No. 17-646

# In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR TEXAS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MONTANA, NEBRASKA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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## INTEREST OF AMICI CURIAE

This amici curiae brief is submitted by 36 States: Texas, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Amici, which include the 15 most populous States, represent over 86 percent of the country's population. Their elected leaders span the political spectrum and may disagree on policy issues. But each State has a strong interest in its sovereign power to prosecute violations of its laws regardless of the prosecutorial decisions of other sovereigns, whether the federal government or other States.

The significance of criminal prosecution to the States cannot be understated given the States' inherent authority to define and enforce criminal law. *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 128 (1982). This Court has long recognized that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition [cannot] be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Because the doctrinal change that petitioner seeks would weaken the States' ability to exercise their sovereign authority to prosecute violations of their laws, the States have a significant interest in the outcome of this case.

## SUMMARY OF ARGUMENT

Petitioner seeks to upend the principle by which a State is not precluded from enforcing its criminal laws vindicating its sovereignty because another sovereign prosecuted the individual under *its* criminal laws for a violation of *its* interests. Denying a State the ability to do so would transform the nature of sovereignty.

I. It has long been understood that the term "offence" in the Double Jeopardy Clause refers not to conduct abstractly viewed as wrong but to a violation of sovereignty—the power to order society through laws. Because the atom of sovereignty is split in our federalist system of government, a violation of state law is a different "offence" than a violation of federal law.

As this Court explained just two Terms ago, the States' status as separate sovereigns is "the most fundamental premise[] of our constitutional order, indeed the very bedrock of our Union." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 n.4 (2016). The States retained inherent attributes of sovereignty upon joining the Union, and a key aspect of that sovereignty is the exercise of their police power to define and prosecute crime. Petitioner's revisionist interpretation of the Double Jeopardy Clause would weaken the States' prerogative to enforce criminal laws for the protection of their citizens, in keeping with the States' duties as sovereigns.

Disregarding the separate sovereignty of the States and the federal government would fail to respect their distinctive interests. History provides examples of how the independent interests of the States and the federal government are brought to bear in criminal enforce-

ment. Differing characteristics of those interests counsel against disrupting that approach. Moreover, petitioner offers no good solution to the problems that his reinterpretation of the Double Jeopardy Clause would create.

II. Petitioner does not identify any compelling reason for this Court to depart from more than a century and a half of precedent consistently recognizing the sovereignty-specific nature of an "offence" under the Double Jeopardy Clause.

Petitioner argues that an expansion of federal criminal law requires abandoning the sovereignty-specific view of an "offence." But the scope of federal law, or of state law, has nothing to do with the interpretive merits of the Court's longstanding view. Hence, the Court has reaffirmed the separate-sovereignty understanding again and again throughout the twentieth century, including the New Deal years and other periods of perceived expansion in federal law. Any complaint about federal overcriminalization can be addressed on its own terms in proper cases about Article I federal power, not by fashioning a new reading of the Double Jeopardy Clause that would weaken the States' sovereignty in exercising their traditional police powers.

The various policy concerns proffered by petitioner also do not warrant reversal of the Court's longstanding precedent. Balancing competing concerns in the context of successive prosecutions is an inherently policy-laden decision, best made by each sovereign in keeping with local values and interests. Different sovereigns can make that policy call in different ways in different contexts, and the panoply of policy decisions made by different

States highlights the folly of adopting petitioner's one-size-fits-all approach.

## ARGUMENT

Petitioner asks this Court to overturn more than a century and a half of precedent underlying the "fundamental principle," *Heath*, 474 U.S. at 93, "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," *United States v. Lanza*, 260 U.S. 377, 382 (1922). The Court should decline the invitation.

If state sovereignty is to have real meaning, a State must be free to prosecute crimes against its legitimate interests irrespective of the actions of other, separate sovereigns. None of the reasons advanced by petitioner or amici supporting him justify abrogating that fundamental aspect of the States' retained sovereignty.

### I. Under Our Federal System Of Retained State Sovereignty, A State Crime Is A Different "Offence" Than A Federal Crime.

An offense is a violation of a sovereign's laws, and the separate-sovereigns doctrine reflects that "the atom of sovereignty" is split in our federal system. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Laws imposing obligations under a State's police powers vindicate that State's retained sovereignty, which exists independently of the federal government's sovereignty. The principle of separate sovereignty is thus the natural outgrowth of our unique system of government, one that has withstood the test of time. Jettisoning that approach for a radical, new-

found understanding of the States and federal government as one collective sovereign, as petitioner would prefer, would lead to a host of problems for which petitioner has no solution.

### A. An "offence" is determined with reference to the sovereignty violated.

As the Court has long understood, the term "offence" in the Double Jeopardy Clause, U.S. Const. amend. V, references "the common-law conception of crime as an offense against the sovereignty of the government." *Heath*, 474 U.S. at 88. At the core of sovereignty is the power of government "to govern men and things within the limits of its dominion," whether that dominion be determined based on territory or subject matter. *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (5 How.) 504, 583 (1847) (discussing both state and federal sovereignty). An "offence" is a violation of that sovereignty.

