No. 16-1348

IN THE
Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and submits *amicus* briefs to this Court and other courts across the Nation. Cato regularly advocates for a robust interpretation of the Fifth Amendment's Double Jeopardy Clause, as envisioned by the Framers in the Constitution, as an important check on prosecutorial excesses and a vital bulwark for liberty. It has submitted *amicus* briefs to this Court in a number of relevant cases, including *Hatch v. United States*, No. 13-6765, *Cannon v. United States*, No. 14-5356, and *Bravo-Fernandez v. United States*, No. 15-537.

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus curiae* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of *amicus curiae* briefs and copies of their blanket letters of consent have been lodged with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees that no person shall be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. This "great constitutional protection[]" is a "vital safeguard in our society." *Green v. United States,* 355 U.S. 184, 198 (1957). "[E]mbodied" in this right is the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. *Ashe v. Swenson*, 397 U.S. 436, 443, 445 (1970).

Petitioner here, like more and more criminal defendants in recent years, was charged with multiple, overlapping offenses: (1) breaking and entering, (2) grand larceny, and (3) possession of a firearm as a convicted felon. Pet. App. 4a. This charging decision turned on a highly aggressive application of Virginia's felon-in-possession statute. By the Commonwealth's own account, the alleged firearm violation here was fleeting happenstance: Petitioner supposedly "handled" the victim's firearms by moving them out of the way in order to commit the different offense of stealing money from a safe. Br. in Opp. 11; *see id.* at 4. That is, the Commonwealth brought the felon-in-possession count because its factual theory of grand larceny required Petitioner to "temporarily possess[]" firearms that happened to be stored in the safe. *Id.* at 11.

The Commonwealth recognized that state law protected Petitioner from the prejudice that would result if his trial on the two primary counts included proof he was a convicted felon. It therefore moved to sever the felon-in-possession count and also opted to try the primary offenses first. J.A. 47–48. The jury acquitted Petitioner of the breaking and entering and

grand larceny charges. Pet. App. 4a. Given how those charges were tried, the jury necessarily concluded that Petitioner was not guilty of participating in the underlying burglary and theft. J.A. 101. Undeterred, the Commonwealth pressed forward on the felon-in-possession count, refining its case to present the same underlying factual theory to a second jury—even though "the Double Jeopardy Clause precludes the [g]overnment from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). Glossing over the fact that it had moved to sever the charges in accordance with state law, the Commonwealth now argues that Petitioner "waived his double-jeopardy rights" simply by "agreeing" to severance. Br. in Opp. 25–26.

The Commonwealth's "narrow, grudging application" of the Double Jeopardy Clause would "deprive [it] of much of [its] significance" and should be rejected. *Green*, 355 U.S. at 198. The Commonwealth's position is inconsistent with the historical development of double jeopardy jurisprudence in the United States—in particular, its goal of guarding against the structural power imbalances that exist between prosecutors and defendants. *See infra* Pt. I. It is also impossible to square the Commonwealth's position with the sanctity of jury acquittals and the time-honored authority and prerogative of the jury—speaking for the community—to ultimately and finally determine facts. *See infra* Pt. II.

This Court has emphasized that a jury's verdict must not be "impugn[ed]" even if "logically inconsistent." *Yeager*, 557 U.S. at 125. This case is easier: the first jury rendered a wholly *consistent* verdict, acquitting Petitioner on both primary counts. Thus, the

question before the Court "is simply whether, after a jury determined by its verdict that the petitioner was not one of the [perpetrators], the [Commonwealth] could constitutionally hale him before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 446.

If the Commonwealth's position becomes the law of the land, the government will be further incentivized to charge more offenses based on the same underlying conduct, thus increasing the need for (and likelihood of) multiple trials for the same underlying series of events. This type of overreach will allow the government to run dress rehearsals for successive prosecutions in more and more cases, thereby undermining the salutary—indeed, "sacred," *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1873)—liberty interests protected by the Double Jeopardy Clause, and diminishing the "overriding responsibility" of the jury "to stand between the accused and a potentially arbitrary or abusive [g]overnment." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). This result would be a travesty; in today's world of ever-expanding criminal codes and regulatory regimes, the government needs fewer, not greater, incentives for piling on theories of criminal liability.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PROTECTS DEFENDANTS AGAINST THE STRUCTURAL POWER IMBALANCE BETWEEN THEMSELVES AND THE GOVERNMENT.

