NO. 19-____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

PHILIP JOHN MARTIN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Green v. United States*, the Court held that the Double Jeopardy Clause barred retrial of a greater offense when the jury's "verdict was silent" on that offense. 355 U.S. 184, 186, 190–91 (1957). In *Richardson v. United States*, the Court affirmed that the hung jury rule permits retrial of an offense on which the jury was unable to agree. 468 U.S. 317, 324 (1984).

Here, a jury convicted respondent, Philip Martin, of second-degree murder. In its verdict, the jury stated it was "unable to agree" on the greater, first-degree murder charge. Martin successfully appealed, and his conviction was reversed. On remand, the State again sought—and obtained—a first-degree murder conviction. The Arizona Supreme Court vacated the conviction, holding the Double Jeopardy Clause barred Martin's retrial for first-degree murder under *Green*.

The question presented, upon which courts are divided, is:

When a jury expressly states it is "unable to agree" on a defendant's guilt for a greater offense and convicts the defendant of a lesser offense, and the defendant successfully appeals his conviction, does the hung jury rule permit retrial of the greater offense or does *Green* instead bar retrial of that offense?

STATEMENT OF RELATED PROCEEDINGS

State v. Philip Martin, CR-18-0380-PR (Ariz.) (opinion reversing first-degree murder conviction filed Aug. 9, 2019).

State v. Philip Martin, 1 CA-CR 16-0551 (Ariz. App.) (opinion affirming first-degree murder conviction and memorandum decision addressing other issues filed June 19, 2018).

State v. Philip Martin, CR-15-0034-PR (Ariz.) (order denying review of State's petition for review filed July 10, 2015).

State v. Philip Martin, 1 CA-CR 13-0839 (Ariz. App.) (memorandum decision reversing second-degree murder conviction filed Dec. 23, 2014).

State v. Philip Martin, CR-2012-01326 (Mohave Cty. Super. Ct.) (judgment and sentence for first-degree murder entered Aug. 1, 2016; judgment and sentence for second-degree murder entered Nov. 8, 2013).

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JURISDICTION

The Arizona Supreme Court issued its opinion on August 9, 2019. The Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) ("Although further proceedings are to take place in state court, the judgment rejecting petitioner's double jeopardy claim is 'final' within the meaning of the jurisdictional statute, 28 U.S.C. § 1257.").

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

INTRODUCTION

This case is an ideal vehicle to resolve a conflict on an important and recurring issue involving the Fifth Amendment's Double Jeopardy Clause. The Arizona Supreme Court held that under *Green v. United States*, 355 U.S. 184 (1957), jeopardy on a greater offense terminates upon conviction of a lesser offense, even when a jury is expressly deadlocked on the greater offense and the conviction is later reversed on appeal. But five circuit courts, four state high courts, and the D.C. Court of Appeals have held that double jeopardy protection is not implicated under *Green* unless the defendant was implicitly acquitted of the greater or alternative offense, which is not satisfied where there is a hung jury. Widening an existing conflict, the Arizona Supreme Court aligned with decisions of the Sixth Circuit and one intermediate state court, which have held that an implied acquittal is not necessary for jeopardy to terminate on a greater or alternative offense under *Green*.

Two core double jeopardy principles permit a retrial on the greater offense on which the jury could not agree at the initial trial. First, the Court has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson v. United States*, 468 U.S. 317, 324 (1984). Under the hung jury rule, "jeopardy does not terminate when the jury is discharged because it is unable to agree." *Id*. at 326. Second, "[w]hen a conviction is overturned on appeal, '[t]he general rule is that the [Double Jeopardy] Clause does not bar reprosecution." *Bravo-Fernandez v. United States*,

137 S. Ct. 352, 363 (2016) (quoting *Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984)). "This 'continuing jeopardy' rule neither gives effect to the vacated judgment nor offends double jeopardy principles" because it "reflects the reality that the 'criminal proceedings against an accused have not run their full course.'" *Bravo-Fernandez*, 137 S. Ct. at 363 (citing *Lydon*, 466 U.S. at 308).

The Arizona Supreme Court disregarded both of these firmly-established principles, and broke from the line of courts that have correctly harmonized *Green* with the Court's precedents, when it held that *Green* bars retrial of the greater offense.

In *Green*, the Court held that retrial of the defendant for first-degree murder after his second-degree murder conviction was reversed on appeal was barred by double jeopardy. 355 U.S. at 191. There, the jury's verdict "was silent" on first-degree murder. *Id.* at 186. As the Court later stated in *Price v. Georgia*, 398 U.S. 323 (1970), *Green*'s conclusion "rested on two premises." *Id.* at 328. First, the "jury's verdict of guilty" on the lesser charge was an "'implicit acquittal'" of the greater charge. *Id.* Second, the defendant's "jeopardy on the greater charge had ended when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge." *Id.* at 328–29 (quoting *Green*, 355 U.S. at 190–91). Accordingly, in *Green* and *Price*, the Court "considered jury silence as tantamount to an acquittal for double jeopardy purposes." *Schiro v. Farley*, 510 U.S. 222, 236 (1994).

