No. 24-____

In the Supreme Court of the United States

RUEL M. HAMILTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ashe v. Swenson*, this Court recognized that the Double Jeopardy Clause precludes relitigation of facts found by a jury. 397 U.S. 436 (1970). What, exactly, the jury found is thus where the preclusion issue turns. It is also often elusive—especially when (as in the overwhelming majority of criminal cases) a jury renders a general verdict that does not specify a particular ground.

This Court places the burden to prove what facts the jury found on the defendant. *Dowling v. United States*, 493 U.S. 342, 350–51 (1990). But it has never defined what that burden of proof is. This has resulted in inconsistent standards in the lower courts and calls for this Court's guidance.

As Chief Judge Elrod pointed out in her concurrence below, this lack of guidance leaves lower courts to guess: "Must the invoking party demonstrate [that the jury already decided the issue] by a preponderance of the evidence? Beyond a reasonable doubt? Or by some other standard? The courts"—presumably this one—"would do well to clarify this point." App.15a.

The question presented is:

Must a defendant arguing double jeopardy preclusion prove to a *virtual certainty* (as the Fifth Circuit demanded here) that an issue was decided by the jury in the first trial?

PARTIES TO THE PROCEEDINGS

Petitioner Ruel M. Hamilton was the defendant and appellant below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Hamilton, No. 3:19-cr-83 (Nov. 15, 2023)

United States Court of Appeals (5th Cir.):

United States v. Hamilton, No. 23-11132 (Sept. 30, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The Fifth Amendment's Double Jeopardy Clause prevents a defendant from being prosecuted twice for substantially the same offense. Yet that is precisely what is happening to Ruel Hamilton.

For giving a check to a local politician who requested help covering his elderly mother's medical bills as an act of charity, Hamilton was tried for bribery under the Travel Act and for violating 18 U.S.C. §666 on the theory that the same check was either a bribe or a gratuity. At trial, Hamilton's defense was that he gave the check innocently, to help a friend in need. The jury acquitted on the Travel Act count but convicted on the §666 count—apparently concluding the check was a gratuity, not a bribe.

After the Fifth Circuit vacated the conviction by concluding §666 did not cover gratuities, the government decided to retry Hamilton on the theory that the check was a bribe. This is the very same theory the jury considered and rejected when it acquitted him under the Travel Act.

Hamilton moved to dismiss on double jeopardy grounds, but the district court denied the motion. It accepted a theory that was never argued at trial. The Travel Act is an unusual statute that requires criminal intent at two different points in time, and the government charged that Hamilton violated the statute by calling Caraway by phone (an instrumentality of commerce) with the intent to commit bribery and "thereafter," the next day, intentionally committed bribery by giving Caraway the check. *See* 18 U.S.C. §1952(a). The government claimed it was possible that the jury took a particularly nuanced view of intent under the Travel Act and might have acquitted by concluding Hamiton called innocently but nevertheless paid a

bribe the next day. For the Fifth Circuit, the government's theoretical "possib[ility]" that was never presented to the jury was enough. App.13a. It affirmed.

Chief Judge Elrod wrote separately to lament the lack of guidance on the defendant's burden to prove double jeopardy under *Ashe*—and the Fifth Circuit's "unduly heavy" interpretation of it. App.15a. Had the court applied a preponderance of the evidence burden—more typically applicable to prove constitutional violations—she believed Hamilton may have prevailed, but she felt precedent required her to apply a virtual-certainty test that is a complete outlier in constitutional law. App.16a.

If even the mere possibility of a theoretical alternative basis for the verdict can defeat a double jeopardy claim—effectively requiring proof to a virtual certainty—the Double Jeopardy Clause is all but meaningless. "[T]he extraordinary proliferation of overlapping and related statutory offenses" now makes it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. It cannot be that all a legislature needs to do to circumvent the Double Jeopardy Clause is create a new overlapping crime.

Nothing in this Court's double jeopardy precedent—or that of any other constitutional right—requires the quantum of certainty the Fifth Circuit and some (but not all) courts of appeals demand. This Court should grant certiorari to clarify that, like those other rights, a double jeopardy violation need only be proven by a preponderance of the evidence.

OPINIONS BELOW

The opinion of the court of appeals (App.1a–16a) is reported at 118 F.4th 655, denial of rehearing (App.23a–24a) is available at 2024 U.S. App. LEXIS

27151. The district court's opinion (App.17a–22a) is not reported but is at ECF498.

JURISDICTION

The Fifth Circuit entered judgment on September 30, 2024. Hamilton's timely petition for rehearing en banc was denied on October 25, 2024. On January 14, 2025, Justice Alito extended the time to petition for a writ of certiorari to February 22, 2025. No. 24A686. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment's Double Jeopardy Clause provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

A. A jury acquits Hamilton of bribery under the Travel Act.

Proponents of a paid-sick-leave referendum wanted to put the issue before voters. To get it on the November 2018 ballot, they first needed the mayor to put the referendum on the Dallas City Council's agenda. They hoped then-City Councilman Dwaine Caraway, who supported the measure, could persuade the mayor—but they needed someone to ask Caraway to do so.

To make the ask, proponents enlisted Hamilton, a local businessman and philanthropist known for the generous improvements he made in Caraway's district. Hamilton called Caraway and left a voicemail touting the referendum's merits. Unbeknownst to Hamilton, Caraway was cooperating with the government after being caught taking nearly $500,000 in kickbacks. When Caraway returned the call, recorded

by the government, Hamilton again touted the referendum's merits and requested that Caraway ask the mayor to put it on the agenda. App.3a. During the conversation, Caraway discussed his health problems. Even though Hamilton had said all he intended to say, Caraway asked Hamilton to meet in person the next day where the government had video and audio recording staged. *Id.*

When Hamilton arrived at Caraway's office, Caraway made sure Hamilton overheard him talking on speakerphone with his mother about her health and mounting medical bills. *Id.* When Caraway greeted Hamilton, they commiserated—Hamilton, having barely survived cancer, knew better than most the hardships of illness. Caraway and Hamilton discussed the referendum, and Caraway expressed support. *Id.*

The conversation later returned to Caraway's financial and medical troubles. *Id.* When Hamilton asked how he could help, Caraway asked Hamilton to help cover his mother's medical expenses. App.4a. Hamilton, who was grateful to have afforded his own life-saving health care, generously wrote a check for slightly more than Caraway asked. *Id.* On the memo line, Hamilton wrote his birth date—a private reference to his post-cancer habit of thanking God on his birthdays for each additional year of life and showing that he used the time helping others. App.41a.

