

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TERANCE MARTEZ GAMBLE, )  
 )  
Petitioner, )  
 )  
v. ) No. 17-646  
 )  
UNITED STATES, )  
 )  
Respondent. )  
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Pages: 1 through 92  
Place: Washington, D.C.  
Date: December 6, 2018

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4 Petitioner, )

5 v. ) No. 17-646

6 UNITED STATES, )

7 Respondent. )

8 - - - - -

9

10 Washington, D.C.

11 Thursday, December 6, 2018

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13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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25 in support of affirmance.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 17-646, Gamble versus United States.

Mr. Chaiten.

ORAL ARGUMENT OF LOUIS A. CHAITEN  
ON BEHALF OF THE PETITIONER

MR. CHAITEN: Thank you, Mr. Chief Justice, and may it please the Court:

The separate sovereigns exception to the Double Jeopardy Clause is inconsistent with the text and original meaning of the Double Jeopardy Clause. There is no dispute that the text of the clause was understood to incorporate English practice. And there was no practice of intersovereign successive prosecutions in all of English history or in American history for the first century of this republic after the framing.

There's also a mountain of affirmative evidence that in England, even a foreign acquittal by a court of competent and current -- concurrent jurisdiction bars a subsequent prosecution in England for the -- for the

1 same offense.

2 JUSTICE ALITO: You think that's fair  
3 to --

4 CHIEF JUSTICE ROBERTS: Well, your --

5 JUSTICE ALITO: Excuse me, Chief.

6 CHIEF JUSTICE ROBERTS: Your leading  
7 authority is a foreign prosecution in England  
8 of the -- the -- in -- in the Spanish case.  
9 And the argument on the other side, which has  
10 some traction, I think, is that it would be  
11 quite unusual or surprising for the new  
12 American republic to look to Europe in a  
13 question like that because the one concern, and  
14 applies both in the English situation as well,  
15 is that it would be a significant intrusion on  
16 sovereignty, a particular concern of the new --  
17 new American republic, to allow a foreign  
18 prosecution to limit the authority of -- of the  
19 -- the United States.

20 It's -- and, frankly, it's -- would be  
21 surprising even in the -- the English case. I  
22 mean, the -- the relations between Spain and  
23 England were not exactly the -- the best. And  
24 why -- I mean, if it -- if it were a Spanish  
25 case involving the murder of Englishmen, would

1 the English court really have said, well, he  
2 was tried in Spain, so we're -- our hands are  
3 tied?

4 MR. CHAITEN: Well, there's  
5 overwhelming evidence, as I said, that that is  
6 the English rule, and there's no dispute that  
7 the framers were incorporating English practice  
8 into the Double Jeopardy Clause. And --

9 JUSTICE GINSBURG: Any -- any country  
10 in the world?

11 MR. CHAITEN: Any country in the  
12 world?

13 JUSTICE GINSBURG: Yes. If there's --

14 MR. CHAITEN: Well, it -- I'm -- I'm  
15 sorry.

16 JUSTICE GINSBURG: If there's a -- a  
17 prior criminal proceeding, either an acquittal  
18 or a conviction, any country in the world, that  
19 would count?

20 MR. CHAITEN: So -- so there are a few  
21 requirements. One, it would have to be the  
22 same offense, so you would have to meet the  
23 English standard, which is, in fact, the  
24 standard of this Court today.

25 JUSTICE BREYER: It isn't clear. I

1 mean, I thought when I read your brief, well,  
2 you're absolutely right. But then I read the  
3 other side on the practice.

4 (Laughter.)

5 JUSTICE BREYER: And now I'm not going  
6 to say you're absolutely wrong, but three times  
7 the Court has considered your arguments, looked  
8 at those cases, the English case, Hutchinson,  
9 no report. Later cases refer to it. There was  
10 a complexity involving a special commission  
11 designed to try people who had committed murder  
12 outside the country. The King's Bench didn't  
13 have authority. The King's Bench referred it  
14 to that commission, and that commission said:  
15 Well, he was acquitted in Portugal and,  
16 therefore, we will not try him in this special  
17 commission designed to, dah-dah.

18 And does that reflect a principle of  
19 law? Does it reflect something about the  
20 commission? Does it reflect something about  
21 the individual circumstances? So far, it seems  
22 to me, no one has any idea. If you read Gage,  
23 you'll discover the other side's argument. And  
24 the same is true of the early cases. I won't  
25 go through all of them here.

1 MR. CHAITEN: So -- so --

2 JUSTICE BREYER: But the early cases,  
3 we find some --

4 MR. CHAITEN: So -- so --

5 JUSTICE BREYER: -- you know, that  
6 support you and some that don't. What do we  
7 do?

8 MR. CHAITEN: So I -- I do think they  
9 all support us.

10 JUSTICE BREYER: They all support you?

11 MR. CHAITEN: Yes, I do believe they  
12 all support us. And the one -- the one case  
13 you mentioned that is -- potentially leans the  
14 other way is Gage, but it's a civil case and  
15 it's analogizing to Hutchinson for the purposes  
16 of -- of -- of how -- a rule about recognition  
17 of civil judgments. And there is no ancient  
18 rule rooted in Talmud, in Roman law, in Greek  
19 law, in canon law, in ancient English common  
20 law to have your civil judgments recognized by  
21 another court.

22 JUSTICE BREYER: No, I -- I -- I  
23 accept that.

24 MR. CHAITEN: There is not to be  
25 prosecuted by -- for -- for a successive



1 prosecution. And the point is not --

2 JUSTICE GINSBURG: May I ask you to  
3 just step back and so you can complete your  
4 answer to my question? I had asked you any  
5 country in the world, the judgment from any  
6 country in -- in the world.

7 MR. CHAITEN: So -- so, if -- if  
8 you're asking me what the English rule was, I  
9 would say yes, that is, but there are three  
10 important qualifications on the rule. First,  
11 it -- it does have to be the same offense, so  
12 there is no dispute in -- in -- in the case of  
13 the murder in Portugal and the trial in England  
14 or the murder in -- in the Cape of Good Hope  
15 and the trial in England that those were the  
16 same offense. They were both murder.

17 But sometimes that's a little more  
18 complicated because it has to be the same  
19 elements. That's the -- that's the meaning of  
20 "same offense" under this Court's jurisprudence  
21 and under the original meaning.

22 Secondly, and -- and -- and this is  
23 very important, the second court has to  
24 recognize the competent and concurrent --  
25 concurrent jurisdiction of the first court.

1 That -- that's part of the English rule.

2 And there's no dispute -- whatever may  
3 arise in the international context, there's no  
4 dispute that Alabama and this -- the federal  
5 government have competent and concurrent  
6 jurisdiction over the offense of being a felon  
7 in possession.

8 So, at least in this country, the  
9 answer seems pretty clear, because the rule was  
10 a concurrent jurisdiction rule, and there's no  
11 doubt that there is concurrent jurisdiction. I  
12 don't think the idea, even at the framing, that  
13 you would recognize a -- an acquittal in  
14 another country as a bar to prosecution could  
15 possibly be so shocking because it was  
16 mentioned in Furlong. It was discussed in  
17 Furlong.

18 JUSTICE GINSBURG: How -- how -- how  
19 --

20 MR. CHAITEN: And the only --

21 JUSTICE ALITO: What's the third --  
22 what's the third requirement?

23 MR. CHAITEN: The third requirement is  
24 that it can't be a sham prosecution or a  
25 collusive prosecution. But then you're never

1 really --

2 JUSTICE ALITO: All right, it can't be  
3 a sham. So, today, let's say a group of  
4 American tourists are murdered by terrorists in  
5 a foreign country, and there is a prosecution  
6 in the foreign country for murder, the same  
7 offense in a court of competent jurisdiction  
8 there, and it's not a sham prosecution, but  
9 it's a fairly inept prosecution, lack of  
10 prosecutorial investigative resources in a poor  
11 country, and it results in an acquittal or a  
12 conviction with a very light sentence.

13 And your position is that there could  
14 not be a prosecution here in the United States  
15 under the statute enacted by Congress to permit  
16 the prosecution of individuals who murder  
17 Americans abroad?

18 MR. CHAITEN: So -- so let me address  
19 that in a few different ways. One, the  
20 original understanding was that it applied  
21 between countries.

22 JUSTICE ALITO: Yeah, well --

23 MR. CHAITEN: But that -- and that's  
24 --

25 JUSTICE ALITO: -- could you just

1 answer whether that's correct or not? And if  
2 it's not correct, why is it not correct?

3 MR. CHAITEN: Under the original  
4 understanding, it would be up to the U.S. court  
5 to determine whether it's going to recognize  
6 the competent and concurrent jurisdiction of  
7 that other country.

8 What I'm saying is, in the case of  
9 federal and state relations, there is no  
10 dispute about that.

11 JUSTICE ALITO: But I really don't  
12 think you're --

13 MR. CHAITEN: There's binding law on  
14 that.

15 JUSTICE ALITO: I mean, I don't think  
16 this is in -- a surprise question or a  
17 particularly difficult one. It is a court of  
18 competent jurisdiction. It is the court that,  
19 in that case -- in that country has  
20 jurisdiction to try offenses for murder. No  
21 question about that.

22 MR. CHAITEN: Well, it's not -- it's  
23 --

24 JUSTICE ALITO: So your answer is?  
25 Can they be prosecuted here or can they not be

1 prosecuted here?

2 MR. CHAITEN: The -- the -- the  
3 answer, it's not just that the particular court  
4 is competent jurisdiction; it's that we're  
5 going to recognize the jurisdiction of the  
6 other country over the crime. This was the  
7 point that Furlong was making about the -- the  
8 murder of a British subject by a British  
9 subject on a British ship, and Furlong says  
10 it's pretty doubtful that England would  
11 actually recognize a U.S. acquittal in that  
12 case because England would say you have no  
13 basis for concurrent jurisdiction over that  
14 crime.

15 So that's the determination the U.S.  
16 court would make. You don't have to reach that  
17 question in this case. Our point is that if  
18 that was the rule at the -- at the -- if that  
19 was the original understanding at the time of  
20 the framing --

21 JUSTICE KAVANAUGH: Well -- well, we  
22 do have to reach --

23 MR. CHAITEN: -- if the rule --

24 JUSTICE KAVANAUGH: -- we do have to  
25 reach that question because your position

1     logically would extend to Justice Alito's  
2     hypothetical, and if prosecution is part of the  
3     national security efforts of the United States,  
4     federal prosecution, and your position would  
5     substantially hamper those national security  
6     efforts.

7             MR. CHAITEN:    So -- so I -- I'm saying  
8     the reason you don't have to reach the  
9     questions, obviously, this is a case involving  
10    an Alabama crime and -- and -- and a federal  
11    crime, and there is --

12            JUSTICE KAVANAUGH:   But the logic of  
13    your position --

14            MR. CHAITEN:    The logic of our  
15    position, though -- but -- but the point is  
16    whatever -- whatever the court's ruling in that  
17    case, were it ever to come up, which I think is  
18    exceedingly unlikely, this is a different case  
19    because it's so much stronger.

20            If the -- if the original  
21    understanding was the rule applied between  
22    foreign countries, then, a fortiori, it should  
23    apply between a state and federal government  
24    that --

25            JUSTICE ALITO:    Yeah, a fortiori, but

1 -- but your -- your -- you say -- I -- I wonder  
2 whether you have perhaps exaggerated in saying  
3 there's a mountain of support for your  
4 position. But your main support is a -- a  
5 rumor of a decision involving a prior  
6 prosecution in Portugal and then the  
7 possibility of a subsequent prosecution in  
8 England. So it's a foreign prosecution.

