No. 22-796

IN THE

Supreme Court of the United States

JOHNNY ELLERY SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF NATIONAL INDIAN GAMING ASSOCIATION AND CHEYENNE RIVER SIOUX TRIBE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus National Indian Gaming Association is an inter-tribal association of 184 federally-recognized Indian tribes. Its mission is to protect tribal sovereignty and the ability of tribes to achieve economic self-sufficiency through gaming and other forms of economic development.

Amicus Cheyenne River Sioux Tribe ("Tribe") is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749 (1851), and the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1868). The Tribe is a constituent tribe of the Great Sioux Nation, and its reservation is within the territory "set apart for the absolute and undisturbed use and occupation" of the Great Sioux Nation, as a "permanent home," in the Fort Laramie Treaty of April 29, 1868. Arts. II, VI, XV, 15 Stat. 635.

Amici have an interest in protecting and promoting the sovereign governmental authority of Indian tribes over their members and their territories.[1]

[1] All counsel of record received timely notice of the intent to file this brief under Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

In the decisions below—*United States v. Smith*, 925 F.3d 410 (9th Cir. 2019), and *United States v. Smith*, No. 21-35036, 2022 WL 3102454 (9th Cir. Aug. 4, 2022)—the Ninth Circuit held that the Assimilative Crimes Act, 18 U.S.C. § 13, applies to Indian country, both on its own terms and through the General Crimes Act, 18 U.S.C. § 1152. As a consequence, the court held, the Federal Government may prosecute Indians for state-law criminal offenses committed in Indian country, even minor, victimless offenses that are properly reserved to the exclusive jurisdiction of Indian tribes. This holding fundamentally misapplies the law, including this Court's precedents, and threatens to undermine the self-government and self-determination of Indian tribes on treaty-protected lands reserved by tribes for their exclusive use as permanent homes.

ARGUMENT

THE APPLICATION OF STATE CRIMINAL LAWS TO INTRA-TRIBAL CRIMES IN INDIAN COUNTRY IMPERMISSIBLY INTERFERES WITH TRIBAL SELF-GOVERNMENT

A. Indian Tribes Are Separate Sovereigns With An Inherent Right To Self-Government

American Indian tribes are "'distinct, independent political communities' exercising sovereign authority." *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). They are "separate sovereigns," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56

(1978), and their "claim to sovereignty long predates that of our own Government." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973).

Although Indian tribes accepted "the protection of the United States of America" through treaties, *see*, *e.g.*, Treaty with the Teton, 1815, Art. 3, 7 Stat. 125 (1815), they retain the status of "'domestic dependent nations,'" *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe*, 498 U.S. 505, 509 (1991); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)), and continue to "'possess[] attributes of sovereignty over both their members and their territory,'" *United States v. Lara*, 541 U.S. 193, 204 (2004) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

Perhaps the most fundamental attribute of sovereignty possessed by Indian tribes is the right to "self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883). *Accord*, *Talton v. Mayes*, 163 U.S. 376 (1896). At its core, the right to self-government involves "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). This right includes, without limitation, the "'the inherent power to prescribe laws for their members and to punish infractions of those laws.'" *Denezpi v. United States*, 142 S. Ct. 1838, 1845 (2022) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978)).

This Court has made clear that "the right of self-government in general" and "the power to punish crimes in particular" are inherent rights of Indian tribes, not rights conferred by treaties or statutes. *Wheeler*, 435 U.S. at 327. Indeed, "[t]his Court has referred to treaties made with the Indians as 'not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.'" *Wheeler*, 435 U.S. at 327 n. 24 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). Treaty-based reservations of lands for "exclusive use" by Indian tribes implicitly includes a reservation of the tribal right of self-government.

The Court has said, Indian tribes possess all aspects of their original, inherent sovereignty that have not been withdrawn by treaty, statute, or otherwise. *Wheeler*, 435 U.S. at 323. In *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016), the Court noted that, "unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form." *Id*. at 70.

Indian tribes have a nation-to-nation relationship with the United States, *see*, *e.g.*, 25 U.S.C. §§ 3601(1), 3651(1); Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021); Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000), but they are in no way "dependent on" or "subordinate to" the states. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134. 154 (1980). As a general rule, reservation Indians are subject only to tribal and federal law, not state law. *Williams*, 358 U.S. at 220.

