No. 20-7622

In the Supreme Court of the United States

MERLE DENEZPI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Double Jeopardy Clause provides that the United States may not "twice put in jeopardy" an individual "for the same offense" concerning the same incident. Yet twice petitioner was prosecuted by federal authorities for equivalent offenses arising from a single incident. Twice he was sentenced by a federal court to incarceration in federal custody after having been convicted of those offenses. In both cases, the prosecutors and judges derived their prosecutorial authority from federal statutes and regulations. And both times, judgment was rendered in the name of the United States. Simply put, petitioner was "twice put in jeopardy" by the United States for equivalent crimes arising out of the same incident.

The United States says that it was permitted to bring two prosecutions against and impose two punishments upon petitioner because, in one of the two prosecutions, it arrogated to itself the power to enforce another sovereign's criminal code rather than its own. That position offends common sense and the values that animate the dual-sovereignty doctrine.

The dual-sovereignty doctrine allows a second sovereign to prosecute a defendant under its own criminal code even after a first sovereign has prosecuted him for an equivalent violation under the first sovereign's code. *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). This rule "honors the substantive differences between the interests that two sovereigns can have in punishing the same act." *Id.* at 1966. But a second sovereign does not meaningfully "vindicate" its own "diverse interests" in punishing offenses against its own "peace and dignity" unless it actually undertakes a "separate prosecution[]" in its own name, rendering its own criminal penalties. *Id.* at 1966-1967. If the first sovereign does the prosecuting and the punishing in both cases, the second sovereign's

distinct interest in punishment is an unrealized idea, invoked "merely [as] a tool" by the first sovereign to "avoid[] the prohibition of the Fifth Amendment against a retrial" of its own of a single defendant for an identical offense. *Bartkus* v. *Illinois*, 359 U.S. 121, 123 (1959).

More generally, the Double Jeopardy Clause—like all provisions of the Constitution—must be construed by reference not just to dictionaries and grammar, but also to history and principle. The United States finds no support in either. Never before has this Court allowed a single sovereign to evade the Double Jeopardy Clause by assuming the power to enforce another sovereign's laws. For it to do so now would be manifestly "contrary to both the letter and spirit of the Fifth Amendment." *Green* v. *United States*, 355 U.S. 184, 198 (1957). The Court accordingly should reverse.

ARGUMENT

A. The dual-sovereignty rule requires successive prosecutions undertaken by separate sovereigns

In the United States' view (Br. 25), the only thing that "matters for double-jeopardy purposes is the source of authority for the statute of conviction." And because the United States has assumed for itself the power to enforce tribal laws, it concludes that it may prosecute petitioner twice in a row for equivalent offenses, obtaining cumulative punishments. That position is inconsistent with all relevant precedent and, if adopted by the Court, would reduce the Fifth Amendment to a nullity. The Court should reject it.

1. As we demonstrated in the principal brief (at 3-5 & 15-17), this Court consistently has recognized that "the crucial determination" under the dual-sovereignty doctrine "is whether the two entities that seek successively *to prosecute* a defendant for the same course of conduct can be termed separate sovereigns." *Heath* v. *Alabama*,

474 U.S. 82, 88 (1985) (emphasis added). The Court thus has thus stated clearly that the doctrine saves a successive prosecution from invalidation only when separate sovereigns draw upon "independent sources of power" in both "enacting *and* enforcing [their] criminal laws." *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 69 (2016) (emphasis added).

The United States denies that two prosecutions must be undertaken by separate sovereigns. It notes (Br. 17) that the meaning in 1791 of the word "offense" was merely "transgression" or a "Breaking of a Law." Unthinkingly quoting from *Gamble*, it observes (*ibid.*) that when "there are two sovereigns, there are two laws, and [thus] two offences." On that basis alone, the United States concludes that the dual-sovereignty doctrine turns only on "the source of authority for the statute of conviction" (Br. 25) and thus "the formal difference between two distinct criminal codes" (Br. 18 (quoting *Gamble*, 139 S. Ct. at 1966))—but nothing more.

There are two fatal problems with that reasoning.

First, the United States mistakes a necessary condition for a sufficient one. No one denies that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). Nor does anyone disagree that, for the dual-sovereignty doctrine to apply, the laws being successively enforced must therefore be codified by separate sovereigns. *Gamble*, 139 S. Ct. at 1965-1966.

