No. _____

IN THE

Supreme Court of the United States

ROBERT REEVES,

Petitioner,

v.

CATHLEEN STODDARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should overrule the "legislative override" exception to the Double Jeopardy Clause.

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI

Robert Reeves respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is not published, but it is available at 2020 WL 113993. The District Court's opinion denying Reeves's motion to dismiss is not published, but it is available at 2019 WL 764353.

JURISDICTION

The Sixth Circuit entered judgment on January 8, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

The Fifth Amendment enshrines a promise that "No person shall . . . be twice put in jeopardy" "for the same offence." Yet Robert Reeves has been subjected to

exactly that: two convictions for a single offense. The Double Jeopardy Clause prohibits that result.

The fact that Michigan authorized double punishments for the offense at issue should make no difference. The court-manufactured "legislative override" exception—pursuant to which Reeves's otherwise plainly unconstitutional duplicative conviction was upheld—is inconsistent with the plain text and original meaning of the Constitution. Although the doctrine is premised on the idea that the Double Jeopardy Clause restrains prosecutors and courts, and not the legislature, history shows that there can be no meaningful restraint on the first two without restraining the latter. For precisely these reasons, Justices Marshall and Stevens called for forbidding the legislative-override exception in *Missouri v. Hunter*, 459 U.S. 359, 369 (1983) (Marshall, J., Stevens, J., dissenting). And commentators have agreed that the exception's time has come.[1]

But, as is often the situation when binding precedent from this Court forecloses a line of argument, cases raising this issue have been few and far between. And those few to have raised it have been riddled with vehicle problems.

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[1] *See, e.g.,* Richard T. Carlton, III, *The Constitution Versus Congress: Why Deference to Legislative Intent Is Never an Exception to Double Jeopardy Protection,* 57 HOW. L.J. 601, 628–29 (2014) ("Although it has long been understood that legislatures have the power to define criminal offenses and to prescribe the punishment for those offenses, courts should find Justice Marshall's dissent in *Missouri v. Hunter* to be the foundation of a new interpretation of constitutional double jeopardy protection."); Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy As A Limit on Punishment*, 97 CORNELL L. REV. 45, 47 (2011) ("At the core of the prohibition on double jeopardy is a limitation on the government's ability to impose repeated punishment against one individual for a single offense."); Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1001 (2000) (arguing changes in the legal landscapes require revisiting the modern legislative-override exception).

Until now. This case cleanly and squarely presents the question two members of this Court have already evinced an intent to review. This Court should grant certiorari, overrule the "legislative override" exception, and restore the original meaning of the Double Jeopardy Clause.

STATEMENT OF THE CASE

1. In 2007, Reeves pleaded guilty to (1) using a computer to arrange for child sexually abusive activity, Mich. Comp. Laws § 750.145d(2)(f), and (2) the lesser-included offense of arranging for child sexually abusive activity, Mich. Comp. Laws § 750.145c(2). During his plea hearing, Reeves agreed that he communicated online with a person he believed to be a minor (actually an undercover officer) and arranged to meet her in person. A state trial judge sentenced him to concurrent terms of 6½ to 20 years in prison.

2. In postconviction motions in state and federal court, Reeves argued that Michigan convicted him of two crimes that constitute the "same offense" under the federal Double Jeopardy Clause because both charges arose out of a single event and were based on the "exact same facts." He relied on *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and *Brown v. Ohio*, 432 U.S. 161, 164 (1977).

3. In 2017, the Sixth Circuit agreed. It held that "the two offenses to which [he] pleaded guilty are undoubtedly the 'same' under *Blockburger* and *Brown* because the lesser offense of arranging for child sexually abusive activity requires no proof beyond that which is required for the greater offense of using a computer to arrange for child sexually abusive activity." *Reeves v. Campbell*, 708 F. App'x 230, 239 (6th Cir. 2017). Thus, it explained: "This case presents the clearest example of double jeopardy." *Id.* at 240. Simply put, "the two offenses, § 750.145c and § 750.145d, constitute the same statutory offense under the Double Jeopardy Clause." *Id.*

4. However, Sixth Circuit noted that Respondent raised "for the first time on appeal" the argument that the Supreme Court, in *Missouri v. Hunter*, 459 U.S. 359 (1983), "permitted cumulative punishments if such punishments were authorized by the state legislature." *Id.* Although it recognized this argument as "forfeited," the court decided to allow the district court to address it in the first instance.

