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 *AMICUS CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW THURGOOD MARSHALL CIVIL RIGHTS CENTER IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is the Howard University School of Law Thurgood Marshall Civil Rights Center ("TMCRC"). Howard University is one of the oldest historically Black institutions of higher learning in the United States, established by congressional charter in 1867 in the aftermath of the Civil War. The Law School, established in 1869, will celebrate its sesquicentennial in 2019. "In the 20th century, [the Law School] … emerged as a 'clinic' on justice and injustice in America, as well as a clearinghouse for information on the civil rights struggle."[2] Consistent with these principles and the Mission of Howard University,[3] the TMCRC has an interest in the just

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part and no party or counsel made a monetary contribution for the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] *Our History*, http://law.howard.edu/content/our-history (last visited Aug. 23, 2018).

[3] The Howard University Mission Statement provides:

> Howard University, a culturally diverse, comprehensive, research intensive and historically Black private university, provides an educational experience of exceptional quality at the undergraduate, graduate, and professional levels to students of high academic standing and potential, with particular emphasis upon educational opportunities for Black students. Moreover, the University is dedicating to attracting and sustaining a cadre of faculty who are, through their teaching, research and service, committed to the development of distinguished, historically aware, and compassionate graduates and to the discovery of

and robust enforcement of the federal criminal civil rights laws. Successive prosecutions are uncommon. When they do occur, federal criminal civil rights cases constitute a measurable portion of federal prosecutions occurring after a state prosecution. Resolution of the continuing validity of the dual sovereignty doctrine will impact on the future direction and effectiveness of federal civil rights enforcement. The TMCRC takes no position on whether the dual sovereignty doctrine should be overruled. If dual sovereignty survives, the status quo concerning federal criminal civil rights enforcement would remain unchanged. This amicus brief is intended to supplement the principal briefs by providing additional historical and legal analysis concerning the impact on federal criminal civil rights enforcement should the dual sovereignty doctrine be abolished.

SUMMARY OF ARGUMENT

The TMCRC recognizes the significant burdens associated where an individual is subject to multiple prosecutions and punishments for the same or similar underlying conduct. Most federal criminal civil rights excessive force prosecutions charge violations of 18 U.S.C. § 242, which concern *conduct* that is also prosecutable under numerous state laws. The federal government possesses the solemn obligation to vigorously enforce the Nation's civil rights laws, including the relevant federal criminal civil rights laws. Consequently, any modification or abolition of the dual

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solutions to human problems in the United States and throughout the world. With an abiding interest in both domestic and international affairs, the University is committed to continuing to produce leaders for America and the global community. https://www2.howard.edu/about/mission (last visited Aug. 23, 2018).

sovereignty doctrine will necessarily impact the future direction of federal criminal civil rights enforcement.

Abolishing the dual sovereignty doctrine inevitably will create some degree of uncertainty concerning the complex tapestry of double jeopardy doctrine that would, for the first time, now apply to inter-sovereign prosecutions. Under *Blockburger v. United States*, federal civil rights statutes concerning law enforcement misconduct are not the "same offense" as State statutes that may cover the same or similar underlying conduct. Thus, overruling dual sovereignty should not eliminate the federal government's ability to prosecute these types of civil rights cases after the State has previously prosecuted a case that was tried to verdict.

Additionally, in a criminal case, the government is often without the kind of "'full and fair opportunity to litigate' that is a prerequisite of estoppel." The "collateral estoppel" or "issue preclusion" component of double jeopardy should not be unnecessarily altered or otherwise expanded by any decision in this case so as to adversely bind the federal government, a non-party in any prior State prosecution, from litigating an issue purportedly "necessarily resolved" in the defendant's favor in a prior State trial.

Finally, the paramount importance of civil rights, and the fact that the Fourteenth Amendment places limitations on state action, support a civil rights "exception" to double jeopardy. If dual sovereignty is retained, this issue is moot. Although this case does not concern police misconduct or federal civil rights enforcement, a decision to abolish dual sovereignty inevitably will require reexamination of several interrelated double jeopardy issues that impact on federal criminal civil rights enforcement. Should the

Court abolish the dual sovereignty doctrine, the Court's *ratio decidendi* should not adversely affect or otherwise foreshadow any particular outcome when the framework of a civil rights "exception" ultimately arises in future litigation.[4]

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[4] The double jeopardy clause is principally designed to prevent the government with unlimited resources from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety." *Green v. United States*, 355 U.S. 184, 187-88 (1957). Many commentators contend that the Framers intended to model double jeopardy principles after English common law principles, which purportedly did not include dual sovereignty principles.

On the other hand, this Court has held numerous times that dual sovereignty "finds weighty support in the historical understanding and political realities of the States' role in the federal system." *Heath v. Alabama*, 474 U.S. 82, 92 (1985). Justice Frankfurter dismissed the purported English precedents as "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); *see also United States v. Gillock*, 445 U.S. 360, 369 (1980)(recognizing "our structure of federalism which had no counterpart in England"). "Federalism thus appears to have been the issue around which the controversy over the Constitution turned," as the Framers created a unique federalism system "without precedent." Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, in The Framing and Ratification of the Constitution 132 (Levy & Mahoney ed. 1987).

