No. 17-646

IN THE
Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATOR ORRIN HATCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the senior United States Senator from Utah and the former chairman of the United States Senate Committee on the Judiciary. *Amicus*'s duties require a keen interest in issues of both federal criminal law and federalism, including the impact of the federalization of criminal law on both law enforcement and our constitutional structure. *Amicus* submits this brief in order to provide this Court with an experienced legislator's perspective on the constitutional and practical issues at play as the Court considers whether to overrule the dual sovereignty doctrine in the double-jeopardy context.

SUMMARY OF ARGUMENT

1. This Court has previously upheld the dual sovereignty doctrine, which allows consecutive prosecutions for the same crime by a state and the federal government without violating the Fifth Amendment's Double Jeopardy Clause or the Fourteenth Amendment's Due Process Clause, as an incident of our federalist system. Historically, this accurately reflected the separate spheres of interest protected by each sovereign's body of criminal law, ensuring that the prerogatives of each sovereign were protected from undue or unintentional interference by

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amicus* signing this brief or his counsel made a monetary contribution to the preparation or submission of this brief.

the other. In the decades since this Court last considered the dual sovereignty doctrine, however, the federalist balance of interests in criminal law enforcement has been upset by the federalization of a wide swath of crime previously dedicated to state enforcement. In the process, the practical protection against double prosecution embedded in our federalist system – that the states and federal government generally regulated separate spheres of criminal conduct, with relatively minor overlap – has fallen away along with the federalist balance of responsibilities that this Court previously described.

The rapid federalization of traditionally state-created and state-enforced areas of criminal law is reflected in both the scope and substance of the modern federal criminal code. There is now the potential for the exact harms the Double Jeopardy Clause was designed to prevent – retrial after acquittal and double punishment after conviction – for countless crimes that were traditionally the states' responsibility to define and punish. And neither sovereign's interests nor the federalist system is well-served as a result. This Court should overrule its prior decisions upholding the due sovereignty doctrine as no longer consistent with the interests of federalism nor the liberty protections of the Double Jeopardy Clause.

2. The dual sovereignty doctrine poses a particular hardship to lawmakers in their efforts to craft criminal punishments that reflect the interests they are attempting to protect. Punishing crime requires a balance of multiple factors, including deterrence, the need for incapacitation, the relative

seriousness of an offense, and governmental resources. However, if another sovereign can enforce cumulative punishments on any crime that a lawmaker defines, the interests of neither sovereign will be reflected in the ultimate criminal punishment. In other words, because of the broad federalization of criminal law, the dual sovereignty doctrine no longer protects separate sovereigns' interests as clearly as when this Court last considered the doctrine, and is far more likely than it previously was to undermine both sovereigns' interests.

ARGUMENT

When this Court last reaffirmed the "dual sovereignty" exception to the Fifth Amendment's guarantee against successive prosecutions for the same crime, it did so to preserve the balance of power in our federalist system. As a matter of both constitutional theory[2] and historical practice,[3] the states bore primary

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[2] *See, e.g.*, The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 96 (1964) (White, J. concurring), *overruled in part on other grounds by United States v. Balsys*, 524 U.S. 666 (1998) ("[T]he States still bear primary responsibility in this country for the administration of the criminal law.").

[3] *See, e.g.*, Daniel J. Freed & Marc Miller, *Sentencing in the States*, 6 Fed. Sent. R. 122, 122, 1993 WL 613745 (Vera Inst.

responsibility for defining and prosecuting general crime, with federal criminal law focused on relatively narrow and specific areas of federal interest.

But the balance between state and federal power to define and punish crime has shifted massively since the vitality of the dual sovereignty doctrine was last before this Court. The federalization of criminal law over the intervening decades has given federal prosecutors the ability to bring coordinate federal charges for a wide array of conduct – in many contexts vitiating the distinction between federal and state interests in criminal punishment. In this hyperfederalized context, the federalist underpinnings of this Court's prior dual-sovereignty decisions no longer reflect the reality of federal-state relations, and may well undermine, rather than support, an appropriate division of power. In any event, those federalist interests are no longer sufficiently served by the doctrine to warrant the harm to individual liberty suffered by criminal defendants charged with federal crimes for conduct that traditionally fell under the states' power to criminalize and prosecute. Instead, the dual sovereignty doctrine leaves neither the federal government nor the states certain of whether the criminal justice system is appropriately validating their particular interests.

This Court should reconsider the dual sovereignty doctrine in cases of successive prosecutions for the same crime by the federal government and a state, in

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Just.) (Nov. 1, 1993) ("[M]ost criminal prosecutions are handled by the states.").

light of the extensive federalization of the traditional criminal-law prerogatives of the states.[4] The pervasive federalization of criminal law to cover conduct that traditionally was prosecuted and punished by the states, and that falls within the states' core legislative interests, threatens to undermine the protections of the Double Jeopardy Clause unless the dual sovereignty doctrine is overruled in this context.

