No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 117(a) of Title 18, United States Code, makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic-violence offenses. 18 U.S.C. 117(a).

The question presented is whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which was appellee in the court of appeals. Respondent is Michael Bryant Jr., who was appellant in the court of appeals.

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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 Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 769 F.3d 671. The oral ruling of the district court denying respondent's motion to dismiss (App., *infra*, 32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2014. A petition for rehearing was denied on July 6, 2015 (App., *infra*, 33a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this petition. App., *infra*, 55a-64a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Montana, respondent was convicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). App., *infra*, 3a. The district court sentenced respondent to 46 months of imprisonment, to be followed by three years of supervised release. D. Ct. Doc. 34, at 2-3 (May 9, 2012) (Judgment). The court of appeals reversed the convictions and directed that the charges against respondent be dismissed because, the court held, the Constitution prohibited reliance on respondent's valid uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element. App., *infra*, 1a-16a.

1. When an Indian Tribe criminally prosecutes an Indian in tribal court, it exercises its own sovereign authority and is not governed by provisions of the federal Constitution. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Although "the Bill of Rights does not apply to Indian tribal governments," *Duro* v. *Reina*, 495 U.S. 676, 693 (1990), Congress conferred a range of procedural safeguards on tribal-court defendants in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.* Under ICRA, a tribal-court defendant is guaranteed due process of law and has the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to

have compulsory process for obtaining witnesses in his favor. 25 U.S.C. 1302(a)(6) and (8). A tribal-court defendant accused of an offense punishable by imprisonment is entitled to a jury trial. 25 U.S.C. 1302(a)(10). ICRA also provides protection from unreasonable searches and seizures, compelled self-incrimination, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2), (3), (4), and (7). In addition, tribal-court defendants may seek habeas corpus review of their convictions in a federal district court. 25 U.S.C. 1303.

At the time of respondent's tribal-court convictions, ICRA provided that tribal courts could not impose a prison term greater than one year for any criminal offense and specified that a defendant had the right to the assistance of counsel at his own expense. 25 U.S.C. 1302(6) and (7) (2006).[1] ICRA's counsel provision thus differs from the Sixth Amendment. While the Sixth Amendment provides no right to appointed counsel in misdemeanor cases where only a fine is imposed, it does provide a right to appointed counsel to an indigent defendant in a misdemeanor prosecution that results in actual imprisonment. *Scott* v. *Illinois*, 440 U.S. 367, 369, 373-374 (1979); *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

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[1] The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Tit. II, 124 Stat. 2261, amended ICRA to provide that tribal courts may impose sentences of up to three years of imprisonment for any one offense. *Id.* § 234, 124 Stat. 2279. An indigent defendant must be provided with appointed counsel before a sentence of more than one year of imprisonment is imposed. *Ibid.*; see 25 U.S.C. 1302(c)(2).

2. a. Respondent, who is an enrolled member of the Northern Cheyenne Tribe, has numerous tribal-court misdemeanor convictions for domestic assault. App., *infra*, 3a; Presentence Investigation Report (PSR) ¶ 81. Specifically, respondent pleaded guilty on multiple occasions in the Northern Cheyenne Tribal Court to committing domestic abuse. See *ibid.* In 1999, for example, respondent assaulted his live-in girlfriend by strangling her and hitting her on the head with a beer bottle. *Ibid.* In 2007, respondent kneed his girlfriend in the face and struck her with his fist. *Ibid.* The Northern Cheyenne Tribal Court sentenced respondent to various terms of imprisonment for his offenses, never exceeding one year of incarceration. See *ibid.* Respondent did not seek federal habeas corpus review of any of his domestic-violence convictions.

Respondent has alleged, and the courts below have assumed, that he was indigent and that he did not have access to appointed counsel at the time of his tribal-court convictions. See App, *infra*, 5a & n.4. It is undisputed, however, that those convictions are valid and were obtained in compliance with ICRA. *Id.* at 7a-8a, 46a.

b. Respondent's pattern of domestic violence continued in 2011 with assaults on two different victims. In February 2011, respondent attacked his live-in girlfriend by dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. D. Ct. Doc. 29, at 2-3 (Jan. 12, 2012) (Offer of Proof). Three months later, in May 2011, respondent assaulted a different woman who was living with him. *Ibid.* Respondent woke her by yelling at her and then choked her until she almost passed out. *Ibid.* Based on that

conduct, respondent was indicted in the United States District Court for the District of Montana on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). D. Ct. Doc. 9, at 2 (June 20, 2011) (Indictment).

