NO. 03-107

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

BILLY JO LARA,

Respondent.

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

BRIEF FOR THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, COLORADO, MICHIGAN, MONTANA, NEW MEXICO, AND OREGON AS AMICI CURIAE SUPPORTING PETITIONER

CHRISTINE O. GREGOIRE
Attorney General

Robert K. Costello
Deputy Attorney General

William Berggren Collins
Sr. Assistant Attorney General
Counsel of Record

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

Terry Goddard
Arizona Attorney General
1275 W Washington Avenue
Phoenix, AZ 85007

Bill Lockyer
California Attorney General
1300 I Street Suite 125
Sacramento CA 94244-2550

Ken Salazar
Colorado Attorney General
1525 Sherman Street
Denver CO 80203

Michael A. Cox
Michigan Attorney General
PO Box 30212
Lansing MI 48909-0212

Mike McGrath
Montana Attorney General
215 N Sanders
Helena MT 59620-1401

Patricia A. Madrid
New Mexico Attorney General
PO Drawer 1508
Santa Fe NM 87504-1508

Hardy Myers
Oregon Attorney General
1162 Court Street SE
Salem OR 97301

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Treaties

Other Authorities

Rules

Treatises

Legislative Reports

BRIEF FOR THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, COLORADO, MICHIGAN, MONTANA, NEW MEXICO, AND OREGON AS AMICI CURIAE SUPPORTING PETITIONER

Pursuant to Rule 37.4, Washington and the other amici curiae states respectfully submit this brief in support of petitioner, the United States, to urge that the judgment of the en banc panel of the Eighth Circuit below be reversed.

INTEREST OF THE AMICI CURIAE

The amici curiae states all have Indian reservations within their geographic boundaries. All partner in various ways with the tribal governments as well as with the federal government to provide effective law enforcement services for their citizens, Indian and non-Indian, in Indian Country. All are vitally interested in assuring the public health and safety of their citizens, and in protecting the law enforcement infrastructure built of the three sovereign entities in Indian Country: the United States, the Tribes, and the States and their local governmental subdivisions.

SUMMARY OF ARGUMENT

This case presents the question whether Congressional legislation admittedly intended to change the results of this Court's opinion in *Duro v. Reina*, 495 U.S. 676 (1990), is a valid affirmation and restoration of inherent tribal powers. The amici curiae states assert that 25 U.S.C. § 1301 as amended, is a valid exercise of Congressional

authority to restore Tribal authority to prosecute members of other Tribes, and that therefore the double jeopardy clause of the Fifth Amendment to the United States Constitution prohibiting a successive prosecution by the same sovereign is inapplicable herein.

FACTUAL SETTING

1. Historically And Today Indian Communities And Reservations Have Been Composed Of Indians From Various Tribes

Indian tribes are not now, nor have they ever been, uniform homogeneous communities. Historically, Indian villages often consisted of fairly diverse combinations of Indians from various tribes and tribal groupings. Often these diverse communities were the result of marital and kinship relationships. Many Northwest tribes encouraged marriage with a member of another village. *See United States v. Washington*, 384 F. Supp. 312, 370, 380 (W.D. Wash. 1974).

Nineteenth-century federal policies and laws accentuated the diversity of tribal communities. During the nineteenth century, the United States set aside many parcels of land as reservations for Indians. Though some Tribes secured reservations in their traditional homelands, many did not. Instead, they were consolidated with other tribal groups on reservations created as a matter of geographic happenstance and federal convenience. Many Reservations were and are today home to confederations of numerous bands and groups of Indian people. *See, e.g., Washington*, 384 F. Supp. at

366 (numerous bands consolidated on Muckleshoot Indian Reservation); Treaty With the Yakama Nation of Indians, 12 Stat. 951, art. III (June 9, 1855, ratified Mar. 8, 1859; proclaimed Apr. 18, 1859) (reservation for 14 tribes and bands).

