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 THE UNITED STATES

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QUESTION PRESENTED

Whether the Court should reinterpret the Double Jeopardy Clause and overturn the long-held understanding that offenses against the laws of different sovereigns are not the "same offence."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 694 Fed. Appx. 750. The order of the district court (Pet. App. 5a-10a) is not published in the Federal Supplement but is available at 2016 WL 3460414.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. The petition for a writ of certiorari was filed on October 24, 2017, and granted on June 28, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that "[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Alabama, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). J.A. 29. The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. J.A. 31, 33. The court of appeals affirmed. Pet. App. 1a-4a.

1. In November 2015, a police officer in Mobile, Alabama, found a loaded 9mm handgun, a digital scale, and two bags of marijuana in petitioner's car following a traffic stop. J.A. 27; Presentence Investigation Report (PSR) ¶¶ 5-6. Petitioner had a history of violent crimes, including incidents in which he had endangered others by firing a gun. PSR ¶¶ 6-7, 25-28.

First, in 2008, petitioner had pleaded guilty to Alabama second-degree robbery, based on his use of force during a theft. PSR ¶ 25. Although he was sentenced to ten years of imprisonment, he served only nine months of that term, with the balance suspended pending completion of three years of probation. *Ibid.*

Second, a year after completing probation, petitioner committed two domestic-violence offenses. PSR ¶¶ 26-27. In March 2013, petitioner fired a gun when his girlfriend attempted to leave their home with their child after an argument. PSR ¶ 26. And in May 2013, petitioner forced his way into his former girlfriend's home, chased her out, and was attempting to hit her when the police arrived. PSR ¶ 27. Petitioner pleaded guilty to two Alabama third-degree domestic-violence offenses and received concurrent sentences of 180 days of imprisonment, with all but 42 days suspended pending completion of one year of probation. PSR ¶¶ 26-27.

Third, in October 2014, soon after completing his domestic-violence probation term, petitioner fired a handgun into a title-loan business while two people were inside. PSR ¶ 28. He was charged by the State with two counts of discharging a gun into an occupied building. *Ibid.* Proceedings in that case were still pending when petitioner was stopped with the drugs and gun in November 2015. See *ibid.*

2. Petitioner's possession of the gun with that criminal history violated both federal and state law, and he was charged with both federal and state crimes. In April 2016, a federal grand jury in the Southern District of Alabama indicted petitioner for the federal offense of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). J.A. 10-12. As relevant here, Section 922(g)(1) makes it "unlawful for any person * * * who has been convicted in any court of * * * a crime punishable by imprisonment for a term exceeding one year"—in petitioner's case, his second-degree robbery conviction—to possess a firearm in and affecting interstate commerce. 18 U.S.C. 922(g)(1); see Pet. App. 6a; J.A. 50-51.

Meanwhile, in late 2015, Alabama had separately charged petitioner, under its own criminal code, with a firearm offense and two state drug offenses. See Pet. App. 5a-6a; PSR ¶ 29. The relevant state-law firearm offense prohibits a "person who has been convicted * * * of committing or attempting to commit a crime of violence, misdemeanor offense of domestic violence, violent offense as listed in [Ala. Code §] 12-25-32(15) [(Supp. 2015)], anyone who is subject to a valid protection order for domestic abuse, or anyone of unsound mind" from possessing a firearm. Ala. Code § 13A-11-72(a) (2015); see *id.* §§ 12-25-32(15) (Supp. 2015), 13A-

11-70(2) (2015) (defining relevant predicates to include robbery).

3. Petitioner opted to enter a guilty plea in state court, thereby ensuring that jeopardy attached first in the state proceedings. See PSR ¶¶ 28-29. All of the pending state charges against petitioner—the shooting charges, the drug charges, and the firearm charge—were collectively resolved with concurrent, substantially suspended, sentences. One of the drug and one of the shooting charges were dropped, see *ibid.*, and although petitioner received concurrent ten-year terms of imprisonment on the remaining counts, all but 12 months were suspended. *Ibid.*; CC-2016-2739 Ala. Order 1 (May 18, 2016) (Ala. Order A); CC-2016-2740 Ala. Order 1 (May 18, 2016) (Ala. Order B). The suspension will become permanent following successful completion of a three-year probationary term. *Ibid.* If he qualified, petitioner was allowed to serve his 12 months of imprisonment in a work-release program. Ala. Order A at 1; Ala. Order B at 1.

4. After his state sentencing, petitioner moved to dismiss the federal indictment under the Double Jeopardy Clause. Pet. App. 6a. He argued that his decision to plead guilty to the state firearm offense during the pendency of the federal charge precluded any further federal proceedings for his violation of Section 922(g)(1). *Ibid.* In his view, the state and federal offenses are the "same offence," U.S. Const. Amend. V, and whichever reached trial or plea first would vitiate the other and become the only permissible charge. See Pet. App. 6a.

This Court, however, "has plainly and repeatedly stated" that two offenses "are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if

they are prosecuted by different sovereigns." *Heath* v. *Alabama*, 474 U.S. 82, 92 (1985). The district court accordingly denied the motion. Pet. App. 5a-10a.

The government sought and received a short continuance so that the U.S. Attorney's Office could obtain direction from the Department of Justice about whether to proceed with the federal charge. J.A. 13-14. Under the Department's longstanding "Petite Policy," the government will pursue a federal prosecution after a state disposition arising from "substantially the same act(s) or transaction(s)" only when, *inter alia*, the state case has "left [a] substantial federal interest demonstrably unvindicated." Offices of the U.S. Atty's, U.S. Dep't of Justice, *Justice Manual* § 9-2.031(A) and (D) (updated July 2009), https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals (*Justice Manual*); see *Petite* v. *United States*, 361 U.S. 529, 531 (1960) (per curiam).

The federal case ultimately resolved through a plea agreement, and the government sought a sentence that it viewed as appropriate under federal law in light of petitioner's violation of the federal felon-in-possession statute and history of violent crimes. J.A. 16-28, 42-53. The district court determined that petitioner's advisory Sentencing Guidelines range was 46 to 57 months, based on a total offense level of 21 and a criminal history category of III. D. Ct. Doc. 39, at 1 (Oct. 24, 2016) (Statement of Reasons). The court sentenced petitioner to 46 months of imprisonment and ordered the sentence to run concurrently with petitioner's state sentences. J.A. 31. Petitioner's total term of imprisonment for the full set of state and federal crimes to which he pleaded guilty—the state shooting offense, the state firearm offense, the state drug offense, and the federal firearm

offense—is thus identical to what he would have received had he been prosecuted for the federal firearm offense alone.

5. The court of appeals affirmed. Pet. App. 1a-4a. The court recognized that, under this Court's precedent, "prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns." *Id.* at 2a.

SUMMARY OF ARGUMENT

An unbroken line of this Court's decisions, whose origin reaches back nearly two centuries, has correctly understood the violation of a state law and the violation of a federal law as distinct "offence[s]" under the Double Jeopardy Clause. That understanding is grounded in text and federalism; accords with the Clause's overall application, history, and common-law origins; and allows politically accountable decisionmakers to pursue the distinct sovereign interests of the United States and States in appropriate cases without undue interference from one another or from foreign countries. Petitioner offers no sound reason for suddenly reversing course.

I. Petitioner does not dispute that the term "offence" refers not simply to conduct, but to the "transgression *of a law*." A transgression of two independent sovereigns' laws, even through the same act, is thus two different "offence[s]." The constitutional text expressly distinguishes "offences" based on the sovereign "against" which they are committed. The federalist structure of the Constitution likewise dictates that offenses against the laws of the several States and the United States are not "the same." And this Court's general double-jeopardy jurisprudence on the "same"-ness of "offence[s]"

presumes a single legislature and a single prosecuting authority.

For nearly 170 years, repeatedly and without exception, this Court has relied on the plain meaning of "offence" and principles of federalism to recognize that state and federal offenses are not the "same." And both before and after incorporating the Double Jeopardy Clause against the States, the Court has rejected invitations—which raised arguments nearly identical to petitioner's—to redefine the Clause. Now, as then, such a reinterpretation would require departing from the Constitution's text and its federalist scheme.

The Court's sovereign-specific understanding of "offence" is analytically and historically sound. The evidence does not support petitioner's suggestion that the Clause implicitly incorporates an asserted common-law rule under which foreign criminal judgments can bar domestic ones. Such a rule would allow a foreign government—whether the British at the time of the Framing or some other unfriendly nation now—to preclude U.S. prosecutions for crimes against Americans.

The history of the Founding shows that the Framers would have balked at such a remarkable surrender of sovereignty to other nations, and no well-settled common-law rule supports such an extraordinary interpretation of the Clause. Petitioner and his amici cite no reported pre-Framing decision that actually applied the foreign-preclusion bar he posits, and no treatise could or would have established any such universal rule. The notion that such a rule was so clear as to have made its way without mention into the Double Jeopardy Clause is also belied by disagreement on the issue in early state-court decisions.

II. Even if petitioner's arguments had some potential merit, no justification supports jettisoning the Court's longstanding and embedded precedent. A new approach would inject a significant anomaly into this Court's "same offence" jurisprudence, saddle courts with the confounding task of comparing different sovereigns' laws, and threaten the finality of convictions obtained in reliance on the long-held understanding that, in cases involving separate prosecutions by different sovereigns, it does not matter which sovereign goes first.

Any concerns of potential unfairness from particular separate prosecutions are best addressed by policymakers, not courts. Construing the Double Jeopardy Clause to bar *all* separate prosecutions would produce a host of undesirable consequences. It would, for example, inhibit enforcement of domestic-violence laws and preclude vindication of distinct state and federal interests in cases like a local breach-of-peace whose victim is a federal official. Legislatures, including Congress, have balanced the competing concerns of successive prosecutions by enacting laws that preclude them in certain cases, and policies like the federal Petite Policy require case-specific judgments that a successive prosecution is actually warranted. Courts, moreover, can address any perceived case-specific inequities through sentencing decisions, as the circumstances of petitioner's own case illustrate.

