No. 15-___

IN THE

Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writer of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. Here, a jury acquitted petitioners of conspiring and traveling to violate 18 U.S.C. § 666, but convicted petitioners of violating § 666. The convictions were vacated on appeal because they rested on incorrect jury instructions, and it is undisputed that the acquittals depended on the jury's finding that petitioners did not violate § 666. The government nonetheless sought to retry petitioners on the § 666 charges.

Widening an acknowledged split, the First Circuit held that the acquittals have no preclusive effect under *Ashe* because they were inconsistent with the vacated, unlawful convictions. The First Circuit distinguished *Yeager v. United States*, 557 U.S. 110 (2009), which held that an acquittal retains its preclusive effect even when it is inconsistent with a hung count, on the theory that juries "speak" through vacated convictions, but not through hung counts. The questions presented are:

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

2. Whether, under *Evans v. Michigan*, 133 S. Ct. 1069 (2013), the Double Jeopardy Clause permits a district court to retract its "judgment of acquittal" entered on remand as an interpretation of the Court of Appeals mandate.

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JURISDICTION

The First Circuit issued its decision on June 15, 2015. Pet. App. 1a. Petitioners filed a timely petition for rehearing en banc, which the court denied on July 27, 2015. *Id*. at 134a-135a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

STATEMENT

This case is an ideal vehicle to resolve a deep and acknowledged conflict on a recurring question of national importance concerning the Fifth Amendment's Double Jeopardy Clause. Widening a 5-3 split, the First Circuit held that an unlawful, vacated conviction nullifies the bar against a criminal defendant being twice put in jeopardy for the same offense. That holding turns on the interplay between three of this Court's decisions.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a new prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. In *United States v. Powell*, 469 U.S. 57 (1984), the Court held that, in a single trial,

the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if the conviction is logically inconsistent with the acquittal. And in *Yeager v. United States*, 557 U.S. 110 (2009), the Court held that when a jury acquits on one count and hangs on another, the acquittal retains preclusive effect under *Ashe* and prevents retrial of the hung count—even if the acquittal was logically inconsistent with the hung count. The question here is whether, for purposes of *Ashe*'s collateral estoppel analysis, a vacated conviction that is logically inconsistent with an accompanying acquittal is more like the valid conviction in *Powell* or the hung count in *Yeager*.

Federal courts of appeals and the States' highest courts are hopelessly divided on this question. The question is significant and recurring because prosecutors routinely pile on charges upon charges, either to obtain leverage against defendants or to increase the chances the jury will convict at least on something. The more charges, however, the more likely the trial will result in split, inconsistent verdicts and reversible trial errors. This case well illustrates the point.

The United States brought multiple bribery-related charges against petitioners Juan Bravo-Fernandez and Hector Martínez-Maldonado arising out of a single weekend trip to Las Vegas, worth perhaps a couple thousand dollars at most. The jury acquitted petitioners of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits federal program bribery, but illogically convicted them of the predicate § 666 offense. The First Circuit vacated the § 666 convictions because they rested on improper jury instructions that allowed for conviction on a gratuity theory, even though the statute prohibits only bribes. *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

The prosecutors sought to retry petitioners under § 666, even though petitioners already had served significant terms of imprisonment under the now-vacated convictions. Petitioners sought to bar re-prosecution, arguing that, under *Ashe* and *Yeager*, the acquittals for conspiracy and traveling depended on a finding that petitioners did not violate § 666, and the acquittals thus barred the government from re-prosecuting petitioners for violating § 666. Petitioners argued that *Powell* was irrelevant because it concerned valid convictions, not vacated convictions.

The First Circuit nonetheless extended *Powell* and held that petitioners' vacated, unconstitutional convictions deprived the acquittals of their otherwise preclusive effect and thus deprived petitioners of the protections of the Double Jeopardy Clause.

The decision below squarely conflicts with decisions of the Michigan, New Mexico, and Iowa Supreme Courts. It is irreconcilable with both *Yeager* and the hornbook rule that a vacated conviction is a legal nullity, ineffective for any purpose. And by eliminating the consequences that otherwise would flow from split verdicts, the First Circuit's decision creates perverse incentives for prosecutors both to bring duplicative charges and to advocate overreaching interpretations of criminal statutes. This Court's review is needed to resolve the conflict and correct the First Circuit's erroneous decision.

Certiorari is independently warranted to review the First Circuit's refusal to give preclusive effect to a judgment of acquittal the district court entered after receiving the court of appeals' mandate in the earlier appeal. The court below permitted the district court to retract that acquittal, adopting the precise test that this Court rejected in *Evans v. Michigan*, 133 S. Ct. 1069 (2013).