Although neither Hamilton nor Caraway linked the check to the referendum in the recorded calls or meeting, the government interpreted Hamilton's act of charity as bribery simply because they also discussed helping to advance a referendum that they both supported. For giving Caraway the single check, Hamilton was charged with two felonies: violating the Travel Act and §666. App.41a–42a.

The Travel Act charge was predicated on a Texas bribery statute violation. The jury was specifically instructed that this statute prohibited only bribery, so a quid pro quo was necessary to convict. *United States v. Hamilton*, 46 F.4th 389, 399 n.4 (5th Cir. 2022). On the §666 charge, however, the jury was told to convict if it found the check was *either* a bribe *or* a gratuity. *Id.* The jury acquitted Hamilton on the Travel Act charge but convicted on the §666 charge. *Id.* at 393. The obvious explanation for the split verdict is that the jury determined the check was a gratuity, not a bribe.

B. The government re-prosecutes Hamilton under §666 for the same alleged act of bribery.

Hamilton appealed the conviction, claiming §666 only applied to bribery and not gratuities. The Fifth Circuit agreed.[1] *Id.* at 398–99.

On remand, the prosecution sought to retry the §666 count by claiming the check was a bribe—the very theory the jury rejected in acquitting Hamilton under the Travel Act. Both the Travel Act and §666 counts addressed the single check Hamilton gave Caraway. And when instructed that bribery must be proven under the Travel Act, the jury acquitted. Because the acquittal logically meant the jury rejected bribery, Hamilton sought dismissal on double jeopardy grounds of the §666 charge premised on the same bribery theory.

In its opposition, the government offered—for the first time—a possible alternative explanation for the Travel Act acquittal: the intent element. ECF479 at 2–4. The Travel Act requires defendants have criminal intent at two different points in time: (1) when an

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[1] This Court later concluded §666 prohibits only bribery too. *Snyder v. United States*, 603 U.S. 1 (2024).

instrumentality of interstate commerce is used (the phone call to Caraway), and (2) when a specified crime "thereafter" occurs (giving the check as a bribe). 18 U.S.C. §1952(a). At trial, the government argued both events were part of a single scheme fueled by a single intent—the call was intended to initiate a bribe that Hamilton gave the next day. Hamilton countered (as any innocent person would) that his intent was innocent throughout. But in its opposition, the government picked the series of events apart. It speculated that it was "possible" the jury found Hamilton called Caraway innocently yet corruptly gave the check the next day.

This theory was not advocated to the jury by either side. Nevertheless, the district court accepted the speculative possibility that the jury could have reached this conclusion on its own. App.20a. It reasoned that because the Travel Act charge and the §666 charge might have "concern[ed] different conduct on different days, and involve[d] different elements," Hamilton's double jeopardy right might not have been violated. App.19a. The motion was denied. App.17a, 22a.

C. The Fifth Circuit affirms the denial of the double jeopardy motion, but Chief Judge Elrod laments the "unduly heavy" burden.

Hamilton appealed and the Fifth Circuit affirmed on largely the same grounds as the district court. It accepted that "it is possible that the jury acquitted [Hamilton] on the Travel Act violation because it found he lacked the requisite intent." App.12a. The panel acknowledged that "[o]f course" it was also "possible that the jury could have accepted Hamilton's version of the record and acquitted him by finding that the check was a charitable gratuity and not a bribe."

App.13a. This possibility, however—no matter how much more probable—was "insufficient to apply the collateral estoppel doctrine." *Id.* (quoting *United States v. El-Mezain*, 664 F.3d 467, 555–56 (5th Cir. 2011)). Hamilton therefore "fail[ed] to meet his burden to show that the jury in his first trial necessarily determined that the August 3 check to [Caraway] was not a *quid pro quo* bribe." *Id.*

Chief Judge Elrod concurred, feeling bound by precedent. App.14a, 16a. She wrote separately to "express [her] view that this precedent imposes a burden of proof" for double jeopardy preclusion "that is both unclear in its weight and higher than is appropriate." App.14a.

She identified three problems with the Fifth Circuit's approach. App.15a. *First*, it "do[es] not clarify the weight of the invoking party's burden to demonstrate that the issue was already determined." *Id.* *Second*, not only is the burden "poor[ly] articulat[ed]," it is "unduly heavy." *Id.* The defendant "essentially must prove conclusively that the issue under consideration was the sole disputed issue in the first trial," because "any evidence to the contrary" will defeat a double jeopardy claim. App.15a. *Third*, a burden this high fails to account for the "possibility that a jury could have reached its verdict based on multiple issues, as opposed to merely a single issue." App.16a. Where this is the case, as it often is, the defendant will be "categorically unable" to claim his double jeopardy right. *Id.* "Had Hamilton been required to prove only by a preponderance of the evidence that the question whether his check was a *quid pro quo* bribe was the sole disputed issue in his first trial, the outcome of this appeal may have been different." *Id.*

Applying the Fifth Circuit's test to a statute such as the Travel Act, which requires criminal intent at two

points in time, essentially allows Congress or the states to legislate around the Double Jeopardy Clause. Hamilton—like any purely innocent person—claimed he never had criminal intent. In those circumstances, whenever there is an acquittal, the government can dodge a double jeopardy bar by claiming the jury might have acquitted by finding the defendant innocent at one point in time but not the other. As it did here, the government can claim the jury might have just rejected the jurisdictional element and then seek to reprosecute the substantive charge of bribery. And there is no shortage of statutes the government can choose from. Here, the government chose to prosecute bribery under §666, but it could just have easily chosen to charge honest services fraud, 18 U.S.C. §1346, or the Hobbs Act, 18 U.S.C. §1951(a).