ARGUMENT

Long throughout the Nation's history, this Court has consistently recognized that state and federal crimes are not the "same offence" under the Double Jeopardy Clause and has squarely rejected arguments to the contrary. That precedent reflects the correct understanding of the text of the Clause, flows from the federalist

system established in the Constitution, and comports with the Framing-Era understanding of the double-jeopardy bar. Petitioner provides no sound reason for the Court suddenly to reverse course. The evidence does not support either a retreat from the foundational separateness of state and federal governments or the belated discovery of a long-lost rule under which foreign nations would have the power to bar U.S. prosecutions. Nor should the Court invite the serious practical consequences of categorically precluding politically accountable officials from ever determining that a separate prosecution is warranted—which would hamstring state, tribal, and federal law enforcement; unsettle long-final convictions; and force upon courts the vexing task of comparing different sovereigns' laws. This Court should instead reaffirm that the Double Jeopardy Clause continues to mean what it has always meant.

I. THIS COURT HAS CORRECTLY RECOGNIZED THAT STATE AND FEDERAL CRIMES ARE NOT THE "SAME OFFENCE" UNDER THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This Court has consistently recognized that the Clause imposes no bar "when the 'entities that seek successively to prosecute a defendant for the same course of conduct are separate sovereigns.'" *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)) (brackets omitted). The Clause explicitly allows multiple prosecutions for distinct "offence[s]," and the Court "has always understood the words of the Double Jeopardy Clause to reflect" the "principle that a single act constitutes an 'offence' against each sovereign whose

laws are violated by that act." *Heath*, 474 U.S. at 93. That understanding—which "finds weighty support" not only in the Clause's language but also "in the historical understanding and political realities of the States' role in the federal system," *id.* at 92—is correct.

A. The Transgression Of One Sovereign's Law Is Not The "Same Offence" As The Transgression Of A Different Sovereign's Law

The Court's longstanding recognition that "offence[s]" against two different sovereigns are not the same reflects the plain meaning of the term "offence." An "offence" under the Double Jeopardy Clause is the violation of a particular law of a particular sovereign. A single act can therefore constitute multiple "offence[s]" that may be separately prosecuted and punished.

1. An "offence" is the transgression of a specific sovereign's law

a. This Court has repeatedly explained, and petitioner does not appear to dispute, that the term "offence" refers not to a defendant's conduct alone, but instead to the "transgression of a law." *Heath*, 474 U.S. at 88 (quoting *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 19 (1852)). The Court deviated from that understanding once, in *Grady* v. *Corbin*, 495 U.S. 508 (1990), which entertained a conduct-based approach to double jeopardy. But the Court quickly recognized its mistake and endorsed Justice Scalia's dissent in *Grady* as the correct statement of the law. See *United States* v. *Dixon*, 509 U.S. 688, 704 (1993).

As Justice Scalia observed, "the language of the Clause * * * protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*." *Grady*, 495 U.S. at 529 (dissenting

opinion). "'Offence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Ibid.* (quoting *Dictionarium Britannicum* 517 (Bailey ed. 1730)); see *ibid.* (citing other dictionaries from the relevant time period); see also, *e.g.*, Richard Burn & John Burn, *A New Law Dictionary* 510-511 (1792) ("OFFENCE, is an act committed against law, or omitted where the law requires it."); 2 Timothy Cunningham, *A New and Complete Law Dictionary* 454 (1764) (same); Giles Jacob, *A New Law Dictionary* 542 (6th ed. 1750) (same).

It is thus settled that "[i]f the same conduct violates two (or more) laws, then each offense may be separately prosecuted." *Grady*, 495 U.S. at 529 (Scalia, J., dissenting); see, *e.g.*, *Dixon*, 509 U.S. at 710. Unless both the conduct *and* the laws are deemed identical, successive prosecutions do not fall within the defendant-protective purposes of the Clause. Nor do such prosecutions inherently infringe any fundamental-fairness principle protected by the Due Process Clause. See, *e.g.*, *Hoag* v. *New Jersey*, 356 U.S. 464, 467-469 (1958).

b. The plain meaning of "offence"—"transgression of *a law*"—distinguishes the violation of two independent sovereigns' laws as different "offence[s]" under the Double Jeopardy Clause. Indeed, other portions of the constitutional text use the term "offence" in precisely that sovereign-specific way.

The term "offence" appears not only in the Double Jeopardy Clause, but in two other Clauses, each of which refers to an offense as a transgression committed "against" a particular source of sovereign law. First, the Law of Nations Clause gives Congress the power "[t]o define and punish * * * Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Second, the

Pardon Clause grants the President the power to grant reprieves and pardons "for Offences against the United States, except in Cases of Impeachment." U.S. Const. Art. II, § 2, Cl. 1.[1]

The direct implication of those modifying phrases is that an "offence" exists only by reference to the sovereign lawmaking authority that defines it. "At the founding, the law of nations was considered a distinct 'system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.'" *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1416 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (citation omitted). And the Court has observed that the Pardon Clause "make[s] clear that the pardon of the President was to operate upon offenses against the United States *as distinguished from* offenses against the States." *Ex parte Grossman*, 267 U.S. 87, 113 (1925) (emphasis added). The Framers' express recognition that the underlying source of sovereign law is a key aspect of an "offence" undermines the suggestion that they would have viewed state and federal offenses as the "same."

c. Petitioner errs in suggesting (Br. 10) that, had the Framers intended a sovereign-specific approach to the term "offence" in the Double Jeopardy Clause, they

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[1] The variations in the capitalization of "offence" within the Constitution do not affect the word's meaning. See Philip Huff, *How Different are the Early Versions of the United States Constitution? An Examination*, 20 Green Bag 2d 163, 169 (2017) (noting that the engrosser of the parchment Constitution "famously capitalized virtually every noun in the text, whether proper or common," while copies of the Constitution printed in September 1787 "dropp[ed] this convention"); Akhil Reed Amar, *Our Forgotten Constitution*, 97 Yale L.J. 281, 281-285 (1987) (discussing capitalization variations in early copies of the Constitution).

would have adopted a proposal by Representative Partridge to add the words "by the United States" to an earlier draft of the Clause. As a threshold matter, such a rejected modification of later-discarded language provides no basis for disregarding the plain meaning and context of the term "offence" in the Clause as ultimately ratified. See *United States* v. *Craft*, 535 U.S. 274, 287 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (citation and internal quotation marks omitted).

In any event, petitioner's argument is inherently flawed. As applied to the wording then under consideration, Representative Partridge's proposal would have resulted in language that barred, "in cases of impeachment," "more than one trial or one punishment for the same offence" "by any law of the United States." 1 Annals of Cong. 753 (1789). Contrary to petitioner's suggestion, the phrase "by any law of the United States" would *not* have modified the term "offence." As the other portions of the constitutional text discussed above illustrate, offenses are committed "against" a sovereign's law, not "by" it. The phrase "by any law of the United States" would have modified "one trial or one punishment"—the things that "the law of the United States" could actually bring about—not "offence." Indeed, the debate immediately preceding Representative Partridge's proposal suggests that he proposed it to ensure that the Clause be construed to bar only a second trial sought by the government, and not one sought by the defendant as a remedy for a claim of error. See *ibid.* (statement of Rep. Sherman).

Furthermore, even assuming the proposal had been intended to limit the Clause's scope to offenses against

the United States, its rejection would reflect only that such a limitation was viewed as unnecessary. It was already understood that the Double Jeopardy Clause, at that time, was directed at the federal government alone, see Crim. Pro. Professors Amicus Br. 8-9, which did not have power to prosecute state crimes. The use of the sovereign-specific term "offence," rather than a more verbose phrase like "offence against the United States," was accordingly sufficient. Had the Framers intended a broader prohibition, they would have used a term like "conduct" or "acts," not "offence." See *Grady*, 495 U.S. at 529 (Scalia, J., dissenting).

2. The Constitution's federalist structure distinguishes between federal and state "offence[s]"

The Constitution's foundational dichotomy between state and federal law makes clear that an act that is both a state crime and a federal crime "transgress[es] * * * a law" of two different sovereigns—a State and the United States—and thus is two different "offence[s]" under the Double Jeopardy Clause. In setting forth the fundamental precepts of our dual-sovereignty federalist structure, the Framers would not have used a law-focused term like "offence" to conflate, rather than distinguish, the States and the United States.

a. Nothing is more central to the constitutional framework than the "axiomatic" principle that "'in America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it.'" *Heath*, 474 U.S. at 92-93 (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819)) (brackets omitted); see, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 283 (2011) ("Dual sovereignty is a defining

feature of our Nation's constitutional blueprint.") (citation omitted).

The several States and the United States "'derive power from different sources,' each from the organic law that established it." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978) (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)) (brackets omitted). Each "is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect." *United States* v. *Cruikshank*, 92 U.S. 542, 549 (1876). Thus, "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'" *Wheeler*, 435 U.S. at 320 (quoting *Lanza*, 260 U.S. at 382).

Petitioner's own case is illustrative. The federal firearm statute at issue here includes an interstate-commerce element, see 18 U.S.C. 922(g)(1), while Alabama law requires that petitioner's state firearm offense be committed in that State, see *Ex parte James*, 780 So. 2d 693, 694-696 (Ala. 2000). Those jurisdictional requirements tether the substantive offenses to each sovereign's particular powers, "thus establishing legislative authority," *Torres* v. *Lynch*, 136 S. Ct. 1619, 1630 (2016). And they underscore the connection between the criminal statute defining an offense and the sovereignty of the specific government that adopted that law.

b. In no respect can a conviction for a state offense be considered a conviction for a federal offense. Even if the conviction was for an act that federal law also criminalizes, the independent proscription, prosecution, and punishment of that act by the State is not attributable to the United States.

