No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER, CATO INSTITUTE, AMERICAN CIVIL LIBERITES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF ALABAMA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ILYA SHAPIRO
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, D.C. 20001
(202) 842-0200

DAVID COLE
SOMIL TRIVEDI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St. NW
Washington, D.C. 20005
(202) 715-0802

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
ASHWIN P. PHATAK
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St. NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae
(*Additional Counsel on Inside Cover*)

September 11, 2018

* Counsel of Record

EZEKIEL R. EDWARDS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2610

RANDALL MARSHALL
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
ALABAMA
P.O. Box 6179
Montgomery, AL 36106
(334) 420-1741

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

Books, Articles, and Other Authorities

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

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

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil-rights laws. The ACLU of Alabama is a statewide affiliate of the national ACLU, with thousands of members throughout the state. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court,

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

both as counsel representing parties and as *amicus curiae*.

Amici have a strong interest in ensuring that all constitutional provisions, including the Double Jeopardy Clause, are applied in a manner consistent with their text and history.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Terance Gamble was convicted in Alabama state court for being a felon in possession of a firearm and served a one-year sentence. The federal government, through the Alabama U.S. Attorney's Office, then charged Gamble with being a felon in possession of a firearm under federal law for the very same conduct giving rise to his state conviction. Pet. App. 6a.

If this successive prosecution had been carried out by one government, it plainly would have violated the Fifth Amendment's Double Jeopardy Clause, which prohibits any person from being "twice put in jeopardy of life or limb" for the "same offence." U.S. Const. amend. V. However, because the charges were filed by a State and the federal government respectively, the so-called dual-sovereignty exception to the Double Jeopardy Clause permitted Gamble to be prosecuted twice for the same offense. This result does not accord with the Double Jeopardy Clause's text or history and undermines our constitutional structure.

First, the exception is not supported by the text of the Clause, which focuses on the "person" being charged, and does not reference the sovereign(s) doing the charging. Being charged with a crime causes a person "embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and

insecurity, as well as enhanc[es] the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957). These consequences are the same no matter which sovereign charges him. Moreover, the term "same offence" is a capacious one that naturally includes charges for the same crime by two different sovereigns.

Second, the history of the Double Jeopardy Clause makes clear that it prohibits successive charges by two sovereigns. The Framers adopted the Fifth Amendment to enshrine in the Constitution the English common-law defense of *autrefois acquit*, or "formerly acquitted." *See, e.g.*, *Grady v. Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting). That English common law, in turn, permitted defendants to introduce evidence of an acquittal by a foreign court as a defense to a charge in England. *See* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1, 8-9 (1956). For that reason, it is little surprise that numerous American sources in the decades following the Founding—including opinions from this Court, opinions from state supreme courts, and treatises—assumed that charges by separate sovereigns for the same offense would violate the Double Jeopardy Clause. *See, e.g.*, *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820); *State v. Antonio*, 5 S.C.L. 562, 2 Tread. 776, 781 (1816). It is only more recently that the dual-sovereignty exception has permitted such successive charges.

Finally, the dual-sovereignty exception is at odds with the purpose of the Double Jeopardy Clause and the constitutional structure more broadly. The Framers viewed the Double Jeopardy Clause as a fundamental protection of individual liberty and an important safeguard against government harassment

and overreach. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1774, at 653-54 (Boston, Hillard, Gray, and Co. 1833). The dual-sovereignty exception, by allowing two governments to do together what neither could do alone, undermines the fundamental protection of individual liberty that the Double Jeopardy Clause was adopted to achieve. When a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of who brings the successive prosecutions. Worse yet, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of who brings them.

Reconsideration of the dual-sovereignty exception is particularly appropriate today given two significant legal developments that have occurred since this Court last meaningfully considered the issue in 1959. *See generally United States v. Gaudin*, 515 U.S. 506, 521 (1995) (reasons for *stare decisis* undermined when the "underpinnings" of the "decision in question" have been "eroded[] by subsequent decisions of this Court").

