concerns to management, they described the shooting as "murder." *Id.* at 1849-1850, 2048-2049.

2. Historically, civilians accompanying the American military overseas were, like members of the military, subject to court martial for crimes committed in host countries. Pet. App. 8a. In a series of decisions, however, this Court held it unconstitutional to subject civilians to court-martial jurisdiction. See, *e.g.*, *Reid* v. *Covert*, 354 U.S. 1 (1957) (opinion of Black, J.). The result was a "jurisdictional gap": because many U.S. statutes prohibiting offenses like murder, rape, and robbery do not apply extraterritorially, civilians who committed such crimes overseas went unpunished. See H.R. Rep. No. 778, 106th Cong., 2d Sess. Pt. 1, at 5 (2000) (House Report); *United States* v. *Arnt*, 474 F.3d 1159, 1161 (9th Cir. 2007).

In 2000, Congress passed the first version of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. 3261 *et seq.*, in an effort to close that gap. House Report 5. Then and now, MEJA authorizes the

prosecution of anyone who, "while employed by or accompanying the Armed Forces outside the United States," commits what would be a federal felony in this country. 18 U.S.C. 3261(a)(1). Originally, the term "employed by the Armed Forces" covered only those individuals directly employed by the Department of Defense (DOD), DOD contractors, and employees of DOD contractors. 18 U.S.C. 3267(1)(A) (2000).

In 2004, in the wake of the Abu Ghraib scandal, which involved contractors for the Department of the Interior, Congress expanded the definition of "employed by the Armed Forces outside the United States." Pet. App. 9a. As relevant here, MEJA now defines the term to mean—

> (A) employed as—
>
> * * *
>
> (iii) an employee of a contractor (or subcontractor at any tier) of—
>
> (I) the Department of Defense * * * ; or
>
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

18 U.S.C. 3267(1)(A).

In proposing the new language, the amendment's chief sponsor explained that its purpose was to expand MEJA to cover "private contractors who may not have in every instance been directly associated with the Department of Defense." 150 Cong. Rec. 12,448 (2004); see also *id.* at 12,449 ("[W]e cannot allow [private contractors] to escape justice for crimes they may commit overseas. * * * This amendment * * * leaves no doubt whether wrongdoers can be brought to justice."); see

also *ibid.* (remarks of co-sponsor) (amendment closes "a dangerous loophole" that "allow[s] [non-DOD] civilian contractors who do the crime to escape doing the time"); *ibid.* (under the amended provision, the "world sees when a crime is committed * * * it is prosecuted").

3. A federal grand jury in the District of Columbia charged petitioners with 13 counts of voluntary manslaughter, in violation of 18 U.S.C. 2, 1112, and 3261(a)(1); 16 counts of attempted manslaughter, in violation of 18 U.S.C. 2, 1113, and 3261(a)(1); and one count of using and discharging a firearm in relation to a crime of violence, in violation of 18 U.S.C. 2, 924(c), and 3261(a)(1). C.A. App. 314-319. The grand jury also charged petitioner Slough with two additional counts of attempted manslaughter, in violation of 18 U.S.C. 2, 1113, and 3261(a)(1). C.A. App. 318. After the district court dismissed the indictment against petitioner Slatten for statute-of-limitations reasons, a federal grand jury in the District of Columbia charged petitioner Slatten with one count of first-degree murder, in violation of 18 U.S.C. 1111 and 3261(a)(1). C.A. App. 382-383.

a. Petitioners raised two pretrial arguments that are relevant here. First, they contended that the district court lacked jurisdiction under MEJA. See C.A. App. 261-262. The court ruled that MEJA added a jurisdictional element to the underlying felony charges against petitioners, which had to be submitted to the jury and proved by the government beyond a reasonable doubt. Pet. App. 13a n.1; C.A. App. 263.[1]

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[1] The district court instructed the jury on the meaning of "employed by the Armed Forces outside the United States" as follows:

> The definition of 'employed by the Armed Forces outside the United States' includes not only a direct employee or contractor of the Armed Forces of the United States, but also a contractor

Second, petitioners contended that venue in the District of Columbia was improper. See C.A. App. 265-267. The district court found venue to be proper under 18 U.S.C. 3238, which provides for venue of offenses "committed * * * out of the jurisdiction of any particular State or district * * * in the district in which * * * any one of two or more joint offenders[] is arrested," because a joint offender, Jeremy Ridgeway, had been arrested in the District of Columbia. Pet. App. 25a; C.A. App. 268-270.

b. In 2014, a jury found petitioner Slatten guilty on the one charged count of first-degree murder. C.A. App. 549. It found petitioner Slough guilty on 13 counts of voluntary manslaughter and 17 counts of attempted manslaughter; petitioner Liberty guilty on 8 counts of voluntary manslaughter and 12 counts of attempted manslaughter; and petitioner Heard guilty on 6 counts of voluntary manslaughter and 11 counts of attempted manslaughter. *Id.* at 556-557, 564-565, 572-573. The

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(including a subcontractor at any tier) or an employee of a contractor (or subcontractor at any tier) of any Federal agency of the United States Government to the extent:

(1) such employment relates to supporting the mission of the Department of Defense overseas . . . .

