No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The National Association for Public Defense (NAPD) is an association of nearly 11,000 professionals who provide the full spectrum of services necessary to make the constitutional right to effective assistance of counsel a reality. Its members counsel and advocate for clients, both adults and juveniles—in jails and community settings, as well as in courtrooms. NAPD's ranks include practitioners in state, county, and local systems, who work through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, using a diversity of traditional and holistic practice models. Their collective expertise extends beyond abstract questions of legal doctrine, to the practical, day-to-day realities of the criminal justice system.

This case concerns matters at the core of NAPD's mission and practical expertise. The Constitution's guarantee of a trial by jury for "all Crimes," already under withering pressure, would be further degraded if, as the court of appeals held, juries' valid final verdicts of acquittal may be cast aside—and defendants subject to further prosecution—based on claims of the jury's "irrationality" and the acquittal's incompatibility with a *vacated* conviction.

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[*]Pursuant to Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to its filing.

SUMMARY OF ARGUMENT

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided in a prior case resulting in a defendant's acquittal. Neither the government nor the First Circuit below disputed that, under *Ashe*, petitioners' acquittal on Travel Act and conspiracy charges would, in light of the factual and legal theory of that prosecution, make a subsequent 18 U.S.C. § 666 prosecution unconstitutional. But the court nonetheless held that the jury's valid, final, and unambiguous acquittal was stripped of this preclusive effect by the presence of an inconsistent *vacated* verdict.

I. This restrictive new limitation—premised on the notion that the protections of the Double Jeopardy Clause depend on a second court's assessment of the "rationality" of a prior jury acquittal—reflects a basic misreading of this Court's precedents. Those decisions, including *Ashe*, *Yeager* v. *United States*, 557 U.S. 110 (2009), and *United States* v. *Powell*, 469 U.S. 57 (1984), do not invite courts to examine the rationality of prior jury verdicts. Rather, those cases require that a court asked to try a previously acquitted defendant must *presume*—conclusively—that the acquittal was a rational determination and give preclusive effect accordingly.

II. The First Circuit's strange rule—which treats valid final acquittals as nonevents, while giving controlling effect to guilty verdicts that have been *vacated* as unconstitutional—is at odds with this Nation's constitutional and legal tradition and irreconcilable with Double Jeopardy fundamentals.

Even in civil litigation, courts do not parcel out preclusive effect based on the correctness or rationality of the underlying judgments; and the First Circuit's rule is even more of a departure than might first appear. The presumption of irrationality attaching to the acquittal in cases like this one is irrefutable; as *Ashe* explained, a criminal defendant, unlike a civil litigant, has no practical means of establishing what the jury *actually* decided by a general verdict of acquittal and of thereby showing that the acquittal was rational (and that the apparently incompatible, vacated conviction was not).

In fact, the First Circuit rule defies the central tenet of this Court's Double Jeopardy case law: that judgments of acquittal, and jury verdicts of acquittal in particular, are unassailable. This rule of absolute finality respects the Constitution's central guarantee of a right to trial by jury in every criminal case and the jury's role as a bulwark against judicial and prosecutorial overreach. The sanctity of jury verdicts would be gravely compromised if otherwise forbidden repetitive prosecutions could be maintained on the ground that a first, unwelcome judgment of acquittal was rendered by an "irrational" jury.

III. Practical realities of the present-day criminal justice system increase the value of the Double Jeopardy protection recognized in *Ashe* and amplify the significance, unfairness, and impracticality of the First Circuit's erroneous rule. As *Ashe* recognized, the proliferation of overlapping criminal offenses has significantly increased the danger of repetitive prosecutions on theories of guilt rejected by a jury, but on charges that are not strictly the "same offence." That same development, which has accelerated

alarmingly since 1970, also puts immense pressure on the jury trial right *at the front end*, by affording prosecutors large and unchecked power to raise the costs of a defendant's going to trial, rather than accepting a plea bargain. The First Circuit's rule would make matters worse still. If jury inconsistency—and specifically inconsistency claimed based on *vacated*, unconstitutional verdicts—has the effect of defeating protections accorded valid, final acquittals, prosecutors have further incentive to pursue a "kitchen sink" charging approach. And defendants who have been lawfully acquitted are worse off if prosecutors obtain an unconstitutional conviction on an overlapping charge than if a properly instructed jury deadlocks. The rule adopted below, finally, would create serious problems of administrability in the predictably larger class of cases where post-acquittal prosecutions are attempted.

ARGUMENT

I. The First Circuit's Rule Erodes the Integrity of Jury Verdicts

1. The Double Jeopardy Clause vindicates the right to trial by jury by protecting the sanctity of jury verdicts—especially acquittals. Indeed, "it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy." *Green* v. *United States*, 355 U.S. 184, 188 (1957); accord *Ball* v. *United States,* 163 U.S. 662, 671 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution."). In this way, "[t]he law attaches particular significance to an acquittal." *United States* v. *Scott*, 449 U.S. 82, 91 (1978).