Hamilton sought rehearing, which the Fifth Circuit denied. App.24a. Fearing a trial before further review, he sought a stay of the mandate from the Fifth Circuit and then this Court but was unsuccessful. 5th Cir. ECF107; No. 24A475. His retrial on the §666 bribery charge is scheduled for June 2025. Hamilton now seeks certiorari to avoid having to "'run the gauntlet' a second time" and "endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States*, 431 U.S. 651, 662 (1977).

REASONS FOR GRANTING THE PETITION

Ashe confirmed that issue preclusion applies in criminal cases. 397 U.S. at 443. It specified the critical question: "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose." *Id.* at 444. The Court later placed the burden of proving what the jury decided on the defendant. *Dowling*, 493 U.S. at 351.

This Court, however, has not clarified the *weight* of that burden. *Ashe* said that showing is not "hypertechnical and archaic," but characterized by "realism and rationality." 397 U.S. at 444. With little more guidance than that cryptic statement, the courts of appeals have been left to guess whether the defendant must show that an issue was already decided "by a preponderance of the evidence? Beyond a reasonable doubt? Or by some other standard?" App.15a (Elrod, J., concurring).

The Fifth Circuit erred on the government's side, "impos[ing] a burden of proof that is both unclear in its weight and higher than is appropriate." App.14a. Other courts have applied a burden akin to a preponderance of the evidence, which better reflects the "practical frame" the *Ashe* Court tried to set. *See* 397 U.S. at 444. And a third group has staked out a middle ground between the two.

Only a preponderance is "appropriate in this context." *See* App.14a (Elrod, J., concurring). Not only is this the burden for claiming other constitutional rights, it is the only one that makes sense because the typical general verdict means a court often will "never fully know the reasoning behind or the bases for a jury's verdict." App.16a. "Any test more technically restrictive would . . . simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Ashe*, 397 U.S. at 444.

Ashe double jeopardy protection has never been more necessary. The "extraordinary proliferation of overlapping and related statutory offenses" under the federal criminal law has made it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Id.*

at 445 n.10. When the *Ashe* Court wrote that line, Congress had barely gotten started. Today, "no one can easily count the number of federal crimes," which is likely "north of 5,000." Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 21 (2024). Thwarted under one statute, the government can simply try another, and another, and then another, until it wins.

This is precisely what the Double Jeopardy Clause was meant to prevent—and yet it is happening to Hamilton. The Court should grant certiorari.

I. Lower courts need guidance on the burden by which a defendant must prove double jeopardy preclusion.

"When a defendant has been acquitted of an offense, the [Double Jeopardy] Clause guarantees that the State shall not be permitted to make repeated attempts to convict him." *United States v. Wilson*, 420 U.S. 332, 343 (1975). In practical terms, it prevents him from being subjected "to embarrassment, expense and ordeal" and forced "to live in a continuing state of anxiety and insecurity,"—fearing that retrials "enhanc[e] the possibility that even though innocent he may be found guilty." *Id.* (quotation omitted).

A. The Court's cases have sent mixed messages about the burden of proof.

The government is "entitled to one fair opportunity to prosecute a defendant." *Schiro v. Farley*, 510 U.S. 222, 231 (1994) (quotation omitted). If it fails to convince a jury of a fact in the first trial, and the jury acquits, it does not get another try.

1. *Ashe* confirmed this Court's long-held practice of applying issue preclusion in criminal cases. 397 U.S. at 443 (citing *United States v. Oppenheimer*, 242 U.S.

85 (1916)). This means that "when an issue of ultimate fact has once been determined by a valid and final judgment" in a defendant's trial, "that issue cannot again be litigated" without violating the Double Jeopardy Clause. *Id.*

This Court anticipated an "inquiry" was necessary to determine what facts a jury found in reaching a general verdict. *Id.* at 444. *Ashe* did not specify who must prove what facts the jury found. Nor did it say what burden of proof is required to prove what the jury found.

Ashe did say that courts must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Id.* But its commentary on the legal standard was ambiguous. Quoting a law review article, the Court identified the question as "whether a rational jury *could have* grounded its verdict upon an[other] issue." *See id.* (emphasis added) (quoting Daniel Mayers & Fletcher Yarbrough, Bis Vexari*: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38–39 (1960)).

At the same time, the Court cautioned: "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. The preclusion "inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). This flexibility is necessary because, "in every case where the first judgment was based upon a general verdict of acquittal"—"as is usually the case"—"[a]ny test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings." *Id.* Subsequently, the Court added in *Yeager v. United States*

that having "survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar." 557 U.S. 110, 122 (2009).

The juxtaposition of the seemingly strict "could have" standard coupled with an admonition not to be too strict has sowed confusion. It is like a recipe instructing a baker that the oven should be hot but not too hot, and it naturally leads to mixed interpretations. Just as such a recipe leads to bad cake, it has led to bad law too.

2. After *Ashe*, this Court did not return to the question of the burden in double jeopardy preclusion cases for two decades. In *Dowling*, it "placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." 493 U.S. at 350–51.