9 MR. CHAITEN: So --

10 JUSTICE ALITO: It -- it's true,  
11 that's not what's involved here, but your --  
12 your argument is based on foreign prosecutions.

13 MR. CHAITEN: The original  
14 understanding was based on foreign  
15 prosecutions. The point is, in -- on the  
16 question presented here, a fortiori, it should  
17 apply between federal and state government.  
18 There is a principled basis for limiting this  
19 to governments bound by the Double Jeopardy  
20 Clause if the Court --

21 JUSTICE KAGAN: But --

22 MR. CHAITEN: -- wanted to do that.

23 JUSTICE KAGAN: -- but, Mr. Chaiten, I  
24 think --

25 MR. CHAITEN: It did that in --

1 JUSTICE KAGAN: -- I think the point  
2 is that you're asking us to write an opinion  
3 which is based on this original understanding,  
4 and the original understanding, as you put it,  
5 applies between foreign countries, and, a  
6 fortiori, it must be that our decision would  
7 apply between foreign countries.

8 MR. CHAITEN: The -- the original  
9 understanding is it would.

10 JUSTICE KAGAN: And that's what --

11 MR. CHAITEN: In *Murphy v. Waterfront*  
12 *Commission* --

13 JUSTICE KAGAN: That's -- that's --  
14 that's what your brief is all about. That's  
15 what you're asking us to say, that the original  
16 understanding was that there would be no double  
17 jeopardy bar between different sovereigns when  
18 those sovereigns are foreign countries. So how  
19 could we avoid that consequence?

20 MR. CHAITEN: Well, first of all, I'm  
21 not sure the case is ever going to arise, but  
22 -- and this is *State of Alabama* and federal  
23 government and its undisputed concurrent  
24 jurisdiction. The rule is a rule of concurrent  
25 jurisdiction. So it's when is the U.S. going



1 to recognize the current -- concurrent  
2 jurisdiction of another country.

3 And, again, I want -- just wanted to  
4 say that *Murphy v. Waterfront Commission* is a  
5 case where the court held that the  
6 self-incrimination privilege applies  
7 cross-jurisdictionally. The Court subsequently  
8 limited that to parties bound by the Double  
9 Jeopardy Clause.

10 So there is a principled way of doing  
11 this if the Court ever gets such a case and  
12 wants to do that. And I would like to  
13 emphasize that is -- it would be -- no one in  
14 any of these briefs has pointed to a pattern of  
15 intersovereign successive prosecutions between  
16 nations that is going to be disrupted by our  
17 rule, even if the Court were to suggest that  
18 it's -- it would also apply between foreign  
19 nations.

20 JUSTICE KAGAN: Well, can I ask you a  
21 different --

22 CHIEF JUSTICE ROBERTS: We've been  
23 through -- we've been through all this in  
24 *Bartkus*, right?

25 MR. CHAITEN: I don't think the Court

1 has been -- ever given this question a full and  
2 fair opportunity, certainly post-incorporation,  
3 and it's important to understand how the  
4 holding of this Court arose.

5           There was, of course, a suggestion in  
6 Fox v. Ohio in 1847 that there might be a  
7 separate sovereigns exception. It was based on  
8 a non-incorporation rationale, but no one  
9 actually -- it's dicta. It's the purest dicta,  
10 because there were no intersovereign successive  
11 prosecutions, not only not in that case but no  
12 practice of them.

13           The first time this Court had a chance  
14 to actually hold whether that's permissible was  
15 Lanza. And I think it's worth reading the  
16 respondent's brief in -- in Lanza, Lanza's  
17 brief. There was no representation, the  
18 position we're presenting here. The brief was  
19 incoherent, and the Court said I think what  
20 counsel is arguing is that the separate  
21 sovereigns exception doesn't apply in the  
22 particular context of the Eighteenth Amendment,  
23 given the concurrent powers of the states and  
24 the federal government. But the --

25           CHIEF JUSTICE ROBERTS: None of these

1 concerns were presented in Bartkus, though,  
2 right?

3 MR. CHAITEN: Excuse me?

4 CHIEF JUSTICE ROBERTS: None of the  
5 concerns you've been talking about there were  
6 presented in Bartkus?

7 MR. CHAITEN: So -- so I -- I'm just  
8 -- I -- Bartkus was decided at the same time as  
9 Abbate. Abbate is the case that answers this  
10 particular question. Abbate remarkably says  
11 we're just going to adhere to Lanza because  
12 none of the issues that are presented today are  
13 different from what was presented in Lanza,  
14 which is a really remarkable statement.

15 And Abbate is also pre-incorporation.  
16 Bartkus obviously is a due process case under  
17 the burden of Palko v. Connecticut, and the --  
18 the evidence that we're presenting here was not  
19 fully presented in Bartkus. The Court in --

20 JUSTICE KAGAN: Could you say a little  
21 bit more about why you think incorporation or  
22 the lack of incorporation had anything to do  
23 with this question?

24 MR. CHAITEN: Yeah, so I -- I -- Fox  
25 v. Ohio, it -- its lead rationale is

1 non-incorporation. And, I mean, I think it's  
2 wrong, but it clearly said that and then Lanza  
3 picked it up and then Abbate picked it up. And  
4 I think what the Court --

5 JUSTICE KAGAN: I mean, there is that  
6 reference in Fox, but it honestly makes no  
7 sense that incorporation would be the basis of  
8 the doctrine, because, if incorporation were  
9 the basis of the doctrine, you would have a  
10 doctrine that only cuts one way.

11 In other words, it would -- it would  
12 -- the Court would have held that the federal  
13 government can't prosecute an individual for  
14 the same offense after a state prosecution, but  
15 not the other way around. So the fact that  
16 there's not a one-way ratchet but that, in  
17 fact, it's a symmetrical rule suggests that  
18 incorporation has nothing to do with it at all.

19 MR. CHAITEN: Well I think what the  
20 Court was getting at was the -- I think the --  
21 it was the -- the baronial logic of it was that  
22 "offense" must mean federal offense because the  
23 Double Jeopardy Clause only applies to the  
24 federal government.

25 That's what this Court was getting at.

1 That's what was picked up in Abbate and Lanza,  
2 and that's what's no longer true. So as a --  
3 as a pure -- I -- I don't think it was a  
4 legitimate rationale to begin with because it  
5 conflates two things that are different: to  
6 which government does the clause apply and what  
7 prior offenses count for double jeopardy  
8 purposes. That was the rationale.

9 It's interesting, I don't know that  
10 the government is defending that rationale.  
11 They -- they -- they completely ignore the  
12 non-incorporation rationale.

13 JUSTICE KAGAN: I -- I guess what  
14 strikes me, Mr. Chaiten, is that you can say,  
15 well, you know, this case was a little bit  
16 different. And this case, the arguments  
17 weren't properly presented. In this case,  
18 there's something else that's the matter. But,  
19 you know, this is an 170-year-old rule, and  
20 it's an 170-year-old rule that's been relied on  
21 by close on 30 Justices have voted at one time  
22 or another specifically for this rule, not an  
23 application of this -- but for this rule.

24 And, you know, part of what stare  
25 decisis is, is a kind of doctrine of humility

1 where we say we are really uncomfortable  
2 throwing over 170-year-old rules that 30  
3 Justices have approved just because we think we  
4 could kind of do it better.

5 MR. CHAITEN: Well, I mean, I disagree  
6 with the 170 years because, again, it's -- it's  
7 dicta in dicta in Fox v. Ohio, and I think it  
8 is important to look at the rationale when the  
9 Court finally had an opportunity to decide this  
10 and make a holding on it, and that is Lanza.

11 And it -- there's -- nothing  
12 resembling an argument for the original  
13 understanding the Double Jeopardy Clause was  
14 presented in Lanza. That was picked up in  
15 Abbate. And all these cases are  
16 pre-incorporation. The Court has held  
17 repeatedly that jurisprudential changes are a  
18 reason to revisit a doctrine and incorporate --

19 JUSTICE SOTOMAYOR: But why is the  
20 doctrine wrong? The -- given the uniqueness of  
21 our system of government, because there wasn't  
22 and isn't a comparable system in England at the  
23 time, there were not separate sovereigns, there  
24 was one sovereign, England. And one of the  
25 cases you rely on involved Wales, and so the

1 application of the rule there makes absolute  
2 sense in that context.

3 But the logic of all of our cases  
4 relied on a simple theory of -- of -- of what  
5 the sovereignty between the states and the --  
6 and the federal government are. And you  
7 haven't really explained why that logic is not  
8 sensical.

9 MR. CHAITEN: Well, the -- the logic  
10 of the English rule, as reported in numerous  
11 treatises from the early 18th Century through  
12 the 20th Century, it's still the rule today, is  
13 that, where there's a court of concurrent  
14 jurisdiction, even if it's a -- another  
15 government that has concurrent jurisdiction,  
16 then an acquittal there bars a subsequent  
17 prosecution.

18 JUSTICE SOTOMAYOR: Do you have --

19 MR. CHAITEN: And the logic for --

20 JUSTICE SOTOMAYOR: -- do you have any  
21 current case that describes the English rule  
22 that way?

23 MR. CHAITEN: Current case?

24 JUSTICE SOTOMAYOR: A current case,  
25 something --

1           MR. CHAITEN: So I -- I refer the  
2 Court to two things. One, the famous Professor  
3 Grant article, Successive Prosecutions, tracks  
4 the law of England and the British empire  
5 through -- through the -- into the latter half  
6 of the 20th Century. There was a case in 1985,  
7 Regina v. Thomas, in which the Court describes  
8 and applies the rule.

9           It -- I -- I don't think the idea that  
10 it -- this is not the English rule is a serious  
11 argument. I -- I --

12           JUSTICE GINSBURG: Do you know how the  
13 -- this rule applies within the European Union?

14           MR. CHAITEN: It -- it applies the  
15 same way that we are urging here.

16           JUSTICE BREYER: What --

17           MR. CHAITEN: That is my  
18 understanding.

19           JUSTICE BREYER: The question, I  
20 thought, perhaps Justice Kagan and Justice  
21 Ginsburg and Justice Sotomayor are asking, as I  
22 understand it -- in any case, I'm asking it --  
23 I -- I -- I have spent a certain amount of time  
24 in these old cases. I think that Bartkus in  
25 this Court says there were three with you,



1 three against you, two undecided. I don't find  
2 it quite as clear, but I'll go back and look at  
3 them again.

4 But suppose you're right. Maybe  
5 Marbury versus Madison was wrong. Maybe there  
6 are mis-cites in all kinds of things. Look at  
7 the door we're opening up. And, here, you've  
8 read the briefs. There are -- there are briefs  
9 that say remember the civil rights world where  
10 people were, with victims of a different race,  
11 simply killing them or worse, and the state  
12 would just, ah, don't worry, they'll never  
13 convict, and they didn't.

14 Or think of the brief here with the  
15 Indian tribes. We're saying that we need this  
16 kind of thing for abuse of women. And think of  
17 the case of prohibition. And think of the  
18 cases that you've seen.

19 Now what I looked for in your briefs  
20 which I haven't found yet but for the military  
21 is, is it really the case or not that, as a  
22 practical matter, if you go back the last 10  
23 years or five or whatever it is, you found a  
24 whole lot of cases where people were prosecuted  
25 twice by different sovereigns for what was the

1 same thing. Because I didn't see them listed  
2 here in any brief but for the military.