. . .

The Government may prove that the defendant was 'employed by the Armed Forces' by establishing that:

(a) the defendant was employed as a contractor, or an employee of a contractor (including a subcontractor at any tier) of any federal agency, and

(b) that the defendant's employment related to supporting the mission of the Department of Defense overseas.

Pet. App. 20a-21a (brackets and citation omitted).

jury also found petitioners Slough, Liberty, and Heard guilty on one count each of using and discharging a firearm in relation to a crime of violence. *Id.* at 557, 565, 573.

The district court sentenced petitioner Slatten to life imprisonment. C.A. App. 549-550. It sentenced the other three petitioners to 30 years plus one day in prison, to be followed by five years of supervised release. *Id.* at 556-560, 564-568, 572-576.

4. The court of appeals affirmed the convictions of petitioners Slough, Liberty, and Heard. Pet. App. 3a-4a. It concluded, however, that their sentences violated the Eighth Amendment's prohibition on cruel and unusual punishment, and it remanded for resentencing. *Id.* at 4a. The court also vacated petitioner Slatten's conviction and remanded for a new trial based on a finding of evidentiary error. *Ibid.*[2]

a. The court of appeals found that sufficient evidence proved the MEJA jurisdictional element. See Pet. App. 8a-17a.

The court of appeals determined that the statutory text created two jurisdictional prerequisites: (1) that the defendant committed the crime "'while employed by' a non-DOD contractor," 18 U.S.C. 3261(a)(1); and (2) that "his *employment* (not his conduct) 'relates to supporting' the DOD overseas mission," 18 U.S.C. 3267(1)(A)(iii)(II). Pet. App. 11a. The court noted that, with respect to the latter prerequisite, the statute contained a further clause—"'*to the extent*' such employment relates to a

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[2] In rulings that are not challenged here, the court of appeals rejected petitioner Slatten's claims of vindictive prosecution and evidentiary insufficiency; petitioner Liberty's insufficiency challenge as to all but one of his attempted manslaughter convictions; and all of petitioners' claims that the post-trial statements of a government witness required a new trial. See Pet. App. 4a.

DOD mission"—that "operates as a temporal limitation" applicable to non-DOD contractors. *Ibid.* (citation omitted). As a result, the court reasoned, MEJA covers a non-DOD contractor "only if the defendant's employment *at the time* of the offense relates to supporting a DOD mission." *Ibid.*; see *id.* at 17a ("the most natural conjunctive reading of 'while employed by' * * * and 'to the extent' * * * is one that interprets these provisions as establishing that the *point in time* when [petitioners'] actions occurred is the benchmark by which their employment's relation to a DOD mission is measured"). The court also reasoned that the "relates to" qualification sweeps broadly. See *id.* at 11a-12a (citing, *inter alia*, *Smith* v. *United States*, 508 U.S. 223, 237-238 (1993); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985)).

The court of appeals then determined that "the evidence was sufficient," under the familiar sufficiency standard, to prove that "[petitioners'] employment, at the time of the attack, related to supporting DOD's mission." Pet. App. 13a; see *ibid.* ("the Court must affirm so long as any reasonable factfinder could conclude that the evidence, viewed most favorably to the government, satisfied each element beyond a reasonable doubt") (citing *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)). The court found that the government's evidence sufficed in three different ways. First, the court explained that multiple witnesses had testified that "the Defense Department mission" in Iraq in 2007 was to "rebuild" the country, set up a government, and foster economic and political stability. *Id.* at 14a; see *ibid.* (noting that the evidence showed that in 2007, DOD's mission "went beyond military operations against the insurgency"). The

court found "abundant evidence" that petitioners' employment with Blackwater at the time of the offense "supported the Department of Defense's expanded mission" by providing security for State Department diplomats whose work "plainly supported the DOD mission." *Id.* at 14a-15a. Second, the court found that, under the terms of their employment contracts, Blackwater employees "assist[ed] distressed military units during firefights"; "train[ed] Army security escorts"; and provided security for the Army's Provincial Reconstruction teams when Army escorts were unavailable. *Id.* at 15a. Third, the court observed that before Blackwater came to Baghdad in 2007, the military provided daily security for State Department diplomats there. When Blackwater arrived, its employees "took the majority of those tasks," *id.* at 16a (quoting Army Colonel Michael Tarsa) (citation omitted)—which allowed Army platoons otherwise dedicated to State Department security to return to DOD responsibilities. *Ibid.*

The court of appeals further determined that the district court had properly instructed the jury on MEJA jurisdiction. Pet. App. 19a-24a. The court of appeals explained that the relevant instruction "quoted MEJA's 'to the extent' clause verbatim." *Id.* at 21a. And the court determined that, read in full and in context, the instruction required a finding that the crime occurred at a time when the defendant's employment related to DOD's mission. *Id.* at 21a-23a.

b. The court of appeals separately found that venue was proper in the District of Columbia. Pet. App. 25a-31a. The court explained that the applicable venue statute provides, in part, that "[t]he trial of all offenses begun or committed . . . out of the jurisdiction of any particular State or district[] shall be in the district in which

the offender, or any one of two or more joint offenders, is arrested." *Id.* at 25a-26a (quoting 18 U.S.C. 3238) (brackets in original). The court noted that the government had predicated venue on the arrest of Ridgeway, a member of the Raven 23 team who had participated in the Nisur Square attack, in the District of Columbia. *Id.* at 25a.

