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 PETITIONER

THERESA M. DUNCAN
Duncan Earnest LLC
P.O. Box 2769
Santa Fe, NM 87504
(505) 710-6586

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ALEX C. BOOTA
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

QUESTION PRESENTED

Is the Court of Indian Offenses of Ute Mountain Ute Agency a federal agency such that Merle Denezpi's conviction in that court barred his subsequent prosecution in a United States District Court for a crime arising out of the same incident?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes and regulations

Statutes and regulations—continued

Other Authorities

Other Authorities—continued

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 979 F.3d 777. The order of the district court (Pet. App. 14-21) is not published in the Federal Supplement but is available at 2019 WL 295670.

JURISDICTION

The court of appeals entered judgment on October 28, 2020. A petition for a writ of certiorari was filed on March 26, 2021, and granted on October 18, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause states in relevant part that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb."

INTRODUCTION

The Bureau of Indian Affairs (BIA) is one of the oldest federal agencies, tracing its roots to the Committee on Indian Affairs, first headed in 1775 by Benjamin Franklin. Today, the BIA resides within the United States Department of the Interior. It exercises vast power over federally-recognized Indian tribes and pueblos, including the power to prosecute criminal offenses in certain circumstances. All such prosecutions are brought in the name of the United States in exercise of federal prosecutorial discretion.

In this case, federal prosecutors working for the BIA brought criminal charges on behalf of the United States against petitioner in a Court of Indian Offenses, an Article I court within the BIA often referred to as a "CFR Court." The charges included two alleged violations of federal law and one alleged violation of tribal law. The federal prosecutors obtained a conviction on the tribal offense following a plea agreement; the federal charges were dropped. Petitioner was sentenced to time served (by then, 140 days) and released. JA13.

Evidently dissatisfied with that result, federal prosecutors in the U.S. Attorney's office with concurrent jurisdiction filed a second criminal case against petitioner, again in the name of the United States as plaintiff, but this time in federal district court. The charges concerned the same incident that was at issue in the first prosecution, and the elements of the new charge subsumed entirely the elements of the offense of conviction in the CFR Court. Federal prosecutors obtained a second conviction, and the district court imposed a sentence almost 80 times longer than petitioner's first sentence.

The question presented here is whether petitioner's second federal prosecution violated the Double Jeopardy Clause. It plainly did. This Court's cases teach that the dual-sovereignty doctrine permits successive prosecutions only when the prosecutions both enforce the criminal laws of separate sovereigns and are *actually prosecuted by* separate sovereigns. That is to say that, separate and apart from the source of the criminal law enforced in the two cases, the two prosecuting entities themselves must "draw their authority * * * from distinct sources of [sovereign] power." *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 68 (2016) (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)). There is no basis in historical practice or judicial precedent for the notion that one sovereign may prosecute a defendant twice in its own name and in its own courts for the same conduct—first for a violation of another sovereign's criminal code, and then, when dissatisfied with the result, a second time for a substantively identical violation of its own criminal code.

The rule that successive cases must be prosecuted by separate sovereigns dictates the outcome here. Both prosecuting entities in petitioner's successive criminal cases derive their authority from federal power. And

because both cases were brought in the name of a single sovereign exercising that single sovereign's power to prosecute criminal offenses, the dual-sovereignty doctrine simply does not apply. The decision below accordingly must be reversed.

STATEMENT

A. The dual-sovereignty doctrine

"The ordinary rule under [the Double Jeopardy] Clause is that a person cannot be prosecuted twice for the same offense." *Sanchez Valle*, 579 U.S. at 66. The "concern that lies at the core" of the clause is avoiding "prosecutorial oppression and overreaching through successive trials." *Currier* v. *Virginia*, 138 S. Ct. 2144, 2149 (2018) (quoting *Currier* v. *Commonwealth*, 779 S.E.2d 834, 836–837 (Va. Ct. App. 2015)). Protection against double jeopardy "recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Ibid.*

This case concerns the dual-sovereignty doctrine, which provides a carveout to the ordinary rule against double jeopardy. According to that doctrine, successive prosecutions of a single defendant by separate sovereigns, even to punish "identical criminal conduct through equivalent criminal laws," are not prosecutions for the "same offense" within the meaning of the Double Jeopardy Clause. *Sanchez Valle*, 579 U.S. at 67.

"Whether two prosecuting entities are dual sovereigns in the double jeopardy context * * * depends on whether they draw their authority to punish the offender from distinct sources of power." *Sanchez Valle*, 579 U.S. at 68 (cleaned up) (quoting *Heath*, 474 U.S. at 88). The Court's cases have recognized two elements of the sovereign power undergirding a criminal prosecution,

each essential to the dual sovereignty analysis. See, *e.g.*, *Heath*, 474 U.S. at 93.

The first element is the power to *enact* the criminal law—that is, the power to criminalize conduct. For the dual-sovereignty carveout to apply, the laws that are enforced in the successive prosecutions must themselves emanate from distinct sources of sovereign power. "[A]n 'offence' is defined by a law," the Court has said, "and each law is defined by a sovereign." *Gamble* v. *United States*, 139 S. Ct. 1960, 1965 (2019). "So where there are two sovereigns, there are two laws, and two 'offences.'" *Ibid.* Put another way, "a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it *violates the laws of* separate sovereigns." *Sanchez Valle*, 579 U.S. at 62 (emphasis added).

The second element is the power to *enforce* the criminal law—that is, the "power to prosecute." *Heath*, 474 U.S. at 89. Under this element of the carveout, the "prosecuting entities" themselves—the entities that exercise the discretion to file charges and litigate the criminal case through conviction and sentencing—must also "draw their authority * * * from distinct sources of power." *Sanchez Valle*, 579 U.S. at 68. For two offenses to qualify as "not the same offence for double jeopardy purposes," in other words, the defendant must actually be "'*prosecuted by* different sovereigns.'" *Gamble*, 139 S. Ct. at 1964 (emphasis added) (quoting *Heath*, 474 U.S. at 92). Accord *United States* v. *Lara*, 541 U.S. 193, 217 n.1 (2004) (Thomas, J., concurring) (suggesting that jeopardy attaches as to one sovereign when that sovereign "authorize[s] the prosecution" or "prompt[s] [the] prosecution").