The Arizona Supreme Court, however, concluded that *Green*'s "general rule is that where the state had a complete opportunity to prosecute the defendant and failed to obtain a conviction on the greater charge, retrial on that charge is barred." App. 9. In its view, "an implied acquittal is sufficient but not necessary for jeopardy to terminate" on the greater offense under *Green*. *Id*. Only the Sixth Circuit and one intermediate state court have interpreted *Green* so broadly. This reading of *Green* is unsustainable in light of the Court's more recent precedents that have consistently adhered to the hung jury rule and the continuing jeopardy rule in analogous cases.

Only the Court can resolve the prevalent conflict among lower courts and definitively harmonize its prior decisions. The Court should do so, validating the majority view of the five circuit courts, four state high courts, and the D.C. Court of Appeals.

STATEMENT OF THE CASE

A. Martin Is Tried For First-Degree Murder

In 2013, the State of Arizona tried Martin for premeditated first-degree murder for killing his neighbor with a single shotgun blast as his neighbor was walking toward Martin's home. App. 2, 21, 44. Martin admitted to police at the scene, and at trial, that he shot the victim, stating he did so because the victim had ignored Martin's commands to get off Martin's property. App. 21, 44. Martin asserted that he believed the victim was armed and that the victim was coming toward Martin to harm him. *Id*.

At the conclusion of trial, Martin received self-defense and defense-of-premises jury instructions. App. 44. The court instructed the jurors that the jury could find Martin guilty of a less serious offense, second-degree murder, if all jurors agreed that the State failed to prove him guilty of first-degree murder beyond a reasonable doubt, "or if after reasonable efforts" the jurors were "unable to agree unanimously on the more serious crime" and "do all agree that the state has proven the defendant guilty of the less serious crime." App. 3. *See State v. LeBlanc*, 924 P.2d 441, 444 (Ariz. 1996) (directing Arizona trial courts to "give a 'reasonable efforts' instruction in every criminal case involving lesser-included offenses"); *State v. Sprang*, 251 P.3d 389, 391 (Ariz. App. 2011) ("Second-degree murder is a lesser-included offense of premeditated first-degree murder, the difference between the two being premeditation.").

B. Jury "Unable To Agree" On First-Degree Murder, But Convicts Of Second-Degree

The jury's verdict form contained three alternative options the jury could select on the first-degree murder charge: guilty, not guilty, or unable to agree. App. 59. The second part of the verdict form contained two options for second-degree murder—guilty or not guilty—and advised the jury to complete that section only if it found Martin not guilty of first-degree murder or if the jury was unable to agree as to that charge. App. 59–60.

The jury deliberated for about two hours. App. 62–63. In its completed and final verdict form, the jury

placed a check mark next to the "unable to agree" option for first-degree murder and selected the "guilty" option for second-degree murder. App. 59–60. The clerk formally read the verdict in open court. App. 64. The court then individually polled each juror; each one verbally confirmed that this was his or her true verdict. App. 64–66. *See* Ariz. R. Crim. P. 23.3 (providing that a trial court may poll the jury on its own initiative). The trial court sentenced Martin to a 16-year prison term. App 70.

C. Martin Appeals And Secures A Retrial Based On Jury-Instruction Error

Martin timely appealed his second-degree murder conviction. App. 43. The Arizona Court of Appeals reversed and remanded for a new trial, holding the trial court reversibly erred by denying Martin's request for a jury instruction on a "crime-prevention" justification defense. App. 43–48. The State filed a petition for review challenging the court of appeals' conclusion that this error warranted reversal, but the Arizona Supreme Court denied review. App. 53–54.

D. The Trial Court Grants The State's Motion To Retry Martin For First-Degree Murder, And The Second Jury Convicts Him Of This Offense

On remand, the State moved to retry Martin for first-degree murder as originally indicted. App. 33. The trial court granted the State's motion in a lengthy ruling. App. 30–41. The trial court summa-

rized the Court's holdings in *Green* and *Price* and quoted passages from the Court's precedent addressing jury deadlock. App. 33–36 (citing *Richardson*, 486 U.S. at 324, *Arizona v. Washington*, 434 U.S. 497, 509 (1978), and *Selvester v. United States*, 170 U.S. 262, 263 (1898)). It reasoned that the Court's decisions "suggest the doctrine of implied acquittal is inapplicable to cases in which the jury is expressly deadlocked, rather than merely silent, on the greater offense." App. 34.

The trial court also found instructive the Eighth Circuit's decision in *United States v. Bordeaux*, 121 F.3d 1187, 1193 (8th Cir. 1997), which held that "where the jury expressly indicates that it is unable to reach an agreement on the greater charge, a conviction on a lesser included offense does not constitute an implied acquittal of the greater offense and presents no bar to retrial on the greater offense." App. 37. The court noted that unlike *Green* and *Price*, the jury "clearly indicated that they were deadlocked on the greater charge because they were unable to agree unanimously." App. 39–40. The trial court concluded the Double Jeopardy Clause did not prohibit retrying Martin for first-degree murder because "there was not an implied acquittal of the greater charge" and "there was a genuine deadlock." *Id.*

At the end of Martin's retrial, the jury found him guilty of first-degree murder. App. 2, 56–57. The trial court sentenced him to natural life in prison. App. 57.

