No. 15-537

IN THE

Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
U.S. Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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The jury returned four valid verdicts—acquittals finding petitioners not guilty of conspiring and traveling to violate 18 U.S.C. § 666. Standing alone, those acquittals end this case. The government nonetheless argues that they lose their preclusive effect because the jury also convicted petitioners of violating § 666. Reading the government's brief, one might not grasp that those convictions were vacated. One might even think that the "jury was convinced that the Government had proven each of the elements of the crime beyond a reasonable doubt." U.S. Br. 28. Never mind that the district court misinformed the jury on the main element of the crime. And never mind if in the next case the court misinforms the jury on every element of the crime.

One also might not grasp from the government's brief that *Yeager v. United States*, 557 U.S. 110 (2009), is still good law. The government advances argument after argument that *Yeager* forecloses. And even had *Yeager* never been decided, the decision below is wrong. Only in some bizarro constitution would a conviction that violates the Fifth Amendment's Due Process Clause eliminate the protections of the same Amendment's Double Jeopardy Clause. Only in Alice in Wonderland would a nonevent under the Double Jeopardy Clause—an unconstitutional conviction—be a monumentally significant event under the Double Jeopardy Clause. At bottom, the government urges a constitutional rule that although Lance Armstrong may have cheated and Prohibition has been repealed, Armstrong is still a winner and drinking martinis is still a crime. This Court should decline to treat invalid convictions as anything other than what they are—legal nullities.

I. *Yeager* Requires Reversal

1. *Yeager* holds that hung counts are "non-event[s]" that are not "a 'relevant' part of the 'record'" under *Ashe v. Swenson*, 397 U.S. 436 (1970). *Yeager*, 557 U.S. at 120-21. And because hung counts "have no place in the issue preclusion analysis," only acquittals matter. *Id.* at 122. The same is true of vacated convictions. Like hung counts, vacated convictions lack "finality" and "have never been accorded respect as a matter of law or history." *Id.* at 122-24. *Ashe* asks only what the jury "determined by a valid and final judgment." *Id.* at 119 (quoting *Ashe*, 397 U.S. at 443). Because the government has never disputed that the acquittals here, standing alone, preclude retrial, petitioners satisfied their burden under *Ashe*.

The government argues that *Yeager* is limited to hung counts because *Yeager* reasoned that only "jury verdicts" count in the *Ashe* analysis. On the government's theory, "verdicts" command respect because they reflect "collective action," including convictions vacated because the jury was misinstructed on the elements of the crime. Br. 28. But the government gives away its case when it explains *why* a jury's collective action matters. Br. 27-29. Validity is baked into every sentence. The government argues that vacated convictions differ from hung counts because verdicts reflect valid findings of guilt. Thus, the government argues that courts should consider vacated convictions because "all 12 members of the venire" reached "unanimous" and "collective judgment" on "the merits of the charge" and the "arguments and evidence in the case." Br. 27-28, 34. The government reasons that here "all 12 jurors voted to convict petitioners of a standalone Section 666

offense, indicating that the entire jury was convinced that the Government had proven each of the elements of the crime beyond a reasonable doubt." Br. 28 (alterations omitted).

But there is no such "unanimous" or "collective judgment" here because the jury was misinstructed on the "elements of the crime," *i.e.*, the "merits of the charge" and the "arguments and evidence in the case." Vacated convictions are not "similar to jury verdicts in any *relevant* sense." *Yeager*, 557 U.S. at 124 (emphasis added). The jury's "unanimous" decision here is entitled to no more respect than a jury's "unanimous" decision to order pizza for lunch. Neither reflects a determination that anyone committed a crime.

The government's "collective judgment" mantra implodes when applied to convictions unanimously rendered by an 11-person jury, 12 minors, a jury including the victim's sister, or a jury excluding African-Americans. Pet. Br. 23. And the government's rule extends to verdicts invalidated for any reason, even if the court told the jury that bribery occurs whenever citizens breathe. As long as the errors apply equally to the acquittals and the convictions (U.S. Br. 30), its rule extends to all prejudicial and structural errors, no matter how numerous or egregious, including coerced confessions, withholding of conclusive exculpatory DNA evidence, or jury instructions to convict no matter what or based on a preponderance. Convictions, however, are vacated because they deserve no respect and undermine the public's faith and trust in our criminal justice system. As such, the law regards them as if they never occurred. Reversible errors "impeach the convic-

tion"—full stop. *Fiswick v. United States*, 329 U.S. 211, 223 (1946).

