

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TERANCE MARTEZ GAMBLE, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 17-646  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
 )  
- - - - -

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 17-646, Gamble  
5 versus United States.

6 Mr. Chaiten.

7 ORAL ARGUMENT OF LOUIS A. CHAITEN

8 ON BEHALF OF THE PETITIONER

9 MR. CHAITEN: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 The separate sovereigns exception to  
12 the Double Jeopardy Clause is inconsistent with  
13 the text and original meaning of the Double  
14 Jeopardy Clause. There is no dispute that the  
15 text of the clause was understood to  
16 incorporate English practice. And there was no  
17 practice of intersovereign successive  
18 prosecutions in all of English history or in  
19 American history for the first century of this  
20 republic after their framing.

21 There's also a mountain of affirmative  
22 evidence that in England, even a foreign  
23 acquittal by a court of competent and current  
24 -- concurrent jurisdiction bars a subsequent  
25 prosecution in England for the -- for the

1 same offense.

2 JUSTICE ALITO: You think that's fair  
3 to --

4 CHIEF JUSTICE ROBERTS: Well, your --

5 JUSTICE ALITO: Excuse me, Chief.

6 CHIEF JUSTICE ROBERTS: Your leading  
7 authority is a foreign prosecution in England  
8 of the -- in the Spanish case. And the  
9 argument on the other side, which has some  
10 traction, I think, is that it would be quite  
11 unusual or surprising for the new American  
12 republic to look to Europe in a question like  
13 that because one concern, and it applies both  
14 in the English situation as well, is that it  
15 would be a significant intrusion on  
16 sovereignty, a particular concern of the new --  
17 new American republic, to allow a foreign  
18 prosecution to limit the authority of -- of the  
19 -- the United States.

20 It -- and, frankly, it would be  
21 surprising even in the -- the English case. I  
22 mean, the -- the relations between Spain and  
23 England were not exactly the -- the best. And  
24 why -- I mean, if it -- if it were a Spanish  
25 case involving the murder of Englishmen, would

1 the English court really have said, well, he  
2 was tried in Spain, so we're -- our hands are  
3 tied?

4 MR. CHAITEN: Well, there's  
5 overwhelming evidence, as I said, that that is  
6 the English rule, and there's no dispute that  
7 the framers were incorporating English practice  
8 into the Double Jeopardy Clause. And --

9 JUSTICE GINSBURG: Any -- any country  
10 in the world?

11 MR. CHAITEN: Any country in the  
12 world?

13 JUSTICE GINSBURG: Yes. If there's --

14 MR. CHAITEN: Well, it -- I'm sorry.

15 JUSTICE GINSBURG: If there's a -- a  
16 prior criminal proceeding, either an acquittal  
17 or a conviction, any country in the world, that  
18 would count?

19 MR. CHAITEN: So -- so there are a few  
20 requirements. One, it would have to be the  
21 same offense, so you would have to meet the  
22 English standard, which is, in fact, the  
23 standard of this Court today.

24 JUSTICE BREYER: It isn't clear. I  
25 mean, I thought when I read your brief, well,

1 you're absolutely right. But then I read the  
2 other side of the practice.

3 (Laughter.)

4 JUSTICE BREYER: And now I'm not going  
5 to say you're absolutely wrong, but three times  
6 the Court has considered your arguments, looked  
7 at those cases, the English case, Hutchinson,  
8 no report. Later cases refer to it. There was  
9 a complexity involving a special commission  
10 designed to try people who had committed murder  
11 outside the country. The King's Bench didn't  
12 have authority. The King's Bench referred it  
13 to that commission, and that commission said:  
14 Well, he was acquitted in Portugal and,  
15 therefore, we will not try him in this special  
16 commission designed to, dah-dah.

17 And does that reflect a principle of  
18 law? Does it reflect something about the  
19 commission? Does it reflect something about  
20 the individual circumstances? So far, it seems  
21 to me, no one has any idea. If you read Gage,  
22 you'll discover the other side's argument. And  
23 the same is true of the early cases. I won't  
24 go through all of them here.

25 MR. CHAITEN: So --

1 JUSTICE BREYER: But the early cases,  
2 we find some --

3 MR. CHAITEN: So --

4 JUSTICE BREYER: -- you know, that  
5 support you and some that don't. What do we  
6 do?

7 MR. CHAITEN: So I do think they all  
8 support us.

9 JUSTICE BREYER: They all support you?

10 MR. CHAITEN: Yes, I do believe they  
11 all support us. And the one -- the one case  
12 you mentioned that is -- potentially leans the  
13 other way is Gage, but it's a civil case and  
14 it's analogizing to Hutchinson for the purposes  
15 of -- of -- of how -- a rule about recognition  
16 of civil judgments. And there is no ancient  
17 rule rooted in Talmud and Roman law and Greek  
18 law and canon law and ancient English common  
19 law to have your civil judgments recognized by  
20 another court.

21 JUSTICE BREYER: No, I -- I -- I  
22 accept that.

23 MR. CHAITEN: There is not to be  
24 prosecuted by -- for -- for a successive  
25 prosecution. And the point is not --



1           JUSTICE GINSBURG: May I ask you to  
2 just step back so you can complete your answer  
3 to my question? I had asked you any country in  
4 the world, the judgment from any country in the  
5 world.

6           MR. CHAITEN: So -- so, if you're  
7 asking me what the English rule was, I would  
8 say yes, that is, but there are three important  
9 qualifications on the rule. First, it -- it  
10 does have to be the same offense, so there is  
11 no dispute in -- in -- in the case of the  
12 murder in Portugal and the trial in England or  
13 the murder in -- in the Cape of Good Hope and  
14 the trial in England that those were the same  
15 offense. They were both murder.

16           But sometimes that's a little more  
17 complicated because it has to be the same  
18 elements. That's the -- that's the meaning of  
19 "same offense" under this Court's jurisprudence  
20 and under the original meaning.

21           Secondly, and -- and this is very  
22 important, the second court has to recognize  
23 the competent and concurrent -- concurrent  
24 jurisdiction of the first court. That --  
25 that's part of the English rule.

1           And there's no dispute -- whatever may  
2           arise in the international context, there's no  
3           dispute that Alabama and the federal government  
4           have competent and concurrent jurisdiction over  
5           the offense of being a felon in possession.

6           So, at least in this country, the  
7           answer seems pretty clear, because the rule was  
8           a concurrent jurisdiction rule, and there's no  
9           doubt that there is concurrent jurisdiction. I  
10          don't think the idea, even at the framing, that  
11          you would recognize a -- an acquittal in  
12          another country as a bar to prosecution could  
13          possibly be so shocking because it was  
14          mentioned in Furlong. It was discussed in  
15          Furlong.

16                 JUSTICE GINSBURG: How -- how -- how  
17          --

18                 MR. CHAITEN: And we only --

19                 JUSTICE ALITO: What's the third --  
20          what's the third requirement?

21                 MR. CHAITEN: The third requirement is  
22          that it can't be a sham prosecution or a  
23          collusive prosecution. But then you're never  
24          really --

25                 JUSTICE ALITO: All right, it can't be

1 a sham. So, today, let's say a group of  
2 American tourists are murdered by terrorists in  
3 a foreign country, and there is a prosecution  
4 in the foreign country for murder, the same  
5 offense in a court of competent jurisdiction  
6 there, and it's not a sham prosecution, but  
7 it's a fairly inept prosecution, lack of  
8 prosecutorial investigative resources in a poor  
9 country, and it results in an acquittal or a  
10 conviction with a very light sentence.

11 And your position is that there could  
12 not be a prosecution here in the United States  
13 under the statute enacted by Congress to permit  
14 the prosecution of individuals who murder  
15 Americans abroad?

16 MR. CHAITEN: So -- so let me address  
17 that in a few different ways. One, the  
18 original understanding was that it applied  
19 between countries.

20 JUSTICE ALITO: Yeah, well --

21 MR. CHAITEN: And that --

22 JUSTICE ALITO: -- could you just  
23 answer whether that's correct or not? And if  
24 it's not correct, why is it not correct?

25 MR. CHAITEN: Under the original

1 understanding, it would be up to the U.S. court  
2 to determine whether it's going to recognize  
3 the competent and concurrent jurisdiction of  
4 that other country.

5 What I'm saying is, in the case of  
6 federal and state relations, there is no  
7 dispute about that.

8 JUSTICE ALITO: But I really don't  
9 think you're --

10 MR. CHAITEN: There's binding law on  
11 that.

12 JUSTICE ALITO: I mean, I don't think  
13 this is in -- a surprise question or a  
14 particularly difficult one. It is a court of  
15 competent jurisdiction. It is the court that,  
16 in that case -- in that country has  
17 jurisdiction to try offenses for murder. No  
18 question about that.

19 MR. CHAITEN: Well, it's not --

20 JUSTICE ALITO: So your answer is?  
21 Can they be prosecuted here or can they not be  
22 prosecuted here?

23 MR. CHAITEN: The -- the -- the  
24 answer, it's not just that the particular court  
25 has competent jurisdiction; it's that we're

1 going to recognize the jurisdiction of the  
2 other country over the crime. This was the  
3 point that Furlong was making about the -- the  
4 murder of a British subject by a British  
5 subject on a British ship, and Furlong says  
6 it's pretty doubtful that England would  
7 actually recognize a U.S. acquittal in that  
8 case because England would say you have no  
9 basis for concurrent jurisdiction over that  
10 crime.

11 So that's the determination the U.S.  
12 court would make. You don't have to reach that  
13 question in this case. Our point is that if  
14 that was the rule at the -- at the -- if that  
15 was the original understanding at the time of  
16 the framing, if the rule --

17 JUSTICE KAVANAUGH: Well, we do have  
18 to reach -- we do have to reach that question  
19 because your position logically would extend to  
20 Justice Alito's hypothetical, and if  
21 prosecution is part of the national security  
22 efforts of the United States, federal  
23 prosecution, then your position would  
24 substantially hamper those national security  
25 efforts.

1           MR. CHAITEN: So -- so I'm saying the  
2 reason you don't have to reach the questions --  
3 obviously, this is a case involving an Alabama  
4 crime and -- and -- and a federal crime, and  
5 there is --

6           JUSTICE KAVANAUGH: But the logic of  
7 your position --

8           MR. CHAITEN: The logic of our  
9 position, though -- but -- but the point is  
10 whatever -- whatever the court's ruling in that  
11 case, were it ever to come up, which I think is  
12 exceedingly unlikely, this is a different case  
13 because it's so much stronger.

14           If the -- if the original  
15 understanding was the rule applied between  
16 foreign countries, then, a fortiori, it should  
17 apply between a state and federal government  
18 that --

19           JUSTICE ALITO: Yeah, a fortiori, but  
20 -- but your -- your -- you say -- I -- I wonder  
21 whether you have perhaps exaggerated in saying  
22 there's a mountain of support for your  
23 position. But your main support is a -- a  
24 rumor of a decision involving a prior  
25 prosecution in Portugal and then the

1 possibility of a subsequent prosecution in  
2 England. So it's a foreign prosecution.

3 MR. CHAITEN: It --

4 JUSTICE ALITO: So it's true, that's  
5 not what's involved here, but your -- your  
6 argument is based on foreign prosecutions.

