No. 22-721

IN THE
Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

REPLY BRIEF FOR THE PETITIONER

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November 13, 2023

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INTRODUCTION

In its Brief for Respondent, the State argues for the first time that its repugnant verdict exception to the Double Jeopardy Clause is constitutional because states maintain the right to declare what is and what is not a verdict as a matter of state criminal procedure.[1] The State's latest argument is new to this case, but the Court has seen it many times before. And it has rejected the argument every single time, consistently holding that states cannot avoid the Double Jeopardy Clause by recharacterizing an acquittal as something other than an acquittal.

Under this Court's double jeopardy precedents, an acquittal occurs when, in a court with jurisdiction, there is a ruling that determines the defendant lacks "criminal culpability." *Evans v. Michigan*, 568 U.S. 313, 319 (2013) (quoting *United States v. Scott*, 437 U.S. 82, 98 (1978)). Indeed, this Court has described

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[1] The State's position has been a moving target. In his briefing in *McElrath II*, the Georgia Attorney General conceded that double jeopardy precludes subjecting McElrath to retrial on the malice murder charge. Br. of Appellee by the Att'y Gen. at 9 n.3, *McElrath v. Georgia*, 880 S.E.2d 518 (Ga. 2022) (No. S22A0605). Then, at the petition stage, the State argued primarily that this case is not sufficiently important to merit a grant of certiorari, making only a passing argument on the merits that a repugnant verdict is "no verdict at all" under this Court's precedents and so does not terminate jeopardy. Br. in Opp. 25–27. Now, the State has shifted again, basing its argument on the right of the states to establish criminal procedures. Resp.'s Br. 21–24. The State's inability to settle on a reason why the Double Jeopardy Clause permits retrial of the acquitted charge in this case—or even whether the Clause permits retrial at all—guts its current insistence that retrial is permissible.

the key consideration as being whether there has been a determination by the jury on "the ultimate question of guilt or innocence" in the defendant's favor. *Id.* (quoting *Scott*, 437 U.S. at 98 n.11). It does not matter if the ruling is labeled an "acquittal"; nor does it matter whether the resolution is correct. All that matters is that the court had jurisdiction, jeopardy attached, and then the factfinder issued a ruling determining the defendant not guilty.

Here, the jury indisputably acquitted McElrath of malice murder. The court had jurisdiction, the jury was empaneled and sworn, and it ultimately determined that McElrath was not guilty of malice murder by reason of insanity. The State does not suggest that the trial court lacked jurisdiction or that there was any defect in the process by which the jury reached its verdict. Rather, the State claims Georgia courts are entitled to review the *substance* of the jury's verdict of acquittal; compare that verdict to the *substance* of another verdict on a different charge; conclude the two verdicts are *substantively* irreconcilable; and on that basis declare the acquittal "void" such that jeopardy purportedly never terminated. The Double Jeopardy Clause prohibits what the State now claims it has a right to do.

The State also seeks to justify this dismantling of the Double Jeopardy Clause by declaring that its rule is "generally pro-defendant." Resp.'s Br. 17. It argues that precluding retrial of McElrath on the malice murder charge would entail overturning wholesale the repugnancy doctrine and thereby deprive other defendants of the ability to challenge their own

convictions based on repugnancy. *See, e.g.*, Resp.'s Br. 48. That contention is false.

The Double Jeopardy Clause protects acquittals; it does not preclude defendants from challenging convictions. Before this case, Georgia followed the rule that where a jury returns repugnant verdicts, the *conviction* may be vacated even though the acquittal must stand. Contrary to the State's suggestion, a ruling for McElrath would not call that rule into question. Far from benefiting defendants, the State's argument not only would allow the State to seek to overturn convictions but also would discourage defendants from challenging their convictions, as doing so would risk their acquittals being overturned as well. Thus, the State's proposed exception to the Double Jeopardy Clause is anything but pro-defendant.

ARGUMENT

I. State law cannot circumvent the Double Jeopardy Clause.

The State argues that the prohibition on retrying a defendant on a charge of which he has been acquitted does not apply here because Georgia law deems acquittals that are repugnant to guilty verdicts rendered at the same time to be void and so not acquittals at all. As this Court has repeatedly recognized, however, the Double Jeopardy Clause prohibits retrial following an acquittal even if the acquittal is irreconcilable with another verdict; the State cannot circumvent this rule by characterizing an acquittal as void or somehow not a verdict at all.