Thus, an "offence" is not merely conduct that a community views as immoral. An "offence" exists only with reference to a law expressing sovereignty: "[A]n offence, in its legal signification, means the transgression *of a law*." *Heath*, 474 U.S. at 88 (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852)) (emphasis added). As Justice Scalia explained in his dissenting opinion in *Grady v. Corbin*, 495 U.S. 508 (1990), which the Court soon thereafter endorsed upon *Grady*'s overruling: "[The Double Jeopardy Clause] protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*. 'Offence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Id.*

at 529 (citing definitions); *see United States v. Dixon*, 509 U.S. 688, 704 (1993); U.S. Br. 10-14.

Consequently, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" *Heath*, 474 U.S. at 88 (quoting *Lanza*, 260 U.S. at 382). Because "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other," it follows naturally that a prosecution by one according to its laws cannot preclude prosecution by the other according to its own laws. *Lanza*, 260 U.S. at 382.

That understanding of an "offence" as linked to sovereignty "finds weighty support in the historical understanding and political realities of the States' role in the federal system." *Heath*, 474 U.S. at 92 (observing that "[t]his Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns"); *accord United States v. Wheeler*, 435 U.S. 313, 318 (1978); *Abbate v. United States*, 359 U.S. 187, 195 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959). That view has been reaffirmed time and again, for over a century and a half. States have relied on it and fashioned laws around it. That firm history "goes a long way in the direction of proving the presence of unassailable ground for [its] constitutionality." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *cf. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) ("If a thing has been practiced for two hundred years by common

consent, it will need a strong case for the Fourteenth Amendment to affect it.") (quotations omitted).

### B. The States did not surrender their sovereignty when entering the Union.

1. Under the long-held view of an "offence" as a disregard of sovereign authority, a person who violates both state law and federal law commits two different "offences" because, under our Constitution, the States retain the police powers inherent to sovereignty.

The United States is uniquely composed of States that "entered the [Union] with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *accord* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States."). The Constitution establishes "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring). Thus, the States "are separate sovereigns," not only "from the Federal Government" but "from one another." *Sanchez Valle*, 136 S. Ct. at 1866.

Contrary to the argument of amici curiae supporting petitioner, the States are not comparable to English counties, which never enjoyed the attributes of sovereignty. *Cf.* Constitutional Accountability Ctr. Amicus Br. 9. The American system deliberately departed from the English model: "our structure of federalism . . . had no counterpart in England." *United States v. Gillock*, 445 U.S. 360, 369 (1980). Under our unique federal system, "[w]e have here two sovereignties," "capable of dealing with the same subject matter within the same

territory." *Lanza*, 260 U.S. at 382. It follows axiomatically that there often is "concurrent application of state and federal laws." *Abbate*, 359 U.S. at 190. As even critics of the separate-sovereignty principle have long recognized, that was not true in England. *See, e.g.*, Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 316 (1963) ("[T]his is not true in Britain. In that country two sovereigns do not have *territorial* jurisdiction over a crime.").

The Founders understood the bedrock importance of maintaining state sovereignty when establishing our Union. They assured the ratifying States that "State governments would clearly retain all the rights of sovereignty which they before had" and that were not given over to the national government in the Constitution. The Federalist No. 32 (John C. Hamilton ed., 1892). Indeed, even in those areas where the Constitution vested power in the new federal government, there was to remain "concurrent jurisdiction" in nearly all areas, excepting the rare instances where state power was divested by a grant of exclusive federal power. *Id.* ("[T]he rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor . . . is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.").

The "original and unsurrendered sovereignty" of the States, *Moore*, 55 U.S. (14 How.) at 15, specifically includes the power to enact and enforce criminal laws "to guard the lives and health of their citizens," *Thurlow*, 46 U.S. (5 How.) at 582-83. Indeed, a State without po-

lice powers—"that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion," *id.* at 583—can scarcely be called a State. *See Nebbia v. New York*, 291 U.S. 502, 524 (1934) (discussing the States' "sovereign capacity": "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government."); *see also United States v. Morrison*, 529 U.S. 598, 618 (2000) (observing that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims"); The Federalist No. 9 (John C. Hamilton ed., 1892) (noting that the Constitution leaves the States with "very important portions of sovereign power").

In short, the sovereignty violated by a transgression of state law is independent and distinct from the sovereignty violated by a transgression of federal law. State criminal law does not derive from or depend on federal authority. The Court's Double Jeopardy Clause jurisprudence on the States' separate sovereignty follows ineluctably from federalism.

