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Brief of Amici Curiae Criminal Procedure Professors in Gamble v. United States, No. 17-646

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No. 17-646

In The
Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

Brief of Amici Curiae Criminal Procedure Professors
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In Support of Petitioner

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INTEREST OF AMICI CURIAE

Amici curiae are professors of criminal law, constitutional criminal procedure, and related disciplines who have studied, taught, written about, and litigated cases involving the Double Jeopardy Clause. Amici believe this case presents fundamental issues of double jeopardy law that concern our constitutional structure.*

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* No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution to fund its preparation or submission. Counsel for all parties received timely notice of amici's intent to file this brief; all parties have consented to its filing.

The views expressed herein are those of the individual amici, not of any institution or group with which they are affiliated.

SUMMARY OF THE ARGUMENT

The Fifth Amendment guarantees that, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." Yet that is precisely what happened to Terance Martez Gamble. The State of Alabama prosecuted and convicted him for being a felon in possession of a firearm. Subsequently, the United States initiated a second prosecution for what all parties have assumed is definitionally the same offense, yielding a second conviction. That second, duplicative prosecution and conviction violated the letter and spirit of the Double Jeopardy Clause.

As a matter of the Framer's understanding, as a matter of this Court's theoretical justifications for double jeopardy, and as a matter of policy respecting multiple prosecutorial powers, the United States should not be considered a double jeopardy sovereign that is completely independent of its constituent States. This Court ought to restore the double jeopardy right to its proper constitutional position, holding that as between the United States and Alabama, there is not—and never should have been—a "dual sovereignty" exception to the double jeopardy bar when identical offenses are prosecuted.

* * *

There is evidence that the Double Jeopardy Clause's straightforward text was understood at the time of the framing to protect very broadly against second prosecutions, regardless of the identity of the sovereign. *See* Br. of Amici Curiae Law Professors in Supp. of Pet'r 1 ("At the Founding and for several decades thereafter, a prosecution by one sovereign was understood to bar a subsequent prosecution by all other sovereigns."); *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) ("[I]t has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction."). Although at first this might seem a surprising limit on prosecutorial power, upon reflection it is a most sound one. Without some reason to question the legitimacy of that first prosecution—and thereby to question the very legitimacy of the first sovereign—there is no utilitarian or retributive justification for bringing prosecutorial power to bear against the defendant a second time. A sovereign-agnostic conception of double jeopardy protection is therefore rooted in respect for coordinate jurisdictions and in notions of limited government power.

It was meant to be a simple case, then, when—as here—the alleged authority for the attempted second prosecution for an identical offense "derive[s] from the same 'ultimate source'" as that of the first. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). In creating our federal structure, "[t]he Framers split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)

(Kennedy, J., concurring), "divid[ing it] between the government of the Union, and those of the states," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Framers did not *clone* or *duplicate* sovereignty. Otherwise, the very core of our governing structure would be impossible, as an *independent* sovereign can never be *supreme* over another. *See* U.S. Const. art. VI. It is not surprising, then, that the Framers rejected proposed language that, most plausibly read, would have limited the Fifth Amendment double jeopardy bar to multiple federal prosecutions. *See* The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 467 (Neil H. Cogan ed., 2d ed. 2015) (chronicling the rejection of George Partridge's proposal to add the limiting phrase "by any law of the United States" after the current draft's "same offence"); *see also Abbate*, 359 U.S. at 203-04 (Black, J., dissenting).

Today, we have a very different conception of the scope and frequency of federal criminal prosecution than did the Framers. But changes in federal policy do not trump constitutional rules. What is more, there is not even a conflict in policy. The many and varied federal and state crimes that coexist today create a system of vast prosecutorial discretion. Moreover, applying this Court's long-standing interpretation of what definitionally constitutes the "same offence" reveals that this substantial discretion exists even where there has already been a prosecution concerning a particular historic event. Indeed, it is possible that even the crimes at issue in this very case are two

different offenses under *Blockburger v. United States*, 284 U.S. 299 (1932).[1] *See* 18 U.S.C. § 922(g)(1) (2012) (requiring "a crime punishable by imprisonment for a term exceeding one year" and also "affecting commerce"); Ala. Code § 13A-11-72(a) (2018) (incorporating diverse predicate offenses); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (explicating "a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws").

It is an almost impossible claim, therefore, that acknowledging a double jeopardy prohibition against duplicative state and federal prosecutions could seriously hamper the prosecutorial prerogatives of either the state or federal governments. There will be exceedingly few 'races to the courthouse' because so many avenues are open to both state and federal prosecutors. But in the rare instance when the second prosecution is for the identical offense already prosecuted, the text and animating purposes of the Double Jeopardy Clause dictate that the courthouse door should be closed.

