No. 17-646

IN THE
Supreme Court of the United States

TERANCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

COURT FILINGS

INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. With its affiliates, it represents more than 40,000 attorneys. NACDL is dedicated to advancing the proper, efficient, and just administration of laws. It frequently appears as an *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the separate-sovereigns exception erodes the fundamental protection against successive prosecutions that is enshrined in the Double Jeopardy Clause of the Fifth Amendment and made applicable to the States through the Fourteenth Amendment.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work for federal public and community

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the NAFD is to promote the interests of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Each year, federal defenders represent tens of thousands of individuals in federal court, including defendants who are subject to successive federal and state prosecution for the same offenses. Thus, NAFD has a particular interest in this case because the separate-sovereigns exception affects defendants the NAFD's constituent organizations represent each year.

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of individual rights guaranteed by the state and federal constitutions, and the improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of more than 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts as *amicus curiae*.

SUMMARY OF THE ARGUMENT

The constitutional prohibition against double jeopardy "is intrinsically personal." *United States v. Halper*, 490 U.S. 435, 447 (1989). "[D]eeply ingrained in at least the Anglo-American system of jurisprudence," the double jeopardy prohibition "was designed to protect an individual from being subject-

ed to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

The separate-sovereigns exception "hardly serves that objective." *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring, joined by Thomas, J.). In fact, the exception erodes the protection of the Double Jeopardy Clause, allowing state and federal governments—often working together—to use their combined resources to successively prosecute and punish individuals for the identical offense. Two Justices of this Court recently (and rhetorically) asked, "[I]s it not 'an affront to human dignity,' . . . 'inconsistent with the spirit of [our] Bill of Rights,' . . . to try or punish a person twice for the same offense?" *Id.* (second alteration in original) (citations omitted).

Decades of "judicial and scholarly criticism" have concurred. *See United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997). Published critiques of the separate-sovereigns exception date back to at least 1932, are numerous, and have continued into this century. *See* Pet. Br. at 33-34 & nn.1-2. The separate-sovereigns exception was always inconsistent with the original understanding of the Double Jeopardy Clause. *See id.* at 9-27. And the incorporation of the Double Jeopardy Clause against the States eroded whatever ostensible validity the exception had. *See id.* at 35-41.

If this were not reason enough to justify departing from *stare decisis*, the practical considerations originally supporting the separate-sovereigns exception no longer apply. Most notably, federal criminal law in the nineteenth and early twentieth centuries was

limited in nature. *See United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring). With federal laws enacted only to address those special federal interests, the potential for federal prosecutions in general—let alone successive prosecutions by federal and state authorities—was of little concern. Today, of course, the proliferation of federal criminal offenses significantly overlaps state provisions, frequently implicating the separate-sovereigns exception. Moreover, federal and state officials now often work as partners in criminal prosecutions, not as competing or siloed-off entities. This practical reality further undermines the rationale for the separate-sovereigns exception.

This Court should apply the accepted logic of incorporation to the Double Jeopardy Clause's protection against successive prosecutions and abolish a doctrine that has far outlived its rationales.

ARGUMENT

I. THE FOUNDATIONS OF THE SEPARATE-SOVEREIGNS EXCEPTION HAVE ERODED

Despite the demands of *stare decisis*, this Court has explained that it is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The doctrine "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Precedent should be reconsidered when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine" and

when the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pa v. Case*y, 505 U.S. 833, 855 (1992).

