

No. _____

In The Supreme Court of the United States

RODNEY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Alabama prosecuted Mr. Smith for possessing a pistol on November 18, 2015, after having been convicted of a disqualifying offense. He pleaded guilty and was sentenced to 81 months' imprisonment. Within a month of his sentencing in state court, the United States indicted Mr. Smith under 18 U.S.C. § 922(g)(1) for the same November 18, 2015, conduct.

The Double Jeopardy Clause of the Fifth Amendment states, “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb” The courts below allowed Mr. Smith’s federal prosecution to proceed, relying on a judicially created “dual-sovereignty carve-out from the Double Jeopardy Clause.” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016). Mr. Smith petitions for a writ of certiorari to address this question:

Should the Court overrule the dual-sovereignty allowance for separate state and federal prosecutions of the same offense?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Rodney Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The district court's order denying Mr. Smith's motion to dismiss and the district court's judgment are unpublished and are included in Appendix A.

The Eleventh Circuit's order summarily affirming the district court's judgment, *United States v. Smith*, No. 17-12305 (11th Cir. Jan. 10, 2018), is included in Appendix B.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit summarily affirmed Mr. Smith's conviction on January 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"

INTRODUCTION

The United States prosecuted Mr. Smith in federal court for the same offense that, weeks earlier in Alabama state court, resulted in his conviction and sentence to several years' imprisonment—possessing a firearm after having been convicted of a disqualifying offense. The federal courts below rejected Mr. Smith's claim of double jeopardy, relying on the judicially created “dual sovereignty doctrine,” which provides that successive state and federal prosecutions for the same conduct do not constitute double jeopardy because conduct that violates state and federal laws is not the same offense. The doctrine has long been criticized, and two members of the Court recently urged its reexamination in an appropriate case. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., joined by Thomas, J., concurring). Mr. Smith's case is such a case.

The dual-sovereignty doctrine is due to be overruled because it is incompatible with the text of the Double Jeopardy Clause of the Fifth Amendment, which provides unqualified protection against multiple prosecutions for a single offense. The Court has held for decades that the phrase “same offence,” as used in that provision, is defined by reference to “[t]he same-elements test, sometimes referred to as the ‘*Blockburger*’ test, [which] inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.” *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932)). And the Court has stated that it would be “embarrassing,”

and wrong, “to assert that the single term ‘same offence’ . . . has two different meanings—that what *is* the same offense is yet *not* the same offense.” *Id.* at 704, 113 S. Ct. at 2860.

Yet the dual-sovereignty doctrine *does* give the term “same offense” a different meaning where a state government and the federal government both prosecute. The doctrine abandons the *Blockburger* meaning and provides that “two prosecutions . . . are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws.” *Sanchez Valle*, 136 S. Ct. at 1870.

Mr. Smith’s case presents an appropriate vehicle for the Court to reexamine the soundness of the doctrine. He was prosecuted for purely local conduct, encompassed by a federal statute that did not exist when the Court adopted the dual-sovereignty doctrine in 1922 and that reflects the broad expansion of federal criminal laws since that time. The doctrine rests on unsound conceptions of the protection provided by the Bill of Rights and the constraints on federal police power, and allowing Mr. Smith to be prosecuted federally is incompatible with the Double Jeopardy Clause’s protection.

STATEMENT OF THE CASE

1. State Prosecution. In November 2015, the State of Alabama filed in the District Court of Jefferson County, Alabama, an Affidavit/Warrant alleging,

Rodney Dewayne Smith whose name is otherwise unknown to affiant, in said county did on or about November 18, 2015, after having been

convicted in this State or elsewhere of committing or attempting to commit a crime of violence, to wit: robbery first degree,¹ a crime of violence, did own, possess or have under control, a pistol, to-wit: a 45 caliber pistol, in violation of section 13A-11-72(a), of the Code of Alabama, against the peace and dignity of the State of Alabama

Doc. 22-1 at 6 (capitalization omitted). On June 2, 2016, Mr. Smith pleaded guilty to violating § 13A-11-72(a), “Certain persons forbidden to possess firearm,” as alleged in the Affidavit/Warrant. He was sentenced to 81 months’ imprisonment.