c. Respondent filed a motion to dismiss the indictment, alleging that it would violate the Fifth and Sixth Amendments to use his uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element. D. Ct. Doc. 19, at 1-2 (Nov. 7, 2011) (Motion to Dismiss). The district court denied the motion to dismiss. App., *infra*, 32a.

d. Respondent pleaded guilty to both counts in the indictment, reserving his right to appeal the denial of his motion to dismiss. D. Ct. Doc. 27, at 2-3 (Jan. 10, 2012) (Conditional Plea Agreement). The district court sentenced respondent to concurrent terms of 46 months of imprisonment on each count, to be followed by three years of supervised release. Judgment 2-3.

3. a. The court of appeals reversed respondent's convictions, holding that the indictment must be dismissed because its reliance on uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element violated the Constitution. App., *infra*, 1a-16a.

The court of appeals acknowledged that respondent's uncounseled tribal-court convictions were not constitutionally infirm because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." App., *infra*, 7a-8a. The court observed, however, that respondent's convictions "would have violated the Sixth Amendment had they been obtained in state or federal court" because respondent was incarcerated for his tribal offenses and "indigent

criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed." *Id.* at 8a. The court of appeals concluded that it was "constitutionally impermissible" to use respondent's uncounseled tribal-court convictions to establish the predicate-offense element in his Section 117(a) prosecution because the tribal court had not "guarantee[d] a right to counsel that is * * * coextensive with the Sixth Amendment right." *Id.* at 12a.

In reaching that conclusion, the court of appeals relied heavily on its prior decision in *United States* v. *Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), which held that it was impermissible to use an uncounseled tribal-court guilty plea that resulted in imprisonment as evidence in a later federal prosecution arising out of the same incident. App., *infra*, 10a-11a. The court rejected the suggestion that *Ant* had been effectively overruled by this Court's decision in *Nichols* v. *United States*, 511 U.S. 738 (1994), which held that an uncounseled state misdemeanor conviction that did not result in imprisonment could be used to enhance a sentence for a subsequent offense, *id.* at 746-747. App., *infra*, 12a-13a. In the court's view, "*Nichols* and *Ant* are easily reconcilable because *Nichols* involved an uncounseled conviction [that was] valid under the Sixth Amendment" because no imprisonment was imposed, "whereas *Ant* involved prior tribal court proceedings that, in state or federal court, would not have been valid under the Sixth Amendment." *Id.* at 13a.

The court of appeals recognized that, in holding that the charges against respondent must be dismissed, it had created a "conflict with two other circuits," both of which had "held that a prior uncoun-

seled tribal court conviction could be used as a predicate offense for a [Section] 117(a) prosecution." App., *infra*, 14a (citing *United States* v. *Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012), and *United States* v. *Cavanaugh*, 643 F.3d 592, 603-604 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012)). The court disagreed with those decisions, believing that they could not "be reconciled with *Ant*." *Id.* at 15a.

b. Judge Watford concurred. App., *infra*, 16a-21a. He agreed that *Ant* "control[led] the outcome of" respondent's case, but he wrote separately to explain why "*Ant* warrants reexamination." *Id.* at 16a-17a. As Judge Watford observed, "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Id.* at 17a. Judge Watford found it "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." *Id.* at 17a-18a.

Judge Watford also explained that *Nichols* had "undermin[ed] the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." App., *infra*, 17a. And in Judge Watford's view, "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that uncounseled "tribal court convictions are inherently suspect and unworthy of the federal courts' respect." *Id.* at 20a.

Finally, Judge Watford observed that the Eighth and Tenth Circuits had "pointedly disagreed" with *Ant* when holding that uncounseled tribal court convictions may serve as predicate offenses in a Section 117(a) prosecution. App., *infra*, 20a. "Given this circuit split and the lack of clarity in this area of Sixth Amendment law," Judge Watford believed that "the Supreme Court's intervention seems warranted." *Id.* at 21a.

4. The government petitioned for rehearing en banc. The court of appeals denied rehearing in a published order, with eight judges dissenting. App., *infra*, 33a-54a.[2]

a. Judge Paez, who authored the panel opinion, concurred in the denial of rehearing in an opinion joined by Judge Pregerson, who was also a member of the panel. App., *infra*, 34a-39a. "[W]hile recognizing that only the Supreme Court can clarify the meaning and scope of its decision in *Nichols*," Judge Paez continued to adhere to the view that *Nichols* should not be read to "permit[] the use of [respondent's] convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do)." *Id.* at 34a-35a. "[G]iven the sharp division over the important issues at stake in this case," Judge Paez recognized that "Supreme Court review may be unavoidable." *Id.* at 39a.