And if the question is what the jury thought about the "merits of the charge," U.S. Br. 28, 34, hung counts are if anything more meaningful than vacated convictions. Hung counts may reflect a finding of guilt by at least one juror under the correct law, while for all we know zero jurors thought petitioners guilty under the correct law. Pet. Br. 28-29. The government does not respond.

Conceding that vacated convictions lack "finality," the government disputes that "finality" was essential to *Yeager*'s dismissal of hung counts. The government claims that the "finality of a conviction has no inherent connection to the question whether the conviction provides 'evidence of irrationality.'" Br. 29 (quoting *Yeager*, 557 U.S. at 125). But hung counts provide no evidence of irrationality because they do not bring "an element of needed finality." *Yeager*, 557 U.S. at 124. Finality is inherently connected to a verdict's *validity*, which is why finality is essential to collateral estoppel. *Id.* at 118, 122-24. Again, courts under *Ash*e look only at "final and valid judgment[s]." 397 U.S. at 443.

It is irrelevant if a rational jury that acquitted petitioners of violating § 666 under the conspiracy and travel charges should have acquitted on the standalone § 666 charges. U.S. Br. 23-24. This was equally true in *Yeager*, 557 U.S. at 116, and the hung counts, if considered, undermined the defendant's reliance on the acquittals just the same as the government argues the vacated convictions do here. Yet *Yeager* rejected the dissent's view, resurrected here (U.S. Br. 44 & n.10, 46, 48), that the Court "pretend[ed]" the acquittals meant something they

"probab[ly]" did not and that "a failure to reach a verdict on one count 'make[s] the existence' of a factual finding on a necessary predicate for both counts substantially 'less probable.'" 557 U.S. at 132 & n.3 (Scalia, J., dissenting) (quoting Fed. R. Evid. 401).

The government denies that, under *Yeager*, "collateral estoppel applies despite any inconsistency between the hung counts and the acquittals," Br. 28 (quoting Pet. Br. 36), and instead reads *Yeager* to hold that a "hung count *cannot* be inconsistent" with an acquittal. *Id.* But *Yeager* framed the "question presented" as whether the jury's "apparent inconsistency … affect[ed] the preclusive force of the acquittals." 557 U.S. at 112. The answer was no. *Yeager* did not question that a rational jury that acquitted Yeager of fraud should have acquitted him of insider trading as well. Had *Yeager* concluded otherwise, the opinion would be largely superfluous, particularly the discussion of *Powell*. The Court held that a hung count "*cannot* be inconsistent" only in the sense that it is not cognizable or relevant evidence of inconsistency. The same is true here: invalid convictions "*cannot* be inconsistent" with valid acquittals because the former are nullities.

2. Vacated convictions are irrelevant nonevents for collateral estoppel because they are irrelevant nonevents for continuing jeopardy. Pet. Br. 24-28. It blinks reality to suggest that *Yeager* did not "link" these aspects of double jeopardy. U.S. Br. 34. *Yeager* regarded *Richardson*'s conclusion that hung counts are non-events for continuing jeopardy as a "rejection" of the government's argument that hung counts are "event[s] of significance" for collateral estoppel. 557 U.S. at 123-24; *see id.* at 118, 120 (linking "nonevent[s]" for both doctrines); Pet. Br. 25-26.

Contrary to the government's argument (Br. 33), no "text" in the Double Jeopardy Clause supports treating the same event as irrelevant for one component of the analysis but controlling for another. Double jeopardy protects defendants against being "subject for [1] the same offence to be [2] twice put in jeopardy," U.S. Const. amend. V; both requirements apply in every case. But even were the government correct that only "same offence" matters for collateral estoppel and only "twice put in jeopardy" matters for continuing jeopardy, Br. 33, the government identifies no textual distinction between those two phrases that supports differential treatment of vacated convictions.

This Court should not render the Clause internally inconsistent by perversely declaring vacaturs irrelevant only when doing so benefits prosecutors. Cato Br. 9. Continuing jeopardy is an extra-textual, government-friendly gloss in which this Court permits retrial after vacated convictions and hung counts even though defendants have literally been put in "jeopardy" merely by standing trial. The Court treats the proceedings as if they never happened—they are "wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 720-21 (1969); Pet. Br. 22, 26 (collecting cases). *Pearce* did not hold that a vacated conviction is nullified only "for purposes of continuing jeopardy." U.S. Br. 34. *Pearce* said "wholly nullified," not "partly."