Thus, on first blush, it is surprising to see this Court's historic pronouncements in favor of a federal/state dual sovereignty exception. A close look at those opinions, however, is revealing. Not only were the strongest pronouncements perhaps influenced by contexts of arguable federal crisis, *see* Br. of Amici

[1] Amici take no position on whether such argument has been forfeited in this case; what we emphasize is that, under *Blockburger*, there is not even strongly reasoned policy for preserving a dual sovereignty exception.

Curiae Law Professors in Supp. of Pet'r 7-17, but all of the early cases stated the proposition in dicta, and they did so long before this Court settled on the *Blockburger* interpretation of same offense. Most importantly, this Court has never reconsidered the dual sovereignty exception after holding in 1969 that the double jeopardy protection is—contrary to the Court's earlier conception—incorporated as against the States. *Compare Benton v. Maryland*, 395 U.S. 784, 787 (1969) (incorporating the right), *with Bartkus v. Illinois*, 359 U.S. 121, 124-28 (1959) (discussing incorporation).

Considered in context, therefore, a rejection of a federal/state dual sovereignty exception would follow in the pattern of this Court's precedents. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (rejecting a previous federal/state exception to the Fifth Amendment privilege against compelled self-incrimination); *Elkins v. United States*, 364 U.S. 206 (1960) (rejecting a previous federal/state exception to the Fourth Amendment exclusionary rule). If a state police officer's decisions can, as the Court held in *Elkins*, effectively bind a federal prosecution; and if a State's grant of prosecutorial immunity can, as the Court held in *Murphy*, effectively bind a federal prosecution; then it is hardly surprising that a State's *prosecution* should do the same. *See United States v. Balsys*, 524 U.S. 666, 683 (1998) ("After *Murphy* . . . the state and federal jurisdictions *were as one* . . . ." (emphasis added)).

In short, when it comes to the power of the United States to prosecute the identical offense already prosecuted by a constituent State, any purported "dual

sovereignty" exception to the double jeopardy right is not supported by constitutional text, history, political theory, or even by good policy.

ARGUMENT

I. The drafting history of the Double Jeopardy Clause strongly suggests that the Framers rejected a dual sovereignty exception.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." When an early draft of the Clause was being debated in Congress, one member of the House of Representatives proposed an amendment that would have limited the Clause to federal offenses. That proposed amendment was rejected.

This significant detail of the Clause's drafting history has gone virtually unmentioned in the Court's jurisprudence. *But see Abbate v. United States*, 359 U.S. 187, 203-04 (1959) (Black, J., dissenting) (briefly mentioning the rejected amendment). The rejection of the amendment strongly suggests, however, that the framers and ratifiers of the Clause understood that it would apply to *any* successive federal prosecution, whether that prosecution followed a prior federal prosecution or a prosecution by a State.

On Aug. 17, 1789, the House of Representatives was considering the proposed Double Jeopardy Clause in

the form submitted to it by James Madison: "No person shall be subject, [except] in "cases" of impeachment, to more than one trial or one punishment for the same offence . . . ." 1 Annals of Cong. 781 (1789) (Joseph Gales ed. 1834).[2] After an unrelated motion by Rep. Egbert Benson was defeated, Rep. George Partridge of Massachusetts "moved to insert after 'same offence,' the words 'by any law of the United States.' " *Id.* at 782. But "[t]his amendment was lost also." *Id.* Had the Partridge motion passed, the Clause would then have read: "No person shall be subject except in cases of impeachment, to more than one trial or one punishment for the same offence by any law of the United States."

Unfortunately, there is no record of the debate or the numerical vote on this motion. Its rejection therefore seems susceptible of three interpretations.

First, perhaps the motion was meant to limit the double jeopardy constraint to the federal government, such that its rejection broadens the constraint to similarly prohibit the States from prosecuting twice for the same offense. *See* Jay A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 30-31 (1969) (suggesting that the motion's defeat implies "that double jeopardy may have been intended to apply to the states and the federal government alike"). This interpretation is highly implausible for at least two reasons. First, in no place in the Bill of Rights except for the first word of the First Amendment ("Congress"), and

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[2] The Annals of Congress erroneously omits the word "except."

in the phrase "any court of the United States" in the Seventh Amendment, is there an explicit limitation of the Bill to the federal government.[3] Yet, as far as we know, there were no other efforts to clarify the limited scope of the Bill; had a Member of Congress wanted to include such a limitation, there are many other places where he would have done so. It would have seemed far more obvious, for example, to include such a limitation at the beginning of what became the Sixth Amendment, which begins: "In *all* criminal prosecutions . . ." U.S. Const. amend. VI (emphasis added).