Three Justices would have placed the burden on the government. *Id.* at 357 (Brennan, J., dissenting). "Since the doctrine serves to protect defendants against governmental overreaching," Justice Brennan explained, "the Government should bear the burden of proving that the issue it seeks to relitigate was *not* decided in the defendant's favor by the prior acquittal." *Id.* He emphasized the Court's practical approach to double jeopardy preclusion: "As we noted in *Ashe*, because criminal verdicts are general verdicts, it is usually difficult to determine the precise route of the jury's reasoning and the basis on which the verdict rests." *Id.* He repeated *Ashe*'s warning that in cases where multiple issues were contested, "an excessively technical approach to collateral estoppel 'would, of course, simply amount to a rejection of the rule.'" *Id.* at 358 (quoting *Ashe*, 397 U.S. at 444).

Dowling concluded the defendant "failed to carry his burden" because Dowling never even raised the issue

at trial that he claimed the jury's acquittal rested upon. *Id.* at 352, 357. Accordingly, the Court found "there is nothing at all that persuasively indicates that the question [Dowling sought to preclude] was at issue and was determined in Dowling's favor at the prior trial," and "at oral argument, Dowling conceded as much." *Id.* at 352. Thus, the Court found no need to specify the weight of this burden, as Dowling's claim would fail no matter how low the burden was set.

3. In recent years, the lack of a definitive articulation of the burden of proof for double jeopardy preclusion has sowed further confusion.

a. *Yeager* is the best example. There, this Court quoted the most stringent language from *Ashe* to suggest a heavy burden. 557 U.S. at 119–20. "To decipher what a jury has *necessarily decided*," this Court said, courts should scrutinize the full trial record and consider "whether a rational jury *could have* grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (emphasis added) (quoting 397 U.S. at 444). But noting the need to view the case in a "practical frame," *id.* at 120, this Court paved the way for the defendant to prevail on his double jeopardy claim—even though a plausible alternative explanation for the jury's verdict existed.

Yeager was acquitted of securities fraud, but the jury hung on whether he committed insider trading, and the government sought to retry the insider trading counts. Yeager claimed his acquittal on the fraud counts rested on him not having the insider information at issue in the insider trading counts, so double jeopardy should prevent him from being retried.

The Fifth Circuit agreed the record "appeared to support" this argument but rejected the *Ashe* claim under

circuit precedent allowing hung counts to be retried categorically. 557 U.S. at 120–21. This Court reversed, concluding that hung counts are irrelevant in the *Ashe* analysis.

Importantly for present purposes, this Court remanded for the Fifth Circuit to decide what the jury actually found. The government argued this Court should affirm as harmless error because the jury's acquittal could have rested on Yeager's lack of involvement in making false statements, rather than his lack of insider information. Gov't Br., *Yeager v. United States*, 2009 WL 390031, at *41–45 (U.S. Feb. 17, 2009). The district court had accepted the government's view, but the Fifth Circuit "read the record differently," as supporting Yeager's claim. 557 U.S. at 125–26. Although this difference of opinion among the lower courts demonstrated that the government's explanation was at least plausible, this Court declined the government's invitation to "engage in [the] fact-intensive analysis" necessary to affirm the Fifth Circuit's rejection of the *Ashe* claim. *Id.* at 126.

This outcome would have been impossible under a virtual-certainty test. The very existence of a plausible alternative explanation would have been enough to defeat the *Ashe* claim; there would have been no need for a remand.

Indeed, Justice Alito's dissent took the majority to task for *not* interpreting *Ashe* this way. In his view, *Ashe* required "issue preclusion [to] be applied with . . . rigor." *Id.* at 133 (Alito, J., dissenting). Under this "demanding standard," Justice Alito explained, "[t]he second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question." *Id.* at 133–34. "Only if it would have been *irrational* for the

jury to acquit without finding that fact is the subsequent trial barred." *Id.* at 134. A six-Justice majority, however, rejected the sort of virtual-certainty standard advanced by Justice Alito and followed by the Fifth Circuit in Hamilton's case below.[2]

b. Recent cases have not presented an opportunity to clarify. Instead, this Court has addressed other wrinkles in its double jeopardy preclusion doctrine.

Bravo-Fernandez v. United States, for example, addressed inconsistent verdicts and concluded there can be no issue preclusion when a verdict's inconsistency makes determining what a jury necessarily decided unanswerable. 580 U.S. 5, 9 (2016). Of course, in Hamilton's case, the divergent outcomes are readily reconcilable: the jury rejected bribery through its acquittal on the Travel Act and convicted under §666 when told, erroneously, that a gratuity is sufficient.

In *Currier v. Virginia*, as an aside, this Court described *Ashe* as "forbid[ding] a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." 585 U.S. 493, 499 (2018). What *Ashe* required was not at issue in that case, only whether an *Ashe* claim is waived by a defendant consenting to separate trials for multiple charges. The Court found this was a waiver of any argument that

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[2] On remand, the Fifth Circuit upheld the *Ashe* double jeopardy claim, rejecting the district court's explanation for the verdict in favor of Yeager's. *United States v. Yeager*, 334 F. App'x 707, 709 (5th Cir. 2009). If Yeager had been required to prove to a *virtual certainty* that his explanation was the correct one, this could not have happened. The divergent outcomes between the Fifth Circuit's decisions in *Yeager* and *Hamilton* illustrate a recurring intra-circuit split on this issue.

acquittals in the first trial can bar the second on issue-preclusion grounds. *Id.* at 500. *Currier* continued to recognize that "retrial of an issue can be considered tantamount to the retrial of an offense" and the "focus remains on the practical identity of offenses." *Id.* at 506.

B. The circuits have read *Ashe* to impose burdens ranging from a preponderance to a virtual certainty.

As Chief Judge Elrod pointed out, this Court's precedents, coupled with her own court's attempts to apply them over the years, "do not clarify the weight of the invoking party's burden to demonstrate that the issue was already determined in the first trial." App.15a. "Must the invoking party demonstrate this by a preponderance of the evidence? Beyond a reasonable doubt? Or by some other standard?" *Id.*

Left to their own devices, the courts of appeals have tried all these standards, with varying degrees of consistency and success.