Tellingly, the government in *Yeager* saw continuing jeopardy and collateral estoppel as inextricably linked. It argued that, "because a defendant remains in continuing jeopardy on hung counts, the collateral estoppel component of the double jeopardy clause does not bar retrial," and decried "attempt[s] to whol-

ly divorce collateral estoppel from the surrounding and independently valid double jeopardy principles [] such as [continuing jeopardy]." Brief for the United States at 23, 28, *Yeager v. United States*, 557 U.S. 110 (2009) (No. 08-67) ("U.S. *Yeager* Brief") (capitalization omitted). Now that *Yeager* accepted the linkage but held that it defeats the government's argument, 557 U.S. at 123-24, the government's flip-flop is particularly unconvincing.

The government notes that events like indictments or witness testimony do not terminate jeopardy, but nonetheless "help illuminate the basis of a jury's verdict" under *Ashe*. Br. 33. True, but irrelevant. Continuing jeopardy analysis concerns *trial-ending* events that are treated as non-events for terminating jeopardy. No analogue for indictments or witness testimony exists because those events do not even arguably trigger a second jeopardy. Because the law does not ignore those events in continuing jeopardy analysis, there is no reason they should be ignored in collateral estoppel analysis.

3. The final consideration compelling *Yeager*'s holding—that "there is no way to decipher what a hung count represents," 557 U.S. at 121—equally applies to vacated convictions. Pet. Br. 28-30. The government contends that, "[b]ecause convictions signal the unanimous vote of all 12 jurors to find guilt beyond a reasonable doubt, no 'guesswork' or 'conjecture' is required to decipher their meaning." Br. 30-31 (quoting *Yeager*, 557 U.S. at 122). Again, this argument collapses if one inserts "vacated" or "invalid" before "convictions," or inserts "of giving a lawful gratuity" after "guilt." *Cf.* U.S. Br. 48 n.12.

Petitioners' convictions, too, are indecipherable. The First Circuit vacated them because the instruc-

tions permitted the jury to convict based on lawful conduct. The court could not say, without guessing, that the convictions reflected a conclusion that petitioners violated § 666. Pet. Br. 29. The government occasionally acknowledges this uncertainty. Br. 31 ("impossible to determine [what] the jury believed" in convicting); Br. 40 (jury "did not necessarily" find guilt under correct law). But the government does not confront the problem this creates for its position. Instead it pivots, contending that the inability to decipher the meaning of the vacated convictions "does nothing to eliminate the inconsistency in the jury's verdicts." Br. 31. Again, that was equally true of the hung counts in *Yeager*.

It is impossible to discern the effect of these unlawful instructions. They may have produced disagreement that led to a conviction out of compromise, whereas a properly instructed jury otherwise would have acquitted (or at least hung, in which case *Yeager* would control). Pet. Br. 29-30. The government does not disagree. The government calls this "speculat[ion]" (Br. 31), but that is precisely the problem. *Yeager* disregarded hung counts *because* no one could "identify which factor was at play in the jury room." 557 U.S. at 121-22.

The government's theme that defendants bear the "burden" of proving what the jury necessarily decided (Br. 9, 13, 14, 17, etc.) is misdirection. Again, the government does not dispute that, absent consideration of the vacated convictions, petitioners have met their burden. *Yeager* observed that considering hung counts would have created an impossible burden. 557 U.S. at 122 n.6. Likewise, the Court should not force defendants to "rebut all inferences about *what may* have motivated the jury to [unlawfully

convict] without the ability to seek conclusive proof." *Id.*

II. *Powell* Requires Reversal

1. *Powell* held that a defendant cannot overturn a valid conviction on one count on the ground that the same jury in the same trial acted inconsistently in acquitting on another count. *United States v. Powell*, 469 U.S. 57, 69 (1984). In the government's view, the "whole point" of *Powell* is that "it is impossible to say that the acquittal resolved facts in the defendant's favor when the jury returns inconsistent verdicts." Br. 37. Because the jury at petitioners' 2011 trial "acted irrationally" in returning inconsistent verdicts, the government contends, collateral estoppel is as inappropriate here as it was in *Powell*. Br. 37; *accord* Br. 23-25.

