No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER

BARRE C. DUMAS
126 Government Street
Mobile, AL 36602

ROBERT N. STANDER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

LOUIS A. CHAITEN
Counsel of Record
EMMETT E. ROBINSON
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7244
lachaiten@jonesday.com

AMANDA K. RICE
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48103

Counsel for Petitioner

QUESTION PRESENTED

Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 694 Fed. Appx. 750. The District Court's unpublished opinion denying Gamble's motion to dismiss is available at 2016 WL 3460414.

JURISDICTION

The Eleventh Circuit entered judgment on July 28, 2017. This Court granted certiorari on June 28, 2018, and has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

The Fifth Amendment's Double Jeopardy Clause guarantees that "No person shall . . . be twice put in jeopardy" "for the same offence." That guarantee rang hollow for Terance Martez Gamble, who, as a consequence of the Court-created separate-sovereigns exception, has been subjected to two convictions, and two sentences, for the single offense of being a felon in possession of a firearm. As a result of this double-conviction and double-sentencing—and contrary to the text, original meaning, and purpose of the Double Jeopardy Clause—he must spend three additional years of his life behind bars.

1. In 2008, Gamble was convicted of second-degree robbery in Mobile County, Alabama. J.A. 27. Because second-degree robbery is a felony offense in Alabama, both federal and state law barred him from

subsequently possessing a firearm. *See* Ala. Code §§ 13A-11-70(2), 13A-11-72(a); 18 U.S.C. § 922(g)(1).

2. More than seven years later, on November 29, 2015, Gamble was driving in Mobile when a police officer pulled him over for a faulty headlight. *See* J.A. 27. The officer smelled marijuana and, upon searching Gamble's car, discovered two baggies of marijuana, a digital scale, and a 9mm handgun. *See id.*

3. Alabama prosecuted Gamble for possessing marijuana and violating a state law that "prohibits a convicted felon from possessing a pistol." *Ex parte Taylor*, 636 So. 2d 1246, 1246 (Ala. 1993); *see* Ala. Code §§ 13A-11-70(2), 13A-11-72(a). Gamble received a one-year sentence. Dist. Ct. ECF No. 34 at 7.

4. While the state prosecution was pending, the federal government charged Gamble for the same offense under federal law: being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1) (prohibiting felons from "possess[ing] in or affecting commerce[ ] any firearm"). The federal charge was premised on "the same incident of November 29, 2015 that gave rise to his state court conviction." Pet. App. 6a; *see also* J.A. 27.

Gamble raised one and only one objection to his federal prosecution: that it violated his "Fifth Amendment [right] against being placed twice in jeopardy for the same crime." Dist. Ct. ECF No. 18 at 1. He moved to dismiss his federal indictment on that ground. *Id.*

The District Court, in a thorough opinion, denied Gamble's motion. Pet. App. 5a–10a. Although the court recognized that Gamble had been subject to

duplicative prosecutions, it had no choice but to adhere to this Court's separate-sovereigns exception. "[U]nless and until the Supreme Court overturns" that exception, the District Court concluded, "Gamble's Double Jeopardy claim must . . . fail." *Id.* at 10a.

In light of that decision, Gamble entered a conditional guilty plea, preserving his right to appeal the District Court's denial of his double-jeopardy claim. J.A. 22, 47–48. The court sentenced him to 46 months in prison, three years of supervised release, and payment of a $100 special assessment. *Id.* at 15–20. He is set to be released on February 16, 2020—nearly three years after he would have been released from custody based on the state sentence alone. Bureau of Prisons Find An Inmate, "Terance Martez Gamble," https://www.bop.gov/inmateloc (last visited August 31, 2018).

5. Gamble appealed the "issue preserved in writing in his Plea Agreement and preserved on the record at his Plea Hearing"—namely, whether the federal prosecution violated "his rights pursuant to the Double Jeopardy clause of the Fifth Amendment." Dist. Ct. ECF No. 40 at 1. The government opposed solely on the basis of the separate-sovereigns exception. 11th Cir. Gov't Br. at 3–5. And the Eleventh Circuit issued a *per curiam* opinion affirming the decision below. Like the District Court, the Court of Appeals was bound to follow this Court's precedent. "[U]nless and until the Supreme Court overturns *Abbate*," the court reasoned, "the double jeopardy claim must fail based on the dual sovereignty doctrine." Pet. App. 2a.

6. Gamble petitioned this Court for review of the Eleventh Circuit's ruling. In opposition to certiorari, the government again relied exclusively on the separate-sovereigns exception. Accordingly, as this case comes to the Court, Mr. Gamble's continued imprisonment rests solely on the Court-created separate-sovereigns exception to the Double Jeopardy Clause. On June 28, 2018, this Court granted certiorari to decide whether to overrule that exception.

SUMMARY OF ARGUMENT

This Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause.

I. The separate-sovereigns exception is incompatible with the text, original meaning, and purpose of the Double Jeopardy Clause.

A. The text of the Double Jeopardy Clause contemplates no exceptions to its blanket guarantee of protection from double prosecution and punishment for the same offense. Congress could have written the Clause to exclude prior state convictions, but did not. It considered and rejected such an exclusion, instead choosing a Clause phrased in absolute terms.

B. The separate-sovereigns exception also contravenes the original meaning of the Double Jeopardy Clause, leaving the Clause less protective of liberty today than it was in 1791.

1. The framers of the Bill of Rights understood the Double Jeopardy Clause to incorporate English common law protections against successive prosecutions, including the well-established rule barring successive prosecutions by separate

sovereigns. A long line of English cases, dating to at least 1662, specifically and unequivocally rejected the notion that two sovereigns could punish a defendant for the same crime. And numerous English treatises from the Founding Era uniformly reflected this same rule.

2. Early American sources are in accord. This Court's decisions—in *Houston v. Moore*, 18 U.S. 1 (1820), and *United States v. Furlong*, 18 U.S. 184 (1820)—pay homage to the firmly established traditional rule that prosecution by one sovereign bars prosecution by another. Nearly every state court followed the same rule. As one court summarized the early understanding: It is "against natural justice" for a defendant to be "cropped in one" state, "branded and whipped in another, imprisoned in a third, and hanged in a fourth; and all for one and the same offense." *State v. Brown*, 2 N.C. 100, 101 (1794). Early treatises on American law only reinforce this understanding.

3. In contrast to the unassailable pedigree of the traditional rule, the separate-sovereigns exception did not arise until well over half a century after the founding, and then only in dicta under ignominious circumstances. The first outright embrace of the exception occurred in a fugitive slave case, *Moore v. Illinois*, 55 U.S. 13 (1852), that said nothing about *Houston* or *Furlong*, the traditional English common law rule, or why the framers would have rejected that rule *sub silentio*. And the separate-sovereigns exception did not achieve the status of a holding for another 70 years, when the Court decided *United States v. Lanza*, 260 U.S. 377 (1922), a Prohibition Era decision that was driven by policy considerations

and entirely devoid of any inquiry into the original understanding of the Double Jeopardy Clause. The last time the Court squarely took up the question, in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), the Court sharply divided, and the majority refused to consider overwhelming evidence of the Clause's original meaning.

C. The separate-sovereigns exception likewise conflicts with the purpose of the Double Jeopardy Clause and core principles of federalism.

1. "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," with roots in Greek and Roman law. *Bartkus*, 359 U.S. at 151 (Black, J., dissenting). The purpose of the Double Jeopardy Clause is to protect against this most ancient and basic of evils. Permitting consecutive prosecutions for the same offense simply because different sovereigns initiate them "hardly serves" the deeply rooted principles of finality and fairness the Clause was designed to protect. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Indeed, "[i]f double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Neither English common law nor the Double Jeopardy Clause at the time of its adoption would abide this unfairness, yet somehow this Court's 20th- and 21st-century jurisprudence does.

2. In the same vein, the separate-sovereigns exception turns the liberty-preserving purpose of

federalism on its head. Our system of federalism was designed as a "double security . . . to the rights of the people." The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). But under the separate-sovereigns exception these two levels of government do precisely the opposite—eviscerate individual rights—by accomplishing together what neither can separately. This is an especially unwarranted result in a system where the states and federal government are not foreign nations, but "parts of ONE WHOLE." Federalist No. 82, at 493 (Alexander Hamilton).