The court of appeals determined that Ridgeway's arrest satisfied Section 3238. It explained that a defendant is "arrested" for purposes of Section 3238 "where the defendant is first restrained of his liberty in connection with the offense charged." Pet. App. 26a (citations and emphasis omitted). The court found that test "easily satisfied" in this case: the district court issued an arrest warrant for Ridgeway; Ridgeway was told that he was under arrest but would not be placed in handcuffs if he "behave[d] [himself]"; and Ridgeway understood himself to be under arrest. *Id.* at 26a-27a & n.3 (citation omitted). The court of appeals thus found that "[a]ny reasonable person in Ridgeway's position would have understood he was not free to leave." *Id.* at 27a (citing *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991)). In addition, the court found that Ridgeway was a "joint offender" under Section 3238 because he had "participated in the same act or transaction constituting the charged crimes." *Id.* at 29a; see *id.* at 29a-30a (observing that Ridgeway joined his fellow members of Raven 23 in firing on civilians in Nisur Square); *id.* at 28a-29a & n.4 (explaining preference for joint trials in cases involving multiple defendants who commit the same acts).

In a footnote, the court of appeals rejected petitioners' alternative contention that the district court committed reversible error by declining to present the

question of venue to the jury. Pet. App. 31a n.5. Relying on circuit precedent, it stated that venue becomes a jury issue only if a defendant "raises a genuine issue of material fact" and concluded that petitioners had failed to do so. *Ibid.* (citing *United States* v. *Fahnbulleh*, 752 F.3d 470, 477 (D.C. Cir.), cert. denied, 135 S. Ct. 316 (2014), and 135 S. Ct. 1520 (2015)). To the contrary, the court explained, "[t]he parties do not dispute * * * that Ridgeway participated throughout the Baghdad shootings" and that he "flew from California to the District of Columbia and was arrested once he arrived there." *Ibid.* It determined that the only dispute was over the "legal significance" of those facts. *Ibid.*

c. Judge Brown concurred in part and dissented in part on the question of MEJA jurisdiction. She believed that MEJA allows prosecution of a crime committed by a contractor's employee "only when a *specific task* being performed by that contractor is integral to the DOD's mission." Pet. App. 129a. But even under that more restrictive reading of the statute, Judge Brown found the evidence sufficient to prove jurisdiction under MEJA, because petitioners were supporting DOD's mission on the day of the Nisur Square attack by providing diplomatic security for the State Department and thereby "allowing military personnel previously responsible for providing State Department security to concentrate exclusively on the DOD's rebuilding mission." *Id.* at 132a-133a.

Judge Brown nevertheless would have granted petitioners a new trial because, in her view, the jury instructions would have allowed the jury to find jurisdiction if it found that "any aspect of [petitioners'] employment," not just the actions they took in Nisur Square, related to supporting DOD's mission. Pet. App. 135a-136a.

ARGUMENT

Petitioners contend (Pet. 16-34) that the court of appeals erred in determining that sufficient evidence supported jurisdiction under MEJA and in declining to require a new trial at which the issue of venue would be submitted to the jury. Those contentions lack merit, and no further review is warranted.

1. This Court's review is unwarranted for the threshold reason that this case is in an interlocutory posture, which "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 & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. This Court thus routinely denies petitions for writs of certiorari filed by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if a defendant is convicted and his conviction and sentence are ultimately affirmed on appeal. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 & n.72 (10th ed. 2013). That approach promotes judicial efficiency because the issues raised in a petition may be rendered moot by further proceedings on remand, and because challenges to a conviction and sentence may be consolidated into a single petition for a writ of certiorari.

Here, the court of appeals vacated petitioner Slatten's conviction and vacated the sentences of petitioners

Slough, Liberty, and Heard; it remanded all four petitioners' cases to the district court. Pet. App. 4a. If petitioner Slatten is acquitted on remand, his current claims will be moot. And, although the other petitioners' convictions are final, they may assert their current contentions—together with any other claims that may arise at sentencing—in a single petition following the entry of final judgment. See *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; see also *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioners provide no sound reason to depart in this case from the Court's usual practice of awaiting final judgment.[3]

2. Petitioners renew their contention (Pet. 16-27) that they committed no crime for which they could be prosecuted under MEJA. That contention is essentially a factbound challenge to the sufficiency of the evidence in this case, and it does not warrant this Court's review. To the extent that petitioners make a broader claim about the proper interpretation of MEJA, this case would be a poor vehicle to resolve that claim because the evidence was sufficient to support the jury's finding of MEJA jurisdiction even under petitioners' preferred