Yeager rejected this exact argument. Relying on *Powell*, the government in *Yeager* argued that "if a single finding of fact would dictate acquittal on two counts, and the jury acquits on one and hangs on the other, the jury has not acted consistently or rationally," and thus "[c]ollateral estoppel cannot be applied." U.S. *Yeager* Brief 17; *see Yeager*, 557 U.S. at 124 (describing the government's argument).

Yeager rejected that analysis as "serious[ly] flaw[ed]" because the government "misreads" *Powell*. 557 U.S. at 124-25. Despite "jury verdicts that, on their face, were logically inconsistent," *Powell* "refused to impugn the legitimacy of either verdict," reasoning that "the jury's verdict 'brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.'" *Yeager*, 557 U.S. at 124 (quoting *Powell*, 469 U.S. at 67). If one valid verdict cannot impugn another valid

verdict, "*a fortiori*" a hung count cannot strip an acquittal of preclusive effect. *Id.* at 125. In other words, *Powell*'s logic commanded *Yeager*'s holding.

The government ignores that *Yeager*'s holding follows "*a fortiori*" from *Powell*. The government merely acknowledges "*Yeager*'s observation that *Powell* 'declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict' and instead concluded that 'respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent.'" Br. 38 (quoting *Yeager*, 557 U.S. at 124-25). But that is enough to resolve this case: the only valid verdicts here are acquittals. And if valid acquittals cannot impugn valid convictions, invalid convictions cannot impugn valid acquittals. The government faults petitioners for relying on "*Powell*'s holding" (*id.*), but holdings matter; *Powell*'s holding dictated *Yeager*. Nor do petitioners ignore "the rationale underlying" *Powell*. *Id.* *Powell*'s rationale is that valid verdicts deserve "respect" and must be given "full effect." *Yeager*, 557 U.S. at 124. But the government urges respect for invalid verdicts at the expense of valid verdicts.

Because *Powell* reasoned that collateral estoppel principles "are no longer useful" when "the same jury reached inconsistent results," 469 U.S. at 68, the government argues that "[n]othing about *Powell*'s rationale changes when the inconsistent conviction is vacated for legal error," Br. 37. But again, the jury "reached inconsistent results" in *Yeager*. And again the government equates valid and invalid convictions even though the law respects one but abhors the other. Only *valid* verdicts "bring[] to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Powell*,

469 U.S. at 67. Vacated convictions are non-final and do not reflect a collective judgment that the defendant committed any crime.

Powell's analysis of the equities also no longer applies with vacated convictions. *Id.* at 64-67. When a defendant suffers through a tainted trial, is tarred by an invalid conviction, and possibly served prison time, we know exactly whose "ox has been gored" (the defendant's) and who enjoyed a "windfall" (the government). *Id.* at 65. Further, *Powell*'s observation that jury inconsistency "often" is "a product of jury lenity," *id.* (quoted at U.S. Br. 21), collapses with vacated convictions. Even had the jury believed that petitioners were "guilty of [all] counts" (U.S. Br. 21) and acquitted on some out of lenity, all the jury would necessarily have concluded is that petitioners were guilty of a lawful gratuity.

The government repeatedly asserts that vacatur does not erase the "historical fact" of a conviction. Br. 17, 34, 37, 47. But if it is only the "historical fact" on which the government relies, why did the First Circuit devote 20 pages to exploring what the unlawful convictions "necessarily decided"? Pet. Br. 42. The government does not say. Further, nothing erased the "historical fact" of the hung counts or their apparent inconsistency with the acquittals in *Yeager*, but this Court disregarded them nonetheless.

The government argues that courts consider inconsistent "convictions" to determine whether a jury "resolve[d] a particular issue in the defendant's favor when acquitting on a related count." Br. 19. But the government's cases involve neither vacated convictions nor inconsistency. *Schiro v. Farley* did not even involve an acquittal, but a jury's "failure to return a

verdict" on a particular count. 510 U.S. 222, 234, 236 (1994). The lower court cases involved valid convictions that courts "harmonize[d]" with acquittals. *Flittie v. Solem*, 775 F.2d 933, 941 (8th Cir. 1985); *see United States v. Neal*, 822 F.2d 1502, 1508 (10th Cir. 1987) (similar).

Because petitioners' convictions were vacated, no inconsistent *valid* verdicts exist. The government rather wants to retry petitioners to obtain valid convictions that would be inconsistent with petitioners' acquittals. Pet. Br. 37. *Powell*'s refusal to disturb inconsistent valid verdicts does not allow the government to try to create them.

