No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

BARRE C. DUMAS
126 Government Street
Mobile, AL 36602

ROBERT N. STANDER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

LOUIS A. CHAITEN
Counsel of Record
ROBERT E. JOHNSON
EMMETT E. ROBINSON
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7244
lachaiten@jonesday.com

AMANDA K. RICE
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48103

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORTY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

ARGUMENT

Under the original meaning of the Double Jeopardy Clause, a conviction or acquittal by any government with concurrent and competent jurisdiction bars a successive federal prosecution for the same offense—meaning a crime defined by the same elements. That rule is anchored in the text of the Clause, reflected in numerous treatises from the founding era and before, and embodied in English common-law cases. Indeed, so firmly rooted was the rule that the Government identifies not a single example of a successive inter-sovereign prosecution in all of English history, or in all of American history for well over a century after the founding. This Court's separate-sovereigns exception developed long thereafter, was wrong at its inception, and cannot be sustained on the basis of *stare decisis*.

I. THE SEPARATE-SOVEREIGNS EXCEPTION CONTRAVENES THE TEXT OF THE DOUBLE JEOPARDY CLAUSE.

Offenses are defined by their elements. Whether two "offence[s]" are the "same" under the Double Jeopardy Clause is therefore determined by comparing their elements. *See United States v. Dixon*, 509 U.S. 688 (1993) (adopting *Grady v. Corbin*, 495 U.S. 508, 528–29 (1990) (Scalia, J., dissenting)). This elements-based definition is consistent with the constitutional text and original understanding. *Grady*, 495 U.S. at 527–35.

The Government contends that the Double Jeopardy Clause uses "offence" in a sovereign-specific way, to mean "the violation of a particular law of a particular sovereign." Brief for Respondent ("Br.") 10.

But this definition of "offence" would have been foreign to the framers.

1. To the framers, "offence" referred to an act against law, but "law" would have been understood through the lens of common-law and natural-law traditions. In those contexts, it made perfect sense to speak of an "offence" divorced from a "particular law" or "particular sovereign."

Blackstone traces the origins of the criminal law to the inherent power of every man to punish "offences against the law of nature," which is delegated to the sovereign "by the consent of the whole community." William Blackstone, 4 Commentaries on the Laws of England 8 (5th ed. 1773 & Worcester ed. 1790) (hereinafter Commentaries). The Commentaries provide a taxonomy of offenses "against" non-sovereigns, including "Offences Against the Persons of Individuals" (Chapter 15), "Offences Against the Habitations of Individuals" (Chapter 16), and "Offences Against Private Property" (Chapter 17). These include crimes defined by common law as well as by statutes.

The Government's and the *Grady* dissent's dictionaries confirm this understanding, as they state that "[s]ome Offences are by the Common Law," G. Jacob, *A New Law Dictionary* (6th ed. 1750) ("offence"), and that "offence" includes "[a]ny transgression of law, divine or human," 2 N. Webster, *An American Dictionary of the English Language* (1828). Several define "offence" not against a particular law, but "against law," omitting any definite article before "law." Br. 11. And others define "offence" first and foremost as a "crime," that is, "[a]n act contrary to right." 2 T.

Sheridan, *A General Dictionary of the English Language* (1780); Webster, supra.

Other pre-founding sources likewise use "offence" in a non-sovereign-specific manner. A committee of the Continental Congress stated that federal legislation on import duties was necessary because otherwise "thirteen separate authorities" might "ordain various penalties for the same offence." 30 Journals of the Continental Congress 440 (J. Fitzpatrick ed. 1934). A resolution provided that military personnel should not be tried in state court "for the same offence, for which [they] had previous thereto been tried by a Court Martial." *Id.* at v.10, p.72. And a proposed ordinance regarding maritime crimes stated that defendants could "plead a formal Acquittal on a Trial for the same supposed Offences, in a similar Court in one of the other United States." *Id.* at v.29, p.803.

Early Congresses also used "offence" in this way. The Crimes Act of 1790 prohibited offenses like "murder" and "robbery" without defining those crimes, 1 Stat. 112–19, because the framers understood that these offenses had settled common-law definitions regardless of which sovereign had jurisdiction to prosecute. Criminal statutes enacted in 1806 and 1807 provided that states would retain concurrent "jurisdiction, under the laws of the several states, over offences made punishable by this act." 2 Stat. 405; 2 Stat. 424. In other words, same "offences," despite different sovereigns.