First, when this Court adopted the dual-sovereignty exception, the Double Jeopardy Clause's prohibition on successive prosecutions did not apply to the States. *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). Whatever validity the doctrine may have had in that context, it has been undermined by subsequent decisions by this Court recognizing that the Fourteenth Amendment protects against state infringement of the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784 (1969). Just as incorporation led to the demise of other "dual sovereign" doctrines, so should it here. Where both state and federal officials are barred from bringing successive prosecutions for the same

offense, it makes little sense to allow them to do together what neither could do on their own.

Second, concerns about government overreach and harassment are particularly acute today because the scope of federal criminal law is far more expansive than it was when the dual-sovereignty exception was last considered, *see, e.g.*, *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (noting that "the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws"), and federal law often overlaps with state law even as to localized conduct, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997). There is now also significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011); Meese, *supra*, at 3. These two factors, taken together, make it particularly easy for the federal and state governments to engage in the repeated harassment for a single offense that the Double Jeopardy Clause was adopted to prevent.

For all these reasons, this Court should overrule the dual-sovereignty exception to the Double Jeopardy Clause and restore the proper scope of this important protection of individual liberty.

ARGUMENT

I. THE DUAL-SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE IS AT ODDS WITH THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTION.

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall be . . . subject for

the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The text, history, and structure of the Constitution make clear that the Double Jeopardy Clause prohibits the federal and state governments from successively charging the same defendant for the same crime.

1. First, the text of the Double Jeopardy Clause, which provides that "[n]o *person* shall be . . . subject for the same offence to be twice put in jeopardy of life or limb," *id.* (emphasis added), is inconsistent with the idea that different sovereigns may charge an individual for the same crime. After all, the Clause's text focuses on the "person" being put in jeopardy, and does not even mention the sovereign or sovereigns putting the person in jeopardy. And that is for good reason: the Clause was adopted to prevent the "embarrassment, expense and ordeal" and the "continuing state of anxiety and insecurity" that would result if individuals could be charged with the same criminal offense more than once. *Green*, 355 U.S. at 187; *see Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct.").

From the perspective of the person charged, the jeopardy of life or limb that a criminal charge causes—and the concomitant "embarrassment," "anxiety," and "insecurity"—are the same no matter which sovereign causes it. As Justice Black reasoned, "[i]f danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, then when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Put differently, a defendant

"probably d[oes] not feel better off being doubly prosecuted by different governments rather than by the same one." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 Colum. L. Rev. 1, 9 (1995).

In the past, some have looked to the term "same offence" to justify the dual-sovereignty exception, suggesting that a violation of the laws of two different sovereigns can never be the same offense. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (if a person commits an act that violates the laws of two sovereigns, "he has committed two offences, for each of which he is justly punishable").

But the term "offence" at the time of the Founding was defined broadly as "[a]ny transgression of law, divine or human; a crime; sin; act of wickedness or omission of duty." 2 *Webster's Dictionary* 203 (1st ed. 1828). Thus, the term "same offence" can apply to the "law[s]" or "crime[s]" of two different sovereigns, just as it can apply to two different crimes of the same sovereign. *Cf. Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) (rejecting the idea that "two criminal provisions create 'distinct' offenses simply by appearing under separate statutory headings"). It is thus this Court's long-standing test from *Blockburger v. United States*, 284 U.S. 299 (1932), which looks to whether the elements of two laws each "require[] proof of a different element," *id.* at 304, that should determine whether laws constitute the same "offence," not whether the laws are enforced by different sovereigns. In short, the

text of the Double Jeopardy Clause provides no support for a dual-sovereignty exception to its protections.

2. In addition to the text, the history of the Double Jeopardy Clause makes clear that the Framers adopted the Clause to ensure that an acquittal or conviction in one jurisdiction could be pled as a defense in another jurisdiction.