E. The Arizona Court Of Appeals Affirms Conviction, Rejecting Double Jeopardy Claim Premised On *Green*

On appeal, Martin argued that his retrial for first-degree murder was barred under *Green* and *Price*. App. 22–23. The Arizona Court of Appeals noted that although the Court "has not addressed the precise issue here[,]" the Court has held that "double jeopardy does not bar retrial of charges on which a jury has been unable to agree." App. 23–24 (citing *Richardson*, 468 U.S. at 324–26, and *Sattazahn v. Pennsylvania*, 537 U.S. 101, 104–05 (2003)). It further noted that "[a] number of other courts have held" that "when a jury convicts on a lesser offense after stating on the record that it is unable to agree on the greater offense, double jeopardy presents no bar to retrial on the greater offense." App. 24 (citing *Bordeaux*, 121 F.3d at 1192–93, *United States v. Williams*, 449 F.3d 635, 645 (5th Cir. 2006), and state court decisions from Washington and Colorado, as well as a decision of the D.C. Court of Appeals).

The court of appeals distinguished *Green* and *Price*, reasoning that the "implicit acquittal" found in those cases "rested on significantly different circumstances" because the juries were in fact silent on the greater murder charges. App. 25–26. Emphasizing that the jury's verdict here stated it was "unable to agree" on first-degree murder, that the clerk announced the verdict in open court, and that Martin had not objected to the jury's instructions or the verdict form, the court held, "[u]nder these circumstances, we conclude that the jury was genuinely dead-

locked on the charge of first-degree murder, and double jeopardy did not bar retrial on that charge." App. 26.

F. The Arizona Supreme Court Reverses Martin's Conviction, Holding That *Green* Controls Rather Than *Richardson*

The Arizona Supreme Court vacated the court of appeals' opinion. App. 1. In a unanimous opinion, the Arizona Supreme Court held that "double jeopardy barred Martin's retrial for first-degree murder because the State had a full and fair opportunity to try him on that charge in the first trial and the jury, after full deliberation, refused to convict." App. 2.

The court agreed with Martin "that *Green* guides the analysis here" and decided that "an implied acquittal is sufficient but not necessary for jeopardy to terminate" under *Green*. App. 6–9. In the Arizona Supreme Court's view, *Green* establishes "that where the state had a full and fair opportunity to try the defendant on a charge and the jury refused to convict, jeopardy terminates when the jury is dismissed following its verdict, and therefore the state may not place the defendant in jeopardy again for that same charge." App. 7.

The Arizona Supreme Court acknowledged the principle that a jury's inability to agree "does not equate to an implicit acquittal." App. 9 (citing *Richardson*, 468 U.S. at 325). It then determined that the jury's inability to agree in this case did not establish a true jury deadlock under *Arizona v. Washington*, 434 U.S. 497, 509 (1978). *Id.* The court rea-

soned that "as a necessary corollary in applying *Green* and *Washington*, when a verdict is reached on a lesser-included offense in accord with the [reasonable efforts] instruction, jeopardy terminates for the greater offense and the defendant may not be retried on the greater offense." App. 11.

Citing *Green*, the Arizona Supreme Court held that "[b]y appealing a conviction on a lesser-included offense, a defendant does not restart the jeopardy clock on a greater charge." App. 13. The court concluded that "trying Martin a second time for first-degree murder under the circumstances here violated his constitutional right to be free from double jeopardy." App. 13. It vacated the court of appeals' opinion and remanded the case to the trial court to determine whether to reduce his conviction to second-degree murder, "or, if Martin can show prejudice, to order a new trial." App. 13–14.

REASONS FOR GRANTING THE PETITION

The Double Jeopardy Clause "embodies … vitally important interests" and the Court accordingly has "decided an exceptionally large number of cases interpreting" it. *Yeager v. United States*, 557 U.S. 110, 117 (2009). The Arizona Supreme Court's decision deepens a conflict among lower courts over the reach of *Green*'s rule. The overwhelming majority of federal and state courts have correctly reconciled *Green* with *Richardson* by holding that jeopardy on a greater or alternative offense only terminates under *Green* with an implied acquittal, which is not satisfied by a hung jury. Aligning with the Sixth Circuit and one intermediate state court, the Arizona Supreme Court read *Green* in isolation and disregarded *Richardson*. The decision below is wrong because it rests on a reading of *Green* that cannot be reconciled with the hung jury rule, which establishes that "jeopardy does not terminate when the jury is discharged because it is unable to agree." *Richardson*, 468 U.S. at 325.

The time to answer the question presented is now. Since *Green* was decided, lower courts have struggled to reconcile *Green* with the Court's more recent double jeopardy precedent. Indeed, lower courts have repeatedly emphasized that the Court has not addressed this "complex question." *Bordeaux*, 121 F.3d at 1192; *see also Brazzel v. Washington*, 491 F.3d 976, 984 (9th Cir. 2007) ("No Supreme Court case addresses precisely such an 'unable to agree' jury instruction"); *United States v. Allen*, 755 A.2d 402, 408 (D.C. 2000) (noting the Court "has not squarely ruled on the issue before us"); *People v. Fields*, 914 P.2d

832, 837 (Cal. 1996) (the Court "has not passed on the precise double jeopardy issue presented here").

This case, in which Arizona has sided with the Sixth Circuit against the weight of authority, presents an ideal opportunity for the Court to settle the conflict and clarify the relationship between *Green*, *Richardson*, and the hung jury rule. The Court should grant certiorari to clarify that the Double Jeopardy Clause, as interpreted by *Green* and its progeny in conjunction with *Richardson* and its progeny, does not prohibit retrial of a greater offense when a jury expressly indicates that it is unable to agree on that offense and the retrial is a consequence of the defendant's deliberate choice to appeal his conviction.

