No. 16-636

IN THE

Supreme Court of the United States

CALVIN GARY WALKER,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, NINTH DISTRICT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the constitutional protection against double jeopardy prohibit a successive state prosecution following a federal prosecution arising out of the same facts and conduct derived from a single investigation conducted jointly by a federal-state task force?

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INTEREST OF *AMICUS CURIAE*[1]

The mission of the Center on the Administration of Criminal Law, based at New York University School of Law, is to promote and defend good government practices in criminal matters. The Center analyzes important issues of criminal law, particularly focusing on prosecutorial power and discretion. The Center is dedicated to defining good government practices in criminal prosecutions. This case presents significant questions regarding efficient and fair exercise of prosecutorial power.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1959, this Court ruled that successive prosecutions might be permitted when pursued separately by federal and state authorities – under what has become known as the "separate sovereigns" exception. Yet the Court has not addressed squarely the question presented on these facts, where the subsequent state prosecution arose out of a joint task force ("JTF") composed of federal and state entities. Given the dramatic expansion in the use of federal-state JTFs over the past fifty years, amicus curiae urges the Court to grant certiorari in this case to provide clarity on this important question.

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1. No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund such preparation or submission. The Petitioner has filed a blanket consent with the Court consenting to the filing of all *amicus* briefs. The consent of the Respondent is being filed herewith. The parties were given at least ten days notice of the intent to file this brief.

The prosecutorial landscape has changed profoundly since 1959. The federal police power, which historically had been quite limited, has expanded dramatically over the intervening decades to the present day, when federal authority increasingly overlaps with state police power. Federal-state JTFs have been formed to cover an increasingly broad array of the most active and sensitive areas of criminal jurisdiction. Modern JTFs entail deliberate collaboration and material integration between federal and state authorities to investigate and prosecute.

Because existing double jeopardy jurisprudence speaks predominantly to the scenario of successive prosecutions by sovereign authorities who were acting separately, the Court's guidance is needed to clarify the double jeopardy implications for cases arising from a federal-state JTF.

The Constitutional prohibition on double jeopardy is animated by centuries-old concerns for fairness and justice. The U.S. Constitution and subsequent case law have enshrined that protection by prohibiting successive criminal prosecutions of a defendant for the same underlying conduct, absent a particularly compelling justification. In articulating the separate sovereigns exception, this Court has balanced these concerns for due process against countervailing, though equally important, concerns for state sovereignty. The exception – that permits successive prosecution by a separate sovereign – has been legally justified as necessary to vindicate distinct interests of the state and federal government under federalism. But the case law balances those sovereignty concerns with the due process rights of individuals to be free via double jeopardy from unfair exercise of government power.

Existing jurisprudence has not squarely grappled with how a state's choosing to participate in a federal-state JTF, as an expression of and a manifestation of a state's sovereignty, likely alters that balance of competing concerns. If a state has chosen to share resources, information, and decision-making authority with the federal government on certain investigations, would it nevertheless impinge that state's sovereignty to prohibit a successive state prosecution following a federal prosecution on the same conduct and facts? If it would still impinge the state's sovereignty, is the encroachment less than if that state had conducted a truly separate investigation? In the scenario of a JTF, has state sovereignty been sufficiently vindicated by the state's decision to act jointly with the federal authorities such that double jeopardy should prohibit successive prosecutions?

A key question for this Court to consider is whether the state has essentially ceded a degree of its sovereignty to the federal government by participating in a JTF or can be deemed to have done so? The answer is likely to be 'yes,' given the practical realities of a modern JTF – where state resources are voluntarily subjected to federal authority, where the state surrenders the right to make unilateral decisions on charging, and where the venue for any prosecution must be selected jointly. Does a state's active participation in a JTF cede a portion of its sovereignty in a way that constitutes a corresponding waiver of jurisdiction to successive prosecution? Amicus respectfully suggests that, where a state actively participates in a JTF, a corresponding waiver of the state's sovereign right to prosecute appears warranted in the interest of protecting against double jeopardy.