A. The Jury Issues a Split Verdict

On June 22, 2010, a federal grand jury indicted petitioners Bravo, the president of a private security firm in Puerto Rico, and Martínez, then a member of the Puerto Rico senate, on a series of bribery-related charges in connection with their trip to a Las Vegas boxing match in May 2005. The government alleged that Bravo paid some of Martínez's expenses for the trip—totaling perhaps a couple thousand dollars—in connection with Martínez's support of two senate bills related to the security industry in Puerto Rico. Pet. App. 3a, 61a-63a. The senate later overwhelming passed the bills by votes of 26-1 and 24-1. COA Joint App. 246, 250. The government nonetheless charged petitioners with a panoply of federal crimes: (1) committing federal program bribery, in violation of 18 U.S.C. § 666; (2) conspiring (a) to violate § 666 and (b) to travel in interstate commerce in aid of racketeering, in violation of 18 U.S.C. § 371; and (3) traveling in interstate commerce to further violations of (a) § 666 and (b) Puerto Rico bribery statutes, in violation of 18 U.S.C. § 1952(a)(3)(A). Pet. App. 3a-4a, 63a.

At the government's urging and over petitioners' objection, the court instructed the jury that § 666 criminalizes not only quid pro quo bribery, but also mere gratuities. *Id*. at 89a. The government's closing argument thus encouraged the jury to convict on the theory that Bravo paid Martínez a gratuity in violation of § 666. *Id*.

On March 7, 2011, after the three-week trial, the jury acquitted Bravo and Martínez of conspiring to violate § 666, and of traveling in interstate commerce to further a violation of § 666. But the jury convicted both petitioners of violating § 666. The jury also convicted Bravo of conspiring to travel in furtherance of "unspecified 'racketeering' activity," and traveling in furtherance of a violation of Puerto Rico bribery statutes, but acquitted Martínez of those offenses. *Id*. at 4a, 64a.

The district court granted Bravo's motion for judgment of acquittal on the charge of traveling to further a violation of Puerto Rico bribery statutes, because Puerto Rico repealed the statutes at issue before the petitioners went to Las Vegas. *Id*. at 110a-111a. The court explained that "Bravo cannot be convicted of conduct that was effectively not a crime at the time the offense took place." *Id*. at 111a (quoting district court).

The district court sentenced both petitioners to 48 months of imprisonment, and imposed a fine of $175,000 on Bravo and $17,500 on Martínez. *Id*. at 64a. The court denied petitioners' motions for bail pending appeal. Martínez began serving his sentence on March 1, 2012, and Bravo began serving his sentence on May 7, 2012. *Id*. at 64a n.4.

B. The First Circuit Reverses or Vacates All Convictions

In 2013, a panel of the First Circuit reversed or vacated each remaining conviction. Pet. App. 4a, 60a. First, the court reversed Bravo's conviction for conspiring to travel to further "unspecified 'racketeering'

activity," because the court found that the only potential predicates for this charge were invalid. *Id*. at 4a, 108a-120a.

Second, and key here, the court vacated Bravo and Martínez's convictions for violating § 666, because they resulted from unlawful jury instructions. *Id*. at 5a, 81a-105a. The court held that § 666 criminalizes only quid pro quo "bribes," not mere "gratuities." *Id*. at 102a-103a. The district court's instructions, however, "improperly invited the jury to convict both Martínez and Bravo for conduct involving gratuities rather than bribes." *Id*. at 104a. Likewise, "the government's closing argument improperly invited the jury to convict the [petitioners] on the proscribed 'gratuity theory,' and the evidence presented at trial could support a finding that the 'payment' Bravo gave and Martínez received constituted a gratuity." *Id*. The § 666 convictions thus "violate[d] due process." *Id*. at 105a (quoting *Fiore v. White*, 531 U.S. 225, 228 (2001)).

After oral argument but before issuing a decision, the First Circuit ordered the petitioners' release on bail. But in the meantime, Bravo served 8 months in prison and Martínez served 10 months in prison on the basis of the unlawful convictions. *Id*. at 64a n.4.

C. The District Court Issues and then Retracts a Judgment of Acquittal on All Counts

On October 25, 2013, two days after the First Circuit's mandate issued, the district court entered a line order granting Bravo and Martínez a "judgement of acquittal" on all counts, including "both [petitioners'] section 666 convictions." Pet. App. 5a-6a. Hours later, the government moved "to clarify" the court's judgment, stating that the First Circuit had

only vacated the § 666 convictions, not reversed them, and that the government planned to retry the petitioners on the standalone § 666 counts. *Id*. at 6a. That same day, the court "vacated" its line order, *id*., on the ground that the "order of acquittal" was "contrary to the Court of Appeals' mandate." *Id*. at 55a. The district court simultaneously issued a new order vacating the § 666 convictions. *Id*. Petitioners moved to reinstate the acquittals, arguing that the Double Jeopardy Clause barred the district court from retracting them. The court denied the motion. *Id*. at 54a-58a.