Any suggestion (cf. Pet. Br. 30) that the state and federal governments are exercising mixed or delegated authority cannot be squared with this Court's repeated insistence that each entity be accountable for its own laws and actions. See, *e.g., Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476-1477 (2018). The federal government did not bestow the authority under which a State enacts criminal laws, adopt the particular state criminal law at issue, or pursue the state criminal case against the defendant. "Crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State." *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892). Because "the United States ha[s] no power to execute the penal laws of the individual states," an "offence against the state law" is one that "the courts of the state alone could punish." *Gwin* v. *Breedlove*, 43 U.S. (2 How.) 29, 37 (1844).

Petitioner attempts to justify an approach to "same offence" at odds with the Constitution's federalist structure on the ground that federalism is intended to be liberty-enhancing. See Pet. Br. 29-30. But federalism enhances liberty through the *separation* of States and the federal government, not through their conflation. "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). The necessary consequence of preserving liberty by dividing power between dual sovereigns is dual regulation, such

as "the power of taxation" that is "concurrently exercised" by both States and the federal government. *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 155 (1886). Either sovereign may therefore elect to proscribe conduct under its own laws. As this Court has explained, the citizen of a State "owes allegiance to two sovereignties," and "[i]n return" for his ability to "demand protection from each within its own jurisdiction," he "must pay the penalties which each exacts for disobedience to its laws." *Cruikshank*, 92 U.S. at 550-551.

c. Treating the United States and a State, or one State and another State, as a single sovereign for purposes of criminal prosecution fails "to ensure that States function as political entities in their own right." *Bond*, 564 U.S. at 221. If States and the federal government have independent authority to *define* criminal offenses—a principle that petitioner does not dispute—it necessarily follows that they have independent authority to *enforce* them.

At times, the federal government and the States adopt criminal laws proscribing the same conduct. See, *e.g.*, *Cruikshank*, 92 U.S. at 550. But each "ha[s] legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both." *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977) (per curiam). For example, this Court has recognized that the federal government has an independent interest in the enforcement of civil-rights laws that can justify prosecuting local law-enforcement officers for beating an African-American man to death, even if a State may also prosecute the murder under its criminal law. See *Bartkus* v. *Illinois*, 359 U.S. 121, 136-137 (1959) (discussing *Screws* v. *United States*, 325 U.S. 91

(1945)); *Screws*, 325 U.S. at 93, 108-109 (plurality opinion).

The Court has observed that it "'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines'" to "deny a State its power to enforce its criminal laws because another State has won the race to the courthouse." *Heath*, 474 U.S. at 93 (quoting *Bartkus*, 359 U.S. at 137). "A State's interest in vindicating its sovereign authority through enforcement of its laws," the Court explained, "by definition can never be satisfied by another State's enforcement of *its* own laws." *Ibid.* Likewise, "the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government." *Ibid.*; see, *e.g.*, *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (describing "the enforcement of federal criminal statutes" as an "important federal interest[]").

3. A sovereign-specific interpretation of "same offence" underlies multiple aspects of this Court's double-jeopardy jurisprudence

This Court's recognition of the "fundamental principle" that the term "offence" is sovereign-specific, *Heath*, 474 U.S. at 93, is not limited to its precedent addressing prosecutions by different sovereigns. It is also inherent in other features of the Court's double-jeopardy jurisprudence that petitioner does not challenge.

a. The very decision on which petitioner relies (Br. 10) to define "same offence"—*Blockburger* v. *United States*, 284 U.S. 299 (1932)—is itself premised on a sovereign-specific understanding of that phrase, which presumes that the offenses being compared were en-

acted by a single sovereign legislature. *Blockburger* addressed a double-jeopardy challenge to the prosecution of a single drug sale under two federal criminal statutes. *Id.* at 303-304. As the Court has explained, the Double Jeopardy Clause "serves principally as a restraint on courts and prosecutors," while a "legislature remains free * * * to define crimes and fix punishments." *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). The question whether the violations of the two statutes in *Blockburger* were the "same offence" thus turned on "whether the legislature" —there, Congress—"*intended* that each violation be a separate offense." *Garrett* v. *United States*, 471 U.S. 773, 778 (1985) (emphasis added); see *Blockburger*, 284 U.S. at 304.

In order "to help determine legislative intent," the Court in *Blockburger* applied "a rule of statutory construction," *Garrett*, 471 U.S. at 778-779, under which it examined whether "each provision require[d] proof of a fact which the other does not," *Blockburger*, 284 U.S. at 304. Because that was true of the provisions at issue in *Blockburger*, the Court found them to be separate offenses. *Ibid.* The Court has subsequently observed that, at least in some contexts, a result suggested by *Blockburger* "must of course yield to a plainly expressed contrary view on the part of Congress" about whether offenses are the same or different. *Garrett*, 471 U.S. at 779.

That analysis of legislative intent presupposes that the same legislature defined the laws at issue, or at least that overlapping legal definitions presumptively reflect the same sovereign interest. Cf. *Sanchez Valle*, 136 S. Ct. at 1870 (holding that offenses defined by Congress and a legislature exercising authority derived from Congress can be the same). But it makes little sense to

resolve the "same offence" inquiry through "a rule of statutory construction" designed "to help determine legislative intent," *Garrett*, 471 U.S. at 778-779, when two separate legislatures are acting within their independent sovereign spheres. Such legislatures could easily enact laws that *Blockburger* might classify as the "same"—*e.g.*, state robbery and federal bank robbery, see *Bartkus*, 359 U.S. at 121-122—but that cannot be presumed to reflect any legislative intent that they are a single "offence."

b. The Court's definition of "same offence" in the context of a trial following a prior acquittal similarly presumes prosecution by a single sovereign. The Court has held that, in that context, the Double Jeopardy Clause borrows from civil law certain aspects of "collateral estoppel" or "issue preclusion." *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 356-358 & n.1 (2016). Under the incorporated issue-preclusion principles, even if the crimes are legally distinct, "it is appropriate to treat [separate] charges as the 'same offence'" when a prior acquittal on one charge necessarily reflects the failure to prove an "ultimate fact" that would also be necessary to prove the other charge. *Yeager* v. *United States*, 557 U.S. 110, 119, 123 (2009).

Even in civil law, however, preclusion principles generally apply only to the parties to the prior litigation, or those in some special relationship with them. See, *e.g.*, *Taylor* v. *Sturgell*, 553 U.S. 880, 892-895 (2008); see also, *e.g.*, *Bravo-Fernandez*, 137 S. Ct. at 358 (cautioning that issue preclusion is more "guarded" in criminal cases). Their incorporation into the Double Jeopardy Clause thus presupposes that both the first case (the acquittal) and the second case (challenged as a double-jeopardy violation) were prosecuted under the same

sovereign authority. That is plainly true when the prosecuting sovereigns are the same, and may be true when one derives power from the other. But it is difficult to see how it could be true when they are independent sovereigns vindicating their own legal interests under their own criminal codes.

B. The Constitution's Text And Structure Have Underpinned This Court's Consistent Treatment Of State And Federal Crimes As Separate "Offence[s]"

This Court's longstanding recognition that an offense against a State is different from an offense against the United States, or an offense against another State, follows inexorably from the plain meaning of "offence" and the Constitution's federalist design.

1. A pair of cases decided in 1820, although not directly addressing the Double Jeopardy Clause, illustrates an early understanding of offenses as sovereign-specific. In each case, the Court described successive prosecutions as impermissible only if they were premised on the same source of law.

In *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820), the Court considered the circumstances under which certain crimes at sea might be punished by the United States. In the course of its discussion, the Court differentiated between successive prosecutions by different sovereigns for piracy and murder. See *id.* at 197. Although the Court stated that an acquittal on a piracy charge in the court of any "civilized State" would bar a prosecution in another "civilized State," *ibid.*, the Court was "inclined to think that an acquittal" on murder charges in the United States "would *not* have been a good plea in a Court of Great Britain," *ibid.* (emphasis added). In drawing that distinction, the Court focused on the source of law defining each crime, observing that

piracy was "an offence within the criminal jurisdiction of all nations" and "punished by all," while murder was "punishable under the laws of each State" and was not "within this universal jurisdiction." *Ibid.*; see *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 158-160 (1820) (explaining that piracy is an offense against the law of nations). The Court's analysis in *Furlong* thus reflects an understanding that offenses against different bodies of sovereign law are not the same.

Two weeks earlier, in *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Court held that a Pennsylvania court martial had jurisdiction "to enforce the laws of Congress"—*i.e.*, federal law—against delinquent militia men who had disobeyed the President's call. *Id.* at 32 (opinion of Washington, J.). Justice Washington, who wrote the only opinion in support of the judgment (in which other Justices in the majority "d[id] not concur in all respects," *ibid.*), suggested that if jurisdiction were proper in both state and federal military courts, then final adjudication of the federal offense in one would bar the other from prosecuting the same federal offense. *Id.* at 31. That suggestion was premised on Justice Washington's "belief that the state statute imposed state sanctions for violation of a *federal* criminal law," *Bartkus*, 359 U.S. at 130 (emphasis added), rather than for an offense against Pennsylvania's own sovereignty.