2. Federal Prosecution. Twenty-seven days after his conviction and sentence in Alabama state court, the United States indicted Mr. Smith in the Northern District of Alabama on one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that Mr. Smith had possessed a .45-caliber pistol in Jefferson County, Alabama, on November 18, 2015, and that he had prior felony convictions, including one for second-degree robbery in Jefferson County, Alabama, case number DC 11-9853.

3. Statement of the Facts. Mr. Smith and the government stipulated to facts set forth in a written plea agreement. The stipulated facts state that on November 18, 2015, Birmingham Police Department officers detained Mr. Smith after a foot chase. When officers retraced Mr. Smith’s route, they discovered a .45-caliber pistol.

4. Judgment of the District Court. Mr. Smith moved to dismiss the indictment, asserting that his prosecution violated the Double Jeopardy Clause of the

¹ Mr. Smith’s Presentence Investigation Report (“PSR”) in this case identifies no prior conviction for first-degree robbery, but it states that he was convicted of second-degree robbery in Jefferson County, Alabama, case number DC 11-9853 after having been charged originally with first-degree robbery.

Fifth Amendment because the State of Alabama previously prosecuted and convicted him for the same offense. The district court denied the motion, finding that “at present there’s no legal basis for granting [it].” Doc. 46 at 4. Mr. Smith entered a conditional guilty plea, reserving the right to appeal the denial of the motion to dismiss. The district court sentenced him to 51 months’ imprisonment to be followed by 36 months’ supervised release. Because his state sentence was for “relevant conduct” to the federal conviction under U.S.S.G. § 5G1.3, the district court ordered the federal sentence to run concurrently with it.

5. Judgment of Court of Appeals. Mr. Smith appealed to the Eleventh Circuit, arguing that his federal conviction subjected him to double jeopardy because he was convicted of the same offense in Alabama state court. The government moved for summary affirmance, asserting that Mr. Smith’s argument was contrary to this Court’s dual-sovereignty precedents.

The Eleventh Circuit summarily affirmed. The court stated, “The district court was, and we are, bound by Supreme Court precedent holding that state and federal prosecutions based on the same conduct do not violate double jeopardy, and Smith’s argument is therefore foreclosed.” *United States v. Smith*, No. 17-12305, slip op. at 2 (11th Cir. Jan. 10, 2018).

REASONS FOR GRANTING THE PETITION

The dual-sovereignty doctrine should be overruled because state and federal prosecutions for the same offense constitute double jeopardy and violate the Fifth Amendment.

The dual-sovereignty doctrine's allowance for state and federal prosecutions for a single offense gives governmental interests precedence over the Fifth Amendment's unqualified protection of individuals against double jeopardy. That result is incompatible with the text and purpose of the Double Jeopardy Clause. As Justice Ginsburg, joined by Justice Thomas, recently wrote, "[c]urrent 'separate sovereigns' doctrine hardly serves [the] objective" of the Double Jeopardy Clause and "bears fresh examination in an appropriate case." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Mr. Smith asks that this Court overrule its adoption of the dual-sovereignty doctrine, *see United States v. Lanza*, 260 U.S. 377, 382, 43 S. Ct. 141, 142–43 (1922), which rests on extinct legal principles, and reverse the judgments of the Eleventh Circuit and the district court.

A. Mr. Smith's federal prosecution violates the text and purpose of the Double Jeopardy Clause.

Mr. Smith's multiple prosecutions for a single act of possessing a pistol as a prohibited person is the very evil the Fifth Amendment's Double Jeopardy Clause seeks to prohibit. That provision establishes without equivocation, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb" The text contains no exception, nor does the principle on which it is based, which predates the Constitution: the "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." *Green*

v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957) (quoting 4 William Blackstone, Commentaries *335).