The briefs filed at the certiorari consideration stage and the Brief for Petitioner (Gamble), No. 17-646 (Sept. 4, 2018), indicate that the parties will comprehensively address the methodology in evaluating whether this Court should overrule long standing precedent. This brief, while taking no position on the fate of dual sovereignty, focuses on how federal criminal civil rights enforcement, particularly police brutality prosecutions, could be affected if dual sovereignty is abolished.

ARGUMENT

I. A FEDERAL PROSECUTION UNDER 18 U.S.C. § 242 IS NOT THE "SAME OFFENSE" AS A STATE HOMICIDE, RECKLESS ENDANGERMENT, ASSAULT, OR OTHER SIMILAR PROSECUTION

A. The *Blockburger* Test Would Remain in Force Even if Dual Sovereignty is Abolished

Many of the most notable successive or dual criminal prosecutions concern federal civil rights prosecutions commenced after a state prosecution that was tried to verdict. For example, *United States v. Guest*, 383 U.S. 745 (1966), was a federal prosecution based on the Georgia murder of American serviceman Lemuel Penn. A prior state murder prosecution resulted in an acquittal. Michal R. Belknap, Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown* South 186-189 (1987).[5] The murder of civil rights worker Viola Liuzzo in the aftermath of the Selma to Montgomery Civil Rights March resulted in state court acquittals. A subsequent section 241 federal civil rights conspiracy prosecution was successful. *Id*. at 190-192. More recently, the Rodney King trials in Los Angeles resulted in a section 242 federal prosecution after prior state court acquittals. *See United States v. Koon*, 34 F.3d 1416, 1425 (9th Cir. 1994)(referencing prior state court acquittals).

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[5] For a comprehensive account of the Penn murder and subsequent prosecutions, see Michal R. Belknap, *The Legal Legacy of Lemuel Penn*, 25 How. L.J. 467 (1982).

The *Blockburger* test to determine whether two offenses are the "same offense" under the double jeopardy clause matured during the dual sovereignty regime. *Blockburger v. United States*, 284 U.S. 299 (1932). Under *Blockburger*, a defendant may be prosecuted for the same act under two distinct statutes if each offense requires proof of an element not contained in the other. *See id*. at 304. States have long possessed the authority to provide greater individual rights protections than those required under the federal constitution, including double jeopardy protections. *See generally Cooper v. California*, 386 U.S. 58, 62 (1967)(stating analogous hornbook proposition that a State possesses the "power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so"); *see also Bartkus v. Illinois*, 359 U.S. 121, 133-148 (1959)(discussing state statutory permutations limiting dual sovereignty). These statutory experiments are part of our "laboratory" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandies, J., dissenting), but have often proven difficult to apply, with many of the statutes embodying awkward statutory formulations making it problematic to assess whether a particular prosecution is barred before the second trial takes place. *See Bartkus*, 359 U.S. at 138 (noting difficulty in applying state dual sovereignty limitation statutes).[6]

[6] For a state by state breakdown, including how the Model Penal Code addresses these issues, see Adam Harris Kurland, Successive Criminal Prosecutions: The Dual Sovereignty Exception to Double Jeopardy in State and Federal Courts (2001); *see also* Carolyn Kelly MacWilliam, Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State*

If dual sovereignty is overruled, *Blockburger's* analytical structure would still remain.[7] *Blockburger's* enduring utility was evident when this Court abandoned a short-lived "same conduct" test and reinstated the *Blockburger* test in *United States v. Dixon*, 509 U.S. 688 (1993)(overruling *Grady v. Corbin*, 495 U.S. 508 (1990)). The *Grady* test was deemed unworkable largely because a conclusive determination often could not be made until well into a second trial—thereby frustrating one of the main objectives of the double jeopardy clause to avoid the inconvenience and harassment of a second trial. *Grady*, 495 U.S. at 529 (Scalia, J., dissenting); *see also Dixon*, 509 U.S. at 703-712 (*Grady* deemed unworkable). Moreover, last term this Court reiterated that it "has emphatically refused to import into criminal double jeopardy law the civil law's more generous 'same transaction' or same criminal 'episode' test." *Currier v. Virginia*, 138 S. Ct. 2144, 2154 (2018)(citing *Garrett v. United States*, 471 U.S. 773, 790 (1985)).

The question then becomes how prosecutions under section 242, the most important federal criminal civil rights statute used to prosecute police brutality, would be affected should dual sovereignty be abolished. Title 18 United States Code, Section 242 provides in relevant part:

Offense Based on Same Facts-Modern View, 97 A.L.R. 5th 201 (2002).

[7] Petitioner agrees. Petitioner's Brief at 9, 51-52. In some circumstances, Congress has statutorily abrogated dual sovereignty. *See*, *e.g.*, 18 U.S.C. § 659 (theft of interstate shipment statute which provides "[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*")(emphasis added).

