No. 22-721

In the Supreme Court of the United States

DAMIAN MCELRATH,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF MISSOURI AND FOURTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes

Rules

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI* STATES

Petitioner Damian McElrath is of course correct that "[t]he Double Jeopardy Clause prohibits retrying a defendant on a charge of which he has previously been acquitted." Pet. Br. 13. But the Georgia Supreme Court held that McElrath was *not* acquitted. Rather, as a matter of state law, the jury simply never issued a verdict. Petitioner asks this Court to override that decision and hold that the Georgia Supreme Court incorrectly interpreted state law. But this Court has repeatedly held that it lacks jurisdiction to overturn a state court's interpretation of state law. *E.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1041–42 (1983).

Amici States submit this brief in support of Georgia because "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz* v. *United States*, 521 U.S. 898, 928 (1997). There is perhaps nothing more essential to sovereignty than the ability of a State to craft its own laws and have its own highest court authoritatively interpret those laws. *See Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982).

The Double Jeopardy Clause includes no exception to this well-established principle. Certainly, there is no text, history, or precedent clear enough to federalize the process judges and juries must go through to

issue valid verdicts. That remains well within the authority of the States.

A State can determine, for example, that a "verdict" is valid only if it appears on a specific form, "signed by the foreman." *E.g.*, Mo. S. Ct. R. 29.01(a). A State can determine that this form must be "returned by the jury to the judge in open court." *Id.* And, as here, a State can require that a special verdict form include content establishing that the jury in fact decided the issue.

So if a jury returns a purported "verdict" written in ketchup on a napkin, delivered to the judge at a restaurant during a lunch recess, and filled with contradictory statements on the issue the jury is supposed to find, any State is well within its authority to determine that the jury has rendered no verdict at all, regardless of whether the napkin reads "not guilty." And of course, double jeopardy would not prohibit a State from prosecuting a defendant just because a mob in the town square declaring itself a "people's court" purported to acquit the defendant. That is because States get to set the rules, as a matter of state law, about what is or is not a valid verdict in the first place.

This Court should reject McElrath's attempt to upend that sovereign authority. That authority falls well "within the power of the State to regulate procedures under which its laws are carried out." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977). Federal-

izing every aspect of criminal procedure is fundamentally inconsistent with foundational principles of federalism.

As coequal sovereigns, *Amici* States have a profound interest in ensuring that basic principles of comity and federalism are maintained and that the States retain their primacy in defining and enforcing criminal law and procedure.

ARGUMENT

I. States bear primary responsibility for defining and enforcing criminal law.

Our uniquely American system of governance, described by this Court as "Our Federalism," finds its roots in the "early struggling days of our Union of States." *Younger* v. *Harris*, 401 U.S. 37, 43–45 (1971). "Our Federalism" is neither "blind deference to 'State's Rights'" nor the "centralization of control over every important issue in our National Government and its courts." *Id.* It is instead a fundamental aspect of "separation of powers" that protects the People from tyranny and oppression by "split[ting] the atom of sovereignty." *Seila L. LLC* v. *Consumer Fin. Protec. Bureau*, 140 S. Ct. 2183, 2202, 2205 (2020) (citation omitted); *accord New York* v. *United States*, 505 U.S. 144, 182 (1992); *see also* The Federalist No. 51, at 323 (C. Rossiter ed. 1961) (describing American Federalism as providing a "double security" to the People). And in our system, the States retain the "residuary and inviolable sovereignty" that States had before joining the national union. *New York* v. *United States*, 505 U.S. 144, 188 (1992); *accord Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991).