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[3] After the court of appeals remanded this case to the district court, the government noted in opposing a motion to schedule resentencing that petitioners planned to file this petition for a writ of certiorari. See 1:08-cr-360 D. Ct. Doc. 832, at 4 (Jan. 18, 2018). But even if resentencing had been scheduled for March 2018—the earliest date that petitioners had proposed, see 1:08-cr-360 D. Ct. Doc. 831, at 2 (Jan. 5, 2018)—petitioners could not have obtained review of that decision in the court of appeals before filing this petition.

interpretation—as Judge Brown concluded in her separate opinion.

a. Petitioners principally contend (Pet. 16-19, 24, 26) that the court of appeals erred in determining that DOD's "mission" in Iraq in 2007 was to "rebuild" that country in order to help it recover from a years-long war. Petitioners characterize (Pet. 17-19) the decision below as adopting a "virtually boundless" premise that would extend the reach of U.S. criminal law to every federal employee and contractor in any country where the United States has a "rebuilding" mission. Petitioners' assertions significantly overstate the court's holding in this case.

Although petitioners attempt to frame their argument as one of statutory construction, it is a case-specific challenge to the sufficiency of the evidence here. The court of appeals did not construe the phrase "mission of the Department of Defense overseas," but simply evaluated the evidence presented and found that the jury could have accepted the government's evidence. 18 U.S.C. 3267(1)(A)(iii)(II); see, *e.g.*, Pet. App. 14a ("The government sufficiently established the DOD's overseas mission."). The scope of DOD's "mission" in Iraq in September 2007 was an evidence-driven inquiry, as it will be in any future MEJA prosecution. Thus, far from deciding that MEJA covers "*any* federal employee or contractor overseas" whose agency in some way supports a U.S. rebuilding mission, as petitioners assert (Pet. 17), the court specifically noted that "[a]ll we decide today is that *these defendants*' criminal liability fits within MEJA's scope." Pet. App. 17a n.2.

Further review of that factbound determination is unwarranted. Determining the sufficiency of the evi-

dence is primarily the responsibility of a court of appeals, see *Hamling* v. *United States*, 418 U.S. 87, 124 (1974), and this Court does not ordinarily grant review to reevaluate the evidence or discuss specific facts. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10. Petitioners identify no other court of appeals decision that conflicts with the decision here or even discusses the scope of MEJA jurisdiction. And petitioners' speculation (Pet. 19-22) about how MEJA might apply to different facts and different hypothetical defendants—namely, "employees and contractors of intelligence agencies," Pet. 19—provides no reason for this Court to grant review. There is no reason to believe that this decision—involving private guards engaged in security work that the military would otherwise have performed, who opened fire on defenseless citizens—will criminalize "authorized intelligence activities of the United States Government," as petitioners speculate (Pet. 20) (citation omitted).

b. The court of appeals correctly determined that, in the case before it, the evidence was sufficient to sustain petitioners' convictions under MEJA. Even putting aside the scope of DOD's "mission" in Iraq in 2007, all three members of the panel recognized that petitioners had supported DOD operations in a tangible way. In particular, they all agreed that the evidence showed that by protecting American diplomats in Baghdad, the Blackwater guards allowed military personnel who had previously been performing that security function to return to DOD-specific tasks and responsibilities. See Pet. App. 16a (petitioners' work "increased the manpower available to the military" and prevented the State Department from "draining personnel from the DOD mission") (citation omitted); accord *id.* at 133a (Brown,

J., concurring in part and dissenting in part) (petitioners' employment "indirectly supported the DOD's mission by allowing military personnel previously responsible for providing State Department security to concentrate exclusively on the DOD's rebuilding mission"). That the panel unanimously found the evidence sufficient to support petitioners' convictions—regardless of the scope of DOD's mission in Iraq—makes this Court's review of the court of appeals' sufficiency-of-the-evidence holding particularly unwarranted.

The panel majority also permissibly relied on significant evidence introduced at trial about DOD's broad "mission" in Iraq. See Pet. App. 14a-15a. As it noted, the evidence showed that by September 2007, DOD's undertaking in Iraq had evolved. *Id.* at 14a. The military was no longer just battling an enemy or suppressing opposition forces; instead, it was focused on reconstruction efforts, with the goal of bringing stability to the region. *Ibid.* Military officials testified that, among other things, the military sought to "stimulat[e] local governance"; restore essential services like sewer, water, and power; rebuild infrastructure; and foster economic development. *Ibid.* (citation omitted); see C.A. App. 1373-1377. As Army Colonel Michael Tarsa testified, troops worked "outside of their typical roles" to restore the country's "quality of life," in order to "dissuad[e] people from joining the insurgency." Pet. App. 14a; C.A. App. 1394, 1376; see Pet. App. 14a (reciting Marine Corps Officer Shelby Lasater's testimony that, after the initial phase of warfare, the military's role in Iraq transitioned "to rebuild the country and set up a government") (citation omitted). Then-Deputy Secretary of Defense Gordon England also "affirmed that the De-

fense Department 'strategy' was to 'help the Iraqi people build a new Iraq with constitutional representative government that respects civil rights and has security forces sufficient to maintain domestic order and keep Iraq from becoming a safe haven for terrorists.'" Pet. App. 14a (citation omitted).[4] Petitioners do not meaningfully dispute that their particular employment and activities supported such a mission.

c. Apart from their dispute with the court's evidentiary finding regarding DOD's "mission" in Iraq in 2007, petitioners make two brief textual arguments.