> Whoever, under color of law … willfully subjects any person in any State … to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States … shall be imprisoned not more than one year …and if bodily injury results… shall be imprisoned not more than ten years, … and if death results… shall be imprisoned for any term of years or for life … or may be sentenced to death.

First, the Department of Justice's ("DOJ") discretionary Petite Policy would still apply for section 242 prosecutions. The Policy presently recognizes that a federal prosecution following a state prosecution based on substantially the same acts is constitutionally appropriate under the dual sovereignty doctrine. United States Attorneys' Manual ("USAM") § 9-2.031(B). However, the Policy also applies where "a prior prosecution would not legally bar a state or federal prosecution under the double jeopardy clause because each offense requires proof of an element not contained in the other." *Id.* (citing Supreme Court authority). Thus, should dual sovereignty be abolished, the constitutional justification would shift to the above noted second prong of the Policy. As such, the Petite Policy, which was unchanged after a 2017 comprehensive revision of the USAM, would still remain in full force and effect. A successive federal prosecution may be appropriate if the prior state prosecution left a "substantial federal interest … demonstrably unvindicated." *Id*. § 9-2.031(A).[8]

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[8] Successive federal prosecutions following state prosecutions for the same or similar conduct are uncommon. DOJ generally does not publically release the relevant Petite Policy statistics. Some studies suggest that the federal government authorizes

Additionally, federal prosecutors generally defer to local authorities in the first instance for prosecution of police brutality cases, which concern local criminal conduct squarely within the general police power of the states. The Federalist No. 45 (James Madison); *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014); *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995). This federal "back stop" policy is consistent with bedrock Federalism principles and sensibly provides local prosecutors "'every opportunity to clean up their own shops.'" Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 539 (1994)(citing discussions with federal prosecutors).

Federal deference to state prosecution can be traced back to 1866, when the first federal criminal civil rights statutes were enacted. *See* Robert Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 52 (1985)(noting United States Attorney Benjamin H. Bristow "instructed federal officers to assume primary criminal jurisdiction only after blacks were denied justice in state courts"). As recently as 2015, Attorney General Eric Holder advocated for

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approximately 150 successive prosecutions a year. Kurland, Successive Criminal Prosecutions, at xiv. An American Bar Association Ad Hoc Task Force on Double Jeopardy Report included otherwise unpublished data provided by DOJ officials that indicated most Petite Policy approvals concern situations where a defendant was convicted in state court but received what DOJ considered a manifestly inadequate sentence. *Id*. at 377-378. That appears to be the case with Petitioner Gamble. *See* Petitioner's Brief at 2-3 (defendant received one year state court sentence and then received federal sentence increasing his incarceration approximately three more years).

more aggressive federal civil rights enforcement but nonetheless reaffirmed DOJ's "backstop" role in police brutality cases. Christian Farias, *Eric Holder Wants to Lower the Bar for Federal Civil Rights Prosecutions: That's Trickier Than it Sounds.*, The New Republic, Feb. 27, 2015, https://newrepublic.com/article/121177/eric-holder-we-might-lower-bar-civil-rights-prosecutions.

B. Section 242 "Same Offense" Analysis

In the aftermath of the Civil War, Congress sought to provide a mechanism to federally prosecute those responsible for racial killings, and adroitly drafted the predecessor statutes to current sections 241 and 242. Congress relied on broad statutory terms protecting civil rights so as to legally differentiate these federal crimes from State crimes based on similar conduct:

> Congress thus sought to authorize the federal courts to punish crimes, such as murder, by broadly defining them as violations of federally enforceable civil rights [based on the statutory elements] in order to avoid the accusation that the federal courts were unconstitutionally supplanting state courts in punishing offenses against the criminal laws of the states.

Kaczorowski, *supra* at 57. This was recognition of what would later become known as the *Blockburger* principle to determine whether two statutes constituted the same offense under the double jeopardy clause. *See also Currier*, 138 S. Ct. at 2153 ("the [federal] courts apply today much the same [*Blockburger*] double jeopardy test they did at the founding").

Reconstruction era federal prosecutors, often faced with the lone option of pursing a federal misdemeanor

civil rights charge, obviously would have preferred a competent, fair, and zealous state murder prosecution. Nothing in the historical record suggests that if a state homicide prosecution involving culpable state actors resulted in an unjust acquittal (not an implausible outcome), pursuit of a misdemeanor civil rights charge would be precluded as a matter of law. If anything, the Reconstruction era record suggests otherwise. As Rep. John Bingham, principal author of the Fourteenth Amendment noted:

> I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath [to support, protect, and defend the Constitution], and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 18 n.104 (1995) (citing sources).