The question presented here, of the permissibility of successive prosecutions arising out of a federal-state JTF, raises important policy concerns that deserve this Court's focused deliberation. While JTFs present a particular set of factual issues, the concerns for justice and fairness directly implicated by multiple prosecutions of an individual are no different. Investigators and prosecutors at the federal and state level also would benefit from increased certainty of a clear ruling on this question. Given the prevalence of JTFs, and the time and resources committed to their very important and effective work, greater clarity on the legal limitations to prosecution can only aid in directing resources more efficiently toward prosecutions that are more likely to survive Constitutional scrutiny. This case presents an appropriate opportunity to provide needed guidance on these important questions, and certiorari should be granted.

ARGUMENT

I. *Bartkus* Provides Insufficient Guidance for Modern Realities of Law Enforcement and Criminal Prosecution.

Bartkus v. *Illinois*, 359 U.S. 121 (1959), recognized an exception to the Double Jeopardy Clause, in an opinion that focused on the Constitutional underpinnings to the exception. However, the limited rule articulated in *Bartkus* provided insufficient guidance to evaluate the complex factual realities of modern law enforcement and criminal prosecution. The key issue of this case therefore presents a question of first impression.

A. *Bartkus* Articulated a Limited Exception Where Sovereigns Act Separately.

In *Bartkus*, the Court examined the exception to the Double Jeopardy Clause, otherwise known as the "separate sovereigns" doctrine. 359 at 123–24. Under this exception, the Clause does not "bar a second trial even though there ha[s] been a prior trial by another government for a similar offense." *Id.* at 121. The *Bartkus* Court advised that this exception would not apply if the second sovereign was "merely a tool" of, or its prosecution was a "sham and a cover for the other sovereign." *Id.* at 123–24. The language of the opinion and the description of the facts in that case leave significant uncertainty about what actions would constitute a "sham" in the eyes of the Court.

B. The Separate Sovereigns Exception Was Justified by Competing Interests of Federal and State Authorities, Rather than Congruent Interests in a JTF.

The legal justification to permit separate successive federal and state prosecutions is rooted in concerns for state sovereignty. As reasoned in *Bartkus* and its progeny, the exception is necessary to vindicate distinct interests of state and federal governments. Yet the case law also seeks to balance these legitimate interests of the sovereign states with the due process rights of individuals to be free from unfair exercise of government power in the form of excessive prosecution. That balance between sovereignty on the one hand and due process on the other is substantially altered in the case of a JTF, where federal and state interests are fully aligned.

The separate sovereigns doctrine developed out of the constitutional structure of dual sovereignty in which the states retain sovereign power not expressly granted to the federal government. *See Heath* v. *Alabama*, 474 U.S. 82, 89 (1985) ("The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." (citing *United States* v. *Lanza*, 260 U.S. 377, 382 (1922))). This federal structure "divides authority between federal and state governments for the protection of individuals." *New York* v. *United States*, 505 U.S. 144, 181 (1992). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

Through that balance of power, "a double security arises to the rights of the people. The different governments will control each other, at the same that each will be controlled by itself." *See Printz* v. *United States*, 521 U.S. 898, 922 (1997) (quoting The Federalist No. 51). The rise of federal-state JTFs warrants a reconsideration of whether the separate sovereigns exception should apply in a case where two sovereign entities choose to fuse their law enforcement capabilities. The Court should therefore grant *certiorari* in this case to evaluate the effect of voluntary combination of the instruments of federal and state police powers into a cohesive law enforcement unit.

