No. 23-886

IN THE

Supreme Court of the United States

CARLOS GUARDADO,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The **National Association for Public Defense** (NAPD) is an association of more than 28,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities, and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents federal, state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models. In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial and trial advocacy and strives to obtain optimal results for clients both at the trial level and on appeal.

The **Massachusetts Association of Criminal Defense Lawyers** (MACDL) is an incorporated association representing more than 1,000 experienced

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[1] Pursuant to Supreme Court Rule 37, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief.

trial and appellate lawyers who are members of the Massachusetts Bar and devote a substantial part of their practices to criminal defense. MACDL's mission is to preserve the adversarial system of justice, to maintain and foster independent and able criminal defense lawyers, and to ensure justice and due process for the criminally accused. MACDL is dedicated to protecting the rights of individuals as guaranteed by the United States Constitution and Massachusetts Declaration of Rights. MACDL seeks to improve the criminal justice system by supporting policies and procedures that ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying and striving to prevent or rectify deficiencies within the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice.

As such, NAPD and MACDL, as *amici curiae*, submit this brief in support of petitioner Carlos Guardado.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae NAPD and MACDL represent a wide swath of the criminal defense bar in Massachusetts and nationwide. *Amici* and their members know firsthand how important the individual right to be free from twice being tried for the same crime is to criminal defendants.

Forty years ago, in *Burks v. United States*, this Court set forth a clear rule to enforce those double jeopardy protections: *Any* determination that the trial record does not support a conviction is an acquittal that precludes a second trial. 437 U.S. 1, 10 (1978). Since that time, state courts—like the SJC here—have repeatedly sought ways to try to avoid *Burks* and allow prosecutors to retry defendants when the state court believed that the acquittal deprived the prosecution of an attempt to prove its case to the jury under the correct legal standard. *See* Pet. App. 9a. Time after time, this Court has rejected those efforts. *See, e.g.*, *Evans v. Michigan*, 568 U.S. 313 (2013). Indeed, earlier this Term this Court was once again forced to reverse a state supreme court and reiterate—unanimously—that the "ultimate question" in determining whether there has been an "acquittal" that precludes a retrial is whether "there has been *any* ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *McElrath v. Georgia*, 144 S. Ct. 651, 660 (2024) (quotation marks omitted; emphasis added).

The change-in-law exception to *Burks* on which the SJC relied is just the latest example of lower courts trying to undermine the clear, administrable rule this Court has enforced for "half a century." *Evans*, 568

U.S. at 318. After all, the SJC held: "The Commonwealth therefore did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes at issue." Pet. App. 8a. It is hard to imagine a clearer "ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *McElrath*, 144 S. Ct. at 660. Instead of following this Court's instructions and ending the case, however, the SJC reversed its prior precedent to adopt a change-in-law exception to *Burks* that finds no support in this Court's precedents and that conflicts with decisions from the Seventh, Tenth, and Eleventh Circuits and the Pennsylvania Supreme Court.

Amici submit this brief to highlight three particular reasons certiorari is warranted.

First, the SJC's decision is not just wrong, but is also part of a longstanding effort by state courts to avoid this Court's decisions establishing, as this Court recently summarized, that retrial is prohibited when "there has been *any* ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *McElrath*, 144 S. Ct. at 660 (quotation marks omitted; emphasis added). This Court has found it so important to enforce that principle that it granted certiorari in *McElrath* even though the petitioner did not even allege any disagreement in the lower courts. Here, there plainly is a conflict in the lower courts, making certiorari even more warranted.

Second, the Question Presented recurs frequently, as the deep circuit conflict demonstrates.

Third, the SJC's decision (and other decisions on its side of the conflict) create an untenable distinction

between appellate decisions that *clarify* law, including in unexpected ways (retrial prohibited), and appellate decisions that *change* the law, even if those changes were largely foreseeable (retrial permitted). The facts of this case powerfully show how arbitrary this distinction is.