I. The Extensive Federalization of Criminal Law Has Undermined the Rationale for the Dual Sovereignty Doctrine.

When this Court last directly considered the dual sovereignty doctrine in 1959, it upheld the doctrine as a boon to "our federal system." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). Specifically, allowing the federal government and the states to initiate dual prosecutions for the same offense was understood as a check on "displace[ment] of the reserved power of the States over state offenses." *Id.*; *see also id.* at 155 (Black, J., dissenting). The Double Jeopardy Clause was not yet incorporated under the Fourteenth Amendment, and *Bartkus* was concerned primarily with the possibility that federal prosecution of a narrow federal interest might preclude state prosecution of a serious crime. This Court sought to avoid the "shocking and untoward deprivation of the historic right and obligation of the

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[4] *Amicus* takes no position on the appropriate test to determine whether a federal and state charge constitute the "same offence" under the Fifth Amendment. *See* U.S. Const. amend. V.

States to maintain peace and order within their confines" that might result if "federal prosecution of a comparatively minor offense" preceded and foreclosed "state prosecution of [a] grave . . . infraction of state law." *Id.* at 137.

Bartkus and its companion case, *Abbate v. United States*, were accordingly built on the assumption that criminal law would be defined and enforced primarily by the states, with the federal government playing a only a smaller role in legislating and prosecuting crimes touching on particular federal interests. *See Abbate v. United States*, 359 U.S. 187, 195 (1959) ("[T]he States under our federal system have the principal responsibility for defining and prosecuting crimes."). This assumption was reasonable at the time, when federal criminal law was largely circumscribed to areas of particular federal interest, and the states were left to regulate and prosecute general crimes.

But what was true about the federalist nature of our criminal system in 1959 is no longer true today. In the decades since *Bartkus* and *Abbate*, Congress has federalized[5] criminal law at a staggering rate, and a substantial swath of substantive "state" crime is "federal" crime as well. Indeed, "[w]ith legislation

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[5] As used in this brief, "federalization" refers specifically to enactment of federal legislation defining and punishing crimes that were already regulated by the states without preempting states' ability to prosecute the same conduct. Federalization thereby alters the allocation of responsibilities between the federal and state governments.

covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas." John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1125 (1995).

This sweeping federalization of criminal law has undermined the federalism benefits of the dual sovereignty doctrine as described in *Bartkus* and *Abbate*. Unrestrained by the need to balance its own interests against the states', Congress has felt free to expand federal criminal law well beyond the scope envisioned at the founding and even through the mid-twentieth century, and the states have been powerless to resist. The diminished federalism interests served by the dual sovereignty doctrine in the era of federalization no longer justify the substantial threat to individual liberty posed by the potential for routine dual prosecutions for historically state-regulated crimes.

To restore the individual liberty protections of the Double Jeopardy Clause and ensure proper allocation of responsibilities in the federalist system, this Court should overrule *Bartkus* and *Abbate* insofar as they permit separate prosecutions for the same offense by a state and the federal government.

A. The Historical Division Between State and Federal Crime Has Almost Entirely Eroded Over the Past Sixty Years.

This Court first enunciated the dual sovereignty doctrine in *Fox v. Ohio*, 46 U.S. 410 (1847). In *Fox*, this Court held that the states had concurrent jurisdiction over areas of criminal enforcement explicitly within federal jurisdiction, such as offenses against "the current coin of the United States," and are not preempted from prosecuting such crimes. *Id.* at 434-35. This Court also discussed the potential double jeopardy implications of such a rule, and concluded that the possibility of double punishment by dual sovereigns did not require preemption. *Id.* Reflecting the balance between the federal and state roles in criminal law enforcement of the era, this Court believed that dual prosecutions for the same conduct, if constitutionally permissible, would be exceedingly rare. *See id.* at 435 ("It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."). Such a belief was well-founded in an era when the enactment and enforcement of general criminal laws was the province of the states – an arrangement that, though somewhat weakened, persisted and prevailed up to and through this Court's last consideration of the dual sovereignty doctrine in 1959.

The Constitution granted Congress specific power to regulate only four categories of crime: counterfeiting of federal money and securities, U.S. Const. art. I, § 8, cl. 6; "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id.* cl. 10; crimes committed in the District of Columbia and on other federal land, *id.* cl. 17; and treason, *id.* art. III, § 3, cl. 2; *see also* Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 456 n.10 (1994). Before the Civil War, "the federal government's role in defining and enforcing criminal law was limited to the areas of unique national concern listed among its constitutionally enumerated powers." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 4 (1992). *Fox* was thus decided against a backdrop of highly limited federal role in criminal law enforcement, and one that was largely limited to subject matter of specific interest to the federal government.