In addition, many treaties and other instruments also provided for the later inclusion and accommodation of groups or individual Indians not previously located on Reservations. *See, e.g.*, Treaty With the Qui-Nai-Elt and Quil-leh-ute Indians (Treaty of Olympia, Jan. 25, 1856), 12 Stat. 971, art. VIII (July 1, 1855; ratified Mar. 8, 1859; proclaimed Apr. 11, 1859); Treaty With the Flathead, Kootenay, and Upper Pend d'Oreilles Indians (Treaty of Hell Gate), 12 Stat. 975, art. II (July 16, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Eastern Band of Shoshonees and the Bannack Tribe of Indians, 15 Stat. 673, art. II (July 3, 1868; ratification advised Feb. 16, 1869; proclaimed Feb. 24, 1869); I Charles J. Kappler, Indian Affairs: Laws and Treaties 916 (1904) (Executive Order of July 2, 1872 establishing Colville Indian Reservation). In still other instances, Indians from the same tribe settled on more than one reservation. *See, e.g.*, *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 338-39 (9th Cir. 1996) (Chehalis Indians settled on Chehalis and Quinault Reservations), *cert. denied*, 520 U.S. 1168 (1997); *United States v. Oregon*, 787 F. Supp. 1557, 1576-77 (D. Or. 1992) (Nez Perce Indians settled on Nez Perce and Colville Reservations); *id.* at 1579 (members of several historical bands settled on Yakama and Colville Reservations). Indeed, one of the treaties involved in this case created two

reservations for the signatory Indians. Treaty With the Sissiton and Warpeton Bands of Dakota or Sioux Indians, 1867, 15 Stat. 505, art. III, art. IV (Feb. 19, 1867; ratification advised, with Amendments, Apr. 15, 1867; Amendments accepted Apr. 22, 1867; proclaimed May 2, 1867).

So it is that, today, members of extended families may live within more than one Indian reservation. It is common for persons enrolled in one tribe to live within the reservation of another, and for family members who live together to be enrolled in different tribes.

The results of a 1991 survey conducted by the National Congress of American Indians revealed that nearly twelve percent of Indians living in reservation communities were not members of the local or host tribe(s). S. Rep. No. 102-68, App. E at 58 (1991). Moreover, 80% of the tribes responding to the survey indicated that non-member Indians were married to tribal members and 92% of the responding tribes reported that the non-member Indians worked on their reservations. *Id*. Such diversity is encouraged by current federal policies and practices that provide many federal benefits and services to members of Indian tribes regardless of where they reside. *See, e.g.*, 25 U.S.C. § 13 (Bureau of Indian Affairs authority to expend money for the benefit of Indians); 25 U.S.C. § 309 (vocational training for Indians); 25 C.F.R. § 27.1 (definition of "Indian" for vocational training); 25 U.S.C. § 1603(c) (definition of "Indian" for health care services);

25 U.S.C. § 472 (Bureau of Indian Affairs employment preference for Indians).[1]

2. Community Law Enforcement Benefits From The Amendments to 25 U.S.C. § 1301

In enacting the Indian Civil Rights Act Amendment at issue in this case, Congress recognized that tribal governments afford a broad array of services to non-member Indians. Congress recognized that non-member Indians often own property on the host reservation, their children attend tribal schools, and families receive health care from tribally-operated hospitals and clinics. S. Rep. No. 102-68, at 6-7 (1991). Congress also recognized that federally-administered programs and services are provided to non-member Indians because of their status as Indians, without regard to whether they are a member of the tribe on whose reservation they reside. H.R. Rep. No. 101-938, at 133 (1990).

According to the 1991 survey conducted by the National Congress of American Indians, disorderly conduct, assault/battery, intoxication, and driving while intoxicated were the most common types of criminal activity reported on Reservations. S. Rep. No. 102-68, at 59 (1991). In addition, the facts underlying many of the federal cases in this area of jurisprudence reveal that assault/battery on family

---

[1] Some federal benefits are available to members of any tribe, regardless of place of residency. Because all tribal members have a relationship through their Tribes with the federal government, special legislation for Indians, including the amendment to 25 U.S.C. § 1301 at issue here, is a political, not a racial classification. *See Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

members or partners is an unfortunate, recurrent theme. *United States v. Archambault*, 174 F. Supp. 2d 1009 (D.S.D. 2001); *United States v. Weaselhead*, 36 F. Supp. 2d 908 (D. Neb. 1997), *subsequent history omitted; Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998).