1. The Ninth Circuit has taken the most heed of *Ashe*'s admonishment that its examination "should not be formalistic." *United States v. Romeo*, 114 F.3d 141, 143 (9th Cir. 1997). It described its task as "ascertain[ing] *whether the issue was necessarily decided in the first case*"—a high standard, as the court's own emphasis suggests. *Id.* (quoting *United States v. McLaurin*, 57 F.3d 823, 836 (9th Cir. 1995)). The court also recited *Ashe*'s passage cautioning against a "hypertechnical and archaic approach," but rather to conduct its review "with realism and rationality." *Id.*

This "practical" approach (*id.* (quoting 397 U.S. at 444)) led the Ninth Circuit to read *Ashe* as requiring it to "give jury verdicts the most rational interpretation possible." *United States v. Carbullido*, 307 F.3d 957,

962 (9th Cir. 2002). Functionally, this is a preponderance of the evidence standard: if the defendant can convince the court that the "most rational" ground for the acquittal is the same one the government is again prosecuting, double jeopardy bars the second trial. *See, e.g.*, *United States v. Castillo-Basa*, 494 F.3d 1217, 1221 (9th Cir. 2007) (Callahan, J., dissenting from denial of en banc review) (arguing that, because other factors could also have explained the verdict, there was no preclusion).

The First Circuit holds that preclusion will bar the second trial if the defendant can convince the court that "all proffered explanations for why a jury's verdict does not decide an issue are frankly implausible." *United States v. Morris*, 99 F.3d 476, 481 (1st Cir. 1996). When the defendant's explanation for a verdict is more reasonable, the court will "not bend over backwards to formulate some route by which the jury could have conceivably found" something else. *United States v. Fernandez*, 722 F.3d 1, 34 (1st Cir. 2013). Stated differently, an *Ashe* claim fails where "the jury *most likely* grounded its verdict on an issue other than the one" the defendant is trying to preclude. *United States v. Dray*, 901 F.2d 1132, 1136 (1st Cir. 1990) (emphasis added) (quotation omitted). This is a preponderance standard.

The Third Circuit initially described *Ashe*'s burden as "heavy." *United States v. Rigas*, 605 F.3d 194, 217 (3d Cir. 2010) (en banc). But it later applied a more pragmatic gloss, describing "the correct approach" to reviewing the record as: "where no clear answer emerges" for the basis for the verdict, "the tie goes to the Government." *Wilkerson v. Superintendent, Fayette State Corr. Inst.*, 871 F.3d 221, 233 (3d Cir.

2017). This is just another way of saying the defendant must tip the scale in his favor beyond equipoise—a preponderance standard.

2. The Sixth and Eleventh Circuits have tried to reconcile *Ashe*'s "could have grounded" language with its exhortation to "realism and rationality" by staking out a middle ground. *See* 397 U.S. at 444.

The Eleventh Circuit recognized that where the government's alternative explanation is plausible, but less likely, courts sometimes treat such arguments as requests "to adopt 'the hypertechnical and archaic approach'" this Court in *Ashe* "instructed [them] to reject." *United States v. Whitaker*, 702 F.2d 901, 904 (11th Cir. 1983). That court's solution was to require defendants "to prove *by convincing and competent evidence* that in the earlier trial, it was necessary to determine the fact sought to be foreclosed." *United States v. Hogue*, 812 F.2d 1568, 1578 (11th Cir. 1987) (emphasis added); *accord United States v. Crabtree*, 878 F.3d 1274, 1283 (11th Cir. 2018).

The Sixth Circuit, too, assigns defendants the burden "to prove by convincing and competent evidence that the fact sought to be foreclosed was necessarily determined by the jury against the government in the prior trial." *Christian v. Wellington*, 739 F.3d 294, 299 (6th Cir. 2014) (quoting *United States v. Benton*, 852 F.2d 1456, 1466 (6th Cir. 1988)).

3. Still other courts of appeals have imposed even higher burdens ranging from beyond-a-reasonable-doubt to a virtual certainty.

The Fourth Circuit—relying on a pre-*Ashe* Third Circuit decision—requires defendants to prove beyond a reasonable doubt that the issue they argue precludes the second trial "was necessarily decided" in the first one. *United States v. Ruhbayan*, 325 F.3d 197, 203

(4th Cir. 2003) ("reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel") (quoting *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970)).

The Second Circuit also imposes a "weighty burden": if "it cannot be said with certainty that the jury in the first trial necessarily decided the . . . issue," the defendant cannot establish double jeopardy preclusion. *United States v. Seijo*, 537 F.2d 694, 698 (2d Cir. 1976) (quotation omitted). Because "it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case," that court acknowledged, "it is a rare situation in which the collateral estoppel defense will be available to a defendant." *United States v. McGowan*, 58 F.3d 8, 12 (2d Cir. 1995) (quotation omitted). The Seventh Circuit requires a similar quantum of certainty. *See United States v. Kimberlin*, 805 F.2d 210, 232 (7th Cir. 1986) ("the critical question is whether it can be said with assurance that the fact was necessarily established by the judgment at the earlier trial").

The Fifth Circuit now requires even more. In this case, it read its own precedents interpreting *Ashe* to mean that a preclusion claim must fail if it is "possible" the jury's verdict rested on some other basis. App.10a (citing, inter alia, *El-Mezain*, 664 F.3d at 555–56 ("that it is *possible* that the jury could have based its verdict on any number of facts is insufficient"), and *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997) ("When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue.")). In doing so, the Fifth Circuit seemed to be walking away from its prior decisions, but without overruling or even addressing them in its opinion. *See Yeager*, 334 F. App'x

707 (finding an *Ashe* bar despite another plausible explanation for a prior verdict); *United States v. Griggs*, 651 F.2d 396 (5th Cir. Unit B July 1981) (same); *McDonald v. Wainwright*, 493 F.2d 204 (5th Cir. 1974) (same). Thus, litigants can still cite cases in that circuit that point in opposite directions.