I. The Decision Below Cannot Be Reconciled With The Hung Jury Rule Or The Continuing Jeopardy Rule

The Arizona Supreme Court's holding that *Green* barred retrying Martin for first-degree murder under the Double Jeopardy Clause is irreconcilable with two firmly-established double jeopardy principles: the hung jury rule and the continuing jeopardy rule. Disregarding these principles, including the Court's opinion in *Richardson*, the decision below instead applied its understanding of *Green*'s rule in isolation. In doing so, it failed to consider whether its holding is sustainable in light of the Court's more recent double jeopardy precedents. The Arizona Supreme Court also failed to recognize that *Green* does not foreclose application of either the hung jury rule or

the continuing jeopardy rule in a case like this one, where a jury expressly states that it is unable to agree on the charged offense.

1. First, the Arizona Supreme Court disregarded the hung jury rule by holding that retrying Martin for first-degree murder was barred under *Green* despite the jury's express inability to agree on this offense. This conclusion is flawed because "[i]t has been established for 160 years ... that a failure of the jury to agree on a verdict [i]s an instance of 'manifest necessity' which permit[s] a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.'" *Richardson*, 468 U.S. at 323–24 (quoting *United States v. Perez*, 9 Wheat. 579 (1824)).

The Court has historically distinguished between a jury's disagreement formally entered on the record and an acquittal. In *Selvester*, for example, the Court affirmed the trial court's receipt of the jury's guilty verdicts on three counts even though the jury deadlocked on a fourth count. 170 U.S. at 263. The Court explained: "[I]f ... after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution." *Id*. at 270.

After *Green* and *Price* were decided, the Court decided *Richardson*, where a court declared a mistrial on deadlocked charges after the jury was "unable to agree" and set the charges for retrial. *Richardson*, 468 U.S. at 318. The Court held that retrial of the

deadlocked offenses was permissible, reiterating that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325. Unlike an acquittal, "the failure of the jury to reach a verdict is not an event which terminates jeopardy." *Id.* The rationale for this hung jury rule is that "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury." *Id.* at 326.

Accordingly, the hung jury rule permitted retrying Martin for first-degree murder because the jury's inability to agree on this offense at the initial trial did not qualify as an event that terminated jeopardy. *See id.* at 325 ("the failure of the jury to reach a verdict is not an event which terminates jeopardy"); *Sattazahn*, 537 U.S. at 109 (deadlocked jury is a "non-result" that "cannot fairly be called an acquittal"). The Arizona Supreme Court's decision violates this longstanding principle.

2. The Arizona Supreme Court also erred by disregarding the continuing jeopardy rule, failing to recognize that Martin's deliberate choice to appeal his conviction led to the possibility of a retrial on the originally-indicted offense. "It has long been settled … that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to the conviction." *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) (cit-

ing *Ball v. United States*, 163 U.S. 662, 671–72 (1896)). "In *Price*[,] [the Court] recognized that implicit in the Ball rule permitting retrial after reversal of a conviction is the concept of 'continuing jeopardy[,]'" which applies "where criminal proceedings against an accused have not run their full course." *Lydon*, 466 U.S. at 308.

The "[i]nterests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver." *Id.* This principle also "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).[1] Accordingly, the Double Jeopardy Clause "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." *Pearce*, 395 U.S. at 720.

To be sure, *Green* stated that one of the underlying purposes of the Double Jeopardy Clause "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety

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[1] The Court later stated that "[t]he 'clean slate' rationale recognized in *Pearce* is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." *Bullington*, 450 U.S. at 443. That did not occur here.

and insecurity[.]" 355 U.S. at 187. But post-*Green* and -*Price*, the Court made clear that requiring a criminal defendant to "stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States v. Scott*, 437 U.S. 82, 91 (1978). The protection "guards against Government oppression, [but] does not relieve a defendant from the consequences of his voluntary choice." *Id*. at 99. Thus, as the Court reasoned in *Scott*, "this language from *Green* is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *Id*. at 95–96.

The Arizona Supreme Court's conclusion that jeopardy terminated on the first-degree murder charge when the State had "a complete opportunity" to convict Martin of murder at the first trial and obtained a conviction on second-degree murder, App. 9, is irreconcilable with the continuing jeopardy rule because the retrial was a consequence of Martin's deliberate choice to upset his second-degree murder conviction. *Cf. Sattazahn*, 537 U.S. at 106 ("Where, as here, a defendant is convicted of murder and sentenced to life imprisonment, but appeals the conviction and succeeds in having it set aside, we have held that jeopardy has not terminated, so that the life sentence imposed in connection with the initial conviction raises no double-jeopardy bar to a death sentence on retrial.").

3. The Arizona Supreme Court erred by relying on *Green* in isolation as a basis to disregard these core Double Jeopardy principles. *Green* itself does not foreclose application of either the hung jury rule or the continuing jeopardy rule in a case like this one, where a jury expressly states that it is unable to agree on the charged offense. *Green* recognizes that "jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances ... such as the failure of a jury to agree on a verdict'" make completion of a trial impossible. 355 U.S. at 188 (quoting *Wade v. Hunter*, 336 U.S. 684, 688–89 (1949)). Thus, the Arizona Supreme Court's conclusion that jeopardy terminated "when the jury [wa]s dismissed following its verdict" (App. 7) is inconsistent with *Green*'s express recognition that a jury's inability to agree is not a terminating event. *Green* also concludes, "[i]n brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'" 355 U.S. at 191.