A central question to be addressed in this case is whether, by electing to participate in a JTF, the state can essentially cede its sovereign prosecution rights to the federal government or can be deemed to have done so? For example, relevant jurisprudence has held that a state can be deemed to have waived other sovereign rights related to criminal prosecution and enforcement of the police power. In *Ponzi* v. *Fessenden*, this Court noted that a sovereign may waive a similar prerogative, the right to custody of an accused, in favor of another sovereign. 258 U.S. 254, 260 (1922). The reasoning in *Ponzi* strongly suggests that when a state exercises its sovereign discretion in a manner that assists criminal prosecution by another sovereign, but waives its own rights, the state's sovereignty is vindicated rather than impinged.

> [A defendant] may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

Id. Similarly, in *Coleman* v. *Tennessee*, the Court, in holding that Tennessee did not have concurrent criminal jurisdiction with the federal government before it was readmitted to the Union following the Civil War, relied on the doctrine that a sovereign waives its police power over a foreign army by granting free passage to traverse its territory. 97 U.S. 509, 515–16 (1878) ("It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission

of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of *The Exchange* (7 Cranch, 139), to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: ' . . . . The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.'"). Indeed, *Coleman* held that this act of cooperation by a state with another sovereign "implies a waiver" of jurisdiction and that the state "is understood . . . to cede a portion of his territorial jurisdiction." *Id.* at 516. This Court should grant certiorari in this case to consider whether a state's active participation in a JTF cedes a portion of its sovereignty in a way that constitutes a corresponding waiver of jurisdiction to successive prosecution.

C. The Facts in *Bartkus* Do Not Adequately Reflect the Realities of Modern Law Enforcement.

The defendant in *Bartkus* was charged with robbery of a federally-insured savings and loan association, tried in federal District Court, and acquitted. The defendant then was prosecuted in a subsequent trial in Illinois state court based on the same acts. The Court found that the state authorities prosecuted the state court case "within their discretionary responsibility and on basis of evidence" and that criminal conduct occurred within their jurisdiction. 359 U.S. at 123. The record demonstrated that the state and federal investigations were independent from one another, conducted "separately," and involved autonomous decision-making. *Id.*

Although the Federal Bureau of Investigation (FBI) agent on the federal case did turn over evidence to the Illinois prosecution, their involvement in one another's investigations was minimal, as there was no evidence of participation or coordinated efforts between the federal and state investigations. The only other connection between the federal and state trials was a suggestion that the "federal sentencing of the accomplices who testified against petitioner in both trials was purposely continued by the federal court until after they testified in the state trial." *Id.*

The FBI and the Illinois prosecution seemingly had acted unilaterally rather than jointly, as the two did not share resources nor did they partake in joint decision making. Accordingly, the Court found that the state officials' conduct did not support the defendant's assertion that the state was "merely a tool of federal authorities, or that the prosecution was a sham and a cover for federal prosecution, and in effect another federal prosecution." *Id.* at 121. Thus, the Court held that the subsequent trial in state court based on the same acts did not deprive the defendant of due process of law under the Fourteenth Amendment.

II. The Transformation of the Prosecutorial Landscape and the Development of JTFs over the Last Several Decades Warrants Consideration of the Limits of *Bartkus*.

Although *Bartkus* addressed the permissibility of a second prosecution by a government other than the one first prosecuting, it does not squarely consider or opine on the situation presented by a federal-state JTF. The

modern paradigm of JTFs involves cooperative ventures between state and federal forces that provide and pool a diversity of resources between agencies. As described below, a JTF provides immeasurable investigative and prosecutorial advantages as it combines federal and local law enforcement agents into a cohesive unit. Federal and state agencies participate and cooperate to jointly conduct investigations by sharing resources, information, manpower, and intelligence up until the point of prosecution. Because JTFs involve sovereigns cooperating, coordinating, and making decisions essentially as equals, they present a distinct set of facts from cases falling under the *Bartkus* rubric.

