No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTINEZ-MALDONADO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
RANDAL MEYER
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DAVID DEBOLD
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

AKIVA SHAPIRO
WILLIAM J. MOCCIA
ESTER MURDUKHAYEVA
GENEVIEVE B. QUINN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether, under *Ashe v. Swenson* and *Yeager v. United States*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and submits *amicus* briefs to this Court and other courts across the Nation. Cato regularly advocates for a robust interpretation of the Fifth Amendment's Double Jeopardy Clause, as envisioned by the Framers in the Constitution, as an important check on prosecutorial excesses and a vital bulwark for liberty. It has submitted *amicus* briefs to this Court in a number of relevant cases, including *Hatch v. United States*, No. 13-6765, and *Cannon v. United States*, No. 14-5356.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees that no person shall be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. This "great constitutional protection[]" is a "vital safeguard in our society." *Green v. United States,* 355 U.S. 184, 198 (1957).

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus curiae* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

"[E]mbodied" in this right is the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. *Ashe v. Swenson*, 397 U.S. 436, 443, 445 (1970). In *Yeager v. United States*, the Court applied *Ashe* to a case where the jury rendered a mixed verdict—"an acquittal on some counts and a mistrial declared on others"—and held that the "apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts" does not "affect[] the preclusive force of the acquittals under the Double Jeopardy Clause." 557 U.S. 110, 112, 120 (2009).

Petitioners here, like more and more criminal defendants in recent years, were charged by federal prosecutors with multiple, overlapping offenses, including an expansive and textually unsupported interpretation of a criminal statute—in this case, a "gratuity" theory of federal program bribery under a statute (18 U.S.C. § 666) that criminalizes only *quid pro quo* bribery. *See* Pet. App. 59a. As relevant here, the jury returned a mixed verdict: acquittal on two of the charges—conspiring and traveling to violate § 666—and guilt on the predicate § 666 violation. Pet. App. 64a.

The acquittals necessarily depended on a finding that neither defendant violated § 666. Pet. App. 12a–15a & n.5. The guilty verdict, however, was the product of instructions allowing conviction for conduct that is not a crime. *See* Pet. App. 104a–105a. The government seeks to retry Petitioners on that reversed count—this time with the jury instructed on an actual crime—even though "the Double Jeopardy Clause precludes the [g]overnment from relitigating

any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119. Ignoring entirely the relevance and legal effect of the subsequent vacatur, the government argues that the acquittals are stripped of their collateral estoppel effect because the jury "was not acting rationally when it rendered an inconsistent verdict." Br. for the U.S. in Opp. 16.

The government's "narrow, grudging application" of the Double Jeopardy Clause would "deprive[it] of much of [its] significance" and should be rejected. *Green*, 355 U.S. at 198. The government's position is inconsistent with the historical development of double jeopardy jurisprudence in the United States—in particular, the parallel treatment of hung counts and vacated convictions for double jeopardy purposes. *See infra* Pt. I. It is also impossible to square with the long-settled status of vacated convictions as legal nullities in this and numerous other contexts. *See infra* Pt. II. In fact, the government itself benefits from treating vacated convictions as if they never existed for double jeopardy purposes when it retries a defendant who has successfully appealed a conviction. If such convictions were not legal nullities, the Double Jeopardy Clause would preclude retrial. *See id*.

Finally, if the government's position becomes the law of the land, it will encourage even greater prosecutorial overreach. The more offenses the government can charge for the same underlying conduct, the greater the chance of split verdicts where even a later-reversed conviction would have the consequence of nullifying the estoppel effect of acquittals. The government needs fewer, not greater, incentives for piling on theories of criminal liability that push beyond the law's limits. Nor should the government

be allowed to use trials as dress rehearsals for future successive prosecutions, thereby undermining the salutary—indeed, "sacred," *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1873)—liberty interests protected by the Double Jeopardy Clause, and improperly chipping away at the "validity" and "legitimacy" of jury verdicts which, this Court has emphasized, must not be "impugn[ed]," even when "logically inconsistent." *Yeager*, 557 U.S. at 125. *See infra* Pt. III.