II. *Stare decisis* concerns should not keep the Court from overruling the separate-sovereigns exception.

A. The separate-sovereigns exception was egregiously wrong from the start, in ways that lend it less precedential force. The separate-sovereigns exception originated in ill-considered dicta and solidified through a series of decisions that ignored prior precedents and never meaningfully engaged with the text or original meaning of the Double Jeopardy Clause. *Bartkus* and *Abbate* were decided by the narrowest of margins over spirited dissents. And the separate-sovereigns exception has long been questioned by members of this Court, lower-court jurists, and legal scholars.

B. *Stare decisis* loses its force when a decision's doctrinal underpinnings have been eroded. That is indisputably the case here. The separate-sovereigns exception developed on the understanding that the Double Jeopardy Clause did not apply to the states, and has not been re-visited since the Court held to

the contrary. Incorporation eliminated the separate-sovereigns exception's doctrinal justification. The Court has repeatedly held in nearly identical contexts that incorporation justifies overruling precedents premised on a provision's inapplicability to the states. In *Elkins v. United States*, 364 U.S. 206 (1960), the Court overruled the so-called "silver platter" doctrine, which had allowed federal prosecutors to use evidence unlawfully obtained by state officers. And in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court overruled its prior holding that one sovereign could, in convicting a defendant, rely on testimony unlawfully compelled by another. Both decisions reflect the unassailable principle that, following incorporation, the Court should not adhere to precedent allowing coordinate governments to accomplish together what neither could do alone. That principle applies with equal force here.

C. Foundational changes in the factual landscape can also justify departing from *stare decisis*. The dramatic federalization of criminal law over the past 60 years is such a foundational change. It has rendered almost laughable another pillar undergirding the separate-sovereigns exception: the assumption that state and federal jurisdiction will only rarely overlap.

D. The separate-sovereigns exception is also unworkable. Even the federal government acknowledges that some check on successive prosecutions by separate sovereigns is required to protect against unfairness. For decades, that check has been the Department of Justice's so-called *Petite* policy. But a prosecutor's secretive application of a

discretionary policy is no substitute for judicial enforcement of a mandatory constitutional right.

E. Finally, no reliance interests justify retaining the separate-sovereigns exception. No property rights hinge on its continued existence. And vindicating the text, purpose, and original meaning of the Double Jeopardy Clause will not unduly impede law-enforcement efforts. Many states already reject the separate-sovereigns exception as a matter of state law, yet no chaos has ensued. Indeed, under this Court's demanding *Blockburger* test for deeming two crimes to be the "same offence" within the meaning of the Double Jeopardy Clause, it will be the unusual case in which federal and state governments may not both bring some charges. And where crimes are in fact the "same offence," federal and state prosecutors can coordinate their prosecution efforts, as they already frequently do.

ARGUMENT

I. THE SEPARATE-SOVEREIGNS EXCEPTION CONTRAVENES THE TEXT, ORIGINAL MEANING, AND PURPOSE OF THE DOUBLE JEOPARDY CLAUSE.

A. The Text of the Double Jeopardy Clause Contains No Exception for Separate Sovereigns.

The Double Jeopardy Clause provides, in absolute terms, that no person shall be "twice put in jeopardy" "for the same offence." U.S. Const. amend. V. The text admits of no exceptions: If two offences are "the same," the Clause forbids successive prosecutions.

As this Court has long held, two crimes are the "same offence" if their elements are the same. That is,

whether "two distinct statutory provisions" are "two offenses or only one" depends simply on "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The words "same offence" cannot be understood to exclude crimes with the same elements simply because they are prosecuted by two different sovereigns.

It would have been a simple matter to write such an exception into the Double Jeopardy Clause. A few additional words would have done the trick. In fact, one member of the first Congress proposed language to do just that. The original draft of the Double Jeopardy Clause prohibited "more than one trial or one punishment for the same offence." 1 Annals of Cong. 753 (1789). Representative George Partridge suggested adding, after "same offence," the words "by any law of the United States." *Id.* Partridge's proposal would have permitted the federal government to prosecute a defendant after conviction for the same offense under state law or any law other than a "law of the United States." *Id.* Yet Congress *rejected* the Partridge amendment, instead choosing a Double Jeopardy Clause phrased in absolute terms. *Id.* As Congress's rejection of the Partridge amendment confirms, those absolute terms admit of no exceptions.

B. The Separate-Sovereigns Exception Is at War with the Original Meaning of the Double Jeopardy Clause.

Not only is the separate-sovereigns exception irreconcilable with the text of the Double Jeopardy Clause, it also departs sharply from the original

understanding of the Clause, rendering the Clause *less* protective of individual liberty than it was in 1791. The framers of the Bill of Rights well understood that the Double Jeopardy Clause reflected the English common law rule. English common law courts forbade successive prosecutions by separate sovereigns long before the American founding. And early American practice reflected the English rule, all through the years of Chief Justice John Marshall. Not until the time of Chief Justice Roger Taney did the Court ever hint that the Constitution might permit successive prosecutions by different sovereigns for the same crime. Not until 1922, moreover, did the Court hold—without any consideration of historical evidence—that the federal government could prosecute a defendant after a state had already convicted him for the same offense. In short, the separate-sovereigns exception is irreconcilable with overwhelming evidence of the Double Jeopardy Clause's original meaning.

1. The Framers Understood the Double Jeopardy Clause to Incorporate the English Common Law Rule Prohibiting Successive Prosecutions by Separate Sovereigns.

a. The framers understood the Double Jeopardy Clause generally to embody an established principle of English common law. During debates in the first Congress, one representative voiced the uncontroversial point that the Clause is "declaratory of the law as it now stood" and consistent with "the universal practice in Great Britain, and in this country." 1 Annals of Congress 753 (1789) (remarks of Rep. Livermore). The prohibition against double

jeopardy was thus understood as "another great privilege secured by the common law" of England and incorporated into the Constitution of the United States. 3 Joseph Story, Commentaries on the Constitution of the United States 662 (1833).

This Court has since confirmed that the Double Jeopardy Clause is derived from English "common law, . . . carried into the jurisprudence of this Country through the medium of Blackstone." *Benton v. Maryland*, 395 U.S. 784, 795 (1969). To determine the original scope of the Double Jeopardy Clause, the Court must therefore look to the "English practice, as understood in 1791." *Grady v. Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting), *overruled by United States v. Dixon*, 509 U.S. 688 (1993); *see Ex parte Lange*, 85 U.S. 163, 170 (1873) (the Double Jeopardy Clause protects against successive prosecutions "so far as the common law gave that protection").

b. For centuries, English law followed the ancient and "universal maxim" "that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 335 (5th ed. 1773) (hereinafter Commentaries). This principle was embodied in several pleas, two of which are relevant here: *autrefois acquit* (former acquittal), and *autrefois convict* (former conviction). *Id.* at 335–36. In a proper case, a defendant could enter one of these pleas to bar a second prosecution in the same or different court. *Id.*

At the time of the American founding, English law had specifically and squarely rejected the idea that

two sovereigns could punish a defendant for the same crime. *See* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1 (1956). Indeed, English courts repeatedly held that prosecution in a foreign country would bar a second prosecution for the same crime in England. And English treatises universally confirmed that rule.

i. The most instructive case is *King v. Roche*, (1775) 168 Eng. Rep. 169, 169 (K.B.). There, an English prosecutor sought to convict Roche for a murder committed in South Africa. *Id.* Roche "pleaded *Autrefois acquit*," asserting that a Dutch court had previously acquitted him of the same murder. *Id.* The court agreed that a prior acquittal would bar prosecution in England because "a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction." *Id.* at cmt. a. For perfect clarity, the court explained that "if A., having killed a person in Spain, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in Spain in bar." *Id.*

Roche relied on the oft-cited *King v. Hutchinson*. There, a Portuguese court acquitted Hutchinson of a murder committed in Portugal. *Roche*, 168 Eng. Rep. at 169 cmt. a. He was later prosecuted again in England, "the King being very willing to have him tried here for the same offence." *Id.* The court held that, "as he had been already acquitted of the charge by the law of Portugal, he could not be tried again for it in England." *Id.* Though there is no surviving direct report of *Hutchinson*, at least three reported cases in addition to *Roche* cite that decision as

settling English law on the separate-sovereigns issue. *See Beak v. Tyrrell*, (1688) 89 Eng. Rep. 411, 411 (K.B.), *sub nom Beak v. Thyrwhit*, 87 Eng. Rep. 124; *Burrows v. Jemino*, (1726) 25 Eng. Rep. 235 (Ch.), *sub nom Burroughs v. Jamineau*, 93 Eng. Rep. 815; *Gage v. Bulkeley*, (1744) 27 Eng. Rep. 824, 826–27 (K.B.).

