NO. 20-7622

In the
Supreme Court of the United States

MERLE DENEZPI,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF COLORADO, NEBRASKA, NEVADA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

This case concerns the constitutionality of a Court of Indian Offenses (CFR Court) and a federal district court prosecuting an individual for the same conduct. CFR Courts serve thousands of citizens from various tribes, operating as tribal courts when the tribes have not created their own judicial system. CFR Courts operate across five States, all of which rely on a combination of tribal and federal prosecutions to hold criminal offenders accountable.

Petitioner's preferred result would not only harm the States but would also put tribes in the precarious position of either choosing not to exercise their sovereign right to prosecute offenders in Indian country or risk an offender receiving an absurdly low sentence due to congressional limitations on tribal sentencing.

Amici curiae are the States of Colorado, Nebraska, Nevada, and Utah.

The Amici States have a significant interest in ensuring that criminal offenses within their borders are prosecuted appropriately, which sometimes requires that CFR Courts and federal district courts prosecute the same individual for the same conduct. *See People v. Warren*, 612 P.2d 1124, 1126 (Colo. 1980) (noting that a sentencing "court should strive for a sentencing result that addresses both the need of society for protection and the need of the defendant for correction"). Amici States have a substantial interest in ensuring that all citizens—including American Indians residing off or on reservations within the territorial confines of their respective states—are protected from threats to public safety through the effective prosecution of crime.

SUMMARY OF THE ARGUMENT

I. This Court has recognized the important State and societal interest in ensuring that crime is appropriately punished. In light of this compelling interest, the best way to ensure that States continue to serve their citizens is to maintain the status quo and allow CFR Courts and the federal government to prosecute individuals for the same conduct. Both CFR Courts and federal courts play important and complementary roles in preventing and punishing crime in Indian country, particularly given the limitations Congress has placed on CFR Courts' sentencing authority. Federal courts can impose sentences for major crimes that CFR Courts cannot. But CFR Courts allow for swift investigation and prosecution and ensure tribes can continue to exercise their sovereign right to prosecute their own citizens. Given the high rates of domestic violence in Indian country and how crime affects communities nearby, the ability of CFR Courts to quickly respond to any criminal offenses helps deter crime and effectively address threats to public safety. Only the current double jeopardy regime protects the States' interests.

II. The necessity that both the CFR Court and the federal court prosecute the same offender for the same offense regularly arises. But Petitioner's proposed rule imposes a difficult choice on tribes—prosecute quickly in the CFR Court and forego the appropriate sentence, or allow the lengthy federal prosecution but give up the deterrence of swift justice. And the States are unable to step in because most States lack the legal authority to prosecute any crime within Indian country where either the offender or the victim is Indian. For

the States to step into the United States' role, Congress would have to change the law authorizing them to do so. And historically, many States have not filled that role.

ARGUMENT

I. The States have an interest in ensuring appropriate punishment for crimes committed within their borders.

States are committed to the maintenance of public safety and the prevention and deterrence of crime, whether that criminal conduct occurs in Indian country or not. However, the best way to prevent and deter crime in Indian country is to maintain the status quo of allowing CFR and federal district courts to convict defendants. That status quo allows federal district courts to impose appropriate sentences in light of the CFR Courts' limited sentencing options, while maintaining the CFR Court's independence and important role in specific deterrence. The States' interest in deterrence is especially acute in situations like the one presented here involving domestic and sexual violence. And this violence affects not only those living in Indian country, but also surrounding communities.

A. All States have a similar interest in the prosecution of criminal conduct.

"One general interest" of the States and society at large "is of course that of effective crime prevention and detection." *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *see also United States v. Salerno*, 481 U.S. 739, 749 (1987) (noting that the States have a "general concern with crime prevention" that is "compelling"). And "[a] sentence in a criminal case should be appropriate for the defendant in light of his background and the crime

committed and also serve the interests of society which underlie the criminal justice system." *State v. McClendon*, 611 P.2d 728, 729 (Utah 1980).

But it is an "established principle that the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" *Faretta v. California*, 422 U.S. 806, 849 (1975) (Blackmun, J., dissenting) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). As outlined below, here justice is best served through preservation of the current system allowing federal and CFR prosecution, rather than creating a prosecutorial gap, as most States do not have jurisdiction in Indian country. *See infra* Section II. Thus, it is in the States' best interest for crime prevention that CFR Courts and federal district courts both continue to have jurisdiction over defendants in Indian country.

B. Because CFR Courts have limited sentencing options, the lack of federal prosecution would allow defendants to escape appropriate sentences.

Non-CFR tribal courts can impose a maximum sentence of three years' imprisonment for a single offense, or nine years' imprisonment for a single proceeding. 25 U.S.C. § 1302(a)(7)(C)–(D).

