No. 15-537

IN THE
Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTINEZ-MALDONADO,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, under *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

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BRIEF OF CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of a group of criminal law professors in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

This case presents an important question of criminal law and procedure: Whether a jury's acquittal retains its preclusive effect under the Double Jeopardy Clause where the acquittal was logically inconsistent with the same jury's vacated, unconstitutional conviction on another count. The undersigned *amici* are professors of criminal law and procedure. While they have varied views on many topics, all of them have a particular interest in ensuring the continued vitality and coherence of the Constitution's protections for the accused, including the Double Jeopardy Clause of the Fifth Amendment. As scholars in the field, *amici* have a unique perspective on both the legal rules and underlying principles that govern in this area.

A full list of *amici* is attached as an appendix to this brief.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed concurrently herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutional prohibition against double jeopardy reflects the "universal and humane principle of criminal law that no man shall be brought into danger more than once for the same offense." *Ball v. United States*, 163 U.S. 662, 668 (1896) (quotation omitted). The rule is "an indispensable requirement of a civilized criminal procedure," *Green v. United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting), that is "fundamental" to "our constitutional heritage," *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Its deep historical roots can be traced to the ancient Greeks and Romans. And it serves several important, related functions: protecting defendants from the ordeal of multiple trials, minimizing the attendant risk that the government will eventually secure a conviction against an innocent individual, and preserving the finality of judgments.

Of particular significance here, the Court held in *Ashe v. Swenson*, 397 U.S. 436 (1970), that the Double Jeopardy Clause embodies the longstanding principle that a jury's verdict of "not guilty" precludes retrial not only on the same charge, but on any issue necessarily decided in the defendant's favor by the acquittal—i.e., that the Double Jeopardy Clause includes a collateral estoppel prong. The Court reaffirmed that principle in *Yeager v. United States*, 557 U.S. 110 (2009), and concluded that when a jury acquits on one count but hangs on another, the acquittal precludes retrial on the hung count if, by acquitting, the jury necessarily decided facts essential to the hung count in the defendant's favor—

regardless of whether the jury's failure to reach a verdict is seemingly inconsistent with its acquittal.

Those holdings dictate the result in this case. Petitioners have been acquitted of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits federal-program bribery, yet the government seeks to re-prosecute them for the underlying § 666 offense now that their conviction on that count has been vacated because of a legally erroneous (and non-harmless) jury instruction. But just like the hung counts at issue in *Yeager*, petitioners' vacated convictions have no legal effect, and thus can carry no weight in the collateral estoppel analysis. The only remaining verdicts are the acquittals, and those acquittals accordingly must be afforded their full preclusive effect.

Modern developments in criminal law and procedure underscore the need for rigorous enforcement of the Double Jeopardy Clause's protections, including its collateral estoppel component. The federal criminal code has undergone a dramatic expansion over the last several decades, and prosecutors now commonly charge defendants with multiple overlapping felonies based on a single course of conduct. Such prosecutions can easily produce inconsistent verdicts, as they did in this case. By declaring that such inconsistency on its own eliminates the double jeopardy protections that would otherwise follow from an acquittal—even if the jury's convictions are later declared legally void—the decision below encourages prosecutors to bring duplicative charges. It also reduces the government's incentives to avoid legal error in the first place by guaranteeing the government a second chance so long as it is able to ob-

tain at least one conviction in an initial trial, no matter how flawed.

The rule adopted by the First Circuit strips acquittals of the special status they have long been afforded under the Double Jeopardy Clause, and it substantially dilutes the Clause's protection against "unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10. The decision below should be reversed.

ARGUMENT

I. A VACATED, UNCONSTITUTIONAL CONVICTION DOES NOT NULLIFY THE PRECLUSIVE EFFECT OF A UNANIMOUS VERDICT OF "NOT GUILTY"

A. The Double Jeopardy Clause Embodies Deep-Rooted Principles That Protect Defendants From Serial Prosecutions

1. a. The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall … be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Constitution's protection against double jeopardy is the "most ancient" procedural protection in the Bill of Rights, with roots tracing back more than two thousand years. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 81 (1978). Indeed, "[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