Even where the federal government regulated and punished general crimes around the time *Fox* was decided, the scope of such enforcement was limited to areas of particular federal concern, either geographically or by virtue of the subject protected. For instance, "[i]n 1790, Congress made it a crime to commit murder, manslaughter, mayhem, or larceny 'within any fort, arsenal, dock-yard, magazine, or in any other place . . . under the sole and exclusive jurisdiction of the United States,'" and in 1792 "Congress made it a crime to rob a carrier of, or to steal, the mail of the United States." George C. Thomas III, *Islands in the*

Stream of History: An Institutional Archeology of Dual Sovereignty, 1 Ohio St. J. Crim. L. 345, 348 (2003). While state law surely would have covered crimes such as murder and robbery, "as long as those acts took place on federal bases or were directed at mail carriers, the states might very well have been indifferent" to the federal government's enforcement of these laws. *Id.*

It was not until 1872 that Congress first enacted criminal legislation covering a general crime already regulated by the states, when it passed the original mail fraud statute, the predecessor to the current 18 U.S.C. § 1341. *See* Braun, *Praying to False Sovereigns* at 4 & n.14. That statute "was the first significant instance of federal legislation in an area traditionally within the states' jurisdiction." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1165 n.18 (1995).

It was not until Prohibition and the Great Depression, however, that federalization of criminal law would start to encompass a substantial amount of conduct already within the states' sphere of regulation. New federal laws "includ[ed], for the first time, crimes of violence against private individuals and businesses, as well as the first federal firearms legislation." Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825, 833 (2000). The Eighteenth Amendment granted Congress and the states concurrent power to enforce Prohibition, *see* U.S. Const. amend. XVIII, an invitation that Congress took up with passage of the National Prohibition Act (popularly known as the Volstead Act), Pub. L. No. 66-66, 41 Stat. 305 (1919). Enforcement of the Volstead

Act was at issue when this Court reaffirmed the dual sovereignty doctrine in *United States v. Lanza*, 260 U.S. 377 (1922). There, this Court held that the states and the federal government "[e]ach may, without interference by the other, enact laws to secure prohibition," and that prosecution under state prohibition provisions did not bar subsequent prosecution under the Volstead Act. *Lanza*, 260 U.S. at 382.

Despite the ratification of the Twenty-First Amendment in 1933, the repeal of Prohibition did not provide impetus to reverse the trend in the federalization of criminal laws designed to protect general welfare. Prohibition had given rise to "a thriving organized crime underworld and a massive federal law enforcement apparatus, [and] the federal government continued the federalization of criminal law directed at combatting organized crime even after the repeal of the Eighteenth Amendment." Michael A. Simons, *Prosecutorial Discretion & Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 904-05 (2000). Even so, the federal government's role in general criminal enforcement was limited compared to the states, even in this initial period of expansion. Federalization remained "modest[] . . . through the middle part of the twentieth century." *Id.* at 905.

During the second half of the twentieth century,[6] however, the scope of federal criminal law exploded. *See* 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(d), at 75 n.297 (4th ed. 2015). In contrast to the narrow and explicit grants of authority to define and punish crime that underlay the antebellum federal criminal code, this rapid federalization of criminal law was accomplished largely through the use of Congress's power to regulate commerce, *see* U.S. Const. art. I, § 8, cl. 3, and used the approach that an "entire class of a given activity, be it manufacturing goods, loan sharking or drug dealing, by definition 'affects commerce'" and could therefore be the subject of federal criminal law. Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 Syracuse L. Rev. 1317, 1326 (2000). The rise of omnibus crime bills, which "can be hundreds of pages long and contain an infinite number of provisions defining new crimes," pushed federalization of the criminal law even further. *Id.* at 1327. Examples include "the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and

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[6] Exactly when the rapid expansion of federal criminal law began is somewhat contested. *See* 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(d), at 75 n.297 (4th ed. 2015). Regardless of whether the most explosive growth began in the 1960s, the 1980s, or somewhere in between, the massive federalization of criminal law could only be recognized as such after this Court's last direct consideration of the dual sovereignty doctrine in *Bartkus* and *Abbate*.

Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1145 (1995). As the criminal provisions of the federal code accumulated, any differentiation in the criminal law-enforcement role of the federal and state governments coordinately decreased.

The relative recency of the federalization of criminal law was captured in the report of an American Bar Association task force in 1998. The task force found that more than 40% of federal criminal provisions enacted since the Civil War – that is, the timeframe when the federal government began enacting general criminal statutes in realms traditionally governed by the states – had been enacted since 1970. Am. Bar Ass'n Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 7 (1998). This pace did not slow in the years that followed. Between 2000 and 2007, Congress enacted 452 new criminal laws, a rate of 57 new crimes per year. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Found. Legal Memo. at 1 (June 16, 2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf.

Because of this rapid expansion, "the bulk of federal criminal provisions now deal with conduct also subject to the states' general police powers." Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals*

and Mattress Tags to Overfederalization, 54 Am. U. L. Rev. 747, 754 (2005). And with respect to crimes historically policed by the states, "[d]ual federal-state criminal jurisdiction is now the rule rather than the exception." Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 997 (1995). In other words, the federal government has come to occupy much of the same role in criminal law enforcement as the states, eliding the historical distinction in the two sovereigns' interests in defining and prosecuting crime.