Hutchinson itself reflects the rule of an even earlier case, *King v. Thomas*, 1 Lev. 118 ((1664) 83 Eng. Rep. 326 (K.B.)); 1 Keble 663; 1 Sid. 179, (1662) 82 Eng. Rep. 1043 (K.B.). In *Thomas*, the King's Bench held that a previous acquittal in Wales would bar prosecution in England. *Id.* As one reporter stated it: "*Auterfoits acquit in les marches de Gales est bone plea icy in Angleterre*." 1 Sid. 179. This was because the Welsh were "to have the same immunities as English born, who on acquittal cannot be tried again." 1 Keble 663, 664.

This traditional rule—dating at least to 1662—remained the same into the 20th century. *King v. Aughet*, 13 Cr. App. R. 101 (C.C.A. 1918). *See* Grant, *Successive Prosecutions*, *supra* at 8–12 (discussing the English cases); J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1318–20 (1932) (same).

ii. English treatises uniformly reflected the well-known *Hutchinson* rule. Blackstone, for example, explained that an acquittal "before any court having competent jurisdiction" would bar a second prosecution in England. Commentaries at 335 & cmt. j. For the proposition that "any court having competent jurisdiction" included courts of a separate sovereign, Blackstone cited *Beak v.*

Thyrwhit, which itself cited *Hutchinson* for the settled traditional rule. *Id.* Blackstone, of course, was considered by the founders to be "the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904); *see also Benton*, 395 U.S. at 795.

Other treatises from before and after the American founding followed suit: "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." L. MacNally, The Rules of Evidence on Pleas of the Crown 428 (1802); *accord* 1 T. Starkie, A Treatise on Criminal Pleading 301 n.h (1814); 1 J. Chitty, A Practical Treatise on the Criminal Law 458 (1816); F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius 245 (5th ed. 1788); 2 W. Hawkins, A Treatise of the Pleas of the Crown 372 (1739). Professor Grant's well-known article cites 20 English treatises published between 1724 and 1965, all restating the *Hutchinson* rule. Grant, *Successive Prosecutions* at 10 n.36. Without question, then, a prior conviction or acquittal by a separate sovereign would bar a second prosecution in England.

2. Early American Cases and Treatises Reflect the *Hutchinson* Rule.

a. Throughout the Marshall years, this Court accepted the traditional *Hutchinson* rule as an established background principle. The leading case is *Houston v. Moore*, 18 U.S. 1 (1820). There, the Court held that state and federal courts had concurrent jurisdiction to prosecute a defendant for deserting the militia. *Id.* at 14. Resisting that conclusion, the defendant argued that concurrent

state and federal jurisdiction "might subject the accused to be twice tried for the same offence." *Id.* at 31. The Court rejected this argument with a straightforward statement of the traditional rule: "[I]f the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.*

Justice Story dissented in *Houston* based on his view that the state lacked concurrent jurisdiction. *Id.* at 20. But his dissent only reinforces the *Hutchinson* rule. Concurrent jurisdiction must be wrong, he argued, because it would mean either that an initial state conviction would oust the federal government of jurisdiction (a result he could not abide), "or that the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government." *Id.* at 30. Thus, while the majority and dissent disagreed over concurrent jurisdiction, both thought it beyond question that separate sovereigns could not prosecute a defendant for the same crime.

Two weeks after deciding *Houston*, this Court again unanimously endorsed the *Hutchinson* rule in *United States v. Furlong*, 18 U.S. 184 (1820). The case involved an Irish defendant who had been tried in federal court for both piracy and the murder of an English victim on an English ship. *Id.* at 194. The Court explained that when multiple sovereigns hold concurrent jurisdiction over an offense "the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Id.* at 197.

Thus, in two clear-cut cases, the Marshall Court embraced the firmly rooted traditional rule against double prosecutions by separate sovereigns.

b. Nearly every state court followed the traditional rule as well, both before ratification of the Fifth Amendment and in the decades afterward. In one early case, the defendant stole a horse in the Ohio Territory and took it to North Carolina, where he was prosecuted. *Brown*, 2 N.C. at 100. The court barred the prosecution based on its concern about successive prosecutions in multiple jurisdictions. It is "against natural justice," the court said, for a defendant to be "cropped in one" state, "branded and whipped in another, imprisoned in a third, and hanged in a fourth; and all for one and the same offence." *Id.* at 101.

In several other state cases, the double-jeopardy issue arose in the context of the pressing issue of the day: disputes over concurrent federal and state jurisdiction. These state courts reassured defendants that concurrent jurisdiction could not possibly lead to successive state and federal prosecutions for the same offence. The problem is more "imaginary than real," said the Supreme Court of Vermont, because "a decision in one court will bar any farther prosecution for the same offence, in that or any other court." *State v. Randall*, 2 Aik. 89, 100–01 (Vt. 1827).

Perhaps the best example is *State v. Antonio*, 2 Tread. 776, 781 (S.C. 1816), a case decided by South Carolina's Constitutional Court (its highest court at the time for cases at law). *Antonio* held that the state had concurrent jurisdiction with the federal government to punish counterfeiting. Though the

case produced three opinions regarding this issue, all agreed that double-jeopardy principles would bar successive prosecutions by the state and federal government. *The majority*: The established practice among foreign nations is "to discharge one accused of a crime, who has been tried by a court of competent jurisdiction," and if that practice "prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties?" *Id.* *The concurrence*: If federal and state courts possess concurrent criminal jurisdiction then both courts must "allow of the plea of *autrefois acquit*, which will be a good bar to a second prosecution, because a determination in a court having competent jurisdiction, must be final and conclusive on all courts of concurrent jurisdiction." *Id.* at 788. *The dissent*: Prosecution by both the federal government and a state government "is not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice." *Id.* at 804.

Again and again for decades, state courts reassured defendants that concurrent state and federal jurisdiction would pose no double-jeopardy problem because prosecution by one sovereign would bar a second prosecution by another. A Massachusetts court stated that "the delinquent cannot be tried and punished twice for the same offence" by different sovereigns because only the first court to "exercise[] jurisdiction has the right to enforce it by trial and judgment." *Commonwealth v. Fuller*, 49 Mass. 313, 317–18 (1844). A Michigan court stated that a state "conviction would be admitted in federal courts as a bar" to a subsequent

federal prosecution for the same offense. *Harlan v. People*, 1 Doug. 207, 212 (Mich. 1843). And a Missouri court simply rejected concurrent jurisdiction to punish counterfeiting, with analysis based on the premise that a defendant could "plead [a state] conviction in bar" to a second federal prosecution. *Mattison v. State*, 3 Mo. 421, 426 (1834). Even when dissenters disagreed about concurrent jurisdiction, they emphatically agreed that a state conviction would "bar any other or further prosecution for the same offense, by the same or any other power, and may be so pleaded" in accordance with the Double Jeopardy Clause, the "law of nations," and "the law in separate States." *Id.* at 433 (Wash, J. dissenting); *see also People ex rel. McMahon v. Sheriff*, 2 Edm. Sel. Cas. 324, 343 (N.Y. Sup. Ct. 1852) ("nor is it unusual, where the United States and the State courts have concurrent jurisdiction, for them to allow a judgment rendered in one to be a bar to the recovery of a judgment in the other").