In 355 B.C., Athenian statesman Demosthenes said that the law "forbid[s] the same man to be tried

twice on the same issue." Demosthenes, *Against Leptines*, in Demosthenes pt. 20, § 147 (C.A. Vince & J.H. Vince trans., Harvard Univ. Press 1926). The Roman law encompassed the maxim *nemo debet bis puniri pro uno delicto*, meaning that no person should be punished twice for the same offense, a more specific version of the principle *nemo debet bis vexari pro una et eadem causa*, which translates as "[n]o one should be twice troubled for the same cause." Black's Law Dictionary 1933 (10th ed. 2014). The Digest of Justinian explains that "[t]he governor must not allow a man to be charged with the same offenses of which he has been acquitted." 4 The Digest of Justinian bk. 48, pt. 2, § 7.2 (Ulpian, Duties of Proconsul 7), at 797 (Theodor Mommsen et al. eds., Univ. of Pa. Press 1985). Ancient Jewish law also contains several references to the concept of double jeopardy, including in the Babylonian Talmud, a collection of teachings of Rabbinic Judaism compiled around 450 to 500 A.D. *See* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 Wm. & Mary Bill Rts. J. 193, 197 (2005). The principle that no person may be tried multiple times for the same offense survived through the Middle Ages as part of the canon law, and into the Renaissance. *See Bartkus*, 359 U.S. at 152 (Black, J., dissenting) (discussing the writings of St. Jerome); Rudstein, *supra*, at 200-02 (discussing the Gregorian Decretals and the King James Bible).

By the thirteenth century, the prohibition on double jeopardy had become firmly established in English common law. A defendant could use one of four "pleas in bar"—*autrefois acquit*, *autrefois con-*

vict, *autrefois attaint*, and "former pardon"—to argue, respectively, that he had already been acquitted, convicted, attainted, or pardoned of the offense charged. Donald Eric Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L.J. 799, 801 (1988). The plea of *autrefois acquit*, Blackstone concluded, "is grounded on this univer[s]al maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offen[s]e." 4 William Blackstone, Commentaries 326, 329 (1769). Although Blackstone's reference to the "same offense" today might appear to mean the same *statutory* offense, "Blackstone made quite clear that the focus was on blameworthy acts and not on offense descriptions." George C. Thomas III, Double Jeopardy: The History, The Law 84 (1998).

b. Double jeopardy principles were well understood by the time of the Founding. In 1641, Massachusetts included an express guarantee against double jeopardy in its Body of Liberties, which formally extended the protection to non-capital offenses and served as a model for many other colonies and, ultimately, for the Bill of Rights. *See United States v. Halper*, 490 U.S. 435, 440 (1989); Rudstein, *supra*, at 221-22. New Hampshire incorporated a prohibition against double jeopardy into its constitution in 1784. Rudstein, *supra*, at 223. And while the legislative history is limited, the debates surrounding Congress's adoption of the Double Jeopardy Clause reveal that it was intended to memorialize well-established common law principles. *See* 1 Annals of Cong. 781-82 (1789) (Joseph Gales ed., 1834) (statements of Reps. Benson, Sherman, and Livermore);

see also Burton, *supra*, at 802 ("Congress apparently did intend the clause to conform to 'universal practice' in Great Britain and the United States."). Indeed, the language in the Clause is substantively identical to that in Blackstone's Commentaries. Following the Civil War and ratification of the Fourteenth Amendment, the bar on double jeopardy was incorporated against the States as one of the Constitution's fundamental protections of individual liberty. *Benton*, 395 U.S. at 794.

2. Over time, this Court has distilled and clarified the principles underlying the Double Jeopardy Clause's prohibitions against successive prosecutions and duplicative punishments. The Court has explained that the Clause reflects "the 'deeply ingrained' principle 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.'" *Yeager*, 557 U.S. at 117-18 (quoting *Green*, 355 U.S. at 187-88).

A closely related "primary purpose" of the Double Jeopardy Clause—derived from the common law pleas of *autrefois acquit* and *autrefois convict*—is to preserve the finality of judgments. *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *see Yeager*, 557 U.S. at 118. The principle of finality, however, does not apply with equal force to acquittals and convictions. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence" is that a verdict of acquittal cannot be reviewed on appeal if a second

trial would be necessitated by a reversal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Even an acquittal "based upon an egregiously erroneous foundation" is unassailable. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *see Green*, 355 U.S. at 188 ("[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."); *see also Evans v. Michigan*, 133 S. Ct. 1069, 1074-76 (2013) (applying *Fong Foo* and *Martin Linen* to conclude that Double Jeopardy Clause bars retrial even when the trial court grants an acquittal based on the prosecution's failure "to prove an 'element' of the offense that, in actuality, it did not have to prove"). A conviction, by contrast, can be reviewed for error, and a successful reversal (on any ground other than insufficiency of evidence) poses no bar to further prosecution. *Burks v. United States*, 437 U.S. 1, 18 (1978).