B. The Scope of Federal Criminal Law Has Become Practically Unknowable and Substantially Overlaps with State Criminal Law.

1. Federal criminal law has grown so substantially that accurately quantifying the number of federal criminal provisions is now all but impossible.

Efforts to count the number of federal criminal provisions have repeatedly been unsuccessful because of the stunning breadth of the federal criminal code. *See* Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, The Wall St. J. (July 23, 2011), https://on.wsj.com/2oKFAiM. The Justice Department made the first known effort to do so in the post-federalization era, and arrived at an estimate of 3,000 federal crimes created by statute. *Id.*

The American Bar Association made its own effort to count the number of federal criminal provisions in 1998. *See* American Bar Association Task Force on the Federalization of Criminal Law, *supra*. While it

ultimately did not succeed in arriving at an estimate of the size of the federal criminal code, it determined that the Justice department's decade-old conclusion of 3,000 was likely an underestimate of the number of federal criminal provisions. And this figure was exclusive of federal regulations that may be enforced criminally, which the ABA estimated to be approximately 10,000 by the end of 1996, and another estimate from 2008 placed at over 300,000. Baker, Jr., *Revisiting the Explosive Growth of Federal Criminal Law*, Heritage Found. Legal Memo. at 4.

By 2004, a new estimate placed the number of federal crimes at over 4,000.[7] John S. Baker, Jr., Federalist Soc'y for Law & Pub. Pol'y, *Measuring the Explosive Growth of Federal Crime Legislation*, 5 Engage 23, 23 (Oct. 1, 2004), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/BNvfVKmeVXx9uulnQbIvKotdpzytrAliLKLilhaX.pdf. An updated estimate by the same scholar in 2008 put the number of federal crimes created by statute at nearly 4500 – an increase of 1500 crimes in approximately 20 years, and of nearly 500 in just the last eight years of that period. Baker, *Revisiting the Explosive Growth of Federal Criminal Law*, at 1.

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[7] "Crimes," in this study, includes all provisions in the U.S. Code carrying a criminal penalty, regardless of whether they require a *mens rea* and therefore meet the common-law definition of "crime." Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, at 30.

2. The newly massive scope of federal criminal law is reflected in the federal courts' dockets. In 2003, Judge Guido Calabresi of the Second Circuit Court of Appeals estimated that appeals of convictions for federal crimes that also could have been prosecuted under state statutes accounted for thirty to fifty percent of the Second Circuit's overall appellate docket. *See* Guido Calabresi, *Federal and State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. Rev. 1293, 1297 (2003). This change, he said, was not salutary: "Apart from the dramatic change that such federalization effects in our federal system, making criminal law national rather than local causes great problems for the lower federal courts." *Id.* Other judges have echoed this concern. *See United States v. Wall*, 92 F.3d 1444, 1480 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) (stating "federal courts have been deluged with cases of late" in part because of "the federalization of state crimes by Congress," and stating that restraint in federalization would promote "not only state sovereignty . . . but the quality of justice in the federal courts."); *United States v. Crawford*, 982 F.2d 199, 206 (6th Cir. 1993) (Merritt, C.J., concurring) (citations omitted) ("Under the system of federalism devised by our founders and maintained until recently, federal prosecutors have not sought to displace the state systems of criminal justice in routine cases. This is no longer the case as routine street crime cases like this firearms case are brought in federal court in order to insure longer sentences under the sentencing guidelines and mandatory minimum sentencing laws . . . ."); *United States v. Hickman*, 179 F.3d 230, 242 (5th Cir. 1999) (en banc) (Higginbotham,

J., dissenting) ("With the increased federalization of traditional state crimes, the consequence of this acquiescence of the judiciary looms large. Not surprisingly, the increased overlapping of traditional state criminal statutes taxes the institution of Article III courts.").[8]

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[8] *See also United States v. Rutherford*, 236 F. App'x 835, 845 (3d Cir. 2007) (Ambro, J., concurring) ("By prosecuting Rutherford at the federal level, the Federal Government has effectively incapacitated a career criminal for the remainder of his adult life. To do so, however, it has overridden the default state criminal system in what looks like a classic state-law crime."); *United States v. Rrapi*, 175 F.3d 742, 756 (9th Cir. 1999) (Thomas, J., dissenting) (criticizing extension of federal bank robbery act to include off-premises ATMs as "an unwarranted and unnecessary judicial federalization of burglary – a crime well within the expertise of local law enforcement and the state courts."); *United States v. Snyder*, 136 F.3d 65, 70 (1st Cir. 1998) ("The continuing federalization of criminal law increases the frequency with which federal/state sentencing disparities occur."); *cf. United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (in light of federalization of criminal law, "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome."); *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[T]he recent expansion of federal criminal law jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well."); *United States v. Claiborne*, 92 F. Supp. 2d 503, 509 (E.D. Va. 2000), *aff'd*, 3 F. App'x 166 (4th Cir.