Against this overwhelming weight of state authority, research reveals just one outlier, *Hendrick v. Commonwealth*, 32 Va. 707 (1834). The defendant in *Hendrick* argued that a Virginia prosecution for check forgery at the Bank of the United States could lead to a second federal prosecution for the same forgery, so "that a person might be punished twice for the same offence." *Id.* at 713. Without supporting authority, the court responded that "the law of *Virginia* punishes the forgery, not because it is an offence against the *U. States,* but because it is an offence against this commonwealth." *Id.* Among all reported state cases decided before or in the several decades after the founding, this lone sentence is the

only suggestion that the same crime could be punished under both state and federal law.

c. Treatises on American law uniformly reported the settled traditional rule. Some widely read treatises cited the English cases—particularly *Hutchinson* and *Beak*—and explained that an "acquittal in any court whatsoever of competent jurisdiction . . . will be sufficient to preclude any subsequent proceedings before every other court." Francis Wharton, A Treatise on the Criminal Law of the United States 137 (1846); *accord* Francis Wharton, A Treatise on the Law of Homicide in the United States 283 (1855). Others cited this Court's decision in *Houston v. Moore* for the same principle: "Where the jurisdiction of the United States court and of a state court is concurrent, the sentence of either court, whether of conviction or acquittal, may be pleaded in bar to a prosecution in the other." Thomas Sergeant, Constitutional Law 278 (2d ed. 1830); *accord* William Rawle, A View of the Constitution of the United States of America 191 (1825); 1 James Kent, Commentaries on American Law 374 (1826).

3. The Separate-Sovereigns Exception Developed in Dicta, Long after the Founding.

a. Not until the Taney Court did the separate-sovereigns exception develop, and at first only in dicta. In three concurrent-powers cases between 1847 and 1852, the Court began to suggest that the Double Jeopardy Clause would not bar successive prosecutions by state and federal governments. The foundation stone of the Court's reasoning in each case

was that the Double Jeopardy Clause did not apply to the states.

The first was *Fox v. Ohio*, 46 U.S. 410, 432 (1847). There, the State of Ohio prosecuted a defendant for counterfeiting money. The Court upheld the conviction, holding that that the federal government did not have exclusive power to criminalize counterfeiting. In a familiar argument, the defendant pointed out that concurrent jurisdiction could potentially result in two prosecutions for the same offense. *Id.* at 434. Without fully responding to the dual-prosecution problem, the Court reasoned that it would not use the Bill of Rights as a weapon against the states to limit their substantive authority to punish crimes. *Id.* at 434–35. Citing *Barron v. City of Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights did not apply to state governments, the Court deemed it unlikely "that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority." *Id.* at 435.

The Court confronted a federal prosecution for counterfeiting in *United States v. Marigold*, 50 U.S. 560 (1850). Taking the opposite tack of the defendant in *Fox*, this defendant argued that the *states* had exclusive jurisdiction over counterfeiting. *Id.* at 563. Rejecting that argument, the Court held that the federal and state governments hold concurrent jurisdiction to punish counterfeiting. *Id.* at 570. As for the still hypothetical dual-prosecutions problem, the Court stated that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its

commission the penalties denounced by either, as appropriate to its character in reference to each." *Id.* at 569. While this dictum edged closer to the separate-sovereigns exception, the Court still said only that *either* the state or federal government could prosecute the crime. It did not say *both* could do so.

It was in a fugitive-slave case that the Court first offered a full-throated rejection of the original meaning of the Double Jeopardy Clause. In *Moore v. Illinois*, 55 U.S. at 17, an Illinois court convicted the defendant of harboring a fugitive slave, and the defendant claimed that a federal statute preempted the Illinois law. In support, the defendant argued that the federal government could potentially prosecute him for the same offense. *Id.* at 19. The Court first explained that the state crime and federal crime were not the same offense because they contained distinct elements. *Id.* In the alternative, it provided the separate-sovereigns rationale. "The same act," the Court said, "may be an offence or transgression of the laws of both" the state and federal governments. *Id.* at 20. When both sovereigns separately punish the offender, it means only that "he has committed two offences." *Id.* "He could not plead the punishment by one in bar to a conviction by the other." *Id.* The Court cited only *Fox* and *Marigold* for this analysis. It said nothing of *Houston* or *Furlong*. It said nothing of the widely known, traditional English rule. And it said nothing of why the framers would have rejected that traditional rule *sub silentio*. Justice McLean dissented: "[N]o government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to

a great principle of action, sanctioned by humanity and justice." 55 U.S. at 22.

b. While the Taney Court sowed the seeds of the separate-sovereigns exception, not until the Prohibition Era did the doctrine take root as a holding. This Court first upheld a successive federal prosecution after a state prosecution for the same crime in *Lanza*, 260 U.S. at 382–84. The *Lanza* defendants were convicted in Washington state court of illegally manufacturing and transporting liquor, and were later charged with the same crime in federal court. They argued that the Double Jeopardy Clause barred the federal prosecution. *Id.* at 379. The Court held that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.* at 382.

Despite that the Double Jeopardy Clause was understood to reflect the English common law rule, the Court reached this result without so much as mentioning the traditional English rule, the adoption of that rule in the Double Jeopardy Clause, or the acceptance of that rule in *Houston*, 18 U.S. at 13, and *Furlong*, 18 U.S. at 197. Rather than inquiring into the meaning of the Constitution, the Court focused on the policy concern that a bar against successive state and federal prosecutions might permit states to frustrate national prohibition. *Lanza*, 260 U.S. at 385. And *Barron v. City of Baltimore* supplied the key legal rationale for the Court's holding. Because the Fifth Amendment "applies only to proceedings by the federal government," the Court explained, the Double Jeopardy Clause prohibits only "a second prosecution under authority of the Federal

Government after a first trial for the same offense under the same authority." *Id.* at 382.

c. The separate-sovereigns exception metastasized further in a pair of cases—*Bartkus*, 359 U.S. 121, and *Abbate*, 359 U.S. 187—decided ten years before this Court held in *Benton*, 395 U.S. at 787, that the Fourteenth Amendment incorporated the Double Jeopardy Clause against the states.

The primary battle played out in *Bartkus*, a five-to-four decision that upheld a state prosecution after a federal acquittal for the same bank robbery. At great length, the Court explained that the Double Jeopardy Clause had not been incorporated into the Due Process Clause of the Fourteenth Amendment. 359 U.S. at 124–28. The Court therefore applied principles of due process, rather than seeking to ascertain the meaning of the Double Jeopardy Clause itself. *Id.* The Court also relied on the line of cases beginning with *Fox*, 46 U.S. at 432, which again rested on the theory that the Double Jeopardy Clause applied only to the federal government. 359 U.S. at 129.

Not only was *Bartkus* a due process case, but the Court made two crucial errors that undermined its holding from the outset.

First, the Court refused to even "consider" English cases as "relevant." *Id.* at 128 n.9. It based this conclusion in part on the "confused and inadequate reporting" of *Hutchinson*, notwithstanding that every English case cited in *Bartkus* uniformly states the *Hutchinson* rule against successive foreign prosecutions. *Id.* And *Bartkus* does not even cite *Roche*, which cannot conceivably be subject to

criticism based on confused reporting because it exists in only one reported version and contains a pellucid explication of the *Hutchinson* rule. *See supra* at 13. Nor does *Bartkus* offer any example of a material difference in the various English reports of *Hutchinson*—because there is none. Regardless, for purposes of determining the original meaning of the Double Jeopardy Clause, the crucial question is not what actually happened in *Hutchinson*, but whether the English common law was understood to bar successive prosecutions by different sovereigns. Based on the reported English cases, Blackstone's Commentaries (which the *Bartkus* majority does not even cite), and every other relevant English treatise, it would have been abundantly clear to the founding generation that English law did bar such prosecutions.

Second, *Bartkus* misinterpreted *Houston*, 18 U.S. at 1. According to *Bartkus*, the majority in *Houston* was speaking only to circumstances in which a "state statute impose[s] state sanctions for violation of a federal criminal law," not those in which a state imposes sanctions for a violation of its own criminal law. 359 U.S. at 130. That is not the best reading of *Houston*. The Pennsylvania statute at issue in *Houston* prohibited desertion from the militia, and it was worded similarly to a federal statute also prohibiting desertion. But Pennsylvania was enforcing its own desertion statute, not the federal one. *Houston*, 18 U.S. at 12. True, the opinion in *Houston* states that the purpose of the Pennsylvania statute was "to confer authority upon a State Court Martial to enforce the laws of the United States against delinquent militia men." *Id.* at 28. But the

Court did not literally mean that Pennsylvania was enforcing a federal statute; it meant instead that Pennsylvania—by enacting its own criminal statute as a "re-enactment of the acts of Congress"—was adding its enforcement efforts to those of the federal government. *Id.* At any rate, even if *Houston* were inconclusive, the other evidence of original meaning is perfectly clear.