No such limitations were proposed because the common understanding of the founding generation was that the Bill implicitly bound only the federal government and not the States. As this Court said in *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), the Constitution's "limitations on power, if expressed in general terms, are naturally, and . . . necessarily, applicable to the government created by the" Constitution, i.e., the federal government. The Court reached this unanimous conclusion without "much difficulty." *Id.*

The second reason that such an interpretation is not plausible is that Rep. Partridge was a Federalist, and a pro-administration Federalist at that. *See* John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. Pol. 295, 322

[3] The first two proposed amendments, which went unratified in 1791, also explicitly applied only to the federal government. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8-19 (1998).

(1993). As such, Partridge would have had no interest in limiting the reach of the Bill solely to the federal government. To the contrary, Federalist ideology supported the enhancement of the powers of the federal government at the expense of the powers of the States. For him to have moved to clarify that a constraint in the Bill of Rights applied only to the federal government and did not apply to the States would have made little sense.

Second, Partridge could have been using the word "law" to mean only statutory—not decisional—law, attempting to limit the Double Jeopardy Clause to only statutorily defined crimes and not common law crimes. Such an interpretation might be consistent with his political inclinations, given that such a move would enhance federal power by limiting the constraints of the Clause. But this interpretation is implausible for a separate reason.

Partridge would have known that the only basis for federal jurisdiction over federal crimes was the first clause of Article III, Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, *the Laws of the United States*, and Treaties made, or which shall be made, under their Authority . . . ." (emphasis added). If this judicial authority included the power to recognize and adjudicate federal common law crimes, then the phrase "the Laws of the United States" would necessarily include common law. Thus, pursuant to this second interpretation, Partridge would have believed both (1) that "laws of the United States" in Article III included the common law but, (2) that his proposed, virtually identical "law of the

United States" included only statutory law. That is implausible, to say the least.

Third, and most plausibly, by rejecting the Partridge motion, the framers of the Double Jeopardy Clause could have been rejecting the very dual sovereignty exception that this Court later created in *United States v. Lanza*, 260 U.S. 377 (1922), and reaffirmed in *Abbate*, 359 U.S. at 195. That is precisely how Justice Black understood the failed motion. *See id.* at 204 (Black, J., dissenting) ("I fear that this limitation on the scope of the Double Jeopardy Clause, which Congress refused to accept, is about to be firmly established as the constitutional rule by the Court's holding in this case . . . ."). Partridge, a pro-administration Federalist, likely understood that without his proposed limiting phrase, the Clause would be understood as forbidding a federal prosecution following a prior prosecution for the "same offence," whether that first prosecution was by the federal government *or by a State*.

Given the lack of historic record, we of course cannot be sure who voted to defeat Partridge's motion, nor why they did so. We can, however, make some educated guesses. Because Federalists greatly outnumbered Anti-Federalists in the First Congress, presumably it required a bloc of Anti-Federalists and anti-administration Federalists—a bloc that would soon achieve political dominance as Jeffersonian Republicans, *see* Aldrich & Grant, *supra*, at 301—to defeat the motion. They likely did so to give the Clause, and the rest of the Bill of Rights, the full import of their Anti-

Federalist design: to limit federal prosecutorial power in favor of that of the States.

The Bill of Rights was demanded by the Anti-Federalists in large part because they wanted to maintain the states' virtual monopoly on criminal justice. Some Anti-Federalists went so far as to claim that Congress's authority to define and punish crimes did not extend past the four crimes expressly enumerated in the Constitution. *See* Adam H. Kurland, *First Principles Of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 Emory L.J. 1, 54 (1996). Some Jeffersonian Republicans later repeated this claim, including Thomas Jefferson himself. *See* Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* The Virginia and Kentucky Resolutions of 1798 and '99 16 (Jonathan Elliott ed. 1832). Even those in the founding generation who did not share this rather extreme position saw a very limited role for the federal government to mete out criminal punishment. After all, the Anti-Federalists feared that the new, powerful central government might abuse whatever power it was given to create, prosecute, and punish crime, in order to oppress its enemies. *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 158-59 (2001). They sought to keep that power tightly cabined via a set of procedural restrictions that became a large portion of the Bill of Rights.

In this manner, the power to punish crime would overwhelmingly remain where it had been, in some instances, for over a century and a half: with the States.