In short, when two prosecuting entities draw upon "separate and independent sources of power" in both "enacting *and* enforcing [their] criminal laws," the dual-

sovereignty doctrine applies, permitting successive prosecutions by those entities. *Sanchez Valle*, 579 U.S. at 69 (emphasis added). But when the power exercised to enact the separate criminal laws *or* to prosecute their violation derives from a single sovereign, it does not.

Applying these principles, the Court held in *United States* v. *Wheeler*, 435 U.S. 313 (1978), that when an Indian tribe prosecutes a defendant in its own courts for a violation of its own criminal laws, it is a separate sovereign from the United States for double jeopardy purposes. *Id.* at 322-324. The Court did not resolve, however, the question whether a Court of Indian Offenses is an "arm of the Federal Government" for purposes of the dual-sovereignty doctrine. *Id.* at 327 n. 26.

B. The CFR Courts

1. "Criminal jurisdiction over offenses committed in 'Indian country'" involves "a complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (citation omitted) (quoting *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990)). "[O]ffenses committed by one Indian against the person or property of another Indian" in Indian country ordinarily constitute tribal offenses that are "subject to the jurisdiction of the concerned Indian tribe" and prosecuted in tribal court. *Ibid.* (quoting F. Cohen, *Handbook of Federal Indian Law* 288 (1982 ed.)). See also *Lara*, 541 U.S. at 199. Tribal courts are distinct judicial systems that operate independent of the federal government. See U.S. Dep't of the Interior, *Tribal Court Systems*, perma.cc/UW45-QJR8.

The federal government plays a concurrent role in the prosecution of crimes in Indian country in two circumstances. *First*, the Major Crimes Act, enacted in 1885, provides that any Indian who commits certain enumerated felony offenses in Indian country "shall be subject to the same law and penalties as all other persons

committing [the enumerated] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). A defendant accused of an enumerated felony is thus subject to concurrent federal and tribal criminal jurisdiction. See 25 U.S.C. § 2810(5). Prosecutions under the Major Crimes Act are brought by U.S. Attorneys in federal district courts.

Second, in some areas of Indian country, tribes lack an adequate judicial apparatus to administer a system of criminal justice. "[T]o provide adequate machinery for the administration of justice for Indian tribes" in those areas, the BIA operates the Courts of Indian Offenses. 25 C.F.R. § 11.102. Because these courts are constituted by federal regulations and enforce a criminal code promulgated by the BIA in the Code of Federal Regulations, they are commonly referred to as "CFR Courts." See U.S. Dep't of the Interior, *Courts of Indian Offenses*, perma.cc/UDF2-X343; *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978).

At the height of the courts' influence around the end of the nineteenth century, the BIA administered scores of CFR Courts throughout nearly two thirds of Indian country. William T. Hagan, *Indian Police and Judges* 109 (1966); Vine Deloria, Jr., & Clifford M. Lytle, *American Indians, American Justice* 115 (1983). There are only five such courts remaining in operation today, serving 16 tribes and pueblos. See U.S. Dep't of the Interior, *Courts of Indian Offenses*, perma.cc/UDF2-X343.

2. The CFR Courts have criminal jurisdiction over both tribal and federal offenses defined by regulation. Accordingly, they may hear cases concerning any act by an Indian "that is made a criminal offense under" the BIA's own code of criminal offenses when the act occurs "within the Indian country subject to the court's jurisdiction." 25 C.F.R. § 11.114(a). At the same time, a tribe "over which a Court of Indian Offenses has juris-

diction may enact [its own criminal] ordinances which, when approved by the Assistant Secretary [for] Indian Affairs," are "enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe." *Id.* § 11.108(a).

To carry out the work of the CFR Courts, Congress has established within the BIA a "Branch of Criminal Investigations." See 25 U.S.C. § 2802(d). The BIA's investigative branch employs uniformed federal law enforcement officers authorized by federal law to make arrests and execute warrants "issued under the laws of the United States (including those issued by a Court of Indian Offenses)." *Id.* § 2803(2). These "investigative personnel" are subject to federal control and support the BIA's prosecutors. *Id.* § 2802(d)(1), (d)(4)(i).[1]

Prosecutors in the CFR Courts are appointed by the superintendent of the relevant regional "agency" and work for the BIA. 25 C.F.R. § 11.204.[2] In light of the overlap between federal offenses under the BIA's regulatory code, tribal offenses under applicable tribal criminal codes, and offenses under the Major Crimes Act, Congress has mandated coordination between BIA prosecutors and any U.S. Attorney's office with overlapping jurisdiction. 25 U.S.C. § 2810(b)(1), (8).

---

[1] The BIA separately employs police officers "responsible for the routine law enforcement and police operations of the Bureau in Indian Country." 25 U.S.C. § 2802(c), (d)(2). See also BIA, *Careers*, perma.cc/FJF7-ZAVH. Those officers, who are employed within the BIA's Office of Justice Services, are authorized to enforce tribal law with the consent of the respective tribe. 25 U.S.C. § 2802(c)(1).

[2] The BIA is divided into twelve regional offices, which are further divided into more than 80 tribal "agencies." Each agency is headed by a superintendent. Historically, each tribe was assigned its own agency, but today, many agencies supervise multiple tribes.

3. The CFR Courts themselves are "established by the Department of the Interior" as Article I courts within the department. *Law and Order on Indian Reservations*, 58 Fed. Reg. 54,406 (Oct. 21, 1993). The Assistant Secretary for Indian Affairs appoints the judges of the CFR Courts, subject to the approval of the relevant tribal governing bodies. 25 C.F.R. § 11.201(a). Tribal input on the appointment of judges is a matter of federal grace, however. The BIA retains authority "to appoint a magistrate without the need for confirmation by the Tribal governing body." *Court of Indian Offenses Serving the Kewa Pueblo*, 85 Fed. Reg. 10,714 (Feb. 25, 2020).

The courts maintain official records, which are treated by statute as federal executive records subject to federal recordkeeping rules under 44 U.S.C. § 3102. See 25 C.F.R. § 11.206. Official court documents bear the words "The United States of America" above the words "In the Court of Indian Offenses." *E.g.*, JA11-13. This stands in contrast to tribal court documents, which bear the name of the respective tribe. *E.g.*, JA14-17.