1. The double jeopardy bar serves as one of our criminal justice system's most important structural protections against the ill-effects of the imbalance of power between the government and the accused—a

danger driven by deep, systemic factors, notwithstanding the good intentions of individual prosecutors. The preclusive effect of an acquittal therefore should not turn on whether multiple trials resulted from prosecutorial misconduct or strategic gamesmanship in the case at hand. In arguing otherwise, the Commonwealth fundamentally misconstrues the history, purpose, and development of double jeopardy safeguards.

2. "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence." *Benton v. Maryland*, 395 U.S. 784, 795 (1969). "[T]he ancient common law . . . provided that one acquittal or conviction should satisfy the law," in light of the historical reality that "state trials have been employed as a formidable engine in the hands of a dominant administration." *Lange*, 85 U.S. at 171 (citations omitted). The Founders placed the "double jeopardy guarantee" into the United States Constitution to "embody the protection of the common-law pleas." *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

The original "purpose of the double jeopardy rule was to protect against abusive prosecutorial behavior." John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 444 (2009). When a jury acquits, the double jeopardy bar accomplishes this goal not through a case-specific inquiry into the actions of individual prosecutors, but rather with "the brightest of the bright-line rules": "whenever, and by whatever means, there is an acquittal in a criminal prosecution,

the scene is closed and the curtain drops." Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases*, 63 SMU L. Rev. 1033, 1043 n.104 (2010) (citation omitted).

As this Court explained sixty years ago (and has repeated in numerous double jeopardy opinions since):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187–88.

3. The issue-preclusion component of the Double Jeopardy Clause plays a central role in preserving this structural protection. By prohibiting the prosecution from relitigating factual allegations a prior jury has already rejected, the government is prevented from "gain[ing] an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980). Indeed, the prosecution's ability to "treat[] the first trial as no more than a dry run for the second prosecution" is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

The Double Jeopardy Clause thus precludes the prosecution from relitigating any issue of fact that

was necessarily decided against the government through a jury acquittal, whether or not the prosecutor committed misconduct. *See Harris v. Washington*, 404 U.S. 55, 56–57 (1971) (per curiam) (first jury's verdict entitled to issue-preclusive effect "irrespective of whether the [first] jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions"). The prosecution is simply prohibited from taking any proverbial second bites. "For whatever else [the] constitutional guarantee [against double jeopardy] may embrace . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe*, 397 U.S. at 445–46. In this situation, no inquiry into the propriety of the prosecutor's actions is either necessary or appropriate.

Indeed, when the Court has spoken of government overreach in issue-preclusion cases, it has focused on structural concerns as opposed to case-specific instances of prosecutorial misconduct. In *Yeager*, the Court held that an "apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts" does not "affect[] the preclusive force of the acquittals under the Double Jeopardy Clause." 557 U.S. at 112. The Court noted that the Clause serves as a structural barrier between the substantial power of the government's Goliath and the Davidian defendant. *See id.* at 117–18. The Court rejected the dissent's view that the Clause and its issue-preclusion component are inoperative "'where the State has made no effort to prosecute the charges seriatim,'" *id.* at 131 (Scalia, J., dissenting) (quoting *Ohio v. Johnson*, 467 U.S. 493, 500 n.9

(1984)), language the Commonwealth relies on here as well, Br. in Opp. 17 & n.72.[2]

The structural role of the Double Jeopardy Clause in safeguarding the accused—as opposed to policing case-specific prosecutorial misconduct—was also the animating force in *Ashe*. There, the State tried the accused in connection with the robbery of participants in a poker game. 397 U.S. at 437–38. The jury acquitted him of robbing one of the victims, and the only rationale for that finding was that he was not present at the scene and could not have been one of the robbers. *Id.* at 446. The State was therefore precluded from trying him for robbing another victim, as doing so would require a second jury to contradict the first jury's factual findings. *Id.* This Court did not tie the outcome in *Ashe* to prosecutorial bad faith; in fact, it identified no misconduct at all by the State. *See, e.g.*, *id.* at 447 (crediting the State's position that the prosecutor "did what every good attorney would do" in "refin[ing] his presentation" for the second trial). But the

[2] The Commonwealth misses the mark when it invokes this dictum from *Johnson* to argue that issue-preclusion turns on whether the prosecutor wanted separate trials. In *Johnson*, the Court declined to apply the Double Jeopardy Clause to bar prosecution for murder and aggravated robbery when the defendant, over the State's objection, pleaded guilty to the lesser charged crimes of involuntary manslaughter and grand theft. 467 U.S. at 495–96. The Court's comment about the State not seeking to prosecute "seriatim," *id.* at 500 n.9, was not the basis for the holding. Rather, the double jeopardy bar did not apply because there simply was no "double" jeopardy: Two of the four charged crimes had been resolved through guilty pleas, with the other two to be tried in the same proceeding. *Id.* at 501–02. This plea-trial distinction likewise rendered the issue-preclusion component of the Double Jeopardy Clause inapplicable. *See id.* at 500 n.9. Indeed, without an earlier trial, there could have been no acquittal. *See id.* at 501–02.