See Amar, *supra*, at 5 (observing that Virginia had existed as a legal entity "since the 1620s"). By subjecting the federal government to the same set of restrictions that constrained the States, the criminal procedure protections of the Bill of Rights would dampen the incentives that the federal government would otherwise have to displace state criminal law with federal criminal law. *See* Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69, 106 (2012). The Bill thus helped ensure that the States' primacy in defining and punishing crimes was to be maintained.

Viewed in this context, the House of Representatives' rejection of the Partridge motion dovetails almost perfectly with the major thrust of the Anti-Federalist project that was the Bill of Rights. Partridge endeavored to carve a significant hole into the Double Jeopardy Clause, leaving the federal government free to prosecute the "same offence" after a conviction—or even after an acquittal—in state court. Under such a regime, Congress could not only create a parallel universe of criminal law that overlapped substantially with that of the States; it could also wield this law irrespective of the outcomes of prior state cases involving the same offenses by the same defendants. The States' virtual monopoly over criminal justice would be destroyed, and the nascent Jeffersonian coalition would have none of it.

Concededly, some informed speculation is necessary to interpret the import of the failed Partridge motion. But the best educated guess is that it shows that the Framers contemplated and rejected the very dual

sovereignty exception this Court engrafted onto the Double Jeopardy Clause in *Lanza* and *Abbate*. The Court in those cases unfortunately ignored the failed Partridge motion, despite Justice Black's raising it in dissent in *Abbate*. Indeed, in neither case did the Court provide historical support from the founding era for its creation of a dual sovereignty exception. Instead, as explained in greater detail below, *see infra* Part IV.B., the Court placed primary reliance on a series of cases decided over fifty-five years after ratification of the Fifth Amendment. *See Abbate,* 359 U.S. at 190-92 (discussing *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852)). Thus, not only did the Court in *Lanza* and *Abbate* ignore the only available evidence regarding the drafting history of the Double Jeopardy Clause, but its ahistorical invention of a dual sovereignty exception to the Clause is at war with the best interpretation of that evidence.

II. This Court's double jeopardy sovereignty test confirms that the federal government is not a sovereign completely independent of the states.

For double jeopardy purposes, "sovereignty . . . does not bear its ordinary meaning." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016).

> To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question. The inquiry does not turn, as the term "sovereignty" sometimes

> suggests, on the degree to which the second entity is autonomous from the first or sets its own political course. Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same "ultimate source."

Id. at 1867. "The degree to which an entity exercises self-governance . . . plays no role," and "the inquiry (despite its label) does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity." *Id.* at 1870.

Instead, the "single criterion"—"the 'ultimate source' of the power undergirding the respective prosecutions," *id.* at 1871—can be determined through a bit of constitutional geometry:

> Whether two prosecuting entities are dual sovereigns in the double jeopardy context, we have stated, depends on "whether [they] draw their authority to punish the offender from distinct sources of power." The inquiry is thus historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority. If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not.

Id. (citation omitted).

Such 'lines of sovereignty' for each of our original thirteen states blink into existence sometime between 1776 and 1783—perhaps with the 1776 Declaration of Independence, perhaps with the adoption of each state Constitution, perhaps with the 1781 ratification of the Articles of Confederation, or perhaps with the 1783 Treaty of Paris. Fortunately, the precise date does not matter. What does matter is that each of the thirteen states was originally a separate sovereign, each constituting a distinct "parallel line."

So, thirteen parallel 'sovereignty lines' begin by 1783, and they continue until they intersect at a single hub in 1788 with the ratification of our federal Constitution. It might be unclear whether those state lines emerge unscathed. *See, e.g.*, Akhil Reed Amar, America's Constitution: A Biography 21-39 (2005) (chronicling how adoption of the Constitution was "in a manner of speaking, the world's largest corporate merger"). But that is a matter for another day.[4] What is critical is that it seems impossible to imagine how such ratification created an *additional* federal

[4] In *Sanchez Valle*, this Court acknowledged fundamental difficulties in drafting the origin "lines" for the other thirty-seven states as independent from the federal government, but felt that it would be intolerable to treat those states differently than the original thirteen for purposes of double jeopardy. 136 S. Ct. at 1871 n.4 (treating the later states differently "contradicts the most fundamental conceptual premises of our constitutional order, indeed the very bedrock of our Union"). Yet were there no dual sovereignty exception, this structural crisis vanishes.