The Court, however, has held that “two prosecutions . . . are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws.” *Sanchez Valle*, 136 S. Ct. at 1870. That “dual-sovereignty carve-out from the Double Jeopardy Clause,” *id.*, has been said to rest on “a dangerous fiction”—“that, somehow, one act becomes two because two jurisdictions are involved.” *Bartkus v. Illinois*, 359 U.S. 121, 158, 79 S. Ct. 676, 699 (1959) (Black, J., dissenting). The text of the Fifth Amendment neither suggests nor supports that interpretation of the words “same offence.”

Just as the dual-sovereignty doctrine lacks textual support, it also conflicts with the purpose and function of the Double Jeopardy Clause. The Court has long recognized that the Bill of Rights’ protection against double jeopardy embodies an “underlying idea” that “is deeply ingrained in at least the Anglo-American system of jurisprudence”:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187–88, 78 S. Ct. at 223.

The weight of those considerations is the same whether multiple prosecutions are brought by multiple governments or one. As Justice Black wrote, “If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for

one.” *Bartkus*, 359 U.S. at 155, 79 S. Ct. at 697 (Black, J., dissenting). But whereas a second prosecution by the same government is recognized to be quintessential double jeopardy, *see Green*, 355 U.S. at 188, 78 S. Ct. at 224, the dual-sovereignty doctrine withholds the Fifth Amendment’s protection if a separate government brings the second prosecution. That result does not comport with the requirements of the Double Jeopardy Clause, which should have barred Mr. Smith’s second prosecution for the same offense.

B. By elevating governmental interests over protection of the individual, the dual-sovereignty doctrine conflicts with the Court’s consistent application of the Due Process Clause in other contexts.

1. The dual-sovereignty doctrine prioritizes government power.

The Double Jeopardy Clause’s protection of individual rights does not yield to a claim of a superior governmental interest. The presumed purpose of any criminal prosecution is to further a governmental interest, and any restriction on prosecutions frustrates those interests. *See Abbate v. United States*, 359 U.S. 187, 195, 79 S. Ct. 666, 671 (1959) (“The basic dilemma” that the dual-sovereignty doctrine prevents is that “if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.”). But the Double Jeopardy Clause limits the lengths to which a government may pursue its interests for a single offense, subjugating the governmental interest in law enforcement—no matter how compelling—to the protection of the accused. *See, e.g., Arizona v. Rumsey*, 467 U.S. 203, 207, 104 S. Ct. 2305, 2308 (1984) (second capital-sentencing hearing barred as

double jeopardy, though prior imposition of life sentence resulted from erroneous finding of no aggravating circumstance).

The dual-sovereignty doctrine circumvents that protection, giving priority to governments' pursuits of their respective interests. Even before this Court formally adopted the doctrine, it suggested that the power of each government to legislate avoided any "same offense" problem. A state could prosecute a man for harboring a fugitive slave even though the act also was punishable under federal law, the Court held, because "The question before this court is one of power—of power in the State to legislate in the particular manner." *Moore v. Illinois*, 55 U.S. 13, 15 (1852). That result did not risk "two punishments for one offence" even if the man were also prosecuted federally, because "one act constitutes two distinct offences against the several laws of distinct jurisdictions." *Id.* at 16. Governmental power, or authority, continues to be the purpose for which the dual-sovereignty doctrine exists. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 90, 106 S. Ct. 433, 438 (1985) (state and federal governments' "independent sovereign authority to prosecute . . . constitutes the basis for the dual sovereignty doctrine").

Sanchez Valle illustrates that fact well. Because Puerto Rico is not a "sovereign" for dual-sovereignty purposes, criminal acts in that territory are fully protected by the Double Jeopardy Clause, undiminished by any "dual-sovereignty carve-out," *Sanchez Valle*, 136 S. Ct. at 1870. Meanwhile, the states' superior constitutional status as separate sovereigns has the perverse effect of withholding full double-jeopardy protection for acts committed there. From a constitutional-rights

perspective, it makes no sense that the Bill of Rights would provide fuller protection in U.S. territories than in the states themselves. But that is one result of the dual-sovereignty doctrine's elevation of sovereign authority, to the derogation of protection of the individual.