Acquittals are thus "accorded special weight" under the Double Jeopardy Clause. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Indeed, since the time of the Founding, the rule has been that "'whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.'" *United States v. Jenkins*, 490 F.2d 868, 872 n.6 (2d Cir. 1973) (quoting *Duchess of Kingston's Case*, 20 State Tr. 355, 528 (1776)).

3. The principles underlying the Double Jeopardy Clause prevent the government from relitigating not only *charges* on which a previous jury has reached an acquittal (res judicata or claim preclusion), but also *factual elements* necessarily decided

by such a verdict (collateral estoppel or issue preclusion). Even before the adoption of the Bill of Rights, English courts had established that there was a collateral estoppel component to the prohibition against double jeopardy. *See Duchess of Kingston's Case*, 20 State Tr. at 535. In the United States, collateral estoppel has been an established rule of federal criminal law for at least a century. *Ashe*, 397 U.S. at 443 (citing *United States v. Oppenheimer*, 242 U.S. 85 (1916)).

This Court's decision in *Ashe* vividly illustrates the importance of the collateral estoppel aspect of the Double Jeopardy Clause. There, a group of masked men robbed six poker players, and the defendant was charged with (and acquitted of) robbing one of them. *Ashe*, 397 U.S. at 438-39. The government then sought to prosecute him for robbing one of the *other* players (and presumably, if unsuccessful, would have sought to prosecute him in turn for robbing each of the other four victims). *Id.* at 439. The second prosecution—based on testimony from largely the same cohort of witnesses as the first—was successful. *Id.* at 439-40. But this Court concluded that the second prosecution was constitutionally prohibited, because the issue of whether the defendant was one of the robbers was necessarily decided in the defendant's favor when he was acquitted in the first trial. *Id.* at 446. The Double Jeopardy Clause, the Court explained, prohibits the government from treating a trial resulting in an acquittal as a "dry run" for a second prosecution of the same individual for virtually the same offense. *Id.* at 447.

B. The Decision Below Is Incompatible With This Court's Double Jeopardy Precedents

The First Circuit's conclusion that a vacated, unconstitutional conviction based on a legally erroneous instruction can undermine the effect of an undisputedly valid acquittal is irreconcilable with the history and purposes of the Double Jeopardy Clause, and with this Court's decisions interpreting it.

1. As explained above, this Court has long recognized that "the law attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978); *see supra* at 7-8. The Court reaffirmed that principle in *Yeager* when it held that an acquittal retains its preclusive effect even where the same jury was unable to reach a verdict on related counts. 557 U.S. at 122.

In *Yeager*, the jury acquitted the defendant of multiple counts of securities fraud, wire fraud, and conspiracy to commit those offenses. *Id.* at 114. At the same time, the jury was unable to reach a verdict on related charges of insider trading and money laundering, and the court declared a mistrial on those counts. *Id.* at 114-15. When the government attempted to retry the defendant on the hung counts, the defendant objected that doing so would violate the collateral estoppel prong of the Double Jeopardy Clause, because the jury had necessarily decided controlling issues of fact in his favor through its acquittals. *Id.* at 115. On appeal, the Fifth Circuit reasoned that because the hung counts were logically inconsistent with the acquittals, the government should not be prevented from retrying the in-

sider trading and money laundering charges—i.e., that the "inconsistent" hung counts deprived the jury's acquittals of their ordinary preclusive effect. *See id.* at 116.

This Court rejected that view, holding that a jury's acquittal can preclude the government from retrying a defendant on hung counts even when the failure to reach a verdict on those counts is logically inconsistent with the acquittal. That result, the Court explained, followed from its decision in *Ashe*, in which it "squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial"—full stop. *Yeager*, 557 U.S. at 119. And while *Ashe* "involved an acquittal for a single offense" and *Yeager* instead "involve[d] an acquittal on some counts and mistrial declared on others," the Court nonetheless found *Ashe*'s reasoning "controlling" because, for double jeopardy purposes, "the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts" were therefore "entitled to the same effect as Ashe's acquittal." *Id.* at 120.

2. *Yeager*'s analysis applies equally here. A vacated conviction is just as much a "nonevent" as a failure to reach a verdict. Like hung counts, vacated convictions carry no legal weight; they have been "wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *see* Black's Law Dictionary 1782 (10th ed. 2014) (defining "vacate" as "[t]o nullify or cancel; make void; invalidate").

Indeed, the fact that vacated convictions have no legal effect is one of the reasons why, like hung counts or mistrials granted out of manifest necessity, they do not terminate the defendant's original jeopardy and can ordinarily be retried without offending double jeopardy principles. *See United States v. Tateo*, 377 U.S. 463, 465 (1964) ("The principle that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence."); *see also Arizona v. Washington*, 434 U.S. 497, 505-06 (1978). But as the Court recognized in *Yeager*, the preclusive effect of an acquittal *separately* terminates the defendant's original jeopardy as to factual issues necessarily decided in that acquittal, thereby preventing retrial on counts that otherwise could be retried. 557 U.S. at 119 ("[T]he jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts.").