But "each [government's] power to prosecute" also "is derived from," and is thus likewise an exercise of, "its own 'inherent sovereignty.'" *Heath*, 474 U.S. at 89. It hardly could be otherwise; a people do not govern themselves by enacting laws and filing them away on shelves never to be enforced. This Court's cases thus invariably

have asked, not just whether the two *laws* were *enacted* by two different sovereigns, but also whether "the two *prosecutions* were *brought* by two different sovereigns." *United States* v. *Lara*, 541 U.S. 193, 198 (2004) (emphasis added).

That is why the United States is wrong to insist, as it repeatedly does (Br. 16, 24, 27), that under our approach, tribal offenses prosecuted in a CFR Court (also known as a Court of Indian Offenses) would be "transform[ed]" into "federal offenses," solely by virtue of the forum in which they are tried. That is mere wordplay. In fact, an offense against a tribe's criminal code remains just that, no matter where it is enforced. But for the United States to avail itself of the dual-sovereignty doctrine as grounds for a second prosecution, a tribe—and not the United States—must have brought the first prosecution.

Second, the government's reasoning on this point (Br. 17-18, 24-25) is overly rigid and mechanical. When it comes to the construction of constitutional provisions, "something more is involved than consultation of the dictionary and the rules of English grammar." *Wright* v. *United States*, 302 U.S. 583, 607 (1938). Constitutional rules "are not to be interpreted like those of a municipal code or of a penal statute," without a view to broader purpose and principle. *Id.* at 606. The meaning of the Double Jeopardy Clause, in particular, is "derived from history" and therefore "must be determined, not simply by taking the words and a dictionary, but by considering its origin and the line of its growth" across the historical record. *Green* v. *United States*, 355 U.S. 184, 199 (1957) (Frankfurter, J., dissenting) (cleaned up) (quoting *Gompers* v. *United States*, 233 U.S. 604, 610 (1914)).

For just that reason, the Court explained in *Gamble* that the dual-sovereignty doctrine reflects not just "the formal difference between two distinct criminal codes," but also "the substantive differences between the inter-

ests that two sovereigns can have in punishing the same act." 139 S. Ct. at 1966. It is common sense that, for the doctrine to honor such differences, the separate offenses must not only be defined by different sovereigns, but also "prosecuted by different sovereigns," who only then are able to vindicate their distinct interests with independent punishments. *Id.* at 1964 (quoting *Heath*, 474 U.S. at 92). That "an act denounced as a crime by [two] sovereignties is an offense against the peace and dignity of both" means that it "may be punished by each," not that it may be punished by one of them twice. *Lanza*, 260 U.S. at 382.

That same view was expressed in *United States* v. *Wheeler*, 435 U.S. 313 (1978), where the Court held that tribes are separate sovereigns in the double-jeopardy sense because they retain "the inherent power [both] to prescribe laws for their members *and to punish infractions of those laws*." *Id.* at 323 (emphasis added). Accord *Sanchez-Valle*, 579 U.S. at 70 (tribes "count as separate sovereigns under the Double Jeopardy Clause" as long as they retain the "power to prosecute"). Recognizing the importance to the inquiry of the powers to prosecute and punish, the *Wheeler* Court thus expressly reserved the question presented here. 435 U.S. at 327 n.26. If the United States were correct that it makes no difference whether a CFR Court "is an arm of the Federal Government" (*ibid.*), the Court's reservation would have been unnecessary.

These observations also underlie the Court's earlier observation in *Bartkus* that if a second sovereign's prosecutor were "merely a tool" for a first sovereign, such that a second prosecution were "in essential fact" just a "cover" for another prosecution by the first sovereign, dual-sovereignty would not apply. 359 U.S. at 123-124. The United States questions (Br. 31) whether *Bartkus*'s reasoning on this score is good law and asserts that it cannot, in any event, be applied in a "blanket" manner.

But this Court has never called *Bartkus* into question. Indeed, it favorably cited *Bartkus* a half-dozen times in *Gamble*. And regardless of whether *Bartkus* can be applied in a blanket manner, there is no serious question that its reasoning applies here.

2. The United States rightly observes (Br. 28) that we have not cited any "decision in which the Court considered the authority to initiate a prosecution separately from the authority to proscribe conduct." But that is only because separate sovereigns invariably have been responsible for both defining separate crimes and undertaking separate prosecutions in every dual-sovereignty case on the books. If that suggests anything, it is only that the situation presented here would have been viewed in 1791 as utterly outlandish—certainly, there is no evidence in pre-founding English common law cases, treatises, or founding-era decisions of this Court to indicate that it was an accepted practice for one government to reference another government's laws as a basis for bringing successive prosecutions in its own name.

