

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes had lost their inherent sovereign power to prosecute members of other Tribes for offenses committed on their reservations. Congress responded to the Court's decision by amending the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, to "recognize[] and affirm[]" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians." The question presented is:

Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

(I)

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-22a) is reported at 324 F.3d 635. The vacated panel opinion (App., *infra*, 23a-34a) is reported at 294 F.3d 1004. The opinion of the district court (App., *infra*, 35a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2003. On June 13, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. The Fifth Amendment to the Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sections 1301 through 1308 of Title 25 of the United States Code are reproduced at App., *infra*, 44a-46a.

STATEMENT

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes no longer possessed the inherent authority to enforce their criminal laws against members of other Tribes. In response to that decision, Congress amended the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, to recognize and affirm "the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). This case concerns whether, in light of the amendment, a Tribe acts as a sovereign when it prosecutes members of other Tribes, as the Ninth Circuit held in *United States v. Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), or whether a Tribe acts as an instrumentality of the United States,

as the Eighth Circuit held here. The resolution of that question bears on whether a subsequent prosecution by the United States for an offense with the same elements is permissible under the Double Jeopardy Clause of the Fifth Amendment.

1. This Court has held that Indian Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law. *United States v. Wheeler*, 435 U.S. 313, 323-324 (1978). It follows that, under the "dual sovereignty" principle, the Double Jeopardy Clause permits the prosecution of a tribal member by the United States and by his Tribe for an offense with the same elements. *Ibid.*; *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (describing the dual sovereignty doctrine). The Court has also held, however, that the Tribes were divested of their inherent power to prosecute non-Indians upon their submission to the authority of the United States. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978). In *Duro*, the Court further held that the Tribes were divested of their inherent power to prosecute Indians who are members of other Tribes, sometimes referred to as "nonmember Indians." 495 U.S. at 696; see *id.* at 687-688.

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country. It appeared possible that neither the United States, nor the State, nor the Tribe could exercise jurisdiction if the putative defendant was a member of another Tribe, the offense was not among the major crimes enumerated in the Indian Major Crimes Act, 18 U.S.C. 1153 (or a generally applicable federal crime), and Congress had not authorized the State to exercise such jurisdiction. The *Duro* Court acknowledged that problem, 495 U.S. at 697-698, but reasoned that it was for Congress, "which

has the ultimate authority over Indian affairs," to provide a solution, if needed, *id.* at 698.

Congress quickly closed that jurisdictional gap by amending ICRA to recognize the sovereign power of Tribes to exercise criminal jurisdiction over "all Indians." See Act of Nov. 5, 1990, Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892-1893 (25 U.S.C. 1301(2) and (4)) (the ICRA amendment); see also Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (permanently enacting the ICRA amendment, which was originally effective only through September 30, 1991). In pertinent part, the amendment expanded ICRA's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The amendment also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. 25 U.S.C. 1301(4).

2. Respondent is an enrolled member of the Turtle Mountain Band of Chippewa Indians, which governs a reservation in north-central North Dakota. The events that gave rise to respondent's tribal and federal prosecutions occurred on the Spirit Lake Nation Reservation, which is governed by the Spirit Lake Nation Tribe and which is located in northeastern North Dakota.

On June 13, 2001, police officers of the Bureau of Indian Affairs (BIA) arrested respondent for public intoxication on the Spirit Lake Nation Reservation. When the BIA officers reminded respondent that he was subject to an order excluding him from that reservation, respondent struck one of the officers with his fist. App., *infra*, 2a, 28a.

Respondent pleaded guilty in the Spirit Lake Nation tribal court to three violations of the Spirit Lake Nation tribal code, including violence against a police officer, resisting arrest, and public intoxication. He was sentenced to 90 days' imprisonment for the first of those offenses. See App., *infra*, 36a.

3. On August 29, 2001, respondent was indicted in the United States District Court for the District of North Dakota for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1). The charge involved the same attack on the BIA police officer that was involved in the tribal charge. Respondent consented to proceeding before a magistrate judge. App., *infra*, 35a.

