No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici's members include a diverse group of state and local governments, active prosecutors, law enforcement personnel, and elected officials, each of whom has an acute interest in ensuring that the long-entrenched dual sovereignty doctrine remains intact. *Amici* and their members rely on their States' sovereign authority to enact criminal laws and to pursue criminal prosecutions that benefit the communities they serve. The dual sovereignty doctrine promotes these efforts.

Eliminating the doctrine, by contrast, would threaten *amici*'s ability to meet local needs. It would hinder state and local cooperation with the federal government and increase competition among law enforcement—a process that is sure to have an outsized impact on state and local officials forced to try to jostle with federal prosecutors for cases. State and local officials remain the face of law enforcement, and they assume the political accountability that comes with that role. In doing so, however, they rely every day on the continued certainty that, through the dual sovereignty doctrine, they can seek to serve their own sovereign interests as best they see fit. The Court should not topple this centuries-old doctrine.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935,

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. The League is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National District Attorneys Association (NDAA) is the largest prosecutor organization repre-

senting 2,500 elected and appointed District Attorneys across the United States as well as 40,000 Assistant District Attorneys. NDAA provides professional guidance and support, serves as a resource and education center, and follows and addresses criminal justice issues of national importance.

The National Sheriffs' Association (NSA) is a 501(c)(4) non-profit association formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States. One of the primary missions of NSA is to promote and protect the Department/Office of Sheriff located throughout the United States. NSA has over 21,000 members and is a strong advocate of America's over 3,080 Sheriffs. Over 99% of all our nation's Departments/Offices of Sheriff are directly elected by the people of their local parish, city and county. NSA promotes the public interest goals and policies of law enforcement in our nation by participating in judicial processes where the vital legal interests of law enforcement and our membership are affected.

INTRODUCTION AND SUMMARY OF ARGUMENT

At its most elemental level, the dual sovereignty doctrine is a recognition of the States' inherent, and equal, sovereignty reserved to them by the Tenth Amendment. Although the States and the federal government are indeed "parts of ONE WHOLE," see *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (quoting THE FEDERALIST NO. 82 (Alexander Hamilton) (J. Hopkins ed., 1802)), it is equally true that "the whole people of the United States asserted their political identity and unity of purpose when they created the federal system," with "two political capacities, one state and one

federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In advocating to eliminate the dual sovereignty doctrine, Petitioner loses sight of the doctrine's Tenth Amendment foundation and fails to recognize the significant benefits from our federal system that will be jeopardized in its absence.

Amici submit this brief to highlight two important points. *First*, Petitioner's brief focuses on the text and history of the Fifth Amendment's Double Jeopardy Clause, while largely failing to account for the dual sovereignty doctrine's Tenth Amendment foundation. This Court's cases make clear, however, that the Tenth Amendment and the federalism principles it enshrines have formed and shaped the doctrine both before and after the Double Jeopardy Clause's incorporation. These roots are critical to ensuring that the doctrine remains true to its primary objectives: the protection of state sovereignty, the enhancement of individual liberty, and the heightening of political accountability.

Second, eliminating the dual sovereignty doctrine would frustrate cooperative federalism and have a lopsided impact on state and local governments. It would directly impair the state and local exercise of prosecutorial discretion, which this Court has routinely safeguarded as fundamental to the federalist system. It would prevent the States from fully securing their citizens' right to liberty from violence, which is at the heart of the liberty secured by federalism. It would also uproot longstanding state efforts to provide *greater* protections against double jeopardy and require that each State cede prosecutorial authority to the federal government. And eliminating the dual sovereignty doctrine would unfairly impact state and

local prosecutors, who would remain politically accountable for law enforcement outcomes, despite being stripped of the ability to address those problems locally.

Put simply, the dual sovereignty doctrine is not a doctrine of convenience: it safeguards the benefits of federalism and ensures that the States retain their primary authority over the administration of criminal justice. The Court should affirm the ruling of the United States Court of Appeals for the Eleventh Circuit and ensure that the dual sovereignty doctrine remains undisturbed.

I. THE DUAL SOVEREIGNTY DOCTRINE'S TENTH AMENDMENT FOUNDATION.

Petitioner focuses heavily on double jeopardy as understood in English history and precedent. But this Court has correctly recognized that those authorities are "dubious . . . because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus* v. *Illinois*, 359 U.S. 121, 128 n.9 (1959). Consideration of the dual sovereignty doctrine instead requires us to look "to the American experience, including our structure of federalism which had no counterpart in England." See *United States* v. *Gillock*, 445 U.S. 360, 369 (1980).

