No. 20-7622

# In the Supreme Court of the United States

MERLE DENEZPI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**

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## QUESTION PRESENTED

Whether petitioner's prior prosecution in the Court of Indian Offenses for the tribal-law offense of assault and battery, in violation of 6 Ute Mountain Ute Code § 2, bars his prosecution in federal district court for the federal-law offense of aggravated sexual abuse, in violation of 18 U.S.C. 1153(a), 2241(a)(1) and (2).

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## BRIEF FOR THE UNITED STATES

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

### CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution 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.

## STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of aggravated sexual abuse in Indian country, in violation of 18 U.S.C. 1153(a), 2241(a)(1) and (2). Judgment 1. The district court sentenced him to 360 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-11.

### A. Historical Background

1. "Before the coming of the Europeans," Indian tribes "were self-governing sovereign political communities." *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978). As such, they "exercise[d] inherent sovereign authority over their members and territories," *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991), including "the inherent power to prescribe laws for their members," "to punish infractions of those laws," and to similarly regulate nonmembers within their territory. *Wheeler*, 435 U.S. at 323; see *United States* v. *Lara*, 541 U.S. 193, 199, 208 (2004) (recognizing tribes' inherent power to enforce laws against nonmember Indians); *Duro* v. *Reina*, 495 U.S. 676, 685 (1990) (recognizing tribes' inherent power to "enforce laws against all who c[ame] within [their] territory"). Tribes used a variety of mechanisms to "maintain[] order and cohesiveness * * * including * * * the imposition of sanctions" against transgressors. *Cohen's Handbook of Federal Indian Law* § 4.04[3][c][iv][A], at 263 (2012 ed.) (*Cohen*).

Following incorporation into the United States, tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished." *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). But tribes remain "distinct, independent political communities," *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), "qualified to exercise many of the powers and prerogatives of self-government," *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Tribes' "dependent status" in our political order means that the "sovereignty that the Indian tribes retain is of a unique and limited character." *Wheeler*, 435 U.S. at 323. But that sovereignty continues to encompass those powers "not withdrawn by treaty or statute, or by implication as a necessary result of [tribes'] dependent status." *Ibid.*; see *United States* v. *Cooley*, 141 S. Ct. 1638, 1642-1643 (2021).

2. From the Founding through the late 19th century, Congress imposed "no limitation on tribes in terms of their ability to use traditional forms of judgments." Justin B. Richland & Sarah Deer, *Introduction to Tribal Legal Studies* 98 (2d ed. 2010). During that time, Congress established federal criminal jurisdiction in Indian country, but recognized and "declined to disturb" tribes' exclusive jurisdiction over offenses by one Indian against another Indian and tribes' authority "to punish offenses against tribal law by members of a tribe." *Wheeler*, 435 U.S. 324-325.

Congressional policy toward Indian tribes shifted during the "allotment era" in the latter part of the 19th century. *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2463 (2020). In that era, "Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe

members"—a policy aimed at "creat[ing] a class of assimilated, landowning, agrarian Native Americans." *Ibid.*; see, *e.g.*, *Cohen* § 1.04, at 72. In 1882, the Secretary of the Interior directed the "formulat[ion of] certain rules for the government of the Indians" that would restrict or prohibit "rites and customs" considered "injurious to the Indians," including certain tribal ceremonies, marriage relationships, medicine-man positions, and property conveyances. Office of Indian Affairs, U.S. Dep't of the Interior, *Regulations of the Indian Department* 86-88 (1884) (*1884 Regulations*).

Carrying out that directive, the Commissioner of Indian Affairs established "'the Court of Indian Offenses'" comprising "a tribunal" for each tribe "consisting of three Indians" that "ha[d] original jurisdiction over all 'Indian offenses' designated" in departmental rules. *1884 Regulations* 88; see *United States* v. *Clapox*, 35 F. 575, 577 (D. Or. 1888) (upholding authority to establish the Courts of Indian Offenses). The original Courts of Indian Offenses sought "to end Indian culture" and advance assimilation by "eliminat[ing] 'heathenish practices.'" *Cohen* § 1.04, at 75-76. The courts administered a code established by the Bureau of Indian Affairs (BIA), see *1884 Regulations* 88-91, and the Indian Agent for each tribe appointed the tribal-member judges, *id.* at 88. Nonetheless, the courts' "decision[s] and authority" were understood to "com[e] * * * from the[] [Indians'] own people." Office of Indian Affairs, U.S. Dep't of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for The Year 1884* X (1884); see Office of Indian Affairs, U.S. Dep't of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for The Year 1885* XXI (1885) (observing that

in the Courts of Indian Offenses, "the Indians themselves, through their judges, decide who are guilty of offenses").

In 1883, this Court invalidated the federal district court conviction of an Indian defendant for the murder of an Indian victim. *Ex parte Crow Dog*, 109 U.S. 556, 570-572. Congress responded by enacting the Indian Major Crimes Act, ch. 341, § 9, 23 Stat. 385; 18 U.S.C. 1153(a), which establishes federal criminal jurisdiction over certain "major" crimes when committed by an Indian in Indian country. The Secretary of the Interior stated in support of the Act that Courts of Indian Offenses were insufficient to address crimes like murder, because such courts "exist[ed] only by the consent of the Indians of the reservation." *Keeble* v. *United States*, 412 U.S. 205, 211 (1973) (citation omitted).

3. Federal Indian policy shifted once more in the 1930s. "As a new generation of reformers advocated increased respect for native life ways, the federal government enacted legislation aimed at reestablishing tribal governance, reconstituting tribal land bases, and revitalizing tribal economies and cultures." *Cohen* § 4.04[3][a][i], at 256.

In 1934, Congress "signaled [that] major shift in federal Indian policy from assimilation to self-determination," Pet. App. 17 (citation omitted), by enacting the Indian Reorganization Act (IRA), ch. 576, § 16, 48 Stat. 987, which endorsed each tribe's authority to adopt a constitution for self-government, see 25 U.S.C. 5123(a). As this Court has emphasized, the IRA did not "create[] the Indians' power to govern themselves [or] their right to punish crimes committed by tribal offenders." *Wheeler*, 435 U.S. at 328 (emphasis omitted). Instead,

the IRA expressly "recognized that Indian tribes already had such power under 'existing law.'" *Ibid.*; see 25 U.S.C. 5123(e); *Powers of Indian Tribes*, 55 Interior Dec. 14 (1934).

Exercising that power, many tribes adopted model constitutions that "create[d] tribal courts to replace Courts of Indian Offenses." Christine Zuni, *Strengthening What Remains*, 7 Kan. J.L. & Pub. Pol'y 17, 20 (1997); see, *e.g.*, *Wheeler*, 435 U.S. 327 & n.25. Given the tribes' familiarity with the regulations and procedures of the Courts of Indian Offenses, "that model provided the framework" for many of those tribal courts. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997). A number of tribes thereafter revised their tribal-court systems to incorporate more "traditional tribal values, symbols, and customs," resulting in "[m]any tribal codes now combin[ing] unique tribal law with adapted State and Federal law principles." *Ibid.* Since 1975, tribes have had the option of contracting to receive significant federal funding in return for providing their own judicial services, instead of relying on a Court of Indian Offenses. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. 5301 *et seq.*); 25 U.S.C. 5321; 25 C.F.R. 11.104(a)(1).

Consistent with congressional and tribal efforts, "[i]t is the BIA's policy to encourage the replacement of Courts of Indian Offenses with tribal courts." 58 Fed. Reg. 54,406, 54,407 (Oct. 21, 1993).[*] A Court of Indian

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[*] The term "tribal courts" is often used to encompass (1) tribal courts wholly funded by a tribe; (2) courts operated by a tribe through a contract with the federal government; and (3) Courts of Indian Offenses. See, *e.g.*, *Wheeler*, 435 U.S. at 332 n.35 (referring

Offenses remains in place only "until either: (1) BIA and the tribe enter into a contract or compact for the tribe to provide judicial services; or (2) [t]he tribe has put into effect a law-and-order code that establishes a court system" that meets certain requirements. 25 C.F.R. 11.104(a); see Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 Okla. City U. L. Rev. 267, 297 (2010). Since 1934, the number of Courts of Indian Offenses has steadily declined, as tribes have increasingly chosen to operate their own courts. See, *e.g.*, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978) (noting that in 1978, approximately 30 Courts of Indian Offenses remained); Moppett 297 (noting that as of 2010, 23 tribes still used such courts).