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[2] When the court of appeals issued its mandate following its denial of rehearing, respondent had finished serving his term of imprisonment and was subject to a three-year term of supervised release. Respondent's completion of his term of incarceration does not moot appellate proceedings seeking to reinstate his convictions and his term of supervised release. See, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977) (per curiam).

b. Judge Owens, joined by Judges O'Scannlain, Gould, Tallman, Bybee, Callahan, Bea, and M. Smith, dissented from the denial of rehearing en banc. App., *infra*, 40a-43a. Noting that Congress had enacted Section 117(a) to address "the grave problem of domestic violence on tribal lands," Judge Owens criticized the panel for "wip[ing] this important statute off the books." *Id.* at 40a-41a. Judge Owens further noted the panel's acknowledgment that its decision created a circuit split by explicitly disagreeing with the Eighth and Tenth Circuits on whether the Constitution permits the use of uncounseled tribal-court convictions to prove a defendant's status as a habitual offender in a Section 117(a) prosecution. *Id.* at 41a. That holding, Judge Owens emphasized, tears "a massive gap in the fragile network that protects tribal women and their children from generations of abuse." *Ibid.* Judge Owens also pointed out that the decision parted ways with circuits that treat uncounseled misdemeanor convictions as valid even if a sentence of imprisonment is not. *Id.* at 42a. Judge Owens concluded by observing that "only the Supreme Court can rectify this terrible situation." *Ibid.* He "urge[d] the Court to do so as soon as possible, before [respondent], and the many more men like him, terrorize more women and their families." *Id.* at 42a-43a.

c. Judge O'Scannlain, joined by Judges Gould, Tallman, Bybee, Callahan, Bea, M. Smith, and Owens, authored a separate dissent. App., *infra*, 44a-54a. Judge O'Scannlain explained that the panel's decision "contravenes the Supreme Court's decision in *Nichols* v. *United States*, stands in direct conflict with the only two other circuit courts to consider the issue presented, and, ultimately, holds tribal courts in contempt for

having the audacity to follow the law as it is, rather than the law as we think it should be." *Id.* at 45a (citation omitted). As Judge O'Scannlain observed, "[b]oth Nichols's and [respondent's] uncounseled convictions comport with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a (citation and internal quotation marks omitted). Judge O'Scannlain deemed it irrelevant that "the prior tribal court proceedings *would* have violated the Sixth Amendment *if* they were in state or federal court" because "using a federal recidivist statute to prosecute [respondent] does not transform his prior, valid, tribal court convictions into new, invalid, federal ones." *Ibid.* (citation and internal quotation marks omitted).

Judge O'Scannlain concluded that the panel's opinion "must rest on an assumption that tribal court convictions are inherently unreliable," which "trample[s] upon the principles of comity and respect that undergird federal court recognition of tribal court judgments." App., *infra*, 52a (emphasis omitted). The panel's decision, he emphasized, "cries out for [Supreme Court] review." *Id.* at 45a; see *ibid.* (observing that "*every member of the panel* has acknowledged that this case requires the Supreme Court's attention").

REASONS FOR GRANTING THE PETITION

The court of appeals held that the federal domestic-violence recidivist provision, 18 U.S.C. 117(a), is unconstitutional as applied to repeat offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. That holding is incorrect, in conflict with other circuits, and highly damag-

ing to federal prosecutorial efforts to combat the serious problem of domestic violence in Indian country.

The court of appeals premised its decision on a decades-old circuit precedent that relied on precedent from this Court that was later overruled. The court's bar against the use of valid, but uncounseled, tribal-court convictions in subsequent federal proceedings cannot be reconciled with this Court's decisions upholding the subsequent use of prior valid, but uncounseled, convictions to support recidivist punishment. The Ninth Circuit's decision also conflicts with the decisions of the two other courts of appeals that have addressed the identical issue and have upheld Section 117(a). The court's decision will impede the effective and uniform enforcement of Section 117(a) by hamstringing the prosecution of recidivist offenders like respondent, who have lengthy records of domestic assault in tribal court but have previously avoided felony-level punishment for their violence. As recognized by all members of the court of appeals panel, and eight judges who dissented from rehearing en banc, this Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Section 117(a) Is Unconstitutional As Applied To Habitual Offenders With Valid Uncounseled Tribal-Court Misdemeanor Convictions