7 MR. CHAITEN: The original  
8 understanding was based on foreign  
9 prosecutions. The point is, on the question  
10 presented here, a fortiori, it should apply  
11 between federal and state government. There is  
12 a principled basis for limiting this to  
13 governments bound by the Double Jeopardy Clause  
14 if the Court --

15 JUSTICE KAGAN: But --

16 MR. CHAITEN: -- wanted to do that.

17 JUSTICE KAGAN: -- but, Mr. Chaiten, I  
18 think --

19 MR. CHAITEN: It did that in --

20 JUSTICE KAGAN: -- I think the point  
21 is that you're asking us to write an opinion  
22 which is based on this original understanding,  
23 and the original understanding, as you put it,  
24 applies between foreign countries and, a  
25 fortiori, it must be that our decision would

1 apply between foreign countries.

2 MR. CHAITEN: The -- the original  
3 understanding is it would.

4 JUSTICE KAGAN: And that's what --

5 MR. CHAITEN: In Murphy v. Waterfront  
6 Commission --

7 JUSTICE KAGAN: That's -- that's --  
8 that's what your brief was all about. That's  
9 what you're asking us to say, that the original  
10 understanding was that there would be no double  
11 jeopardy bar between different sovereigns when  
12 those sovereigns are foreign countries. So how  
13 could we avoid that consequence?

14 MR. CHAITEN: Well, first of all, I'm  
15 not sure the case is ever going to arise, but  
16 -- and this is State of Alabama and federal  
17 government and its undisputed concurrent  
18 jurisdiction. The rule is a rule of concurrent  
19 jurisdiction. So it's when is the U.S. going  
20 to recognize the concurrent jurisdiction of  
21 another country?

22 And, again, I want -- just wanted to  
23 say that Murphy v. Waterfront Commission is a  
24 case where the court held that the  
25 self-incrimination privilege applies



1 cross-jurisdictionally. The Court subsequently  
2 limited that to parties bound by the Double  
3 Jeopardy Clause.

4 So there is a principled way of doing  
5 this if the Court ever gets such a case and  
6 wants to do that. And I would like to  
7 emphasize that it is -- it would be -- no one  
8 in any of these briefs has pointed to a pattern  
9 of intersovereign successive prosecutions  
10 between nations that is going to be disrupted  
11 by our rule, even if the Court were to suggest  
12 that it's -- it would also apply between  
13 foreign nations.

14 JUSTICE KAGAN: Well, can I ask you a  
15 different --

16 CHIEF JUSTICE ROBERTS: We've been  
17 through -- we've been through all this in  
18 *Bartkus*, right?

19 MR. CHAITEN: I don't think the Court  
20 has been -- ever given this question a full and  
21 fair opportunity, certainly post-incorporation,  
22 and it's important to understand how the  
23 holding of this Court arose.

24 There was, of course, a suggestion in  
25 *Fox v. Ohio* in 1847 that there might be a

1 separate sovereigns exception. It was based on  
2 a non-incorporation rationale, but no one  
3 actually -- it's dicta. It's the purest dicta,  
4 because there were no intersovereign successive  
5 prosecutions, not only not in that case but no  
6 practice of them.

7 The first time this Court had a chance  
8 to actually hold whether that's permissible was  
9 Lanza. And I think it's worth reading the  
10 respondent's brief in -- in Lanza, Lanza's  
11 brief. There was no representation, the  
12 position we're presenting here. The brief was  
13 incoherent, and the Court said I think what  
14 counsel is arguing is that the separate  
15 sovereigns exception doesn't apply in the  
16 particular context of the Eighteenth Amendment,  
17 given the concurrent powers of the state and  
18 the federal government.

19 CHIEF JUSTICE ROBERTS: None of these  
20 concerns were presented in Bartkus, though,  
21 right?

22 MR. CHAITEN: Excuse me?

23 CHIEF JUSTICE ROBERTS: None of the  
24 concerns you've been talking about there were  
25 presented in Bartkus?

1           MR. CHAITEN: So -- so just -- Bartkus  
2 was decided at the same time as Abbate. Abbate  
3 is the case that answers this particular  
4 question. Abbate remarkably says we're just  
5 going to adhere to Lanza because none of the  
6 issues that are presented today are different  
7 from what was presented in Lanza, which is a  
8 really remarkable statement.

9           And Abbate is also pre-incorporation.  
10 Bartkus obviously is a due process case under  
11 the burden of Palko v. Connecticut, and the --  
12 the evidence that we're presenting here was not  
13 fully presented in Bartkus. The Court made --

14           JUSTICE KAGAN: Could you say a little  
15 bit more about why you think incorporation or  
16 the lack of incorporation had anything to do  
17 with this question?

18           MR. CHAITEN: Yes. So Fox v. Ohio, it  
19 -- its lead rationale is non-incorporation.  
20 And, I mean, I think it's wrong, but it clearly  
21 said that and then Lanza picked it up and then  
22 Abbate picked it up. And I think what the  
23 Court --

24           JUSTICE KAGAN: I mean, there is that  
25 reference in Fox, but it honestly makes no

1 sense that incorporation would be the basis of  
2 the doctrine, because if incorporation were the  
3 basis of the doctrine, you would have a  
4 doctrine that only cuts one way.

5 In other words, it would -- it would  
6 -- the Court would have held that the federal  
7 government can't prosecute an individual for  
8 the same offense after a state prosecution, but  
9 not the other way around. So the fact that  
10 there's not a one-way ratchet but that, in  
11 fact, it's a symmetrical rule suggests that  
12 incorporation has nothing to do with it at all.

13 MR. CHAITEN: I think what the Court  
14 was getting at was the -- I think the -- it was  
15 the -- the baronial logic of it was that  
16 "offense" must mean federal offense because the  
17 Double Jeopardy Clause only applies to the  
18 federal government.

19 That's what this Court was getting at.  
20 That's what was picked up in Abbate and Lanza,  
21 and that's what's no longer true. So as a --  
22 as a pure -- I don't think it was a legitimate  
23 rationale to begin with because it conflates  
24 two things that are different, to which  
25 government does the clause apply and what prior

1 offenses count for double jeopardy purposes.  
2 That was the rationale.

3 It's interesting, I don't know that  
4 the government is defending that rationale.  
5 They -- they -- they completely ignore the  
6 non-incorporation rationale.

7 JUSTICE KAGAN: I -- I guess what  
8 strikes me, Mr. Chaiten, is that you can say,  
9 well, you know, this case was a little bit  
10 different. In this case, the arguments weren't  
11 properly presented. In this case, there's  
12 something else that's the matter. But, you  
13 know, this is an 170-year-old rule, and it's an  
14 170-year-old rule that's been relied on by  
15 close on 30 justices have voted at one time or  
16 another specifically for this rule, not an  
17 application of this -- but for this rule.

18 And, you know, part of what stare  
19 decisis is, is a kind of doctrine of humility  
20 where we say we are really uncomfortable  
21 throwing over 170-year-old rules that 30  
22 justices have approved just because we think we  
23 can kind of do it better.

24 MR. CHAITEN: Well, I mean, I disagree  
25 with the 170 years because, again, it's -- it's

1 dicta and dicta in Fox v. Ohio, and I think it  
2 is important to look at the rationale when the  
3 Court finally had an opportunity to decide this  
4 and make a holding on it, and that is Lanza.

5 And there's -- nothing resembling an  
6 argument for the original understanding of the  
7 Double Jeopardy Clause was presented in Lanza.  
8 That was picked up in Abbate. And all these  
9 cases are pre-incorporation. The Court has  
10 held repeatedly that jurisprudential changes  
11 are a reason to revisit a doctrine and  
12 incorporate --

13 JUSTICE SOTOMAYOR: But why is the  
14 doctrine wrong? The -- given the uniqueness of  
15 our system of government, because there wasn't  
16 and isn't a comparable system in England at the  
17 time, there were not separate sovereigns, there  
18 was one sovereign, England. And one of the  
19 cases you rely on involved Wales, and so the  
20 application of the rule there makes absolute  
21 sense in that context.

22 But the logic of all of our cases  
23 relied on a simple theory of -- of -- of what  
24 the sovereignty between the states and the --  
25 and the federal government are. And you

1 haven't really explained why that logic is not  
2 sensical.

3 MR. CHAITEN: Well, the logic of the  
4 English rule as reported in numerous treatises  
5 from the early 18th Century through the 20th  
6 Century, it's still the rule today, is that  
7 where there's a court of concurrent  
8 jurisdiction, even if it's another government  
9 that has concurrent jurisdiction, then an  
10 acquittal there bars a subsequent prosecution.

11 JUSTICE SOTOMAYOR: Do you have --

12 MR. CHAITEN: And the logic for --

13 JUSTICE SOTOMAYOR: -- do you have any  
14 current case that describes the English rule  
15 that way?

16 MR. CHAITEN: Current case?

17 JUSTICE SOTOMAYOR: A current case,  
18 something --

19 MR. CHAITEN: So I refer the Court to  
20 two things. One, the famous Professor Grant  
21 article, Successive Prosecutions, tracks the  
22 law of England and the British empire  
23 through -- through the -- into the latter half  
24 of the 20th Century. There was a case in 1985,  
25 Regina v. Thomas, in which the Court describes

1 and applies the rule.

2 It -- I don't think the idea that this  
3 is not the English rule is a serious argument.

4 I -- I --

5 JUSTICE GINSBURG: Do you know how  
6 this rule applies within the European Union?

7 MR. CHAITEN: It -- it applies the  
8 same way that we are urging here.

9 JUSTICE BREYER: What --

10 MR. CHAITEN: That is my  
11 understanding.

12 JUSTICE BREYER: The question, I  
13 thought, perhaps Justice Kagan and Justice  
14 Ginsburg and Justice Sotomayor are asking, as I  
15 understand it, in any case I'm asking it, I --  
16 I -- I have spent a certain amount of time in  
17 these old cases. I think that Bartkus in this  
18 Court says there were three with you, three  
19 against you, two undecided. I don't find it  
20 quite as clear, but I'll go back and look at  
21 them again.

22 But suppose you're right. Maybe  
23 Marbury versus Madison was wrong. Maybe there  
24 are mis-cites in all kinds of things. Look at  
25 the door we're opening up. And here you've



1 read the briefs. There are -- there are briefs  
2 that say remember the civil rights world where  
3 people were, with victims of a different race,  
4 simply killing them or worse, and the state  
5 would just, ah, don't worry, they'll never  
6 convict, and they didn't.

7 Or think of the brief here with the  
8 Indian tribes. We're saying that we need this  
9 kind of thing for abuse of women. And think of  
10 the case of prohibition. And think of the  
11 cases that you've seen.

12 Now what I looked for in your briefs  
13 which I haven't found yet but for the military  
14 is, is it really the case or not that, as a  
15 practical matter, if you go back the last 10  
16 years or five or whatever it is, you found a  
17 whole lot of cases where people were prosecuted  
18 twice by different sovereigns for what was the  
19 same thing. Because I didn't see them listed  
20 here in any brief but for the military.

21 And -- and, therefore, to me, that's  
22 an important question.

23 MR. CHAITEN: Well -- well, we can't  
24 know for sure how many successive prosecutions  
25 there are --

1 JUSTICE BREYER: Of course.

2 MR. CHAITEN: -- because the federal  
3 government and the states --

4 JUSTICE BREYER: I don't expect you to  
5 know for sure.

6 MR. CHAITEN: Well, and I -- well, and  
7 I want to say the reason I'm saying we can't  
8 know for sure is because the government's  
9 Petite policy is a secretive policy that they  
10 implement and they don't really share data on  
11 it, other than the prosecutions they decline to  
12 make.

