No. 16-636

In The
Supreme Court of the United States

CALVIN GARY WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Ninth District At Beaumont

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BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS – MIAMI CHAPTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit 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. It has a nationwide membership of many thousands of direct members and, with its affiliates, represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. 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 current separate sovereigns doctrine erodes the fundamental protection against successive prosecutions that is enshrined in the Double Jeopardy Clause of the Fifth Amendment.

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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. The parties received 10 days' notice of the intention to file this brief.

Founded in 1963, the Miami Chapter of the Florida Association of Criminal Defense Lawyers (FACDL-Miami) is one of the largest bar associations in Miami-Dade County. The 450-plus attorneys in the Miami Chapter include private practitioners and public defenders who are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

FACDL-Miami recently submitted an *amicus* merits brief in support of Respondents in *Puerto Rico v. Sanchez-Valle*, a double jeopardy case that was decided last Term. The question presented in that case accepted the premise that the Double Jeopardy Clause permits successive prosecutions by separate sovereigns and only asked whether the Commonwealth of Puerto Rico and the federal government are, indeed, separate sovereigns. In its *amicus* brief, however, FACDL-Miami contended, "consistent with the observations of numerous jurists and commentators, that the Court should abandon the dual sovereignty doctrine and hold that the Fifth Amendment's Double Jeopardy Clause bars a successive prosecution for the same crime, even if initiated by a different prosecuting authority." Brief for Florida Association of Criminal Defense Lawyers – Miami Chapter as *Amicus Curiae*, *Puerto Rico v. Sanchez-Valle*, No. 15-108 at 5 (Dec. 2015). Justice Ginsburg's concurring opinion, joined by Justice Thomas, echoed that contention, which is the issue that is squarely presented by this case.

SUMMARY OF THE ARGUMENT

Last Term, two Justices of the Court opined that the "separate sovereigns" exception to the double jeopardy proscription against successive prosecutions "bears fresh examination in an appropriate case." *Puerto Rico v. Sanchez-Valle*, 136 S.Ct. 1863, 1877 (2016). Numerous judges of the federal courts of appeal have extended invitations to the Court to weigh in on the separate sovereigns question.[2] They have noted

[2] *E.g.*, *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999) ("[W]e and other Courts of Appeal have suggested that the growth of federal criminal law has created a need for the Supreme Court to reconsider the application of the dual sovereignty rule to situations such as this."); *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[A] reexamination of *Bartkus* may be in order, since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states."); *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (welcoming "a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause."); *Turley v. Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977) (Lay, J., concurring) ("I am not convinced that subsequent decisions of the Supreme Court have not fully eroded *Bartkus* and *Abbate* and that the double jeopardy defense should be sustained. . . . As an intermediate appellate judge I realize it is not my singular role to express opinion contrary to established law. However, recognition of this judicial discipline should not prevent one from expressing dismay in the use of stare decisis to perpetuate an injustice."); *see also*, *e.g.*, *United States v. Barrett*, 496 F.3d 1079, 1119 (10th Cir. 2007) ("To the extent Barrett questions the continued viability of the dual sovereignty doctrine . . . , this court is bound to follow *Lanza* and its progeny until such time as the Supreme Court overrules it."); *United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) ("Unless and until the Supreme Court overrules its existing

decades worth of "judicial and scholarly criticism" of the doctrine. *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).[3] As explained below, the separate sovereigns exception to the Double Jeopardy Clause was

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precedents, we are bound to conclude that the federal prosecution under federal law is not barred by the fact that the defendant was previously tried and convicted under State law on the basis of the same facts."); *United States v. Singleton*, 16 F.3d 1419, 1429 n.48 (5th Cir. 1994) ("[A]mici curiae[ ] invite us to reconsider the constitutionality of the 'dual sovereignty' exception to double jeopardy in this case. We decline the invitation. . . . Even if the constitutionality of the 'dual sovereignty' doctrine were properly before us, however, we are bound by Supreme Court precedent upholding the doctrine. . . . It is to that Court amici must address their arguments.").

