No. 19-7834

In the Supreme Court of the United States

TRAVIS SOTO,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a charge is dismissed before trial as part of a plea agreement, does jeopardy automatically attach?

LIST OF PARTIES

The Petitioner is Travis Soto.

The Respondent the State of Ohio.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Soto*, No. 2018-0416, Supreme Court of Ohio. Judgment entered Oct. 31, 2019.

2. *State v. Soto*, No. 12-17-05, Court of Appeals of Ohio for the Third Appellate District. Judgment entered Feb. 5, 2018.

3. *State v. Soto*, No. 2016 CR 00057, Court of Common Pleas for Putnam County, Ohio. Judgment entered Apr. 13, 2017.

4. *State v. Soto*, No. 2006 AP 00017, Court of Appeals of Ohio for the Third Appellate District. Judgment entered Nov. 3, 2006.

5. *State v. Soto*, No. 2006 CR 00019, Court of Common Pleas for Putnam County, Ohio. Judgment entered Sept. 5, 2006.

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INTRODUCTION

The Double Jeopardy Clause provides that "[n]o person shall … be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This language prohibits putting someone *twice* in jeopardy for the same offense. And that raises the following question: At what point in a criminal proceeding is someone put in jeopardy? For over a century, this Court has articulated rules and standards that help state and federal courts answer that question in any given case. But Soto claims that the courts are now divided over an answer to the question as it arises in a particular situation. According to him, courts are split regarding whether jeopardy attaches when the government dismisses a charge against a defendant, before trial, as part of a negotiated plea agreement. And Soto asks the Court to grant *certiorari* to resolve this supposed split.

The Court should decline to do so. The courts are not split on the question, at least not in any manner presented by this case. No court, state or federal, holds that jeopardy automatically attaches to a charge dismissed before trial, merely because it was dismissed as part of a negotiated plea agreement. And the *only* question this case presents is whether jeopardy attached *automatically*; Soto failed to incorporate the record of his first prosecution into the record of this case, so there is no way to know whether facts specific to his circumstances mean jeopardy attached. Thus, the only way to rule for Soto and reverse the Supreme Court of Ohio is to adopt the rule that Soto proposes, which is also a rule no other court has ever adopted: that jeopardy *always* attaches when a charged crime is dismissed as part of a negotiated plea agreement. Said differently, this case does not implicate the

split Soto has identified. Happily for Soto, this cases arises in an interlocutory posture. Pet.App.5. That means he can introduce evidence about the circumstances of his plea agreement on remand, and come back to this Court if and when his case more clearly implicates the question presented.

There is, to be sure, a split lurking in the background. In particular, courts are divided over whether jeopardy automatically attaches to a charge dismissed *with prejudice*. But that is not the issue in this case for the simple reason that the charge here was not dismissed with prejudice. At least, there is no evidence in the record, and Soto does not argue, that it was. And *even if* the charge was dismissed with prejudice and the issue were properly before this Court, the question presented *still* would not be worthy of this Court's attention. That is because the disagreement arises from one Tenth Circuit case that itself flouted earlier Tenth Circuit precedent and that the Tenth Circuit may not (and should not) regard as binding. One outlier decision from the Tenth Circuit does not give rise to the sort of circuit split that cries out for resolution—at least not in a petition, like this one, from outside the Tenth Circuit.

It is also true that some courts employ a fact-based approach in analyzing whether jeopardy attaches to a charge dismissed in a plea agreement and that others, including the court below, hold categorically that jeopardy *does not* attach. But even if the Court were inclined to resolve that disagreement, it should wait for a case where it could conceivably engage in that fact-based inquiry. It cannot do that here given the deficiencies in the record.

The Court should deny the petition for a writ of *certiorari*.

JURISDICTION

The Court has jurisdiction over this case under 28 U.S.C. § 1257(a). *See Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981); *accord Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986).