Congress enacted 18 U.S.C. 117 in part "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. No. 109-162, § 902(3), 119 Stat. 3078 (42 U.S.C. 3796gg-10 note). For that purpose, Congress authorized prosecution of repeat of-

fenders who commit a domestic assault in Indian country and provided that prior convictions for domestic assaults in "Indian tribal court proceedings" can serve as predicate offenses in a Section 117(a) prosecution. 18 U.S.C. 117(a). Contrary to the Ninth Circuit's decision in this case, nothing in the Constitution prohibits Congress's judgment that prior tribal-court misdemeanor convictions, whether or not they were counseled and whether or not they resulted in imprisonment, support a recidivist prosecution under Section 117(a).

1. The Sixth Amendment does not preclude Congress from subjecting habitual offenders with valid uncounseled tribal-court misdemeanor convictions to prosecution under Section 117(a)

This Court's precedents demonstrate that a prior conviction that did not violate the Sixth Amendment when it was imposed also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a subsequent proceeding. Because respondent's tribal-court convictions were validly entered in accordance with tribal and federal law, the court of appeals erred in holding that the Sixth Amendment prohibited their use in his Section 117(a) prosecution.

a. After this Court held in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that the Constitution guarantees indigent state defendants the right to appointed counsel in a felony case, the Court addressed whether uncounseled convictions that violated *Gideon* may be used in subsequent proceedings. In *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), the Court held that they may not. The Court reasoned that if the government could exploit the *Gideon* "defect in the prior conviction" by

using that conviction in a later prosecution, it would cause the defendant to "suffer[] anew from the deprivation of [his] Sixth Amendment right." *Ibid.* In addition, the Court concluded, reliance on an invalid conviction would "erode the principle" of *Gideon*. *Ibid.*

The corollary of those principles is that a conviction that is constitutionally valid despite the absence of counsel may be used in a later proceeding without violating the Sixth Amendment. The use of a valid conviction neither exacerbates a prior constitutional violation nor undermines this Court's case law concerning the right to counsel.

In *Nichols* v. *United States*, 511 U.S. 738 (1994), the Court made those principles clear. In that case, the Court held that an uncounseled state misdemeanor conviction that did not violate the Sixth Amendment (because no term of imprisonment was imposed) could be relied upon to enhance a defendant's sentence for a later offense. *Id.* at 748-749. In so holding, *Nichols* overruled *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), in which a majority of a fractured Court, which could not agree on a rationale, had ruled that a prior uncounseled misdemeanor conviction that was valid for its own purposes could not be used to establish a defendant's recidivist status in a subsequent prosecution. 511 U.S. at 748.

Nichols noted that "the Sixth Amendment right to counsel did not obtain" in the prior prosecution because the defendant was fined but not incarcerated. 511 U.S. at 740, 746 (citing *Scott* v. *Illinois*, 440 U.S. 367, 373-374 (1979)). The "logical consequence," the Court explained, was that the valid uncounseled prior conviction could be used to increase the sentence for a

subsequent offense, "even though that sentence entails imprisonment." *Id.* at 746-747. "Enhancement statutes," the Court reasoned, "whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction"; instead, the Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* at 747 (internal quotation marks omitted) (citing *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962)). Thus, the Court held that, "consistent with the Sixth and Fourteenth Amendments of the Constitution, * * * an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748-749.

Nichols demonstrates that the Sixth Amendment does not preclude relying on a valid, uncounseled tribal-court conviction in a Section 117(a) prosecution for recidivist domestic violence. Because the "Bill of Rights does not apply to Indian tribes" when they act in their sovereign capacity to prosecute their own members, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), "the Sixth Amendment right to counsel d[oes] not obtain" in those proceedings, *Nichols*, 511 U.S. at 746. The use of the tribal-court conviction in a Section 117(a) proceeding accordingly does not inflict harm based on a prior constitutional violation, because no "defect in the prior conviction" exists. *Burgett*, 389 U.S. at 115. Nor does the use of an uncounseled tribal-court misdemeanor conviction in a subsequent prosecution "erode

the principle[s]" articulated in this Court's decisions interpreting the Sixth Amendment right to counsel. *Ibid.* Because those decisions recognize a misdemeanor conviction as valid when rendered in tribal court, even if the defendant was not counseled, no principle in this Court's jurisprudence is undermined.