2. A State's inherent sovereignty, existing independent of the federal government, is not diminished because the two sovereigns may sometimes enact coincident criminal prohibitions. Indeed, even the criminal laws of separate nations may sometimes reach the same conduct. That overlap in the reach of the criminal laws of the separate sovereigns does not negate their separate sovereignty. The same goes for the laws of a State and the federal government (or the laws of two States). Even where their criminal laws may prohibit the same

conduct, each sovereign has legitimate interests in vindication of its own authority to order private conduct. Thus, "dual federalism validly recognizes the inherent authority of a sovereign to govern itself." Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles*," 78 Va. L. Rev. 1769, 1773-74 (1992).

The inherent, retained sovereignty of the States also is not diminished because prosecutors across jurisdictions sometimes cooperate in the enforcement of one another's criminal laws. *Contra* Pet. Br. 41, 44. As a preliminary matter, cooperation between the States and the federal government in criminal matters is hardly new. Over half a century ago, this Court in *Bartkus* noted that the federal prosecutor there "acted in cooperation with state authorities" and observed that such cooperation was "conventional practice between the two sets of prosecutors throughout the country." 359 U.S. at 123.

More fundamentally, petitioner points to no authority establishing that voluntary cooperation somehow cedes sovereignty. It does not. *See, e.g.*, *United States v. X.D.*, 442 F. App'x 832, 833 (4th Cir. 2011) (per curiam) ("Cooperation between sovereigns does not establish that one sovereign has ceded its prosecutorial discretion to the other sovereign."); *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008) (same). Petitioner and amici argue that increased cooperation means that state and federal interests are no longer distinct. *See* Pet. Br. 41-44; Constitutional Accountability Ctr. Amicus Br. 5, 20-21. But that argument fails to respect the sovereign-

ty-based nature of an offense. In the general course, "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition [cannot] be satisfied by another State's enforcement of *its* own laws." *Heath*, 474 U.S. at 93. Whatever choices each government may make about cooperation in particular instances, the States and the federal government always have separate and distinct interests in defining and prosecuting offenses. *See infra* Parts I.C, I.D.

3. Petitioner argues that the sovereignty-based view of a Double Jeopardy Clause "offence" cannot be correct because federalism "was supposed to protect liberty, not destroy it," which petitioner says happened when he was held to account for violating the laws of separate sovereigns. Pet. Br. 29. That argument at once diminishes and confuses the benefits of federalism. In asking to be freed of the natural consequences of our federalist system, it is petitioner who would "turn[] federalism on its head." Pet. Br. 29.

Obeying multiple sovereigns' laws is a normal part of a federalist system of government. In such a system, "[e]very citizen of the United States is also a citizen of a State," and thus "may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either." *Bartkus*, 359 U.S. at 131 (quoting *Moore*, 55 U.S. (14 How.) at 20); *accord United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550-51 (1875) (observing that it is a "natural consequence of a citizenship . . . [to] pay the penalties which each exacts for disobedience to its laws"). The creation and protection of that social contract—that is, "the establishment of laws requiring each citizen to . . . conduct himself" according

to the rules of society—is "the very essence of government." *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 125 (1876). As the price for living in a federalist system whose divided sovereignty generally protects liberty, citizens are confronted with the "background presumption that federal law generally will not interfere" with administration of state law. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) (addressing tax example).

The benefits of federalism do not hinge on the perceptions of those who occasionally feel the bite of its application. *Cf.* Pet. Br. 29. Criminal law operates "for the benefit of society as a whole." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). Although the accused being held to account for his crime against a particular sovereign may resent it, he, too, benefits from laws that provide order to society. One person's liberty from a sovereign's laws can imperil the welfare of others, protected by a sovereign's laws. *See generally* U.S. Const. pmbl. (giving liberty as only one among many purposes of the Constitution, also created to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare"); *see also W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("[T]he Constitution does not recognize an absolute and uncontrollable liberty.").

### C. Treating the States and the federal government as a single sovereign fails to respect the legitimate interests of each.

While the States and federal government all battle crime, and are generally open to cooperation in that effort, their sovereign interests have distinctive charac-

teristics that petitioner's view of the Double Jeopardy Clause would not respect.

1. From the perspective of lines of accountability, state prosecution is typically more local to a community. State-level prosecutions often involve actors with accountability mechanisms not present in the federal system, such as elected prosecutors. And the Court has recognized that criminal prosecution is a local institution through which communities govern themselves, allowing them to "shap[e] the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 564 U.S. 211, 221 (2011). As Alexander Hamilton wrote, "the ordinary administration of criminal and civil justice" is the "one transcendent advantage belonging to the province of the State governments," and "contributes, more than any other circumstance, to impressing upon minds of the people affection, esteem, and reverence towards the government." The Federalist No. 17 (John C. Hamilton ed., 1892). The law often incorporates those concepts explicitly, as in death-penalty cases. *E.g.*, *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (jury must "express the conscience of the community on the ultimate question of life or death").