As Petitioner has thoroughly and persuasively explained, the separate-sovereigns exception is inconsistent with the original understanding of the Double Jeopardy Clause, Pet. Br. at 10-30, and the incorporation of the Double Jeopardy Clause against the States entirely undermined whatever validity the exception initially purported to have, *id.* at 35-41. Premised on the idea that the Double Jeopardy Clause did not apply to the States, *id.*, the Court repeatedly upheld the separate-sovereigns exception prior to the incorporation of the Double Jeopardy Clause against the States. *See Bartkus v. Illinois*, 359 U.S. 121, 136-38 (1959); *Abbate v. United States*, 359 U.S. 187, 196 (1959); *United States v. Lanza*, 260 U.S. 337 (1922). However, the Court's decision to incorporate the Double Jeopardy Clause in *Benton v. Maryland*, 395 U.S. 784 (1969), "undermine[d] the logical foundation" for the separate-sovereigns exception. *Elkins v. United States*, 364 U.S. 206, 214 (1960) (after incorporation of Fourth Amendment, rejecting "silver platter" exception permitting federal law enforcement use of evidence unlawfully seized by state officers in violation of the Fourth Amendment); *see also Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (concurrent with incorporation of privilege against self-incrimination, overturning doctrine allowing one sovereign to rely on testimony procured by another in violation of the Fifth Amendment).

The practical reality of dual sovereign law enforcement has evolved as well. Indeed, standard practices and their surrounding circumstances have changed to such a degree as to deprive the separate-sovereigns exception of its practical foundation. The separate-sovereigns exception relies on the outdated premise that the state and federal criminal systems operate in separate spheres and vindicate disparate interests. The exception was established at a time when federal criminal prosecutions were rare. But federal criminal law has expanded dramatically in recent decades and now encompasses large swaths of local conduct. As a result, the threat of successive prosecution by the federal government and the States is far greater than it was when the separate-sovereigns exception developed. Moreover, cooperation between state and federal law enforcement has surged in recent years. For all these reasons, the separate-sovereigns exception has been robbed of its original practical justifications and should be overruled.

A. The Purview of Federal Criminal Law Has Expanded Dramatically Since *United States v. Lanza*

In the eighteenth and nineteenth centuries, the federal government's role in criminal law was minimal. After all, "[t]he Constitution itself gives Congress jurisdiction over only a few crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 6 (1997) [hereinafter "*Expanding Federalization*"] (footnotes omitted). The Founders did not envision a

wide-ranging "national police power." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1138 (1995) [hereinafter "*Criminal Mischief*"]. Thus, "[f]or years following the adoption of the Constitution in 1789, the States defined and prosecuted nearly all criminal conduct." ABA Crim. Just. Sec., Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 5 (1998).

Indeed, "early federal criminal laws addressed only issues of special federal interest." *Criminal Mischief* at 1138. For example, the Crimes Act of 1790 prohibited "forgery of United States certificates and other public securities, perjury in federal court, treason, piracy, and committing acts of violence against an ambassador," as well as "murder and other crimes committed in a fort or other place controlled by the federal government" and "crimes committed outside the jurisdiction of any state." *Id.*

Congress began enacting criminal laws "extending beyond direct federal interests" only after the Civil War. *Id.* at 1139. During Reconstruction, the federal government was given jurisdiction over criminal laws that state courts were unwilling to enforce. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27. Shortly thereafter, Congress enacted laws prohibiting mail fraud and the mailing of obscene materials. *Criminal Mischief* at 1140. In the early twentieth century, Congress began to increasingly rely on its interstate commerce power in enacting criminal laws. This led to prohibitions such as "the Mann Act (prohibiting transporting a woman across state lines for illicit purposes), the Dyer Act (prohibiting transporting a stolen motor vehicle across state lines), the Volstead

Act (just plain Prohibition), and statutes forbidding interstate transportation of lottery tickets, interstate transportation of obscene literature, and selling liquor through the mail." *Id.* at 1142 (footnotes omitted).

After this long and steady creep of federal criminal jurisdiction, the criminal code began expanding exponentially in the late 1960s, when Congress began passing sprawling omnibus crime legislation. These new and massive federal frameworks included

> the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994.

Id. at 1145 (footnotes omitted). These laws increasingly inserted federal law enforcement into what had previously been considered local crime.