2. The Government suggests that its sovereign-specific interpretation of "offence" is justified by other uses of the word in the Constitution, but the opposite is true. The Pardon Clause, which authorizes the

President to grant "pardons for Offences against the United States," U.S. Const. art. II, § 2, cl. 1, only shows that, when the framers wanted to limit "offence" to a specific sovereign, they did so expressly. And the Define and Punish Clause, which empowers Congress to "define and punish . . . Offences against the Law of Nations," U.S. Const. art I, § 8, cl. 10, confirms that an "offence" is distinct from the sovereign and legislation that "define[s]" it. Though "define[d]" by the U.S. Congress, these offenses could fall within the concurrent jurisdiction of multiple sovereigns.

3. In the same vein, the Government does not appear to dispute that at least some offenses prosecuted by different sovereigns can be the "same" for double-jeopardy purposes. In *United States v. Furlong*, 18 U.S. 184, 197 (1820), for example, the Court recognized that double jeopardy would bar successive inter-sovereign prosecution for piratical robbery because it was "an offence within the criminal jurisdiction of all nations." The Government's response—that these are the same offense because the same "source of law defin[es] each crime," Br. 21—cannot be squared with the text of the Constitution, which empowers *Congress* "to *define* . . . Piracies . . . and Offences against the Law of Nations," U.S. Const., art. I, § 8, cl. 10 (emphasis added).[1]

---

[1] *Furlong* explained that a plea of *autrefois acquit* based on a U.S. verdict would "be good in any civilized State" as to robbery (because the United States and all nations had concurrent jurisdiction over that offense) but would not be good "in a Court of Great Britain" as to the murder of a *British* subject by a *British* subject on a *British* ship because Great Britain would not recognize U.S. jurisdiction over that murder. 18 U.S. at 197. This

The same held true in *Houston v. Moore*, 18 U.S. 1, 31 (1820). The Government claims that *Houston* is limited to cases in which state courts "imposed state sanctions for violation of a federal criminal law." Br. 22 (emphasis omitted). But Pennsylvania enacted and enforced *its own* criminal statute, which prohibited the refusal to serve in the militia and provided a list of penalties copied from federal law. 18 U.S. at 24.

4. The Clause's drafting history—in particular, the rejection of Representative Partridge's proposal to add "by any law of the United States" following "same offence"—also refutes the Government's interpretation. Pet. Br. 10. The Government argues that the Partridge amendment was intended to "ensure that the Clause be construed to bar only a second trial sought by the government, and not one sought by the defendant as a remedy for a claim of error." Br. 13. But it is unclear how the proposed language could have had that effect. The Government appears to conflate the discussion of two separate proposed amendments, as the concern it mentions was addressed by a different proposal (by Representative Benson) that was rejected before Partridge introduced his. 1 Annals of Cong. 753 (1789).

The Government further speculates that the Partridge amendment was rejected as unnecessary because "it was already understood" that the Bill of Rights "was directed at the federal government alone." Br. 14. But that argument elides two distinct issues: which government the Clause applies to and what

---

precisely describes the English rule, which barred a second prosecution after an acquittal "before any court having competent jurisdiction of the offence." Blackstone, Commentaries 335.

prior prosecutions it covers. The Clause could (and did) apply only to the United States, yet still bar federal prosecution after state prosecution for the same offense.

5. The Government's statute-specific reading of the text is also inconsistent with this Court's elements-based understanding of the Double Jeopardy Clause. Under *Blockburger*, "same offence" is not limited to a "particular law." Br 10. Two distinct laws frequently constitute the same offense, so long as their elements are the same. That is true even for laws enacted by governments that function as separate sovereigns. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) (territories); *Waller v. Florida*, 397 U.S. 387, 391 (1970) (home-rule municipalities). The Government's interpretation of "offence" cannot account for these results.

