No. 12-1394

In The
Supreme Court of the United States

EDWARD ROACH,
Petitioner,
v.

STATE OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents the important question whether the Double Jeopardy Clause of the Fifth Amendment, which prohibits any person from being "twice put in jeopardy of life or limb" for the same offense, bars a state prosecution for a criminal offense when the defendant has been previously convicted of the same offense in federal court. As the Petition demonstrates, such successive prosecutions plainly violate the Double Jeopardy Clause, which was

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

adopted to preserve the fundamental common law protection against successive prosecutions for a single offense, even when brought by different sovereigns. Allowing such prosecutions undermines the important protections the Double Jeopardy Clause was adopted to provide and cannot be reconciled with significant developments in constitutional law that have occurred since this Court last meaningfully considered the issue.

The text and history of the Double Jeopardy Clause establish that the Framers of the Bill of Rights viewed its prohibition on successive prosecutions as a fundamental protection of individual liberty and safeguard against government harassment. When the Bill of Rights was drafted, the protection against double jeopardy was a well-established part of the English common law, discussed at length in Blackstone's famous Commentaries on the Laws of England. The drafters of the Bill of Rights thus incorporated the double jeopardy prohibition because they saw it as an important tool in guarding against governmental overreach and preventing vexatious prosecution. In debating the Double Jeopardy Clause, the Framers repeatedly affirmed the importance of the protection that it would provide, a protection that is plainly undermined if the federal and state governments are permitted to do in tandem what neither may do alone.

When this Court first adopted the dual sovereignty doctrine that allows successive prosecutions by different sovereigns, it did so against the background of a legal regime in which

the Double Jeopardy Clause did not apply to the States. Whatever validity the doctrine may have had in that context, it has been completely undermined by subsequent decisions by this Court recognizing that the Fourteenth Amendment protects the personal rights guaranteed by the Bill of Rights, including the Double Jeopardy Clause, against State infringement. As this Court has recognized in other contexts, the incorporation of the protections of the Bill of Rights undermines whatever basis may once have existed for the dual sovereignty doctrine. Indeed, the Fourteenth Amendment's emphasis on protecting individual rights against all governmental action makes clear that the Double Jeopardy Clause protects a fundamental individual right that is undermined whenever successive prosecutions are allowed, even if by different sovereigns. This Court has not meaningfully revisited the validity of the dual sovereignty doctrine in this context since the Double Jeopardy Clause was incorporated. It should do so now.

Amicus urges the Court to grant the Petition for a Writ of Certiorari to revisit the validity of the dual sovereignty doctrine as applied to the Double Jeopardy Clause and restore the proper scope of this important protection of individual liberty.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO RESTORE THE PROPER SCOPE OF THE DOUBLE JEOPARDY CLAUSE'S PROTECTIONS

Amicus urges this Court to grant *certiorari* to revisit the propriety of the "dual sovereignty" doctrine and restore the proper scope of the Double Jeopardy Clause. The "dual sovereignty" doctrine, which provides that "one independent sovereign's exercise of criminal jurisdiction does not bar another sovereign's subsequent prosecution of the same defendant," *United States v. Lara*, 541 U.S. 193, 229 (2004), has long been criticized for both its "weakness from an originalist point of view and its jurisprudential flaws," *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring).

In addition to these long-standing criticisms, there have been fundamental changes in both constitutional and criminal law since the Court last meaningfully considered the issue: the Double Jeopardy Clause has been incorporated against the states, *see Benton v. Maryland*, 395 U.S. 784 (1969), and there has been a significant expansion in the scope of federal criminal law, *see, e.g.*, *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) ("the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws"). These changes warrant reconsideration of this doctrine, which the Court

has not meaningfully considered in over 50 years, *see Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). *See generally United States v. Gaudin*, 515 U.S. 506, 521 (1995) (reasons for *stare decisis* undermined when the "underpinnings" of the "decision in question" have been "eroded[] by subsequent decisions of this Court").

As this Court recognized just last year, it is important that it "assure preservation" of constitutional rights as they "existed when [the Bill of Rights] was adopted." *Jones v. United States*, 132 S. Ct. 945, 958 (2012). Reconsideration of the text and history of the Double Jeopardy Clause makes clear that the "dual sovereignty" doctrine significantly restricts the protections of the Double Jeopardy Clause as they existed at both the Framing and Reconstruction, protections that the Framers viewed as fundamental.

A. The Framers Viewed the Double Jeopardy Clause as a Fundamental Protection of Individual Liberty, and the Dual Sovereignty Doctrine Undermines That Protection.

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As the text suggests, the Framers incorporated this critical safeguard of liberty into the Constitution to secure to all persons an individual right against being subjected to the "hazards of trial and possible

conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957).