This sovereignty encompasses the general police power within a State's borders, including codifying and punishing criminal offenses. As the "Great Dissenter" Justice Harlan explained, at the heart of State sovereignty is the police power to legislate according to "design[s] and calculat[ions] to promote the general welfare, or to guard the public health, the public morals, or the public safety." *Lochner* v. *New York*, 198 U.S. 45, 67 (1905) (Harlan, J., dissenting). This has long been the rule. *See, e.g., United States* v. *Hudson*, 11 U.S. 32, 33–34 (1812) (holding that federal courts lack general criminal jurisdiction). More recent opinions of this Court reaffirm this understanding. *See, e.g., Shinn* v. *Ramirez*, 596 U.S. 366, 376 (2022) ("The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'") (citing The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)); *Gamble* v. *United States*, 139 S. Ct. 1960, 1966 (2019) (recognizing the need to "honor[] the substantive differences between the interests that two sovereigns can have").

McElrath draws on the Bill of Rights, but the Bill of Rights reinforces the long-settled rule that States have primacy in defining and enforcing criminal law. While Congress is a body of enumerated powers "herein granted," U.S. Const, art. I, § 1, the Bill of Rights expressly recognizes that States retain their general police power, subject only to specifically enumerated exclusions: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

As a result, and as this Court routinely explains, "[f]rom the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas* v. *Garcia*, 140 S. Ct. 791, 806 (2020). It is the States that "possess primary authority for defining and enforcing the criminal law." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). And it is the States that have principal authority "to regulate procedures under which its laws are carried out." *Patterson*, 432 U.S., at 201.

II. An important aspect of federalism is respect for the States' chosen criminal procedures.

Incorporation of the Double Jeopardy Clause against the States simply means that States "[i]n criminal trials . . . also hold the initial responsibility for vindicating constitutional rights." *Engle*, 456 U.S., at 128. It does not mean that federal courts should second-guess what counts as a verdict under state law. As this Court has previously explained, the Fourteenth Amendment does not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer* v. *Texas*, 385 U.S. 554, 563–64 (1967). "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules . . . so long as [the States'] rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568–69; *see also Estelle* v. *McGuire*, 502 U.S. 62, 70–72 (1991) (declining to create a federal code of evidence applicable in state court).

Principles of federalism thus caution strongly against this Court becoming "a roving commission"

able to "impose upon the criminal courts of [States] [the Court's] own notions of enlightened policy." *Spencer*, 385 U.S., at 569 (Stewart, J., concurring). The genius of American federalism is that it allows "different communities" to live "with different local standards" according to local needs or preferences. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). In our constitutional order, "Our Federalism" means that the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S., at 44; *see also id.*, at 43 ("Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."). Here, that means respecting state laws that define when a "verdict" is valid or not.

III. Reversal risks unsettling a wide variety of State rules.

Ruling for McElrath would create a host of potential problems for States. McElrath stresses that Georgia is the only State that has adopted the rule at issue in this case. Pet. Br. 23 n.3. But even assuming that is true, that provides little comfort because McElrath offers no limiting principle to the assertion that federal courts can second guess rules adopted by States about when a "verdict" occurs as a matter of state law. The downstream consequences of McElrath's rule are potentially extraordinary and would keep federal courts very busy, especially on habeas review.

1. For starters, McElrath's rule would cast doubt on the ability of States to require that verdicts on a *single* count be consistent. McElrath relies on cases involving inconsistent verdicts among *different* counts. *E.g.*, *United States* v. *Powell*, 469 U.S. 57, 60 (1984). But States also routinely encounter situations where the jury returns an inconsistent verdict on the same count.

In one Missouri case, for example, a jury returned two competing verdict forms, one announcing the defendant was "not guilty" on "Count I" and another stating the defendant was "guilty" on the "same count." *State* v. *Zimmerman*, 941 S.W.2d 821, 823–26 (Mo. App. W.D. 1997). The Missouri Court of Appeals determined that the "two inconsistent verdicts as to the same count" meant "that there was no final verdict" at all. *Ibid.* But under McElrath's rule, the Constitution could be interpreted to require acquitting a dangerous, violent criminal even when the jury has returned a form declaring the person "guilty."

