No. 12-____

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

PETITION FOR A WRIT OF CERTIORARI

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095

JESSICA M. HATHAWAY
OFFICE OF THE STATE PUBLIC DEFENDER
1010 Market Street #1100
St. Louis, MO 63101

FRED A. ROWLEY, JR.
Counsel of Record
DANIEL B. LEVIN
RAY SEILIE
MUNGER TOLLES & OLSON LLP
355 S. Grand Ave., 35th floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

QUESTION PRESENTED

Under the original meaning of the Double Jeopardy Clause, a prosecution by one sovereign barred subsequent prosecutions by all sovereigns. But the Court strayed from this original meaning when it adopted the doctrine of "dual sovereignty," which permits prosecutions by multiple sovereigns. Criminal defendants thus now have less Double Jeopardy protection than they had at the Founding. This petition presents unequivocal historical evidence that dual sovereignty is inconsistent with the original meaning of the Double Jeopardy Clause.

The question presented is whether the Double Jeopardy Clause bars a state prosecution for a criminal offense when the defendant has previously been convicted of the same offense in federal court.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

ENGLISH CASES

FEDERAL STATUTES

MISSOURI STATUTES

LEGISLATIVE MATERIALS

TREATISES

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Edward Roach, respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at 391 S.W.3d. 8 (Mo. Ct. App. 2012). The Missouri Supreme Court's order denying review is not reported. App. 2a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on November 20, 2012. A timely application for transfer to the Missouri Supreme Court was denied on February 26, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

INTRODUCTION

At the time of the Founding, the common law protected criminal defendants from all successive prosecutions for a single offense, even by different sovereigns. The Framers intended to preserve this fundamental common law protection when they

ratified the Fifth Amendment's Double Jeopardy Clause. In a series of decisions adopting the so-called dual sovereignty doctrine, which permits separate state and federal prosecutions for the same offense, the Court strayed from the Double Jeopardy Clause's original meaning and reduced the protection it affords. In the decades since those decisions were handed down, the constitutional and practical underpinnings of the doctrine have eroded. The Double Jeopardy Clause, like many other fundamental criminal procedure rights, is now applicable to the states. And the exposure of criminal defendants to serial state and federal prosecutions has grown dramatically with the expansion of federal criminal jurisdiction. This petition asks the Court to restore the original scope of the Double Jeopardy Clause and abrogate the dual sovereignty doctrine.

STATEMENT OF THE CASE

1. Petitioner Edward Roach was indicted in state court on two counts: Count I, for unlawful use of a weapon; and Count II, for possessing a firearm while having previously been convicted of a felony. App. 3a. While these state charges were pending, Roach was charged by the United States, under federal law, for possessing a firearm while having previously been convicted of a felony. *Id*.

a. The state and federal felon-in-possession charges were based on the same conduct. *Id*. Count II of the state indictment was under Mo. Ann. Stat. § 571.070, which prohibits possession of a firearm by any person who "has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony." Missouri law

defines a "felony" in the standard way, as a crime punishable by "imprisonment for a term which is in excess of one year." Mo. Ann. Stat. § 556.016(2). The federal charge was under 18 U.S.C. § 922(g), which prohibits possession of a firearm by any person who "has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Both of these charges could not have been brought by a single sovereign, because they have identical elements. *See United States v. Dixon*, 509 U.S. 688, 695-96 (1993).

b. Roach pled guilty to the federal charge. App. 3a. He then moved to dismiss Count II of the state indictment on the ground that prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment. App. 3a-4a. At the hearing on the motion, the prosecutor acknowledged that both the state and federal felon-in-possession charges were based on Roach's possession of a single firearm on a single occasion. "These are not two separate weapons," the prosecutor admitted. "It's the exact same gun .... Same incident, same weapon." App. 12a-13a. Nevertheless, the prosecutor argued that "double jeopardy does not attach because we're dealing with two separate jurisdictions." *Id*.

The trial court granted Roach's motion and dismissed Count II. App. 4a. Roach pled guilty to Count I—the unlawful use of a firearm charge—and was sentenced to a prison term of fifteen years. *Id*.

2. Missouri appealed the trial court's judgment dismissing Count II. App. 3a. The state's sole argument on appeal was that the principle of dual sovereignty allows successive federal and state prosecutions for the same offense. App. 4a.

The Missouri Court of Appeals reversed. App. 5a. The court observed that Missouri "adheres to [the] principle of dual sovereignty as established by the U.S. Supreme Court." App. 4a. It reasoned that under the dual sovereignty doctrine, "a conviction or acquittal in federal court will not prevent a subsequent conviction for the same offense in state court if the case is one over which both sovereigns have jurisdiction." App. 4a (citing *State v. George*, 277 S.W.3d 805 (Mo. Ct. App. 2009)). Roach argued that the dual sovereignty doctrine contradicts the original meaning of the Double Jeopardy Clause. App. 5a. Nonetheless, the Missouri Court of Appeals concluded that it was bound to follow precedent and reversed. *Id*.