2. State prosecutions under general police powers can also reflect interests broader than those of the federal government, a government of limited powers stemming from targeted grants of authority. Thus, federal crimes often require a link to interstate commerce or

another font of federal authority, in contrast to crimes prohibited under a State's police power.[1]

For instance, dual state and federal interests can exist when state laws protecting bodily integrity overlap with federal civil-rights laws. Take *United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012), where the defendants brutally beat and killed a Hispanic man in their town. *Id.* at 136. The defendants were prosecuted in the state courts of Pennsylvania for various state crimes related to bodily integrity, resulting in acquittals on all but a simple assault charge. *Id.* at 148. The federal government then successfully prosecuted the defendants for a bias crime under the Fair Housing Act. *Id.* at 140. Although the federal government of course shared the State's concern with bodily integrity, its prosecution also reflected the federal government's interest under that Act with equal access to housing. *Id.* As the court of appeals noted in rejecting a double-jeopardy argument, the State and the federal government each decided to prosecute based on facts implicating their own valid interests. *Id.* at 149.

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[1] It is an open question in this Court whether the *Blockburger* element-comparison test applies to a so-called jurisdictional hook in a statute, as to make a federal law requiring proof of a link to interstate commerce but not requiring proof of conduct within a given State a different offense than a state law requiring proof of conduct within a given State but not requiring proof of a link to interstate commerce. *Cf. United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995) (rejecting the defendant's request to treat the jurisdictional element in 18 U.S.C. § 2111 "as purely incidental" for purposes of the *Blockburger* analysis, but noting conflicting authority).

Or consider *United States v. Angleton*, 314 F.3d 767 (5th Cir. 2002), where the defendant was prosecuted on federal murder-for-hire charges after a prior prosecution by Texas on capital murder charges resulted in an acquittal. *Id.* at 769-70. Although both the state and federal government obviously detest murder, the federal law reflects an additional and distinct federal interest in ensuring that "facilit[ies] of interstate . . . commerce" are not used for the commercial solicitation of murder. *See* 18 U.S.C. § 1958. Reflecting the separate sovereignty breached by the defendant's conduct, the federal government was not barred, in a successive prosecution, from vindicating its own sovereignty. A similar dynamic can exist with respect to human trafficking, sex abuse, child exploitation, or fraud affecting government facilities. An act might violate important interests of both a State and the federal government.

Similarly, in the area of financial crimes, a state prosecution might reflect a State's interest in protecting bodily integrity and property, whereas a federal prosecution might reflect additional federal interests related to protecting interstate commerce and financial markets. For example, in *Application of Coulter*, 860 P.2d 51 (Kan. Ct. App. 1993), federal authorities brought charges to vindicate the federal interest in interstate commerce by protecting member institutions of the Federal Reserve System. *Id.* at 53; *see also* 18 U.S.C. § 2113(f). Although the defendant was acquitted of the federal offenses of aiding and abetting bank robbery and assault during a bank robbery, the State of Kansas still had its sovereign interest in the enforcement of its laws protecting property and public safety in

its territory. So, consistent with the State's separate sovereignty, Kansas charged the defendant with violating the State's robbery and assault laws. *Application of Coulter*, 860 P.2d at 53-55. The State's interest in punishing breaches of its own laws was not diminished by the federal government's prosecution reflecting its own sovereign interests.

3. The separate-sovereigns doctrine also allows vindication of sovereign interests despite potential systemic barriers to prosecution in one jurisdiction, as can arise in the context of civil-rights litigation.

Take, for example, the state and federal trials of the police officers involved in the beating of Rodney King.[2] Within two weeks of the beating, state charges were

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[2] Historical examples of challenges in seeking justice for victims of civil-rights abuses are also well known. *See, e.g.*, *United States v. Price*, 383 U.S. 787, 790-92 (1966) (involving the killing of three civil-rights workers by a deputy sheriff and seventeen others in violation of 18 U.S.C. § 242); *Liuzzo v. United States*, 485 F. Supp. 1274, 1276 (E.D. Mich. 1980) (mem. op.) (describing federal prosecutions for the 1965 murder of civil-rights worker Viola Liuzzo, after two state juries failed to convict); *see also United States v. Guest*, 383 U.S. 745, 746-49 (1966) (upholding federal indictment of defendants charged with conspiring to deprive an African-American army officer murdered while traveling through Georgia). Those cases did not easily lend themselves to prosecution by state courts in the first instance: "state and local accountability systems, to the extent they existed, failed." Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception*," 41 UCLA L. Rev. 649, 663 (1994). Federal civil-rights prosecutions, "in response to official misconduct or private racist violence left unredressed by state or local authorities," were essential to securing constitutional rights. *Id.* at 664.

filed against the officers involved for excessive use of force. Leslie Berger & Tracy Wood, *At Least 4 Officers Indicted in Beating: Police Probe*, L.A. Times, Mar. 15, 1991, at A1. The jury in the state trial acquitted all but one of the defendants. Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. Times, Apr. 30, 1992, at A1. But the decision to transfer venue from Los Angeles County to Ventura County had led to the selection of a jury that was perceived as biased in favor of the police-officer defendants. *See, e.g.*, Charles L. Lindner, *Lesson of the King Case: The Risk of Shuttle Justice*, L.A. Times, Apr. 25, 1993, at M1.