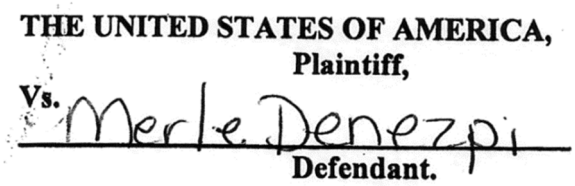
Prosecutions in CFR Courts are brought by the BIA in the name of "the United States of America" as plaintiff. *E.g.*, JA11-13. When a defendant is detained pending trial or convicted and sentenced to a period of incarceration, he is held in a federal facility. *E.g.*, JA11, 13 (sentencing petitioner to incarceration at the federal detention center). In fact, the BIA's Office of Justice Services operates numerous federal detention centers throughout Indian country. U.S. Dep't of the Interior, *Office of Justice Services*, perma.cc/JS4K-4NEU. And if the defendant is assessed a fine, the amount owed is paid into the federal treasury and not any tribal treasury. 25 C.F.R. § 11.209.

Finally, all expenses incurred for the investigation, prosecution, and punishment of crimes in and by the

CFR Courts are paid for with federal appropriations to the Interior Department. 25 U.S.C. § 2808.

C. The first prosecution by the United States

1. Petitioner (a Navajo) allegedly forced a woman (another Navajo) to engage in nonconsensual sex in Indian country. Pet. App. 3. Following a short investigation, BIA Special Agent Lyle Benally swore out a criminal complaint in the CFR Court for the Ute Mountain Ute Agency, charging petitioner with one tribal offense for assault and battery (6 Ute Mountain Ute Code 2 (2010)) and two federal regulatory offenses for terroristic threats (25 C.F.R. § 11.402) and false imprisonment (*id.* § 11.404). JA9. The caption appearing on all CFR Court documents (*e.g.*, JA10-12) was:


THE UNITED STATES OF AMERICA,
Plaintiff,
Vs. Merle Denezpi
Defendant.

Petitioner, while maintaining his innocence, pleaded no contest to the tribal assault-and-battery charge in return for dismissal of the federal charges. JA13; Pet. App. 4. The CFR Court accepted the plea and sentenced petitioner to 140 days incarceration in the Chief Ignacio Federal Detention Center. JA13.

D. The second prosecution by the United States

1. Around six months after his release from federal detention for the assault-and-battery conviction, petitioner was indicted by a federal grand jury on one count of aggravated sexual abuse in Indian Country, in violation of the Major Crimes Act, 18 U.S.C. §§ 2241-(a)(1)-(2), 1153(a). Pet. App. 4. The indictment concerned the same incident for which the United States had prosecuted petitioner in the CFR Court. Assault and

battery is a lesser included offense of aggravated sexual abuse. Just like the prosecution in the CFR Court, the caption in the district court was *United States of America, Plaintiff* v. *Merle Denezpi, Defendant*. JA3.

Petitioner moved to dismiss the indictment on double jeopardy grounds, but the district court denied the motion. Pet. App. 14-21. In the district court's view, "the CFR courts' power to punish crimes occurring on tribal lands derives from their [tribal] sovereignty, not from a grant of authority by the federal government." Pet. App. 18.

2. The court of appeals affirmed. Pet. App. 1-13. Relying on prior circuit precedent, the court reasoned that, "[w]hile CFR courts are not tribal courts, they nevertheless 'function as tribal courts' and provide the 'judicial forum through which the tribe can exercise its jurisdiction until such time as the tribe adopts a formal law and order code.'" Pet. App. 7-8 (quoting *Tillett* v. *Lujan*, 931 F.2d 636, 640 (10th Cir. 1991)).

In the Tenth Circuit's view, the Ute Mountain Ute Tribe had "authorize[d] the use of the CFR courts as [its] own" for purposes of enforcing tribal laws. Pet. App. 9 (quoting *Kiowa Election Bd.* v. *Lujan*, 1 Okla. Trib. 140, 151-52 (Kiowa Ct. Indian App. 1987)). This meant that "'the ultimate source of the power undergirding' the CFR prosecution" was the tribe's own "inherent sovereignty," and not "delegated" federal power. Pet. App. 10 (quoting *Sanchez Valle*, 579 U.S. at 68).

For that reason, the Tenth Circuit held the dual-sovereignty doctrine applicable and concluded that "the subsequent prosecution of [petitioner] in the federal district court did not violate the Fifth Amendment's prohibition against Double Jeopardy." Pet. App. 10.

SUMMARY OF ARGUMENT

After prosecuting petitioner in a CFR Court, the United States was barred from prosecuting him a second time in an Article III court for an offense subsuming the same elements. In holding otherwise, the Tenth Circuit concluded that the dual-sovereignty doctrine applies in these circumstances. It does not; the Double Jeopardy Clause plainly bars a single sovereign from prosecuting the same defendant twice for substantively identical criminal offenses.

A.1. The dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign. The Court repeatedly has recognized that, before the dual-sovereignty doctrine can apply, the distinct criminal laws of separate sovereigns must actually be prosecuted by separate sovereigns, in exercise of independent prosecutorial discretion. In other words, the dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign, regardless of the source of the power to adopt the criminal codes enforced in each prosecution.

2. That rule resolves this case because petitioner's successive prosecutions were undertaken by a single sovereign—the United States. There is no dispute that the source of power to prosecute petitioner's second criminal case was federal. As a matter of both the original genesis of the CFR Courts and current practice, the source of power to prosecute petitioner's first criminal case likewise was federal. The BIA has expressly recognized as much in prior rulemakings, limiting the scope of its regulatory code of criminal offenses explicitly to avoid double-jeopardy problems.

The Courts of Indian Offenses, first established by the Interior Department in 1882, were part of a federal effort to impose western law on the Indian tribes. They were thus designed to disrupt, suppress, and criminalize

Indian customs and to assimilate Indians into Anglo-American culture. The code of criminal offenses first adopted and enforced by the BIA in the Courts of Indian Offenses thus criminalized many Indian cultural practices. And although the code was enforceable alongside state and territorial criminal laws, tribal laws were not enforceable there.

Indeed, any assertion of tribal sovereignty to enforce tribal laws in the Courts of Indian Offenses would have been inconsistent with the purpose of the courts. As scholars and federal authorities alike have uniformly recognized, their purpose was to undermine rather than promote traditional tribal self-government. The only possible source of power to prosecute crimes in such courts is federal, not tribal, sovereignty.