13 Sources from the early 2000s say that  
14 they've authorized 150 Petite authorizations  
15 per year. There's reason to believe, I  
16 think -- and, first of all, let me step back  
17 and say I don't think that should dictate what  
18 the constitutional rule is. There's no minimum  
19 number of constitutional violations that  
20 triggers this Court's duty to enforce the  
21 Constitution. But I think there's every reason  
22 to believe that the use of this intersovereign  
23 prosecution, particularly federal after state,  
24 for the same crime is increasing. You could  
25 just see the facts of this case.

1           It is really difficult --

2           JUSTICE GINSBURG: How much does --  
3 does Blockburger shrink the significance?  
4 Because -- because with -- if there's a  
5 different element in one, that's enough to take  
6 it out of double jeopardy?

7           MR. CHAITEN: If each has a different  
8 -- an element the other doesn't have, then,  
9 yes, that's enough to take it out of double  
10 jeopardy. And that's -- that -- that makes  
11 sense when you're talking about federal and  
12 state government because, if the federal  
13 government has made a considered decision that  
14 there's some substantial federal interest here,  
15 they can write -- they can define the crime in  
16 a way that's probably going to be different  
17 than -- than -- than crimes that states  
18 prosecute which are local crimes.

19           I think --

20           JUSTICE SOTOMAYOR: Well, it could  
21 come under --

22           JUSTICE GINSBURG: Do you know how  
23 that would work for the civil rights cases?

24           MR. CHAITEN: Yeah -- yes, yes. So --  
25 so -- so, one, I want to note that the -- the

1 -- on the civil rights concern, the ACLU  
2 supported us. Other progressive organizations  
3 have supported us. The Howard Civil Rights  
4 Clinic, the Howard University Thurgood Marshall  
5 Civil Rights Clinic, has filed a brief in  
6 support of neither side, but I believe it's  
7 quite helpful to us because it explains why, if  
8 the Court adopts our rule, it is not likely to  
9 be a problem for civil rights prosecutions.

10 The main tools for federal civil  
11 rights prosecutions are 18 U.S.C. 241 and 18  
12 U.S.C. 242.

13 JUSTICE ALITO: Well, that would be  
14 the case if the Blockburger rule holds, but  
15 your interpretation of the term "offence" in  
16 the Fifth Amendment is perhaps inconsistent  
17 with the way this Court has interpreted that --  
18 that concept in Blockburger cases. Isn't that  
19 true?

20 MR. CHAITEN: I -- I don't think it's  
21 the least bit inconsistent. I think if you  
22 look at -- if you look at -- so the -- the  
23 current understanding of the Blockburger rule  
24 derives from Justice Scalia's dissent in Grady  
25 v. Corbin, which had -- which was adopted in

1 Dixon, and it's exactly what we're saying it  
2 is. It's a crime defined by the same elements  
3 or -- or a lot lesser --

4 JUSTICE ALITO: But didn't he --  
5 didn't he say it is the elements defined by a  
6 particular sovereign?

7 MR. CHAITEN: I -- I don't believe he  
8 actually said that in Grady v. Corbin, and I  
9 don't think the Court said that in Dixon.  
10 There was nothing sovereign-specific about it.  
11 The government tries to say that it's -- it --  
12 it -- it's necessarily a rule of legislative  
13 intent which makes it sovereign-specific. But  
14 that -- that is not what -- that is not what  
15 the English authorities said.

16 Now the English --

17 JUSTICE ALITO: Can I go back to the  
18 way you began? I mean, you told us that there  
19 is a mountain of evidence supporting your  
20 interpretation of the original meaning of the  
21 Double Jeopardy Clause.

22 Put aside Hutchinson and put aside the  
23 case involving Welsh law that Justice Sotomayor  
24 referred to. Can you cite any 17th -- any 16th  
25 or 17th or 18th Century British case in which a

1 foreign judgment actually barred a prosecution  
2 in Great Britain?

3 MR. CHAITEN: In Great Britain? Well,  
4 it -- it's -- it's Hutchinson. The actual  
5 holding of Roche was that the plea of autrefois  
6 acquit based on foreign acquittal would be a  
7 bar because that -- if that was necessary to  
8 the court's decision, the court was deciding  
9 whether -- whether the defendant could plead  
10 that and innocence at the same time and said it  
11 couldn't because the plea of autrefois acquit  
12 based on foreign conviction would be a bar.

13 It's true that the Hutchinson --

14 JUSTICE ALITO: Well, there's -- I  
15 mean, there are questions about Roche. What --  
16 in the version of the opinion that was  
17 available at the time of the founding, was  
18 Hutchinson even cited?

19 MR. CHAITEN: Hutchinson wasn't cited,  
20 but Roche on its own -- Roche on its own stood  
21 for that proposition. And then, in 1800, the  
22 Hutchinson explanation was added to the  
23 opinion.

24 JUSTICE ALITO: So this is a mount --  
25 this is a mountain?

1           MR. CHAITEN: The -- the mountain -- I  
2 would primarily start with the treatises. And,  
3 by the way, in the -- in the Grady v. Corbin  
4 dissent, the entirety of the English common law  
5 evidence that the Court -- that Justice Scalia  
6 relied on, that then became the opinion of the  
7 Court in Dixon, was five treatises, one  
8 pre-ratification case that was dicta, and one  
9 post-ratification case that adopted it. So  
10 that was -- that was the way the originalist  
11 inquiry happened.

12           If you want to know what the public  
13 understanding of the rule was --

14           JUSTICE ALITO: Do you have any  
15 evidence that most of these treatises -- that  
16 these treatises -- with the exception of  
17 Blackstone, which was every lawyer's bible at  
18 the time of the founding. But there's almost  
19 nothing in Blackstone about this. These other  
20 treatises were well-known to the members of the  
21 first Congress and to the -- the members of the  
22 state ratifying conventions? They had these  
23 treatises on their bookshelves and that was  
24 what they looked to? Do you have any evidence  
25 of that?

1 MR. CHAITEN: Yeah. Yes. These  
2 treatises were all -- all the treatises we cite  
3 were available in America.

4 JUSTICE SOTOMAYOR: They were?

5 MR. CHAITEN: They were well-known  
6 treatises. The Buller treatise, which the  
7 government seems to enjoy taking potshots at --  
8 the Buller treatise was written by Sir Francis  
9 Buller, who was a member of the King's Bench at  
10 the time of the framing. It is cited in  
11 numerous cases in this country, pre-framing and  
12 post-framing, for criminal law principles and  
13 civil law principles.

14 So three -- three of the five  
15 treatises that Justice Scalia relied on in  
16 Grady v. Corbin are -- are treatises we rely on  
17 here, Hawkins, Starkie, and Chitty. You know,  
18 this is --

19 JUSTICE ALITO: But those treatises  
20 don't cite any actual authority.

21 MR. CHAITEN: Those treatises?

22 JUSTICE ALITO: What -- what actual  
23 authority? What holdings of pre-Fifth  
24 Amendment-adoption courts are cited in those --  
25 can be cited in those treatises? You're just



1 --

2 MR. CHAITEN: Yeah, MacNally --  
3 MacNally cites Hutchinson and cites -- and  
4 cites Roche.

5 JUSTICE ALITO: Hutchinson? Do we  
6 have the --

7 MR. CHAITEN: It just doesn't cite  
8 them. It discusses them. And it says --

9 JUSTICE ALITO: Do we have -- do we  
10 have the opinion in Hutchinson?

11 MR. CHAITEN: There is a bail  
12 notation, and that is the only thing that  
13 survived, and the scholars have -- scholarship  
14 has long noted that that was from one phase of  
15 the case. But it doesn't matter. It doesn't  
16 matter because we have the King's Bench  
17 repeatedly saying this is the rule, this is the  
18 rule.

19 And -- and the government cites not a  
20 single authority to the contrary, stating an  
21 opposite rule. There's no --

22 JUSTICE GORSUCH: Counsel, I apologize  
23 for ping-ponging you from the -- from the  
24 framing back to the present, but I'd like to  
25 return you to Justice Breyer's question about

1 the impact this might have on civil rights  
2 organizations and -- and others.

3 You know, the stare decisis  
4 considerations, one of which would be are we  
5 upsetting settled expectations currently?

6 MR. CHAITEN: Well, I don't think it  
7 would have an impact on civil rights  
8 litigation. As I was -- as I was saying, I  
9 think the --

10 JUSTICE GORSUCH: You started, but I'm  
11 -- I'd like you to develop that further.

12 MR. CHAITEN: Yes. So --

13 JUSTICE GORSUCH: I didn't get a  
14 complete answer.

15 MR. CHAITEN: Sorry. And so I  
16 mentioned that the primary tools of the federal  
17 government in the area of civil rights  
18 prosecution are 18 U.S.C. 241 and 242. 241 is  
19 conspiracy to deprive someone of their  
20 constitutional rights under color of law. 242  
21 is actually doing it. Those aren't going to be  
22 the same offenses as, say --

23 JUSTICE BREYER: Now.

24 MR. CHAITEN: -- a murder or an  
25 assault.

1 JUSTICE BREYER: Now. Now. But a  
2 state -- well, I don't -- I can't foresee the  
3 future. And it wouldn't be that hard. It  
4 wouldn't have been --

5 MR. CHAITEN: Well, in the federal  
6 government, if --

7 JUSTICE BREYER: -- for a state  
8 government in -- you see? Look, what's  
9 actually bothering me is, yes, I know you're  
10 convinced on the history. I also know that --  
11 that, there, it maybe less clear than you  
12 think, but maybe not, that this Court several  
13 times has looked at the history and they've  
14 said it's inconclusive and, therefore -- and  
15 now we have a rule that's been there a long,  
16 long time.

17 And if we're going to go back and look  
18 to whether this Court got the history right in  
19 cases, I have my own candidates. You see?

20 MR. CHAITEN: So --

21 JUSTICE BREYER: Okay? So -- so -- so  
22 now --

23 MR. CHAITEN: -- I don't agree that  
24 the Court has several times looked --

25 JUSTICE BREYER: -- my problem is

1 that.

2 MR. CHAITEN: But --

3 JUSTICE BREYER: My problem is, is  
4 this a basis for going back, the same one that  
5 -- the same question. But I haven't heard the  
6 answer that Justice Kagan started with.

7 MR. CHAITEN: So -- so -- so two --  
8 two responses. And one, could I -- if I could  
9 finish on the civil rights issue. I just  
10 wanted to add that the federal government can  
11 take control in all manner of ways. In a  
12 particular case, they can take custody of  
13 someone via an ad prosequendum writ. If  
14 Congress -- if -- if states were becoming  
15 uncooperative in the area of civil rights, and  
16 this were really a problem, which it doesn't  
17 seem to be today, the federal government could  
18 preempt certain state crimes. There are any  
19 number of ways the -- the federal government  
20 could take control if, in the future, there  
21 were these problems that we can't foresee  
22 today.

23 And then as far as the -- the history  
24 being analyzed in several opinions of this  
25 Court, no, which -- respectfully, Your Honor, I

1 disagree. It is one footnote in one opinion.  
2 It is Footnote 9 of Bartkus.