Against the Reconstruction backdrop of Southern backlash and violent resistance, the sobering grisly reality is that white men regularly beat or killed black men with relative impunity and State and local prosecutions often did not take place:

> The Klan effectively paralyzed local government agencies and officers. Many public officers were members of the Klan and participated in these crimes. Consequently, though hundreds of crimes were committed, local officers moved against very few. Even when they wanted to bring criminals to justice, local

> officers were too frightened and/or unable to do so.

Kaczorowski, Politics of Judicial Interpretation, at 55; *see also* Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 119-123 (1st Perennial Lib. ed. 1989)(chronicling daily violence against blacks "that raged almost unchecked in large parts of the postwar South"). As one Reconstruction era Florida sheriff lamented, "[i]f a white man kills a colored man in any of the counties of this state … you cannot convict him." Foner, at 435. More than a century later, the situation remained abysmal in much of the South. "As [Klan] victims became all too well aware, in such bastions of segregation as Alabama it was simply 'not a punishable crime to kill a Negro or civil rights worker.'"[9]

If dual sovereignty is abolished, virtually all federal section 242 "under color of law" prosecutions commenced after prior state court prosecutions based on the same underlying conduct should not constitute the "same offense" under *Blockburger*. 18 U.S.C. § 242 and virtually every State law homicide and aggravated assault statute each contain elements not contained in the other.[10] The critical focus is on

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[9] Michal R. Belknap, *The Vindication of Burke Marshall, The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 Emory L.J. 93 & n.1 (1984)(referencing J. Minnis, Life with Lyndon Johnson in the Great Society (May 20, 1965)(original source citations to document in SNCC papers at Martin Luther King, Jr. Center).

[10] 18 U.S.C. § 242 contains the elements of "under color of law" and deprivation of a constitutional right (usually drafted in section 242 indictments as deprivations of the right to a trial or the right to be free from unreasonable force). On the other hand, state homicide statutes, including Model Penal Code based statutes, contain the element of killing a human being, and

the elements, not the particular manner in how the case was proved. *See Dixon*, 509 U.S. at 700-704; *see also Currier*, 138 S. Ct. at 2153 ("[t]o prevent a second trial on a new charge, the defendant must show an identity of statutory elements between the two charges against him; it's not enough that 'a substantial overlap [exists] in the *proof* offered to establish the crimes'") (citing *Iannelli v. United States*, 420 U.S. 770, 785, n.17 (1975)(emphasis added). Thus, a subsequent section 242 prosecution should likely satisfy *Blockburger* and the federal prosecution should proceed.

Additionally, in *Schmuck v. United States*, 489 U.S. 705 (1989), this Court, although not mentioning *Blockburger* by name, again relied on *Blockburger* principles to determine what constitutes a lesser included offense by focusing on the elements of the statutes, as opposed to relying on an amorphous "inherent relationship approach." *Id.* at 716-717.[11] Consequently,

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assault statutes require proof of the commission of an assault. *See* Appendix 4a-5a (setting forth representative statutes). Thus, *Blockburger* is satisfied even without consideration of jurisdictional or mens rea requirements. Federal courts are split on whether jurisdictional elements can be used to satisfy *Blockburger*. *See United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995)(jurisdictional elements may be used to satisfy *Blockburger*); *United States v. Salad*, 907 F. Supp. 2d 743, 748-750 (E.D. Va. 2012)(surveying circuit split). The status of mens rea elements is also unclear. *See Dixon*, 509 U.S. at 701 (suggesting specific intent to kill element can be used in *Blockburger* analysis).

[11] The *Schmuck* Court held:

> Since offenses are statutorily defined, that comparison is appropriately conducted by reference to the statutory elements of the offenses in question, and not, as the inherent relationship approach would mandate,

there is no basis to modify the *Blockburger* test in the event dual sovereignty is overruled.

Nonetheless, if dual sovereignty is abolished, a new level of cooperative federalism may be necessary if the federal government still chooses to pursue the sensible policy of federal deference in many police brutality cases. Federal prosecutors may have to walk a legal tightrope so as to avoid a claim that a purported increase in the level of interjurisdictional coordination establishes that a second prosecution is a sham.

For example, some state criminal civil rights charges which closely parrot section 242 should, out of an abundance of caution, not be brought. *See*, *e.g.*, Cal. Penal Code §§ 149 (misdemeanor for public officer, acting under color of authority, to unlawfully use excessive force); 422.6 (misdemeanor to injure or threaten person exercising constitutional right, whether or not acting under color of law); *see also* Model Penal Code § 243.1 ("Official Oppression" misdemeanor statute).[12] These are rarely prosecuted misdemeanors, and state prosecutors could easily adopt review procedures that would largely avoid these charges altogether. *See* Levenson, at 553 (noting California civil rights misdemeanor statutes are rarely, if ever, utilized). More problematic could be inclusion of less serious related state charges, including lesser included offenses, for the purpose of increasing the likelihood of a conviction on *some* charge even if the jury cannot reach a verdict on the more serious charges. This scenario could conceivably bar a subse-

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> by reference to conduct proved at trial regardless of the statutory definitions.

Schmuck, 489 U.S. at 716-717.