On the same day it decided *Bartkus*, the Court also decided *Abbate*, a six-to-three decision upholding a federal prosecution after a state conviction for the same act of destroying telecommunications equipment. 359 U.S. at 190. Like *Bartkus*, *Abbate* relied on *Fox*, *Lanza*, and the argument that the Double Jeopardy Clause had not been incorporated against the states. *Id.* The Court concluded that "[n]o consideration or persuasive reason not presented to the Court" in *Lanza* "is advanced why we should depart from its firmly established principle." *Id.* at 195. Rather than look to the meaning of the Double Jeopardy Clause itself, the Court simply pointed to the "undesirable consequences" that "would follow if *Lanza* were overruled"—namely, that "federal law enforcement must necessarily be hindered." *Id.* As in *Bartkus*, the majority opinion did not cite any historical evidence of the Clause's original meaning.

Justice Black (joined by the Chief Justice and Justice Douglas) dissented in both *Bartkus* and *Abbate*. None of the Court's reasons, he explained, justified a departure from the traditional rule that barred successive prosecutions by different sovereigns. *See* 359 U.S. at 150–64; 359 U.S. at 201–04. Justice Black cited the overwhelming evidence of

original meaning. *See* 359 U.S. at 156 n.15. He showed that the majority mischaracterized the many state cases decided in the decades after the founding—the overwhelming majority of which affirmed the traditional rule. *See id.* at 158–59. And, as discussed below, he explained that the separate-sovereigns exception misuses federalism to trample individual rights. *See id.* at 155.

C. The Separate-Sovereigns Exception Conflicts With the Purpose of the Double Jeopardy Clause and With Core Principles of Federalism.

1. The separate-sovereigns exception seriously undermines the purpose of the Double Jeopardy Clause. "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," with roots in Greek and Roman law. *Bartkus*, 359 U.S. at 151 (Black, J., dissenting). At its core, the Clause protects against that ancient abuse of governmental power. In doing so it embodies a principle of fundamental fairness—a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187–88 (1957).

Permitting consecutive prosecutions for the same offense simply because different sovereigns initiate

those prosecutions "hardly serves" the deeply rooted principles of finality and fairness the Clause was designed to protect. *Sanches Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring). After all, "[l]ooked at from the standpoint of the individual," the notion that "a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State" is "too subtle . . . to grasp." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). "If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Id.* "It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

These concerns are far from theoretical. The separate-sovereigns exception forces defendants like Gamble—who have already been convicted or acquitted of an offense—to " 'run the gauntlet' a second time." *Abney v. United States*, 431 U.S. 651, 662 (1977). And Gamble is far from the only one who has suffered that fate. Justice Black's dissent in *Bartkus* noted multiple examples of "a conviction following acquittal." 359 U.S. at 163. And this Court's own cases provide many other examples of successive prosecutions, such as the defendant in *Heath v. Alabama*, 474 U.S. 82, 84–85 (1985), who was tried in Georgia and sentenced to life in prison, then tried again in Alabama and sentenced to death—all for the same crime. Indeed, the exception

would permit a defendant *acquitted* in federal court to be convicted and sentenced to death by a state for the same crime. These results are intolerable—"contrary to the [very] spirit of our free country." *Bartkus*, 359 U.S. at 150 (Black, J. dissenting). Neither English common law nor the Double Jeopardy Clause at the time of the founding would abide this unfairness, yet somehow this Court's 20th- and 21st-century jurisprudence does.

To make matters worse, "the victims of such double prosecutions" will most often be those who are least prepared to handle the ordeal—"the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again." *Bartkus*, 359 U.S. at 163 (Black, J., dissenting). It is precisely this kind of harassment that the Double Jeopardy Clause was designed to prevent.

2. The separate-sovereigns exception also runs afoul of foundational concepts of federalism. The division of power "between two distinct governments"—state and federal—was designed to afford a "double security . . . to the rights of the people." Federalist No. 51, *supra* at 323. Federalism, in other words, was supposed to protect liberty, not destroy it. *See Bond v. United States*, 564 U.S. 211, 220–21 (2011). The Court should therefore be "suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards" of individual liberty. *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

The separate-sovereigns exception turns federalism on its head. The mechanism through

which federalism enhances liberty was, to the founders, straightforward: "The different governments will control each other, at the same time that each will be controlled by itself." Federalist No. 51, *supra*, at 323. Under the separate-sovereigns exception, however, federalism does precisely the opposite: It permits different governments "to do together what . . . neither can do separately"—all to the detriment of individual liberty. *Abbate*, 359 U.S. at 203 (Black, J., dissenting). This liberty-destroying version of federalism "is a misuse and desecration of the concept." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

The exception is especially unwarranted because the states, unlike foreign nations, are not independent sovereigns under the Constitution. The states and federal government are "kindred systems," and "parts of ONE WHOLE." Federalist No. 82, *supra*, at 493 (Alexander Hamilton). It is one thing to reject the English rule and permit successive prosecutions after a foreign acquittal. It is quite another to permit successive prosecutions after an acquittal by a coordinate government that is part of the same national system. And it is all the worse to allow this in the name of sovereignty: Our federal and state sovereigns—so "intimately bound by political ties"—should respect the criminal judgments of one another at least as much as "nations who [we]re strangers to each other" did at the time of the founding. *Antonio*, 2 Tread. at 781.

II. *STARE DECISIS* SHOULD NOT PREVENT THIS COURT FROM VINDICATING THE FUNDAMENTAL CONSTITUTIONAL RIGHT NOT TO BE HELD TWICE IN JEOPARDY FOR THE SAME OFFENSE.

Stare decisis is not an "inexorable command." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). To the contrary, this Court has always been willing to overrule bad precedent in certain, well-defined circumstances. *See, e.g.*, Jonathan H. Adler, *The Stare Decisis Court?* (July 8, 2018), *available at* https://reason.com/volokh/2018/07/08/the-stare-decisis-court (collecting data showing that the Court regularly overturns precedent, though the Roberts Court has done so at a lower rate than its predecessors). That is particularly true in cases of constitutional interpretation, where the force of *stare decisis* "is at its weakest." *Agostini*, 521 U.S. at 235; *see also Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (explaining that *stare decisis* is stronger in the statutory context because, in statutory cases, "critics of [this Court's] ruling[s] can take their objections across the street, and Congress can correct any mistake it sees").

This case exemplifies nearly all of the traditional justifications for overruling an erroneous precedent. The separate-sovereigns exception developed without any thorough consideration of constitutional text and original meaning. It was built on a jurisprudential foundation that crumbled when the Double Jeopardy Clause was incorporated against the states. It is the product of a bygone era in which federal law rarely criminalized conduct punishable under state law. It

produces unfair and unworkable results. And it implicates no reliance interests. For any and all of these reasons, *stare decisis* should not prevent this Court from overruling the separate-sovereigns exception.

A. The Separate-Sovereigns Exception Was Egregiously Wrong from Its Inception.

It goes without saying that "[a]n important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus v. Am. Fed'n of State, Cty., & Mun. Emp.*, 138 S. Ct. 2448, 2479 (2018). The separate-sovereigns exception is wrong in precisely the ways this Court has recognized render a precedent less deserving of *stare decisis* protection.

First, this Court has recognized (in the double-jeopardy context, no less) that a precedent is ripe for overruling when it "contradict[s] an 'unbroken line of decisions,' [and] contain[s] 'less than accurate' historical analysis." *United States v. Dixon*, 509 U.S. 688, 711–12 (1993) (quoting *Solorio v. United States*, 483 U.S. 435, 439, 442 (1987)). The separate-sovereigns exception certainly fits that bill. The doctrine had its origins in ill-considered dicta, much of it driven by concerns over fugitive slaves. *See supra* Part I.B.3.a. And it solidified through a series of decisions that involved other constitutional provisions, ignored prior precedents, and never meaningfully engaged with the text or original meaning of the Double Jeopardy Clause. *See supra* Part I.B.3.b–c. Indeed, the Court in *Lanza* did not even have the original-meaning evidence before it—so did not consider the traditional English rule or

this Court's early acceptance thereof. And neither *Lanza*, nor the majority opinions in *Bartkus* and *Abbate,* so much as cited Blackstone's Commentaries. *See supra* Part I.B.3.b.