This Court historically has offered two answers to claims that allowing a single act to be prosecuted under the laws of multiple governments is incompatible with the Double Jeopardy Clause. First, the Court long held that the Bill of Rights did not constrain the states: "The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, and the double jeopardy therein forbidden is [only] a second prosecution under authority of the federal government after a first trial for the same offense under the same authority." *United States v. Lanza*, 260 U.S. 377, 382, 43 S. Ct. 141, 142 (1922). Second, the Court expressed confidence that the Constitution's creation of distinct spheres of state and federal authority would guarantee that even where a single act is prosecuted by both sovereigns, the prosecutions would vindicate truly distinct interests. But intervening developments have undermined both of those justifications.

2. The dual-sovereignty doctrine is based on an outdated view of the Bill of Rights.

The dual-sovereignty doctrine was practically inevitable as long as the Double Jeopardy Clause was interpreted to impose no restriction on the states. Because that interpretation predominated when this Court decided *Lanza*, the dual-sovereignty doctrine required little further reflection at the time. After all, the foremost concern

of double jeopardy plainly is the number, not the sequence, of prosecutions. If the Double Jeopardy Clause limited only the federal government, then compliance simply meant ensuring that the federal prosecution was completed before the state prosecution began. Under that rubric, barring separate prosecutions on double-jeopardy grounds would only punish missteps, not meaningfully protect individuals on a principled basis.

Ten years after a divided Court in *Bartkus* reaffirmed *Lanza*, however, the Court held that the Due Process Clause of the Fourteenth Amendment requires “that the Double Jeopardy Clause of the Fifth Amendment [be] applicable to the States” *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 2058 (1969). No longer could the dual-sovereignty doctrine rest on the principle that the Double Jeopardy Clause constrains only the federal sovereign, nor that “the double jeopardy therein forbidden is [only] a second prosecution under authority of the federal government after a first trial for the same offense under the same authority.” *Lanza*, 260 U.S. at 382, 43 S. Ct. at 142. But the dual-sovereignty doctrine was entrenched by then.

3. Federal criminal laws overlap with state criminal laws to an extent not contemplated when the Court adopted the dual-sovereignty doctrine.

The Court’s assumption of separate state and federal criminal spheres has eroded gradually. The statute under which Mr. Smith was federally prosecuted for purely local possession of a firearm, 18 U.S.C. § 922, is part of a broader “federalization of crime” in recent decades. *United States v. McLean*, 802 F.3d 1228, 1230 (11th Cir. 2015). Like many federal drug-possession laws, § 922 did not exist when *Lanza* was decided. But after those laws were enacted, the federal prison

population increased 790 percent, from 24,640 to 219,298, between 1980 and its 2013 peak. *See* Federal Bureau of Prisons, “Federal Prison System Population Actuals,” *available at* https://www.bop.gov/about/statistics/raw_stats/BOP_pastPopulationTotals.pdf?v=1.1 (last visited Mar. 30, 2018). “Drug Offenses” and “Weapons, Explosives, [and] Arson” offenses are the two largest categories of crimes for which federal inmates are incarcerated, accounting for more 63 percent of the federal prison population. *BOP Statistics: Inmate Offenses*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Mar. 24, 2018).

The increasing federalization of crime simply was not foreseeable when the Court adopted the dual-sovereignty doctrine in 1922. The doctrine fledged in a time when dual state and federal prosecutions appeared to be an infrequent phenomenon confined to special cases, and the Court’s early dual-sovereignty decisions assumed that the doctrine would seldom be used. *Lanza*, for example, quoted the suggestion, made long before in *Fox v. Ohio*, 46 U.S. 410 (1847), that given “the benignant spirit in which . . . the state and federal [criminal-justice] systems are administered,” dual prosecutions could safely be expected only “in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.” *Lanza*, 260 U.S. at 383, 43 S. Ct. at 143 (quoting *Fox*, 46 U.S. at 435).