STATEMENT

Travis Soto killed his son, a toddler. App.3. At first, Soto told the police that he accidentally caused the boy's death while driving an ATV. The State's coroner accepted that claim, and the State later indicted Soto for child endangerment and involuntary manslaughter. In exchange for Soto's pleading guilty to the child-endangerment charge, the State agreed to drop the involuntary-manslaughter charge. App.3-4.

About a decade later, Soto voluntarily appeared at the Putnam County Sheriff's Office and came clean: his story about the ATV accident was a lie, and Soto in fact pummeled his son to death. App.4. After reviewing photos from the incident and the original coroner's report, a pediatric-abuse specialist determined that Soto was telling the truth this time. The specialist noted, for example, that the boy did not have injuries that one would expect from an ATV accident. The specialist concluded that Soto's earlier lies had led the coroner astray. The boy had died from multiple blunt force trauma inflicted by his father. App.4, 30.

So, once again, the State indicted Soto. This time, the State charged Soto with, among other offenses, murder and aggravated murder. Soto moved to dismiss both murder charges under the Double Jeopardy Clause. He argued that involun-

tary-manslaughter—the crime with which he had been charged in his first case but which the government dropped in the plea deal—was a lesser-included offense of murder and aggravated murder. As such, Soto argued, the State would "twice" be putting him "in jeopardy of life or limb" if it prosecuted him for the more serious charges. App.4.

The trial court denied the motion. As relevant here, it concluded that involuntary manslaughter was not the "same offense" as murder or aggravated murder under the "same elements" test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). App.5.

2. The state court of appeals reversed. A two-judge majority determined that involuntary manslaughter *was* a lesser-included offense of aggravated murder and murder. Because the charge had been dropped only in exchange for Soto's guilty plea, the majority reasoned, Soto had been in "jeopardy of being tried and convicted" of involuntary manslaughter. To the majority, "it seem[ed] that a subsequent prosecution would be barred in these circumstances." App.37. Judge Zimmerman dissented. He did not take a position on the *Blockburger* issue. He did not need to because, in his view, the involuntary-manslaughter charge had been dropped "*before jeopardy attached* (i.e. prior to swearing a jury or swearing in the first witness)." App.45. Accordingly, the new charges put Soto in jeopardy for the first time, not the second.

3. The Ohio Supreme Court reversed 6 to 1, agreeing with Judge Zimmerman's dissenting opinion in the process. App.11. Writing for the majority, Justice

DeWine explained that the Ohio Supreme Court had understood the bar on double jeopardy "to protect against … a second prosecution from the same offense after acquittal." Pet.App.6 (internal quotations omitted). But the State had not violated the prohibition on such prosecutions. "Because the involuntary-manslaughter charge was dismissed under [Soto's] plea agreement, Soto was never tried for involuntary manslaughter nor was he convicted of or punished for that crime." In holding otherwise, the court of appeals had "ignored the principle that a dismissal entered before jeopardy attaches does not function as an acquittal and does not prevent further prosecution for the offense." App.7.

Writing in dissent, Justice Donnelly concluded that jeopardy *had* attached to the involuntary-manslaughter charge. According to Justice Donnelly, "[b]ut for the state's agreement to drop the involuntary-manslaughter charge, Soto unquestionably faced the risk of a determination of guilt." Thus, in "[a]ccepting Soto's plea," it followed that "the trial court" had "conclusively determined" Soto's "criminal culpability for purposes of double jeopardy." App.20. Justice Donnelly also concluded that involuntary manslaughter was a lesser included offense of murder and aggravated murder. Accordingly, he would have held that double jeopardy barred the State from prosecuting Soto for murder or aggravated murder. App.24–25.

REASONS FOR DENYING THE WRIT

I. There is no circuit split on the question actually presented in this case.

The Court should deny the petition because neither the federal courts of appeals nor state supreme courts disagree on the question that is actually present-

ed in this case: whether jeopardy automatically attaches to the dismissal of a charge before trial merely because it was dismissed as part of a plea agreement.

