No. 19-605

In the Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,
v.
PHILIP JOHN MARTIN,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF OF KENTUCKY, ALABAMA, ARKANSAS, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND UTAH AS *AMICI CURIAE* SUPPORTING PETITIONER

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February 5, 2020

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* States have the prerogative to determine what jury instructions are used in their courts. When it comes to criminal trials, nearly all states use some kind of transition instruction to inform juries how they should proceed from considering a greater offense to a lesser-included offense. Some of these states use "hard transitions," while others employ "soft transitions." Hard-transition instructions require juries to acquit a defendant on a greater offense before returning a verdict on a lesser-included offense, whereas soft-transition instructions allow juries to proceed to a lesser-included offense without first having to acquit on the greater offense. States that have chosen between the two types of transitions have done so based on largely settled expectations as to how each transition will affect various policy considerations. The Arizona Supreme Court's decision below threatens to disrupt those settled expectations.

Because the decision below misapplied this Court's Double Jeopardy Clause jurisprudence as it relates to soft-transition instructions—and did not base its decision on any Arizona law—it not only created a conflict with other courts' applications of the same law, but it also established a troubling precedent that might lead other courts astray in the future. As a result, some states that would otherwise prefer to keep their current jury-instruction regimes might nevertheless

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[1] *Amici* have notified counsel for all parties of their intention to file this brief, and counsel for all parties have consented to the filing of this brief.

change them to avoid the Double Jeopardy problems that might arise if their courts adopt Arizona's misapplication of this Court's Double Jeopardy Clause jurisprudence. The *amici* States have a strong interest in ensuring that they—and all other states—are able to craft jury instructions based on accurate expectations about how those instructions will affect the various policy considerations at stake, including the ability to re-try defendants following a vacated conviction.

SUMMARY OF THE ARGUMENT

States have always had significant leeway to prescribe whatever jury instructions best comport with their laws and public policy preferences. In the criminal arena, some states have determined that "soft transition" instructions work best for them, while other states have concluded that "hard transition" instructions work best. Arizona is a "soft transition" state. But, as a result of the wayward precedent established in the decision below, states might feel compelled to switch to hard transitions in order to better protect their interests in obtaining decisions on the merits with respect to all charged offenses.

States should not be put in the position of having to choose between their legitimate policy preferences and their desire for the maximum opportunity to obtain decisions on the merits. But the decision below threatens to put states in just that position. And, in doing so, it jeopardizes the states' traditional prerogative to prescribe their own jury instructions. This Court should step in to clarify the law so that states will be able to continue adopting their own jury instructions based on the previously settled

expectations about how particular instructions will affect various policy considerations.

This Court should also grant Arizona's Petition because states need clarity about what constitutes an implied acquittal. The decision below creates significant confusion on this issue. This Court should use this case to explain precisely what constitutes an implied acquittal. And, in doing so, it should reiterate what nearly every other court has held—*i.e.*, that a defendant can be re-tried on a greater offense when the original jury deadlocked on that offense and rendered a conviction on a lesser-included offense that was ultimately vacated.

ARGUMENT

When a criminal defendant is acquitted of a charge, the Double Jeopardy Clause bars the defendant from being tried again on that same charge. This is elementary. And it is equally elementary that Double Jeopardy does not necessarily bar re-trial when a jury deadlocks and is unable to reach a verdict on a particular charge. *See Richardson v. United States*, 468 U.S. 317, 325 (1984). Nevertheless, the decision below struck out on a different path.

In the decision below, the Arizona Supreme Court was confronted with a situation where the original jury convicted a defendant on a lesser-included offense after expressly deadlocking on the greater offense. *See State v. Martin*, 446 P.3d 806, 807 (Ariz. 2019). After the lesser-included conviction was vacated on appeal, the state re-tried the defendant on the greater offense. *Id.* Even though the original jury had expressly deadlocked

on the greater offense—and thus clearly had not acquitted the defendant—the Arizona Supreme Court held that this Court's Double Jeopardy Clause jurisprudence barred re-trial on that offense. *See id.* at 808–11. Thus, the decision below effectively treated the deadlocked jury as having implicitly acquitted the defendant.

That decision is an outlier and causes at least two problems that the Court should address. *First*, it threatens the efficacy of soft-transition jury instructions, thereby potentially forcing states to choose hard transitions when they might otherwise prefer soft transitions. *Second*, the Arizona Supreme Court's rule creates uncertainty about what constitutes an implied acquittal.