Nonetheless, not every tribe has chosen to create its own tribal court; some tribes have opted to retain a Court of Indian Offenses. See, *e.g.*, *Cohen* § 4.04[3][c][iv][B], at 266. Today, five regional Courts of Indian Offenses serve 16 tribes in Colorado, Oklahoma, Nevada, New Mexico, and Utah. Indian Affairs, U.S. Dep't of the Interior, *Court of Indian Offenses*, https://www.bia.gov/CFR-Courts.

4. The present-day Courts of Indian Offenses serve "to provide adequate machinery for the administration of justice for Indian tribes" that have opted to retain

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to "[t]ribal courts of all kinds, including Courts of Indian Offenses"). This brief uses "tribally operated courts" or "tribal courts" to refer to the first two categories. In addition, while federal law defines "'Courts of Indian Offenses'" as "the courts established pursuant to" 25 C.F.R. Part 11, 25 U.S.C. 3602(2), such courts are also known as "CFR courts," see Pet. App. 4 n.2. This brief uses the statutory name.

them. 25 C.F.R. 11.102; see 25 U.S.C. 3611(c)(5). The tribes whose judicial systems depend on the Courts of Indian Offenses are generally tribes whose "constitution[s] and codes do not provide for a tribal court," Moppett 297, and are often tribes that have "limited resources" or "small numbers of members," Gloria Valencia-Weber, *Tribal Courts: Customs and Innovative Law*, 24 N.M. L. Rev. 225, 234 n.25 (1994).

Today's Courts of Indian Offenses are "viewed as vehicles for the exercise of tribal jurisdiction" and differ significantly from their assimilation-era predecessors. *Cohen* § 4.04[3][c][iv][B], at 266; see, *e.g.*, *Election Bd.* v. *Snake*, 1 Okla. Trib. 209, 227 (Ponca Ct. Indian App. 1998). Although their jurisdiction extends to serious crimes, federal law limits Courts of Indian Offenses, like tribally operated courts, in the sentences that they may impose. See 25 U.S.C. 1302(b) (limiting sentences to one year or three years in certain circumstances); 25 C.F.R. 11.315. Furthermore, while the Code of Federal Regulations still includes a default set of criminal provisions, a Court of Indian Offenses will, if a tribe so chooses, enforce the tribe's own criminal ordinances, which (like all tribal ordinances) "[s]upersede" conflicting federal regulations. 25 C.F.R. 11.108(b); see 25 C.F.R. 11.449. Courts of Indian Offenses also "apply the customs" of the relevant tribe "to the extent that they are consistent with [federal] regulations." 25 C.F.R. 11.110. And tribes are involved in court administration through their confirmation of the Court's judicial officers, 25 C.F.R. 11.201, role in the removal of judicial officers, 25 C.F.R. 11.202, and ability to contract to appoint the prosecutor and clerks, see 25 C.F.R. 11.203, 11.204.

**B. Factual Background And Proceedings Below**

1. The Ute Mountain Ute Reservation was established in 1868, in what is now southwestern Colorado and northern New Mexico. See Treaty between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, art. II, *concluded* Mar. 2, 1868, 15 Stat. 619 (proclaimed Nov. 6, 1868). Today, the Ute Mountain Ute Tribe has "a little over 2,000 members." Ute Mountain Ute Tribe, *Ute Mountain Ute Tribe: The People* (2020), www.utemountainutetribe.com. Rather than operate its own court, the Tribe has elected to use the Southwest Region Court of Indian Offenses. See Indian Affairs, U.S. Dep't of the Interior, *Court of Indian Offenses: CFR Courts*, https://www.bia.gov/CFRCourts.

Petitioner is a member of the Navajo Nation. Pet. App. 2. In July 2017, he traveled with V.Y., another member of the Navajo Nation, to Towaoc, Colorado, which lies within the Ute Mountain Ute Reservation. *Ibid.* Petitioner and V.Y. went to the home of petitioner's girlfriend, where petitioner threatened to beat V.Y. with a four-foot post if she did not have sex with him. *Ibid.*; D. Ct. Doc. 81, at 63-65 (Aug. 14, 2019). Petitioner then pulled V.Y. by her shirt and hair, pushed her to the ground, and forced her to engage in nonconsensual sex. D. Ct. Doc. 81, at 65-68. Petitioner barricaded the door, hid V.Y.'s clothing, and threatened her with physical harm if she went to the police. *Id.* at 69-74; see Pet. App. 2-3.

After petitioner fell asleep, V.Y. managed to escape and flee to the Ute Mountain Casino. Pet. App. 3. V.Y. was herself taken into custody for public intoxication and for an outstanding warrant on an unpaid fine, after which she reported the sexual assault to a BIA police

officer. *Ibid.*; D. Ct. Doc. 81, at 75-78, 188-195. A nurse conducted a sexual-assault exam and documented injuries to V.Y.'s chest, back, arms, legs, and genitals. Pet. App. 3. Subsequent forensic testing showed the presence of petitioner's DNA and semen on V.Y.'s genitals. D. Ct. Doc. 82, at 145-151 (Aug. 14, 2019).

About two hours after V.Y. reported the assault, officers went to petitioner's girlfriend's house to investigate. Pet. App. 3. When he heard the officers knock, petitioner fled through a second-floor window and hid in a neighbor's yard for about 13 hours. *Ibid.* When officers found him, petitioner initially denied having sexual contact with V.Y., but he later changed his story and "claimed he and V.Y. had engaged in consensual sex." *Ibid.*

2. An officer with the BIA's Office of Justice Services filed a criminal complaint in the Court of Indian Offenses. J.A. 9-10; C.A. ROA 36; see 25 C.F.R. 11.300(a); see also Pet. Br. 7 & n.1. The complaint alleged violations of both the Ute Mountain Ute Code and federal regulations—specifically, one count of assault and battery, in violation of 6 Ute Mountain Ute Code § 2; one count of terroristic threats, in violation of 25 C.F.R. 11.402; and one count of false imprisonment, in violation of 25 C.F.R. 11.404. J.A. 10.

In December 2017, petitioner entered a plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), and was convicted solely on the tribal-law assault-and-battery count. J.A. 12. The regulatory charges were dismissed. *Ibid.* Petitioner was sentenced to time served, which amounted to 140 days of imprisonment, for that violation of the tribal code. Pet. App. 4.

3. Six months later, a federal grand jury in the District of Colorado indicted petitioner on one count of aggravated sexual abuse in Indian country, in violation of 18 U.S.C. 1153(a), 2241(a)(1) and (2). Indictment 1. Petitioner moved to dismiss the indictment on the theory that his conviction for the tribal offense reflected a prosecution for the "same" offense under the Double Jeopardy Clause as the one charged in the indictment. D. Ct. Doc. 29, at 3 (Jan. 6, 2019).

The district court denied the motion. Pet. App. 14-21. The court explained that under the "dual sovereignty doctrine," "'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.'" *Id.* at 15-16 (quoting *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 62 (2016)). The court observed that in *United States* v. *Wheeler*, this Court had applied that doctrine to hold that a tribal-court prosecution for a tribal offense does not bar a federal prosecution for a federal offense, because tribes are separate sovereigns whose "right to punish crimes occurring on tribal lands derives from the tribes' 'primeval sovereignty' * * * 'and is attributable in no way to any delegation to them of federal authority.'" *Id.* at 18 (quoting *Wheeler*, 435 U.S. at 328). And the court recognized that *Wheeler*'s logic applies equally to a prosecution in the Court of Indian Offenses. *Id.* at 21.

Following a trial, a jury found petitioner guilty on the federal charge of aggravated sexual abuse, D. Ct. Doc. 52, at 1 (Mar. 1, 2019), and the court of appeals affirmed petitioner's conviction, Pet. App. 1-11. Like the district court, the court of appeals recognized that while *Wheeler* had "declined to address" prosecutions in the Court of Indian Offenses directly, see 435 U.S. at 327

n.26, its reasoning "also applies" to prosecutions in that forum. Pet. App. 8. The court of appeals emphasized that the "'ultimate source' of the power undergirding" petitioner's prosecution under tribal law was "the Ute Mountain Ute Tribe's inherent sovereignty" and that the Court of Indian Offenses "merely provided the forum through which the [T]ribe[] could exercise that power until a tribal court replaced" the Court of Indian Offenses. *Id.* at 8, 10 (citation omitted).