Petitioner fails to do so and, in fact, never once even cites to the Tenth Amendment. That ahistorical account ignores the Framers' intent to reserve primary authority over criminal justice to the States by way of the Tenth Amendment—an intent that has molded the Court's dual sovereignty cases. And protecting state authority over the administration of criminal justice was not an end unto itself but was, instead, designed to make government more responsive and

accountable, and to enhance individual liberties. The dual sovereignty doctrine serves these goals.

A. The Tenth Amendment Historical Record Confirms The States' Primary Sovereignty Over Criminal Justice.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X. The historical record underlying this amendment amply confirms that, where criminal justice is concerned, the power was almost exclusively "reserved to the States" and is a feature of the States' inherent sovereignty.

At the founding, Antifederalists voiced concern at nearly every state ratifying convention that an overly powerful national government would subdue the role of the States in the constitutional design. See generally 1-4 The Debates in the Several State Conventions of the Adoption of the Federal Constitution (Washington, J. Elliot 1827) [hereinafter ELLIOT], *available at* https://bit.ly/2OjNatI; *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting). They understood that the natural inclination of a central government would be "to lessen and ultimately to subvert the State authority." BRUTUS, FEDERALIST POWER WILL ULTIMATELY SUBVERT STATE AUTHORITY, *reprinted in* Antifederalist No. 17, THE ANTIFEDERALIST PAPERS 42, 45 (Morton Borden ed., 1965).

Despite widespread disagreement on the proper scope of federal power, however, there was widespread agreement about one thing: criminal justice was by and large a power reserved to the States. See BRUTUS, CERTAIN POWERS NECESSARY FOR THE COM-

MON DEFENSE, CAN AND SHOULD BE LIMITED (1788), *reprinted in* ANTIFEDERALIST NO. 23, THE ANTIFEDERALIST PAPERS, *supra*, at 57, 59 ("The most important end of government then, is the proper direction of its internal police, and economy; this is the province of the state governments, and it is evident, and is indeed admitted, that these ought to be under their control."); BRUTUS, THE POWER OF THE JUDICIARY (PART 2) (1788), *reprinted in* ANTIFEDERALIST NO. 80, THE ANTIFEDERALIST PAPERS, *supra*, at 226, 226 (raising alarm over the effect of a federal judicial system on "the internal police and mode of distributing justice at present subsisting in the respective states").

Even Alexander Hamilton, one of the most prominent Federalists, saw the States as arbiters of criminal justice. In his view, "[t]here is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice." THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He considered the administration of justice the "great cement of society, which will diffuse itself almost wholly through the channels of the particular governments" and "insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union." *Id.*; see also THE FEDERALIST NO. 45, *supra*, at 292-93 (James Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

The Federalists eventually conceded that in order to secure the votes for ratification, a bill of rights was necessary—including a provision reserving powers to the States. *Garcia*, 469 U.S. at 568 (Powell, J., dissenting). The Tenth Amendment is the result of this important compromise. The amendment does not contain an enumerated list of powers "reserved to the States."

That choice was deliberate. For one thing, enumeration could have wrongly implied that powers not enumerated were thereby ceded to the national government. See Letter from George Lee Tuberville to James Madison (Dec. 11, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 231, 232 (John P. Kaminski et al., eds., 1988) [hereinafter Kaminski], *available at* https://bit.ly/2DfYLsq ("[A]n enumeration of those priviledges which we retained – wou'd have left floating in uncertainty a number of non enumerated contingent powers and priviledges . . . thereby indisputably trenching upon the powers of the states."). For another thing, an enumerated list was viewed as unnecessary due to the plenary powers enjoyed by the States. See, *e.g.*, 2 ELLIOT, *supra,* at 64 ("[I]t would require a volume to describe" the "rights of particular states"); see *Sossamon* v. *Texas*, 563 U.S. 277, 283 (2011) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint. Upon ratification of the Constitution, the States entered the Union with their sovereignty intact." (citation omitted)).

Even when enumerations were attempted, however, they consistently listed criminal justice among the many rights to be reserved to the States. See, *e.g.*, Tench Coxe, *A Freeman* (Essay II), *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS: 1787-88, at 93 (Colleen A. Sheehan & Gary L.

McDowell eds., 1998) ("[t]he states will regulate and administer the criminal law, *exclusively of Congress*, so far as it regards *mala in se*, or real crimes; such as murder, robbery [etc.]. They will also have a certain and large part of the jurisdiction, with respect to *mala prohibita*."); A.B., Hampshire Gazette (Jan. 2, 1788) *reprinted in* 5 KAMINSKI, *supra*, at 596, 599, *available at* https://bit.ly/2ERHSGl ("murther [sic], adultery, theft, robbery, burglary, lying, perjury, [and] defamation" were state concerns); see also Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 483 (2003) ("On numerous occasions, federalists cited criminal law and local law enforcement, as well as the administration of civil justice and state legal systems generally, as exemplars of reserved state powers.").