A. The Paradigm of Separate Federal and State Law Enforcement Is Outdated.

Prior to the mid-1950s, the federal government's involvement in defining and controlling crime was confined to the enumerated areas of special federal concern. Federal and state law enforcement personnel operated in distinct substantive fields, leaving little need or opportunity to interact. Haley White, *Centralized Prosecution: Cross-Designated Prosecutors and an Unconstitutional Concentration of Power*, 21 Wash. & Lee J. Civ. Rts. & Soc. Just. 521 (2015). This traditional limitation on the federal government's police powers was the context for courts' analyses of the then-rare instances of overlap between federal and state authority. As one court noted, "there are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties." *Ex parte Siebold*, 100 U.S. 371, 392–93 (1879).

The rise in federal police power can largely be attributed to the expansion of the Commerce Clause. The Court has frequently established that Congress' exercise of power under the commerce clause is analogous to the police power of the states. *Brooks* v. *United States*, 267 U.S. 432, 436–437 (1925). The commerce power ensured an integrated economic union, and "[a]s interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *New York*, 505 U.S. at 158.

The proliferation of interstate commerce and subsequent criminal laws addressing these issues increased the interaction between federal and state law enforcement. For example, in 1964 the Court in *Murphy* v. *Waterfront Commission of New York Harbor* interpreted the extensive interaction between state and federal authorities within the criminal process, as part of an "age of 'cooperative federalism,' [in which] the Federal and State Governments are waging a united form against many types of criminal activity." 378 U.S. 52 (1964). This "united form" developed into the creation of federal and state JTFs.

B. The Use of JTFs has Expanded Dramatically Since *Bartkus*.

The expansion of the federal police power has resulted in myriad federal-state JTFs. JTFs cover an increasingly broad array of criminal investigations and law enforcement. The FBI in particular has established JTFs with other federal, state, and local law enforcement agencies that allow them to pool resources of various agencies, taking

"advantage of the efficiencies and expertise of each of these agencies." FBI Organized Crime Report 2016, https://www.fbi.gov/investigate/organized-crime.

1. *Drug Enforcement*

In 1973, the Drug Enforcement Agency (DEA) formed a narcotics task force, encompassing direct cooperation with state and local partners, to investigate the highest level of domestic and international traffickers. Drug Enforcement Administration Programs: State & Local Task Forces (2016), https://www.dea.gov/ops/taskforces.shtml. The 1986 Anti-Drug Abuse Act institutionalized the DEA Task Force Program, replacing informality with formal procedures and appropriations. *Id.* The relationship between DEA and state and local task force participants is now formalized by a signed cooperative agreement, prepared by the DEA's Office of the Chief Counsel and signed by state or local chief executives and DEA officials. *Id.*

Today, the DEA State and Local Task Force Program manages 271 state and local task forces, which included Program Funded, Provisional, HIDTA, and Tactical Diversion Squads. Financial support for funded task forces is provided by DEA headquarters and includes additional resources for state and local overtime. Provisional task forces are supported by the operating budgets of DEA field division offices, without resources from DEA headquarters, and do not included state and local overtime. These task forces are staffed by over 2,200 DEA special agents and over 2,500 state and local officers. Participating state and local task force officers are deputized to perform the same functions as DEA special agents. *Id.*

2. *Organized Crime*

The Organized Crime and Drug Enforcement Task Force (OCDETF) was created in 1982 to combat the ongoing threat posed by organized crime. Drug Enforcement Administration Programs: Organized Crime and Drug Enforcement Task Force (2016), https://www.dea.gov/ops/ocdetf.shtml. The force combines the resources and expertise of its member federal agencies which include: the Drug Enforcement Administration, the Federal Bureau of Investigation, the Bureau of Immigration and Customs Enforcement, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the U.S. Marshals Service, the Internal Revenue Service, and the U.S. Coast Guard – in cooperation with the Department of Justice Criminal Division, the Tax Division, and the 93 U.S. Attorney's Offices, as well as with state and local law enforcement. *Id.*