These community and family crimes often lend themselves best to "community policing". Community Policing is "a method by which communities lend their authority to the police enterprise, see their norms and values reflected in the police mission, and employ their considerable formal and informal resources to address crime". U.S. Dep't Of Justice, Research Report, *Policing On American Indian Reservations* ix (July 2001) (http://www.ncjrs.org/pdffiles1/nij/188095.pdf). This "gives rise to law enforcement institutions that have the characteristics [of] self determination and cultural appropriateness, and such institutions have the potential to substantially improve public safety". *Id*. Even where state or federal law enforcement authorities have the authority and resources to arrest and try non-member Indians, they have less intimate knowledge of local cultural norms than do Tribal law enforcement authorities. Thus, current concepts of "community policing" would suggest that in some cases Tribal law enforcement may be better positioned to carry it out.

The Amici States have been working with the Tribes in their respective states to strengthen cooperative relationships between Tribal and State governments, particularly in the area of law enforcement. *See, e.g.*, N.M. Stat. § 29-1-11 (authorization of tribal and pueblo police officers to

act as New Mexico peace officers).[2] It is the belief of these states and tribal governments that cooperative and mutually respectful law enforcement efforts will benefit our communities, both individually and collectively. In this age of diminishing resources and increasing law enforcement challenges, agreements and protocols that maximize the collective effectiveness of tribal, state, and federal law enforcement efforts are essential. Whether by reason of proximity, knowledge of custom and culture, resources, legal authority, and appropriateness of possible sanction, one law enforcement agency (whether it be tribal, federal, or state) may be better positioned to take enforcement action than another. All the cooperative agreements and protocols, however, cannot fill the void if none of the agencies possesses the authority to arrest and prosecute.

Should this Court determine that Congress' effort to restore inherent sovereignty over non-member Indians is invalid, it will reopen a jurisdictional gap, where no government will have jurisdiction over misdemeanors committed by non-member Indians in Indian country. While this Court has held that the Assimilative Crimes Act applies to Indian country through 18 U.S.C. § 1152 (The General Crimes Act), which excepts Indian versus Indian crimes from its purview, the Assimilative Crimes Act likely does not apply of its own force. *See Williams v. United States*, 327 U.S. 711, 714

---

[2] Copies of many cooperative law enforcement agreements are posted on the internet web site of the National Congress of American Indians, http://www.ncai.org/main/pages/issues/governance/agreements/law_enforcement_agreements.asp.

n.3 (1946). In *Duro v. Reina*, 495 U.S. 676 (1990), this Court noted: "And federal authority over minor crime, otherwise provided by the Indian Country Crimes Act, 18 U.S.C. § 1152, may be lacking altogether in the case of crime committed by a non-member Indian against another Indian, since § 1152 states that general federal jurisdiction over Indian country crime 'shall not extend to offenses committed by one Indian against the person or property of another Indian.'" *Duro*, 495 U.S. at 697. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 505 (1976). It is not in the interest of tribal or state law enforcement to have such a gap develop and result in lawlessness.

ARGUMENT

Congress Validly Exercised Its Plenary Power Over Indian Tribes To Restore Tribal Jurisdiction Over Non-member Indians

This case arose after the Spirit Lake Nation prosecuted Billy Jo Lara, a member of another Indian Tribe, concerning an incident that occurred within the boundaries of the Spirit Lake Nation Reservation. When the United States attempted to prosecute Mr. Lara for the same conduct, the Eighth Circuit held that the prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003).

The Spirit Lake Nation prosecuted Mr. Lara in accordance with the 1990 and 1991 amendments to 25 U.S.C. § 1301, which Congress enacted in response to this Court's decision in *Duro*. The

Eighth Circuit said the amendments were ineffective because *Duro* was a constitutional holding, which Congress lacked power to overrule. *Lara*, 324 F.3d at 639. The Eighth Circuit erred in drawing that conclusion.