3 And -- and, therefore, to me, that's  
4 an important question.

5 MR. CHAITEN: Well -- well, we can't  
6 know for sure how many successive prosecutions  
7 there are --

8 JUSTICE BREYER: Of course.

9 MR. CHAITEN: -- because the federal  
10 government and the state --

11 JUSTICE BREYER: I don't expect you to  
12 know for sure.

13 MR. CHAITEN: Well, and I -- and I --  
14 well, I -- and I want to say the reason I'm  
15 saying we don't -- can't know for sure is  
16 because the government's Petite policy is a  
17 secretive policy that they implement and they  
18 don't really share data on it, other than the  
19 prosecutions they decline to make.

20 Sources from the early 2000s say that  
21 they've authorized 150 Petite authorizations  
22 per year. There's reason to believe, I  
23 think -- and, first of all, let me step back  
24 and say I don't think that should dictate what  
25 the constitutional rule is. There's no minimum

1 number of constitutional violations that  
2 triggers this Court's duty to enforce the  
3 Constitution.

4 But I think there's every reason to  
5 believe that the use of this intersovereign  
6 prosecution, particularly federal after state,  
7 for the same crime is increasing. You could  
8 just see the facts of this case.

9 It is really difficult --

10 JUSTICE GINSBURG: How much does --  
11 does Blockburger shrink the significance?  
12 Because -- because with -- if there's a  
13 different element in one, that's enough to take  
14 it out of double jeopardy?

15 MR. CHAITEN: If each has a different  
16 -- an element the other doesn't have, then,  
17 yes, that's enough to take it out of double  
18 jeopardy. And that -- that's -- that makes  
19 sense when you're talking about federal and  
20 state government because, if the federal  
21 government has made a considered decision that  
22 there's some substantial federal interest here,  
23 they can write -- they can define the crime in  
24 a way that's probably going to be different  
25 than -- than -- than crimes that states

1 prosecute which are local crimes.

2 I think it --

3 JUSTICE SOTOMAYOR: I think that it  
4 would come under --

5 JUSTICE GINSBURG: Do you know how  
6 that would work for the civil rights cases?

7 MR. CHAITEN: Yeah -- yes, yes. So --  
8 so -- so, one, I want to note that the -- the  
9 -- the -- on the civil rights concern, the ACLU  
10 supported us. Other progressive organizations  
11 have supported us. The Howard Civil Rights  
12 Clinic, the Howard University Thurgood Marshall  
13 Civil Rights Clinic, has filed a brief in  
14 support of neither side, but I believe it's  
15 quite helpful to us because it explains why, if  
16 the Court adopts our rule, it is not likely to  
17 be a problem for civil rights prosecutions.

18 The main tools for federal civil  
19 rights prosecutions are 18 U.S.C. 241 and 18  
20 U.S.C. 242.

21 JUSTICE ALITO: Well, that would be  
22 the case if the Blockburger rule holds, but  
23 your interpretation of the term "offence" in  
24 the Fifth Amendment is perhaps inconsistent  
25 with the way this Court has interpreted that --

1 that concept in Blockburger cases. Isn't that  
2 true?

3 MR. CHAITEN: I -- I don't think it's  
4 the least bit inconsistent. I think if you  
5 look at -- if you look at -- so they -- the --  
6 the current understanding, the Blockburger rule  
7 derives from Justice Scalia's dissent in Grady  
8 v. Corbin, which had -- which was adopted in  
9 Dixon, and it's exactly what we're saying it  
10 is. It's a crime defined by the same elements  
11 or -- or a lot lesser --

12 JUSTICE ALITO: But didn't he --  
13 didn't he say it is the elements defined by a  
14 particular sovereign?

15 MR. CHAITEN: I -- I don't believe he  
16 actually said that in Grady v. Corbin, and I  
17 don't think the Court said that in Dixon.  
18 There was nothing sovereign-specific about it.  
19 The government tries to say that it's -- it --  
20 it -- it's necessarily a rule of legislative  
21 intent which makes it sovereign-specific. But  
22 that -- that is not what -- that is not what  
23 the English authorities said.

24 Now the English --

25 JUSTICE ALITO: Can I go back to the

1 way you began? I mean, you told us that there  
2 is a mountain of evidence supporting your  
3 interpretation of the original meaning of the  
4 Double Jeopardy Clause.

5 Put aside Hutchinson and put aside the  
6 case involving Welsh law that Justice Sotomayor  
7 referred to. Can you cite any 17th -- any 16th  
8 or 17th or 18th Century British case in which a  
9 foreign judgment actually barred a prosecution  
10 in Great Britain?

11 MR. CHAITEN: In Great Britain? Well,  
12 it -- it's -- it's Hutchinson. The actual  
13 holding of Roche was that the plea of autrefois  
14 acquit based on foreign acquittal would be a  
15 bar because that -- if that was necessary to  
16 the court's decision, the court was deciding  
17 whether -- whether the defendant could plead  
18 that and innocence at the same time and said it  
19 -- it couldn't because the plea of autrefois  
20 acquit based on foreign conviction would be a  
21 bar.

22 It's true that the Hutchinson --

23 JUSTICE ALITO: Well, there's -- I  
24 mean, there are questions about Roche. What --  
25 in the version of the opinion that was

1 available at the time of the founding, was  
2 Hutchinson even cited?

3 MR. CHAITEN: Hutchinson wasn't cited,  
4 but Roche on its own -- Roche on its own stood  
5 for that proposition. And then, in 1800, the  
6 Hutchinson explanation was added to the  
7 opinion. This Court is --

8 JUSTICE ALITO: So this is the mount  
9 -- this is a mountain?

10 MR. CHAITEN: The -- the mountain -- I  
11 would primarily start with the treatises. And,  
12 by the way, in the -- in the Grady v. Corbin  
13 dissent, the entirety of the English common law  
14 evidence of that the Court -- that Justice  
15 Scalia relied on, that then became the opinion  
16 of the Court in Dixon, was five treatises, one  
17 pre-ratification case that was dicta, and one  
18 post-ratification case that adopted it. So  
19 that was -- that was the way the originalist  
20 inquiry happened.

21 If you want to know what the public  
22 understanding of the rule was --

23 JUSTICE ALITO: Do you have any  
24 evidence that most of these treatises -- that  
25 these treatises -- with the exception of

1 Blackstone, which was every lawyer's bible at  
2 the time of the founding. But there's almost  
3 nothing in Blackstone about this. These other  
4 treatises were well-known to the members of the  
5 first Congress and to the -- the members of the  
6 state ratifying conventions? They had these  
7 treatises on their bookshelves and that was  
8 what they looked to? Do you have any evidence  
9 of that?

10 MR. CHAITEN: Yeah. Yes. These  
11 treatises were all -- all the treatises we cite  
12 were available in America.

13 JUSTICE SOTOMAYOR: They were?

14 MR. CHAITEN: They were well-known  
15 treatises. The Buller treatise, which the  
16 government seems to enjoy taking potshots at --  
17 the Buller treatise was written by Sir Francis  
18 Buller, who was a member of the King's Bench at  
19 the time of the framing. It is cited in  
20 numerous cases in this country, pre-framing and  
21 post-framing, for criminal law principles and  
22 civil law principles.

23 So three -- three of the five  
24 treatises that Justice Scalia relied on in  
25 Grady v. Corbin are -- are treatises we rely on



1 here, Hawkins, Starkie, and Chitty. You know,  
2 this is --

3 JUSTICE ALITO: Those treatises don't  
4 cite any actual authority.

5 MR. CHAITEN: Those treatises?

6 JUSTICE ALITO: What -- what actual  
7 authority? What holdings of pre-Fifth  
8 Amendment-adoption courts are cited in those --  
9 can be cited in those treatises? You're just  
10 --

11 MR. CHAITEN: Yeah, MacNally --  
12 MacNally cites Hutchinson and cites -- and  
13 cites Roche.

14 JUSTICE ALITO: Hutchinson? Do we  
15 have the --

16 MR. CHAITEN: It just doesn't cite  
17 them. It discusses them. And it says --

18 JUSTICE ALITO: Do we have -- do we  
19 have the opinion in Hutchinson?

20 MR. CHAITEN: There is a bail  
21 notation, and that is the only thing that  
22 survived, and the scholars have -- scholarship  
23 has long noted that that was from one phase of  
24 the case. But it doesn't matter. It doesn't  
25 matter because we have the King's Bench

1 repeatedly saying this is the rule, this is the  
2 rule.

3 And -- and the government cites not a  
4 single authority to the contrary, stating an  
5 opposite rule. There's no --

6 JUSTICE GORSUCH: Counsel, I apologize  
7 for ping-ponging you from the -- from the  
8 framing back to the present, but I'd like to  
9 return you to Justice Breyer's question about  
10 the impact this might have on civil rights  
11 organizations and -- and others.

12 You know, the stare decisis  
13 considerations, one of which would be are we  
14 upsetting settled expectations currently?

15 MR. CHAITEN: Well, I don't think it  
16 would have an impact on civil rights  
17 litigation. As I was -- as I was saying, I  
18 think the --

19 JUSTICE GORSUCH: You started, but I'm  
20 -- I'd like you to develop that further.

21 MR. CHAITEN: Yes --

22 JUSTICE GORSUCH: I didn't get a  
23 complete answer.

24 MR. CHAITEN: Sorry. And so I  
25 mentioned that the primary tools of the federal

1 government in the area of civil rights  
2 prosecution are 18 U.S.C. 241 and 242. 241 is  
3 conspiracy to deprive someone of their  
4 constitutional rights under color of law. 242  
5 is actually doing it. Those aren't going to be  
6 the same offenses as, say --

7 JUSTICE BREYER: Now.

8 MR. CHAITEN: -- a murder or an  
9 assault.

10 JUSTICE BREYER: Now. Now. But a  
11 state -- well, I don't -- I can't foresee the  
12 future. And it wouldn't be that hard. It  
13 wouldn't have been --

14 MR. CHAITEN: Well, in the federal  
15 government, if --

16 JUSTICE BREYER: -- for a state in the  
17 19 -- you see? Look, what's actually bothering  
18 me is, yes, I know you're convinced on the  
19 history. I also know that -- that, there, it  
20 may be less clear than you think, but maybe  
21 not, that this Court several times has looked  
22 at the history and they've said it's  
23 inconclusive and, therefore -- and now we have  
24 a rule that's been there a long, long time.

25 And if we're going to go back and look

1 to whether this Court got the history right in  
2 cases, I have my own candidates. Is that --

3 MR. CHAITEN: So --

4 JUSTICE BREYER: -- okay? So -- so --  
5 so now --

6 MR. CHAITEN: -- I don't agree that  
7 the Court has several times looked --

8 JUSTICE BREYER: -- my problem is  
9 that.

10 MR. CHAITEN: The Court --

11 JUSTICE BREYER: My problem is, is  
12 this a basis for going back, the same one that  
13 -- the same question. But I haven't heard the  
14 answer that Justice Kagan started with.

15 MR. CHAITEN: So -- so -- so two --  
16 two responses. And one, could I -- if I could  
17 finish on the civil rights issue. I just  
18 wanted to add that the federal government can  
19 take control in all manner of ways. In a  
20 particular case, they can take custody of  
21 someone via an ad prosequendum writ. If  
22 Congress -- if -- if -- if states were becoming  
23 uncooperative in the area of civil rights, and  
24 this were really a problem, which it doesn't  
25 seem to be today, the federal government could

1 preempt certain state crimes.

2           There are any number of ways the --  
3 the federal government could take control if,  
4 in the future, there were these problems that  
5 we can't foresee today.

