No. 20-7622

In the

Supreme Court of the United States

MERLE DENEZPI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Former United States Attorneys John C. Anderson, Michael W. Cotter, D. Michael Dunavant, Troy A. Eid, Halsey B. Frank, Barry R. Grissom, Thomas B. Heffelfinger, John W. Huber, David C. Iglesias, Brendan V. Johnson, Brian J. Kuester, Erica H. MacDonald, Robert G. McCampbell, Wendy J. Olson, Ronald A. Parsons, Jr., Timothy Q. Purdon, Bryan D. Schroder, R. Trent Shores, and Billy J. Williams, as *Amici Curiae* Supporting Respondent

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former United States Attorneys who worked on behalf of the United States to promote public safety in Indian Country.[2] Specifically:

- John C. Anderson was appointed by President Donald Trump as United States Attorney for the District of New Mexico and served from 2018 to 2021.
- Michael W. Cotter was appointed by President Barack Obama as United States Attorney for the District of Montana and served from 2009 to 2017.
- D. Michael Dunavant was appointed by President Donald Trump as United States Attorney for the Western District of Tennessee and served from 2017 to 2021.
- Troy A. Eid was appointed by President George W. Bush as United States Attorney for the District of

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[1] Both parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no other person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici curiae* join this brief solely in their personal capacities. They do not represent or advise the Respondent in this matter, and they have not been involved in this case apart from joining the briefing as *amici curiae.*

Colorado and served from 2006 to 2009.

- Halsey B. Frank was appointed by President Donald Trump as United States Attorney for the District of Maine and served from 2017 to 2021.
- Barry R. Grissom was appointed by President Barack Obama as United States Attorney for the District of Kansas and served from 2010 to 2016.
- Thomas B. Heffelfinger was appointed by both President George H.W. Bush and President George W. Bush as United States Attorney for the District of Minnesota and served from 1991 to 1993 and from 2001 to 2006.
- John W. Huber was appointed by President Barack Obama and re-appointed by President Donald Trump as United States Attorney for the District of Utah and served from 2015 to 2021.
- David C. Iglesias was appointed by President George W. Bush as United States Attorney for the District of New Mexico and served from 2001 to 2007.
- Brendan V. Johnson was appointed by President Barack Obama as United States Attorney for the

District of South Dakota and served from 2009 to 2015.

- Brian J. Kuester was appointed by President Donald Trump as United States Attorney for the Eastern District of Oklahoma and served from 2017 to 2021.
- Erica H. MacDonald was appointed by President Donald Trump as United States Attorney for the District of Minnesota and served from 2018 to 2021.
- Robert G. McCampbell was appointed by President George W. Bush as United States Attorney for the Western District of Oklahoma and served from 2001 to 2005.
- Wendy J. Olson was appointed by President Barack Obama as United States Attorney for the District of Idaho and served from 2010 to 2017.
- Ronald A. Parsons, Jr. was appointed by President Donald Trump as United States Attorney for the District of South Dakota and served from 2018 to 2021.
- Timothy Q. Purdon was appointed by President Barack Obama as United States Attorney for the District of North Dakota and served from 2010 to 2015.

- Brian D. Schroder was appointed by President Donald Trump as United States Attorney for the District of Alaska and served from 2017 to 2021.
- R. Trent Shores was appointed by President Donald Trump as United States Attorney for the Northern District of Oklahoma and served from 2017 to 2021.
- Billy J. Williams was appointed by President Barack Obama and re-appointed by President Donald Trump as United States Attorney for the District of Oregon and served from 2015 to 2021.

Amici served on the Native American Issues Subcommittee to the Attorney General's Advisory Committee. *Amici* also served in federal districts in which there were public safety issues relating to federally recognized tribes or Indian Country.

In their roles, the *amici* gained familiarity with the inner workings of criminal prosecutions in the federal courts. Based on their experience—or lack thereof—with Courts of Indian Offenses during their tenures as federal prosecutors, it is the position of the *amici curiae* that Courts of Indian Offenses are *not* courts of the United States. The *amici* respectfully submit this brief to offer their practical perspective on the issue before this Court and to better ensure the effective functioning of the criminal justice system.

SUMMARY OF THE ARGUMENT

When they served as United States Attorneys, the *amici curiae* were the chief federal law enforcement officers for their respective districts. In those roles, they did not prosecute or supervise prosecutions in any Courts of Indian Offenses sitting within the geographic boundaries of their respective federal districts. Nor, to their knowledge, did any Assistant United States Attorney serving under them. The reason for this is simple: Courts of Indian Offenses exist separate and apart from the federal court system. As shown below, Courts of Indian Offenses are tribal courts affiliated with sovereign tribal governments—*not* courts of the United States government in which the *amici curiae* served.