This language in *Green* bolsters the majority view of lower courts, which is that *Green*'s rule is premised on an implied acquittal analysis. Obviously, the jury in Martin's trial did not acquit him of first-degree murder; it stated it was "unable to agree." App. 59. *See Washington*, 434 U.S. at 509 ("The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and

therefore requires acquittal, has been uniformly rejected in this country.")

* * *

In sum, because Martin was not implicitly acquitted of first-degree murder, as the jury instead noted its inability to agree on the charge, the Arizona Supreme Court erred when it held in sole reliance on *Green* that the Double Jeopardy Clause barred retrying Martin of this offense after his successful appeal of his second-degree murder conviction.

II. The Arizona Supreme Court's Decision Deepens A Widespread Conflict

Consistent with the Court's settled double jeopardy principles discussed above, the Eighth Circuit, along with the D.C. Court of Appeals and four state high courts—Washington, New Mexico, California, and Indiana—have held that *Green* does not bar retrial of a greater offense when a jury is unable to agree on that offense. Instead, *Richardson* controls and the hung jury rule permits retrial. This conclusion is consistent with the decisions of four other circuit courts—the Second, Fourth, Seventh, and Tenth Circuits—which have held that an implied acquittal of a greater or alternative offense is necessary to invoke double jeopardy protection under *Green*. These courts have reasoned that absent an implied acquittal, *Green* is inapplicable.

By contrast, the Arizona Supreme Court held that the Double Jeopardy Clause barred a retrial under *Green* even when the jury's failure to produce a ver-

dict on the greater offense was not an implied acquittal. Its conclusion that "an implied acquittal is sufficient but not necessary for jeopardy to terminate" on a greater offense under *Green* (App. 9) is joined only by the Sixth Circuit and one intermediate state court.

The Court should grant review to resolve the prevalent conflict and clarify that when the facts of a case implicate these double jeopardy principles, *Green*'s implied acquittal rule must give way to the hung jury rule. This outcome would appropriately reconcile the Court's double jeopardy precedents while "accord[ing] recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Richardson*, 468 U.S. at 324 (quoting *Washington*, 434 U.S. at 509).

1. The Arizona Supreme Court's decision squarely conflicts with decisions of the Eighth Circuit, four state supreme courts, and the D.C. Court of Appeals. In *Bordeaux*, the Eighth Circuit held on indistinguishable facts that the Double Jeopardy Clause did not bar retrial of a greater offense. There, the defendant was charged with attempted aggravated sexual abuse by force. 121 F.3d at 1188. The jury returned a blank verdict on this charge, accompanied by a note stating it could not reach an agreement. *Id*. It also returned a guilty verdict for the lesser-included offense of abusive sexual contact by force. *Id*. The defendant's conviction was then reversed on appeal because of instructional error, and the gov-

ernment sought to retry the defendant on the greater offense. *Id.* at 1189–90.

The Eighth Circuit held that the government may do so. The court discussed *Green* and *Price*, initially noting "some support" in those decisions for the defendant's argument that he could only be retried for the lesser offense. *Id.* at 1192. The court also extensively discussed *Richardson*, observing that "jeopardy did not terminate on the greater offense because the jury could not agree as to that offense and the district court therefore declared a mistrial." *Id.* The Eighth Circuit recognized that "[t]he jury's express statement that it could not agree on a verdict as to the greater offense obviously precludes the inference that there was an implied acquittal." *Id.* The court concluded, "although in light of *Green* and *Price* we find the question difficult, we hold that where the jury expressly indicates that it is unable to reach an agreement on the greater charge, a conviction on a lesser included offense does not constitute an implied acquittal of the greater offense and presents no bar to retrial on the greater offense." *Id.* at 1193.[2]

2. The supreme courts of Washington, New Mexico, California, and Indiana, and the D.C. Court of Appeals, have likewise held that retrial of a greater

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[2] *Accord United States v. Williams*, 449 F.3d 635, 645 (5th Cir. 2006) (rejecting the defendant's *Green* claim where the jury deadlocked on the greater offense, stating, "[i]f we assume that there was a conviction, [on the lesser offense] … we agree with the Eighth Circuit[,]" and quoting *Bordeaux*'s holding).

offense is not prohibited under *Green* when a jury is unable to agree on a greater offense.

The Washington Supreme Court held in *State v. Glasmann*, that the "core reasoning" of *Green* and *Price* does not apply when the record shows that a jury was unable to agree on a greater offense. 349 P.3d 829, 833 (Wash. 2015). In *Glasmann*, the defendant was charged with, *inter alia*, first degree assault and first degree attempted robbery, and the trial court instructed the jury on lesser offenses for these charges. *Id.* at 830. The court further instructed the jurors to fill in the verdict forms if they unanimously agreed on a verdict but to leave the forms blank if they were unable to agree. *Id.* The jury left the verdict forms blank for both of these charged offenses and instead convicted the defendant of second degree assault and second degree attempted robbery. *Id.* After the convictions were reversed, the State refiled the original charges and the defendant objected to retrial of the greater offenses on double jeopardy grounds. *Id.*

The Washington Supreme Court did not see *Green* as dispositive and held that a jury's silence "does not terminate jeopardy when the record indicates that the jury failed to agree on a verdict." *Id.* at 831. It reasoned that in light of the trial court's instruction that the jury should "leave the form blank" if it could not agree on a verdict, "the jurors leaving the verdict form blank necessarily meant that they were genuinely deadlocked on the charge." *Id.* at 833. Thus, the court stated it could not "reasonably conclude that the jury acquitted [the defendant]" and held re-

trial of the greater offenses would not violate double jeopardy principles. *Id*. at 833–34.