6           And then, as far as the -- the history  
7 being analyzed in several opinions of this  
8 Court, no, which -- respectfully, Your Honor, I  
9 disagree. It is one footnote in one opinion.  
10 It is Footnote 9 of Bartkus.

11           JUSTICE GORSUCH: I -- I think the  
12 question, though, is, of all the errors this  
13 Court has made over the years --

14           (Laughter.)

15           JUSTICE BREYER: That's right.

16           JUSTICE GORSUCH: -- why this one?  
17 Why should we care about this one?

18           MR. CHAITEN: Well -- well, we should  
19 care because there is an ancient right not to  
20 be tried twice for the same crime. And the  
21 original understanding of the Double Jeopardy  
22 Clause considers this the same crime.

23           It would allow --

24           JUSTICE KAGAN: But, Mr. Chaiten, I  
25 mean, one of the --

1 MR. CHAITEN: You should care --

2 JUSTICE KAGAN: I'm sorry. Please.

3 MR. CHAITEN: You should -- you should  
4 care because we've cited examples of cases  
5 where a state court --

6 JUSTICE GORSUCH: I -- I -- I -- I --

7 MR. CHAITEN: -- acquitted someone of  
8 murder and the federal government convicted.

9 JUSTICE GORSUCH: Counsel -- counsel,  
10 I'm sorry to interrupt, but I -- I think -- I  
11 think we've got that, okay? I think it -- it's  
12 just a practical question. It took until last  
13 year for this Court to overrule Korematsu. Why  
14 is this case, practically, today important?

15 MR. CHAITEN: It is -- it is important  
16 for the -- it is important because we currently  
17 have a rule that allows the federal government  
18 to come in decide they didn't like the way a  
19 state prosecuted someone or the result of the  
20 prosecution or the sentence they got and re-  
21 prosecute them.

22 It's precisely what happened in this  
23 case. There's every reason to believe it  
24 happens with some regularity. And the Court  
25 can put an end to it. The scholars --

1           JUSTICE KAGAN: Well, I guess -- I  
2     guess the -- the question that underlies  
3     Justice Breyer's question about civil rights is  
4     something along the lines of: You know, that's  
5     consistent with our structure of government.  
6     We have dual sovereigns. That means dual  
7     regulation. And dual regulation often means  
8     dual punishment.

9           And if we were to adopt the rule that  
10    you suggest, it might very well be that either  
11    the federal government would have to  
12    subordinate its interests to the states or that  
13    the states would have to subordinate their  
14    interests to the federal government.

15           And one of the things about our  
16    constitutional structure makes -- which makes  
17    it unusual is that -- is that both sovereigns  
18    are understood to have significant interests  
19    that they have the capacity to pursue.

20           MR. CHAITEN: But where they have the  
21    concurrent jurisdiction over something that is  
22    the same offense, that is illegitimate for  
23    reasons that were understood at the framing.  
24    Take the cases of -- take -- take -- take  
25    Furlong. That's a case where multiple

1       sovereigns have concurrent jurisdiction over  
2       robbery at sea, and it was well understood that  
3       a prosecution by one would bar a prosecution by  
4       another.

5                 JUSTICE KAGAN:  Yeah.  Well, I read  
6       Furlong a little bit differently, as actually  
7       separating out the offense of piracy, which was  
8       an offense that sort of was in common, versus  
9       the offense of murder, which Furlong says, yes,  
10      each different jurisdiction can prosecute the  
11      offense.

12                MR. CHAITEN:  The murder of a British  
13      subject by a British subject on a British ship  
14      is what they were saying.

15                JUSTICE KAGAN:  I guess I want to ask  
16      --

17                MR. CHAITEN:  They weren't -- they  
18      weren't -- they weren't drawing -- they were --  
19      they were just applying the concurrent  
20      jurisdiction rule, and they were saying why  
21      would the U.S. have concurrent jurisdiction  
22      over that.

23                JUSTICE KAGAN:  I suppose my -- my  
24      main question, which actually goes back to  
25      Justice Gorsuch's question, because Justice



1 Gorsuch has been trying to lead you away from  
2 something, and I'm a little bit also confused  
3 as -- as to why your argument seems, frankly, a  
4 little bit one note.

5           You know, your -- your brief and now  
6 your argument is just all about the original  
7 jurisdiction. And there are some people on  
8 this bench that think that that is the Alpha  
9 and Omega of every constitutional question.

10           But there are other people on this  
11 bench who do not, who think that 170 years of  
12 significant practice where 30 Justices have  
13 signed on to a rule, that you're going to have  
14 to give me more than the fact that, you know,  
15 actually, pretty early on in the republic they  
16 decided that that was not what the original  
17 understanding was, even if they're wrong.

18           MR. CHAITEN: Well --

19           JUSTICE KAGAN: And so this is your  
20 opportunity to give me more.

21           MR. CHAITEN: Okay. 1922, I would  
22 say. But my opportunity in response to your --  
23 your offering me an opportunity to give you  
24 more, I will tell you incorporation.  
25 Incorporation, incorporation, incorporation.

1           The Court has said its own precedents  
2           are that incorporation makes a big difference  
3           for purposes of stare decisis.

4           So look at *Elkins* and look at -- look  
5           at *Murphy v. Waterfront Commission*. After  
6           incorporation, the federal government and the  
7           state government shouldn't be able to combine  
8           to do that which they can't do alone.

9           JUSTICE KAVANAUGH: Part of -- part of  
10          the original understanding as well was stare  
11          decisis, and stare decisis is a principle, in  
12          my view, rooted in Article III, as Federalist  
13          78 points out and as Justice Kagan points out.  
14          It's a doctrine of stability and humility that  
15          we take very seriously.

16          And the reason -- with the bar that  
17          you have to clear, I believe, is not just to  
18          show that it's wrong but to show that it's  
19          grievously wrong, egregiously wrong, something  
20          meeting a very high bar because stare decisis  
21          is itself a constitutional principle.

22          And given, as Justice Alito says, the  
23          uncertainty about the history, can you clear  
24          that bar?

25          So two questions. Is that the right

1 way to look at it, grievously wrong, and --  
2 and, two, how can you clear that given some of  
3 the uncertain?

4 MR. CHAITEN: Yeah, so I -- I'm not  
5 sure grievously wrong is the right way to look  
6 at it when you're talking about an  
7 unconstitutional law enforcement practice  
8 because this Court has never upheld an  
9 unconstitutional --

10 JUSTICE KAVANAUGH: But that's begging  
11 -- that's begging the question. The whole  
12 point is that there are prior decisions going  
13 back, as Justice Kagan says, many years,  
14 reaffirming this doctrine.

15 And the question is, when are we going  
16 to upset that stability, when are we going to  
17 depart from the humility of respecting  
18 precedent and overrule it?

19 MR. CHAITEN: So --

20 JUSTICE KAVANAUGH: And usually it has  
21 to be -- your -- your brief uses egregiously  
22 wrong. I -- I use the term grievously wrong.

23 MR. CHAITEN: Well, I -- and I agree  
24 this -- this rule is egregiously wrong. If  
25 it's a rule that -- there was no practice for

1 all of English history, no practice for the  
2 first century of this republic. That alone, I  
3 think, speaks volumes.

4 And the -- I think, going back to  
5 incorporation, I think, in addition to just how  
6 wrong the rule is, as explained by many jurists  
7 and many scholars over many decades, I think  
8 incorporation -- the -- the Court has never had  
9 a full and fair opportunity post-incorporation  
10 to revisit this rule.

11 JUSTICE GORSUCH: And I guess, counsel --

12 CHIEF JUSTICE ROBERTS: How -- how  
13 does it work as a practical matter? Is this --  
14 is it a race to the courthouse? I mean, if a  
15 prosecution bars a subsequent one, the state  
16 and federal government may have different  
17 perspectives, is it whoever can empanel a jury  
18 first is going to block the others?

19 MR. CHAITEN: So I don't think so.  
20 So, first of all, the -- the norm in the  
21 country is cooperation between federal and  
22 state authorities. There are just -- speaking  
23 of one agency in one area of law, the DEA --

24 CHIEF JUSTICE ROBERTS: Well, it sure  
25 wasn't at the -- entirely true at the time of

1 the civil rights actions in the -- in the '60s  
2 and '70s. It wasn't true at the time of the  
3 fugitive slave law.

4 MR. CHAITEN: Well, as a practical  
5 matter, I think it is true today.

6 Secondly, Blockburger has been subject  
7 to enormous criticism because it isn't  
8 defended, frankly, enough. When you apply  
9 Blockburger, oftentimes, these aren't going to  
10 be the same offenses.

11 And this is a critical, critical  
12 point. We have had an experiment in this rule.  
13 The experiment is that between 20 and 37 states  
14 already bar successive prosecutions after a  
15 federal prosecution or by another state as a  
16 matter of state law. And where is the race to  
17 the courthouse concerned in those states?  
18 Where are the law enforcement problems in those  
19 states? They don't exist.

20 And I don't think Texas and the  
21 government have ever really -- ever even really  
22 responded to that point.

23 If I may, Mr. Chief Justice, I'd like  
24 to reserve the remainder of my time.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Feigin?

4 ORAL ARGUMENT OF ERIC J. FEIGIN

5 ON BEHALF OF THE RESPONDENT

6 MR. FEIGIN: Thank you, Mr. Chief  
7 Justice, and may it please the Court:

8 Throughout its history, this Court has  
9 correctly recognized that the distinct and  
10 separate sovereign powers of the state and  
11 federal governments make state and federal  
12 crimes different offenses under the Double  
13 Jeopardy Clause.

14 Petitioner provides no reason for this  
15 Court suddenly to conclude that it's been wrong  
16 all this time. And overturning 170 years of  
17 precedent on this issue is going to invite a  
18 whole host of problems that this Court has thus  
19 far been able to avoid.

20 CHIEF JUSTICE ROBERTS: Well, 170  
21 years, I -- I -- I think your friend is right,  
22 isn't it, that we have not had a full  
23 consideration and exposition of the issue in  
24 any of our precedents?

25 MR. FEIGIN: I don't think that's

1 correct, Your Honor. I think, as you yourself  
2 pointed out earlier in the argument, the  
3 historical point that he is making here and  
4 that is the centerpiece of his argument, that  
5 even prosecutions by a foreign sovereign can  
6 bar domestic prosecution by the -- a state or  
7 by the United States, was fully before the  
8 Court in Bartkus.

9           The Grant article that is all over the  
10 Petitioner's brief and that Petitioner's  
11 counsel cited at argument today was cited by  
12 Justice Black in his dissent in Bartkus. And  
13 all the authorities on which he's relying, with  
14 the exception of Roche, which, correctly  
15 understood, doesn't actually announce this  
16 rule, were identified by Justice Frankfurter  
17 for the majority in Footnote 9.

18           And the Court found these authorities  
19 to be dubious and of limited value in --  
20 because they don't really speak to our  
21 federalism.

22           JUSTICE GINSBURG: But you -- you have  
23 to concede, won't you, that this rule, this  
24 separate sovereign rule, has been widely  
25 criticized by both academics and federal

1 judges?

2 MR. FEIGIN: Your Honor, it has come  
3 under some criticism. But I think what's worth  
4 noting is a lot of the articles that criticize  
5 it also recognize that some exceptions are  
6 necessary and that successive prosecutions and  
7 separate prosecutions are sometimes necessary  
8 to vindicate particular sovereign interests.