A. The State cannot relabel an acquittal as not an acquittal to avoid the Double Jeopardy Clause.

The State concedes that the Double Jeopardy Clause prohibits retrying a defendant on a charge of which he has already been acquitted. That principle decides this case.

The State does not dispute that the jury rendered a verdict finding McElrath not guilty by reason of insanity of malice murder. Nor does the State argue that the trial court lacked jurisdiction or that there was any procedural error in how the jury rendered its verdict. Rather, the State argues that a verdict of acquittal may be declared "void" after the fact because it is "repugnant" to another verdict rendered at the same time. In other words, the State contends that a court may review the substance of a jury's verdict acquitting a defendant; determine that the verdict contradicts a verdict rendered on a different charge; and on that basis, vacate the jury's acquittal and give the State a do-over. The Double Jeopardy Clause does not permit a State to second-guess a jury's decision in that way.

1. The State attempts to avoid this conclusion by asserting that state law defines when an acquittal occurs, and under Georgia law, an acquittal is not valid, and does not terminate jeopardy, if it is repugnant to another verdict. Resp.'s Br. 20.

This Court has squarely held, however, that a state may not avoid the restrictions of the Double Jeopardy Clause by relabeling an acquittal as something else. "[W]hat constitutes an 'acquittal' is not to be

controlled by the form of the judge's action." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *see also Smith v. Massachusetts*, 543 U.S. 462, 468 (2005) (stating that "change in nomenclature" does not affect double jeopardy); *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986) ("[T]he trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]." (quoting *Scott,* 437 U.S. at 96)); *United States v. Wilson*, 420 U.S. 332, 336 (1975) (indicating that the relevant question is "whether the ruling in [defendant's] favor was actually an 'acquittal' even though the District Court characterized it otherwise").

Under this Court's precedents, an "acquittal includes any . . . rulin[g] which relate[s] to the ultimate question of guilt or innocence," *Evans*, 568 U.S. at 319 (internal quotation marks omitted), including rulings on "'factual defense[s]' that negate culpability by 'provid[ing] a legally adequate justification for otherwise criminal acts.'" *Smith v. United States*, 599 U.S. 236, 253 (2023) (quoting *Scott*, 437 U.S. at 97–98); *see also Martin Linen*, 430 U.S. at 571 (concluding that a defendant has been acquitted for double jeopardy purposes if a ruling, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged"); Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 54 (1951) (stating that a verdict is final when "a verdict of 'Not guilty' has cleared the defendant of the charge"). Under this rule, "[w]hen a trial terminates with a finding that the defendant's 'criminal culpability ha[s] not been established,' retrial is prohibited" under the Double

Jeopardy Clause, even if state law does not consider the ruling to be an acquittal. *Smith*, 599 U.S. at 253 (quoting *Burks v. United States*, 437 U.S. 1, 10 (1978)).

Smalis v. Pennsylvania, 476 U.S. 140 (1986), is instructive. There, Pennsylvania prosecutors charged a husband and wife with various crimes in connection with a fire. Ruling on defendants' demurrer, the trial court dismissed several of the charges because the prosecutor had failed to allege facts sufficient to establish the defendants' guilt. The Supreme Court of Pennsylvania held that the Double Jeopardy Clause did not bar the government from appealing the dismissal of those charges, reasoning that "a demurrer is not the functional equivalent of an acquittal." *Com. v. Zoller*, 490 A.2d 394, 401 (Pa. 1985), *rev'd sub nom. Smalis v. Pennsylvania*, 476 U.S. 140 (1986). In that court's view, an acquittal occurs for double jeopardy purposes only when there is a factual determination based on the evidence that the defendant is not guilty, and so double jeopardy does not apply where a defendant by demurrer "elects to seek dismissal on grounds unrelated to his factual guilt or innocence." *Id.*

This Court reversed, explaining that the "Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us." *Smalis*, 476 U.S. at 144 n.5. The Court then concluded that the demurrer constituted an acquittal because it determined that Pennsylvania had failed to establish the defendant's guilt. *Id.* at 144.