In recognition of the States' authority in this realm, the first Congress enacted a fairly limited set of federal offenses in the Crimes Act of 1790. This included treason, piracy, and other offenses committed on federal enclaves—crimes which were all understood to be within federal purview. This Court's early precedents also recognized the States' central role over the administration of criminal justice—that "Congress cannot punish felonies generally," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and "the police power . . . unquestionably remains, and ought to remain, with the States." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

The Court's more recent Tenth Amendment jurisprudence has further solidified the understanding that criminal law enforcement is "an area to which States lay claim by right of history and expertise." *United States* v. *Lopez*, 514 U.S. 549, 582 (1995) (Kennedy, J., concurring); *id.* at 584-85 (Thomas, J., concurring) ("The Federal Government has nothing

approaching a police power."); *United States* v. *Morrison*, 529 U.S. 598, 618 n.8 (2000) (the principle is "deeply ingrained in our constitutional history" that "the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States.").

In sum, the Tenth Amendment historical record confirms the Framers' intention to draw clear boundaries between federal and state authority in the administration of criminal justice, with the vast majority of this power being reserved to the States.

B. The Dual Sovereignty Doctrine Arises From The Recognition That States Possess Primary Authority Over Matters Of Criminal Justice.

The Court's dual sovereignty cases before and after incorporation of the Double Jeopardy Clause confirm that the States' authority over criminal prosecutions is "preserved to them by the Tenth Amendment," *United States* v. *Lanza*, 260 U.S. 377, 381-82 (1922), and that the dual sovereignty doctrine operates as a check against the "displace[ment]" of the reserved power of the States. *Bartkus*, 359 U.S. at 137. Incorporation did not affect the States' authority in this realm, which remains an important basis for the doctrine's continued vitality.

1. Pre-Incorporation Decisions Confirm The Doctrine's Tenth Amendment Anchor.

The Court's earliest recognition of the dual sovereignty doctrine arose in *Fox* v. *Ohio*, a case that affirms the inviolability of state authority over criminal prosecutions. 46 U.S. (5 How.) 410 (1847). The defendant was indicted in Ohio state court for passing counterfeit coin. *Id*. at 432. He argued the state court

had no jurisdiction to prosecute for that offense, as Congress was given power to coin money and "provide for the punishment of counterfeiting the securities and current coin of the United States." U.S. CONST., Art. I, § 8, cl. 5-6.

This Court rejected the argument, because "[t]he punishment of a cheat or a misdemeanor practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties." 46 U.S. at 434. This state power was so fundamental, in fact, that not even a former federal prosecution could render the state prosecution invalid. Federal prosecution "would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Id.* at 435.

The dual sovereignty doctrine's Tenth Amendment mooring later became even more explicit. The Court reaffirmed the doctrine in *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 15 (1852), recognizing the States' "original and unsurrendered sovereignty" over criminal prosecution. At length, the Court explained that "[t]he power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the United States. In the exercise of this power, which has been denominated the police power, a State has a right to [enact penal laws]." *Id.* at 18.

In *Lanza*, the Court cited directly to the Tenth Amendment, noting that the States' authority to prosecute derived its force "from power originally be-

longing to the states, preserved to them by the Tenth Amendment." 260 U.S. at 381-82; *Abbate* v. *United States*, 359 U.S. 187, 193 (1959) ("The Court . . . pointed out [in *Lanza*] that the State could constitutionally make Lanza's acts criminal under its original powers reserved by the Tenth Amendment, and the Federal Government could constitutionally prohibit the acts under the Eighteenth Amendment."). And in *Bartkus*, the Court explained that the dual sovereignty doctrine serves as a check on federal power: "[i]t 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 137.

2. Incorporation Did Not Alter This Tenth Amendment Foundation.

In *Benton* v. *Maryland*, the Court incorporated the Double Jeopardy Clause against the States, thereby preventing each individual state from twice prosecuting an individual for the same offence. 395 U.S. 784, 796 (1969). This decision did not impact the dual sovereignty doctrine, nor did it undermine the doctrine's Tenth Amendment foundation, but rather the validity of the conviction was judged "under this Court's interpretations of the Fifth Amendment double jeopardy provision." See *id*. The decision left unimpaired each State's sovereign authority to prosecute—once—for offenses to the State's own laws.

