No. 15-537

IN THE

Supreme Court of the United States

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

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct.

NACDL was founded in 1958 and has approximately 9,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL filed an *amicus* brief in support of the petitioners in *Yeager* v. *United States*, 557 U.S. 110 (2009), and files here because it has grave concerns that the First Circuit's rationale in this case undermines the protections afforded defendants by the Double Jeopardy Clause, particularly in light of the proliferation of vague and expansive criminal statutes and the accompanying rise of indictments bloated with duplicitous and overlapping charges.

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioners and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with Clerk.

SUMMARY OF THE ARGUMENT

When a jury acquits on one count of a multi-count prosecution but hangs on another count relying on the same facts, the collateral estoppel prong of the Fifth Amendment's guarantee against double jeopardy prevents a retrial on the hung counts. But when a jury acquits on one count and convicts on another with the same facts, each verdict stands and the defendant may not overturn the conviction, even though it may be utterly irreconcilable with the acquittal as a matter of fact, law, and logic. The question in this case is simple, but essential to the continued vitality of the Double Jeopardy Clause's collateral estoppel effect: Whether a vacated conviction based on an incorrect jury instruction should be treated like a valid conviction or like a hung count.

Treating a vacated conviction the same as a valid conviction for collateral estoppel purposes, as the First Circuit did in this case, unjustly revives a conviction that should never have been possible, and gives it continuing legal effect where it should have none. It produces a windfall for the prosecution, effectively nullifying the oftentimes-Herculean efforts of defense counsel to vacate an illegal conviction in the first place. It stacks the deck against collateral estoppel in multi-count cases, and directs courts into the kind of searching and hyper-technical analysis of jury proceedings that this Court has long cautioned against. And it emboldens the worst impulses of prosecutors in a world where a single act can be subject to penalty under a dizzying and constantly expanding array of criminal statutes.

ARGUMENT

I. RELYING ON A VACATED CONVICTION TO DEPRIVE AN ACQUITTAL OF ITS COLLATERAL ESTOPPEL EFFECT IS INCONSISTENT WITH *YEAGER* AND FUNDAMENTALLY UNFAIR.

The Double Jeopardy Clause of the Fifth Amendment provides that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As part of that guarantee, the Clause includes a collateral estoppel prong. An "awkward phrase" that "stands for an extremely important principle in our adversary system of justice," collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970).

To apply the collateral estoppel bar, a court must engage in "an examination of the entire record," approaching the inquiry with "realism and rationality" rather than "the hypertechnical and archaic approach of a 19th century pleading book." *Id.* at 444. The court must thus "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (citing Mayers & Yarbrough, *Bis Vexari*: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38–39). If the court concludes that the fact at issue was "actually and necessarily decided" in favor of the defendant in a previous acquittal, *Schiro* v. *Farley*, 510 U.S. 222, 236 (1994),

then the government may not seek to persuade any future jury to come down the other way on the same factual issue in any subsequent prosecution. The inquiry is a pragmatic one that "must be set in a practical frame" of mind; any "more technically restrictive alternative would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Ashe*, 397 U.S. at 444.

Thus, in *Ashe* itself, this Court confronted a case in which a defendant was alleged to have robbed six victims at a home poker game. *Id.* at 437–38. The jury acquitted the defendant on charges of robbing one of the victims, and this Court held that collateral estoppel barred the prosecution from trying again with another one of the victims. *Id.* at 445. In light of the particular facts and record of that case, this Court held that "[t]he single rationally conceivable issue before the jury [in the first trial] was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." *Id.* The prosecution therefore could not argue to a subsequent jury that the defendant was in fact one of the robbers, contrary to the previous jury's conclusion.

The *Ashe* inquiry requires courts to undertake a thorough and pragmatic review of the record from the initial trial to determine what the jury necessarily decided. But there are limits on that inquiry. As this Court explained in *Yeager* v. *United States*, 557 U.S. 110 (2009), a court cannot rely on implications from a jury's failure to reach agreement on one count to assess what it must have decided in acquitting on another count. For purposes of the collateral estoppel inquiry, "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding.'" *Id.* at 121–22.

That is so even though the acquittal may be logically irreconcilable with a failure to reach agreement on the other count. "A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang." *Id.* For a court applying the *Ashe* inquiry to attempt "[t]o ascribe meaning to a hung count" would require "guesswork" and "speculation into what transpired in the jury room," factors which "should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id.* at 122.