## SUMMARY OF ARGUMENT

Petitioner's prosecution in the Court of Indian Offenses for the tribal-law offense of assault and battery does not bar his prosecution in federal district court for the federal-law offense of aggravated sexual abuse. The Double Jeopardy Clause prohibits multiple prosecutions only for the "same offence," and this Court has consistently recognized that violating the law of one sovereign is not the "same offence" as violating the law of another. U.S. Const. Amend. V. Petitioner's effort to displace that clear rule with an amorphous approach that focuses on the particular details of the forum of prosecution, and the identity of the prosecutor, finds no foothold in the text or history of the Double Jeopardy Clause or this Court's decisions, and would produce significant practical difficulties.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. For nearly two centuries, this Court has consistently recognized that a single act that violates two sovereign's laws comprises two distinct "offences" and that the Double Jeopardy Clause accordingly permits two prosecutions. See *Gamble* v. *United States*, 139 S. Ct. 1960 (2019). This Court has likewise recognized that Indian tribes

and the United States are distinct sovereigns for purposes of the Double Jeopardy Clause because tribes' authority to criminalize and punish conduct arises from their own historic sovereignty, not any grant of federal authority. See *United States* v. *Wheeler*, 435 U.S. 313 (1978). Those longstanding principles make clear that, because petitioner's sexual assault violated the laws of both the Ute Mountain Ute Tribe and the United States, he was subject to prosecution and punishment for each "offence."

Petitioner does not dispute that had he been tried for his tribal-law offense in a tribally operated court, his subsequent federal prosecution would be permissible under *United States* v. *Wheeler*. He instead argues that his offense under the Ute Mountain Ute Tribe's law became the "same" as his offense under federal law because the Tribe utilizes the Court of Indian Offenses as the forum for vindicating the interests served by tribal law. That argument has no sound basis in the text or history of the Double Jeopardy Clause. An "'offence'"—"that is, 'the Violation or Breaking of a Law,'" *Gamble*, 139 S. Ct. at 1965 (brackets and citation omitted)—is complete upon its commission and does not depend on the circumstances of its prosecution. The Framers employed the law-specific term "offence" notwithstanding the possibility, illustrated in one of this Court's earliest double-jeopardy cases, that the prosecution for violating one sovereign's law might take place in another sovereign's court. Nothing suggests that the Framers intended such a prosecution to have a greater preclusive effect than any other prosecution for that same "offence."

The special ad hoc rule that petitioner seeks also lacks meaningful support in this Court's decisions. The

Court's dual-sovereignty doctrine has always depended on the ultimate source of the power undergirding two prosecutions, not the current exercise of that authority. BIA supervision over the Court of Indian Offenses, or employment of the prosecutor, is therefore immaterial to the Clause's operation. Indeed, this Court has made clear that the Double Jeopardy Clause imposes no bar to multiple convictions for the same act arising from successive prosecutions in the courts of a single sovereign. Such successive prosecutions are instead permissible so long as the "offences" at issue are different—a principle that should apply with equal, if not greater, force where the difference between offenses is a product of two distinct sovereigns' independent exercise of substantive authority to proscribe unlawful conduct.

Petitioner's attempts to erase that critical difference rest on insupportable or immaterial efforts to equate a prosecution for a tribal-law offense in the Court of Indian Offenses with a prosecution for a federal-law offense in a federal district court. All three Branches of the federal government have recognized that the Courts of Indian Offenses, like tribally operated courts, exercise tribes' sovereign authority. Petitioner's misplaced reliance on the history of the early Courts of Indian Offenses does not meaningfully refute that consensus. The early Courts of Indian Offenses were themselves understood to exercise the tribes' own authority, and in any event, they differed markedly from the modern Courts of Indian Offenses at issue here. Petitioner understates the extent to which tribes now exercise authority over the Courts of Indian Offenses—including by choosing to utilize such courts in the first place.

In failing to recognize that Courts of Indian Offenses are simply a mechanism for effectuating tribal sovereignty, petitioner fails to provide a clear and workable standard that would provide guidance to tribes, the federal government, and courts. Federal government supervision and support is not unique to Courts of Indian Offenses, but is instead a feature of many tribally operated courts whose prosecutions for violating tribal law undisputedly allow subsequent prosecutions for violating federal law. And petitioner does not account for the fact that tribal control over even a single Court of Indian Offenses may differ over time. Petitioner's indeterminate approach is thus incapable of coherent application and fundamentally at odds with this Court's existing bright-line dual-sovereignty jurisprudence.

Moreover, adopting petitioner's approach would derogate the sovereignty and impair the public safety of smaller and less resource-rich tribes that lack a standalone judicial branch, forcing them to choose between the enforcement of tribal and federal law. The resulting two-tier hierarchy of tribal sovereignty would jeopardize such tribal communities by precluding swift action in the Courts of Indian Offenses to incapacitate tribal-law offenders while federal-court proceedings are not certain to occur, have not yet commenced, or are ongoing. This Court should reject that result and accord full respect to the Ute Mountain Ute Tribe's decision to enlist the Court of Indian Offenses to enforce its sovereign criminal code.

## ARGUMENT

### A VIOLATION OF TRIBAL LAW AND A VIOLATION OF FEDERAL LAW ARE CATEGORICALLY NOT THE "SAME OFFENCE" UNDER THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause's text unambiguously permits multiple prosecutions for "offence[s]" that are not the "same," and this Court has "long held"—and recently "affirm[ed]" in *Gamble* v. *United States*—"that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." 139 S. Ct. 1960, 1963-1964 (2019). Here, petitioner's sexual assault on V.Y. undisputedly violated the laws of two sovereigns—the Ute Mountain Ute Tribe and the United States. He was therefore properly subject to separate prosecution and punishment for each "offence," and "[t]he Double Jeopardy Clause * * * drop[ped] out of the picture." *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 67 (2016) (citation omitted).

Petitioner cannot and does not dispute that had the forum for prosecuting his tribal offense been a tribal court, this Court's decision in *United States* v. *Wheeler*, 435 U.S. 313 (1978), would foreclose his double-jeopardy claim. Petitioner nevertheless contends that his prosecution for a tribal offense transforms into the equivalent of a prosecution for a federal offense solely because the Ute Mountain Ute Tribe has chosen to use the Court of Indian Offenses to enforce its laws. Petitioner's focus on the functional features of the prior forum, such as its precise method of operations and the identity of the prosecutor, has no sound basis in the text of the Double Jeopardy Clause, the history of its application, or this

Court's dual-sovereignty decisions. And petitioner's forum-focused inquiry would yield confusion in the lower courts and harm public safety on reservations. This Court should affirm his conviction for violating the law of the United States.

### A. A Transgression Against Tribal Law Is Not The "Same Offence" As A Transgression Against Federal Law

This Court has repeatedly and recently explained that where a single act violates two sovereign's laws, the Double Jeopardy Clause poses no bar to two prosecutions. It has also made clear that Indian tribes and the United States are separate sovereigns for that purpose. Those bright-line principles resolve this case.

#### *1. An "offence" is the transgression of a specific sovereign's law*

a. This Court has consistently recognized, and petitioner does not dispute, that the Double Jeopardy Clause "protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*." *Gamble*, 139 S. Ct. at 1965 (quoting *Grady* v. *Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting)). As the Court has recently explained, the term "'offence'" "was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Ibid.* (brackets and citation omitted). Thus, "an 'offence' is defined by a law." *Ibid.* And "each law is defined by a sovereign." *Ibid.* "So where there are two sovereigns, there are two laws, and two 'offences.'" *Ibid.*; see, *e.g.*, *Wheeler*, 435 U.S. at 317.

That "dual-sovereignty rule is often dubbed an 'exception' to the double jeopardy right," but "it is not an exception at all." *Gamble*, 139 S. Ct. at 1965. Rather, "it follows from the text that defines that right in the

first place." *Ibid.* "[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.'" *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (quoting *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852). Instead, "'by one act he has committed two offences, for each of which he is justly punishable.'" *Ibid.* (quoting *Moore*, 55 U.S. (14 How.) at 20).

b. The dual-sovereignty doctrine honors not only the text of the Double Jeopardy Clause, but also the "common-law conception of crime as an offense against the sovereignty of the government," *Heath*, 474 U.S. at 88; "the formal difference between two distinct criminal codes," *Gamble*, 139 S. Ct. at 1966; and the "substantive differences between the interests that two sovereigns can have in punishing the same act," *ibid.*; see *id.* at 1966-1967. The doctrine recognizes that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

The source-of-authority-focused dual-sovereignty doctrine dates back nearly two centuries. In recently reaffirming the doctrine in *Gamble*, the Court recounted more than a dozen decisions spanning 170 years explaining that offenses against different bodies of sovereign law are not the "same offence" for double-jeopardy purposes. See 139 S. Ct. at 1966-1967. For instance, in a trio of 19th-century decisions, the Court reasoned that because each citizen "owe[s] allegiance to two sovereigns[,] and may be liable to punishment for an infraction of the laws of either," "[t]he same act may be an offence or transgression of the laws of both." *Moore*, 55 U.S. (14 How.) at 20; see *United States* v.