First, they contend (Pet. 18, 25-26) that MEJA applies only to non-DOD contractors who are "performing military work under military command." Petitioners point to the title of the statute—"the '*Military* Extraterritorial Jurisdiction Act'"—and to the phrase "employed by the Armed Forces." Pet. 25 (emphasis omitted). Petitioners assert that "[n]o 'educated user of English' would describe protecting State Department

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[4] Although, as petitioners note (Pet. 7, 26-27) (citation omitted), England expressed his belief that petitioners "were not supporting DOD's mission" in Iraq, he did not articulate DOD's mission in Iraq apart from the rebuilding effort; he did not contradict the testimony of the military officers on the ground; and he did not in any way suggest that DOD's mission at the time was traditionally military. Indeed, in addition to the passage quoted above, England testified that, after the initial military incursion in 2003 and the removal of Saddam Hussein's government, DOD, along with other agencies, was "essentially rebuilding a nation." C.A. App. 2939-2940; see *ibid.* (agreeing that the Defense and State Departments bore the lion's share "of the responsibility of rebuilding Iraq"). And any dispute between his characterization of DOD's mission and the characterization of on-the-ground officers, see Pet. 26-27, relates merely to the weight of disputed evidence. It does not demonstrate that a rational factfinder could not find an essential element beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

diplomats as being 'employed by' the Army, Navy, Air Force, Marines, or Coast Guard." *Ibid.* (quoting *Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014)).

Whether that is true, however, is beside the point, as Congress defined "employed by the Armed Forces" to cover not just employees or contractors of DOD but also those employed by "any other Federal agency * * * to the extent such employment relates to supporting the mission of the Department of Defense overseas." 18 U.S.C. 3267(1)(A)(iii)(II). It did so after "a series of high-profile offenses committed by" non-DOD contractors revealed a perceived loophole in the statute. Pet. App. 9a. And unlike in *Bond*, in which the Court concluded that principles of federalism counseled against a broad construction of the relevant statutory definition, see 134 S. Ct. at 2088-2090, no such principles apply here. Moreover, petitioners do not attempt to distinguish the authority on which the court of appeals relied to establish the broad scope of the term "relates to." See Pet. App. 11a-12a (citing *Smith* v. *United States*, 508 U.S. 223, 237-238 (1993); *District of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)); see also *id.* at 131a (Brown, J., concurring in part and dissenting in part) (acknowledging that "[t]he phrase 'relating to' * * * must be given broad scope") (citation omitted).

Second, petitioners suggest (Pet. 26) that a different statutory phrase—"*to the extent* [a defendant's] employment relates to supporting the mission of the Department of Defense overseas," 18 U.S.C. 3267(1)(A)(iii)(II) (emphasis added)—renders MEJA inapplicable to them. Petitioners devote (Pet. 26) just two sentences to that suggestion, asserting that the "to the extent" language

confines MEJA's application to non-DOD contractors only when the *specific task* they were performing at the time of their crime was integral to a DOD function. *Ibid.* (citing Pet. App. 129a (Brown, J., concurring in part and dissenting in part)). But petitioners offer no response to the court of appeals' view that the statute's use of the term "employment" requires a focus on a defendant's general job duties rather than his conduct at a particular moment. See Pet. App. 17a.

In any event, as noted, see pp. 16-17, *supra*, even Judge Brown, who agreed with petitioners' reading of the "to the extent" language, see Pet. App. 129a-132a, believed that the evidence against petitioners satisfied MEJA, *id.* at 132a-133a. She would have concluded only that the jury instructions incorrectly permitted the jury to find MEJA applicable based on "actions completely unrelated to the events that transpired in Nisur Square." *Id.* at 136a. But petitioners appear to have abandoned that claim of case-specific instructional error, asserting (Pet. i, 18-19) only that they categorically fall outside of MEJA. This case would therefore be an inappropriate vehicle for the Court to decide the scope of MEJA jurisdiction, because petitioners would not prevail even under the statutory construction that they propose, for the reasons in Judge Brown's separate opinion.

3. Petitioners also renew their contention (Pet. 27-34) that the district court committed reversible error by not instructing the jury on venue. That contention lacks merit and does not warrant this Court's review.

a. Article III of the U.S. Constitution requires that a criminal trial "be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

U.S. Const. Art. III, § 2, Cl. 3; see Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."). By statute, an offense committed outside the jurisdiction of any particular State or district may be tried in "the district in which the offender, or any one of two or more joint offenders, is arrested." 18 U.S.C. 3238.[5]

Courts have repeatedly explained that venue does not constitute an element of a criminal offense, see, *e.g.*, *United States* v. *Davis*, 689 F.3d 179, 185 (2d Cir. 2012), cert. denied, 568 U.S. 1183 (2013); *United States* v. *Muhammad*, 502 F.3d 646, 652 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008); *United States* v. *Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998); *United States* v. *Griley*, 814 F.2d 967, 973 (4th Cir. 1987)—or, put differently, does not constitute a "substantive" or "essential" element of the offense, see, *e.g.*, *United States* v. *Stickle*, 454 F.3d 1265, 1271-1272 (11th Cir. 2006); *United States* v. *Zidell*, 323 F.3d 412, 421-422 (6th Cir.), cert. denied, 540 U.S. 824 (2003); *United States* v. *Perez*, 280 F.3d 318, 329-330 (3d Cir.), cert. denied, 537 U.S. 859 (2002); *United States* v. *Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988).