The Government nevertheless insists that the elements test cannot be applied to laws promulgated by different legislatures because *Blockburger* turns on "whether the legislature . . . intended that each violation be a separate offense." Br. 19 (quoting *Garrett v. United States*, 471 U.S. 773, 778 (1985)). But the Government's quote comes from a section of *Garrett* addressing whether there was "statutory authorization for a subsequent prosecution," not whether the subsequent prosecution was constitutional. *Id.* at 778. When *Garrett* addressed the constitutional question it said nothing about legislative intent. *Id.* at 786. And for good reason: The Double Jeopardy Clause is a restraint on the political branches; a legislature cannot write it out of the Constitution by simply proclaiming that all

offenses, even those with the same elements, are "different."[2]

In all events, a legislative-intent test is incompatible with the original understanding of the word "offence." At the time of the framing, "offence" covered common-law crimes. Blackstone, Commentaries 194. And a legislative-intent-based reading of "offence" makes no sense where no legislature was involved. *Id.* at 335–36 (discussing *autrefois acquit* and *convict* using common-law crimes and saying nothing about legislative intent).[3]

6. Lastly, the Government asserts that if "offence" were not sovereign-specific the framers "would have used a term like 'conduct' or 'acts,' not 'offence.'" Br. 14. But a same-elements test is not a same-conduct test.

---

[2] *Blockburger* developed as a "rule for determining whether Congress intended to permit cumulative punishment" in a single trial. *United States v. Woodward*, 469 U.S. 105, 108 (1854) (*per curiam*). But when used to determine whether the Double Jeopardy Clause bars successive prosecutions, the test is independent of legislative intent. *See Grady*, 495 U.S. at 517 n.8; *Dixon*, 509 U.S. at 704 (adopting the "proofs . . . set forth at length in the *Grady* dissent" that English common law applied an elements test); *see also id.* at 699 (opinion of Scalia, J.) (applying *Blockburger* to find that statutory violation and judicial contempt were the same offense).

[3] The doctrine of issue preclusion does not support the Government's sovereign-specific reading, either. Br. 20. That doctrine is a limited and much-criticized gloss on the constitutional text—developed nearly two centuries after the framing—based on rules of civil law pursuant to which parties typically need to be the same in both proceedings. *See United States v. Mendoza*, 464 U.S. 154, 157–60 (1984); *see also Currier v. Virginia*, 137 S. Ct. 2144, 2152 (2018) (plurality op.).

II. THE SEPARATE-SOVEREIGNS EXCEPTION CONTRAVENES THE ORIGINAL MEANING OF THE DOUBLE JEOPARDY CLAUSE.

1. On original understanding, the Government's brief is more notable for what it omits than for what it includes. The Government presents no affirmative evidence that English common law embraced successive inter-sovereign prosecutions for crimes with the same elements. It cites not a single treatise, English case, or founding-era American case endorsing the separate-sovereigns exception. And it identifies no practice of successive inter-sovereign prosecutions at any point in English history, or in America for nearly a century after the founding. This Court's 1922 decision in *Lanza* is the earliest case the Government cites in which a federal prosecution followed a state prosecution for a crime with the same elements. The earliest such lower court case of which we are aware occurred in 1884. *See United States v. Barnhart*, 22 F. 285, 290–92 (C.C.D. Or. 1884). If the founding generation believed that the Double Jeopardy Clause permitted duplicative prosecutions by separate sovereigns, prosecutors surely would have employed them. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring in part) (failure to exercise a power is evidence that the power was thought unconstitutional).

2. And there is a mountain of affirmative evidence cutting the other way. Indeed, the treatises could not be more clear:

> [A]n acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England.

2 L. MacNally, The Rules of Evidence on Pleas of the Crown 428 (London ed. 1802); 1 T. Starkie, A Treatise on Criminal Pleading 301 n.h (1814) (same); F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius 245 (5th ed. 1788) (same).[4]

Blackstone confirmed the concurrent-jurisdiction rule, explaining that an acquittal "before *any court having competent jurisdiction* of the offence" can be pleaded in "bar of any subsequent accusation for the same crime." Blackstone, Commentaries 335 & n.j. (emphasis added). In support, Blackstone cited *Beak v. Thyrwhit*, (1688) 3 Mod. 194 (K.B.), in which the reporter explained that Mr. Hutchinson "killed Mr. Colson in Portugal, and was acquitted there of the murder," and that "the Judges" of the King's bench "all agreed that he, being already acquitted by their law, could not be tried again" in England. 3 Mod. at 195.