Court nevertheless held that giving the State another opportunity to prove the same underlying facts in a subsequent trial "is precisely what the constitutional guarantee forbids." *Id.*

4. As this Court has recognized time and again, prosecutors already have substantial power in the criminal justice system—including the unfettered authority to pursue multiple overlapping charges that increase their chances of obtaining a conviction. *See Ashe*, 397 U.S. at 446; *see also Yeager*, 557 U.S. at 113 (defendant charged with 126 counts in a securities fraud case); *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting) ("[W]here the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict."). The double jeopardy bar is an essential, structural limitation on that power.

5. The era of overcriminalization in which we live highlights the importance of the Double Jeopardy Clause's structural safeguard against repeated prosecution for the same underlying conduct. The United States Code contains 27,000 pages of federal crimes. Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 59 (2015). The estimated number of federal crimes is somewhere between 3,000 and 4,500.[3] Indeed, there are "at least 100 federal

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[3] *See* Glenn Harlan Reynolds, *Reynolds: You Are Probably Breaking the Law Right Now*, USA Today (Mar. 29, 2015), https://www.usatoday.com/story/opinion/2015/03/29/crime-law-criminal-unfair-column/70630978; Edwin Meese III, *Too Many Laws Turn Innocents into Criminals*, Heritage Foundation (May 26, 2010), http://www.heritage.org/crime-and-justice/commentary/too-many-laws-turn-innocents-criminals.

false statement statutes" alone. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 566 n.107 (2012) (citation omitted) (noting that approximately fifty-four do not even "contain an express materiality requirement"). Even more incredibly, some 300,000 regulations can form the basis for a criminal prosecution.[4] And many of these regulatory crimes do not even require proof of mens rea. Reynolds, *supra* note 3. It is no longer far-fetched to posit, as one scholar does, that "'[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.'"[5]

This Court has seen first-hand the effects of this overcriminalization. From using the document destruction prohibitions of the Sarbanes-Oxley Act against a fisherman who released his catch, to charging a vengeful spouse under the Chemical Weapons Treaty, federal prosecutions alone have expanded to more and more conduct. *See Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014). The existence of numerous overlapping crimes gives prosecutors the freedom "to

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[4] John-Michael Seibler, *The Trump Administration Should Crack Down on Silly Rules That Carry Criminal Penalties*, Daily Signal (Dec. 2, 2016), http://dailysignal.com/2016/12/02/the-trump-administration-should-crack-down-on-silly-rules-that-carry-criminal-penalties.

[5] Timothy Head & Matt Kibbe, *Too Many Laws Means Too Many Criminals,* National Review (May 21, 2015), http://www.nationalreview.com/article/418689/too-many-laws-means-too-many-criminals-timothy-head-matt-kibbe (quoting Professor John Baker). A civil rights expert has further suggested "that the average American commits three felonies a day, and they are often not even aware they are breaking the law." *Id.* (linking to article by Harvey Silverglate).

pick and choose among the applicable statutes as they see fit." Smith, *supra*, at 554–55.

Under the Commonwealth's proposed rule—*i.e.*, a defendant's issue-preclusion objections are waived prospectively just because he assents to separate trials—prosecutors would be structurally incentivized to charge multiple overlapping crimes and then rely on severance to secure the very "dry run" that this Court has prohibited. *Ashe*, 397 U.S. at 447 (1970). Properly applied, the issue-preclusion component of the double jeopardy bar plays a vital role in reining in these structural enticements to prosecutorial overreach. *See* Griffin, *supra*, at 1043 n.104. That was precisely this Court's point more than forty-five years ago in *Ashe* when, after noting "the extraordinary proliferation of overlapping and related statutory offenses" and the resultant greater "potential for unfair and abusive reprosecutions," it recognized the "need to prevent such abuses through the doctrine of collateral estoppel." *Ashe*, 397 U.S. at 445 n.10.