A. No circuit holds that jeopardy attaches to a charge merely because it was dismissed pursuant to a plea agreement.

1. An "accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. 377, 393 (1975). But *when* does jeopardy "attach" in the first place? The general rule is that jeopardy attaches at the "point in criminal proceedings at which the constitutional purposes and policies are implicated." *Id*. at 388. Over the years, this Court has offered a substantial amount of guidance regarding what that means in particular contexts. The Court has long recognized, for example, that jeopardy attaches in a jury trial at the time that the jury is empaneled and sworn. *Kepner v. United States*, 195 U.S. 100, 128 (1904). And in bench trials, it attaches when the judge begins to hear evidence. *See Wade v. Hunter*, 336 U.S. 684, 688 (1949).

The Court has also addressed *pretrial* attachments of jeopardy. Thus, in *Serfass*, the Court held that jeopardy had not attached to a pretrial dismissal of an indictment even though the dismissal had relied on "evidentiary acts outside of the indictment, [that] could constitute a defense on the merits at trial." 420 U.S. at 390 (internal quotation omitted). The Court explained that jeopardy does not attach before a defendant is "put to trial before the trier of facts." *Id.* at 389 (internal quotation omitted). Under the circumstances in *Serfass*, "the District Court was without power to make any determination regarding petitioner's guilt or innocence." *Id.*

And that defeated the petitioner's claim because, "[w]ithout risk of a determination of guilt, jeopardy does not attach." *Id.* at 391–92.

2. *Serfass* provides the lodestar for analyzing whether jeopardy attaches to pretrial dismissals. This case deals with one of type of pretrial dismissal: the dismissal of a charge as part of a negotiated plea agreement. Does jeopardy attach to such a dismissal? Soto is right that this Court has "not yet resolved" that question. Pet.19–20. But he is wrong to say that the question has "produced a split amongst this country's federal and state judiciary." Pet.i. True, the circuits are split on whether "jeopardy … attach[e]s to charges dismissed *with prejudice* pursuant to a plea agreement." *United States v. Faulkner*, 793 F.3d 752, 758 (7th Cir. 2015) (emphasis added) (stating that "[t]his is an unsettled proposition"). But Soto has a problem: *that* question—whether jeopardy attaches to a charge dismissed *with prejudice*—is not presented in this case. Everyone agrees that the State dropped Soto's involuntary-manslaughter charge in exchange for his guilty plea on the child-endangerment charge. *See* Pet.5–6. But nobody knows much else about Soto's original plea. Soto explained why in his petition: "the record in this matter does not include the record of Soto's [earlier] prosecution." Pet.5 n.1. As a result, the record in this case does not contain Soto's plea agreement or the transcripts of the sentencing hearings from his first prosecution. App.11, 22 n.8. So no one can say whether the involuntary-manslaughter charge was dismissed with prejudice.

Even if the record of the earlier prosecution had been incorporated into this case, it likely would not say whether the charges were dismissed with prejudice.

After all, Soto contended below "that the judgment entries and transcripts from [his earlier prosecution] did not address whether the matter would be dismissed with or without prejudice." App.30. If anything, the "presumption of regularity" that attaches to all judicial proceedings in Ohio requires presuming that the charges were dismissed *without* prejudice. *State v. Raber*, 134 Ohio St. 3d 350, 355 (2012). As Judge Zimmerman explained in his dissent in the court of appeals, the presumption of regularity requires presuming that the State dismissed the charges by entering a *nolle prosequi*. App.45. (Zimmerman, J., dissenting). And a "*nolle prosequi* dismisses the charge without prejudice to reindictment." App.45 (citing *State v. Bonarrigo*, 62 Ohio St.2d 7, 12 (1980)).

All of this should doom Soto's petition. Because so little is known about the dismissal in this case, Soto can obtain relief only by asking this Court to adopt the following categorical rule: jeopardy *automatically* "attach[es] to … charges dismissed during execution of a negotiated plea agreement." Pet.19. But neither the federal courts of appeals nor state supreme courts are divided on this issue.