*Marigold*, 50 U.S. (9 How.) 560, 569 (1850); *Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 435 (1847).

Indeed, as *Gamble* recognized, the seeds for the dual-sovereignty doctrine and its focus on the source of law were planted even earlier. See *Gamble*, 139 S. Ct. at 1978. In *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820), for example, the Court considered the circumstances under which certain crimes at sea might be punished by the United States. Although the Court stated that an acquittal on a piracy charge in the court of any "civilized State" would bar a prosecution in another "civilized State," *id.* at 197, the Court was "inclined to think that an acquittal" on murder charges in the United States "would not have been a good plea in a Court of Great Britain," *ibid.* The Court explained that piracy was "an offence within the criminal jurisdiction of all nations" and "punished by all," while murder was "punishable under the laws of each State" and was not "within this universal jurisdiction." *Ibid.*; see *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 158-160 (1820) (piracy is an offense against the law of nations). *Furlong* thus reflects the understanding that "crimes that were understood to offend against more than one sovereign" were "separate offenses." *Gamble*, 139 S. Ct. at 1978.

***2. Indian tribes and the United States are distinct sovereigns***

To determine whether two governments "are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question." *Sanchez Valle*, 579 U.S. at 62. "The inquiry does not turn, as the term 'sovereignty' sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course." *Ibid.* Rather, this

Court's "test hinges on a single criterion: the 'ultimate source' of the power undergirding the respective prosecutions." *Id.* at 68 (citation omitted). That "historical, not functional" inquiry looks to the "deepest wellsprings, not the current exercise," of each sovereign's "power to punish" the conduct at issue. *Ibid.*

Applying that approach, this Court has explained that the States are separate sovereigns from the federal government, and from each other, because "[p]rior to forming the Union, the States possessed 'separate and independent sources of power and authority,' which they continue to draw upon in enacting and enforcing criminal laws." *Sanchez Valle*, 579 U.S. at 69 (citation omitted). Municipalities, in contrast, are not distinct sovereigns from their States, because their power to proscribe conduct is purely derivative of the States' overarching authority. *Waller* v. *Florida*, 397 U.S. 387 (1970). Similarly, territories are not distinct sovereigns from the United States because they draw their power from the federal government. See *Sanchez Valle*, 579 U.S. at 71.

In *Wheeler*, this Court explicitly recognized that "Indian tribes," which have a long history of possessing and retaining core aspects of inherent sovereignty, are akin to States "under the Double Jeopardy Clause" and likewise "count as separate sovereigns." *Sanchez Valle*, 579 U.S. at 70. *Wheeler* concerned a member of the Navajo Nation who was convicted in Navajo tribal court of disorderly conduct and contributing to the delinquency of a minor, in violation of the Navajo Tribal Code; based on the same conduct, he was later indicted by a federal grand jury for statutory rape, in violation of 18 U.S.C. 1153 and 2032 (1970). See *Wheeler*, 435 U.S. at 314-316 & n.3. The Court rejected the defendant's argument

that "the Indian tribes * * * derive their power to punish crimes from the Federal Government" such that the Double Jeopardy Clause would bar the later federal prosecution. *Id.* at 319. The Court emphasized that while "Congress has plenary authority to legislate for the Indian tribes in all matters," the dual-sovereignty doctrine turns on "the ultimate source of the power under which the respective prosecutions were undertaken," and that tribal codes did not derive from the same source of power as federal laws. *Id.* at 319-320.

The Court observed that before European settlers arrived on this continent, Indian tribes "had the inherent power to prescribe laws for their members and to punish infractions of those laws." *Wheeler*, 435 U.S. at 323. And after thoroughly considering the relevant treaties and statutes, the Court determined that the Navajo Nation had "never * * * given up" that sovereign power. *Ibid.*; see *id.* at 323-326. Because the ultimate source of authority for the tribal law underlying the defendant's tribal prosecution was "the Navajos' primeval sovereignty," *id.* at 328, whereas the ultimate source of authority for the federal law underlying the federal prosecution was "the sovereignty of the Federal Government," *id.* at 322, the Double Jeopardy Clause permitted the defendant's conduct to be punished by both sovereigns.

The Court has since applied similar reasoning to a tribe's authority over Indians who are members of a different tribe. After *Duro* v. *Reina*, 495 U.S. 676 (1990), concluded that incorporation into the United States had circumscribed tribes' inherent authority to punish violations of tribal law by nonmember Indians, Congress restored that aspect of tribes' sovereignty through legislation, see 25 U.S.C. 1301(2). And in upholding the

federal government's authority to bring a prosecution after a tribal prosecution of a nonmember Indian in *United States* v. *Lara*, 541 U.S. 193 (2004), this Court explained that, like the source of the power to punish member offenders, "'the source of [the] power to punish' nonmember Indian offenders" was not "delegated federal authority" but instead "'inherent tribal sovereignty.'" *Id.* at 199 (quoting *Wheeler*, 435 U.S. at 322) (emphasis omitted; brackets in original).

***3. Because petitioner's conduct transgressed each sovereign's law, he committed two "offences" and is subject to prosecution and punishment for each***

What was true in *Wheeler* and *Lara* is equally true here. To be sure, *Wheeler* considered a prosecution in a tribally operated court followed by a prosecution in federal court, and the Court stated it "need not decide" whether a prosecution in a Court of Indian Offenses is "derive[d] * * * from the inherent sovereignty of the tribe." 435 U.S. at 327 n.26. But the logic of *Wheeler*—and the Court's many other dual-sovereignty decisions—shows that the ultimate source of authority for petitioner's prosecution was the inherent sovereignty of the tribe that enacted and defined the crime. Petitioner's prosecution for violating the law of the Ute Mountain Ute Tribe was therefore a prosecution for a different "offence" than his later prosecution for violating the law of the United States.

As in *Wheeler* and *Lara*, two distinct sovereigns—the Tribe and the United States—have "denounced as a crime" the sexual assault that petitioner committed. *Gamble*, 139 S. Ct. 1967 (quoting *Lanza*, 260 U.S. at 382). Like the Navajo Nation in *Wheeler* and the Spirit Lake Tribe in *Lara*, the Ute Mountain Ute Tribe has the "inherent power to prescribe laws for [its] members

and to punish infractions of those laws" by tribal members and nonmember Indians. *Wheeler*, 435 U.S. at 323; see *Lara*, 541 U.S. at 209-210. That power has not been "withdrawn by treaty or statute, or by implication as a necessary result of [the Tribe's] dependent status." *Wheeler*, 435 U.S. at 323. Nor is it "attributable * * * to any delegation * * * of federal authority." *Id.* at 328. Thus, as in *Wheeler* and *Lara*, each sovereign has exercised its own "primeval sovereignty," *ibid.*, to authorize the prosecution and punishment of petitioner's conduct.

In doing so, each sovereign sought to "vindicate" its own "interests." *Gamble*, 139 S. Ct. at 1967. The Tribe has a "significant interest in maintaining orderly relations among [its] members" and other Indians "and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation." *Wheeler*, 435 U.S. at 331. At the same time, the federal government has "important * * * interests in the prosecution of major offenses on Indian reservations" that are independent of the Tribe's. *Ibid.* The United States therefore "ha[d] the right to decide" that a prosecution for a violation of the Ute Mountain Ute Tribal Code did not sufficiently "vindicate" the federal government's interest in punishing violent sexual assaults. *Heath*, 474 U.S. at 93; see, *e.g.*, *Wheeler*, 435 U.S. at 331.