Along similar lines, the United States emphasizes *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820). See U.S. Br. 25-26. But there, "Justice Washington taught only that the law prohibits two sovereigns (in that case, Pennsylvania and the United States) from both trying an offense against one of them (the United States)." *Gamble*, 139 S. Ct. at 1977. That proposition is entirely consistent with our theory of this case: As we have said, for the dual-sovereignty doctrine to apply, both the first and second offenses *and* the first and second prosecutions must be attributable to separate sovereigns. If either are attributable to a single sovereign, the doctrine is inapplicable. *Houston* confirms the doctrine's first element—that separate sovereigns must independently define separate offenses. The Court there had no occasion to consider the second element—that separate sovereigns must also

independently prosecute the defendant *for* those offenses. That is not a "silent[]" prejudgment (U.S. Br. 26) of the question presented here, one way or the other. And the same goes for the government's piracy example, which assumes a single source of power to criminalize piracy. See U.S. Br. 19 (citing *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820)).

B. The CFR Courts are federal Article I courts that exercise federal sovereignty

Because the United States undertook both of petitioner's prosecutions, the dual-sovereignty doctrine does not apply and petitioner's second prosecution violated the Double Jeopardy Clause. The United States asserts that the CFR Courts exercise tribal rather than federal power, but that too is wrong.

1. The BIA itself has consistently taken the view that the CFR Courts are "Federal instrumentalities and not tribal bodies" and that, as such, they are subject to exclusively federal "supervision," including with respect to both prosecutions and punishments. *Law and Order on Indian Reservations*, 58 Fed. Reg. 54,406, 54,407-08 (Oct. 21, 1993); see also 25 C.F.R. §§ 11.201(a), 11.204. The regulations thus state plainly that the CFR Courts "provide adequate machinery for the administration of justice *for* Indian Tribes" *by* the BIA when "tribal courts have not been established"—not *by* the tribes for themselves, as though the CFR Courts were tribal courts. 25 C.F.R. § 11.102 (emphasis added). And in light of federal control of prosecutors and judges in the CFR Courts, the decisions to pursue charges and impose punishments in that forum necessarily reflect federal sovereign discretion. *Cf. McCleskey* v. *Kemp*, 481 U.S. 279, 311-312 (1987) (prosecutorial discretion encompasses the choice of which crimes to charge under which statutes, which penalties to seek, when leniency should be granted, how plea bargains should be negotiated, and so on).

None of this is a new development. As we showed in the principal brief (at 17-22), the CFR Courts, from their establishment in the 1880s, have derived their power from federal wellsprings. That understanding of the CFR Courts has persisted even following enactment of the Indian Reorganization Act in 1934. Authoritative sources published years after the Act's adoption continued to opine that "the disciplinary authority of the Secretary of the Interior" over Indians in the CFR Courts derives from the United States' "guardianship over the Indians" and is akin to the "disciplinary power [that] parents [may exercise] with respect to their children" or that "guardians generally may exercise * * * over their wards." *Cohen's Handbook of Federal Indian Law*, Ch. 18 § 2, at 359-360 (1945 ed.). Put in contemporary terms, the statutes and regulations that establish and govern the CFR Courts are an exercise of the federal government's "plenary authority" over the tribes as "domestic dependent nations." *Sanchez Valle*, 579 U.S. at 70.[1]

That is why the BIA has forthrightly acknowledged "the possibility that someone who has committed a serious offense may be immunized from federal prosecution [under the Major Crimes Act] because of the prohibition against double jeopardy by a prosecution in a [CFR Court]." 58 Fed. Reg. at 54,406.

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[1] The United States' view that the CFR Courts' "decisions and authority were understood to come from the Indians' own people" from their genesis in 1882 (Br. 4 (cleaned up)) blinks reality. The courts were tools of a foreign power to oppress the Indian tribes. See Petr. Br. 17-22. In addition to the courts' establishment and operation by federal authorities, tribes at the time were very clear that they did not consent to them. *E.g.*, *Indians Plead Well for Rights*, LAS VEGAS OPTIC 1 (June 12, 1914), perma.cc/249Y-MHYP (quoting an official and express statement of the Pueblo Indians that they did not "consent" to the "court of Indian offenses" but rather spurned them as "mock courts [that] have no real authority and are the arbitrary creation of [BIA superintendents]").