D. The Decision Below

Bravo and Martínez thereafter moved to preclude retrial of the § 666 charges under the Double Jeopardy Clause. They argued that *Ashe*'s and *Yeager*'s collateral estoppel analysis barred retrial on those charges, because the jury necessarily found that Bravo and Martínez did not violate § 666 in acquitting them of conspiring and traveling to violate § 666. The court denied the motions. Pet. App. 41a-53a.

A panel of the First Circuit affirmed. It was undisputed, the court acknowledged, that the jury's acquittals on conspiring to violate § 666 and traveling to violate § 666 necessarily depended on a finding that neither defendant violated § 666. *Id*. at 12a-15a & n.5. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Under an ordinary double jeopardy analysis, therefore, the Fifth Amendment would prohibit the government from re-prosecuting petitioners on the standalone § 666 charges. *See id*. at 444-46.

But the court of appeals held that the Double Jeopardy Clause did not apply. The court reasoned that the § 666 convictions—which were vacated because they were obtained unlawfully, in violation of the Due Process Clause—divested petitioners of their double jeopardy rights. Pet. App. 15a-20a. The vacated convictions, the court believed, were "part of what the jury decided at trial" and factored into the double jeopardy analysis. *Id*. at 18a-20a. Relying on *Powell*, the court thus concluded that an acquittal has no preclusive effect if the acquittal was logically inconsistent with a vacated conviction. *Id*.

The First Circuit then turned to *Yeager*'s holding that an acquittal retains its preclusive effect even if the acquittal is logically inconsistent with a hung count. *Id*. at 17a-18a. Because "a jury speaks only through its verdict," and not through hung counts, *Yeager* held, hung counts do not bear on what the jury necessarily decided in an *Ashe* analysis. *Id*. at 18a (quoting *Yeager*, 557 U.S. at 121-22). But the court of appeals concluded that vacated convictions are "meaningfully different" from hung counts, *id*. at 17a, because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Id*. at 18a. Because the court found the acquittals here logically inconsistent with the vacated convictions, the court refused to accord the acquittals preclusive effect. *Id*. at 20a-33a.

The First Circuit acknowledged that "a divided Michigan Supreme Court recently came to the opposite judgment," holding that vacated convictions, like hung counts under *Yeager*, are irrelevant to the collateral estoppel inquiry. *Id*. at 19a-20a (citing *People v. Wilson*, 852 N.W.2d 134 (Mich. 2014)). But the court of appeals found the dissent in the Michigan

case "more persuasive," and accordingly joined two other circuits and two state high courts that likewise hold that a vacated conviction can negate the preclusive effect of an acquittal. *Id*. at 19a-20a & nn.7-8.

The First Circuit then rejected petitioners' separate double jeopardy argument—that the district court's October 25, 2013 judgment of acquittal on all counts barred retrial on the § 666 counts. *Id*. at 37a-39a. The court below acknowledged the "well-established rule that 'the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation.'" *Id*. at 37a (quoting *Evans*, 133 S. Ct. 1074). But the court below permitted the district court to retract its acquittal here on the theory that the acquittal did not resolve any "factual element[] of the offense charged." *Id*. at 37a-38a (quotation marks omitted).

On July 27, 2015, the First Circuit denied rehearing. *Id*. at 134a-135a. Over the government's objection, the court stayed its mandate pending this Court's resolution of this petition. *Id*. at 136a-137a.

REASONS FOR GRANTING THE PETITION

I. The First Circuit Deepened an Acknowledged Split About the Collateral Estoppel Aspect of the Double Jeopardy Clause

This case presents an ideal opportunity for the Court to resolve a 5-3 split over whether a vacated, unconstitutional conviction can eliminate the preclusive effect of an acquittal under the Double Jeopardy Clause. The First Circuit's decision answering that question in the affirmative is also at odds with this Court's decision in *Yeager* and with the blackletter principle that vacated convictions are legal nullities

with no effect, in any context. The question is squarely presented, outcome determinative in this years-long prosecution, and of enormous significance to federal and state criminal defendants.

A. The Decision Below Conflicts With Decisions of the Supreme Courts of Michigan, New Mexico, and Iowa

1. The First Circuit acknowledged that its decision is directly contrary to the Michigan Supreme Court's decision in *People v. Wilson*, 852 N.W.2d 134 (Mich. 2014). Pet. App. 19a-20a. There, the jury convicted the defendant of felony murder but acquitted him of home invasion, which was the only predicate felony that could support the felony murder conviction. 852 N.W.2d at 136-37. The felony murder conviction was then vacated on appeal for unrelated reasons, and the court held that the acquittal for home invasion collaterally estopped the government from retrying the defendant for felony murder. *Id*. at 139-42.