In *Duro*, this Court held that the inherent sovereignty then retained by Indian Tribes did not include the power to prosecute non-member Indians. In its analysis, the Court recognized, however, that tribal powers with respect to non-member Indians were not static, but had evolved over time with changing congressional policies, such as those embodied in the 1924 act granting United States citizenship to Indians. *Duro*, 495 U.S. at 688-93; *see id*. at 706 (describing majority as having concluded "tribes were implicitly divested of this power in 1924 when Indians became full citizens") (Brennan, J., dissenting). The Court recognized that Indian citizenship "does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class", but noted that Congress had not done so with respect to criminal punishment of one tribe's members by another tribe. *Id*. at 692, 693.

Congress responded by enacting the amendments at issue in this case.[3] Certainly

---

[3] Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990); *see* H.R. Rep. No. 101-938, at. 133 (1990) (made permanent by Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991), codified at 25 U.S.C. § 1301(2), (4)). The amendments amended the definition of "powers of self-government", in 25 U.S.C. § 1301(2), to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians" and defined the term "Indian", in 25 U.S.C. § 1301(4), to mean "any person who would be subject to the

Congress cannot exercise powers reserved exclusively to the judiciary. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). Congress cannot, for example, declare to be constitutional a law that the Court has said is not. *See id.* But that is not what Congress did.

In enacting the 1990 and 1991 amendments to 25 U.S.C. § 1301, Congress validly restored Tribes' sovereign power to prosecute non-member Indians. The enactment has the effect of amending treaties, other laws, and federal common law that expressly or impliedly withdrew tribes' power to prosecute non-member Indians.

The Constitution is not the principal basis for this Court's Indian law jurisprudence. As this Court observed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress". *Cf. McClanahan v. Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973) (in the area of state-tribal relations, "modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power"); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 474 n.13 (1976) (analysis of state power to tax Indians depends not on constitutional "federal-instrumentality doctrine," but on "applicable treaties and federal legislation"). In

---

jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies".

Duro, this Court drew from non-constitutional sources, including statutes and treaties, to conclude that a constellation of federal laws had withdrawn Indian tribes' power to prosecute non-member Indians. *See Duro*, 495 U.S. at 688-92. The dissent drew the opposite conclusion from the same federal laws. *Id*. at 700-06. Though Congress, as the Eighth Circuit properly concluded, does not have the power to overrule this Court's construction of the United States Constitution, it does have the power to amend statutes and treaties like those that formed the backdrop for this Court's holding in *Duro* that help to define the inherent powers of Indian tribes. That is what Congress did when it enacted the 1990 and 1991 amendments to 25 U.S.C. § 1301.

Among other things, the 1990 and 1991 legislation can be viewed as having the effect of amending a treaty to which the Spirit Lake Nation is a party.

The Spirit Lake Nation Reservation, where Mr. Lara was prosecuted, was created by Article IV of the Treaty With the Sissiton and Warpeton Bands of Dakota or Sioux Indians, 1867, 15 Stat. 505, 506 (Feb. 19, 1867; ratification advised, with Amendments, Apr. 15, 1867; Amendments accepted Apr. 22, 1867; proclaimed May 2, 1867). *See generally Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002); *Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n*, 896 F. Supp. 955 (D.N.D. 1995). The Indian bands who executed the 1867 treaty also executed two earlier treaties with the United States, in 1851 and 1858. Treaty With the Sioux – Sisseton and Wahpeton Bands, 1851, 10

Stat. 949 (July 23, 1851); Treaty With the Sisseeton and Wahpaton Bands of the Dakota or Sioux Tribe of Indians, 1858, 12 Stat. 1037 (June 19, 1858; ratified Mar. 9, 1859; proclaimed Mar. 31, 1859). *See generally* Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 199-200, 269, 276 (1994). In Article VI of the 1858 Treaty, the Sisseton and Warpeton Bands acknowledged as follows:

> "The Sisseeton and Wahpaton bands of Dakota or Sioux Indians . . . pledge themselves not to engage in hostilities with the Indians of any other tribe, unless in self-defence, but to *submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby.* They also agree to deliver to the proper officers all persons belonging to their said bands who may become offenders against the treaties, laws, or regulations of the United States, or the laws of the State of Minnesota, and to assist in discovering, pursuing, and capturing all such offenders whenever required so to do by such officers, through the agent or other proper officer of the Indian department." 12 Stat. 1037, art. VI (emphasis added).