The New Mexico Supreme Court has similarly declined to extend double jeopardy protection under *Green* when a jury is unable to agree on a greater offense. In *State v. Martinez*, the defendant was charged with attempted murder and aggravated battery. 905 P.2d 715, 715 (N.M. 1995). The jury was unable to reach a verdict on the attempted murder charge but convicted on the battery charge. *Id*. The defendant contended the battery charge was a lesser-included offense of the attempted murder charge, and that the Double Jeopardy Clause therefore precluded the State from retrying him for attempted murder after his successful appeal, which resulted in reversal of his conviction for evidentiary error. *Id*. at 716.

Declining to decide whether aggravated battery was subsumed within the crime of attempted murder, the New Mexico Supreme Court recognized the limitations of *Green* and *Price*, stating, "[t]here was no suggestion in either *Green* or *Price* that the jury was unable to reach a verdict on the greater offense." *Id*. at 717. The supreme court reasoned that *Green* was "not dispositive" and that absent an implied acquittal, "[t]he State is entitled to a verdict on all charges presented in the same prosecution, including a new trial resulting from the jury's inability to reach a verdict in the first proceeding." *Id*. at 716–17. It further reasoned that because the charges "were prosecuted in the same trial, and no verdict has been entered on the attempted murder charge ...

[t]he second trial is considered a continuation of the first[.]" *Id*. at 716.

Similarly, the California Supreme Court has held that *Green* does not bar retrial of a greater offense on which a jury was deadlocked. In *Fields*, 914 P.2d at 834–35, the defendant was charged with gross vehicular manslaughter while intoxicated, among other offenses. The jury sent a note to the court stating it could not agree on this offense, and after further deliberations, was hopelessly deadlocked. *Id*. The court declared a mistrial on this count and set it for retrial. *Id* at 835. Meanwhile, the jury convicted the defendant of vehicular manslaughter while intoxicated, a lesser-included offense that had been separately charged. *Id*. at 835, 837 & n.2.

The defendant in *Fields* argued that under *Green*, when the jury returned a guilty verdict on the lesser-included offense, "it impliedly acquitted [him] of the greater offense." *Id*. at 837. Rejecting this argument, the California Supreme Court noted that although the Court "has not passed on the precise double jeopardy issue presented here, several of its prior decisions strongly suggest the doctrine of implied acquittal is inapplicable to cases in which the jury is expressly deadlocked, rather than merely silent, on the greater offense." *Id*. (citing *Selvester*, 170 U.S. at 263, 265). The court further reasoned that "*Green* does not compel the conclusion that when the jury expressly deadlocks on the greater offense but returns a verdict of conviction on the lesser, the convic-

tion of the lesser operates as an implied acquittal of the greater." *Id.* at 838.[3]

The Indiana Supreme Court has also rejected a claim that a jury's conviction of lesser-included offenses while expressing inability to agree on the greater offenses bars retrial of the greater offenses under *Green*. In *Cleary v. State*, the defendant was charged with "multiple offenses related to his drunk driving." 23 N.E.3d 664, 666 (Ind. 2015). The jury found him guilty on some offenses "but reported that it was deadlocked on others." *Id.* The trial court denied the defendant's motion to compel an entry of judgments on the verdicts, instead permitting the State to retry him on all counts. *Id.* The Indiana Supreme Court explained that "the fact that [the] jury affirmatively deadlocked on his greater offenses is significant—and fatal to his [double jeopardy] claim—for several reasons[,]" one of which was that "it takes his case out of the scope of the implied acquittal doctrine." *Id.* at 668. Accordingly, the Indiana Supreme Court held that retrial of the greater charges was not barred by *Green*. *Id.* at 671–72.

Likewise, the D.C. Court of Appeals has held that the double jeopardy question presented in this case turns on whether the jury is silent or is expressly unable to agree on the greater offense. In *United States v. Allen*, the defendant was convicted of the lesser-included offense of possession of cocaine, but

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[3] The California Supreme Court ultimately concluded in *Fields* that retrial of the greater offense was barred by a state statute. 914 P.2d at 840–41.

the jury did not reach a verdict on the greater charge and announced that after deliberations, it had made "'a reasonable effort to reach a conclusion'" but that additional deliberation would not result in a verdict. 755 A.2d 402, 403 (D.C. 2000). At the defendant's request, the trial court declared a mistrial and the government sought to retry the defendant on the greater charge. *Id*. The trial court determined that the Double Jeopardy Clause prohibited retrial of that offense, and the government appealed. *Id*.

