No. 16-636

IN THE

Supreme Court of the United States

CALVIN GARY WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Faced with recent calls from Justices of this Court, numerous lower courts, prominent organizations, scholars, and a former Attorney General to reconsider the separate sovereigns exception to the Double Jeopardy Clause, the State tries to manufacture vehicle problems and to make the exception's infirmities seem like old news. But to no avail. This case properly raises the question presented. And as petitioner and his *amici* have explained, there have been important doctrinal and practical developments since the Court last seriously considered the separate sovereigns exception. It is time, therefore, to bring this aberrant strand of constitutional law into line with modern legal and governmental realities. Doing so would preclude an unsupportable legal fiction from doing any further harm, while also restoring a fundamental constitutional guarantee to its original meaning.

At a minimum, this Court should consider establishing meaningful limits on the separate sovereigns exception. The State notes that lower courts have been reluctant to deem the exception inapplicable where federal and state prosecutors engage in "significant cooperation"—or even where, as here, state prosecutors are cross-designated as federal agents. BIO 27-28. But that reticence only underscores the need for this Court's intervention. Where the notion of separate sovereign interests is fictitious in both theory *and* fact, the Court should not permit it to erase the vital safeguard against being prosecuted twice for the same offense.

ARGUMENT

I. This Case Is a Proper Vehicle for Reconsidering the Legitimacy and Scope of the Separate Sovereigns Exception.

Neither of the State's vehicle arguments withstands scrutiny.

A. The State first argues that the only issue on appeal is the "state law" question whether the trial court improperly denied an evidentiary hearing on petitioner's double jeopardy claim, not the double jeopardy claim itself. BIO 10-11. This is incorrect. The trial court's decision to deny relief on petitioner's double jeopardy claim "without further factual development" rested on its belief that the initial filings made clear that the claim failed as a matter of law. Pet. App. 28a-33a. The Texas Court of Appeals affirmed, holding that "the facts alleged in Walker's habeas petitions, even if proven true, do not show" that the Double Jeopardy Clause was violated. Pet. App. 25a; *accord id.* at 12a. In other words, the appellate court held that petitioner has failed to state a claim on which relief could be granted because the separate sovereigns exception precludes any double jeopardy claim he might otherwise have. That is the holding petitioner challenges in this Court.

B. The State acknowledges that jeopardy attached when petitioner stood trial in federal court. BIO 12. And the State does not dispute that it is seeking to prosecute petitioner for the "same" set of offenses (defrauding the Beaumont Independent School District) as the federal government did in the first trial. *See* Pet. App. 2a, 4a; *cf. Heath v. Alabama*, 474 U.S. 82, 87-88 (1985) (noting same premise in

another case involving the separate sovereigns exception).[1] The State maintains, however, that even if this Court were to abolish or limit the separate sovereigns exception, petitioner would still be unable to obtain relief under the Double Jeopardy Clause. BIO 12. Specifically, the State contends that trying petitioner a second time on the fraud charges would still be permissible because the first jeopardy on those charges never terminated. *Id.* at 12-13.

This argument does not raise a vehicle problem. No court has yet considered whether this prosecution places petitioner in jeopardy a second time under the Double Jeopardy Clause. (The State did not even make the argument below.) And this is a "[C]ourt of review, not of first view." *Nautilis, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Therefore, this Court should grant certiorari to review the holding below—namely, that the separate sovereigns exception renders petitioner's double jeopardy argument dead on arrival. If this Court reverses that holding, it should then remand to allow the state courts to consider petitioner's double jeopardy claim in the first instance.

Indeed, that is precisely the procedure this Court followed when it abrogated the Fourth Amendment's

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[1] The State argues that its charges differ from the *tax* offense to which petitioner pleaded guilty. BIO 15-17. But petitioner's double jeopardy claim is that the state charges are identical to the federal *fraud* charges on which he was initially tried. Pet. 5; Pet. App. 4a. The State does not dispute those charges are the "same" under *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