[12] These statutes are set forth at Appendix 4a-5a.

quent federal civil rights prosecution if some lesser offense resulting in a conviction or acquittal is later determined to constitute the "same offense" as section 242.

Federal conspiracy prosecutions for violations of 18 U.S.C. § 241, another vitally important federal criminal civil rights statute often undertaken after a state prosecution, would likely be largely unaffected by the abolition of dual sovereignty. Section 241 reaches conspiracies involving acts under color of law and can also reach certain wholly private conspiracies as well.[13] The double jeopardy clause does not apply where there are two separate convictions for an underlying substantive crime and a conspiracy to commit that same crime. *United States v. Felix*, 503 U.S. 378 (1992). Similarly, separate conspiracy convictions that concern overlapping but legally distinct conduct do not violate the double jeopardy clause. *Albernaz v. United States*, 450 U.S. 333 (1981). The resolution of this case should not affect those precedents.

C. The Issue Preclusion Component of Double Jeopardy Does Not Apply to Successive Inter-Sovereign Prosecutions

The briefs filed at the petition for certiorari stage focused exclusively on the constitutional legitimacy of dual sovereignty. The issue preclusion (or "collateral estoppel") component of double jeopardy as reflected in *Ashe v. Swenson*, 397 U.S. 436 (1970), was not addressed in Petitioner's Brief or in any of the

[13] The relevant portions of section 241 are set forth at Appendix 1a.

principal or amicus briefs previously filed at the petition for certiorari phase.[14]

The abolishment of dual sovereignty would necessitate the almost immediate determination that *Ashe's* issue preclusion principles are inapplicable to inter-sovereign prosecutions. Under *Ashe*, the issue preclusion component of double jeopardy applies when an issue was necessarily resolved in the defendant's favor in the first trial and is sought to be used against the *same* sovereign who lost the first trial. The *Ashe* Court held that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit." *Id*. at 443 (emphasis added).

If this Court does not ultimately overrule *Ashe* in its entirety,[15] *Ashe* should remain as is, and not be extended to bar "relitigation" of an issue purportedly necessarily resolved in the defendant's favor in a prior state court trial. Collateral estoppel cannot be used as a sword to bind a non-party to the prior litigation–in this case the federal government in a subsequent prosecution who had no opportunity to litigate the issue in a prior state trial. Binding the federal government as a non-party is inappropriate because

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[14] In the aftermath of the Rodney King trials, one commentator noted that "there has been surprisingly little exploration of the implications of the constitutionally based collateral estoppel doctrine recognized in *Ashe*." Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King*, *and the ACLU*, 41 UCLA L. Rev. 609, 645 (1994).

[15] Last term, a plurality of this Court suggested that *Ashe* was an awkward fit in criminal cases, and that collateral estoppel should have no place in double jeopardy jurisprudence. *Currier v. Virginia*, 138 S. Ct. at 2150-2156 (Gorscuch, J.,)(plurality opinion).

"[i]n a criminal case, the government is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." *Standefer v. United States*, 447 U.S. 10, 22 (1980). This Court recently warned "that issue preclusion principles should have only 'guarded application … in criminal cases.'" *Currier*, 138 S. Ct. at 2152 (citing *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016)).

If dual sovereignty is abolished, *Ashe* should not be extended to apply to inter-sovereign successive prosecutions. The federal government is not a party to any prior state trial. In the civil rights context, extending *Ashe* could effectively bar the federal government from establishing the requisite willful misconduct in a successive federal trial where the defendant was acquitted in a prior state court homicide, reckless endangerment, or assault prosecution. Although the outcome would be far from certain, the defendant could claim that the acquittal was based on a determination that the defendant officer's conduct striking or killing the victim was lawful. In some circumstances, this could effectively bar a subsequent federal trial altogether even if the federal prosecution involved a statute that did not otherwise constitute the "same offense" as the prior state charge.

Standefer supports rejection of this extension of collateral estoppel. *Standefer*, 447 U.S. at 23 ("[u]nder contemporary principles of collateral estoppel [the prosecution's inability to appeal an erroneous acquittal] strongly militates against giving an acquittal preclusive effect"). Extending *Ashe* to permit sword-like use against non-party federal prosecutors in a subsequent trial would severely weaken federal criminal civil rights enforcement of police brutality cases, and derail sensible long standing DOJ policies favoring initial

deference to state prosecution. *See Standefer*, 447 U.S. at 25 (emphasizing importance of judicial interpretive doctrines that vindicate the public interest in the enforcement of the criminal law, and cautioning against application of an estoppel rule "that would spread the effect of an erroneous acquittal").