The same issue has arisen in the context of motions to dismiss criminal charges. The Missouri Supreme Court recently confronted a case where the trial court declared that the statute under which the defendant was charged was unconstitutional, but then rather than dismiss the case, the trial court declared the defendant "not guilty." *State* v. *Ward*, 568 S.W.3d 888, 891 (Mo. 2019). Because the Missouri Supreme Court was "unable to determine if the judgment is an acquittal or a dismissal," the court rejected the criminal defendant's assertion that double jeopardy necessarily barred the appeal, and it instead vacated the trial court's judgment as internally inconsistent. *See id.*, at 889–92. But under McElrath's rule, any time

a trial court imprecisely uses the term "not guilty" when it really means to dismiss the count on purely legal grounds, that judgment necessarily must be an acquittal (that cannot be appealed) rather than a dismissal (that can).

2. Consider also the common rule allowing litigants to poll the jury. To lessen the chance of situations like the one in *Zimmerman* occurring, every State and the District of Columbia permits parties to poll the jurors.[1] Under Missouri's rule, for example,

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[1] Ala. R. Crim. Proc. 23.5; Alaska R. Crim. Proc. 31(d); Az. S. Ct. R. Crim. Proc. 23.3; Ark. Code Ann. § 16–89–128; Cal. Penal Code §1163, 1164; Colo. Crim. Proc. R. 31(d); Conn. R. Superior Ct. Crim. § 42–31; Del. Superior Ct. R. Crim. Proc. 31(d); D.C. Dist. R. Crim. 31(d); Fla. R. Crim. Proc. 3.450; *Benefield* v. *State*, 602 S.E.2d 631, 633 (Ga. 2004); Haw. R. Penal Proc. 31(c); Idaho Code § 19–2316; 725 Ill. Comp. Stat. Ann. 5 / 115–4; Ind. Code § 35–37–2–7; Iowa R. Crim. Proc. 2.22(5); Kan. Stat. Ann. § 22–3421; Ky. R. Crim. Proc. 9.88; La. Code Crim. Proc. Ann. art. 812; Me. R. Crim. Proc. 31(c); Md. R. 4–327(e); Ma. R. Crim. Proc. 27(D); Mich. R. Crim. Proc. 6.420(D); 49 Minn. S. Ct. R. 26.03(20)(5); Miss. R. Crim. Proc. 24.5; Mo. S. Ct. R. 29.01(D); Mont. Code Ann. § 46–16–604; Neb. Rev. Stat. § 29–2024; Nev. Rev. Stat. § 175.531; N.H. R. Crim. Proc. 25(c); N.J. R. 1:8–10; N.M. R. Dist. Ct. R. Crim. Proc. 5–611(E); N.Y. Crim. Proc. § 310.080; N.C. Gen. Stat. § 15A–1238; N.D. R. Crim. Proc. 31(d); Oh. R. Crim. Proc. 31(D); 22 Okl. Stat. Ann. § 921; Oreg. Rev. Stat. § 136.330; Pa. R. Crim. Proc. 648(G); R.I. R. Superior Ct. Crim. Proc. 31(d); *Green* v. *State*, 569 S.E.2d 318, 324 (S.C. 2002); S.D. Codified Laws § 23A–26–10; Tenn. Code Ann. § 20–9–508; Tex. Code Crim. Proc. Ann. art. 37.05, 37.04; Utah R. Crim. Proc. 21(f); Vt. R. Crim. Proc. 31(d); Wa. Superior Ct. Crim. R. 6.16(a)(3); W. Va. R. Crim. Proc. 31(d); *State* v. *Raye*, 697 N.W.2d 407, 411 (Wis. 2005); Wy. Stat. Ann. § 7–11–501. Jurors can also be polled in federal court. Fed. R. Crim. P. 31(d). The U.S. Military does not require unanimous verdicts, except in cases where capital punishment is mandatory, and thus generally does not allow jury polling. *See* Rule for Courts-Martial 921; *id.* 922(e).