That is not to say that the logical implications of a hung count shed no light at all on what a jury may have decided in acquitting on another count. The facts of *Yeager* illustrate the point. There, a jury acquitted the defendant on several fraud counts, and hung on several insider trading counts. *Id.* at 115. Both the fraud counts and the insider trading counts relied on the same allegation that the defendant possessed material non-public information about his company; if the jury believed that the defendant did not have such information, which it must have done to acquit on the fraud counts, then it logically should have acquitted on the insider trading counts as well. *Id.* To reach the outcome it did, the jury must have either misunderstood or failed to apply the court's instructions—perhaps due to "confusion about the issues [or] exhaustion after a long trial." *Id.* at 121. Given that confusion, it was not possible in *Yeager* to be certain that the jury had *necessarily* decided the factual issue in favor of the defendant on the acquitted counts.

But this Court held that such reasoning is simply, and categorically, irrelevant to the *Ashe* inquiry. "[A] jury speaks only through its verdict," so any insight

that can be gleaned from sifting the tea leaves of counts that did not produce a valid final jury verdict has no power to strip the jury's actual verdict of its collateral estoppel force. *Id.*

Inconsistent final verdicts in the same trial are a different matter, however. As this Court held in *United States* v. *Powell*, 469 U.S. 57 (1984), a defendant may not leverage an acquittal on one count to overturn a valid and final, though logically inconsistent, conviction on another. Such cases "present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *Id.* at 65. When two verdicts in the same trial are irreconcilable, it is impossible to know which one "the jury 'really meant.'" *Id.* at 68.

The First Circuit relied on *Powell* to conclude that "a true inconsistency in what the jury has done in acquitting on one offense while convicting on another can make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal." Pet. App. 11a. That reasoning was wrong when the Fifth Circuit applied it in *Yeager*, and it is wrong here.

Yeager distinguished *Powell* on two grounds, each of which is equally applicable to this case. First, this Court observed that it is inappropriate to "take[] *Powell*'s treatment of inconsistent *verdicts* and import[] it into an entirely different context involving both *verdicts* and seemingly inconsistent *hung counts*." 557 U.S. at 124. Hung counts are different from valid final verdicts, this Court reasoned, because "hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense." *Id.*

Just so with vacated convictions. Once a conviction is vacated for trial error, "the slate [is] wiped clean." *Poland* v. *Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 442 (1981)). And not always to the defendant's ultimate benefit—unless collateral estoppel applies, a defendant who succeeds in vacating a conviction (except by persuading the reviewing court that the prosecution failed to prove its case) faces the full range of punishment available under the law in a subsequent prosecution. A vacated conviction provides no basis for recidivist sentencing enhancements, or felon-in-possession charges, or a change in immigration status; on the other hand, a defendant who succeeds in vacating a conviction with a lenient sentence risks a harsher sentence on the second go around unless the defendant can show vindictiveness. And all for the same reason: A conviction, once vacated, ceases to have any legal effect whatsoever—except, under the First Circuit's rule, to deprive a valid and final acquittal of its collateral estoppel effect. See, *e.g.*, *People* v. *Wilson*, 852 N.W.2d 134, 141 n.5 (Mich. 2014). Carving out one solitary patch of doctrine in which to give vacated convictions continued legal consequence makes no sense—any more than affording the same ramifications to hung counts did in *Yeager*.

Yeager's second basis for distinguishing *Powell* is equally apropos in the context of a vacated conviction. The government in *Yeager* argued that "a mistried count can, in context, be evidence of irrationality," thus stripping the acquittal of collateral estoppel effect under *Powell*. 557 U.S. at 124–25. But "the fact that a jury hangs is evidence of nothing." *Id.* at 125. At best, "there is merely a *suggestion* that the jury may have acted irrationally." *Id.*

That logic applies *a fortiori* to vacated convictions. When a jury receives valid instructions and produces logically inconsistent results, it is possible to make at least some inferences about the rationality of its deliberative process. But that is not the case when the jury is misdirected. Some or all of the jurors may have voted to convict on the bribery count in this case because they believed that the defendants engaged in conduct that all now agree is legal. The faulty instruction in this case adds another layer of confusion to any attempt to figure out what the jury may have believed, and makes any assessment of the jury's rationality still more speculative than in *Yeager*.