It would be particularly anomalous to bar the use of a valid but uncounseled tribal court misdemeanor conviction simply because imprisonment was imposed; the Sixth Amendment, even when it applies, does not bar the entry of the *conviction* itself, but only the imprisonment sentence. Accordingly, "[t]he appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself." *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); see also *Iowa* v. *Tovar*, 541 U.S. 77, 88 n.10 (2004) (reserving judgment on this issue). Respondent should not be protected against the use of his tribal criminal record based on the sentence he received in tribal court, when that sentence has no relevance to the use of the conviction as a predicate under Section 117(a).

b. The court of appeals relied primarily on its decision in *United States* v. *Ant*, 882 F.2d 1389, 1394-1395 (9th Cir. 1989), which had relied on *Baldasar* in concluding that an uncounseled tribal guilty plea that resulted in imprisonment could not be used as evidence in a later federal prosecution for the same conduct. App., *infra*, 12a, 15a ("we are bound by *Ant*"), 16a ("we reiterate *Ant*'s continued vitality"). But *Nichols* overruled *Baldasar* and thus abrogated *Ant*'s rationale. The court of appeals' attempt to rehabilitate *Ant* fails. The court purported to distinguish *Nichols* on the ground that it "involved a prior conviction that

did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." *Id.* at 12a (citation omitted). But as Judge O'Scannlain observed, "the court's argument is illogical" because "[b]oth Nichols's and [respondent's] uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a.

In sum, nothing in this Court's Sixth Amendment cases supports barring the use of a valid tribal-court conviction because it would have triggered different constitutional protections had it been rendered in a different court. And nothing in logic supports allowing the government to rely on a tribal-court misdemeanor conviction when the tribal court imposed only a fine, but barring it from using the same conviction if the tribal court imposed imprisonment, when nothing in the federal recidivist prosecution turns on the sentence received in tribal court.

2. Due process principles do not preclude Congress from subjecting habitual offenders with valid uncounseled tribal-court misdemeanor convictions to prosecution under Section 117(a)

Although the panel did not ground its decision in the Due Process Clause or concerns about reliability, an opinion concurring in the denial of rehearing suggested that tribal-court convictions do not "pass[] muster at the guilt phase" because of "reliability concerns" See App., *infra*, 36a (Paez, J., concurring in the denial of rehearing en banc). That suggestion is unfounded. Congress's decision to make a tribal misdemeanor conviction an element of a recidivist

domestic-violence crime satisfies due process if it is "rational[]," *Lewis* v. *United States*, 445 U.S. 55, 65 (1980), and Section 117(a) readily passes that test.

a. This Court's decision in *Scott* upheld the constitutional validity of an uncounseled misdemeanor conviction in state and federal court so long as imprisonment was not imposed. If such a conviction does not raise due process reliability concerns, Congress could rationally conclude that reliance on an uncounseled tribal misdemeanor conviction, whether or not imprisonment was imposed, similarly does not raise due process reliability concerns, because the fact of the misdemeanor domestic-violence conviction, not the tribal-court sentence, is the relevant consideration under Section 117(a).

Nichols further establishes that Congress acted rationally in deeming uncounseled tribal-court convictions sufficiently reliable to serve as predicate offenses in a Section 117(a) prosecution. The Court in *Nichols* recognized the argument—pressed by three Justices in *Baldasar* and the dissenting opinion in *Nichols* itself—that "an uncounseled misdemeanor conviction is 'not sufficiently reliable' to support imprisonment" and "'does not become more reliable merely because the accused has been validly convicted of a subsequent offense.'" 511 U.S. at 744 (quoting *Baldasar*, 446 U.S. at 227-228) (opinion of Marshall, J.); *id.* at 757-758 (Blackmun, J., dissenting) (expressing the view that "prior uncounseled misdemeanor conviction[s]" are not "sufficiently reliable to justify additional jail time imposed under an enhancement statute"). But the Court overruled *Baldasar* and permitted an uncounseled misdemeanor conviction to trigger a sentencing enhancement. The *Nichols* Court

thus necessarily rejected the claim that those convictions, though uncounseled, are so unreliable as to violate due process when used to support imprisonment in a later proceeding.