The federalization of criminal law is reflected in the number of criminal prosecutions pending in federal courts. In 1959, when *Bartkus* and *Abbate* were decided, there were 7,727 pending criminal cases in the federal courts at year-end. *See* Federal Judicial Center, Caseloads: Criminal Cases, 1870-2017, https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2017 (last accessed Sept. 10, 2018). Leaving aside outlier numbers of prosecutions in the Prohibition era (1920-1933),[9] the number of pending federal prosecutions at year's end continued to hover at or below 10,000 until the mid-1960s, when it began to rise steadily, reaching as many as 81,079 pending prosecutions at year's end 2010. *Id.* The number of pending federal prosecutions was 73,874 at the end of 2017 – a nearly tenfold increase from 1959. *Id.*

3. Nor does the federal criminal code in its modern iteration reflect a considered judgment about the circumstances and interests that should underlie a

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2001) ("Where the Commerce Clause has been broadly expanded and the line between federal and state crimes has been blurred to allow virtually every crime to be prosecuted in federal court under the auspice of 'affecting interstate commerce,' the rationale of the dual sovereignty doctrine is nullified and thus, the doctrine should be eliminated.")

[9] Between 1933 and 1934, the number of pending federal prosecutions dropped from 20,903 to 9,478. *See* Federal Judicial Center, Caseloads: Criminal Cases, 1870-2017, https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2017 (last accessed Sept. 10, 2018). The Twenty-First Amendment was ratified on December 5, 1933.

federal intrusion into traditional areas of state interest. Instead, "[t]he most distinctive feature of federal criminal law is that it had evolved piecemeal, with overlapping and often inconsistent statutes passed at different times in response to different national concerns." Jeffries, Jr. & Gleeson, *The Federalization of Organized Crime*, 46 Hastings L.J. at 1125.

The upshot of this scattershot and extensive federalization is that "many federal statutes duplicate state laws by prohibiting the same or similar conduct and enabling federal prosecutors to bring charges to protect interests no different than those that state laws address." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 654–55 (1997). The types of general crime now subject to federal as well as traditional state control include "drug trafficking, firearms offenses, certain forms of theft and embezzlement, arson, fraud committed by mail or telephone, bank fraud, robbery and extortion, fraudulent use of credit cards, and auto theft . . . ." *Id.*; *see also* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997) (listing as federalized state crimes "virtually all drug crimes, carjacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from an insurance company, and murder of a state official assisting a federal law enforcement agent."); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 512 n.9 (1994).

To be sure, "some duplicative federal crimes require proof of elements not present in the definition of state crimes, such as a connection to interstate commerce or use of the mail." Clymer, *Unequal Justice*, 70 S. Cal. L. Rev. at 655. But "these elements do not ensure that prosecutions are limited to cases involving unique or significant federal interests." *Id.* As long as these often minimal requirements to bring a state crime within federal jurisdiction are met, whether there is a federal "interest" is no limitation on the federal government's ability to prosecute quintessentially state-level crimes. There is no dispute that "federal prosecutors do employ duplicative federal statutes in cases that involve distinct federal interests, such as prosecutions of national and international fraud and drug conspiracies, but they also can (and often do) use them when no such federal interests are at stake." *Id.* at 655.

4. The federal offenses that overlap with state crimes, and criminalize conduct traditionally regulated by the states, are far too numerous to list. Nevertheless, the following examples illustrate the extent of federal occupation of the traditional state role. These are not all necessarily examples of the most common prosecutions for federal crimes, but rather demonstrate the nature of federalization.

Drug crimes. The overlap in federal and state criminal drug laws is well-documented. *See, e.g.*, Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. at 834, 839. The judiciary has long recognized the problems for both case administration and the balance of federal-state authority that mass

federalization of drug laws can cause. *See* Fed. Courts Study Comm., Judicial Conf. of the U.S., *Report of the Federal Courts Study Committee*, at 6 (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf (describing "deterioration in the indices of federal judicial performance" brought on by surge in trials from the "expanded federal effort to reduce drug trafficking"); *id.* at 15-16 (recommending demarcation between state and federal responsibilities in prosecuting drug trafficking in order to "conform to the principles of federalism."); *id.* at 35-36 (recommending federal prosecutors limit drug charges to those that "cannot or should not be prosecuted in the state courts," and noting that drug filings have fueled increase in federal criminal cases). While the largest trafficking cases may benefit from federal expertise, many low-level cases wind up the subject of federal prosecutions as well. *See* 1 LaFave et al., *Criminal Procedure* § 1.2(d), at 84 n.333 (quoting study stating that "some 36 percent of all sentenced drug offenders in the federal system could be classified as 'low-level drug law offenders'").

