No. 22-721

In the Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil-rights laws. The ACLU of Georgia is a statewide affiliate of the national ACLU, with thousands of members throughout

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

the state. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court, both as counsel representing parties and as *amicus curiae*, including cases involving the rights of criminal defendants, and the jury trial right in particular.

This case presents a question of great importance to *amici* because the Double Jeopardy Clause provides a critical safeguard for the jury and the accused, and *amici* have an interest in ensuring that protection remains inviolate.

INTRODUCTION & SUMMARY OF ARGUMENT

The "most fundamental rule in the history of double jeopardy jurisprudence" is that acquittals are inviolate, no matter the reason behind them. *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (citation omitted). No judge can overturn an acquittal. And no prosecutor can retry a defendant on the acquitted charge. But not, apparently, in Georgia. In this case, the Georgia Supreme Court vacated an acquittal, as well as two convictions, because it viewed the jury's verdicts as inconsistent, and therefore "valueless." As a result, Damian McElrath faces retrial on a charge for which he was acquitted. That judgment, however, was not the Georgia Supreme Court's to make.

The bright-line rule concerning acquittals exists for a reason: to protect the jury's structural role in the criminal system. The jury stands between the accused and the power of the State, preventing judges or prosecutors from wielding the criminal sanction unless a jury of the accused's peers agrees. The jury checks judges and prosecutors through its acquittal power,

and out of respect for the jury's sovereignty and the individual's right to a jury trial, juries have "unreviewable power" to acquit, "even for impermissible reasons." *Smith v. United States*, 143 S. Ct. 1594, 1608 (2023) (citation omitted).

But that power would mean nothing if it could be circumvented by judges dissatisfied with the verdict. The Framers therefore sought to fortify the jury through the Double Jeopardy Clause. By making acquittals final, the Clause allows the jury to bind the hands of judges and prosecutors, and to ensure that defendants cannot be retried because those officials disagree with the jury's determinations. By virtue of the Clause, a jury can mark the end of the matter.

Only limited exceptions sit on the other side of this line, where finality does not attach, and retrial is permitted. Those exceptions include certain court-ordered mistrials before the jury has actually decided guilt or innocence, such as a mistrial due to a procedural issue or juror deadlock. In both circumstances, the jury right is not undermined by a retrial.

Those circumstances are not these circumstances. Inconsistent verdicts, like the ones at issue here, have never fallen on the same side of the line as mistrials. Far from it. The finality of an acquittal does not depend on whether a judge believes it can be reconciled with a different verdict rendered by the same jury in the same case. Any perceived inconsistency among the jury's decisions at most affects the preclusive power of the acquittal. It does not remove the verdict from the Double Jeopardy Clause's protections.

The Court need only reaffirm these well-established principles to resolve this case. A jury of McElrath's peers acquitted him of one charge and convicted him of two others. In vacating the acquittal due to inconsistencies (or "repugnancies") that it perceived among the jury's verdicts, the Georgia Supreme Court crossed a line. It transformed the logic courts use to deny certain acquittals preclusive effect into a reason to deny them finality, circumventing the most fundamental rule of the Double Jeopardy Clause. If left standing, this new exception threatens to erode the bright-line rule regarding acquittals, undermine the structural role of the jury, and create difficult line-drawing problems. The Georgia Supreme Court's decision should be reversed.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PROHIBITS REVIEWING OR RETRYING CHARGES AFTER AN ACQUITTAL.

The Double Jeopardy Clause makes acquittals unreviewable, thereby barring retrial on the acquitted charge. This bright-line rule protects the role of the jury in the criminal system. The limited exceptions to this rule in the context of certain mistrials do not undermine the jury's essential role. But allowing judges to overrule acquittals on the ground that they are inconsistent with other verdicts, as the Georgia Supreme Court did here, would directly undermine the jury's role and the defendant's right not to be placed in jeopardy twice for the same offense.

A. A Defendant Cannot Be Retried After an Acquittal, No Matter the Jury's Basis for Acquitting.

The Double Jeopardy Clause requires that no "person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Under the Clause, after a jury has acquitted a defendant for a certain offense, that finding terminates jeopardy and ends the proceedings completely. *United States v. Scott*, 437 U.S. 82, 91-92 (1978). The acquittal cannot be appealed; it cannot be vacated; and the defendant cannot be retried for the same offense. *Id.*[2]

That acquittals are inviolate is the "most fundamental rule in the history of double jeopardy jurisprudence." *Sanabria*, 437 U.S. at 64 (citation omitted). And the application of this rule does not depend on a jury's reason for acquitting. To the contrary, it attaches to acquittals that are the "result of compromise, compassion, lenity, or misunderstanding of the governing law." *Bravo-Fernandez v. United States*, 580 U.S. 5, 11 (1984). It even covers acquittals that result from "impermissible reasons," *Harris v. Rivera*, 454 U.S. 339, 345-46 (1981), or "egregiously erroneous foundation[s]," *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). On this, the Court has been crystal-

[2] The Double Jeopardy Clause applies to the States through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969). It also "protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (citation omitted). Because this case concerns the vacating of an acquittal specifically, we focus on the Clause's protections of acquittals alone.

clear—an acquittal, whatever the reason behind it, is "unreviewable." *Harris*, 454 U.S. at 345-46.