### B. Petitioner's Approach, Which Focuses On The Forum For Prosecution Rather Than The Ultimate Authority To Punish, Is Unsound

Petitioner does not dispute that the Ute Mountain Ute Tribe exercised its inherent sovereign authority in defining the assault-and-battery crime underlying his tribal-law prosecution. See, *e.g.*, Pet. Br. 2; Pet. App. 5-6. Nor does he dispute that, under *Wheeler*, his prosecution for that crime would have no preclusive effect on

any later federal prosecution had it taken place in a tribally operated court. But petitioner contends that the Ute Mountain Ute Tribe's decision to utilize the Court of Indian Offenses as the forum for vindicating its interest in enforcing its substantive law transforms prosecutions for violating tribal law into prosecutions for federal "offences." Petitioner's forum-focused approach to the dual-sovereignty doctrine, which rests on the assertion that the Court of Indian Offenses is an "arm[] of the federal government" because it was created by the BIA and is subject to federal supervision, Pet. Br. 22 (citation omitted), finds no foothold in the text or history of the Double Jeopardy Clause, or in this Court's decisions explicating it.

***1. Petitioner's forum-focused approach cannot be squared with the text or history of the Double Jeopardy Clause***

Petitioner contends that the dual-sovereignty inquiry encompasses "two elements"—"the power to criminalize and the power to prosecute"—each of which must be premised on a different sovereign's inherent authority in order for two "offences" to be separate. Pet. Br. 13; see *id.* at 16. That argument is inconsistent with the text and history of the Double Jeopardy Clause.

As previously discussed, the term "offence" in the Double Jeopardy Clause means "'transgression,' that is, 'the Violation or Breaking of a Law.'" *Gamble*, 139 S. Ct. at 1965 (brackets and citation omitted). An "offence" is therefore complete once the criminal conduct occurs; its definition in no way depends on the conduct's subsequent discovery or any proceedings that may follow. The Clause's focus on the "offence," U.S. Const. Amend. V—*i.e.*, the legal violation—thus includes no

consideration of the identity of the prosecutor or the court. Both in isolation and in context, an "offence" is the same no matter where or how it is tried.

What matters for double-jeopardy purposes is the source of authority for the statute of conviction—as the Clause's history confirms. Although it is now the norm that federal prosecutors and courts generally enforce federal law, and that state prosecutors and courts generally enforce state law, see, *e.g.*, *Gwin* v. *Breedlove*, 43 U.S. (2 How.) 29, 37 (1844); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 Am. U. L. Rev. 275, 306-307 (1989), that practice was neither preordained nor universal at the time of the Framing, see, *e.g.*, *Gamble*, 139 S. Ct. at 1977-1978; Krent 290-295, 303-309 (examining the history of private prosecutions and providing examples of federal laws vesting criminal enforcement authority in state courts); *State* v. *Wells*, 20 S.C.L. 687, 695 (S.C. Ct. App. 1835); see also Pet. Br. 31.

Indeed, one of this Court's earliest double-jeopardy cases, *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820), was understood to involve a state prosecution of a federal offense. In *Houston*, "a member of the Pennsylvania militia was tried by a state court-martial for the *federal offense* of deserting the militia." *Gamble*, 139 S. Ct. at 1977. Justice Washington, who wrote an individual opinion in support of the judgment, observed that "[s]peaking upon the subject of the federal judiciary, the *Federalist* distinctly asserts the doctrine * * * that in every case, in which the State tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth." *Houston*, 18 U.S. (5 Wheat.) at 25-26. And he found it "perfectly

clear" that States could authorize the trial of federal crimes in state court so long as such state jurisdiction was "not prohibited by the exclusive jurisdiction of the federal Courts." *Id.* at 27-28. In light of such cross-jurisdictional practices, the Framers of the Double Jeopardy Clause could not silently have intended that the forum for prosecution would convert one sovereign's "offence" into another's.

***2. Petitioner's forum-focused approach lacks support in this Court's decisions***

Although the Court has not directly addressed the question presented here, its decisions show that the only relevant factor in the dual-sovereignty inquiry is the sovereign authority for the criminal prohibition. The Court's dual-sovereignty test has "hinge[d] on a single criterion: the 'ultimate source' of the power undergirding the respective prosecutions." *Sanchez Valle*, 579 U.S. at 68 (citation omitted). In applying that criterion, considerations like "[t]he degree to which an entity * * * submit[s] to outside direction" have "play[ed] no role in the analysis." *Id.* at 67.

a. As explained above, this Court has consistently tethered the term "offence" to the violation of a specific law—not to the forum in which the prosecution occurs. See, *e.g.*, *Gamble*, 139 S. Ct. at 1965; *Lanza*, 260 U.S. at 382. And the Court has consistently demonstrated that the question whether the dual-sovereignty doctrine applies is "historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority." *Sanchez Valle*, 579 U.S. at 68; see *id.* at 71 (explaining that degree of current autonomy is "wholly beside the point"). Accordingly, because the Ute Mountain Ute Tribe has the "primeval" power to prescribe laws and punish infractions of them, *Wheeler*,

435 U.S. at 328, it is a separate sovereign from the United States. It makes no difference that the Tribe currently relies on the machinery of the Court of Indian Offenses to enforce its laws. See, *e.g.*, *Heath*, 474 U.S. at 92 (explaining that if two sovereigns are separate, "the circumstances of the case are irrelevant").

A forum-focused, rather than a source-of-authority-focused, view cannot be squared with *Houston* and *Gamble*. The petitioner in *Gamble* argued that certain language in Justice Washington's individual opinion in *Houston* cast doubt on the dual-sovereignty doctrine altogether, by suggesting that prosecution for a state offense would bar prosecution for a substantively similar federal offense. See 139 S. Ct. at 1977; Pet. Br. at 16, *Gamble*, *supra* (No. 17-646). In rejecting that argument, and reaffirming the dual-sovereignty doctrine, the Court in *Gamble* explained that Justice Washington's opinion in *Houston* had endorsed only the proposition that the Double Jeopardy Clause "prohibits two sovereigns (in that case, Pennsylvania and the United States) from both trying an offense against one of them (the United States)." 139 S. Ct. at 1977. Nowhere did Justice Washington suggest that trial of a federal crime in state court would make it the equivalent of a state "offence" for double-jeopardy purposes.

Had Justice Washington in fact held that view, the Court in *Gamble* could not have described his opinion as "consistent with our doctrine allowing successive prosecutions for offenses against separate sovereigns." *Gamble*, 139 S. Ct. at 1977 (emphasis omitted). If Justice Washington had conceived of the State's court-martial for a federal crime as a prosecution for a state "offence," rather than a federal one, then Justice Washington would indeed have been indicating that a state

prosecution could preclude a later federal prosecution. And the Court in *Gamble* could not readily have described such a view, under which a state prosecution could preclude a federal one, as "consistent" with the dual-sovereignty doctrine. *Ibid.* Thus, both *Houston* and *Gamble* take as a given that a trial of a federal offense in state court is the trial of a federal "offence," not the trial of a state "offence," for double-jeopardy purposes, notwithstanding the identity or affiliation of the prosecutors.

b. Petitioner's argument that the forum of prosecution is decisive rests on quotations that are taken out of context from this Court's decisions. Petitioner notes that the Court has at times asked "whether the two entities that seek successively *to prosecute* a defendant for the same course of conduct can be termed separate sovereigns." Pet. Br. 16 (quoting *Heath*, 474 U.S. at 88) (emphasis added). But petitioner points to no decision in which the Court considered the authority to initiate a prosecution separately from the authority to proscribe conduct.

The Court's inquiry in each case cited by petitioner turned on the source of authority for the underlying criminal prohibition, not the forum of prosecution or the identity of the prosecutor. See *Gamble*, 139 S. Ct. at 1965; *Sanchez Valle*, 579 U.S. at 68-69; *Heath*, 474 U.S. at 88; *Wheeler*, 435 U.S. at 320, 323-325. And it was natural for the Court in the decisions cited by petitioner to refer to the power to "prosecute" as a synonym for the power to enact criminal laws. To modern generations, "[i]t may seem strange to think of state courts as prosecuting crimes against the United States" or vice versa. *Gamble*, 139 S. Ct. at 1977. The Court in those late 20th- and early 21st-century decisions thus likely did not have

in mind cases in which "two prosecuting entities," Pet. Br. 16 (citation omitted), might be permitted to enforce each other's criminal laws—let alone deliberately intend to suggest that such cross-enforcement would change the nature of the "offence" under the Double Jeopardy Clause. U.S. Const. Amend. V.

In addition, the inquiry that petitioner would conduct—into the power undergirding "the prosecutors who * * * bring charges" and the "courts that * * * enter judgments and impose punishments," Pet. Br. 16—would not inherently be distinct from the inquiry into the source of the substantive law. The sovereign that enacted that law may play a vital role in authorizing its prosecution in another sovereign's forum. For example, as Justice Washington recognized in *Houston*, the federal government could preclude state trial of a federal crime if it so chose. See 18 U.S. (5 Wheat.) at 27-28. Similarly, in this case, although the BIA provides the machinery to enforce the Ute Mountain Ute's tribal laws, a prosecution for a violation of tribal law cannot occur without the Tribe's enactment of the underlying criminal prohibition and its decision to use a Court of Indian Offenses—both of which are exercises of the Tribe's own authority.

