No. 17-5410

IN THE
Supreme Court of the United States

WILLIE TYLER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS 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. With its affiliates, it 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 laws. It frequently appears as an *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case because the separate sovereigns doctrine erodes the fundamental protection against successive prosecutions that is enshrined in the Double Jeopardy Clause of the Fifth Amendment and made applicable to the States through the Fourteenth Amendment.

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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 *amicus* and its 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.

SUMMARY OF THE ARGUMENT

Two Justices of this Court recently stated that the "separate sovereigns" exception to the Double Jeopardy Clause "bears fresh examination in an appropriate case." *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring, joined by Thomas, J.). This call to action follows decades of "judicial and scholarly criticism" of the doctrine. *See United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).[2]

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[2] Published critiques of the separate sovereigns doctrine date back to 1932 and have continued into this century. *See, 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. 477 (1979); Note, *Double Jeopardy and Federal Prosecution After State 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. & 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*

As explained below, the separate sovereigns exception to the Double Jeopardy Clause was originally supported by two pillars that no longer exist today. *First*, the separate sovereigns doctrine was supported by jurisprudence predating the incorporation of the Bill of Rights against the States through the Fourteenth Amendment. Before the Bill of Rights applied to the States, this Court embraced the separate sovereigns doctrine in a variety of criminal contexts. The doctrine applied to 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 (1960), and to self-incrimination, *see Malloy v. Hogan*, 378 U.S. 1, 11-13 (1964); *Murphy v. Waterfront Comm'n*, 378 U.S. 52

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 Sovereign Doctrine*, 41 UCLA L. Rev. 693 (1993); 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, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 Fordham Urb. L.J. 353 (1996-1997); David Bryan Owsley, Note, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 Wash. U.L.Q. 765, 767 (2003).

(1964). However, the Court has since recognized that the Bill of Rights protects individuals against State action. That recognition has "operated to undermine the logical foundation" for the separate sovereigns rule. *Elkins v. United States*, 364 U.S. 206, 214 (1960). As the Court explained, the incorporation of the Bill of Rights against the States eviscerated any "continuing legal vitality to, or historical justification for, the rule" that two sovereigns may collude to accomplish what a single sovereign could not do alone in the criminal context. *Murphy*, 378 U.S. at 77.

Second, the judicial adoption of the separate sovereigns doctrine was originally supported by practical considerations stemming from the specific, limited nature of federal criminal law in the nineteenth and early twentieth centuries. *See United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring). Moreover, at the time the exception was adopted, there was genuine concern that the States would strategically exercise their prosecutorial authority to nullify federal laws. Now, however, the federal criminal code widely covers areas of traditional state concern. And federal and state officials often work as partners in criminal prosecutions, not as competitive or independent entities. This practical reality further undermines the rationale for the separate sovereigns doctrine.

This case presents a sound vehicle for the Court to extend the logic of incorporation to the Double Jeopardy Clause's protection against successive prosecutions and abolish a doctrine that has long outlived its rationales.

ARGUMENT

I. THE DOCTRINAL FOUNDATION FOR THE SEPARATE SOVEREIGNS EXCEPTION HAS ERODED

Despite the demands of *stare decisis*, this Court has held that precedent should be reconsidered when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992). After this Court incorporated the Double Jeopardy Clause against the States, the already-thin doctrinal support for the separate sovereigns exception eroded, making the exception "no more than a remnant of abandoned doctrine." *Id.* The exception should thus be reconsidered and overruled.

The separate sovereigns exception was initially articulated in several decisions between 1847 and 1852, before the adoption of the Fourteenth Amendment and the incorporation against the States of the protections of the Bill of Rights. In two cases, *Fox v. Ohio*, 46 U.S. 410, 434-35 (1847), and *United States v. Marigold*, 50 U.S. 560, 569-70 (1850), the Court indicated that federal and state governments could bring separate prosecutions for the same offense. Notably, *Fox* relied on *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights did not bind the States. *Fox*, 46 U.S. at 434-35. The Court later cited *Fox* and *Marigold* in adopting an early version of the separate sovereign exception. *See Moore v. Illinois*, 55 U.S. 13, 20 (1852). All of those rulings preceded

the adoption of the Fourteenth Amendment and its incorporation against the States.