The "special weight [attached] to judgments of acquittal," *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982), flows from our legal tradition's strong and essentially absolute commitment to jury sovereignty. That principle dates back to the Magna Carta, see *United States* v. *Booker*, 543 U.S. 220, 239 (2005), and extends even to "flat-out acquittals in the face of guilt," which were understood to represent "'pious perjury' on the jurors' part." *Jones* v. *United States*, 526 U.S. 227, 245 (1999) (quoting 4 W. Blackstone, Commentaries on the Laws of England 238–239 (1769)); see also *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'") (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Thus, a jury verdict will not be

overturned based on evidence that it was reached by a coin toss, *Vaise* v. *Delaval*, 99 Eng. Rep. 944 (K.B. 1785) (Lord Mansfield, C.J.), cited in *Yeager*, 557 U.S. at 122; a bargain, *Hyde* v. *United States*, 225 U.S. 347, 383–384 (1912); or by a jury under the influence of drugs and alcohol, *Tanner* v. *United States*, 483 U.S. 107, 125 (1987).

2. Essential to the respect that the jury is owed is the *Ashe* rule: "'[W]hen an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, 'it cannot again be litigated' in a second trial for a separate offense." *Yeager*, 557 U.S. at 119 (quoting *Ashe*, 397 U.S. at 443). That is, a prosecution that would require the government to prove something inconsistent with what an acquitting jury logically must have determined may not be brought.

The First Circuit did not deny that, in light of the evidence the prosecution presented in this case and the theory of guilt it argued to the jury, the verdicts of acquittal would logically be understood to rest on determinations that Bravo and Martínez did *not* violate 18 U.S.C. § 666. See Pet. App. 13a-14a. The court nonetheless refused to attach preclusive effect to the verdicts of acquittal, announcing an exception to *Ashe*'s general rule: The acquittals, the court held, "lose the[ir] collateral estoppel effect" if inconsistent with verdicts of guilty that *have been vacated* as unlawful on appeal. *Id.* 15a. This divestment of "otherwise available" Double Jeopardy protections, the First Circuit declared, "follow[ed] in large part from *Ashe* itself," *id.* 16a, highlighting this Court's instruction that courts accord preclusive effect based on what a "rational jury" "necessarily decided" by its acquittal and do so by "a 'practical' analysis' * * * with

'an eye to all the circumstances of the [prior] proceedings.'" *Ibid.* (quoting *Ashe*, 397 U.S. at 444) (some internal quotation marks omitted).

That misunderstands *Ashe*, which was premised on recognition that a practical preclusion approach was necessary because a "more technically restrictive [test] would * * * amount to a rejection of the rule of collateral estoppel in [all] criminal proceedings." 397 U.S. at 444. Allegedly robbing one poker player, the Court reasoned, is not literally the "same offence," U.S. Const. amend. V, as robbing someone else playing at the table, and, given that criminal juries render general verdicts, the second court could not know for certain what the jury *actually* decided when it acquitted in the first trial. Because a defendant seeking to avoid a second prosecution could not, as a practical matter, prove that the jury had acquitted on "rational" grounds—that is, based on insufficient evidence that the defendant was present, rather than on, *e.g.*, a belief that the robbery had never occurred, *Ashe* held that the judgment must be treated as embodying determinations that a rational jury, presented with the prosecution's evidence and theory of guilt, *would have made* in acquitting.

The First Circuit's ostensibly "practical" approach does the opposite; it makes jury "rationality" a *precondition* for preclusion and then places on the re-prosecuted defendant the essentially impossible burden of showing what the jury *actually* decided in acquitting him or her. *Ashe* imposed no such precondition. Rather, *Ashe* recognized criminal defendants' right to a general verdict, the impermissibility of inquiring into jury deliberations, and the reality that juries can and do act

irrationally—*e.g.*, by "disbeliev[ing] substantial and uncontradicted evidence of the prosecution on a point the defendant [does] not contest." 397 at 444 n.9. Accordingly, the Court announced a rule for determining what an acquittal *means* for Double Jeopardy purposes, establishing an objective, elements-based test that looks to whether the jury rationally "*could have* grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (emphasis added).

Here, petitioners showed that a rational jury could not have acquitted them based on the elements of interstate travel or agreement. They thus successfully established that the acquittal must logically be understood to mean that the prosecution failed to prove an 18 U.S.C. § 666 violation—"[t]he single rationally conceivable issue in dispute" at their first trial. 397 U.S. at 445. Under *Ashe*, that is all that is required to activate Double Jeopardy protection.