At the time of the Founding, English common law allowed a defendant acquitted in a foreign court to raise the defense of *autrefois acquit*, or "formerly acquitted," and *autrefois convict*, or "formerly convicted," to subsequent criminal charges in another jurisdiction. *See* Grant, *supra*, at 8-9. For example, in the leading case of *Rex v. Hutchinson*, the judges apparently concluded that Hutchinson's acquittal of a murder charge in a Portuguese court served as a defense in England for the same crime. *Id.* at 9.[2] Similarly, in *The King v. Captain Roche*, Captain Roche pleaded *autrefois acquit* to a murder charge based on an acquittal before a Dutch court, and the court held that the acquittal barred the charge. As the judges noted: if the court held "for the prisoner" on the *autrefois acquit* issue, the jury "could not go to the [issue of guilt] because that finding [of *autrefois acquit*] would be a bar." *The King v. Captain Roche*, 1 Leach 134, 135, 168 Eng. Rep. 169 (1775).

---

[2] This Court has previously questioned whether it is appropriate to rely on *Rex v. Hutchinson* given that the case was never reported itself, but instead only discussed in other cases. *See, e.g.*, *Bartkus*, 359 U.S. at 128 n.9 (questioning the "confused and inadequate reporting" of the case). But what is important is what the Framers of the Fifth Amendment would have understood it to mean, and at the time of the Founding numerous other courts and treatises treated *Hutchinson* as a case that stood for the proposition that an acquittal in one court served as a defense in another court.

Based on these precedents, Founding-era treatises made clear that an acquittal in any court could serve as a bar to further prosecution in any other court. For instance, Hawkins' 1762 *Pleas of the Crown* explained that "if a Man steal Goods in one county, and then carry them into another, in which case it is certain . . . that he may be indicted and found guilty in either, it seems very reasonable, that an acquittal in the one County for such stealing may . . . be pleaded in bar of a subsequent prosecution for the same stealing in another county" because otherwise "his life would be twice in danger from that which is in truth but one and the same offence." 2 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 35, § 4, at 526 (Thomas Leach ed., 6th ed. 1787). Hawkins later reiterated that "an acquittal of murder at a grand sessions in Wales, may be pleaded to an indictment for the same murder in England. [F]or the . . . rule is, [t]hat a man's life shall not be brought into danger for the same offence more than once." *Id.* § 10, at 529. At no point in his treatise did Hawkins attempt to determine whether two counties, or England and Wales, were separate sovereigns for purposes of the *autrefois acquit* or *autrefois convict* defenses, as modern dual-sovereignty doctrine requires.

Similarly, MacNally's *Rules of Evidence on Pleas of the Crown*, published in England and the United States just after the Founding, explained that "[the] final sentence, decree, or judgment of any foreign court which hath competent jurisdiction of the subject determined before them, is conclusive evidence *in any other court of concurrent jurisdiction*; and therefore an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." 2 Leonard MacNally, *Rules of Evidence on Pleas of the Crown* 427-28 (1802); *see Green*, 355

U.S. at 200 (Frankfurter, J., dissenting) (quoting Blackstone's Commentaries as stating that "when a man is once fairly found not guilty upon any indictment, or other prosecution, *before any court having competent jurisdiction of the offence*, he may plead such acquittal in bar of any subsequent accusation for the same crime" (emphasis added)); Grant, *supra*, at 10 n.36 (collecting other treatises).

Members of the First Congress suggested that the Double Jeopardy Clause was intended to mirror this common law rule. *See, e.g.*, 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Livermore) (noting that it "is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence" and that the Clause "was declaratory of the law as it now stood"). Moreover, American treatises confirmed that the Double Jeopardy Clause imported English common law principles. *See, e.g.*, 3 Story, *supra*, § 1781, at 659 (the Double Jeopardy Clause "is another great privilege secured by the common law"); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* 467 (7th rev. ed. 1874) (the Double Jeopardy Clause "is nothing more than a solemn asservation of the common law maxim"); *see also Grady*, 495 U.S. at 530 (Scalia, J., dissenting) ("The Clause was based on the English common-law pleas of *auterfoits acquit* and *auterfoits convict* . . . ."); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873) (The Clause "prevent[s] a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").[3]

---

[3] Notably, although Madison's initial proposal provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence," 1