As a matter of current practice, too, the CFR Courts and the BIA's prosecutors undeniably derive their power from federal, not tribal, sources. The courts may be established unilaterally by the BIA pursuant to federal regulations, regardless of tribal consent. As the BIA itself has explained, the CFR Courts therefore remain federal instrumentalities and not tribal bodies, and they are subject to exclusively federal control and supervision. The BIA dictates the appointments of both judges and prosecutors, all of whom work for and at the direction of the United States. Prosecutions in the CFR Courts are therefore commenced pursuant to federal prerogatives, reflecting federal policies and priorities. There is no way to conceive of them as an exercise of tribal sovereignty. Both of petitioner's prosecutions thus were undertaken by a single sovereign—the United States—in violation of the Double Jeopardy Clause.

B.1. The decision below is not defensible on any other ground. To begin with, it finds no support in founding-era common law. Cases before and around the founding stand only for the proposition that a prosecu-

tion under one sovereign's laws does not preclude a second sovereign from prosecuting the same conduct under its own laws. There is no support for the idea that a single sovereign may prosecute a defendant successively for violations of its own laws and substantively identical laws of another sovereign.

2. It also makes no difference as a practical matter that the offense of conviction in the CFR Court was a tribal crime and the subsequent offense of conviction in the district court was a federal crime. A federal court does not morph into an instrumentality of an Indian tribe simply by purporting to enforce the substantive law of the tribe. To say otherwise would collapse the two elements of the dual-sovereignty doctrine (the power to criminalize and the power to prosecute) into one, which is not the law.

3. Finally, the decision below does not further the purposes underlying the dual-sovereignty doctrine and leads to troubling results.

In previous cases, the Court has expressed concern for a race-to-the-court problem, which the dual-sovereignty doctrine addresses by allowing prosecuting entities of separate sovereigns both to bring criminal cases. But that problem is not implicated when a single sovereign is responsible for both prosecutions—particularly where, as here, Congress has expressly directed cooperation among federal prosecutors with concurrent jurisdiction over crimes committed in Indian country.

Nor is there any concern that a double-jeopardy bar will prevent Indian tribes from vindicating their sovereign interest in prosecuting their own offenses. As previously noted, BIA prosecutions in the CFR Courts necessarily are brought pursuant to federal prosecutorial discretion and thus reflect federal (not tribal) prerogatives, regardless of the substantive law invoked. And federal regulations impose significant limits on punish-

ments in the CFR Courts in any event, meaning that enforcement of tribal codes in the CFR Courts often may not fully (if at all) reflect tribal interests.

The Tenth Circuit's reasoning also introduces the troubling prospect that states could authorize their courts to try federal crimes and vice versa. In either case, the Tenth Circuit's reasoning would render the Double Jeopardy Clause meaningless—federal or state prosecutors would be free to charge substantially identical crimes successively in the same courts, exercising the same prosecutorial powers, simply by asserting enforcement of a different sovereign's laws. That would be a shocking end run around the Double Jeopardy Clause. It is not something the founders would have thought possible under the Fifth Amendment.

ARGUMENT

AFTER PROSECUTING PETITIONER IN A CFR COURT, THE UNITED STATES WAS BARRED FROM PROSECUTING HIM A SECOND TIME IN AN ARTICLE III COURT FOR AN OFFENSE SUBSUMING THE SAME ELEMENTS

This case involves a straightforward violation of the Double Jeopardy Clause: The United States brought the first criminal case against petitioner (JA9-13) and also the second criminal case against him (JA3-6) for the same course of conduct and for offenses with entirely overlapping elements. The fact that the first prosecution took place in a CFR Court—an Article I court established by the BIA—and resulted in a conviction for a tribal offense makes no difference. The historical wellsprings of the BIA's authority to prosecute criminal defendants in the CFR Courts is manifestly federal. And in practice—both past and present—federal authorities control all relevant aspects of the prosecutions litigated there. There is no founding-era precedent for permitting successive prosecutions by a single sovereign in circum-

stances like these. What is more, allowing petitioner's conviction to stand would disserve the purposes of the dual-sovereignty doctrine. The Court should reverse.

A. The dual-sovereignty doctrine does not apply under these circumstances

1. The dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign

The Double Jeopardy Clause provides that no person shall be "twice put in jeopardy" "for the same offence." U.S. Const. amend. V. Whether "two distinct statutory provisions" are "two offenses or only one" depends on "whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). When one offense is a lesser included offense of the other (as here), it is the same offense for double jeopardy purposes. *Ibid.*

The Court has long recognized a carveout to the rule against double jeopardy when two offenses are defined by separate sovereigns. "As originally understood, * * * an 'offence' is defined by a law, and each law is defined by a sovereign," meaning that when "there are two sovereigns, there are two laws, and two 'offences.'" *Gamble*, 139 S. Ct. at 1965. Put another way, "[i]f the same conduct violates two (or more) laws, then each offense may be separately prosecuted" without offending the Double Jeopardy Clause. *Ibid.* (quoting *Grady* v. *Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting), overruled by *United States* v. *Dixon*, 509 U.S. 688 (1993)).

The Court has never held, however, that the mere invocation of the distinct criminal laws of separate sovereigns is by itself sufficient for the dual-sovereignty doctrine to justify multiple prosecutions of a single defendant for the same conduct. The Court instead has consistently recognized that the distinct criminal laws of

separate sovereigns must also be *prosecuted by* separate sovereigns, in exercise of independent prosecutorial discretion. Put another way, the dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign, regardless of the source of the power to adopt the criminal codes enforced in each prosecution.

In *Heath*, for example, the Court emphasized that "the crucial determination" under the dual-sovereignty doctrine "is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns." 474 U.S. at 88. Thus, the inquiry is not simply whether the criminal laws sought to be enforced in successive prosecutions have been defined by separate sovereigns; it is also whether the "two prosecuting entities" themselves—the prosecutors who exercise the power to bring charges, and the courts that exercise the power to enter judgments and impose punishments—derive their power "from separate and independent sources of power and authority." *Id.* at 89-90. The Court recently reaffirmed this principle in *Gamble*, explaining that "two offenses are not the same offence for double jeopardy purposes" only if the offenses are actually "*prosecuted by* different sovereigns." 139 S. Ct. at 1964 (quotation marks omitted and emphasis added) (quoting *Heath*, 474 U.S. at 92). Accord *Wheeler*, 435 U.S. at 320 (focusing on "the ultimate source of the power under which the respective prosecutions were undertaken").