3. The First Circuit's rule would be a dramatic departure from age-old rules for *civil* adjudication. As the Court observed a century ago, "the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice [*i.e.*, preclusion] in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916). "It cannot be," Justice Holmes explained, "that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id. at* 87. True to that insight, this

Court in *Ashe* declined to condition preclusion on proof of what the jury *actually* decided. See p. 7, *supra*; compare Fed. R. Civ. P. 49 (providing for special verdicts and general verdicts "with questions" in civil cases). And the general rule that civil judgments not subject to appeal are denied preclusive effect, see 18A Charles Alan Wright et al., Federal Practice & Procedure § 4433 (2d ed. 2016), does not allow prosecutors, who are barred from appealing acquittals, to "relitigat[e] issues that [have been] lost against the same defendant," *id.*[1]

Standard preclusion rules foreclose relitigation of matters, both factual and legal, necessarily and conclusively determined. See Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). And preclusive effect attaches when an issue is first conclusively resolved, notwithstanding continued litigation in the same controversy. Restatement (Second) of Judgments § 13 ("A judgment may be final

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[1] There are, to be sure, important rules of civil preclusion law that are already unavailable to criminal defendants, including the protection against claim splitting, see *United States* v. *Dixon*, 509 U.S. 688, 709 n.14 (1993), and the shield of defensive, nonmutual issue preclusion, see *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972). In domains where it does apply, however—and governs as a matter of constitutional law—preclusion, rooted in the respect for the criminal jury, is more, not less, potent. See David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 47 (2001).

in a res judicata sense as to a part of an action although the litigation continues as to the rest."); 18A Charles Alan Wright et al., Federal Practice & Procedure § 4432 (2d ed. 2016) (collecting sources).

Importantly, while the existence of inconsistent—final—judgments may defeat preclusion in civil cases, Restatement (Second) Judgments § 29(4), none of the elements for preclusion inquires into the rationality of the first decision. Preclusion "does not depend on the correctness of the judgment." 18A Federal Practice & Procedure § 4433.

4. The same respect for the absolute finality of a jury's verdict that prohibits government appeals even when an acquittal is "based upon an egregiously erroneous foundation," or rendered "in the teeth of both law and facts," *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920), necessarily applies to re-litigation and preclusion.[2] It would stand the Double Jeopardy right on its head to hold that the government, barred from appealing an irrational verdict of acquittal, could effectively overturn the jury's decision by initiating a fresh prosecution. "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendants so that 'even though innocent he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188).

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[2] Cf. *United States* v. *Gaudin*, 515 U.S. 506, 520 (1995) (overturning *Horning*'s conclusion that a court's error in directing a guilty verdict may be excused as harmless).

5. Although the First Circuit suggested that its rule followed from *Ashe*, the court did not deny that under *Ashe* the jury's acquittals—the only valid and final judgments in petitioners' case—would bar retrial "standing alone." Rather, the court below held that petitioners' claim was governed by an "important exception" to the *Ashe* principle codified in *United States* v. *Powell*, 469 U.S. 57 (1984), citing language from this Court's opinion that it read as supporting a juror rationality prerequisite.

But the holding and logic of *Powell* do not support—and indeed powerfully contradict—the First Circuit rule. In *Powell*, a jury had acquitted the defendant of substantive drug offenses, but convicted her of using a telephone in "committing and in causing" the same offenses. 469 U.S. at 60. Rejecting the defendant's argument that the inconsistency required that the guilty verdict be vacated, this Court instead upheld both. *Id*. at 69. That holding expressed undiminished respect for final and otherwise valid verdicts, rather than (as the First Circuit posited) a "limitation on the application of [preclusion principles]" whenever inconsistency is present. Pet. App. 10a.

In fact, as this Court later explained, the result reached in *Powell* "and, before that, in *Dunn* [v. *United States*, 284 U.S. 390 (1932)]"—"giving each [inconsistent] verdict *full effect*," *Yeager*, 557 U.S. at 124 (emphasis added)—affirms the finality of jury decisions, whether rational or not. Manifest logical inconsistency, those decisions held, *was not* ground for "impugn[ing] the legitimacy of either verdict." *Yeager*, 557 U.S. at 125. The *Powell* Court's refusal to view an inconsistent acquittal as basis for

overturning, on Double Jeopardy Clause grounds, an otherwise final, valid, and lawfully rendered judgment of conviction is no authority for relying on a *vacated* guilty verdict to "impugn" a valid, final acquittal and permitting a second prosecution to overturn the first jury's determination.

Brushing past this anomaly, the First Circuit placed heavy reliance on language in *Powell* observing that "principles of collateral estoppel * * * are predicated on the assumption that the jury acted rationally" and "impossible to apply" when inconsistent judgments are presented. Pet. App. 11a (quoting *Powell*, 469 U.S. at 68). But the defendant in *Powell* lost because of *adherence to* the presumption of rationality for each lawful verdict, inconsistency notwithstanding, and because those judgments' effects could, in essence, cancel one another out. By rebuffing a defendant's right to use inconsistency offensively, *Powell* did not hand the government a sword that could cut through Double Jeopardy protections and seek conviction of a defendant on charges of which he was already lawfully acquitted.