Wilson held that this Court's decision in *Powell* was not implicated because *Powell* addresses the inconsistency within a single, valid verdict, not "the doctrine of collateral estoppel." *Id*. at 139-40. "It is instead the *Yeager* holding that demonstrates why the prosecution cannot re-try the defendant for felony murder," namely, that re-prosecuting the defendant for "felony murder would [] require the same factual basis as home invasion, for which he was previously and finally acquitted." *Id*. at 140. "The inconsistency in the defendant's initial jury verdict," *Wilson* continued, "does not alter this fundamental principle, given the subsequent appellate reversal of his convictions." *Id*. "[T]he defendant no longer stands convicted, not of anything, not at all." *Id*. "*Yeager* thus

controls: [t]he defendant's reversed felony-murder conviction here must be treated exactly as the hung counts were treated in *Yeager*." *Id*. at 141.

2. The court of appeals' decision below also conflicts with decisions of two other State high courts. Like the Michigan Supreme Court, the New Mexico and Iowa Supreme Courts have held that an acquittal precludes retrial of a vacated conviction, if the acquittal necessarily determined a fact that is an element of the vacated conviction.

In *State v. Montoya*, 306 P.3d 426 (N.M. 2013), the jury acquitted the defendant of second-degree murder, *id*. at 432, but convicted him of felony murder, *id*. at 429. The felony murder conviction was vacated on appeal based on unlawful jury instructions, *id*. at 429-31, and the New Mexico Supreme Court held that the collateral estoppel aspect of the federal Double Jeopardy Clause prohibited retrial, *id*. at 431-32. Under New Mexico law, the court explained, second-degree murder is a lesser-included offense of felony murder. *Id*. Thus, the defendant, "having been acquitted of second-degree murder, is constitutionally protected from further prosecution for that offense," including "as a component of felony murder." *Id*. at 432 (citing *Ashe*, 397 U.S. at 446). And that was so even though the acquittal was by definition inconsistent with the initial, vacated conviction for felony murder. The acquittal retained its preclusive effect.

Similarly, in *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), the jury convicted the defendant of assault while participating in a felony but acquitted him of first degree theft, the only potential predicate felony. *Id*. at 807. The Iowa Supreme Court vacated the conviction for assault while participating in a

felony on a state law ground.[1] *Id*. at 815-16. The Court then concluded that the collateral estoppel aspect of the federal Double Jeopardy Clause prohibited retrial of that charge. *Id*. at 816 (citing *Ashe*, 397 U.S. at 442-46). "Here, it is clear that the jury has acquitted the defendant of the underlying predicate offenses. We find that collateral estoppel bars any subsequent retrial on the compound felony charge because the factual issues of guilt on the predicate felonies have been authoritatively determined." *Id*. In short, in Iowa, the fact that acquittals conflict with vacated convictions does not deprive them of their preclusive effect.[2]

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[1] The court vacated the conviction because it concluded that, under Iowa law, inconsistent verdicts rendered in the same trial "undermine[]" "our confidence in the outcome of the trial." *Id.* at 815. In that respect, the court diverged from this Court's decision in *Powell*. But the decision to vacate under state law did not affect the court's analysis of the separate question presented in this case: whether the vacated conviction could be retried under the federal collateral estoppel principles in *Ashe*. Other state courts that diverge from *Powell* and vacate inconsistent convictions under state law have held that the vacated conviction *does* deprive the acquittal of preclusive effect. *E.g.*, *DeSacia v. State*, 469 P.2d 369, 379-81 (Alaska 1970).

[2] In addition to the cases from Michigan, New Mexico, and Iowa, the California Supreme Court assumed without deciding that an acquittal could bar a retrial on a vacated count, but held that the acquittal did not necessarily determine any issue essential to a conviction on the vacated count. *People v. Santamaria*, 884 P.2d 81, 87-91 (Cal. 1994). The Delaware Supreme Court, applying Delaware law, held that an acquittal for conspiracy precluded a retrial of a vacated conviction for first degree murder on an accomplice theory, because the acquittal necessarily determined that the defendant was not an accomplice. *Banther v. State*, 884 A.2d 487, 495 (Del. 2005).

3. Departing from the Michigan, New Mexico, and Iowa decisions, the First Circuit below instead joined two other circuits and two other state high courts that hold that vacated convictions can divest defendants of the protections of the Double Jeopardy Clause. Pet. App. 19a (citing *United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985); *State v. Kelly*, 992 A.2d 776, 789 (N.J. 2010); *Evans v. United States*, 987 A.2d 1138, 1141-42 (D.C. 2010)).