5. The district court again denied relief. It reasoned that the Michigan Legislature authorized cumulative punishments for Reeves's crimes. (*Id.* at 907–08.) It emphasized Mich. Comp. Laws § 750.154d(4), which says the computer-use statute "'does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section, including the underlying offense.'" (*Id.* at 908, quoting § 750.154d(4).)

6. Reeves appealed again, and the Sixth Circuit affirmed. The Sixth Circuit agreed that Reeves's convictions constitute multiple punishments for the same offense. *Reeves v. Stoddard*, No. 19-1179, 2020 WL 113993, at *2 (6th Cir. Jan. 8, 2020). But the court then decided that "the language of section 750.145d clearly demonstrates the Michigan legislature's intention to authorize cumulative punishment." *Id.* at *3. And "[b]ecause the legislature has authorized cumulative punishments for his conduct, Reeves' convictions do not violate the Double Jeopardy Clause. *Id.*

7. This petition followed.

I. REASONS FOR GRANTING THE PETITION

The "legislative override" exception to the Double Jeopardy Clause should be overruled. Indeed, the exception flunks every test of constitutional interpretation. It has no basis in the text of the Fifth Amendment. It is inconsistent with the Clause's

original meaning. As Justice Marshall explained, "the Constitution does not permit a State to punish as two crimes conduct that constitutes only one 'offence' within the meaning of the Double Jeopardy Clause." *Hunter*, 459 U.S. at 370 (Marshall, J., dissenting). He continued:

> If the prohibition against being "twice put in jeopardy" for "the same offence" is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name, or to create a series of greater and lesser-included offenses, with the first crime a lesser-included offense of the second, the second a lesser-included offense of the third, and so on.

Hunter, 459 U.S. at 370–71 (Marshall, J., dissenting).

Nor should considerations of *stare decisis* stand in the way. In particular, the legislative-override exception's factual premises—that the Double Jeopardy Clause can act as a restraint on prosecutors without also constraining the legislature—has been shown to be woefully flawed. As discussed later, several modern features of criminal procedure in the United States make it "unquestionable that the proliferation of overlapping and duplicative criminal statutes vastly increases the opportunities for government harassment of defendants." Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1039 (2000). These changes show that, "the protection against double jeopardy is one constitutional criminal

procedural guarantee for which state and federal legislators ought not to be given the final word." *Id.* at 1049. These sorts of changes are classic grounds for reconsidering legal doctrines that, like this one, have outlasted their foundations.

This case presents the ideal vehicle for reconsidering the legislative-override exception. No procedural or substantive obstacle impedes this Court's review. That is no small thing, as a clean vehicle for revisiting this question has proven hard to come by.

In sum, the legislative-override exception bears fresh examination, and this is the appropriate case in which to do it.

II. THIS COURT SHOULD OVERRULE THE LEGISLATIVE-OVERRIDE EXCEPTION.

A. The Legislative-Override Exception Is Inconsistent with the Plain Text, Original Meaning, and Purpose of the Constitution.

1. The text of the Double Jeopardy Clause of the Fifth Amendment provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Clause contains nothing to indicate an end-run permitted by legislative fiat. To the contrary, it unambiguously protects each person from being "twice put in jeopardy."

For this reason, Justice Stewart criticized the view that the Constitution authorizes the Legislative Branch to impose multiple punishments for the same offense as "supported by neither precedent nor reasoning." *Albernaz v. United States*, 450 U.S. 333, 345 (1981) (Stewart, J., concurring). "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not." *Id.*

2. Evidence of the Clause's original meaning overwhelmingly supports this reading. The Double Jeopardy Clause has its origins in "this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 329 (1768). The Founders took the core promise of the Clause as a given: "[T]he courts of justice," they assumed, "would never think of trying and punishing twice for the same offence." 1 Annals of Cong. 753 (1789) (statement of Representative Roger Sherman). To the contrary, "it [was] the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* (statement of Representative Samuel Livermore).

The understanding that the Double Jeopardy Clause prohibits double punishment, not just double prosecution, "has deep historical roots." Carissa Byrne Hessick & F. Andrew Hessick, 97 CORNELL L. REV. 45, 50 (2011). "Ancient Athenian, Jewish, Roman, and ecclesiastical law all contain some limitation on the imposition of multiple punishments." *Id.* (collecting sources).