In fact, post-incorporation decisions reaffirmed the doctrine's Tenth Amendment foundation in full-throated terms. In *Heath* v. *Alabama*, the Court concluded that each State is considered a separate sovereign, and the States' "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." 474 U.S. 82, 89 (1985).

Most recently, the Court reaffirmed the vitality of the doctrine in *Puerto Rico* v. *Sanchez Valle*, citing to the Tenth Amendment and explaining that "[p]rior to forming the Union, the States possessed 'separate and independent sources of power and authority,' which they continue to draw upon in enacting and enforcing criminal laws. State prosecutions therefore have their most ancient roots in an 'inherent sovereignty' unconnected to, and indeed pre-existing, the U.S. Congress." 136 S. Ct. at 1871 (quoting *Heath*, 474 U.S. at 89)).

Simply put, given the dual sovereignty doctrine's Tenth Amendment mooring, the Court's incorporation of the Double Jeopardy Clause did not affect the doctrine's continuing vitality.

C. The Dual Sovereignty Doctrine Ensures That States Can Guarantee To Their Citizens The Benefits Of Federalism.

Petitioner argues that the dual sovereignty doctrine "runs afoul of foundational concepts of federalism" by "'obliterating ancient safeguards' of individual liberty." Pet. Br. 29. Not only is that wrong in its own right, but Petitioner's position fails to appreciate that "[f]ederalism has more than one dynamic." *Bond* v. *United States*, 564 U.S. 211, 221 (2011) ("*Bond I*").

"The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.* For this reason, the Court has routinely ensured that the States' reservation of authority over the administration of criminal justice remains more than symbolic. It has done so by inval-

idating federal statutes that encroach on the States' authority over criminal conduct, and by refusing to apply federal statutes in ways that infringe on this authority. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (invalidating federal statute that "foreclose[d] the States from experimenting and exercising their own judgment in an area [criminal justice] to which States lay claim by right of history and expertise."); *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) ("*Bond II*") (applying rule of construction against application of federal statute because "the Constitution's division of responsibility between sovereigns . . . leav[es] the prosecution of purely local crimes to the States.").

This reservation of state authority, however, is not federalism's "exclusive sphere of operation." *Bond I*, 564 U.S. at 221. By committing to the States their reserved sovereignty over the administration of criminal justice, States are able to "secure[] to citizens the liberties that derive from the diffusion of sovereign power." *Id.* And these liberties are diverse. "Federalism secures the freedom of the individual," but it also secures liberties "of a political character" that benefit individuals in their operation. *Id.* For example, "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government "more responsive by putting the States in competition for a mobile citizenry." *Id.* (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)). As Madison recognized, "[a]chievement of these ends . . . was the 'great object' of the Constitution." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484,

1492 (1987) (quoting THE FEDERALIST NO. 10, *supra*, at 80 (James Madison)).

Where criminal justice is concerned, these liberties are best secured by protecting the diffusion of power to state and local governments. Indeed, the Framers believed that "state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government," as the actions of a powerful national government—extending to the citizenry at large—were considered to be more dangerous to liberty than those of a diffuse group of states. *Id.* at 1506.

The States, in turn, have gone a step further by diffusing their own sovereign powers to municipal governments. Although municipalities are not considered independent sovereigns under the dual sovereignty doctrine, many states treat municipalities as separate sovereign entities "for all relevant real-world purposes" by giving them "broad home-rule authority, including the power to enact criminal ordinances and prosecute offenses." *Sanchez Valle*, 136 S. Ct. at 1872; *Reynolds* v. *Sims*, 377 U.S. 533, 580 (1964) ("Local governmental entities are frequently charged with various responsibilities incident to the operation of state government."). As discussed below, this diffusion of power inures to the benefit of those impacted by the criminal justice system, including offenders, victims, and the communities affected by crime.

II. ELIMINATING THE DUAL SOVEREIGNTY DOCTRINE WILL FRUSTRATE COOPERATIVE FEDERALISM AND HAVE AN OUTSIZED IMPACT ON LOCAL GOVERNMENT.

The dual sovereignty doctrine ensures that each State—and, by extension, each municipality—may

exercise the States' inherent sovereignty over the administration of criminal justice. THE FEDERALIST NO. 16, *supra*, at 116 (Alexander Hamilton) (each State must "possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted").

Eliminating the doctrine will interfere with state and local prosecutorial discretion, prevent state efforts to foster liberty through innovation and experimentation, impede state and federal cooperative efforts toward a double jeopardy regime that is *more* protective of individual liberty, and blur the lines between state and federal criminal authority in ways that undermine accountability. Each of these unwelcome repercussions, moreover, would disproportionately impact state and local governments.