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[5] Section 3238 provides in full:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

18 U.S.C. 3238.

As the courts of appeals have explained, "unlike the substantive facts which bear on guilt or innocence in the case," venue "is wholly neutral; it is a question of procedure * * * , and it does not either 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); accord *Kaytso*, 868 F.2d at 1021; cf. *United States* v. *Maldonando-Rivera*, 922 F.2d 934, 969 (2d Cir. 1990) ("[V]enue provisions deal not with whether prosecution of a given charge is permissible but only with that prosecution's permissible location."), cert. denied, 501 U.S. 1211, and 501 U.S. 1233 (1991). Thus, as every court of appeals has recognized, the government need only prove the relevant facts establishing venue in a criminal case by a preponderance of the evidence.[6] Similarly, a dismissal of the indictment for improper venue does not, on double-jeopardy grounds, bar a retrial in the proper venue, even where the dismissal occurs during trial. See, *e.g.*, *United States* v. *Hernandez*, 189 F.3d 785, 792 & n.5 (9th Cir. 1999), cert. denied, 529 U.S. 1028 (2000); *Kaytso*, 868 F.2d at 1021; *Wilkett*, 655 F.2d at

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[6] See, *e.g.*, *United States* v. *Salinas*, 373 F.3d 161, 163 (1st Cir. 2004); *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008); *Perez*, 280 F.3d at 329-330; *United States* v. *Robinson*, 275 F.3d 371, 378 (4th Cir. 2001), cert. denied, 535 U.S. 1006, and 535 U.S. 1070 (2002); *United States* v. *Strain*, 396 F.3d 689, 692 & n.3 (5th Cir. 2005); *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; *United States* v. *Johnson*, 462 F.3d 815, 819 (8th Cir. 2006), cert. denied, 549 U.S. 1298 (2007); *United States* v. *Hui Hsiung*, 778 F.3d 738, 745 (9th Cir.), cert. denied, 135 S. Ct. 2837 (2015); *United States* v. *Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000), cert. denied, 532 U.S. 951 (2001); *Stickle*, 454 F.3d at 1271-1272; *United States* v. *Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004).

1011. In addition, unlike substantive elements, the issue of proper venue can be waived if not timely raised, see, *e.g.*, *United States* v. *Knox*, 540 F.3d 708, 716 (7th Cir. 2008), cert. denied, 555 U.S. 1212 (2009); *Perez*, 280 F.3d at 328; *United States* v. *Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998), including when the defendant fails to move to dismiss the case for improper venue before trial based on a defect that is apparent from the face of the indictment, see, *e.g.*, *United States* v. *Khan*, 821 F.2d 90, 93 (2d Cir. 1987). And "the standard for finding a waiver of venue rights is much more relaxed than the rigorous standard for finding waivers of the right to trial by jury, the right to confront one's accusers or the privilege against compulsory self incrimination." *United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984); accord *United States* v. *Miller*, 111 F.3d 747, 750 (10th Cir. 1997).

b. Because venue is not a substantive element of an offense and has no bearing on guilt or innocence, petitioners err in relying on this Court's statement in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," *id.* at 510, to support their argument that venue is invariably a jury issue. As this Court recognized in *Gaudin*, not every mixed question of law and fact must be submitted to a jury. See *id.* at 520-522. Indeed, Chief Justice Rehnquist observed in his concurring opinion in *Gaudin* that the "propriety of venue" is among those questions that "remain the proper domain of the trial court." *Id.* at 525-526. Courts of appeals have accordingly read *Gaudin* to focus on the substantive elements of an offense. See, *e.g.*, *United States* v. *Svoboda*,

347 F.3d 471, 485 (2d Cir. 2003) (because "venue is not an essential element of the crime," *Gaudin* is inapplicable) (emphasis omitted), cert. denied, 541 U.S. 1044 (2004); *United States* v. *Tinoco*, 304 F.3d 1088, 1110, 1125 (11th Cir. 2002) (if a factual determination does not bear on a substantive element of the offense, "the principles laid down in *Gaudin* do not apply"), cert. denied, 538 U.S. 909 (2003).[7]

Petitioners' reliance on (Pet. 29-31) *United States* v. *Jackalow*, 66 U.S. (1 Black) 484 (1862), is likewise misplaced. In *Jackalow*, the defendant was tried and convicted of piracy on the high seas in the District of New Jersey, where, according to the indictment, he was first apprehended for the crime. *Id.* at 485. It was unclear, however, whether the offense was committed "out of the jurisdiction of any particular State," and venue was proper in New Jersey only if the offense was not committed within another State's jurisdiction. *Id.* at 486. In a special verdict, the jury found that the crime was committed aboard a ship located in waters adjoining