This Court's precedents thus make clear that a state may not avoid the Double Jeopardy Clause by

relabeling what under this Court's precedents is an acquittal as something other than an acquittal or by calling it void. And make no mistake, that is exactly what Georgia is attempting to do here. The only basis the State offers for claiming that McElrath's not guilty verdict is not an acquittal is a legal fiction under Georgia law that results when a court examines the *substance* of the jury's verdict. *See* Pet. App. 11a (Pinson, J., concurring dubitante) (describing the "repugnant" verdict classification as a "state-law-based legal fiction that treats the jury's verdict as though it never happened").

Neither the State nor its *amici* argue that the jury did not in fact acquit McElrath of malice murder. Nor do they suggest that there was any procedural error in the process by which the jury rendered its verdict or that the court lacked jurisdiction. Instead, the State is simply seeking a do-over on the malice murder charge by rejecting the substance of the jury's acquittal.

Accepting the State's argument would strip the Double Jeopardy Clause of much of its meaning because states could avoid it by picking and choosing which acquittals are void based only on the substance underlying the verdict of acquittal. Thus, for example, a state could determine that no valid acquittal occurs if the jury concludes that a defendant has established an affirmative defense or that the evidence is insufficient to support conviction, deeming those rulings to be void or otherwise not terminating jeopardy. *But see Scott*, 437 U.S. at 91 ("[A] ruling by the court that the evidence is insufficient to convict"

constitutes "[a] judgment of acquittal."). States cannot avoid the Double Jeopardy Clause in this way.

2. Prohibiting states from circumventing the Double Jeopardy Clause by recharacterizing acquittals aligns with the broader principle that states may not avoid constitutional obligations through innovative interpretations of state law. *Moore v. Harper*, 600 U.S. 1, 35 (2023). As the Court recognized in *Moore,* although a state may define its lawmaking power, it may not circumvent the Elections Clause's requirement that voting districts "shall be prescribed in each State by the Legislature" by delegating the state's legislative power to the judiciary. *Id.*

The analogies the State draws to other areas of law only highlight this point. For example, as the State notes, state law defines property rights protected by the Takings Clause. Resp.'s Br. 27. But states cannot circumvent the Takings Clause by defining property rights to have an exception for takings—for example, a state cannot define fee simple absolute to be "fee simple absolute except with respect to government takings." Likewise, a state cannot avoid the restrictions imposed by the First Amendment by defining a space to be a public forum, except with respect to disfavored speech; nor can it avoid federal arbitration obligations by deeming arbitration clauses invalid.

Thus, instead of helping the State, these examples simply confirm the fatal flaw in the State's argument. In particular, the State may not evade the Double Jeopardy Clause's prohibition on retrying acquitted

charges by recharacterizing an acquittal as void or something other than an acquittal.

The State acknowledges that "it may not effectively expose someone to double prosecution by defining jeopardy-terminating 'verdicts' to include only guilty verdicts." Resp.'s Br. 29. It has no coherent explanation, however, for its contention that a state may treat an acquittal as not an acquittal because it is repugnant to a conviction rendered at the same time. On its face, the State's argument permits a court to second-guess (and throw out) an acquittal because the court considers the verdict to be substantively deficient. The Double Jeopardy Clause, at its very core, precludes that result.

The State relatedly asserts that prohibiting a state from recharacterizing an acquittal as void when it is repugnant to a guilty verdict "would unsettle previously settled understandings that states can determine what their own orders and procedures mean" and would deprive states of their traditional power to fashion rules of procedure regulating criminal trials. Resp.'s Br. 45, 46. Neither law nor logic supports this naked contention.

The State's argument—that it must have carte blanche in defining acquittals to avoid calling into question other state criminal procedures—gets constitutional law backwards. Resp.'s Br. 45. The Constitution constrains the State's authority, not the other way around. States do not get a "free pass" to violate the Constitution merely out of procedural convenience.

In any event, a ruling for McElrath would in no way call into question a state's right to regulate criminal procedure. This case presents a very narrow issue: may Georgia evade the Double Jeopardy Clause by declaring what is unquestionably a verdict of acquittal not to be a verdict at all. A ruling on that issue would not cast any doubt on the State's ability to fashion rules prescribing the procedures for trying and resolving cases. For example, it would not affect state rules governing evidentiary issues, signing of the verdict form, or polling the jury. Instead, it would simply prohibit Georgia from vacating an acquittal, returned by a jury *acting in full compliance with all of Georgia's procedural rules,* based on the *content* of the verdict.