To be sure, a vacated conviction, unlike a hung count, was at one point a unanimous jury verdict, and the Court in *Yeager* noted that hung counts do not factor into the collateral estoppel analysis under *Ashe* because "a jury speaks only through its verdict." *Id.* at 121. But what matters for double jeopardy purposes is that a conviction vacated as a result of an erroneous instruction tells the reviewing court nothing about what a *properly instructed* jury would have concluded looking at the same evidence; as with a hung count, "there is no way to decipher" its exact meaning. *Id.* A vacated conviction is thus just as

irrelevant to the collateral estoppel analysis as a hung count.

3. The First Circuit believed that *United States v. Powell*, 469 U.S. 57 (1984), required it to treat vacated convictions differently than hung counts for collateral estoppel purposes, but *Powell* does no such thing. In *Powell*, the defendant was acquitted of various drug offenses but convicted of telephone facilitation of those same offenses. 469 U.S. at 59-60. This Court upheld the defendant's convictions even though they were logically inconsistent with the acquittals, explaining that that inconsistency made principles of collateral estoppel "no longer useful" for determining whether the convictions could stand. *Id.* at 68.

Powell's holding accordingly gives effect to two inconsistent but otherwise *valid* and final verdicts. Of course, a conviction that is later vacated due to error is neither valid nor final. And where a conviction has been vacated, the jury's decision was based on an error that was—by definition—not harmless. 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a). If it were clear how the jury would have decided the case absent the legal error, there would be no need for a retrial, because either the conviction would be affirmed or an acquittal would be ordered. *See Burks*, 437 U.S. at 18 (court must direct judgment of acquittal where evidence was legally insufficient to support conviction). Under *Powell*, even a *valid* "clearly inconsistent verdict" cannot be used to "second-guess the soundness of another verdict." *Yeager*, 557 U.S. at 125. It necessarily follows that an *invalid* inconsistent verdict cannot be used for that purpose.

Powell, moreover, dealt with two valid verdicts simultaneously rendered by the same jury at the conclusion of one trial. "[F]aced with jury verdicts that, on their face, were logically inconsistent," the Court "refused to impugn the legitimacy of either verdict." *Yeager*, 557 U.S. at 125. Here, by contrast, it is petitioners' successful appeal that has stripped their convictions of their "legitimacy." The government seeks to secure a conviction against petitioners on the underlying § 666 offense in a second, separate trial, when there is already a valid acquittal deciding common factual issues in petitioners' favor. Conducting a second trial after an acquittal—a situation not presented in *Powell*—was one of the primary evils the Double Jeopardy Clause was designed to prevent. *See Yeager*, 557 U.S. at 117 (Double Jeopardy Clause embodies "the deeply ingrained principle 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" (quotation omitted)); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (Double Jeopardy Clause "protects against a second prosecution for the same offense" following acquittal or conviction (quoting *Pearce*, 395 U.S. at 717)).

In this case, the government is attempting to use petitioners' invalidated convictions to revoke the preclusive effect of the jury's valid verdicts of acquittal—just as it attempted to use the hung counts in *Yeager*. The Court rejected the government's effort in *Yeager*, and it should do so again here.

II. THE PROLIFERATION OF OVERLAPPING CRIMINAL OFFENSES UNDERSCORES THE NEED TO AFFORD ACQUITTALS PROPER WEIGHT IN THE DOUBLE JEOPARDY ANALYSIS

As this Court has long recognized, the Double Jeopardy Clause's history helps inform its modern application. *See, e.g.*, *Scott*, 437 U.S. at 87; *United States v. Wilson*, 420 U.S. 332, 339-42 (1975); *see also Green*, 355 U.S. at 199 (Frankfurter, J., dissenting). But there can be no question that the backdrop against which the Clause operates today is radically different from that at the time of the Founding.

When "the Fifth Amendment was adopted, its principles were easily applied, since most criminal prosecutions proceeded to final judgment, and neither the United States nor the defendant had any right to appeal an adverse verdict"—meaning that the jury's verdict "was unquestionably final, and could be raised in bar against any further prosecution for the same offense." *Scott*, 437 U.S. at 88 (citing Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84); *see Green*, 355 U.S. at 189 ("At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances."). As Congress expanded defendants' right to appeal, the double jeopardy analysis grew more complex, *see Scott*, 437 U.S. at 88, but the Court continued to reaffirm the vitality of the principles at the Clause's core.