[3] Published critiques of the dual sovereignty doctrine date back to 1932 and have continued into this century. *E.g.*, J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 CASE W. RES. L. REV. 700 (1963); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Richard D. Boyle, *Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland on Successive Prosecutions for the Same Offense by State and Federal Governments*, 46 IND. L.J. 413 (1971); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 277 (1979); Note, *Double Jeopardy and Federal Prosecution After State's Jury Acquittal*, 80 MICH. L. REV. 1073 (1982); Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama: *A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. &

supported by two pillars of jurisprudence that no longer exist today.

First, the separate sovereigns doctrine was supported by historical jurisprudence pre-dating the incorporation of the Bill of Rights in State courts through the Fourteenth Amendment. Before the Bill of Rights applied to the States, this Court embraced the separate sovereigns doctrine as a necessary corollary to the federal criminal justice system in all manner of contexts – ranging from double jeopardy, *see Abbate v. United States*, 359 U.S. 187, 195 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959), to evidence obtained in unlawful searches, *see Elkins v. United States*, 364 U.S. 206, 223

CRIMINOLOGY 801 (1985); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metropolitan Transit Authority, 22 NEW ENG. L. REV. 31 (1987); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereignty Doctrine*, 41 UCLA L. REV. 693 (1994); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997); Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If At First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353 (1997); David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U.L.Q. 765, 767 (2003).

(1960), to self-incrimination, *see Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). The Court has since recognized that the Bill of Rights protects individuals against State action which "operated to undermine the logical foundation" for a separate sovereigns rule, *Elkins v. United States*, 364 U.S. 206, 214 (1960), and eviscerated any "continuing legal vitality to, or historical justification for, the rule" that two sovereigns may collude to accomplish what any single sovereign could not do alone. *Murphy*, 378 U.S. at 77. The time is ripe for the Court to extend its logic to the Double Jeopardy Clause's protection against successive prosecutions.

Second, the judicial adoption of the separate sovereigns doctrine was supported by practical considerations from a time when the federal criminal code was limited to core areas of national interest, and when there was a genuine concern that the states would strategically exercise their prosecuting authority to nullify federal laws. *See United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995). Today, such "generalized statements of sovereign interests" no longer "justify limiting the reach of the Bill of Rights," *id*. at 498, now that the federal criminal code widely covers areas of traditional state concern, causing federal and state officials to work hand-in-glove as partners in criminal prosecution and not as competitive, independent entities.

ARGUMENT[4]

I. The Doctrinal Foundation of the Separate Sovereigns Doctrine Has Been Eroded

The Fifth Amendment's Double Jeopardy Clause mirrors double jeopardy principles derived from English common-law pleas that were well-established at the time of the Founding and prohibited successive prosecutions regardless of whether the previous prosecution was brought by the same or different sovereigns. *See R. v. Roche*, 168 Eng. Rep. 169 (K.B. 1775) (holding that a Dutch acquittal for murder "would be a bar" to an English prosecution); *R. v. Hutchinson* (holding that an acquittal for murder in Portugal barred prosecution in England), *cited in Burrows v. Jemino*, 93 Eng. Rep. 815 (Ch. 1726) and *Beak v. Thyrwhit*, 87 Eng. Rep. 124, 125 (K.B. 1688) (both discussing *Hutchinson*, of which there is apparently no surviving report).

Although "[t]o the Constitution of the United States the term SOVEREIGN is totally unknown," *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793)

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[4] As Justices of the Court have recognized, "[s]everal jurists and commentators," *Puerto Rico v. Sanchez-Valle*, 136 S.Ct. 1863, 1877 (Ginsburg, J., concurring), share the position advanced by *amici* in this case. Accordingly, this brief draws heavily from the prior writings of those jurists and commentators, which includes the *amicus* brief that undersigned counsel submitted in support of Respondents in *Sanchez-Valle*, which itself stood on the shoulders of "briefs filed in earlier cases challenging the continued viability of the dual sovereignty doctrine." Brief for Florida Association of Criminal Defense Lawyers – Miami Chapter as *Amicus Curiae*, *Puerto Rico v. Sanchez-Valle*, No. 15-108 at 6 n.4 (Dec. 2015) (citing authorities).