"sovereign" *independent of* those thirteen constituent sovereign states—for if it *were* independent, its laws could not be supreme over them. *Cf.* U.S. Const. art. VI. Instead, the federal government and the States "draw their power from the same ultimate source," *Sanchez Valle*, 136 S. Ct. at 1871, namely the free and independent States of 1776/1783. While the 1788 Constitution certainly provides the "current exercise" of federal prosecutorial authority, its "deepest wellsprings" instead extend back to the States and their separation from England.[5]

Stated another way, in creating our federal structure, "[t]he Framers split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), "divid[ing it] between the government of the Union, and those of the States," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Framers did not, by contrast, *clone* or *duplicate* sovereignty. Thus, just as "the oldest roots of Puerto Rico's power to prosecute lie in federal soil," *Sanchez Valle*, 136 S. Ct. at 1868, the oldest roots of the federal government's power to

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[5] It is telling that in *Sanchez Valle* this Court rather exhaustively described why neither the States nor the Indian tribes derive their authority from the federal government, *see* 136 S. Ct. at 1871-72, why municipalities do derive their authority from their respective States, *see id.*, and why U.S. territories do derive their authority from the United States, *see id.* at 1873—yet nowhere did the Court attempt to explain how the federal authority could be seen as anything *but* derived from that of the States. How could the "ultimate source," "all the way back," *id.* at 1875, for federal authority be anything but a concession from the constituent States?

prosecute lie in state soil, a power the States collectively ceded in 1788 by creating our federal system.

This is not unlike a single State ceding certain powers to a municipality, which this Court has recognized does not create an independent double jeopardy sovereign. *See Waller v. Florida*, 397 U.S. 387 (1970). To use the language of *Sanchez Valle* in explaining that rule, "[b]ecause a State [(in our case, the thirteen states)] must initially authorize any [municipal] charter [(in our case, our federal Constitution)], the State is the furthest-back source of prosecutorial power." 136 S. Ct. at 1875. And just as "Puerto Rico's transformative constitutional moment does not lead to a different conclusion," *id.* at 1875, neither does that of the federal government.

In creating our constitutional structure, the thirteen sovereign States each effectively ceded powers '*x*' and each retained powers '1-*x*.' As this Court has declared, "[t]he delegator cannot make itself any less so—no matter how much authority it opts to hand over." *Id.* at 1876. As any child might tell us, we can split a cookie into two parts, but it would be remarkable to assert that we just created a second cookie.

Using this Court's historic test, then, the federal government is not a double jeopardy "sovereign" independent of its constituent States.

III. A dual sovereignty exception runs contrary to the purposes of double jeopardy and is unnecessary given the *Blockburger* "same offence" analysis.

Pragmatic considerations also cast doubt on the dual sovereignty exception. The goal of double jeopardy protection is to shield people from the "continuing state of anxiety and insecurity" that would result if the government "with all its resources and power . . . [could] make repeated attempts to convict an individual for an alleged offense." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009) (citation omitted). This is no less true when "repeated attempts" take the form of parallel or successive state and federal prosecutions for an identical offense, rather than multiple prosecutions under a single state or federal statute. The underlying concern—that multiple prosecutions will "enhanc[e] the possibility that even though innocent [a defendant] may be found guilty"—holds both ways. *Id.* at 118.

The point is made especially vivid by considering a slight variation on the case at hand, involving an initial acquittal instead of an initial conviction. Because acquittals "represent[ ] the community's collective judgment," their "finality is unassailable," *id.* at 123, and they merit "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982). This Court has thus described protecting the "integrity" of acquittals as the "primary purpose of the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. 82, 92 (1978). Imagine, then, if at time t_1, rather than being convicted on felon-in-possession charges in Alabama, Terance Gamble

had gone to trial and obtained a verdict of not guilty, but at time t_2, the U.S. Attorney for the Southern District of Alabama still decided to press federal charges for the identical offense.

On the government's theory, there is nothing infirm about this hypothetical. That the two prosecutions stem from different, though substantively identical, code provisions—one federal and one state—ends the inquiry. Yet it is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence [that] '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.' " *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). In the hypothetical, what would the t_2 prosecution be, in practical effect, if not a review of the acquittal at t_1? It is telling that the government, in cases concerning the scope of issue preclusion after an acquittal, routinely invokes the principle that prosecutors deserve "one full and fair opportunity" to try their case. *See, e.g.*, Brief for the U.S. at 53, *Bravo-Fernandez v. United States*, 137 S. Ct. 352 (2016) (No. 15-537), 2016 WL 4610960, at *53 (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). And so prosecutors do; but by the same token, once that opportunity ends in an acquittal, it should bind all subsequent prosecution for the "same offence." Some swords come double-edged.

