No. 16-636

IN THE

Supreme Court of the United States

CALVIN GARY WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Ninth District at Beaumont

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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 scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Amici are concerned that all constitutional provisions, including the Double Jeopardy Clause, be applied according to their text and history.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari here 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 already been prosecuted for the same offense in federal court.

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[1] Counsel for all parties received timely notice of *amici's* intention to file this brief; all parties have consented to its filing. Further, no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission.

As the Petition demonstrates, such successive prosecutions plainly violate the Clause, which was adopted to preserve the fundamental common-law protection against successive prosecutions for a single offense, even when brought by different sovereigns. *Amici* submit this brief to underscore that the dual sovereignty exception to the Double Jeopardy Clause is inconsistent with the text, structure, and history of the Constitution, as well as 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 viewed its prohibition on successive prosecutions as a fundamental protection of individual liberty and an important safeguard against government harassment and overreach. Indeed, by the time the Bill of Rights was drafted, the protection against double jeopardy was already a well-established part of the English common law, one that the Framers thought would help provide a "barrier[] . . . against the approaches of arbitrary power." 3 Joseph Story, Commentaries on the Constitution of the United States § 1773.

In adopting the Double Jeopardy Clause to protect against "the approaches of arbitrary power," the Framers were acting out of a more general concern about how to protect individual liberty against government overreach, a concern that they addressed, in part, through the adoption of a federalist structure of government. As James Madison explained, the existence of both the federal government and state governments would provide "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51,* at 291 (Madison) (Clinton Rossiter ed., 1961).

The dual-sovereignty exception, by allowing two governments to do together what neither could do alone, undermines the fundamental protection of individual liberty that both the Double Jeopardy Clause and our federalist structure were supposed to provide. After all, when a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. Similarly, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of whether the successive prosecutions are brought by the same sovereign or different ones.

In addition, concerns about government overreach and harassment are particularly important today for two reasons. First, the scope of the federal criminal law is now far more expansive than it once was. *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"). Second, there is now significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011); Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997). These two factors, taken together, make it particularly easy for the federal and state governments to engage in the repeated harassment for a single offense that the Double Jeopardy Clause was adopted to prevent. *Cf.* Pet. at 30-32 (noting the "tight federal-state collaboration" in this case).

Finally, significant developments in constitutional law that have occurred since this Court last con-

sidered the dual-sovereignty exception make this Court's review all the more important. *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"). 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. *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). 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 against state infringement of the personal rights guaranteed by the Bill of Rights, including the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784 (1969). As this Court has recognized in other contexts, the "incorporation" of the Bill of Rights undermines whatever basis may once have existed for this doctrine. Indeed, the Fourteenth Amendment's protection of individual rights against state action makes clear that successive prosecutions by different sovereigns violate the Double Jeopardy Clause.

This Court has not meaningfully revisited the validity of the dual-sovereignty exception to the Double Jeopardy Clause since that Clause was incorporated. It should do so now. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The [validity of the dual-sovereignty exception] warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.").

Amici urge the Court to grant the Petition, revisit

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

I. THE DUAL-SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE IS AT ODDS WITH THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTION

A. Both the Double Jeopardy Clause and Our Federalist Structure Were Adopted To Protect Individual Liberty

The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall . . . 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 inserted this critical safeguard of liberty into the Constitution to ensure that no one could be 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); *see Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct.").

The Double Jeopardy Clause has its origins in the English common law, which not only "prohibited a second punishment for the same offence, but . . . 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 acquit-

ted or convicted." *Ex parte Lange*, 85 U.S. 163, 169 (1873).[2] To the Framers, the Double Jeopardy Clause was "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." 3 Story, *supra*, § 1773.

In his famous *Commentaries on the Laws of England*, 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 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, 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 On The Laws of England* *335; *cf. Benton,* 395 U.S. at 795 ("[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.

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[2] The roots of the Double Jeopardy principle may go back even further. *See Benton,* 395 U.S. at 795 ("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.").

Drawing on Blackstone, the Framers inscribed the double-jeopardy principle into the Constitution. In so doing, they made clear that the idea that a person could be twice "put in jeopardy of life or limb" for the same offense was anathema. For example, in discussing an early version of the Clause proposed by James Madison, Rep. Roger Sherman observed that "the courts of justice would never think of trying and punishing twice for the same offence." 1 Annals of Cong. 782 (1789).[3] Likewise, Rep. Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted" and "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.*

Thus, to the Framers, the prohibition on double jeopardy was fundamental—and essential to protecting liberty from government overreach. *See* 3 Story, *supra*, § 1774 (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 precipitancy"); *cf. Bartkus*, 359 U.S. at 153-54 (Black, J., dissenting) (noting that the double-jeopardy principle "has been recognized here as fundamental again and again").[4]

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[3] 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). This proposal was amended in the Senate; in its final form, the 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).