CFR Courts are even more limited in the sentences that they can impose. The maximum sentence available for a CFR Court is one year in prison for a misdemeanor—the regulation does not mention prosecuting felonies—with petty misdemeanors and violations resulting in even lesser maximum sentences. 25 C.F.R. § 11.450. These maximum sentences apply to

any "person convicted of an offense under the regulations" applicable to CFR Courts, *id.*, which includes such crimes as sexual assault, terroristic threats, neglect of children, and domestic violence, *see id.* §§ 11.407, 11.402, 11.424, 11.454.

In contrast, federal district courts can impose sentences that are more appropriate for the conduct of defendants who commit serious crimes. When an individual commits any of the crimes delineated in 18 U.S.C. § 1153(a), including murder, assault, and child abuse, federal law applies. And federal law provides more appropriate sentences for those crimes. *See, e.g.*, 18 U.S.C. § 2241 (providing punishments for aggravated sexual abuse).

"Thus, when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity." *United States v. Wheeler*, 435 U.S. 313, 330 (1978). If the Court accepts Petitioner's double jeopardy argument, then individuals who commit crimes on reservations with CFR Courts can face prosecution in only the CFR Court *or* the federal district court. So "the prospect of avoiding more severe federal punishment will surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in" the CFR Court. *Id.* at 330–31. Such a rule would not only result in "important federal interests" being "frustrated," as the Court noted in *Wheeler*, *id.* at 331, but also the frustration of the States' "general concern with crime prevention." *Salerno*, 481 U.S. at 749. And such a rule would punish those tribes simply for not having the

resources or number of members sufficient to set up their own judicial systems by creating different double jeopardy rules for CFR and other tribal courts.

Additionally, when an individual commits a crime not mentioned in § 1153(a), that individual "shall be . . . 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." 18 U.S.C. § 1153(b). "In short, for nonfederal crimes committed on tribal land, federal law incorporates state criminal law." *United States v. Jones*, 921 F.3d 932, 934 (10th Cir. 2019).

Thus, the States' interests are vindicated not only by the ability of federal courts to impose appropriate punishment, but also by the ability of those same courts to impose punishments enacted by state legislatures. *See United States v. Martinez*, 1 F.4th 788, 790 (10th Cir. 2021), *cert. petition pending*, No. 21-6319 ("In sentencing a defendant for an assimilated offense, a federal court may not impose a sentence that falls outside the range of minimum and maximum punishments authorized for the offense under state law.").

Petitioner's case shows the stark difference in sentencing options available in federal and CFR Court. Petitioner assaulted his victim, and a "nurse documented twenty-four injuries to [the victim's] body including bruises on her breasts, back, arms, and legs, as well as seven injuries to her genitals." Pet. App. at 3a. For assault and battery, the CFR Court imposed a sentence of "time served," which was less than six months in prison. *Id.* at 4a. But the federal district court "sentenced [Petitioner] to 360 months in prison

and ten years of supervised release." *Id.* at 5a. The latter sentence better reflects sentences under Colorado state law. *See, e.g.*, *Garcia v. People*, 445 P.3d 1065, 1067 (Colo. 2019) (affirming a sentence of "ten years to life for attempted sexual assault[] and ten years to life for unlawful sexual contact"). Constitutionally barring federal prosecution undermines the States' interest in appropriate punishment for serious crimes.

C. While federal courts can provide appropriate punishment, CFR Courts play an important role in specific deterrence.

"Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution." *Ponzi v. Fessenden*, 258 U.S. 254, 264 (1922). "Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction." *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring).

CFR Courts provide the necessary function of more quickly arresting, prosecuting, and deterring individuals who commit serious crimes while federal prosecutors build their cases for eventual trial in federal district court. For example, tribal authorities charged Petitioner in CFR Court only a few days after the assault. Pet. App. at 3a–4a. And "[s]ix months later, [Petitioner] was indicted by a federal grand jury." *Id.* at 4a. During those six months, the CFR

Court provided the necessary specific deterrence, preventing Petitioner from "becom[ing] a fugitive from justice or commit[ting] other criminal acts." *Dickey*, 398 U.S. at 42 (Brennan, J., concurring).