II. A preponderance of the evidence—not the "virtual certainty" the Fifth Circuit demanded here—is the correct burden.

For the reasons Chief Judge Elrod pointed out in her concurrence—and more—this cannot be the rule. A preponderance standard rooted in probability, and not the impossible-to-meet virtual-certainty standard, is the proper burden in double jeopardy preclusion cases. It is the one this Court has consistently applied for nearly a century, not only in *Ashe* cases, but in cases involving other constitutional rights as well.

A. In practice, this Court has consistently accepted proof by a preponderance.

From the beginning, this Court has required proof of double jeopardy preclusion by a preponderance—even if it has not stated this explicitly. It should take the opportunity to do so here.

1. *Ashe* cautioned against an excessive burden of proof. It began the key paragraph with a warning "that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." 397 U.S. at 444. And it again cautioned that "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings,'" as "[a]ny test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment

was based upon a general verdict of acquittal." *Id.* (quoting *Sealfon*, 332 U.S. at 579).

Obviously, this was a consequence to be avoided. By nature, general verdicts obscure the basis for the jury's verdict. *Ashe* anticipated that applying the rule might be "awkward." App.9a (quotation omitted). "[A] general verdict of acquittal does not specify the facts necessarily decided by the jury" (*id.*), and acquittal could just as easily result from "compromise, compassion, lenity, or misunderstanding of the governing law" as from a finding of fact on a particular issue. *McElrath v. Georgia*, 601 U.S. 87, 94 (2024) (quoting *Bravo-Fernandez*, 580 U.S. at 10). So, if a jury reaches its decision by general verdict—"as is usually the case"—uncertainty is inevitable. *Ashe*, 397 U.S. at 444. The *Ashe* Court knew this, and confirmed that preclusion is available in such cases nonetheless.

The uncertainty that often accompanies general verdicts did not to arise in *Ashe*, where only an alibi defense was raised. That "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers" was mere happenstance—not a doctrinal *requirement*. *See id.* at 445.

Indeed, for the proposition that the approach should be "practical," this Court cited *Sealfon*, where it made a probabilistic assessment of the basis for the jury's verdict. 332 U.S. at 579–80. A jury acquitted Sealfon of conspiracy. *Id.* at 576. When he was prosecuted again on a substantive aiding-and-abetting charge, this Court barred the second trial for double jeopardy because the first jury most likely found that Sealfon did not aid a conspirator. *Id.* at 578–79. Although there was another possibility, the substantive and conspiracy charges are theoretically distinct, so the jury could have found that Sealfon did not join the broader

conspiracy. But viewing the record in a "practical frame," the Court did not find this alternative explanation persuasive. *Id.* at 579–80. Had the mere existence of this alternative explanation been enough to defeat double jeopardy—the logical consequence of a virtual-certainty standard—Sealfon would have lost. But he did not, and the Court integrated this lower burden into the *ratio decidendi* of *Ashe*.

2. More recently, this Court followed the same approach in *Yeager*. As explained above, the government there advanced the same sort of virtual-certainty test and argued that any error was harmless because—as the district court had found—there was a plausible alternative explanation for the prior acquittal. *Supra* at 13–15. Despite this plausible alternative explanation—highlighted by a vigorous dissent—this Court rejected the government's harmless error argument and remanded for the Fifth Circuit to determine what the jury decided. *Id.* On remand, the Fifth Circuit weighed the evidence in the record and reached the opposite conclusion from the district court, and Yeager prevailed. *Id.*

3. Nor should a virtual-certainty test be controlling. As Chief Judge Elrod explained, forcing "the invoking party [to] essentially . . . prove conclusively that the issue under consideration was the sole disputed issue in the first trial for collateral estoppel to apply" makes the burden "unduly heavy." App.15a. A preponderance, by contrast, is consistent with the standard this Court applies to other constitutional rights, and the double jeopardy right—with its explicit textual basis—is entitled to the same treatment.

Chief Judge Elrod identified "other contexts" in which this Court has "recognized that a party challenging a violation of his constitutional right need only satisfy the preponderance of the evidence standard":

incompetence to stand trial for purposes of due process (citing *Medina v. California*, 505 U.S. 437, 439 (1992)), claims that the right to effective assistance was not intelligently waived (citing *Moore v. Michigan*, 355 U.S. 155, 161–62 (1957); and suppression motions for unconstitutionally obtained evidence (citing *United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001)). App.15a; *see also United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (preponderance standard applies at suppression hearings). There are others, including Fourth Amendment challenges to a search warrant obtained through perjury (*Franks v. Delaware*, 438 U.S. 154, 156 (1978)) and standing to challenge an unlawful search (*United States v. Bettis*, 946 F.3d 1024, 1027 (8th Cir. 2020)). Asserting other constitutional rights requires even less than a preponderance. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (*Brady* claims require only a "reasonable probability" of materiality); *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (requiring prima facie showing that jury panels were not drawn from fair cross section of community in violation of Sixth Amendment).

Looking to constitutional immunities cases is particularly instructive, as the Double Jeopardy Clause is among those immunities. *See, e.g.*, *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) ("[T]he Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense[.]"); *Palko v. Connecticut*, 302 U.S. 319, 322 (1937) ("The Fifth Amendment . . . creates immunity from double jeopardy.") In other contexts, the *government* must overcome a presumption in favor of immunity. *See, e.g.*, *Trump v. United States*, 603 U.S. 593, 624 (2024) (government's burden to rebut presumptive presidential immunity); *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir.

1999) (government's preponderance burden to prove it did not use immunized testimony); *see also United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016) (defendant's preponderance burden to prove Speech or Debate Clause immunity). For double jeopardy, the scale is already weighted in favor of the government by placing the burden on the defendant. The government should not also get the benefit of imposing a burden of proof on defendants that is set so high that it becomes virtually impossible for them to ever secure their constitutional right not to be placed in double jeopardy.