6. The aggressive reading of the *Powell* dictum adopted below was urged—and rejected—in *Yeager*, which overturned a decision that had allowed retrial on charges that would be precluded by acquittals "viewed in isolation," on the ground that viewing those verdicts "alongside [inconsistent] hung counts," "made it impossible, to decide with any certainty what the jury necessarily determined." 557 U.S. at 121 (quoting lower court opinion). *Powell*, the *Yeager* Court made clear, does not license "second-guess[ing] the soundness" of an acquittal, *id.* at 125: "a logical

inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." *Ibid.* Indeed, the Court continued, the Government's attack on the acquittals "violate[d] the very assumption of rationality it invoke[d] for support." *Ibid.* So too here.

Thus, in *Yeager*, where the need to give dueling final verdicts "full effect" was absent, the Court respected the preclusive effect of a jury's acquittal—notwithstanding the manifest illogic of the jury's behavior, *i.e.*, that a rational jury would necessarily have also acquitted on the hung counts had it made the determination ascribed to it under the *Ashe* rule. In so holding, *Yeager* reaffirmed the principle that "the jury's verdict 'brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" 557 U.S. at 124 (quoting *Powell*, 469 U.S. at 67). Given that *Powell* and *Dunn* had held these virtues too important to yield in the presence of "a clearly inconsistent *verdict*," *Yeager* reasoned, it followed "*a fortiori,*" that a "potentially inconsistent hung count [can] not command a different result." *Id.* at 125. So too with an inconsistent vacated verdict.

a. The First Circuit (and the Government opposing this Court's review) posited that a Double Jeopardy line could be drawn between hung verdicts and convictions vacated as unlawful, on the ground that the "fact of the conviction" remains "part of the record" and the jury here "sp[oke]" in rendering the—unlawful—guilty verdicts here in a way the *Yeager* jury did not. See Pet. App. 16a (noting Court's observation that "a jury speaks only through its verdicts") (quoting 557 U.S. at 121). But the hung

counts in *Yeager* were also a "fact," and they—including the evidence and argument presented to the jury and the case instructions, were fully part of the case record. And no further "speaking" was necessary to discern the irrationality of what the jury had done in that case. The Government's argument failed and the convictions on the re-tried charges were reversed because this manifest inconsistency, which could reflect compromise, "fatigue," or "confusion" within a jury asked to adjudicate 126 counts, 557 U.S. at 121, did not establish anything that qualified the legal significance of the valid acquittals.

b. *Yeager* and this case are indistinguishable on the point this Court's decision *did* treat as constitutionally significant. Vacated convictions are "nullities" and legal "nonevents" in the very same ways that hung counts are. When a criminal judgment "is reversed for error, then it is the same as if it had never been." 4 W. Blackstone, Commentaries on the Laws of England 336-337 (1769); accord *Bullington* v. *Missouri*, 451 U.S. 430, 442 (1981). Vacated convictions themselves are given no preclusive effect and thus should not deprive a valid, final acquittal of *its* preclusive effect.[3] 18A Federal

[3] In the civil context, judgments vacated pursuant to parties' negotiated settlement were sometimes given preclusive effect, on the ground that parties' private interests should not automatically determine the effect of courts' valid and final public acts. See, *e.g.*, *Bates* v. *Union Oil Co. of Calif.*, 944 F.2d 647, 650 (9th Cir. 1991). The practice of routine vacatur by settlement was itself disapproved, however, in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S 18, 26 (1994). If anything, the rationale and narrow character of this exception emphasizes the fundamental nature of the general rule that a vacated judgment has no preclusive effect.

Practice & Procedure § 4432 ("There is no preclusion as to the matters vacated or reversed."); *id.* ("Once a new trial is granted or the judgment is vacated, preclusion is of course defeated as to any matter that is left open for further proceedings."). [4] When a conviction is "vacated, all [underlying] factual determinations [are] vacated with it, and their preclusive effected surrendered." *Dodrill* v. *Ludt*, 764 F.2d 442, 445 (6th Cir. 1985). The vacatur "technically leav[es] nothing to which [a court] may accord preclusive effect." *Id.* at 444.

In other words, a vacated judgment is, as a matter of law, not conclusive. 1B James W. Moore et al., Moore's Federal Practice ¶ 0.416[2] (2d ed. 1996) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby *deprived of all conclusive effect*,

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[4] See also, *e.g.*, Restatement (Second) of Judgments § 13 (1982) ("The rules of res judicata are applicable only when a final judgment is rendered."); *No East-West Highway Comm., Inc.* v. *Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case."); *Stone* v. *Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992) ("A judgment vacated or set aside has no preclusive effect."); *United States* v. *Nat'l Bank of Commerce*, 775 F.2d 1050, 1050 (8th Cir. 1985) ("[A]n order [to vacate] removes both the *res judicata* and the *stare decisis* effect of the vacated judgment."); *Ornellas* v. *Oakley*, 618 F.2d 1351, 1356 (9th Cir. 1980) ("A reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel."); *Martinez* v. *Winner*, 800 F.2d 230, 231 (10th Cir. 1986) (an order to vacate "will remove[] 'both the *res judicata* and the *stare decisis* effect of the vacated judgment[s]'") (quoting *Bank of Commerce*, 775 F.2d at 1050); *United Bhd. of Carpenters & Joiners* v. *Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment vacated either by the trial court or on appeal has no estoppel effect in a subsequent proceeding.").

both as res judicata and as collateral estoppel."). Nothing is determined by a conviction that is later vacated. A vacated conviction, therefore, cannot qualify a final acquittal.