3. Roach sought review in the Missouri Supreme Court. He argued once again that the dual sovereignty doctrine contradicts the original meaning of the Double Jeopardy Clause. The Missouri Supreme Court denied review. App. 2a.

REASONS FOR GRANTING THE PETITION

This Court has stressed that it "must assure *preservation*" of constitutional rights as they "existed when [the Bill of Rights] was adopted." *Jones v. United States*, 132 S. Ct. 945, 953 (2012) (emphasis added). Under any plausible method of constitutional interpretation, judges lack the power to *reduce* the protections that were afforded criminal defendants at the Founding. Yet that is precisely what has happened to the Double Jeopardy Clause. When the Bill of Rights was ratified, a defendant prosecuted once could not be prosecuted again for the same offense, not even by a different sovereign. The doctrine of "dual sovereignty," which permits separate prosecutions by different sovereigns for the same offense, did not exist. That doctrine is a judicial invention of a later era, and restricts the Double Jeopardy Clause in a way the Founders never intended.

The Court has not taken a hard look at dual sovereignty since 1959. *See Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). In light of the historical record, which demonstrates unequivocally that dual sovereignty is inconsistent with the original meaning of the Double Jeopardy Clause, the time has come to revisit the question. The Clause "was designed originally to embody the protection of the common-law pleas of former jeopardy." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). At common law, defenses based upon prior convictions or acquittals did not turn on the identity of the sovereign; they could be interposed in any court to bar a second prosecution. Founding-era decisions by lower courts and early decisions by this Court reflected the same understanding.

The "doctrine's weakness from an originalist point of view" is exacerbated by fundamental changes to the constitutional principles and federalism concerns that grounded it. *See United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 496-99 (2d Cir. 1995) (Calabresi, J., concurring). The decisions in *Bartkus* and *Abbate* rest in part on the principle, then settled, that the Double Jeopardy Clause applied only to the federal government, and not to the States. Whatever support this principle lent to serial prosecutions by state and federal authorities, it carries no force after *Benton v. Maryland*, 395 U.S. 784 (1969). And since *Bartkus* and *Abbate* were handed down, federal criminal jurisdiction has grown dramatically, expanding the area of overlap with state criminal laws. This convergence of state and criminal prosecutorial authority weakens any federalism interest in protecting distinct areas of sovereign power, while at once underscoring the need for robust Double Jeopardy protections.

This case presents an ideal opportunity for the Court to reconsider the application of dual sovereignty to the Double Jeopardy Clause. The challenge is not only fully preserved, but also squarely presented by the Missouri courts' opinions: the trial court invoked the Double Jeopardy Clause to dismiss the indictment, but the Court of Appeals invoked dual sovereignty and reversed. This Court already has abrogated dual sovereignty with respect to other rights made applicable to the States, *see, e.g.*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964) (right against self-incrimination), and it has also shown a willingness to revisit the scope of Double Jeopardy protections, *see Smith v. Mass.*, 543 U.S. 462 (2005) (extending the Double Jeopardy Clause to

bar reconsideration of a mid-trial judgment of acquittal).

This Court has called the Double Jeopardy bar a "fundamental ideal in our constitutional heritage." *Benton*, 395 U.S. at 794. There is no justification for maintaining a rule that diminishes that ideal and reduces the protection enjoyed by criminal defendants at the Founding. This Court should grant certiorari.

I. The Dual Sovereignty Doctrine Is Contrary to the Original Meaning of the Double Jeopardy Clause

The Fifth Amendment's bar against subjecting a person "for the same offence to be twice put in jeopardy" originated in the English common law pleas of *autrefois acquit* and *autrefois convict*, which allowed a defendant to plead a prior acquittal or conviction in bar of a present prosecution. *See United States v. Scott*, 437 U.S. 82, 87 (1978). In 18th-century England, a criminal defendant could interpose these pleas regardless of whether the previous prosecution was brought by the same or different sovereigns. Both state law and this Court's precedents at the time of the Founding reflected the same understanding. And because the Founders intended the Double Jeopardy Clause to preserve the common law bar, it cannot be squared with the dual-sovereignty doctrine, which permits serial prosecutions by different sovereigns. That doctrine rests upon a demonstrably erroneous understanding of early American sources.

A. 18th-Century English Law Prohibited Successive Prosecutions by Different Sovereigns

Under 18th-century English law, a prosecution by one sovereign barred a subsequent prosecution by another.