Because of this, it is little surprise that early American courts repeatedly referenced the rule that acquittals from out-of-jurisdiction courts could act as defenses against criminal charges. Indeed, in an early opinion, this Court explained that "[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations . . . and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Furlong*, 18 U.S. at 197. Similarly, a South Carolina court around the same time stated that "[i]f [double jeopardy protections] prevail[] among nations who are strangers to each other, could it fail to be exercised with us [states] who are so intimately bound by political ties?" *Antonio*, 2 Tread. at 781. The Michigan Supreme Court opined that if the state and federal criminal code had "concurrent jurisdiction" over certain acts, a state "conviction would be admitted in federal courts as a bar." *Harlan v. People*, 1 Doug. 207, 212 (Mich. 1843). And the Supreme Judicial Court of Massachusetts held that where a State and the federal government have concurrent jurisdiction over certain criminal acts, "the delinquent cannot be tried and punished twice for the same offence" and "the court which *first* exercises jurisdiction has the right to enforce it by trial and judgment." *Commonwealth v. Fuller*, 49 Mass. (8 Met.) 313, 317-18 (1844) (emphasis added).

Annals of Cong. 451-52 (1789) (Joseph Gales ed., 1834), this proposal was amended in the Senate, and in its final form, the Double Jeopardy Clause used "the more traditional language employing the familiar concept of 'jeopardy,'" "language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*," *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

In fact, as recently as 1909, this Court observed that "[w]here an act is . . . prohibited and punishable by the laws of [two] states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other." *Nielsen v. Oregon*, 212 U.S. 315, 320 (1909).[4] Indeed, before this Court's first decision approving of the dual-sovereignty exception in *United States v. Lanza*, 260 U.S. 377 (1922), "the cases of actual double punishment found [were] so few, in relation to the great mass of criminal cases decided, that one can readily discern an instinctive unwillingness to impose such hardships on defendants," *Bartkus*, 359 U.S. at 160 (Black, J., dissenting). It is only more recently that this Court has adopted a dual-sovereignty exception that deviates from the common-law doctrine that existed in England and America before and after the Founding. That doctrine clearly prohibited second prosecutions for the same offense no matter which sovereign charged a person.[5]

---

[4] In *Heath v. Alabama*, this Court sought to "limit[]" *Nielsen* "to its unusual facts" of "questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority." 474 U.S. at 91. However, nothing in *Nielsen*'s language suggests any such limitation. It is difficult to understand why the principle of prohibiting two states from charging a person for the same offense should apply any more to a situation where two states have concurrent jurisdiction over conduct in the same river—as in *Nielsen*—than to a situation where two states have concurrent jurisdiction over a kidnapping and murder that took place across state lines—as in *Heath*.

[5] Although many of these early precedents from England and America concern foreign-nation double jeopardy protections, there is no reason to limit the doctrine to that type of dual sovereignty. Sources from the Framing do not explain the doctrine in

3. In addition to having no basis in the Constitution's text and history, the dual-sovereignty exception also undermines the Clause's purposes, and the constitutional structure more broadly.

First, the dual-sovereignty exception is inconsistent with the purpose of the Double Jeopardy Clause, which, as noted above, was to ensure that individuals were not tried twice for the same offense. As Representative Samuel Livermore noted, "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted," and "in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Livermore); *see id.* (remarks of Rep. Roger Sherman) (observing that "the courts of justice would never think of trying and punishing twice for the same offence").

To the Framers, this prohibition on double jeopardy was essential to protecting a person's liberty from government overreach. *See* 3 Story, *supra*, § 1774, at

---

terms of international relations, but in terms of the individual right of *autrefois acquit*. Moreover, if the Founders believed domestic courts should respect the acquittals or convictions of foreign courts, there is little reason why they would have thought they should accord any less respect to the findings of other domestic courts.

If anything, the argument for extending double jeopardy principles to separate sovereigns is *stronger* in the federal-state context than in the foreign-domestic sovereign context. That is because, as noted below, once the Double Jeopardy Clause was incorporated via the Fourteenth Amendment and applied to the states, the same prohibition applied to both federal and state officials. Where the same constitutional principle prohibits state and federal officials from successive prosecutions when they act independently, those same officials should not be allowed to avoid that prohibition by acting together.