6. The Commonwealth fundamentally misunderstands the type of "prosecutorial overreach" that the Double Jeopardy Clause is meant to prevent. *See* Br. in Opp. 13–17. From the Clause's common law origins to the present, it has served as a critical tool to forestall prosecutorial mischief and the expansion of unchecked State powers at a *systemic* level—the good intentions of a given prosecutor in a particular case notwithstanding. It incentivizes prosecutors to try their full and best case the first time because they may not wear down the accused through successive prosecutions. *See Green*, 355 U.S. at 187–88.

In suggesting that Petitioner's consent to severance abrogated double jeopardy protections that would otherwise be afforded him, the Commonwealth

misapprehends the evil that issue preclusion wards off. Even when prosecutors are not engaging in misconduct, and even where severance is the appropriate way to avoid prejudicing a defendant, the government cannot be permitted to force an accused to defend against the allegations that a jury already rejected in a prior trial. A contrary holding would permit the government to conduct the very type of do-over that the Double Jeopardy Clause was meant to thwart.

II. THE COMMONWEALTH'S POSITION NEGATES THE COMMUNITY'S PREROGATIVE TO DETERMINE FACTS THROUGH TRIAL BY JURY AND IMPUGNS THE INVIOLATE NATURE OF JURY ACQUITTALS.

1. The Commonwealth's narrow focus on Petitioner's interests, including its argument that Petitioner has effectively waived all double jeopardy rights by consenting to two trials, also ignores the separate but related constitutional interests that the *community* has in preserving its vital role in the administration of criminal justice. If the Court permits prosecutors to try defendants a second time on the exact same factual theories that a first jury conclusively rejected, it will upend the Constitution's careful allocation of power and enable the government to override the otherwise unassailable judgment of the community—embodied here in the jury's unambiguous decision to acquit Petitioner on both counts in his first trial.

2. The prohibition against double jeopardy and the right to a jury trial developed in parallel under the common law as mutually reinforcing protections against the pernicious threat of arbitrary rule. As noted above, the original "purpose of the double jeopardy rule was to protect against abusive prosecutorial behavior." Langbein, *supra*, at 444. Similarly, the

right to a jury trial developed as a necessary "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (right to trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

Indeed, these protections were often conceived as concomitant. At common law, the "protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict." *Smith v. Massachusetts*, 543 U.S. 462, 466 (2005). In the colonies, "the only state constitutional precursor" of the United States Constitution's "double-jeopardy clause conjoined this provision to its criminal jury-trial guarantee." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 97 (1998) (citing N.H. Const. of 1784 pt. I, art. I, § XVI). And "the Maryland state ratifying convention—one of only two that raised the double-jeopardy issue—made this linkage even more explicit," providing that "there shall be a trial by jury in all criminal cases" and "no appeal from matter of fact, or second trial after acquittal." *Id.* (citations and internal quotation marks omitted).

3. The community's central role in the administration of criminal justice has been evident since our country's founding. As Alexander Hamilton observed, "friends and adversaries of the plan of the convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in

this: the former regard[ed] it as a valuable safeguard to liberty, the latter represent[ed] it as the very palladium of free government." The Federalist No. 83 (Alexander Hamilton). This "insistence upon community participation in the determination of guilt or innocence" directly addresses the Founders' "[f]ear of unchecked power." *Duncan*, 391 U.S. at 156.

Thus, the Declaration of Independence included among its "solemn objections" to the King his "'depriving us in many cases, of the benefits of Trial by Jury,' and his 'transporting us beyond Seas to be tried for pretended offenses.'" *Duncan*, 391 U.S. at 152 (citation omitted). Against the backdrop of those protestations, the Constitution was drafted to command that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed," U.S. Const. art. III, § 2; that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," U.S. Const. amend. VI; and that no person shall be "twice put in jeopardy of life or limb," U.S. Const. amend. V. Together, these guarantees reflect "a profound judgment about the way in which law should be enforced and justice administered," *Duncan*, 391 U.S. at 155, namely, with the direct participation of the community.

In particular, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also, e.g.*, Letter XV by the Federal Farmer

(Jan. 18, 1788), *reprinted in* 2 The Complete Anti-Federalist 315, 320 (Herbert J. Storing ed. 1981) (the jury "secures to the people at large, their just and rightful control in the judicial department"); Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), *reprinted in* 15 Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed. 1958). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991), and "'places the real direction of society into the hands of the governed,'" Amar, *supra*, at 88 (quoting Alexis De Tocqueville, *Democracy in America* 293–94 (Phillips Bradley ed. 1945)).