"separate sovereigns" exception. In *Elkins v. United States*, 364 U.S. 206 (1960), the lower courts had deemed it "unnecessary" to determine whether the search and seizure violated ordinary Fourth Amendment principles because the separate sovereigns exception rendered that question irrelevant. *Id.* at 208. This Court abrogated the exception and reversed, leaving it to the lower courts to apply the Fourth Amendment in the first instance. *Id.* at 223-24. This Court regularly follows this same course in comparable settings. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. ___, ___ (2017) (slip op. at 11-15) (holding that the Fourth Amendment applies to claims of unlawful pretrial detention following legal process and remanding for assessment of the merits and related issues); *Peña-Rodriguez v. Colorado*, 137 S. Ct. ___, ___ (2017) (slip op. at 17, 21) (holding that the Sixth Amendment requires consideration of evidence offered to prove violation of the right to an impartial jury and remanding for assessment of the merits); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding that the Second Amendment applies to the States and remanding for assessment of the merits); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (holding that the Takings Clause applied and remanding for assessment of the merits).

In any event, petitioner's double jeopardy claim has merit. As a general rule, the Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). The State seeks to benefit from an exception to this rule, which provides that retrial is allowed (that is, the first jeopardy continues) where the defendant obtains a mistrial

because the jury was "genuinely deadlocked" and thus unable to agree on a verdict. BIO 13 (citing *Richardson v. United States*, 468 U.S. 317, 324 (1984); *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). But that exception has *never* been extended—and does not logically apply—where, as here, the prosecution agreed after the first trial to a plea bargain that terminated all charges against the defendant.

In the cases the State cites, this Court has explained that the prosecution, "like the defendant, is entitled to resolution of the case by verdict from the jury." *Richardson*, 468 U.S. at 326. A hung jury, therefore, creates a "manifest necessity" for a continuation of jeopardy, *id.* at 323—that is, the imperative to "giv[e] the prosecution one complete opportunity to convict those who have violated its laws," *Washington*, 434 U.S. at 509. Were the law otherwise, "the ends of public justice would . . . be defeated." *Richardson*, 468 U.S. at 324 (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)); *see also Wade v. Hunter*, 336 U.S. 684, 688-89 (1949) (rule allowing retrial following a mistrial because jury was unable to agree is necessary to avoid "an insuperable obstacle to the administration of justice").

There is no "manifest necessity," however, under the circumstances here. The federal government reached a plea bargain with petitioner following his first trial that resolved all of the charges against him. The very purpose of a plea bargain is to reach an efficient conclusion that *satisfies* the ends of justice. Indeed, as this Court has explained, plea bargaining is "highly desirable" and "an essential component of

the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *see also Missouri v. Frye*, 566 U.S. 133, 143-44 (2013) (elaborating on these points). And when the prosecution agrees to such a bargain, it, like a defendant, voluntarily relinquishes its "entitle[ment] to resolution of the case by verdict from the jury." *Richardson*, 468 U.S. at 326. The federal government's voluntary relinquishment here thus extinguished any "manifest necessity" for a retrial on the charges and thereby terminated the jeopardy that attached when the jury was sworn.

II. This Court Should Reconsider the Legitimacy and Scope of the Separate Sovereigns Exception.

Try as the State might, it is unable to diminish the need—emphasized last Term by Justices Ginsburg and Thomas—to conduct a "fresh examination" of the separate sovereigns exception. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring).

A. The State is wrong that the arguments petitioner advances against the separate sovereigns exception "are mostly arguments explicitly or implicitly rejected by this Court long ago." BIO 7. To the contrary, petitioner relies primarily on developments arising since this Court last considered the legitimacy of the separate sovereigns exception in *Bartkus v. Illinois*, 359 U.S. 121 (1959). The State scarcely confronts these developments.

First and foremost, the incorporation of the Double Jeopardy Clause against the states knocks out a foundational pillar of *Bartkus.* Pet. 14-15; *see also* Amicus Br. of Const. Accountability Ctr. & Cato

Inst. 11-15. Indeed, incorporation has already prompted this Court to revisit and reject the two other judicially-created "separate sovereigns" exceptions. *See* Pet. 15 (citing *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964); *Elkins v. United States*, 364 U.S. 206 (1960)). The State offers no response why reexamination is not similarly in order here.