For this reason, neither hung counts nor vacated convictions have immigration consequences, *Garces* v. *U.S. Atty. Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010),[5] and neither can be introduced to impeach a witness at trial, *United States* v. *Russell*, 221 F.3d 615, 622 (4th Cir. 2000).[6]

And of course, hung juries are treated identically *for purposes of the Double Jeopardy Clause*. This Court's decisions in *Arizona* v. *Washington* and *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294 (1984), rejected Double Jeopardy challenges to re-trials after mistrials and appellate vacaturs, respectively, for essentially the same reasons: The first prosecutions were "nonevents" for Fifth Amendment purposes. The logic of *Yeager* controls here: If these developments do not impair the Government's powers under the Fifth Amendment, so too must they leave defendants' rights unaffected. See 557 U.S. at 123-124. It is a very odd kind of legal

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[5] As in the civil settlement context just discussed, see n. 3, *supra*, if a conviction is vacated not on account of substantive or procedural error, but instead to forestall adverse immigration consequences, courts adjudicating immigration proceedings are not bound to disregard it. See *Andrade-Zamora* v. *Lynch*, 814 F.3d 945 (8th Cir. 2016). This exception is unique to the immigration context.

[6] Likewise, a court can exclude evidence of a previous mistrial. *United States* v. *Amato*, 540 F.3d 153, 165 (2d. Cir. 2008).

"nonevent" that strips a person of a "vital [constitutional] safeguard." *Green*, 355 U.S. at 198.

c. This case and *Yeager* are not constitutionally distinguishable: Both involved efforts to deny defendants Double Jeopardy protection—and deprive final, valid acquittals of their preclusive effect—on the ground the acquittals looked different viewed "alongside" legal nonevents that pointed to internal inconsistency on the jury's part. But to the extent there is a difference between hung counts and unlawfully obtained convictions, it surely does not support the First Circuit's rule. There is no reason why the Government should fare *better* and the defendant worse, when prosecutors obtained an inconsistent, unconstitutional guilty verdict than when the inconsistency arises from the Government's inability, after staying within lawful bounds, to obtain twelve votes to convict.

II. Respecting The Preclusive Effect of a Final Acquittal Furthers the Core Principles Animating the Double Jeopardy Clause

1. The First Circuit's rule slights the reasons why unique rules of finality govern jury acquittals. Like all preclusion regimes, the Double Jeopardy Clause advances society's interest in bringing litigation to an end, see, *e.g.*, *Hopkins* v. *Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821), and the Fifth Amendment provides those criminally accused special protection against harassment and the possibility that prosecuters might win a war of attrition and obtain conviction of an innocent person. See *Green*, 355 U.S. at 187. But the rule—and the complementary prohibition against inquiry into juror deliberations, see, *e.g.*, *McDonald* v. *Pless*, 238 U.S. 264 (1915)—fundamentally express

respect for the importance of the jury's constitutional status and role. The right to trial by jury was guaranteed even before the Bill of Rights was ratified, see U.S. Const. art. III, § 2, cl. 3, and it reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana.*, 391 U.S. 145, 155-156 (1968). As the Court has explained:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-156. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 65 (2003) ("Before an individual can lose her liberty in a criminal case, the people themselves must agree."). Indeed, because of the jury's role as an instrument for citizen participation and its status within the judicial branch, see U.S. Const. art. III, the

question remained open until 1930 whether a defendant could *decline* a jury trial in federal court. See *Patton* v. *United States*, 281 U.S. 276 (1930).

Under the Constitution, jury trials, are meant to be the "main event," *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977), not "dry run[s]" for subsequent prosecutions. *Ashe*, 397 U.S. at 447. These commitments explain the sharply different treatment of convictions and verdicts of acquittal: "[O]verzealous prosecutors" and "compliant judges" will be slow to accept community decisions checking their exercises of power. And those same principles also account for rules protecting the sanctity of jury deliberations and the jury's "entitle[ment] to deliver a general verdict pronouncing the defendant's guilt or innocence." *Gaudin*, 515 U.S. at 513. Requiring juries to detail their reasons and providing a window into the dynamics of the jury room invite prosecutors and judges to review—and overturn—the jury's decisions. See *McDonald* v. *Pless*, 238 U.S. at 267 ("Jurors would be * * * beset by the defeated party" in every case, acting on "the hope of discovering something which might invalidate the[ir] finding.").