Nor do arguments the other direction—focused on governmental interests—fare better. At bottom, the government offers two policy defenses of the dual sovereignty exception. The first is that, absent this

doctrine, different enforcement institutions would have difficulty coordinating their prosecutorial efforts. Br. for the U.S. in Opp'n 10-11. Setting aside the fact that government convenience is not typically the lodestar of constitutional rights, this Court has acknowledged—and common sense confirms—that cooperation between federal and state authorities is neither rare nor arduous. *Bartkus v. Illinois*, decided over a half-century ago, spoke plainly on this point, noting that federal-state coordination has long been a "conventional practice . . . of prosecutors throughout the country." 359 U.S. 121, 123 (1959). If anything, this is even truer today, *see* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011), and unsurprisingly so, given the shared source of ultimate authority between the States and the federal government in our constitutional system—and the need to divvy up the "atom of sovereignty" in practice.

The government's second policy argument is that the Fifth Amendment, by its plain terms, bars successive prosecution only for "the same offence," and when two otherwise-identical offenses appear in distinct codebooks, they are categorically different for double jeopardy purposes. In other words, when an offense appears in two statutory schemes, even if the terms of the offense are identical, the two are necessarily different offenses for double jeopardy purposes because they serve the interests of two different governments.

This argument also fails. The *Blockburger* test, which no one here questions, already does the job of ensuring that offenses implicating distinct state

interests will qualify as different offenses for double jeopardy purposes. The reason is simple: offenses that vindicate different interests often, if not always, have at least some elements out of common. And the inverse is also true. Where two offenses are the same for *Blockburger* purposes, they serve the same interests, even if one offense is defined by state law and the other by federal law.

Blockburger holds offenses to be different if each requires "proof of [an] element" that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Thus, a statute that proscribes burglary with a firearm is a different *Blockburger* offense from a statute that proscribes burglary at night, even if both are violated in the same incident. Likewise, given the alternative ways a violation of the Alabama firearms offense can be proved, it might constitute a different offense, for *Blockburger* purposes, than the federal equivalent. *See* 18 U.S.C. § 922(g)(1) (requiring "a crime punishable by imprisonment for a term exceeding one year" and also "affecting commerce"); Ala. Code § 13A-11-72(a) (incorporating diverse predicate offenses); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (explicating "a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws"). Therefore, although the Government may have forfeited this argument, there is a plausible claim that in Petitioner's actual case, the parallel prosecutions were permissible because they arose from different offenses. What makes this claim colorable, however, is a substantive difference between the statutes' elements, not a formalistic difference between their origins.

By pressing the "same offence" justification for the dual sovereignty exception, the government argues, in effect, for an extension of *Blockburger*: a regime that requires defendants to show not only that two offenses have common elements, but also that they occupy the same codebook. As a matter of principle, this is unwise; it drains the Double Jeopardy Clause of its protective force. And as a matter of practice, it is unnecessary. The government has pointed to no cases—presumably because none exist—where *Blockburger* would be insufficient to permit prosecutors to vindicate different interests violated by the same conduct. Layering a dual sovereignty exception on top of the *Blockburger* rule would serve only to facilitate the circumvention of double jeopardy protection by state and federal authorities, as it did in the instant case.

IV. The dual sovereignty history is less clear than the government claims.

If—as we have argued—the drafting history, the text, and the underlying political theory of the Fifth Amendment, combined with this Court's definition of 'double jeopardy sovereignt' as well as considerations of policy, all point away from a federal/state dual sovereignty exception, how did one ever come about? Scrutiny reveals a fragile exception ripe for reversal.

A. The evolution of "same offence" has undermined the Court's dual sovereignty cases.

This Court has never decided the precise issue now before it. The Court's double jeopardy jurisprudence for decades assumed an equivalence between "same acts" and "same offence," undoubtedly due to the equivalence generally prevailing at common law in simpler times. Thus, all of the Court's dual sovereignty discussions have concerned both sovereigns prosecuting the *same acts*, while the Double Jeopardy Clause, of course, forbids placing a defendant twice in jeopardy for the *same offense*.

This dichotomy arose because the rules changed over time. All of the dual sovereignty cases until *Abbate v. United States*, 359 U.S. 187 (1959), were decided before this Court crystalized the definition of "same offence" in *Blockburger v. United States*, 284 U.S. 299 (1932).[6] The *Abbate* Court, unfortunately, failed to account for "same offence" being a narrower concept than "same act." Indeed, the Court conflated the two concepts in stating the issue: "[T]his case squarely raises the question whether a federal prosecution of defendants already prosecuted for the

[6] To be sure, *Blockburger* does not mention the Double Jeopardy Clause and could, conceivably, be applying a common-law test to determine when statutory offenses define one or more offense when violated by a single act. As *Brown v. Ohio*, 432 U.S. 161, 166 (1977), and subsequent cases make clear, however, the modern Court considers the *Blockburger* test to be part of the double jeopardy inquiry.

same acts by a State subjects those defendants 'for the same offense to be twice put in jeopardy of life or limb' in violation of the Fifth Amendment." *Abbate*, 359 U.S. at 189-90.