This Court has repeatedly applied the principle that acquittals are unassailable without reservation. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 24 (acquittal "forever bars" retrial); *Evans v. Michigan*, 568 U.S. 313, 319 (2013) (treated "absolutely"); *Yeager v. United States*, 557 U.S. 110, 122-23 (2009) ("unassailable"); *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988) ("absolute immunity from further prosecution for the same offense"); *United States v. Powell*, 469 U.S. 57, 63 (1984) ("unreviewable"); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) ("unequivocally prohibits a second trial"); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("absolutely shields the defendant from retrial"); *Burks v. United States*, 437 U.S. 1, 14 (1978) ("we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision"); *Ludwig v. Massachusetts*, 427 U.S. 618, 621 (1976) ("terminates the proceedings"); *United States v. Jorn*, 400 U.S. 470, 484 (1971) (acquittal "end[s] the dispute then and there"); *Green v. United States*, 355 U.S. 184, 188 (1957) ("a verdict of acquittal is final"); *Kepner v. United States*, 195 U.S. 100, 133 (1904) ("final and conclusive"); *United States v. Ball*, 163 U.S. 662, 671 (1896) ("could not be reviewed, on error or otherwise"); *Sparf v. United States*, 156 U.S. 51, 106 (1895) ("cannot be set aside").

Indeed, the Court takes this bright-line rule so seriously that it has applied the Double Jeopardy Clause's protections beyond the scope of the common law. *See, e.g.*, *Ball*, 163 U.S. at 671. This practice reflects the understanding that the Framers intended

the Clause to provide greater protections than its common-law precursors. *See* Petitioner's Br. at 30-35, *McElrath v. Georgia*, No. 22-721 (Aug. 29, 2023). In short, the Clause "attaches particular significance to an acquittal" by making it inviolate in all circumstances. *Scott*, 437 U.S. at 91.

B. Acquittals Must Be Treated Absolutely to Protect the Jury's Role.

A key reason for this bright-line rule affording acquittals absolute finality is to protect the essential function of the jury within the criminal system. For non-petty offenses, the Sixth Amendment entrusts the jury to decide guilt or innocence. The Fifth Amendment, through the Double Jeopardy Clause and its bright-line rule concerning acquittals, seals the deal.[3]

1. The Criminal Jury Stands Between the Accused and the Power of the State.

As enshrined in the Sixth Amendment, and as made applicable by the Fourteenth Amendment against the States, a defendant enjoys the right to a jury trial. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). When invoked, the right requires an impartial jury of the defendant's peers to unanimously find beyond a reasonable doubt that the prosecution has proven its case before the defendant can be convicted. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396-97 (2020).

This power to decide guilt and innocence cannot be overstated. It means that prosecutors cannot secure

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[3] Of course, the Clause serves other purposes as well, which is why, for example, it protects acquittals rendered by judges. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 466-67 (2005).

convictions of individuals unless a jury agrees with them. *Id.* And judges, for their part, cannot "override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977). The jury right prevents judges from sidestepping the jury and issuing directed verdicts of guilty, "no matter how overwhelming the evidence," *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); from instructing the jury to return a guilty verdict, *Rose v. Clark*, 478 U.S. 570, 578 (1986); or from using a special verdict form that allows the jury to decide the facts but not to apply the law to those facts, *United States v. Gaudin*, 515 U.S. 506, 513-14 (1995).

The jury thus "stands between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *Martin Linen*, 430 U.S. at 572. From this position, the jury guards against both "arbitrary or oppressive exercises of power by the Executive Branch," *Powell*, 469 U.S. at 65, and the threat of "judicial despotism" arising from "arbitrary punishments upon arbitrary convictions," *United States v. Booker*, 543 U.S. 220, 238-39 (2005) (quoting The Federalist No. 83 (Alexander Hamilton)). By insisting on "community participation in the determination of guilt or innocence," the jury right allows the community to provide an essential check against the power of the State. *Duncan*, 391 U.S. at 156.

Accordingly, the jury right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure" for the community itself. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). The Framers structured the jury to function as a

"political institution," as "one form of sovereignty of the people." Alexis de Tocqueville, 1 *Democracy in America* 283 (1835). When the jury renders a verdict, it is "not just the verdict of twelve men" but "the verdict of a pays, a 'country,' a neighborhood, a community." *United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960) (Friendly, J.). The jury's ability to speak through its verdict allows it to "inject the commonsense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 59 (2003).