The First Circuit rule is irreconcilable with these principles. First, there can be no Double Jeopardy exception for verdicts rendered by juries whose actions appear irrational. A premise of the Constitution's "judgment" as to how "law should be enforced and justice administered," *Duncan*, 391 U.S. at 155, is that juries have the power to render final judgments of acquittal that are irrational—or at least appear so to prosecutors and courts. See *Jones*, 526 U.S. at 245. Indeed, possible internal logical inconsistency seems like a modest vice compared to

grounds that have been recognized to *not* support reexamination. See, *e.g.*, *Fong Foo*, 369 U.S. at 143 ("egregiously erroneous" acquittal must be respected). The decision below, however, empowers courts to second-guess otherwise preclusive, final verdicts by seeking ambiguities and provides prosecutors a means of circumventing the finality of those acquittals (likely all) they believe mistaken. By doing that, the First Circuit's rule denigrates the efforts of the jurors whose lawful unanimous verdict is cast aside—and who, like the defendant, have no means of defending their decision against allegations of irrationality.

2. The rule also implicates the second "vitally important interest[]" embodied in the Double Jeopardy Clause. *Yeager*, 557 U.S. at 117. Giving an acquittal its full preclusive effect protects individuals from the harm of enduring multiple trials. As this Court has explained, "whatever else [the Double Jeopardy] guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-446 (quoting *Green*, 355 U.S. at 190). This interest reflects concern 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." *Green*, 355 U.S. at 187.

To be sure, that concern, as *Yeager* recognized, has been held in some circumstances to be overcome by the interest in according the government a "fair opportunity to present [its] evidence to an impartial jury," *Washington*, 434 U.S. at 497. Thus, Double Jeopardy does not automatically bar the government

from bringing a second prosecution following a mistrial, *id.*, or following a stand-alone vacated conviction, *Lydon*, 466 U.S. at 308.

But, as *Yeager* makes clear, that governmental interest does not always prevail. As in that case, the jury here has already decided factual questions in petitioners' favor by returning a verdict of acquittal. See 557 U.S. at 123-124 (rejecting dissent's argument that government has an unqualified right to re-trials under these circumstances). The rule announced below would subject defendants to repetitive trials centering on the same issues previously decided. What the First Circuit granted the government was not "one" opportunity to present its evidence—but rather a do-over, which "subject[s the defendant] to embarrassment, expense and ordeal," *Green* 355 U.S. at 187, in the hope of a different outcome.

In any event, the First Circuit's rule is not limited to re-trials on the vacated charges. The same logic would also permit prosecution on *new charges* that conflict with a previous acquittal. Here, the central issue in dispute at petitioners' first trial was whether Martínez's generosity was an unlawful "bribe," a showing necessary for conviction under both 18 U.S.C. § 666 and the Travel Act. But if the "issue in dispute," *Ashe*, 397 U.S. at 445, had instead been travel in interstate commerce, and petitioners had been acquitted under 18 U.S.C. § 1952(a)(3)(A), but convicted—unconstitutionally—of another offense for which interstate travel was an element, the inconsistency between those valid and vacated verdicts would "strip[] the acquittals" of preclusive affect. Pet. App. 15a. Consequently, the government would be free to prosecute for any offense that

requires proof of travel, not merely the one vacated on appeal.[7]

III. Practical Realities of the Criminal Justice System Make Adherence to The *Ashe* Rule Critically Important

A. Prosecutors Should Be Required To Accept the Consequences of Their Decision to Pursue Multiple, Related Charges

The First Circuit's "narrow [and] grudging" conception of Double Jeopardy, *Green*, 355 U.S. at 198, is particularly fateful, given the present-day realities of our criminal justice system. As *Ashe* recognized nearly a half century ago, rules of preclusion, which protect against prosecutions on charges that are substantially identical to those previously tried but "distinct" under the *Blockburger* test, have become far more practically important. Whereas "[a] single course of criminal conduct was likely to yield but a single offense" at the time of the Framing, the Court observed, the "extraordinary proliferation of overlapping and related statutory offenses" in the twentieth century enabled

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[7] The decision below denied that it was robbing the acquittals of *all* preclusive effect, pointing out that they would "forever bar" the government from retrying petitioners on Travel Act charges. See Pet. App. 19a n.6. But that prohibition flows directly from the "same offence" language of the Double Jeopardy Clause. In any event, it is extraordinary in the law of preclusion to treat valid, final judgments as "restricted railway ticket[s] good for [one] day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting); see also *Nichols* v. *United States*, 511 U.S. 738, 744 (1994) (refusing to "create[] a 'hybrid' conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution").

prosecutors to "spin out a startlingly numerous series of [distinct charges] from a single alleged criminal transaction." 397 U.S. at 445 n.10.