English courts often followed the same course. For example, in 1610, in *Dr. Bonham's Case*, 77 Eng. Rep. 638 (K.B.) 654, "Chief Justice Coke concluded that it was inappropriate to punish a person for the unlicensed practice of medicine both under one statute that punished a person who unlawfully practiced for one month and under another provision that punished the unlicensed practice for any amount of time." Hessick & Hessick, *supra*, at 50. Justice Coke quoted the maxim, "nemo debet bis puniri pro uno delicto"—"no one should be punished twice for the same offence"—that later found its way into Blackstone's commentaries. 4 William Blackstone, Commentaries on the Laws of England 311.

The Founders' debates over the Double Jeopardy Clause underscore that it was meant to prohibit double punishment. James Madison favored the Clause stating "no person shall be subject, expect in the cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 451-52 (1789) (Joseph Gales ed., 1834). Several members objected to "the words 'one trial' on the ground that it might actually impair defendants' rights, no one objected to the restriction on multiple punishments." Hessick & Hessick, *supra*, at 51. "To the contrary, the only statement on that language was by Representative Egbert Benson, who noted that the 'humane' reason for a prohibition on double jeopardy was to prevent more than one punishment for a single offense." *Id.* at 51–52 (citing1 Annals of Cong., *supra*, 781–82). In adopting the final language "twice put in jeopardy," it is "unlikely that Congress understood the new text to remove the protection against multiple punishments. Hessick & Hessick, *supra*, at 52.

3. The purpose of the Double Jeopardy Clause likewise extends to prosecutions for the same offense even if authorized by the legislature. At its core, the Clause reflects a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). To that end, it protects individuals "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957).

The legislative-override exception cannot be reconciled with that motivating purpose. To the contrary, permitting the legislature to endorse multiple convictions the same offense implicates the very fairness concerns the Clause was designed to address. That is precisely the result the Double Jeopardy Clause was designed to prevent.

B. The Underpinnings of the Legislative-Override Exception Have Eroded.

1. True, this Court has previously endorsed the legislative-override exception. But a precedent should give way when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855; *see also, e.g. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, (1932) (Brandeis, J., dissenting) ("[T]his court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained[.]"). The dramatic expansion of criminal statutes in the years since the legislative-override exception is exactly the kind of seismic shift that calls for reevaluation of doctrines premised on the old regime.

The changes that underscore why this Court's historic deference to legislative-override are several, and they include "state and federal legislators' penchant for enacting duplicative statutes proscribing identical misconduct; Congress's federalization of the criminal law, congressional enactment of vague and malleable criminal statutes; federal and state prosecutors' ability to double count and otherwise manipulate the quantity of punishment received under the Federal Sentencing Guidelines and their state counterparts; the advent of so-called 'compound' criminal offenses; and federal and state legislators' move toward labeling serious sanctions 'civil' rather than criminal." Klein, *supra*, at 1001.

This Court's current jurisprudence allows all manner of prosecutorial harassment of defendants, "so long as the legislature intends this result." *Id.* at 1046. This result is problematic. History has shown that "[l]egislators will continue to enact more and tougher anticrime measures, and those accused of crimes will continue to constitute a politically powerless and disfavored group, so long as the vast majority of

Americans correctly conclude that they are highly unlikely to be the target of a police investigation, but much more likely to be the victim of a crime." *Id.* at 1049. Thus, "judicial monitoring of legislative excess is particularly crucial in the criminal law area." *Id.*

2. To curb these abuses, this Court should reverse *Hunter*. This approach would force "the legislature to speak clearly regarding the total punishment it wishes a defendant to receive, rather than reducing the Court to guessing legislative intent." Klein, *supra*, at 1008–09. The approach also would "eliminate multiple convictions in a single trial for the same offense, regardless of whether it reduces the absolute quantity of punishment imposed." *Id.* at 1009. This is no small thing:

> This becomes important when one considers that there may be collateral consequences suffered by a defendant when he receives two criminal convictions for something that constitutes only one "offense" within the meaning of the Double Jeopardy Clause. For example, a prosecutor's ability to bring multiple charges for a single offense may increase the risk that a defendant will be convicted on at least one of these charges, on the theory that if you throw enough mud some of it will stick. Moreover, each conviction will bring a defendant closer to being found a habitual offender.

Id. at 1009–10.

Reeves's is, again, a case in point. The *Hunter* Court did not anticipate—and given the facts on the ground could not reasonably have anticipated—the proliferation of criminal laws that permitted Reeves's double punishment. To the contrary, it took as its premise a state of affairs that no longer exists. The legislative-override exception has thus outlived the world that birthed it.

CONCLUSION

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

Respectfully submitted,

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