Respondent moved to dismiss the indictment on double jeopardy grounds. The government did not dispute that the tribal assault charge and the federal assault charge involved the same elements, so that successive tribal and federal prosecutions would be permissible under the Double Jeopardy Clause only if they were brought by separate sovereigns. See, e.g., *Wheeler*, 435 U.S. at 316-319 (applying the dual sovereignty doctrine to successive tribal and federal prosecutions of a tribal member).

The magistrate judge rejected respondent's double jeopardy claim that he was being prosecuted twice by the same sovereign. App., *infra*, 37a-40a. The magistrate judge recognized that "the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources." *Id.* at 37a. The magistrate judge found that requirement to be satisfied in this case, reasoning that the United States and the Tribe each exercises its own sovereign authority in prosecuting a member of another Tribe. See *id.* at 40a. The magistrate judge explained that the post-*Duro* ICRA amendment is "a valid recog-

dition of inherent rights of Indian tribes," not a delegation of the United States' own prosecutorial power to the Tribes. *Id.* at 40a (quoting *United States v. Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), reh'g granted and opinion vacated, 165 F.3d 1209 (8th Cir.) (en banc), cert. denied, 528 U.S. 829 (1999)).

Respondent conditionally pleaded guilty to the violation of 18 U.S.C. 111(a)(1), preserving his double jeopardy claim. He took an interlocutory appeal of the issue before sentencing.¹

4. A divided panel of the court of appeals affirmed. App., *infra*, 23a-28a.

The panel concluded that the Double Jeopardy Clause did not require the dismissal of the federal prosecution, because the tribal prosecution and the federal prosecution were brought by different sovereigns. App., *infra*, 27a. The panel recognized that this Court's decision in *Duro* held that the Tribes no longer had the inherent sovereign power to prosecute members of

¹ This Court has held that pretrial orders denying motions to dismiss indictments on double jeopardy grounds are "final decisions," within the meaning of 28 U.S.C. 1291, and thus are immediately appealable. *Abney v. United States*, 481 U.S. 651, 656-662 (1977). In classifying such orders as within the "small class of cases" that are "beyond the confines of the final-judgment rule," the Court explained that they "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim," are "collateral to, and separable from, the principal issue at the accused's impending criminal trial," and involve rights that cannot be fully vindicated on an appeal following a final judgment. *Id.* at 659-660. Here, in contrast to the ordinary case in which a defendant takes a collateral order appeal from a pretrial order rejecting a double jeopardy claim, petitioner took an appeal only after jeopardy had attached in the second prosecution. That choice would not appear to affect the finality of the order for purposes of Section 1291.

other Tribes. *Id.* at 25a. The panel reasoned, however, that *Duro* was grounded on federal common law, not on any constitutional limitation on tribal sovereignty. *Id.* at 26a-27a. Accordingly, the panel concluded that Congress could modify the federal common law as reflected in *Duro*, and that Congress did so by enacting the ICRA amendment “recogniz[ing] inherent tribal power.” *Id.* at 27a.

Chief Judge Hansen dissented. App., *infra*, 28a-34a. He reasoned that the authority for the tribal prosecution and the federal prosecution derived from a single source—“the legislative authority of the federal Congress exercising, with the President’s approval, the power of the United States.” *Id.* at 33a-34a. He concluded that “[t]he dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable.” *Id.* at 34a.

5. After granting rehearing en banc, the court of appeals reversed and remanded with directions to dismiss the indictment. App., *infra*, 1a-22a.

a. The court of appeals recognized that respondent’s Double Jeopardy Claim turned on whether or not the United States and the Tribe “exercised authority derived from the same ultimate source of power” in prosecuting respondent. App., *infra*, 4a. The court concluded that a Tribe does not exercise its own sovereign power when it prosecutes a member of another Tribe, relying on *Duro*’s holding that, “[i]n the area of criminal enforcement,” a Tribe’s retained sovereign power “does not extend beyond internal relations among members.” *Id.* at 6a (quoting *Duro*, 495 U.S. at 688).

The court of appeals rejected the panel’s characterization of *Duro* as “a common law decision that Congress had the power to override via the ICRA amendments.”