These cases all reflect a simple and commonsense rule: When "two [prosecuting] entities * * * draw their power from the same ultimate source," the dual-sovereignty doctrine will not permit successive prosecutions by those entities, regardless of the source of power to adopt the underlying criminal laws. *Sanchez Valle*, 579 U.S. at 68. Indeed, the Court has gone so far as to

suggest that when one prosecuting entity is "merely a tool" for another prosecuting entity, such that a second prosecution by an apparently separate sovereign is "in essential fact" just a "cover" for a second prosecution by the first sovereign, the dual-sovereignty doctrine will not apply. *Bartkus* v. *Illinois*, 359 U.S. 121, 123-124 (1959). See, *e.g.*, *United States* v. *Angleton*, 314 F.3d 767, 774 (5th Cir. 2002) (the dual-sovereignty doctrine does not apply if the separate sovereigns have not "made independent decisions to prosecute").

2. Petitioner's successive prosecutions were undertaken by a single sovereign

The rule that successive prosecutions must actually be prosecuted by separate sovereigns resolves this case because petitioner's successive prosecutions were undertaken by a single sovereign—the United States. There is no dispute that the source of power to prosecute petitioner's second criminal case (the one brought by the U.S. Attorney in the district court for a violation of the Major Crimes Act) was federal. As a matter of both history and practice, the source of power to prosecute petitioner's first criminal case (the one brought by the BIA in the CFR Court) likewise was federal. It hardly could be otherwise—CFR Courts are Article I courts that reside within the BIA, a federal agency; and the judges who staff the courts and the prosecutors who bring criminal cases there are all subject to exclusive federal control. The dual-sovereignty doctrine thus does not apply, regardless whether the offense of conviction in the first case was a tribal offense.

a. The CFR Courts' historical wellsprings. To determine "whether the prosecutorial powers" brought to bear in two successive prosecutions "have independent origins" or instead "derive from the same 'ultimate source,'" the Court must "look[] at the deepest wellsprings, not the current exercise, of prosecutorial author-

ity." *Sanchez Valle*, 579 U.S. at 62, 68. Here, the historical source of the BIA's power to prosecute petitioner in the CFR Court is unmistakably federal.

In the years preceding the establishment of the Courts of Indian Offenses (now dubbed the CFR Courts), life in the American Midwest was marked by persistent "warfare" and hostilities between western settlers and the Indian tribes. Hagan, *supra*, at 2. To "reduce the friction" between the populations, federal policy at the time called for "further concentration" of the tribes on reservations and, there, "the extension of government over the Indians," so as to "convert[] the nomad pagan warrior into" a peaceful agrarian settler. *Ibid.*

The Courts of Indian Offenses, first established by the Interior Department in 1882, were one element of the federal policy to bring western customs and law to the Indian tribes. The historical record could not be clearer on the assimilationist motives driving the implementation of the courts: The Interior Secretary at the time, H.M. Teller, openly disapproved of tribal customs, which he described in his 1883 annual report to Congress as "intended and calculated to stimulate the warlike passions" among the Indians. Annual Report of the Secretary of the Interior to Congress, at xi (June 30, 1883), perma.cc/D9RQ-6LVN (*1883 DOI Report*). Teller also objected on moral and religious grounds to polygamy and "the influence of medicine men." *Ibid.* More generally, Teller and his contemporaries worried that the tribes were "without law of any kind" at the time, necessitating "some rule of government on the reservations." *Id.* at x. Accord Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 235 (1994) (observing that the CFR Courts were established in response to "a perceived need to regulate law and order on reservations"); Hagan, *supra*, at 107-109 (recounting history).

Teller thus conceived of the Courts of Indian Offenses as a means to disrupt and suppress "savage rites and heathenish customs," with the aim of "bringing the Indians under the civilizing influence of law." *1883 DOI Report* xi-xii. To that end, he directed the BIA to promulgate "certain rules for the government of this tribunal" (meaning the Courts of Indian Offenses), including by defining, as a matter of federal law, the "offenses of which it was to take cognizance." *Ibid.*

The code that the BIA thereafter adopted was designed to serve Teller's goal of undermining tribal sovereignty. In addition to criminalizing basic offenses like theft and prostitution, it further criminalized many Indian cultural practices, including war dances, plural marriages, and practicing as a medicine man. Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior 29-30 (Aug. 27, 1892), perma.cc/4XHN-5QAA (*1892 BIA Report*). And although the code was enforceable alongside the misdemeanor codes of the "State or Territory within which [a] reservation may be located" (*id.* at 30-31), there was no mention then of enforcement of tribal laws.

The laws that the BIA enforced in the CFR Courts, and the power with which it enforced them, were both necessarily federal. Indeed, any assertion of tribal sovereignty to enforce tribal laws in the Courts of Indian Offenses would have been inconsistent with the express purpose of the courts. The point was to stamp out tribal customs and assimilate Indians into western culture, and thus to "undermine[]" rather than promote "the authority of Indian chiefs and traditional Tribal self-government." Federal Office of Child Support Enforcement, IM-07-03, *Tribal and State Jurisdiction to Establish and Enforce Child Support* 10 (Mar. 12, 2007), perma.cc/-9NED-79DE (*2007 FOCSE Memo*).

Put simply, the courts were designed to "punish tribal members under the authority of federal law" for continuing their traditional cultural practices. Dennis Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 Okla. City U. L. Rev. 5, 12 (1994). See also Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. Rev. 1752, 1765 (2016) (explaining that the CFR Courts often "criminalized the actions of tribal government" and were "tools of assimilation wielded by the federal government under the guise of federal regulation for the purpose of 'civilizing' the tribes").[3] The "wellspring" of that power was not, and could not logically have been, tribal sovereignty.

That conclusion is borne out not only in the express policies underlying the courts at their inception, but also in their foundation, practice, and operation at the time. From the beginning, CFR Courts were constituted under the authority of federal regulations. *1892 BIA Report* 28-29. To be sure, those original regulations were issued on what was initially "shaky legal foundation." Hagan, *supra*, at 110. But Congress soon statutorily ratified the creation of the courts with appropriations for judges' salaries beginning in 1888. *Id.* at 111-112; *Oliphant*, 435

---

[3] See also Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. Rev. 49, 56-57 (1988) (explaining that CFR Courts were "widely regarded as entities subject to extensive and excessive Bureau of Indian Affairs control and influence"); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate?*, 34 N.M. L. Rev. 381, 394 n.107 (2004) (explaining that the CFR Courts "were created by Congress to be utilized as federal educational and disciplinary tools to civilize the Indians" and "[n]either the courts, nor the codes found in 25 CFR, were tailored to reflect Indian cultures" or laws).