Subsequently, federal prosecutors charged the defendants with violating King's civil rights. A federal jury convicted two of the officers involved. *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994). The federal government was able to seek vindication of its legitimate interests, unhampered by concerns that, in the state criminal-justice system, "[t]he [police] investigators' loyalty to fellow members of the force may make them less than enthusiastic about developing a case against their colleagues." Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 U.C.L.A. L. Rev. 509, 544 (1994). "Because there was no immediate federal intervention in the case, the local authorities had the opportunity to resolve the issues the case represented." *Id.* at 594. "When they were unable to do so, perhaps because the case was taken from the community it most affected, federal authorities intervened." *Id.* But federal intervention "at an earlier point, simply be-

cause the case involved police misconduct, would have sent a devastating message to the community that the local criminal justice system was not capable of accomplishing justice." *Id.* at 594-95. Respecting separate sovereignty helps ensure that prosecutions do not send that message.

4. Wrongly treating the States and the federal government as a single sovereign may also heighten the effects of undue influence in a particular jurisdiction. That could occur in any direction: undue influence in federal decisions impairing legitimate state interests in enforcing state laws, vice versa, or one State's decisions impairing other States' legitimate interests.

As one example, consider *United States v. Barnhart*, 22 F. (10 Sawy.) 285 (C.C.D. Or. 1884). The court there, in applying the separate-sovereignty principle to reject a double-jeopardy challenge to a federal prosecution, noted the existence of prejudice in a community against a Native American victim. *Id.* at 289. The decision foresaw (*id.* at 292) "the special double jeopardy problems therefore posed when a defendant manipulates a jury's democratic composition through race-based peremptory challenges or venue transfers." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 3 (1994). Just as "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there," instances of "[r]acial bias mar[] the integrity of the judicial system and prevent[] the idea of democratic government from becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

Those concerns are not limited to instances of racial bias. They could arise whenever there is the potential for jurors to be improperly influenced or swayed, as with prosecutions in cases of political corruption. Another instance could be human-trafficking crimes. Federal law generally forbids bringing into or harboring in the United States non-citizens who are not authorized to enter or remain in the country. 8 U.S.C. § 1324; *see also id.* § 1328 (immoral purposes); *id.* § 1327 (aiding or assisting unlawful entry). Several States, in turn, prohibit various forms of human trafficking. *E.g.*, Tex. Penal Code § 20.05. The separate-sovereignty principle helps ensure that no one sovereign's charging or sentencing decisions frustrate another sovereign's policy choices about prosecuting violations in that area. For example, in *People v. Halim*, 223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017), the defendant was federally charged with harboring unauthorized entrants, and the charges were resolved with a plea deal. *Id.* at 495. The State of California then successfully charged the defendant with a violation of its anti-human-trafficking statute, allowing the State to vindicate its independent interests in protecting personal liberty. *Id.* at 498.

5. A State's authority to vindicate its sovereignty could also be deprived under petitioner's view when conduct crosses jurisdictional boundaries. For instance, in *State v. McKinney*, 609 N.E.2d 613 (Ohio Ct. App. 1992), McKinney allegedly killed a man and dumped the body in Indiana. *Id.* at 614. McKinney was initially charged with and convicted of murder in Indiana when the victim's body was found there, as Indiana law created a presumption that a murder victim found in Indiana

was killed there. *McKinney v. State*, 553 N.E.2d 860, 861-64 (Ind. Ct. App. 1990). McKinney was convicted in Indiana trial court, but the conviction was reversed by the Indiana appellate court because the jury instructions did not instruct the jury that "that they were permitted, but not required, to infer from the fact that the body was found in Indiana that the victim was murdered [t]here," *id.* at 865, and McKinney created doubt by citing evidence that he had killed the victim in Ohio, not Indiana, *id.* at 862.

The Indiana prosecution terminated without a conviction, and Ohio then charged and convicted McKinney for murder. *McKinney*, 609 N.E.2d at 614. The separate sovereignty of Ohio thus ensured that Ohio had a chance to vindicate its own laws.[3] The alternative could have allowed a murderer to escape justice in both Indiana and Ohio based on Indiana's burden of proof that the crime happened there.