After the adoption of the Fourteenth Amendment, the Court again addressed the separate sovereigns doctrine in *United States v. Lanza*, 260 U.S. 377 (1922). Relying on *Moore*, the Court held that a federal prosecution under the National Prohibition Act was not barred by a prior state conviction for violation of similar state laws. *Id.* at 378-79. The Court next addressed the separate sovereigns doctrine several decades later, when it held that there is no Fourteenth Amendment bar to a state prosecution following a federal conviction. *Bartkus v. Illinois*, 359 U.S. 121, 136-38 (1959). That same Term, the Court similarly held that there was no bar to a federal prosecution following a state acquittal. *Abbate v. United States*, 359 U.S. 187, 196 (1959). At the time that *Lanza, Bartkus*, and *Abbate* were decided, however, the Court had not yet incorporated the Double Jeopardy Clause against the States. *See Palko v. Connecticut*, 302 U. S. 319, 328 (1937) (rejecting incorporation of the Double Jeopardy Clause).

Even assuming those cases made doctrinal sense pre-incorporation, *but see* Brief of *Amici Curiae* Law Professors in Support of Petitioners at 3-18, they lack any doctrinal support post-incorporation. After *Bartkus* and *Abbate*, the Court incorporated the Double Jeopardy Clause and applied it to the States through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969). As a result, the separate sovereigns exception is no longer consistent with this Court's jurisprudence. Indeed, in other contexts this Court has recognized that applying the

protections in the Bill of Rights to the States "undermine[s] the logical foundation" for the separate sovereigns exception. *Elkins v. United States*, 364 U.S. 206, 214 (1960).

In *Elkins*, for example, the Court held that evidence obtained by state officers in searches and seizures that violated the Fourth Amendment could not be used by federal prosecutors in a federal case. *Id.* at 213-14. The Court reasoned that the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested – that unreasonable state searches did not violate the Federal Constitution – . . . disappeared in [*Wolf v. Colorado*, 338 U.S. 25 (1949)]," when the court incorporated the Fourth Amendment against the States. *Id.* at 213. The Court, echoing Justice Black's dissent in *Bartkus*, added, "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215; *see also Bartkus*, 359 U.S. at 155 (Black, J. dissenting) ("If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone.").

Four years later, in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court eliminated the separate sovereigns exception to self-incrimination under the Fifth Amendment. *Malloy* held that the Fifth Amendment's privilege against self-incrimination applied to the States through the Fourteenth

Amendment. *Malloy*, 378 U.S. at 6. *Murphy* explained that the decision in *Malloy* "necessitates a reconsideration" of the separate sovereigns doctrine. *Murphy*, 378 U.S. at 57. *Murphy* thus held that one jurisdiction could not compel a witness to give testimony that could be used in another jurisdiction. *Id.* The policies behind the privilege, the Court reasoned, would be frustrated by the separate sovereigns exception, which allowed a defendant to be "'whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." *Id.* at 55 (quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (Black, J. dissenting)).

Five years after *Malloy* and *Murphy* were decided, the Court recognized that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The Court therefore held that the Clause "should apply to the States through the Fourteenth Amendment." *Id.* But in contrast to the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment privilege against self-incrimination, the Court did not apply *Benton* to abolish the separate sovereigns exception to double jeopardy.

To the contrary, although the Court has elsewhere recognized that application of the Bill of Rights to the States "operated to undermine the logical foundation" for the separate sovereigns exception, *Elkins*, 364 U.S. at 214, it has continued to apply the separate sovereigns exception in double jeopardy cases, *see, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 92-93

(1985); *United States v. Lara*, 541 U.S. 193, 199 (2004). Unlike the Court's decision in *Murphy*, which acknowledged the contradiction between incorporation and the separate sovereigns exception, *Murphy,* 378 U.S. at 57, the Court never "explained – or even focused on – this anomaly" in *Heath* or *Lara*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King,* 95 Colum. L. Rev. 1, 15 (1995).