2. The United States disregards this settled history and the BIA's present views, asserting (Br. 33) that the CFR Courts, today and always, "exercise tribes' sovereign authority, not the sovereign authority of the United States." But the United States does not explain precisely how tribes might be understood to use the CFR Courts to exercise their sovereign prerogatives. Plainly, the tribes do not adopt criminal laws and thereby define criminal offenses through the CFR Courts; they accomplish that much through their legislative processes. That leaves only the power to prosecute and punish offenses against their criminal codes. But it would be astonishing for the United States to assert that some other government may express its own sovereign prerogatives through independent control of a federal Article I court.

Both the prosecutors and the judges in the CFR Courts serve at the pleasure of the Interior Secretary or her designee pursuant to federal regulations. See 25 C.F.R §§ 11.201(a), 11.202, 11.204; *Court of Indian Offenses Serving the Kewa Pueblo*, 85 Fed. Reg. 10,714 (Feb. 25, 2020). All acknowledge this fact. See U.S. Br. 14, 40; Tribes' Amicus Br. 10. The inescapable conclusion is that BIA prosecutors and judges derive their power from the federal government, and that their decisions reflect federal prerogatives. It is flatly incompatible with settled Article II principles (*e.g.*, *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 492 (2010)) to say otherwise—to suggest that executive officers of the United States, in doing their jobs, derive power from (and are thus answerable to) some other sovereign.

The United States observes in response (Br. 37) that "[t]he decisions of the judges of the Courts of Indian Offenses are not subject to review within the Department of the Interior, but instead by a panel of the Court of Indian Appeals." What difference could that make? All of our observations about the CFR Courts apply equally to

the Court of Indian Appeals. See 25 C.F.R. § 11.200(c). And regardless, it is common for the decisions of Article I trial courts to be subject to review by Article I appellate courts. See, *e.g.*, 20 C.F.R. § 404.967 (decisions of Social Security administrative law judges reviewable by the Appeals Council); 8 C.F.R. § 1003.1 (decisions of immigration judges reviewable by the Board of Immigration Appeals). That in no way suggests that the power of either court is derived from a source other than the federal government.

The United States also notes (Br. 40) that "it is not uncommon for state, tribal, and foreign prosecutors to appear in federal criminal cases on behalf of the federal government." But such specially appointed prosecutors are authorized to undertake only those litigation activities that the Attorney General "specifically direct[s]" in a federal court. 28 U.S.C. § 515(a). And within the scope of the appointment, they must "act under the direction of the United States Attorney General or his delegee." *E.g.*, Letter from Jewel Campos to Ann Wick Allison (Jan. 22, 2020), perma.cc/M46S-SP9Q. This case might be different if BIA prosecutors entered into statutorily authorized agreements with tribal authorities to appear on their behalf in tribal courts, acting under their direction as their special appointees. But that is not the case. BIA prosecutors and judges are federal employees operating in federal courts under the "supervision" and at the direction of the federal government. 58 Fed. Reg. at 54,408.

Nor does it make a difference that the Ute Mountain Ute Tribe has contracted under the Indian Self-Determination and Education Assistance Act (colloquially, Public Law 93-638) to provide back-office administrative services for its CFR Court and to furnish a public defender. See U.S. Br. 37; Tribes' Amicus Br. 10-11. That the BIA has engaged the tribe as a third-party contractor to run the clerk's office and supply a defense attorney

does not in any way suggest that the federally employed prosecutor and judge derive their power from the tribal sovereignty.

3. We readily acknowledge that the Ute Mountain Ute Tribe is a distinct sovereign whose sovereign choices command respect. See U.S. Br. 19-23. But that is not the question here; it is instead whether the tribe exercised its sovereign authority by prosecuting petitioner's first case. The facts are clear that it did not.

The first criminal case was commenced by a federal officer (JA9) and litigated by a federal prosecutor in the name of the United States as plaintiff (JA10-12) in a federal CFR Court. The historical purpose of such courts was to assimilate the tribes and to undermine rather than promote tribal self-government. See Pet. Br. 17-22. As has always been the case in these courts, the prosecutor was therefore exercising federal, not tribal, power. So too was the court, which is constituted by and operates under federal law, resides within a federal agency, and imposes punishment in the name of the United States. Against this backdrop, the United States appears to acknowledge (Br. 41) that "the same sovereign [brought both] successive prosecutions" in this case. The first federal prosecution in the CFR Court thus barred the second federal prosecution in the district court.