Contemporary treatises accordingly understood *Houston* to countenance a separate-prosecution bar only when federal and state courts had "concurrent jurisdiction" over the same "*crime against the United States*." 1 James Kent, *Commentaries on American Law* 374 (1826) (emphasis added); see Edward D. Mansfield, *The Political Grammar of the United States* 137

& n.3 (1835); William Rawle, *A View of the Constitution of the United States of America* 191 (1825); Thomas Sergeant, *Constitutional Law* 278 (2d ed. 1830). And this Court has likewise understood *Houston* to establish only "the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Bartkus*, 359 U.S. at 130.[2]

2. In a trio of decisions between 1847 and 1852—*Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 569 (1850); and *Moore* v. *Illinois*, *supra*—the Court "thoroughly considered the question" and recognized that state and federal crimes are not the "same offence" under the Double Jeopardy Clause. *Abbate* v. *United States*, 359 U.S. 187, 190 (1959). Those cases presented questions of whether federal and state criminal laws could target the same conduct. In holding that they could, the Court rejected the contention that a prosecution under one sovereign's laws would preclude a second sovereign from prosecuting the same conduct under its own laws.

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[2] The Court has rejected petitioner's contention (Br. 16) that Justice Story—who filed a solo dissent in the case—would necessarily have precluded successive prosecutions for separate crimes against separate sovereigns. See *Bartkus*, 359 U.S. at 130 n.18 (noting that while Justice Story "display[ed] dislike of the possibility of multiple prosecutions," he "also suggest[ed] the possibility that under some circumstances, a state acquittal might not bar a federal prosecution"); *Houston*, 18 U.S. (5 Wheat.) at 75 (Story, J., dissenting) ("It will be sufficient to meet [a case involving separate federal and state crimes] when it shall arise."). Indeed, Justice Story expressed no disagreement with *Furlong*'s discussion of successive murder prosecutions by separate sovereigns. See 18 U.S. (5 Wheat.) at 197.

In *Fox*, "[a]ll members of the Court agreed that the Fifth Amendment would not prohibit a federal prosecution even though based on the same act of passing [a] counterfeit coin that resulted in [a] state prosecution." *Abbate*, 359 U.S. at 191; see *Fox*, 46 U.S. (5 How.) at 434-435; *id.* at 439 (McLean, J., dissenting). The majority in *Fox* explained that, even if it were "probable or usual" for a defendant to face successive state and federal prosecutions for the same act, each government could properly prosecute the defendant for "offences falling within [its] competency." 46 U.S. (5 How.) at 435.

The Court reaffirmed that principle in *Marigold*, which likewise involved overlapping prohibitions of counterfeiting. See 50 U.S. (9 How.) at 570. *Marigold* reiterated *Fox*'s observation "that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." *Id.* at 569. The Court found "this distinction," as well as "the entire doctrines laid down in" *Fox*, to be "sound." *Id.* at 569-570.

The Court's decision in *Moore* made explicit that the federalism principles set forth in *Fox* and *Marigold* were part of the Double Jeopardy Clause. See *Abbate*, 359 U.S. at 191; *Moore*, 55 U.S. (14 How.) at 19-20. The Court explained that successive prosecutions "for the same acts" under separate federal and state laws would not mean that the defendant "would be twice punished for the same offence." *Id.* at 19. "An offense, in its legal signification," the Court explained, "means the transgression of a law." *Ibid.* "Every citizen of the United States," the Court observed, "is also a citizen of a State or territory. He may be said to owe allegiance to two

sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." *Id.* at 20.[3]

Petitioner's suggestion (Br. 22-23) that *Moore* is questionable precedent because it was a "fugitive-slave case" decided by "the Taney Court" is misplaced. Although the case involved the conduct of harboring fugitive slaves, the Court's interpretation of the Double Jeopardy Clause did not depend on that in any way. To the contrary, the Court explained that the principle it set forth was the same one applied in *Fox* and *Marigold*, which had involved "uttering or passing false coin." *Moore*, 55 U.S. (14 How.) at 20. The Court reiterated that "Congress, in the proper exercise of its authority, may punish [that] same act as an offence against the United States" even if the State separately punished it "as a cheat or fraud practised on its citizens." *Ibid.* A defendant, the Court emphasized, "could not plead the punishment by one in bar to a conviction by the other." *Ibid.*

The Court also illustrated its point with an example involving successive federal and state prosecutions for

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[3] Contrary to petitioner's suggestion (Br. 22-23), even Justice McLean, who disagreed with the result in *Moore* (as he had with the result in *Fox*), recognized that a state conviction would not preclude a later federal prosecution. See *Abbate*, 359 U.S. at 192; *Moore*, 55 U.S. (14 How.) at 21-22 (McLean, J., dissenting). Although Justice McLean would have precluded multiple prosecutions, he would have done so by invalidating the state law that overlapped with the federal one, not by applying the Double Jeopardy Clause. *Moore*, 55 U.S. (14 How.) at 22 (dissenting opinion). He recognized that double jeopardy in its terms "applies to the respective governments" and that "the punishment under the State law would be no bar to a prosecution under the law of Congress." *Fox*, 46 U.S. (5 How.) at 439 (McLean, J., dissenting); see *Moore*, 55 U.S. (14 How.) at 22 (McLean, J., dissenting) (incorporating *Fox* dissent).

"assault upon the marshal of the United States." *Moore*, 55 U.S. (14 How.) at 20. By "hindering him in the execution of legal process," the defendant would have committed "a high offence against the United States, for which [he] is liable to punishment." *Ibid.* But "the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony." *Ibid.* "That either or both may (if they see fit) punish such an offender," the Court continued, "cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence." *Ibid.*

This Court reiterated the point recognized in *Fox*, *Marigold*, and *Moore* in dictum in more than a dozen cases decided between 1875 and 1922. See *Cruikshank*, 92 U.S. at 550; *Coleman* v. *Tennessee*, 97 U.S. 509, 518 (1879); *Ex parte Siebold*, 100 U.S. 371, 389 (1880); *United States* v. *Arjona*, 120 U.S. 479, 487 (1887); *Cross* v. *North Carolina*, 132 U.S. 131, 139 (1889); *In re Loney*, 134 U.S. 372, 375 (1890); *Pettibone* v. *United States*, 148 U.S. 197, 209 (1893); *Crossley* v. *California*, 168 U.S. 640, 641 (1898); *Sexton* v. *California*, 189 U.S. 319, 322-323 (1903); *In re Heff*, 197 U.S. 488, 507 (1905); *Grafton* v. *United States*, 206 U.S. 333, 353-354 (1907); *Southern Ry. Co.* v. *Railroad Comm'n*, 236 U.S. 439, 445 (1915); *McKelvey* v. *United States*, 260 U.S. 353, 358-359 (1922); see also *Abbate*, 359 U.S. at 192-193; *Bartkus*, 359 U.S. at 132 & n.19.

3. In 1922, in *United States* v. *Lanza*, *supra*, the Court "squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction." *Bartkus*, 359 U.S. at 129. In *Lanza*, a fed-

eral grand jury had indicted the defendants on five offenses under the National Prohibition Act, but the district court dismissed the charges because the defendants had previously been convicted for violating similar state laws based on the same conduct. 260 U.S. at 378-379. In a unanimous opinion by Chief Justice Taft, this Court reversed, explaining that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.* at 382.

Lanza's holding followed from the Court's recognition that the United States and the State were "two sovereignties, * * * capable of dealing with the same subject matter within the same territory." 260 U.S. at 382. The Court explained that "[e]ach state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition." *Id.* at 381. Although state and federal laws might "vary in many particulars, including the penalties prescribed," the Court understood that those differences were "an inseparable incident of independent legislative action in distinct jurisdictions." *Ibid.* The Court recognized that, in enacting criminal laws, each government was "exercising its own sovereignty" by "determining what shall be an offense against its peace and dignity." *Id.* at 382.

The Court subsequently "accepted" the principle explained in *Lanza* in cases arising under a range of criminal statutes. *Abbate*, 359 U.S. at 194 (citing cases). In one of them, Justice Holmes, writing for the Court, observed that the "general proposition" that "the United States may punish acts injurious to the [Federal Reserve] System, although done to a corporation that the State also is entitled to protect," was "too plain to need

more than [a] statement." *Westfall* v. *United States*, 274 U.S. 256, 258 (1927).

4. In 1959, the petitioners in *Abbate* v. *United States*, *supra*, asked this Court to overrule *Lanza*. 359 U.S. at 195. This Court declined to do so, finding that the petitioners had advanced "[n]o consideration or persuasive reason not presented to the Court in the prior cases" for departing from its "firmly established" interpretation of the Double Jeopardy Clause. *Ibid.*

The Court considered many of the relevant substantive arguments in detail in an accompanying case, *Bartkus* v. *Illinois*, *supra*, decided the same day. The defendant in *Bartkus* had been acquitted on a federal bank-robbery charge and then tried and convicted for state robbery based on the same underlying conduct. 359 U.S. at 121-122. Because the Court had not yet applied the Double Jeopardy Clause as such to the States, the defendant challenged the successive prosecution under the Fourteenth Amendment's Due Process Clause. *Id.* at 124, 127. The Court recognized that the analysis would be informed by the same principles and precedents as the analogous double-jeopardy analysis, and it affirmed the defendant's life sentence on the successive state charge. See *id.* at 122, 128-129, 139.

The Court in *Bartkus* rejected the proposition that a state robbery conviction following an acquittal on a federal robbery charge for the same conduct would violate "fundamental principles of our society." 359 U.S. at 128. The Court examined "English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct," and found them to be both a "dubious" product of "confused and inadequate reporting" and "not rel-

evant" due to differences in the applicable legal regimes. *Id.* at 128 n.9. The Court also surveyed pre-*Fox* state-court precedent, which it found to be, at best, evenly divided on the permissibility of successive prosecutions by different sovereigns, with three States countenancing them, one having inconsistent law on the issue, and three—two of which had misread this Court's decision in *Houston*—discountenancing them. See *id.* at 130. The Court also found the more modern state cases that had considered the issue to be nearly unanimous (27 of 28) in allowing such prosecutions. See *id.* at 134-136 & n.24. The Court observed that legislatures could themselves address any perceived policy concerns and emphasized that it "would be in derogation of our federal system" to allow federal prosecution to deprive States of authority to enforce their own laws. *Id.* at 137; see *id.* at 137-138.

Abbate also underscored the practical reasons for adhering to the long-held understanding that the Double Jeopardy Clause does not preclude successive state and federal prosecutions. "The basic dilemma," the Court observed, is that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." 359 U.S. at 195. The prosecutions in *Abbate* itself—involving defendants who "insist[ed] that their Illinois convictions resulting in three months' prison sentences should bar [a] federal prosecution which could result in a sentence of up to five years"—illustrated the point. *Ibid.* "Such a disparity will very often arise," the Court observed, "when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest." *Ibid.* The Court

declined to adopt a system in which the federal government would have to "insure that there would be no state prosecutions for particular acts that also constitute federal offenses," recognizing that "it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses." *Ibid.*

5. This Court has also squarely rejected a more recent invitation to overwrite the sovereign-specific meaning of "offence" under the Double Jeopardy Clause. A decade after *Abbate* and *Bartkus*, the Court incorporated the Double Jeopardy Clause against the States. *Benton* v. *Maryland*, 395 U.S. 784, 787 (1969). It subsequently held in *Heath* v. *Alabama*, *supra*, that its longstanding interpretation of different sovereigns' crimes as different "offence[s]" remains good law.

The defendant in *Heath*, who committed a kidnapping and murder that crossed state lines, was convicted in Alabama for the capital offense of murder during a kidnapping after Georgia had already convicted him of murder. See 474 U.S. at 83-86. Relying on its precedents interpreting the Double Jeopardy Clause in cases involving state and federal prosecutions, the Court held that the second prosecution was constitutionally permissible. *Id.* at 88. The Court emphasized that its long-held understanding of the Clause "is founded on the common-law conception of crime as an offense against the sovereignty of the government." *Ibid.*

The Court accordingly reaffirmed that "[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 'offences.'" *Heath*, 474 U.S. at 88 (citation omitted). The Court observed that it had "uniformly held that the States are separate sovereigns

with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty.'" *Id.* at 89 (quoting *Wheeler*, 435 U.S. at 320 n.14). The Court noted that it had similarly found Indian tribes to have inherent sovereign authority, and it reiterated that the federal government, any State, or any sovereign tribe defines different "offence[s]" from the others under the Double Jeopardy Clause. See *id.* at 90-91.

The Court in *Heath* explicitly declined to abandon its prior jurisprudence and require judicial preapproval for a separate prosecution by a second sovereign. 474 U.S. at 91-93. The Court emphasized that the "express rationale" for its longstanding jurisprudence "is not simply a fiction," but is instead grounded in the text of the Double Jeopardy Clause and the "[f]oremost * * * prerogative[] of sovereignty," preserved by the Constitution, "to create and enforce a criminal code." *Id.* at 92-93. The Court accordingly saw "no reason" to "reconsider" the "fundamental principle" that "a single act constitutes an 'offence' against each sovereign whose laws are violated by that act." *Id.* at 93.

C. This Court's Precedent Accords With The Framing-Era Understanding

That "fundamental principle," as recognized in this Court's decisions, is no historical anachronism. The Framers wrote the Constitution to manifest the sovereign power of the United States and the States, including the power to enforce their own criminal laws. They would not have understood any common-law rule to preclude such an exercise of sovereignty, let alone silently incorporated such a rule into the document itself. Petitioner's central argument—that the Double Jeopardy Clause implicitly incorporates an asserted common-law

rule under which "prosecution in a foreign country would bar a second prosecution," Br. 13—lacks sound historical foundation and implausibly suggests that the Double Jeopardy Clause empowers foreign governments to bar domestic prosecutions.

1. The Framers did not intend the Double Jeopardy Clause to subordinate domestic law-enforcement power to foreign entities

If the Double Jeopardy Clause in fact incorporated a rule of the sort petitioner posits, then a foreign terrorist could assert a constitutional bar to a federal or state prosecution if a foreign sponsor of terrorism had tried him for the same conduct under an equivalent criminal law. Such a contingent form of sovereignty would have been anathema to the Framers.

a. The Declaration of Independence announced the colonists' determination to free themselves from the tyranny of British rule and to govern themselves as "Free and Independent States" with "full Power" to do all "Acts and Things which Independent States may of right do." Declaration of Independence ¶ 32; see *id.* ¶¶ 1-2. Among other complaints, the Declaration denounced the King for "protecting [armed British troops] by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States." *Id.* ¶ 17.

That passage referred to "the so-called Murderers' Act, passed by Parliament after the Boston Massacre," which "provided 'that any government or customs officer indicted for murder in America could be tried in England, beyond the control of local juries.'" Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 687 n.181 (1996) (brackets and citation omitted). "During the late colonial period, Americans

strongly objected to * * * [t]his circumvention of the judgment of the victimized community." *Ibid.* The Continental Congress, for example, decried the Act as "indemnifying the Murderers of the Inhabitants of Massachusetts-Bay." Address to the Inhabitants of the British Colonies (Oct. 21, 1774), printed in 1 *Journals of Congress* 36, 45, 53 (1777).

b. It would be extraordinary to construe the Double Jeopardy Clause as itself granting Great Britain or other foreign countries the ability to shield murderers of Americans from U.S. prosecution by trying them first. On petitioner's theory, the federal government (through the Double Jeopardy Clause), as well as States (through their common law), would have been precluded from prosecuting a British soldier who murdered or injured Americans, so long as Great Britain had already acquitted him or given him a light punishment under a similarly constructed law.

Petitioner identifies no explicit contemplation by the Framers, either in the text of the Double Jeopardy Clause or any discussion of its adoption, that would support such a near-replication of the pre-independence state of affairs. The Framers plainly viewed the trial and punishment of certain transnational crimes, such as murder of Americans by the British in international waters, as within the purview of the federal government. See U.S. Const. Art. I, § 8, Cl. 10 (granting Congress power to define and punish "Felonies committed on the high Seas"). And this Court itself recognized early on that the United States and Great Britain could independently prosecute such a murder as an offense against the separate laws of each. See *Furlong*, 18 U.S. (5 Wheat.) at 197. The Framers did not surrender that

sovereign right, so soon after securing it, by adopting the Double Jeopardy Clause.

Petitioner appears implicitly to acknowledge the implausibility of that result. He contemplates (Br. 30), for example, that the Court might "reject" his asserted common-law rule insofar as it would bar "successive prosecutions after a foreign acquittal." But a bar on domestic prosecution after a foreign acquittal is the very *definition* of his asserted common-law rule. See, *e.g.*, Pet. Br. 13 (asserting rule under which "prosecution in a foreign country would bar a second prosecution for the same crime"). If petitioner would concede away such a bar, he would concede away his entire historical argument. And if petitioner is in fact proposing a rule under which prosecution by a foreign sovereign would not be preclusive, but prosecution by a domestic sovereign would, he is inventing a new federalism-subverting doctrine for which even he does not claim any historical precedent.

2. Framing-Era law is consistent with a sovereign-specific understanding of the Double Jeopardy Clause

In any event, this Court has correctly rejected the assertion that a "well-established" (Pet. Br. 4) common-law rule precluded successive prosecutions by independent sovereigns. See *Bartkus*, 359 U.S. at 128 n.9, 129-130.

a. Common-law decisions do not support petitioner's asserted foreign-judgment bar

Petitioner and his amici cite no report of any pre-Framing decision that actually applied a foreign criminal judgment to bar a domestic prosecution.

i. The cornerstone of petitioner's common-law argument is *Rex* v. *Hutchinson* (1678), reported in 3 Keb. 785 (1685), which he characterizes as creating a "well-

known *Hutchinson* rule," Br. 14, under which a foreign prosecution forecloses a domestic one. But the only actual report ever cited of a decision in *Hutchinson* suggests, if anything, the opposite. The report states, in its entirety:

> On Habeas Corpus it appeared the Defendant was committed to Newgate on suspicion of Murder in Portugal, which by Mr. Attorny being a Fact out of the Kings Dominions, is not triable by Commission, upon 35 H. 8. Cap. 2. §. I. N.2, but by a Constable and Marshal, and the Court refused to Bail him, & c.

3 Keb. at 785.

The report does not say that Hutchinson was acquitted in Portugal, but if such an issue was raised in the proceeding, it did not allow him to avoid prosecution in England. Far from supporting a rule of complete preclusion, the report makes clear that the court found Hutchinson, who was accused of a murder in Portugal, to in fact *be* "triable * * * by a Constable and Marshal" in England. *Hutchinson*, 3 Keb. at 785; see 4 William Blackstone, *Commentaries* 267 (5th ed. 1773) (explaining that the "earl marshal" and "lord high constable" jointly presided over the "court of chivalry," which had "jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it") (emphasis omitted); Burn 135 (similar).

The court did determine that Hutchinson was not triable in a *different* forum—namely, before a special statutory commission empowered to try defendants for certain extraterritorial crimes. See *Hutchinson*, 3 Keb. at 785 (citing 35 H. 8. Cap. 2. §. I. N.2 (1543-1544)). But because Hutchinson was "triable" in at least one English court, the court in *Hutchinson* "refused to Bail"

him. *Ibid.*; see *Rex* v. *Kimberley* (1729), reported in 2 Strange 848 (1755) (recognizing that Hutchinson remained imprisoned).

ii. Acknowledging that no report of the case supports his asserted "*Hutchinson* rule," Br. 13-14, petitioner views *King* v. *Roche* (1775) as the "most instructive" decision. But neither the holding nor reasoning of *Roche* endorses any "*Hutchinson* rule."

The report of that case at the time of the Framing, see *Captain Roche's Case*, 1 Leach 138 (1789), does not cite or discuss *Hutchinson*. Nor does it reflect any holding that an English prosecution was barred by a foreign judgment. It instead describes the case as addressing a matter of procedure—specifically, the impermissibility of simultaneously adjudicating both a plea of not guilty and a plea of prior acquittal. *Id.* at 138-139. Although Roche's own plea of prior acquittal was based on a foreign judgment, the question whether that judgment would in fact have been a valid bar to Roche's prosecution by special commission—let alone a bar to prosecution by *any* English court—was neither presented nor decided, but was at most simply assumed *arguendo*. Before the prosecution could file its "replication" (*i.e.*, its reply to the defendant's pleas), Roche elected to withdraw his prior-acquittal plea. *Ibid.*; see Jacob 687 (defining "replication"). He was then tried and found not guilty. *Captain Roche's Case*, 1 Leach at 139.

Petitioner's more expansive reading of *Roche* (Br. 13) as expressly endorsing his asserted "*Hutchinson* rule" relies on an annotation that was apparently added by a later case reporter, *after* the Framing. Although the annotation appears in later editions of the reporter

(including the version reproduced in the twentieth-century English Reports cited by petitioner), it did not appear in the 1789 and 1792 versions. See *Captain Roche's Case*, 1 Leach 125 (1792); *Captain Roche's Case*, 1 Leach at 138-139 (1789). As petitioner himself acknowledges, "the Court must * * * look to the 'English practice, *as understood in 1791*.'" Br. 12 (quoting *Grady*, 495 U.S. at 530 (Scalia, J., dissenting)) (emphasis added). And even in the versions of the case positing a foreign-judgment-bar theory that may have motivated Roche's prior-acquittal plea, Roche still withdrew that plea—possibly because he actually viewed it as unavailing—and was subsequently put on trial.

iii. Additional criminal cases cited by petitioner likewise tend, if anything, to cast doubt on his asserted "*Hutchinson* rule." In *Rex* v. *Thomas* (1664), reported in 1 Lev. 118 (1722), a defendant was acquitted of murder in Wales, indicted for the same murder in England, and then discharged due to "the irregularity of Proceedings." *Ibid.* By that time, however, Wales had been "united to the kingdom of England," and an English statute provided that "the laws of England and no other, shall be used in Wales." 1 Blackstone 94-95; see *Thomas*, 1 Lev. at 118. The defendant's trial in Wales was therefore conducted "according to the Laws of England." *Thomas*, 1 Lev. at 118 (emphasis omitted). Because both the Welsh and English courts had "Jurisdiction of the Cause"—*i.e.*, authority to try Thomas for "the same Murder" under *the same law*—a second trial was precluded. William Hawkins, *A Treatise of the Pleas of the Crown* 372 & n.o (3d ed. 1739).

King v. *Aughet*, 13 Cr. App. R. 101 (C.C.A.), is from 1918 and illustrates that no well-established rule existed even then. The appellate court in that case relied

on Aughet's prior Belgian court martial to quash his English conviction, *not* because of any common-law preclusion principle, but because of a specific World War I convention expressly recognizing "the exclusive right of jurisdiction" of each country's courts martial. *Id.* at 105; see *id.* at 109. The appellate court did "not think it necessary to decide" the apparently still-unsettled question "whether an acquittal by a Belgian court-martial could in ordinary circumstances be pleaded as a bar in the English courts." *Id.* at 108.

iv. The remaining decisions on which petitioner relies—*Beake* v. *Tirrell/Thyrwhit* (1688) and *Burrows* v. *Jemino* (1726)—are civil cases, whose discussions of *Hutchinson* are hearsay at best and whose holdings could not and do not support his proposed rule of criminal procedure.

In *Tirrell*, reported in Comberbach 120 (1742), the court *rejected* the defendant's argument that a prior admiralty-law judgment barred a later claim under the law of trover (and conversion), on the ground that the defendant had not pleaded the bar with sufficient specificity. See *id.* at 120-121. Both there and in an earlier adjourned session of the same case—*Beak* v. *Thyrwhit* (1688), reported in 3 Mod. 194 (1725)—the defendant had cited *Hutchinson*. See *ibid.*; *Tirrell*, Comberbach at 120; see also *Beak* v. *Thyrwhit*, reported in 87 Eng. Rep. 124, 125 n.d (1908) (annotation recounting procedural history). According to that defendant, *Hutchinson* had involved Hutchinson's presentation of an official Portuguese judgment of acquittal for murder, after which the judges "all agreed[] That he being already acquitted by their Law, could not be tried again here." *Thyrwhit*, 3 Mod. at 195. The court itself, however, neither endorsed the defendant's characterization of

Hutchinson nor agreed with the defendant that the action against him was barred.

Burrows v. *Jemino*, reported in 2 Strange 733 (1755), and *sub nom. Burroughs* v. *Jamineau*, Mosley 1 (1803), is likewise inapposite. Burrows had been relieved of a debt by a foreign court and sought an injunction against an English suit on the debt. See *Burrows*, 2 Strange at 733. In exercising its equitable discretion to grant the injunction, the Lord Chancellor in *Burrows* cited *Hutchinson*, briefly describing that case as having treated Hutchinson's acquittal (which he thought was Spanish, not Portuguese) as "a good bar to any proceedings here." *Ibid.* But notwithstanding that discussion of equity, the Lord Chancellor went on to recognize that Burrows's favorable foreign judgment would *not* have precluded an English "trial at law" and that Burrows might have lost such a trial before some judges. *Ibid.* He granted the injunction only because he himself would have treated Burrows's foreign judgment as conclusive "evidence" that Burrows was entitled to prevail. *Id.* at 733-734.

Indeed, *Burrows*, *Thyrwhit*, and *Hutchinson* were all cited to the court in another civil case identified by petitioner—*Gage* v. *Bulkeley* (1744), reported in Ridg. t. H. 263 (1794)—which determined that "a foreign sentence * * * *cannot at all* be pleaded in a Court of law." *Id.* at 272 (emphasis added); see *id.* at 267, 279. It found *Hutchinson*, in particular, to be "no proof" that "the sentence or judgment of a foreign Court can be used by way of plea in a Court of justice in England." *Id.* at 270-271; see *id.* at 266-267.

b. Treatises cited by petitioner do not illustrate a universal understanding that foreign prosecutions precluded domestic ones

The treatises cited by petitioner cannot, and do not, supply a "well-established" rule that is absent from the reported decisions themselves.

i. Petitioner errs in suggesting (Br. 14-15) that Blackstone supports his foreign-sovereign-bar interpretation of *Hutchinson*. In describing the common-law pleas that informed the Double Jeopardy Clause, Blackstone explained that "when a man is once fairly found not guilty * * * before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 Blackstone 335. The reference to a "court having competent jurisdiction of the offence" has a footnote citing the report of *Thyrwhit*, 3 Mod. at 194, that describes the arguments made in the adjourned session of that case. Blackstone did not, however, cite *Hutchinson* itself, endorse petitioner's "*Hutchinson* rule," or state that a foreign court would have "competent jurisdiction" over an English criminal offense.

To the contrary, Blackstone's earlier chapter on criminal jurisdiction, which explained that its discussion was informed by double-jeopardy principles, 4 Blackstone 259, discussed only English courts, *id.* at 258-279. His citation of *Thyrwhit*, a case about admiralty and trover, likewise concerned only different strands of English law. See 3 Mod. at 194; pp. 38-39, *supra*. Had Blackstone understood *Hutchinson* to establish that a foreign prosecution would preclude a domestic prosecution for the same conduct, he would have said so directly. See, *e.g.*, 4 Blackstone 209 n.q (citing another case from 3 Keb.). Instead, on the page after he cited

Thyrwhit, Blackstone underscored that for a prior acquittal or conviction to serve as a bar, the subsequent case "must be * * * a prosecution for the same identical act *and* crime." *Id.* at 336 (emphasis added); see *Grady*, 495 U.S. at 530 (Scalia, J., dissenting) (quoting same language from Blackstone, with same emphasis).

ii. The remaining historical sources cited by petitioner and his amici appear to be drawn from a single treatise on evidence—not criminal procedure—namely, Henry Bathurst, *The Theory of Evidence* (1761).[4] Bathurst described *Hutchinson* in a single sentence as having allowed an acquittal (which he, too, thought was Spanish, not Portuguese) to be pleaded as a bar "because a final Determination in a Court having competent Jurisdiction is conclusive in all Courts of concurrent Jurisdiction." *Id.* at 39. That description was apparently then replicated in a discussion of evidence law in Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 245 (5th ed. 1788) (cited at Pet. Br. 15), itself a treatise whose "[c]ompass" explicitly excluded "criminal [p]rosecutions (as such)," *id.* at 198. Buller was then cited in the post-Framing *Roche* annotation cited by petitioner, see 168 Eng. Rep. 169, 169 n.a (1925), as well as other post-Framing treatises cited by petitioner and his amici. See Francis Wharton, *A Treatise on the Law of Homicide in the United States* 283 (1855); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816); 1 Thomas Starkie, *A Treatise on Criminal Pleading* 301

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[4] Two "treatises" cited by amici simply reprint *Burrows*, *supra*. See Law Professors Amicus Br. 4 (citing John Strange, *A Collection of Select Cases Relating to Evidence* 142 (1754), and 2 Timothy Cunningham, *The Merchant's Lawyer* 113-114 (1768)).

n.h (1814); Leonard McNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802).

Bathurst did not purport to define which courts actually had "concurrent Jurisdiction" over particular offenses. And the decision in *Gage*—which explained that *Hutchinson* had involved a special statutory commission for trial of crimes abroad that had discretion, not available in a court at law, to decline a second trial following a foreign one—suggests that even Bathurst may well have viewed such overlap to be limited. See Ridg. t. H. 271-272. This Court, reviewing the history in 1959, itself found *Hutchinson*—as to which the reporting was "confused" and "inadequate"—to be "dubious" precedent that, at most, "reflect[ed] a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus*, 359 U.S. at 128 n.9. Petitioner and his amici have uncovered nothing that proves otherwise.

c. Early state cases do not support petitioner

Even assuming the foreign-judgment bar petitioner posits could in fact be found in one of the places he identifies, the lack of uniformity in early state cases belies any suggestion that the Framers necessarily understood such a bar to be hidden there or silently intended to constitutionalize it.

As this Court observed in *Bartkus*, state decisions were split evenly, and thus "totally inconclusive," on "the validity of successive state and federal prosecutions," before the Court effectively settled the matter in *Fox*. 359 U.S. at 129-131. *Bartkus* also observed that the disagreement potentially "manifest[ed] conflict in conscience," rather than in law, and that two cases suggesting a bar had misunderstood the Court's own decision in *Houston*. *Id.* at 131. Petitioner's contrary view

of the pre-*Fox* state decisions (Br. 17-20) is effectively just a meritless challenge to this Court's reading of two of them.

In *Mattison* v. *State*, 3 Mo. 421 (1834), the Supreme Court of Missouri, in considering a challenge to Missouri's authority to criminalize counterfeiting, *rejected* the State's argument that a defendant convicted under the state statute could "plead this conviction in bar" in a later federal prosecution. *Id.* at 425-426. "To make a former conviction good at common law," the court explained, "the cause of the prosecution must be the same in both actions," and "the judgment of law with regard to the degree or quantity of punishment should be the same also." *Id.* at 426. The court observed that "these coincidents are not likely to happen where the offender and the offense are subject to the separate action of two independent separate wills," and it found that they were not the same in the case before it because the Missouri and federal statutes prescribed different punishments. *Ibid.* The court also expressed concern that, if a state prosecution could bar a later federal prosecution, States could intentionally thwart the enforcement of federal laws with which they disagreed. *Id.* at 427-428.

In *State* v. *Brown*, 2 N.C. 100 (1794)—the earliest case petitioner identifies—the Superior Courts of Law and Equity of North Carolina *relied on* the evident possibility of multiple trials by different States as a reason to construe North Carolina theft law not to apply to a defendant arrested there while riding a horse he had stolen in Ohio. *Id.* at 101-102. The court considered whether, if the defendant "were tried and condemned here, or tried and acquitted here, * * * the sentence of this court [would] be pleadable in bar to an indictment preferred against him in the Territory South of the

Ohio." *Id.* at 100-101. It "th[ought] it would not; because the offence against the laws of this state, and the offence against the laws of that country are distinct; and satisfaction made for the offence committed against this state, is no satisfaction for the offence committed against the laws there." *Id.* at 101.

II. NO SOUND REASON EXISTS TO OVERTURN 170 YEARS OF PRECEDENT INTERPRETING THE DOUBLE JEOPARDY CLAUSE

The correctness of this Court's decisions in itself justifies adhering to them. But even if petitioner had offered some basis for revisiting the long-held understanding of "same offense," no sufficient justification exists for overruling the Court's precedent.

A. Petitioner Has Not Justified Discarding This Court's Long Line Of Decisions Treating Separate Sovereigns' Crimes As Different "Offence[s]"

In numerous decisions since the nineteenth century, this Court has repeatedly recognized that successive prosecutions for the same act by different sovereigns are not prosecutions for the "same offence" under the Double Jeopardy Clause. See pp. 23-31, *supra*. In so doing, the Court has considered and rejected most of the arguments that petitioner and his amici have now disinterred. See, *e.g.*, *Montejo* v. *Louisiana*, 556 U.S. 778, 792-793 (2009) (identifying "the antiquity" and "reason[ing]" of precedent as reasons for retaining it). Petitioner does not dispute (*e.g.*, Br. 31) that, under the doctrine of *stare decisis*, overruling precedent generally requires a "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson* v. *United States*, 530

U.S. 428, 443 (2000)). He provides no sound reason for renouncing the Court's long, consistent, and coherent line of precedent here.

1. Abandoning the sovereign-specific understanding of "offence" would unsettle double-jeopardy law

Petitioner's characterization of the issue in this case as whether to retain a "'separate sovereigns' *exception*" to the Double Jeopardy Clause, *e.g.*, Pet. i (emphasis added), misapprehends the overall coherence of this Court's double-jeopardy jurisprudence. And it accordingly disregards the disruptive effect that overturning the challenged precedents would have.

a. Petitioner contends that "*stare decisis* carries less weight for cases 'decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions.'" Br. 33 (citation omitted). But 29 different Justices of this Court joined the majority opinions in *Fox*, *Lanza*, *Abbate*, and *Heath* alone. And most of the Court's key decisions were either unanimous or drew only one or two dissenting votes. See *Heath*, 474 U.S. at 83 (7-2 decision); *Lanza*, 260 U.S. at 378 (8-0 decision); *Moore*, 55 U.S. (14 How.) at 17, 21 (8-1 decision); *Fox*, 46 U.S. (5 How.) at 432, 435 (8-1 decision).

The Court decided *Bartkus* and *Abbate* by narrower margins, but the dissenting opinions in those cases do not support petitioner's position here. Justice Brennan dissented in *Bartkus* because he believed, based on the record, that the successive state prosecution in that case was puppeteered by federal authorities and thus "actually a second federal prosecution of Bartkus." 359 U.S. at 165-166. Far from disputing the basic point at issue here, Justice Brennan wrote the Court's opinion

in *Abbate*, which was issued the same day. See 359 U.S. at 187, 189.

The other three Justices who dissented in *Bartkus* and in *Abbate* treated the Double Jeopardy Clause as barring at least some successive prosecutions for a single act, irrespective of the law that applied. See *Bartkus*, 359 U.S. at 158 (Black, J., dissenting) (criticizing rule under which "one act becomes two"); *Abbate*, 359 U.S. at 202 (Black, J., dissenting) (criticizing rule under which "identical conduct of an accused might be prosecuted twice"). The Court itself later experimented with a conduct-focused approach, see *Grady*, 495 U.S. at 510, but the experiment was short-lived and repudiated as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy," *Dixon*, 509 U.S. at 704.

The Court's direct rejection of a conduct-focused approach counsels strongly against the mass abrogation that petitioner seeks here. This Court has identified a decision's "consistency with other related decisions" as a factor in considering whether to discard it. *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The precedents at issue here follow logically from basic principles of federalism and the Clause's focus on not only the act, but also the particular law, at issue in a prosecution. See pp. 10-18, *supra*. Petitioner does not offer any meaningful definition of "offence" that would erase the inherent distinction between the laws of independent sovereigns or explain how such a definition could be reconciled with other double-jeopardy doctrines that reflect a sovereign-specific approach to that term. See pp. 18-21, *supra*.

b. Petitioner's failure to provide a coherent definition of "offence" illustrates why it is his approach, not

this Court's precedent, that creates "unworkable doctrinal consequences" (Pet. Br. 48). This Court's precedent is "simplicity itself to apply," *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015), because it eliminates any double-jeopardy issues if prosecutions are by independent sovereigns. Petitioner suggests (Br. 48-49) that the test for independent sovereignty can be difficult to apply, but the Court has already done all the work that is relevant to the vast majority of cases. The Court has made clear that the United States, individual States, and individual Indian tribes are separate sovereigns, while certain territories are not. See *Sanchez Valle*, 136 S. Ct. at 1876-1877; *Heath*, 474 U.S. at 89; *Wheeler*, 435 U.S. at 332; *Waller* v. *Florida*, 397 U.S. 387, 394-395 (1970).

Overruling the Court's precedent, however, would present lower courts with a new and vexing problem—namely, comparing offenses enacted by different legislatures to determine whether they are the "same" in some relevant sense. Contrary to petitioner's passing assertions (Br. 10, 51-52), *Blockburger*'s element-comparison test—which is "a rule of statutory construction" developed "to help determine legislative intent," *Garrett*, 471 U.S. at 778-779—is neither designed for, nor adequate to, that purpose. That "simple-sounding" test "has proved extraordinarily difficult to administer in practice" even when the same legislature has defined both crimes. *Texas* v. *Cobb*, 532 U.S. 162, 185 (2001) (Breyer, J., dissenting). Those difficulties would multiply if courts were required to apply a *Blockburger* analysis to compare the elements of offenses under the laws of different sovereigns—including foreign sovereigns, whose laws may present especially difficult analytical challenges.

Petitioner's own case illustrates the point. Not only do the federal and state firearm offenses have different jurisdictional requirements (which may be relevant for this purpose), see p. 15, *supra*, but also different predicates. Compare 18 U.S.C. 922(g)(1), with Ala. Code § 13A-11-72(a) (2015). For example, a conviction for a felony not formally classified as violent would be a predicate for the federal firearm prohibition but not the Alabama one, while the reverse is true of a prior conviction for certain misdemeanors. Yet petitioner must have in mind some analysis under which the offenses would nevertheless be the "same."

Analysis of another sovereign's law may also raise the question whether statutory alternatives are elements of different offenses or means of committing a single offense, cf. *Descamps* v. *United States*, 570 U.S. 254, 261-263 (2013), and, if the former, whether and how to apply a "modified categorical approach," *ibid.*, like the one used to compare offense elements under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), see *Shepard* v. *United States*, 544 U.S. 13, 19-20 (2005). As experience with the ACCA demonstrates, both the derivation and application of such an analytical framework would present considerable practical difficulties. See *Kimble*, 135 S. Ct. at 2411 (adhering to precedent where "trading in" prior approach for a new one "would make the law less, not more, workable than it is now").

c. The United States, States, and Indian tribes have long relied on the Court's precedent to achieve important law-enforcement goals. For example, overlapping federal prosecutions can help to "stem the tide of domestic violence experienced by Native American women." *United States* v. *Bryant*, 136 S. Ct. 1954, 1960

(2016). To "fill [an] enforcement gap" resulting in part from "patchwork" legal regimes in Indian country, federal law provides for enhanced punishments for recidivist domestic abusers there. *Id.* at 1959-1961 (discussing 18 U.S.C. 117(a)) (citation omitted). Under this Court's longstanding interpretation of "same offence," tribes have been able to immediately enforce their own more limited domestic-abuse laws against a recidivist without concern that doing so will foreclose a later federal prosecution that will provide more appropriate punishment. See *Wheeler*, 435 U.S. at 330-331 (recognizing concerns with treating federal and tribal prosecutions as the "same").