Gun crimes. Federal gun prosecutions similarly have risen precipitously since the early 1990s. The number of federal gun possession prosecutions doubled between 1991 and 2001, and nearly tripled between 1991 and 2006. David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 Cardozo L. Rev. 1427, 1441 (2011). In 1997, the city of Richmond, Virginia announced a policy known as "Project Exile," which mandated that all criminal firearm offenses would be prosecuted federally if a federal statute applied. *See* Daniel C. Richman,

"Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 379 (2001). This decision was made not because federal authorities had a particular interest in Richmond-based gun crimes, but specifically to obtain certain aspects of federal criminal law – such as pre-trial detention and longer sentences – in order to advance local interests. *Id.* at 379-80; *see also* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1311 n.163 (2005).

Carjacking. Under 18 U.S.C. § 2119, any person who takes from another person, by force and violence or by intimidation, a car that has been shipped or received in interstate or foreign commerce, with the intent to cause death or serious bodily harm, is guilty of a felony and subject to a fine and up to 15 years' imprisonment if no injury occurs, 25 years' if serious bodily injury occurs, and capital punishment if death occurs. *See* 18 U.S.C. § 2119. Such conduct is already covered under the criminal law of every state, as robbery and otherwise. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 708 & n.29 (2005); *see also* Mary C. Michenfelder, Note, *The Federal Carjacking Statute: To Be or Not to Be? An Analysis of the Propriety of 18 U.S.C. § 2119*, 39 St. Louis U. L.J. 1009, 1012 (1995) (arguing that "[c]arjacking is predominantly a state crime and states have proven successful in its prosecution and punishment," and that "[a]n examination of the crime of carjacking and its impact upon federal courts reveals no clear need for federal presence to combat this state crime.").

Hate crimes. Often passed in circumstances that rightly inspire outrage, hate crimes legislation also federalizes conduct that already is criminal under state law. For example, the Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. § 247, provides punishment for conduct such as kidnapping, sexual abuse, homicide, arson, and battery, each of which does not require a federal statute to be criminally prosecuted. *See* 18 U.S.C. § 247; *see also* 18 U.S.C. § 249 (punishing homicide, kidnapping, assault, or battery against a victim chosen on the basis of race, color, religion, national origin, gender, sexual orientation, gender identity, or disability). Despite the additional intent and interstate commerce elements of such statutes, the core conduct required for prosecution is an underlying crime traditionally falling within state prosecutorial powers. *Cf.* Scott Wallace, *Creative Coalitions: New Brakes on Congress's Drive to Federalize Crime*, 11 Fed. Sent'g Rep. 3, 1998 WL 1113332 (Vera Inst. Just.) (Dec. 1, 1998) (arguing insufficient consideration taken of state criminal laws during debate over proposed hate-crime bill in 1998). The potential for double punishment of such conduct implicates successive prosecution concerns, and calls into question the dual sovereignty doctrine. *See, e.g.*, Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 Stan. L. & Pol'y Rev. 251, 277 (2008) (noting, in discussion of the Hate Crimes Prevention Act of 2007, that "it is not easy to defend a doctrine that allows a defendant to be tried twice for what is in reality the same crime."); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics*,

Expressive Law, or Tool for Criminal Enforcement?, 80 B.U. L. Rev. 1227, 1275 (2000) (arguing that "cooperative federalism" model of criminal enforcement calls into question the dual sovereignty doctrine).

Murder-for-hire. The federal murder-for-hire statute, 18 U.S.C. § 1958(a), provides that "[w]hoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed *in violation of the laws of any State or the United States* as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so," may be punished with a series of escalating penalties up to the death penalty, depending on whether death resulted. 18 U.S.C. § 1958(a) (emphasis added). This statute explicitly piggybacks the ability to bring a federal prosecution on state laws already outlawing the same conduct, with an "interstate commerce" requirement appended to bring the statute within Congress's constitutional powers.

Because of the dual sovereignty doctrine, § 1958 provides a mechanism to obtain duplicative or inconsistent outcomes on a murder-for-hire charge, depending on the circumstances. The latter occurred in 2002, when a Texas man was convicted under § 1958 after he had been acquitted by a Texas jury for the same murder-for-hire plot. *See* David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 Wash. U. L.Q. 765, 768-69 (2003). The federal investigators assigned to the case were even able to "interview[] members of the

jury that acquitted [the defendant], questioning them as to what evidence and aspects of Texas's case led them to return the not-guilty verdict." *Id.* at 769.

C. The Expanding Scope of Federal Criminal Law Has Vitiated Federalism Protections Formerly Inherent In the Dual Sovereignty Doctrine.