The Double Jeopardy Clause has its origins in the English common law. *See Ex parte Lange*, 85 U.S. 163, 169 (1873) ("The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."); *see also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1773 (describing the Double Jeopardy Clause as "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power").[2] And Americans of the founding generation viewed the prohibition on double jeopardy as a fundamental right essential to the protection of liberty from government overreaching, *see id.* § 1774 (explaining that the Clause provided "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous

[2] The roots of the principle may go back even farther. *See Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times."); *Bartkus*, 359 U.S. at 151 (Black, J., dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.").

precipitancy"); *cf. Bartkus v. Illinois*, 359 U.S. at 153-54 (Black, J., dissenting) (noting that the double jeopardy principle "has been recognized here as fundamental again and again").

As this Court has recognized, "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the 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.[3]

In his famous Commentaries on the Laws of England, William Blackstone discussed the double jeopardy principle at length and described the two common law pleas, *autrefois acquit* and *autrefois convict*, which provided the basis for the text of the Double Jeopardy Clause. "[T]he plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England,

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[3] The Clause also provides an important structural protection of the right to trial by jury, a right James Madison noted was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." 1 Annals of Cong. 454 (1789); *see* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96 (1998) (double jeopardy principles "safeguard not simply the individual defendant's interest in avoiding vexation but also the integrity of the initial petit jury's judgment").

that no man is to be brought into jeopardy of his life, more than once . . . . [W]hen a man is once fairly found not guilty . . . before any court having competent jurisdiction, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 William Blackstone, Commentaries *335; *cf. Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("[a]s with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone"). Blackstone explained that the second of these pleas, "*autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given," also "depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime." *Id.* at *336. These principles thus "safeguard[ed] . . . the individual defendant's interest in avoiding vexation," whether he was acquitted or convicted in the first prosecution. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96 (1998).

Drawing on Blackstone, the Framers of the Bill of Rights wrote this critical guarantee against government overreaching into the Constitution, and debates over the Bill of Rights expressly affirmed the fundamental double jeopardy principle that a person cannot be twice "put in jeopardy of life or limb" for the same offense, U.S. const. amend. V. For example, Representative Roger Sherman, in discussing an early version of the

Clause proposed by James Madison,[4] observed that "the courts of justice would never think of trying and punishing twice for the same offence." 1 Annals of Cong. 782 (1789). Representative Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted." *Id.* He explained that "in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.*

As the Petition demonstrates, when the Framers were drafting the Bill of Rights, they would not have thought double jeopardy principles permitted successive prosecutions simply because those prosecutions were brought by different sovereigns. *See* Pet. 7-16. And no wonder. When a defendant is subjected to multiple prosecutions for the same offense, the feelings of anxiety and humiliation are the same, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. *See Bartkus*, 359 U.S. at 155 (Black, J., dissenting) ("The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the

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[4] Madison's initial proposal provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 451-52 (1789). Madison's initial proposal was amended in the Senate. In its final form, the Fifth Amendment's Double Jeopardy Clause used "the more traditional language employing the familiar concept of 'jeopardy', . . . language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*." *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one.").

Moreover, in an age of expansive federal criminal law and significant federal-state cooperation in criminal law enforcement, *see, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011), the application of the dual sovereignty doctrine makes it particularly easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense, just the type of government overreaching that the Double Jeopardy Clause was adopted to prevent. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 9-10 (1995) ("given the increased level of federal-state cooperation in enforcing criminal laws, dual sovereign prosecutions also raise[] the traditional double jeopardy concern that successive prosecutions [will] give government an illegitimate dress rehearsal of its case and a cheat peek at the defense" (internal footnote omitted)).

The dual sovereignty doctrine thus undermines the protections the Double Jeopardy Clause was intended to provide, protections that the Framers of the Bill of Rights viewed as fundamental.

B. The Dual Sovereignty Doctrine Is Inconsistent with the Incorporation of the Double Jeopardy Clause Against the States.

As just noted, the Framers would have thought it inconsistent with the Double Jeopardy Clause's fundamental protection of an individual right that the individual could be "twice put in jeopardy of life or limb" simply because he was the subject of prosecution by different sovereigns. *See* Pet. 7-16. Moreover, whatever sense the dual sovereignty doctrine might have made before the Double Jeopardy Clause was incorporated against the States, it plainly makes no sense after incorporation.

The origins of the dual sovereignty doctrine long pre-date incorporation. In its 1847 decision in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), this Court cited *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which held that the Bill of Rights did not bind the States, and then suggested in dicta that the Double Jeopardy Clause would not bar successive punishments by state and federal governments because the prohibition was "exclusively [a] restriction[] upon federal power." *Fox*, 46 U.S. at 434; *see United States v. Marigold*, 50 U.S. 560, 569 (1850) (citing *Fox* for the proposition 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"); *Moore v. Illinois*, 55 U.S. 13 (1852) (relying on *Fox* and *Marigold* to adopt the dual sovereignty doctrine).