Lastly, and most fundamentally, the State and federal government are not the *same* parties, nor are they remotely the functional criminal law equivalent of parties in privity.[16] Quotation marks notwithstanding, even Justice Black's preeminent critique of dual sovereignty acknowledges that inter-sovereign prosecutions are being undertaken by different parties:

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a

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[16] *Compare* Fed. R. Evid. 804(b)(1), which limits the use of prior statements in criminal cases to situations where the *same* party had opportunity and similar motive to previously question the witness, but permitting admission of such statements in civil cases on a more lenient basis where the same party *or predecessor in interest* had opportunity and similar motive to examine the witness. It would be illogical to interpret the collateral estoppel component of double jeopardy more harshly against the government than the manner by which the Federal Rules of Evidence regulate the admission of evidence against the government. *But cf.* Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 334-335 (1963)(suggesting state and federal government are in privity when each prosecution concerns the same interest). For cases expressly rejecting criminal collateral estoppel to non-parties, see *Martin v. Rose*, 481 F.2d 658, 660 (6th Cir. 1973)("since … successive federal and state prosecutions do not involve the same parties or their privies" collateral estoppel cannot apply); *State v. Rogers*, 566 P.2d 1142, 1145 (N.M. 1977)(same).

> State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. *If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials than when one of these "Sovereigns" proceeds alone.* In each case, inescapably, a man is forced to face danger twice for the same conduct.

Bartkus, 359 U.S. at 155 (Black, J., dissenting) (emphasis added).

Abolishing dual sovereignty provides no basis to further abrogate traditional collateral estoppel principles. In order to avoid the unnecessary devolution of police misconduct prosecutions into an unseemly "race to the courthouse"[17] and to maintain important and sensible discretionary DOJ policy preferences to defer to state prosecution in the first instance, the traditional collateral estoppel principle that non-parties cannot be bound should be maintained as sound constitutional doctrine.[18]

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[17] *See Heath v. Alabama*, 474 U.S. 82, 93 (1985)(criticizing interjurisdictional "race to the courthouse" as unsatisfactory method of prosecutorial decision making).

[18] This could be particularly problematic for federal civil rights prosecutions, which, at present, often rely on significant federal-state coordination and cooperation. Even under the current dual sovereignty regime, interjurisdictional tensions concerning the order of prosecution sometimes become public spectacles, pitting vital state interests concerning enforcing state homicide laws against the federal government's vital interests in enforcing federal criminal civil rights laws. *See* Andrew Knapp, *Wilson:*

II. CONSTITUTIONAL DOCTRINE SUPPORTS AN INDEPENDENT CIVIL RIGHTS EXCEPTION TO DOUBLE JEOPARDY

As noted above, if dual sovereignty is abolished, most successive section 242 police brutality prosecutions would not constitute a prosecution for the "same offense" in relation to offenses based on the same or similar conduct previously tried to verdict in state court. However, the abolishment of dual sovereignty will likely create some uncertainty concerning the ability to prosecute other federal criminal civil rights statutes after a state prosecution covering similar conduct.[19]

Feds ignoring S.C. Roof case Solicitor frustrated over scheduling conflicts, idea of families enduring trial during holidays, The (Charleston) Post & Courier, June 19, 2016, https://www.postandcourrier.com/archives/wilson-feds-ignoring-s-c-roof-case-solicitor-frustrated-over/article_9eb4911e-fe10-5d68-9771-228e4dcc2fe6.html (highlighting state court hearing that exposed state prosecutor's frustration concerning whether Roof should be prosecuted first by federal or South Carolina authorities); *see also* Doug Stanglin, *Driver accused of plowing into crowd at Charlottesville rally charged with federal hate crimes*, USA Today, June 27, 2018, https://www.usatoday.com/story/news/2018/06/27/charlottesville-rally-james-alex-fields-charged-federal-hate-crimes/738514002 (noting federal hate crimes indictment in Charlottesville incident, further noting defendant already facing state trial commencing in November, 2018 on first degree murder and related charges). This inter-sovereign friction likely would increase if dual sovereignty is abolished, where, for some crimes determined to constitute the "same offense," a race to the courthouse could replace more measured federal-state coordination and cooperation to determine the sole jurisdiction that should prosecute the defendant concerning the incident.

[19] For example, some federal hate crimes prosecutions could be vulnerable as a prosecution for the "same offense" under

The concept of a constitutional civil rights exception derives from the inherent necessity to "consult not only the Founding vision articulated in the original Bill of Rights, but also the Reconstruction vision enacted in the Fourteenth Amendment." Amar & Marcus, at 19 n.108. Should dual sovereignty be abolished, this Court should recognize—or, at minimum, not foreclose— a limited civil rights "exception," the parameters of which would necessarily be defined in future litigation.

"[T]he constitution [is not] a suicide pact," *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949)(Jackson, J., dissenting)(warning that "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact"), and the federal government's solemn constitutional obligation to vigorously enforce the federal civil rights laws must factor into the Court's constitutional decision making. Professors Amar and Marcus observe:

> Section 5 [of the Fourteenth Amendment] was paradigmatically about federal criminal law enforcement of Section 1. ... Congress designed Section 5 to support the Civil Rights Bill of 1866, which included a key criminal provision at abusive state officials (and only state officials). In light of this clear history, it would be highly ironic if federal criminal prosecution of abusive state officials under the Act of 1866 could be blocked by –of all things—the Fourteenth Amendment itself.