3 JUSTICE GORSUCH: I -- I think the  
4 question, though, is, of all the errors this  
5 Court has made over the years --

6 (Laughter.)

7 JUSTICE BREYER: That's right.

8 JUSTICE GORSUCH: -- why this one?  
9 Why should we care about this one?

10 MR. CHAITEN: Well -- well, we should  
11 care because there is an ancient right not to  
12 be tried twice for the same crime. And the  
13 original understanding of the Double Jeopardy  
14 Clause considers this the same crime.

15 It would allow --

16 JUSTICE KAGAN: But, Mr. Chaiten, I  
17 mean, one of the --

18 MR. CHAITEN: You should care --

19 JUSTICE KAGAN: I'm sorry. Please.

20 MR. CHAITEN: You should -- you should  
21 care because we've cited examples of cases  
22 where a state court --

23 JUSTICE GORSUCH: I -- I -- I --

24 MR. CHAITEN: -- acquitted someone of  
25 murder and the federal government convicted.

1 JUSTICE GORSUCH: Counsel -- counsel,  
2 I'm sorry to interrupt, but I think -- I think  
3 we've got that, okay? I think it's just a  
4 practical question.

5 It took until last year for this Court  
6 to overrule Korematsu. Why is this case  
7 practically today important?

8 MR. CHAITEN: It is -- it is important  
9 for the -- it is important because we currently  
10 have a rule that allows the federal government  
11 to come in and decide they didn't like the way  
12 a state prosecuted someone or the result of the  
13 prosecution or the sentence they got and re-  
14 prosecute them.

15 It's precisely what happened in this  
16 case. There's every reason to believe it  
17 happens with some regularity. And the Court  
18 can put an end to it. The scholars --

19 JUSTICE KAGAN: Well, I guess -- I  
20 guess the -- the question that underlies  
21 Justice Breyer's question about civil rights is  
22 something along the lines of: You know, that's  
23 consistent with our structure of government.  
24 We have dual sovereigns. That means dual  
25 regulation. And dual regulation often means

1 dual punishment.

2           And if we were to adopt the rule that  
3 you suggest, it might very well be that either  
4 the federal government would have to  
5 subordinate its interests to the states or that  
6 the states would have to subordinate their  
7 interests to the federal government.

8           And one of the things about our  
9 constitutional structure makes -- which makes  
10 it unusual is that -- is that both sovereigns  
11 are understood to have significant interests  
12 that they have the capacity to pursue.

13           MR. CHAITEN: But where they have the  
14 concurrent jurisdiction over something that is  
15 the same offense, that is illegitimate for  
16 reasons that were understood at the framing.  
17 Take the cases of -- take Furlong. That's a  
18 case where multiple sovereigns have concurrent  
19 jurisdiction over robbery at sea, and it was  
20 well understood that a prosecution by one would  
21 bar a prosecution by another.

22           JUSTICE KAGAN: Yeah. Well, I read  
23 Furlong a little bit differently, as actually  
24 separating out the offense of piracy, which was  
25 an offense that sort of was in common, versus

1 the offense of murder, which Furlong says, yes,  
2 each different jurisdiction can prosecute the  
3 offense.

4 MR. CHAITEN: The murder of a British  
5 subject by a British subject on a British ship  
6 is what they were saying.

7 JUSTICE KAGAN: I guess I would ask --

8 MR. CHAITEN: They weren't -- they  
9 weren't -- they weren't drawing -- they were --  
10 they were just applying a concurrent  
11 jurisdiction rule, and they were saying why  
12 would the U.S. have concurrent jurisdiction  
13 over that.

14 JUSTICE KAGAN: I suppose my -- my  
15 main question, which actually goes back to  
16 Justice Gorsuch's question, because Justice  
17 Gorsuch has been trying to lead you away from  
18 something, and I'm a little bit also confused  
19 as -- as to why your argument seems, frankly, a  
20 little bit one note.

21 You know, your -- your brief and now  
22 your argument is just all about the original  
23 jurisdiction. And there are some people on  
24 this bench that think that that is the alpha  
25 and omega of every constitutional question.



1           But there are other people on this  
2 bench who do not, who think that 170 years of  
3 significant practice where 30 Justices have  
4 signed on to a rule, that you're going to have  
5 to give me more than the fact that, you know,  
6 actually, pretty early on in the republic they  
7 decided that that was not what the original  
8 understanding was, even if they're wrong.

9           MR. CHAITEN: Well --

10           JUSTICE KAGAN: And so this is your  
11 opportunity to give me more.

12           MR. CHAITEN: Okay. 1922, I would  
13 say. But my opportunity in response to your --  
14 your offering me an opportunity to give you  
15 more, I will tell you incorporation.  
16 Incorporation, incorporation, incorporation.

17           The Court has said its own precedents  
18 are that incorporation makes a big difference  
19 for purposes of stare decisis.

20           So look at Elkins and look at -- look  
21 at Murphy v. Waterfront Commission. After  
22 incorporation, the federal government and the  
23 state government shouldn't be able to combine  
24 to do that which they can't do alone.

25           JUSTICE KAVANAUGH: Part of -- part of

1 the original understanding as well was stare  
2 decisis, and stare decisis is a principle, in  
3 my view, rooted in Article III, as Federalist  
4 78 points out and as Justice Kagan points out.  
5 It's a doctrine of stability and humility that  
6 we take very seriously.

7 And the reason -- with the bar that  
8 you have to clear, I believe, is not just to  
9 show that it's wrong but to show that it's  
10 grievously wrong, egregiously wrong, something  
11 meaning a very high bar because stare decisis  
12 is itself a constitutional principle.

13 And given, as Justice Alito says, the  
14 uncertainty about the history, can you clear  
15 that bar?

16 So two questions. Is that the right  
17 way to look at it, grievously wrong, and --  
18 and, two, how can you clear that given some of  
19 the uncertainty?

20 MR. CHAITEN: So -- so I'm not sure  
21 grievously wrong is the right way to look at it  
22 when you're talking about an unconstitutional  
23 law enforcement practice because this Court has  
24 never upheld an unconstitutional --

25 JUSTICE KAVANAUGH: But that's begging

1 -- that's begging the question. The whole  
2 point is that there are prior decisions going  
3 back, as Justice Kagan says, many years,  
4 reaffirming this doctrine.

5 And the question is, when are we going  
6 to upset that stability, when are we going to  
7 depart from the humility of respecting  
8 precedent and overrule it?

9 MR. CHAITEN: So --

10 JUSTICE KAVANAUGH: I mean, usually it  
11 has to be -- your -- your brief uses  
12 egregiously wrong. I -- I use the term  
13 grievously wrong.

14 MR. CHAITEN: Well, and I agree this  
15 -- this rule is egregiously wrong. It's a rule  
16 that -- there was no practice for all of  
17 English history, no practice for the first  
18 century of this republic. That alone, I think,  
19 speaks volumes.

20 And the -- I think, going back to  
21 incorporation, I think, in addition to just how  
22 wrong the rule is, as explained by many jurists  
23 and many scholars over many decades, I think  
24 incorporation -- the Court has never had a full  
25 and fair opportunity post-incorporation to

1       revisit this rule.

2               JUSTICE GORSUCH:  And I guess, counsel --

3               CHIEF JUSTICE ROBERTS:  How -- how  
4       does it work as a practical matter?  Is this --  
5       is it a race to the courthouse?  I mean, if a  
6       prosecution bars a subsequent one, the state  
7       and federal government may have different  
8       perspectives, is it whoever can empanel a jury  
9       first is going to block the others?

10              MR. CHAITEN:  So I don't think so.  
11       So, first of all, the -- the norm in the  
12       country is cooperation between federal and  
13       state authorities.  There are just -- speaking  
14       of one agency in one area of law, the DEA --

15              CHIEF JUSTICE ROBERTS:  Well, it sure  
16       wasn't entirely true at the time of the civil  
17       rights actions in the -- in the '60s and '70s.  
18       It wasn't true at the time of the fugitive  
19       slave law.

20              MR. CHAITEN:  Well, as a practical  
21       matter, I think it is true today.

22              Secondly, Blockburger has been subject  
23       to enormous criticism because it isn't  
24       defended, frankly, enough.  When you apply  
25       Blockburger, oftentimes these aren't going to

1 be the same offenses.

2 And this is a critical, critical  
3 point. We have had an experiment in this rule.  
4 The experiment is that between 20 and 37 states  
5 already bar successive prosecutions after a  
6 federal prosecution or by another state as a  
7 matter of state law. And where is the race to  
8 the courthouse concerned in those states?  
9 Where are the law enforcement problems in those  
10 states? They don't exist.

11 And I don't think Texas and the  
12 government have ever really -- ever even really  
13 responded to that point.

14 If I may, Mr. Chief Justice, I'd like  
15 to reserve the remainder of my time.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Mr. Feigin?

20 ORAL ARGUMENT OF ERIC J. FEIGIN

21 ON BEHALF OF THE RESPONDENT

22 MR. FEIGIN: Thank you, Mr. Chief  
23 Justice, and may it please the Court:

24 Throughout its history, this Court has  
25 correctly recognized that the distinct and

1 separate sovereign powers of the state and  
2 federal governments make state and federal  
3 crimes different offenses under the Double  
4 Jeopardy Clause.

5           Petitioner provides no reason for this  
6 Court suddenly to conclude that it's been wrong  
7 all this time. And overturning 170 years of  
8 precedent on this issue is going to invite a  
9 whole host of problems that this Court has thus  
10 far been able to avoid.

11           CHIEF JUSTICE ROBERTS: Well, 170  
12 years, I -- I think your friend is right, isn't  
13 it, that we have not had a full consideration  
14 and exposition of the issue in any of our  
15 precedents?

16           MR. FEIGIN: I don't think that's  
17 correct, Your Honor. I think, as you yourself  
18 pointed out earlier in the argument, the  
19 historical point that he is making here and  
20 that is the centerpiece of his argument, that  
21 even prosecutions by a foreign sovereign can  
22 bar domestic prosecution by a state or by the  
23 United States, was fully before the Court in  
24 *Bartkus*.

25           The Grant article that is all over the

1 Petitioner's brief and that Petitioner's  
2 counsel cited at argument today was cited by  
3 Justice Black in his dissent in Bartkus. And  
4 all the authorities on which he's relying, with  
5 the exception of Roche, which, correctly  
6 understood, doesn't actually announce this  
7 rule, were identified by Justice Frankfurter  
8 for the majority in Footnote 9.

9 And the Court found these authorities  
10 to be dubious and of limited value in --  
11 because they don't really speak to our  
12 federalism.

13 JUSTICE GINSBURG: But you -- you have  
14 to concede, won't you, that this rule, this  
15 separate sovereign rule, has been widely  
16 criticized by both academics and federal  
17 judges?

18 MR. FEIGIN: Your Honor, it has come  
19 under some criticism. I think what's worth  
20 noting is a lot of the articles that criticize  
21 it also recognize that some exceptions are  
22 necessary and that successive prosecutions and  
23 separate prosecutions are sometimes necessary  
24 to vindicate particular sovereign interests.

25 So take the civil rights brief that my

1 friend was just mentioning. They think that  
2 this Court, if it goes for the position the  
3 Petitioner's advocating, should then announce a  
4 separate constitutional doctrine that save  
5 civil rights prosecutions.