3. *Terrorism*

The FBI created the Joint Terrorism Task Forces ("JTTFs") with other federal, state, and local law enforcement agencies that allow them to pool resources of various agencies, taking "advantage of the efficiencies and expertise of each of these agencies." Federal Bureau of Investigation (2016), https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces. *Id.* The first JTTF was established in New York City in 1980; now JTTFs are based in 104 cities nationwide. *Id.* A total of 71 of these JTTFs have been created since the terrorist attacks of September 11, 2001. *Id.* Today, JTTFs include approximately 4,000 members nationwide (more than four times the pre-9/11 total) hailing from over 500 state and local agencies and 55 federal agencies. *Id.*

4. *Drug Trafficking*

The High Intensity Drug Trafficking Areas ("HIDTA") program, created by Congress with the Anti-Drug Abuse Act of 1988, provides assistance to Federal, state, local, and tribal law enforcement agencies operating in areas determined to be critical drug-trafficking regions of the United States. Drug Enforcement Administration Programs: High intensity Drug trafficking Area (2016), https://www.dea.gov/ops/hidta.shtml. This grant program is administered by the Office of National Drug Control Policy (ONDCP). *Id.* There are currently 28 HIDTAs, which include approximately 16 percent of all counties in the United States and 60 percent of the U.S. population. *Id.* HIDTA-designated counties are located in 46 states, as well as in Puerto Rico, the U.S. Virgin Islands, and the District of Columbia. *Id.* The DEA plays a very active role and has 589 authorized special agent positions dedicated to the program. At the local level, the HIDTAs are directed and guided by Executive Boards composed of an equal number of regional Federal and non-Federal (state, local, and tribal) law enforcement leaders. *Id.* The 2012 HIDTA annual budget is $238 million. *Id.*

5. *Financial Crimes*

Due to the increasing number of major financial crimes, in 1992 the U.S. Immigration and Customs Enforcement created the El Dorado Task Force to target financial crime at all levels. U.S. Immigration and Customs Enforcement: Money Laundering Report 2016, https://www.ice.gov/money-laundering. The task force consists of more than 260 members from more than 55 law enforcement agencies, including federal agents, state

and local police investigators, intelligence analysts and federal prosecutors.

6. *Human Trafficking*

In 2004, the Bureau of Justice Assistance (BJA) funded a total of 48 Anti-Human Trafficking Task Forces. Bureau of Justice Assistance Anti-Human Trafficking Task Force Initiative 2004, https://www.bja.gov/ProgramDetails.aspx?Program_ID=51. Those task forces have identified 3,336 persons as potential victims of human trafficking. *Id.* The task forces have also trained 85,685 law enforcement officers and others in identifying the signs of human trafficking and its victims. *Id.* By 2015 there were 20 BJA-funded, operational task forces, located in 17 states. Bureau of Justice Assistance Anti-Human Trafficking Task Force Initiative 2015, https://www.bja.gov/ProgramDetails.aspx?Program_ID=51.

7. *Border Enforcement Security*

In 2005, The Department of Homeland (DHS) created the Border Enforcement Task Forces (BESTs), which are composed of Federal, state, local, and international law enforcement. In the Fiscal Year 2014, BESTs made 3,231 criminal arrests and 870 administrative arrests; federal prosecutors obtained 2,013 indictments and 1,837 convictions in BEST-investigated cases. Written testimony of CBP Commissioner R. Gil Kerlikowske for a Senate Committee on Homeland Security and Governmental Affairs field hearing titled "All Hands on Deck: Working Together to End the Trafficking and Abuse of Prescription Opioids, Heroin, and Fentanyl" Dept. of Homeland Security (Sept. 14, 2015), https://www.dhs.gov/

news/2015/09/14/written-testimony-cbp-commissioner-senate-committee-homeland-security-and.