The principal federalism benefit of the dual sovereignty doctrine is, in theory, to prevent a state or the federal government from preventing vindication of the others' unique interest in a prosecution by rushing to the courthouse or otherwise obtaining a less serious punishment than the other would consider sufficient. Historically, the Court's concern was for the "undesirable consequences" that might result if a state's criminal case prevented federal prosecution of activity that "impinge[s] more seriously on a federal interest than on a state interest," *Abbate*, 359 U.S. at 195, or a federal prosecution prevented vindication of a primarily state interest, *see Bartkus*, 359 U.S. at 137. In other words, this Court described the power of each "sovereign" to prosecute as an incident of our federalist system, bolstering the proper allocation of power between the federal government and the states.[10]

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[10] To be sure, this Court stated in *Heath v. Alabama* that "it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Government in our federalist system, that constitutes the basis for the dual sovereignty doctrine." 474 U.S. 82, 90–91 (1985) (holding successive prosecutions by separate states

This rationale may have been required before incorporation of the Fourteenth Amendment. And it may have been sensible when the federal government and the states largely prosecuted conduct within separate spheres, when any overlap in conduct covered by criminal prohibitions was likely incidental to the separate interests captured by the federal and state criminal prohibitions at issue. Indeed, "[t]he dual sovereignty doctrine was introduced and developed during eras of federalist sentiment characterized by strident assertions of state sovereignty." Dominic T. Holzhaus, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 Colum. L. Rev. 1697, 1705 (1986). As this Court's rationale in *Bartkus* and *Abbate* demonstrated, the doctrine addressed the concern that prosecution under a narrow area of federal interest would not fully vindicate the general police protection interests of the states, or that a general state prosecution would not take sufficient account of the narrow but important areas of federal interest. Even

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not barred by Double Jeopardy Clause). But while the states' and federal government's "independent sovereign authority" makes the dual sovereignty doctrine *possible*, it does not answer the question whether that independent sovereign authority requires the dual sovereignty doctrine between the federal government and the states, as a matter of constitutional interpretation of the Fifth Amendment. *Abbate* and *Bartkus* made quite clear that the dual sovereignty doctrine was justified, at least in the federal-state context, as a matter of the relationship between the sovereigns in our federalist system.

in the relatively rare instances where the same conduct was regulated by both federal and state authorities, the states and federal government could be understood to have sufficiently unique interests in enforcing their criminal prohibitions that, in those well-defined areas, the potential for dual prosecution did not substantially impair the individual liberty interests protected by the Double Jeopardy Clause. *See, e.g.*, *Lanza*, 260 U.S. at 381 (stating that Eighteenth Amendment's grant of power to Congress and reservation of power to states to enforce Prohibition was adopted to preserve extant state power, in order to "put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits.")

Now, however, "the dual sovereignty doctrine presents an inaccurate factual description of the relationship between the state and federal governments in the area of criminal law." Braun, *Praying to False Sovereigns*, 20 Am. J. Crim. L. at 10. This Court did not and could not have anticipated the expansive federalization of criminal law. And as federal criminal law has expanded into most areas that were historically the province of state criminal law, the individual liberty interest protected by the Double Jeopardy Clause, *see* Pet'r Br. 29-30, has been overwhelmed by the nearly universal potential for dual prosecution and punishment of historically state-regulated criminal behavior. The upshot is that, for most state crimes, the Double Jeopardy Clause is currently almost no guarantee against successive prosecution, contrary to the Clause's intended role and the liberty interests of citizens charged with a crime.

Indeed, both the federal government and the states pay a high federalism price under the dual sovereignty doctrine. Although justified as a boon to federalism, the dual sovereignty doctrine in its current operation privileges federal interests – or federal prosecution in areas that are properly understood as primarily being of state interest – at the expense of the states. Because federal criminal law was initially quite circumscribed, the expansion of federal criminal law has come at the expense of states' traditionally exclusive criminal jurisdictions. And while states remain free to punish behavior falling within these areas of interest, their ability to instill fixed or proportionate penalties has eroded in light of the ability of federal prosecutors to tack on additional penalties to conduct already criminalized by the states. Indeed, each of the ostensibly separate sovereigns suffers from the possibility that a successive, and cumulative, prosecution by the other will override its judgment about the appropriate punishment. "In sum, because the federal government need not preempt or displace state laws in passing comparable federal criminal laws, states have no grounds on which to challenge the growing scope of the federal law enforcement establishment." Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1180 (1995).

D. The Federalization of Crime Undermines the Practical Rationale for the Dual Sovereignty Doctrine.

Not only has federalization of criminal law undermined the federalism rationale for the dual sovereignty doctrine, but it has also exposed an increasing number of defendants to the very ills that the Double Jeopardy clause was designed to prevent: second attempts at unsuccessful prosecutions, and "multiple punishments for the same offense." *See Whalen v. United States*, 445 U.S. 684, 688 (1980) (quotation marks omitted); *Green v. United States*, 355 U.S. 184, 187 (1957). As the federalism benefits of the doctrine are eroded by the federal government's wholesale move into prosecution of general crimes based on the same interests as the states, the harm to individual defendants becomes all the more egregious as the possibility of dual prosecutions, once thought a rarity, becomes reality for more and more criminal defendants. Simply put, "[t]he federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions." Meese, III, *Big Brother on the Beat*, 1 Tex. Rev. L. & Pol. at 22.