2. *Powell* did not involve a re-prosecution, but rather valid verdicts rendered by the same jury at a single trial. The government argued in *Powell* that collateral estoppel is "simply inapposite to jury verdicts on multiple counts at a single trial." U.S. *Powell* Brief 28 n.36. The Court agreed, holding that double jeopardy did not apply at all. 469 U.S. at 65; Pet. Br. 31-32, 36. Having won *Powell* by arguing that single trials are different than re-prosecutions, the government now turns around and argues that *Powell* governs re-prosecutions. Br. 38.

As support for this extension of *Powell*, the government cites *Standefer v. United States*, 447 U.S. 10 (1980). Br. 21, 38. But *Standefer*, like *Powell*, involved neither double jeopardy, vacated convictions, nor re-prosecution. *Standefer*, rather, concerned whether *nonmutual* estoppel applies when the jury at a *separate* defendant's earlier trial returned inconsistent *valid* verdicts. 447 U.S. at 11-13. And while *Standefer* stated in a footnote that the inconsistency "is reason, in itself, for not giving preclusive effect to the acquittals," *id.* at 23 n.17, it said nothing

about invalid verdicts. The government unsuccessfully relied on the same footnote in *Yeager*. U.S. *Yeager* Brief 32-35.

The government argues that *Powell* "contemplated that the acquittals in that case would not … foreclose retrial on the counts of conviction if the convictions were set aside." Br. 38. But because the Court refused to set aside the convictions, it had no need to—and did not—address whether double jeopardy would preclude a retrial had the decision gone the other way. In the portion of *Powell* the government cites, the Court passingly referred to a "new trial" only in explaining that double jeopardy did not apply at all. 469 U.S. at 65.

3. The government chastises petitioners for invoking "respect" for the jury's acquittals while "ignor[ing] the jury's unanimous decision that they were guilty of violating Section 666." Br. 40. But the government acknowledges that the "jury did not necessarily find [petitioners] guilty of an exchange theory of bribery"—*i.e.*, no "unanimous decision" found petitioners "guilty of violating Section 666." *Id.* There is nothing anomalous in concluding that petitioners' "final and unassailable" acquittals are entitled to respect, U.S. Br. 39, while the non-final, wholly-assailed convictions are not. But there *is* something anomalous about denying double jeopardy protection to valid acquittals, which must be given "full effect," *Yeager*, 557 U.S. at 124, based solely on vacated convictions, which lack "any … effect," *Butler v. Eaton*, 141 U.S. 240, 244 (1891).

The government argues that "all 12 jurors may well have found that petitioners committed bribery in violation of Section 666 under a valid theory." Br. 40. But the First Circuit held that the instructional

error was prejudicial. Pet. App. 104a-105a. The government is similarly wrong that "collateral estoppel is inapplicable when a court lacks confidence in the correctness of an original adjudication." Br. 23. Again, the same could have been said in *Yeager*, and courts might "lack confidence in the correctness" of an acquittal for countless reasons—like if the jury announced that it flipped a coin, or acquitted in the face of incontrovertible DNA evidence of guilt. Pet. Br. 37-38; NAPD Br. 10, 19-20. The government does not dispute that its theory would strip such acquittals of preclusive effect. But this Court rejected that path long ago—acquittals are acquittals. Pet. Br. 34-37.*

4. The government notes that, in the civil context, "non-mutual collateral estoppel does not apply when the judgment that would be given preclusive effect is inconsistent with another prior judgment." Br. 22 (citing Restatement (Second) of Judgments § 29 cmt. f). That may be true with respect to an inconsistent prior *valid* judgment, but the government cites no authority that an inconsistent *invalid* judgment strips a valid judgment of civil non-mutual collateral estoppel effect. Regardless, the estoppel here

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* Bravo-Fernandez's vacated conviction for traveling to violate repealed Puerto Rico statutes offers no support for the government's speculation. U.S. Br. 40-41 n.9. And Martínez-Maldonado was acquitted of this charge. J.A. 88. The government also misrepresents that the "evidence at trial established that Bravo-Fernandez had been giving cash bribes to de Castro Font." Br. 4 n.2. Every time de Castro Font's name appeared on the verdict form, the jury checked "no" for not guilty. J.A. 86-88. Contrary to the government's insinuation (Br. 4-5 n.2), de Castro Font's 2009 conviction had nothing to do with Bravo-Fernandez.

is *mutual*, and non-mutual estoppel imposes stricter requirements than estoppel between the same parties. Restatement (Second) of Judgments § 29 cmt. b. The Restatement identifies no inconsistency exception for *mutual* estoppel. *Compare id.* § 28 *with id.* § 29(4).