Beyond the clear doctrinal resonances between this case and *Yeager*, though, lies a more fundamental concern: Allowing a second prosecution in this case would be profoundly unfair. The erroneous jury instruction in this case dramatically and illegally lowered the bar for the prosecution, subjecting a huge range of innocent conduct to criminal sanction. And allowing the prosecution to try again now that the conviction has been vacated amounts to an unjustifiable windfall.

Had the jury been correctly instructed, there is every reason to believe that Petitioners would not have been convicted, particularly in light of the acquittals on the conspiracy and Travel Act counts. If even a single juror voted to convict for bribery based only the gratuity theory, and would have voted to acquit if properly instructed on quid pro quo bribery, then re-prosecution would be out of the question. The jury would either have hung, in which case *Yeager* would preclude another prosecution, or acquitted altogether.

The First Circuit's rule gives the prosecution another shot, even after it faced an artificially low burden on its first attempt. The prosecution may thus treat its first attempt as a test run, and "refine[] [its] presentation in light of the turn of events at the first trial"—in other words, "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447. With the benefit of a full-scale dress-rehearsal at the first trial, the prosecution can hone its presentation, better prepare its witnesses, and anticipate defense strategy. Conversely, petitioners will be forced to "run the gantlet" again, *id.* at 445-46, contrary to the "'deeply ingrained' principle 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." *Yeager*, 557 U.S. at 117–18 (quoting *Green* v. *United States*, 355 U.S. 184, 187–88 (1957)).

The First Circuit's rule also turns this Court's historic concern for "the finality of judgments"—one of the "vitally important interests" protected by the Double Jeopardy Clause—on its head. *Id.* at 117, 118 (quoting *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978)). The jury finally and conclusively found the Petitioners not guilty of the conspiracy and Travel Act counts. But under the First Circuit's approach, another jury will be asked to resolve the same underlying factual dispute. That approach flies directly in the face of this Court's longstanding special solicitude for the finality of acquittals: "the fact that petitioner has already survived one trial should be a factor cutting

in favor of, rather than against, applying a double jeopardy bar." *Id.* at 122.

On top of depriving Petitioners of the ordinary benefit of an acquittal, the First Circuit also effectively nullified their efforts to vacate the illegal conviction. The kind of victory Petitioners achieved on appeal in this case is rare and difficult to achieve—in 2010, for example, less than one in eight criminal appeals in state court resulted in *any* modification or reversal of a conviction, including remands for new trials. See, Nicole L. Waters et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Appeals in State Courts* 1 (2015), http://www.bjs.Gov/content/pub/pdf/casc.pdf. The odds are even more daunting for appellants raising challenges to jury instructions: only 8.5% of such challenges, or around one in twelve, succeeded in state courts in 2010. *Id.* at 6. The picture in federal court is grimmer still for criminal appellants, with only 423 of the 8,342 criminal appeals in fiscal year 2013, or just over 5%, resulting in any decision against the government. See U.S. Dep't of Justice, Executive Office for United States Attorneys, *United States Attorneys' Annual Statistical Report Fiscal Year 2013* 72 (2013), https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf.

Having overcome the many obstacles to relief and secured the vacatur of their illegal convictions, Petitioners have since faced literally years of additional "embarrassment, expense and ordeal" to fight off the government's efforts to re-prosecute on factual claims that have already been rejected by one jury. This Court should not tolerate such a dramatic erosion of the Double Jeopardy Clause's collateral estoppel protections.

II. THE FIRST CIRCUIT'S DECISION MAKES COLLATERAL ESTOPPEL EFFECTIVELY UNAVAILABLE IN MULTI-COUNT PROSECUTIONS RESULTING IN A VACATED CONVICTION.

The First Circuit's logic in this case sets up the same trap for criminal appellants as the Fifth Circuit created in *Yeager*. By weighing the implications of a legal non-event, whether a vacated conviction or a hung count, each court effectively rendered collateral estoppel a dead letter in multi-count prosecutions. That is because the criminal defendant, as the party seeking to invoke collateral estoppel, bears the burden of showing that an issue of ultimate fact was actually and necessarily decided in her favor by the original jury. Considering the jury's decision in a vacated conviction alongside a factually overlapping acquittal *necessarily* introduces uncertainty as to what the jury may have been thinking. And that uncertainty alone is enough, given the defendant's burden, to make collateral estoppel effectively unavailable. A tie goes to the government, and when the same factual considerations underpin multiple counts, a defendant will practically never be able to show better than a tie.

Of course, as *Yeager* recognized, the possible explanations for seemingly inconsistent verdicts are many and varied; all the more so when the jury gets the wrong instruction on a crucial count. "[C]onfusion about the issues" and "exhaustion" will always remain as possible explanations, and so will the jury's possible good-faith belief that innocent conduct was actually criminal. The defendant will never be able to know, or show, for sure.

Even if she could rustle up proof of what the jury actually and necessarily decided, it would be of no

use. The federal rules generally forbid the introduction of evidence about what transpired in the jury room in any proceeding affecting the validity of the jury's verdict. See Fed. R. Evid. 606(b); see also, *e.g.*, *Warger* v. *Shauers*, 135 S.Ct. 521, 524 (2014). Courts have consistently been wary of allowing such evidence, fearing that it "would open the door to the most pernicious arts and tampering with jurors" and "lead to the grossest fraud and abuse," leaving "no verdict . . . safe." *McDonald* v. *Pless*, 238 U.S. 264, 268 (1915) (internal citations and quotation marks omitted). But with no way to discover what a jury actually decided, or to introduce such evidence even if it were available, a defendant is left powerless to balance the scales when a reviewing court weighs vacated convictions in the *Ashe* inquiry.

The decision below makes a mockery of the constitutional promise of collateral estoppel protection from double jeopardy when a conviction is vacated. This Court should reaffirm that acquittals are due "special weight" under the Double Jeopardy Clause, and that a legal non-event like a vacated conviction cannot strip a conclusive judgment of acquittal of its finality. *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980).

III. THE FIRST CIRCUIT'S DECISION ENCOURAGES OVERCHARGING AND SUCCESSIVE PROSECUTIONS.

Allowing vacated convictions to strip otherwise final acquittals of their collateral estoppel effect inevitably makes it more appealing for prosecutors to bloat indictments with overlapping charges on factually related crimes stemming from the same conduct. And it encourages prosecutors to push the envelope with aggressive theories of liability, secure in the knowledge that any vacated conviction can be

recharged, whether or not the jury acquitted on a factually overlapping count. Larding indictments with overlapping charges acts as an insurance policy against both the collateral estoppel consequences of an acquittal on any one charge and the possibility that an appellate court will overturn an erroneous jury instruction. When a jury convicts on one count and acquits on another with the same underlying facts, the acquittal will pose no barrier to re-prosecuting in case the conviction is vacated. Piling on related charges costs the prosecutors nothing, and the First Circuit's approach sharply curtails the risks from pushing for aggressive readings of already broad criminal statutes.

This case illustrates the point. Bringing conspiracy and Travel Act charges as well as the underlying bribery charge gave the prosecutors three shots on goal for the same underlying conduct. If only the Travel Act count or only the conspiracy count had been tried, *Ashe* would prevent a subsequent trial on the bribery charge. And if the jury had been instructed that bribery requires quid pro quo corruption, rather than a mere gratuity, the prosecution would have had a tougher hill to climb to secure a conviction. But when the jury rejected the conspiracy and Travel Act counts, and the appellate court threw out the gratuity theory of bribery, the First Circuit's pinched interpretation of collateral estoppel allows the prosecution a *fourth* attempt to make the same factual charges stick.

Constricting collateral estoppel in this manner rewards "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create[s] a risk of conviction through sheer governmental perseverance." *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982). It allows prosecutors to hone their trial

strategies and evidence in successive efforts at conviction, and it keeps defendants trapped in a "continuing state of anxiety and insecurity." *DiFrancesco*, 448 U.S. at 128.

The First Circuit's erosion of the Double Jeopardy Clause's collateral estoppel element contributes to the "deeper patholog[ies]" of the criminal justice system, including excessively "broad and undifferentiated" criminal statutes, "too-high maximum penalties," and "prosecutors [with] too much leverage." *Yates* v. *United States*, 135 S.Ct. 1074, 1101 (2015) (Kagan, J., dissenting). It exacerbates the problems created by the "extraordinary proliferation of overlapping and related statutory offenses" that allow "prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction," and it adds to "the potential for unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10.

The decision below lets the most aggressive prosecutorial tactics off the leash, protecting prosecutions from the downsides of acquittals and leaving defendants vulnerable to multiple trials on the same factual issues. A robust collateral estoppel doctrine is essential to the real-world vitality of the Double Jeopardy Clause, and this Court should step in to defend that indispensible constitutional protection.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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