(opinion of Wilson, J.), the separate sovereigns doctrine is premised on the notion that "two identical offenses are not the 'same offense' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath v. Alabama*, 474 U.S. 82, 92 (1985). This doctrine is inconsistent with both historical and modern jurisprudence, and is an artifact from an era in which the Bill of Rights did not bind the States.[5]

The Court first squarely confronted the separate sovereigns doctrine in *United States v. Lanza*, 260 U.S. 377 (1922), in which it concluded that a federal prosecution under the National Prohibition Act was not barred by a prior state conviction for violations of similar state laws. *Id*. at 378-79. According to the Court, "[t]he Fifth Amendment . . . applies only to proceedings

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[5] To the extent that a separate sovereigns exception was implicitly grafted onto the Double Jeopardy Clause of the Fifth Amendment, *but see, e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. LAW. & POL. 19-20 (1997), courts and commentators have noted Founding-era publications reflecting that the federal government and the states are "parts of ONE WHOLE," *Puerto Rico v. Sanchez-Valle*, 136 S.Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (quoting The Federalist No. 82, p. 245 (J. Hopkins ed., 2d ed. 1802) (reprint 2008)), rather than genuinely distinct sovereigns. And, to the extent that the federal and state governments could be considered separate sovereigns, that was only to ensure that they would compete to "protect citizens from overzealous government," and not to operate in tandem to expose individuals to successive prosecutions. Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. LAW. & POL. 21 (1997) (citing The Federalist No. 51, at 323 (Clinton Rossiter ed., 1961)).

by the federal government," and so "the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority." *Id*. at 382.

In two subsequent cases in 1959, the Court held that there is no Fourteenth Amendment bar to a state prosecution following a prior federal conviction, *Bartkus v. Illinois*, 359 U.S. 121 (1959), and reaffirmed *Lanza*'s holding that there is no Fifth Amendment bar to a federal prosecution following a state acquittal. *Abbate v. United States*, 359 U.S. 187 (1959). But Justice Black's dissenting opinions in both cases ring true today.

The separate sovereigns doctrine was not imported from existing English common-law double jeopardy jurisprudence, but rather was conjured by courts in response to concerns about federalism, States' rights, and distinct federal-state interests. As Justice Black observed, the separate sovereigns doctrine was developed in cases that

> had assumed that identical conduct of an accused might be prosecuted twice, once by a State and once by the Federal Government, because the "offense" punished by each is in some, meaningful, sense different. The legal logic used to prove one thing to be two is too subtle for me to grasp.

Abbate, 359 U.S. at 202 (Black, J., dissenting). The Double Jeopardy Clause, after all, conveys an individual

right, 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). Observing that "the Court's reliance on federalism amounts to no more than the notion that, somehow, one act becomes two because two jurisdictions are involved," Justice Black implored that the separate sovereigns exception to the Double Jeopardy Clause be "discarded as a dangerous fiction." *Id.* at 158.

Although a separate sovereigns exception to the Double Jeopardy Clause may have been a necessary or compelling consequence of pre-incorporation jurisprudence that prevailed when *Lanza*, *Bartkus*, and *Abbate* were decided, the Court has since held that protections in the Bill of Rights were made applicable to the States through the Due Process Clause of the Fourteenth Amendment, including double jeopardy:

> [T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

Benton v. Maryland, 395 U.S. 784, 794 (1969).

And the Court recognized that this change in the law "operated to undermine the logical foundation" for a separate sovereigns rule outside of the double jeopardy context. *Elkins v. United States*, 364 U.S. 206, 214

(1960). For example, after holding that the Fourth Amendment applied to the states, *see Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that evidence obtained in unlawful searches by state officials was inadmissible in federal criminal trials. *See Elkins*, 364 U.S. at 223. Echoing Justice Black's dissents in *Bartkus* and *Abbate*, the Court reasoned that evidence seized illegally by one sovereign could not be turned over to another sovereign: "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id*. at 215.