App., *infra*, 8a. The court instead “conclude[d] that the distinction between a tribe’s inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court.” *Ibid.* “Once the federal sovereign divests a tribe of a particular power,” the court reasoned, “it is no longer an inherent power and it may only be restored by delegation of Congress’s power.” *Ibid.*

The court of appeals concluded, however, that it “need not construe the ICRA amendment[] as a legal nullity.” App., *infra*, 10a. Giving effect to Congress’s perceived intent “to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians,” the court interpreted the amendment as delegating federal power to Tribes. *Ibid.* Accordingly, the court held that, because respondent was “necessarily prosecuted pursuant to that delegated [federal] power,” the “dual sovereignty doctrine does not apply.” *Id.* at 11a.

b. Judge Morris Sheppard Arnold, joined by three other members of the court, dissented. App., *infra*, 11a-22a.

Judge Arnold understood this Court’s decision in *Duro* to be based not on the Constitution, but on federal common law. App., *infra*, 11a. He reasoned that the ICRA amendment is a permissible exercise of Congress’s “plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty.” *Ibid.* Accordingly, he concluded that, “[b]ecause the Sprit Lake Nation, in trying [respondent], was simply exercising its own sovereignty, and not a power that Congress delegated to it, [respondent’s] double jeopardy rights were not violated.” *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that Congress cannot authorize Indian Tribes to exercise a sovereign power—the power to prosecute members of other Tribes—that this Court held in *Duro v. Reina*, 495 U.S. 676 (1990), that the Tribes had lost. Accordingly, the court interpreted the ICRA amendment, which affirmed “the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians,” 25 U.S.C. 1301(2), as a delegation of federal power. As a result, the court determined that, after a Tribe exercises the authority recognized in the ICRA amendment to prosecute a non-member Indian, a federal prosecution of that Indian is barred by the Double Jeopardy Clause of the Fifth Amendment. *Duro*, however, was a federal common law decision, not a constitutional one. Nothing in the Constitution, therefore, prevents Congress from prospectively redefining the scope of tribal sovereignty, as it did in the ICRA amendment, to include the power to prosecute non-member Indians.

The Eighth Circuit's en banc decision in this case squarely conflicts with the Ninth Circuit's en banc decision in *United States v. Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), which rejected a similar double jeopardy challenge on the ground that the United States and a Tribe each exercises its own sovereign power when prosecuting a member of another Tribe. And the Eighth Circuit's holding that Tribes conduct such prosecutions only as instrumentalities of the United States undermines effective law enforcement in Indian country. Under that holding, a tribal prosecution, in which only misdemeanor-type punishments may be imposed, would foreclose a subsequent federal prosecution for the same offense or a

greater encompassing offense. Because the question presented in this case is recurring and important, this Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Congress Cannot Remove Impediments To The Exercise Of Tribal Sovereign Powers

The court of appeals held that this Court's opinions analyzing the scope of the Tribes' retained sovereign powers are constitutional decisions. The court of appeals consequently held that Congress cannot restore, or remove impediments to the exercise of, sovereign powers that this Court has held to have been divested from the Tribes. Contrary to the court of appeals' view, the scope of tribal sovereignty is defined by federal common law as informed by the backdrop of federal treaties and statutes, not by the Constitution, and thus may be modified by Congress in the exercise of its plenary authority over Indian affairs.

1. The Double Jeopardy Clause states 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 dual sovereignty doctrine permits successive prosecutions by separate sovereigns for offenses with the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence" for purposes of the Double Jeopardy Clause. See *Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court considered whether the United States could prosecute a member of the Navajo Nation for statutory rape, one of the major crimes enumerated in 18 U.S.C.

1153, after he had been prosecuted by the Navajo Nation for the lesser included offense of contributing to the delinquency of a minor. The Court reasoned that the issue turned on the ultimate "source of [a Tribe's] power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" 435 U.S. at 322. The Court concluded that, when a Tribe prosecutes a tribal member for a violation of tribal law, "the tribe acts as an independent sovereign, and not as an arm of the Federal Government," *id.* at 329, and thus that the federal prosecution is permissible under the Double Jeopardy Clause.