Given how natural it is to think of double jeopardy protections in terms of 'acts,' perhaps it is not surprising that even recent cases speak in this manner. *E.g., Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) ("So the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws."). But natural or no, the Eleventh Circuit in this case conflated "offense" with "conduct" when it wrote, "The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause . . . ." *United States v. Gamble*, 694 F. App'x 750, 750 (11th Cir. 2017).

In *Blockburger*, this Court held that "acts" and "offense" are not necessarily co-extensive: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. No federal/state dual sovereignty case from this Court has ever applied this test when discussing whether both sovereigns can prosecute for the same crime. Whatever its merits generally, the *Blockburger* test is suited equally well to prosecutions in different jurisdictions (like this case) as to prosecutions in the same jurisdiction.

If the two firearms offenses are identical under *Blockburger*, and all parties have assumed this to be true, this case presents the Court with an ideal opportunity to hold that the federal government may not prosecute the identical offense, consisting of the same elements, that led to a state verdict. As long as the two sovereigns can each prosecute the same criminal act, but not the identical offense, the policy behind the dual sovereignty doctrine is fully satisfied—respecting each sovereign's prosecutorial interests—without acting contrary to the text of the Double Jeopardy Clause, which prohibits being twice placed in jeopardy for the same offense. As explained in Part III, *supra*, there will be many overlapping but not identical offenses from which each sovereign can vindicate its interest in preventing and punishing crime. *Blockburger* thus preserves the power of both the states and the federal government to advance their respective interests by prosecuting the same person for the same conduct, so long as those interests are not identical. But where they are, and *Blockburger* declares that the "same offence" has occurred, the inquiry should end.

B. The dual sovereignty precedents are fragile.

The United States claimed in its brief in opposition to certiorari that the Court has been applying the dual sovereignty doctrine for more than 150 years. Br. for the U.S. in Opp'n 4. This claim is exaggerated.

To begin, the claim ignores the Court's first case to acknowledge the potential of dual prosecutions, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). Justice Washington's opinion announcing the judgment in *Houston* stated that a judgment in state court would bar a federal prosecution for the same offense. *Id.* at 31. Admittedly, as the United States points out in its brief, this statement is not inconsistent with the modern view of dual sovereignty because the situation envisioned by Washington involved two judgments, one state and one federal, based on a violation of *one statute*. What the United States ignores, however, is the reason Washington imagined two judgments based on a violation of a single statute: He rejected the "novel and unconstitutional doctrine" that states can legislate "upon any subject on which Congress has acted." *Id.* at 24. Only one justice disagreed with this statement. *See id.* at 33-34 (Johnson, J., concurring). If states cannot criminalize the same conduct, of course, dual prosecutions are not possible. *Houston* thus, in dicta, *rejected* the dual sovereignty doctrine.

The '150 years' of dual sovereignty relied on by the United States begin with *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), but the Court's opinion there is an odd way to "apply" the doctrine. First, it is but dicta; there was only one prosecution in *Fox*. More significantly, the embrace of dual sovereignty came hedged with an exhortation that it would occur only "in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 435.

There the issue lay, quiescent for seventy years, the Court having ignored the *Houston* dicta to embrace

the notion that each sovereign *could enact* criminal offenses within its sphere of power, and expressing dicta that there could even be *dual prosecutions*. But despite repeating the dicta in several cases, the Court never upheld dual prosecutions until *United States v. Lanza*, 260 U.S. 377 (1922), decided two years after the Volstead Act became effective to enforce Prohibition. In affirming the federal prosecution for the same alcohol-related conduct for which Lanza had been convicted in state court, the Court quoted the *Fox* language that dual prosecutions would not be routine but, rather, would occur only in "instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 383 (quoting *Fox*, 46 U.S. at 435).