The government asserts that civil mutual collateral estoppel may not apply if a verdict "was the result of compromise," *id.* § 28 cmt. j (quoted at Br. 22), but this exception applies only where "the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding." *Id.* The government had every opportunity and incentive to prosecute the charges at the 2011 trial; petitioners were the ones denied a "full and fair adjudication" because of improper instructions.

Regardless, collateral estoppel cannot be any less protective of criminal defendants than it is of civil litigants, Pet. Br. 40; rather it is *more* protective. For instance, the absence of appellate review forecloses estoppel in the civil context, but not the double jeopardy context. U.S. Br. 28. Contrary to the government's suggestion (*id.*), the fact that the government cannot appeal acquittals does not support denying preclusive effect here. It rather highlights the skepticism that should accompany the government's effort to undermine acquittals by questioning their rationality.

III. Vacated Convictions Are Legal Nullities

1. This Court repeatedly has announced that vacated convictions are legal nullities, and cannot impose "disabilities or burdens" on criminal defendants. *Fiswick*, 329 U.S. at 222; *see* Pet. Br. 39-41 (collect-

ing cases). The government fails to identify any decision of this Court giving legal effect to a vacated conviction to a defendant's detriment.

Morris v. Mathews, 475 U.S. 237 (1986), does not aid the government (U.S. Br. 41). The defendant was convicted of aggravated murder in connection with a robbery, and the "aggravated" aspect violated double jeopardy based on a prior robbery conviction. 475 U.S. at 242. As a remedy, the state appellate court reduced the aggravated-murder conviction to the lesser included offense of murder, which was not jeopardy-barred. *Id.* at 243. This Court held that this remedy was adequate unless "the inclusion of the jeopardy-barred charge"—*i.e.*, the "aggravated" aspect—likely influenced the outcome on the lesser included, non-jeopardy-barred offense. *Id.* at 247. The Court thus effectively severed the invalid aspect of the conviction and treated the case as if the state tried the defendant for two separate offenses—aggravated murder and simple murder. The case was "no differen[t]" than *Benton v. Maryland*, 395 U.S. 784 (1969), where the defendant was convicted of both burglary and a jeopardy-barred larceny charge. *Morris*, 475 U.S. at 246.

In noting that the jury had "necessarily found" the defendant committed murder, the Court relied on the *valid* conviction for murder. *Id.* at 247. Far from relying on the vacated conviction, the Court ensured that it was irrelevant. If the presence of the vacated charge and conviction *had* influenced the jury in convicting on simple murder—in other words, if it was prejudicial—that conviction too had to be vacated. *Id.* Here, the vacated convictions would indisputably be prejudicial—reliance on invalid convictions, which

have no lesser included offense, is the only thing the government says permits retrial.

The government concedes in its corrected brief and accompanying letter that *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141 (1887), was not a criminal case and did not involve a vacated conviction. Br. 44-45. The word "conviction" appears only once, describing a state court's holding that, "i[f] there be a conviction before a magistrate having jurisdiction of the subject-matter, *not obtained by undue means*, it will be conclusive evidence of probable cause." *Id.* at 151 (emphasis added) (quoting *Payson v. Caswell*, 22 Me. 212, 226 (1842)). The italicized language supports petitioners' position. *Crescent City* then held that legitimate *judicial* disagreement about entitlement to a civil injunction forecloses a litigant from obtaining damages for malicious prosecution of a civil claim. 120 U.S. at 157-60.

2. It is especially egregious to rely on vacated convictions to question petitioners' innocence; vacaturs restore the presumption of innocence. *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988); Pet. Br. 43. The government denies that it presupposes that "vacated convictions embody a factual finding of guilt," insisting that they are relevant only "to establish the jury's inconsistency." Br. 46, 47 n.11. But make no mistake: a purported "factual finding of guilt" is the government's *exclusive* explanation for why inconsistent vacated convictions deserve consideration while inconsistent hung counts do not. Again, purporting to distinguish *Yeager*, the government asserts: "[T]he entire jury was convinced that the Government had proven each of the elements of the crime beyond a reasonable doubt." Br. 28. And here:

"[Vacated] [c]onvictions *are* evidence of something because they … signal the unanimous vote of all 12 jurors to find guilt beyond a reasonable doubt." Br. 30. Once more: The jury's vacated "decision to convict represents the unanimous judgment of jurors on the merits of the charge." Br. 28. Yet again: "[T]he jury believed the defendant was guilty of both counts." Br. 21.