The D.C. Court of Appeals reasoned that its review of the Court's "hung jury and implicit acquittal" cases led it to conclude that the case was "controlled by the hung jury principles rather than those governing an implicit acquittal." *Id*. at 408. The court noted that its holding—allowing retrial on the greater offense—was "consistent with the approach of the Eighth Circuit" in *Bordeaux*. *Id*. at 410.[4]

3. Consistent with these decisions, the Second, Fourth, Seventh, and Tenth Circuits have held that double jeopardy protection is not triggered under *Green* unless the record shows that the jury implicitly acquitted the defendant of the greater or alternative offense. *See United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1044–49 & n.12 (2d Cir. 1972) (distinguishing *Green* and holding double jeopardy

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[4] *Accord People v. Aguilar*, 317 P.3d 1255, 1259 (Colo. App. 2012) ("We conclude that when a jury deadlocks on a greater charge but convicts on a lesser included charge, the hung jury rule, and not the implied acquittal doctrine, applies.") (citing *Allen* and decisions of the Oregon Supreme Court and Washington Supreme Court).

did not bar retrial for felony murder because the defendant was not impliedly acquitted of this offense, where jury convicted him of premeditated murder and was silent on felony murder after being instructed to remain silent if it reached a verdict on one form of murder); *United States v. Ham*, 58 F.3d 78, 85 (4th Cir. 1995) (rejecting *Green* claim while reasoning that "[a] jury's failure to decide an issue will be treated as an implied acquittal only where the jury's verdict necessarily resolves an issue in the defendant's favor"); *Kennedy v. Washington*, 986 F.2d 1129, 1133–35 (7th Cir. 1993) (construing *Green* as an "implied acquittal" case and reasoning that an implied acquittal can have collateral estoppel effects); *United States v. Wood*, 958 F.2d 963, 971–72 (10th Cir. 1992) (distinguishing *Green* while reasoning the defendant "was not acquitted of any lesser offense" when the jury found defendant guilty on one factual basis and was silent on alternative factual bases).

The state supreme courts of West Virginia and Massachusetts have relied on this circuit authority while rejecting double jeopardy claims premised on *Green*, thus requiring the record to show an implicit acquittal of the offense at issue. *See State v. Kent*, 678 S.E.2d 26, 30 (W. Va. 2009) (distinguishing *Green* where "the jury merely elected between two alternative forms of first-degree murder") (citing *Kennedy*, 986 F.2d at 1134, and *Ham*, 58 F.3d at 85); *Comm. v. Carlino*, 865 N.E.2d 767, 774 (Mass. 2007) (reasoning that "the jury convicted on theories of premeditation and extreme atrocity or cruelty, and nothing in those conclusions logically requires the

conclusion that the jury must have acquitted the defendant of felony murder," and observing that "[m]ost courts that have considered the issue have determined that retrial is not barred in these circumstances") (citing *Ham*, 58 F.3d at 84–86, and state court decisions from Kansas and Iowa).

These courts have required an implied acquittal on a greater or alternative offense to find double jeopardy protection under *Green*. It follows then, *a fortiori*, that these courts would not extend double jeopardy protection to offenses on which a jury is expressly deadlocked. *See Sattazahn*, 537 U.S. at 109 (a deadlocked jury "cannot fairly be called an acquittal").

4. The Arizona Supreme Court departed from the overwhelming majority of federal and state courts, which have construed *Green*'s holding as a rule of limited applicability that requires an implied acquittal, which would not be satisfied by a hung jury. Instead, the Arizona Supreme Court aligned with the Sixth Circuit and one intermediate state court. It disregarded the hung jury rule, cited the Ninth Circuit's decision in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), and determined that the jury's express statement that it was "unable to agree" on first-degree murder did not establish "jury deadlock." App. 10.

Brazzel does not support the Arizona Supreme Court's analysis. There, the Ninth Circuit found that the Washington Court of Appeals' assumption of an implied acquittal based on jury silence, coupled with an "unable to agree" jury instruction, was not "con-

trary to" federal law because "[n]o Supreme Court case addresses [these circumstances] precisely[.]"[5] 491 F.3d at 984. The Ninth Circuit opined that a jury instructed to consider a lesser alternative crime if they "cannot agree" is "fundamentally different" from a genuine deadlock. *Id.* at 984 (quoting *Washington*, 434 U.S. at 509). However, because *Brazzel* was a habeas appeal under 28 U.S.C. § 2254, it was required to apply the highly deferential standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 983–94. Thus, the Ninth Circuit did not hold that the state court's finding of an implied acquittal was legally correct; it simply found the AEDPA standard satisfied because the Court has not addressed the issue. *Id.* at 984.

The Arizona Supreme Court's reading of *Green* does align with the Sixth Circuit's approach. In *Terry v. Potter*, the habeas petitioner was charged with two alternative forms of capital murder: wanton murder and intentional murder. 111 F.3d 454, 455 (6th Cir. 1997). The jury convicted the petitioner of wanton murder and left the verdict form for intentional murder blank. *Id.* The conviction was re-

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[5] *Brazzel* noted that the Washington Supreme Court had since held that retrial for a greater offense is permitted where an unable to agree instruction is given and the blank verdict forms on the greater offense indicate that the jury was unable to agree. 491 F.3d at 987 n.1 (citing *State v. Ervin*, 147 P.3d 567 (Wash. 2006)). The Ninth Circuit emphasized that "the Washington Court of Appeals did not have the benefit of [*Ervin*] in deciding Brazzel's appeal, and could only have been influenced by existing state precedent[.]" *Id.*

versed because the evidence did not support a conviction for wanton murder. *Id*. at 455–56.