More than procedure has changed: the criminal code itself has undergone a dramatic transformation that has greatly increased the avenues through which the government can secure a conviction. For

centuries, the common law (and, later, the federal criminal code) had "offense categories [that] were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense." *Ashe*, 397 U.S. at 445 n.10. In the late 1500s and early 1600s, for example, there were only 30 felony offenses. 2 J. Stephen, A History of the Criminal Law of England 219 (1883). By the time of the Founding, the number of felonies had grown to just 160. *Id.* And the Founders advocated restraint in introducing more or redundant laws, warning that "[i]t will be of little avail to the people … if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." The Federalist No. 62 (James Madison).

Today, however, criminal laws are enacted at dizzying speed, with roughly one new federal criminal statute passed each week. *See* John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Found. Legal Mem. No. 26, at 1 (June 16, 2008). By 1989, the Department of Justice estimated that there were roughly 3,000 federal crimes. R. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L.F. 99, 110 (1989). By 2000, the number has risen to over 4,000. John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Society 8 (2004). And by 2008, there were an estimated 4,500 criminal offenses on the books. Baker, *Revisiting the Explosive Growth*, *supra*, at 1. Altogether, more than 40 percent of all federal criminal provisions enacted since the Civil War have been passed in the years after 1970. ABA Task Force on the Federalization of

Criminal Law, *The Federalization of Criminal Law* 7 (1998).[2]

Today, new crimes are "enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14-15. Politicians often pass "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation" when they "want[] credit for addressing a national problem but do[] not have the time (or perhaps the votes) to grapple with the nitty-gritty." *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting); *see also* William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 529-33 (2001). The result is a criminal code that has been described as a "haphazard grab bag of statutes" that can be "incomprehensible, random and incoherent, duplicative, ambiguous, incomplete, and organizationally nonsensical." Julie O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 643 (2006) (quotations omitted).

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[2] The universe of potential federal crimes expands exponentially when one takes into account federal regulations that can trigger criminal sanctions; there may be as many as 300,000 federal regulations that can be enforced criminally. *See Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Att'y Gen. of the United States); *see also* Lawrence M. Friedman, Crime and Punishment in American History 282-83 (1993) (regulatory crimes "now exist in staggering numbers").

The modern explosion in federal criminal law has produced an "extraordinary" number of "overlapping and related statutory offenses," allowing prosecutors to "spin out a startlingly numerous series of offenses for a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. Prosecutorial discretion is no longer so much "an exercise of wisdom" as "a selection of weaponry." Robert Weisberg, *Crime and Law: An American Tragedy*, 125 Harv. L. Rev. 1425, 1445 (2012). And "[a]s the number of statutory offenses [has] multiplied, the potential for unfair and abusive reprosecutions" has grown "far more pronounced." *Ashe*, 397 U.S. at 445 n.10; *see id.* at 452 (Brennan, J., concurring) ("Given the tendency of modern criminal legislation to divide the phrases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening.").

What is more, prosecutors frequently advocate expansive readings of federal criminal statutes—especially those that are vague and open-ended—pushing the statutes' scope beyond any limits discernible from the text or other indicators of Congressional intent. *See* Baker, *Revisiting the Explosive Growth*, *supra*, at 6. In doing so, they may further inflate the number of criminal prohibitions potentially implicated by a single course of conduct.

It is hardly surprising that when prosecutors bring an array of overlapping charges, the jury's verdicts are sometimes logically inconsistent—whether as a result of confusion or compromise. If inconsistency in the jury's verdict alone were enough to strip an acquittal of its preclusive effect, the government would have every incentive to bring as

many charges as possible to increase its chances of securing at least one conviction to diminish the impact of any acquittal. And if even an *invalid*, vacated conviction sufficed to nullify an acquittal's preclusive effect, the government's incentives to avoid legal error in the first trial would also be diminished: So long as the government secured a conviction on any count, even if only through impermissible overreaching, it could try again with a new jury and new legal theory regardless of what the jury necessarily decided on other counts in the defendant's first trial.

The collateral estoppel doctrine embedded in the Double Jeopardy Clause protects defendants against precisely such "unfair and abusive reprosecutions," *Ashe*, 397 U.S. at 445 n.10, in which the government treats a defendant's first trial as "no more than a dry run" for a second, *id.* at 447. It does so in part by ensuring that a jury's unanimous verdict of "not guilty" is given the full weight to which this Court has affirmed it is entitled. When an acquittal is afforded that special weight, a legally null, vacated conviction cannot neutralize its preclusive effect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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