9 So take the civil rights brief that my  
10 friend was just mentioning. They think that  
11 this Court, if it goes for the position the  
12 Petitioner's advocating, should then announce a  
13 separate constitutional doctrine that saves  
14 civil rights prosecutions.

15 And that's because they realize the  
16 enormous consequences that overturning all this  
17 precedent would have. What's --

18 JUSTICE GINSBURG: I thought the  
19 answer to the civil rights cases is it's not  
20 the same offense, 241 and 242. There are no  
21 state law counterparts to those.

22 MR. FEIGIN: Your Honor, those aren't  
23 the only civil rights charges we bring. So in  
24 the recent shootings by -- the recent shootings  
25 of the synagogue in Pittsburgh and of the



1 African-American church in Charleston, we've  
2 charged those with offenses that -- I mean, I  
3 can get into the details if you'd like, but  
4 they're essentially murder plus a bunch of  
5 elements. And those would be Block --

6 JUSTICE GINSBURG: Well, but once you  
7 say --

8 MR. FEIGIN: -- could be Blockburger  
9 barred.

10 JUSTICE GINSBURG: -- once -- once you  
11 say "a bunch of elements," then you get into  
12 Blockburger.

13 MR. FEIGIN: No, Your Honor, murder  
14 would be a less -- considered a lesser-included  
15 offense of those offenses if the offenses  
16 defined by different sovereigns were considered  
17 the same, as Petitioner is urging. But those  
18 -- that's not even the only consequence.

19 Even the -- there are a number of  
20 categories of cases that would be put at issue  
21 here. And I -- I can get into more detail in  
22 those in a moment, but before I get to that,  
23 even the possibility of claims like this  
24 creates adverse consequences for law  
25 enforcement, for legislatures, and for courts.

1           CHIEF JUSTICE ROBERTS: Well, you had  
2 -- you must think that there's some problem or  
3 you wouldn't have the Petite policy. I mean,  
4 that's -- that's an odd defense of a -- of a --  
5 a position to say, well, we take care of it  
6 somewhere else, so don't worry about it.

7           MR. FEIGIN: Well, no, Your Honor, I  
8 think there are a number of instances,  
9 including the Double Jeopardy Clause just last  
10 term, where a plurality of this Court has  
11 recognized the Constitution doesn't solve every  
12 potential policy problem that may arise, and we  
13 leave those -- a lot of those questions for  
14 legislatures or for the political branches in  
15 general.

16           And I think this has actually been a  
17 real success story of that because he was just  
18 asked if he could point to any significant  
19 practical problems, and he couldn't. But I can  
20 point to a lot of practical problems that are  
21 going to arise if this Court adopts his rule.

22           So, on the law enforcement side, just  
23 the possibility that this could happen is going  
24 to deter cooperation, encourage aggressive  
25 prosecutions, a race to the courthouse, and

1 defendants trying to play each sovereign off  
2 against the other where one sovereign will have  
3 the ability to unilaterally bargain away the  
4 other sovereign's ability to enforce its  
5 interests. And I'd -- I'd like to get into  
6 some concrete examples of that in a second.

7 But, as to legislatures, he said it  
8 himself, he's going to -- this would  
9 incentivize Congress to preempt state law in  
10 more circumstances, and it's going to also  
11 incentivize --

12 JUSTICE GINSBURG: What about a case  
13 like this, this very case, a felon in  
14 possession? It's the same crime, federal and  
15 state. What is the manipulation that you see  
16 there?

17 MR. FEIGIN: Well, Your Honor, the --  
18 the examples I would get into, and I'm happy to  
19 get into them, are examples of cases in which  
20 state and federal interests would be blocked.  
21 But speaking to this particular case, I don't  
22 think there's any dispute, at least by  
23 Petitioner, that the federal government has a  
24 substantial interest in regulating access to  
25 the interstate market for firearms by someone

1 who has twice fired weapons in that endangered  
2 members of his own family and other members of  
3 the community.

4 The only question is whether that  
5 substantial federal interest was vindicated  
6 when he entered into an omnibus plea deal with  
7 the state where he wound up, as a practical  
8 matter, not receiving any additional time in  
9 prison for the firearm offense.

10 JUSTICE GORSUCH: Well, but I think  
11 that's exactly the problem that is practically  
12 more apparent today or at least of potential  
13 concern that counsel might have addressed, and  
14 that is, with the proliferation of federal  
15 crimes, and I think over 4,000 statutes now and  
16 several hundred thousand regulations, the  
17 opportunity to -- for the government to seek a  
18 successive prosecution if it's unhappy with  
19 even the most routine state prosecution is a  
20 problem.

21 Justice Brennan was concerned about it  
22 in Bartkus. In that case, there was some  
23 evidence of manipulation even by federal  
24 authorities to secure a second conviction in  
25 state court.

1           Why shouldn't that be a practical  
2           concern we ought to be more concerned about  
3           today?

4           MR. FEIGIN: Well, let me say a few  
5           things about that, Your Honor. I mean, the  
6           reason we have the Petite policy is we do  
7           understand that successive prosecutions are  
8           very often inappropriate and we try to reserve  
9           them for circumstances in which the federal  
10          interest hasn't been vindicated.

11          But I think, to the extent that --  
12          that there's a concern about successive  
13          prosecutions, it's not so much successive  
14          prosecutions based on a particular law of one  
15          sovereign or another; it's successive  
16          prosecutions for the same conduct all raise  
17          those concerns.

18          But everyone agrees that successive  
19          prosecutions for the same conduct don't raise  
20          any double jeopardy concerns. That's why the  
21          Petite policy, Mr. Chief Justice, is somewhat  
22          broader. It covers a -- a subsequent federal  
23          prosecution following a state or federal  
24          disposition for the same act or transaction.

25          But, to get back to your question,

1 Justice Gorsuch, I think that makes the Double  
2 Jeopardy Clause not necessarily the appropriate  
3 vessel for vindicating that concern.

4 JUSTICE GORSUCH: Well, you know, I --  
5 I wonder about that because, in our prior  
6 cases, we hinged on two things, in Bartkus,  
7 among other places. One was incorporation, and  
8 we were concerned that the federal government  
9 would be at a disadvantage compared to states  
10 without this rule because states were not bound  
11 then by the Double Jeopardy Clause and could  
12 pursue a second prosecution after a failed  
13 federal prosecution. So why shouldn't the  
14 reverse be true, we thought.

15 That rationale has now disappeared  
16 with incorporation. And we've since revisited  
17 a very similar -- similar issue in the Fourth  
18 Amendment context in Elkins, where we used to  
19 allow federal prosecutors to use illegally  
20 obtained evidence, and now we don't.

21 So that rationale seems to have, in  
22 fact, changed over time. So that might be one  
23 -- one argument. And then -- and then the  
24 other is, again, with the -- with the -- in --  
25 in Bartkus, we relied on the -- on -- on the --

1 and elsewhere on -- on the promise that  
2 prosecutors wouldn't do this in routine cases.

3 And, you know, at least to some eyes,  
4 this might look like a pretty routine case,  
5 where -- as did Bartkus itself. And why  
6 shouldn't we be concerned about those two  
7 things?

8 MR. FEIGIN: Well, Your Honor, we  
9 don't view this as a routine case. We don't --  
10 first of all, you have to understand that the  
11 set of cases that could even come under the  
12 Petite policy is already a very selective  
13 group. The federal government doesn't charge  
14 very many criminal cases as compared to the  
15 states.

16 And then we don't -- our number of  
17 Petite policy approvals each year is about a  
18 hundred. And this case is important to us  
19 because it's a part of a program called  
20 Operation Safe Neighborhoods. The case studies  
21 have shown, by focusing on recidivist  
22 offenders, like Petitioner, we've reduced crime  
23 in some neighborhoods by up to 42 percent.

24 But even if you don't like this  
25 prosecution, let me give you a few other

1 examples of the kinds of cases that are going  
2 to be barred under his rule.

3 First, there's the foreign judgment  
4 problem that the Court was discussing with  
5 Petitioner's counsel. And that's not just a  
6 hypothetical problem. That's a real one.

7 And let me give you a real example.  
8 In 2003, the FARC rebels in Colombia kidnapped  
9 American journalists and held them hostage for  
10 five years. And we have open indictments on  
11 them. And when there was the peace accord  
12 between the Colombian government and the FARC  
13 rebels, the charges against them in Colombian  
14 court were dismissed.

15 Now I'm not certain whether those  
16 charges -- jeopardy actually attached in those  
17 cases under Colombian law or exactly what the  
18 elements of the Colombian law were, but that's  
19 precisely the inquiry we don't want courts to  
20 have to have.

21 And we certainly don't want to have to  
22 file as the government --

23 JUSTICE GORSUCH: Well, why not?

24 MR. FEIGIN: -- pieces of --

25 JUSTICE GORSUCH: We do it in -- in



1 civil cases all the time, right? And we -- we  
2 won't enforce judgments that are shams. We  
3 won't enforce judgments when there are  
4 different elements. We won't enforce judgments  
5 when jeopardy acquittal hasn't attached, so  
6 claim preclusion wouldn't apply.

7 But why is it that civil defendants,  
8 corporations, businesspeople, get the benefit  
9 of this rule but not criminal defendants, least  
10 amongst us?

11 MR. FEIGIN: Well, usually, Your  
12 Honor, there, there's going to be privity among  
13 the parties. Here, the Colombian government  
14 had a perfectly legitimate sovereign reason for  
15 forgiving this conduct once the rebel -- in  
16 return for which the rebels admitted it and got  
17 amnesty. But that reason doesn't apply to the  
18 federal government.

19 And the other thing that we can't do  
20 and the thing that Petitioner's counsel's --

21 JUSTICE GINSBURG: Well, wouldn't they  
22 -- they say since there was never any trial,  
23 that they were never in jeopardy?

24 MR. FEIGIN: Well, Your Honor, I'm not  
25 sure how far the proceedings with respect to

1 each and every individual rebel we might charge  
2 in Colombia got. But his only solution to  
3 this -- and I can give you other examples as  
4 well, but just to finish this one up, his only  
5 solution to this is to ask the federal  
6 government to make a filing in U.S. district  
7 court asking that court not to respect the  
8 judgment of a Colombian court.

9 Now we can't do that with respect to  
10 Colombian courts or French courts or Italian  
11 courts without creating enormous diplomatic  
12 problems for ourselves. And I don't think U.S.  
13 district courts --

14 JUSTICE GINSBURG: I don't know  
15 whether a dismissal based on some amnesty --

16 MR. FEIGIN: So --

17 JUSTICE GINSBURG: -- is a -- anything  
18 like an adjudication on the merits.

19 MR. FEIGIN: So, Your Honor, let me  
20 give you another example. There's the bombing  
21 of PanAm Flight 103 over Lockerbie, Scotland.  
22 That implicates the interests of numerous  
23 sovereigns. One of the bombers has been tried  
24 in Pakistan, and the U.S. might want to try  
25 that bomber as well.

1           His rule would preclude that. And,  
2           again, his only solution is to ask a U.S. court  
3           to declare that some foreign court is not a  
4           court of competent jurisdiction.

5           And to -- Justice Ginsburg, to your  
6           question before about what European countries  
7           do, it's not correct that European countries  
8           all have his rule. Germany, Italy, France,  
9           Belgium, and Austria are all countries that  
10          follow the same rule we do. In 2009, French --

11          JUSTICE GORSUCH: But -- but -- but as  
12          I understand it -- and tell me if I'm wrong --  
13          the common-law countries, Great Britain and  
14          Canada, do?