In this way, the jury right is "meant to ensure [the people's] control in the judiciary," akin to how "suffrage ensures the people's ultimate control in the legislative and executive branches." *Blakely*, 542 U.S. at 306 (collecting sources). And out of respect for the jury's sovereignty, the jury has "unreviewable power" to acquit, "even for impermissible reasons." *Smith*, 143 S. Ct. at 1608 (citation omitted).

That feature flows from a key structural safeguard of the jury's sovereignty: when a jury votes to acquit, its decision cannot be "upset by speculation or inquiry into such matters." *Id.* (citation omitted). These protections are deeply rooted in historical practice and precedent. As this Court has explained, jury deliberations have long been considered "secret and not subject to outside investigation." *Yeager*, 557 U.S. at 122 (collecting cases); *accord Powell*, 469 U.S. at 67 ("Courts

have always resisted inquiring into a jury's thought processes.").[4]

At least two principles animate the use of these protective barriers. *First*, they ensure the community's willingness to participate in the process. The protections encourage jurors to engage in "full and frank discussion in the jury room," allow jurors to return "unpopular verdicts," and bolster "the community's trust" in the system itself—all of which would be undermined by inquiry and speculation. *Tanner v. United States*, 483 U.S. 107, 121 (1987). *Second*, these barriers prevent judges from usurping the defendant's jury right, which would be violated if judges could substitute their own explanations for the jury's acquittal. *Smith*, 143 S. Ct. at 1608; *Powell*, 469 U.S. at 66-67, 66 n.7; *Dunn v. United States*, 248 U.S. 390, 393-94 (1932).

The guarding of the jury's sovereign power to acquit from outside scrutiny is thus overinclusive by design. Although jurors take an "oath to follow the law as charged" and are "expected to follow it," they can and sometimes do render acquittals based on "compromise, compassion, lenity, … misunderstanding of the governing law," *Bravo-Fernandez*, 580 U.S. at 11, "impermissible reasons," *Harris*, 454 U.S. at 345-46, or "egregiously erroneous foundation[s]," *Fong Foo*, 369 U.S. at 143; *accord Green*, 355 U.S. at 188. But because the jury's acquittal cannot be upset by scrutiny

[4] Concerns of due process sometimes result in investigations into the jury and its verdict. But those exceptions involve issues with guilty verdicts, not acquittals. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017).

into whether such errors occurred, courts necessarily allow these practices to persist. *Smith*, 143 S. Ct. at 1608; *see United States v. Dotterweich*, 320 U.S. 277, 279 (1943) ("Juries may indulge in precisely such motives or vagaries."); *cf. Tanner*, 483 U.S. at 120 (explaining that although "post-verdict investigation[s]" may in some cases root out "irresponsible or improper juror behavior," it is doubtful "that the jury system could survive such efforts to perfect it"). Ultimately, when a jury acquits, "litigants"—and judges—simply "must accept the jury's collective judgment" for what it is. *Powell*, 469 U.S. at 67.

2. The Double Jeopardy Clause Protects the Jury's Ability to Check Prosecutorial and Judicial Power.

The Framers understood that due to the jury's tremendous power and important structural role, government actors might be tempted to evade and undermine it. *See Jones v. United States*, 526 U.S. 227, 247-48 (1999) (observing that "Americans of the [founding] period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion"). So they added additional constitutional protections to fortify it. *See United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834); Joseph Story, *Familiar Exposition of the Constitution of the United States* § 387, at 230 (1840). The Double Jeopardy Clause is one such protection.

The Double Jeopardy Clause protects the jury by affording "finality" to its "judgments." *Yeager*, 557 U.S. at 18-19. And that finality, in turn, protects the individual criminal defendant by guarding against the possibility that "the Government, with its vastly

superior resources, might wear down the defendant [with another trial] so that 'even though innocent, he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188). This rule saves individuals "additional 'embarrassment, expense and ordeal,'" and the need to "live in a continuing state of anxiety and insecurity" from the possibility of retrials. *Evans*, 568 U.S. at 319 (citation omitted). By virtue of the Clause, a jury can mark the end of the matter.

In providing this finality, the Clause forces judges and prosecutors to abide by the jury's verdict. *Accord Brown v. Ohio*, 432 U.S. 161, 165 (1977) ("The Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors."). For instance, the Clause prevents a judge from ever overturning an acquittal. *Martin Linen*, 430 U.S. at 572. And it prevents a prosecutor from securing "a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence," *Standefer v. United States*, 447 U.S. 10, 22 (1980); from securing appellate review of the acquittal, *id.*; or from conducting a do-over through a retrial on the same charges, *Bravo-Fernandez*, 580 U.S. at 9; *see also Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (explaining that the Clause forbids "treat[ing] the first trial as no more than a dry run for the second prosecution").