In considering the scope of the Tribes' inherent sovereignty, the *Wheeler* Court explained that the Tribes, before their incorporation into the United States, possessed "the full attributes of sovereignty," including "the inherent power to prescribe laws for their members and to punish infractions of those laws." 435 U.S. at 322-323. In contrast, the Court said, the sovereignty that Tribes retain today "is of a unique and limited character," existing "only at the sufferance of Congress" and "subject to complete defeasance." *Id.* at 323. The Court added, however, that the Tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Ibid.* The Court concluded that the Tribes' sovereign power to exercise criminal jurisdiction over their own members had not been extinguished by Congress or surrendered incident to their entering into a dependent relationship with the United States. *Id.* at 323-328.

The Court distinguished the Tribes' criminal jurisdiction over their own members from their criminal

jurisdiction over non-Indians, which was at issue in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). There, the Court declined to recognize an inherent tribal power to prosecute non-Indians, reasoning that, “[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.” *Id.* at 210. The Court concluded that the Tribes could not exercise such power absent a “treaty provision or Act of Congress.” *Id.* at 196 n.6.

In *Duro*, the Court considered the unresolved issue at the “intersection” of *Wheeler* and *Oliphant*—namely, whether the Tribes retained the inherent power to prosecute Indians who are members of other Tribes. 495 U.S. at 684. *Duro* held that judicial recognition of such an inherent power would be inconsistent with the Tribes’ dependent status, and thus that the Tribes could not exercise that attribute of sovereignty, at least absent some affirmative act by Congress. *Id.* at 684-696.

2. As noted above, Congress enacted the ICRA amendment to restore the criminal jurisdiction that *Duro* found that the Tribes had lost. The text of the amendment embodies Congress’s determination to authorize Tribes to act in their own sovereign capacities, not as instrumentalities of the United States, in prosecuting members of other Tribes. The amendment modifies ICRA’s definition of tribal “powers of self-government” to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” 25 U.S.C. 1301(2). Jurisdiction exercised as a “power[] of self-government” necessarily refers to jurisdiction derived

from the Tribes' sovereign authority. And the amendment "recognized" and "affirmed" the existence of that jurisdiction as an "inherent" tribal power, not a federal power.

The legislative history of the ICRA amendment confirms that conclusion. The Senate Report explains that the amendment was intended "to recognize and reaffirm the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." S. Rep. No. 168, 102d Cong., 1st Sess. 4 (1991). The House Report adds that "this legislation is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, 102d Cong., 1st Sess. 7 (1991); see H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991) (the "legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations").

3. The court of appeals held that *Duro* is a constitutional decision and, therefore, cannot be altered by Congress. App., *infra*, 8a. The court was mistaken. *Duro* is properly understood as stating a rule of federal common law, which is "subject to the paramount authority of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981).

The Constitution does not address the extent to which the Tribes retain their sovereign powers after their incorporation into the United States. From the early years of this Nation, tribal sovereignty has been understood to be subject to adjustment by federal treaties and statutes; to the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-19 (1831) (Marshall, C.J.); see also *Oliphant*, 435 U.S. at

206 (observing that “Indian law’ draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress,” which “beyond their actual text form the backdrop for the intricate web of judicially made Indian law”). Thus, in *Duro*, the Court assessed the extent of tribal criminal jurisdiction by reference to non-constitutional sources, including statutes, treaties, and federal court practice. See 495 U.S. at 688-692.

The Court has recognized that Congress may, in the exercise of its “plenary” authority over Indian affairs, *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974), remove restraints that federal common law would otherwise impose on the Tribes’ exercise of their sovereign powers. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (“Where nonmembers are concerned, the ‘exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.’”) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)) (emphasis omitted); *Montana*, 450 U.S. at 562 (“If Congress had wished to extend tribal jurisdiction [over hunting and fishing within the reservation] to lands owned by non-Indians, it could easily have done so by [a statutory revision.]”); *United States v. Mazurie*, 419 U.S. 544, 556-559 (1975) (Congress may authorize a Tribe to regulate the sale of alcoholic beverages by non-Indians on lands owned by non-Indians within its reservation); cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“Congress has plenary authority to limit, modify or eliminate the

powers of local self-government which the tribes otherwise possess.”²

So, too, Congress may permissibly remove the constraint that *Duro* recognized to exist, as a matter of federal common law, on Tribes’ exercise of their sovereign power to prosecute members of other Tribes. Indeed, *Duro* and *Oliphant* suggest that the scope of tribal criminal jurisdiction as articulated in those cases could be modified by future congressional action. See *Duro*, 495 U.S. at 698 (“If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.”); *Oliphant*, 435 U.S. at 212 (identifying “considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians”); cf. *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) (Congress has “ple-