That reality has of course become even more "startling" in the decades after *Ashe*, prompting a former Attorney General to observe that "the sheer number of federal laws that impose criminal penalties has grown to an unmanageable point." Michael B. Mukasey & Paul Larkin, *Heritage Foundation Legal Memorandum: The Perils of Overcriminalization* at 1 (Feb. 12, 2015). The number of criminal offenses in the U.S. Code increased from 3,000 in the early 1980s to 4,000 by 2000, and more than 4,450 by 2008. See Heritage Found., "Overcriminalization," in *Solutions 2016* (2016) at 123. Indeed, this explosion of criminal laws has reached the point where it is no longer possible to render a precise count of the laws imposing criminal penalties, see *Defining The Problem and Scope of Over-Criminalization and Over-Federalization*, Hearing Before the H. Comm. on the Judiciary, 100th Cong. 32 (2013) (statement of John G. Malcom), though one credible estimate places the number of federal criminal statutes at 5,000, supplemented by more than 300,000 federal regulations whose violation can give rise to criminal punishment. See *Solutions 2016* at 126.

In almost every criminal case, the prosecutor can pick and choose among a wide array of statutes potentially applicable to the conduct alleged. By 2000, "[t]he federal criminal code contain[ed] over three hundred separate fraud and misrepresentation offenses," William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1881 (2000), such that the same conduct could be prosecuted as a violation of the

generic federal mail and wire fraud statutes, see, *e.g.*, 18 U.S.C. §§ 1341, 1343, and also as "bank fraud, health care fraud, tax fraud, computer fraud, bankruptcy fraud, accounting fraud, [or] conspiracy to defraud the government," Stuart P. Green, *Lying, Cheating, And Stealing: A Moral Theory of White Collar Crime* 152 (2006).

And the problem is not merely that prosecutors have a "smorgasbord" of offenses from which to choose, Pet. Br. at 45 (quoting Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 653 (2006)), but that they are largely free to opt for "all of the above" from the buffet. The first casualty of this extraordinary shift in power is that the Constitution's principal safeguards for checking prosecutorial overreach, the Sixth Amendment jury trial right and the Double Jeopardy Clause's rule of absolute finality are, in the vast majority of cases, never engaged. As the Court has recognized, "[c]riminal justice today is for the most part a system of pleas, not a system of trials." *Laffler* v. *Cooper*, 132 S. Ct. 1376, 1381 (2012). Of the 75,573 criminal cases disposed of in federal district courts in 2003, 95% were resolved by a guilty plea. Lindsay Devers, U.S. Dep't of Justice, *Plea and Charge Bargaining* 1 (2011). Thus, plea-bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system," and "horse trading" between prosecutors and defense counsel largely "determines who goes to jail and for how long." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1919 (1992) (emphasis in original)). Although this Court has long expressed concern about wrongful

convictions resulting from innocent defendants' being worn down through multiple prosecutions by heavily resourced prosecutors, 355 U.S. at 187-188, prosecutors' power to stack charges exerts tremendous pressure on the accused to accept a plea offer rather than maintain innocence at trial and risk maximal punishments. See Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 Cal. L. Rev. 1573, 1582 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 520 (2001).

Indeed, one need not strain to see these dynamics at work in this case or *Yeager*: The defendant in *Yeager* was charged, in a "fifth superseding indictment," with some 126 violations of five federal overlapping offenses. In such cases, "confusion" and "exhaustion" among lay jurors are utterly unsurprising. 557 U.S. at 121. Here, the government charged Bravo and Martínez with multiple federal felonies based on their trip to watch a sporting event and its alleged link to a noncontroversial, nearly unanimous legislative vote. It was only after trial that the district court realized that the Puerto Rico statutes supplying the predicate for convicting Bravo on one count had been repealed, Pet. App. 110a-111a, and even in the Court of Appeals there remained confusion as to what Bravo's conviction for "unspecified 'racketeering activity'" referred to, *id.* 4a.

Although the Double Jeopardy Clause cannot be expected to significantly curb such pretrial overreaching, the First Circuit's rule, by reducing the practical value of a verdict of acquittal, needlessly aggravates this already troubling dynamic.

Defendants who refuse plea offers, brave the vagaries of criminal trials, and obtain jury verdicts of acquittal—in this case the only valid judgments that were entered at trial—still risk further prosecution based on claimed inconsistency with vacated, wrongful counts. Standing on its own, this rule is palpably unfair: The government, which already has substantial incentive to take a "kitchen sink" approach—*Powell* allows prosecutors to retain inconsistent (valid) convictions—may take aim at the acquittals, by pursuing multiple, overlapping charges and invoking inconsistency born of confusion and exhaustion to attack the jury's verdicts as irrational. And considered in light of *Yeager*, the rule is truly perverse: The Prosecution is better off pushing for an unconstitutional conviction.

As in *Yeager*, it was the prosecution in this case, not the defense, that decided to charge repetitive and predicate offenses; that elected to present each charge to the jury separately; and that insisted on jury instructions that authorized conviction for conduct that Congress did not make criminal. It is the prosecution, therefore, that should in fairness bear the consequence of the acquittal and the inconsistent unlawful verdict on the overlapping charges.