### D. Petitioner has no good solution to the problems posed by his proposal to strip away separate sovereignty.

The problems with disregarding the separate sovereignty of the States and the federal government are not easily addressed by solutions proposed by petitioner. A

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[3] Although a separate doctrine "may exist" that allows a successive prosecution where newly unearthed facts were not "discovered despite the exercise of due diligence," *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977), the *McKinney* case cited above did not involve new facts but rather existing evidence and doubt about whether the burden of proof on a territorial element was met.

central premise of petitioner's argument is that the interests of a sovereign that would be barred from prosecuting without the separate-sovereignty doctrine can be served through cooperative efforts between state and federal prosecutors. *See* Pet. Br. 41-44. But cooperation does not always exist or function smoothly in the real world.

1. In reality, federalism is often "uncooperative." As relevant here, "uncooperative federalism" refers to the counterbalance of States that disagree with the way that they believe federal authorities are (or are not) enforcing federal law at any given time. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256 (2009). States often partner with the federal government to combat crime, but that does not mean that their views are always aligned. State and federal laws may themselves reflect different goals or priorities.

To take just one example, following the recent passage of Proposition 64, a Californian possessing 100 kilograms of marijuana intended for sale would face, at a state trial, conviction of a misdemeanor punishable by "imprisonment in a county jail for a period of not more than six months" and "a fine of not more than five hundred dollars." Cal. Health & Safety Code § 11359(b). By contrast, that same Californian would face, at a federal trial, conviction of a felony punishable by five to 40 years in prison and a fine of up to $5 million. 21 U.S.C. § 841(b)(1)(B)(vii). Such "disparity" is a reflection of our unique system of separate sovereigns, in which certain criminal acts will "impinge more seriously on a federal

interest than on a state interest," *Abbate*, 359 U.S. at 195, and vice versa, *Bartkus*, 359 U.S. at 137.

Prosecutors working for each sovereign will presumably choose to prosecute to serve the interests reflected in their respective laws, which may well not reflect the other sovereign's interests. Abandoning the separate-sovereignty principle would remove an important tenet of federalism, since States would be left with the choice to cooperate, attempt to race to the courthouse, or do nothing if federal authorities insisted on being the ones to prosecute.

Although the federal Executive Branch is democratically accountable for decisions, that accountability is to voters across the Nation, not to the States directly or to the voters of any single State. That structure eliminates, as compared to state and local prosecutors, an accountability mechanism for responsiveness to a State's policies. Increasing reliance on prosecution by a detached entity—although a benefit in some instances, *see supra* Part I.C.3—would in the more general course reduce local responsiveness.

Petitioner's view would create troubling results even where one might generally expect cooperation between state and federal prosecutors because of similar interests. For instance, one inevitable outcome of expecting separate sovereigns to pick a single prosecutor is a "race to the courthouse." *Heath*, 474 U.S. at 93. Defendants might even race to plead guilty in the jurisdiction with the most favorable law. "If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure im-

munity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect." *Lanza*, 260 U.S. at 385.[4]

2. It is also unclear what benefit cooperation would reliably provide as between States. Differences in resources and the relative seriousness of offenses between two States' criminal-justice systems are not always obvious. Nor might a State be willing to entrust prosecution to the laws and citizens of a different State. If only one State can prosecute, its actors are not accountable to the other State, since the "enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." *Heath*, 474 U.S. at 93. So there is less incentive to cooperate than when considering federal prosecution.

In any event, mere cooperation between States cannot fully vindicate the States' separate sovereignty. Each State has its own laws to protect its interests in its own

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[4] Petitioner's heavy reliance on a supposed historical rule about foreign prosecutions indicates that, on his view, not even foreign prosecutions would implicate separate "offences" for purposes of the Double Jeopardy Clause. But the possibility of state cooperation with foreign countries is even more nebulous. Federal authorities can engage with foreign countries diplomatically to decide which sovereign will prosecute. States cannot have that diplomatic engagement with foreign countries. That fact puts the States at a particular disadvantage because it removes them from the decisionmaking process. *Cf., e.g.*, Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 Tex. Int'l L.J. 527, 542-43 (2003) ("The American people expect that certain decisions affecting them will be made through specified constitutional processes by people who are accountable to them.").

way, and the balance struck by one State cannot vindicate—and therefore cannot bar—the actions of another State. *See id.* For example, in *Heath*, a defendant who conspired to have his wife murdered by hired assassins could have escaped justice in one State by pleading guilty in another State. *Id.* But separate sovereignty allowed Alabama to vindicate its interests and express the community's opprobrium through a death sentence, when it otherwise could not have done so given the defendant's guilty plea in Georgia. *See id.* at 83-86, 92.