² This Court’s use of the term “delegation” in cases such as *Nevada v. Hicks*, 553 U.S. at 359, does not imply that a power exercised by the Tribes as a result of congressional action is a federal power, not a tribal power. Rather, the Court has used the term to encompass action by Congress that restores to a Tribe a sovereign power that was previously divested. See *Montana*, 450 U.S. at 564 (preempted “tribal power * * * cannot survive without express congressional delegation”); accord *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993); *Merriam v. Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982) (Stevens, J. dissenting). In *Mazuris*, the Court sustained an Act of Congress, 18 U.S.C. 1161, that allows the Tribes to regulate non-Indians’ liquor sales on reservations. See 419 U.S. at 556-558. In doing so, the Court recognized that the Tribes exercise “independent tribal authority” when they engage in the liquor regulation allowed by Section 1161, whether or not “this independent authority is itself sufficient for the tribes to” engage in such regulation in the absence of congressional action. 419 U.S. at 557.

nary authority to alter” the allocation of criminal jurisdiction in Indian country).

Even if the constraints on the Tribes’ exercise of sovereign powers were viewed as deriving from understandings or default rules reflected in the Constitution, it would not necessarily follow, as the court of appeals assumed, that Congress could not authorize an exercise of power that the Tribes would otherwise lack. The Commerce Clause operates as a constraint on the States’ inherent sovereign power to regulate commerce within their borders. Yet, Congress may authorize States to exercise that power in a manner that the Commerce Clause would otherwise forbid. See, e.g., *Hillside Dairy Inc. v. Lyons*, 123 S. Ct. 2142, 2147 (2003) (“Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce.”); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-436 (1946) (concluding that the States regained the authority, as a result of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to regulate insurance in a manner that could otherwise violate the Commerce Clause).

B. The Court Of Appeals Erred In Rewriting The ICRA Amendment As A Delegation Of Federal Prosecutorial Power

1. Having determined that Congress could not restore the Tribes’ sovereign power to prosecute members of other Tribes, the court of appeals construed the ICRA amendment as delegating federal prosecutorial power to the Tribes. App., *infra*, 10a-11a. That ruling cannot be squared with the amendment’s text and legislative history.

As discussed above, the ICRA amendment “recognize[s] and affirm[s]” that the Tribes’ “powers of self-

government" include "the inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). That language can be understood only as an attempt to restore that aspect of tribal sovereignty. The House Committee Report confirms that the amendment "is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, *supra*, at 7. Nor is there any reason to assume that Congress would have countenanced the adverse consequences for Indian country law enforcement that would result from the court of appeals' recharacterization of the amendment. See pp. 22-23, *infra*.

The court of appeals had no authority, in the name of saving the ICRA amendment, to rewrite it in a manner that Congress did not intend. See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 741-742 (1984) ("[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *, or judicially rewriting it.") (citation and internal quotation marks omitted). If, contrary to the government's view, Congress could not restore the tribal sovereign power to prosecute members of other Tribes, the ICRA amendment would have to be invalidated, not recharacterized as a delegation of federal prosecutorial power.