These decisions arguably made sense in light of *Barron*: if a state government could prosecute an individual as many times as it wanted for the same offense, or could prosecute an individual after he had already been prosecuted by the federal government, it was not a stretch to think that the federal government could prosecute an individual after he had been prosecuted by the state government. *See* Amar & Marcus, *supra*, at 11 (noting that "the logic of [*Barron*] furnished an important justification for the early dual sovereignty doctrine" (internal footnote omitted)). All the Double Jeopardy Clause barred, under this view, was re-prosecution by the federal government. *See id.* at 4. "This logic radiated beyond double jeopardy," *id.* at 11, and the dual sovereignty doctrine was applied in other contexts. *See, e.g.*, *Feldman v. United States*, 322 U.S. 487, 492-93 (1944) (immunized testimony compelled by federal officials could nonetheless be used in state prosecutions).

When this Court last meaningfully considered the dual sovereignty doctrine, the Double Jeopardy Clause had not yet been incorporated against the States, as the Court noted in concluding that the Clause posed no bar to successive prosecutions by federal and state governments. *See Bartkus v. Illinois*, 359 U.S. at 124 ("We have held from the beginning and uniformly that the Due Process Clause of the

Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."); *Abbate v. United States*, 359 U.S. 187, 194 (1959) (declining to overrule *United States v. Lanza*, 260 U.S. 377, 382 (1922), in which the Court held that a state prosecution did not bar a subsequent federal prosecution because "[t]he Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, . . . and 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").[5]

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[5] This Court's adherence to the dual sovereignty doctrine at that time may also have been motivated by the practical concern that prohibiting successive punishments "must necessarily" "hinder[]" federal law enforcement. *Abbate*, 359 U.S. at 195. These practical concerns may have been particularly salient in the late 1950s when southern States were resisting federal desegregation laws. *See All Assets*, 66 F.3d at 497 (Calabresi, J., concurring) (observing that the Court's embrace of the dual sovereignty doctrine may have been motivated by "[t]he danger that one sovereign [would] negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence" and explaining that "this justification may explain the doctrine's emergence 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" (internal footnotes omitted)). But these practical concerns cannot justify the continued application of a doctrine that is so clearly inconsistent with the Constitution's text and history. *See id.* at 498 ("it is hard to justify limiting the reach of the Bill of Rights, adopted as it was to protect individual

In the years following *Bartkus* and *Abbate*, this Court's view of the relationship between the Bill of Rights and the States underwent a radical transformation, as this Court recognized that most of the protections of the Bill of Rights, including the Double Jeopardy Clause, should apply against the States. *See Benton*, 395 U.S. at 795-96 (double jeopardy); *see also, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth and Fifth Amendments); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (self-incrimination); *cf.* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Jacob Howard, in introducing the Fourteenth Amendment in the Senate, explained that its broad text protected against state infringement all of the "personal rights guaranteed and secured by the first eight amendments of the Constitution").

In the years following *Bartkus* and *Abbate*, this Court also began recognizing that the incorporation of the Bill of Rights' protections against the States had important implications for the continuing viability of the dual sovereignty doctrine, a doctrine that had rested heavily on *Barron* and its conclusion that the Bill of Rights' protections did not apply to state governments. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, this Court reexamined the doctrine that permitted federal prosecutors to use evidence

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rights and liberties against governmental encroachment, on no stronger grounds than the relative cumbersomeness of plausible alternative measures that would protect the interests of the sovereigns involved").

unlawfully seized by state officers. *Id.* at 213. As this Court explained, the "foundation" of the doctrine—"that unreasonable state searches did not violate the Federal Constitution"—disappeared when the Court held in 1949 that the Fourth Amendment applied against the States. *Id.* Significantly, the Court underscored that the Fourteenth Amendment had recognized the Fourth Amendment's importance as an individual right that could be violated by either the federal or state government: "[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.

Four years later, in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), this Court again recognized that repudiation of the dual sovereignty doctrine followed naturally from the incorporation of the Bill of Rights' protections against the States. There, the Court held that one jurisdiction could no longer compel a witness to give testimony that could be used to convict him of a crime in another jurisdiction. *Id.* at 77-78. As this Court explained, the incorporation of the Incrimination Clause against the States "necessitate[d] reconsideration of [the dual sovereignty] rule." *Id.* at 57.

Both *Elkins* and *Murphy* stand for the fundamental propositions that "the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and . . . the federal and state governments should not be allowed to do in tandem what neither could do alone." Amar, *supra*, at 16. Those principles are no less applicable to the

protections of the Double Jeopardy Clause. As discussed earlier, the Double Jeopardy Clause was adopted, in part, to prevent an individual from being "subject[ed] . . . to embarrassment, expense and ordeal and compell[ed] . . . to live in a continuing state of anxiety and insecurity, as well as [the greater] possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-88. A person experiences those harms whenever he is "twice put in jeopardy of life or limb," regardless of whether the second prosecution is brought by a different sovereign or not.

The Fourteenth Amendment's incorporation of the Double Jeopardy Clause's protections against the States thus underscores what the Framing history also makes clear: double jeopardy principles safeguard an individual right that protects against successive prosecutions, regardless of the sovereigns bringing the prosecutions.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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