B. Under the Double Jeopardy Clause, an acquittal, even if repugnant to a conviction on another count, precludes retrial.

1. The State argues that an acquittal that is "repugnant" to a conviction rendered at the same time is not final and does not terminate jeopardy, akin to when a court declares a mistrial. That analogy does not hold.

It is true that the Double Jeopardy Clause's prohibition on retrial following an acquittal does not apply when a jury fails to render a verdict of acquittal. *See United States v. Ball,* 163 U.S. 662, 669 (1896); *Yeager v. United States,* 557 U.S. 110, 121–22 (2009). But there is a fundamental difference between a jury failing to render a verdict and a jury rendering a verdict of acquittal that the state subsequently deems invalid because it conflicts with another verdict. In

the former, the jury has failed to reach a decision; in the latter, the jury has reached a verdict that the state refuses to recognize as valid.

Ignoring this crucial distinction, the State cites various cases dealing with situations in which the jury did not in fact acquit the defendant. Resp.'s Br. 29–30. In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), for example, the Court rejected the argument that double jeopardy precluded retrial in a capital sentencing proceeding after a jury failed to agree whether to impose the death penalty. The Court explained that the jury itself did not decide to acquit the defendant; instead "the verdict form returned by the foreman stated that the jury deadlocked." *Id*. at 109.

Similarly, in *Blueford v. Arkansas*, 566 U.S. 599 (2012), the jury did not render a verdict of acquittal. There, the trial court called the jury into the courtroom to discuss a potential deadlock and asked the foreperson to disclose the jury's votes on the four offenses for which the defendant was charged. *Id.* at 603. The foreperson told the court that the jury had unanimously found the defendant not guilty on the two greatest offenses charged but was deadlocked as to the third offense and had not yet voted on the fourth offense. *Id.* at 603–04. The court sent the jury back for further deliberations, but when it returned for the final time, the foreperson did not indicate whether the jurors still agreed that the defendant was not guilty on the two greatest offenses. Instead, the foreperson indicated that the jury was unable to reach a unanimous resolution on all counts, and the court therefore declared a mistrial. *Id.* at 604. This Court

held that the jury had not rendered an acquittal protected by double jeopardy, reasoning that "[t]he foreperson's report was not a final resolution of anything" because "deliberations had not yet concluded," thereby depriving the foreperson's report "of the finality necessary to constitute an acquittal." *Id.* at 606.

United States v. Shippley, 690 F.3d 1192 (10th Cir. 2012), involved similar facts, but in any event did not even address double jeopardy.[2] There, the Tenth Circuit upheld a district court order instructing a jury to continue deliberating after it rendered a guilty verdict and an acquittal on the *same* charge. In doing so, the Tenth Circuit expressly distinguished the situation in which verdicts are inconsistent "between counts," stating that the case before it presented inconsistency on "the same count." *Id.* at 1195. There was accordingly no ascertainable verdict rendered in that case.

The Tenth Circuit's distinction in *Shippley* makes sense. Where a jury renders a verdict on a distinct charge (such as the malice murder charge here), it is clear what decision the jury reached. In contrast, where a jury renders conflicting verdicts on the *same* count it can fairly be said that the jury neither

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[2] The *Shippley* court expressly noted that the defendant did not "suggest the court's course in ordering additional deliberations violated the Double Jeopardy Clause of the Fifth Amendment." 690 F.3d at 1194; *see also, e.g.*, *id.* at 1195–96 ("We do not purport to address other arguments, possibly emanating from the Double Jeopardy Clause or otherwise, [the defendant] doesn't raise.").

convicted nor acquitted the defendant of that charge; it is unclear what the jury intended as to that charge.