Like the First Circuit, the New Jersey and D.C. high courts expressly extended *Powell* and rejected the application of *Yeager* adopted by the Michigan Supreme Court. *Kelly*, 992 A.2d at 785-86, 789; *Evans*, 987 A.2d at 1141-43. The Second and Fifth Circuit decisions pre-date *Yeager*. But as the First Circuit explained, by the time of the Second and Fifth Circuit decisions, both courts had already adopted the rule of *Yeager*, that hung counts are irrelevant to the *Ashe* analysis. Pet. App. 19a n.7. And the Second Circuit has continued to follow *Citron* after *Yeager*. *Id*. (citing *United States v. Bruno*, 531 F. App'x 47, 49 (2d Cir. 2013) (unpub.)).[3]

This Court should grant review to resolve the acknowledged conflict.

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[3] Beyond the cases the First Circuit cited for its side of split, the Alaska Supreme Court also has held that an inconsistent vacated conviction deprives an acquittal of its preclusive effect, at least where the conviction was vacated under state law because of the inconsistency. *DeSacia v. State*, 469 P.2d 369, 380-81 (Alaska 1970). But that decision predated *Yeager* and was at a time when Alaska had not otherwise adopted the principle later recognized in *Yeager*.

B. The Decision Below Conflicts With *Yeager* and Other Decisions of this Court

The First Circuit's decision is irreconcilable with this Court's decision in *Yeager*. And the decision violates the longstanding rule—reflected in numerous decisions of this Court and other courts of appeals—that vacated convictions are legal nullities for *all* purposes, including collateral estoppel. There is no principled reason to treat them differently for purposes of collateral estoppel under the Double Jeopardy Clause.

1. *Yeager* holds that a jury's acquittal bars a subsequent prosecution that depends on facts the acquittal necessarily decided in the defendant's favor, full stop. 557 U.S. at 119-20. That the same jury had hung on other counts, and that hanging on those counts was inconsistent with the acquittal, does not undermine the finality of the acquittal or withdraw its preclusive effect. *Id*. at 120. *Yeager* reasoned that the jury's "inability to reach a verdict [on the hung counts] . . . was a nonevent" because "a jury speaks only through its verdict." *Id*. at 120-21. "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*. at 124.

A straightforward application of *Yeager* bars reprosecution of the § 666 counts here. A vacated, unlawful conviction too is a "nonevent" that enjoys no respect as a matter of law or history. It "has been nullified." *Bullington v. Missouri*, 451 U.S. 430, 442 (1981). Like a hung count, a vacated conviction does *not* "bring[] to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Yeager*, 557 U.S. at 124 (quotation marks omitted). Quite the contrary, a vacated

conviction brings no finality whatsoever, because it no longer exists. If anything, a vacated conviction is *less* meaningful than a hung count. With a hung count, at least some jurors thought that the government had proven the determinative fact under the relevant law. With a conviction vacated for faulty jury instructions, one cannot say that *any* juror thought the government had proven *anything*.

Indeed, the First Circuit's decision vacating the § 666 convictions presumes that the faulty instructions potentially affected jurors' decisions. With proper instructions, the jury at a minimum might have hung on the § 666 counts, in which case *Yeager* would control. But the illegal jury instructions eliminated the possibility of a hung jury.

Nevertheless, the First Circuit below reasoned that under *Powell*, a vacated conviction eliminates the preclusive effect of an inconsistent acquittal for purposes of a subsequent prosecution. But *Powell* did not involve either a vacated conviction or a subsequent prosecution. *Powell* applied, rather, the longstanding rule on inconsistent verdicts—an acquittal does not undermine a *simultaneously rendered*, *valid* conviction. The Court reasoned that the valid, final judgment of conviction is entitled to respect because it is a final judgment. *Powell* thus does not mean that a valid conviction undermines the preclusive effect of an acquittal on *open* counts, nor does it suggest that an *invalid* conviction is entitled to any respect for purposes of a retrial.

As *Yeager* later explained: "*Powell* . . . declined to use a clearly inconsistent verdict [*i.e.*, the acquittal] to second-guess the soundness of another verdict [*i.e.*, the conviction]." 557 U.S. at 125. "[T]hen, *a fortiori*, a

potentially inconsistent hung count could not command a different result," *i.e.*, could not be used to second-guess the soundness of the acquittal whose preclusive effect was at issue in *Yeager*. *Id*. That analysis applies equally here: "*a fortiori*," a potentially inconsistent vacated judgment cannot "command a different result" and second-guess the soundness of the acquittal.