ARGUMENT

A. There is no double jeopardy in this case because prosecutions in Courts of Indian Offenses and courts of the United States are prosecutions by separate sovereigns.

The Double Jeopardy Clause "provides that no person may be 'twice put in jeopardy' 'for the same offence.'" *Gamble v. United States*, ___ U.S. ___, 139 S. Ct. 1960, 1963 (2019); *see id.* at 1964 (noting that "at its core, the Clause means that those acquitted or convicted of a particular 'offence' cannot be tried a second time for the same 'offence.'"). Because Courts of Indian Offenses operate to carry out tribal sovereignty, not federal sovereignty, prosecutions in the Courts of Indian Offenses and federal courts involve separate offenses applying different codes of

law. Thus, prosecutions in both courts based on the same conduct does not trigger double jeopardy.

1. When the same act violates the laws of two different sovereigns, it gives rise to two different "offenses" for purposes of double jeopardy.

The Court's double jeopardy inquiry has been—and should remain—focused on whether a criminal defendant has been tried twice for the "same offence." The Double Jeopardy Clause does not prevent the defendant from being punished twice for the same *conduct*. *See Gamble*, 139 S. Ct. at 1965. Rather, the Court's focus is on the *law* that is violated, *i.e.,* the legal "offence." *Id.* ("[A]n 'offence' is defined by a law" and "each law is defined by a sovereign."). As a result, the Court has long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." *Id*. at 1964, 1965 (noting that "where there are two sovereigns, there are two laws, and two 'offences'"); *see Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("[W]hen the same act transgresses the laws of two sovereigns, 'it cannot be truly averred that the offender has been twice punished for the same offence….'") (quoting *Moore v. Illinois*, 55 U.S. 13, 20 (1852)). Instead, a criminal defendant may, by a single action, "commit[] two offences, for each of which he is justly punishable.'" *Heath*, 474 U.S. at 88. This dual-sovereignty doctrine recognizes that each government exercises its own sovereignty "in determining what shall be an offense against its peace and dignity," *United States v. Lanza*, 260 U.S. 377, 382 (1922), and preserves the "substantive difference between the interests that two

sovereigns can have in punishing the same act," *Gamble*, 139 S. Ct. at 1966.

To determine whether sovereigns are sufficiently separate that they may both prosecute the same defendant for the same conduct, the Court looks to "the 'ultimate source' of the power undergirding the respective prosecutions." *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 68 (2016). This is an "historical, not functional" inquiry. *Id.* Thus, in *Sanchez Valle*, the Court held that the States are separate sovereigns from the federal government because they were separate sovereigns prior to the formation of the Union and the States "continue to draw upon [their pre-Union sovereignty] in enacting and enforcing criminal laws." *Id.* at 69. In contrast, municipal authority is derivative of the States' authority, so a defendant may not be convicted of both state and municipal offenses for the same conduct. *See Waller v. Florida*, 397 U.S. 387 (1970).

2. Tribes have inherent, sovereign authority to punish crimes by tribal members.

Like States, "Indian tribes also count as separate sovereigns under the Double Jeopardy Clause." *Sanchez Valle*, 579 U.S. at 70. This is because tribal sovereignty arises from a tribe's historic status as a sovereign, not from a delegation or grant of authority from the federal government. In *United States v. Wheeler*, the Court emphasized that "the power to punish offenses against tribal law committed by Tribe members, which was part of the [tribe's] primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no

way to any delegation to them of federal authority." 435 U.S. 313, 328 (1978).

More specifically, federal action, including the establishment of the Court of Indian Offenses by the Bureau of Indian Affairs ("BIA"), did not "create[] the Indians' power to govern themselves [or] their right to punish crimes committed by tribal offenders." *Id.* (emphasis omitted). Rather, as Congress expressly recognized in the Indian Reorganization Act, "Indian tribes already had such power under 'existing law.'" *Id.* Because "[a] tribe's power to punish" offenses under tribal law "pre-existed the Union," then "a tribal prosecution, like a State's, is 'attributable in no way to any delegation . . . of federal authority.'" *Valle,* 579 U.S. at 60 (quoting *Wheeler*, 435 U.S. at 328) (second alteration in original); *see Wheeler*, 435 U.S. at 328 (noting that when a tribe exercises its sovereign power to punish offenses against tribal law, "it does so as part of its retained sovereignty and not as an arm of the Federal Government."). As a result, the prosecution of a tribal law violation is derived from the historic and inherent sovereignty of the tribe and cannot constitute the "same offense" as a federal law offense under the Double Jeopardy Clause.