Numerous examples demonstrate how States use their powers to prosecute offenses to vindicate differing interests—which petitioner seeks to undo. Consider *State v. Ellis*, 656 A.2d 25 (N.J. Super. Ct. App. Div. 1995), in which the defendant abducted the victim in New York and held the victim in New Jersey. *Id.* at 32-33. Under New York and New Jersey law, kidnapping was a continuing offense, whose elements overlapped.[5]

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[5] The New York statute of which defendant was convicted provided that "[a] person is guilty of kidnapping in the second degree when he abducts another person." *Ellis*, 656 A.2d at 34 (citing N.Y. Penal Law § 135.20). "Abducts" was defined as "restrain[ing] a person with intent to prevent his liberation by . . . using or threatening to use deadly physical force." *Id.* (quoting N.Y. Penal Law § 135.00(2)). The New Jersey statute provided that "[a] person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:"

> (1) To facilitate commission of any crime or flight thereafter;

The New York prosecution would not have allowed New Jersey to vindicate its interests because the factual basis for the New York prosecution was the victim's abduction, while the New Jersey prosecution was based on the victim's confinement. *Id.* at 34. Separate sovereignty thus allowed New York and New Jersey to vindicate their interests in prosecuting the same continuing conduct. *Id.* at 32-34.

Another example is *State v. Smith*, 575 N.E.2d 1231 (Ohio Mun. 1991), where the defendant was charged with driving under the influence in Ohio. *Id.* at 1231. The defendant unsuccessfully moved to dismiss the charge because he had already been tried and convicted of driving under the influence in Kentucky for the same conduct. *Id.* Applied in that case, the separate-sovereignty doctrine reflects that both Ohio and Kentucky have a legitimate state interest in maintaining peace and order within their borders.

## II. Petitioner And The Amici Curiae Supporting Him Offer No Sound Reason To Discard The Centuries-Old, Sovereignty-Specific Understanding Of An "Offence."

Petitioner offers no good reason to reconsider the Court's long and unbroken line of precedent holding that an offense under the Double Jeopardy Clause is determined with reference to the sovereignty violated.

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(2) To inflict bodily injury on or to terrorize the victim or another.

*Id.* (quoting N.J. Stat. § 2C:13-1(b)).

### A. The scope of federal criminal law does not warrant reconsideration of the separate-sovereignty principle.

Petitioner and amici curiae supporting him argue for rejection of the separate-sovereignty principle because of a perceived "tectonic shift[]" in criminal enforcement to the national government, in the form of a "bloated" federal criminal code. Pet Br. 42-43; Constitutional Accountability Ctr. Amicus Br. 16-23. But nothing about the scope of federal law affects the interpretive merits of the sovereignty-specific view of an "offence." Hence, the Court has consistently reaffirmed that sovereignty-based view over decades, including periods seeing marked growth in federal criminal law. *See, e.g.*, *Federal Coöperation in Criminal Law Enforcement*, 48 Harv. L. Rev. 489, 490 (1935) (noting New Deal-era federal criminal legislation).

Any objection to "hyperfederaliz[ation]" of criminal law, Hatch Amicus Br. 4, should be confronted directly in adjudicating the scope of Article I federal powers. It should not be used as window dressing for a reinterpretation of the Double Jeopardy Clause that would limit and thereby weaken the States' police powers to prosecute crime. Petitioner's view would do just that. In the words of Justice Frankfurter, "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Bartkus*, 359 U.S. at 137.

Indeed, petitioner's revision of the Double Jeopardy Clause could lead the federal government to exercise its preemption authority more often, further diminishing

the States' police powers. Again, the reaction to a perceived federal intrusion into state matters should not be to incentivize a weakening of state power.

### B. Petitioner's policy objections can be addressed by legislatures, which have adopted a number of reticulated policies to regulate successive prosecutions.

All States respect the burdens that a successive prosecution imposes on an accused. At the same time, the States must weigh their independent interests in vindicating their own criminal laws. *See supra* Part I.B. Those policy concerns can, of course, come into tension in particular cases. As with many matters on which reasonable minds can differ, "considerable disagreement exists about how best to accomplish" a fair balancing of those competing considerations. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). It is precisely in situations such as those, "where the best solution is far from clear," that the "theory and utility of our federalism are revealed." *Id.*; *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

And it is precisely because that balance turns on the facts of particular prosecutions that this Court should avoid categorical prohibitions and, instead, allow the political branches to adopt context-sensitive approaches tailored to specific cases and local policies. One benefit of the separate-sovereignty doctrine is allowing individual sovereigns to tailor their prosecutorial decisions to the preferences of their community. *See supra* Parts I.C, I.D. Our federalist system has long allowed States

the sovereignty to make that type of decision for themselves. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("[A] state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State.") (citation omitted); *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926) ("[State officials] are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done."); *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469, 548 (1833) ("[T]he legislature possess all the legislative power that the body politic could confer, except so far as they are restricted by the [Constitution] itself.").