1. The leading case at time of the Founding was *R. v. Roche*, 168 Eng. Rep. 169 (K.B. 1775). Roche was charged in England with murder, after having been acquitted of the same murder by a court in the Cape of Good Hope, which was then a Dutch colony. The King's Bench held that the Dutch acquittal "would be a bar" to an English prosecution. *Id.* While the defendant withdrew his *autrefois acquit* plea at trial—the court refused to submit that plea together with a not-guilty plea—*Roche* shows that the plea may apply across sovereigns. As reporter explained: "It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction: therefore if A., having killed a person in Spain, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in Spain in bar." *Id.* at 169 note a.

The other frequently-cited English case of the era was *R. v. Hutchinson*, in which the defendant had been acquitted of murder in Portugal. After returning to England he was indicted for the same murder. In a *habeas* proceeding before the King's Bench, the defendant "produced an exemplification of the Record of his acquittal in Portugal." *Id.* The King's Bench held that the foreign acquittal barred prosecution in England. *See id.*; *see also Burrows v. Jemino*, 93 Eng. Rep. 815 (Ch. 1726); *Beak v. Thyrwhit*, 87 Eng. Rep. 124, 125 (K.B. 1688) (both

discussing *Hutchinson*, of which there is apparently no surviving report).

2. Contemporaneous English legal treatises unanimously confirm that at the time of the Founding, the common law understanding was that "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802); *see also* 1 Thomas Starkie, *A Treatise on Criminal Pleading* 301 note h (1814) ("Where the defendant has been tried by a foreign tribunal, it seems equally clear that an acquittal will enure to his defence in this country."). Other English treatises of the period expressly noted that *autrefois* pleas applied across sovereigns, stating that an acquittal or conviction "will be sufficient to preclude any subsequent proceedings before every other tribunal." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816); *see also* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 372 (1721) ("[A]n Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court."); 4 William Blackstone, *Commentaries on the Laws of England* 329 (1770) ("[H]e may plead such acquittal in bar of any subsequent accusation of the same crime."); Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 245 (5th ed. 1788) (discussing *Hutchinson*).

3. English law remained the same into the twentieth century. *See R. v. Aughet*, 13 Cr. App. R. 101 (C.C.A. 1918). As one commentator explained, "it does not matter whether the [previous] trial was

summary or on indictment, nor whether the Court is an English Court, or one of another of the King's dominions, or of a foreign country." 2 William Russell, *A Treatise on Crimes and Misdemeanors* 1820 (8th ed. 1923).

B. Early American Courts Understood that the Double Jeopardy Clause Barred Successive Prosecutions, Even by Different Sovereigns

The Double Jeopardy Clause was intended to enshrine common law protections in the Constitution. Those protections bar a subsequent prosecution regardless of which sovereign brought it.

1. As Representative Samuel Livermore explained in the first Congress, the Clause "was declaratory of the law as it now stood," and codified "the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offense." 1 Annals of Cong. 782 (1789). American courts shared this view, characterizing Double Jeopardy as a principle as "a sound and fundamental one of the common law." *People v. Goodwin*, 18 Johns. R. 187 (N.Y. 1820); *see also United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (Story, J.) ("[T]he privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law; and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitation."). Commentators likewise recognized that the right was "imbedded in the very elements of the common law," and thus "has a deeper foundation than mere positive enactment." 3 Simon Greenleaf, *A Treatise on the Law of Evidence* 36 (1853); *see also*

Francis Wharton, *A Treatise on the Criminal Law of the United States* 147 (1846) (describing the Double Jeopardy Clause as "nothing more than a solemn asseveration of the common law maxim").

2. There is evidence that, consistent with the prevailing view, the Framers did not think these protections would change if serial prosecutions were brought by different sovereigns. When the text of what would become the Fifth Amendment was being debated, the first Congress rejected a proposal to narrow the common law rule to allow multiple prosecutions so long as only one of them was pursuant to federal laws. The original draft of the Double Jeopardy Clause provided: "No person shall be subject … to more than one trial or one punishment for the same offence." 1 Annals of Cong. 781 (1789). Representative George Partridge suggested adding, after "same offence," the words "by any law of the United States." *Id.* at 782. By conditioning Double Jeopardy prosecutions on whether one of the prosecutions was federal, Partridge's proposal would have, in effect, established the dual sovereignty doctrine. But Congress immediately rejected Partridge's suggestion. *Id.*

3. The Court's early cases reflected the common law understanding that double jeopardy concerns attached to multiple prosecutions by different sovereigns. In *Houston v. Moore*, 18 U.S. 1 (1820), the defendant had been convicted by a state court martial for deserting the militia. He argued that the state lacked authority to try him for that offense because desertion was also a federal crime, so a state conviction "might subject the accused to be twice tried for the same offence." *Id.* at 31. The Court brushed aside this argument with a clear statement

of the traditional rule: "[I]f the jurisdiction of the two Courts be concurrent the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.*

Justice Story dissented in *Houston* because he believed that the state and federal governments could not exercise concurrent criminal jurisdiction, but he agreed that the Double Jeopardy Clause would bar federal prosecution of a defendant already prosecuted by a state. Indeed, that was why he dissented. If the state could try a defendant for desertion, Justice Story argued, one of two impossible consequences would follow: either the federal government would be unable to prosecute the defendant, or "the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government." *Id.* at 72 (Story, J., dissenting).