Rex v. Woodfall, 98 Eng. Rep. 398 (1770), likewise falls into the category of cases in which the jury failed to enter a verdict at all. There, the defendant was charged with publishing a seditious libel. The jury did not render a verdict of conviction or acquittal, but instead found the defendant "guilty of printing and publishing only." *Id.* at 398. Explaining that this finding could be read to support a verdict of conviction or acquittal, the court stated "[i]t is impossible to say, with certainty, 'what the jury really did mean.'" *Id.* at 402. Accordingly, the court remanded for a new trial. *Rex* thus stands for the unremarkable proposition that a new trial is permitted when a jury does not render a verdict of conviction or acquittal. It casts no doubt on the principle that when a jury *does* render a verdict of acquittal, retrial is prohibited.[3]

Other hypotheticals raised by the State—such as when a jury renders a verdict that is "unintelligible gibberish," addresses the wrong issues, or fails to meet unanimity requirements, Resp.'s Br. 34—similarly involve circumstances in which it can be fairly said that the jury failed to reach a verdict on the crime charged. Here, in sharp contrast, the jury reached a

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[3] For the same reason, the historical practice described in Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L.J. 575, 589–91 (1923), provides no help to the State. Under that practice, a court could enter a judgment of guilty if a jury rendered conflicting general and special verdicts *on the same count*; the practice did not apply when a jury rendered conflicting verdicts on different counts.

unanimous and unequivocal verdict on the malice murder charge: not guilty by reason of insanity.

Missouri and the other state *amici* supporting the State likewise conflate the situation in which a jury fails to render a verdict with the quite different situation in which a jury renders a verdict that is illogical or inconsistent. For example, in *Missouri v. Zimmerman*, 941 S.W.2d 821, 823–26 (Mo. App. W.D. 1997), the jury returned two conflicting verdict forms on the *same* charge, finding the defendant guilty on one verdict form and not guilty on the other, like what occurred in *Shippley*. The Missouri court held that the Double Jeopardy Clause's prohibition on retrial following an acquittal did not apply there because it was impossible to discern whether the jury rendered an acquittal on that specific charge.[4]

Missouri v. Ward, 568 S.W.3d 888 (Mo. 2019), is similar. There, the Missouri Supreme Court could not determine whether a trial court judge had ruled the defendant "not guilty" of a charge based on a finding that the government had failed to prove all elements of the crime alleged or dismissed the charge on constitutional grounds without making any factual

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[4] Without providing any explanation, the State's *amici* assert that prohibiting retrial of McElrath for malice murder would somehow call into question acquittal-first laws, under which a jury must acquit a defendant of a greater charged offense before considering guilt on a lesser included offense. Br. Missouri and Fourteen Other States as *Amici Curiae* 10–11. That assertion makes no sense. An acquittal on a greater offense does not constitute a verdict of any sort on the lesser charge, nor is there any intrinsic inconsistency between a verdict of not guilty on a greater offense and a verdict of guilty on the lesser offense.

findings. Because of this uncertainty over the nature of the trial court's ruling, the Missouri Supreme Court remanded the case with instructions for the trial court to delineate the basis for its dismissal. *Id.* at 890.

Likewise, the cases cited by Missouri and the other state *amici* in which verdicts were obtained illegally do not help the State. For example, in *Illinois v. Aleman*, 667 N.E.2d 615, 618 (Ill. App. Ct. 1996), the trial court rendered a verdict of not guilty, but the defendant was indicted again after it was discovered that the trial court judge had accepted a bribe in exchange for an acquittal. The court held that the Double Jeopardy Clause does not apply to acquittals acquired through fraud because, in that event, the defendant was in no real sense "subjected to the hazards of trial and possible conviction." *Id.* at 624–25. The defendant was accordingly "never placed in jeopardy" at the first trial. *Id.* at 625. That exception to the rule has no bearing on cases in which a jury renders repugnant verdicts. Repugnancy does not suggest that the defendant was never placed in jeopardy; to the contrary, it signifies only that the jury rendered irreconcilable verdicts on different charges.

Smith v. Massachusetts, 543 U.S. 462 (2005), is also inapposite. There, the Court ventured in dicta that state law may permit a judge to reconsider a "midtrial determination of the sufficiency of the State's proof." *Id.* at 470. That conjecture has no bearing on whether a state may overturn an acquittal rendered by a jury on the ground that the acquittal is repugnant to a conviction on another charge.

In sum, none of the cases cited by the State and its *amici* calls into question the rule that double jeopardy

prevents retrial of a charge following an earlier acquittal in a court with jurisdiction. The State thus has provided no basis for abandoning the protections the Double Jeopardy Clause has long been understood to provide to a defendant who has obtained a verdict of acquittal.