8. *Government Contracting*

In 2006, the DOJ created the National Procurement Fraud Task Force as a partnership of over 50 federal and state law enforcement and investigative agencies. U.S. Dept. of Justice Report 2015, https://www.justice.gov/usao-md/pr/former-government-employee-and-government-contractor-indicted-53-million-procurement. The aim of the NPFTF is to promote the early detection, identification, prevention and prosecution of procurement fraud associated with the increase in government contracting activity for national security and other government programs. *Id.* In 2010, the NPFTF's mission was expanded to encompass the newly formed Financial Fraud Enforcement Task Force ("FFETF") with its focus on combatting mortgage, securities and corporate fraud. *Id.*

C. Modern Task Forces are Integrated Efforts of Federal and State Authorities.

Modern task forces are increasingly integrated efforts of federal and state authorities, coordinating, contributing and participating essentially as equal partners in the investigation and prosecution. Typically, the federal and local agencies enter into Memorandums of Understanding (MOUs) and Common Interest Agreements, to formalize the relationship among the Federal agencies and the participating state and local agencies. *See, e.g.*, FBI: Joint Terrorism Task Force Standard Memorandum of Understanding between the FBI and Metropolitan

Police Department [hereinafter "FBI Standard JTTF MOU"], *available at* http://www.brennancenter.org/sites/default/files/analysis/FN%20374%20%28Federal%20Bureau%20of%20Investigation%2C%20Standard%20Memorandum%20of%20Understanding%29.pdf. The terms of these agreements are designed to maximize cooperation and to create a cohesive unit capable of addressing the most complex criminal investigations. *Id.* For example, the JTF between the DEA and state and local participants is formalized by a signed cooperative agreement. Federal Agencies are permitted to enter into these MOUs based on US statutory authority and regulations. *See, e.g.*, 28 U.S.C. § 533.

Typically these agreements specify that equal resources will be committed by federal and state authorities for use by the JTF. The personnel assigned to JTFs are often comprised of roughly the same number of members of both federal and local agencies. Drug Enforcement Administration Programs: State & Local Task Forces (2016), https://www.dea.gov/ops/taskforces.shtml. Participating agencies similarly contribute other key resources, including intelligence assets, evidence gathering, and prior case files, with the aim of leveraging the collective resources of the member agencies for the prevention, investigation and deterrence of the given crime.

The terms of these agreements illustrate the ex ante commitment of federal and state agencies to joint rather than unilateral action. Typically the agreements expressly acknowledge that the participants are conducting a joint operation and undertake shared responsibilities. Participating state and local task force officers are

deputized to perform the same functions as federal agents. For example, in a typical JTTF arrangement, the local police department assigns a number of its officers to work on the task force with federal agents. Local officers are paid by their local department, but are considered federal agents for most purposes. *See* FBI STANDARD JTTF MOU at 7.

Moreover, state agencies must often coordinate with federal agencies before taking steps outside the scope of these agreements. *Id.* at 9. For example, many MOUs created between the FBI and local agencies specify that the participating agency may not "unilaterally act on any matter affect the [agency] without first coordinating with the FBI." *Id.*

In addition, federal and state entities cooperate selecting venue for prosecution. Often, joint determinations are made for each investigation on whether the matter should be submitted for filing in federal or state court. *Id.* This determination is typically based on the evidence "obtained and a consideration of which method of prosecution will result in the greatest benefit to the overall objectives of the agency and the community." FBI: CYBER CRIME TASK FORCE MEMORANDUM OF UNDERSTANDING (March 2006), *available at* https://www.ashland.or.us/Files/Cyber%20Crime%20Task%20Force_Memo.pdf; *see also* FBI STANDARD JTTF MOU at 9.

Because modern JTFs represent a significant concentration of federal and state investigatory power and government authority, prosecutions arising from JTFs investigations raise greater concerns for potentially abusive successive prosecutions and therefore greater need for protection from double jeopardy.