ARGUMENT

I. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE COMMON LAW ORIGINS AND HISTORICAL DEVELOPMENT OF OUR NATION'S DOUBLE JEOPARDY JURISPRUDENCE.

1. Prosecutors benefit greatly from the manner in which double jeopardy jurisprudence has developed to allow them—after a jury hangs or a conviction has been vacated—to put a defendant on trial a second time for the same offense. The rationales permitting this result in the two contexts have developed in parallel from their common law roots to the modern era, diverging in their particulars but anchored fundamentally in the notion that neither a hung jury nor an overturned conviction is a legally operative event. But now, the government asks this Court to treat vacated convictions *differently* from hung counts when assessing their impact on the preclusive effect of an acquittal. The Court should reject this invitation to introduce such doctrinal inconsistency at odds with the common law origins and historical development of Fifth Amendment jurisprudence.

2. Double jeopardy "is rooted in history and is not an evolving concept like that of due process . . . ."

Gore v. United States, 357 U.S. 386, 392 (1958). The general principle has been "nearly universal" in legal systems throughout history and was recognized at common law by the thirteenth century. Donald Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L.J. 799, 800 (1988). "By the early 15th century it was settled by statute that an acquittal after a jury trial on charges initiated by appeal [*i.e.*, at the behest of a private party rather than the crown] was a bar to prosecution for the same offense by subsequent indictment." U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals* 8, *reprinted in* 22 U. Mich. J. L. Reform 831 (1989).

At common law, double jeopardy took the form of four different "pleas in bar": *auterfoits acquit* (former acquittal), *auterfoits convict* (former conviction), *auterfoits attaint* (former attainder), and pardon. Charles Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. Tex. L.J. 735, 754 (1983). A criminal defendant "could use one of these pleas to bar prosecution on the grounds that the state had already acquitted, convicted, attainted, or pardoned him for the offense of which he was accused." Burton, *supra*, at 801.

With respect to prior convictions, a defendant was entitled to double jeopardy protection only if the conviction remained intact at the time of the plea. If, however, the "judgment, pronounced upon conviction, [wa]s falsified or reversed, all former proceedings [we]re absolutely set aside, and the party st[ood] as if he had never been at all accused," for better and for worse: He was "restored in his credit, his capaci-

ty, his blood, and his estates," but he was also "liable to another prosecution for the same offence." 4 William Blackstone, *Commentaries* *393.

3. These principles guided early American courts as they confronted double jeopardy challenges throughout the nineteenth century. *See* Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1, 9 (1983) (discussing the Double Jeopardy Clause's roots in the common law pleas). For example, it was widely accepted that double jeopardy does not attach to convictions that have been reversed or set aside. *See, e.g.*, *Gibson v. Commonwealth*, 4 Va. (2 Va. Cas.) 111, 111 (Gen. Ct. 1817) ("A discharge of a jury, after they have rendered a verdict against a prisoner, but which verdict is adjudged to be a nullity because it was not duly perfected, and therefore set aside as insufficient, is no bar to a prosecution under the same, or a new Indictment.").[2] This Court later adopted the same rule: "Although Mr. Justice Story . . . thought that a new trial could not be granted to a man convicted of murder by a jury, because to do so would be to put him

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[2] *See also, e.g.*, *State v. Redman*, 17 Iowa 329, 335 (1864) ("[W]here the verdict, especially if intended to be a verdict of guilty, is so defective and uncertain that the court does not know for what offense to pass judgment, it may be set aside by the court, even against the defendant's objection, and the proceeding is no bar to another trial." (emphasis removed)); *Lawrence v. People*, 2 Ill. (1 Scam.) 414, 415 (1837) ("The only question presented in this case, is, on the power of the Circuit Court to set aside a defective verdict, on which no judgment could be rendered, and to award a *venire de novo*. The right to exercise this power can not be questioned. It has been exercised and practiced on in numerous criminal cases, and is undoubted.").

twice in jeopardy of his life, yet the circuit courts of the United States may doubtless grant new trials after conviction, though not after acquittal, in criminal cases tried before them." *Sparf v. United States*, 156 U.S. 51, 175 (1895).[3] In reaching this conclusion, this Court came to the view that the defendant's decision to appeal the conviction carried with it an implied consent to retrial, notwithstanding whatever double jeopardy protection might otherwise have flowed from the jury's verdict. *See Murphy v. Massachusetts*, 177 U.S. 155, 160 (1900) ("[I]f the sentence had been complied with he could not have been punished again for the same offense. But as the original sentence was set aside at his own instance, he could not allege that he had been in legal jeopardy by reason thereof." (citation omitted)).

4. A second question confronting 19th-century American courts was whether judges could discharge the original jury and order the defendant retried following a mistrial. Again, the courts looked to the common law for guidance, with this Court answering

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[3] A contrary view of double jeopardy might have had an adverse impact on the rights of early American criminal defendants by pushing states to forbid or severely limit the mechanisms available to challenge jury verdicts. The right to appeal criminal convictions did not exist at common law, *see, e.g.*, Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions*, 17 Tul. Eur. & Civ. L.F. 151, 167 (2002); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518, 525–26 (1990), and this Court took as self-evident that "[a]n appeal from a judgment of conviction is not a matter of absolute right" and is "wholly within the discretion of the state to allow or not to allow." *McKane v. Durston*, 153 U.S. 684, 687 (1894).

the question in the affirmative: "The prisoner has not been convicted or acquitted, and may again be put upon his defence . . . whenever, in the [trial court's] opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 579–80 (1824); *see also, e.g.*, *People v. Goodwin*, 18 Johns. 187, 187–88 (N.Y. Sup. Ct. 1820).

The Court has since repeatedly applied *Perez* in rejecting double jeopardy claims following mistrials, *see, e.g.*, *Lovato v. New Mexico*, 242 U.S. 199, 201–02 (1916); *Thompson v. United States*, 155 U.S. 271, 274 (1894), including where the mistrial resulted from a hung jury, *see, e.g.*, *Keerl v. Montana*, 213 U.S. 135, 137–38 (1909); *Dreyer v. Illinois*, 187 U.S. 71, 85–86 (1902); *see also* Burton, *supra*, at 815 ("[The Double Jeopardy Clause] bars a mistrial declared at the request of a prosecutor unless the prosecutor shows that the judge ended the first trial only out of 'manifest necessity.' The 'prototypical' example of manifest necessity to end a trial is a hung jury." (footnote omitted)).

5. The notion that the government can retry a defendant after the jury hangs or a conviction is vacated is now fully engrained in American criminal procedure, despite apparent tension with the literal terms of the Double Jeopardy Clause. The guarantee that no person shall twice be "put in *jeopardy*" of punishment for the same offense is not conditioned on the result of the first trial. U.S. Const. amend. V (emphasis added). Yet, following a mistrial or overturned conviction, defendants are often forced to stand trial a second time for the same offense. In the hung jury context, this Court has expressly acknowl-

edged that *Perez*'s holding may not have been intended to resolve the double jeopardy question for which it has long been cited. *See Crist v. Bretz*, 437 U.S. 28, 34 n.10 (1978). But the Court dismissed this potential misreading of *Perez* as being "of academic interest only," *id.*, and *Perez* remains the controlling authority in this area, *see Richardson v. United States*, 468 U.S. 317, 323–24 (1984) (noting that the Court has been "entirely unwilling to uproot this settled line of cases").

Prosecutors, of course, benefit greatly from this Fifth Amendment jurisprudence, for it allows them to put a defendant on trial more than one time for a single offense. While the rationales permitting this result in the two contexts have diverged over time, both can be traced—at least in part—to the principles governing the early common law pleas: whether the jury hangs or its guilty verdict is set aside, in neither case is there a legally operative acquittal or conviction. But now, the government asks this Court to treat vacated convictions *differently* from hung counts when assessing their impact on the preclusive effect of an acquittal. The common law origins of double jeopardy protection and the historical development of double jeopardy jurisprudence in the United States counsel against such an inconsistent result.

II. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE NULLIFYING EFFECT OF VACATUR IN NUMEROUS CONTEXTS, INCLUDING DOUBLE JEOPARDY.

1. "[A]s every lawyer of experience in criminal law knows," a vacated conviction is a legal "nullity," devoid of power, effect, or consequence. *Coleman v. Tennessee*, 97 U.S. 509, 530 (1878) (Clifford, J., dis-

senting); *see also North Carolina v. Pearce*, 395 U.S. 711, 720–21 (1969) (overturned conviction "wholly nullified"). Vacatur "wipe[s] clean" the slate, *Bullington v. Missouri*, 451 U.S. 430, 442 (1981) (internal quotation marks and citation omitted), and leaves the defendant "stand[ing] as if he had never been at all accused" of the crime, 4 Blackstone, *supra*, at *393; *see also, e.g.*, *United States v. Jerry*, 487 F.2d 600, 607 (3d Cir. 1973); *cf. In re St. Lawrence Condensed Milk Corp.*, 5 F.2d 65, 65 (2d Cir. 1925) (vacated civil judgment treated as "never [having] had an effective existence").

2. Vacated convictions are treated as null and void across a wide range of contexts. For example, vacated convictions do not constitute final judgments for purposes of collateral estoppel, because vacatur "leav[es] nothing to which [a court] may accord preclusive effect." *Dodrill v. Ludt*, 764 F.2d 442 (6th Cir. 1985); *see also Kosinski v. C.I.R.*, 541 F.3d 671, 676–77 (6th Cir. 2008) (where court vacated judgments in criminal case, "there was no valid final judgment to which [another court] could give preclusive effect"); *cf. Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (once the defendant's conviction was reversed "there could have been no collateral estoppel effect of any kind"). This is but one aspect of the broader rule that a "judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." *Franklin Sav. Ass'n. v. Office of Thrift Supervision,* 35 F.3d 1466, 1469 (10th Cir. 1994) (internal quotation marks and citation omitted)); *accord, e.g.*, *United Bhd. of Carpenters & Joiners v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment vacated either by the trial court or on ap-

peal has no estoppel effect in a subsequent proceeding."); *No E.-W. Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985). A vacated judgment cannot have preclusive effect because vacatur "eliminates [the original] judgment," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), rendering it "null and void" and leaving the parties "in the same situation as if no trial had ever taken place," *United States v. Ayres*, 76 U.S. 608, 610 (1869); *accord Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996).

Similarly, vacatur "deprives [a] court's opinion of precedential effect." *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975); *see also, e.g.*, *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012) ("[T]his court has consistently held that vacated opinions are not precedent . . . ."); *Russman v. Bd. of Educ.*, 260 F.3d 114, 121 (2d Cir. 2001) (noting that vacating district court's judgment would "deny it . . . precedential consequence"). Because a vacated decision is treated as if it never existed, that decision necessarily "has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991).

Vacated convictions also are treated as legal nullities in the sentencing context. *Cf. Johnson v. United States*, 544 U.S. 295, 303 (2005). For example, the Federal Sentencing Guidelines instruct that "[s]entences resulting from convictions that have been reversed or vacated because of errors of law . . . are not to be counted" when determining the appropriate sentence for a repeat offender. U.S. Sentencing Guidelines Manual § 4A1.2, cmt. n.6. (2015). Applying this guideline, courts hold that defendants are entitled to resentencing where a prior conviction on which a sentence was based is subsequently vacated on procedural or substantive grounds. *See, e.g.*,

United States v. Ortiz, 741 F.3d 288, 293 (1st Cir. 2014) ("[T]he inappropriateness of including a vacated conviction in the computation of a defendant's criminal history score is readily evident."); *United States v. Guthrie*, 931 F.2d 564, 572 (9th Cir. 1991) (stating that it would be "contrary to the Guidelines" and "odd . . . for a federal court to treat as valid a state conviction that no longer exists"); *accord United States v. Cox*, 245 F.3d 126, 130 (2d Cir. 2001).

Even before the Federal Sentencing Guidelines, courts remanded for resentencing where a sentence was based—even in part—on a constitutionally infirm conviction. *See United States v. Tucker*, 404 U.S. 443, 447–48 (1972); *see also, e.g.*, *Walker v. United States*, 636 F.2d 1138, 1138–39 (6th Cir. 1980) (remanding for resentencing where defendant's sentence was based on an unconstitutional prior conviction that was later vacated); *Taylor v. United States*, 472 F.2d 1178, 1180 (8th Cir. 1973) (remanding for resentencing where one of defendant's prior convictions was later found to be "constitutionally infirm"). For example, in *Tucker*, this Court remanded for reconsideration of a sentence that had been based, in part, on subsequently vacated convictions, which this Court characterized as "misinformation of a constitutional magnitude." 404 U.S. at 447. The Federal Sentencing Guidelines thus formalized the well-established rule that convictions vacated on constitutional ground are legal nullities.[4]

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[4] Generally, "only those convictions valid at the time of sentencing" will be considered when calculating a sentence. *See United States v. Cisneros-Cabrera*, 110 F.3d 746, 748 (10th Cir. 1997). Section 2L1.2 of the Guidelines, however, explicitly provides for a sentencing enhancement "[i]f the defendant previ-

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In the immigration context, almost every circuit to have considered the issue has held that a conviction vacated due to "procedural or substantive defect" does not constitute a "conviction" under 8 U.S.C. § 1101(a)(48), and therefore "cannot serve as the basis for removability." *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006); *see also Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (conviction "vacated because of procedural or substantive infirmities" does not "remain[] valid for immigration purposes"); *accord Alim v. Gonzales*, 446 F.3d 1239, 1251 (11th Cir. 2006); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001).

In fact, although Section 1101(a)(48) does not define the term "conviction"—and is arguably susceptible to a "spectrum of possible interpretations," *Saleh v. Gonzales*, 495 F.3d 17, 22 (2d Cir. 2007)—courts nevertheless consider convictions vacated on the basis of procedural or substantive defects to be outside the scope of the statute, *see, e.g.*, *id.* This reading of the statute is eminently reasonable, because, "[w]here a conviction is vacated 'based on a defect in

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ously was deported, or unlawfully remained in the United States, *after* [being convicted of certain enumerated offenses]." U.S. Sentencing Guidelines Manual § 2L1.2 (emphasis added). Accordingly, "the relevant time frame for determining whether [§ 2L1.2's] enhancement should apply is *specifically provided by statute*," which is the time of deportation, rather than sentencing. *Cisneros-Cabrera*, 110 F.3d at 748 (emphasis added); *see also United States v. Orduno-Mireles*, 405 F.3d 960, 962 (11th Cir. 2005). Section 2L1.2 thus represents a statutorily mandated exception to the general rule that vacated convictions will not be considered for sentencing purposes.

the underlying criminal proceedings,' *the conviction is 'no longer.'*" *Phan v. Holder*, 667 F.3d 448, 452 (4th Cir. 2012) (emphasis added) (quoting *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003)); *see also Pinho v. Gonzales*, 432 F.3d 193, 199 (3d Cir. 2005) (same); *Rumierz v. Gonzales*, 456 F.3d 31, 35 (1st Cir. 2006) (same).[5]

3. The same holds true under the Double Jeopardy Clause. A vacated conviction is a legal "nullity": a "nonevent" to which double jeopardy does not attach. *See supra* pp. 9–10. Post-vacatur, it is as if the verdict never existed, and as if no trial on that count had ever taken place. *See id*. A vacated conviction cannot, accordingly, divest a jury's acquittal of its preclusive effect.

Not only does this rule comport with the treatment of vacated convictions in numerous contexts, *see supra* pp. 10–14, it is in accord with the historical

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[5] Courts distinguish between convictions vacated on procedural or substantive grounds and those vacated solely "in an effort to avoid adverse immigration consequences." *Saleh*, 495 F.3d at 21. Convictions vacated on constitutional grounds—like the convictions at issue here—are *not* considered "convictions" under 8 U.S.C. § 1101(a)(48). *See Saleh*, 495 F.3d at 21. If the Fifth Circuit's decision in *Renteria-Gonzales v. INS*, 322 F.3d 804, 813-14 (5th Cir. 2002) is read to suggest that any vacated conviction qualifies as a "conviction" under § 1101(a)(48), regardless of the basis for vacatur, it is a complete outlier. Indeed, it has been criticized and called into question by a number of courts, including the Fifth Circuit itself. *See, e.g.*, *Pinho*, 432 F.3d at 209 n.22; *Renteria-Gonzales*, 322 F.3d at 820–23 (Benavides, J., concurring); *see also Discipio v. Ashcroft,* 369 F.3d 472 (5th Cir. 2004), *vacated by Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005) (vacating panel decision and denying petition for rehearing en banc as moot where government agreed to terminate removal proceedings).