On the contrary, several courts (including the Ohio Supreme Court) categorically hold that jeopardy does *not* attach to such dismissals. *See, e.g.*, App.8; *United States v. Green*, 139 F.3d 1002, 1004 (4th Cir. 1998); *United States v. Nyhuis*, 8 F.3d 731, 735 n.2 (11th Cir. 1993); *United States v. Soto-Alvarez*, 958 F.2d 473, 482 n.7 (1st Cir. 1992). And at least one has held as much for a charge that was dismissed *with prejudice*. *See United States v. Garner,* 32 F.3d 1305, 1311 n.6 (8th Cir. 1994). Other courts apply more of a fact-based approach. These courts ask

"whether the defendant faced the risk of a determination of guilt" before deciding whether jeopardy attached to such a dismissal. *United States v. Dionisio*, 503 F.3d 78, 83 (2d Cir. 2007); *People v. Mezy*, 453 Mich. 269, 276 n.9; *United States v. Vaughan*, 715 F.2d 1373, 1376–77 (9th Cir. 1983). And only one circuit *arguably* (more on that below) holds that jeopardy *automatically* attaches to charges dismissed with prejudice. *See United States v. Mintz*, 16 F.3d 1101, 1103, 1106 (10th Cir. 1994).

Regardless of which approach is correct, *no* federal court of appeals or state supreme court holds that jeopardy attaches merely because a charge was dropped pursuant to a plea agreement. Yet that is the only issue that is truly before this Court, because the Court would need to adopt such a rule to grant Soto any relief. If the Court adopts a categorical rule against jeopardy's attachment, as the Ohio Supreme Court did below, Soto loses. If the Court adopts the fact-intensive approach, Soto still loses because the "record does not contain any facts surrounding the defendant-appellant's original plea." App.44 (Zimmerman, J., dissenting). Finally, if the Court holds that jeopardy automatically attaches to charges dismissed with prejudice, *see Mintz*, 16 F.3d at 1103, 1106, Soto loses because there is no evidence his charge *was* dismissed with prejudice. Soto thus seeks what amounts to an advisory opinion on the Double Jeopardy Clause's meaning.

B. The split concerning whether jeopardy attaches to charges dismissed *with prejudice* would not be worthy of this Court's attention even if this case presented it.

Soto realizes that, to have a realistic chance at obtaining a writ of *certiorari*, he needs to identify a circuit split on the question presented. In attempting to iden-

tify one, he points to the Tenth Circuit's decision in *Mintz*. *See* Pet.14–15. Because *Mintz* addressed only a question not presented here—whether jeopardy attaches to charges dismissed *with* prejudice, 16 F.3d at 1106—any split created by that decision is not presented here.

But assume for the sake of argument that Soto's charge was dismissed with prejudice. This case would still not implicate a genuine circuit split—at least not one worthy of this Court's attention. Why? Because *Mintz* is an outlier case; no other state supreme court or appellate court has embraced its reasoning, and even the Tenth Circuit can, and apparently does, treat *Mintz* as non-binding.

1. To understand *Mintz*'s outlier status, it is worth saying a bit about how the case came to be. In *Mintz*, the Tenth Circuit held that double jeopardy barred the government from prosecuting a defendant for a conspiracy. It determined that jeopardy had already attached when the government dismissed an earlier conspiracy charge (for the same conspiracy) against the defendants as part of a plea agreement. *Id.* at 1106. In reaching that decision, the court relied on a parenthetical cite to *United States v. Holland*, 956 F.2d 990 (10th Cir. 1992)—a case that did not even involve a plea agreement. *Mintz* noted that, in *Holland*, jeopardy had "attached to [a] conspiracy count which had been dismissed with prejudice." *Id.* at 1103. *Holland*, in concluding that jeopardy had attached to the dismissal of a charge with prejudice, had relied exclusively on *United States v. Derr*, 726 F.2d 617, 619 (10th Cir. 1984). *Holland*, 956 F.2d at 993. And *that* is the root of the problem. *Derr* had nothing to do with double-jeopardy principles. *Derr* held that it was "appropriate"

to dismiss a second indictment charging the defendant with the same criminal conduct that a first indictment had charged. 726 F.2d at 619. But *Derr* deemed the dismissal appropriate not because of double-jeopardy concerns, but because the dismissal constituted a proper application of the court's authority to prevent prosecutorial harassment of defendants, the primary purpose of Rule 48(a) of the Federal Rules of Criminal Procedure. *Id.* Nowhere did *Derr* hold (or even suggest) that jeopardy attaches to a charge dismissed with prejudice. Yet *Holland* relied on *Derr* for that exact proposition, and *Mintz* relied on *Holland* for the same.