III. JTFs Require a Double Jeopardy Analysis Distinct from the Separate Sovereigns Doctrine.

Existing jurisprudence stemming from *Bartkus* speaks predominantly to the question of double jeopardy in the scenario of successive prosecutions by sovereign authorities truly acting separately. Because JTFs constitute a particular expression of state sovereignty in collaboration with federal authority, the established separate sovereigns doctrine is an inadequate legal framework by which to evaluate an assertion of double jeopardy. In this new reality both of broad overlapping federal and state police power and of substantial and deliberate collaboration between federal and state law enforcement, this Court's guidance is needed to clarify the implications of a JTF's work under the Double Jeopardy Clause.

The Court should grant certiorari here to clarify whether a state's participation in a JTF triggers double jeopardy protection. Amicus respectfully suggests that an appropriate rule could be articulated for double jeopardy that is focused upon and tailored to the modern realities of the JTF and consistent with the legal underpinnings of the separate sovereigns doctrine.

1. A Distinct Double Jeopardy Rule Should Apply in Cases Arising, as Here, from a State's Participation in a Federal-State JTF.

In articulating the separate sovereigns exception to the double jeopardy prohibition, this Court has balanced concerns for due process against the countervailing, though equally important, policy concern of respect

for state sovereignty. The result has been fairly wide latitude afforded to states, in deference to sovereignty (as described below), to pursue a separate prosecution subsequent to a federal prosecution on similar facts. The notable exception-to-the-exception, articulated in *Bartkus*, has been where a defendant can show that the state has acted as an instrumentality of the federal authorities. Such cases require a fact-specific inquiry into the level of involvement between the federal and state authorities on a particular investigation, with the goal of determining whether the state authorities were acting at the behest of federal authorities.

By contrast, when a state chooses to participate in a joint federal-state task force, that state has openly exercised its sovereignty by actively collaborating with the federal authorities. Where a state has chosen to share resources, information, and decision-making authority with the federal government as part of a JTF, that state's sovereignty is unlikely to be impinged by prohibiting a successive state prosecution following a federal prosecution on the same conduct and facts. In such cases, the state has made a deliberate decision, usually memorialized in a written agreement, that the state's interests are best served by acting in concert with the federal authorities. When the state voluntarily cedes relevant aspects of its sovereignty relating to investigatory resources, charging of crimes, and venues for prosecution, a subsequent state prosecution should not be viewed as the independent action of a separate sovereign, but simply as a second bite at the apple.

Where *Bartkus* and *Abbate* raised issues regarding the double jeopardy clause concerning the encroachment

of one sovereign on another's prosecutorial power, JTFs present the question of how the double jeopardy clause should apply where the sovereigns join together to enhance each other's law enforcement capacities. Existing precedent regarding the double jeopardy clause simply does not answer that question.

This case provides an appropriate vehicle for consideration of whether and how the double jeopardy clause applies to prosecutions by JTFs. Here, the state and federal prosecutors formed a JTF regarding the subject matter of a failed federal prosecution. Apparently conscious of the double jeopardy implications caused by the JTF's existence, the federal prosecutor explicitly cautioned the state prosecutor not to refer to the state prosecution of Walker as the work of the JTF. This effort to skirt the double jeopardy issue in form, if not function, presents the Court with the opportunity to decide the extent to which one sovereign's action binds another when they enter into a JTF.

2. JTFs Do Not Raise the Concerns for Sovereignty That Animate the Separate Sovereigns Exception.

The policy considerations motivating the original separate sovereigns jurisprudence are largely inapplicable to JTFs, because state sovereignty has been sufficiently vindicated by the state's decision to act jointly with the federal authorities. The separate sovereigns doctrine has historically focused on competition between federal and state sovereigns. The *Bartkus* Court rejected an interpretation of the double jeopardy clause that could permit "the federal prosecution of a comparatively

minor offense to prevent state prosecution of [a] grave . . . infraction of state law" because it "would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." 359 U.S. at 136–37.

Similarly in *Abbate* v. *United States*, the Court observed that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." 359 U.S. 187, 195 (1959). The separate sovereign exception to the double jeopardy clause therefore safeguarded the power of the competing federal and state governments under the constitutional structure of dual sovereignty.