15          MR. FEIGIN: Not all of them, Your  
16          Honor. Great Britain, it has become apparent  
17          recently, the -- probably the best case is the  
18          Regina against Thomas case that my friend  
19          cited. It's become apparent recently that they  
20          do adhere to that rule, although even in Regina  
21          against Thomas, the prosecution, I believe, was  
22          allowed to proceed for other reasons.

23          Canada's Supreme Court has reserved  
24          this question. And the idea that there is some  
25          international norm that sovereigns can't

1 separately vindicate their own interests when  
2 they're implicated is simply not a rule. But  
3 let me focus just to -- let -- let's just turn  
4 to domestic --

5 JUSTICE GINSBURG: May I ask, before  
6 you do that, you -- you rely very heavily on  
7 federalism, separate sovereigns.

8 Is there another case where federalism  
9 has been invoked to strengthen the hand of  
10 government, state and/or federal, vis-a-vis an  
11 individual? Federalism is usually invoked  
12 because it's a protection of the liberty of the  
13 individual, but, here, the party being  
14 strengthened is not the individual, it is the  
15 state's freedom and the federal government's  
16 freedom to bring -- to prosecute with the same  
17 offense, felon in possession.

18 MR. FEIGIN: So I think the Court's  
19 recognized in older cases, like Cruikshank,  
20 which was from the 19th Century, and in its  
21 recent first decision in Bond against United  
22 States that one of the things that American  
23 citizens get by being citizens of both the  
24 state and the United States is that there are  
25 two sovereigns that can positively legislate;

1 that is, pass affirmative legislation to  
2 protect them.

3 So, in the civil rights era, when the  
4 states weren't affirmatively protecting the  
5 civil rights of their citizens enough, they're  
6 also American citizens, and the United States  
7 stepped in to vindicate those interests.

8 JUSTICE GINSBURG: To -- to -- to  
9 state a different crime, not the garden-variety  
10 assault, murder.

11 MR. FEIGIN: So, Your Honor, there are  
12 civil rights offenses on the books now, like 18  
13 U.S.C. 249, which precludes -- criminalizes  
14 causing bodily injury to someone for racially  
15 motivated reasons that could be double jeopardy  
16 barred under their rule.

17 But let me give you -- let me give you  
18 some other examples of --

19 JUSTICE GORSUCH: But, counsel, just  
20 -- before we get to more examples, I thought  
21 Justice Ginsburg's point was worth exploring a  
22 little bit more.

23 I -- I had thought in this country the  
24 people were -- were the sovereign and that  
25 sovereignty was divided, exercise of

1 sovereignty was divided, not multiplied. So it  
2 was divided between the federal government and  
3 the state governments, Ninth and Tenth  
4 Amendment. And that it -- it is awkward, isn't  
5 it, to say that there are two sovereigns who  
6 get to multiply offenses against you?

7 I can't think of another case where  
8 federalism is used, as Justice Ginsburg  
9 indicated, to allow greater intrusions against  
10 the person, rather than to protect more against  
11 them.

12 MR. FEIGIN: Well, Your Honor, the  
13 people have vested the sovereignty in both the  
14 state and the United States --

15 JUSTICE GINSBURG: Is there such an  
16 example? Is there such an example, other than  
17 double jeopardy, where the individual has a  
18 double whammy, both the state and the federal,  
19 usually federalism, as Justice Gorsuch just  
20 pointed out --

21 MR. FEIGIN: Well --

22 JUSTICE GINSBURG: -- is protective of  
23 the individual?

24 MR. FEIGIN: Well, Your Honor, it is a  
25 common fact of life that everyone is subject to

1 both state and federal regulation. It's why  
2 everyone in this room, except maybe my friends  
3 from Texas, pay both state and federal taxes.

4 (Laughter.)

5 MR. FEIGIN: It's why businesses are  
6 regulated by both the federal and state  
7 governments, and why everyone knows that an  
8 act, and even Petitioner agrees, the same act  
9 can be both a state and federal crime.

10 JUSTICE ALITO: But what about the  
11 adoption of the Black -- the Blockburger rule  
12 as opposed to the same -- same transaction  
13 test?

14 MR. FEIGIN: So, Your Honor, I think  
15 the -- the origins --

16 JUSTICE ALITO: That -- that's a --  
17 that's a rule that -- that's a rule of  
18 federalism in a way. And -- and yet it exposes  
19 defendants to prosecution for the same acts in  
20 both federal court and state court.

21 MR. FEIGIN: I think that's right,  
22 Your Honor. It would respect the judgments of  
23 the legislatures as to how they wanted to craft  
24 their crimes. Blockburger hasn't --

25 JUSTICE GINSBURG: It's -- it's --

1 MR. FEIGIN: -- heretofore been --

2 JUSTICE GINSBURG: -- it's a double  
3 jeopardy. We're talking about double jeopardy,  
4 whether it's Blockburger or this case. I  
5 asked, outside the realm of double jeopardy, is  
6 there such an instance?

7 MR. FEIGIN: Your Honor, I -- I think  
8 I've just given several examples of cases where  
9 people are regulated more heavily because there  
10 are two governments than in -- than they would  
11 be if they were subject only to one unitary  
12 government. That's a necessary consequence of  
13 our system. And the Court has repeatedly  
14 recognized it.

15 JUSTICE KAGAN: May I ask, Mr. Feigin,  
16 do you think that there's a prospect of abuse  
17 where two different governments can use the  
18 possibility of prosecutions as a bargaining  
19 tactic to get defendants to agree to plea  
20 deals? Is -- is -- is that something that  
21 happens regularly?

22 MR. FEIGIN: I -- I'm not really  
23 familiar with that being a serious problem  
24 under the current system. I think the main  
25 concern would actually be the opposite under



1 the new unprecedented system that Petitioner is  
2 asking this Court to adopt, where someone could  
3 go into -- to the state prosecutors, someone --  
4 let's say someone's caught in California with  
5 100 kilograms of marijuana, which is a  
6 misdemeanor in California, as the states point  
7 out in their brief, but is a felony under  
8 federal law.

9 And he agrees to plead to the state  
10 offense, and, therefore, that would bar a  
11 federal prosecution for possession with intent  
12 to distribute, which would be considered, under  
13 his rule, a greater included offense.

14 JUSTICE GINSBURG: Do -- do you  
15 remember what the situation was in the D.C.,  
16 not so very long ago, when we had the same  
17 prosecutor for the local courts and the federal  
18 court? And the D.C. code had lower penalties  
19 than the U.S. code, and the prosecutor engaged  
20 in just that kind of tactic. Plead guilty  
21 under the D.C. code, and if you don't, I'm  
22 going to indict you under the U.S. code.

23 MR. FEIGIN: Well, Your Honor, D.C. is  
24 kind of a special case where both of those fall  
25 under federal government. It's like Puerto

1 Rico in that sense in that they're not separate  
2 sovereigns.

3 But here's another problem we've run  
4 into in Puerto Rico. Now the -- we can't  
5 charge -- we can't rely on the separate  
6 sovereign understanding of the Double Jeopardy  
7 Clause there, is that the territorial  
8 prosecutors in Puerto Rico don't view the  
9 prosecution of crime in quite the same way as  
10 the federal government does. They're more  
11 concerned with crime of a transactional nature,  
12 rather than necessarily developing longer term  
13 investigations.

14 And so one thing that they do is they  
15 frequently prosecute drug conspiracies that  
16 last only for one day, an agreement just to  
17 sell particular drugs from particular location  
18 on a particular day.

19 And at least one district court has  
20 dismissed a federal indictment for a broader  
21 drug conspiracy that occurred for over a range  
22 of years on the ground that it was simply a  
23 greater included offense of the smaller Puerto  
24 Rico drug conspiracy.

25 And that's just a consequence of the

1 different ways in which the state and the  
2 federal government use their resources and the  
3 ways in which they want to prosecute crime.

4 JUSTICE BREYER: Are --

5 MR. FEIGIN: Another difficulty that's  
6 going to arise here is prosecutions by the  
7 federal government that follow tribal  
8 prosecutions, which I think are about  
9 two-thirds of the -- of the few hundred  
10 successive prosecutions that we bring each  
11 year.

12 And as this Court recognized a couple  
13 of terms ago in United States against Bryant,  
14 the federal government plays a critical role in  
15 curbing the serious problem of domestic  
16 violence against Native American women.

17 Tribes are limited generally to  
18 prosecuting only for misdemeanors. So, if they  
19 find that someone has been committing domestic  
20 abuse, the most that they can do is prosecute  
21 that person for a misdemeanor.

22 Under federal law, 18 U.S.C. 117(a),  
23 we can prosecute for -- recidivist domestic  
24 abusers for a felony. And the tribes bring --

25 JUSTICE GINSBURG: And what is --

1 MR. FEIGIN: -- the tribes bring --

2 JUSTICE GINSBURG: -- what is the  
3 reason for the tribes' very limited  
4 jurisdiction?

5 MR. FEIGIN: So the tribes have  
6 limited jurisdiction as a consequence of  
7 federal law. Some tribes are allowed to do  
8 more serious offenses in exchange for providing  
9 more protections in their courts.

10 Very few have decided they want to  
11 make that tradeoff because it would require  
12 them to dispense with some of the traditional  
13 accoutrements of tribal justice that are  
14 important to their traditions.

15 So, as the Court noted in United  
16 States against Wheeler, justice in tribal  
17 courts is more focused on restitution between  
18 the defendant and the victim and less focused  
19 on incarceration and deterrence and the kinds  
20 of treatment programs that they can receive in  
21 federal prison but that they're not going to be  
22 able to receive in tribal prison.

23 JUSTICE BREYER: I see the problem. I  
24 just wondered if you want to say a few words on  
25 a slightly different thing, which I don't know

1 if you have anything to add to what's in my  
2 mind, and I've never been able to formulate a  
3 principle.

4 All right. I -- I looked at the  
5 history, it's not just a Footnote 9. It's a --  
6 a whole discussion in Frankfurter's opinion,  
7 which is on your side, but they have a pretty  
8 strong argument on their side.

9 Then you've pointed to some  
10 problems and -- and I'm sure they're real  
11 ones -- but they don't seem like overwhelming  
12 ones in terms of how often they occur. Then  
13 you say: Well, it's 100 cases where this  
14 applies every year in the federal part and  
15 there are also 20 states, probably 50,000  
16 federal prosecutions, something like that,  
17 there are 100 cases, and this has been around  
18 for 70 years, at least, 170, possibly, or  
19 somewhere in between.

20 So how am I supposed to decide in your  
21 opinion about whether their arguments, which  
22 are past, plus a certain unfairness, which  
23 Justice Black says pretty well, outweighs the  
24 stare decisis. You can't say never, stare  
25 decisis is never. If it always holds, it

1 wouldn't have Brown versus Board.

2 But, if it never holds, we're really  
3 in trouble in terms of the stability of the  
4 law. Okay? Wonderful. This has occurred to  
5 you, this problem. And do you have anything to  
6 say that will help me decide this kind of  
7 balance?

8 MR. FEIGIN: Your Honor, I think they  
9 need to show a lot more than they have shown  
10 here in order to overcome this Court's  
11 consistent understanding throughout its history  
12 of what the Double Jeopardy Clause means.

13 As Justice Kavanaugh pointed out  
14 earlier -- I forget what adjective he used, but  
15 it was --

16 JUSTICE KAVANAUGH: Grievously.

17 MR. FEIGIN: Thank you. You have to  
18 show that this was grievously wrong, and they  
19 haven't come close to doing that. I can talk  
20 about the history in -- in a second, but just  
21 in terms of the consequences, there are very  
22 serious consequences -- these consequences are  
23 going to multiply if you have -- if you adopt  
24 their rule because everyone understands how to  
25 operate under the old rule.