Today, the Federal Criminal Code reflects an extraordinary departure from early American practice. A 2010 publication estimated that federal law contains 4,450 criminal provisions. *See* Brian W. Walsh & Tiffany M. Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law 6 (2010). Those provisions cover a surprising variety of conduct, including the following actual federal crimes: "reproduc[ing] the image of 'Woodsy Owl' and 'Smokey the Bear'," "transport[ing]

false teeth into a state without the permission of a local dentist," "transport[ing] water hyacinths in interstate commerce," "issu[ing] a check for a sum less than one dollar not intended to circulate as currency," "impersonat[ing] a 4-H club member," "issu[ing] a false weather report on the representation that it is an official weather bureau forecast," and "issu[ing] a false crop report." Roger Miner, *Crime and Punishment in the Federal Courts*, 43 Syracuse L. Rev. 681, 681 (1992) (footnote omitted). Those are in addition, of course, to the government's broad authority to prosecute mail fraud, *see* 18 U.S.C. § 1341, wire fraud, *see id.* § 1343, robbery or extortion, *see id.* § 1951, and other more commonplace crimes.

Even with this wide variety of tools at their disposal, federal prosecutors have been increasingly eager to stretch existing law beyond its outer bounds. For example, a few Terms ago this Court addressed the federal government's contention that the Chemical Weapons Convention Implementation Act of 1998 criminalized "purely local crime[s]" such as "an amateur attempt by a jilted wife to injure her husband's lover" using household chemicals—even though that conduct "ended up causing only a minor thumb burn readily treated by rinsing with water." *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014). The Court held that the Implementation Act did not cover such insignificant local conduct. Indeed, the Court reminded the federal prosecutors that "our constitutional structure leaves local criminal activity primarily to the States." *Id.*

One year later, the Court again reminded prosecutors that federal criminal laws do not carry limitless authority. In *Yates v. United States*, 135 S.

Ct. 1074 (2015), the Court held that the disposal of an undersized fish was not criminalized by the document-shredding provision of the Sarbanes-Oxley Act of 2002, 116 Stat. 745. That legislation was originally "designed to protect investors and restore" the nation's "trust in financial markets." *Yates*, 135 S. Ct. at 1079. But the defendant in *Yates*, a commercial fisherman, had been prosecuted and convicted of violating the Act because he threw an undersized grouper back into the water after his boat was stopped by federal authorities, thereby destroying "tangible" evidence of a federal offense. *Id.* at 1079-81. The Court held that the provision did not stretch so far, again reining in an overexpansive interpretation of federal criminal authority. *Id.* at 1088-89.

The foundation of the separate-sovereigns exception was laid long before this explosion of federal criminal jurisdiction and the recent era of prosecutorial overreach. In the early case of *Fox v. Ohio*, 46 U.S. 410 (1847), for example, the Court believed successive prosecution would be rare. The Court reasoned,

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

Id. at 435. *Fox*, of course, was decided before the Civil War, at a time when federal criminal laws were few.

In *United States v. Lanza*, 260 U.S. 337 (1922), a prohibition-era case, the Court expressed concern that an absolute bar on successive prosecutions might prevent the federal government from protecting uniquely federal interests. *Id.* at 385. At the time, however, the federal criminal apparatus was still miniscule. For example, in 1922, the federal government had only begun to establish its own prisons. The first federal prison opened in 1895, and two more were added shortly thereafter. *Criminal Mischief* at 1147. "Those three facilities," which housed only a few thousand convicts, comprised "the sum total of the federal prison 'system' until 1925"—after *Lanza* was decided. *Id.* Today, by contrast, 122 prison facilities house more than 182,000 federal inmates. *See* Federal Bureau of Prisons, *Statistics*, www.bop.gov/about/statistics/population_statistics.jsp (last visited Sept. 6, 2018). Those statistics underscore the exponential growth of the federal criminal system.

The next two separate-sovereign cases—*Bartkus* and *Abbate*—also were decided well before the recent expansion of federal criminal law; a nearly unrecognizable legal landscape in comparison. At the time, no concerted federal effort to combat organized crime, small drug offenses, or domestic violence existed. *See Criminal Mischief* at 1145. Today, those prosecutions are staples of every federal district court's docket—duplicating the efforts of many state courts.

