No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The "separate sovereigns"-shaped hole in the protections afforded by the Double Jeopardy Clause ought to be sealed shut. The government's argument to the contrary rests on the faulty premises that constitutional protections must give way to erroneous judicial precedent and that nothing has changed legally or factually in the century-and-a-half since the exception's creation *ex nihilo* to justify reassessing it now. The government largely ignores Mr. Gamble's arguments regarding constitutional text, purpose, and history, and the erosion of the exception's legal and factual underpinnings. And it does not deny that this case is the ideal vehicle for taking up the call, already issued by two members of this Court, to revisit the viability of this dubious doctrine. The Court should grant certiorari and put an end to the separate-sovereigns exception once and for all.

ARGUMENT

I. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED.

A. The Separate-Sovereigns Exception Is Inconsistent with the Plain Text, Original Meaning, and Purpose of the Constitution.

1. The Government does not even attempt to ground its position in the actual text of the Double Jeopardy Clause: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." It offers no response to petitioner's observation that the Clause provides for no exception

based on the identity of the prosecuting entity but rather unambiguously protects each "person" from double prosecution. Instead, the Government relies exclusively on the separate-sovereigns exception itself to conclude that each "prosecution[] by [a] separate sovereign" constitutes a separate "offense[]." Opp'n Br. at 4.

But this reasoning is entirely circular. It is also contrary to the ordinary meaning of the term "offense" in use at the time the Clause was drafted (and today). *See* Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) (defining "offence" to mean a "[c]rime" or "act of wickedness," and defining "crime," in turn, to mean "[a]n act contrary to right; an offense; a great fault; an act of wickedness"); *see also United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."). Moreover, discarding an ordinary, acts-based definition for a technicalized, sovereigns-based one is particularly artificial here given that the Clause applied originally (*i.e.*, pre-incorporation) to *only one sovereign*.

2. The Government likewise gives short shrift to the discussion of original meaning in light of historical English precedent, dismissing that whole line of argument by quoting *Bartkus v. Illinois*, 359 U.S. 121, 128 n.9 (1959), for the proposition that such precedent is "dubious" and by observing that our system of federalism has no precise analog in the United Kingdom. But the citation to *Bartkus* is itself dubious. *Bartkus* discussed only a single case, *King*

v. Hutchinson, concluding that it was unhelpful in context because of "confused" accounts of the case in later English opinions and because the case, and others like it, "reflect[ed] a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Id.*

As relevant here, however, the authorities recounting *Hutchinson* all agree: Hutchinson's acquittal abroad for murder barred his retrial in England. *See Beak v. Thyrwhit* (1688) 87 Eng. Rep. 124, 124-25; *Burrows v. Jemino* (1726) 93 Eng. Rep. 815, 815; *Gage v. Bulkeley* (1744) 27 Eng. Rep. 824, 827. The only disagreement among them—that one of the three sources reported the original trial as having occurred in Spain, not Portugal—has nothing to do with the separate-sovereigns question. *Compare Hutchinson*, 84 Eng. Rep. at 1011 (Portugal), *Beak*, 87 Eng. Rep. at 125 (Portugal), *and Gage*, 27 Eng. Rep. at 826 (Portugal)*with Burrows*, 93 Eng. Rep. at 815 (Spain). The *Bartkus* distinction between the supposed "power of discretion" exercised by English judges and "the constitutional law of our federalism" is no less inconsequential. That the English guarantee against double jeopardy was anchored in judicial discretion while its American progeny was enshrined in a written constitution says nothing about the *substance* of the guarantee itself. Indeed, if anything, the Founders' decision to include the guarantee in our Constitution rather than to rely on the discretion of judges alone is evidence of an invigorated, not weakened, protection. *See, e.g.*, *Florida v. Meyers*, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting) ("we must not forget that a central

purpose of our written Constitution . . . was to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State Governments").

The Government's attempted distinction between the separate sovereigns of the British Empire and those in our federal republic is no more persuasive. Of course, the British system, like ours, involved separate sovereigns exercising jurisdiction over the same subject matter. The only distinction the Government draws is the territorial one—*i.e.,* the separate sovereigns at issue in the English precedents did not exercise jurisdiction over the same territory. Opp'n Br. at 8. But that is a distinction without a difference. The Government offers no explanation why or how that fact has any bearing on interpretation of the Double Jeopardy Clause.