A. Eliminating The Dual Sovereignty Doctrine Will Impair State Prosecutorial Discretion.

The dual sovereignty doctrine reserves to each state the ability "independently to determine what shall be an offense against its authority, *and to punish such offenses*." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978) (emphasis added). Prosecutorial discretion is an essential hallmark of that power. Indeed, the Court has "traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system." *Bond II*, 134 S. Ct. at 2092.

Bond is a telling example. Federal prosecutors aggressively pursued an indictment under a chemical weapons statute after complaining that Pennsylvania authorities had "charged Bond with only a minor offense." *Id.* The Court refused to read the federal statute to reach purely local conduct, noting that "the

laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond," and the federal government had "displaced the public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign," not to pursue more serious charges. *Id.* at 2092-93. In narrowly construing the statute, the Court added that permitting the federal prosecutors to usurp the State's authority "would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States." *Id.* at 2093.

Petitioner asks for just such a "dramatic departure" here. Consider just a small tweak to the facts of *Bond*, in the absence of the dual sovereignty doctrine. Had the federal prosecutors opted to pursue less aggressive charges in their zeal to convict, or had they done so before the State case, the effort would not only have "displaced" Pennsylvania's prosecutorial decisions but could also have *pre-empted* those decisions. The dual sovereignty doctrine prevents such encroachments while protecting the constitutional boundaries between federal and state governments. See *U.S. Term Limits*, *Inc.*, 514 U.S. at 838 (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

Bond is not, of course, the only instance in which a federal prosecutor's decision to initiate a successive prosecution has encroached on state prosecutorial decisions "in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). In *Lopez*, for example, Texas officials had initiated gun possession charges against a 12th-grade

student, only to reverse that decision the day after federal prosecutors charged the student under a federal gun possession statute. 514 U.S. at 551. Federal prosecutors' incursion into state prosecutorial decisions like this occurs with some frequency, particularly when the subject or crime is considered high profile. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 40 (1998), https://bit.ly/2CSvao2.

The dual sovereignty doctrine prevents such vertical incursions on prosecutorial discretion from the federal government, but it also prevents horizontal incursions by ensuring that each state's prosecutorial decisions remain independent of those made by a sister state. *Heath*, 474 U.S. at 89 ("The States are no less sovereign with respect to each other than they are with respect to the Federal Government."). In recent years in particular, the Court has emphasized the importance of equal sovereignty among and between the state and federal governments. *E.g.*, *Shelby Cty.* v. *Holder*, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States."); *Franchise Tax Bd. Of Cal.* v. *Hyatt*, 136 S. Ct. 1277, 1282 (2016) (requiring each state to afford a "healthy regard for . . . [the] sovereign status" of sister states).

Eliminating the dual sovereignty doctrine will only exacerbate turf wars among the states and the federal government and thereby lead to a "shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Bartkus*, 359 U.S. at 137.

B. The Dual Sovereignty Doctrine Safeguards The States' Ability To Secure Their Citizens' Liberty From Crime.

Petitioner argues that the dual sovereignty doctrine does not serve federalism's goal of enhancing individual liberty. Pet. Br. 29. However, Petitioner's conception of liberty is unduly cramped and is not aligned with the understanding of the Framers, who recognized that true liberty is to be free from violence. That liberty is best secured by the States who, through "innovation and experimentation" have ensured preferable outcomes for offenders and victims alike. *Bond I*, 564 U.S. at 221. And the dual sovereignty doctrine acts as a final safeguard to the rights of victims by ensuring that one sovereign's institutional failures or lack of political will to address injustice does not constrain another sovereign from doing so.

1. The Framers' conception of liberty was indelibly tied to John Locke's recognition of a social compact, whereby individuals would secure greater liberty through self-government. "[W]here there is no law, there is no freedom. For liberty is to be free from restraint and violence from others." John Locke, *Second Treatise of Government* 86 (Richard H. Cox ed., John Wiley & Sons, Inc. 2014) (1690). This was the basis for James Madison's view that "the first object of government" is to secure the "protection" of "the faculties of men" and, by extension, "the rights of property." THE FEDERALIST NO. 10, *supra*, at 78 (James Madison). As this Court has recognized, the Constitution guarantees freedom from restraint "under conditions essential to the equal enjoyment of the same right by others." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26-27 (1905).