Similarly, in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), the Court discarded the separate sovereignty theory of self-incrimination. The Court explained that "there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction . . . may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Murphy*, 378 U.S. at 77. The policies behind the privilege would be frustrated by the separate sovereignty doctrine, which allowed a defendant to be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination applied to each." *Id.* at 55 (quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (Black, J., dissenting)); *accord Abbate*, 359 U.S. 187, 203 (Black, J., dissenting) ("I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing

them to do together what, generally, neither can do separately.").

Nevertheless, the Court has continued to apply the separate sovereigns exception in the double jeopardy context, *see, e.g.*, *Heath v. Alabama*, 474 U.S. 82 (1985); *United States v. Lara*, 541 U.S. 193, 199 (2004), without ever "explain[ing] – or even focus[ing] on – this anomaly." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 15-16 (1995).

> Indeed, *Elkins* and *Murphy* stand for the propositions that (1) the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and (2) the federal and state governments should not be allowed to do in tandem what neither could do alone. Yet the dual sovereignty doctrine is still alive and well in double jeopardy cases, in seeming violation of these propositions.

Id.

Recognizing this tension, courts have likewise suggested that the Court consider a "retreat from a rigid doctrine of dual sovereignty." *United States v. Grimes*, 641 F.2d 96, 101-02 (3d Cir. 1981). For example, the Third Circuit, in an opinion authored by the late Judge Adams, explained:

> [A]n important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has

> been undercut by subsequent constitutional developments. . . . Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be impermissible if accomplished by either jurisdiction alone.

Id. "[D]evelopments in the application of the Bill of Rights to the states, consequent alterations in the system of dual sovereignty, and the historic idiosyncracies of various of the precedents upon which *Bartkus* relie[d] may deprive the opinion of much of its force." *Id.* at 104; *see also United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (Aldisert, J., dissenting) ("I am of the view that *Abbate* was wrongly decided in 1959. The majority opinion never came to grips with Justice Black's analysis in dissent, joined by Chief Justice Warren and Justice Douglas, and no developing doctrine in the intervening eighteen years has persuaded me to alter my original views.").

II. The Practical Foundation of the Separate Sovereigns Doctrine Has Been Eroded

The separate sovereigns exception to the Double Jeopardy Clause finds its roots in a bygone era in which the likelihood that an individual criminal act could be prosecuted by both state and federal authorities was remote, and in which state and federal authorities operated largely independently from one another. In addition to the development of constitutional law

since 1959, modern realities in our system of criminal justice justify a reexamination of the practical rationale underpinning its continued viability.

"The 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. LAW. & POL. 6 (1997). And "[f]or years following the adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct," while the "federal government confined its prosecutions to less than a score of offenses." A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 5 (1998). "Prior to the Civil War, the federal government's role in defining and enforcing criminal law was limited to the areas of national concern listed among its constitutionally enumerated powers." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. LAW 1, 4 (1992).

By "the 1960s and 1970s, however, concern with organized crime, drugs, street violence and other social ills precipitated a particularly significant rise in federal legislation tending to criminalize activity involving more local conduct," and the "trend to federalize crime has continued dramatically." A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998).

A January 1989 *Report to the Attorney General on Federal Criminal Code Reform* estimated that there were "approximately 3,000 federal crimes" on the books at that time, a figure that has since been "frequently cited." Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L. FORUM 9 (1989).

But that "helpful estimate" was deemed "outdated by the large number of federal crimes enacted" by the time the 1998 Task Force of the Federalization of Criminal Law was convened. A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 9-10 & n.11 (1998). The 1998 Task Force was incapable of providing an "exact count" of the number of existing criminal regulations, other than to say that "[n]early 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated 'civil.'" *Id*.