Second, the State does not dispute that we now know the *Bartkus* Court was incorrect when it stated that English common law was inconclusive on the question presented here, *see* 359 U.S. at 128 n.9. That law (as well as Founding-era American law) unequivocally prohibited one sovereign from prosecuting someone after another sovereign had already done so. *See* Pet. 10-13; Amicus Br. of Stuart Banner 1-14.

Clinging to a single sentence in a footnote of *Bartkus*, the State protests that English common law is "not relevant to the constitutional law of our federalism." BIO 20 (quoting *Bartkus*, 359 U.S. at 128 n.9). This Court, however, has since squarely repudiated that notion. Abrogating the "separate sovereigns" exception to the right against self-incrimination (the Double Jeopardy Clause's Fifth Amendment neighbor), the Court deemed "English antecedents" on the issue directly pertinent and controlling. *Murphy*, 378 U.S. at 57; *see also id.* at 58-63, 77. And more generally, this Court has recently made clear that the Framers intended individual liberty to be "*enhanced* by the creation of two governments, not one." *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (emphasis added) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)); *see also*

The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003) (federalism is designed to afford "a double security . . . to the rights of the people"); Amicus Br. of Const. Accountability Ctr. & Cato Inst. 7-11. Allowing the State and the federal government to do jointly what neither could do separately turns this principle on its head.

It is no answer that abolishing the separate sovereigns exception "would allow the federal government essentially to take the States' traditional police powers by adverse possession"—that is, by prosecuting a person in federal court before a state proceeded against him. BIO 24. The Double Jeopardy Clause protects *individuals* against prosecutorial power. It does not regulate the relationship between the federal government and the states. Even if it did, it bears stressing once more that the common-law principle of double jeopardy did *not* permit a sovereign to prosecute someone for the same thing another sovereign already had. And states in our system of cooperative federalism did not acquire *greater* sovereign powers than those they possessed before the Founding. *See* Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 19-22 (1997). The State elsewhere implicitly concedes as much, contending only that the states "retain all the rights of sovereignty which they before had." BIO 17-18 (quoting The Federalist No. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

Third, it can hardly be disputed that the modern proliferation of federal criminal law—and joint federal-state task forces in cases involving overlapping jurisdiction—has fundamentally altered

the relationship between federal and state authorities since *Bartkus* was decided. *See* Pet. 18-19; Amicus Br. of NACDL 13-23. The State responds that "[i]t is beside the point whether the federal and state governments have distinct interests in prohibiting certain conduct." BIO 25. But in fact, that assumption was critical to the development of the separate sovereigns exception. This Court asserted in *Bartkus* and its companion case that sometimes "a federal interest" in prosecuting certain conduct diverges from "a state interest." *Abbate v. United States*, 359 U.S. 187, 195 (1959); *see also Bartkus*, 359 U.S. at 137. Moreover, this Court surmised "it would be highly impractical" for federal and state authorities regularly to coordinate regarding prosecutions in which both might be interested. *Abbate*, 359 U.S. at 195. Now that those suppositions are plainly outdated, the separate sovereigns exception demands reexamination.

B. At the very least, this Court should grant certiorari to consider limiting the scope of the separate sovereigns exception. The State belittles this as merely an "abstract" question. BIO 29. But it is nothing of the sort. Petitioner contends that even if the separate sovereigns exception is generally valid, it should not apply where a subsequent prosecution arises from a joint federal-state task force. Pet. 30-33. This is an important issue in its own right, *see* Amicus Br. of Ctr. on Admin. of Crim. Law 5-25, and it is outcome determinative here.

Conceding that "there is some disagreement" in the lower courts concerning limits on the separate sovereigns exception, the State argues the confusion is "immaterial" because no limits in fact exist. BIO

27-29. This argument on the merits just underscores the need for this Court to intervene. The *Bartkus* majority plainly suggested that the separate sovereigns exception should not apply where state and federal prosecutors cooperate so closely that a state prosecution is "in essential fact another federal prosecution." 359 U.S. at 124. Yet the lower courts have been so hesitant to preclude successive prosecutions on this basis—even when evidence of concerted activity has been overwhelming, *see* Pet. 27—that the State feels justified in characterizing *Bartkus*' suggestion as wholly "illusory." BIO 29 (quotation marks and citation omitted). It is time for this Court to provide guidance on the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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