The Framers also understood that this liberty was best secured by the States. The States would retain their sovereign authority over "the ordinary administration of criminal and civil justice" because they were best positioned—they were "the immediate and visible guardian[s] of life and property" and could thus "impress[] upon the minds of the people affection, esteem, and reverence towards the government." THE FEDERALIST NO. 17, *supra*, at 120 (Alexander Hamilton). There would be no true "liberty," and indeed no "reverence towards the government," *id.*, if the States could not ensure that the people were "free from restraint *and violence from others*." Locke, *supra*, at 86 (emphasis added).

2. The States are not only better *positioned* to safeguard liberty; they are better *in practice*, having over the centuries used "innovation and experimentation" to prevent recidivism and protect the victims of crime. *Bond I*, 564 U.S. at 221. Consider, for example, the opioid crisis, which the current administration has made one of its priorities. Rachel Weiner & Sari Horwitz, *Sessions Vows Crackdown on Drug Dealing and Gun Crime*, WASH. POST (Mar. 15, 2017), https://wapo.st/2AmXRI2. In the federal system, a first-time defendant possessing one gram of heroin will face a one-year jail sentence and a minimum $1,000 fine. 21 U.S.C. § 844(a). The same defendant in West Virginia faces only a six month sentence and a maximum $1,000 fine, but may instead proceed through drug court, receive treatment options, and have the charges dismissed. W.V. CODE § 60A-4-401(c) (setting penalties); *Id.* § 62-15-4(g) (permitting court to dismiss charges upon completion of drug court program). The federal system only contains a handful of intervention programs like this, whereas "every state and the District of Columbia have several such court pro-

grams, and some states now have several dozens of them." U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARC-ERATION COURT PROGRAMS 8, 93 (Sept. 2017), https://bit.ly/2ypdyx2.

Preserving the States' ability to administer criminal justice also best serves victims, who have greater rights under many state laws. For example, the State of Arizona has enshrined victims' rights in its constitution, and one of the unique features of the State's regime is the victim's right to refuse an interview, deposition, or other discovery request by the defendant or the defendant's representatives. AZ. CONST. § 2.1(A)(5). No such right exists under the federal Crime Victims' Rights Act. 18 U.S.C. § 3771. In fact, when a state case moves through federal habeas corpus proceedings, the federal statute specifically disclaims any obligation to state crime victims on the part of federal prosecutors. *Id*. § 3771(b)(2)(C) ("This paragraph . . . does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.").

3. The dual sovereignty doctrine further ensures that one sovereign can obtain justice for victims where another sovereign's institutional failures or lack of political will has prevented it from doing so. By dividing power "between two distinct governments, . . . a double security arises to the rights of the people. The governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51, *supra*, at 323 (James Madison). Our nation's history of civil rights prosecutions, and its more recent prosecution of financial crimes, provide apt illustrations of this principle in practice.

When the state of Georgia failed to bring charges against local law enforcement officers for beating an

African-American man to death, the federal government initiated its own prosecution under the Civil Rights Act. See *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring) (plurality opinion). Dual sovereignty ensures that in instances like this of "gross abuse," one sovereign may act as a double security to the rights of the people, without causing "grave or substantial problem of interference by federal authority in state affairs." *Id.* at 133 (Rutledge, J., concurring) (noting the inherent constraints on federal prosecutions under the Civil Rights Act). Absent the dual sovereignty doctrine, however, the officers' three-year sentence under the Civil Rights Act would have precluded the State from prosecuting the officers for the underlying murder, despite the State's primary responsibility for the administration of criminal justice. For this reason, the *Abbate* court—highlighting the *Screws* case specifically—noted that eliminating the dual sovereignty doctrine "would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes." 359 U.S. at 195 (citing *Screws*, 325 U.S. at 109 (plurality opinion)).

The federal government's inability to secure prosecutions following the 2008 economic crisis is another good illustration. There was an "abundance of tangible evidence of wrongdoing by Wall Street bankers, traders and executives in the years leading up to the great unwinding," yet very few prosecutions have resulted, due in large measure to perceived institutional constraints. See William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES (July 21, 2016), https://nyti.ms/2Dcm4U2. The States have, however, held the federal government's feet to

the fire and have also pursued their own prosecutions. For example, when the Obama administration was promoting a $25 billion settlement among five of the nation's largest lending institutions, a number of the States balked after learning that the settlement would have permitted the banks to remain clear of state or federal prosecution. Harold Meyerson, Opinion, *Eric Schneiderman, New York AG, Shaped Drive to Hold Banks Accountable*, WASH. POST (Jan. 31, 2012), https://wapo.st/2ObpA21. As a result of the States' involvement, the final consent judgment "does not prevent state and federal authorities from pursuing criminal enforcement actions." U.S. Dep't of Justice, Press Release No. 12-186, Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), https://bit.ly/1Vh7CMg.