Where a state voluntarily participates in a JTF, any encroachment on state sovereignty is too minute to justify an exception to the prohibition on double jeopardy. Unlike the potential displacement of sovereign prerogative to prosecute at issue in *Bartkus* and *Abbate*, JTFs concern the combination of the power of the two sovereigns. At the outset, this combination disposes of the concern in *Abbate* that "unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer." *Id.* While the *Abbate* Court believed "it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses," *id.*, such information sharing is the essence of JTFs.

3. Significant Risks to Individual Liberty Will Result from Permitting JTFs to Rely on the Separate Sovereigns Doctrine.

While sovereignty concerns are not implicated by JTFs, the concerns for individual liberty, justice, and fairness that animate the prohibition on double jeopardy are directly implicated by JTFs. The Constitutional prohibition on double jeopardy is a more recent manifestation of centuries-old concerns that multiple criminal prosecutions of a defendant for the same underlying conduct constitute an insult to justice, fairness, and due process, absent a particularly compelling justification. *Bartkus*, 359 U.S. at 151–54 (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."). While JTFs present a particular set of factual issues, the concerns for justice and fairness directly implicated by multiple prosecutions of a person are no different.

Federal-state JTFs present the scenario where two sovereign entities are not a check and balance on each other's power but rather result in a reciprocal augmentation in their law enforcement capabilities. The Court has considered the issue of the combination of federal and state sovereignties in applying the anti-commandeering doctrine in *New York* and *Printz*. Those cases invalidated statutes by which Congress sought to dictate the execution of law by the states. The rationale of the anti-commandeering doctrine is that the system of dual sovereignty safeguards individual liberty, so an attempt by the federal government to control involuntarily a state's exercise of its sovereignty is unconstitutional. In

Printz, the Court warned that the "separation of the two spheres is one of the Constitution's structural protections of liberty" so "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 states." 521 U.S. at 921–22. That warning merits consideration here.

While JTFs represent a voluntary combination of sovereignties, they pose profound questions about individual liberty in the context of the double jeopardy clause, because they augment the power of the federal and state sovereigns through the cooperation mechanisms. When federal and state sovereigns operate through a JTF, they are not acting as check on each other, as intended by the structure of dual sovereignty, but rather are working together toward a common goal. Application of the separate sovereign exception to JTFs would give both sovereigns two chances to prosecute. This case therefore raises the question of the effect on individual liberty of the voluntary combination of the sovereignties' law enforcement resources.

These issues are particularly salient following the expansion of the federal police power in the twentieth century since *Bartkus* and *Abbate*. *See Abbate*, 359 U.S. at 195 (noting that "the States under our federal system have the principal responsibility for defining and prosecuting crimes"). The recent expansion of federal criminal law creates the risk of numerous dual prosecutions. If the separate sovereign exception were to apply to JTFs, there would be a grave risk of coordinated successive prosecutions of individuals – a threat to individual liberty on the order of that considered in *Printz*.

4. Investigators and Prosecutors Would Benefit from the Increased Certainty of a Clear Ruling on this Question.

Apart from providing obvious benefits to individual liberty, a clear double jeopardy rule focused on federal-state JTFs would benefit federal and state prosecutors through increased legal certainty. Federal and state authorities could avoid expending resources on duplicative investigations and prosecutions that could later be challenged or even overturned on grounds of double jeopardy. For cases arising from JTFs, federal and state authorities would be relieved of intrusive judicial inquiry and collateral litigation to assess sensitive facts concerning the state's participation or the feds' level of control. Given the prevalence of JTFs, and the time and resources committed to their very important and effective work, greater clarity on the Constitutional limitations to prosecution can only aid in directing resources more efficiently toward prosecutions that are more likely to survive double jeopardy scrutiny.

CONCLUSION

For the aforementioned reasons, amicus curiae urges the Court to grant the petition.

Respectfully submitted,

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