Judge Paez believed that *Nichols* could be distinguished because it "is a sentencing case." App., *infra*, 35a. *Nichols* did observe that "[r]eliance on [an uncounseled misdemeanor] conviction is * * * consistent with the traditional understanding of the sentencing process, which [the Court] ha[s] often recognized as less exacting than the process of establishing guilt." 511 U.S. at 747. But whether a prior conviction is used to enhance a sentence or to satisfy a predicate-offense element, Congress could rationally conclude that the conviction represents a sufficiently reliable indicator of prior criminal conduct. In both contexts, the government is entitled to rely on the fact of the prior conviction and need not relitigate whether the underlying conduct occurred. While the government must establish the fact of the prior conviction beyond a reasonable doubt in a Section 117(a) prosecution, that procedural difference does not alter the substantive use of the conviction to demonstrate that the defendant is a repeat offender.

b. Although the Bill of Rights does not apply to tribal governments, Congress has exercised its power to provide an array of protections to promote the reliability of tribal-court criminal proceedings through ICRA. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 57-58 & n.8 (1978). A "central purpose" of ICRA was "to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Id.* at 61

(quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

ICRA's counsel provision does diverge from the Sixth Amendment, but Congress could rationally conclude that appointed counsel is not essential to an accurate determination of guilt in tribal-court misdemeanor proceedings, particularly in light of the other procedural protections that help ensure the reliability of tribal-court convictions. ICRA guarantees that a tribal-court defendant will not be "deprive[d] * * * of liberty or property without due process of law." 25 U.S.C. 1302(a)(8). A defendant accused of an offense punishable by imprisonment has the right to a jury trial, and ICRA further grants a defendant "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. 1302(a)(6) and (10). In addition, tribal-court defendants are empowered to seek habeas corpus review of their convictions in federal court. 25 U.S.C. 1303. Congress accordingly had a rational basis to criminalize a third act of domestic violence by a habitual offender with two valid tribal-court convictions.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The Ninth Circuit's holding that Section 117(a) is unconstitutional as applied to habitual offenders with uncounseled tribal-court convictions resulting in imprisonment conflicts with the published decisions of two other courts of appeals. App., *infra*, 14a. In square conflict with the decision below, the Eighth

and Tenth Circuits have held that it does not violate the Constitution to rely on uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element.

In *United States* v. *Cavanaugh*, 643 F.3d 592 (2011), cert. denied, 132 S. Ct. 1542 (2012), the Eighth Circuit held that the Constitution did not "preclude use of" an uncounseled tribal-court conviction in a Section 117(a) prosecution "merely because [the conviction] *would have been* invalid had it arisen from a state or federal court." *Id.* at 604. Like respondent, the defendant in *Cavanaugh* had multiple uncounseled tribal-court convictions for domestic violence that had resulted in incarceration. See *id.* at 593-594 & n.1. Also like respondent, the defendant in *Cavanaugh* "allege[d] no irregularities with his tribal-court proceedings other than the denial of counsel (which was not a violation of any tribal or federal law)." *Id.* at 603 n.7. Relying on *Nichols*, the Eighth Circuit rejected the defendant's argument that it would violate the Constitution to use his uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element. See *id.* at 603-604. "[N]ot only did *Nichols* reject the theory that some portion of a subsequent punishment could be viewed as having been 'caused' by a prior conviction," the Eighth Circuit explained, but "the majority in *Nichols* [also] appears to have rejected * * * arguments based on concerns about prior convictions' reliability." *Id.* at 600. Accordingly, the Eighth Circuit held that "predicate [tribal-court] convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of [Section] 117." *Id.* at 594.

The Tenth Circuit reached the same conclusion in *United States* v. *Shavanaux*, 647 F.3d 993 (2011), cert. denied, 132 S. Ct. 1742 (2012). The court observed that the defendant's uncounseled tribal-court domestic-violence convictions did not violate the Sixth Amendment "[b]ecause the Bill of Rights does not constrain Indian tribes." *Id.* at 997. Thus, the use of those convictions "in a subsequent prosecution c[ould] not violate 'anew' the Sixth Amendment, because the Sixth Amendment was never violated in the first instance." *Id.* at 997-998 (citation omitted) (quoting *Burgett*, 389 U.S. at 115). The court further held that the Due Process Clause did not prohibit the use of uncounseled tribal-court convictions in a Section 117(a) proceeding. *Id.* at 998-1001. The court emphasized that tribal-court convictions must be "obtained in compliance with ICRA," which rendered them "compatible with due process of law." *Id.* at 1000. Therefore, under "principles of comity," federal courts in Section 117(a) proceedings do not violate the Constitution when they rely on valid tribal-court convictions as predicate offenses. *Id.* at 1001; see *id.* at 1000 (noting that courts may credit foreign convictions obtained "through means that deviate from our constitutional protections" so long as they "comport[] with our notion of fundamental fairness") (internal quotation marks omitted).