B. This case shows why any possible alternative basis for the verdict cannot be allowed to foreclose double jeopardy protection.

1. As Chief Judge Elrod recognized, "the outcome of this appeal may have been different" under a preponderance standard "because [Hamilton] has shown that at least some evidence in the record weighs in his favor." App.16a. Indeed, the jury's verdict speaks for itself: it acquitted when it was told the check must be a bribe and convicted only where it was told (erroneously) to convict if it found the check was a gratuity. The obvious inference is that the prosecution's bribery theory was rejected.

Conversely, the record does not support the government's explanation, which rests upon a view of the facts that nobody argued to the jury. Hamilton's pitch to Caraway on the merits of the proposed referendum was the same on the call as in the meeting. The government argued the call and meeting were part and parcel of the same criminal scheme. Conversely, Hamilton argued he always had innocent intent. The government's suggestion that the jury took it upon itself to split the baby, so to speak—by finding Hamilton

called innocently but decided to commit bribery the next day—is rank speculation.

And yet Hamilton lost because this alternative explanation—no matter that it was not presented to the jury and no matter how inferior—was nonetheless "possible." App.13a. As the government put it below, in circuits that apply this sky-high standard, the fact that "a previous trial included multiple bases for acquittal" means "a defendant cannot demonstrate that the jury necessarily rested its acquittal on any one of them." CA5 Gov't Br. 14. Perversely, this means that if a defendant pokes too many holes in the government's case, he waives his double jeopardy protection.

Making matters worse, Hamilton argued only one defense: that he never had criminal intent. It is only because the Travel Act requires criminal intent at two separate points in time that this one defense is treated as a challenge to two elements. Legislatures should not be allowed to draft statutes that circumvent the Double Jeopardy Clause any more than any other constitutional guarantee.

2. A defendant who wants to preserve their double jeopardy right is thus left with only one surefire option: argue only a single defense at trial.

Hamilton's case illustrates this absurdity. If speculation about the intent element is enough to defeat an *Ashe* claim, the only way to preserve his rights on the Travel Act charge would be to (falsely) concede that he did call with intent to bribe—only then to argue that the check he gave the next day was not really a bribe. No sensible defendant—or one with a purely innocent mind—would adopt this strategy. A standard that requires a defendant like Hamilton to concede an element of the case against him is untenable.

Worse still, it would require defendants to choose between their Fifth and Sixth Amendment rights. The Sixth Amendment confers a right "to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). But this cannot be reconciled with a rule where arguing more than one basis for acquittal renders him "categorically unable to succeed on a collateral estoppel challenge." App.16a (Elrod, J., concurring). A defendant faced with this situation must sacrifice his double jeopardy right for his right to present a complete defense, which is a false choice. The Constitution entitles him to exercise both rights.

III. Given the proliferation of federal criminal law, *Ashe* double jeopardy protection is more important than ever.

The prospect of a life in legal purgatory has long troubled our forebears on both sides of the Atlantic. The Double Jeopardy Clause's protection against being "twice put in jeopardy of life or limb" (U.S. Const. amend. V) traces its roots back to the Magna Carta's guarantee "that one acquittal or conviction should satisfy the law." *Ex parte Lange*, 85 U.S. 163, 171 (1873) (citations omitted). This Court has long appreciated that "to try a man after a verdict of acquittal is to put him twice in jeopardy." *Kepner v. United States*, 195 U.S. 100, 133 (1904).

But "[i]n more recent times," the *Ashe* Court warned in 1970, "the extraordinary proliferation of overlapping and related statutory offenses" has made it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." 397 U.S. at 445 n.10. That created "the potential for unfair and abusive reprosecutions." *Id.* And the proliferation of federal criminal laws has

greatly expanded in the half-century that followed *Ashe*, making *Ashe* protection all the more important now.

A. The number of federal crimes has proliferated since the Founding—and even since *Ashe*.

1. "Abuse of the criminal process is foremost among the feared evils that led to the inclusion of the Double Jeopardy Clause in the Bill of Rights." *Ashe*, 397 U.S. at 459 (Brennan, J., concurring). At the Founding, however, double jeopardy analysis was simple—there were few crimes, and each was distinct. English common law as of 1784 "recognized only fourteen felonies: murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy, mayhem, blasphemy, conspiracy, forgery, and sedition." Susan Klein & Katherine Chiarello, *Successive Prosecutions and Compound Statutes: A Functional Test*, 77 Tex. L. Rev. 333, 356–57 (1998) (citing Wayne LaFave & Austin Scott, Jr., *Criminal Law* §2.1(b) (2d ed. 1986)). "Under such a regime, it was essentially impossible for a prosecutor to attempt to circumvent a bar against subsequent prosecutions following an acquittal or conviction, because the conduct that constituted the initial felony would rarely constitute any other felony." *Id.* at 357.

By the time the Constitution was ratified, legislatively created crimes had begun to supplant common-law crimes. There were roughly 160 legislatively created felonies, but (as with prior common-law crimes) "each crime was specific enough that a defendant was unlikely to commit more than a single offense by his misconduct." *Id.* at 358.

The rapid expansion of federal criminal law since the Civil War changed that. By 1970, the *Ashe* Court was well aware of the temptation to misuse this raft of new

laws. "As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced." 397 U.S. at 445 n.10. It understood "the need to prevent such abuses through the doctrine of collateral estoppel," which had already become "a safeguard firmly embedded in federal law." *Id.*

Since *Ashe* noted "the explosive growth of federal criminal law," the problem has grown exponentially worse. Am. Bar Ass'n, *The Federalization of Criminal Law* 7 (1998) ("More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."). "Amazingly, no one—not the DOJ, scholars in the field, or blue-ribbon task forces that spent years studying the subject—has even a rough idea of how many federal criminal laws there are." Stephen Smith, *Federalization's Folly*, 56 San Diego L. Rev. 31, 35 (2019). Those who try to calculate the number of federal crimes deem it "an impossible task." Julie O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 Harv. J. L. & Pub. Pol'y 57, 57 (2014). A decade ago, the best guess was that there were nearly 5,000 federal crimes, growing at a rate of roughly 67 new crimes per year. *The Crimes on the Books and Committee Jurisdiction: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 32 (2014) (statement of John Baker, Jr., Professor, Georgetown Law School). The result is that "no one knows" how many federal crimes there are, and despite the "considerable resources and time" various scholars and government officials have spent trying to count them, "they come up short. Every time." Gorsuch, *supra*, at 21.