As Attorney General Meese observed,

> [i]n the previous era of separate and distinct roles for the federal and state governments in law enforcement, the dual sovereignty exception to double jeopardy protection was unfortunate but tolerable. However, in an era of the federalization of crime, there is little difference between the federal government and state governments in law enforcement because the federal government has duplicated virtually every major state crime.

Expanding Federalization at 22.

In response to concerns about the fairness implications of the multiple prosecution power, in 1977 the United States Department of Justice enacted a federal "*Petite* policy" regulating successive prosecutions of "substantially the same act(s) or transgressions." U.S. Dep't of Justice, United States Attorneys' Manual ("USAM") § 9-2.031 (updated July 2009); *see Petite v. United States*, 361 U.S. 529 (1960). This policy, however, confers no substantive rights on defendants, and allows the federal government to pursue a successive prosecution when, in its estimation, the case implicates a "substantial federal interest" purportedly left unvindicated by the prior state conviction. USAM § 9-2.031.

Left to the government's discretion, implementation of the policy has failed to meet the challenge posed by the separate-sovereigns exception. *See* Pet. Br. at 46-49. Moreover, as the government acknowledges, this discretionary policy has not been a

bulwark against cases implicating dual sovereignty controversies. *See, e.g.*, Resp't Br. in Opp'n to Pet. Cert. 5 (citing *Walker v. Texas*, 137 S. Ct. 1813 (2017) (mem.); *Roach v. Missouri*, 134 S. Ct. 118 (2013); *Donchak v. United States*, 568 U.S. 889 (2012); *Mardis v. United States*, 562 U.S. 943 (2010); *Angleton v. United States*, 538 U.S. 946 (2003); *Sewell v. United States*, 534 U.S. 968 (2001); *Koon v. United States*, 515 U.S. 1190 (1995)); *see also Tyler v. United States*, No. 17-5410 (U.S. docketed July 28, 2017); *Ochoa v. United States*, No. 17-5503 (U.S. docketed Aug. 4, 2017); *Bearcomesout v. United States*, No. 17-6856 (U.S. docketed Nov. 22, 2017); *Gordillo-Escandon v. United States*, No. 17-7177 (U.S. docketed Dec. 20, 2017); *Hall v. United States*, No. 17-9221 (U.S. docketed June 5, 2018).[2]

Those advocating on behalf of criminal defendants, including *amicus* NAFD, can attest to this. In NAFD's experience, it is not uncommon for the federal government, despite the *Petite* policy, to prosecute an individual who already has been prosecuted at the state level for identical or substantially the same conduct, as happened in this very case. The federal government pursues such dual prosecutions against defendants across criminal offenses and jurisdictions throughout the country. *See, e.g.*, *United States v. Stokes*, 124 F.3d 39, 41-42 & n.1 (1st Cir. 1997) (observing that federal government obtained a waiver of

[2] The cited cases are examples of those ultimately making their way to the Supreme Court. Given the high volume of criminal cases that resolve in guilty pleas or otherwise do not reach the Supreme Court, the cited cases presumably represent a small percentage of those that have presented separate-sovereigns exception concerns.

the *Petite* policy in Massachusetts case); Appellant's Excerpts of Record, Vol. I of II at 97, *United States v. Perez*, No. 17-10216 (9th Cir. Sept. 18, 2017), ECF No. 5 (noting federal government obtained *Petite* policy waiver for criminal charge in California); Government's Sentencing Memorandum at 2, n.1, *United States v. Salant*, Case No. 6:12-CR-00185-AA (D. Or. Nov. 1, 2012), ECF No. 21 (stating that federal government obtained waiver of *Petite* policy after defendant already had been sentenced in state court for same offense); Government's Opposition to Defendant's Motion to Dismiss for Violation of Double Jeopardy Clause at 4, *United States v. Storm*, Case No. 3:11-cr-00373-SI (D. Or. May 22, 2012), ECF No. 31 (acknowledging that federal government sought and obtained permission to bring successive prosecution).