Petitioner's proposed analogy (Br. 27) between this case and a civil case in which a federal district court is exercising diversity jurisdiction over state-law claims works against him, not for him. Just as the district court sitting in diversity stands in the shoes of a state court for purposes of applying a state's civil proscriptions, see generally *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), a Court of Indian Offenses stands in the shoes of a tribally operated court for purposes of applying the tribe's criminal proscriptions. The federal government

no more becomes the "'ultimate source'" of authority for application of a different sovereign's law in one circumstance than in the other—and that source of authority "alone is what matters for the double jeopardy inquiry." *Sanchez Valle*, 136 S. Ct. at 1872.

c. Petitioner's reading of this Court's decisions is particularly unsound insofar as it assumes (Br. 17) that successive prosecutions by the same sovereign's prosecutors would be barred by double-jeopardy principles. The Court has in fact explained that the opposite is true. As the Court made clear in *United States* v. *Dixon*, a single sovereign is "entirely free" to prosecute two offenses "separately, and can win convictions in both," so long as the offenses are not otherwise the "same." 509 U.S. 688, 705 (1993).

The only limitation that the Double Jeopardy Clause imposes on successive prosecutions by a single sovereign for different offenses is the "collateral-estoppel effect attributed to" the Clause under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), which "may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." *Dixon*, 509 U.S. at 705. That limitation constrains prosecutors from failing once and then, having learned from their mistakes, trying again to secure a conviction. See *Ashe*, 397 U.S. at 447. But nothing bars a single sovereign's prosecutors from obtaining multiple convictions for different offenses in separate prosecutions for the same conduct. See *Dixon*, 509 U.S. at 705. And petitioner provides no sound basis for a special additional limitation where the particular reason that an "offence" is different is because it reflects a transgression on a second

sovereign's authority. If anything, the separate substantive prohibitions of two distinct sovereigns should receive *more*, not less, respect under the Clause.

Petitioner's attempt (Br. 17) to infer such a special additional limitation from *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), is misplaced. The Court in *Bartkus* affirmed a life sentence resulting from a state prosecution that followed an unsuccessful federal prosecution, notwithstanding the defendant's allegations that federal officers urged and guided the state prosecutors. *Id.* at 122, 128-129, 139. The Court observed that "cooperation" between federal and state prosecutors "is the conventional practice * * * throughout the country," *id.* at 123, and it rejected the dissent's assertion that "the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution," *id.* at 124; see *id.* at 166-170 (Brennan, J., dissenting). Although some lower courts have suggested that the qualifying language in *Bartkus* may give rise to a "potential" and "narrow[]" exception to the dual-sovereignty doctrine where one sovereign manipulates another into bringing a prosecution, *Gamble*, 139 S. Ct. at 1994 n.3 (Ginsburg, J., dissenting), it is far from clear that such an exception exists, see, *e.g.*, *United States* v. *Angleton*, 314 F.3d 767, 773-774 (5th Cir. 2002), cert. denied, 538 U.S. 946 (2003). And such an exception would not in any event support the blanket preclusion of federal prosecutions that petitioner seeks.

*Bartkus* concerned an *acquittal* followed by a conviction; its language reflects a concern with "prosecutors * * * treat[ing] trials as dress rehearsals until they secure the convictions they seek," *Currier* v. *Virginia*, 138 S. Ct. 2144, 2149 (2018). It thus has no application to the successive-conviction situation discussed in *Dixon*

and present here. Furthermore, because any *Bartkus*-based "'tool or sham' exception" would be "functional, rather than historical," Nat'l Ass'n of Crim. Def. Lawyers Amicus Br. 6, it is antithetical to this Court's more recent double-jeopardy decisions, which apply a singular and clear source-of-authority approach. See, *e.g.*, *Sanchez Valle*, 579 U.S. at 68-69. And at all events, the exception perceived by some courts of appeals would not apply here. Nothing even begins to suggest that the Ute Mountain Ute Tribe's decision to utilize the Court of Indian Offenses for the enforcement of its tribal ordinances "was so dominated, controlled, or manipulated * * * that it did not act of its own volition," *United States* v. *Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994), such that prosecutions for violations of tribal law in that forum should be treated as prosecutions for federal, rather than tribal, "offences."

### C. Petitioner's Attempted Application Of His Forum-Focused Approach To This Case Draws Unsupported Distinctions And Illustrates Its General Impracticality

Not only does petitioner's forum-focused approach lack textual, historical, or jurisprudential grounding, but its asserted application here—and in other cases—depends on tenuous or nonexistent distinctions that are both unsupported and unworkable. To the extent that the approach would even be an available interpretation of the Double Jeopardy Clause, the Court should reject it in favor of adhering to the definitional clarity of the dual-sovereignty doctrine as preserved by nearly two centuries of the Court's precedents.

### *1. The Courts of Indian Offenses exercise tribal authority*

Petitioner's principal submission to this Court is that the federal government plays such an outsized role in the Courts of Indian Offenses as to overwhelm the tribal source of the law that such a court may enforce. That submission is fundamentally mistaken.

a. As a threshold matter, all three Branches of the federal government have recognized that the Courts of Indian Offenses exercise tribes' sovereign authority, not the sovereign authority of the United States. And in related tribal sovereignty contexts, this Court has afforded "considerable weight" to "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Congress, through legislation signed by the President, has recognized "courts of Indian offenses" as "tribunals by and through which" "governmental powers possessed by an Indian tribe" "are executed." 25 U.S.C. 1301(2); see 25 U.S.C. 1301(3) (defining "'Indian court'" to include any "court of Indian offense"); 25 U.S.C. 1903(12) (same for "tribal court"). It has accordingly applied the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq*.—which contains analogues for various constitutional protections, see 25 U.S.C. 1302(a)—to tribal courts and the Courts of Indian Offenses alike, see 25 U.S.C. 1301(2) and (3). If the Courts of Indian Offenses were in fact exercising federal authority, as petitioner contends, the original constitutional protections would themselves apply without any need for separate legislation.

The Executive Branch, like Congress, has long recognized that the Courts of Indian Offenses exercise

tribal sovereignty. In 1935, shortly after the IRA's enactment, the Solicitor of the Interior explained that "the courts of Indian offenses do not rely for their legality solely upon the authority of the Secretary to create them. They are manifestations of the inherent power of the tribes to govern their own members." Nathan R. Margold, Solicitor, U.S. Dep't of the Interior, *Secretary's Power to Regulate Conduct of Indians* (Feb. 28, 1935), *reprinted in* 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 531, 536 (1979).

Finally, this Court has itself recognized, at least indirectly, that Courts of Indian Offenses effectuate a tribe's own sovereignty. In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court held that state courts lack jurisdiction over civil actions arising out of events in Indian Country that are brought by non-Indians against Indians. The Court reasoned that "the Navajo Courts of Indian Offenses"—the same type of court at issue here—"exercise[d] broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants" and that "to allow the exercise of state jurisdiction * * * would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 222-223. If the Courts of Indian Offenses exercised the sovereignty of the federal government, as petitioner asserts, then the Court would less readily have classified them as "tribal courts," see p. 6 n.*, *supra*, and state jurisdiction in *Williams* would not have "infringe[d]" on tribal self-government. 358 U.S. at 223.

b. Petitioner contends (Br. 17-22) that the "deepest well-springs" of the power to prosecute in the Courts of Indian Offenses are federal in nature because the

Courts of Indian Offenses were initially used, at least in part, to eliminate certain traditional tribal practices. Pet. Br. 17 (citation omitted). But as discussed earlier, see pp. 4-5, *supra*, in regulating relationships between Indians, the early Courts of Indian Offenses were nevertheless understood to exercise the tribes' own authority.

In any event, as petitioner acknowledges (Br. 19-20), the early Courts of Indian Offenses discouraged traditional tribal practices by enforcing *federal* regulations, rather than tribal law. They could not enforce tribal law until 1935, after the IRA's enactment. See 3 Fed. Reg. 1132, 1139 (May 18, 1938) (reprinting regulations adopted in 1935); 25 C.F.R. 161.74 (1938). The Court of Indian Offenses' early enforcement of federal regulations sheds no light on the authority undergirding its modern enforcement of the Ute Mountain Ute Tribe's criminal code.