U.S. at 196 n.7. Today, statutory authorization for the CFR Courts appears, among other places, at 25 U.S.C. §§ 2508(2)(A) and 3611(c)(5).

In light of that foundation, it is no surprise that historically the courts "were run by the BIA Indian agent for each reservation pursuant to legal codes and procedures established by the BIA." *2007 FOCSE Memo* 10. Accord Cutler, *supra*, at 1765 ("The CFR Courts administered justice on tribal lands at the direction of a federal Indian Agent."). To that end, the reservation superintendents "would appoint [the] judge[s] for the tribe[s]." Cutler, *supra*, at 1765. See also *2007 FOCSE Memo* 10 (judges of the courts "were hired and fired by the BIA," not the tribes). And BIA regulations called for the appointment of judges who rejected tribal customs—those "who read and wr[ote] English readily, w[ore] citizens' dress, and engage[d] in civilized pursuits." *1892 BIA Report* 28. "Even the police were chosen by the BIA," long before Congress's formal establishment of the BIA's investigative force. *2007 FOCSE Memo* 10. The CFR Courts were thus widely regarded as a "foreign" and "hated institution" to the members of the reservations on which they operated. Deloria & Lytle, *supra*, at 115-116.

Against this historical background, it is troublingly revisionist to say that establishment of the CFR Courts "merely provide[d] the administrative 'machinery' for exercising [inherent tribal] authority" "to prosecute an Indian for violating tribal law." U.S. Opp. 9. In fact, the exact opposite is true: The courts were initially created with federal regulatory power as purely federal instrumentalities to force federal law (and western cultural norms) on the tribes, in hopes of extinguishing their cultural practices and assimilating their members into Anglo-American society. As one scholar has described it, the CFR Courts were the BIA's "imposition of [an]

adversarial court system to displace or supplant indigenous justice systems" and customs. Barbara Creel, *The Right to Counsel for Indians Accused of Crime*, 18 Mich. J. Race & L. 317, 360 (2013).

The only possible source of power to prosecute crimes in such courts is federal, not tribal, sovereignty. *Cf. United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886) (explaining the source of federal power for enactment and enforcement of the Major Crimes Act). As the Ninth Circuit has said, it is "pure fiction" to say that the CFR Courts "are not in part, at least, arms of the federal government," given that "they were created by the federal executive and imposed upon the Indian community" and have all along been subject to federal control. *Colliflower* v. *Garland*, 342 F.2d 369, 378-379 (9th Cir. 1965). See also Creel, *supra*, at 340 (describing the early Courts of Indian Offenses as "blatant federal instrumentalities" "with the mission to keep Indians from being Indian").

In sum, the original source of the BIA's power to prosecute crimes in the CFR Courts is federal sovereignty. And that is all the Court needs to say to resolve this case: Because "the two entities that [sought] successively to prosecute [petitioner] for the same course of conduct" both derive their power from federal sovereignty and not "separate and independent sources of power" (*Heath*, 474 U.S. at 88-89), petitioner's second prosecution violated the Double Jeopardy Clause.

b. Current exercise. Without acknowledging this well-documented history, the United States asserted in its brief in opposition (at 9) that "[t]he premise of prosecuting an Indian offender under tribal law in [a CFR Court] is * * * that tribes 'retain' authority to punish offenses against tribal law committed by Indians." That mirrors the court of appeals' reasoning, which asserted that the CFR Courts "function as tribal courts and

provide the judicial forum through which the tribe can exercise its jurisdiction." Pet. App. 7-8 (quotation marks omitted).

Of course, those assertions falter out of the gate because they make no effort to grapple with the historical wellsprings of the BIA's prosecutorial authority in the CFR Courts, which were not originally designed to serve any such purpose. Rather, the Tenth Circuit's and federal government's positions reflect wholly contemporary views with no discernable relation to the origins of the CFR Courts. Indeed, the federal policy shift toward tribal "self-determination" commenced nearly a century after the CFR Courts were first established. See Deloria & Lytle, *supra*, at 21-23.[4]

But even on its own terms, the government's position is mistaken. The CFR Courts today remain federal instrumentalities, in which federal prosecutors exercise exclusively federal prosecutorial discretion. The CFR Courts are *not* at all a "judicial forum through which the tribe can exercise its jurisdiction" (Pet. App. 7); tribes simply have no relevant role in the prosecution of crimes in those courts.

The BIA itself has been clear on this point. In updating its regulations in 1993, for example, it stated that

---

[4] It was not until the 1930s—around the time of the Indian Reorganization Act of 1934 and more than 50 years after the BIA had first established the CFR Courts—that sources first suggested that the courts "derive their authority from the tribe, rather than from Washington." Deloria & Lytle, *supra*, at 115 (quoting W.G. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. of Comp. Legis. & Int'l L. 78 (1934)). See also Opinion of the Solicitor of Labor, *Secretary's Power to Regulate Conduct of Indians*, at 536 (1935), perma.cc/HTX2-HCYA (similar). But this ex post "attempted justification" for the early CFR Courts has never been credited by scholars, given the history just recounted. Deloria & Lytle, *supra*, at 115.

its current policy is to encourage tribes to adopt sufficiently robust judicial systems of their own, so as to permit a replacement of existing CFR Courts with tribal courts. 58 Fed. Reg. at 54,407. But until that occurs, the agency explained, the CFR Courts remain "Federal instrumentalities and not tribal bodies," and "[f]ederal supervision" of the courts "is therefore mandatory." *Id.* at 54,407-08. The BIA accordingly maintains control over appointments of both judges (*ibid.*) and prosecutors (25 C.F.R. § 11.204), all of whom work for and at the direction of the United States. There is no way to conceive of a BIA prosecution in these courts as an exercise of tribal sovereignty or a CFR Court as a "judicial forum through which [a] tribe can exercise its jurisdiction." Pet. App. 7-8.

That is especially so because—contrary to the Tenth Circuit's belief that "[t]he tribes * * * authorize the use of the CFR Courts as their own" (Pet. App. 9)—the tribes have no say in whether a CFR Court is established or disbanded in the first place. In establishing a new CFR Court for the Kewa Pueblo just last year, the BIA stated that it retains authority to "unilaterally establish a CFR court" in the *absence* of tribal consent, and "to appoint a magistrate without the need for confirmation by the Tribal governing body." *Court of Indian Offenses Serving the Kewa Pueblo*, 85 Fed. Reg. 10,714 (Feb. 25, 2020). And the road is one-way only: The tribes cannot terminate CFR Courts unilaterally. To do so, they must adopt ordinances that must be approved by the Assistant Secretary for Indian Affairs. See 25 C.F.R. § 11.104; Const. of Ute Mountain Ute Tribe art. V, sec. 1(n).