Only a bright-line rule concerning acquittals can guarantee the jury's critical role. It makes no sense to give judges and prosecutors, the very individuals subject to the jury's check, veto power over its exercise of it. Permitting these actors to override acquittals would undermine the purpose of entrusting questions of culpability to the jury. *Smith*, 143 S. Ct. at 1608. For the

jury's role to matter, it must "remain[] sacred and inviolate … from all attacks … which may sap and undermine it." *Jones*, 526 U.S. at 246 (quoting 4 Blackstone, *Commentaries on the Laws of England* *342-44 (1769)). Limiting the acquittal power would not just undermine the jury; it would threaten its structural role entirely.

C. This Court Has Recognized Only Limited Exceptions That Do Not Jeopardize the Structural Role of the Jury.

For all the reasons given, when the jury votes to acquit a defendant, the Double Jeopardy Clause's bright-line rule prevents a retrial. *Smith*, 143 S. Ct. at 1608. On the other side of this line, however, are situations in which a trial ends in a mistrial "on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused," such as when the jury deadlocks or a judge dismisses a case due to a procedural issue. *Id.* The Court has consistently allowed retrials in these circumstances, even when the dismissal is stylized as an "acquittal."

These exceptions are allowed because they do not undermine the structural role of the jury. For example, when a jury deadlocks, the jurors could not reach consensus, and were thus not able to cast a unanimous vote to acquit or convict the defendant. But a jury can only "speak[] through its verdict." *Yeager*, 557 U.S. at 121. Because a deadlocked jury has said nothing of a defendant's guilt or innocence, allowing retrials do not undermine its sovereignty. *Richardson v. United States*, 468 U.S. 317, 324 (1984).

Similarly, when a judge dismisses a case midtrial because of a procedural issue, such as improper venue, the case "was [not] actually submitted to the jury as a trier of fact." *Scott*, 437 U.S. at 99. In this respect, the defendant "had not been 'deprived' of his valued right to the first jury," and the jury had not performed its constitutional role of deciding guilt or innocence. *Id.* at 100. Rather, the State was deprived of "one *complete* opportunity" to secure a conviction unrelated to the defendant's guilt, so the Constitution allows it to try again from square one. *Id.* (emphasis added). Through the Double Jeopardy Clause, a jury can prevent a *second* prosecution. It cannot prevent a first.

In both circumstances, "no expectation of finality attaches" and retrials do not undermine the jury's essential role. But after the jury decides that the prosecution has failed to prove its case (for any reason at all) and votes to acquit the defendant, the case then crosses the line, and that verdict is protected absolutely.[5]

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[5] In *United States v. Ball*, this Court suggested that for an acquittal to be treated absolutely, the trial court must have had proper jurisdiction over the case. 163 U.S. at 670. In *Martinez v. Illinois*, however, the Court appeared to distance itself from this position, reversing a lower court's decision for "introduce[ing] confusion into what we have consistently treated as a bright-line rule: A jury trial begins, and jeopardy attaches, when the jury is sworn." 572 U.S. 833, 840 (2014). The Court acknowledged that "[s]ome commentators have suggested that there may be limited exceptions to this rule," including "where the trial court lacks jurisdiction," but the Court declined to address the "scope of any such exceptions." *Id.* at 840 n.3. In any event, those exceptions speak to when jeopardy attaches and when the jury can render a

D. Because Acquittals Cannot Be Questioned, Judges Cannot Override Them By Finding Them Inconsistent.

The finality of an acquittal does not depend on whether a judge believes it can be reconciled with a different verdict reached by the same jury. Accordingly, inconsistent verdicts have never been considered to fall on the same side of the line as mistrials. Any perceived inconsistency at most affects the preclusive power of the acquittal. It does not exempt the verdict from the Double Jeopardy Clause's ambit.

1. The Court Has Treated Inconsistent-Verdicts Acquittals Absolutely.

Inconsistent verdicts are a class of verdicts where a jury decides two or more counts in ways that are "irreconcilabl[e]." *Bravo-Fernandez*, 580 U.S. at 13. This includes inconsistency across counts concerning a single defendant or between defendants charged and tried together for the same offenses. *See Harris*, 454 U.S. at 345-46. This Court has encountered inconsistent verdicts on several occasions. And it has repeatedly reaffirmed that even where inconsistent, acquittals remain inviolate.

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valid acquittal. If the jury had no authority to render such a decision and thus had no authority to bind the hands of judges or prosecutors in the first instance, permitting a retrial does not undermine the jury's essential role. Nor is the jury undermined by courts restating a conviction on *appeal* after "a trial judge (or an appellate court) sets aside [the jury's verdict of guilty] and enters a judgment of acquittal." *Smith*, 543 U.S. at 467. In those circumstances, the case returns to how the jury voted originally.

The Court first confronted inconsistent verdicts in *Dunn v. United States*. There, the jury acquitted a defendant "for unlawful possession of intoxicating liquor" and "for the unlawful sale of such liquor," but found him guilty "for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor." 284 U.S. at 391-92. The defendant argued that the conviction should be vacated because it was inconsistent with the acquittals.