B. The First Circuit Rule Creates Serious Problems of Fairness and Administrability

In allowing the government to pursue a second § 666 prosecution, the First Circuit simply assumed that petitioners' second trial would proceed as if the first one (including the acquittal) had never occurred. However accurately that assumption reflects practice in the *federal* courts, it seriously misdescribes practice in many *state* courts and will cause serious

problems of administrability there. See *Benton* v. *Maryland*, 395 U.S. 784 (1969) (federal Double Jeopardy Clause applies in state prosecutions).

Following this Court's decision in *Dowling* v. *United States*, 493 U.S. 342 (1990), most States allow the government to introduce evidence in subsequent prosecutions tending to show that the defendant was guilty of a crime of which he was earlier acquitted. See *State* v. *J.M., Jr.*, 438 N.J. Super. 215, 230 n.11 (N.J. Super. Ct. App. Div. 2014) (collecting cases), *appeal granted* 221 N.J. 216 (2015). But the majority of States have also permitted *the defense* to introduce evidence of the prior acquittal. *Id.* at 234 n.15 (collecting cases).[8] These rules have generated difficult practical problems, which the First Circuit's rule aggravates. Some States permit judges to "take judicial notice" of an earlier acquittal. See, *e.g.*, *Hess* v. *State*, 20 P.3d 1121, 1123 (Alaska 2001). Other States allow the defendant to enter into evidence the physical judgment of acquittal from his previous trial. See *Nolan* v. *State*, 131 A.2d 851, 857 (Md. 1957). And others have taken a third course, allowing admission of "[a]ll of the facts of the previous trial and acquittal" at the later trial. See, *e.g.*, *Hare* v. *State*, 467 N.E.2d 7, 18 (Ind. 1984); *State* v. *Bernier*, 491 A.2d 1000, 1005-1006 (R.I. 1985) (potentially allowing acquittal to be admitted through "the parties' testimony").

While all of these approaches are fairer than the prevailing federal practice, which treats the fact of

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[8] Federal circuits, by contrast, have generally excluded such evidence altogether. See, *e.g.*, *United States* v. *Dortch*, 696 F.3d 1104, 1114 (11th Cir. 2012); *United States* v. *Jones*, 808 F.2d 561, 566–567 (7th Cir. 1986).

acquittal as inadmissible—and effectively requires a duly-acquitted person to defend himself a second time, see *Dowling*, 493 U.S. at 362 (Brennan, J., dissenting)—each has proven problematic. Defendants in the first two groups of States receive only bare protection, and jurors can be baffled as to what to make of a prior acquittal (and the prosecution's decision to bring a new case). The third approach, in contrast, can result in a trial-within-a-trial, with the defendants explaining the first jury's acquittal to the new jury and arguing what that judgment means. The *Hare* court held just such a trial, concluding that a key prosecution witness "did * * * a poor job of testifying before the [original] jury" and that this was the "likely * * * reason the [first] jury found the defendant not guilty there." 467 N.E.2d at 18.

Besides burdening the courts, such retrials-within-trials ask jurors to enter the minds of jurors in a different case to determine on the basis of indirect evidence *why* that group acquitted and effectively require defendants to "rebut all inferences about what *may have* motivated the [original] jury" to reach the conclusion it did, *Yeager*, 557 U.S. at 122 n.6 (emphasis in original), a burden they cannot meet with direct evidence of the first jurors' intent. And such proceedings sow confusion about jurors' own service. A second jury tasked with determining whether an earlier acquittal was correct will be understandably uncertain about the practical and legal significance of *its* verdict.

Indeed, the First Circuit's rule would require state juries to determine the meaning and legal effect of acquittals in the most problematic situation possible.

Cases like this one do not involve allegations that the defendant committed a *similar* crime at a different time. See, *e.g.*, *Walker* v. *State*, 921 P.2d 923, 925 (Nev. 1996) (series of similar robberies). The First Circuit rule, by definition, concerns factual issues identical to some of those in a prior prosecution. In these circumstances, juries will have the greatest difficulty knowing what to make of a prior acquittal.

By ensuring that cases involving apparently inconsistent final and vacated verdicts are resolved at the *Ashe* stage, petitioners' rule would avoid all these problems. If the record of the proceedings that resulted in the acquittal "necessarily" establishes determinations that would render conviction at retrial impossible, the judge would not let a second prosecution proceed. A second prosecution *may* proceed, by contrast, if the judge determines that a conviction would not contravene a determination a rational jury necessarily would have made in acquitting the defendant. Such an approach avoids plunging later judges, let alone jurors, into determining what *may* have led the first jury to acquit (and doing so without the benefit of first-hand testimony from the jurors themselves). By enforcing a rule that gives final acquittals—and vacated convictions—their usual effect, this Court would prevent an already messy situation in state courts from becoming worse.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted.

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