Recognizing the tension, some courts have suggested that this Court reconsider the exception and its "rigid doctrine of dual sovereignty." *United. States v. Grimes*, 641 F.2d 96, 101-02 (3d Cir. 1981).[3] The *Grimes* court explained that "an important predicate of the *Bartkus* opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitu-

[3] *See also United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (suggesting "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"); *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."); *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.").

tional developments." *Id.* at 101. Commentators have likewise argued that the time has come for the Court to reconsider the separate sovereign exception to the Double Jeopardy Clause in light of current constitutional principles.[4]

Those criticisms recognize that the continued application of the separate sovereigns exception is inconsistent with the doctrinal developments following the incorporation of the Double Jeopardy Clause against the States. This Court should take the opportunity presented by Mr. Tyler's petition to reconsider the separate sovereigns exception in light of the evolution of constitutional law.

II. THE PRACTICAL FOUNDATION OF THE SEPARATE SOVEREIGNS DOCTRINE HAS ALSO BEEN ERODED

In determining whether to overrule constitutional precedent, the Court also considers "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992). The separate sovereign exception to the Double Jeopardy Clause relies on the premise that the state and federal criminal systems operate in separate spheres and vindicate disparate interests. The doctrine was

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[4] *See, e.g.,* 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); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 2-3 (1995).

established at a time when federal criminal prosecutions were rare. But that is no longer true. Federal criminal law has expanded dramatically in recent decades and now encompasses large swaths of local conduct. Not coincidentally, cooperation between state and federal law enforcement has likewise increased in recent years. As a result, the separate sovereign exception has been robbed of its original practical justification and should be overruled.

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

In the eighteenth and nineteenth centuries, the federal government's role in criminal law was minimal. After all, "[t]he Constitution itself gives Congress jurisdiction over only a few crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations." Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. Law. & Pol. 1, 6 (1997). The Founders did not envision a wide-ranging "national police power." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1138 (1995). Thus, "[f]or years following the adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct." ABA Crim. Just. Sec., Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 5 (1998).

Indeed, "early federal criminal laws addressed only issues of special federal interest." Brickey, *supra*,

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

Congress began enacting criminal laws "extending beyond direct federal interests" only after the Civil War. *Id.* at 1140. During Reconstruction, the federal government was given jurisdiction over criminal laws that state courts were unwilling to enforce. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27. Shortly thereafter, Congress enacted laws prohibiting mail fraud and the mailing of obscene materials. Brickey, *supra*, 1140. In the early twentieth century, Congress began to rely increasingly on its interstate commerce power in enacting criminal laws. This led to prohibitions such as "the Mann Act (prohibiting transporting a woman across state lines for illicit purposes), the Dyer Act (prohibiting transporting a stolen motor vehicle across state lines), the Volstead Act (just plain Prohibition), and statutes forbidding interstate transportation of lottery tickets, interstate transportation of obscene literature, and selling liquor through the mail." *Id.* at 1142.

Despite this steady increase in federal criminal jurisdiction, the criminal code expanded exponentially only in the late 1960's, when Congress began passing sprawling omnibus crime legislation. These massive new Acts included "the Omnibus Crime Control and Safe Streets Act of 1968, the Organized

Crime Control Act of 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, the Comprehensive Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994." *Id.* at 1145. These laws increasingly inserted federal law enforcement into what had previously been considered local crime.

Today, the Federal Criminal Code reflects an extraordinary departure from early American practice. A 2010 publication estimated that federal law contains 4,450 criminal provisions. *See* Brian Walsh & Tiffany M. Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law 6 (2010). Those provisions cover a surprising variety of conduct, including the following actual federal crimes: "reproduc[ing] the image of 'Woodsy Owl' and 'Smokey the Bear'," "transport[ing] false teeth into a state without the permission of a local dentist," "transport[ing] water hyacinths in interstate commerce," "issu[ing] a check for a sum less than one dollar not intended to circulate as currency," "impersonat[ing] a 4-H club member," "issu[ing] a false weather report on the representation that it is an official weather bureau forecast," and "issu[ing] a false crop report." Roger Miner, *Crime and Punishment in the Federal Courts*, 43 Syracuse L. Rev. 681, 681 (1992). Those are in addition, of course, to the government's broad authority to prosecute mail fraud, *see* 18 U.S.C. § 1341, wire fraud, *see id.* § 1343, robbery or extortion, *see id.* § 1951, and other more commonplace crimes.