2. If the ICRA amendment were invalid as exceeding Congress's constitutional authority, the Spirit Lake Nation would have lacked criminal jurisdiction over respondent. Jeopardy therefore would not have attached in his tribal prosecution for purposes of the Double Jeopardy Clause. See *United States v. Phelps*, 168 F.3d 1048, 1054-1055 (8th Cir. 1999) (rejecting a double jeopardy challenge to a federal prosecution, which followed

a tribal prosecution for an offense with the same elements, because the Tribe lacked criminal jurisdiction over a non-Indian defendant); *California v. Mesa*, 813 F.2d 960, 963 n.5 (9th Cir. 1987), *aff'd*, 489 U.S. 121 (1989). And, if jeopardy did not attach in the tribal prosecution, a federal prosecution would not put respondent twice in jeopardy, and there would be no double jeopardy bar to this federal prosecution.

C. Two Circuits With Extensive Indian Country Are In Square Conflict On The Validity Of The ICRA Amendment As A Restoration Of Tribal Sovereign Authority

The Eighth Circuit's decision in this case squarely conflicts with the Ninth Circuit's decision in *United States v. Enas*. See App., *infra*, 8a (court notes its disagreement with *Enas*); *id.* at 22a (Arnold, J., dissenting) (observing that the court's decision is "contrary" to *Enas*); see also *Enas*, 255 F.3d at 673 (noting disagreement with an Eighth Circuit panel decision similar to the decision in this case, see *United States v. Weaselhead*, 156 F.3d 818, 823 (1998), *reh'g* granted and opinion vacated, 165 F.3d 1209 (en banc), cert. denied, 528 U.S. 829 (1999)).

In *Enas*, the defendant, a member of the San Carlos Apache Tribe, had been convicted in the tribal court of the White Mountain Apache Tribe on charges of assault with a deadly weapon and assault with intent to cause serious bodily injury. He was subsequently indicted in federal district court on the same charges under 18 U.S.C. 118(a) and 1153. The district court dismissed the indictment on double jeopardy grounds. The court of appeals, sitting en banc, reversed and remanded for trial. See *Enas*, 255 F.3d at 675.

The Ninth Circuit unanimously held that the dual sovereignty doctrine permits an Indian to be prosecuted successively for an offense with the same elements by the United States and by a Tribe other than his own. Although the majority and the concurrence reached that conclusion by different routes, all members of the en banc court agreed that Congress could respond to *Duro* by defining Tribes' inherent sovereign powers to include the exercise of criminal jurisdiction over reservation crimes committed by non-member Indians. See 255 F.3d at 670 (observing that the majority and the concurring judges "agree that Congress has the authority to identify the parameters of tribal sovereignty").

The majority characterized the ICRA amendment as an attempt by Congress "to replace *Duro's* historical narrative—according to which the tribes had no power over nonmember Indians—with a different version of history that recognized such power to be 'inherent.'" *Enas*, 255 F.3d at 669. The majority acknowledged that Congress could not do so if *Duro's* historical understanding of tribal sovereignty rested on the Constitution. *Id.* at 673. The majority reasoned, however, that "*Duro* is not a constitutional decision but rather * * * a decision founded on federal common law," noting that "[n]owhere does *Duro* intimate that it is announcing a constitutional precept, nor does it state that its analysis is compelled or influenced by constitutional principles." *Ibid.* "Consequently," the majority concluded, "Congress had the power to do exactly what it intended when it enacted the 1990 amendments to the ICRA," *i.e.*, "to determine that tribal jurisdiction over non-member Indians was inherent." *Id.* at 675.

The four concurring judges viewed *Duro* as conclusively determining, as of the time of that decision, the

federal common-law relationship between the United States and the Tribes and the extent to which the Tribes retained an aspect of their sovereignty. See *Enas*, 255 F.3d at 678-679 (Pregerson, J., concurring). The concurrence nonetheless reasoned that Congress could prospectively redefine that relationship, and thus could "add[] to * * * tribal sovereignty by recognizing the tribes' inherent power to prosecute members of other tribes." *Id.* at 680.

The decision in this case cannot be reconciled with *Enas*. In the Ninth Circuit, successive tribal and federal prosecutions of a non-member Indian for an offense with the same elements is permissible; in the Eighth Circuit, they are not. Because the vast majority of the Nation's Indian country lies within the Eighth and Ninth Circuits, together with the Tenth Circuit, there is particular reason for the Court to resolve the conflict in this case without awaiting additional cases from other circuits.