Petitioner's argument is also in considerable tension with the logic of *Wheeler*. In holding that prosecution for a tribal offense in a tribal court was an exercise of the tribe's inherent sovereign power, *Wheeler* recognized that the Navajo Nation's history included a period in which "the Bureau of Indian Affairs established a Code of Indian Tribal Offenses and a Court of Indian Offenses for the reservation." 435 U.S. at 327. But the Court found that history insufficient to break the chain of the Navajo Nation's historic sovereignty. The Court emphasized that "none of the[] laws" passed by Congress "*created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders." *Id.* at 328; see *Sanchez Valle*, 579 U.S. at 74-75 (rejecting reliance on "an intermediate[] locus of power"). Rather, the Navajo Nation enacted its tribal

code "as part of its retained sovereignty." *Wheeler*, 435 U.S. at 328. Similarly here, the Ute Mountain Ute Tribe's criminal code is an exercise of its own sovereignty, and nothing about the presence of a Court of Indian Offenses divests it of that heritage.

c. Petitioner further contends (Br. 23) that today, "tribes simply have no relevant role in the prosecution of crimes" in the Courts of Indian Offenses. His characterization of those courts is inaccurate. The Courts of Indian Offenses are a mechanism for effectuating, not usurping, tribal authority.

Most fundamentally, tribes have the authority to choose whether to establish their own tribal courts, to enter a contract to provide their own judicial services, or to instead enforce tribal law through a Court of Indian Offenses. See pp. 6-7, *supra*; 25 C.F.R. 11.104(a). Because their size and resources vary, tribes will make different choices—and a single tribe may choose different options over time. But each of those choices reflects an exercise of the tribe's inherent sovereignty. Even where a tribe is currently unable to operate its own adequate tribal-court system (see Pet. Br. 24 (citing *Court of Indian Offenses Serving the Kewa Pueblo (Previously Listed as the Pueblo of Santo Domingo)*, 85 Fed. Reg. 10,714 (Feb. 25, 2020)), it retains the authority to establish (or reestablish) a tribal court when it is able to provide defendants with due process.

Where a tribe opts for tribal-law enforcement through a Court of Indian Offenses, the BIA simply provides "adequate machinery for the administration of justice," 25 C.F.R. 11.102; see 25 C.F.R. 161.1 (1938), while the tribe retains meaningful control over both the law applied and the court's operations. A tribe may select the ordinances eligible for enforcement in a Court

of Indian Offenses, see 25 C.F.R. 11.108(a), 11.449, and its ordinances "[s]upersede" any conflicting federal regulations, 25 C.F.R. 11.108(b). Courts of Indian Offenses also "apply the customs of the tribe * * * to the extent that they are consistent with [federal] regulations." 25 C.F.R. 11.110; see 25 C.F.R. 161.23 (1938).

Tribes also play a significant role in selecting and removing judges. 25 C.F.R. 11.201, 11.202; see 25 C.F.R. 161.3, 161.4 (1938). And BIA employees not associated with a Court of Indian Offenses are prohibited from "obstruct[ing], interfer[ing] with, or control[ling] the functions of" such courts. 25 C.F.R. 11.207; see 25 C.F.R. 161.21 (1938). The decisions of the judges of the Courts of Indian Offenses are not subject to review within the Department of the Interior, but instead by a panel of the Court of Indian Appeals, composed of tribally-confirmed judges who were not involved at the trial level. 25 C.F.R. 11.200(c).

Tribes also may elect to take on even greater authority over the operation of the Court of Indian Offenses. By regulation, they may contract to appoint the prosecutor and clerk for the Court of Indian Offenses, see 25 C.F.R. 11.203, 11.204, and in certain circumstances have been permitted to contract to provide other functions. Here, for example, this Office has been informed by the Department of the Interior that the Ute Mountain Ute Tribe has contracted with the government to provide the court clerk, court administration, and public defender—making the Court of Indian Offenses in this case even more similar to the tribal court in *Wheeler*.

d. Petitioner asserts (Br. 24-25) that in some ways, the Courts of Indian Offenses "remain subject to federal control and supervision." See, *e.g.*, Pet. Br. 22-25. But

while "Congress has in certain ways regulated the manner and extent of the tribal power of self-government," that "does not mean that Congress is the source of that power." *Wheeler*, 435 U.S. at 328. To the contrary, "beginning with Chief Justice Marshall and continuing for nearly two centuries, this Court has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty." *Sanchez Valle*, 579 U.S. at 72 n.5.

Indeed, as petitioner ultimately acknowledges (Br. 30 n.5), the federal government also supervises tribally operated courts in ways akin to its maintenance of the Courts of Indian Offenses without supplanting tribal sovereignty. For example, petitioner observes (Br. 7, 24) that certain tribal ordinances enforceable in the Court of Indian Offenses must be approved by the Assistant Secretary for Indian Affairs. But that was also true of the Navajo Nation Tribal Code at issue in the tribal-court prosecution in *Wheeler*. 435 U.S. at 327-328; see 25 U.S.C. 5123(d) (similar requirement for tribes operating under IRA constitutions).

Similarly, while petitioner observes that the BIA defines certain procedures in the Courts of Indian Offenses, federal law also defines certain aspects of procedure in tribally operated courts, see, *e.g.*, 25 U.S.C. 1302(a)(2), (3), (4), (6), (7), (8), and (10). Likewise, while defendants in the Court of Indian Offenses may be remanded to a facility operated or funded by the federal government, see Pet. Br. 25, that is also true of some defendants in tribally operated courts, see 25 U.S.C. 1302(d)(1)(B). Although fines assessed in the Court of Indian Offenses go the "federal treasury," Pet. Br. 25, such fines are "in the nature of an assessment for the

payment of designated court expenses," 25 C.F.R. 11.209, and thus simply fund the operation of the courts themselves, in support of tribal law enforcement. And to the extent that the federal government does provide independent resources for the Court of Indian Offenses to operate, it does the same for tribally operated courts. See 25 U.S.C. 3613; see also Indian Affairs, U.S. Dep't of the Interior, *Court of Indian Offenses: Tribal Justice Support Directorate*, https://www.bia.gov/CFR-Courts/tribal-justice-support-directorate.

***2. Petitioner's forum-focused approach would be unworkable***

As discussed, many of the features that petitioner cites to argue that the Courts of Indian Offenses exercise federal authority are also true of tribally operated courts. Petitioner thus fails to explain how this case could be meaningfully distinguished from *Wheeler*. And because tribes may choose different arrangements for criminal law enforcement—and a single tribe may make different decisions over time—petitioner's test would "raise serious problems of application" in other cases as well as inviting "uncertain" results and "introducing error and inconsistency into [the Court's] double jeopardy law." *Sanchez Valle*, 579 U.S. at 68 n.3.

a. The degree of a tribe's control over the enforcement of its laws is neither uniform nor static in any type of forum. Federal regulations contemplate that a tribe may contract to provide judicial services in lieu of utilizing the Court of Indian Offenses, but those contracts may include a variety of different provisions, including differing levels of federal support. And even where a tribe chooses to utilize a Court of Indian Offenses, it may exercise varying degrees of control, for example by

enacting an ordinance that supersedes a federal regulation, 25 C.F.R. 11.108(b); promulgating additional qualifications for the court's judicial officers, 25 C.F.R. 11.201(e); or seeking to appoint the court's prosecutor, 25 C.F.R. 11.204.

It is unclear whether exercising those options would lead to a different result under petitioner's approach, or where he would ultimately draw the line. Petitioner at times suggests (Br. 17) that his approach might turn solely on the Courts of Indian Offenses' existence "within the BIA." But that binary test has no textual or historical basis and would itself disrupt existing understandings. For example, federal officers charged with state offenses may be tried in federal court under the federal-officer removal statute. 28 U.S.C. 1442. This Court has explained that such removal "does not revise or alter the underlying law to be applied"; it simply "insure[s] a federal forum" for a "prosecution under state law." *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981); see *id.* at 243. Yet a court-dispositive approach would suggest that such prosecutions are in fact "federal" for purposes of the Double Jeopardy Clause.