2. The State's effort to distinguish inconsistent verdicts from repugnant verdicts for purposes of double jeopardy also fails. The State argues that double jeopardy prohibits retrial where an acquittal was rendered as part of an inconsistent verdict because there is uncertainty regarding the reason for the inconsistency. Resp.'s Br. 41. According to the State, repugnant verdicts do not create similar uncertainty because the "contradictory affirmative findings" by the jury make clear the jury's inability to reach a conclusion. *Id.*

The State's argument about uncertainty is beside the point. Uncertainty about the jury's conclusions is *not* the reason the Double Jeopardy Clause precludes retrial on an acquitted charge following inconsistent verdicts. Instead, retrial is prohibited *because the Double Jeopardy Clause prohibits retrial following an acquittal.* Always. And for all acquittals—even those that rest on clear and "egregiously erroneous" findings. *Sanabria v. United States*, 437 U.S. 54, 64 (1978). The reason for the acquittal is irrelevant. "[T]he jury holds an unreviewable power . . . to return a verdict of not guilty" even "for impermissible reasons." *Smith*, 599 U.S. at 252–53 (internal quotation marks omitted).

The State also suggests that repugnant verdicts should be treated differently from inconsistent

verdicts, because inconsistent verdicts may rest on contradictory applications of law or fact, while repugnant verdicts necessarily rest on contradictory factual findings. Resp.'s Br. 40–41. But the Double Jeopardy Clause does not distinguish between acquittals based on legal conclusions and acquittals based on factual ones. *See Evans*, 568 U.S. at 318 ("[A]n acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a misconstruction of the statute defining the requirements to convict." (internal citations and quotation marks omitted)).

II. Reversing the Georgia Supreme Court's decision would not harm defendants.

The State and its *amici* argue that a holding that the Double Jeopardy Clause precludes subjecting McElrath to a second trial on the malice murder charge would harm defendants. That argument cannot withstand analysis.

A. The Double Jeopardy Clause does not require states to affirm convictions that are repugnant to another verdict.

According to the State, "[w]ithout the repugnancy doctrine, Georgia courts could instead affirm purported convictions as well as purported acquittals, even when the jury has affirmatively declared contradictory facts." Resp.'s Br. 6. Despite all the hyperbole in their briefs, however, neither the State nor its *amici* appear to contend that the Double

Jeopardy Clause would somehow require Georgia to affirm convictions rendered as part of repugnant verdicts—and for good reason.

The Double Jeopardy Clause protects defendants from the government; it does not protect the government from defendants. *See United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980). As this Court has explained, the Double Jeopardy Clause prohibits "overrid[ing] or interfer[ing] with the jurors' independent judgment in a manner contrary to the interests of the accused," but it does not impose a similar "limitation on . . . ruling[s] in favor of a criminal defendant." *Martin Linen*, 430 U.S. at 573. Thus, the Double Jeopardy Clause precludes the states from seeking to retry a defendant on an acquitted charge. But it in no way precludes either a defendant from challenging a conviction on the ground that it is repugnant to another verdict or a state from holding that a conviction rendered as part of a repugnant verdict must be vacated. *See United States v. Powell*, 469 U.S. 57, 64–66 (1984).

Although the Double Jeopardy Clause prescribes the minimum protections that states must afford to criminal defendants, states can further protect criminal defendants by crafting rules that go well beyond the mandates of the Double Jeopardy Clause.

Before the decisions in *McElrath I* and *II*, Georgia did exactly that. In *Kuck v. Georgia*, 99 S.E. 622 (Ga. 1919), the Georgia Supreme Court held that inconsistent verdicts generally (not just repugnant verdicts) were a basis for overturning convictions but not acquittals, *see King v. Waters*, 598 S.E.2d 476, 477 (Ga. 2004)—a decision that stood for 70 years until

Milam v. Georgia, 341 S.E.2d 216, 218 (Ga. 1986). Likewise, early decisions employing the repugnancy doctrine reversed criminal convictions because of the repugnancy, but not acquittals. Thus, in *Turner v. Georgia*, 655 S.E.2d 589 (Ga. 2008), the Georgia Supreme Court overturned convictions on charges of felony murder and aggravated assault because they were repugnant to an acquittal rendered by the same jury on a charge for malice murder. *Id.* at 592.[5] But the court did not touch the acquittal. *Id.*

Other states similarly afford greater protections for criminal defendants than the Double Jeopardy Clause requires. Alaska and New York, for example, have both held that, although acquittals must stand, a conviction may be overturned based on its inconsistency with an acquittal. *DeSacia v. Alaska*, 469 P.2d 369, 378 (Alaska 1970); *New York v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981).