The court below declined to apply *Yeager*'s reasoning, noting that "while a vacated conviction, like a hung count, is not a final jury verdict, *Yeager* did not rely solely on a respect-for-finality rationale." Pet. App. 18a. But that analysis misconstrues both the Court's holding in *Yeager* and its underlying rationale. This Court said finality is the decisive issue: "We must determine whether the interest in preserving the finality of the jury's judgment on the [acquitted] fraud counts . . . bars a retrial on the insider trading counts." 557 U.S. at 118.

In any event, the decision below is equally inconsistent with *Yeager*'s discussion of the difficulty of deciphering hung counts, the aspect of *Yeager* the First Circuit thought more significant. The court below concluded that, although there is "no way to decipher what a hung count represents" because "a jury speaks only through its verdict," Pet. App. 18a (quoting *Yeager*, 557 U.S. at 121-122), "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken," albeit under an erroneous view of the law. *Id*. The notion that a jury "speaks" through an unconstitutional conviction secured through faulty instructions that has been vacated as contrary to due process is anathema to our legal system. Imagine if the jury had been told it could convict under a preponderance of the evidence

standard, or was wrongly instructed on all but one element of the offense. In any event, a vacated conviction is *not* a "jury decision." Rather, this Court repeatedly has stated that, when a conviction is vacated, "the slate [is] wiped clean." *Poland v. Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington*, 451 U.S. at 442)). Indeed, the First Circuit vacated the convictions in this case precisely because that court could not say "with fair assurance" that the jury had agreed that petitioners were guilty under the correct understanding of § 666. Pet. App. 104a-105a.

The court below theorized that a vacated conviction strips an acquittal of its preclusive effect because the vacated conviction "may still suggest that an acquittal with which that conviction conflicts was the result of 'mistake, compromise, or lenity.'" *Id*. at 18a (quoting *Powell*, 469 U.S. at 65). But that notion did not carry the day in *Yeager*. Where an acquittal rests on a factual finding that logically required an acquittal on a hung count, one can equally say that "the conflicting dispositions are irrational—the result of 'mistake, compromise, or lenity.'" 557 U.S. at 132 (Scalia, J., dissenting) (quoting *Powell*, 469 U.S. at 65).

2. Beyond *Yeager*, the First Circuit's decision runs headlong into the hornbook rule that, when a conviction is vacated because it was obtained in violation of the Constitution, the conviction has "been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *see Bullington*, 451 U.S. at 442 (same). But here, the court invoked a conviction that violated the Due Process Clause to deprive petitioners of the protections of the Double Jeopardy Clause. That holding has dangerous implications that independently warrant this Court's review.

Across a variety of contexts, courts refuse to give effect to an invalid judgment, especially where that judgment is constitutionally defective. Most notably, "a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). If a criminal judgment is found unconstitutional, even on "grounds having no bearing on the validity of the fact-findings," that "reversal . . . vacates the judgment entirely, technically leaving nothing to which [courts] may accord preclusive effect." *Id*. When a criminal defendant "won his appeal and the judgment was vacated, all [adverse] factual determinations were vacated with it, and their preclusive effect surrendered." *Id*. at 444-45. The Seventh Circuit likewise has held that a vacated judgment is "a nullity and was hardly admissible" even as *evidence* supporting the formerly victorious party in a subsequent proceeding. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 864 (7th Cir. 1974).

Other courts of appeals are in accord. *See 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 appeal has no estoppel effect in a subsequent proceeding."); *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992) (same).

The rule that vacated convictions have no collateral estoppel effect is merely one example of a categorical, equally well-settled rule: a "vacated conviction [may not] be used to the defendant's detriment." *Wilson*, 852 N.W.2d at 141 n.5. A vacated conviction may not be used to impeach a criminal defendant. *United States v. Russell*, 221 F.3d 615, 622 (4th Cir. 2000). A

vacated conviction may not be used to enhance a sentence. *Johnson v. United States*, 544 U.S. 295, 303 (2005). A vacated conviction may not be used as the predicate for a felon-in-possession charge. 18 U.S.C. § 921(a)(20). "[T]he vacatur of a conviction because of a constitutional, statutory, or procedural defect in the underlying criminal proceedings [means] there is no longer a 'conviction' for immigration purposes." *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010).

In this case, the First Circuit reasoned that, though a "vacated conviction has been 'nullified,'" Pet. App. 16a (quoting *Bullington*, 451 U.S. at 442), "the 'fact of the conviction'" remains, "[a]nd it is the 'fact of the conviction,' and not its 'attendant legal disabilities,' that is relevant to the *Ashe* analysis." *Id.* (quoting *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004)) (citation omitted). But it is not the "fact of the conviction" that the First Circuit took into account. It was the underlying factual determinations the court of appeals held were reflected in the vacated convictions. That is why the court devoted 20 pages of its opinion to exploring what the jury "necessarily decided" when it convicted the petitioners on the basis of unlawful instructions. *Id.* at 20a-33a. Reciting the "fact of the conviction" would have taken one sentence. And it is cold comfort to tell a defendant that his vacated conviction is not being used to impose any "attendant legal disabilit[y]," *id.* at 16a, when the vacated conviction is the sole reason that he remains exposed to a criminal charge carrying a 10-year sentence.