Second, *stare decisis* carries less weight for cases "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." *Payne*, 501 U.S. at 828–29. That description fits *Bartkus* and *Abbate* to a T. *See supra* Part I.B.3.c. *Bartkus* was five-to-four, and the follow-on decision in *Abbate* garnered only one additional vote. Justice Black's opinions in those cases (particularly *Bartkus*) were ones for the ages, well deserving of a place in the pantheon of dissents that later become law.

Finally, incorrect decisions merit reconsideration when "[t]hey have been questioned by Members of the Court in later decisions," *Payne*, 501 U.S. at 829–30, or otherwise subjected to "substantial and continuing" criticism, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). Three Terms ago, in *Sanchez Valle*, 136 S. Ct. 1863, Justices Ginsburg and Thomas called for "fresh examination" of the separate-sovereigns exception "in an appropriate case." *Id.* at 1877 (Ginsburg, J., dissenting). In so doing, they added their voices to those of Justice Black and the other *Bartkus* dissenters, as well as to an ever-growing chorus of respected lower-court jurists[1] and legal

[1] *See, e.g.*, *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J.) (arguing that "the entire dual sovereignty doctrine is in need of serious reconsideration"); *United States v. Grimes*, 641 F.2d 96, 104 (3d Cir. 1981) ("Although developments in the application of the Bill

scholars [2] who have long criticized the exception, often in the harshest terms. Indeed, far from

(continued…)

of Rights to the states, consequent alterations in the system of dual sovereignty, and the historic idiosyncracies of various of the precedents upon which *Bartkus* relies may deprive the opinion of much of its force, we do not believe we are the proper forum to overturn a legal directive from the Supreme Court."); *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999) ("[W]e and other Courts of Appeal have suggested that the growth of federal criminal law has created a need for the Supreme Court to reconsider the application of the dual sovereignty rule to situations such as this.").

[2] *See, e.g.,* 6 W. LaFave, J. Israel, N. King, & O. Kerr, CRIMINAL PROCEDURE § 25.5(a), 851 (4th ed. 2015) (citing various criticisms of the separate-sovereigns exception); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1 (1995); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); James E. King, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961); Thomas Franck, *An International Lawyer Looks at the* Bartkus *Rule*, 34 N.Y.U. L. REV. 1096 (1959); Grant, *Successive Prosecutions*, *supra*; Grant, *The* Lanza *Rule*, *supra*.

engendering "sustained and widespread debate" or "national controvers[y]," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992), the separate-sovereigns exception is as uniformly criticized a rule of constitutional law as any. Even within legal academia—which tends to reward unconventional viewpoints—defenders of the exception are nowhere to be found.

B. Incorporation of the Double Jeopardy Clause Against the States Eviscerated the Core Doctrinal Premise of the Separate-Sovereigns Exception.

Separately, *stare decisis* loses its force where "subsequent decisions of this Court" have "eroded" a decision's doctrinal "underpinnings." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). "[W]here there has been a significant change in, or subsequent development of, our constitutional law," this Court has not hesitated to update old doctrines to cohere with the new legal landscape. *Agostini*, 521 U.S. at 235–36; *see also, e.g., Alabama v. Smith*, 490 U.S. 794, 803 (1989) (explaining that a "later development of . . . constitutional law" is a basis for overruling a decision); *Casey*, 505 U.S. at 857 (observing that overruling precedent is proper when "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking").

The separate-sovereigns exception developed on the understanding that the Double Jeopardy Clause, like the other provisions of the Bill of Rights, simply did not apply to the states. When this Court incorporated the Double Jeopardy Clause against the

states in 1969, the exception became unmoored from its only doctrinal anchor. This Court has repeatedly held, in nearly identical contexts, that incorporation is precisely the kind of jurisprudential sea change that justifies a departure from *stare decisis*. It should do so again here.

1. In the beginning, the Bill of Rights did not apply to the states. *See Barron v. Baltimore*, 32 U.S. 243, 247 (1833) ("The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."). Accordingly, absent an applicable state-law provision, nothing prevented states from effecting the very deprivations of liberty the Constitution forbade the federal government from accomplishing. Indeed, as early as 1833 this Court recognized that the Fifth Amendment, specifically, did not impose any limitations on state actors. *See id.* ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."). Although many states barred successive prosecutions as a matter of state law, *see supra* at Part I.B.2.b, the federal Double Jeopardy Clause carried no import for state prosecutions.

This Court explicitly relied on this principle when it first suggested in *Fox* that successive prosecutions by separate sovereigns might be permissible. *Fox* cited *Barron* for the proposition that the Fifth Amendment was "intended to prevent interference with the rights of the States." 46 U.S. at 434. The Double Jeopardy Clause did not bar duplicative state and federal convictions, the Court reasoned, because the Clause was "exclusively [a] restriction[ ] upon

federal power." *Id.* "[T]he logic of [*Barron*]" thus "furnished an important justification for the early dual sovereignty doctrine." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 11 (1995).

When, in *Lanza*, the Court first held that the Double Jeopardy Clause permits a successive federal prosecution after a state prosecution for the same crime, it again relied on the logic of *Barron*. The Court reasoned that "[t]he Fifth Amendment . . . applies only to proceedings by the Federal Government," and, therefore, "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." 260 U.S. at 382. Although *Lanza* post-dated ratification of the Fourteenth Amendment, this Court had yet to hold that passage of that Amendment had incorporated the Double Jeopardy Clause against the states and, indeed, would reject the proposition soon after *Lanza*, in *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

In later declining to overrule *Lanza* in *Bartkus* and *Abbate*, the Court again relied on the absence of any double-jeopardy limitation for the states. As the Court put it in *Bartkus*, "the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments." 359 U.S. at 124. Indeed, that was why the Court's analysis was limited to the scope of the Due Process Clause of the Fourteenth Amendment: Because it was a state conviction under review, the Double Jeopardy Clause—seen then as a restriction only on the federal government—had no

relevance. *See id.* The Court decided *Abbate* on the very same day in reliance on the *Lanza* rationale: "[T]he Fifth Amendment . . . applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is [therefore] a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." 359 U.S. at 194 (quoting *Lanza*, 260 U.S. at 382). The *Abbate* Court did "not write on a clean slate," 359 U.S. at 190; its conclusion was "compelled" by *Lanza*, which it declined to overrule, *id.* at 196. *See also United States v. Grimes*, 641 F.2d 96, 102 (3d Cir. 1981) (questioning "whether successive federal or successive state proceedings can be validly distinguished from successive federal-state proceedings").

2. Ten years after *Bartkus* and *Abbate*, the Double Jeopardy Clause became one of the last Bill of Rights protections to be formally incorporated against the states. *See Benton*, 395 U.S. at 787. "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," the Court held, so it "should apply to the States through the Fourteenth Amendment." *Id.* at 794.

With the Double Jeopardy Clause's "fundamental ideal" now applicable to the states, the primary justification for the separate-sovereigns exception—that is, its "important predicate," *Grimes*, 641 F.2d at 101–02—disappeared. Indeed, the logic of incorporation cannot be reconciled with such an exception: "Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow

the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone." *Id.*

3. This Court has previously recognized that the incorporation of other constitutional provisions justifies overruling precedents premised on those provisions' inapplicability to the states.

For example, in *Elkins*, 364 U.S. 206, the Court reexamined—and ultimately overruled—the so-called "silver platter" doctrine, which provided that federal prosecutors could use evidence unlawfully obtained by state officers. *Id.* at 213. That doctrine was first endorsed by this Court in *Weeks v. United States*, 232 U.S. 383 (1914), which held that the admission of this sort of evidence was permissible because "the Fourth Amendment is not directed to individual misconduct of [local] officials. Its limitations reach the Federal government and its agencies." *Id.* at 398. Following *Weeks*, "the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years." *Elkins*, 364 U.S. at 210.