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

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

so far, again reining in prosecutorial ambition. *Id.* at 1088-89.

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

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

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

In *United States v. Lanza*, 260 U.S. 337 (1922), a prohibition-era case, the Court expressed concern that an absolute bar on successive prosecutions might prevent the federal government from protecting unique federal interests. *Id.* at 385. At the time, however, the federal criminal apparatus was still miniscule. For example, in 1922, the federal government had only begun to establish its own prisons.

The first federal prison opened in 1895, and two more were added shortly thereafter. Brickey, *supra*, 1147. "Those three facilities," which housed only a few thousand convicts, comprised "the sum total of the federal prison 'system' until 1925" – after *Lanza* was decided. *Id.* Today, by contrast, 122 prison facilities house over 187,000 federal inmates. *See* Federal Bureau of Prisons, *Our Locations*, https://www.bop.gov/locations/ (last visited Aug. 22, 2017). Those statistics underscore the exponential growth of the federal criminal system.

The next two separate sovereign cases – *Bartkus* and *Abbate* – were also decided well before the recent expansion of federal criminal law. The factual landscape was thus quite different. At the time, there was no concerted federal effort to combat organized crime, small drug offenses, or domestic violence. *See*, Brickey, *supra*, 1145. Today, those cases are a staple of every federal district court's docket – duplicating the efforts of many state courts.

As Attorney General Meese observed, "In the previous era of separate and distinct roles for the federal and state governments in law enforcement, the dual sovereignty exception to double jeopardy protection was unfortunate but tolerable. However, in an era of the federalization of crime, there is little difference between the federal government and state governments in law enforcement because the federal government has duplicated virtually every major state crime." Meese, *supra*, 22. What was once tolerable is now intolerable. The Court should reevaluate the holdings of *Lanza*, *Bartkus*, and *Abbate* based on this drastic change in federal practice.

B. Federal and State Law Enforcement Often Work Jointly, Not as Separate Sovereigns

In *Lanza*, the Court imagined a scenario in which the state and federal governments had such separate interests that a state prosecutor might attempt to subvert federal criminal law. 260 U.S. at 385. That is not the reality faced by criminal defendants today. Rather, "[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, 499 (2d Cir. 1995) (Calabresi, J., concurring). The increasing state-federal prosecutorial cooperation further undermines the factual underpinnings of the separate sovereign doctrine.

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

Courts have commented with increasing frequency on the prevalence of collaborative investigations and prosecutions. The Second Circuit has observed, "As the challenge facing the nation's law enforcement

authorities has grown in sophistication and complexity, cooperation between federal and local agencies has become increasingly important and increasingly commonplace." *United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990). The Seventh Circuit has also observed instances of "commendable cooperation between state and federal law enforcement officials." *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989); *see also United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979) ("cooperation between state and federal authorities is a welcome innovation"); *United States v. Searp*, 586 F.2d 1117, 1121 (6th Cir. 1978) ("In this case, the investigation into the bank robberies, which were simultaneously state and federal crimes, was a joint undertaking between the Kentucky police and the FBI from the beginning."). State courts have noted a similar increase in collaboration. *See, e.g.*, *State v. Fletcher*, 240 N.E.2d 905, 911 (Ohio Ct. Com. Pl. Cuyahoga Cty. 1963) ("The cases are replete with examples of the entirely commendable practice of hand-in-glove co-operative efforts by state and federal authorities to investigate crime, gather evidence, and prosecute criminals."), *aff'd*, 259 N.E.2d 146 (Ohio Ct. App. 1970), rev'd, 271 N.E.2d 567 (Ohio 1971).

These collaborations are, in part, the result of an increasing number of federal-state joint task forces. For example, the federal Drug Enforcement Administration ("DEA") manages 271 state and local task forces, "staffed by over 2,200 DEA special agents and over 2,500 state and local officers." DEA, *Drug Enforcement Administration Programs: State & Local Task Forces*, https://www.dea.gov/ops/taskforces.shtml (last visited Aug. 22, 2017). There are also 104

Joint Terrorism Task Forces, which "include approximately 4,000 members nationwide . . . hailing from over 500 state and local agencies and 55 federal agencies." Federal Bureau of Investigation, *Joint Terrorism Task Forces*, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (last visited Aug. 22, 2017). U.S. Immigration and Customs Enforcement also runs a massive anti-money laundering task force that "consists of more than 260 members from more than 55 state and local law enforcement agencies." U.S. Immigration and Customs Enforcement, *Money Laundering*, https://www.ice.gov/money-laundering (last visited Aug. 22, 2017).

These joint enterprises are authorized by federal legislation and are often embodied in formal state-federal agreements. *See, e.g.*, 18 U.S.C. § 2518(5) (expressly allowing federal agents to enlist the help of non-federal personnel in conducting federally authorized electronic surveillance operations); 21 U.S.C. § 873(a) (authorizing the Attorney General to share information regarding narcotics operations, cooperate in state prosecutions, and enter into agreements with state and local agencies "to provide for cooperative enforcement and regulatory activities"). Indeed, the task force system "'encourages, where appropriate, the cross designation of Federal attorneys and state and local attorneys; the deputation of state and local police officers as Special Deputy U.S. Marshalls; the payment of certain overtime, travel, and per diem costs for state and local officials engaged in Task Force work; and the signing of agreements to set forth the nature of the understanding between the Task Forces and the state and local jurisdictions.'" Braun, *supra*, at 68 n.345 (quot-

ing 11 DRUG ENFORCEMENT 10 (1984)); *see also* Gabriel J. Chin, *Controlling the Criminal Justice System: Colorado as a Case Study*, 94 Denver L. Rev. 497, 506 (2017) ("Federal law also provides that [state] attorneys who are not federal prosecutors may be made Special Assistant U.S. Attorneys to participate in or pursue federal cases.").[5]

The current degree of cooperation between federal and state law enforcement officials to enforce an increasingly overlapping set of criminal laws should "cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the

[5] To the extent the Court is concerned that federal law enforcement's interests may be unprotected without the separate sovereigns exception (in the rare case in which federal and state interests diverge), there are other ways to ensure the vindication of uniquely federal concerns. Congress, of course, could always preempt state legislation in certain spheres of criminal law. *See, e.g.*, Note, *Double Jeopardy and Federal Prosecution after State Jury Acquittal*, 80 Mich. L. Rev. 1073, 1077 (1982). Scholars have also suggested that "selective" preemption might protect federal interests by allowing federal prosecutors to enjoin (or perhaps remove) specific state-level cases that tread on federal jurisdiction. *See* Ophelia S. Camina, Note, *Selective Preemption: A Preferential Solution to the* Bartkus-Abbate *Rule in Successive Federal-State Prosecutions*, 57 Notre Dame L. Rev. 340, 360-62 (1982). Still others have argued that consecutive civil rights prosecutions aimed at vindicating federal constitutional interests should be permitted, whether the separate sovereigns exception exists or not. *See, e.g.*, Paul L. Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception*,*"* 41 UCLA L. Rev. 649, 659-71 (1994). In those cases, some have argued, other constitutional interests would counterbalance double jeopardy concerns. *Id.* at 670. And, of course, in those same civil rights cases, subsequent civil trials may also be possible under federal *civil* statutes. *Id.* at 673-74.

dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499 (Calabresi, J., concurring). Other commentators have suggested that, "in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed." Amar & Marcus, *supra*, 48.

This Court has observed that the protection offered by the Double Jeopardy Clause "is intrinsically personal." *Halper v. United States*, 490 U.S. 435, 447 (1989). And "from the standpoint of the individual who is being prosecuted, . . . it hurts no less for two 'Sovereigns' to inflict" the pain of successive prosecutions "than for one." *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting). Whether a defendant is twice prosecuted by the State, the federal government, or an amalgamated state-federal task force,

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

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

The time has come to cast aside the illusion of two separate sovereigns pursuing two different agendas when prosecuting the same crime. The separate sovereign exception to the Double Jeopardy Clause should be overruled.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 21, 2017