Petitioner does not dispute that the Ute Mountain Ute Tribe exercised its inherent sovereign authority to prosecute him for violating its own tribal laws prohibiting domestic assault. Pet. Br. at 5-6. However, Petitioner asks this Court to create a carveout to the Court's dual-sovereignty doctrine because his first prosecution occurred in a Court of Indian Offenses and not a court administered and funded by the tribe itself.

Courts of Indian Offenses "provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction." 25 C.F.R. § 11.102; *see Tillett 7 v. Lujan*, 931 F.2d 636, 638 (10th Cir. 1991). In essence, the federal government provides a *forum* in which tribes without courts of their own may prosecute those actions that the tribes have deemed to be "offenses." But as the Court observed in *Wheeler*, the BIA's establishment of the Court of Indian Offenses, did not "create[] the Indians' power to govern themselves [or] their right to punish crimes committed by tribal offenders." 435 U.S. at 328 (emphasis omitted). Rather, the substantive power to hold tribal members accountable for tribal crimes in those forums flows from the sovereignty of the tribes themselves, not the authority of the federal government. The federal government merely facilitates—and does not nullify—the tribes' exercise of their own sovereignty.

B. Courts of Indian Offenses are not federal agencies or courts of the United States.

Notwithstanding the clear existence of separate sovereigns enforcing separate laws, Petitioner asks this Court to hold that the Courts of Indian Offenses and the federal courts are all courts of the United States. Based on their experience as former federal prosecutors, the *amici curiae* find this attempt to equate the two is untenable. Although somewhat elementary, a comparison of criminal prosecutions in Courts of Indian Offenses and prosecutions in federal courts is instructive.

There is a standard cast and basic script for federal criminal prosecutions in courts of the United States. A United States Attorney or Assistant United States Attorney ("AUSA") prosecutes a federal criminal case. He or she begins by presenting evidence to a federal grand jury, which may indict the defendant for violating a provision of the United States Criminal Code. Any resulting charges are filed in the United States District Court in a case that is opened by the Federal Court Clerk's office, and the file is maintained by that office and available for public review on the PACER system. The Federal Bureau of Investigation or the United States Marshals Service is tasked with arresting the defendant. An indigent defendant may obtain representation from the Federal Public Defender's Office. If the defendant is convicted, the United States Probation and Pretrial Services Office makes recommendation for sentencing based on the United States Sentencing Guidelines, and the Marshals Service oversees his or her incarceration. Any appeal is made to a federal Article III Court, and any prison sentence is served at a facility operated by the federal Bureau of Prisons.

In contrast, none of the aforementioned cast of characters nor processes are present in a prosecution in a Court of Indian Offenses. Take, for example, the Southwest Region Court of Indian Offenses, in which the Ute Mountain Ute Tribe enforces its criminal code and charged Petitioner with a violation of tribal law. A magistrate of the Ute Mountain Ute Court of Indian Offenses presides over criminal proceedings. The tribal prosecution itself lacks many of the basic elements commonly found in federal prosecutions, *i.e.*, no AUSA, no federal public defender, no Article III judge, no federal probation officer, no Deputy U.S.

Marshal, and no consideration or application of the United States Code or the United States Sentencing Guidelines.

Defendants are brought before the Court of Indian Offenses for violations of either 25 C.F.R. Part 11 or the prosecuting tribe's criminal code.[3] "The governing body of each tribe … may enact ordinances" that, once approved by the BIA, are "enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe" and "[s[upersede any conflicting regulation" in the C.F.R.[4] The Federal Rules of Evidence apply by default in a Court of Indian Offenses, but they may be superseded by a court order or by the tribe's own evidentiary rules.[5] Tribes may contract with the BIA to appoint tribal prosecutors[6] who "act[] on behalf of the tribes to enforce criminal laws."[7] A Court of Indian Offenses magistrate, who is "confirm[ed] by a majority vote of a tribal governing body," presides over the matter and determines the sentence.[8]

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[3] 25 C.F.R. §§ 11.114(a), 11.449.

[4] 25 C.F.R. § 11.108.

[5] 25 C.F.R. § 11.313(b).

[6] *See* 25 C.F.R. § 11.204.

[7] *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Court of Indian Offenses (last visited January 12, 2022, 8:45 AM), https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses).

[8] 25 C.F.R. § 11.201(a); *see also* 25 C.F.R. 11.202 ("Any magistrate of a Court of Indian Offenses may be…removed…for cause, upon the written recommendation of a majority of the tribal governing bodies…under the jurisdiction of the Court….").

These obvious differences from federal court are further underscored by the absence of some procedural and constitutional protections afforded to criminal defendants in federal court. For example, the Constitution demands that convictions in courts of the United States result from unanimous verdicts of twelve jurors.[9] However, prosecutions in Courts of Indian Offenses require only "[six] out of the eight jurors [to] concur to render a verdict."[10]

Finally, the civil dockets of the Courts of Indian Offenses reinforce the fact that the courts differ from federal courts. Federal courts lack jurisdiction over domestic cases. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("[T]he domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees."); *Barber v. Barber*, 62 U.S. 582, 583 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony ..."). But Courts of Indian Offenses adjudicate a number of domestic issues, including "divorce, guardianship, custody, child support,

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[9] U.S. Const. amend. VI; *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct 1390 (2020) ("As early as 1898, the Court said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'") (quoting *Thompson v. Utah*, 170 U.S. 343, 351 (1898)).

[10] 25 C.F.R. § 11.314(e).

determination of paternity, [and] name change" proceedings.[11]

Nevertheless, Petitioner claims that the federal government's oversight of Court of Indian Offense makes it a court of the United States. Pet. Br. at 23-25. While it is true that some tribal prosecutions in Courts of Indian Offenses take place within the walls of a United States courthouse, this is not required, nor is it always the case. In fact, most Courts of Indian Offenses have separate facilities designated for each tribe.[12] And regardless of the physical location in which his first prosecution occurred, the lack of federal law, process, and procedure in Courts of Indian Offenses indicate that Petitioner's prosecution was not a federal prosecution in a court of the United States.

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[11] *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Court of Indian Offenses (last visited January 12, 2022, 8:45 AM), https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses).

[12] For example, the West Region Court of Indian Offenses has three different locations for the tribal dockets under its umbrella: (1) the docket for the Skull Valley Band of Goshute Indians is heard at a community building in Utah; (2) the Te-Moak Tribe of Western Shoshone Indians prosecutes its criminal cases at a Court of Indian Offenses Building in Nevada; and (3) the Winnemucca Indian Colony utilizes the Humboldt County District Courthouse—a *state* courthouse. *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Court of Indian Offenses (last visited January 17, 2022, 9:26 PM), https://www.bia.gov/CFRCourts/western-region-cfr-court). Petitioner fails to explain how, under his forum-based analysis, a Court of Indian Offenses that is administered at a state courthouse could be a court of the United States.

C. Courts of Indian Offenses adjudicate local issues, including public safety.

The focus of Courts of Indian Offenses also differs from the focus of federal courts. Courts of Indian Offenses apply tribal laws to address local issues of public safety such as traffic citations. They do not purport to enforce federal law or to address issues of broader national concern. Instead, they deal with the types of "local crimes" that are typically the domain of tribal prosecutors in tribe-administered tribal courts or city attorneys. This is consistent with the historic focus of tribes on their communities and the limited reach of their sentencing authority to misdemeanor crimes.

Petitioner's case highlights these public safety goals. Petitioner violated both a tribal ordinance and federal law when he violently assaulted a female victim in Indian Country. The Ute Mount Ute Tribe prosecuted Petitioner in a Court of Indian Offenses to further its sovereign interests in stopping domestic violence involving tribal members and punishing those responsible for any such violence. As this Court has noted, Native American women experience the highest rates of domestic violence in the United States. *See United States v. Bryant*, 579 U.S. 140, 144 (2016). In fact, more than half of Native American women report being victims of sexual violence.[13] Native American children also experience higher-

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[13] *See, e.g.,* Andre B. Rosay, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Violence Against American Indian and Alaska Native Women and Men* 43 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

than-average rates of abuse.[14] While United States Attorneys' Offices are able to address a broad range of offenses in Indian country, they typically prioritize the prosecution of major crimes.[15] The Courts of Indian Offenses provide those tribes without their own tribal court systems with the forum they need to protect their most vulnerable citizens. In utilizing that forum, the tribes not only exercise their inherent sovereign authority, but they also fulfill their governmental duties to promote public safety and prosecute local crimes, including domestic violence.

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[14] U.S. Dep't Of Justice, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Att'y Gen.'s Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive* 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf.

[15] Nowhere is this more prevalent today than in northern and eastern Oklahoma, where federal prosecutors and agents are working diligently to prosecute major crimes occurring on Indian reservations, and where the Cherokee, Chickasaw, Choctaw, and Muscogee Nations have combined to file nearly 10,000 court cases prosecuting "local crimes" since July 2020 when this court decided *McGirt v. Oklahoma,* ___ U.S. ___, 140 S. Ct. 2452 (2020). *See* "Most released due to McGirt have been charged either federally or tribally, Tulsa World analysis finds" by Curtis Killman, TULSA WORLD, January 9, 2022. https://tulsaworld.com/news/local/crime-and-courts/most-released-due-to-mcgirt-have-been-charged-either-federally-or-tribally-tulsa-world-analysis/article_96e94b7e-6f30-11ec-992c-9f9ace817196.html.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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