6 And that's because they realize the  
7 enormous consequences that overturning all this  
8 precedent would have. What's --

9 JUSTICE GINSBURG: I thought the  
10 answer to the civil rights cases is it's not  
11 the same offense, 241 and 242. There are no  
12 state law counterparts to those.

13 MR. FEIGIN: Your Honor, those aren't  
14 the only civil rights charges we bring. So in  
15 the recent shootings by -- the recent shootings  
16 of the synagogue in Pittsburgh and of the  
17 African-American church in Charleston, we've  
18 charged those with offenses that -- I mean, I  
19 can get into the details if you'd like, but  
20 they're essentially murder plus a bunch of  
21 elements. And those would be Block --

22 JUSTICE GINSBURG: Well, but once you  
23 say --

24 MR. FEIGIN: -- could be Blockburger  
25 barred.



1                   JUSTICE GINSBURG: -- once -- once you  
2 say "a bunch of elements," then you get into  
3 Blockburger.

4                   MR. FEIGIN: No, Your Honor, murder  
5 would be a less -- considered a lesser-included  
6 offense of those offenses if the offense is  
7 defined by different sovereigns were considered  
8 the same, as Petitioner is urging. But those  
9 -- that's not even the only consequence.

10                   Even the -- there are a number of  
11 categories of cases that would be put at issue  
12 here. And I -- I can get into more detail in  
13 those in a moment, but before I get to that,  
14 even the possibility of claims like this  
15 creates adverse consequences for law  
16 enforcement, for legislatures, and for courts.

17                   CHIEF JUSTICE ROBERTS: Well, you had  
18 -- you must think that there's some problem or  
19 you wouldn't have the Petite policy. I mean,  
20 that's -- that's an odd defense of a -- of a --  
21 a position to say, well, we take care of it  
22 somewhere else, so don't worry about it.

23                   MR. FEIGIN: Well, no, Your Honor, I  
24 think there are a number of instances,  
25 including the Double Jeopardy Clause just last

1 term, where a plurality of this Court has  
2 recognized the Constitution doesn't solve every  
3 potential policy problem that may arise, and we  
4 leave those -- a lot of those questions for  
5 legislatures or for the political branches in  
6 general.

7           And I think this has actually been a  
8 real success story of that because he was just  
9 asked if he could point to any significant  
10 practical problems, and he couldn't. But I can  
11 point to a lot of practical problems that are  
12 going to arise if this Court adopts his rule.

13           So, on the law enforcement side, just  
14 the possibility that this could happen is going  
15 to deter cooperation, encourage aggressive  
16 prosecutions, a race to the courthouse, and  
17 defendants trying to play each sovereign off  
18 against the other where one sovereign will have  
19 the ability to unilaterally bargain away the  
20 other sovereign's ability to enforce its  
21 interests. And I'd -- I'd like to get into  
22 some concrete examples of that in a second.

23           But, as to legislatures, he said it  
24 himself, he's going to -- this would  
25 incentivize Congress to preempt state law in

1 more circumstances, and it's going to also  
2 incentivize --

3 JUSTICE GINSBURG: What about a case  
4 like this, this very case, a felon in  
5 possession? It's the same crime, federal and  
6 state. What is the manipulation that you see  
7 there?

8 MR. FEIGIN: Well, Your Honor, the --  
9 the examples I would get into, and I'm happy to  
10 get into them, are examples of cases in which  
11 state and federal interests would be blocked.  
12 But speaking to this particular case, I don't  
13 think there's any dispute, at least by  
14 Petitioner, that the federal government has a  
15 substantial interest in regulating access to  
16 the interstate market for firearms by someone  
17 who has twice fired weapons that endangered  
18 members of his own family and other members of  
19 the community.

20 The only question is whether that  
21 substantial federal interest was vindicated  
22 when he entered into an omnibus plea deal with  
23 the state where he wound up, as a practical  
24 matter, not receiving any additional time in  
25 prison for the firearm offense.

1           JUSTICE GORSUCH: Well, but I think  
2 that's exactly the problem that is practically  
3 more apparent today or at least of potential  
4 concern that counsel might have addressed, and  
5 that is with the proliferation of federal  
6 crimes, I think over 4,000 statutes now and  
7 several hundred thousand regulations, the  
8 opportunity to -- for the government to seek a  
9 successive prosecution if it's unhappy with  
10 even the most routine state prosecution is a  
11 problem.

12           Justice Brennan was concerned about it  
13 in Bartkus. In that case, there was some  
14 evidence of manipulation even by federal  
15 authorities to secure a second conviction in  
16 state court.

17           Why shouldn't that be a practical  
18 concern we ought to be more concerned about  
19 today?

20           MR. FEIGIN: Well, let me say a few  
21 things about that, Your Honor. I mean, the  
22 reason we have the Petite policy is we do  
23 understand that successive prosecutions are  
24 very often inappropriate and we try to reserve  
25 them for circumstances in which the federal

1 interest hasn't been vindicated.

2 But I think, to the extent that --  
3 that there's a concern about successive  
4 prosecutions, it's not so much successive  
5 prosecutions based on a particular law of one  
6 sovereign or another; it's successive  
7 prosecutions for the same conduct all raise  
8 those concerns.

9 But everyone agrees that successive  
10 prosecutions for the same conduct don't raise  
11 any double jeopardy concerns. That's why the  
12 Petite policy, Mr. Chief Justice, is somewhat  
13 broader. It covers a -- a subsequent federal  
14 prosecution following a state or federal  
15 disposition for the same act or transaction.

16 But, to get back to your question,  
17 Justice Gorsuch, I think that makes the Double  
18 Jeopardy Clause not necessarily the appropriate  
19 vessel for vindicating that concern.

20 JUSTICE GORSUCH: Well, you know, I  
21 wonder about that because, in our prior cases,  
22 we hinged on two things, in *Bartkus*, among  
23 other places. One was incorporation, and we  
24 were concerned that the federal government  
25 would be at a disadvantage compared to states

1 without this rule because states were not bound  
2 then by the Double Jeopardy Clause and could  
3 pursue a second prosecution after a failed  
4 federal prosecution. So why shouldn't the  
5 reverse be true, we thought.

6 That rationale has now disappeared  
7 with incorporation. And we've since revisited  
8 a very similar -- similar issue in the Fourth  
9 Amendment context in Elkins, where we used to  
10 allow federal prosecutors to use illegally  
11 obtained evidence, and now we don't.

12 So that rationale seems to have, in  
13 fact, changed over time. So that might be one  
14 -- one argument. And then -- and then the  
15 other is, again, with the -- with the -- in  
16 Bartkus, we relied on the -- on the -- and  
17 elsewhere on -- on the promise that prosecutors  
18 wouldn't do this in routine cases.

19 And, you know, at least to some eyes,  
20 this might look like a pretty routine case,  
21 where -- as did Bartkus itself. And why  
22 shouldn't we be concerned about those two  
23 things?

24 MR. FEIGIN: Well, Your Honor, we  
25 don't view this as a routine case. We don't --

1 first of all, you have to understand that the  
2 set of cases that could even come under the  
3 Petite policy is already a very selective  
4 group. The federal government doesn't charge  
5 very many criminal cases as compared to the  
6 states.

7           And then we don't -- our number of  
8 Petite policy approvals each year is about a  
9 hundred. And this case is important to us  
10 because it's a part of a program called  
11 Operation Safe Neighborhoods. The case studies  
12 have shown, by focusing on recidivist offenders  
13 like Petitioner, we've reduced crime in some  
14 neighborhoods by up to 42 percent.

15           But even if you don't like this  
16 prosecution, let me give you a few other  
17 examples of the kinds of cases that are going  
18 to be barred under his rule.

19           First, there's the foreign judgment  
20 problem that the Court was discussing with  
21 Petitioner's counsel. And that's not just a  
22 hypothetical problem. That's a real one.

23           And let me give you a real example.  
24 In 2003, the FARC rebels in Colombia kidnapped  
25 American journalists and held them hostage for

1 five years. And we have open indictments on  
2 them. And when there was the peace accord  
3 between the Colombian government and the FARC  
4 rebels, the charges against them in Colombian  
5 court were dismissed.

6 Now I'm not certain whether those  
7 charges -- jeopardy actually attached in those  
8 cases under Colombian law or exactly what the  
9 elements of the Colombian law were, but that's  
10 precisely the inquiry we don't want courts to  
11 have to have.

12 And we certainly don't want to have to  
13 file, as the government --

14 JUSTICE GORSUCH: Well, why not?

15 MR. FEIGIN: -- pieces of --

16 JUSTICE GORSUCH: We do it in -- in  
17 civil cases all the time, right? And we -- we  
18 won't enforce judgments that are shams. We  
19 won't enforce judgments when there are  
20 different elements. We won't enforce judgments  
21 when jeopardy acquittal hasn't attached, so  
22 claim preclusion wouldn't apply.

23 But why is it that civil defendants,  
24 corporations, businesspeople, get the benefit  
25 of this rule but not criminal defendants, least



1 amongst us?

2 MR. FEIGIN: Well, usually, Your  
3 Honor, there, there's going to be privity among  
4 the parties. Here, the Colombian government  
5 had a perfectly legitimate sovereign reason for  
6 forgiving this conduct once the rebels -- in  
7 return for which the rebels admitted it and got  
8 amnesty, but that reason doesn't apply to the  
9 federal government.

10 And the other thing that we can't do  
11 and the thing that Petitioner's counsel's --

12 JUSTICE GINSBURG: Well, wouldn't they  
13 -- they say since there was never any trial,  
14 that they were never in jeopardy?

15 MR. FEIGIN: Well, Your Honor, I'm not  
16 sure how far the proceedings with respect to  
17 each and every individual rebel we might charge  
18 in Colombia got. But his only solution to  
19 this -- and I can give you other examples as  
20 well, but just to finish this one up, his only  
21 solution to this is to ask the federal  
22 government to make a filing in U.S. district  
23 court asking that court not to respect the  
24 judgment of a Colombian court.

25 Now we can't do that with respect to

1 Colombian courts or French courts or Italian  
2 courts without creating enormous diplomatic  
3 problems for ourselves. And I don't think U.S.  
4 district courts --

5 JUSTICE GINSBURG: I don't know  
6 whether a dismissal based on some amnesty --

7 MR. FEIGIN: So --

8 JUSTICE GINSBURG: -- is a -- anything  
9 like an adjudication on the merits.

10 MR. FEIGIN: So, Your Honor, let me  
11 give you another example. There's the bombing  
12 of PanAm Flight 103 over Lockerbie, Scotland.  
13 That implicates the interests of numerous  
14 sovereigns. One of the bombers has been tried  
15 in Pakistan, and the U.S. might want to try  
16 that bomber as well.

17 His rule would preclude that. And,  
18 again, his only solution is to ask a U.S. court  
19 to declare that some foreign court is not a  
20 court of competent jurisdiction.

21 And to -- Justice Ginsburg, to your  
22 question before about what European countries  
23 do, it's not correct that European countries  
24 all have his rule. Germany, Italy, France,  
25 Belgium, and Austria are all countries that

1 follow the same rule we do. In 2009, French --  
2 JUSTICE GORSUCH: But -- but -- but as  
3 I understand it -- and tell me if I'm wrong --  
4 the common-law countries, Great Britain and  
5 Canada, do?