In the decision below, the court of appeals acknowledged that its "holding place[d] [it] in conflict with" the Eighth and Tenth Circuits. App., *infra*, 14a; see *id.* at 21a (Watford, J., concurring) (noting the "circuit split"). Judge Owens and Judge O'Scannlain likewise emphasized the division among the circuits in their dissents from the denial of rehearing en banc. See *id.*

at 41a (Owens, J.) (lamenting "the split [the panel's decision] creates with the Eighth and Tenth Circuits," which "has torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse"); *id.* at 54a (O'Scannlain, J.) (observing that the panel's decision "creates a circuit split by disagreeing with all other circuit courts which have addressed the very issue presented").

The United States opposed certiorari in *Cavanaugh* and *Shavanaux*, reasoning that those decisions did not squarely conflict with the Ninth Circuit's decision in *Ant*, which was in any event of "doubtful continuing validity because it was decided before *Nichols* overruled *Baldasar*." Br. in Opp. 14, *Shavanaux*, *supra* (No. 11-7731) (explaining that review would be premature because "the Ninth Circuit may well reconsider its holding [in *Ant*] if the opportunity arises"). Now that the Ninth Circuit has affirmed "*Ant's* continued vitality" and relied on that decision to create a square conflict on the constitutionality of Section 117(a) as applied to habitual offenders with uncounseled tribal-court convictions, an intractable division of authority exists. App., *infra*, at 16a.

That conflict alone warrants review. But the Ninth Circuit's decision also creates serious tension with a line of cases holding that an uncounseled misdemeanor conviction may be used in a subsequent proceeding, even if a term of imprisonment was impermissibly imposed, because it is the sentence of imprisonment that violates *Scott,* not the underlying adjudication of guilt. Several courts have held that the remedy for a *Scott* violation is to vacate the imprisonment sentence, but

affirm the conviction.[3] See, *e.g.*, *United States* v. *Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (striking sentence of imprisonment imposed on uncounseled misdemeanant, but affirming his conviction and fine); *United States* v. *White*, 529 F.2d 1390, 1391, 1394 (8th Cir. 1976) (same); *Alabama* v. *Shelton*, 851 So. 2d 96, 102 (Ala. 2000) (same), aff'd, 535 U.S. 654 (2002); but see *United States* v. *Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (stating in dicta without analysis that "if an uncounseled defendant is sentenced to prison, the conviction itself is unconstitutional"). And three courts of appeals have held that an uncounseled misdemeanor conviction may be counted in a defendant's criminal history at sentencing for a subsequent offense, even if the defendant was impermissibly sentenced to a term of imprisonment in the prior proceeding. See *United States* v. *Acuna-Reyna*, 677 F.3d 1282, 1284-1285 (11th Cir.), cert. denied, 133 S. Ct. 342 (2012); *United States* v. *Jackson*, 493 F.3d 1179, 1183-1184 (10th Cir. 2007); *Ortega*, 94 F.3d at 769-770. As Judge Owens observed, "[b]y holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the panel splits with every circuit to seriously consider this issue." App., *infra*, 41a.

C. The Question Presented Is Significant And Warrants This Court's Review

The Ninth Circuit's invalidation of 18 U.S.C. 117 as applied in this case, and its creation of a circuit conflict on that issue, warrants this Court's review. Section 117(a) serves a vital function in addressing the

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[3] This Court noted but reserved this question in *Iowa* v. *Tovar*, 541 U.S. at 88 n.10.

"grave problem of domestic violence on tribal lands." App., *infra*, 40a (Owens, J., dissenting from denial of rehearing en banc). The Ninth Circuit's ruling substantially limits the government's ability to "remove these recidivists from the communities that they repeatedly terrorize." *Id.* at 41a. Because the court's decision frustrates Congress's goal in enacting Section 117(a) and detrimentally affects the administration of the federal criminal justice system, this Court's review is warranted. Moreover, the circuit conflict on this issue has considerable practical significance because tribal lands are particularly concentrated in the three jurisdictions that have considered the question presented. Of the 567 federally recognized tribes, more than 500 are located in the Eighth, Ninth, and Tenth Circuits.[4] This Court should grant certiorari to ensure that habitual domestic-violence offenders with tribal-court convictions are treated the same way under Section 117(a) no matter where they reside.