2. But numbers alone do not tell the whole story. As Justice Gorsuch pointed out in his recent book, the real

problem is that "[m]any federal criminal statutes overlap entirely, are duplicative in part, or when juxtaposed raise perplexing questions about what they mean." *Id.* at 22. As cases in point, he named various species of fraud statutes: mail fraud, wire fraud, "honest services," and—of particular relevance here—"federal bribery and illegal gratuities laws." *Id.*

Hamilton's case illustrates the problem. For giving a check to Caraway, the government prosecuted Hamilton for Travel Act bribery, and he was acquitted. Now, the government seeks to reprosecute him on the same theory—that the same check was a bribe—but under §666 this time. If that fails, too, perhaps the government will try again by charging the check as a bribe in violation of the honest services fraud statute or the Hobbs Act.

If a defendant like Hamilton cannot meaningfully argue issue preclusion under *Ashe*, an acquittal might prove to be nothing more than a Pyrrhic victory in what the government views as only the first battle in a longer war. And each successive battle increases its odds of ultimate success. For the government, this is a game of "heads-I-win, tails-I-get-a-do-over."

B. *Ashe* is consistent with other decisions of this Court that prevent Congress from overriding constitutional principles.

1. No one doubts that Congress and the states have the power to innovate in crafting new laws to address new circumstances and to improve upon what came before. But at the same time, this Court has been careful to ensure that the constitutional principles that prevailed in 1789 continue to check government overreach. *See, e.g.*, *Carpenter v. United States*, 585 U.S. 296 (2018) (maintaining Fourth Amendment's privacy protections in the face of technological advancements);

Giles v. California, 554 U.S. 353 (2008) (modern expansion of forfeiture-by-wrongdoing exception to Confrontation Clause violates the Clause).

Ashe itself is an example of this. As the number of offenses has multiplied, this Court held that the Double Jeopardy Clause guarantee often requires deeming "separate offenses to be the 'same' for purposes of protecting the accused from having to 'run the gantlet' a second time." *Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977) (quoting *Ashe*, 397 U.S. at 446).

In other contexts, too, this Court has not allowed Congress to circumvent constitutional protections by creating new causes of action. For example, Congress cannot create new causes of action to bypass Article III's structural protections. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 499 (2011) (striking down attempt to create new claims to be decided by non-Article III courts when they would otherwise fall within the jurisdiction of Article III courts); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (criminal defendants cannot be required to have non-Article III judges oversee critical stages of their trials).

Nor does it allow new causes of action to be used to skirt individual rights. Recently, in *SEC v. Jarkesy*, this Court held that a cause of action allowing the government to seek civil penalties through administrative proceedings violated the Seventh Amendment right to a jury trial. 603 U.S. 109, 140 (2024). Although the Seventh Amendment by its terms applies to "[s]uits at common law," this Court read that broadly to embrace *all* legal claims, not just "the 'common-law forms of action recognized' when the Seventh Amendment was ratified." *Id.* at 122. Otherwise, Congress could eviscerate the Seventh Amendment by simply creating new causes of action.

And in a now expansive line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has precluded Congress and the states from creating criminal offenses that leave judges free to decide elements by a preponderance, rather than a jury beyond a reasonable doubt, as the Fifth and Sixth Amendments require. *See, e.g.*, *S. Union Co. v. United States*, 567 U.S. 343 (2012) (facts serving as basis for fines). Congress's attempts to skirt the Eighth Amendment by creating new and more expansive uses of civil forfeiture have met the same fate. *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 613–14 (1993) (applying Eighth Amendment to civil in rem forfeiture).

2. Critics of *Ashe* who argue that the Framers would have understood the Double Jeopardy Clause to prevent only retrials on the exact same criminal charge ignore the broader context in which the Clause was enacted. *See*, *e.g.*, *Yeager*, 557 U.S. at 128 (Scalia, J., dissenting); *see also Ashe*, 397 U.S. at 460–61 (Burger, C.J., dissenting). At a time when criminal causes of action were few and distinct, it is true that the only risk of reprosecution would involve the same criminal charge—there *were* no other, "overlap[ping]" laws to turn to. *See* Gorsuch, *supra*, at 22. Ignoring the sea change that modern criminal practice represents requires one to assume, despite all evidence to the contrary, that the Framers were more concerned with form than substance.

"[W]hatever else [the Double Jeopardy Clause] may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445–46 (citation omitted) (quoting. *Green v. United States*, 355 U.S. 184, 190 (1957)). The Framers would surely not have wanted Congress to be

able to simply sidestep this core value of Anglo-American law by creating yet another offense to try him on.

These concerns are at the center of this case. Hamilton successfully defended against the charge of bribery by obtaining his Travel Act acquittal. The government should not be allowed a do-over by charging §666 bribery (or honest-services-fraud bribery, or Hobbs Act bribery, for that matter). He is being forced to run the gauntlet yet again, all to prove the same fact: the check he gave Caraway was not a bribe. The jury's acquittal—and Hamilton's double jeopardy right not to be retried—should be respected.

CONCLUSION

The Court should accept Chief Judge Elrod's invitation to clarify the burden of proof for double jeopardy preclusion. Certiorari should be granted.

Respectfully submitted.

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