The Government cites no definition of "competent jurisdiction" that would exclude foreign courts. It quibbles that Blackstone should have referred to them "directly," Br. 40, but, particularly given the citation to *Beak*, Blackstone's meaning was clear. The only double-jeopardy reference in *Beak* was *Hutchinson*. And Blackstone's separate statement that double jeopardy applies only if the second prosecution is for

---

[4] The Government's suggestion that the law was "still-unsettled" into the 20th century is not a serious argument. Br. 38. *See* ALI, Administration of the Criminal Law, Official Draft: Double Jeopardy 129 (1935) ("England—If a person has been acquitted in a court of competent jurisdiction for an offense in another country he may not be tried for the same offense again in an English court."); J.A.C. Grant, *Successive Prosecutions by State and Nation*, 4 UCLA L. Rev. 1, 11–12 (1956).

"the same identical act *and* crime," Br. 41, simply confirms that Blackstone used an elements-based definition of "crime." Commentaries 335–36 & n.j. It beggars belief that Blackstone could have had a legislature-specific definition in mind when he wrote of common-law crimes.

As for the other treatises, the Government says they are meaningless because they trace to "a single treatise on evidence." Br. 41–42. That does nothing to undermine the relevant point: that the concurrent-jurisdiction rule was "widely cited and universally accepted" as English law at the founding. Grant, *Successive Prosecutions*, *supra*, at 9. This is exactly the kind of evidence relied upon in Justice Scalia's *Grady* dissent—but more. *See* 495 U.S. at 527–35 (relying on five English treatises and two English cases).

3. The Government next undertakes its own novel reading of the English cases.

The Government relies on a report from the bail phase of *Hutchinson*, which it claims shows that Hutchinson's plea of *autrefois acquit* did not bar a second prosecution in England because Hutchinson was deemed "triable" in another English court and denied bail. Br. 35.

But the Government tells only half the story. The Government's report is from an earlier phase of the case and "gives only a brief entry as to the denial of bail." Grant, *Successive Prosecutions*, *supra*, at 9 n.32. Indeed, the report simply did not address the double-jeopardy issue. It instead dealt only with a jurisdictional issue, which under English common-law procedures was addressed before a plea in bar like

autrefois acquit. Starkie, *supra*, at 292 (explaining that only "[a]fter a plea to the jurisdiction [was] overruled," would the defendant raise a plea like *autrefois acquit*). The subsequent opinion on the *autrefois acquit* plea was not reported. Grant, *Successive Prosecutions*, *supra*, at 9 n.32; M. Friedland, Double Jeopardy 362 (1969).

The Government would apparently have this Court believe that all of the English sources discussing *Hutchinson* fabricated out of whole cloth the acquittal in Portugal, the plea of *autrefois acquit*, and even the name of the victim ("Colson"). They then somehow conflated the jurisdictional issue in the bail report with the double-jeopardy rule that an acquittal in Portugal meant Hutchinson "could not be tried again for it in England." *King v. Roche*, (1775) 1 Leach 160, 160–61 n.a (3d ed. 1800) (K.B.). That is absurd and, even if conceivably true, irrelevant. The point is that at the time of the founding the concurrent-jurisdiction rule was widely reported to be a principle of English law.

In addition, *Roche* unequivocally describes the concurrent-jurisdiction rule as barring a second prosecution "in England" after a foreign acquittal. *Id.* It is true that the explanatory footnote discussing *Hutchinson* was not added until the 1800 report. 1 Leach 160 (3d ed.). But *Roche*'s footnote explained what would have already been clear from the case and treatises—that if the jury had believed Roche's evidence about a prior acquittal at the Cape of Good Hope, and made a "finding" "for the petitioner" on that question of fact, "that finding would be a bar" to a

prosecution in England. *Id.* at 160.[5] Regardless, this Court has often relied on post-ratification sources as a reflection of the law as understood at the time of ratification, including in the double-jeopardy context. *See Grady*, 495 U.S. at 530–33 (Scalia, J., dissenting) (relying on 1796 English case and three post-ratification English treatises); *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (citing 1825 treatise); *Crawford v. Washington*, 541 U.S. 36, 47 (2004) (citing "[e]arly 19th-century treatises" confirming an English rule).

Burrows and *Beak* likewise report the concurrent-jurisdiction rule. *Burrows* explained that Hutchinson was acquitted in Spain and "indicted again for the same murder here, to which indictment he pleaded the acquittal in Spain in bar, and the plea was allowed to be a good bar to any proceedings here." *Burrows v. Jemino*, (1726) 2 Strange 733, 733 (K.B.).[6] And *Beak* reported the facts and holding of *Hutchinson*. *Beak*, 3 Mod. at 195. The civil-law holdings in those cases are beside the point.