either party, or the court itself, has a right to request a poll of the jury after "a verdict is returned and before it is recorded." Mo. Sup. Ct. R. 29.01(d). If a juror disagrees with the "verdict" submitted by the foreman, the court can instruct the jury to go back, deliberate, and submit a new form. *Ibid.* That is because a "verdict," under Missouri law, does not become "final" until after the opportunity to poll the jury. *See State* v. *Jamerson*, 809 S.W.2d 726, 729 (Mo. App. E.D. 1991), *overruled on other grounds by State* v. *Carson*, 941 S.W.2d 518 (Mo. 1997). Even if the foreperson returns a verdict that reads "not guilty," there is no verdict as a matter of state law until after the opportunity for polling has passed. Accepting McElrath's rule in this case could risk enabling a single foreperson to (mistakenly or intentionally) acquit a defendant even if all other jurors disagree.

3. McElrath's rule would also place a constitutional straitjacket on courts that sometimes must deal with "verdicts" obtained through fraud, such as bribery.

For example, after a trial court in Chicago found a criminal defendant not guilty of murder, the defendant was indicted again when the State discovered that the trial court judge had accepted a $10,000 bribe to "acquit" the defendant. *People* v. *Aleman*, 667 N.E.2d 615, 618 (Ill. App. Ct. 1996).[2] The defendant, "the main enforcer for the mob in Chicago," moved to dismiss on double jeopardy grounds, which the Illinois Court of Appeals rejected. *Id.*, at 617–18. Following this Court's statement that "[t]he word 'acquittal'

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[2] After the bench trial but before a grand jury re-indicted Aleman, the judge was found in his backyard with "a single gunshot wound to his head. The cause of death was listed as suicide." *Id.*, at 620.

invokes no talismanic protection," the court determined that the earlier "acquittal" was no verdict at all because of the fraud perpetrated on the court. *Id*., at 624 (quoting *Serfass* v. *United States*, 420 U.S. 377, 392 (1975)).

It should go without saying that an "acquittal" or "conviction" obtained through fraud is no verdict at all. Yet McElrath presses the same talismanic argument as the defendant in *Aleman*: "an acquittal is an acquittal." *Compare Aleman*, 667 N.E.2d, at 624, *with* Pet. Br. 19 (citing William Shakespeare, *Romeo and Juliet*, act II, sc. 2, ls. 47–48). Under that rule, the States would be compelled to permit a murderer to run free if his gangster father successfully bribes the jurors or judge to "acquit."

4. Finally, untold other procedures are also at risk under McElrath's rule. For example, in so-called "acquittal-first jurisdictions," the jury is instructed that they must acquit the defendant of the greater charged offense before considering guilt on a lesser included offense. *See, e.g., Tennessee* v. *Davis*, 266 S.W.3d 896, 902–08, 910 (Tenn. 2008). Some States similarly allow judges in bench trials to consider lesser included offenses *sua sponte* after acquitting on a greater charge. *E.g., Missouri* v. *Neher*, 213 S.W.3d 44, 47–48 (Mo. 2007) (double jeopardy clause does not bar a determination of guilt of a lesser included offense in the same trial in which the defendant is acquitted of the greater offense); *see also Nebraska* v. *Keup*, 655 N.W.2d 25, 37 (Neb. 2003); *Connecticut* v. *Atkinson*, 741 A.2d 991, 994–95, 1002–03 (Conn. Sup. Ct. 1999); *Sorrell* v. *Florida*, 855 So.2d 1253, 1257 (Fla. App. 4 Dist. 2003); *Shute* v. *State*, 877 S.W.2d 314, 314 (Tex. Crim. App. 1994).

Under McElrath's logic, the stability of these state rules would be uncertain. Would it matter if the State charges the lesser included offense as a separate count (like in Georgia) or instead charges the lesser included offense as an alternative within the same single count (like in Missouri)? One thing is certain: McElrath's rule would have federal courts decide that question and many others that would become apparent only years down the road.

CONCLUSION

Just as federal courts should not "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz*, 521 U.S., at 935, so too federal courts should not entangle themselves in the minutiae of what is or is not a verdict under state law. The ramifications for doing so are potentially extraordinary and are, at the very least, unclear. The Court should affirm.

Respectfully submitted,

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