D. The Question Presented In This Case Has Significant Ramifications For Law Enforcement In Indian Country

The question whether the ICRA amendment permissibly restored the Tribes' sovereign authority to prosecute members of other Tribes is of great practical importance. If the ICRA amendment is invalid, or if it is construed as a delegation of federal prosecutorial authority, law enforcement in Indian country will be significantly undermined.

1. As the House and Senate Committee Reports on the ICRA amendment recognized, "the administration of justice in Indian country is better served by allowing tribes to exercise jurisdiction over all criminal misdemeanor cases involving Indians." H. R. Rep. No. 61, *su-*

pra, at 7; accord S. Rep. No. 168, *supra*, at 6. That is so for several reasons.

First, as a matter of existing law, neither the United States nor, in many instances, the State has authority to prosecute minor crimes committed by one Indian against another Indian in Indian country. Absent a change in the law, therefore, many offenses committed by non-member Indians could fall within a "jurisdictional void," unable to be prosecuted by any government. S. Rep. No. 168, *supra*, at 4.

Second, neither the United States nor the State might be able to devote sufficient resources to the prosecution of minor crimes committed by non-member Indians. The Senate Committee Report found that, after *Duro*, "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of nonmember Indians." S. Rep. No. 168, *supra*, at 4. The Committee also found that, even in Public Law 280 States (where States have been granted the authority to prosecute crimes committed by Indians in Indian country, see 18 U.S.C. 1162, 28 U.S.C. 1360), "state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands." S. Rep. No. 168, *supra*, at 4.

Third, and relatedly, "[m]ost Indian reservations are located far from urban centers, they are geographically isolated and remote, they are separated from state law enforcement centers by significant distances." S. Rep. No. 168, *supra*, at 7. As the House Committee Report observed, prosecuting minor crimes committed by non-member Indians in distant federal or state courts not only would be "impractical and inefficient," but also would reduce the "deterrent effect" and "community

awareness" produced by administering justice "within the community where the offenses were committed." H.R. Rep. No. 61, *supra*, at 3.

2. Other law enforcement concerns would be presented if the ICRA amendment were construed, as the court of appeals construed it, to authorize Tribes to exercise federal prosecutorial authority over members of other Tribes. In that event, whenever a federal offense was committed on a reservation by a non-member Indian, a tribal prosecution for the "same offence," which includes any lesser-included offense, would bar a federal prosecution. See *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (Double Jeopardy Clause bars successive prosecutions for lesser-included and greater-encompassing offenses, because they are the "same offence" within the meaning of the Clause). Although there is no limit to the types of offenses that Tribes may prosecute, punishments are limited to one year's imprisonment and a \$5000 fine for any offense. 25 U.S.C. 1302(7). Often, therefore, a tribal prosecution, even if successful, could not result in a sentence adequate to vindicate federal interests. Here, for example, the offense of assault on a federal officer, while carrying misdemeanor penalties when it involves "only simple assault," carries a sentence of as much as 20 years' imprisonment if the defendant used a deadly or dangerous weapon or inflicted bodily injury. See 18 U.S.C. 111(a) and (b).

In many instances, a Tribe could be expected to defer prosecuting a non-member Indian until the United States had decided whether to do so. The risk would nonetheless exist that, whether as a result of choice or inadvertence, a tribal prosecution could occur before a decision whether to pursue a federal prosecution had been made. A Tribe may have different law enforce-

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ment priorities and objectives than does the United States; for example, a Tribe may perceive that a violation of tribal law is more effectively addressed within the reservation community by measures other than incarceration. If the Eighth Circuit's decision were to stand, a non-member Indian would have a great incentive to seek tribal prosecution, thereby gaining protection from federal prosecution. See *Wheeler*, 435 U.S. at 330-331 (noting incentives that would exist for tribal members to plead guilty to tribal offenses in order to avoid prosecution for federal offenses carrying more severe penalties).

In sum, whether the ICRA amendment validly restored the Tribes' sovereign power to prosecute non-member Indians—and, if not, whether the amendment should be construed as a delegation of federal power—are questions of vital importance for Indian country law enforcement. For that reason, as well, this Court's review is warranted.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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