Rex v. Thomas (1664) also supports the concurrent-jurisdiction rule, even though England ruled Wales at

---

[5] The prosecutor would have had no reason to submit the plea in bar to a jury if a plea of foreign acquittal were invalid as a matter of law. Roche withdrew that plea presumably to establish his innocence; also, establishing prior foreign acquittal involved a difficult evidentiary burden. *See* Starkie, *supra*, at 299–300 & n.h.

[6] The reference to Spain is unsurprising; the Spanish king ruled Portugal for decades during the 16th and 17th centuries. *See* David Birmingham, Concise History of Portugal 34–35 (3d ed. 2018).

the time. 1 Keb. 663 (K.B.). To determine whether a lawmaker is a separate sovereign, this Court looks to the entity's oldest source of authority. *United States v. Lara*, 541 U.S. 193, 210 (2004). The original source of Welsh sovereignty was not England; rather, Wales was originally "an absolute and undependent Kingdom." 1 Keb. 663.

Finally, *Gage v. Bulkeley* (1744) was a civil case from the court of chancery holding that a foreign judgment could be used as evidence in an English court. Ridg. t. H. 263, 271–74. In discussing *Hutchinson*, the court confused the double-jeopardy issue with the jurisdictional issue from *Hutchinson*'s bail report. *Id.* at 271–72. For example, the court claimed that Hutchinson could not have "pleaded" his foreign acquittal because he had not yet been indicted at the time of the bail decision. *Id.* In any event, to the extent *Gage* casts doubt, it is an outlier. The overwhelming weight of authority reported the concurrent-jurisdiction rule as stated in *Roche*, *Burrows*, *Beak*, Blackstone, MacNally, Starkie, and Buller.

4. Turning to American sources, the Government cites not a single early treatise supporting the separate-sovereigns exception. Early state cases, too, overwhelmingly rejected inter-sovereign successive prosecutions. *Bartkus v. Illinois*, 359 U.S. 121, 158–59 & nn.18–20 (1959) (Black, J., dissenting). The Government casually dismisses this near-universal understanding because a few opinions disagree over the rationale. Br. 43. But that is like rejecting incorporation because some ground it in the Due

Process Clause and others in the Privileges or Immunities Clause.

In any event, while the Government insists the state cases are "split evenly," it discusses only two, *State v. Brown*, 2 N.C. 100 (1794), and *Mattison v. State*, 1834, 3 Mo. 421 (1834). Br. 43. Both held that the state lacked concurrent jurisdiction over a criminal offense, and both relied on the universal condemnation of successive prosecutions. *Brown*, 2 N.C. at 101; *Mattison*, 3 Mo. at 426. Indeed, *Brown* found the concept of dual prosecutions by separate sovereigns to be "against natural justice." *Brown*, 2 N.C. at 101. *Mattison*, for its part, suggests that a prosecution by a separate sovereign *would* bar a second prosecution if the ordinary requirements were met—*i.e.*, if both the "cause of the prosecution" and the "degree or quantity of punishment" were the same. 3 Mo. at 426. Because the court believed that was "not likely to happen" frequently, it held that the state court lacked concurrent jurisdiction over the offense. *Id.*

5. The Murderer's Act and the Declaration of Independence do not support the Government, either—for much the same reasons as its "foreign terrorist" hypothetical is absurd. Br. 32. The "mock Trial" the Declaration complained of—like a foreign sponsor of terror's trial of a foreign terrorist—is a sham prosecution, to which double jeopardy would not apply even assuming the crimes involved the same elements. Declaration of Independence ¶ 32; *see Bartkus*, 359 U.S. at 161 (Black, J., dissenting); David Rudstein, Double Jeopardy 107–10, 120–21 (2004). Moreover, nothing requires American courts to accept a foreign prosecution by a belligerent country, much

less a "mock Trial" by one; the concurrent-jurisdiction rule applies only where the second government recognizes the competent jurisdiction of the first, *see Furlong*, 18 U.S. at 197, as our federal and state governments do for one another. Finally, by 1789 the concern was the opposite of the Murderer's Act: A key reason for ratifying the Constitution was to ensure the federal government would "uphold[] the rights of foreign sovereigns under the law of nations," particularly regarding offenses committed by Americans "*against* British subjects." Anthony Bellia & Bradford Clark, The Law of Nations and the United States Constitution 11–12 (2017) (emphasis added).