While today we have a difficult time imagining Prohibition demanding "extraordinary rigor," by the time *Lanza* was decided, forty-six of forty-eight states had ratified the Eighteenth Amendment. *See* Henry S. Cohn & Ethan Davis, *Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 Quinnipiac L. Rev. 327, 328 (2009). The *Lanza* Court noted that the Amendment "was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce." 260 U.S. at 381. Moreover, after quoting the "extraordinary rigor" language from *Fox*, the Court noted that the judgment it reversed was "the *only* District Court which has held conviction in a state court a bar to prosecution for the same act under the Volstead Law." *Id.* at 384 (emphasis added). The *Lanza*

Court, reflecting public opinion manifested in the Eighteenth Amendment, seemed to believe that the alcohol problem required a strong, uniquely federal solution. It is difficult to make that case for the thousands of federal criminal offenses today.[7] Moreover, the *Lanza* Court relied heavily on the fact that the Double Jeopardy Clause applied only to the federal government, which is obviously no longer true. *See id.* at 382.

Lanza was accepted by *Abbate* in 1959. Yet when citing and quoting *Fox*, *Abbate* ignored the "enormity" and "extraordinary rigor" language that *Lanza* prominently displayed. *Abbate* neglected to apply the *Blockburger* test. And *Abbate* then declined to overrule *Lanza* because the Court believed that "undesirable consequences would follow if *Lanza* were overruled." 359 U.S. at 195. As demonstrated in Part III, *supra*, however, any such adverse consequences are

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[7] In particular, the problem of firearms possession by felons, involved here, hardly requires a uniquely federal response. First, virtually every state maintains some prohibition on firearms possession by felons. *See* Margaret C. Love et al., Collateral Consequences of Criminal Convictions: Law, Policy & Practice app. A-2 (2016). Moreover, such prohibitions have a far longer pedigree in the states than at the federal level. While state felon-in-possession constraints date back to the founding generation, *see Drake v. Filko*, 724 F.3d 426, 450 (3d Cir. 2013) (Hardiman, J., dissenting), the first federal felon-in-possession statute did not appear on the scene until 1938, *see United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). Finally, amici are unaware of any systemic problem of states so drastically under-punishing felons in possession so as to implicate the danger of frustrating federal policy in this area.

avoided by measuring dual prosecutions under the narrow *Blockburger* test of "same offence," rather than measuring by the broader concept of "same conduct."

The history of dual sovereignty thus consists of an initial rejection in dicta, a tepid embrace in dicta with the limiting language of "enormity" and "extraordinary rigor," a series of cases embracing the dicta without the limiting language, a holding that included the limiting language, and, finally in 1959, a holding without the limiting language. It is certainly not as sturdy a history as the United States has suggested.

* * *

A key factor that this Court considers in deciding whether to overrule precedent is whether it was "well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). A doctrine that is at odds with basic textual principles, that ignores a critical event in drafting history, that is inconsistent with the Court's conception of sovereignty, and that relies on anemic foundational cases can hardly be considered "well reasoned." The Court has also instructed that "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016) (citation omitted). This certainly applies to the dual sovereignty exception, which was born in an era when the surrounding doctrine was still in its infancy, before development of the *Blockburger* definition of same offense, and before

incorporation of the Double Jeopardy Clause. For all these reasons, *Lanza* and *Abbate* should be overruled.[8]

CONCLUSION

As Justices Ginsburg and Thomas have recognized:

> Current "separate sovereigns" doctrine hardly serves [the Double Jeopardy Clause's] objective. States and Nation are "kindred systems," yet "parts of one whole." Within that whole is it not "an affront to human dignity," "inconsistent with the spirit of [our] Bill of Rights," to try or punish a person twice for the same offense?

Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (Ginsburg, J., concurring) (emphasis omitted) (citations omitted).

This case presents the easiest and clearest instance in which a 'dual sovereigns' exception runs

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[8] In overruling *United States v. Lanza*, 260 U.S. 377 (1922), and *Abbate v. United States*, 359 U.S. 187 (1959), this Court need not overrule either *Bartkus v. Illinois*, 359 U.S. 121 (1959), or *Heath v. Alabama*, 474 U.S. 82 (1985). That is to say, the reasons that this Court should reject a dual sovereignty exception with respect to a federal prosecution following a state prosecution do not necessarily apply with the same force to a state prosecution following either a federal prosecution or a prosecution by a sister state. Amici take no position on these issues.

contrary to the text, tradition, and policy of the double jeopardy protection. The state and federal offenses have been conceded to be identical. No policy reason supports the duplicative prosecution. The federal government, historically the delegee of sovereign power, presumes to prosecute in the wake of a prosecution by a State, historically the delegator of such power. This Court should restore the protection to its rightful place, reversing the Eleventh Circuit and holding that the United States may not bring a second, duplicative prosecution for the identical criminal offense after Alabama has already sought and achieved a conviction for the same.

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