Lanza itself involved a seemingly rare instance of overlapping state and federal authority: the Constitution’s lone use of the word “concurrent.” 260 U.S. at 379, 43 S. Ct. at 141 (quoting U.S. Const. amend. XVIII, § 2) (Eighteenth Amendment gave “Congress and the several states . . . concurrent power to enforce” Prohibition). And

the prosecutions in *Abbate* resulted from the distinct interests of a state in protecting public safety and the federal government in protecting infrastructure of interstate communication. 359 U.S. at 187–88, 79 S. Ct. at 667 (defendant prosecuted for conspiring to dynamite telephone facilities).

As federal criminal enforcement has expanded ever more into matters once entrusted to the states, some federal authorities have recognized the need to safeguard against multiple prosecutions and punishments for the same conduct. For example, certain statutes defining federal crimes explicitly bar federal prosecution after a state conviction or acquittal. *See, e.g.*, 18 U.S.C. §§ 659 (theft or embezzlement of goods from common carrier), 660 (theft or embezzlement of funds from common carrier), 2101(c) (inciting a riot by communications medium), 2117 (breaking or entering transportation facility); 15 U.S.C. § 80a-36 (larceny or embezzlement from investment company); 49 U.S.C. § 80501(b) (damaging property traveling interstate). Likewise, Department of Justice policy recognizes that federal statutes may allow for “federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding.” *U.S. Attorneys’ Manual*, § 9-2.031(A), Dual and Successive Prosecution Policy (“*Petite Policy*”) (2009) (citing *Rinaldi v. United States*, 434 U.S. 22, 27, 98 S. Ct. 81, 84 (1977); *Petite v. United States*, 361 U.S. 529, 80 S. Ct. 450 (1960)). That policy generally “precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)” *Id.* But it permits exceptions with the authorization

of an Assistant Attorney General in certain circumstances. *Id.* at § 9-2.031(A), (D), (E).

Those laws and policies provide some checks on discretionary dual prosecutions like Mr. Smith's, but the judgments of political appointees and Congress's piecemeal provision of statutory limitations are no substitute for the protection of the Constitution. The Double Jeopardy Clause removes the option of multiple prosecutions from the reach of political passions. The dual-sovereignty doctrine, abetted by the increasing federalization of criminal law, undermines that restriction. *See generally* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1 (1997).

Developments since *Lanza* have exposed the error of the dual-sovereignty doctrine. That decision, like the doctrine itself, rests on understandings of the spheres occupied by the states and the nation, and the protection provided by the Constitution, that have since been shown to be inaccurate. The matter "bears fresh examination," *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring), and this is an appropriate case for the Court to reexamine the dual-sovereignty doctrine and to hold that Mr. Smith's federal prosecution violates the Double Jeopardy Clause.

C. *Stare decisis* does not justify retaining the dual-sovereignty doctrine.

Legal and factual developments since *Lanza* show not only why the dual-sovereignty doctrine is incompatible with the Double Jeopardy Clause, but also why *stare decisis* does not warrant retaining the doctrine. "[S]tare decisis is not an inexorable command," particularly when we are interpreting the Constitution"

Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 2336 (2000) (citations omitted) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 284 (1997)). While the Court “ha[s] always required a departure from precedent to be supported by some ‘special justification,’” it “ha[s] overruled . . . precedents when subsequent cases have undermined their doctrinal underpinnings . . .” *Id.* (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856, 116 S. Ct. 1793, 1801 (1996)). Overruling precedent may also be warranted where “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,” or where “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification . . .” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855, 112 S. Ct. 2791, 2808–09 (1992) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–174, 109 S. Ct. 2363, 2370–2371 (1989); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, 52 S. Ct. 443, 449 (1932) (Brandeis, J., dissenting)).