Then came incorporation. In 1949, this Court held that the Fourth Amendment's protection against unreasonable searches and seizures was "enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949). The "foundation" of the silver-platter doctrine thus "disappeared." *Elkins*, 364 U.S. at 210. Accordingly, when the Court had occasion to reconsider that doctrine in 1960, it did not hesitate to do so. With

the Fourth Amendment's protections now applicable to both sovereigns, the Court found no justification for allowing two coordinate governments to accomplish together what neither could do alone. After all, the Court explained, "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

Similarly, in *Murphy*, 378 U.S. 52, the Court overruled its prior holding that one sovereign could, in convicting a defendant, rely on testimony unlawfully compelled by another. *Id.* at 57. That rule was recognized and developed through a series of decisions issued between 1931 and 1958. *See United States v. Murdock*, 284 U.S. 141 (1931) (holding that the federal government could compel a witness to give testimony which might incriminate him under state law); *Knapp v. Schweitzer*, 357 U.S. 371 (1958) (holding that a state could compel a witness to give testimony which might incriminate him under federal law).

For the Fifth Amendment privilege against self-incrimination, incorporation came in 1964. *See Malloy v. Hogan*, 378 U.S. 1 (1964). The very same day, the Court recognized that incorporation "necessitate[d] a reconsideration" of the separate-sovereigns exception to the privilege against self-incrimination. *Murphy*, 378 U.S. at 57. The purpose of that privilege, the Court recognized, is "defeated when a witness can be whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each." *Id.* at 55 (internal quotation marks omitted). Accordingly, after examining

English precedents the prior cases had neglected, the Court overruled the exception and restored the original meaning of the Fifth Amendment protection.

4. This case is of a piece. The separate-sovereigns exception to the Double Jeopardy Clause—just like the silver-platter doctrine and the privilege exception—made sense, if ever, only in a world where the Bill of Rights did not apply to the states. Incorporation changed the game. The Double Jeopardy Clause now applies to the states, and the separate-sovereigns exception survives only as a remnant of a bygone constitutional era—"the kind of doctrinal dinosaur or legal last-man-standing" against which *stare decisis* carries no force. *Kimble*, 135 S. Ct. at 2411.

Indeed, not only does *stare decisis* permit disavowal of the separate-sovereigns exception, it affirmatively counsels in favor of that result. This case is indistinguishable from *Elkins* or *Murphy*. And *stare decisis*, of course, applies to those precedents too. Just as in *Elkins*, "[t]o the victim it matters not whether his constitutional right has been invaded by a federal . . . or . . . state officer." 364 U.S. at 215. And just as in *Murphy*, the Constitution does not permit the state and federal governments to achieve through cooperation the violation of a "constitutional privilege . . . [that] is applicable to each." 378 U.S. at 55. In the wake of incorporation, the separate-sovereigns exception is nothing more than the last "remnant of abandoned doctrine." *Casey*, 505 U.S. at 855. It should be overruled.

C. The Multiplication of Federal Criminal Law Reversed the Factual Premise of the Separate-Sovereigns Exception.

Just as doctrinal erosion can support a departure from *stare decisis*, so too can tectonic shifts in the factual landscape. Specifically, a precedent loses its force when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. An erroneous precedent "must give way to the 'far-reaching systemic and structural changes' " that render the "earlier error all the more egregious and harmful." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018). The dramatic expansion of federal criminal law in the years since the Court adopted the separate-sovereigns exception is exactly the kind of foundational change that calls for reevaluation of previously settled doctrine.

1. Again, start where the separate-sovereigns exception did: with *Fox*. In indicating that successive prosecutions by separate sovereigns would be permissible, the Court relied on its understanding that such prosecutions would occur only in the most exceptional circumstances:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of

> peculiar enormity, or where the public safety demanded extraordinary rigor.

46 U.S. at 435; *see also Lanza,* 260 U.S. at 383 (block-quoting this rationale).

In that era, the Court had every reason to feel "almost certain" that duplicative state and federal convictions would be exceedingly rare. At the time, the federal and state criminal justice systems operated in almost entirely separate spheres. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138–40 (1995). Criminal law was largely the province of the states, with federal crimes existing only to protect limited and well-defined special federal interests. *See id.* As a result, only in unusual cases would duplicative prosecutions be possible even in theory. And, in practice, because there was "little, if any, official coordination" between state and federal prosecutors, opportunities for mischief and manipulation were limited. Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 205 (2011).

2. No longer. The federal criminal code has since become so bloated that "the federal government has [now] duplicated virtually every major state crime." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997); *see* Brickey, *supra*, 1140–45 (describing the expansion of federal criminal law over time). The Department of Justice last tried to arrive at a precise count of the total number of federal crimes in 1982, and, after a two-year effort, gave up.

See Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920. No one has apparently attempted a manual recount since, but a Twitter feed going by the handle @CrimeADay has been tweeting a federal crime every day since 2014, with no end in sight. *See* https://twitter.com/crimeaday. Strikingly, moreover, even 20 years ago, "[m]ore than 40% of the federal provisions enacted since the Civil War ha[d] been enacted since 1970." Task Force on Federalization of Criminal Law, Am. Bar. Ass'n, The Federalization of Criminal Law (1998). Suffice it to say, the national government's role in criminal enforcement has expanded far beyond what the judicial framers of the separate-sovereigns exception could have possibly imagined.

Given this explosion of federal crimes, nearly every crime can be charged both in state court and in federal court. As a result, "[t]he degree of cooperation between state and federal officials in criminal law enforcement"—and, accordingly, the opportunity for inter-governmental collusion at the expense of individual constitutional rights—"has . . . reached unparalleled levels." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995); *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 31–32 (2011).

3. The state of affairs that the separate-sovereigns exception took as its premise thus no longer exists. "The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for

successive prosecutions" than the *Fox* Court, in its wildest dreams (or nightmares) could have envisaged. Meese, *supra*, at 22. Just look at Gamble. Whereas *Fox* anticipated that duplicative prosecutions would occur only in "instances of peculiar enormity, or where the public safety demanded extraordinary rigor," 46 U.S. at 435, Gamble faced duplicative prosecutions for the most pedestrian of offenses: He was pulled over for a broken headlight and found to be in the possession of a small amount of marijuana and a firearm. Convictions involving "illegal possession of a firearm, usually by a convicted felon," accounted for more than half of the 7,305 federal firearms convictions in fiscal year 2016. *See* United States Sentencing Commission, Overview of Federal Criminal Cases—Fiscal Year 2016 8–9. Far from an "instance[] of peculiar enormity" of the sort that the *Fox* Court suggested might justify successive prosecution, 46 U.S. at 435, Gamble's case is indistinguishable from thousands of others in state and federal courts.

Even if duplicative sentences are ultimately not imposed in many of those cases, the mere possibility of that result works grave harm to defendants. Again, state and federal prosecutors routinely coordinate where their jurisdictions overlap. *See All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499. And even when they do not both proceed on the same charge, the mere threat of doing so gives them further leverage to extort pleas from defendants.

This Court has previously recognized that the expansion of federal criminal law—and the opportunities for collusion that expansion entails—justifies overruling precedent founded on the

assumption that the overlap between state and federal criminal law would remain minimal. Again, *Elkins* and *Murphy* are illustrative. In *Elkins*, the Court emphasized that, at the time the silver-platter doctrine was first adopted, the fact "[t]hat such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction could not, perhaps, have been foreseen." 364 U.S. at 211. And in *Murphy*, the Court noted that the dawning of the "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity," created opportunities for abuse that could not have been anticipated. 378 U.S. at 55–56. So too here.

D. The Separate-Sovereigns Exception Is Unworkable.

"[T]he fact that a decision has proved 'unworkable'" is another "traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2008) (quoting *Payne*, 501 U.S. at 827); *see also Casey*, 505 U.S. at 854 (in considering whether to overrule precedent "we may ask whether the rule has proven to be intolerable simply in defying practical workability"). As the federal government's own workaround policy and this Court's precedents demonstrate, the separate-sovereigns exception is "unworkable."

1. Even the federal government acknowledges that some check is required "to protect 'the citizen from any unfairness that is associated with successive prosecutions.'" Br. for the U.S. in Opp'n at 11 (quoting *Rinaldi v. United States*, 434 U.S. 22, 27 (1977)). That check, adopted in "response to repeated

expressions of concern by Members of this Court," 434 U.S. at 27, is the so-called *Petite* Policy. *See* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J. L. & PUB. POL'Y 167, 178 (2004). It is an internal, discretionary policy of selective restraint. The policy was later codified in the United States Attorneys' Manual, which provides:

> The policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

UAM § 9-2.031(A).