[4] The Clause also provides an important structural protection of the right to trial by jury, a right Madison noted was "as

The Framers' adoption of the Double Jeopardy Clause to protect against "the approaches of arbitrary power," 3 Story, *supra*, § 1773, was consistent with their more general concern about how to "enhance[]" individuals' protection from government overreach, *see Bond v. United States*, 564 U.S. 211, 221 (2011) (quotation marks and citation omitted), a concern that they addressed, in part, through the adoption of a federalist structure. *See, e.g.*, *id.* at 220-21 ("The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999))); *New York v. United States*, 505 U.S. 144, 181 (1992) ("'federalism secures to citizens the liberties that derive from the diffusion of sovereign power'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))). As Madison explained, federalism provides "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51, supra,* at 291 (Madison); *see id. No. 28*, at 149 (Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress.").

The dual-sovereignty exception, by allowing two governments to do jointly what neither can do alone, undermines the fundamental protection of individual

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essential to secure the liberty of the people as any one of the pre-existent rights of nature." 1 Annals of Cong. 454 (1789).

liberty that both the Double Jeopardy Clause and our federalist structure were supposed to provide.

B. The Dual-Sovereignty Exception to the Double Jeopardy Clause Undermines the Protection of Individual Liberty that that Clause and Our Federalist Structure Were Designed To Provide

As this Court has recognized:

> The underlying idea [behind the Double Jeopardy Clause], 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; *see* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96 (1998) (Double Jeopardy Clause "safeguards . . . the individual defendant's interest in avoiding vexation," whether he was first acquitted or convicted).

When a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. Similarly, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of whether the successive prosecutions are brought by the same sovereign or different ones. As Justice Black once put it, "If double punishment is what is

feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *See Bartkus*, 359 U.S. at 155 (Black, J., dissenting); *see also id.* ("The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the 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.").

Indeed, the dual-sovereignty exception to the Double Jeopardy Clause turns federalism principles on their head, permitting the two levels of government that the Framers believed would enhance individual liberty to do just the opposite. This perversion of federalist principles is particularly troubling in an age of expansive federal criminal law and significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Meese III, *supra*, at 3 ("[F]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction."); Ryan, *supra*, at 31-32. After all, 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 overreach 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)); Meese III, *supra*, at 22 ("The federalization of crime has profound implications for double jeopardy protec-

tions for the simple reason that it creates more opportunities for successive prosecutions.").

II. THE DUAL-SOVEREIGNTY DOCTRINE IS INCONSISTENT WITH THE INCORPORATION OF THE DOUBLE JEOPARDY CLAUSE AGAINST THE STATES

As just noted, the dual-sovereignty doctrine is inconsistent with the text, structure, and history of the Constitution. *See also* Pet. 10-13 ("The original meaning of the Double Jeopardy Clause confirms the illegitimacy of the separate sovereigns exceptions."). Moreover, whatever sense it might have made before the Double Jeopardy Clause was incorporated against the States, it plainly makes no sense now.

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 could prosecute an individual as

many times as it wanted for the same offense, or could prosecute him after he had already been prosecuted by the federal government, it was not a stretch to think that the federal government could prosecute him after he had been prosecuted by the state. *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, then, 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 the Court last meaningfully considered the dual-sovereignty doctrine, the Double Jeopardy Clause had not yet been incorporated—as the Court noted in concluding that the Clause posed no bar to successive prosecutions by federal and state governments. *See Bartkus*, 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*, 359 U.S. at 194 ("[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]

[5] The Court's adherence to the dual-sovereignty doctrine then may also have been motivated by the practical concern that prohibiting successive punishments "must necessarily"

In the years following *Bartkus* and *Abbate*, this Court's view of federalism underwent a radical transformation, as the Court recognized that most 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").

In the years following *Bartkus* and *Abbate*, this Court also began to recognize that incorporating the

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"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 United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (observing that the Court's embrace of dual sovereignty 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 ("[I]t is hard to justify limiting the reach of the Bill of Rights, adopted as it was to protect individual 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.").

Bill of Rights' protections against the States had important implications for the viability of the dual-sovereignty doctrine—which 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, the Court reexamined the doctrine that permitted federal prosecutors to use evidence 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 government or state governments: "[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*, the Court again recognized that repudiation of the dual-sovereignty doctrine followed naturally from the incorporation of the Bill of Rights 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. 378 U.S. 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, this 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 Constitution's text, structure, and history all make clear: double-jeopardy principles safeguard an individual right that protects against successive prosecutions, regardless of the sovereigns bringing those prosecutions.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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