The Court rejected this argument. As it explained, "[t]he most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* at 393. As to the acquittal, the Court reasoned, "[w]e interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Id.* The Court added that although other reasons may have driven the jury toward inconsistency—such as "compromise" or even "mistake"—the verdicts could not "be upset by speculation or inquiry into such matters." *Id.* at 394. For these reasons, the Court held that inconsistency between an acquittal and a conviction is not a basis for overturning the conviction. The acquittal remained inviolate, so all three verdicts stood unchanged.[6]

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[6] Although the Double Jeopardy Clause does not *require* vacating a conviction because it is inconsistent with an acquittal, that constitutional floor does not prohibit states, like Georgia here, from adopting their own rules that are more protective of defendants' rights and *allow* for such vacatur of a guilty verdict

Fifty-three years later, this Court reaffirmed *Dunn* and elaborated on the rationales supporting its holding.[7] In *United States v. Powell*, the defendant was charged with 15 violations of federal law. 469 U.S. at 59. The jury voted to acquit her of some of the substantive drug offenses but found her guilty of using the telephone to facilitate those offenses. *Id.* at 59-60. She thus challenged the convictions on appeal, arguing that because they were inconsistent with the jury's findings on the acquitted charges, issue preclusion should bar "acceptance of [the] guilty verdict[s]." *Id.* at 64.

This Court disagreed. In doing so, it interpreted *Dunn* as establishing two "alternative" justifications for why courts are not required to vacate convictions that are part of facially inconsistent verdicts. *Id.* at 65-66.

The first rationale reflected "a prudent acknowledgement of a number of factors." *Id.* at 65. Those factors included that: (1) issue preclusion is "predicated on the assumption that the jury acted rationally," *id.*

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when it conflicts with an acquittal. *See, e.g.*, *McNeal v. State*, 44 A.3d 982, 989-90, 993 (Md. 2012) (disallowing legally inconsistent verdicts and citing cases from Florida, New York, Massachusetts, and Iowa that do the same); *see also Martin Linen*, 430 U.S. at 573 ("The trial judge is … barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused," but "[s]uch a limitation … has never inhibited his ruling in favor of a criminal defendant.").

[7] In the interim period, the Court extended *Dunn* to inconsistent verdicts between defendants in joint trials, *Dotterweich*, 320 U.S. at 279, and to inconsistent verdicts resulting from bench trials, *Harris*, 454 U.S. at 345-48.

at 68; (2) when a jury returns inconsistent verdicts, the jury did not act "rationally" because "either in the acquittal or the conviction the jury did not speak their real conclusions," *id.* at 64; (3) courts cannot upset the verdicts through speculation or investigation to know what the jury "really meant," *id.* at 65, 68; (4) it is impossible to know which party benefitted from the inconsistency because the jury may have "properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense," *id.* at 65; and (5) since the Government "has no recourse" to correct the jury's error because it cannot "appeal or otherwise upset [the] acquittal[s] under the Double Jeopardy Clause," it makes little sense to give the defendant the benefit of inconsistency as a matter of course, *id.* Taken together, these factors counseled against granting the acquittals preclusive effect.

Next, the Court turned to *Dunn*'s "alternative rationale," which relied on the understanding that "inconsistencies often are a product of jury lenity." *Id.* The Court emphasized that this rationale "has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id.* at 65-66 (collecting sources). However, given that the burden of "the exercise of lenity falls only on the Government" because it cannot challenge an acquittal, this rationale also suggested that the acquittals should not have preclusive effect. *Id.*

Both rationales weighed against giving preclusive effect to acquittals that are part of inconsistent

verdicts. But both rationales also reaffirmed and indeed were premised on the notion that the Double Process Clause prohibits the government from challenging acquittals.

In *Yeager v. United States*, the Court confronted the issue of whether acquittals that are paired with "potentially inconsistent hung count[s]" could have preclusive effect. 557 U.S. at 125. This time the Court held that they could. Because only "a jury's decisions, not its failures to decide," identify "what a jury necessarily determined at trial," the hung counts have "no place in the issue-preclusion analysis." *Id.* at 122. Accordingly, the acquittals were the only decisions that reflected the jury's opinions, so they were preclusive for subsequent retrials on the deadlocked charges. *Id.* And for good measure, the Court reiterated once again that the acquittals were "unassailable." *Id.* at 123.

Finally, in *Bravo-Fernandez v. United States*, the Court addressed whether *Dunn* applied when the convictions that were part of the inconsistent verdicts are later vacated on appeal. 580 U.S. at 9. The Court held that it did: the "convictions' later invalidation on an unrelated ground does not erase or reconcile [the initial] inconsistency," and therefore could not erase the jury's irrationality in rendering the inconsistent verdicts. *Id.* at 21. Once again, the Court reiterated that although the acquittal was not preclusive, the government was "forever bar[red]" from retrying that count. *Id.* at 24.