Blockburger if a federal prosecution sought to follow a prior state homicide prosecution based on the same underlying acts.

* * *

> Thus, where the federal government is exercising its power pursuant to Section 5 to prosecute tyrannical state officials, as in the prosecution of the Los Angeles police officers, the dual sovereignty doctrine retains validity: it makes structural sense even after the Fourteenth Amendment is added to the original Bill of Rights and *Barron* is generally repudiated.
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> * * *
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> In sum, the dual sovereignty doctrine, while rendered largely obsolete by the Fourteenth Amendment, still has a narrow but crucial role to play in enforcing the Reconstruction values of that same amendment against state officials.

Amar & Marcus, at 17-19. Other prominent federal criminal law scholars further note that "because the Fourteenth Amendment was adopted after the Fifth Amendment's Double Jeopardy Clause and Equal Protection Clause, the Congressional enforcement authority under that Amendment might be understood to create an exception to double jeopardy." Norman Abrams, Sara Sun Beale, Susan Riva Klein, Federal Criminal Law and its Enforcement 117 (6th ed. 2015). In determining constitutional issues concerning the consequent evolution of federal and state sovereignty, this Court has often recognized the "tacit postulates" of federalism "necessary to make the Constitution a workable governing charter … [which] are as much engrained in the fabric of the document as its express provisions, because, without them, the Constitution is denied force, and often meaning." *Nevada v. Hall*, 440

U.S. 410, 433 (1979)(Rehnquist, J., dissenting)(citing examples).

As noted above, future litigation will be necessary to define the contours of this doctrine. *See*, *e.g.*, Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649, 670-71 (1994)(endorsing civil rights exception based on "constitutional authority possessed by Congress to implement guarantees of [*all three*] Civil War amendments")(emphasis added). The doctrinal development will be challenging.

For example, Chapter 13 of Title 18 of the United States Code is entitled "Civil Rights." However, several of the statutes in that chapter do not require state action and were not enacted solely pursuant to Congress' section 5 enforcement powers.[20]

Apart from section 242, which requires state action and is unambiguously based on section five of the Fourteenth Amendment,[21] other important federal criminal civil rights statutes concern conduct that could constitute the "same offense" as some state homicide, assault, or arson statutes, but lack pure Fourteenth Amendment, section five constitutional pedigrees. For example, the most recent "Matthew Shepard Act" amendments to 18 U.S.C. § 249(a)(2) are based on the commerce clause. *See* 18 U.S.C.

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[20] Additionally, some criminal civil rights statutes are not even found in Title 18, chapter 13. *See*, *e.g.*, 42 U.S.C. § 3631 (interference with housing rights).

[21] *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). In *United States v. Morrison*, 529 U.S. 598 (2000), this Court held that Congress' purported reliance on section five of the Fourteenth Amendment does not provide talismanic unreviewable constitutional justification. *Id.* at 619-627.

§ 249(B)(i)(I)(II)(proscribed conduct must cross a state line or use a channel, facility, or instrumentality of interstate or foreign commerce). As such, depending on the scope of any recognized civil rights exception, the federal government's ability to prosecute some important civil rights cases could be significantly impeded. Other potentially vulnerable statutes which cover conduct often prosecuted by state authorities include 18 U.S.C. § 245 (based, in part, on commerce clause), § 247(a)(b)(damage to religious property statute based on commerce clause), § 248 (congressional statement of purpose that FACE statute enacted pursuant to both commerce clause, U.S. Const. art. I, § 8, cl. 3, and section five, 14th amendment), 42 U.S.C. § 3631 (1988 amendments to anti-housing discrimination law extended statutory coverage to disabled persons based on commerce clause).[22] However, the potential difficulties in defining the ultimate parameters of the exception do not reduce the vital importance of constitutional recognition of the exception.[23]

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[22] *See* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 Ala. L. Rev. 203, 234-239 (2006)(convoluted congressional intent reflecting original 1968 enactment relied on both section five of Fourteenth Amendment and commerce clause (citing sources). For the relevant statutory language of the above listed statutes, see Appendix 1a-2a.

[23] It is worth noting that this Court upheld the constitutionality of the Civil Rights Act of 1964 as a proper exercise of congressional authority under the commerce clause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-262 (1964). For a comprehensive history regarding the struggle to pass the 1964 Civil Rights Act, see Clay Risen, The Bill of the Century: The Epic Battle for the Civil Rights Act (2014).

CONCLUSION

Federal criminal civil rights enforcement was born in the immediate aftermath of the Civil War. Since then, the federal government and the States have possessed concurrent civil rights enforcement authority, and the federal government has often wisely deferred to state prosecution in the first instance. The federal criminal civil rights laws proscribing misconduct undertaken "under color of law" do not preempt state criminal laws, and were constitutionally designed to supplement state law enforcement. Section 242 was originally a misdemeanor, and remained so for more than a century. Thus, preference for a vigorous state felony prosecution was explicable. Even today, long after section 242 was elevated to felony status, DOJ still generally prefers initial federal deference to state law enforcement in local police misconduct cases.