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[7] Petitioners suggest that this Court's post-*Gaudin* sentencing decisions indicate that venue must be treated as a traditional element of an offense, subject to proof to a jury beyond a reasonable doubt. Pet. 29 n.16 (citing *United States* v. *Booker*, 543 U.S. 220 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301-302, 305-306, 313 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466, 476-478 (2000)). But those sentencing decisions do not extend the reasoning of *Gaudin* to venue determinations. Rather, they address the application of the Sixth Amendment to any fact (other than a prior conviction) that "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Facts establishing venue do not belong in that category because, just as they do not relate to the issue of guilt or innocence of the charged offense, they also do not affect the maximum penalties a defendant faces if convicted.

Connecticut and New York, but it did not specify whether that location "was within the jurisdiction of any State, within any district of the United States, or upon the high seas." *Id.* at 485. As the Court noted, the boundaries of those States were at the time subject to a border dispute. *Id.* at 486-487. The Court thus set aside the verdict because the disputed boundary issue—and whether the ship was located in New York, Connecticut, or on the high seas—was a question of "material fact" that had to be presented to the jury. *Id.* at 487-488. As a result, *Jackalow* stands, at most, for the proposition that a venue question must be submitted to the jury when it involves disputed issues of material fact.

Here, by contrast, petitioners contend (Pet. 27-30) that the jury must decide venue even when the material facts are *not* in dispute. The court of appeals in this case concluded that petitioners had not "raise[d] a genuine issue of material fact regarding venue." Pet. App. 31a n.5. "The parties d[id] not dispute what happened—*i.e.* that Ridgeway participated throughout the [Nisur Square] shootings and that he flew from California to the District of Columbia and was arrested once he arrived there." *Ibid.* The only relevant questions were whether those undisputed facts meant that Ridgeway had been legally "arrested" in the District of Columbia and qualified as a "joint offender" under Section 3238, both of which were legal matters for the court to decide. See *id.* at 25a-31a; cf. *Thompson* v. *Keohane*, 516 U.S. 99, 112-115 & n.13 (1995) (explaining that whether a person is "in custody" is a legal determination to be made by the court).[8]

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[8] To the extent petitioners challenge (Pet. 32-33) the court of appeals' determination that the facts regarding venue were not in dispute, that factbound claim does not warrant this Court's review.

Petitioners err in asserting (Pet. 31) that, by deciding those legal questions, the court of appeals "import[ed] a judgment-as-a-matter-of-law mechanism similar to that in civil trials" into a criminal trial. The court of appeals never suggested that a district court could direct a verdict against a criminal defendant. Although a defendant has a constitutional right to have a jury, not a judge, determine guilt, that right does not apply to the question of venue because, as explained above, venue is not a substantive element of the offense. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993) (the jury trial right includes, "as its most important element," the "right to have the jury, rather than the judge, reach the requisite finding of 'guilty'") (citing, *inter alia*, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Sparf* v. *United States*, 156 U.S. 51, 105-106 (1895)); *Carella* v. *California*, 491 U.S. 263, 268 (1989) (per curiam) (Scalia, J., concurring in the judgment) ("a judge may not direct a verdict of guilty") (citation omitted).

c. Petitioners assert that the court of appeals' decision on venue conflicts with decisions of the Second, Fifth, Ninth, and Tenth Circuits that require a court to instruct the jury on venue whenever requested by a defendant. Pet. 31-32 (citing *United States* v. *Casch*, 448 F.3d 1115, 1117 (9th Cir. 2006); *United States* v. *Miller*, 111 F.3d 747, 750 (10th Cir. 1997); *Green* v. *United States*, 309 F.2d 852, 856-857 (5th Cir. 1962);

And petitioners' own recitation of the facts (Pet. 8) shows that no real dispute exists. Petitioner Slatten's case-specific contention (Pet. 33 n.17) that he and Ridgeway were not joint offenders likewise is incorrect and would not in any event warrant further review. See Pet. App. 30a (explaining that one who participates "in the same series of acts or transactions giving rise to [the] counts" charged is a "joint offender," even if he did not "personally participate[] in each act giving rise to each count"); see also C.A. App. 459 & n.2.

United States v. *Gillette*, 189 F.2d 449, 452 (2d Cir.), cert. denied, 342 U.S. 827 (1951)). That assertion is significantly overstated.