653 (the Clause provided "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy"); *Green*, 355 U.S. at 187-88; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96 (1998) (Double Jeopardy Clause "safeguard[s] . . . the individual defendant's interest in avoiding vexation," whether he was first acquitted or convicted).

When a defendant is subjected to multiple prosecutions for the same offense, however, the "embarrassment, expense and ordeal," *Green*, 355 U.S. at 187, are the same regardless of who brings the successive prosecutions. The prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of who brought them. The dual-sovereignty exception carves a hole in this fundamental protection of liberty, requiring defendants who have been convicted or acquitted to "'run the gauntlet' a second time," *Abney v. United States*, 431 U.S. 651, 662 (1977).

More broadly, the dual-sovereignty exception also undermines the right to a jury trial enshrined in the Sixth Amendment. The jury trial right and the prohibition against double jeopardy go hand in hand. "[T]he Double Jeopardy Clause precludes the Government 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). The Clause therefore "safeguard[s] not simply the individual defendant's interest in avoiding vexation but also the

integrity of the initial petit jury's judgment." Amar, *supra*, at 96.[6]

The dual-sovereignty exception undermines the role of the jury. Under the dual-sovereignty exception, a defendant with both state and federal charges arising from the same conduct could be acquitted by a state jury, then subsequently convicted by a federal jury—or vice versa. This possibility erodes the historic respect accorded to a jury's verdict. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 130 (1978).

Finally, some have defended the dual-sovereignty exception on federalism grounds, arguing that state and federal governments should be permitted to carry out law enforcement independently. But this view turns federalism principles on their head. The division of powers between state and federal governments was premised on the notion "that 'freedom is *enhanced* by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)) (emphasis added). As Madison explained, federalism provides "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed., 1961). Instead of protecting liberty, however, the dual-sovereignty exception permits the two levels of government to do together what neither could

---

[6] Indeed, 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). Thus, for example, in an early case, an English court banned trial judges from attempting to eliminate double jeopardy protections by discharging juries when they were poised to deliver an acquittal. *King v. Perkins*, Holt K.B. 403, 90 Eng. Rep. 1122 (1698).

do alone. *Cf.* Meese, *supra*, at 21 (the Founders viewed "our separate sovereign governments as rivals that would protect citizens from overzealous government, as opposed to cooperating prosecutors successively trying a defendant for the same offense"). Federalism principles thus can provide no justification for the dual-sovereignty exception to the Double Jeopardy Clause's protections.

II. CHANGES IN THE LEGAL BACKDROP SUPPORT ELIMINATION OF THE DUAL-SOVEREIGNTY EXCEPTION.

As noted above, this Court has applied a dual-sovereignty exception to the Double Jeopardy Clause over the last century, despite the lack of support for such an exception in the Constitution's text, history, or structure. Though prior precedent should be accorded strong weight, it must give way when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992). Two legal developments—the incorporation of the Double Jeopardy Clause against the States and the exponential increase in the size of the federal criminal code—have substantially undermined whatever foundations might have initially supported the dual-sovereignty exception.

1. First, the incorporation of the Double Jeopardy Clause against the States dramatically undermines the rationale for the dual-sovereignty exception in the federal-state context. Until 1969, the Clause's protections did not apply to the States. *See Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."). "[T]he logic of *Barron v. Baltimore* furnished an important justification for the early dual

sovereignty doctrine." Amar & Marcus, *supra*, at 11. If a State could prosecute an individual as many times as it wanted for the same offense, or could prosecute him after he had already been prosecuted by the federal government, it was not unreasonable to think that the federal government could prosecute him after he had been prosecuted by the State.

When this Court last meaningfully considered the dual-sovereignty doctrine, in *Bartkus* and *Abbate*, it "leaned heavily on the prevailing view that the Fourteenth Amendment did not incorporate the Double Jeopardy Clause or the rest of the Bill of Rights." *Id.* at 9; *see Bartkus*, 359 U.S. at 124 ("We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."); *Abbate*, 359 U.S. at 194 ("The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government . . . and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority." (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))).