Together, these cases establish four governing principles regarding inconsistent verdicts. *First*, consistency among verdicts is not necessary and any inconsistency is simply understood to reflect the jury

performing its sovereign role—and its ability to acquit defendants for any reason—as it works through multi-count indictments. *Second*, acquittals that are part of inconsistent verdicts are not automatically preclusive for the corresponding convictions. *Third*, an acquittal is preclusive when paired with a "potentially inconsistent hung count." And *fourth*, and most relevant here, acquittals that are part of inconsistent verdicts are inviolate. Whatever happens with the convictions or the hung charges, the acquittals cannot be appealed; they cannot be disturbed; and individuals cannot be retried for the same offenses.

2. Affording Finality to Inconsistent-Verdicts Acquittals Protects the Jury's Essential Role.

Protecting acquittals that are part of inconsistent verdicts is vital to preserving the jury's essential function. As explained, the jury right brings the community into the culpability decision. Those values can often drive juries to compromise or to provide lenity in the form of acquitting a defendant of some charges but finding him guilty of others. *Powell*, 469 U.S. at 64. Barring review of acquittals on grounds of inconsistency ensures that the jury can do both.

Regarding compromise, because the Sixth Amendment requires unanimity, juries will often compromise in "the difficult cases," especially when they wish to "avoid … all-or-nothing verdict[s]." *Id.* at 66. "[I]gnoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict that the Sixth Amendment requires." *Maybury*, 274 F.2d at 903 (Friendly, J.).

Regarding lenity, allowing inconsistent verdicts "reaffirms the jury's power to exercise leniency by limiting punishment to sentence upon only one of many counts." Alexander M. Bickel, *Judge and Jury–Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649, 651-52 (1950). As *Powell* explained, this practice allows the jury to perform its check against the power of the State. 469 U.S. at 64. "To deny the jury a share in this endeavor is to deny the essence of the jury's function." Bickel, 63 Harv. L. Rev. at 651.

Moreover, the practice of tailoring a verdict across different counts to ensure the verdict reflects the community's values has longstanding support in the common law. As this Court has recognized, although juries often used "flat-out acquittals" to check the power of the State, juries also performed that check in other ways. *Jones*, 526 U.S. at 245. For example, juries often voted to render "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." *Id.* (quoting 4 Blackstone at *238-39). Through this practice, juries "devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant." *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.5 (2000).

The utility of this practice does not change when the jury's attempt to inject such values into the process manifests as an inconsistency. As Judge Friendly once explained, "[t]he vogue for repetitious multiple count indictments may well produce an increase in

seemingly inconsistent jury verdicts, where in fact the jury is using its power to prevent the punishment from getting too far out of line with the crime." *Maybury*, 274 F.2d at 902. Although inconsistencies may not always stem from lenity or compromise, courts cannot inquire into the reasoning behind them to vacate the acquittal. Protecting acquittals that are part of inconsistent verdicts thus respects the jury's ability to ensure the criminal sanction reflects the community's values.

II. THE GEORGIA SUPREME COURT'S DECISION VIOLATES THESE PRINCIPLES.

Under these well-established principles, the Georgia Supreme Court's decision is wrong on all counts. Its decision violates the Double Jeopardy Clause's bright-line rule concerning acquittals, and if left standing, will threaten the jury's constitutional role in the criminal legal system and result in significant line-drawing problems.

A. The Georgia Supreme Court's Decision Violates the Double Jeopardy Clause.

In the trial below, a prosecutor presented three counts to the jury: malice murder, felony murder, and aggravated assault. The jury acquitted Damian McElrath of the malice murder charge by finding him not guilty by reason of insanity. On the remaining counts, the jury found him guilty but mentally ill. On appeal, the Georgia Supreme Court vacated the acquittal and the convictions. Neither the court's justification for why vacating the acquittal did not run afoul of the Double Jeopardy Clause nor the Georgia

Solicitor General's alternative explanation in this Court can be squared with the principles outlined above.

Take the Georgia Supreme Court's rationale first. As an initial matter, the court vacated the verdicts because they were "repugnant." Under Georgia law, so-called repugnant verdicts arise when the jury "make[s] affirmative findings shown on the record that cannot logically or legally exist at the same time." *McElrath v. State*, 839 S.E.2d 573, 579 (Ga. 2020). Thus, they are simply a kind of "inconsistent" verdicts. In this case, the jury's repugnant findings were that McElrath was "simultaneously … both sane (guilty but mentally ill) and insane (not guilty by reason of insanity) during the single episode" in which the alleged crimes took place. *McElrath v. State*, 880 S.E.2d 518, 520 (Ga. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

In the Georgia Supreme Court's view, these findings rendered the verdicts "valueless" and legal "nullit[ies]" because McElrath "cannot be said with any confidence to have been found not guilty based on insanity any more than it can be said that the jury made a finding of sanity and guilt with regard to the same conduct." *Id.* at 521. Given that "[t]here is no way to decipher what factual finding or determination they represent," the jury's verdicts "failed to result in an event that terminated jeopardy, akin to a situation in which a mistrial is declared after a jury is unable to reach a verdict." *Id.* at 522. On this basis, the court vacated the verdicts, including the acquittal.