Under the First Circuit's rule, the government may retry petitioners *only* because the government previously obtained illegal convictions based on illegal

jury instructions. This holding raises serious due process concerns, casts doubt on well-settled precedent declaring illegal convictions to be nullities, and creates perverse incentives for the government in future cases to pile on duplicative charges in the hopes that one of them will stick (even if later reversed).

C. The Question Presented Is Important and Recurring, and this Case Is an Ideal Vehicle

The Double Jeopardy Clause "embodies . . . vitally important interests," and this Court accordingly has "decided an exceptionally large number of cases interpreting" it. *Yeager*, 557 U.S. at 117. And as the First Circuit recognized, "[t]his appeal raises important . . . issues." Pet. App. 2a.

1. The question whether an unlawful conviction deprives a lawful acquittal of its preclusive effect is a matter of immense significance to criminal defendants and to the administration of justice in this country. This Court has recognized that the "extraordinary proliferation of overlapping and related statutory offenses" has made it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. One study has found that Congress creates 500 new crimes per decade. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008). The collateral estoppel doctrine prevents "the potential for unfair and abusive reprosecutions" enabled by this multiplicity of statutory offenses. *Ashe*, 397 U.S. at 445 n.10.

Exacerbating the issue is Congress's penchant for enacting broadly-worded criminal prohibitions and the government's penchant for pushing interpretations even broader than Congress imagined. The government frequently wins convictions under graspingly expansive theories that are later rejected on appeal, forcing defendants to undergo the expense and anxiety of a second trial premised on a proper interpretation of the statute. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015) (Sarbanes-Oxley did not prohibit destruction of fish); *Bond v. United States*, 134 S. Ct. 2077 (2014) (statute implementing chemical weapons treaty did not cover domestic dispute); *Skilling v. United States*, 561 U.S. 358 (2010) (honest services fraud statute did not reach beyond bribes and kickbacks); *Cleveland v. United States*, 531 U.S. 12 (2000) (federal mail fraud statute did not cover state license applications).

This prosecution exemplifies both problems. The allegedly criminal conduct in this case was a single trip to Las Vegas, worth perhaps a couple thousand dollars. Pet. App. 62a-63a. On the basis of the trip the government charged Bravo and Martínez with multiple felonies: federal program bribery, traveling in interstate commerce in aid of federal program bribery, conspiring to commit federal program bribery, and conspiring to travel in interstate commerce in aid of federal program bribery, not to mention additional counts alleging violations of *repealed* Puerto Rico statutes.

Simultaneously, and over petitioners' vehement objections, the government sought instructions permitting the jury to convict petitioners of federal program bribery under a gratuity theory, rather than a bribery theory. The government argued the gratuity

theory to the jury in closing, and won a conviction based on that unlawful theory. *Id*. at 104a.

Absent intervention by this Court, the rule adopted by the First Circuit will encourage prosecutors simultaneously to overcharge and to push for far-reaching interpretations of criminal statutes, as the prosecutors did here. Prosecutors will overcharge as a form of insurance against the possibility of an acquittal on any particular count. They know that if they do, the odds are in their favor: Excluding defendants whose charges are dismissed pre-trial, 99.6% of federal criminal defendants in this country are convicted.[4] And prosecutors will push for broad interpretations of criminal statutes knowing that if their interpretation is rejected on appeal, they can simply retry the case—this time with the "opportunity to hone [their] presentation on those issues which have already been decided against" them. *United States v. Bailin*, 977 F.2d 270, 277-78 (7th Cir. 1992). From the government's perspective, trial becomes a coin toss where it is heads I win, tails I get a do-over.

Permitting the government to have multiple bites at the apple also increases the likelihood of wrongful convictions of the innocent. *Green v. United States*, 355 U.S. 184, 187-88 (1957). In this case, for example, the jury necessarily determined that petitioners *did not commit bribery*—the crime the government now wants to retry. Pet. App. 12a-15a n.5. Yet the First Circuit gave the government another chance because the government brought duplicative charges and won an unlawful conviction under an unlawful theory.

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[4] Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download.

Letting the decision below stand sanctions and rewards the government's abusive charging decisions.