6 MR. FEIGIN: Not all of them, Your  
7 Honor. Great Britain, it has become apparent  
8 recently, the -- probably the best case is the  
9 Regina against Thomas case that my friend  
10 cited. It has become apparent recently that  
11 they do adhere to that rule, although even in  
12 Regina against Thomas the prosecution, I  
13 believe, was allowed to proceed for other  
14 reasons.

15 Canada's Supreme Court has reserved  
16 this question. And the idea that there is some  
17 international norm that sovereigns can't  
18 separately vindicate their own interests when  
19 they are implicated is simply not a rule. But  
20 let me focus just to -- let's just turn to  
21 domestic --

22 JUSTICE GINSBURG: May I ask, before  
23 you do that, you -- you rely very heavily on  
24 federalism, separate sovereigns.

25 Is there another case where federalism

1 has been invoked to strengthen the hand of  
2 government, state and/or federal, vis-à-vis an  
3 individual? Federalism is usually invoked  
4 because it's a protection of the liberty of the  
5 individual, but here the party being  
6 strengthened is not the individual, it is the  
7 state's freedom and the federal government's  
8 freedom to bring -- to prosecute the same  
9 offense, felon in possession.

10 MR. FEIGIN: So I think the Court's  
11 recognized in older cases like Cruikshank,  
12 which was from the 19th century, and in its  
13 recent first decision in Bond against United  
14 States that one of the things that American  
15 citizens get by being citizens of both the  
16 state and the United States is that there are  
17 two sovereigns that can positively legislate;  
18 that is, pass affirmative legislation to  
19 protect them.

20 So in the civil rights era when the  
21 states weren't affirmatively protecting the  
22 civil rights of their citizens enough, they're  
23 also American citizens, and the United States  
24 stepped in to vindicate those interests.

25 JUSTICE GINSBURG: To -- to state a

1 different crime, not the garden-variety  
2 assault, murder.

3 MR. FEIGIN: So, Your Honor, there are  
4 civil rights offenses on the books now, like 18  
5 U.S.C. 249, which precludes -- criminalizes  
6 causing bodily injury to someone for racially  
7 motivated reasons that could be double jeopardy  
8 barred under their rule.

9 But let me give you -- let me give you  
10 some other examples of --

11 JUSTICE GORSUCH: But counsel, just --  
12 before we get to more examples, I thought  
13 Justice Ginsburg's point was worth exploring a  
14 little more.

15 I had thought in this country that the  
16 people were the sovereign and that sovereignty  
17 was divided, exercise of sovereignty was  
18 divided, not multiplied.

19 So it was divided between the federal  
20 government and the state governments, Ninth and  
21 Tenth Amendment. And that it is awkward, isn't  
22 it, to say that there are two sovereigns who  
23 get to multiply offenses against you?

24 I can't think of another case where  
25 federalism is used, as Justice Ginsburg

1 indicated, to allow greater intrusions against  
2 the person, rather than to protect more against  
3 them.

4 MR. FEIGIN: Well, Your Honor, the  
5 people have vested the sovereignty in both the  
6 state and the United States --

7 JUSTICE GINSBURG: Is there such an  
8 example? Is there such an example, other than  
9 double jeopardy, where the individual has a  
10 double whammy, both the state and the federal,  
11 usually federalism, as Justice Gorsuch just  
12 pointed out, are protective of the individual?

13 MR. FEIGIN: Well, Your Honor, it is a  
14 common fact of life that everyone is subject to  
15 both state and federal regulation. It's why  
16 everyone in this room, except maybe my friends  
17 from Texas, pay both state and federal taxes.

18 (Laughter.)

19 MR. FEIGIN: It's why businesses are  
20 regulated by both the federal and state  
21 governments, and why everyone knows that an  
22 act, and even Petitioner agrees, the same act  
23 can be both a state and federal crime.

24 JUSTICE ALITO: But what about the  
25 adoption of the Black -- the Blockburger rule

1 as opposed to the same -- same transaction  
2 test?

3 MR. FEIGIN: So, Your Honor, I think  
4 --

5 JUSTICE ALITO: That -- that's a --  
6 that's a rule that -- that's a rule of  
7 federalism, in a way. And yet it exposes  
8 defendants to prosecution for the same acts in  
9 both federal court and state court.

10 MR. FEIGIN: I think that's right,  
11 Your Honor. It would respect the judgments of  
12 the legislatures as to how they wanted to craft  
13 their crimes.

14 JUSTICE GINSBURG: It's -- it's --

15 MR. FEIGIN: Blockburger hasn't  
16 heretofore been --

17 JUSTICE GINSBURG: It's a double  
18 jeopardy. We're talking about double jeopardy,  
19 whether it's Blockburger or this case. I asked  
20 outside the realm of double jeopardy, is there  
21 such an instance?

22 MR. FEIGIN: Your Honor, I -- I think  
23 I've just given several examples of cases where  
24 people are regulated more heavily because there  
25 are two governments than -- than they would if

1 they were subject only to one unitary  
2 government.

3 That's a necessary consequence of our  
4 system. And the Court has repeatedly  
5 recognized it.

6 JUSTICE KAGAN: May I ask, Mr. Feigin,  
7 do you think that there is a prospect of abuse  
8 where two different governments can use the  
9 possibility of prosecutions as a bargaining  
10 tactic to get defendants to agree to plea  
11 deals? Is -- is that something that happens  
12 regularly?

13 MR. FEIGIN: I'm not really familiar  
14 with that being a serious problem under the  
15 current system. I think the main concern would  
16 actually be the opposite under the new  
17 unprecedented system that Petitioner is asking  
18 this Court to adopt, where someone could go  
19 into the state prosecutors, someone -- let's  
20 say someone's caught in California with 100  
21 kilograms of marijuana, which is a misdemeanor  
22 in California, as the states point out in their  
23 brief, but is a felony under federal law.

24 And he agrees to plead to the state  
25 offense, and, therefore, that would bar a



1 federal prosecution for possession with intent  
2 to distribute, which would be considered under  
3 his rule a greater offense.

4 JUSTICE GINSBURG: Do you remember  
5 what the situation was in the D.C., not so very  
6 long ago, when we had the same prosecutor for  
7 the local courts and the federal court? And  
8 the D.C. court had lower penalties than the  
9 U.S. code and the prosecutor engaged in just  
10 that kind of tactic. Plead guilty under the  
11 D.C. code, and if you don't, I'm going to  
12 indict you under the U.S. code.

13 MR. FEIGIN: Well, Your Honor, D.C. is  
14 kind of a special case where both of those fall  
15 under federal government. It's like Puerto  
16 Rico, in that sense, in that they are not  
17 separate sovereigns.

18 But here is another problem we have  
19 run into in Puerto Rico. Now the -- we can't  
20 charge -- we can't rely on the separate  
21 sovereign understanding of the Double Jeopardy  
22 Clause there, is that the territorial  
23 prosecutors in Puerto Rico don't view the  
24 prosecution of crime in quite the same way as  
25 the federal government does. They're more

1 concerned with crime of a transactional nature,  
2 rather than necessarily developing longer term  
3 investigations.

4 And so one thing that they do is they  
5 frequently prosecute drug conspiracies that  
6 last only for one day, an agreement just to  
7 sell particular drugs from a particular  
8 location on a particular day.

9 And at least one district court has  
10 dismissed a federal indictment for broader drug  
11 conspiracy that occurred for over a range of  
12 years on the ground that it was simply a  
13 greater included offense of the smaller Puerto  
14 Rico drug conspiracy.

15 And that's just a consequence of the  
16 different ways in which the state and the  
17 federal government use their resources and the  
18 ways in which they want to prosecute crime.

19 JUSTICE BREYER: Are --

20 MR. FEIGIN: Another difficulty that's  
21 going to arise here is prosecutions by the  
22 federal government that follow tribal  
23 prosecutions, which I think are about  
24 two-thirds of the -- of the few hundred  
25 successive prosecutions that we bring each

1 year.

2           And as this Court recognized a couple  
3 of terms ago in United States against Bryant,  
4 the federal government plays a critical role in  
5 curbing the serious problem of domestic  
6 violence against Native American women.

7           Tribes are limited generally to  
8 prosecuting only for misdemeanors. So if they  
9 find that someone has been committing domestic  
10 abuse, the most that they can do is prosecute  
11 that person for a misdemeanor.

12           Under federal law, 18 U.S.C. 117(a),  
13 we can prosecute for -- recidivist domestic  
14 abusers for a felony. And the tribes bring --

15           JUSTICE GINSBURG: And what is --

16           MR. FEIGIN: The tribes bring --

17           JUSTICE GINSBURG: What is the reasons  
18 for the tribe's very limited jurisdiction?

19           MR. FEIGIN: So the tribes have  
20 limited jurisdiction as a consequence of  
21 federal law. Some tribes are allowed to do  
22 more serious offenses in exchange for providing  
23 more protections in their courts.

24           Very few have decided they want to  
25 make that tradeoff because it would require

1       them to dispense with some of the traditional  
2       accoutrements of tribal justice that are  
3       important to their traditions.

4               So as the Court noted in United States  
5       against Wheeler, justice in tribal courts is  
6       more focused on restitution between the  
7       defendant and the victim and less focused on  
8       incarceration and deterrence and the kinds of  
9       treatment programs that they can receive in  
10      federal prison, but that they not going to be  
11      able to --

12             JUSTICE BREYER: I see the problem. I  
13      just wondered if you want to say a few words on  
14      a slightly different thing, which I don't know  
15      if you have anything to add to what's in my  
16      mind, and I have never been able to formulate a  
17      principle.

18             All right. I looked at the history,  
19      it's not just a footnote 9. It's a whole  
20      discussion in Frankfurter's opinion, which is  
21      on your side, but they have a pretty strong  
22      argument on their side.

23             Then you've pointed to some  
24      problems -- and I'm sure they are real ones --  
25      but they don't seem like overwhelming ones in

1 terms of how often they occur. Then you say:  
2 Well, it's 100 cases where this applies every  
3 year in the federal part and there are also 20  
4 states, probably 50,000 federal prosecutions,  
5 something like that, there are a hundred cases,  
6 and this has been around for 70 years, at  
7 least, 170, possibly, or somewhere in between.

8 So how am I supposed to decide in your  
9 opinion about whether their arguments, which  
10 are past, plus a certain unfairness, which  
11 Justice Black says pretty well outweighs the  
12 stare decisis. You can't say never, stare  
13 decisis is never. If it always holds, we  
14 wouldn't have Brown versus Board.

15 But, if it never holds, we're really  
16 in trouble in terms of the stability of the  
17 law. Okay? Wonderful. This has occurred to  
18 you, this problem. And do you have anything to  
19 say that will help me decide this kind of  
20 balance?

21 MR. FEIGIN: Your Honor, I think they  
22 need to show a lot more than they have shown  
23 here in order to overcome this Court's  
24 consistent understanding throughout its history  
25 of what the Double Jeopardy Clause means.

1           As Justice Kavanaugh pointed out  
2 earlier -- I forget what adjective he used, but  
3 it was --

4           JUSTICE KAVANAUGH: Grievously.

5           MR. FEIGIN: Thank you. You have to  
6 show that this was grievously wrong, and they  
7 haven't come close to doing that. I can talk  
8 about the history in -- in a second, but just  
9 in terms of the consequences, there are very  
10 serious consequences -- the consequences are  
11 going to multiply if you have -- if you adopt  
12 their rule because everyone understands how to  
13 operate under the old rule.