With regard to the dual-sovereignty doctrine, “*stare decisis* cannot possibly be controlling” because *Lanza* has had “its underpinnings eroded by subsequent decisions of this Court.” *See United States v. Gaudin*, 515 U.S. 506, 521, 115 S. Ct. 2310, 2319 (1995) (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480–481, 109 S. Ct. 1917, 1919–1920 (1989); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 92 S. Ct. 1562 (1972)). Crucial legal understandings that underlay *Lanza* have not survived the intervening decades, and crucial factual assumptions have been shown to be mistaken:

- The Double Jeopardy Clause is applicable to state and federal prosecutions alike. *Benton*, 395 U.S. at 787, 89 S. Ct. at 2058 (overruling *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149 (1937)).
- Congress’s power under the Commerce Clause extends to the criminalization of purely local possession of guns, *Scarborough v. United States*, 431 U.S. 563, 575–77, 97 S. Ct. 1963, 1969–70 (1977), and drugs, *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S. Ct. 2195, 2205–06 (2005).
- State and federal prosecutions of the same conduct are not confined to “instances of peculiar enormity, or where the public safety demand[s] extraordinary rigor,” *Lanza*, 260 U.S. at 383, 43 S. Ct. at 143 (quoting *Fox*, 46 U.S. at 435).

Under present circumstances, the dual-sovereignty doctrine allows precisely the kind of “second prosecution for the same offense” that the Double Jeopardy Clause exists to prevent. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977).

In light of the erosion of the dual-sovereignty doctrine’s underpinnings, overruling precedents recognizing the doctrine would bring the Court’s double-jeopardy jurisprudence into harmony with the law applying other provisions of the Bill of Rights. After the Court recognized that the Fourteenth Amendment’s incorporation of the Fourth Amendment “undermine[d] the logical foundation of” precedents allowing admission in federal proceedings of evidence illegally seized by state officials, the Court overruled those precedents. *Elkins v. United States*, 364 U.S. 206, 214, 223, 80 S. Ct. 1437, 1442, 1447 (1960). Likewise, after holding that the

Fourteenth Amendment’s incorporation of the Fifth Amendment’s privilege against compulsory self-incrimination invalidated “the fundamental assumption underlying” precedents allowing state and federal officials to compel witnesses’ self-incrimination in each other’s courts, this Court overruled those precedents as well. *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 79–80, 84 S. Ct. 1594, 1610 (1964).

In the same way, *Benton*’s recognition of the incorporation of the Double Jeopardy Clause, even by itself, warrants overruling the dual-sovereignty doctrine. And yet *Benton* is only one of the developments that has “undermined [the] doctrinal underpinnings” of dual sovereignty. *Dickerson*, 530 U.S. at 443, 120 S. Ct. at 2336. The expansion of federal criminal prosecutions for purely local acts that are also state crimes has demonstrated that the dual-sovereignty doctrine allows widespread double jeopardy, not just occasional overlap attributable to distinct law-enforcement interests. And the fine technicalities needed to distinguish a sovereign from a non-sovereign, and thereby to sustain the doctrine, bear no relation to any consideration underlying the Double Jeopardy Clause. *See Sanchez Valle*, 136 S. Ct. at 1870–71, 1874 (quoting *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 597, 96 S. Ct. 2264, 2279 (1976)) (“‘sovereignty’ in this context . . . overtly disregards common indicia of sovereignty” and is purely “historical, not functional,” so even though Puerto Rico enjoys “a measure of autonomy comparable to that possessed by the States” it is not a sovereign for double-jeopardy purposes).

The dual-sovereignty doctrine is incompatible with the text, purpose, and application of the Double Jeopardy Clause, a truth demonstrated by legal and factual

developments that “have robbed the old rule of significant . . . justification” and “have left the old rule no more than a remnant of abandoned doctrine” *Casey*, 505 U.S. at 855, 112 S. Ct. at 2808–09. *Stare decisis* cannot rescue the dual-sovereignty doctrine under those circumstances.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 10th day of April, 2018.

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