C. Sacrificing tribal defendants' constitutional rights would not honor tribal sovereignty

We explained (Pet. Br. 29-30) that prosecution and punishment by the United States cannot meaningfully vindicate tribal sovereign interests, no matter the identity of the government that enacts the underlying criminal statute. The United States does not directly disagree. It responds (Br. 43) instead by asserting that, to refuse to apply the dual-sovereignty doctrine in this case would

"devalue tribal sovereignty" by creating a "two-tier system" of tribes, rendering those that use the CFR Courts "second-class sovereigns." That is mistaken.

Nothing in our position diminishes the tribes' sovereign power to define crimes or punish criminal acts. As the United States itself repeatedly asserts (Br. 7-8, 24, 36, 45-46), tribes have a "choice" whether to establish their own systems of criminal justice or instead to place the power to enforce tribal codes in the hands of federal prosecutors acting in the CFR Courts. Tribes that elect the CFR Courts must accept the double-jeopardy consequences that follow. Those that find the tradeoff unacceptable can opt instead to establish courts of their own. Nothing about confirming the double-jeopardy implications of one option compared with another in any way "devalues" (U.S. Br. 43) the decisionmaker's power to make its choice.

In truth, however, the tribes that use the CFR Courts probably do not have a choice in the matter; they do so only because they lack the resources "to provide basic government services" for themselves. Tribes' Amicus Br. 9; accord U.S. Br. 8. If that regrettable fact produces a "two-tier system" of sovereigns, it is only because the United States continues to require resource-deprived tribes to hand over the administration of criminal justice to federally controlled (and often neglected) Article I courts. See Tribes' Amicus Br. 6, 16, 18. It would be more respectful of tribal sovereignty to retire the CFR Courts altogether (especially given their assimilationist origins) and simply give grants directly to the tribes for them to establish and run judicial systems of their own. But that is a problem for Congress to solve, not the Court.

For present purposes, it suffices to say that it would not honor tribal sovereignty to sacrifice the constitutional rights of tribal members as an expedient for making the CFR Courts more palatable for the tribes that must use

them. See *Gamble*, 139 S. Ct. at 2009 (Gorsuch, J., dissenting) ("It is not for this Court" to recalibrate the Bill of Rights "to make the prosecutor's job easier.").[2]

D. Practical considerations strongly favor reversal

The United States and its amici raise a number of other practical and policy arguments. Such contentions are largely irrelevant to the constitutional question presented here. But even taken on their own terms, they are unpersuasive.

1. A rule requiring prosecutions by separate sovereigns would be manageable

The United States describes our approach to the dual-sovereignty doctrine as "amorphous" (Br. 12), "ad hoc" (Br. 13), "[un]clear and [un]workable" (Br. 15), "incapable of coherent application" (Br. 15), and lacking "any meaningful standards" (Br. 42).

These aspersions are difficult to understand. Our rule, which is the rule recognized by this Court many times over, implicates the same "bright-line source-of-authority approach" that the government touts. See U.S. Br. 40. Under settled precedent, courts must determine whether the source of authority underlying the power to prosecute in two successive cases derives from separate sovereigns. Although the forum in which the prosecution takes place is a pertinent consideration, the inquiry is not solely "forum-focused." See U.S. Br. 27, 32-46. In determining "whether the prosecutorial powers of the two jurisdictions have independent origins" or instead "derive from the same 'ultimate source'" (*Sanchez Valle*, 579 U.S. at 62), courts must look foremost to the statutes and

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[2] We explained in our principal brief (at 28-29) that a sovereign's interest in punishment is not threatened by a race-to-the-courthouse problem in these circumstances, either. The United States does not disagree—after all, a single sovereign cannot beat itself to court.

regulations that authorize and empower the prosecutors and courts at issue, to the history of both, and to the factual context of the prosecutions. There is nothing novel about this approach; it is the same inquiry that applies to the question whether separate sovereigns are responsible for distinct criminal codes. And in the vast majority of cases, the answer should be readily clear.