III. THE SEPARATE-SOVEREIGNS EXCEPTION IS INCONSISTENT WITH PRINCIPLES OF FEDERALISM.

As a practical matter, the separate interests of the state and federal governments mean that state and federal crimes will often be different offenses under *Blockburger*. Perhaps for that reason, all evidence suggests that inter-sovereign successive prosecutions are rare.[7] But where a state and the federal government do seek to prosecute the same offense, federalism is not a reason to cast aside the ancient prohibition on double prosecutions.

---

[7] The Government issues about 150 Petite Policy authorizations annually. *See* Adam H. Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts § 1.04 p.8 & n.13 (2001). Those relying on the separate-sovereigns exception are presumably fewer, given that the "policy sweeps more broadly than the Double Jeopardy Clause." Br. 54.

1. This case is about the Fifth Amendment's limit on *federal* power. And for the framers of the Fifth Amendment the concern was an overreaching federal government, one that would impinge on state authority and trample individual rights. *See* Federalist 45 (Madison). That is why they insisted on a Bill of Rights—"to guard against the abuse of power" and "encroachments of the general government." *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833). The notion that the federal government would step in and prosecute a defendant after a state jury acquitted him of the same offense would have shocked the founding generation. In contrast, the framers would not have worried that the Double Jeopardy Clause would impinge on state sovereignty because the Bill of Rights did not apply to the states. *Id.*

2. Besides, fully enforcing the original understanding of the Fifth Amendment's Double Jeopardy Clause would enhance state sovereignty, as it would force the federal government to respect the finality of state proceedings. *See Engle v. Isaac*, 456 U.S. 107, 127 (1982) (noting importance of finality of state criminal judgments). The facts here illustrate the point. The State of Alabama decided that Mr. Gamble was best punished through a prison term, probation, and work release. *See* Br. 4. But federal officials disregarded the State's decision and re-prosecuted him. *Id.* at 5. Properly applying the Double Jeopardy Clause would advance both Alabama's sovereign prerogatives and Mr. Gamble's individual rights—showing, as this Court has oft observed, that federalism and liberty walk hand-in-hand.

3. But what about cases where state prosecution follows a federal proceeding? If the Court takes up that Fourteenth Amendment question in this case, it should reject any suggestion that incorporation watered down the original understanding of the Fifth Amendment. If anything, incorporation provides an *additional* reason to overrule the separate-sovereigns exception: With state and federal governments equally bound by the Double Jeopardy Clause, they cannot be allowed to accomplish together what they could not accomplish alone. *See Elkins v. United States*, 364 U.S. 206 (1960); *Murphy v. Waterfront Comm'n of N.Y.,* 378 U.S. 52, 55 (1964).

Neither the Government nor its *amici* cite actual evidence that barring successive state prosecutions would inhibit state law enforcement. They identify no example of a successive state prosecution during the early years of the Republic, and it is difficult to believe that a practice unheard of at the founding is essential to state sovereignty. Even today, the vast majority of criminal cases are state cases, so fully enforcing the Double Jeopardy Clause could not bar more than a tiny fraction of state proceedings. *See* ABA Task Force, https://bit.ly/2CSvao2. Plus, the sky has not fallen in the many states that allow prosecutions by home-rule municipalities or that depart from the separate-sovereign exception as a matter of state law.

IV. *STARE DECISIS* PRESENTS NO OBSTACLE TO OVERRULING THE SEPARATE-SOVEREIGNS EXCEPTION.

The Government offers little in the way of a *stare decisis*–based defense. What the Government does say misses the point.

A. Overruling the Exception Would Not "Unsettle" Double-Jeopardy Law.

1. The Government begins its *stare decisis* argument by counting noses. Br. 45. The fact remains, however, that no rule of constitutional law has been more uniformly criticized—by Justices of this Court, lower-court judges, and scholars—than the separate-sovereigns exception. *See* Pet. Br. at 33–35 & nn.1–2. Indeed, the Government cites nary a student note supporting the doctrine.

That some Justices have joined opinions applying the exception does nothing to show that overruling it would "unsettle" double-jeopardy law. The Government cites *Janus v. American Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018), for the principle that "consistency with other related decisions" is a factor supporting *stare decisis*. Br. 46. But the only "related" doctrine the Government appears to have in mind is an elements-based, rather than conduct-based, interpretation of "offence." Again, however, the suggestion that overruling the separate-sovereigns exception somehow entails a conduct-based interpretation of "offence" is a strawman.