A 2010 publication estimated that federal law contains 4,450 criminal provisions. *See* Brief for Eighteen Criminal Law Professors as Amicus Curiae, *Yates v. United States*, No. 13-7451 (July 2014) (citing Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 6 (2010)). And when a 2013 bi-partisan congressional judicial task force requested the Congressional Research Service to provide a listing of all federal crimes, its initial response, as Congressman John Sensenbrenner noted, "was that they lack the manpower and resources to accomplish this task. . . . I

think this confirms the point that all of us have been making on this issue and demonstrates the breadth of overcriminalization." Hr'g Tr. Over-Criminalization Task Force of 2013, Serial No. 113-44 (June 14, 2013). "According to one estimate, there are now more than 300,000 federal regulations that may trigger criminal sanctions." Brief for Eighteen Criminal Law Professors as Amicus Curiae, *Yates v. United States*, No. 13-7451 (July 2014) (citing *Over-Criminalization of Conduct/ Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Attorney General of the United States)).

When then-Senator and Chairman of the Senate Judiciary Committee Joseph R. Biden, Jr. said that "[w]e federalize everything that walks, talks, and moves," former Attorney General Edwin Meese III responded that, "[u]nfortunately, this is not much of an exaggeration." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. LAW. & POL. 2-3 (1997).

> Few crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction. For example, the following is a representative sample of serious, but purely local, crimes that have been duplicated in the federal code: virtually all drug crimes, car-jacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from

> an insurance company, and murder of a state official assisting a federal law enforcement agent. [These crimes] are outlawed by the states already and need not be duplicated in the federal criminal code.

Id. at 3. To put it another way, a "complex layer is being added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states." A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 18 (1998). "[T]he scope of federal criminal law has expanded enormously. And the number of crimes for which a defendant may be made subject to both a state and a federal prosecution has become very large." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 498 (2d Cir. 1995) (Calabresi, J., concurring).

The surge of duplicative criminalization shows no sign of abating, as there appears to be no "underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law." A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 14 (1998). Rather, "federalization is politically popular," causing new criminal regulations to be "enacted in patchwork response to newsworthy events," as opposed to "a cohesive code developed in response to an identifiable federal need." *Id.* at 14-15.

As criminal law professors serving as *amici* in another recent case observed:

> Seldom does Congress consider whether it must re-write or repeal an existing law to accommodate a new one. The reality is that the "political process of criminal law legislation is * * * a 'one-way ratchet' * * * . Criminal codes expand but don't contract." Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007). Consequently, "new statutes [are often] layered over the existing federal criminal statutes," to the end of widespread redundancy. Sara Sun Beale, *Too Many, Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995).

Brief for Eighteen Criminal Law Professors as Amicus Curiae, *Yates v. United States*, No. 13-7451 (July 2014) (alterations in original).

It is not just the sheer number of federal regulations that justifies a "fresh examination," *Puerto Rico v. Sanchez-Valle*, 136 S.Ct. 1863, 1877 (Ginsburg, J., concurring), of the separate sovereigns doctrine in the double jeopardy context. Owing to the now-extensive overlap between state and federal criminal regulations, "[t]he degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels in the last few years. . . ." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 498 (2d Cir. 1995) (Calabresi, J., concurring). They are encouraged to function as a unit, bound together

by information, technology, financial incentives, contractual arrangement, and statutory mandate. *See, e.g.*, 21 U.S.C. § 873 (authorizing the Attorney General to transfer forfeited property to any federal, state, or local agency that participated directly in the seizure or forfeiture of the property). Courts have approved such collaboration. *See United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990) ("[C]ooperation between federal and local agencies has become increasingly important and increasingly commonplace."); *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989) (finding nothing more than "commendable cooperation between state and federal law enforcement officials"); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 69 & n.351, 77 (1992).

Thus, whereas the separate sovereigns doctrine emerged "during prohibition when there was considerable fear of state attempts to nullify federal liquor laws, as well as the doctrine's rebirth just at the time when state attempts to nullify federal desegregation laws and orders were at their height," *All Assets*, 66 F.3d at 497 (Calabresi, J., concurring),[6] the need to insulate the federal and state prosecutorial authorities

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[6] Judge Adams similarly observed that the *Bartkus* majority relied on *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), a case that "concerned the validity of state fugitive slave legislation . . . a politically freighted issue," leading him to conclude that "the Court's statement that a citizen owes allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either should be read with considerable caution." *United States v. Grimes*, 641 F.2d 96, 101, 102-03 (3d Cir. 1981).

from incursions by one another is now more illusory than ever. *See also Bartkus*, 359 U.S. at 156 (Black, J., dissenting) (dismissing as "unwarranted" the "assumption that State and Nation will seek to subvert each other's laws.").