In 1863, following hostilities in 1862 between Indians and settlers, Congress annulled some portions of the 1858 treaty. Act of Feb. 16, 1863, 37th Cong., ch. 37 at 652-54. The 1863 act did not change Article VI of the 1858 Treaty, however.

Some of the tribal signatories to the 1858 Treaty did not participate in the 1862 hostilities. In the 1867 Treaty, the United States recognized their loyalty and created two new reservations for them, including the Spirit Lake Nation Reservation where Mr. Lara was prosecuted. The 1867 Treaty did not change Article VI of the 1858 Treaty.

Article VI of the 1858 Treaty with the Sisseeton Sioux was not unusual. Provisions in which Indians agreed to submit differences between themselves and members of other tribes for decision by the United States government were common features in Indian treaties of the nineteenth century. *See* Karl Jeffrey Erhart, Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. S.L.J. 727, 737-41 (1980). For example, more than two dozen tribes in the Pacific Northwest are parties to treaties with such provisions.[4]

---

[4] *See* Treaty With Nisqualli, Puyallup, etc., 1854 (Treaty of Medicine Creek), 10 Stat. 1132, art. VIII (Dec. 26, 1854); Treaty With the Dwámish Indians (Treaty of Point Elliott), 12 Stat. 927, art. IX (Jan. 22, 1855); Treaty With the S'Klallams Indians (Treaty of Point No Point), 12 Stat. 933, art. IX (Jan. 26, 1855; ratified Mar. 8, 1859; proclaimed Apr. 29, 1859); Treaty With the Makah Tribe of Indians (Treaty of Neah Bay), 12 Stat. 939, art. IX (Jan. 31, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians, 12 Stat. 945, art. VIII (June 9, 1855; ratified Mar. 8, 1859; proclaimed Apr. 11, 1859); Treaty With the Yakama Nation of Indians, 12 Stat. 951, art. VII (June 9, 1855, ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Nez Percé Indians, 12 Stat. 957, art. VIII (June 11, 1855; ratified Mar. 8, 1859; proclaimed Apr. 29, 1859); Treaty With the Confederated Tribes and Bands of Indians in Middle Oregon, 12 Stat. 963, art. VII (June 25, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859);

These treaties, as well as other laws, formed the backdrop for the Court's holding in *Duro* that Tribes then lacked inherent sovereignty to prosecute non-member Indians. *See Duro*, 495 U.S. at 690. Congress unquestionably has the power to amend treaty provisions such as Article VI of the 1858 Treaty With the Sisseeton Sioux. *United States v. Dion*, 476 U.S. 734, 738 (1986). Congress has the power to restore inherent tribal powers previously withdrawn by treaty or statute. *See United States v. Long*, 324 F.3d 475, 479-83 (7th Cir. 2003) (tribe that Congress had terminated but later restored possessed inherent criminal jurisdiction over member), *cert denied*, 124 S. Ct. 151 (2003). Congress' restoration of inherent tribal power to punish non-member Indians in the amendments to 25 U.S.C. § 1301 can be viewed as having had that effect.

Because of the amendments to 25 U.S.C. § 1301, the legal landscape of treaties, statutes, and common law is different now from what it was when the Court decided *Duro*. Congress restored inherent tribal powers with respect to non-member Indians with the adoption of the amendments to 25 U.S.C. § 1301. The United States' prosecution of Mr. Lara was a prosecution by a separate sovereign that did

---

Treaty With the Flathead, Kootenay, and Upper Pend d'Oreilles Indians (Treaty of Hell Gate), 12 Stat. 975, art. II (July 16, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Qui-Nai-Elt and Quil-leh-ute Indians (Treaty of Olympia, Jan. 25, 1856), 12 Stat. 971, art. VIII (July 1, 1855; ratified Mar. 8, 1859; proclaimed Apr. 11, 1859); Treaty With the Blackfeet, 1855, 11 Stat. 657, art. II (Oct. 17, 1855).

not offend the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED.

CHRISTINE O. GREGOIRE
Attorney General

Robert K. Costello
Deputy Attorney General

William Berggren Collins
Sr. Assistant Attorney General
Counsel of Record

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

November 14, 2003