The Court has likewise recognized the "shocking and untoward" results of allowing a limited federal prosecution to preclude a more sweeping state prosecution, *Bartkus*, 359 U.S. at 137, and the similar undesirability of the reverse scenario, see *Abbate*, 359 U.S. at 195. As this Court has explained, "it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses" or to "insure that there would be no state prosecutions for particular acts." *Ibid.* The problems are even worse if the Clause could in fact bar a domestic prosecution following a foreign prosecution, as petitioner contends. Neither the federal government nor the States have any way to ensure that no foreign enemy prosecutes and acquits (or only lightly punishes) someone who commits crimes against United States citizens or interests.

The issue is not limited to future, or even pending, prosecutions. Under well-settled law, law-enforcement authorities from different sovereigns had no double-jeopardy-related reason to insist that they be the first

to prosecute in circumstances where multiple sovereigns' interests were implicated. But were the Court to decide this case in favor of petitioner, they will wish they had been less accommodating. Defendants will undoubtedly challenge long-final convictions by whichever sovereign happened to go second, on the theory that a reversal of course in this case would represent a new retroactive rule. See *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016) (discussing retroactivity). Whether or not that theory is accepted by the courts, the proliferation of collateral attacks would itself undermine expectations reflected in plea agreements, assurances to victims, and otherwise.

2. No intervening developments justify a reinterpretation of "same offence"

Petitioner identifies no intervening development that requires treating the United States, States, Indian tribes, and foreign countries as defining and prosecuting the same legal "offence[s]."

a. Petitioner's reliance (Br. 35-41) on the incorporation of the Double Jeopardy Clause against the States in *Benton* v. *Maryland*, *supra*, is misplaced. The Court in *Heath* reaffirmed its sovereign-specific understanding of the Clause after *Benton*. See pp. 30-31, *supra*. And even putting *Heath* aside, petitioner's incorporation argument is unsound.

Nothing about the sovereign-specific interpretation of the term "offence" rests on a presumption that the Double Jeopardy Clause applies to the United States alone. *Benton* altered neither the text of the Clause nor the independent sovereignty of States and the federal government. Petitioner's examples (Br. 39-40) of scenarios in which this Court has overruled precedent

premised on non-incorporation—like the "silver-platter" doctrine, which addressed interactions of federal authorities who were subject to a constitutional prohibition and state authorities who were not—are inapposite. See *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 77 (1964) (explaining that doctrine had "no continuing legal vitality"); *Elkins* v. *United States*, 364 U.S. 206, 213 (1960) (explaining that doctrine's "foundation * * * disappeared" upon incorporation).

b. Petitioner likewise errs in suggesting that Congress's enactment of additional criminal laws has undercut the "factual premise" of this Court's precedents. Br. 42 (capitalization and emphasis omitted); see *id.* at 42-46. An assumption about the number of federal criminal laws has never been a premise of the Court's interpretation of the Double Jeopardy Clause. To the contrary, although the Court in *Fox* noted its expectation that successive state and federal prosecutions would be rare, it recognized (as did the Court in *Lanza*) that such prosecutions would be valid even if "either probable or usual." 46 U.S. (5 How.) at 435; see *Lanza*, 260 U.S. at 383. The Double Jeopardy Clause, which is not principally directed at the lawmaking authority of legislatures, see *Brown*, 432 U.S. at 165, imposes no cap on the number of criminal laws that Congress may enact pursuant to its enumerated powers.

Petitioner contends (Br. 44-46) that the enactment of more federal criminal laws could result in more cooperation—or, in his words, "collusion"—between federal and state prosecutors. But this Court's construction of the Double Jeopardy Clause does not rest on any assumption that federal and state officials are walled off from one another. The Court has long been aware that

federal-state cooperation is a "conventional practice between the two sets of prosecutors throughout the country." *Bartkus*, 359 U.S. at 123. The Court has reserved the possibility that successive prosecutions might be barred in the rare circumstance where the second sovereign is simply acting as a "tool of" the first. *Ibid.* But "cooperation" in achieving each sovereign's interests does not rise to that level, see *ibid.*, and should be encouraged rather than deterred.

B. The Political Branches Are Best Situated To Address Case-Specific Concerns With Successive Prosecutions

Petitioner's request that this Court adopt a new interpretation of the Double Jeopardy Clause appears largely to be grounded in his view that the longstanding interpretation produces "unfairness." *E.g.*, Br. 6. But any such policy concerns about successive prosecutions by different sovereigns are best addressed in a more fine-tuned manner by the political branches.

1. A successive prosecution by a different sovereign can impose substantial burdens on a defendant and will often be unnecessary. But in certain cases, countervailing factors will counsel in favor of separate sovereign prosecutions. Relevant case-specific considerations can include, for example, whether a defendant expedited a plea in one court knowing that he would receive a much lighter sentence there, see *Wheeler*, 435 U.S. at 330-331, or whether the crime infringes on distinct sovereign interests, see, *e.g.*, *Moody* v. *Holman*, 887 F.3d 1281, 1283 (11th Cir.), cert. denied, 138 S. Ct. 1590 (2018) (state and federal murder prosecutions of defendant who killed federal judge); *United States* v. *Roof*, 252 F. Supp. 3d 469, 470-471 (D.S.C. 2017) (federal prosecution of race-motivated shooting of church parishioners); Indictment Nos. 2015-GS-10-4115 to -4124, *Roof*, *supra* (S.C. Ct. of

Gen. Sessions) (state murder prosecution of same defendant).

Context-specific determinations that a second prosecution is warranted have proved to be important in a variety of circumstances. Overlapping federal prosecution of bank robbery during the Great Depression, for example, cut the crime rate in half. See *Bartkus*, 359 U.S. at 133 n.22. And a bar on successive prosecutions by different sovereigns would have impeded efforts to secure justice for racially motivated crimes during the civil-rights era. See, *e.g.*, Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141, 1165 & n.89 (2003) (discussing federal prosecution, following state acquittal, of a Ku Klux Klan member for murdering an African-American farmhand).

2. The judiciary's refusal to categorically preclude successive prosecutions by different sovereigns reflects a longstanding tradition of leaving such case-specific policy judgments to the political branches, which can balance the competing concerns in a more context-sensitive way. See, *e.g.*, *Heath*, 474 U.S. at 91-93 (rejecting requirement of judicial preapproval for second sovereign's prosecution); see also *Bartkus*, 359 U.S. at 136-137 (describing practices in state courts). Taking up that mantle, some state legislatures have barred successive prosecutions in at least some circumstances. See *Bartkus*, 359 U.S. at 138; 6 Wayne R. LaFave, *Criminal Procedure* § 25.5(b) (4th ed. 2015). Congress has done the same with respect to certain crimes. See, *e.g.*, 15 U.S.C. 80a-36; 18 U.S.C. 659; 18 U.S.C. 2101(a) and (c); 18 U.S.C. 2117; 49 U.S.C. 80501. And prosecutorial discretion is frequently exercised in this area.

The Department of Justice has adopted its Petite Policy on dual or successive prosecutions with the "overriding purpose * * * to protect the individual from any unfairness associated with needless multiple prosecutions." *Rinaldi*, 434 U.S. at 31. The policy sweeps more broadly than the Double Jeopardy Clause, covering any "federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding." *Justice Manual* § 9-2.031(A). It "precludes" such prosecutions unless the prior proceeding left "a substantial federal interest * * * demonstrably unvindicated" and a federal conviction is likely. *Ibid.* And it requires approval from a senior Department of Justice official for such a prosecution to proceed. *Ibid.* Even putting aside the more informal ways in which the policy affects federal decisionmaking, federal prosecutors formally invoked it as a reason for declining more than 1200 prosecutions over a recent eight-year period. See Bureau of Justice Statistics, *Federal Justice Statistics*, https://www.bjs.gov/index.cfm?ty=tp&tid=62 (Statistical Tables for 2006-2013).

Petitioner and his amici may disagree about judgments made under the policy, or with Congress's judgments about what types of conduct should be prohibited by federal criminal law. But a one-size-fits-all judicial reinterpretation of the Double Jeopardy Clause is not the proper tool for dealing with such policy disagreements. "[N]o one should expect (or want) judges to revise the Constitution to address every social problem they happen to perceive," particularly when the "proper authorities, the States and Congress, are empowered to"—and do—"adopt new laws or rules experimenting" with different ways to address the issue. *Currier* v. *Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion).

At the same time, individual courts can, and regularly do, ensure that a defendant is not over-punished by taking account of previous prosecutions by different sovereigns, including other sentences that the defendant has received. See 18 U.S.C. 3553(a); 18 U.S.C. 3584(a); *Setser* v. *United States*, 566 U.S. 231, 236 (2012); *Koon* v. *United States*, 518 U.S. 81, 112 (1996). The district court in this case did just that, by providing that petitioner's sentence for his federal firearm offense would run concurrently with the sentences for his state drug, firearm, and shooting offenses, J.A. 31, thereby effectively punishing petitioner as if he had been prosecuted only for the single federal crime. His violation of state law, as well as federal law, should not entitle him to any special additional leniency.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[*] The Solicitor General is recused in this case.