Justice Johnson was the only member of the *Houston* Court who expressed doubt about whether "an acquittal in the State Courts could be pleaded in bar to a prosecution in the Courts of the United States." *Id.* at 35 (Johnson, J., concurring in the judgment). Nevertheless, in another case decided two weeks later, even Justice Johnson accepted the traditional rule. In *United States v. Furlong*, 18 U.S. 184 (1820), the Court's unanimous opinion, authored by Johnson, declared: "[T]here can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Id.* at 197. The Court concluded that this plea did not bar the second prosecution on the facts of *Furlong*, because the defendant's first prosecution in a U.S.

court—for a murder committed "by a foreigner upon a foreigner in a foreign ship," *id.*—had not been within the jurisdiction of the federal courts. The critical point, however, is that this Court clearly endorsed the traditional rule that a prosecution by one sovereign, where that sovereign has jurisdiction, bars a subsequent prosecution by another.

4. The overwhelming majority of state courts addressing the issue likewise concluded that a prosecution by one sovereign bars a subsequent prosecution by another. For example, in *State v. Antonio*, 7 S.C.L. 776 (1816), South Carolina's Constitutional Court of Appeals rebuffed a defendant's argument that a state conviction for counterfeiting left him open to a federal prosecution for the same offense. "[T]his could not possibly happen," the court held,

> because it is the established comitas gentium, and is not unfrequently brought into practice, to discharge one accused of a crime, who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties? But a guard yet more sure is to be found in the 7th article of amendments [*i.e.*, the Fifth Amendment] to the federal constitution.

Id. at 781. Justice Grimke concurred. He agreed that if counterfeiting were both a state and federal crime, either court would have to "allow of the plea of *autrefois acquit*, which will be a good bar to a second prosecution, because a determination in a court having competent jurisdiction, must be final and

conclusive on all courts of concurrent jurisdiction." *Id.* at 788 (Grimke, J., concurring). Justice Nott dissented, but he too agreed that prosecution by both the state and federal governments would be "not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice." *Id.* at 804 (Nott, J., dissenting).

Numerous other contemporaneous state cases are in accord. These decisions recognized that double jeopardy principles would bar a second prosecution for the same offense by a different state. *See State v. Brown*, 2 N.C. 100, 101 (1794) (serial prosecutions by different states for horse theft would be "against natural justice, and therefore I cannot believe it to be law"). They reasoned—often in analyzing whether the federal government's criminal jurisdiction was concurrent with or exclusive of the states'—that a conviction or acquittal in state court would bar a subsequent federal prosecution. *Harlan v. People*, 1 Doug. 207, 212-13 (Mich. 1843) (a state conviction "would be admitted in federal courts as a bar. This would follow necessarily from the exercise of a concurrent jurisdiction, even if it did not come strictly within the provision of the seventh article of the amendments of the constitution."); *Mattison v. State*, 3 Mo. 421, 426-28 (1834) (assuming, in analyzing preemption, that a state conviction or acquittal could bar a federal prosecution, but noting that common law requirements not met in that case); *id.* at 433 (Wash, J., dissenting) (explaining that a valid prosecution by a sovereign power "will bar any other or further prosecution for the same offense, *by the same or any other power* and may be so pleaded" (emphasis added)). And they recognized that the same plea could be interposed if a state prosecution followed a federal prosecution for the offense. *See*

State v. Randall, 2 Aik. 89, 100-01 (Vt. 1827) (where state and federal courts have concurrent jurisdiction, "[t]he court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a decision in one court will bar any further prosecution for the same offence, in that or any other court"); *Commonwealth v. Fuller*, 49 Mass. 313, 317-18 (1844) (where state and federal courts have concurrent criminal jurisdiction, "the delinquent cannot be tried and punished twice for the same offence, and … the supposed repugnancy between the several laws does not, in fact, injuriously affect any individual"); *People ex rel. McMahon v. Sheriff*, 2 Edm. Sel. Cas. 324, 343-44 (N.Y. Sup. Ct. 1852) ("where the United States and the State courts have concurrent jurisdiction" over a criminal matter, "a judgment rendered in one [is] a bar to the recovery of a judgment in the other"). *See generally Manley v. People*, 7 N.Y. 295, 303 (1852) (citing *Houston v. Moore* in support of "the practice of the several federal and state courts as congress extends its power by its enactments, and that is in allowing the judgment in one court to be pleaded in bar in the other").