ARGUMENT

I. Certiorari Is Warranted To Ensure Compliance With This Court's Double Jeopardy Precedents And Resolve The Circuit Conflict.

Forty years ago, in *Burks*, this Court set forth a clear rule: An appellate court's determination that the trial record does not support a conviction is an acquittal that precludes a new trial. *See* 437 U.S. at 18. Since that time, though, lower courts have sought to resist *Burks* and find reasons to allow a new trial even where the appellate record does not support a conviction. This Court has repeatedly granted certiorari to correct those lower court decisions, even when there was no conflict. It should do so again here, especially because there *is* a clear conflict.

1. This Court has repeatedly granted certiorari to reverse lower court decisions that allow a retrial where the trial record does not support a conviction. For instance, in *Evans*, this Court addressed an exception recognized by the State of Michigan for midtrial judicial acquittals, as opposed to jury acquittals. Michigan, like a majority of States, permitted its trial courts to grant an acquittal before the case was submitted to the jury. *See* 568 U.S. at 329. After the prosecution's case in chief in *Evans*, the defendant moved for a directed verdict of acquittal,

arguing that the State failed to meet its burden of proof on all the elements of the state crime. *Id.* at 316. The trial court granted the motion, but the Supreme Court of Michigan remanded for a retrial. *Id.* at 316-17. "It held that 'when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." *Id.* at 317 (citation omitted). This Court reversed, holding that "retrial is barred when a trial court grants an acquittal because the prosecution had failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *See ibid.*

The Court rejected as irrelevant the State's argument, joined by the United States, "that if the grounds for an acquittal are untethered from the actual elements of the offense, a trial court could issue an unreviewable order finding insufficient evidence to convict for any reason at all." *Evans*, 568 U.S. at 325. That may be so, the Court recognized, but it had "long held" that "there is *no limit to the magnitude of the error that could yield an acquittal*" unreviewable under the Double Jeopardy Clause. *Ibid.* (emphasis added). The Court also rejected the State and U.S. government's alternative argument that it should "reconsider [its] past decisions." *Id.* at 327. The longstanding, bright line rules set out in the cases had not proved unreasonably "unworkable," "the logic of these cases still holds," and the defendant received no undue "'windfall' from the trial court's unreviewable error." *Id.* at 328-30.

Earlier this Term (but after the petition was filed in this case), this Court in *McElrath* again rejected a state supreme court decision seeking to undermine this Court's double jeopardy precedents. Notably, this Court granted certiorari in *McElrath* even though the petition alleged only a conflict with this Court's precedents, not any conflict among the lower courts. Pet. at iii, *McElrath*, *supra* (No. 22-721).

In unanimously reversing the Georgia Supreme Court's decision, this Court reiterated that "the ultimate question is whether the Double Jeopardy Clause recognizes an event as an acquittal." *McElrath v. Georgia*, 144 S. Ct. 651, 660 (2024). "In making that determination, we ask whether—given the operation of state law—there has been 'any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.'" *Ibid.* (quoting *Evans*, 568 U.S. at 318).

The SJC's decision in this case conflicts with *Evans* and *McElrath* (and this Court's prior precedent on which *Evans* and *McElrath* relied). The SJC recognized that the government "concede[d] that it did not present evidence at trial to indicate that the defendant lacked a firearms license." Pet. App. 8a. "The Commonwealth therefore did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes at issue." *Ibid.* That should have been the end of the matter because the SJC's decision was plainly a "'ruling that the prosecution's proof is insufficient to establish criminal liability for an offense,'" and such a ruling constitutes an "acquittal" that bars a retrial. *Ibid.* (quoting *Evans*, 568 U.S. at 318). Yet the SJC, following some (but not all) other courts, held that,

because there had been a post-trial change in law, a retrial was permitted *even though* the SJC had ruled that the prosecution's proof is insufficient to establish criminal liability for the offense. There is simply no way to reconcile the SJC's decision with this Court's double jeopardy precedents.