I. The decision below threatens, in practical effect, to take away states' ability to choose between hard-transition and soft-transition jury instructions.

From the states' perspective, the ultimate concern in this case is the interplay between jury instructions and the Double Jeopardy Clause. Specifically, states need clarity as to the double-jeopardy ramifications of soft-transition instructions so that they can make adequately informed decisions about the kinds of instructions to use in their courts. As it stands, the Arizona Supreme Court's application of this Court's double-jeopardy jurisprudence creates significant confusion and threatens to force states to adopt hard-transition instructions when they might otherwise prefer soft transitions.

1. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This clause prevents criminal defendants from being re-tried for an offense after there has been an event that terminates the original "jeopardy" for that offense. *See Richardson*, 468 U.S. at 325. An acquittal is such an event. *See id.* However, it is well established that jeopardy does not terminate when a jury is unable to agree on a verdict. *See id.* And, it is likewise well established that a defendant can be re-tried for the same offense following a reversal or vacatur of a conviction on appeal. In such instances, jeopardy "continues" through re-trial rather than terminating with the original verdict. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984); *Burks v. United States*, 437 U.S. 1, 14 (1978). Thus, it has been widely understood that if a jury deadlocks on a greater offense while convicting on a lesser-included offense, double jeopardy will not bar the defendant's re-trial on the greater offense if the conviction on the lesser-included offense is subsequently vacated. *See, e.g., State v. Ervin*, 147 P.3d 567, 572 (Wash. 2006).

States have crafted their criminal jury instructions against this backdrop. In doing so, most states have elected to provide juries with either a "hard" transition or a "soft" transition when instructing them about how to proceed from considering a greater offense to considering a lesser-included offense. Hard-transition instructions require jurors to acquit a defendant of a greater offense before moving on to consideration of a lesser-included offense. *See, e.g., State v. Davis*, 266 S.W.3d 896, 905–06 (Tenn. 2008). Soft-transition

instructions, in contrast, permit jurors to consider a lesser-included offense if they are unable to reach a verdict on the greater offense despite having made reasonable efforts to do so. *See, e.g., State v. Labanowski*, 816 P.2d 26, 36–37 (Wash. 1991).

Proponents of both types of instructions point to various policy rationales for their preferred instructions. The Second Circuit has succinctly summarized these policy considerations:

> [A hard-transition instruction] has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree. But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury

> might have reached sincere and unanimous agreement with respect to the lesser charge.
>
> An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides the mirror images of those associated with the charge actually given here. It facilitates the Government's chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser.

United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978) (footnote omitted). The Washington Supreme Court has similarly observed that hard transitions have the benefit of preventing juries from reaching "compromise verdicts based on sympathy for defendants or to appease holdout jurors," *see Labanowski*, 816 P.2d at 33 (citing *People v. Boettcher*, 505 N.E.2d 594, 597 (N.Y. 1987)), while a soft transition "allows the jury to correlate more closely the criminal acts with the particular criminal conviction," *id.* at 34. The Washington court also noted that soft transitions promote judicial economy because "where unanimity is required, the refusal of just one juror to acquit or convict on the greater charge prevents the

rendering of a verdict on the lesser charge and causes a mistrial even in cases where the jury would have been unanimous on a lesser offense." *Id.*

2. The point here is not necessarily that one type of transitional instruction is inherently better than the other. Rather, both types of instructions carry various benefits, and—most importantly—states have the prerogative to select the instruction that they prefer based on the benefits that they value most highly.

Until now, states have been able to make that choice based on largely settled expectations about the double-jeopardy implications of their choice. States choosing a soft transition could generally expect that their choice would not bar the re-trial of a defendant on a greater offense following a vacated conviction of a lesser-included offense where the original jury was deadlocked on the greater offense. As Arizona's Petition correctly points out, the overwhelming weight of authority held that re-trial on the greater offense was not barred by double jeopardy under such circumstances. *See* Pet. at 19–27. Now, however, the decision below has deepened a conflict in authority. And that deepened conflict casts a pall on the states' expectations about the double-jeopardy implications of soft-transition instructions. It is now less certain that a defendant can be re-tried on a greater offense under the circumstances at issue here—*i.e.*, where there is a re-trial following a vacated conviction on a lesser-included offense and the original jury expressly deadlocked on the greater offense.