14           Their rule's going to create problems  
15 for courts comparing offenses across  
16 jurisdictions. That's complicated --

17           JUSTICE GINSBURG: May I ask you a  
18 question about issue preclusion? You say no --  
19 no double -- double jeopardy doesn't operate  
20 state -- federal -- federal/state. But how  
21 about a case that has been tried in one system  
22 and the jury has found whatever it's found, and  
23 then it's tried in the other system and the  
24 identical conduct is involved. Is -- does  
25 issue preclusion operate?

1           MR. FEIGIN:  In -- are you talking in  
2 criminal law --

3           JUSTICE GINSBURG:  Yes.

4           MR. FEIGIN:  -- or in -- huh?

5           JUSTICE GINSBURG:  Yeah.

6           MR. FEIGIN:  Or in civil law?

7           JUSTICE GINSBURG:  I'm talking about  
8 criminal law.

9           MR. FEIGIN:  So, in criminal law, Your  
10 Honor, there is no non-mutual collateral  
11 estoppel.  The Court said as much in -- in  
12 Standefer.  And this issue hasn't come up, of  
13 course, because the Court has understood that  
14 federal and state crimes are not the same  
15 offense under the Double Jeopardy Clause.

16           CHIEF JUSTICE ROBERTS:  Don't -- don't  
17 all your problems go away if you're the first  
18 to file, if you win the race to the courthouse?  
19 And I would assume the same is true with the  
20 states.  And so what's most likely is that you  
21 and the states are going to sit down and  
22 develop a -- a way of coordinating which cases  
23 you're going to file in first and which ones  
24 they're going to file in first?

25           MR. FEIGIN:  Well, Your Honor, I'm not

1 sure that's true, because I'm not sure that  
2 we're always going to cooperate. I think the  
3 history of this nation has shown that the  
4 federal government and states do not always see  
5 eye to eye on matters of criminal law  
6 enforcement, and there are going to be cases in  
7 which each has separate interests to vindicate.

8           You could imagine federal prosecutors  
9 in California, as a protest against -- I'm  
10 sorry, state prosecutors in California, as a  
11 protest against federal marijuana laws,  
12 allowing anyone who's caught with 50 kilograms  
13 of marijuana to walk in and plead to a  
14 misdemeanor to frustrate federal prosecutions.

15           There are also going to be cases where  
16 the state prosecutors simply don't have perfect  
17 information or maybe the federal prosecutors  
18 don't. So the state prosecutors might see  
19 something and just think it's a simple assault,  
20 and what they don't realize is that it's  
21 actually part of a racketeering conspiracy.

22           And I'm not making up these examples,  
23 Your Honor. We see all the Petite waiver  
24 requests, and the examples I'm giving the Court  
25 are real cases that have actually happened.



1 They're at least based on --

2 JUSTICE GORSUCH: So, counsel, it  
3 seems like the ones that you can't cooperate  
4 you could solve by getting to the courthouse  
5 first, right?

6 MR. FEIGIN: Well, then we're not --  
7 Your Honor, then, if there's a race to the  
8 courthouse, it deters state and federal  
9 prosecutors from cooperating even at the  
10 investigation stage. You don't have to take my  
11 word for it. If you look at the state and  
12 local government brief, that's exactly what  
13 they say.

14 JUSTICE GORSUCH: Can I ask one  
15 question on -- on -- on stare decisis that we  
16 haven't explored so far? And that's reliance.  
17 The government doesn't make a reliance argument  
18 here as far as I can tell. It says that  
19 there's going to be some systemic trouble if we  
20 were to change the rule, and confusion.

21 But you -- you can't -- you haven't  
22 suggested, I don't think, that -- that a  
23 prosecutor has a right to rely on an  
24 unconstitutional rule to put someone in prison.  
25 I mean, that wouldn't be a thing, would it?

1           MR. FEIGIN: Well, Your Honor, I do  
2 think that it should weigh heavily on this  
3 Court that what it would be doing would  
4 potentially be letting people out of prison  
5 based -- based on, I think, a rule that is at  
6 best --

7           JUSTICE GORSUCH: If we -- if we were  
8 convinced, though, the Constitution stood one  
9 way, against you, just hypothetically, you  
10 wouldn't -- you wouldn't argue that the  
11 government has a reliance interest to keep  
12 people in prison despite an unconstitutional  
13 rule, would you?

14           MR. FEIGIN: Your Honor, I think if  
15 they had shown the kind of monumental or  
16 grievously serious evidence that they would  
17 need to show --

18           JUSTICE GORSUCH: Well, no. How  
19 about 50 --

20           MR. FEIGIN: -- to prevent stare  
21 decisis.

22           JUSTICE GORSUCH: Let's just say  
23 51 percent, they've persuaded us 51 percent  
24 that the Constitution's meaning under any sort  
25 of interpretation, just hypothetically, is

1 against the government.

2 Would it be appropriate, in the  
3 government's view, to keep people in prison in  
4 those circumstances?

5 MR. FEIGIN: Well, Your Honor, it's --  
6 it's hard to put an exact percentage on it, but  
7 I do think they would have to show -- this  
8 isn't just a preponderance of the evidence test  
9 or stare decisis means nothing. There's also  
10 something about the reputation of this Court  
11 and ensuring that this Court doesn't lightly  
12 overturn its precedents, unless there is some  
13 monumental reason to do so. And they haven't  
14 shown that -- they haven't shown any such  
15 reason to do so today.

16 I mean, one -- one further point I  
17 would -- I would make on that is that their  
18 entire argument is based on a historical  
19 principle that no court in the United States  
20 has ever adopted, which would be this foreign  
21 judgment bar principle.

22 And the result that they would reach  
23 would be, I think, frankly, unworkable.  
24 They're not raising any arguments that this  
25 Court hasn't already considered and rejected.

1 JUSTICE KAVANAUGH: Well, it's  
2 based --

3 MR. FEIGIN: And in terms of -- I'm  
4 sorry.

5 JUSTICE KAVANAUGH: Go ahead.

6 MR. FEIGIN: Your Honor, you  
7 referenced earlier and -- as did Justice Kagan  
8 -- the idea of stare decisis representing  
9 something about judicial humility. And I can't  
10 think of anything that's more antithetical to  
11 judicial humility than deciding that this  
12 Court, all of a sudden, has discovered some  
13 historical principle that has eluded its  
14 predecessors going back 170 years.

15 JUSTICE KAVANAUGH: They --

16 MR. FEIGIN: If these -- I'm sorry,  
17 Justice Kavanaugh.

18 JUSTICE KAVANAUGH: They also raise,  
19 of course, a general principle of individual  
20 liberty. And we've often said, as Justice  
21 Ginsburg points out, that federalism is  
22 designed to protect individual liberty.

23 I think your basic response to that is  
24 that, actually, that's wrong in certain  
25 respects. Federal -- that this system of

1 separate sovereigns means your individual  
2 liberty's infringed more often by double  
3 prosecution, double regulation, double  
4 taxation.

5 Is that your answer, or do you have an  
6 answer other than that in response to the  
7 individual liberty concern?

8 MR. FEIGIN: No, Your Honor, I think  
9 it's a very narrow and not correct view of  
10 liberty, only to look at the liberty interests  
11 of the defendant.

12 There are also the liberty --

13 JUSTICE KAVANAUGH: From the  
14 perspective of negative liberty, liberty --  
15 freedom from government oppression or  
16 government regulation, your rule strikes some  
17 -- and this is what they point out -- as a --  
18 as an infringement of basic concepts of  
19 individual liberty: You didn't get me the  
20 first time; you're going to take another crack  
21 at it.

22 MR. FEIGIN: Well, Your Honor, I -- I  
23 don't think that's the right way to think about  
24 it. I think the framers decided that they were  
25 going to protect -- may I finish, Your Honor?

1 CHIEF JUSTICE ROBERTS: Uh-huh.

2 MR. FEIGIN: They were going to  
3 protect liberty in a particular way, and the  
4 way they were going to do that is by vesting  
5 sovereign power in the states and in the United  
6 States, which could both positively enact laws  
7 and protect people who may be victims of  
8 crimes.

9 And they did not have any  
10 understanding that the United States or the  
11 states would be precluded from vindicating  
12 their distinct sovereign interests in their own  
13 sovereign spheres by the unilateral actions of  
14 the other sovereign.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 Mr. Feigin.

18 General Hawkins.

19 ORAL ARGUMENT OF KYLE D. HAWKINS  
20 FOR TEXAS, ET AL., AS AMICI CURIAE,  
21 IN SUPPORT OF AFFIRMANCE

22 MR. HAWKINS: Thank you, Mr. Chief  
23 Justice, and may it please the Court:

24 I'm here today on behalf of a broad  
25 and diverse coalition of 36 states collectively

1 representing over 86 percent of the U.S.  
2 population. The states may disagree with one  
3 another about various policy issues, but we are  
4 united here in urging the Court not to overrule  
5 its long-standing interpretation of the Double  
6 Jeopardy Clause.

7 To rule for Petitioner, the Court  
8 would have to read "offence" to mean conduct  
9 without regard to sovereignty; overrule Fox,  
10 Lanza, Bartkus, Abbate, and Heath; allow one  
11 sovereign to potentially thwart another's  
12 ability to prosecute violations of its laws;  
13 give foreign powers a potential veto over  
14 domestic prosecutions; incentivize even --

15 JUSTICE GINSBURG: In the -- in the  
16 numbers -- the numbers you just mentioned, I  
17 thought we had heard from the other side that  
18 something like 25 states, something like that,  
19 do not have the separate sovereigns, one state  
20 versus another, state versus federal.

21 MR. HAWKINS: Well, Your Honor, it's  
22 true that there are 20 states that have enacted  
23 a general sort of bar on their ability to bring  
24 a prosecution based on conduct that was already  
25 prosecuted by another sovereign.

1           There are some quirks and differences  
2 within those states, but I think it's important  
3 to note that 14 of those 20 states are a part  
4 of our coalition today. They have signed on to  
5 our amicus brief urging this Court to leave  
6 that decision and those types of policy  
7 considerations to the states, which are already  
8 actively legislating in this area.

9           Take the Commonwealth of Virginia, for  
10 example. The Commonwealth of Virginia  
11 generally bars a prosecution by that state when  
12 the federal government has already brought a  
13 prosecution based on the same conduct. But, as  
14 recently as 2003, following the 9/11 attacks,  
15 Virginia amended its law to make an exception  
16 for terrorism cases.

17           Other -- the parties have spoken about  
18 potential exceptions related to civil rights,  
19 for example. I think the Virginia example  
20 shows that states are capable of recognizing  
21 the fairness concerns and the policy concerns  
22 that Petitioner raises and legislating  
23 appropriately.

24           In asking the Court not to overturn  
25 its long-standing interpretation, we'd like to



1 emphasize a couple of points. First,  
2 Petitioner's position would create a litany of  
3 practical problems that could harm state  
4 interests.

5           And I'd like to go through a number of  
6 examples of those. First, imagine a situation  
7 in which state A has a tougher penalty for a  
8 particular type of conduct than does state B.  
9 That, of course, is the fact pattern of *Heath*  
10 *v. Alabama*.