These unconvincing attacks on the historical sources are, in the end, all the Government has to offer on this front, as it is unable to muster any historical evidence in support of its own position. And at the end of the day, the fact remains that it was a "universal maxim of the common law of England, that no man [was] to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 329 (1768). So too in the early days of our country: "There is no principle better established by the common law . . . than that an individual shall not be put in jeopardy twice for the same offence." *Fox v. Ohio*, 46 U.S. 410, 439 (1847) (McLean, J., dissenting).

3. While the Government spends time discussing the purpose of the separate-sovereigns exception, it is

completely silent on the purpose of the Double Jeopardy Clause itself. The Government does not—and cannot—dispute that the Clause reflects a "constitutional policy of finality *for the defendant's benefit*." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (emphasis added); *Green v. United States*, 355 U.S. 184, 187-88 (1957) (Clause's purpose is to prevent "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"). The separate-sovereigns exception cannot be reconciled with that motivating purpose.

4. Largely as a result of its failure to grapple with the text, history, and purpose of the Double Jeopardy Clause, the Government's federalism-based argument misses the mark as well. The argument boils down to the propositions that interpreting the Double Jeopardy Clause as written (*i.e.*, to bar multiple convictions for the same crime, including when those convictions are rendered at the hands of different sovereigns) results in an impermissible restraint on the police powers of the State and federal governments and that it somehow upsets the balance of power between these two sovereigns.

The former contention is baseless. Applying the Clause to bar prosecution by the federal government after conviction (or acquittal) in State court, or vice versa, would not, as the Government contends, leave the criminal law of the second sovereign unvindicated or render its justice system subordinate. As an initial matter, a sovereign's criminal law is not left unvindicated simply because a separate sovereign

has already vindicated it. *See Moore v. Illinois*, 55 U.S. 13, 22 (1852) (McLean, J., dissenting) ("[T]he criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the Federal Government . . . may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offences under its own laws within its jurisdiction."); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (it is "fiction" to maintain "that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other"). More importantly, this argument misunderstands the purpose of the protections afforded to individuals by the Bill of Rights, particularly those protections which have been incorporated vis-à-vis the States. The purpose of the Double Jeopardy Clause, like the purpose of the Free Speech Clause or Free Exercise Clause, is not to protect the State and federal governments from each other but, rather, to secure the rights of the individual by circumscribing the powers of both. It is thus of no use to argue, as does the Government, that the plain-meaning interpretation of the Double Jeopardy Clause would in some manner cabin the authority of the government (whether State or federal): That is, after all, precisely what rights-guaranteeing clauses are intended to do. *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) ("application, through the Fourteenth Amendment, of

the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess"). The Double Jeopardy Clause, then, only "vitiate[s]" or "hinder[s]," Opp'n Br. at. 7, the power of the State and federal governments in the same way, *e.g.*, that the First Amendment "vitiate[s]" government's ability to criminalize protected speech or the Fifth Amendment "hinder[s]," *id.*, the State and federal criminal justice systems by barring the government from compelling any person to testify against him- or herself.

The Government's other, related line of reasoning—that undiluted application of the Double Jeopardy Clause will upset the balance of power between the State and federal governments—fares no better, given that *both* would be barred from re-prosecuting a defendant where the other has already pursued the case to conviction or acquittal. The Government argues, or at least intimates, that the "historical police powers" of the States will be disproportionately affected. Opp'n Br. at 7. But to the extent the States' police powers have been improperly curtailed, the fault lies not with the plain language of the Double Jeopardy Clause but rather with the improper federalization of criminal law. *Cf. United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("States possess primary authority for defining and enforcing the criminal law." (citation omitted)).

Contrary to the Government's assertion, then, it is the separate-sovereigns exception itself that runs afoul of federalist principles, making a mockery of the assertion that our federal system preserves and enhances freedom, *Bond v. United States*, 564 U.S.

211, 220–21 (2011). The separate-sovereigns exception does precisely the opposite, permitting the two components of our federal system to conspire together to deprive an individual of liberty where a single government would be powerless to do so. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) (exception permits different governments "to do together what . . . neither can do separately").

B. The Separate-Sovereigns Exception's Doctrinal and Factual Underpinnings Have Eroded.

1. As set forth in Mr. Gamble's opening brief, "*stare decisis* cannot possibly be controlling when . . . the decision in question has . . . [had] its underpinnings eroded . . . by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). And as also set forth there, justification for the separate-sovereigns exception has, since its creation, rested largely on the fact that the Double Jeopardy Clause applied only to the federal government. Indeed, all of the precedents developing and reaffirming the exception pre-date the 1969 incorporation of the Double Jeopardy Clause in *Benton v. Maryland*, 395 U.S. 784 (1969). The government asserts the exception has been reaffirmed since then, Opp'n Br. at 9-10, but while this Court has applied and explained the traditional justifications for the exception, it has never squarely reconsidered the validity of the exception after, and in light of, incorporation.