With respect to the possibility of double punishment, "it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting); *see also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). And dual punishment can be particularly unfair for federal prosecution of traditionally state-regulated crimes, because federalization often "provides harsher

penalties than those available at the state level." Guerra, *The Myth of Dual Sovereignty*, 73 N.C. L. Rev. at 1167. For example, federal "law prescribes stiff mandatory minimum sentences and . . . maximum penalties for drug offenses. Under the Continuing Criminal Enterprise statute, a person convicted of any of the most serious drug felonies will receive a mandatory life sentence. The statute also authorizes the death penalty for an intentional killing committed in furtherance of a continuing criminal enterprise." *Id.* at 1167–68. With nearly every state crime now subject to potential double punishment because of mass federalization, these concerns have come to overwhelm whatever federalism benefit remains from the dual sovereignty doctrine.

An acquitted defendant's interest in not being subject to a second trial for the same conduct, meanwhile, is quintessential to the Double Jeopardy Clause's protections. As this Court has explained, "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) (citation omitted). Indeed, the very purpose of a successive prosecution may be to overcome an acquittal by a "separate" sovereign. *See, e.g.*, *United States v. Angleton*, 221 F. Supp. 2d 696, 700 (S.D. Tex. 2002) (permitting federal prosecution after FBI agents interviewed jurors in unsuccessful state prosecution), *aff'd*, 314 F.3d 767 (5th Cir. 2002). With federal statutes available to retry essentially any acquitted state defendant, the dual sovereignty doctrine greatly

diminishes the guarantees of the Double Jeopardy Clause.

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In light of the changed face of federal criminal law since the 1950s, the dual sovereignty doctrine no longer reflects sound federalist policy as it did when the dual sovereignty doctrine was last considered. Aligning the protections of the Double Jeopardy Clause with the practical reality of increasing federalization should encourage more judicious use of federal legislation and federal prosecutorial power when matters of primary importance to the states are at issue, and more accurately reflect the interest in federalism in the era of federalization of criminal law.

II. The Dual Sovereignty Doctrine Complicates Legislators' Task When Fixing Criminal Punishments.

This Court's dual sovereignty cases recognize the importance of sovereigns' ability to align their particular interests with the punishment they choose to impose for criminal conduct. Both *Bartkus* and *Abbate* describe the possibility that divergent federal and state interests may lead to vastly different punishments for similar conduct. *See Bartkus*, 359 U.S. at 137 ("It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States."); *Abbate*, 359 U.S. at 195 ("[A] disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest.").

However, when the federal government applies criminal sanctions to conduct already penalized by the states and that is historically the states' responsibility to regulate, the dual sovereignty doctrine upsets each sovereigns' ability to align criminal punishments with its particular interests. For instance, if a state decides particular conduct should be punishable by no more than 5 years' imprisonment, and the federal government decides that it should be punishable by no more than 7 years' imprisonment, because of the dual sovereignty doctrine, that conduct exposes an individual to 12 years' imprisonment – significantly more than either sovereign believed to be in its interest.

By the same token, the dual sovereignty doctrine frustrates legislators' efforts to craft appropriate criminal sanctions. Legislators already face uncertainty when only one sovereign is involved; regardless of the penalties the legislature prescribes, there is always a question about how aggressively the statute will be enforced. The dual sovereignty doctrine further complicates legislators' task. A legislator cannot be certain about how other sovereigns will address the same conduct under their laws, or the degree to which state and federal prosecutors will coordinate or defer to each when enforcing those laws. Thus both state and federal legislators are left with little ability to understand how severely particular conduct will be punished under the laws they write.

For example, a state legislator seeking to fully vindicate state interests, may find the state interest overwhelmed by federal legislation and prosecution

that would permit, through consecutive punishment, a far more substantial prison term than the state legislator would find appropriate. Conversely, a federal legislator who undershoots her preferred punishment to fully vindicate federal interests, based on the possibility that a cumulative state prosecution would, in tandem, satisfy without overshooting those interests, risks that a subsequent state prosecution never comes, thereby leaving the federal interest underprotected.

In this way, far from protecting the interest of each separate sovereign in our federalist system, the dual sovereignty doctrine can prevent either from being able to achieve their preferred ends. This concern is paramount to *amicus*, who is tasked with making these difficult judgments. It is critical that legislators be able to reasonably predict the effects of criminal legislation, and fostering such certainty is critical to a legislator's task of balancing individual liberty and governmental interests. The dual sovereignty doctrine, however, in conjunction with the massive federalization of criminal law, ensures that legislators will always be shooting at a moving target when attempting to fix appropriate criminal penalties.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court overrule its holdings in *Bartkus* and *Abbate* and put to rest the dual sovereignty exception to the Double Jeopardy Clause as applied to subsequent federal-state or state-federal prosecutions. The extensive federalization of criminal law has rendered ineffective the federalist underpinnings of the

dual sovereignty doctrine, and its persistence impairs full realization of the Double Jeopardy Clause's liberty protections.

Respectfully submitted,

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