1           Their rule's going to create problems  
2 for courts comparing offenses across  
3 jurisdictions. That's complicated --

4           JUSTICE GINSBURG: May I ask you a  
5 question about issue preclusion? You say no --  
6 no double -- double jeopardy doesn't operate  
7 state/federal -- federal/state. But how about  
8 a case that has been tried in one system and  
9 the jury has found whatever it's found, and  
10 then it's tried in the other system and the  
11 identical conduct is involved. Is -- does  
12 issue preclusion operate?

13           MR. FEIGIN: In -- are you talking in  
14 criminal law --

15           JUSTICE GINSBURG: Yes.

16           MR. FEIGIN: -- or in -- huh?

17           JUSTICE GINSBURG: Yeah.

18           MR. FEIGIN: Or in civil law?

19           JUSTICE GINSBURG: I'm talking about  
20 criminal law.

21           MR. FEIGIN: So, in criminal law, Your  
22 Honor, there is no non-mutual collateral  
23 estoppel. The Court said as much in -- in  
24 Standefer. And this issue hasn't come up, of  
25 course, because the Court has understood that

1 federal and state crimes are not the same  
2 offense under the Double Jeopardy Clause.

3 CHIEF JUSTICE ROBERTS: Don't -- don't  
4 all your problems go away if you're the first  
5 to file, if you win the race to the courthouse?  
6 And I would assume the same is true with the  
7 states. And so what's most likely is that you  
8 and the states are going to sit down and  
9 develop a -- a way of coordinating which cases  
10 you're going to file in first and which ones  
11 they're going to file in first?

12 MR. FEIGIN: Well, Your Honor, I'm not  
13 sure that's true, because I'm not sure that  
14 we're always going to cooperate. I think the  
15 history of this nation has shown that the  
16 federal government and states do not always see  
17 eye to eye on matters of criminal law  
18 enforcement, and there are going to be cases in  
19 which each has separate interests to vindicate.

20 You could imagine federal prosecutors  
21 in California, as a protest against -- I -- I'm  
22 sorry, state prosecutors in California, as a  
23 protest against federal marijuana laws,  
24 allowing anyone who's caught with 50 kilograms  
25 of marijuana to walk in and plead to a



1 misdemeanor to frustrate federal prosecutions.

2           There are also going to be cases where  
3 the state prosecutors simply don't have perfect  
4 information or maybe the federal prosecutors  
5 don't. So the state prosecutors might see  
6 something and just think it's a simple assault,  
7 and what they don't realize is that it's  
8 actually part of a racketeering conspiracy.

9           And I'm not making up these examples,  
10 Your Honor. We see all the Petite waiver  
11 requests, and the examples I'm giving the Court  
12 are real cases that have actually happened.  
13 They're at least based on some --

14           JUSTICE GORSUCH: So, counsel, it  
15 seems like the ones that you can't cooperate  
16 you could solve by getting to the courthouse  
17 first, right?

18           MR. FEIGIN: Well, then we're not --  
19 Your Honor, then, if there's a race to the  
20 courthouse, it deters state and federal  
21 prosecutors from cooperating even at the  
22 investigation stage. You don't have to take my  
23 word for it. If you look at the state and  
24 local government brief, that's exactly what  
25 they say.

1 JUSTICE GORSUCH: Can I ask one  
2 question on -- on -- on stare decisis that we  
3 haven't explored so far? And -- and -- and  
4 that's reliance. The government doesn't make a  
5 reliance argument here as far as I can tell.  
6 It says that there's going to be some systemic  
7 trouble if we were to change the rule, and  
8 confusion.

9 But you -- you can't -- you haven't  
10 suggested, I don't think, that -- that a -- a  
11 prosecutor has a right to rely on an  
12 unconstitutional rule to put someone in prison.  
13 I mean, that wouldn't be a thing, would it?

14 MR. FEIGIN: Well, Your Honor, I do  
15 think that it should weigh heavily on this  
16 Court that what it would be doing would  
17 potentially be letting people out of prison  
18 based -- based on, I think, a rule that is at  
19 best --

20 JUSTICE GORSUCH: If we -- if we were  
21 convinced, though, the Constitution stood one  
22 way, against you, and -- just hypothetically,  
23 you wouldn't -- you wouldn't argue that the  
24 government has a reliance interest to keep  
25 people in prison despite an unconstitutional

1 rule, would you?

2 MR. FEIGIN: Your Honor, I think if  
3 they had shown the kind of monumental or  
4 grievously serious evidence that they would  
5 need to show --

6 JUSTICE GORSUCH: Well, no. How  
7 about 50 --

8 MR. FEIGIN: -- to prevent stare  
9 decisis.

10 JUSTICE GORSUCH: Let's just say  
11 51 percent, they've persuaded us 51 percent  
12 that the Constitution's meaning under any sort  
13 of interpretation, just hypothetically, is  
14 against the government.

15 Would it be appropriate, in the  
16 government's view, to keep people in prison in  
17 those circumstances?

18 MR. FEIGIN: Well, Your Honor, it's --  
19 it's hard to put an exact percentage on it, but  
20 I do think they would have to show -- this  
21 isn't just a preponderance of the evidence test  
22 or stare decisis means nothing. There's also  
23 something about the reputation of this Court  
24 and ensuring that this Court doesn't lightly  
25 overturn its precedents, and unless there is

1 some monumental reason to do so. And they  
2 haven't shown that -- they haven't shown any  
3 such reason to do so today.

4 I mean, one -- one further point I  
5 would -- I would make on that is that their  
6 entire argument is based on a historical  
7 principle that no court in the United States  
8 has ever adopted, which would be this foreign  
9 judgment bar principle.

10 And the result that they would reach  
11 would be, I think, frankly, unworkable.  
12 They're not raising any arguments that this  
13 Court hasn't already considered and rejected.

14 JUSTICE KAVANAUGH: Well, it's  
15 based --

16 MR. FEIGIN: And in terms of -- I'm  
17 sorry.

18 JUSTICE KAVANAUGH: Go ahead.

19 MR. FEIGIN: Your Honor, you  
20 referenced earlier and -- as did Justice Kagan  
21 -- the idea of stare decisis representing  
22 something about judicial humility. And I can't  
23 think of anything that's more antithetical to  
24 judicial humility than deciding that this  
25 Court, all of a sudden, has discovered some

1 historical principle that has eluded its  
2 predecessors going back 170 years.

3 JUSTICE KAVANAUGH: They --

4 MR. FEIGIN: If these -- I'm sorry,  
5 Justice Kavanaugh.

6 JUSTICE KAVANAUGH: They also raise,  
7 of course, a general principle of individual  
8 liberty. And we've often said, as Justice  
9 Ginsburg points out, that federalism is  
10 designed to protect individual liberty.

11 I think your basic response to that is  
12 that, actually, that's wrong in certain  
13 respects. Federal -- that this system of  
14 separate sovereigns means your individual  
15 liberty's infringed more often by double  
16 prosecution, double regulation, double  
17 taxation.

18 Is that your answer, or do you have an  
19 answer other than that in response to the  
20 individual liberty concern?

21 MR. FEIGIN: No, Your Honor, I think  
22 it's a very narrow and not correct view of  
23 liberty, only to look at the liberty interests  
24 of the defendant.

25 There are also the liberty --

1 JUSTICE KAVANAUGH: From the  
2 perspective of negative liberty, liberty --  
3 freedom from government oppression or  
4 government regulation, your rule strikes some  
5 -- and this is what they point out -- as a --  
6 as an infringement of basic concepts of  
7 individual liberty: You didn't get me the  
8 first time; you're going to take another crack  
9 at it.

10 MR. FEIGIN: Well, Your Honor, I -- I  
11 don't think that's the right way to think about  
12 it. I think the framers decided that they were  
13 going to protect -- may I finish, Your Honor?

14 CHIEF JUSTICE ROBERTS: Uh-huh.

15 MR. FEIGIN: They were going to  
16 protect liberty in a particular way, and the  
17 way they were going to do that is by vesting  
18 sovereign power in the states and in the United  
19 States, which could both positively enact laws  
20 and protect people who may be victims of  
21 crimes.

22 And they did not have any  
23 understanding that the United States or the  
24 states would be precluded from vindicating  
25 their distinct sovereign interests in their own

1 sovereign spheres by the unilateral actions of  
2 the other sovereign.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Feigin.

6 General Hawkins.

7 ORAL ARGUMENT OF KYLE D. HAWKINS  
8 FOR TEXAS, ET AL., AS AMICI CURIAE,  
9 IN SUPPORT OF AFFIRMANCE

10 MR. HAWKINS: Thank you, Mr. Chief  
11 Justice, and may it please the Court:

12 I'm here today on behalf of a broad  
13 and diverse coalition of 36 states collectively  
14 representing over 86 percent of the U.S.  
15 population. The states may disagree with one  
16 another about various policy issues, but we are  
17 united here in urging the Court not to overrule  
18 its long-standing interpretation of the Double  
19 Jeopardy Clause.

20 To rule for Petitioner, the Court  
21 would have to read "offence" to mean conduct  
22 without regard to sovereignty; overrule Fox,  
23 Lanza, Bartkus, Abbate, and Heath; allow one  
24 sovereign to potentially thwart another's  
25 ability to prosecute violations of its laws;

1 give foreign powers a potential veto over  
2 domestic prosecutions; incentivize even --

3 JUSTICE GINSBURG: In the -- in the  
4 numbers -- in the numbers you just mentioned, I  
5 thought we had heard from the other side that  
6 something like 25 states, something like that,  
7 do not have the separate sovereigns, one state  
8 versus another, state versus federal.

9 MR. HAWKINS: Well, Your Honor, it's  
10 true that there are 20 states that have enacted  
11 a general sort of bar on their ability to bring  
12 a prosecution based on conduct that was already  
13 prosecuted by another sovereign.

14 There are some quirks and differences  
15 within those states, but I think it's important  
16 to note that 14 of those 20 states are a part  
17 of our coalition today. They have signed on to  
18 our amicus brief urging this Court to leave  
19 that decision and those types of policy  
20 considerations to the states, which are already  
21 actively legislating in this area.

22 Take the Commonwealth of Virginia, for  
23 example. The Commonwealth of Virginia  
24 generally bars a prosecution by that state when  
25 the federal government has already brought a



1 prosecution based on the same conduct. But, as  
2 recently as 2003, following the 9/11 attacks,  
3 Virginia amended its law to make an exception  
4 for terrorism cases.

5 Other -- the parties have spoken about  
6 potential exceptions related to civil rights,  
7 for example. I think the Virginia example  
8 shows that states are capable of recognizing  
9 the fairness concerns and the policy concerns  
10 that Petitioner raises and legislating  
11 appropriately.

12 In asking the Court not to overturn  
13 its long-standing interpretation, we'd like to  
14 emphasize a couple of points.

15 First, Petitioner's position would  
16 create a litany of practical problems that  
17 could harm state interests, and I'd like to go  
18 through a number of examples of those.

19 First, imagine a situation in which  
20 state A has a tougher penalty for a particular  
21 type of conduct than does state B. That, of  
22 course, is the fact pattern of *Heath v.*  
23 *Alabama*.

24 Under Petitioner's view, state A would  
25 not be able to vindicate its interest in that

1 sterner prosecution if state B were to go  
2 first. That could -- that situation could also  
3 play out if a state has a sterner penalty for a  
4 particular act than does the federal  
5 government.