But as this Court has established, any inconsistency, or "repugnancy," between the jury's verdicts

does not affect the acquittal's finality under the Double Jeopardy Clause. Even where verdicts are "irreconcilabl[e]," the acquittal remains inviolate. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 24; *Powell*, 469 U.S. at 65. The only significance to the inconsistency is that the acquittal lacks preclusive effect. And repugnant verdicts, where the jury makes affirmative findings that cannot exist at the same time, are merely a subset of inconsistent verdicts, which this Court has defined to cover "irreconcilabl[e]" verdicts that turn on "the same issue of ultimate fact." *Bravo-Fernandez*, 580 U.S. at 14. The presence (or absence) of on-the-record factual findings does not change the core conflict between the acquittal and the conviction.

The Georgia Supreme Court vacated the *acquittal* because there "was no way to decipher" what the jury really meant by its verdicts, using the same analytical reasoning this Court has deployed to justify letting a jury's *conviction* stand when it is part of inconsistent verdicts. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 13 ("When a jury returns irreconcilably inconsistent verdicts, … one can glean no more than that 'either in the acquittal or the conviction the jury did not speak their real conclusions.'" (citation omitted)); *see also Powell*, 469 U.S. at 64; *Dunn*, 284 U.S. at 393-94. But as established above, that fact does not permit the court to second-guess a verdict of acquittal.

The Georgia Supreme Court's attempt to analogize these circumstances to mistrials due to juror deadlock is unavailing. Unlike those situations where the jury fails to reach a verdict, here the prosecution had its "one complete opportunity" to secure a conviction on the acquitted count. *See Scott*, 437 U.S. at 99. In fact,

the jury expressly passed on guilt, reaching the culpability question on three charges and voting to acquit McElrath of one of them. In those circumstances, the Clause automatically prevents both prosecutors from pursuing a second prosecution on the acquitted charge and judges from upsetting that verdict in any regard.

In its brief in opposition to certiorari in this Court, the Georgia Solicitor General does not defend the Georgia Supreme Court's rationale. But the Solicitor General's attempt to explain and defend the court's decision fares no better.

The Georgia Solicitor General relies principally on the "mutually exclusive affirmative factual findings on the record" that are necessary for verdicts to qualify as "repugnant." Br. in Opp. at 13, *McElrath v. Georgia*, No. 22-721 (Apr. 5, 2023). Those affirmative factual findings, according to the Solicitor General, mean that no one is "left to wonder as to the jury's reasons for returning inconsistent verdicts; the jury's reasoning—or, more accurately, its *error*—is 'transparent' in the record." *Id.* at 14. Because the error is "transparent," it reasons, a court can vacate the acquittal without running afoul of the Double Jeopardy Clause. *Id.* at 14-15.

But this explanation fails for two reasons. To start, even assuming the error is apparent and no speculation or investigation into the jury's verdict is necessary, the error "does not alter [the acquittal's] essential character." *Evans*, 568 U.S. at 318. Juries are free to render acquittals based on legal errors. The Double Jeopardy Clause, by the nature of its bright-line rule, protects their verdicts in any event. *E.g.*, *Smith*, 143 S. Ct. at 1608; *Green*, 355 U.S. at 188.

Second, on-the-record factual findings say nothing of *how* or *why* the jury reached them. As this Court has explained repeatedly, the jury could have reached what appears to be an apparent (or transparent) "error" between two inconsistent verdicts through lenity, compromise, or mistake. *Bravo-Fernandez*, 580 U.S. at 23; *Powell*, 469 U.S. at 65; *Dunn*, 284 U.S. at 393. What a court cannot do is dictate the *kind* of error the jury committed as a reason to vacate an acquittal.

And the bar on judges examining the reasoning behind an acquittal is not just about avoiding speculation; it prevents judges from "usurping the jury right." *Smith*, 143 S. Ct. at 1608. When a judge reviews how or why a jury reached its verdicts, she substitutes her own reasoning for the jurors—and does so to the detriment of the accused. *Martin Linen*, 430 U.S. at 572-73. Such review impermissibly places the judge over the jury with respect to the ultimate decision of culpability. *E.g.*, *Powell*, 469 U.S. at 66; *Dunn*, 284 U.S. at 394.