C. The Dual Sovereignty Doctrine Actually Ensures Greater Double Jeopardy Protections.

Petitioner also fails to account for the significant benefits to liberty secured by our system of cooperative federalism, including enhanced protections from double jeopardy. Those protections will be impaired in the absence of the dual sovereignty doctrine.

1. The dual sovereignty doctrine has led to a cooperative system of state and federal laws that offers *greater* protections from double jeopardy. The Fifth Amendment's Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend. V. States have historically shielded their citizens from double jeopardy in ways more protective than the "same offence" restriction under the Double Jeopardy Clause. For example, whereas in

seventeenth century England double jeopardy "meant that no man's *life* ought twice to be placed in jeopardy for the same offense," the Massachusetts colony adopted a rule that was far more protective, as it "extended to all types of criminal prosecutions and to civil trespasses as well." Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 285, 300 (1963) (emphasis added).

Since the Founding, States have continued to enact diverse double jeopardy protections. See ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS § 4 (2001) (compiling laws). Take, for instance, New York, which has imposed broad dual sovereignty limitations since 1829. The state's constitution contains a double jeopardy clause with nearly identical language to the federal clause, but New York's clause "has been interpreted to give more protection to defendants than the federal double jeopardy clause in some contexts." *Id.* at 217 n.1. New York also provides enhanced statutory protection from double jeopardy, as the state's statute protects individuals from successive prosecutions "based upon the same act or criminal transaction." N.Y. CRIM. PROC. LAW § 40.20. The State has carved out limited exceptions to this rule in order to protect its ability to prosecute unimpeded where "legitimate state law enforcement interests" so warrant. KURLAND, *supra*, at 219. This approach safeguards *both* individual liberty *and* state sovereignty.

States have also imposed heightened double jeopardy protections in subject-specific areas. One example is the Uniform Controlled Substances Act, which provides: "If a violation of this [Act] is a violation of a federal law or the law of another State, a conviction or acquittal under federal law or the law of another

State for the same act is a bar to prosecution in this State." UNIF. CONTROLLED SUBSTANCES ACT § 418 (UNIF. LAW COMM'N 1994), https://bit.ly/2JpxlAE. The majority of states have adopted the Act, including its double jeopardy protections, in one form or another. Uniform Law Commission, *Legislative Fact Sheet – Controlled Substances Act*, https://bit.ly/2RlNTfG (last visited Oct. 30, 2018); see MICH. COMP. LAWS § 333.7409; WASH. REV. CODE § 69.50.405; OKLA. STAT. tit. 63, § 2-413; N.Y. PUB. HEALTH LAW § 3396(3).

The federal government has also taken steps to eliminate successive prosecutions. Although its patchwork of statutes and policies is not as protective as many state regimes, Congress has enacted protections against double jeopardy in a variety of areas where federal criminal jurisdiction is concurrent with the States. See, *e.g.*, 18 U.S.C. § 659 (embezzlement statute providing that "[a] judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts."). The Department of Justice (DOJ) has done the same through its Petite Policy, which "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)," unless to vindicate particular federal interests. U.S. Dep't of Justice, *U.S. Att'ys Manual* § 9-2.031 (2009). As Respondent has indicated, this policy has led DOJ to decline successive prosecutions in over 1,200 cases in a recent eight-year period. Resp. Br. 54 (citing Bureau of Justice Statistics, *Federal Justice Statistics*, https://bit.ly/2yGbFMJ (Statistical Tables for 2006-2013)).

Elimination of the dual sovereignty threatens these cooperative efforts. It takes no great forecasting to

understand that, without the dual sovereignty doctrine, state authorities would likely revisit their heightened double jeopardy protections in order to ensure that they retain the authority to prosecute where law enforcement needs dictate.

The former New York Attorney General, for example, expressed an interest in revisiting his state's double jeopardy statute out of a concern that the presidential pardon power could be used to undermine the State's ability to prosecute. In a letter addressed to the New York Governor and Legislature, he noted his concern that, "due to a little-known feature of New York [double jeopardy] law that appears to be unique in its reach—a strategically-timed pardon could prevent individuals who may have violated our State's laws from standing trial in our courts as well." Letter from N.Y. Att'y Gen. Eric T. Schneiderman to Gov. Andrew Cuomo et al. (Apr. 18, 2018), https://on.ny.gov/2Hxck8N. Reactive decisions like this are the natural result of competitive, rather than cooperative, federalism, and similar results will yield in the absence of the dual sovereignty doctrine. States may also be eager to craft new "offences" that could avoid the Fifth Amendment's double jeopardy bar.