The Sixth Circuit framed the question presented in *Terry* as "whether [the defendant]'s jeopardy of conviction for intentional murder continued after his trial or expired when the jury was discharged." *Id*. at 457. Citing *Green* and *Price*, the Sixth Circuit held that the petitioner could not be retried for this offense, reasoning that "'[w]hat happened here most accurately is described as a termination of the jeopardy ..., without a conviction or an acquittal, but a termination nonetheless.'" *Id*. at 458 (quoting *Saylor v. Cornelius*, 845 F.2d 1401, 1404 (6th Cir. 1988)). It concluded, "although jeopardy on the wanton murder charge may have continued after the trial and successful appeal, we hold that jeopardy on the intentional murder charge ended with the trial." *Id*.

The Sixth Circuit noted that the Second Circuit had "reached the opposite conclusion in a similar case" but declined to follow that approach, *id*. (citing *Follette*, 462 F.2d at 1041), and granted the petitioner habeas relief. *Id*. at 460. Thus, the Sixth Circuit in *Terry*, like the Arizona Supreme Court, read *Green* to establish a rule that an implied acquittal is sufficient, but not necessary, to terminate jeopardy on an alternative form of murder. *Id*.

The only other court that appears to agree with the Arizona Supreme Court's holding that *Green* controls even when the record shows that a jury was unable to agree on a greater offense is an intermediate state court in Illinois. *See People v. Fisher*, 632 N.E.2d 689, 694–96 (Ill. App. Ct. 1994) (holding *Green*

barred retrial of greater offense, despite jury notes showing deadlock and foreman's report that jury was at an impasse on greater offense, and finding no analytical distinction between jury deadlock and jury silence).

* * *

As these decisions illustrate, there is a conflict in the courts, and the conflict stems from confusion over *Green*'s rule and its interplay with the hung jury rule that the Court reaffirmed in *Richardson*. Absent clarification, lower courts will inevitably continue to disagree over the scope of double jeopardy protection under *Green*, generating additional uncertainty and inconsistent outcomes. The Court should grant certiorari to clarify how the Double Jeopardy Clause operates in this important context. *See Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018) ("Because courts have reached conflicting results on the double jeopardy arguments [the defendant] pressed in this case, we granted certiorari to resolve them."); *Bravo-Fernandez*, 137 S. Ct. at 362 (granting certiorari "to resolve a conflict among courts" on a double jeopardy question that had not been squarely answered by the Court's precedent).

III. The Question Presented Is A Recurring Issue Of Nationwide Importance

The Arizona Supreme Court recognized that "whether double jeopardy prevents a retrial on the greater offense in these circumstances presents a recurring question of statewide importance." App. 4. Notably, *Green* expressly states that its holding is

not limited to a greater-lesser offense scenario. 355 U.S. at 219 n.14 ("It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense."). The undeniable split among federal and state courts confirms that the question presented is not unique to Arizona. Whether a defendant may constitutionally be retried for a greater offense under these circumstances has nationwide implications for innumerable prosecutions and criminal convictions. *See Richardson*, 468 U.S. at 320 (noting a circuit conflict on the double jeopardy question presented and that the decision below had "implications ... for the administration of criminal justice").

The Arizona Supreme Court's application of *Green*'s rule in isolation gives scant recognition to the fundamental interests at stake in cases like this one. Society, without question, has an interest in "giving the prosecution one complete opportunity to convict those who have violated its laws." *Richardson*, 468 U.S. at 324 (quoting *Washington*, 434 U.S. at 509). When a jury has not reached a final resolution on a charged offense, and a second trial occurs only as a consequence of a defendant's successful appeal of his lesser conviction, the principles at play—the hung jury and continuing jeopardy rules—jointly establish that the State's opportunity is not yet "complete" for double jeopardy purposes.

Indeed, no exception to the "clean slate" rule (a close relative to the continuing jeopardy rule) exists to bar retrial of a greater offense when a jury has

deadlocked on that offense. *See Bullington*, 451 U.S. at 443 (explaining "the 'clean slate' rationale recognized in *Pearce* is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case"). When the slate is wiped clean at the defendant's behest, excluding from retrial the original charged offense, on which the first jury could not reach agreement, violates crime victims' and society's interest in a final resolution of the case. *See Calderon v. Thompson*, 523 U.S. 538, 554–56 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law ... Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

The states likewise share these interests because "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury[.]" *Richardson*, 468 U.S. at 326. Here, if Martin had not appealed his second-degree murder conviction, the State would have accepted the lesser conviction. But when the case must be retried anyway, the Double Jeopardy Clause should not bar retrial of the greater offense because the retrial is not the product of "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Scott*, 437 U.S. at 91; *cf. Sattazahn*, 537 U.S. at 110 ("A State's simple interest in closure might make it willing to accept the default penalty of life imprisonment when the conviction is affirmed and the case is, except for that issue, at an end—but unwilling to do so when the case must be retried anyway.").

IV. This Case Is In The Best Possible Posture For The Court To Resolve The Split And Clarify The Interaction Of Its Existing Cases

The State preserved its double jeopardy claim at every stage of the state court proceedings, each court squarely and thoroughly addressed it, and the answer to the question presented is outcome-determinative. Because this case comes to the Court on direct review, the Court can decide the question without any of the complications or layers of review that often accompany habeas cases.

Additionally, there are no unique features of the opinion below or state law that would affect resolution of the question presented.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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