"'The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history.'" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan*, 411 U.S. at 170- 171.

The application of state criminal laws in Indian country may be preempted if it "would unlawfully infringe upon tribal self-government." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2501 (2022) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–335 (1983)). In this case, the assimilation of state criminal laws by the Federal Government would work just as great an interference with tribal self-government and it, too, must not be permitted.

B. Tribal Criminal Jurisdiction Is Essential To Tribal Self-Government

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (citations omitted). "Numerous federal statutes designed to promote tribal government embody this policy." *Id.* at 14 n.5 (citing Indian Reorganization Act, 25 U.S.C. § 5123, *et seq.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301, *et seq.*, and Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*). *See also* 25 U.S.C. § 3601(2),(3) (finding and declaring that, "the

United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," and "Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes").

One of the most essential "powers of self-government" that Congress has "recognized and affirmed" in Indian tribes is "the inherent power … to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(1),(2). Indeed, it is hard to imagine a more important aspect of tribal sovereignty than a tribe's criminal jurisdiction. "After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty." *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting) (citations omitted).

Tribal criminal jurisdiction is essential for the enforcement of tribal "mores and laws," "maintaining orderly relations among [tribal] members and … preserving tribal customs and traditions." *Wheeler*, 435 U.S. at 331. "Tribal laws and procedures are often influenced by tribal custom," and "[t]raditional tribal justice … often emphasizes restitution rather than punishment." *Id.* at 331-332, n.34 (citations omitted).

Recognizing that "tribal courts are important mechanisms for protecting significant tribal interests," this Court has declared that, "Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract

substantially from tribal self-government." *Wheeler*, 435 U.S. at 332.

Congress has "repeatedly recognized" the "sovereign power" of Indian tribes "to punish offenses against tribal law by members of a tribe," and has "declined to disturb" that power. *Wheeler*, 435 U.S. at 325. For example, the General Crimes Act (GCA), 18 U.S.C. § 1152, includes an "intra-Indian offense exception because 'the tribes have exclusive jurisdiction' of such offenses and 'we cannot with any justice or propriety extend our laws to' them." *Wheeler*, 435 U.S. at 325 (citing H. Rep. No. 23-474 at 13 (1834)). This Court noted that the tribal "'right of self government, and to administer justice among themselves … has never been questioned; and . . . the Government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country.'" *Id.* at 325, n.23 (quoting S. Rep. No. 41-268 at 10 (1870)). *Accord, Donnelly v. United States*, 228 U.S. 243, 270 (1913) (noting that under the GCA and its precursors, "'offenses committed … by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform'") (quoting *Ex parte Crow Dog*, 109 U.S. at 571).

In the modern era, Congress has promoted tribal criminal justice systems and repeatedly acknowledged the importance of tribal criminal justice systems to tribal self-government. For example:

- Congress enacted the Indian Law Enforcement Reform Act, P.L. 101-379, 104 Stat. 473 (Aug. 18, 1990), to strengthen law enforcement activities in Indian country. The Senate Committee on Indian Affairs reported that: "Intrinsic to the sovereignty of Indian tribes is the power of a tribe to create and administer a criminal justice system." S. Rep. No. 101-167, at 8 (1989).

- In the Indian Tribal Justice Act, P.L. 103-176, 107 Stat. 2004 (Dec. 3, 1993), Congress found and declared that, "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments," and "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." *Id*. at § 2(5),(6), *codified at* 25 U.S.C. § 3601(5),(6).

- In the Indian Tribal Justice Technical and Legal Assistance Act, P.L. 106-559, 114 Stat. 2778 (Dec. 21, 2000), Congress found and declared that, "Indian tribes are sovereign entities and are responsible for exercising governmental authority over Indian lands," and "tribal justice systems [are] the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." Id. at § 2(2),(6), *codified at* 25 U.S.C. § 3651(2),(6).