2. The question presented recurs frequently. Beyond the courts in the 5-3 split, numerous decisions of federal district courts and lower state courts likewise have grappled with the question whether an acquittal precludes retrial of a vacated charge that depends on facts necessarily decided by the acquittal.[5]

Notably, the issue is recurring in large part because lower courts are in disagreement over the interplay between three decisions of this Court—*Ashe*, *Yeager*, and *Powell*. This Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Shapiro et al., Supreme Court Practice 254 (10th ed. 2013). Only this Court can clarify how

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[5] *See, e.g.*, *United States v. Cabrera*, 804 F. Supp. 2d 1261, 1267-71 (M.D. Fla. 2011) (prohibiting retrial of money laundering counts after convictions were vacated for instructional error, because acquittals on money wire fraud counts necessarily determined that defendant was innocent of an essential element of the money laundering counts); *Madsen v. McFaul*, 643 F. Supp. 2d 962, 969-71 (N.D. Ohio 2009) (prohibiting retrial of kidnapping count after conviction was vacated based on ineffective assistance of counsel, because acquittal on rape charges decided a fact critical to the kidnapping charge); *Owens v. Addison*, No. 12-CV-0117-CVE-FHM, 2013 WL 1828049, at *8 (N.D. Okla. Apr. 30, 2013), *aff'd sub nom. Owens v. Trammell*, 792 F.3d 1234 (10th Cir. 2015) (holding that petitioner could be retried on vacated felony murder charge though he had been acquitted of the underlying felony); *People v. Hopkins*, No. 284631, 2009 WL 2244537, at *2 & n.2 (Mich. Ct. App. July 28, 2009) (vacating conviction for possession of a firearm during a felony for instructional error, and barring retrial because the defendant had been simultaneously acquitted of predicate felonies).

the Double Jeopardy Clause operates in this important context.

3. This case offers an ideal vehicle to consider the question presented. It is a direct appeal from a First Circuit decision that thoroughly examines the issue. This question is outcome-determinative. There is also no dispute that, in acquitting petitioners of conspiring to commit federal program bribery and traveling to commit federal program bribery, the jury necessarily determined that petitioners did not commit federal program bribery. Pet. App. 15a n.5 (the government "does not argue" that the acquittals rested on some other ground). In other words, if the Court sides with petitioners and holds that the vacated conviction is irrelevant to the collateral estoppel inquiry, this case ends.

Indeed, presumably recognizing that this case was a likely candidate for this Court's review, the First Circuit over the government's objection stayed its mandate, thereby prohibiting the government from attempting to retry this case pending this Court's decision on the petition for certiorari. This Court should grant the petition and resolve the division between federal circuit courts and state courts of last resort.

II. The Decision Below Permitting Retraction of a Judgment of Acquittal Conflicts With this Court's Decision in *Evans v. Michigan*

Certiorari is also warranted because this Court's precedent barred the district court from "withdrawing" its judgment of acquittal.

"[T]he Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation,'" such as an "'erroneous interpretations of governing legal principles.'" *Evans*, 133 S. Ct. at 1074 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), and *United States v. Scott*, 437 U.S. 82, 98 (1978)). "[T]he relevant distinction is between judicial determinations that go to 'the criminal defendant's lack of criminal culpability,' and those that hold 'that a defendant, although criminally culpable, may not be punished because of a supposed' procedural error,'" such as pre-indictment delay. *Id*. at 1077 (quoting *Scott*, 437 U.S at 98). The question is whether the trial court's action "'serve[s]' substantive 'purposes' or procedural ones." *Id*. at 1078 (quoting *Scott*, 438 U.S. at 98 n.11).

The court below held that the district court's judgment of acquittal was not "substantive" because it did not "'represent[] a resolution . . . of some or all of the factual elements of the offense charged.'" Pet. App. 37a-38a (quoting *United States v. Martin Linen Supply Co*., 430 U.S. 564, 571 (1977)). But *Evans* rejected this precise test, which "reads *Martin Linen* too narrowly, and it is inconsistent with our decisions since then." *Evans*, 131 S. Ct. at 1077.

The First Circuit below never evaluated whether the district court's acquittal turned on a "procedural" error, as *Evans* requires, and it plainly did not. The First Circuit's decision in the first appeal reflected a substantive determination that "the jury explicitly rejected allegations that either the conspiracy or the Travel Act conduct implicated § 666." Pet. App. 120a. The court of appeals did not rule for petitioners on the basis of any "procedural" issue. And the order

acquitting petitioners reflected the district court's reading of the substantive determination in the first appeal. Even "erroneous interpretations of governing legal principles" still trigger Double Jeopardy. *Evans*, 133 S. Ct. at 1074.

To the extent the district court's judgment of acquittal may fall somewhere between what the Court has described as "substantive" versus "procedural," the Court should grant review to provide guidance for future cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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