2. The dual sovereignty doctrine also fosters coordination among federal, state, and local officials in ways that serve individual liberty. Coordination among sovereigns is a recognition of the reality that the Framers "designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz* v. *United States*, 521 U.S. 898, 919–20 (1997). And coordination between local, state and federal prosecutors continues to be "conventional practice between the two sets of

prosecutors throughout the country." *Bartkus*, 359 U.S. at 123.

But eliminating the dual sovereignty doctrine would make law enforcement a more competitive enterprise, to the detriment of individual liberty, in several significant ways. *First*, as *amici* can attest, evidence sharing between state and federal law enforcement leads prosecutors to determine that criminal charges are, in many cases, unwarranted. If, however, sharing information will lead to preemptive prosecutions, state officials will be much less likely to do so. *Second*, it would cause law enforcement in certain cases to devote less time to the underlying investigation, as prosecutors would fear ceding authority to another sovereign if they do not rush to prosecute. The results of this system are obvious: if law enforcement is made more competitive, individual liberty will be sacrificed in the cross-fire, given that more thorough investigations often lead prosecutors not to file charges. *Third*, to the extent that a state's criminal statute provides lesser penalties than its federal counterpart, and therefore less leverage over an offender in an investigation, states will be incentivized—perversely—to increase penalties.

In short, Petitioner's position would frustrate the cooperative federalism that has over the centuries secured a regime more protective of individual liberty than the Double Jeopardy Clause.

D. Eliminating The Dual Sovereignty Doctrine Will Undermine Political Accountability.

Federalism's diffusion of power is also geared toward enhancing political accountability, and the importance of that accountability is particularly important where criminal justice is concerned.

"[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function." *Lopez*, 514 U.S. at 576-77 (Kennedy, J. concurring). Eliminating the dual sovereignty doctrine, however, would allow federal prosecutors to preempt state authority over local criminal activity such that "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id*. at 577.

There is no question that state and local governments are responsible for the vast majority of criminal prosecutions in the United States—and rightly so. "In 2003, state and local governments were responsible for 96 percent of those under correctional supervision—i.e., in prison or jails, on probation or parole. Similarly, in 2004 just 1 percent of the over 10 million arrests made nationwide were for federal offenses." *Exploring the National Criminal Justice Commission Act of 2009: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm on the Judiciary*, 111th Cong. 4 (2009) (written statement of Brian W. Walsh). With that responsibility comes accountability: "[b]ecause primary law enforcement responsibility rests with the states, state prosecutors are blamed for underenforcement, not federal prosecutors. Similarly, federal prosecutors do not concern themselves as much with how their selection of cases affects a community. They do not have an obligation to fix local problems, and they are not directly accountable to those communities." Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 536 (2011).

The dual sovereignty doctrine gives state and local officials the flexibility to answer this accountability. Erasing the doctrine, by contrast, strips state and lo-

cal officials of inherent control over public reactions. Local officials would remain the face—and scapegoats—of under-enforcement and other law enforcement failures, even when their hands are tied by an earlier federal prosecution. Consider the recent prosecution of Darren Wilson (the police officer in Ferguson, Missouri who shot Michael Brown). In that case, and amid a national outcry over police shootings, St. Louis County Prosecutor Robert McCulloch chose not to appoint a special prosecutor and instead sought a grand jury indictment. Ultimately, no indictment was returned against Officer Wilson. Federal prosecutors later issued a memorandum, declining to bring their own charges. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), https://bit.ly/2OHW8pK.

In addressing the federal prosecutors' declination, Mr. McCulloch suggested that his critics should "rethink their position" or at least "level the same criticism at the Department of Justice, if they want to be consistent." Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), https://nyti.ms/2JaxNTt. But given the faceless, and distant, nature of the federal investigation, St. Louis voters had nowhere to effectively target that criticism. Instead, they recently elected a new county prosecutor in Mr. McCulloch's place (he had served in the post since 1991). Cleve R. Wootson, Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, WASH. POST (Aug. 8, 2018), https://wapo.st/2OH7ZUT.

In this instance, as in countless others, the political ramifications for the outcome fell directly on the

shoulders of the local prosecutor, while federal prosecutors—largely unaccountable politically—remained insulated from any reprisal. Federal prosecutors did not even list their names on the memorandum declining to prosecute. The dual sovereignty doctrine thus ensures that political accountability remains *justifiably* with state and local prosecutors, who would otherwise relinquish prosecutorial control while alone facing any political fallout.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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