Indeed, "[t]his logic radiated beyond double jeopardy." Amar & Marcus, *supra*, at 11. The dual-sovereignty doctrine was applied in other contexts, such as the use of immunized testimony across state and federal jurisdictions. *See Feldman v. United States*, 322 U.S. 487, 491-92 (1944) (immunized testimony compelled by federal officials could nonetheless be used in state prosecutions). Similarly, as long as the Fourth Amendment's exclusionary rule did not apply to the States, the Court adopted a "dual sovereign" approach to the exclusion of illegally obtained evidence depending on which sovereign seized it and which sovereign

was seeking to use it. *See Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence seized unlawfully by federal officials could be used in state criminal proceedings).

In the years following *Bartkus* and *Abbate*, however, the Court recognized that most of the protections in the Bill of Rights, including the Double Jeopardy Clause, apply to the States via the Fourteenth Amendment. *See Benton*, 395 U.S. at 795-96 (double jeopardy); *see also, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth and Fifth Amendments); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (self-incrimination); *cf.* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Senator Jacob Howard, in introducing the Fourteenth Amendment, explained that its broad text protected against state infringement all of the "personal rights guaranteed and secured by the first eight amendments").

This Court also recognized that incorporating the Bill of Rights' protections against the States had critical implications for the viability of the dual-sovereignty exception in other areas of criminal procedure. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, the Court reexamined the doctrine that permitted federal prosecutors to use evidence unlawfully seized by state officers. As the Court explained, the "foundation" of the doctrine—"that unreasonable state searches did not violate the Federal Constitution"—disappeared when the Court held in 1949 that the Fourth Amendment applied against the States. *Id.* at 213. Significantly, the Court underscored that the Fourteenth Amendment had recognized the Fourth Amendment's importance as an individual right that could be violated by either the federal government or state governments: "[t]o the victim it matters not

whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

Four years later, in *Murphy v. Waterfront Commission*, this Court again recognized that the dual-sovereignty exception was inconsistent with incorporation. The Court held that one jurisdiction could no longer compel a witness to give testimony that could be used to convict him of a crime in another jurisdiction. *Murphy*, 378 U.S. at 77. As the Court explained, the incorporation of the Incrimination Clause against the States "necessitate[d] reconsideration of [the dual-sovereignty] rule." *Id.* at 57.

Both *Elkins* and *Murphy* stand for the proposition that "the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and . . . the federal and state governments should not be allowed to do in tandem what neither could do alone." Amar & Marcus, *supra*, at 16. They also reflect the common-sense notion that if a constitutional prohibition applies equally to state and federal actors, those actors should not be permitted to coordinate their actions to avoid the prohibition. Those principles are no less applicable in the context of the Double Jeopardy Clause than they are in the context of other criminal procedure issues.[7]

---

[7] In the past, this Court has suggested that "undesirable consequences would follow if [the dual-sovereignty exception] were overruled. . . . [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate*, 359 U.S. at 195. But the fact that the government may be hindered in its ability to prosecute a person is not reason enough to decline to enforce a constitutional protection the Framers chose to include in the Bill of Rights. That reasoning would invalidate countless legal protections—from the right to a jury to the prohibition on unreasonable

As discussed earlier, that Clause was adopted to prevent an individual from being "subject[ed] . . . to embarrassment, expense and ordeal and compell[ed] . . . to live in a continuing state of anxiety and insecurity," and to avoid "enhancing the [greater] possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-88. A person experiences those harms whenever he is "twice put in jeopardy of life or limb," regardless of whether the second prosecution is brought by a different sovereign.

The Fourteenth Amendment's incorporation of the Double Jeopardy Clause's protections against the States thus underscores what the Constitution's text, history, and structure all make clear: the double jeopardy principle protects against successive prosecutions, regardless of the sovereigns bringing those prosecutions.

2. The continued application of the dual-sovereignty doctrine is also particularly troubling in an age of expansive federal criminal law and significant federal-state cooperation in law enforcement.

At the time the dual-sovereignty exception developed, the federal criminal code was sparse. As late as 1964, Justice White noted that "the States still bear primary responsibility in this country for the

---

searches—all of which necessarily limit the government's power in order to protect individual liberty. In any event, even if the dual-sovereignty exception were overruled, it would only prohibit successive prosecutions for the "same offence." So long as state and federal laws covering certain conduct each "require[] proof of a different element," the Double Jeopardy Clause would not preclude prosecution by both sovereigns. *Blockburger*, 284 U.S. at 304. Thus, it is only in the rare case—like Gamble's—in which all elements of the two laws are the same that overruling the doctrine would affect the federal or state government's ability to prosecute.

administration of the criminal law; most crimes . . . are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system." *Murphy*, 378 U.S. at 96 (White, J., concurring); *see The Federalist No. 45*, at 292 (James Madison) (Clinton Rossiter ed., 1961) (assuming that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined" while "[t]hose which are to remain in the State governments are numerous and indefinite").

Today, that assumption could not be further from the truth. The United States Code contains 27,000 pages of federal crimes. *See* Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 59 (2015). And as former Attorney General Meese has noted, "[f]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction." Meese, *supra*, at 3. Thus, federal law now includes the following seemingly local crimes: "virtually all drug crimes, carjacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from an insurance company, and murder of a state official assisting a federal law enforcement agent." *Id.* (citations omitted).

To be sure, most prosecutions continue to be done at the state level, but the significant expansion of federal criminal law makes it much more likely that state and federal governments will have concurrent jurisdiction over the same criminal activity. This increasing jurisdictional overlap, combined with the dual-sovereignty exception, allows state and federal governments to circumvent double jeopardy prohibitions that would otherwise prevent a person from being prosecuted a

second time for the same offense. *See id.* at 6-7; *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970) (noting "the extraordinary proliferation of overlapping and related statutory offenses" and the resultant greater "potential for unfair and abusive reprosecutions," and recognizing the "need to prevent such abuses through the doctrine of collateral estoppel").

The possibility of successive prosecutions is especially acute in light of the increased federal-state cooperation in fighting crime. *See* Ryan, *supra*, at 31 ("State and federal law enforcement agencies regularly negotiate responsibility for investigating and prosecuting criminal activity punishable under both state and federal law, often involving drug trafficking, alien smuggling, racketeering, or conspiracy cases."). The dual-sovereignty doctrine makes it easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense—exactly what the Double Jeopardy Clause was adopted to prevent. Allowing a State and the federal government to both prosecute an individual for the same offense would "give government an illegitimate dress rehearsal of its case and a cheat peek at the defense." Amar & Marcus, *supra*, at 10; *see Ashe*, 397 U.S. at 447 (the Double Jeopardy Clause prohibits the government from treating a "first trial as no more than a dry run for [a] second prosecution").[8]

---

[8] The government argues that under the so-called *Petite* policy, the Department of Justice will "generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was 'demonstrably unvindicated' by the prior state prosecution." U.S. Resp. to Pet. 11 (quoting United States Attorneys' Manual § 9-2.031 (2009)). However, the public—and particularly a prospective criminal defendant—has virtually no guidance as to what that means. And a fundamental constitutional right like the prohibition on double jeopardy should

In short, the exponential increase in the size and scope of federal criminal law beyond anything the Court could have imagined the last time it seriously considered the dual-sovereignty doctrine make reconsideration of the doctrine even more necessary today. To prevent state and federal governments from cooperating to successively charge defendants for the same offense, this Court should overrule the dual-sovereignty exception.

---

not "leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Moreover, even if the federal government follows this policy, it does nothing to prevent state governments from successively prosecuting individuals.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

ILYA SHAPIRO
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, D.C. 20001
(202) 842-0200

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
ASHWIN P. PHATAK
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St. NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

DAVID COLE
SOMIL TRIVEDI
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
915 15th St. NW
Washington, D.C. 20005
(202) 715-0802

EZEKIEL R. EDWARDS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2610

RANDALL MARSHALL
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
ALABAMA
P.O. Box 6179
Montgomery, AL 36106
(334) 420-1741

Counsel for Amici Curiae

September 11, 2018 * Counsel of Record