11           Under Petitioner's view, state A would  
12 not be able to vindicate its interest in that  
13 sterner prosecution, if state B were to go  
14 first. That could -- that situation could also  
15 play out if a state has a sterner penalty for a  
16 particular act than does the federal  
17 government.

18           This Court, of course, saw that in the  
19 *Screws* case, where the state penalty was much  
20 stronger than the federal penalty. We also see  
21 that in, for example, the area of robbery.

22           Under federal law a robbery of a U.S.  
23 letter carrier carrying U.S. mail is punishable  
24 by up to ten years. In Texas, however, robbery  
25 is punishable by up to 20 years. Again, under

1 Petitioner's view, Texas would not be able to  
2 vindicate --

3 JUSTICE KAGAN: I think what your  
4 friends on the other side might say to that is  
5 something along the lines of: Well, it's one  
6 thing to pick the higher penalty and, you know,  
7 let the state or the -- or the government with  
8 the higher penalty go forward. The problem  
9 with this is that you can get both.

10 MR. HAWKINS: Well -- well, Your  
11 Honor, oftentimes as a practical matter there  
12 won't be both. But suppose another practical  
13 problem that would arise under Petitioner's  
14 theory, suppose that a state had a particular  
15 interest in prosecuting a drug kingpin in that  
16 state. Suppose he's public enemy number 1 in a  
17 given state.

18 Well, unbeknownst to the state, the  
19 U.S. government is also looking at that kingpin  
20 in connection with a different federal  
21 prosecution. Now, unbeknownst to the state the  
22 federal government could enter into a plea  
23 agreement with that criminal in exchange for  
24 testimony in some other matter that's of grave  
25 concern to the federal government.

1           The states might not know about that  
2           until it's too late. At that point the states  
3           would not be able to vindicate their interest  
4           in prosecuting public enemy number 1.

5           And, of course, as the discussion  
6           earlier --

7           JUSTICE GINSBURG: That would  
8           certainly limit the willingness of the  
9           defendant to cooperate, if that -- if that were  
10          the rule.

11          MR. HAWKINS: I'm sorry, Your Honor?  
12          Can you please repeat that?

13          JUSTICE GINSBURG: If the -- if the --  
14          if the defendant could be re-prosecuted by the  
15          state that would be a disincentive to entering  
16          into a plea bargain if he can -- if he can just  
17          be subject to prosecution by another sovereign  
18          for the same conduct.

19          MR. HAWKINS: Your Honor, I suppose  
20          that may be theoretically true, but as my  
21          friend from the federal government indicated,  
22          we don't have any evidence that that's the  
23          case, and I don't believe that Petitioner has  
24          pointed to any.

25          As was discussed earlier, we could

1 also see this play out as to foreign  
2 prosecutions. Imagine a situation involving a  
3 international drug lord, a Pablo Escobar type,  
4 for example. Suppose that Florida could show  
5 that this individual had trafficked large  
6 amounts of drugs into the state of Florida and  
7 devastated local Florida communities.

8 Well, if a local Medellin prosecutor  
9 and a local Medellin jury were to try and  
10 acquit Escobar or potentially give him a light  
11 sentence or something like that, that would,  
12 under Petitioner's theory, forever prevent the  
13 Supreme Court of --

14 JUSTICE GINSBURG: Acquit of conduct  
15 engaged in Florida?

16 MR. HAWKINS: Well, yes, Your Honor,  
17 if -- if there were drugs being trafficked by  
18 the -- by Escobar and a cartel into the state  
19 of Florida, that would certainly implicate the  
20 interests of Florida.

21 And under Petitioner's theory --

22 JUSTICE GINSBURG: Yes, but I asked  
23 about the Colombia? If the crime is committed  
24 in Florida against Florida residents --

25 MR. HAWKINS: Well, Your Honor, my

1 hypothetical I am making assumes that there's  
2 some sort of Colombian law against trafficking  
3 drugs out of that country into another country.  
4 We can certainly imagine that being the case in  
5 -- in many scenarios.

6 Other practical concerns that would  
7 arise, as my friend from the Department of  
8 Justice indicated, would involve races to the  
9 courthouse and competition between states and  
10 the federal government, rather than  
11 cooperation, all to the detriment of law  
12 enforcement.

13 And even setting aside these practical  
14 problems, there are a number of other concerns  
15 that Petitioner's view would raise. First,  
16 under Petitioner's view, courts around this  
17 country would be for the first time asked to  
18 apply Blockburger across the federal and state  
19 divide.

20 That is no easy thing to do. This  
21 Court has experienced a taste of that in its  
22 Armed Career Criminal Act jurisprudence where  
23 the Court has tried to do something similar to  
24 that, has developed the modified categorical  
25 approach and other doctrines to try to

1 accomplish that.

2           It's no easy matter to do that. That  
3 problem would even be compounded if this Court  
4 were to declare a ruling for Petitioner to be  
5 retroactive.

6           Anybody who had been convicted or even  
7 charged, really, a second time based on similar  
8 conduct would challenge that prosecution as  
9 unconstitutional under this Court's rule. And  
10 then, of course, a Court in reviewing that, if  
11 the rule were retroactive, would have to go  
12 back through history and apply Blockburger, not  
13 just across the federal and state divide, but  
14 also as a historical matter as to offenses that  
15 may have changed over time.

16           Finally, setting all of these  
17 practical problems aside, I think it's  
18 important to note that Petitioner seeks to take  
19 us into uncharted waters. The -- the rule that  
20 he imagines has never been the rule in this  
21 country until potentially now.

22           The states and the federal government  
23 have never had to be concerned about who goes  
24 first. Under the law of unintended  
25 consequences, surely there are practical

1 problems that would arise from Petitioner's  
2 position that we may not have even thought  
3 about today.

4 Unless there are further questions.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 MR. HAWKINS: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Mr. Chaiten,  
9 four minutes remaining.

10 REBUTTAL ARGUMENT OF LOUIS A. CHAITEN

11 ON BEHALF OF THE PETITIONER

12 MR. CHAITEN: I just -- I guess I will  
13 pick up where -- thank you, Mr. Chief Justice.

14 I will pick up where he ended, which  
15 is that this has never been the rule in the  
16 country -- in this country today. It's the  
17 rule in at least 20 -- 20 states. It's the  
18 rule in 37 states with respect to certain  
19 crimes. And it also seems to have worked out  
20 okay.

21 I did want to -- I did want to return  
22 to the issue of stare decisis and respond to  
23 what they were saying. We -- we have a legal  
24 framework for answering stare decisis  
25 questions. It's a law of stare decisis.

1           And I think it provides some pretty  
2 standard guidance on this. We -- we have to be  
3 right on the merits, that's true, but if we're  
4 right, if we're assuming we're right on the  
5 merits, then -- then the question is what else  
6 do we need to show?

7           And I already told you about one key  
8 factor under this Court's jurisprudence, which  
9 is a jurisprudence -- jurisprudential change.  
10 And I think incorporation is a pretty  
11 significant one.

12           Second, we -- there has been a -- a  
13 massive expansion in federal law as this Court  
14 has recognized. That was recognized by this  
15 Court in Murphy and Elkins as the kind of  
16 changed factual circumstance that would -- that  
17 would justify revisiting an issue.

18           There -- another issue is reliance.  
19 And, of course, reliance isn't really a  
20 relevant issue where you're talking about an  
21 unconstitutional law enforcement practice.

22           And, finally, the -- this is a  
23 constitutional case. It is not a statutory  
24 case. And the Court's approach to stare  
25 decisis has been different in constitutional



1 cases.

2 As -- as for --

3 JUSTICE ALITO: Do you think there is  
4 less reliance here than there was on the issue  
5 of the Miranda rule?

6 MR. CHAITEN: Well, the issue is  
7 whether -- whether you are continuing an  
8 unconstitutional law enforcement practice. And  
9 my point is the Court has pointed out in  
10 Arizona v. Gant that the Court has never  
11 allowed continuation of an unconstitutional law  
12 enforcement practice --

13 JUSTICE ALITO: So you think that --

14 MR. CHAITEN: -- on reliance.

15 JUSTICE ALITO: -- any -- any  
16 constitutional decision of this Court that  
17 imposes any limitation on any right in the Bill  
18 of Rights that affects criminal procedure is  
19 always open to reexamination without  
20 consideration of stare decisis because doing  
21 that would expand the rights of the criminal  
22 defendant? That's your position?

23 MR. CHAITEN: Your Honor, I'm not  
24 saying without consideration of stare decisis.  
25 I am saying without consideration of reliance

1 interests.

2 JUSTICE BREYER: Reliance --

3 MR. CHAITEN: This Court has said --

4 JUSTICE BREYER: I mean, the obvious  
5 thing that comes into my mind, I got the other  
6 factors, but the -- the -- the -- it seems --  
7 what's wrong with what I'm thinking, which must  
8 be something wrong with it, that very often  
9 this Court has said the rule of Constitution is  
10 X, but we're not going to apply it  
11 retroactively, because to do that would mean a  
12 vast release of prisoners who have committed  
13 crimes.

14 Now, that sounds like reliance and  
15 sounds like reliance on a law that the Court  
16 has said is unconstitutional, which is the  
17 preceding situation.

18 MR. CHAITEN: Yeah, I don't think it's  
19 a reliance issue on addressing the underlying  
20 merits question. It's just whether to apply  
21 the law retroactively. Incidentally I don't --

22 JUSTICE BREYER: You don't --

23 MR. CHAITEN: I'm sorry.

24 JUSTICE BREYER: No, the reason you  
25 don't apply the unconstitutional -- the reason

1 you still apply the unconstitutional law to all  
2 those people who are in prison is because the  
3 reliance in the community on their staying in  
4 prison.

5 MR. CHAITEN: Well -- - well, I think  
6 the reason you don't apply it is because the  
7 judgment is final, but -- so I think it is a  
8 separate question from the underlying merits  
9 question, the underlying constitutional  
10 question.

11 And, incidentally, I don't think this  
12 rule would be retroactive. It's a procedural  
13 rule. It doesn't go to substantive. It's not  
14 a watershed rule. So I -- I don't think that's  
15 a concern here.

16 And then --

17 JUSTICE ALITO: And there have been  
18 many decisions of this Court that have imposed  
19 some limits on -- have rejected some claims  
20 that have been asserted under the Fourth  
21 Amendment, under the Fifth Amendment right  
22 against self-incrimination, under the Sixth  
23 Amendment jury trial right and the right to  
24 ineffective assistance of counsel, under the  
25 Eighth Amendment, right against cruel and

1 unusual punishment.

2 And if any of those was challenged,  
3 you would say there's no -- there can never be  
4 a reliance, and because there's a -- there  
5 never can be reliance because it's a -- it  
6 involves an individual right, we put stare  
7 decisis aside?

8 MR. CHAITEN: I'm -- so I'm not --  
9 there's more that goes into stare decisis than  
10 reliance. That's one factor.

11 What I'm saying is that the Court has  
12 said that we will not --

13 JUSTICE ALITO: But --

14 MR. CHAITEN: -- we will not rely on  
15 reliance in the case of an unconstitutional law  
16 enforcement practice.

17 Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel. The case is submitted.

20 (Whereupon, 11:24 a.m., the case was  
21 submitted.)

22

23

24

25

## Official - Subject to Final Review

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