The Government's attempt to downplay the significance of this fact is to no avail. Besides

pointing to this Court's post-1969 invocation of the exception (again, without considering the effects of incorporation on its continuing validity), it raises only a single argument in opposition to reconsideration of the doctrine in light of incorporation: "A defendant who claims a right to avoid prosecution by the federal government based on previous prosecution by a State is in the same position irrespective of whether the State is subject to the Double Jeopardy Clause." Opp'n Br. at 10. But the government cites no authority in support of this position, which runs counter to this Court's jurisprudence regarding other incorporated constitutional protections. *See Elkins v. United States*, 364 U.S. 206, 213 (1960) (foundation of doctrine allowing federal prosecutors to rely on evidence illegally obtained by state officials "disappeared" upon incorporation of the Fourth Amendment); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (overruling prior holding that one sovereign could prosecute in reliance on testimony unlawfully compelled by another in light of incorporation of Fifth Amendment's protection against self-incrimination). The argument is also faulty in that it focuses exclusively on the subsequent federal prosecution. Were the Double Jeopardy Clause not applicable to the States (as was the case prior to 1969), then a State prosecution simply would not "count" for purposes of double-jeopardy analysis, regardless of whether it occurred before or after prosecution by the federal government. *See, e.g.*, *United States v. Lanza*, 260 U.S. 377, 382 (1922) ("The Fifth Amendment['s protection against double

jeopardy] . . . applies *only to proceedings by the Federal Government*, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a *first trial* for the same offense *under the same authority*." (internal citation omitted; emphasis added)). Incorporation of the Clause changed that, turning the exception's jurisprudential underpinnings on their head.

2. The government stumbles again in its response to Mr. Gamble's argument regarding the federalization of criminal law. It does not deny that federal criminal law and prosecution have undergone a dramatic expansion in recent decades, nor does it engage with any of the numerous sources cited by Mr. Gamble in support of this observation. Instead, the government merely hedges, asserting that "it is not clear whether a significant increase in the rate of federal prosecution has actually occurred in areas of overlap with state authority." Opp'n Br. at 11. But even that seemingly modest assertion is an overreach, as the single source the Government relies upon is an outlier that has been deeply criticized. *See* Julie O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 Harv. J.L. & Pub. Pol'y 57 (2014) (critiquing Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1 (2012)).

The Government emphasizes the Department of Justice's internal policy to "generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was demonstrably unvindicated by the prior state prosecution." Opp'n Br. at 11 (quotation omitted).

But as this case epitomizes, a discretionary executive policy is no substitute for the proper enforcement of a constitutional guarantee. The government makes no attempt to identify what "Federal interest" would have gone "demonstrably unvindicated" had it opted to forego double prosecution and punishment here. Indeed, the events surrounding Mr. Gamble's crime—a broken taillight, two baggies of marijuana, and possession of a handgun—are remarkable only for their banality. If double prosecution is appropriate here, it is difficult to imagine when it would not be.

II. THIS CASE IS AN IDEAL VEHICLE.

The Government does not deny that, should the Court decide to take up the separate-sovereigns question, this case presents the perfect opportunity to do so. It presents neither the vehicle problems that plagued *Walker* (and presently plague *Ochoa*) nor the complex procedural history at issue in *Tyler*. *See Walker v. Texas*, 137 S. Ct. 1813 (2017) (denying certiorari); *Ochoa v. United States*, No. 17-5503; *Tyler v. United States*, No. 17-5410. To the contrary, the procedural posture of the case is straightforward, and the constitutional question is squarely, and exclusively, presented. Mr. Gamble raised only one defense to his federal conviction—that it violated the Double Jeopardy Clause. That defense has been meticulously preserved. And he sits in prison today because of the separate-sovereigns exception. This is indeed the "appropriate case" in which to undertake a "fresh examination" of the separate-sovereigns exception. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring).

CONCLUSION

"Nothing can be more repugnant . . . than two punishments for the same act." *Fox*, 46 U.S. at 440 (McLean, J., dissenting). For the foregoing reasons and those stated in Mr. Gamble's opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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