> The Federal Government is given power to act in limited areas only, but in matters properly within its scope it is supreme. It can retain exclusive control of such matters, or grant the States concurrent power on its own terms. If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts, or by excluding the States altogether.

Id. at 157.

As Judge Calabresi put it, the current degree of cooperation between federal and state law enforcement officials to enforce an increasingly overlapping set of criminal regulations should "cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets*, 66 F.3d at 499 (Calabresi, J., concurring).

Other commentators have taken that sentiment a step further and posited 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 COLUM. L. REV. 1, 48 (1995).

While "the dual sovereign exception to double jeopardy protection was unfortunate but tolerable" in a "previous era of separate and distinct roles for the federal and state governments in law enforcement," Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. LAW. & POL. 22 (1997), "the dramatic changes that have occurred in the relationship between the federal government and the states . . . have made what was then perhaps acceptable, or at least tolerable, far more dangerous today." *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 498 (2d Cir. 1995) (Calabresi, J., concurring).

Now that the federal criminal code retreads so much ground that is already covered by the criminal laws of the several states, the separate sovereigns doctrine is no longer an exceptional remedy permitting successive prosecutions only in "instances of peculiar enormity, or where the public safety demand[s] extraordinary rigor." *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847). And now that federal and state law enforcement officials have entered a new "age of 'cooperative federalism,' where the federal and state governments are waging a united front against many types of criminal activity," *Murphy*, 378 U.S. at 55-56, "the story of two independent sovereigns pursuing their independent goals is a transparent fiction." Daniel A. Braun,

Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 AM. J. CRIM. L. 1, 10 (1992).

The separate sovereigns doctrine represents an anachronistic judicial construct fashioned in an era when the states and the federal government ostensibly acted as two separate sovereigns pursuing conflicting criminal-law interests. But the days when the separate sovereigns doctrine might have mediated the tendency of state and federal officials to frustrate each other's efforts to prosecute a narrow band of exceptional offenses are long gone. In today's world, the separate sovereigns doctrine primarily serves as a tool for state and federal officials to foster each other's efforts to subject their citizens to successive prosecutions for an endless array of ordinary offenses. Yet, "most civilized nations do not and have not needed the power to try people a second time," *Bartkus*, 359 U.S. at 156 (Black, J., dissenting), and "[n]ot even God judges twice for the same act." *Id*. at 152 (quoting Brooke, *The English Church and the Papacy*, 205).

Indeed, the term "double jeopardy" is itself a misnomer given the prevalence of modern high-speed transportation and communication, which can regularly lead to the prospect of "triple jeopardy" – or more – depending on the number of jurisdictions the allegedly criminal conduct traverses. A great number of federal criminal prosecutions find their jurisdictional hook by virtue of a nexus to interstate commerce. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Bass*, 404

U.S. 336 (1971). And in such cases, under the current conception of the Double Jeopardy Clause, the Constitution would permit successive prosecutions to be initiated by at least three prosecuting authorities – i.e., the federal government and each of the individual states in which the activity occurred. Thus in a future case, involving a fraud scheme or drug trafficking conspiracy that crosses one or more state lines, an otherwise innocent defendant would find no apparent Constitutional shelter from a succession of federal prosecutions and multiple state prosecutions until his resources are exhausted and his conviction is – or convictions are – assured. A regime in which such circumstances are possible does a disservice to the "underlying idea," *Green v. United States*, 355 U.S. 184, 187-88 (1957), animating the Fifth Amendment's guarantee that no individual shall "be subject for the same offence to be twice put in jeopardy of life and limb." U.S. CONST. amend. V.

> [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, 355 U.S. at 187-88.

CONCLUSION

Amici respectfully submit that the Court should abandon the separate sovereigns exception to the Double Jeopardy Clause to ensure that the Fifth Amendment guarantee against successive prosecutions accords with modern Constitutional jurisprudence and law enforcement practices.

Respectfully submitted,

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