2. Protecting this Court's Double Jeopardy precedent—as this Court did in *McElrath*—is crucial because the Double Jeopardy Clause's protection against multiple trials is among the most important rights for criminal defendants. In *amici*'s experience, criminal trials put enormous stress on criminal defendants, and subjecting defendants to multiple trials even where the government has failed to introduce evidence to support a conviction in the first trial undermines the core right the Double Jeopardy Clause is intended to protect.

The Double Jeopardy Clause provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The "controlling constitutional principle" of the Clause "focuses on prohibitions against multiple trials." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quotation marks omitted). "[I]t has long been settled ... that a verdict of acquittal is final, ending a defendant's jeopardy, and ... is a bar to a subsequent prosecution for the same offence." *Green v. United States*, 355 U.S. 184, 188 (1957) (quotation marks omitted).

This fundamental right "has been regarded as so important that exceptions to the principle have been only grudgingly allowed." *United States v. Wilson*, 420 U.S. 332, 343 (1974). The Double Jeopardy Clause, as with all the protections enshrined in the Bill of Rights,

exists to protect individuals like petitioner from government overreach. It is thus well established, for example, that an acquittal—be it by a jury, or mid-trial by judge—prevents retrial and is unreviewable, even if legally wrong. *Evans v. Michigan*, 568 U.S. 313, 329 (2013); *see also* Pet. 28-29.

That is because the "constitutional prohibition against 'double jeopardy' was designed *to protect an individual* from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green*, 355 U.S. at 187 (emphasis added). It does not exist to protect prosecutors' interests on behalf of the State. Indeed, at the Founding, the "common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and *whether in the former trial he had been acquitted or convicted*." *Ibid.* (quoting *Ex parte Lange*, 85 U.S. 163, 169 (1873)) (emphasis added). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence," this Court explained, "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Ibid.* Without the double jeopardy prohibition, prosecutors could retry a defendant as often as they pleased, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-88. That was intolerable to the Founders, and it is the reason "exceptions to the

principle have been only grudgingly allowed." *Wilson*, 420 U.S. at 343.

Given that the Double Jeopardy Clause's individual protections are so important that they preclude retrial even when an acquittal was based on conceded legal error, the SJC's reasoning that a retrial was necessary to avoid unfairness to the government rings hollow. The Double Jeopardy Clause has never been analyzed in terms of whether its prohibition on retrying the accused multiple times for the same crime is "fair" to the Government. "Whatever the basis, the Double Jeopardy Clause prohibits second-guessing," for example, "the reason for a jury's acquittal." *McElrath v. Georgia*, 144 S. Ct. 651, 659 (2024). "As a result, 'the jury holds an unreviewable power to return a verdict of not guilty *even for impermissible reasons*.'" *Ibid.* (quoting *Smith v. United States*, 599 U.S. 236, 253 (2023)) (emphasis added). The rule is no different if the acquittal is instead ordered by a judge. *See Evans v. Michigan*, 568 U.S. 313, 318 (2013) ("It has been half a century since we first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'" (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam))); *see also Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("[A]n acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation." (cleaned up)).

In sum, this Court has long recognized the critical importance of criminal defendants' rights not to be tried twice for the same offense—and has regularly granted certiorari to enforce that right, even in cases

like *McElrath*, where there was no conflict in the lower courts.

3. Certiorari is particularly warranted here because there *is* such a clear conflict across the courts of appeals and state supreme courts, as the petition lays out in detail. Pet. 13-23. As this Court made clear in granting certiorari in *McElrath*, double jeopardy protections are sufficiently important to warrant certiorari even without a conflict in the lower courts. But where there *is* a conflict in the lower courts, certiorari is plainly warranted. Put simply, whether a defendant like Mr. Guardado can be retried should not depend on where in the country he was indicted.

II. Certiorari Is Especially Warranted Because The Question Presented Recurs Frequently.

As the deep split in the lower courts demonstrates, the Question Presented arises with considerable frequency in the courts of appeals and state appellate courts. In recent decades, the Question Presented has repeatedly arisen across at least eight courts of appeals and multiple state supreme courts. And it has arisen in the context of prosecutions in a remarkable range of subject areas, from structuring currency transactions to water pollution to driving under the influence of alcohol to uninsured operation of a motor vehicle or unlicensed possession of a firearm. Pet. 24.