At bottom, affirming the Georgia Supreme Court's decision would require crossing not one, but two lines. *First*, allowing courts to vacate an acquittal based on apparent inconsistencies would run up against the longstanding, bright-line rule attached to acquittals, which makes them absolutely unreviewable. *See, e.g.*, *Bravo-Fernandez*, 580 U.S. at 13; *Powell*, 469 U.S. at 64. *Second*, allowing a court to reverse an acquittal due to supposed errors in the jury's reasoning would impermissibly encroach on the jury's sovereign authority. *Smith*, 143 S. Ct. at 1608; *Bravo-Fernandez*, 580 U.S. at 13; *Powell*, 469 U.S. at 66; *Dunn*, 284 U.S. at 394. As this Court has long understood, the

presence of repugnant verdicts—a subset of inconsistent verdicts—is not a reason to cross either line.

B. The Practical Effects of the Georgia Supreme Court's Decision Would be Severe.

The consequences of allowing the Georgia Supreme Court's decision to stand would be immense. Its decision is not a ticket good for only one ride. To the contrary, a repugnant verdict exception threatens to swallow the very rule that this Court has described as the "most fundamental … in the history of double jeopardy jurisprudence," *Sanabria*, 437 U.S. at 64 (citation omitted), and would severely undermine the structural role of the jury in the process. It also will prove difficult to apply in practice.

It is easy to see why. Turning to the latter point first, this Court's precedents make clear that judges cannot vacate an acquittal because it is inconsistent with a guilty verdict. *Supra* at 15-19. An affirmance in this case, however, would permit judges to vacate acquittals they deem "repugnant."

In vacating the acquittal here, the Georgia Supreme Court justified the repugnancy finding by saying that there was "no way to decipher what factual finding or determination [the verdicts] represent." *McElrath*, 880 S.E.2d at 521. But this Court has used virtually the same language to discuss inconsistent verdicts more broadly. *E.g.*, *Bravo-Fernandez*, 580 U.S. at 19 ("It is unknowable 'which of the inconsistent verdicts—the acquittal[s] or the conviction[s]—'the jury really meant.'" (alterations in original) (citation omitted)). Drawing a principled line between these forms of inconsistency will prove difficult. And as a

result, the line the Framers drew to protect acquittals will no longer be absolute, but a moving target, allowing judges to decide when the Double Jeopardy Clause's prohibition on retrial will protect the jury's acquittal, and the defendant by extension, and when the prosecution will get a do-over.[8]

Even if the State's alternative rationale governs, a repugnant verdict exception still leaves it to judges to decide key questions. Those include: (1) when "affirmative factual findings" are clear from the record; and (2) how to decipher when those findings are "utterly and irreconcilably inconsistent," thereby allowing one to conclude that the jury's decision was the result of a specific kind of legal error and not others. Opening that door risks inviting judges to attach their own judgements to the jury's findings to determine if they can be reconciled. But that directly interferes with the jury's province in criminal trials.

Allowing judges to vacate acquittals that are deemed "repugnant" undermines the jury's essential role in additional ways. For instance, here the verdicts could well have been the result of compromise, central to the kind of community decision-making the Sixth Amendment contemplates. Or the verdicts could have been the result of lenity—the jury could have thought McElrath committed the underlying conduct, but that he should not be blamed for all three counts with which he was charged. Whether the verdicts were the

[8] Georgia, under state law, can allow judges to exercise their discretion to resolve difficult questions like these in reviewing convictions. But as the principles discussed above instruct, Georgia cannot promulgate rules that will allow judges to exercise such review as a basis for overturning an acquittal.

result of "error," compromise, or lenity, "[j]uries may indulge in precisely such motives or vagaries." *Dotterweich*, 320 U.S. at 279. The Georgia Supreme Court took away that prerogative.

Affirming the Georgia Supreme Court would curtail the jury's ability to inject community values in some circumstances, but not others, and without a logical distinction between the two. If the rule were that judges must respect *inconsistent* verdicts but can vacate *repugnant* verdicts, a jury could use lenity or compromise in multi-verdict cases only so long as those verdicts are not too inconsistent and cannot be labeled as "repugnant" in the eyes of judges. This will place a limitation on when, where, and how the community can check judicial and prosecutorial power.

Moreover, the threat to the jury's voting power will be difficult to contain. The possibility of so-called "repugnant" verdicts could arise in any case where the government must disprove an affirmative defense applicable across different counts. It might extend to any case where there are overlapping facts of conviction across multi-count indictments, such as the classic example of when the jury acquits on the lesser-included offense but renders a guilty verdict on the greater offense. What's more, given the tendency of prosecutors to stack indictments with overlapping charges, *see* Note, *Stacked: Where Criminal Charge Stacking Happens–And Where it Doesn't*, 136 Harv. L. Rev. 1390, 1392 (2023), and the natural tendency of juries to render split verdicts in such cases, prosecutors may be tempted to use this exception to preserve an opportunity to urge courts to vacate acquittals after failing to prove their cases.

At bottom, permitting judges to vacate acquittals that are part of so-called "repugnant verdicts" will carve an impermissible and unwieldy hole out of the Double Jeopardy Clause's "absolute" protections. The Court should reverse.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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