The Court should reevaluate the holdings of *Lanza*, *Bartkus*, and *Abbate* based on the reality that federal criminal law today is pervasive and the *Petite* policy falls far short of providing the essential protection against oppressive multiple prosecutions that the Framers enshrined in the Double Jeopardy Clause.

B. Federal and State Law Enforcement Often Work Jointly in Cooperation

In *Lanza*, the Court imagined a scenario in which the state and federal governments had such inconsistent interests that a state prosecutor might attempt to subvert federal criminal law. 260 U.S. at 385. That hypothetical, however, is not representative of the reality that criminal defendants face today. Rather, "[t]he degree of cooperation between state and federal officials in criminal law enforcement

has . . . reached unparalleled levels." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499 (Calabresi, J., concurring). This increasing state-federal prosecutorial cooperation further undermines the underpinnings of the separate-sovereigns exception.

Cooperation and collaboration between state and federal law enforcement "is a regular and, in some fields, pervasive feature of the modern American criminal justice system." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 7 (1992) [hereinafter "*False Sovereigns*"]. Indeed, as early as 1964 this Court observed that criminal prosecutors had embraced the "age of 'cooperative federalism,' [in which] the Federal and State Governments are waging a united front against many types of criminal activity." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-56 (1964).

Courts have commented with increasing regularity on the prevalence of collaborative investigations and prosecutions. The Second Circuit has observed, "[a]s the challenge facing the nation's law enforcement authorities has grown in sophistication and complexity, cooperation between federal and local agencies has become increasingly important and increasingly commonplace." *United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990). The Seventh Circuit has also noted instances of "commendable cooperation between state and federal law enforcement officials." *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989); *see also United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979) ("[C]ooperation between state and federal authorities is a welcome innovation."); *United States v. Searp*,

586 F.2d 1117, 1121 (6th Cir. 1978) ("In this case, the investigation into the bank robberies, which were simultaneously state and federal crimes, was a joint undertaking between the Kentucky police and the FBI from the beginning."). State courts have noted a similar increase in collaboration. *See, e.g.*, *State v. Fletcher*, 240 N.E.2d 905, 911 (Ohio Ct. Com. Pl. Cuyahoga Cty. 1963) ("The cases are replete with examples of the entirely commendable practice of hand-in-glove co-operative efforts by state and federal authorities to investigate crime, gather evidence, and prosecute criminals."), *aff'd*, 259 N.E.2d 146 (Ohio Ct. App. 1970), *rev'd*, 271 N.E.2d 567 (Ohio 1971).

These collaborations are, in part, the result of an increasing number of federal-state joint task forces. For example, the federal Drug Enforcement Administration ("DEA") manages 271 state and local task forces, "staffed by over 2,200 DEA special agents and over 2,500 state and local officers." DEA, *Task Forces*, https://www.dea.gov/ops/taskforces.shtml (last visited Sept. 6, 2018). There are also 104 Joint Terrorism Task Forces, which "include approximately 4,000 members nationwide . . . hailing from over 500 state and local agencies and 55 federal agencies." Fed. Bureau of Investigation, *Joint Terrorism Task Forces*, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (last visited Sept. 6, 2018). U.S. Immigration and Customs Enforcement also runs a massive anti-money laundering task force that "consists of more than 260 members from more than 55 state and local law enforcement agencies." U.S. Immigration and Customs Enforcement, *Money Laundering*, https://www.ice.gov/money-laundering (last visited Sept. 6, 2018).