2. The Government's suggestion (Br. 46-47) that *Blockburger* would be unworkable without the separate-sovereigns exception is mystifying. If it is workable for state-state or federal-federal prosecutions, it is workable for state-federal prosecutions. The judicial exercise of comparing elements is identical. And none of the supposed difficulties in application the Government highlights are unique to the inter-sovereign context.

The Government's citation of Petitioner's own case in support of its apparent critique of *Blockburger*, Br. 48, is rich in light of its forfeiture (at least thrice over) of any argument that Petitioner's offenses do not qualify as the "same" under *Blockburger*. For that reason, the *Blockburger* question has never been briefed or argued in this case. But its resolution would pose no intractable problems. Courts look to the predicate offense at issue in comparing offenses with multiple potential predicates. *See Whalen v. United States*, 445 U.S. 684, 694 (1980); *see also, e.g., United States v. Hodge*, 870 F.3d 184, 195 (3d Cir. 2017) (applying this principle where defendant faced firearms charges under federal and Virgin Islands law).[8]

3. The Government's suggestion that prosecutors have "relied" on the separate-sovereigns exception is not a legitimate "reliance" argument. Reliance interests can justify retaining faulty precedents in "cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). But this case could hardly have less to do with those sorts of interests. Indeed, this Court has "never" done what the Government asks here: "rel[y] on *stare decisis* to justify the continuance of an unconstitutional police practice." *Arizona v. Gant*, 556 U.S. 332, 348 (2009).

---

[8] The Government has no authority for the proposition that Alabama territorial limitations create an additional non-statutory element for *Blockburger* analysis. Br. 15. Regardless, non-substantive jurisdictional requirements ought not "count." *United States v. Gibson*, 820 F.2d 692, 698 (5th Cir. 1987); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016); *but see United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995).

Regardless, the law-enforcement interests the Government attempts to cast in reliance terms are overblown. *Blockburger* is oft-characterized as under-protective because rarely do two offenses qualify as the "same." *Cf. United States v. Johnson*, 462 F.2d 423, 426 (3d Cir. 1972). Given that, and given the breadth of federal criminal law, it is difficult to imagine a scenario in which an alternative charge would not be available. The Government identifies no apparent enforcement difficulties for those states that already prohibit successive state prosecutions. *See* Pet. Br. 50–51 nn.3–5. Nor does it point to any difficulties involving home-rule municipalities or territories that are functionally separate sovereigns. *See Waller*, 397 U.S. at 391; *Sanchez Valle*, 136 S. Ct. at 1870.

4. That reversing here could conceivably result in challenges to other unconstitutionally duplicative convictions gives no reason for pause. The possibility assumes what the Government nowhere concedes: that a decision overruling the separate-sovereigns exception would apply retroactively. Besides, if duplicative prosecutions have been as unusual as the Government suggests, *see* Br. 54, a "proliferation of collateral attacks" seems hardly likely, *id.* at 50. More important, the possibility that vindicating Mr. Gamble's constitutional rights might result in overturning other unconstitutional convictions is no reason for this Court—which the framers tasked with checking Executive excess and vindicating individual rights—to stand idly by.

B. The Foundation of the Separate-Sovereigns Exception Has Eroded.

The Government does not dispute what this Court has repeatedly held: that divergence from *stare decisis* is appropriate when "subsequent decisions of this Court" have "eroded" a decision's legal or factual "underpinnings." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). And its brief does nothing to undermine Petitioner's account of why both are true here. Pet. Br. 35–46.

1. As for doctrine, Petitioner's brief showed that the inapplicability of the Double Jeopardy Clause to the states was the separate-sovereign exception's foundational premise and repeated justification. *See id.* at 35–38. Indeed, the very first decision to suggest that separate sovereigns might be able to engage in duplicative prosecutions, *Fox v. Ohio*, expressly cited non-incorporation as a rationale. 46 U.S. 410, 434 (1847) (the Clause does not bar duplicative prosecutions because it was "exclusively [a] restriction[ ] upon federal power"). The Court relied on non-incorporation again in *United States v. Lanza*. 260 U.S. 377, 382 (1922) ("applies only to proceedings by the Federal Government"). And then again in *Bartkus*, 359 U.S. at 124, and *Abbate v. United States*, 359 U.S. 187, 194 (1959). To be sure, the Court continued to apply the by-then settled rule after incorporation, including in *Heath v. Alabama*, 474 U.S. 82, 89 (1985). But the question whether to overrule the separate-sovereigns question was not presented in *Heath*. *See* Pet. Br., *Heath*, 474 U.S. 82. Nor was the Court even presented with evidence of original meaning. *See id.* Until now, the Court has never had