- Congress enacted the Tribal Law and Order Act, P.L. 111-211, Tit. II, 124 Stat. 2258 (Jul. 29, 2010), to increase tribal sentencing authority and to "empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country." *Id.* at § 202(b)(3). Congress found that "tribal law enforcement officers are often the first responders to crimes on Indian reservations," and "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country." *Id.* at § 202(a)(2).

It is well-settled that "substantive criminal law is important to community self-determination." Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 834 (2006). Through their criminal laws, communities codify their "moral foundations" and "assert, protect, and defend their core values." *Id.* at 834-835. For Indian tribes, the criminal justice system is an "important outlet for self-determination and self-definition." *Id.* at 842. When foreign criminal laws are imposed on Indian communities, tribes are denied their own inherent self-determination, and instead must "live with criminal laws that reflect the values—and relative value judgments—of an external community." *Id.*

Proper respect for tribal self-determination counsels against the imposition of foreign criminal laws in Indian country, including the application of state criminal laws by the United States through the Assimilative Crimes Act, and instead favors policies

that guarantee to Indian tribes "control of the instruments of criminal justice." Washburn, 84 N.C. L. REV. at 854. *Accord*, *Ex parte Crow Dog*, 109 U.S. at 571; *United States v. Quiver*, 241 U.S. 602, 605-606 (1916)).

C. The Assimilative Crimes Act Does Not Apply By Its Own Terms In Indian Country

The Assimilative Crimes Act (ACA), 18 U.S.C. § 13, makes no mention of Indian tribes or Indian country. It applies by its own terms on federal enclaves, defined in relevant part as "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," 18 U.S.C. § 7, such as national parks, military bases, federal courthouses, and post offices. "The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Lewis v. United States*, 523 U.S. 155, 160 (1998) (citations omitted).

The ACA does not apply by its own terms in Indian country. Indian reservations are not "lands reserved or acquired to the use of the United States," within the meaning of 18 U.S.C. § 7. Instead, they are lands reserved by Indian tribes to themselves, through treaties and other arrangements, for their exclusive use and occupation. *See Winans*, 198 U.S. at 381. For example, the Warm Springs Reservation was "set apart" by treaty for the "exclusive use" of the Confederated Tribes of Warm Springs as a "permanent home." Treaty with the Tribes of Middle Oregon, 1855, Arts. 1, 5, 12 Stat. 963 (1855).

This Court has confirmed that Indian reservations and other tribal lands are not "federal enclaves." *Castro-Huerta*, 142 S. Ct. at 2495 (rejecting argument that "equate[d] federal enclaves and Indian country for jurisdictional purposes" and disavowing as "pure dicta" contrary language in *Williams v. United States*, 327 U.S. 711 (1946)).

The leading treatise on federal Indian law confirms that, "[n]othing in the legislative history of the ACA suggests that Congress intended the Assimilative Crimes Ac to apply to Indians in Indian country. Federal policy in the period during which these statutes were developed favored the complete separation of tribal lands from state authority and supported internal tribal autonomy." 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02[1][c][ii] (2019) (citing *Quiver*, *supra*).

The Ninth Circuit incorrectly construed the ACA as applying by its own terms to Indian country and allowing the application of state criminal law in Indian country. This construction of the ACA undermines the federal policy of promoting tribal sovereignty and self-government and is foreclosed by this Court's admonition that, "federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982) (quoting *Bracker*, 448 U.S. at 144). *Accord*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the

Indians, with ambiguous provisions interpreted to their benefit").

D. The Assimilative Crimes Act Does Not Apply Through The General Crimes Act, In Part Because It Would Undermine Tribal Self-Government

The General Crimes Act (GCA), 18 U.S.C. § 1152, extends to Indian country that "the general laws of the United States as to the punishment of offenses committed" on federal enclaves. Petitioner correctly asserts that the ACA is a "jurisdictional statute" that "creates federal jurisdiction to prosecute offenses defined by, and to impose punishments established by, *state* law," and is not a criminal law of the United States that is extended to the Indian country by the GCA. Pet. 15-16. This construction of the ACA and GCA comports with the Indian canon of statutory construction, recited above, that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766.