6 This Court, of course, saw that in the  
7 Screws case, where the state penalty was much  
8 stronger than the federal penalty. We also see  
9 that in, for example, the area of robbery.

10 Under federal law, a robbery of a U.S.  
11 letter carrier carrying U.S. mail is punishable  
12 by up to 10 years. In Texas, however, robbery  
13 is punishable by up to 20 years. Again, under  
14 Petitioner's view, Texas would not be able to  
15 vindicate its interests.

16 JUSTICE KAGAN: I think what your  
17 friends on the other side might say to that is  
18 something along the lines of: Well, it's one  
19 thing to pick the higher penalty and, you know,  
20 let the state or the -- or the government with  
21 the higher penalty go forward. The problem  
22 with this is that you can get both.

23 MR. HAWKINS: Well -- well, Your  
24 Honor, oftentimes, as a practical matter, there  
25 won't be both. But -- but suppose another

1 practical problem that would arise under  
2 Petitioner's theory, suppose that a state had a  
3 particular interest in prosecuting a drug  
4 kingpin in that state. Suppose he's public  
5 enemy number 1 in a given state.

6 Well, unbeknownst to the state, the  
7 U.S. Government is also looking at that kingpin  
8 in connection with a different federal  
9 prosecution. Now, unbeknownst to the state,  
10 the federal government could enter into a plea  
11 agreement with that criminal in exchange for  
12 testimony in some other matter that's of great  
13 concern to the federal government.

14 The states might not know about that  
15 until it's too late. At that point, the states  
16 would not be able to vindicate their interests  
17 in prosecuting public enemy number 1.

18 And, of course, as the discussion  
19 earlier --

20 JUSTICE GINSBURG: That would  
21 certainly limit the willingness of the  
22 defendant to cooperate if that -- if that were  
23 the rule.

24 MR. HAWKINS: I'm sorry, Your Honor?  
25 Can you please repeat that?

1           JUSTICE GINSBURG:  If the -- if the --  
2   if the defendant could be re-prosecuted by the  
3   state, that would be a -- a disincentive to  
4   entering into a -- a plea bargain if he can --  
5   if he can just be subject to prosecution by  
6   another sovereign for the same conduct.

7           MR. HAWKINS:  Your Honor, I suppose  
8   that may be theoretically true, but, as my  
9   friend from the federal government indicated,  
10  we don't have any evidence that that's the  
11  case, and I don't believe that Petitioner has  
12  pointed to any.

13           As was discussed earlier, we could  
14  also see this play out as to foreign  
15  prosecutions.  Imagine a situation involving a  
16  international drug lord, a Pablo Escobar type,  
17  for example.  Suppose that Florida could show  
18  that this individual had trafficked large  
19  amounts of drugs into the State of Florida and  
20  devastated local Florida communities.

21           Well, if a local Medellin prosecutor  
22  and a local Medellin jury were to try and  
23  either acquit Escobar or potentially give him a  
24  light sentence or something like that, that  
25  would, under Petitioner's theory, forever

1 prevent the State of Florida --

2 JUSTICE GINSBURG: Acquit of conduct  
3 engaged in Florida?

4 MR. HAWKINS: Well, yes, Your Honor,  
5 if -- if there were drugs being trafficked by  
6 the -- by Escobar and a cartel into the State  
7 of Florida, that would certainly implicate the  
8 interests of Florida.

9 And under Petitioner's theory --

10 JUSTICE GINSBURG: Yes, but I asked  
11 about the Colombia? If the crime is committed  
12 in Florida against Florida residents --

13 MR. HAWKINS: Well, Your Honor, my --  
14 my hypothetical I am making assumes that  
15 there's some sort of Colombian law against  
16 trafficking drugs out of that country into  
17 another country. We can certainly imagine that  
18 being the case in -- in many scenarios.

19 Other practical concerns that would  
20 arise, as my friend from the -- the Department  
21 of Justice indicated, would involve races to  
22 the courthouse and competition between states  
23 and the federal government, rather than  
24 cooperation, all to the detriment of law  
25 enforcement.

1           And even setting aside these practical  
2 problems, there are a number of other concerns  
3 that Petitioner's view would raise.

4           First, under Petitioner's view, courts  
5 around this country would be for the first time  
6 asked to apply Blockburger across the federal  
7 and state divide.

8           That is no easy thing to do. This  
9 Court has experienced a taste of that in its  
10 Armed Career Criminal Act jurisprudence where  
11 the Court has tried to do something similar to  
12 that, has developed the modified categorical  
13 approach and other doctrines to try to  
14 accomplish that.

15           It's no easy matter to do that. That  
16 problem would even be compounded if this Court  
17 were to declare a ruling for Petitioner to be  
18 retroactive. Anybody who had been convicted or  
19 even charged, really, a second time based on  
20 similar conduct would challenge that  
21 prosecution as unconstitutional under this  
22 Court's rule.

23           And then, of course, a court in  
24 reviewing that, if -- if the rule were  
25 retroactive, would have to go back through

1 history and apply Blockburger not just across  
2 the federal and state divide but also as a  
3 historical matter as to offenses that may have  
4 changed over time.

5           Finally, setting all of these  
6 practical problems aside, I think it's  
7 important to note that Petitioner seeks to take  
8 us into uncharted waters. The -- the rule that  
9 he imagines has never been the rule in this  
10 country until potentially now.

11           The states and the federal government  
12 have never had to be concerned about who goes  
13 first. Under the law of unintended  
14 consequences, surely, there are practical  
15 problems that would arise from Petitioner's  
16 position that we may not have even thought  
17 about today.

18           Unless there are further questions.

19           CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21           MR. HAWKINS: Thank you, Your Honor.

22           CHIEF JUSTICE ROBERTS: Mr. Chaiten,  
23 four minutes remaining.

24  
25

1 REBUTTAL ARGUMENT OF LOUIS A. CHAITEN  
2 ON BEHALF OF THE PETITIONER

3 MR. CHAITEN: I -- I just -- I guess  
4 I'll pick up where -- thank you, Mr. Chief  
5 Justice.

6 I'll pick up where he ended, which is  
7 that this has never been the rule in the  
8 country -- in this country today. It is the  
9 rule in at least 20 -- 20 states. It's the  
10 rule in 37 states with respect to certain  
11 crimes. And it all seems to have worked out  
12 okay.

13 I did want to -- I did want to return  
14 to the issue of stare decisis and respond to  
15 what they were saying. We -- we have a legal  
16 framework for answering stare decisis  
17 questions. It's a law of stare decisis.

18 And I think it provides some pretty  
19 standard guidance on this. We -- we have to be  
20 right on the merits, that's true, but if we're  
21 right -- right -- if we're assuming we're right  
22 on the merits, then -- then the question is,  
23 what else do we need to show?

24 And I already told you about one key  
25 factor under this Court's jurisprudence, which



1 is a jurisprudence -- jurisprudential change.  
2 And I think incorporation is a pretty  
3 significant one.

4 Second, we -- there has been a -- a --  
5 a massive expansion in federal law, as this  
6 Court has recognized. That was recognized by  
7 this Court in Murphy and Elkins as the kind of  
8 changed factual circumstance that would -- that  
9 would justify revisiting an issue.

10 There -- another issue is reliance.  
11 And, of course, reliance isn't really a  
12 relevant issue where you're talking about an  
13 unconstitutional law enforcement practice.

14 And -- and finally, the -- the -- the  
15 -- this is a constitutional case. It is not a  
16 statutory case. And the Court's approach to  
17 stare decisis has been different in  
18 constitutional cases.

19 As -- as for --

20 JUSTICE ALITO: Do you think there's  
21 less reliance here than there was on the issue  
22 of the Miranda rule?

23 MR. CHAITEN: Well, the -- the issue  
24 is whether -- whether you are continuing an  
25 unconstitutional law enforcement practice. And

1 my point is the Court has pointed out in  
2 Arizona v. Gant that the Court has never  
3 allowed continuation of an unconstitutional law  
4 enforcement practice --

5 JUSTICE ALITO: So you -- you think  
6 that --

7 MR. CHAITEN: -- on reliance.

8 JUSTICE ALITO: -- any -- any  
9 constitutional decision of this Court that  
10 imposes any limitation on any right in the Bill  
11 of Rights that affects criminal procedure is  
12 always open to reexamination without  
13 consideration of stare decisis because doing  
14 that would expand the rights of the criminal  
15 defendant? That's your position?

16 MR. CHAITEN: Your Honor, I'm not  
17 saying without consideration of stare decisis.  
18 I am saying without consideration of reliance  
19 interests.

20 JUSTICE BREYER: Reliance --

21 MR. CHAITEN: This Court has said --

22 JUSTICE BREYER: I mean, the obvious  
23 thing that comes into my mind, I got the other  
24 factors, but the -- the -- the -- it seems --  
25 what's wrong with -- I'm -- with what I'm

1 thinking, which must be something wrong with  
2 it, that -- that very often this Court has said  
3 the rule of Constitution is X, but we're not  
4 going to apply it retroactively, because to do  
5 that would mean a vast release of prisoners who  
6 have committed crimes.

7 Now that sounds like reliance and it  
8 sounds like reliance on a law that the Court  
9 has said is unconstitutional, which is the  
10 preceding situation.

11 MR. CHAITEN: Yeah, I don't think it's  
12 a reliance issue on addressing the underlying  
13 merits question. It's just whether to apply  
14 the law retroactively. Incidentally, yet I --  
15 I don't think that --

16 JUSTICE BREYER: You don't --

17 MR. CHAITEN: -- I don't -- I'm sorry.

18 JUSTICE BREYER: No, the reason you  
19 don't apply the unconstitutional -- the reason  
20 you still apply the unconstitutional law to all  
21 those people who are in prison is because the  
22 reliance in the community on their staying in  
23 prison.

24 MR. CHAITEN: Well -- well, I think  
25 there -- the reason you don't apply it is

1 because the judgment's final, but I -- I -- so  
2 I think it's a separate question from the  
3 underlying merits question, the underlying  
4 constitutional question.

5 And, incidentally, I don't think this  
6 rule would be retroactive. It's a procedural  
7 rule. It doesn't go to substantive. It's not  
8 a watershed rule. So I -- I don't think that's  
9 a concern here.

10 And then --

11 JUSTICE ALITO: And there have been  
12 many decisions of this Court that have imposed  
13 some limits on -- have rejected some claims  
14 that have been asserted under the Fourth  
15 Amendment, under the -- the Fifth Amendment  
16 right against self-incrimination, under the  
17 Sixth Amendment jury trial right and the right  
18 to ineffective assistance of counsel, under the  
19 Eighth Amendment, right against cruel and  
20 unusual punishment.

21 And if any of those was challenged,  
22 you would say there's no -- there can never be  
23 a reliance, and because there's a -- there  
24 never can be reliance because it's a -- it  
25 involves an individual right, we put stare

1       decisis aside?

2                 MR. CHAITEN:  I'm -- so I'm not --  
3       there's more that goes into stare decisis than  
4       reliance.  That's one factor.

5                 What I'm saying is that the Court has  
6       said that we will not --

7                 JUSTICE KAVANAUGH:  But you --

8                 MR. CHAITEN:  -- we will not rely on  
9       reliance in the case of an unconstitutional law  
10      enforcement practice.

11                Thank you, Mr. Chief Justice.

12                CHIEF JUSTICE ROBERTS:  Thank you,  
13      counsel.  The case is submitted.

14                (Whereupon, 11:24 a.m., the case was  
15      submitted.)

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## Official

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