Mintz's holding, far from adhering to Tenth Circuit precedented, flouted it. More than a decade before *Mintz* or *Holland*, the Tenth Circuit had read *Serfass* to mean "that the double jeopardy clause is not implicated until a proceeding commences before the trier of fact having jurisdiction to try the question of the guilt or innocence of the accused." *United States v. King*, 581 F.2d 800, 801 (10th Cir. 1978). Under this rule, double jeopardy did not attach based on charges dismissed "before the trier of fact commenced to take evidence." *Id.* at 801.

Because *Mintz* contradicts earlier binding precedent, later Tenth Circuit panels are free to disregard its holding. This follows from the well-established rule that "when faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom." *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996).

Later Tenth Circuit panels have cast serious doubt on whether *Mintz* remains good law. Take, for example, *United States v. Marchese*, 46 F.3d 1020 (10th

Cir. 1995). There, the district court had dismissed a thirty-four-count indictment upon the defendants' pre-trial motion. *Id.* at 1021. The defendants then argued that the government's appeal of that decision was "improper because any retrial would constitute a violation of the Double Jeopardy Clause." *Id.* at 1022. The Tenth Circuit rejected that argument, reasoning that the defendants were "not then, nor have they ever been, put to trial before the trier of facts." *Id.* (quoting *Serfass v. United States*, 420 U.S. 377, 389 (1975) (alterations omitted). "Without a risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* (quoting *Serfass*, 420 U.S. at 391–92). The court then explained that, "[i]n a nonjury trial," "jeopardy does not attach until the court begins to hear evidence from which a factual determination of guilt or innocence can be made." *Id.* (citing *Serfass*, 420 U.S. at 388). Because the defendants' motion "did not constitute the presentation of evidence for the purpose of determining guilt or innocence," the court held, "jeopardy did not attach" to the dismissal. *Id.* at 1023; *see also United States v. La Cock*, 366 F.3d 883, 887 n.8 (10th Cir. 2004) (holding that jeopardy had not attached to a dismissed charge before trial because "the district court could not have decided Defendant's innocence or guilt").

In light of these decisions holding that jeopardy does not attach until the court begins to hear evidence based on which guilt or innocence can be found, *Mintz* is best regarded "as an aberrance in Tenth Circuit law." *United States v. Dionisio*, 415 F. Supp. 2d 191, 197 (E.D.N.Y. 2006). An "aberrance" indeed. To date, no panel

of the Tenth Circuit (or any circuit, for that matter) has relied on *Mintz* to hold that jeopardy attaches to dismissals with prejudice. Like *Marchese* and *La Cock*, they have either ignored *Mintz*, or they have avoided the double-jeopardy issue altogether. In *United States v. Angilau*, 717 F.3d 781 (10th Cir. 2013), for example, the court acknowledged that "*Mintz* [] stated, without discussion," that jeopardy attaches to a pre-trial dismissal of a charge with prejudice. 717 F.3d at 787 n.1. The government even "conceded the point on appeal." *Id.* But the Tenth Circuit observed that "*Mintz* appear[ed] to be in tension with" other decisions of the court, "both earlier … and later." *Id.* (citing *King*, 581 F.2d 801 and *Marchese*, 46 F.3d at 1022–23). So, the court avoided *Mintz*, and determined that the defendant's claim failed for an independent reason "even assuming" *Mintz* applied. *Id.* Courts in the Second Circuit have gone further and outright rejected *Mintz*. *See*, *e.g.*, *United States v. Dionisio*, 415 F. Supp. 2d 191, 196–97 (E.D.N.Y. 2006); *United States v. Dionisio*, 503 F.3d 78, 88 n.11 (2d Cir. 2007).