treatment of hung juries and overturned convictions under the Double Jeopardy Clause, *see supra* pp. 4–9. Given the shared status of hung juries and later-overturned convictions as legal nonevents—for double jeopardy purposes and more broadly—it is appropriate that their effect on simultaneously rendered acquittals is the same: no effect at all.

4. The government's attempt to distinguish hung juries from vacated convictions lacks merit. As this Court has made clear, for double jeopardy purposes, there is "no sensible basis" for differentiating "with regard to retrial" between an invalid verdict and "a failure to get a jury verdict at all." *United States v. Tateo*, 377 U.S. 463, 467 (1964) ("A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all."); *cf. Redman*, 17 Iowa at 333 (noting that, in both contexts, "the verdict is a nullity (or so defective that no judgment can be rendered upon it), [and] the defendant may again be put upon his trial"). Both are legal nullities that cannot negate the preclusive effect of simultaneously rendered acquittals. Indeed, it is precisely because a hung jury or vacated conviction is a legal nullity or nonevent that the government has the power to retry a defendant on the same charge. *See supra* pp. 6–9; *Bullington*, 451 U.S. at 442 ("[The] rule that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction . . . rests on the premise that the original conviction has been nullified . . . ."); *Yeager*, 557 U.S. at 118 ("[T]he jury's inability to reach a verdict [i]s a nonevent that does not bar retrial.").[6]

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[6] The court below relied on *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004), for the proposition that a court "does

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To distinguish hung juries, the government would assess the effect of the conviction at the moment the verdict is rendered, while ignoring all that follows. But if that were the accepted approach, the government would *always* be prohibited from retrying counts where the jury convicted and a court later vacated the conviction. The reason the government *is* allowed to retry on vacated counts is that vacatur of the conviction renders it a nullity. Call it Schrödinger's conviction, which both exists and does not exist until we observe the decision on appeal; if that decision vacates the conviction, we learn that it never existed at all.

Analogies to quantum physics aside, the issue here is not whether the jury may have acted illogically, inconsistently, or irrationally. The express "hold[ing]" of *Yeager* was that the "apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other

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not necessarily attempt to erase the fact of the conviction" when vacating a conviction. Pet. App. 16a (quoting *Crowell*, 374 F.3d at 792). From this the lower court erroneously leapt to the conclusion that a vacated conviction remains a relevant legal "event" under *Ashe* and *Yeager*. Not so. *Crowell*'s language must be read in context. *Crowell* was distinguishing expungement from vacatur. Expungement involves the physical destruction or sealing of records associated with a conviction without rendering the conviction itself a legal nullity. *See United States v. Dyke*, 718 F.3d 1282, 1292–93 (10th Cir. 2013). In contrast, as *Crowell* recognized, vacatur "nullifies the conviction and its attendant legal disabilities," 374 F.3d at 792; but vacatur does not necessarily involve physical destruction of the record of conviction. In other words, a vacated conviction may technically remain a matter of public record, but vacatur erases any shred of legal significance.

counts" does not "affect[] the preclusive force of the acquittals under the Double Jeopardy Clause." 557 U.S. at 112. And that holding was an *extension* of *Dunn v. United States*, 284 U.S. 390 (1932), which had held that "a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either." *Yeager*, 557 U.S. at 112. An acquittal is not impugned by a legally nullified guilty verdict.

By arguing for a contrary rule, the government attempts to use vacated convictions as both a sword and a shield. On one hand, the government seeks to treat the vacated convictions as legal nullities: "non-events" that permit retrial on the exact same counts. *Cf. Yeager*, 557 U.S. at 123–24. On the other, it argues that the vacated convictions are significant legal "events" that deprive the accompanying acquittals of their preclusive effect. The government's position is logically untenable and, more importantly, flies in the face of history and precedent.

III. THE GOVERNMENT'S POSITION ENCOURAGES PROSECUTORIAL OVERREACH, UNDERMINES THE SACRED LIBERTY INTERESTS PROTECTED BY THE DOUBLE JEOPARDY CLAUSE, AND IMPUGNS THE INVIOLATE NATURE OF JURY ACQUITTALS.

Allowing the decision below to stand would give prosecutors even more incentive to overcharge the same underlying conduct with multiple counts, forgive the government for pursuing unlawful theories of criminality, permit the government to use trials as dress rehearsals for future successive prosecutions, and impugn the inviolate nature of jury acquittals. These concerns strike at the heart of the Double Jeopardy Clause.

1. The original "purpose of the double jeopardy rule was to protect against abusive prosecutorial behavior," John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 444 (2009), and this continued to be the motivating principle of the rule as it was imported into the United States Constitution and modern jurisprudence, *see, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 165 (1977) ("Because it was designed originally to embody the protection of the common-law pleas . . . , the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors."); *United States v. Wilson*, 420 U.S. 332, 342 (1975) ("The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions . . . ."); Langbein, *supra*, at 444 ("In modern American practice, the superior resources and the politicized character of the prosecutor's office have been thought to justify the rule against prosecutorial appeal."). In a system where prosecutors have expansive charging authority and an ever-growing number of criminal statutes and incorporated regulations from which to choose in crafting an indictment, the Double Jeopardy Clause is a necessary restraint on the government's power to wield the criminal law against its citizens.

The rule barring the government from prosecuting an individual for the same offense following an *acquittal* in particular has numerous purposes—it "preserve[s] the finality of judgments," *Crist*, 437 U.S. at 33, protects an individual from the grueling and expensive ordeal of multiple trials, *see Green*, 355 U.S. at 187, minimizes the risk of wrongful convictions, *see id.* at 188, and, most importantly, prevents prosecutors from using the criminal justice

system to continually harass individuals who have been tried and acquitted. *See* Martin L. Friedland, *Double Jeopardy* 3–4 (1969) ("The main rationale of the rule against double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions."). Accordingly, this Court has been clear that "[a]n acquittal is accorded special weight" and "particular significance" in the double jeopardy context, specifically because of the "unacceptably high risk that the [g]overnment, with its superior resources, would wear down a defendant" if given the opportunity to bring successive prosecutions in an effort to secure a conviction. *United States v. DiFrancesco*, 449 U.S. 117, 129–30 (1980).

It is, moreover, "deeply ingrained" in our judicial framework "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense," thereby "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187–88. Indeed, it was "[t]o perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours," that the Double Jeopardy Clause was "introduc[ed] into our Constitution." *Ex Parte Lange*, 85 U.S. (18 Wall.) at 171.

2. These concerns are especially palpable given the power of the legislative branch to create new, overlapping, and expansive criminal statutes in response to political and public pressures, in turn producing an arsenal of statutory and regulatory provisions that prosecutors can choose from in charging the same underlying conduct or course of con-

duct. There are now innumerable federal and state criminal statutes,[7] and "[m]ore than 300,000 regulations—not even laws—can trigger criminal sanctions."[8]

This concern is far from new. More than 60 years ago, Professor Marlyn E. Lugar warned that, when criminal statutes proliferate without limit, a "prosecutor may, with little imagination and even less research," bring subsequent indictments for nominally different offenses "even though the defendant is being retried for essentially the same anti-social conduct." Marlyn E. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317, 317 (1954). And if the government is permitted to retry a case under multiple theories, "disregard[ing]" acquittals in the process, it is likely eventually to secure a conviction regardless of whether the defendant is innocent, for "[i]f you play with something long enough, you are likely to break it." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 31 n.158 (1995); *see also, e.g.*, *Ashe*, 397 U.S. at 439–40 (defendants convicted at a second trial following an acquittal due to "substantially stronger" testimony from "witnesses [who] were for the most part the same").