a full and fair opportunity to determine the original scope of the Double Jeopardy Clause—and certainly has not had occasion to do so since incorporation. *See* Pet. Br. 38.

Incorporation is exactly the sort of jurisprudential shift this Court has recognized justifies a departure from *stare decisis*. *Elkins* overruled the silver-platter doctrine, which was premised on the Fourth Amendment's inapplicability to the states, once that "foundation . . . disappeared." 364 U.S. at 213. And *Murphy* overruled a separate-sovereigns exception to the privilege against self-incrimination, which was premised on that privilege's inapplicability to the states, because incorporation "necessitate[d] a reconsideration." 378 U.S. at 57. The Government's one-sentence dismissal of these precedents as "inapposite," Br. 51, is, well, inapposite. Because *Fox*, *Lanza*, and *Abbate* expressly relied on a non-incorporation rationale, incorporation provides grounds for the Court to revisit the doctrine, just like in *Elkins* and *Murphy*. Indeed, that the Government declines to defend the *Barron*-ial logic of *Fox*, *Lanza*, and *Abbate* is itself a reason to depart from *stare decisis*. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished.").

2. The multiplication of federal criminal laws far beyond the bounds of what *Fox* and *Lanza* anticipated provides yet another basis for departing from *stare decisis*. In both cases, the Court was "almost certain" that duplicative prosecutions would be incredibly rare. *Fox*, 46 U.S. at 435; *Lanza*, 260 U.S. at 383. But the

dramatic expansion of federal law—which *Elkins* and *Murphy* both cited in overruling precedents issued in reliance on the limited scope of federal criminal jurisdiction—upended that expectation.

The Government has no real response. Petitioner, of course, has never argued that "[t]he Double Jeopardy Clause . . . imposes" any "cap on the number of criminal laws that Congress may enact." Br. 51. The point is that the Courts that adopted the separate-sovereigns exception could not have anticipated these "far-reaching systemic and structural changes." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

C. Punting to the Political Branches Is Not An Appropriate Response to the Persistent Violation of Individual Constitutional Rights.

It is no answer to suggest that the political branches are competent to right this constitutional wrong.

The Petite Policy and judicial sentencing discretion—the Government's preferred political alternatives—are cold comfort to the defendant who has "previously been indicted, tried, and acquitted of the precise state crime" for which he is later tried in federal court. *United States v. Frumento*, 563 F.2d 1083, 1099 (3d Cir. 1977); *see also, e.g., United States v. Angleton*, 221 F. Supp. 2d 696 (S.D. Tex. 2002), aff'd 314 F.3d 767 (5th Cir. 2002) (re-prosecution of murder following a state jury's acquittal); *United States v. Basile*, 109 F.3d 1304, 1306 (8th Cir. 1997) (similar).

And, as this case demonstrates, neither safeguard is effective. The Government nowhere explains why this case involves "a substantial federal interest," as

the Petite Policy requires. *Justice Manual* § 9-2.031(A). And if "a senior Department of Justice official" in fact approved Petitioner's prosecution on that ground, Br. 54, it is difficult to see how any criminal defendant could be told to rely on prosecutorial discretion, delineated by an unenforceable policy manual, to vindicate his constitutional rights. Likewise for sentencing discretion. The fact that Petitioner's federal sentence was set to run concurrently with his state sentence does not solve the problem: He remains in prison today because a federal court decided to impose a longer sentence than the one he had already received from a state court for the same offense.

CONCLUSION

The Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause and reverse the judgment below.

Respectfully submitted,

BARRE C. DUMAS
126 Government Street
Mobile, AL 36602

LOUIS A. CHAITEN
Counsel of Record
ROBERT E. JOHNSON
EMMETT E. ROBINSON
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7244
lachaiten@jonesday.com

AMANDA K. RICE
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48103

ROBERT N. STANDER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

November 21, 2018