In this case, for example, we know for a host of reasons that the "prosecuting entities" in both of petitioner's criminal cases "derive[d] their power to punish" from the federal government (*Sanchez Valle*, 579 U.S. at 68): In each case, the prosecutor's position was established by federal statute or regulation. Both were employees of the United States and acted at the direction of higher federal officers, exercising federal prosecutorial discretion. Both were thus authorized to commence prosecutions under the laws of the United States and in its name—which they did both times. The courts in both cases likewise are established by federal statute or regulation and derive their power to impose criminal penalties from the federal government. Other contextual clues include the documents on which official business of the courts was conducted (both bearing the name "United States of America") and that petitioner was twice incarcerated in a federal detention center and paid all amounts due related to both prosecutions to the United States Treasury. See Pet. Br. 8.

To be sure, cooperative, intergovernmental prosecutions might present less clear-cut facts. See U.S. Br. 31. But that has been so ever since *Bartkus* was decided more than 60 years ago, and the lower courts have not had any apparent difficulty with the applicable standards. In all events, the analysis is hardly amorphous or unworkable, nor is its application in this case at all unclear.

2. A reversal would not threaten public safety

The United States notes (Br. 44) that bringing charges in a CFR Court is likely "to provide the most immediate form of incapacitation," implying that a reversal would make immediate incapacitation more challenging, in turn putting public safety at risk. But a defendant ordinarily is not "placed in jeopardy in a criminal proceeding [until he] is put to trial before the trier of the facts." *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). Thus, nothing about a ruling in petitioner's favor would limit BIA officers' ability to place dangerous suspects immediately in pretrial detention.

The tribes (Amicus Br. 13-15) and victims' rights organizations (Amicus Br. 13-16) express understandable concern that the U.S. Attorneys' offices with jurisdiction over Indian Country too often decline to prosecute Indian offenders for serious crimes under the Major Crimes Act. But that is a problem quite apart from the question presented here; indeed, if it suggests anything, it is that a reversal in this case would have a very limited practical impact on actual outcomes. And any such impact ought to be mitigated altogether by the statutorily required coordination between U.S. Attorneys' offices and BIA prosecutors. 25 U.S.C. § 2810(b)(1), (8). A reversal here would encourage such coordination, to the benefit of public safety.

3. To affirm would create an alarming end run around the Double Jeopardy Clause

We explained in the principal brief that that the federal government could in theory assume for itself the power to prosecute violations of state criminal codes within Indian Country and other federal territories under federal control—or anywhere across the country, for that matter, for state offenses touching interstate commerce. Conversely, the states could in theory enact legislation

declaring that federal offenses are enforceable in their own courts. The United States acknowledges (Br. 25-26) the historical precedent for these possibilities.

The practical implications of the United States' position in this case are thus stunning. If the Court were to accept the assertion that one sovereign can prosecute a defendant successively in its own name and in its own courts merely by invoking a different sovereign's criminal code the second time, the Double Jeopardy Clause would be gutted of all practical effect. For example, 26.6% of all federal offenders in 2019 were prosecuted for drug crimes. See Charles R. Breyer et al., *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* 45, perma.cc/9N6W-B5U5. Such crimes nearly always overlap significantly with state-law offenses, as the Court's experience with the categorical approach demonstrates well. Another 11.1% of all federal offenders were prosecuted for firearms offenses (*ibid.*), which likewise overlap substantially with state criminal laws. Yet another 12.2% of federal offenders were prosecuted for robbery, embezzlement, or money laundering (*ibid.*), all also typical state offenses.

In each of these *tens of thousands* of cases annually, a state displeased with the outcome of an initial prosecution under its own laws could—under the United States' theory of this case—bring a second prosecution in its own courts and in its own name by simply purporting to enforce a federal criminal statute instead, all with no worry for double jeopardy. So too the United States could do the same in reverse.

Remarkably, the United States embraces this very troubling outcome, proclaiming (Br. 26) that, in light of early American precedent for states enforcing federal law, "the Framers * * * could not silently have intended that the forum for prosecution would" drive the double-jeopardy analysis. But the fact that neither party and no

amicus has uncovered a single case adopting the government's view is clear evidence of precisely such intent. *Cf. Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring in part) (failure to exercise a power is evidence that the power was thought to be unconstitutional).

To the extent there is any relevant evidence on the topic, it is this Court's recognition that "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won" and must "be highly valued." *Green*, 355 U.S. at 198. "If such great constitutional protections are given a narrow, grudging application," as the United States advocates here, "they are deprived of much of their significance." *Ibid.* That is not a result that the Framers could have intended or would have approved.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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