Domestic violence against Indians is a pressing problem of alarming magnitude. More than forty percent of Indians have been victims of physical violence, rape, or stalking by an intimate partner in their lifetimes. See Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3, 39-40 & tbls. 4.3 and 4.4 (Nov. 2011), http://www.cdc.gov/ViolencePrevention/pdf/NISVSReport2010-a.pdf. Moreover, recidivism represents a severe threat because "[d]omestic violence often escalates in severity over time." *United States* v. *Castleman*, 134 S. Ct. 1405, 1408 (2014). In

[4] See 80 Fed. Reg. 1942 (Jan. 14. 2015); 80 Fed. Reg. 39,144 (July 8, 2015).

legislative findings accompanying Section 117, Congress found that "during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75% were killed by family members or acquaintances." VAWA Reauthorization Act § 901(4), 119 Stat. 3077 (42 U.S.C. 3796gg-10 note).

Before Section 117's enactment, Indian habitual offenders who committed repeated acts of domestic violence on tribal lands frequently escaped felony-level punishment. The federal government generally could not prosecute those recidivist offenders unless their violence caused death or serious bodily injury and so rose to the level of a major crime. See 18 U.S.C. 1152, 1153. Most States have no criminal jurisdiction over crimes involving Indians in Indian country, and those that do often face funding constraints that substantially limit their efforts to combat crime on tribal land. See Sarah Deer et al., Tribal Law and Pol'y Inst., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* 7-8 (2007), http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf; see also *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-474 (1979) (summarizing jurisdiction of States over crimes occurring on tribal land). And at the time Congress enacted Section 117, ICRA precluded the tribes themselves from imposing felony punishment on repeat offenders. See 25 U.S.C. 1302(7) (2006) (preventing tribal courts from imposing "punishment greater than imprisonment for a term of one year").[5]

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[5] More than four years after Section 117 was enacted, Congress amended ICRA to authorize tribal courts to impose sentences of

In enacting Section 117, Congress recognized the inadequacy of efforts to punish domestic violence on tribal lands and sought to close that gap. Emphasizing that "Indian tribes require additional criminal justice * * * to respond to violent assaults against women," Congress passed Section 117 "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA Reauthorization Act §§ 901(5), 902(3), 119 Stat. 3078 (42 U.S.C. 3796gg note). Section 117's inclusion of tribal-court domestic-violence convictions as predicate offenses is essential to accomplishing that goal. See 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain introducing bill containing precursor to Section 117) (observing that perpetrators of domestic violence on tribal lands "may escape felony charges until they seriously injure or kill someone" and that Section 117 addresses that problem by "creat[ing] a new Federal offense aimed at the habitual domestic violence offender and allow[ing] tribal court convictions to count for purposes of Federal felony prosecution").

By invalidating Section 117 as applied to recidivist domestic-violence offenders with uncounseled tribal-court convictions that resulted in imprisonment, the court of appeals has "stripped Congress * * * of the power to meaningfully punish" individuals like re-

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up to three years of imprisonment for a single offense, provided the courts comply with additional procedural requirements. 25 U.S.C. 1302(b) and (c). As of August 14, 2015, only ten tribes were relying on that enhanced sentencing authority. See Tribal Law and Policy Institute, *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing* (Aug. 14, 2015), http://www.tribal-institute.org/download/VAWA/VAWA ImplementationChart.pdf.

spondent and to "protect their victims from another beating (or worse)." App., *infra*, 42a (Owens, J., dissenting from denial of rehearing en banc). Because the Ninth Circuit has nullified a central application of Section 117, and created disuniformity in the national enforcement of the important statute, this Court should grant review.

Indeed, every member of the panel recognized the need for this Court's intervention. See App., *infra*, 39a (Paez, J., concurring in denial of rehearing en banc) (acknowledging that "Supreme Court review may be unavoidable" in light of "the sharp division over the important issues at stake in this case"); *id.* at 21a (Watford, J., concurring) ("Given th[e] circuit split and the lack of clarity in this area of Sixth Amendment law, the Supreme Court's intervention seems warranted."). The eight judges who dissented from the denial of rehearing en banc likewise emphasized the need for this Court to resolve the issue of Section 117(a)'s constitutionality, "urg[ing] the Court" to intervene "as soon as possible, before [respondent], and the many more men like him, terrorize more women and their families." *Id.* at 42a-43a. As one judge concisely stated, the Ninth Circuit's erroneous holding that the Constitution precludes Congress's method for combatting recidivist domestic violence on tribal land is "a decision [that] cries out for [this Court's] review." *Id.* at 45a (O'Scannlain, J., dissenting from denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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