This uncertainty might lead states to conclude that they have no choice but to adopt hard-transition

instructions. States have an obvious interest in obtaining final decisions on the merits. *See Richardson*, 468 U.S. at 326. If soft-transition states view the decision below as creating a trend that will make it harder to re-try defendants on greater offenses, then they might feel compelled to adopt hard-transition instructions in order to avoid being deprived of opportunities to obtain decisions on the merits of greater offenses—as Arizona has been deprived here. If states thus convert to hard-transition instructions, it will not be because they have chosen to abandon the policy preferences that led them to select soft transitions to begin with. To the contrary, those states will be abandoning soft transitions simply to avoid the undesirable—and unnecessary—implications of the decision below. That is, the states would be abandoning their preferred soft transitions just to ensure a full opportunity to obtain a decision on the merits of a greater offense in situations like the one in this case—*i.e.*, where the jury settles on a lesser-included conviction after being unable to agree on the greater offense, and the lesser-include conviction is eventually vacated.

States should not be put in the position of having to choose between their legitimate policy preferences and their desire for the maximum opportunity to obtain a decision on the merits with respect to all charged offenses. Because the decision below threatens to put states in that position, it jeopardizes their traditional leeway to prescribe jury instructions for themselves. This Court should step in to clarify the law so that states will be able to continue adopting their own jury instructions based on the previously settled

expectations about how particular instructions will affect various policy considerations. If it does not, states may find that their ability to choose between hard- and soft-transition instructions has been negated in practical effect. States should be able to craft their jury instructions based on accurate expectations as to how those instructions will affect the various policy considerations at stake, including the ability to re-try defendants on greater offenses following a vacated conviction of a lesser-included offense. *See Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status.").

II. This case presents a compelling opportunity for the Court to clarify its decisions on implied acquittals and deadlocked juries.

The Arizona Supreme Court's decision marks a definitive split in authority on what constitutes an implied acquittal under the Double Jeopardy Clause. Make no mistake, the Arizona Supreme Court is now in the shallow minority on this issue. Virtually every court directly confronting the problem has reached the opposite conclusion. But that makes this case the perfect opportunity for the Court to clarify an issue that lower federal courts and state Supreme Courts have been wrestling with for years.

1. The split of authority on this issue is wide but lopsided. As Arizona points out in its Petition, almost every court addressing the issue of implied acquittals in a similar circumstance has held that the Double Jeopardy Clause does not bar re-trial when the jury

expressly indicates it cannot agree on a verdict. *See* Pet. at 20–25.

Perhaps the best example of this is the Eighth Circuit's decision in *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997), a case almost indistinguishable from the facts below. In *Bordeaux*, the United States charged the defendant with attempted aggravated assault. The jury could not agree on a verdict, but convicted the defendant of the lesser-included charge of abusive sexual contact by force. As in Arizona's case, the jury used its verdict form to explain its inability to agree. It wrote a note on the form stating that it was "unable to reach a verdict on the charge." *Id*. at 1188. The Eighth Circuit looked at the plain language of *Richardson* and concluded that the Double Jeopardy Clause did not prohibit a re-trial on the greater offense. It held that "[t]he jury's express statement that it could not agree on a verdict as to the greater offense obviously precludes the inference that there was an implied acquittal." *Id*. at 1192.

The high courts of Washington, New Mexico, California, and Indiana have reached the same conclusion in similar cases. *See* Pet. at 20–21; *State v. Glassman*, 349 P.3d 829, 833 (Wash. 2015); *State v. Martinez*, 905 P.2d 715, 717 (N.M. 1995); *People v. Fields*, 914 P.2d 832, 837 (Cal. 1996); *Cleary v. State*, 23 N.E.3d 664, 674 (Ind. 2015).[2] So too the D.C. Court

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[2] The Indiana Supreme Court's decision focuses primarily on Indiana's own provision against double jeopardy, but only after first acknowledging that it mirrors the federal provision. *See Cleary*, 23 N.E.3d at 674 n.7.

of Appeals. *See United States v. Allen*, 755 A.2d 402, 408 (D.C. 2000). The logic of these decisions need not be restated at length: While an *implied* acquittal might trigger the Double Jeopardy Clause, an *express* statement disclaiming acquittal obviously should not. That is consistent with *Richardson*, and until the Arizona Supreme Court issued its ruling below, it was consistent with almost every authority passing on the question elsewhere.