The Tenth Circuit, for example, addressed the question in 1996, correctly holding that prosecutors are not permitted to put on new proofs in a new trial even if there is an intervening "change" in the law. *See United States v. Miller*, 84 F.3d 1244 (10th Cir. 1996); *United States v. Smith*, 82 F.3d 1564 (10th Cir. 1996).

The Tenth Circuit had to reiterate twice more in the last five years that, "when faced with a sufficiency challenge, a court asks … whether there was sufficient evidence presented at trial for a reasonable jury, properly instructed, to have found the essential elements of the crime beyond a reasonable doubt." *United States v. Simpkins*, 90 F.4th 1312, 1315-16 (10th Cir. 2024) (cleaned up); *United States v. Wyatt*, 964 F.3d 947, 951 (10th Cir. 2020) (question on sufficiency review is "whether there was sufficient evidence presented at trial for a reasonable jury, properly instructed," to convict).

The Seventh Circuit, too, has had to reiterate its agreement with the Tenth Circuit's view in multiple cases. *United States v. Gonzalez*, 93 F.3d 311 (7th Cir. 1996); *United States v. Robinson*, 96 F.3d 246, 250 (7th Cir. 1996); *United States v. Hightower*, 96 F.3d 211 (7th Cir. 1996). The issue has also arisen multiple times in the Eleventh Circuit, even causing confusion in seemingly inconsistent rulings. *Compare United States v. Mount*, 161 F.3d 675, 678 (11th Cir. 1998) (holding that if a properly instructed jury could not have convicted under post-trial interpretation of the required proofs, "then double jeopardy principles mandate that we vacate the conviction and remand to the district court with directions to enter a judgment of acquittal on the count in question" (citing *Hightower*, 96 F.3d at 215; *Smith*, 82 F.3d at 1567)), *with United States v. Robison*, 505 F.3d 1208, 1224-25 (11th Cir. 2007) (opposite conclusion in later panel opinion). So, too, has the Pennsylvania Supreme Court. *See Commonwealth v. Shade*, 681 A.2d 710 (Pa. 1996) (adopting same approach as the Seventh and

Tenth Circuits, and the Eleventh Circuit in *Mount*, 161 F.3d at 678).

The other (wrong) side of the split also shows how frequently the Question Presented arises. In addition to the SJC's decision deepening the split, the issue continues to arise in Fourth Circuit cases decades apart. *See, e.g.*, *United States v. Ford*, 703 F.3d 708, 711-12 (4th Cir. 2013); *United States v. Ellyson*, 326 F.3d 522, 533-34 (4th Cir. 2003) (when "[a]ny insufficiency in proof was caused by the subsequent change in the law … , not the government's failure to muster evidence," the government can retry the defendant). The Sixth, Eighth, and Ninth Circuits, as well as the Supreme Court of Connecticut and even the D.C. Circuit—which reviews criminal judgments far less often than its sister courts—have been forced to confront the issue as recently as the last few years. *See United States v. Reynoso*, 38 F.4th 1083 (D.C. Cir. 2022); *United States v. Harrington*, 997 F.3d 812 (8th Cir. 2021); *see also United States v. Houston*, 792 F.3d 663 (6th Cir. 2015); *United States v. Weems*, 49 F.3d 528 (9th Cir. 1995); *State v. Drupals*, 49 A.3d 962 (Conn. 2012).

This deep split on a frequently recurring question implicating the Constitution's prohibition on being tried twice for the same crime—a right of the accused that "has been regarded as so important that exceptions to the principle have been only grudgingly allowed," *Wilson*, 420 U.S. at 343—urgently calls for this Court's intervention.

III. The Change-In-Law Exception To *Burks* Creates An Untenable Conflict Between Appellate Decisions Clarifying The Law, Even In Unexpected Ways, And Appellate Decisions Changing The Law, Even If Those Changes Were Foreseeable.

Amici also strongly agree with petitioner's argument that the SJC's decision creates an indefensible distinction between appellate decisions that *clarify* the law, even in ways that were totally unexpected, and appellate decisions that *change* the law, even if those changes were foreseeable. As petitioner explains in detail, every court of which *amici* are aware has held (at least since *Musacchio v. United States*, 577 U.S. 237 (2016)) that when an appellate court addresses a legal issue for the first time, it applies its understanding of the law to the defendant's sufficiency-of-the-evidence challenge. And that is true even where the appellate court's view differs dramatically from the trial court's—for instance, where the appellate court interprets a statute in a way that differs from all seven courts of appeals to consider the question or where the appellate court rejects the applicable model jury instructions on which the trial court and prosecution had relied. Pet. 30-34.

Just as a clarification to the law can be entirely unexpected, a change in law can be foreseeable—for instance, when this Court's precedent has strongly undermined, if not directly abrogated, a given lower court decision. This case presents a good example. According to the SJC, because Mr. Guardado was tried before *Bruen*, "the Commonwealth reasonably could not have known [the court] would reverse" its earlier

cases, so it reasoned that "a judgment of acquittal is not required by principles of double jeopardy." Pet. App. 9a-10a. "Without the ability to gaze into the future of this court's and the Supreme Court's rulings," the SJC held, "the Commonwealth simply had no reason to believe that any evidence concerning licensure would be necessary." Pet. App. 10a.

The SJC's reasoning both ignores the clarification cases, in which the prosecution also had "no reason to believe" the appellate courts would reach the legal holdings they reached, and dramatically overstates how unforeseeable it would have been that the SJC would define lack of licensure as an essential element. Put simply, there *were* "reason[s] to believe," even at the time of Mr. Guardado's trial, that the SJC's prior decisions treating licensure as an affirmative defense were on increasingly tenuous footing such that "evidence concerning licensure would be necessary." At least since *Heller* and *McDonald* were decided nearly 15 years ago, this Court has made clear that the right to keep and bear arms is a fundamental constitutional right that prohibits dispossessing law-abiding citizens of firearms for traditionally law abiding purposes. And though it was not entirely clear at the time of Mr. Guardado's trial that this Court would hold that the Second Amendment right recognized in *Heller* and *McDonald* applies to firearm possession outside the home, it was certainly a strong possibility given that (1) by the time of Mr. Guardado's trial, multiple federal courts of appeals had held that the Second Amendment right to bear arms applies outside the home and (2) this Court had already granted certiorari in *Bruen*. Pet. 32-33. And if the Second Amendment right applies outside the home,

then it is practically inevitable that lack of licensure must be an element; otherwise the prosecution could obtain a conviction merely by proving that the defendant engaged in constitutionally protected conduct.

Retrial therefore was no more justifiable in this case than it would have been in the clarification cases. The prosecution was "hardly powerless to prevent this sort of situation." *See Evans*, 568 U.S. at 329. The Commonwealth could have prophylactically put on any evidence in its possession to prove lack of licensure, given (at a minimum) this Court's grant to review the directly relevant Question Presented in *Bruen*. Had the prosecution done so, there would be no double jeopardy violation now.

* * *

In sum, an acquittal includes "*any* ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.'" *McElrath*, 144 S. Ct. at 660 (quoting *Evans*, 568 U.S. at 318) (emphasis added). It does not matter that the prosecution proceeded on "an erroneous decision to exclude evidence; a mistaken understanding of what evidence would suffice to sustain a conviction; or a misconstruction of the statute defining the requirements to convict." *See Evans*, 568 U.S. at 318 (quotation marks and citations omitted). The Double Jeopardy Clause prohibits the Commonwealth from retrying petitioner no matter how reasonable the prosecution's mistaken understanding was at the time of trial. Full stop.

CONCLUSION

Amici curiae NAPD and MACDL respectfully urge the Court to grant the petition for a writ of certiorari.

March 18, 2024

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