The federal government and many of the States already limit successive prosecutions through statutes or formal policies. For its part, the federal government has long maintained a policy by which, with certain specific exceptions, it will not initiate a federal prosecution "following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)." Offices of the U.S. Att'ys, U.S. Dep't of Justice, *Justice Manual* § 9-2.031 (updated 2009), https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-matters prior-approvals. That policy "allows the federal government to bring a successive prosecution only when there are compelling reasons to do so and the prosecuting attorney obtains prior approval from the appropriate United States Assistant Attorney General." *Double Jeopardy*, 44 Geo. L.J. Ann. Rev. Crim. Pro. 522, 552 (2015).

The States have taken a wide variety of approaches. Thirty-five States have some type of statutory con-

straint on their ability to prosecute a crime adjudicated by a separate sovereign.[6] Of these, thirteen states have restrictions for specifically enumerated crimes.[7] Many of those restrictions concern prior prosecutions related to the Uniform Controlled Substances Act or other drug crimes.[8] Others do not.[9]

The variety of state approaches to successive prosecutions shows the inherently policy-laden nature of those prosecutorial decisions. Some States bar a subse-

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[6] *See* Ark. Code §§ 5-1-114, 5-64-418; Cal. Penal Code §§ 656, 793; Colo. Rev. Stat. § 18-1-303; Del. Code tit. 11, § 209; Ga. Code § 16-1-8(c); Haw. Rev. Stat. § 701-112; Idaho Code § 19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code § 35-41-4-5; Iowa Code § 124.405; Kan. Stat. § 21-5110; Ky. Rev. Stat. § 505.050; Mich. Comp. Laws §§ 333.7409, 767.64; Minn. Stat. § 609.045; Miss. Code § 99-11-27; Mont. Code § 46-11-504; Neb. Rev. Stat. § 28-427; Nev. Rev. Stat. § 171.070; N.J. Stat. § 2C:1-11; N.M. Stat. § 30-31-27; N.Y. Code Crim. Proc. § 40.20(2)(f); N.C. Gen. Stat. § 90-97; N.D. Cent. Code § 19-03.1-28; Ohio Rev. Code § 2925.50; Okla. Stat. tit. 63, § 2-413; Or. Rev. Stat. §§ 475.265, 475B.389; 18 Pa. Stat. and Cons. Stat. § 111; 21 R.I. Gen. Laws § 21-28-4.12; S.C. Code § 44-53-410; Utah Code § 76-1-404; Va. Code § 19.2-294; Wash. Rev. Code § 10.43.040; W. Va. Code § 60A-4-405; Wisc. Stat. §§ 939.71, 961.45; Wyo. Stat. § 35-7-1035.

[7] *See* Iowa Code § 124.405; Mich. Comp. Laws §§ 333.7409, 767.64; Neb. Rev. Stat. § 28-427; N.M. Stat. § 30-31-27; N.C. Gen. Stat. § 90-97; N.D. Cent. Code § 19-03.1-28; Ohio Rev. Code § 2925.50; Okla. Stat. tit. 63, § 2-413; Or. Rev. Stat. §§ 475.265, 475B.389; 21 R.I. Gen. Laws § 21-28-4.12; S.C. Code § 44-53-410; W. Va. Code § 60A-4-405; Wyo. Stat. § 35-7-1035.

[8] *See, e.g.*, Iowa Code § 124.405; Mich. Comp. Laws § 333.7409; Neb. Rev. Stat. § 28-427; N.M. Stat. § 30-31-27.

[9] *See, e.g.*, Mich. Comp. Laws § 767.64 (theft).

quent prosecution unless the statutory elements require different facts to be proved.[10] Some States allow a prosecution only if the statutes are aimed at separate evils.[11] One State allows prosecution in either of those scenarios, or if the second offense was not consummated when the former trial began.[12] One State prohibits prosecution only if the two statutes' elements are identical.[13] Another State prohibits prosecution only when there was a prior federal prosecution, with an exception for terrorism charges.[14] And still another State sweeps broader, extending its prohibition to prior adjudications in other countries, so long as the defendant was in fact punished.[15]

In short, the States have a multiplicity of approaches to balancing the conflicting policy concerns in this context. Removing that policy-laden issue from legislatures, who can make context-dependent determinations based on the characteristics of specific prosecutions, is unwarranted.

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[10] *See* Ark. Code § 5-1-114; Colo. Rev. Stat. § 18-1-303; Del. Code tit. 11, § 209; Ga. Code § 16-1-8(c); Haw. Rev. Stat. § 701-112; 720 Ill. Comp. Stat. 5/3-4(c); Kan. Stat. § 21-5110; Ky. Rev. Stat. § 505.050; N.Y. Code Crim. Proc. § 40.20(2)(f); 18 Pa. Stat. and Cons. Stat. § 111; Wisc. Stat. § 939.71.

[11] *See, e.g.*, Haw. Rev. Stat. § 701-112.

[12] *See* N.J. Stat. 2C:1-11.

[13] *See* Minn. Stat. § 609.045.

[14] *See* Va. Code § 19.2-294.

[15] *See* Wash. Rev. Code § 10.43.040.

## CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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