Virtually alone in its decision, Arizona looked to the Ninth Circuit to support its reasoning. *See* Pet. App. at 10. In *Brazzel v. Washington*, 491 F.3d 976 (9th Cir. 2007), the court granted a habeas petition on the basis that the jury's decision to leave a verdict form blank amounted to an implied acquittal, triggering the Double Jeopardy Clause. In that case, the jury instructions directed the jury to leave the form blank only if they could not agree on a charge. The Ninth Circuit explained that a jury's "inability to agree" on a verdict "with the option of compromise on a lesser alternative offense" is not the kind of circumstance that *Richardson* identified as constituting a deadlocked jury. *Id*. at 984. But, as Arizona notes in its Petition, *Brazzel* had a limited scope. The state court had already determined that the verdict form demonstrated an implied acquittal, and so on collateral review the Ninth Circuit was limited to the highly deferential standard of review required by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Brazzel* did not resolve the issue for the Ninth Circuit, and a future panel of the court could chart a different course.

2. The Arizona Supreme Court's departure from the majority rule here leaves the states in doubt as to what the Double Jeopardy Clause requires to avoid an implied acquittal in trials involving multiple charges. Two problems in particular arise from the conflict in authority that this Court can resolve by granting certiorari.

First, as is the case with any split of authority, the Arizona Supreme Court's decision creates confusion about the meaning of the federal Constitution—here, Fifth Amendment. This is particularly problematic when, as here, state courts diverge over the meaning of the federal Constitution. *See Kansas v. Carr*, 136 S. Ct. 633, 641–42 (2016). In such circumstances, this Court has a heightened interest in ensuring that the state court decisions are correct. *Id.* Incorrect interpretations of the federal Constitution by state courts enables them to deflect blame for unpopular decisions onto the "the Federal Constitution when it is in fact their own doing." *Id*. at 642.

In this respect, Arizona's Petition is on similar footing as *Kansas v. Glover*, No. 18-556, *petition for writ of certiorari granted*, 139 S. Ct. 1445 (Apr. 1, 2019). *Glover* presents a question of federal constitutional law about the requirements of the Fourth Amendment for an investigative stop. Like this case, *Glover* arose from a decision by a state supreme court that went against the overwhelming majority of decisions elsewhere. At the time of the petition for certiorari, 12 state supreme courts and four federal circuits had reached a different decision than the Kansas Supreme Court on the Fourth Amendment

question at issue. This Court rightly granted certiorari to correct the inconsistency, ensuring that the meaning of the Fourth Amendment would not change from state to state or court to court. Likewise, the states need clear, consistent guidance about what constitutes an implied acquittal under the Fifth Amendment.

Second, granting certiorari in this case will "spare" the courts in states like Arizona, Washington, and California from "having to confront" an inevitable "legal quagmire" that results when the state's highest court reaches a different conclusion on a matter of federal constitutional law than the federal appellate court in which the state sits. *See Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729–30 (2017).

The Arizona Supreme Court's decision stands squarely against decisions from both the California Supreme Court and Washington Supreme Court. That is particularly problematic because all three states are located in the Ninth Circuit.

As explained above, the Ninth Circuit has considered the issue of implied acquittals from soft-transition instructions only on collateral review, and so it has yet to establish any binding law of the circuit. When it does, it will create a "legal quagmire" no matter how it resolves the problem. If it declines to follow *Richardson* and finds that soft-transition instructions like those in Arizona lead to an implicit acquittal, it will immediately place courts in Washington and California on uneasy ground as they attempt to apply the meaning of the Fifth Amendment in the face of competing authorities. As the Washington Supreme Court explained in *Glassman*,

"the Ninth Circuit's decisions are not binding" on the state courts. 349 P.3d at 832. The result will be that the federal constitutional rights of the citizens of Washington or California will differ depending on whether they are charged in state or federal court. That cannot be allowed, and this Court has stepped in to prevent precisely that kind of problem in the past. *See LeBlanc*, 137 S. Ct. at 1729–30.

The Court can prevent any such quagmires by granting certiorari and establishing a clear rule for the states to follow. In so doing, it should follow its path in *Richardson* and hold that jeopardy does not terminate when the jury expressly states that it cannot agree on a verdict.

CONCLUSION

The Court should grant Arizona's Petition. The states need clarity on the issues at stake here so that they can adopt jury instructions based on accurate understandings of this Court's Double Jeopardy Clause jurisprudence.

Respectfully submitted,

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