"[T]hough small in its empire of a single verdict," the jury "serves a critical democratic function—grounding the law in the living world of the citizens whose obedience it commands." Jenny Carroll, *The Jury as Democracy*, 66 Ala. L. Rev. 825, 830 (2015); *see also* H.R. Rep. No. 90-1076, at 1797 (1968) ("[T]he jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it."). The jury is tasked with making "difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (citation, alteration, and internal quotation marks omitted). The jury's role in the criminal justice system ensures the fair administration of justice and, with it, the "continued acceptance of the laws by . . . the people." *Powers*, 499 U.S. at 407.

The constitutionally prescribed composition of the jury—ordinary citizens drawn "from a representative cross section of the community," *Taylor v. Louisiana*,

419 U.S. 522, 528 (1975)—also reflects a determination (borne out by empirical studies) that a group of individuals "can draw wiser and safer conclusions from admitted facts . . . than can a single judge." *R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873); *see also* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 242 (2009) ("The diversity, group dynamics, and neutrality of juries offer benefits in fact-finding over that of a single judge."). Indeed, "when juries differ with the result at which [a] judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan*, 391 U.S. at 157.

4. By virtue of the intersection of the Double Jeopardy Clause and the jury trial right, the double jeopardy bar is more than just a shield for the defendant alone; rather, it is also a vehicle for the furtherance of the community's prerogatives in the criminal justice system. The community has a strong interest, complementary to but separate from that of the individual defendant's, in seeing that its verdicts—rendered through a jury process that "the Constitution regards as most likely to produce a fair result," *Singer v. United States*, 380 U.S. 24, 36 (1965)—are given great deference. And nowhere is that more true than in the context of a jury acquittal, which the Constitution regards as inviolate. *See Burks v. United States*, 437 U.S. 1, 16 (1978); *see also, e.g.*, *Yeager*, 557 U.S. at 123 (extolling "unassailable" "finality" of jury acquittal);

Green, 355 U.S. at 188 ("[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final.").[6]

The "special weight" afforded to jury acquittals, *DiFrancesco*, 449 U.S. at 129, provides a critical check against the legislative branch's broad power to enact expansive and overlapping criminal statutes, and the executive branch's virtually unfettered discretion in selecting which of those offenses to charge. *See Martin Linen*, 430 U.S. at 572–73. The Double Jeopardy Clause, moreover, sustains the Constitution's careful allocation of powers by safeguarding "the jury's sovereign space." *Yeager*, 557 U.S. at 122. "The Double Jeopardy Clause thus allows the jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments." Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 130 (1978). The Commonwealth's insistence that a defendant waives the issue-preclusive effect otherwise afforded to jury ac-

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[6] This "'absolute finality'" of "'a jury's verdict of acquittal'" under the Double Jeopardy Clause, *DiFrancesco*, 449 U.S. at 130 (emphasis omitted) (quoting *Burks*, 437 U.S. at 16), is a complete answer to the Commonwealth's reliance on situations in which non-acquittals such as hung juries, mistrials, and overturned convictions are denied preclusive effect, *see* Br. in Opp. 14, 17–18. Moreover, while acquittals by judges are also afforded preclusive effect, they do not possess the absolute finality of a jury acquittal. *Cf. Smith*, 543 U.S. at 467 ("When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty.").

quittals by consenting to severance of the charges ignores the community's fundamental interest in seeing that "'the collective judgment of the community,'" expressed through the jury as the finder of fact, is treated with "'needed finality.'" *Yeager*, 557 U.S. at 124 (quoting *United States v. Powell*, 469 U.S. 57, 67 (1984)).

5. Although the jury trial is the very bedrock on which our criminal justice system is founded, the role of the jury is dwindling to the point of a practical nullity. Recent developments—most notably, the proliferation of plea bargains—have reduced the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). That is cause for great caution: as the Framers understood, "the jury right [may] be lost not only by gross denial, but by erosion." *Jones*, 526 U.S. at 248. That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, at 25, 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court.").

There is no panacea for the jury's dissipating function in our criminal justice system; it is a structural problem that far exceeds the bounds of any one case or doctrine. But to avoid making the problem worse, the Court should resist the Commonwealth's proposed diminishment of the Double Jeopardy Clause and the

protection it supplies against encroachment on "the jury's sovereign space." *Yeager*, 557 U.S. at 122. The Commonwealth's attempt to chip away further at the role of the jury—in this case, by abrogating the jury's power to render an unassailable verdict of acquittal—should be rejected. It is contrary to this Court's jurisprudence and inimical to the community's vital role in safeguarding our liberty through its ongoing participation in the administration of criminal justice.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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December 7, 2017