The bottom line is this: *Mintz* does not create a circuit split over the question actually presented in this case because the charge here was not dismissed with prejudice. And even if the earlier charge had been dismissed with prejudice, resolving the *Mintz*-created split would not be a good use of this Court's time. *Mintz* is regarded with skepticism even within the Tenth Circuit, and is probably best understood as non-binding even within the circuit. Until the Tenth Circuit holds that *Mintz* is binding—or until some other federal court of appeals or state supreme court adopts *Mintz*'s rule—there is no split worthy of this Court's attention.

II. Soto and the *amici*'s policy argument is misguided.

Soto and the *amici* also offer a policy argument for why the Court should grant *certiorari* in this case. They recount familiar history about how the vast majority of convictions in this country eventually came to be disposed of by guilty pleas. Neither laments this trend, however. Soto acknowledges that, "[w]ithout guilty pleas, the criminal justice system could not function." Pet.30. Likewise, the *amici* acknowledge that "negotiated pleas properly administered can benefit all concerned." Am.Br.17 (internal quotation and alterations omitted).

But Soto argues that, without a rule like the kind he proposes, "there is no legal principle preventing reindictment of every crime ever dismissed during the execution of a plea agreement save for perhaps the statute of limitations." Pet.31. The *amici* make a similar point in arguing that, "without according a great measure of finality to plea agreements all the players within the system are at a disadvantage." Am.Br.17 (internal quotation and alterations omitted). The same concern drove the court of appeals' analysis below. The majority reasoned, for example, that "the State could routinely negotiate a plea agreement wherein it would dismiss the most serious charge and later, after a defendant served his sentence thinking the matter had concluded, re-indict, try, convict, and sentence him on the greater offense." App.38. And Justice Donnelly echoed the same sentiment in his dissent: "Under the majority's conclusion, no plea bargain is necessarily conclusive and any plea agreement can be negated with new information. To accept this position is to declare that a plea agreement is not worth the paper it is journalized on." App.24.

None of these concerns is justified. Each fails to appreciate that a plea agreement is essentially a contract. And the Supreme Court of Ohio succinctly explained what follows from the contractual nature of plea agreements: "Separate and apart from the constitutional protections provided by the double-jeopardy provisions, a plea agreement may bar further charges based on principles of contract law." App.9 (citing *State v. Dye*, 127 Ohio St.3d 357, 361 (2010)). "The underlying premise is that when a plea rests on a promise made by the prosecutor, that promise must be fulfilled." *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)). Thus, defendants can avoid being prosecuted again on a dismissed charge by demanding freedom from future charges as a condition of pleading guilty.

In any event, the resolution of this case must be guided by law, not policy. And, as explained above (and in the Supreme Court of Ohio's decision below), the law stands squarely against Travis Soto.

III. The Court should decline the *amici*'s invitation to resolve an issue neither pressed nor passed upon below.

The *amici* supporting Soto invite this Court to address an issue that was neither briefed by any of the parties nor passed on by any of the courts below. Essentially, the *amici* ask this Court to constitutionalize the doctrine of "merger of offenses" through the Double Jeopardy Clause of the Fifth Amendment and incorporate it against the States through the Fourteenth Amendment. Am.Br.3. The *amici* argue that, under the doctrine, the child-endangering charge Soto pleaded guilty to in his original indictment "should be considered … merged with the current homicide charges" against him. Am.Br.24. The *amici* say this follows from the fact that the

child-endangering charge forms "the basis of any theory of his current confinement." Am.Br.24–25. There are many problems with this argument, but the State will limit its discussion to one, which turns out to be dispositive: the issue was neither pressed nor passed upon below. This is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Absent a compelling reason, the Court should not review an issue that no party has briefed and no court addressed below. Here, there is no compelling reason to reach the *amici*'s issue.

CONCLUSION

The Court should deny Soto's petition for a writ of certiorari.

Respectfully submitted,

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