These joint enterprises are authorized by federal legislation and are often embodied in formal state-federal agreements. *See, e.g.*, 18 U.S.C. § 2518(5) (expressly allowing federal agents to enlist the help of non-federal personnel in conducting federally authorized electronic surveillance operations); 21 U.S.C. § 873(a) (authorizing the Attorney General to share information regarding narcotics operations, cooperate in state prosecutions, and enter into agreements with state and local agencies "to provide for cooperative enforcement and regulatory activities"). Indeed, the task force system encourages,

> where appropriate, the cross designation of Federal attorneys and state and local attorneys; the deputation of state and local police officers as Special Deputy U.S. Marshals; the payment of certain overtime, travel, and per diem costs for state and local officials engaged in Task Force work; and the signing of agreements to set forth the nature of the understanding between the Task Forces and the state and local jurisdictions.

False Sovereigns at 68 n.345 (citation omitted); *see also* Gabriel J. Chin, *Controlling the Criminal Justice System: Colorado as a Case Study*, 94 Denver L. Rev. 497, 506 (2017) ("Federal law also provides that [state] attorneys who are not federal prosecutors may be made Special Assistant U.S. Attorneys to participate in or pursue federal cases.").

The Court previously expressed a fear that one sovereign may "hinder" the interests of the other. *See Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (arguing that federal prosecution would result in a

"deprivation of the historic right and obligation of the States to maintain peace and order within their confines"); *Abbate v. United States*, 359 U.S. 187, 195 (1959) (noting that prior state prosecution would mean "federal law enforcement must necessarily be hindered"). However, increasing state and federal cooperation makes those concerns far less relevant today.[3]

The current degree of cooperation between federal and state law enforcement officials to enforce an increasingly overlapping set of criminal laws should "cause one to wonder whether it makes much sense to maintain the fiction that federal and state gov-

[3] To the extent the Court is concerned that federal law enforcement's interests may be unprotected without the separate-sovereigns exception (in the rare case in which federal and state interests diverge despite the fact that the two sovereigns are by definition prosecuting the defendant for the same offense), other methods could ensure the vindication of uniquely federal concerns. Congress could preempt state legislation in certain spheres of criminal law. *See, e.g.*, Note, *Double Jeopardy and Federal Prosecution after State Jury Acquittal*, 80 Mich. L. Rev. 1073, 1077 (1982). Scholars also have suggested that "selective" preemption might protect federal interests by allowing federal prosecutors to enjoin (or perhaps remove) specific state-level cases that tread on federal jurisdiction. *See* Ophelia S. Camina, Note, *Selective Preemption: A Preferential Solution to the* Bartkus-Abbate *Rule in Successive Federal-State Prosecutions*, 57 Notre Dame L. Rev. 340, 360-62 (1982). Still others have argued that consecutive civil rights prosecutions aimed at vindicating federal constitutional interests should be permitted. *See, e.g.*, Paul L. Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649, 659-71 (1994). In those cases, some have argued, other constitutional interests would counterbalance double jeopardy concerns. *Id.* at 670. And, of course, in those same civil rights cases, subsequent civil actions may also be possible under federal *civil* statutes. *Id.* at 673-74.

ernments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499 (Calabresi, J., concurring). Other commentators have suggested that, "in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Columbia L. Rev. 1, 48 (1995).

This Court has observed that the protection offered by the Double Jeopardy Clause "is intrinsically personal." *United States v. Halper*, 490 U.S. 435, 447 (1989). And "from the standpoint of the individual who is being prosecuted, . . . it hurts no less for two 'Sovereigns' to inflict" the pain of successive prosecutions "than for one." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Whether a defendant faces a successive prosecution by the State or the federal government:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).[4]

The time has come to cast aside the fiction that two separate sovereigns pursue two separate agendas when prosecuting the same person for the same crime. The separate-sovereigns exception to the Double Jeopardy Clause should be overruled.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

[4] Because the Double Jeopardy Clause applies to the federal government as well as the States, *see Benton v. Maryland*, 395 U.S. 784 (1969), "it matters not whether [a defendant's] constitutional right has been invaded by a federal agent or by a state officer." *Elkins v. United States*, 364 U.S. 206, 214 (1960). The Court should thus overturn both *Bartkus* (state prosecution following federal prosecution) and *Abbate* (federal prosecution following state prosecution).

Respectfully submitted,

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