Nor can the government ignore vacated convictions' conceded lack of "collateral estoppel effect" on the theory that the government is not using the convictions affirmatively to "estop petitioners." Br. 47 n.11. For collateral estoppel purposes, vacated judgments are, "to our judicial knowledge, without any validity, force, or effect." *Butler*, 141 U.S. at 244. Using vacated convictions to establish guilt and using them to establish lack of innocence is a distinction without a difference. In both situations the vacated conviction operates against the defendant to devastating "effect."

Adhering to the rule that vacated convictions are nullities does not contravene *Ashe*'s rule of "realism and rationality" (U.S. Br. 47-48) any more than ignoring hung counts did in *Yeager*. Only some proceedings are "relevant matter" under *Ashe*, 397 U.S. at 444; unreliable convictions do not qualify.

3. Lower courts agree in myriad contexts that vacated convictions cannot be used against defendants. Pet. Br. 38-41. The vast majority of the government's cases are inapposite. U.S. Br. 42-47. In *United States v. Velasquez*, a vacated conviction worked to the defendant's *benefit*: the court "relied" on it in the sense that the same absence of facts that required reversal of one co-defendant's conspiracy conviction required reversal of the other co-

defendant's conspiracy conviction. 885 F.2d 1076, 1090-91 (3d Cir. 1989). In *Brennan v. United States*, the court upheld a RICO conviction because the defendant had been separately and validly convicted of Travel Act counts that qualified as RICO predicates, regardless of vacated wire-fraud predicates. 867 F.2d 111, 115 (2d Cir. 1989).

Other courts admitted evidence of criminal acts, not the vacated conviction itself, in a subsequent prosecution under Federal Rule of Evidence 404(b). *United States v. Sneezer*, 983 F.2d 920, 924 (9th Cir. 1992); *Russell v. Lynaugh*, 892 F.2d 1205, 1212 (5th Cir. 1989). This Court has likewise distinguished between reliance on "conduct which gave rise to the [] charge" and reliance on an "invalid conviction." *Johnson*, 486 U.S. at 585-86. Or courts admitted the vacated conviction to show motive for other acts, not because the vacated conviction itself had legal effect. *United States v. Blanton*, 793 F.2d 1553, 1564-65 (11th Cir. 1986); *Newport News Shipbuilding & Dry Dock Co. v. NLRB,* 738 F.2d 1404, 1407 n.4 (4th Cir. 1984).

Nor do lower courts agree (U.S. Br. 42-47) that vacated convictions reflect probable-cause determinations that preclude malicious-prosecution suits. Courts are "divided" on the question. *Mosley v. Wilson*, 102 F.3d 85, 91 (3d Cir. 1996) (Br. 45). *Harris v. Bornhorst*, 513 F.3d 503, 521-22 (6th Cir. 2008) (Br. 45), *permitted* a malicious-prosecution suit to proceed notwithstanding a vacated conviction. Regardless, cases concerning tort recovery hardly suggest that vacated convictions can deprive defendants of double jeopardy protection. Indeed, courts have held that hung counts "confirm[] that there surely was probable cause" that bars a malicious-prosecution

suit. *Singleton v. City of New York*, 632 F.2d 185, 193-94 (2d Cir. 1980). But hung counts are still irrelevant for double jeopardy under *Yeager*.

Against the mountain of cases treating vacated convictions as legal nullities in countless contexts, the government found two lower court decisions that relied on vacated convictions. U.S. Br. 42-43, 46. One used a vacated conviction to support probable cause for a wiretap, *United States v. Wagner*, 989 F.2d 69, 73-74 (2d Cir. 1993); the other used vacated convictions in affirming separate convictions on plain error review, *United States v. Christensen*, 2015 WL 11120665, at *15-17 (9th Cir. Aug. 25, 2015). Those decisions are wrong. And that they are the best the government could find in the history of legal jurisprudence says it all.