If the ACA were incorporated through the GCA—and if the Federal Government were found to have the authority to prosecute state-law criminal offenses committed by Indians in Indian country—it would undermine tribal self-government and self-determination. It would create a regime in which states—communities that are "alien and external to tribal communities"—would define "the local offenses within the tribal community." Washburn, 84 N.C. L.

REV. at 836.[2] State law may criminalize minor or victimless offenses that Indian tribes choose not to criminalize, and in those cases, state values and norms would supplant tribal values and norms. Further, the Federal Government would have the authority to adjudicate "everyday violations of the alien norms, thereby reifying the alien norms on a daily basis through the process of criminal justice." *Id*. Finally, "in setting and then reinforcing through prosecutions the norms of an alien community, it effectively preempts the Indian communities' own opportunity to formally articulate their norms about serious offenses and to have them reinforced through a criminal justice system." *Id*. at 836-837.

It is "an enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790 (citations omitted). Accordingly, out of "proper respect … for tribal sovereignty itself," the courts must "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60.

Congress did not clearly or expressly authorize the assimilation of state criminal laws in the GCA. Congress knows how to assimilate state law when it wants to do so. In the Major Crimes Act (MCA), 18 U.S.C. § 1153, Congress authorized federal criminal jurisdiction over Indians who commit certain enumerated major crimes in Indian country. *Id*. at §

[2] Although Dean Washburn's article addressed the application of federal law in Indian country through the MCA, his concerns apply of equal force to the potential application of state law in Indian country through incorporation of the ACA through the GCA.

1153(a). The MCA specifically states that any of the enumerated major crimes that "is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense." *Id*. at § 1153(b).

This Court distinguished the GCA from the MCA in *Castro-Huerta*, noting that the statutes have "substantially different language." 142 S. Ct. at 2496. The MCA expressly authorizes the assimilation of state criminal laws, while the GCA does not. This Court should not "lightly assume that Congress has omitted from its adopted text" in the GCA a requirement that it "nonetheless intends to apply," namely a requirement to assimilate state criminal laws in Indian country, especially when "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). To the contrary, the Court should assume "different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (when "the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended").[3]

"[T]his Court has long 'require[d] a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands." *McGirt*, 140 S. Ct. at 2477 (quoting *Ex parte Crow Dog*, 109 U.S. at 572).

[3] The GCA and MCA were both codified, as amended, in the Act of June 25, 1948, 62 Stat. 683 (1948).

Congress did not clearly express an intention in the GCA that the Federal Government may prosecute Indians for state-law criminal offenses committed in Indian country. The Ninth Circuit erred by holding that the GCA authorizes such prosecutions.

This Court and Congress have both shown great solicitude for tribal self-government and for the exclusive jurisdiction of Indian tribes over non-major intra-tribal crimes committed by Indians in Indian country. *See supra* pages 6-7 (discussing *Wheeler* and the text and legislative history of the GCA). This solicitude is confirmed by the express exceptions in the GCA for (1) offenses committed by one Indian against the person or property of another, (2) Indians committing offenses in Indian country who have been "punished by the local law of the tribe," and (3) any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes. 18 U.S.C. § 1152.

In *Quiver*, *supra* this Court held that the first exception—for offenses committed by one Indian against the person or property of another—must not be construed "so strictly" as to permit federal prosecution of victimless crimes committed by Indians, such as the crime committed by Petitioner in this case, while precluding federal prosecution of far more serious victim-based crimes. 241 U.S. at 605-606. The Court held that the "true view" is that the ""words of the exception are used in a sense more consonant with reason," and are "intended to be in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians among themselves—the conduct of one toward another—is to be controlled by

the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise." *Id.* at 605.

In cases, such as this one, where exclusive tribal jurisdiction over intra-tribal offenses is secured by treaty—either expressly or by implication from the reservation of tribal land for the "exclusive use" of the tribes—the third exception in the GCA also precludes federal prosecution.

The Ninth Circuit ignored these authorities and has permitted the Federal Government to prosecute a victimless state-law offense committed by an Indian on treaty-protected lands reserved by the Confederated Tribes of Warm Springs for their "exclusive use" as a "permanent home." The decisions below impermissibly undermine tribal self-government and self-determination and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the Court should summarily reverse the decisions below.

Respectfully submitted.

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