Most courts of appeals have held that a defendant is entitled to a jury instruction on venue only where the evidence places that question sufficiently "in issue." See, *e.g.*, *United States* v. *Fahnbulleh*, 752 F.3d 470, 477 (D.C. Cir.), cert. denied, 135 S. Ct. 316 (2014), and 135 S. Ct. 1520 (2015) (jury instruction on venue "is necessary only when the question of venue is genuinely in issue") (citation omitted); *United States* v. *Engle*, 676 F.3d 405, 413 (4th Cir.) (instruction necessary if "there is a genuine issue of material fact with regard to proper venue") (citation omitted), cert. denied, 568 U.S. 850 (2012); *United States* v. *Zamora*, 661 F.3d 200, 208 (5th Cir. 2011) (instruction unnecessary if "the defendant fails to contradict the government's evidence"); *Muhammad*, 502 F.3d at 656 (defendant's "factual submissions" must "make venue a serious issue") (citation omitted); *Perez*, 280 F.3d at 334-335 (defendant must place venue in issue by "establishing a genuine issue of material fact"); *United States* v. *Bascope-Zurita*, 68 F.3d 1057, 1063 (8th Cir. 1995) (district court may determine venue "as a matter of law" if a defendant fails to "present[] any evidence at trial that create[s] a factual dispute on whether venue [i]s proper"), cert. denied, 516 U.S. 1062 (1996); *United States* v. *Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980) (in light of the "substantial evidence" that venue was proper, it was "within the bounds of [the judge's] discretion" to decline to give a venue charge to the jury, "even had one been properly formulated and timely proposed").

That list includes more recent decisions of the Second and Fifth Circuits than those on which petitioners

rely. See *Grammatikos*, 633 F.2d at 1023; *Zamora*, 661 F.3d at 208. Indeed, the Second Circuit has recently questioned whether the jury should ever be instructed on venue. See *Davis,* 689 F.3d at 185 n.2 (noting without deciding that "because venue is not an element of a crime, a question might be raised as to whether venue disputes must, in fact, be submitted to a jury") (citing *United States* v. *Rommy*, 506 F.3d 108, 119 n.5 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008)). Those circuits thus align with the prevailing view that juries need not be instructed on venue in the absence of disputed facts.

Petitioners' convictions would likewise be sustained in the Ninth Circuit. That court has stated that a court may not decline to give a venue instruction but that any failure to do so is subject to a harmless-error analysis. See *Casch*, 448 F.3d at 1117; see also *United States* v. *Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012) ("Where a rational jury could not fail to conclude that a preponderance of the evidence establishes venue, then a court is justified in determining venue as a matter of law."), cert. denied, 569 U.S. 912 (2013). Thus, so long as the evidence of venue is "substantial" and "uncontroverted," *Casch*, 448 F.3d at 1118, an error in failing to instruct the jury on venue is harmless. Accordingly, in a case like this one, where a venue issue was decided by the judge but lacked any genuine disputes of material fact, the Ninth Circuit would find no reversible error.

Finally, the Tenth Circuit's approach appears to be somewhat in flux. Petitioners rely (Pet. 32, 34) on *Miller*, which stated that a "failure to instruct the jury on venue when requested to do so is error," 111 F.3d at 750, and that reversal is required unless the government can show "beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates

a finding of proper venue," *id.* at 751. But the Tenth Circuit has since recognized that this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), requires traditional harmless-error review even for failure to instruct the jury on a substantive element of the offense, and that circuit precedent to the contrary (on which *Miller* relied) is no longer good law. See *United States* v. *Acosta-Gallardo*, 656 F.3d 1109, 1122 n.3, cert. denied, 565 U.S. 994 (2011). The Tenth Circuit has accordingly recognized that traditional harmless-error review may apply in this context, *ibid.*, in which case it, like the Ninth Circuit, would not find reversible error in the circumstances of this case.

To the extent that petitioners contend that they were in fact prejudiced by the omission of venue from the jury charge, that contention lacks merit. As the court of appeals "easily" found, Ridgeway was arrested in the District of Columbia. See Pet. App. 26a-27a & n.3 (recounting that, upon meeting the FBI agent, Ridgeway was handed an arrest warrant, was told that he was under arrest, was further told that he would not be handcuffed if he "behave[d]," believed that he was under arrest, and was formally booked) (citation omitted). That Ridgeway's credibility had been impeached more generally on other matters (Pet. 34) does not mean that a genuine issue of fact existed about the circumstances of his arrest, which were primarily objective in nature and about which petitioners did not challenge Ridgeway. And as the court also found, "it is clear Ridgeway was a joint offender." Pet. App. 29a; see *id.* at 30a (explaining that "Ridgeway's persistent, multi-directional shooting

throughout the entire Nisur Square attack" demonstrated that he had participated in the "same series of acts or transactions" that gave rise to the prosecution).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioners contend (Pet. 33-34) that the harmless-error analysis is itself subject to conflicting court of appeals approaches. But, as explained above, see pp. 28-29, *supra*, any such conflict stems from the Tenth Circuit's decision in *Miller*, which the Tenth Circuit itself may no longer see as precedential. In any event, this case would be an inappropriate vehicle for considering the proper formulation of harmless error in the venue context, as the court of appeals did not conduct such an inquiry because it found no error. See Pet. App. 31a n.5. This Court recently denied a petition for certiorari which squarely presented the question whether the failure to instruct on venue was harmless. See *Caroni* v. *United States*, 136 S. Ct. 2513 (2016) (No. 15-1292). The same course is warranted here, where the issue is not directly presented.