IV. The Decision Below Invites Prosecutorial Abuse

1. Prosecutors routinely overcharge cases, exploiting the "extraordinary proliferation of overlapping and related statutory offenses" in the modern criminal code. *Ashe*, 397 U.S. at 445 n.10. This case is no exception. The government charged petitioners with duplicative offenses, predictably resulting in inconsistent verdicts. *Ashe* is designed to prevent such abuse, but the government's position would condone and even encourage it.

The government contends that prosecutors do not overcharge cases specifically "in hopes of obtaining inconsistent verdicts so that they can avoid application of collateral estoppel in a subsequent prosecution." Br. 49. That is a strawman. Prosecutors already have plenty of incentives to bring duplicative charges. Pet. Br. 45-47. Of course they do not set out hoping to obtain inconsistent verdicts. But two

chances to convict—or 200—are better than one. *Ashe's* collateral estoppel rule *deters* overcharging by imposing consequences on prosecutors who engage in this abuse or who stretch criminal statutes beyond their proper reach. The decision below would remove this deterrent. NACDL Br. 12-14; Criminal Law Profs. Br. 18-19.

The government suggests that prosecutors have adequate incentives to bring compact indictments because overcharging risks "confusing jurors" and "increasing the likelihood" of "acquit[tals] out of lenity." Br. 49. But multiple charges increase the likelihood of *convictions*—not acquittals. Pet. Br. 46-47. And confusing the jury with duplicative charges tends to benefit the government—jurors may wrongly believe that defendants must be guilty of something. *Id.* Additional charges also increase prosecutors' leverage in plea negotiations. *Id.* at 46.

The government further suggests that prosecutors would not overcharge cases in hopes of obtaining a retrial because the passage of time disadvantages the prosecution. Br. 49-50. The government unsuccessfully pressed this argument in *Yeager*. U.S. *Yeager* Brief 39. And again, the point is not that prosecutors "try to obtain an inconsistent verdict," Br. 50, but that the availability of retrial after inconsistent verdicts removes the disincentive to overcharge. Meanwhile, the government fails to confront the perverse incentives that would result from the interplay of *Yeager* and the government's position here. Pet. Br. 50-51.

Quibbling with the cases petitioners cited as examples of "overcharging" does not change the fact that overcharging is undeniably rampant. U.S. Br. 50 n.13. Commentators and members of this Court

have lamented the problem. Pet. Br. 45-46. In any event, the fact that multiple charges comply with *Blockburger*—which is all the government establishes, Br. 50 n.13—hardly justifies piling charge on top of duplicative charge. *Ashe* adopted a collateral estoppel rule because *Blockburger* did not prevent the prosecution there—*Blockburger* alone does not secure individuals against the abuses *Ashe* prevents.

Ashe's discussion of the policies supporting collateral estoppel is no less relevant because the government did not bring charges "sequentially." U.S. Br. 51. Again, the government unsuccessfully pressed this argument in *Yeager*. U.S. *Yeager* Brief 25-26. Piling on duplicative charges in a single indictment is no less abusive than the prosecution in *Ashe*. And at a second trial, the government could "hone[] its trial strategy to shore up its case," making petitioners' 2011 trial a "'dry run.'" U.S. Br. 51 (quoting *Ashe*, 397 U.S. at 447).

The government claims that no "overcharging" occurred here, noting that it is neither "unusual" nor "pernicious" to charge defendants with "both conspiracy and the substantive offense." Br. 51 n.14. The laundry list of duplicative charges in this case speaks for itself: the government charged petitioners with bribery, conspiracy to commit bribery, traveling to commit bribery, conspiracy to travel to commit bribery, and traveling to violate repealed statutes. The fact that the government sees this as business as usual only illustrates the problem.

2. The "weighty interests in permitting retrial" of vacated counts as a general rule (U.S. Br. 52-53) do not justify discarding acquittals and allowing the government a second bite at the apple. The Court re-

jected this argument when the government made it about hung counts in *Yeager*. 557 U.S. at 123-24.

The government's warning that this case threatens "the sound administration of justice" rings as hollow as it did in *Yeager*. Br. 52; *see* U.S. *Yeager* Brief 23-27. If collateral estoppel applies here, the government still will usually be able to retry after convictions are vacated. Collateral estoppel will bar retrial only where the jury returns inconsistent verdicts. That situation is the exception, not the rule. And it would happen even less frequently if prosecutors stopped overcharging cases and limited themselves to compact indictments.

CONCLUSION

The First Circuit's judgment should be reversed.

Respectfully submitted,

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