B. The possible reaction of Georgia and other states to a ruling in this case does not factor into the double jeopardy analysis.

The State makes much of how states might react to a ruling in McElrath's favor. According to the State, a ruling that the State may not subject McElrath to a second trial on the malice murder charge will "encourage Georgia and other states" to adopt state law rules precluding defendants from challenging

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[5] Although *Turner* does not use the term "repugnant verdicts," *McElrath I* confirmed that it is a repugnant verdict case. *McElrath v. Georgia*, 839 S.E.2d 573, 579, 580 n.16 (Ga. 2020).

convictions that are irreconcilable with acquittals. Resp.'s Br. 48.

The State's argument misconceives constitutional law. The possible adverse reaction the states might have to enforcing constitutional rights is not a valid reason to disregard those rights. This Court recognized that point in *Cooper v. Aaron*, 358 U.S. 1 (1958), when it held that that "constitutional rights . . . are not to be sacrificed or yielded to . . . violence and disorder." *Id.* at 16; *see also Buchanan v. Warley*, 245 U.S. 60, 81 (1917) ("[P]romot[ing] the public peace by preventing race conflicts . . . cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.").

Moreover, the State's warning—that refusing to recognize the repugnancy exception to the Double Jeopardy Clause crafted by the Georgia Supreme Court will result in the widespread adoption of rules refusing to overturn convictions based on repugnancy—is vastly overblown. Refusing to uphold Georgia's post-*McElrath* repugnancy doctrine will have little effect outside of Georgia beyond confirming that an acquittal is an acquittal and thus bars a second prosecution for the same offense. This Court and every state to address the issue (aside from Georgia) already recognize that inconsistency in verdicts is not a basis for overturning an acquittal. Consequently, as to acquittals, a ruling for McElrath will do nothing more than bring Georgia into line with

the law in every other jurisdiction to consider the issue.[6]

Nor is there any reason to believe that adopting a prohibition on overturning acquittals based on repugnancy will lead to comparable prohibitions on challenging convictions. To be sure, under federal law and the law of some states, inconsistency between verdicts is not a basis for overturning a conviction. *See, e.g.*, *Powell*, 469 U.S. at 69; *Hawai'i v. Moses*, 408 P.3d 885 (Haw. Ct. App. 2017); *New Mexico v. Roper*, 34 P.3d 133, 139 (N.M. Ct. App. 2001); *Holtzclaw v. Oklahoma*, 448 P.3d 1134, 1143 ¶ 16 (Okla. Crim. App. 2019). But, as discussed above, other states—including Georgia before the *McElrath* decisions—have reached the opposite conclusion and elected to

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[6] It also bears noting the absurdity of the State's effort to cast itself as the hero and McElrath as the villain of defendants' rights. McElrath seeks to enforce the rights conferred by the Double Jeopardy Clause on defendants. The State, by contrast, seeks to limit the protections of the Double Jeopardy Clause. The rule for which the State advocates would permit the government to set aside an acquittal and subject the defendant to a second trial on the same criminal charge of which a jury acquitted him. It would also discourage defendants from challenging convictions as repugnant for fear their acquittals would also be overturned, especially where the acquittal was on the more serious charge. In short, the rule for which Georgia and its *amici* advocate is anything but pro-defendant. *See Green v. United States*, 355 U.S. 184, 193–94 (1957) ("Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.").

afford defendants greater protections than the Constitution requires.

The State and its *amici* give the Georgia Supreme Court too little credit. There is no basis for the State's implied threat that the Georgia Supreme Court may lash out in reaction to a ruling for McElrath by reversing prior Georgia law treating defendants who receive repugnant verdicts more favorably than the Constitution requires. But even if there were, that would not be a legitimate reason to deprive McElrath of his fundamental constitutional right afforded by the Double Jeopardy Clause not to be subject to a second trial on a charge of which he has already been acquitted.

CONCLUSION

The Georgia Supreme Court's decision should be reversed.

Respectfully submitted,

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November 13, 2023