At bottom, the modern CFR Courts are established by the BIA pursuant to federal statutory authority (25 U.S.C. § 3611(c)(5)), they issue orders and warrants in the name and under the laws of the United States (*id.* § 2508(2)(A)), and they remain subject to federal control

and supervision without required input from the tribes, other than as a matter of federal grace. That describes a body whose power derives from federal and not tribal sovereignty.

Any lingering doubt on that score (there should be none) is resolved by the manner in which the BIA, through the CFR Courts, exerts its power to prosecute and punish: Again, criminal prosecutions in the CFR Courts are brought in the name of "the United States of America," as the sovereign plaintiff. *E.g.*, JA11-13. And when a defendant is sentenced to a period of incarceration, he is remanded to federal custody. *E.g.*, JA13. If he is assessed a fine, it must be paid to the federal treasury. 25 C.F.R. § 11.209. In these circumstances, the power to prosecute and punish crimes in the CFR Courts is plainly federal.

That resolves the matter against the government beyond all doubt. The United States brought the first criminal case against petitioner in the CFR Court (JA11) and *also* the second criminal case against him in the district court (JA3), charging substantively overlapping offenses for the same incident. That is a straightforward violation of the Double Jeopardy Clause.

B. The decision below is indefensible

In reaching the opposite conclusion below, the Tenth Circuit reasoned that because CFR Courts prosecute tribal crimes, they "exercise[] * * * tribal power." Pet. App. 9. As we have just shown, that is simply wrong: Tribes do not, and logically cannot, exercise their own sovereignty through federal prosecutions undertaken unilaterally by the BIA.

Nor is there anything else in the Court's precedents on which the government might hang its hat: The decision below finds no support in founding-era common law or the policies that underlie the dual-sovereignty doctrine. It is indefensible and should be reversed.

1. The decision below finds no support in founding-era common law

As a starting point, we are unaware of any basis in founding-era English common law for the notion that the framers would have tolerated successive prosecutions in circumstances like these. See *Benton* v. *Maryland*, 395 U.S. 784, 795 (1969) (holding that the clause's meaning is derived from preratification English authorities); *Grady*, 495 U.S. at 530 (Scalia, J., dissenting) (same).

Cases early in the Nation's history stand only for the proposition that a prosecution under one sovereign's laws does not preclude a second sovereign from prosecuting the same conduct under its own laws. See generally *Gamble*, 139 S. Ct. at 1969-1977 (recounting cases before and around ratification of the Bill of Rights, all involving both foreign laws *and* "foreign trial[s]," which is to say "*prosecutions* by separate sovereigns" (emphasis added)).

We have searched extensively and found no case to support the proposition that a single sovereign may prosecute a defendant twice in its own name and in its own courts—first for a violation of another sovereign's laws, and then a second time for a substantively identical violation of its own laws. By all appearances, the idea would have been foreign to the framers. The government thus finds no refuge in the preratification "common-law principles" that "the [Fifth] Amendment constitutionalized." *Gamble*, 139 S. Ct. at 1969.

2. Prosecutions in the CFR Courts are federal, regardless of the substantive law applied

Nor is it any response to say that the criminal offense to which petitioner pled guilty was defined by tribal law rather than federal law. As we have just shown, BIA prosecutions in the CFR Courts are predicated on federal sovereignty. That is the case, not as a function of the criminal law that the BIA is enforcing,

but because the "ultimate source" of the BIA's "power to prosecute" (*Sanchez Valle*, 579 U.S. at 66) derives from the United States Code and the Code of Federal Regulations. To say otherwise would collapse the two elements of the dual-sovereignty doctrine into one. But that is not the law; a federal court does not morph into an instrumentality of a state or a tribe every time it purports to enforce the substantive law of the state or tribe.

This point is familiar in the civil context. Federal district courts routinely enforce state civil codes in cases brought pursuant to diversity jurisdiction (28 U.S.C. § 1332) and pendant jurisdiction (*United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966)). In rendering judgments in such cases, a federal court does not in any sense assume or exercise state sovereign powers. That is to say, it does not mutate by mere interposition of a state-law claim into a "judicial forum through which" the state "can exercise its [own civil] jurisdiction." Pet. App. 7-8. In such cases, a federal court instead exercises its own independent power to determine the rights of the parties before it—a power devolving exclusively from Congress and Article III of the Constitution. Conversely, state courts do not convert into federal instrumentalities every time they are called upon to enforce federal laws, as they often are. See generally *Claflin* v. *Houseman*, 93 U.S. 130, 136-137 (1876) (detailing the concurrent power of the states to enforce federal law in their own courts).

There is no reason to think these truisms play out any differently when a court is called upon to enforce another sovereign's criminal rather than civil laws. And that is precisely why this Court's dual-sovereignty precedents have consistently required not only two offenses defined by separate sovereigns, but also two prosecutions undertaken by separate sovereigns. See

supra Section A.1. *Cf. Bartkus*, 359 U.S. at 123-124 (holding that the dual-sovereignty doctrine does not apply when one sovereign uses another sovereign as a "tool" or "cover" for its own successive prosecution).

3. The decision below does not further the purposes underlying the dual-sovereignty doctrine and leads to troubling results

a. The Tenth Circuit's decision below also finds no support in the practical considerations that underlie the modern dual-sovereignty doctrine.

First, the Court has previously voiced concern that, without the dual-sovereignty doctrine, a faster-moving prosecutor working for one sovereign could stymie a slower-moving prosecutor working for a second sovereign by winning the sprint to the court. *Heath*, 474 U.S. at 93. "To deny [one sovereign] its power to enforce its criminal laws because another [sovereign] has won the race to the courthouse," the Court has said, "'would be a shocking and untoward deprivation of the historic right and obligation'" of each independent sovereign to define and enforce its own criminal code. *Ibid.* (quoting *Bartkus*, 359 U.S. at 137).

But there is no such problem where—as here—the decision to prosecute both criminal cases is made by the same sovereign. Indeed, Congress has explicitly directed the U.S. Attorneys' Offices with jurisdiction over Indian country to "[c]oordinat[e] the prosecution of Federal crimes that occur in Indian country" with the BIA. 25 U.S.C. § 2810(b)(1), (8). That interagency cooperation eliminates any concern for a strategic dash to the court.