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[7] The Smart on Crime Coalition, *Smart on Crime: Recommendations for the Administration and Congress*, at 2 (2011), *http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf*.

[8] Ilya Shapiro & Randal John Meyer, *Obama's Weaponized Justice Department*, National Review Online (Oct. 30, 2015), *http://www.nationalreview.com/article/426307/obamas-weaponized-justice-department-ilya-shapiro-randal-john-meyer?target=author&tid=900875*.

3. Subsequent prosecutions would also permit the government to use the first trial as a "dry run," *Ashe*, 397 U.S. at 447, or "dress rehearsal," *United States v. Dixon*, 509 U.S. 688, 749 (1993) (Souter, J., concurring in the judgment in part and dissenting in part). Without the potential preclusive effect of an acquittal, the government need not carefully select appropriate legal theories, as it will have the comfort of knowing that it can retry a case based on lessons learned about the strengths and weaknesses of its evidence and legal theories in the first trial. This opportunity for the prosecutor to "refine[] his presentation in light of the turn of events at the first trial" is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

Where the proposed second trial is a result of the government's reckless pursuit of an expansive theory of criminality—here, its efforts to enlarge federal program bribery to permit a conviction on a "gratuity" theory—it is especially "offensive to allow the prosecutor to come into a second trial" seeking to avoid the consequences of his efforts to overreach. Comment, *An Exception to Collateral Estoppel in Criminal Cases Because of Prosecutor's Incompetence?*, 115 U. Pa. L. Rev. 1346, 1354 (1967).

Permitting subsequent prosecutions provides even more advantages to the government, which already possesses disproportionate resources and power. The government would also be able to use the first trial as a discovery device, receiving a "detailed account of the defendant's story," and a preview of the defendant's evidence and witnesses. Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. Crim. L. & Criminology 625, 647 (1995). Finally, permitting re-

trial following an acquittal vitiates the defendant's right to have a jury of twelve persons stand between the defendant and the power of the state. Under such circumstances, even an innocent defendant may plead guilty to avoid "the expense and the mental fatigue" that accompanies being subjected to numerous criminal trials. *Id.*

Moreover, in seeking to strip the two acquittals of their preclusive effects by dint of a vacated conviction, the government hopes to get the "second bite at the apple" that the Double Jeopardy Clause is intended to prevent. *Burks v. United States*, 437 U.S. 1, 17 (1978); *cf. Green*, 355 U.S. at 193 (rejecting view of Double Jeopardy Clause that would force a defendant to "barter his constitutional protection against a second prosecution for [one] offense . . . as the price of a successful appeal from an erroneous conviction of another offense").

4. The court of appeals' assertion that "the acquittals themselves remain inviolate" and "forever bar" future prosecutions for conspiracy and traveling to violate § 666, Pet. App. 19a n.5, rings profoundly hollow if the government is free to prosecute the petitioners again for the same exact conduct and secure the same exact sentence that would have been available had the jury convicted on every count.[9]

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[9] *See United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); *see also* U.S. Sentencing Guidelines §§ 2X1.1(b)(2) (providing that the sentencing guideline range is the same for conspiracy and the substantive offense where "all of the acts the conspirators believed necessary

[Footnote continued on next page]

Here, "the jury's acquittals unquestionably terminated petitioner[s'] jeopardy with respect to the issues finally decided in" the conspiracy counts. *Yeager*, 557 U.S. at 119. The government should be precluded from relitigating those issues, including whether defendants agreed to commit the substantive § 666 offense, which is a necessary element of that crime. That the jury also rendered a subsequently vacated verdict of conviction is immaterial. A legal nullity, being a nullity, cannot itself effectively annul simultaneously rendered acquittals.

[Footnote continued from previous page]

on their part for the successful completion of the substantive offense" were completed) & 3D1.2 (providing that "[a]ll counts involving substantially the same harm shall be grouped together" for purposes of determining the appropriate sentencing guideline range).

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

ILYA SHAPIRO
RANDAL MEYER
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DAVID DEBOLD
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

AKIVA SHAPIRO
WILLIAM J. MOCCIA
ESTER MURDUKHAYEVA
GENEVIEVE B. QUINN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

Counsel for Amicus Curiae

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