Nor can petitioner offer an administrable, nonarbitrary rule by focusing solely on a prosecutor's federal versus tribal employment. Not only could that aspect of a Court of Indian Offenses change over time, see 25 C.F.R. 11.204, but cross-sovereign employment of prosecutors is likewise present in contexts where the Court has consistently applied the bright-line source-of-authority approach to the dual-sovereignty doctrine. In particular, it is not uncommon for state, tribal, and foreign prosecutors to appear in federal criminal cases on behalf of the federal government. See 28 U.S.C. 515, 543. Nothing in this Court's decisions would suggest

that the presence of those officials does, or even could, transform a prosecution for violation of federal law into a state or tribal prosecution for purposes of the Double Jeopardy Clause, let alone what the necessary degree of involvement would be. The courts of appeals have accordingly uniformly applied the dual-sovereignty doctrine to successive prosecutions where one sovereign "cross-designat[es]" another sovereign's prosecutors "to assist or even to conduct [its] prosecution." *United States* v. *All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (collecting authority).

Relatedly, while petitioner's brief in this Court repeatedly asserts (*e.g.*, at 1, 3, 25) that his prosecution in the Court of Indian Offenses was "brought in the name of the United States," he acknowledged below that "[t]he caption on the pleadings * * * [is] of course not determinative" of the double-jeopardy inquiry, Pet. C.A. Br. 18. As previously discussed, this Court has recognized that the same sovereign may bring successive prosecutions for different offenses, even when both offenses are applications of its *own* law. See *Dixon*, 509 U.S. at 705. And contrary to petitioner's assertion, see Pet. Br. 1, prosecutions in the Courts of Indian Offenses are often captioned in the name of the tribe. See, *e.g.*, Criminal Court Docket, Court of Indian Offenses of the Western Region, May 29, 2020, https://www.bia.gov/sites/bia.gov/files/assets/bia/wstreg/Te-Moak_May_2020_Docket_508.pdf; Court Docket, Court of Indian Offenses for the Southern Plains Region, Sept. 19, 2017 (Comanche Nation, WCD Tribes, and Kiowa Tribe) (on file with the Office of the Solicitor General); Court Docket, Court of Indian Offenses for the Miami Agency, Mar. 16, 2017 (Seneca-Cayuga Nation and Eastern

Shawnee Tribe of Oklahoma) (on file with the Office of the Solicitor General).

b. Petitioner's failure to identify a clear and coherent standard, combined with the dynamic feature of the tribal-federal relationship, would leave tribes, the federal government, and courts at sea as to the degree of federal involvement needed to classify a Court of Indian Offenses (or even a tribally operated court) as a federal agency for double-jeopardy purposes. See *Sanchez Valle*, 579 U.S. at 68. Moreover, to the extent that petitioner's presentation has identified any meaningful standards, his approach would still demand a separate forum-focused inquiry for each tribunal. Even more disruptively, the answer for a particular tribunal could vary with time, as the tribe pursues greater or lesser involvement in the tribunal's operations.

The bright line of the Court's existing dual-sovereignty doctrine would be ill-served by such a malleable and indeterminate carve-out. Nor would the difficulties in applying petitioner's case-by-case approach end with a determination that a particular tribe and the federal government are (at a particular time) the same sovereign for purposes of the Double Jeopardy Clause. Rather, following such a determination, courts presumably would apply the test set out in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to assess whether a tribal and federal crime are the "same offence." But *Blockburger*'s element-comparison test is "a rule of statutory construction" developed "to help determine legislative intent," *Garrett* v. *United States*, 471 U.S. 773, 778-779 (1985); it necessarily presumes that a single sovereign legislature enacted the offenses being compared. And *Blockburger*'s "simple-sounding * * * test has proved extraordinarily difficult to administer in

practice" even when the same legislature has defined both crimes. *Texas* v. *Cobb*, 532 U.S. 162, 185 (2001) (Breyer, J., dissenting). Those difficulties would multiply if courts were required to compare the elements of tribal offenses and federal crimes.

### D. Petitioner's Approach Would Derogate The Sovereignty And Impair The Public Safety Of Tribal Communities Lacking A Standalone Judicial Branch

The Ute Mountain Ute Tribe's decision to utilize the Court of Indian Offenses reflects the long-held understanding that such tribunals provide a vehicle for Indian tribes to exercise their own sovereignty. Petitioner's approach—which recasts such a decision as a relinquishment of tribal sovereignty—would upset that settled framework, devalue tribal sovereignty, and impair the public safety of tribal communities.

Petitioner's approach would create a two-tier system among Indian tribes. Those tribes that have established tribally operated courts would continue to enforce their sovereign tribal laws without fear of double-jeopardy consequences under *Wheeler*. But those tribes that rely on a Court of Indian Offenses—which tend to be smaller tribes with fewer resources—would be rendered second-class sovereigns, forced to choose between enforcement of their own tribal law and a prosecution under federal law.

That rule would not merely fail to recognize certain tribes' sovereignty; it would yield "'undesirable consequences'" for public safety and "frustrate[]" both federal and tribal interests. *Wheeler*, 435 U.S. at 330-331. "It is hard to dispute that Indian Country may be one of the most dangerous places in the United States," due in part to "jurisdictional lines between tribal, state, and

federal agencies." *Los Coyotes Band of Cahuilla & Cupeño Indians* v. *Jewell*, 729 F.3d 1025, 1028, 1030 (9th Cir. 2013). When crime occurs in Indian country, tribal or BIA officers may be the first to respond and investigate, see, *e.g.*, *State* v. *Kurtz*, 249 P.3d 1271, 1279 (Or. 2011), and proceedings for a tribal-law violation in a Court of Indian Offenses may be able to provide the most immediate form of incapacitation, retribution, and deterrence. But sanctions for violations of tribal law are limited, and under petitioner's approach, an offender "fac[ing] the potential of a mild tribal punishment and a federal punishment of substantial severity" would welcome "stand[ing] trial first" in the Court of Indian Offenses, in the hope of barring later federal charges. *Wheeler*, 435 U.S. at 330-331.

Petitioner's criminal offense—a violent sexual assault—illustrates that dynamic. Petitioner was arrested by a BIA officer hours after the assault and immediately imprisoned. Yet he ultimately served only 140 days for his tribal-law violation. Petitioner's federal prosecution commenced several months later but resulted in a more significant sentence. The two prosecutions together vindicated both the Tribe's and the United States' interests, while ensuring both the short-term neutralization of the threat petitioner posed as well as an appropriate punishment for his serious federal crime. Cf. Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* 3 (Nov. 2013) (emphasizing the importance of tribal justice systems in addressing "[d]isproportionately high rates of domestic violence, substance abuse, and related violent crime within many Native nations").

Similar circumstances are not uncommon. "Native American women 'experience the highest rates of domestic violence'" in the country and "'are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general.'" *United States* v. *Bryant*, 136 S. Ct. 1954, 1959 (2016) (citations omitted). To "fill [an] enforcement gap" resulting from "'patchwork'" legal regimes and limited penalties, federal law provides for enhanced punishments for recidivist domestic abusers who commit crimes within Indian country. *Id.* at 1959-1960 (discussing 18 U.S.C. 117(a)) (citation omitted). Under this Court's source-of-authority-focused interpretation of "same offence," all tribes have been able to immediately enforce their own domestic-abuse laws without concern that doing so would foreclose a later federal prosecution that would provide appropriate long-term punishment. Petitioner's approach would remove that important prosecutorial tool from tribes that have chosen to enforce their laws through a Court of Indian Offenses.

Petitioner's response (see Br. 28-30) gives little comfort. He suggests (Br. 30) that tribes may "*prefer* a Major-Crimes-Act prosecution" by the federal government "that will draw a heftier sentence." But petitioner provides no reason to put a subset of smaller tribes to that choice. And as this Court has explained, one sovereign's "interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another [sovereign's] enforcement of *its* own laws." *Heath*, 474 U.S. at 93. Petitioner ultimately falls back on the assertion (Br. 30) that if a tribe "wishes to protect its sovereign interest in enforcing its own criminal code," it should simply "establish[] a sufficient court system of its own." But such efforts take time,

resources, and personnel that a tribe may currently lack. And penalizing a tribe for not investing in tribal courts would impose a condition on a tribe's exercise of inherent sovereign authority well beyond the scope of any congressional withdrawal.

If the Ute Mountain Ute Tribe has the inherent power to enforce its criminal code using its own judicial machinery, as petitioner acknowledges that it does, the Tribe just as assuredly has the inherent power to enlist the assistance of the Court of Indian Offenses to do the same thing. Either choice reflects an exercise of the Ute Mountain Ute Tribe's sovereign authority—and either choice is entitled to respect under the dual-sovereignty doctrine.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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