Beyond that, the BIA has specifically elected to omit felonies from its criminal code altogether, precisely because of the double-jeopardy implications that a BIA prosecution has for subsequent criminal cases under the Major Crimes Act:

> Felonies that are covered by the Major Crimes Act are excluded [from the BIA's code of criminal offenses] to avoid the possibility that someone who has committed a serious offense may be immunized from federal prosecution [under the Major Crimes Act] because of the prohibition against double jeopardy by a prosecution in a Court of Indian Offenses.

58 Fed. Reg. at 54,406. This limitation borders on a concession that the Double Jeopardy Clause bars petitioner's second prosecution here. It also substantially narrows the potential for conflict between BIA prosecutions and prosecutions under the Major Crimes Act. There is therefore no race-to-the-courthouse problem to justify any carveout from the traditional double jeopardy bar here.

Second, and more generally, the Court has emphasized that "fidelity to the Double Jeopardy Clause's text does more than honor the formal difference between two distinct criminal codes" by also "honor[ing] the substantive differences between the interests that two sovereigns can have in punishing the same act." *Gamble*, 139 S. Ct. at 1966. But that concern likewise has no traction in this context because the federal government makes the unilateral decision to charge criminal defendants in both forums—this is not "two sovereigns * * * punishing the same act" (*ibid.*) but rather *one* sovereign punishing the same act twice in succession, under two overlapping laws. Regardless of which forum the government selects for its one chosen prosecution—or the substantive law it seeks to enforce in that forum—the exercise of prosecutorial power necessarily vindicates federal, not tribal, prerogatives.

That conclusion comes into sharper focus in light of BIA regulations that forbid the imposition of a jail sentence exceeding one year by a CFR Court. 25 C.F.R.

§ 11.315(a)(1). Given that constraint, prosecutions of tribal offenses in CFR Courts often may not accurately express a tribe's true judgment concerning the character of the offense at issue. Indeed, it stands to reason that, with respect to some (perhaps most) serious offenses covered by the Major Crimes Act, tribes may often *prefer* a Major-Crimes-Act prosecution that will draw a heftier sentence, rather than the federally-constrained prosecution of a tribal offense that does not fully express the tribe's true interest in condemning the crime. And, of course, if a tribe wishes to protect its sovereign interest in enforcing its own criminal code, it can do so best by establishing a sufficient court system of its own, through which it can avail itself of the dual-sovereignty doctrine. In all events, failure to recognize the dual-sovereignty doctrine in this context will not limit tribes from vindicating their sovereign interests in a meaningful way.[5]

b. Making matters still worse for the government, the Tenth Circuit's reasoning produces highly troubling consequences.

States may, for example, authorize their courts to prosecute federal crimes. And if they were to do so, they would be free under the Tenth Circuit's rationale to pursue successive prosecutions by the same prosecuting entities, in the same courts, for legally and factually identical offenses—precisely the abuse that the Double Jeopardy Clause was meant to forbid—simply by asserting that the first prosecution was for a state offense (reflecting state sovereignty) and the second prosecution

---

[5] Prosecutions in tribal courts are subject to constraints under the Indian Civil Rights Act, as amended by the Tribal Law and Order Act of 2010, which limits tribal sentences to no more than three years. See 25 U.S.C. § 1302(b). But there is a substantial difference even between one and three years' incarceration.

was for an identical federal offense (reflecting federal sovereignty).

This scenario is not entirely fanciful. Early in the Nation's history, some states "imposed state sanctions for violation of a federal criminal law." *Bartkus*, 359 U.S. at 130. See also Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 551 (1925) (detailing examples in which Congress "enact-[ed] legislation vesting in the State Courts power to try special classes of cases, criminal as well as civil, arising under the laws of the United States") (emphasis omitted).

Conversely, the federal government could assume for itself the power to prosecute violations of state criminal codes and avail itself of the same supposed entitlement to try defendants twice in its own name for substantively identical offenses. (It might even establish a Court of State-Law Offenses within the Department of Justice, staffed by administrative law judges to hear federal prosecutions of such state crimes.)

This scenario also is not unrealistic. The Major Crimes Act itself states that any general offense made punishable but "not defined and punished by Federal law" shall instead "be defined and punished in accordance with the laws of the State in which such offense was committed." 18 U.S.C. § 1153(b). This provision mimics the Assimilative Crimes Act, 18 U.S.C. § 13(a), pursuant to which Congress has adopted the substance of state criminal laws in various territories under federal control. "The [act's] basic purpose is one of borrowing state law to fill gaps in the federal criminal law." *Lewis* v. *United States*, 523 U.S. 155, 160 (1998).

To be sure, when the federal government prosecutes offenses under the Major Crimes Act or Assimilative Crimes Act, it is not enforcing state criminal law itself; it is instead enforcing federal criminal law that incor-

porates the substance of state law. But it would be a simple matter, using slightly different language, to authorize federal prosecutors to enforce state offenses in federal court in their own rights—alongside, and not to the exclusion of, substantively overlapping federal offenses. If Congress did so, the Double Jeopardy Clause would be reduced to a nullity under the Tenth Circuit's reasoning—federal prosecutors would be free to charge substantially identical crimes successively in the same court, one after the other, in multiple prosecutions and obtaining multiple punishments (or multiple shots at a conviction) for a single incident. These are not outcomes that the Court can or should countenance. *E.g.*, *Bartkus*, 359 U.S. at 123-124.

As the Court previously has recognized, a singular sovereign, "with all its resources and power[,]" should get one bite at the apple, not more. *Benton*, 395 U.S. at 796 (quoting *Green* v. *United States*, 355 U.S. 184, 187 (1957)). If one sovereign is "allowed to make repeated attempts to convict an individual for an alleged offense," it subjects that individual to continued "embarrassment, expense and ordeal" and "compel[s] him to live in a continuing state of anxiety and insecurity," in violation of one of the most basic precepts of fairness in criminal procedure, embedded "from the very beginning * * * [in] our constitutional tradition." *Ibid.* (quoting same). The decision below undermines that precept, and it is not a view the framers would have endorsed.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

THERESA M. DUNCAN
Duncan Earnest LLC
P.O. Box 2769
Santa Fe, NM 87504
(505) 710-6586

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ALEX C. BOOTA
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner