No. 17-5410

IN THE

Supreme Court of the United States

WILLIE TYLER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government defends this Court's precedents on *stare decisis* grounds; it does not respond to Mr. Tyler's petition. It does not dispute that successive prosecutions are an "affront to human dignity, inconsistent with the spirit of [our] Bill of Rights," or that the petition presents "an appropriate case" for a "fresh examination" of the dual sovereignty exception to the Double Jeopardy Clause. See *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). It does not engage with the petition's critique of *Lanza*, analyze the factors that support revisiting *Lanza* now, or dispute the importance of the question presented. Instead, it attempts to wave away the petition as "foreclosed by controlling precedent." Brief in Opposition at 8 ("Opp'n Br."). But a recitation of the law is not a response to Mr. Tyler's petition or eighty years of scholarship calling for this Court to restore the Double Jeopardy Clause to its full force. The government does not and cannot deny that Mr. Tyler's petition raises a profound and recurring question in a clean case.

ARGUMENT

I. THE DOCTRINE OF *STARE DECISIS* DOES NOT OVERRIDE CONSTITUTIONAL PROTECTIONS.

The government urges the Court to deny Mr. Tyler's petition because the Court has applied the dual sovereignty doctrine "numerous times over the span of more than 150 years." *Id*. That argument ignores this Court's willingness to revisit its precedents if the "necessity and propriety of doing so has been established." *Ring* v. *Arizona*, 536 U.S. 584, 608 (2002)

("Although 'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]' . . . '[o]ur precedents are not sacrosanct.'") (citations omitted); see also *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 363 (2010) (quoting *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940)) ("*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision"); *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (it is "this Court's prerogative . . . to overrule one of its precedents").

a. The petition establishes the necessity and propriety of revisiting the dual sovereignty exception by demonstrating that the Framers intended to bar successive prosecutions by separate sovereigns. Petition for a Writ of Certiorari at 1–13 ("Cert. Pet."). The opposition diverts this Court's attention from Founding-era sources to a line of cases beginning in the mid-nineteenth century. Opp'n Br. at 14. But cases from the 1850s do not illuminate the original meaning of the Double Jeopardy Clause as drafted sixty years earlier.

The Double Jeopardy Clause was based on common law pleas that barred a subsequent prosecution by a separate sovereign. Cert. Pet. at 7–8. Those pleas applied in England even if the original prosecution was by a *foreign* power. *Id.* Against this historical backdrop, the government's assertion that England was not a federal system is a nonsequitor. Opp'n Br. at 13. England recognized that the prosecutorial interests of separate sovereigns must give way to the individual rights of criminal defendants; the Framers did too.

English and American sources from at least 1720-1850 confirm that the Framers did not envision a dual sovereignty exception to the Double Jeopardy Clause. Cert. Pet. at 7–13; Brief for Law Professors

as Amici Curiae Supporting Petitioner at 7–13 (Aug. 15, 2017) ("Law Professors Br."); Brief for Constitutional Accountability Center, et al. as Amici Curiae Supporting Petitioner at 5–8 (Aug. 28, 2017) ("CAC Br."). The opposition does not wrestle with these sources. Instead, it cites *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), for the proposition that the Court has considered the issue before and found English sources "dubious" or "not relevant." Opp'n Br. at 13–15. But *Bartkus* did not delve into the deep well of sources the petition and amici now offer the Court. Law Professors Br. at 3–6. *Bartkus* also misconstrued some of the sources it referenced because it was decided without the benefit of scholarship providing essential historical context. *Id*. Ultimately, the Court decided *Bartkus* based on its own decision in *Lanza* without exploring the Framer's understanding of the Double Jeopardy Clause. Cert. Pet. at 13–16.

b. Application of the *Casey* factors confirms the propriety of revisiting *Lanza* now.

The Court asks three questions when deciding whether to overrule an earlier erroneous decision: (1) has the foundation of the decision been "'ero[ded]' by subsequent decisions"; (2) has the decision "been subject to 'substantial and continuing' criticism"; and (3) is there "'individual or societal reliance' that counsels against overturning" the decision. *Lawrence* v. *Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (citing *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 855 (1992)). See *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 233 (1995) ("*Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law."). The petition answers each of these questions; the opposition ignores them.

The opposition offers no response to the critique of *Lanza* issued by petitioner and amici. Cert. Pet. at 13–23; Law Professors Br. at 13–17. It does not deny that *Lanza*'s foundations include the premise that the Fifth Amendment applies only to the federal government; that premise cannot support the dual sovereignty doctrine now the Double Jeopardy Clause applies against the States. Cert. Pet. at 15–16; Brief for National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 6–9 (Sept. 21, 2017) ("NACDL Br."); CAC Br. at 11–12. The government also has no response to the argument that the dual sovereignty exception is a "doctrinal anachronism" because this Court has eliminated similar exceptions to other constitutional protections for criminal defendants. Cert. Pet. at 19; NACDL Br. at 6–10.

Nor does the government deny that there has been substantial and continuing criticism of the dual sovereignty doctrine. Cert. Pet. at 22–23; NACDL Br. at n.2, n.3. And it makes no attempt to show individual or societal reliance that counsels against overturning *Lanza*. On the contrary, the government's discussion of the *Petite* policy, Opp'n Br. at 17, only confirms that the dual sovereignty exception could be eliminated without serious inequity or damage to the stability of society. Cert. Pet. at 23.

II. OUR FEDERAL SYSTEM DOES NOT DEMAND ADHERENCE TO THE DUAL SOVEREIGNTY EXCEPTION; IT DEMANDS ADHERENCE TO THE CONSTITUTION.

The government attempts to defend the dual sovereignty exception on federalism grounds, emphasizing that the federal government and the states are separate sovereigns with distinct interests in crimi-

nal prosecutions. Opp'n Br. at 11–12. That defense must fail for four reasons.

a. First, the overriding interest of federal and state government must be ensuring for all citizens the full protection of the United States Constitution. This Court cannot set aside a criminal defendant's Constitutional rights to promote the prosecutorial interests of any government, federal or state. Just as the government's interest in obtaining a prosecution must yield to the Constitution's protections against warrantless searches and seizures, so too must it yield to the Constitutional protection against Double Jeopardy. Given that "[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," *Bartkus*, 359 U.S. at 151 (Black, J., dissenting), it is "difficult to accept generalized statements of sovereign interest as justifying . . . successive prosecutions by different governments." *United States* v. *All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 498 (2d Cir. 1995).

b. Second, the dual sovereignty doctrine is inconsistent with the purpose of federalism because it diminishes the individual rights that our federal system was designed to protect. The existence of separate governments was meant to be "a double security . . . to the rights of the people." The Federalist No. 51 (Madison). As amici argue, "the dual sovereignty exception to the Double Jeopardy Clause turns federalism principles on their head, permitting two levels of government that the Framers believed would enhance individual liberty to do just the opposite." CAC Br. at 10. It is therefore a "perversion," not an application of federalist principles. *Id.*

c. Third, successive prosecutions are not the only way to protect the separate interests of the federal and state governments. *Bartkus,* 359 U.S. at 157 (Black, J., dissenting) ("[O]ur Constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials."); *Abbate* v. *United States*, 359 U.S. 187, 202 n.2 (1959) (Black, J., dissenting) ("[F]ederal laws can easily be safeguarded without requiring defendants to undergo double prosecutions.").[1] Given the variety of other options, see NACDL Br. at n.5, "it is hard to justify limiting the reach of the Bill of Rights, adopted as it was to protect individual rights and liberties against governmental encroachment, on no stronger grounds than the relative cumbersomeness of plausible alternative measures that would protect the interests of the sovereigns involved." *G.P.S. Auto. Corp.*, 66 F.3d at 498.

d. Fourth, the extensive cooperation between federal and state governments in criminal investigations and prosecutions undermines the notion that the federal and state governments have divergent interests in prosecuting the same conduct. NACDL Br. at 17–21. It is now merely "fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to

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[1] In the civil context, separate sovereign interests in the same issue do not require separate trials. *See Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 369 (1996) (showing that in the class action context, a federal court cannot "withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts"); *Lawlor* v. *Nat'l Screen Serv. Corp.*, 349 U.S. 322, 326 (1955) ("[U]nder the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action.").

protect one from the other." *G.P.S. Auto. Corp.*, 66 F.3d at 499.

III. THE GOVERNMENT DOES NOT DISPUTE THAT THIS IS A CLEAN CASE FOR THE COURT TO ADDRESS THE IMPORTANT QUESTION PRESENTED.

a. The government suggests that the petition should be denied because "[t]his Court has repeatedly denied other petitions." Opp'n Br. at 9–10. That argument is meritless. "[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted . . . a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. *The Court has said this again and again; again and again the admonition has to be repeated.*" *Maryland* v. *Balt. Radio Show*, 338 U.S. 912, 919 (1950) (emphasis added); see also *Missouri* v. *Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923)) ("Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'").

In 2016, Justices Ginsburg and Thomas invited a "fresh examination" of the dual sovereignty doctrine in "an appropriate case." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring). The opposition cites only one petition since that time: *Walker* v. *Texas*, 137 S. Ct. 1813 (2017). Opp'n Br. at 9–10. The government fails to mention that *Walker* was plagued by vehicle issues. First, it was unclear whether *Walker* properly preserved his challenge to the dual sovereignty exception. In fact, respondents argued that the "sole issue" preserved was the "procedural question whether the trial court erred in declining to hold an evidentiary hearing before ruling on the double-

jeopardy claim." Brief in Opposition at 6, *Walker* v. *Texas*, 137 S. Ct. 1813 (Mar. 17, 2017) (No. 16-636). Second, the respondents argued that resolution of the dual sovereignty issue would not be dispositive. *Id.* at 9–10. ("[P]etitioner's double-jeopardy claim would fail even if all of the charges at issue were brought by one sovereign." *Id.*

Several other petitions were similarly infected with idiosyncratic vehicle problems. *Donchak* v. *United States* shrouded the dual sovereignty inquiry in questions about the: (1) the propriety of a jury instruction under 42 U.S.C. § 3631, assault under the Fair Housing Act; and (2) the sufficiency of evidence to prove that defendants made false entries in police reports under 18 U.S.C § 1519. Petition for a Writ of Certiorari at i, 568 U.S. 889 (Aug. 6, 2012) (No. 12-197). *Angleton* v. *United States* raised the dual sovereignty issue among three other questions: (1) whether the incorporation of a Texas capital murder statute as an element of a federal murder charge precludes the application of the dual sovereignty doctrine entirely; (2) whether the principles of comity and federalism prevent a federal jury from impeaching a state jury's verdict; and (3) whether *Bartkus* establishes a "sham" exception to the dual sovereignty doctrine (i.e. when a state prosecution is a cover for a federal prosecution). Petition for a Writ of Certiorari at i–ii, 538 U.S. 946 (Feb. 19, 2003) (No. 02-1233).

Other petitions raised the dual sovereignty issue as a tangential concern.[2] See Petition for a Writ of

[2] *Roach* v. *Missouri* may appear to raise the same issue as this petition but it does not. *See* Petition for a Writ of Certiorari at i, 134 S. Ct. 118 (May 24, 2013) (No. 12-1394). First, Roach raises the opposite question of whether the Double Jeopardy Clause bars state prosecution for a criminal offense after a *federal* conviction. *Id.* Thus, the petitioner in *Roach* did not rely on (and

Certiorari at i, *Mardis* v. *United States*, 562 U.S. 943 (Aug. 18, 2010) (No. 10-6013) (raising the question of the "sham" exception to the dual sovereignty doctrine when an indictment was filed against the defendant "after the federal government had actively participated in and ultimately modified the disposition of [an] indictment in . . . state court arising out of the same criminal conduct"—without directly challenging the dual sovereignty exception); Petition for a Writ of Certiorari at ii, *Sewell* v. *United States*, 534 U.S. 968 (Sept. 4, 2001) (No. 01-6131) (raising the question of whether the Fifth Amendment as applied to the states implicitly refutes the dual sovereignty doctrine after considering whether a criminal defendant was "denied his constitutional right to put forth a complete defense when he is prohibited from offering evidence of his voluntary intoxication to negate the knowledge element of a general intent crime"); Petition for a Writ of Certiorari at i, *Koon* v. *United States*, 515 U.S. 1190 (Apr. 10, 1995) (No. 94-1664) (asking the dual sovereignty question along with questions about (1) what the appropriate standard of review is for a downward departure from the U.S. Sentencing Guidelines; (2) whether testimony of a witness exposed to a defendant's compelled statement is admissible; and (3) whether the Fourteenth Amendment's substantive due process protection is violated in the context of an arrest by use of objectively unreasonable force).

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the Court did not have opportunity to reconsider) *Lanza*, which was the first case to address a successive *federal* prosecution. Second, the petitioner in *Roach* pled guilty to his federal charge and was not convicted by a jury as Mr. Tyler was, so it did not implicate the same double jeopardy interests. *Id.* at 3. Finally, the Court denied the *Roach* petition before the call for a fresh examination of the dual sovereignty exception in *Sanchez Valle*.

The abundance of these petitions only confirms that the important question presented is a recurring one, and Mr. Tyler's petition is a rare opportunity to address the issue in a clean case.

b. A vast array of criminal conduct can expose defendants to the risk of successive prosecutions. Cert. Pet. at 21. And joint federal and state investigations increase the risk that a successive prosecution will be used, as it was in Mr. Tyler's case, to give the federal government a second bite at the apple. The question presented is profoundly important today because the dual sovereignty exception is "far more dangerous today" than it was in an era of limited federal criminal law. *G.P.S. Auto. Corp.*, 66 F.3d. at 498; see NACDL Br. at 13–16.

The government responds to this argument by citing an article published by Professors Klein and Grobey that purports to challenge the view that crime is over-federalized. See Opp'n Br. at 17 (*citing* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1 (2012)). That source is an outlier. As Professors Klein and Grobey acknowledge, "[v]irtually all criminal law scholars," judges, bar review associations, and special interest groups recognize that there has been an over-federalization of crime. Klein & Grobey, *supra*, at 2. They also concede that "[t]he number of federal criminal prosecutions has grown steadily, with little fluctuation, since 1980, at a rate of about 1,500 additional cases per year." *Id.* at 16. Their work has also been subject to deep criticism. See, *e.g.*, Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 Harv. J.L. & Pub. Pol'y 57, 58–59 (2014) (the "number of federal criminal filings more than doubled from 1964 through 2011 despite a significant overall *decline* in crime

rates.") (emphasis added). The weight of scholarship on this issue confirms that the federalization of criminal jurisdiction intensifies the importance of the question presented.

c. Finally, the government does not deny that there is extensive cooperation between the federal and state government in criminal matters. Cert. Pet at 20–21; NACDL Br. at 17–20. This simultaneously increases the risks to defendants and minimizes the separation of interests between the federal and state government. The undeniable fact of this cooperation contributes to the importance of the question presented.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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