If the dual sovereignty doctrine is abolished, most section 242 law enforcement misconduct prosecutions would survive a *Blockburger* analysis. Nevertheless, the abolishment of dual sovereignty would inevitably require reevaluation of much of the complex tapestry of double jeopardy jurisprudence woven during the nearly two century dual sovereignty era. Most notably, the collateral estoppel component of double jeopardy—if not ultimately overruled in its entirety as suggested by the *Currier v. Virginia* plurality— should continue to embody the traditional requirement that non-parties to the first action are not bound in subsequent litigation where they are parties. A contrary decision could substantially erode the fair and effective enforcement of the federal criminal civil rights laws. Resolution of the dual sovereignty issue need not constitutionally undermine federal criminal civil rights enforcement to such a significant degree.

Next, even if many federal criminal civil rights prosecutions survive a *Blockburger* analysis, abolishing dual sovereignty could undermine DOJ's long held policy to defer many civil rights prosecutions to state authorities in the first instance. This would almost certainly increase interjurisdictional tensions and result in prosecutorial races to the courthouse as well as other injudicious procedural jockeying in order to obtain charge selection advantage.

Lastly, if the dual sovereignty doctrine is abolished, this Court will face future litigation to determine the existence and contours of a civil rights "exception" to the double jeopardy clause. The Fourteenth Amendment provides the foundation for the federal government's solemn constitutional and moral obligation to protect civil rights and to effectively enforce the federal criminal civil rights laws. It would be lamentably ironic if this Court interprets the Fourteenth Amendment, the vehicle by which the double jeopardy clause applies to the States, in a manner that unnecessarily erodes the federal government's solemn civil rights enforcement obligations which arise from the Fourteenth Amendment itself.

Respectfully submitted,

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APPENDIX

APPENDIX

FEDERAL MATERIALS

Pub. L. 103-259, 108 Stat. 694, May 26, 1994

SECTION 1. SHORT TITLE

This Act may be cited as the "Freedom of Access to Clinic Entrances Act of 1994 [18 U.S.C. § 248]".

SEC. 2. PURPOSE

Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

18 U.S.C. § 241, Conspiracy against rights, provides in relevant part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . [t]hey shall be fined under this title or imprisoned not more than ten years, or both, and if death results from the acts committed . . . shall be . . . imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 245, Federally protected activities, provides in relevant part:

(b) Whoever, whether or not acting color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate with –

* * *

(2) any person because of his race, color, religion, or national origin and because he is or has been –

* * *

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air.

18 U.S.C. § 247, Damage to religious property; obstruction of persons in the free exercise of religious beliefs, provides in relevant part:

(b) The circumstances referred to in subsection (a) [setting forth the elements of the offense] are that the offense is in or affects interstate or foreign commerce.

42 U.S.C. § 3631, Fair Housing, Prevention of Intimidation, provides in relevant part:

Whoever, whether or not acting under color of law, by force or threat of force willfully injuries, intimidates or interferes with, or attempts to injure, intimidate or interfere with – [and unlawfully discriminates or harasses persons because of race, color, religion, sex, handicap, . . . family status, or national origin, while they either occupy housing or are contracting to occupy housing] . . . (c) shall be fined . . . or imprisoned [pursuant to law].

Federal Rule of Evidence 804(b)(1)

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or other lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had–or, in a civil case, whose predecessor in interest had–an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

United States Attorneys Manual § 9-2.031 – (Dual and Successive Prosecution Policy ("Petite Policy") provides in relevant part:

> A. This policy establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding.
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> * * *
>
> The policy 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 [three] prerequisites are satisfied . . . the matter must involve a substantial federal interest [and] . . . the prior prosecution must have left that interest demonstrably unvindicated.

> B. The policy . . . constitutes an exercise of the Department's prosecutorial discretion, and applies even where a prior state prosecution would not legally bar a subsequent federal prosecution under the Double Jeopardy Clause because of the doctrine of dual sovereignty, or a prior prosecution would not legally bar a subsequent state or federal prosecution under the Double Jeopardy Clause because each offense requires proof of an element not contained in the other (citations omitted).

OTHER MATERIALS

California Penal Code § 149 provides:

> Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment.

California Penal Code § 187 provides in relevant part:

> (a) Murder is the unlawful killing of a human being, with malice aforethought.

California Penal Code § 422.6 provides in relevant part:

> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in

> whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.
>
> * * *
>
> (c) Any person convicted of violating subdivision (a) . . . shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed $5000, or by both . . . .

Model Penal Code Provisions

Section 210.1. Criminal Homicide

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide.

Section 211.2 Recklessly Endangering Another Person

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another in danger of death or serious bodily injury. . . .

Section 243.1 Official Oppression

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(1) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or

(2) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.