The government, however, has not "faithfully followed" the *Petite* Policy. *United States v. Wilson*, 413 F.3d 382, 388–89 (3d Cir. 2005). To the contrary, its application has been widely criticized as "erratic and unpredictable." Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?,* 69 N.D. L. REV. 915, 927 (1994); *see*

also, e.g., United States v. Belcher, 762 F. Supp. 666, 673 (W.D. Va. 1991) (noting that the prosecutor's actions stood "in sharp contrast to the normal practices regarding dual prosecutions" described in the *Petite* Policy). Just ask Gamble: If the government believes that a "substantial federal interest" is present in a mine-run gun possession case, when will the Policy ever bar re-prosecution? Notably, defendants like Gamble cannot even ask that question, as "the Petite policy, an internal policy of the Justice Department, is not to be enforced against the government." *United States v. Michel*, 588 F.2d 986, 1003 n. 19 (5th Cir. 1979). Moreover, because adherence to the policy is discretionary, it is susceptible to "manipulation and political pressure." White, *supra*, at 202.

Under the *Petite* Policy, then, an individual's constitutional right not to be twice put in jeopardy for the same offense hinges on an individual prosecutor's secretive application of a discretionary and indeterminate policy. *Stare decisis* does not require this Court to stick with a rule that has had such arbitrary and "mischievous consequences" for individual rights. *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965).

2. The separate-sovereigns exception has had unworkable doctrinal consequences, too. In particular, in attempting to apply the exception, this Court has repeatedly been forced to decide which entities qualify as "separate sovereigns" for purposes of the Double Jeopardy Clause. Answering that subsidiary question has yielded its own precedential tangle because, "[f]or whatever reason, the test [this Court] ha[s] devised to decide whether two

governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty." *Sanchez Valle*, 136 S. Ct. at 1870.

Application of that test has yielded unpredictable and unworkable results. On the one hand, states and Indian tribes are deemed separate sovereigns, because the source of their sovereignty pre-dates the Constitution—or is deemed to pre-date the Constitution in the case of states joining the Union after the original 13. *See id.* at 1871–72. On the other hand, "a municipality cannot qualify as a sovereign distinct from a State—no matter how much autonomy over criminal punishment the city maintains." *Id.* Nor do the Philippine Islands or Puerto Rico qualify as "sovereigns," even though the Commonwealth of Puerto Rico, in other contexts, has "a claim" to sovereignty "at least as strong as that of any State." *Alfred L. Snapp & Son Inc. v. Puerto Rico*, 458 U.S. 592, 608 n.15 (1982); *see Sanchez Valle*, 136 S. Ct. at 1873, 1876–77. The senselessness of holding that Puerto Rico is not a separate sovereign, while the Sioux Nation is, is what led Justices Ginsburg and Thomas to call for "fresh examination" of the separate-sovereigns exception. 136 S. Ct. at 1877.

E. No Reliance Interests Justify Retaining the Separate-Sovereigns Exception.

Finally, the kinds of reliance interests "that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation" are entirely absent here. *Casey*, 505 U.S. at 854. Consideration of such reliance interests, particularly in the context of "cases involving property and contract rights," can sometimes justify retaining an

erroneous legal rule pursuant to which private parties have structured their affairs. *Payne*, 501 U.S. at 828. Naturally, "the opposite is true in cases . . . involving procedural and evidentiary rules." *Id.*

This case falls on the "procedural" side of the line. No property rights hinge on the continued existence of the separate-sovereigns exception. And no contractual expectations will be frustrated by the elimination thereof.

Aside from the consumers and authors of criminal-procedure casebooks and treatises, the only people who could conceivably be said to rely on the separate-sovereigns exceptions are prosecutors who wish to use that exception to bypass a defendant's constitutional right not "to be twice put in jeopardy" for the "same offence." U.S. Const. amend. V. But vindicating the text, purpose, and original meaning of the Double Jeopardy Clause will not seriously hinder law-enforcement efforts. At least 20 states already reject the separate-sovereigns exception as a matter of state law[3]; another four reject the doctrine unless

[3] ARK. CODE ANN. § 5-1-114; CAL. PEN. CODE §§ 656, 793; COLO. REV. STAT. § 18-1-303; DEL. CODE ANN. tit. 11 § 209; GA. CODE ANN. § 16-1-8(c); HAW. REV. STAT. ANN. § 701-112; IDAHO CODE § 19-315; 720 ILCS § 5/3-4(c); IND. CODE ANN. § 35-41-4-5; KY. REV. STAT. ANN § 505.050; MINN. STAT. ANN. § 609.045; MONT. CODE ANN. § 46-11-504; NEV. REV. STAT. ANN. § 171.070; N.Y. CRIM. PROC. § 40.20; N.D. CENT. CODE, § 29-03-13; 18 PA. CONS. STAT. § 111; UTAH CODE ANN. § 76-1-404; VA. CODE ANN. § 19.2-294; WASH. REV. CODE ANN. § 10.43.040; WIS. STAT. ANN. § 939.71.

an important state interest is at issue[4]; and another 13 reject it for controlled-substances offenses.[5] Yet no chaos has ensued in their criminal-justice systems.

That is unsurprising: Because this Court deems two crimes to be different offenses any time "each offense contains an element not contained in the other," *Dixon*, at 696 (discussing *Blockburger*, 284 U.S. at 304), it will still be the unusual case in which the federal and state governments may not both

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[4] N.J. STAT. ANN. § 2C:1-11 (rejecting state prosecution after federal prosecution for same offense within the meaning of *Blockburger* unless the state law is "intended to prevent a substantially more serious harm or evil"); *Angiulo v. Commonwealth*, 514 N.E.2d 669, 671-72 (Mass. 1987) (rejecting separate-sovereigns exception unless "Federal crime is punishable much more lightly than the parallel State crime"); *People v. Childers*, 587 N.W.2d 17, 18 (Mich. 1998) (rejecting separate-sovereigns exception as a matter of state constitutional law unless "the interests of the state of Michigan and the jurisdiction which initially prosecuted are substantially different"); *State v. Hogg*, 385 A.2d 844 (N.H. 1978) (rejecting separate-sovereigns exception at least in cases of prior acquittal).

[5] CONN. GEN. STAT. § 21a-282; IOWA CODE § 124.405; NEB. Rev. Stat. § 28-427; N.M. STAT. ANN. § 30-31-27; N.C. GEN. STAT. § 90-97; OHIO REV. CODE ANN. § 2925.50; 63 OKLA. STAT. tit. 63 § 2-413; OR. REV. STAT. § 475.265; R.I. GEN. LAWS § 21-28-4.12; S.C. CODE ANN. § 44-53-410; VT. STAT. ANN. tit. 18 § 4220(b); W. VA. CODE § 60A-4-405; WYO. STAT. § 35-7-1035; *see also* HAW. REV. STAT. ANN. § 712-1254; 720 ILCS § 570/409; MICH. COMP. LAWS ANN. § 333.7409; NEV. REV. STAT. ANN. § 453.346; N.H. REV. STAT. ANN. § 318-B:29; N.J. STAT. ANN. § 24:21-25; N.D. CENT. CODE, § 19-03.1-28; 35; PA. CONS. STAT. tit. 35 § 780-142; WIS. STAT. ANN. § 961.45. For a history of these provisions, see Adam H. Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts §§ 3.24-3.26 (2001).

bring some charge based on the same criminal occurrence. *Cf. United States v. Johnson*, 462 F.2d 423, 426 (3d Cir. 1972) (noting that some have criticized *Blockburger* "as being too broad"). And even then, "in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law," nothing prevents them from "cooperat[ing] in hybrid adjudication to prevent ordinary citizens from being whipsawed." Amar, *supra*, 48.

More importantly, no party has a legitimate reliance interest in continuing to deprive individuals of their constitutional rights. *Arizona v. Gant*, 556 U.S. 332, 349 (2009). "If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Id.* For that reason, this Court has "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice." *Id.* at 348. It should not start now.

CONCLUSION

For the foregoing reasons, the Court should overrule the separate-sovereigns exception and reverse the judgment below.

Respectfully submitted,

BARRE C. DUMAS
126 Government Street
Mobile, AL 36602

LOUIS A. CHAITEN
Counsel of Record
EMMETT E. ROBINSON
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7244
lachaiten@jonesday.com

AMANDA K. RICE
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48103

ROBERT N. STANDER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

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