Our research reveals but a single early American case that broke with this consensus. In *Hendrick v. Commonwealth*, 32 Va. 707 (1834), the defendant challenged Virginia's prosecution for forging checks on the ground that he also could be prosecuted by the federal government for the same offense. The court responded: "The answer to this is, that the law of *Virginia* punishes the forgery, not because it is an offence against the *U. States*, but because it is an offence against this commonwealth." *Id.* at 713. This

single sentence was the court's entire discussion of the subject. With this exception, the early American cases were unanimous in interpreting the Clause and state law to bar successive prosecutions by the state *and* federal governments.

5. American treatises of the era track their English counterparts, uniformly recognizing that where state and federal courts have concurrent criminal jurisdiction, "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other." 1 James Kent, *Commentaries on American Law* 374 (1826); *see also* Thomas Sergeant, *Constitutional Law* 278 (2d ed. 1830) (same); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846) (prosecution "will be sufficient to preclude any subsequent proceedings before every other court").

C. The Court Departed from the Original Meaning of the Double Jeopardy Clause When It Adopted the Dual Sovereignty Doctrine

In three cases decided between 1847 and 1852, the Court adopted the dual sovereignty doctrine. The first two of these cases, *Fox v. Ohio*, 46 U.S. 410 (1847), and *United States v. Marigold*, 50 U.S. 560 (1850), suggested, without clearly holding, that the federal and state governments could bring separate prosecutions for the same offense. But the third case, *Moore v. Illinois*, 55 U.S. 13 (1852), clearly broke from the original meaning of the Double Jeopardy Clause, and the common law grounding it, by holding that the traditional rule barring multiple trials for

the same offense was inapplicable to serial state and federal prosecutions. These unprecedented rulings cascaded into what the Court now calls "the settled 'dual sovereignty' concept," *United States v. Wheeler*, 435 U.S. 313, 332 (1978), leaving the Double Jeopardy Clause weaker than when it was adopted.

1. In *Fox*, the defendant argued that her conviction in Ohio state court for passing counterfeit coins violated the Fifth Amendment, because she might also be prosecuted by the federal government for counterfeiting. The Court determined that this argument was "without real foundation," because the provisions of the Bill of Rights "were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power." *Fox*, 46 U.S. at 434. The Court explained: "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." *Id.* at 435. Nevertheless, the Court reasoned that even if such prosecutions were "probable or usual," it would not follow that "offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to [their] consequences." *Id.*

2. Two years later, in *United States v. Marigold*, 50 U.S. 560 (1850), the Court confronted a challenge to a *federal* prosecution for counterfeiting. The defendant invoked *Fox* in arguing that Congress lacked the power to enact laws punishing counterfeit coin passing. In rejecting that argument, the Court read *Fox* to "point out[] 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." *Id.* at 569.[1]

3. The Court cemented its unexplained departure from the Double Jeopardy's original meaning just a few years later in *Moore v. Illinois*, 55 U.S. 13 (1852). In that case, the defendant had been convicted in Illinois state court of harboring a fugitive slave. *Id.* at 17. He argued that the Illinois statute was preempted by the federal Fugitive Slave Act. In support of this argument, he contended that allowing a state to prosecute would unlawfully subject him to two prosecutions. The Court rejected this argument at length, in the Court's first clear statement of the principle of dual sovereignty:

> But admitting that the plaintiff in error may be liable to an action under the act of Congress, for the same acts of harboring and preventing the owner from retaking his slave,

---

[1] Neither *Fox* nor *Marigold* clearly adopted a dual sovereignty limitation on Double Jeopardy protections. While *Fox* contains language that "hinted at" dual sovereignty*, see, e.g., Jett v. Commonwealth*, 59 Va. 933, 943 (1867) (Rives, J., dissenting), it is best read to merely reaffirm the principle, well accepted at the time, that the Bill of Rights did not restrain the states. And while *Marigold* referenced "an offence against both the State and Federal governments," it stated that the same offence could be prosecuted by "either" rather than "both." But both decisions have been read as origins of the dual sovereignty doctrine, *see, id.* at 953-54; *id.* at 943 (Rives, J., dissenting), and the Court resolved any lingering ambiguity on that score just a few years later in *Moore*.

> it does not follow that he would be twice punished for the same offence .... Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. ... That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.

Id. at 19-20. With these words, the Court imposed a new restriction on the Double Jeopardy Clause—one that would not have been recognized by the Framers.

The *Moore* Court did not cite any authority for this conclusion other than *Fox* and *Marigold*. The Court did not analyze *Houston* or *Furlong*, the two 1820 cases stating that a prosecution by one sovereign bars a second prosecution by the other. The Court did not discuss any English cases, any of the American lower-court cases, or any treatises from either side of the Atlantic. From the reported arguments of counsel in *Moore*, it is uncertain whether counsel even brought contemporaneous English or lower-court cases to the Court's attention. The *Moore* Court thus failed to acknowledge or explain its departure from the Double Jeopardy Clause's original meaning. *See, e.g., Jett*, 59 Va. at 939 (Rives, J., dissenting) (reasoning that under *Houston v. Moore* and the law "as it seemed to stand

until" the Supreme Court's decisions in *Fox*, *Marigold*, and *Moore*, "the plea of *autrefois acquit* or *convict* would lay to either tribunal" where "*concurrent* jurisdiction remains in both courts").

4. *Fox*, *Marigold*, and especially *Moore* would form the cornerstones of the dual sovereignty doctrine. In later years, whenever the issue arose, the Court cited nothing other than these three cases and later cases that rested on them. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 550-51 (1875); *Ex parte Siebold*, 100 U.S. 371, 389-91 (1879); *Cross v. North Carolina*, 132 U.S. 131, 139 (1889); *Pettibone v. United States*, 148 U.S. 197, 209 (1893); *Crossley v. California*, 168 U.S. 640, 641 (1898); *Southern Ry. Co. v. R.R. Comm'n*, 236 U.S. 439, 445 (1915); *Gilbert v. Minnesota*, 254 U.S. 325, 330 (1920); *McKelvey v. United States*, 260 U.S. 353, 358-59 (1922); *United States v. Lanza*, 260 U.S. 377, 382-84 (1922). The original meaning of the Double Jeopardy Clause had been forgotten.

5. The Court has only once closely examined whether the dual sovereignty doctrine is consistent with the original meaning of the Double Jeopardy Clause, and it did not do so until more than a century after *Moore*.

In *Bartkus v. Illinois*, 359 U.S. 121 (1959)—a decision that preceded by a decade the Double Jeopardy Clause's application against the states in *Benton*—the Court upheld a state prosecution following a federal acquittal for the same offense. *Id.* at 122. Justice Frankfurter's opinion for the Court devoted two paragraphs to an investigation of early American sources. These paragraphs fail to justify the Court's departure from the original meaning of the Double Jeopardy Clause.

a. Justice Frankfurter refused even to consider the English cases, dismissing them as "dubious," in part because of "confused and inadequate reporting" and because "they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Id.* at 128 n.9. Neither of these arguments stands up to scrutiny. Two of the English cases are indeed reported with slight differences, but each version says that a prosecution by one sovereign bars a subsequent prosecution by another.[2] And the cases do not reflect any exercise of judicial discretion, but rather are based on a clear rule of law. Had Justice Frankfurter considered the English treatises along with the cases discussed above, he would have realized that the cross-sovereign bar declared in the cases was not "dubious," but settled and clear.

b. In addition, as Justice Black stressed in dissent 359 U.S. at 158-59, the *Bartkus* majority fundamentally misread several of the early American state cases. Justice Frankfurter cited four state cases—*Mattison v. State*, 3 Mo. 421 (1834), *State v. Brown*, 2 N.C. 100 (1794), *Hendrick v. Commonwealth*, 32 Va. 707 (1834), and *State v. Tutt*, 18 S.C.L. 44 (1831)—in support of the claim that history supported the dual sovereignty doctrine. *Bartkus*, 359 U.S. at 129-30 & nn. 10-12, 14. In fact, as we explained above, only *Hendrick* can be read to support the doctrine, and it addressed the issue in a single sentence. *Mattison* and *Brown* recognized,

---

[2] *See Beak v. Thyrwhit*, 87 Eng. Rep. 124, 125 (K.B. 1688); *Beake v. Tyrrell*, 89 Eng. Rep. 411, 411 (K.B. 1688); *Beake and Tirrell*, 90 Eng. Rep. 379, 380 (K.B. 1688); *Burrows v. Jemino*, 93 Eng. Rep. 815, 815 (Ch. 1726); *Burroughs v. Jamineau*, 25 Eng. Rep. 235, 236 (Ch. 1726).

along with many other cases, that a subsequent prosecution by a different sovereign would be barred. *Tutt* did not reach the issue at all, and was preceded by *Antonio*, the South Carolina High Court decision discussed above. *Id. at* 158-59 (Black, J., dissenting).

c. Finally, Justice Frankfurter misread *Houston v. Moore*, 18 U.S. 1 (1820). He contended that the *Houston* Court's reaffirmation of the traditional rule applied only to the unusual situation in which a state imposed criminal sanctions for violating a federal criminal law, and not to the more common circumstance in which a state criminalized a violation of its own law. *Bartkus*, 359 U.S. at 130. In fact, however, neither the *Houston* Court's statement of the traditional rule nor Justice Story's agreement with the traditional rule in his dissent included any such limitation. *Houston*, 18 U.S. at 31, 72. The Court emphasized that the state law enforced a federal statute in a different portion of the opinion, to explain concurrent jurisdiction. *Id.* at 22-24.

6. The Court's only reasoned application of dual sovereignty to the Double Jeopardy Clause rests, then, in a flawed and incomplete analysis of Founding-era sources. Since *Bartkus*, the Court has not revisited the issue. The companion opinion in *Abbate* applied *Bartkus*'s reasoning where "the order of the prosecutions was the reverse," with the federal prosecution following state convictions. 359 U.S. at 192. Subsequent opinions have simply cited these and other dual sovereignty cases decided since the Court turned away from original meaning. *See United States v. Wheeler*, 435 U.S. 313, 316-18 (1978); *Heath v. Alabama*, 474 U.S. 82 (1985); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 782 n.22

(1994); *Koon v. United States*, 518 U.S. 81, 112 (1996).

II. It Is Time for the Court to Revisit the Issue

"Although *stare decisis* is of fundamental importance to the rule of law, this Court has overruled prior decisions where, as here, the necessity and propriety of doing so has been established." *Ring v. Arizona*, 536 U.S. 584, 587 (2002). The dual sovereignty doctrine has been criticized "[s]ince its very first application," *see G.P.S. Auto.*, 66 F.3d at 496-99 (Calabresi, J., concurring), and many courts and judges have urged "the Supreme Court to reconsider the application of the dual sovereignty rule" in the Double Jeopardy context, *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999); *accord United States v. Frumento*, 563 F.2d 1083, 1092-96 (3d Cir. 1977) (Aldisert, J., dissenting); *Turley v. Wyrick*, 554 F.2d 840, 842-45 (8th Cir. 1977) (Lay, J., concurring); *United States v. Angleton*, 221 F. Supp. 2d 696, 712-13 (S.D. Tex. 2002); *United States v. Claiborne*, 92 F. Supp. 2d 503, 509-10 (E.D. Va. 2000); *State v. Hogg*, 385 A.2d 844, 846-47 (N.H. 1978); *Commonwealth v. Mills*, 286 A.2d 638, 641-42 (Pa. 1971).

The "historical precedents on which Justice Frankfurter relied in *Bartkus*" alone make the dual sovereignty doctrine "open to question," *United States v. Grimes*, 641 F.2d 96, 100-04 (3d Cir. 1981). But many courts and judges have argued that the doctrine's application to Double Jeopardy also warrants "a new look by the High Court," *G.P.S. Auto*, 66 F.3d at 499, in light of evolving constitutional principles and the erosion of the doctrine's historical and policy foundations.

1. At the time the Supreme Court decided *Bartkus*, "the Double Jeopardy Clause was considered inapplicable to the states, and the early cases applying the doctrine appeared to rely in part on this fact." *G.P.S. Auto.*, 66 F.3d at 493. Even in applying the Clause to a second federal prosecution—when there was no question of the Clause's force—the Court stressed that "[t]he Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government." *Abbate*, 359 U.S. at 194. This assumption changed with the Court's application of the Clause against the states in *Benton v. Maryland*, 395 U.S. 784 (1969). Before *Benton*, it was possible to argue that the Double Jeopardy Clause did not bar successive prosecutions so long as only one of them was conducted by the federal government. But with the Clause's application to the states, "it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which could be constitutionally impermissible if accomplished by either jurisdiction alone." *Grimes*, 641 F.2d at 102.

In other contexts, the Court has recognized that application of individual rights to the states "operated to undermine the logical foundation" for a dual sovereignty rule. *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*, 328 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. Similarly, the states and the federal government were once allowed to compel a witness to give testimony that would incriminate the witness in the other sovereign's courts. The Court

abandoned this rule in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). With *Benton*'s removal of "the practical reasoning underpinning" dual sovereignty, the Court should take the same approach to Double Jeopardy. *See Grimes*, 641 F.2d at 102.

2. Courts have noted that the dual sovereignty doctrine was developed in an era when federal crimes were few in number and did not substantially overlap with state crimes, and that neither of these conditions exists today. *Grimes*, 641 F.3d at 101; *G.P.S. Auto.*, 66 F.3d at 498 (Calabresi, J., concurring). With the growth of federal criminal laws, many offenses are now subject to both federal and state prosecution. This ever-expanding overlap in criminal jurisdiction has led lower courts and judges to challenge the adequacy of policy protections such as the Department of Justice's *Petite* policy limiting follow-on federal prosecutions, *see United States v. Wilson*, 413 F.3d 382, 394-96 (3d Cir. 2005) (citing *Petite v. United States*, 361 U.S. 529 (1960)), and the exception for "sham or cover" prosecutions by the same sovereign, *see G.P.S. Auto.*, 66 F.3d at 494, 498 (Calabresi, J., concurring). The overall effect of these trends has been to substantially weaken the protections afforded by the Double Jeopardy Clause.

3. These changes in constitutional and criminal law have altered the balance between federalism and individual rights driving decisions like *Bartkus* and *Abbate*. *Bartkus* expressed concern that the "prosecution of minor offenses by federal authorities" would undercut "the historic right and obligation of the States to maintain peace and order," 359 U.S. at 137, while *Abbate* cited the converse concern that state prosecutions would hinder "federal law

enforcement." 359 U.S. at 195. But with the convergence of federal and state prosecutorial interests and Double Jeopardy protections against them, these federalism concerns are now "completely unavailing." *Turley*, 554 F.2d at 844 (Lay, J., concurring). Given that the centuries-old protection against Double Jeopardy is "intrinsically personal," *United States v. Halper*, 490 U.S. 435, 447 (1989), the interest in allocating criminal law enforcement between federal and state power—if it ever justified the dual-sovereignty doctrine—must now give way.

This is particularly true given the historical circumstances surrounding so many of the Court's dual sovereignty cases. *Moore* involved the "politically freighted" issue of fugitive slave laws, and the Court may have been concerned with exacerbating sectional tension between the North and South. *See Grimes*, 641 F.2d at 103. *Bartkus* and *Abbate* were handed down at the same time the Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), was confronting state recalcitrance in enforcing federal desegregation decrees. And *Lanza* centered on a federal bootlegging prosecution at a time "when there was considerable fear of state attempts to nullify federal liquor laws." *G.P.S. Auto.*, 66 F.3d at 497. These special historical circumstances underscore the need to revisit the Court's departure from a core Due Process protection.

4. The fact that the dual sovereignty doctrine is now old is thus not a reason to shy away from reconsidering it. Criminal defendants today receive a weaker form of Double Jeopardy protection than they received in 1791. That is simply wrong. It has not become any less wrong with the passage of time. Some judicial mistakes may eventually come to

deserve adherence for reasons of reliance, *see Flood v. Kuhn*, 407 U.S. 258 (1972), but dual sovereignty is not one of them.

III. This Case Presents a Unique Opportunity to Reexamine the Foundations of the Dual Sovereignty Limitation on the Double Jeopardy Clause

This Court has not hesitated to restore constitutional protections that have narrowed beyond the Framers' intent. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 60 (2004) (overturning a Confrontation Clause precedent that "depart[ed] from [its] historical principles"). In such cases, the Court has stressed the importance of "provid[ing] *at a minimum* the degree of protection [the Constitution] afforded when it was adopted." *Jones*, 132 S. Ct. at 953 (Fourth Amendment). This case gives the Court an ideal opportunity to reconsider whether the Double Jeopardy bar protects defendants subjected to state and federal prosecutions for the same crime.

This case raises the issue as clearly and directly as it could possibly be presented. The trial court dismissed the case against Petitioner on Double Jeopardy grounds. Dual sovereignty was the sole basis on which Missouri appealed that dismissal, and it was the sole ground on which the Missouri Court of Appeals reversed. Nor is there any doubt that the doctrine's requirements are otherwise met. The state charge and the federal charge required the proof of identical elements: that petitioner possessed a firearm and that he had been convicted of a felony. Missouri has never argued otherwise. In this respect, the case is unusual. Defendants are unlikely to challenge the doctrine because lower courts lack the power to overrule this Court's decisions, and a

challenge to such a "settled" doctrine, *cf. Wheeler*, 435 U.S. at 332, requires intensive review of precedent and the doctrine's underpinnings. Because this case presents a rare, preserved challenge to the dual sovereignty doctrine—one that actually prevailed in the trial court—this Court should use it to undertake a first-principles review.

This Court has recently revisited the scope of the Double Jeopardy Clause in other respects, *see Evans v. Michigan*, 133 S. Ct. 1069, 1073 (2013) (holding that Double Jeopardy attached to an erroneous directed acquittal based on a misunderstanding of the offense elements); *Smith*, 543 U.S. at 474-75, but past challenges to the dual sovereignty doctrine have not been backed by the historical evidence and analysis necessary to address it fully. *See, e.g.*, Petition for Writ of Certiorari at 24-30, *Koon v. United States*, 518 U.S. 81 (1996); Brief for Petitioner at 39-45, *Bartkus v. Illinois*, 359 U.S. 121 (1959); Brief for Petitioners at 7-11, *Abbate v. United States*, 359 U.S. 187 (1959). Were the Court to explore the English and early American sources thoroughly, it would conclude that dual sovereignty precedents "depart[ed] from the historical principles identified," and would "revise [its] doctrine to reflect more accurately the original understanding of the [Clause]." *Cf. Crawford*, 541 U.S. at 42-50, 60 (examining Nineteenth-century treatises and decisions). The changes in constitutional and criminal law discussed above only reinforce the need to return to the original understanding of the Double Jeopardy Clause and abandon the dual sovereignty limitation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095

JESSICA M. HATHAWAY
OFFICE OF THE STATE PUBLIC DEFENDER
1010 Market Street #1100
St. Louis, MO 63101

FRED A. ROWLEY, JR.
Counsel of Record
DANIEL B. LEVIN
RAY SEILIE
MUNGER TOLLES & OLSON LLP
355 S. Grand Ave., 35th floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

APPENDIX