Tribal authorities and CFR Courts are often physically closer to the offenses and effected parties, which allows them to more quickly try and convict defendants. Law enforcement for the Ute Mountain Ute Tribe and the CFR Court are both in Towaoc, Colorado, which is located on the Ute Mountain Ute Reservation. *See* Ute Mountain Ute Tribe, *Other Federal Governmental Services*, https://www.utemountainutetribe.com/other%20fed%20gov%20services.html (last visited Jan. 14, 2022). The nearest location for the U.S. Attorney's Office for the District of Colorado is over fifty miles away in Durango, while the main office is hundreds of miles away in Denver. *See* The United States Attorney's Office, *District of Colorado, Contact Us* (Dec. 1, 2021), https://www.justice.gov/usao-co/contact-us; *see also* Ed Hermes, *Law & Order Tribal Edition: How the Tribal Law and Order Act Has Failed to Increase Tribal Court Sentencing Authority*, 45 Ariz. St. L. J. 675, 680 (2013) ("U.S. Attorneys and FBI investigators at times must travel hundreds of miles to get to a crime scene in Indian Country. This is not only a strain on investigators and prosecutors who have to spend many hours traveling to the crime scene; it also means that the first responder to reservation crimes is usually tribal police." (footnotes omitted)).

Other CFR Courts are also in Indian country, unlike the corresponding U.S. Attorneys' offices. *Compare, e.g.*, Indian Affairs, U.S. Dep't of the Interior,

Western Region CFR Court, https://www.bia.gov/CFR-Courts/western-region-cfr-court (last visited Jan. 14, 2022), *with* United States Attorney's Office, *District of Nevada, Contact Us* (Oct. 8, 2020), https://www.justice.gov/usao-nv/contact-us, *and* United States Attorney's Office, *District of Utah, Contact Us* (Dec. 23, 2021), https://www.justice.gov/usao-ut/contact-us.

D. The States' interest in appropriate punishment is especially acute in cases involving domestic and sexual violence in Indian country.

"[C]ompared to all other groups in the United States, Native American women experience the highest rates of domestic violence." *United States v. Bryant*, 579 U.S. 140, 144 (2016) (citation and internal quotation marks omitted). "American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general." *Id.* (citation and internal quotation marks omitted). A 2016 report from the Department of Justice determined that "[m]ore than 4 in 5 American Indian and Alaska Native women (84.3 percent) have experienced violence in their lifetime," including "56.1 percent who have experienced sexual violence." André B. Rosay, U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and Men* 2 (2016), https://www.ojp.gov/pdffiles1/nij/249736.pdf.

Indian women often face repeated violence from the same perpetrator. "As this Court has noted, domestic abusers exhibit high rates of recidivism, and their violence 'often escalates in severity over time.'" *Bryant*, 579 U.S. at 144 (quoting *United States v. Cas-*

tleman, 572 U.S. 157, 160 (2014)). "Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack." *Id.* at 145. And it is "the complete absence of accountability—a system where perpetrators know the probability of prosecution is incredibly low—actually encourages more crime by offenders . . . . Evidence suggests—in regards to domestic violence in particular—that absence of accountability for perpetrators only emboldens them." Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. Rev. 1564, 1618 (2016) (footnotes omitted). If "[u]nprosecuted rapists are likely to repeat their crimes," then it logically follows that *under*prosecuted perpetrators of domestic and sexual violence will become repeat offenders. Ana Condes, *Man Camps and Bad Men: Litigating Violence Against American Indian Women*, 116 Nw. U. L. Rev. 515, 536 n.115 (2021). The States have an interest in preventing such offenders from inflicting violence in the future. *See Warren*, 612 P.2d at 1126 ("The public interest in safety and deterrence is properly a focal point of the sentencing decision in crimes of grave personal violence or abuse, particularly when committed by a repeat-offender.").

If this Court were to accept Petitioner's argument that he cannot be prosecuted in both the CFR Court and the federal district court, then perpetrators of sexual violence, like Petitioner himself, will not be held accountable. Either the CFR Court can provide immediate specific deterrence, but impose only a very short sentence, or the U.S. Attorney's Office can open an investigation that could take months or years to complete. In other words, "[w]ith jurisdictional authority a tribe is better positioned to prevent repeat offenses

and remove the perpetrator from the community," but the federal district court is better positioned to provide appropriate punishment. Hossein Dabiri, *Kiss the Ring, But Never Touch the Crown: How U.S. Policy Denies Indian Women Bodily Autonomy and the Save Native Women Act's Attempt to Reverse That Policy*, 36 Am. Indian L. Rev. 385, 406 (2012).

E. Crimes committed in Indian country affect surrounding communities.

In cases involving state regulation of activities in Indian country, this Court has noted that activity on reservations impacts surrounding communities. *See Rice v. Rehner*, 463 U.S. 713, 724 (1983) ("Liquor sold by Rehner to other Pala tribal members or to nonmembers can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control."). In fact, a "State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

The same is true of crimes committed in Indian country. Criminal conduct on a reservation not only affects residents of that reservation, but also individuals outside Indian country. *See United States v. Kagama*, 118 U.S. 375, 384 (1886). As one commentator has noted, "public safety lapses in Indian country do not exclusively affect Indian country; they also impact surrounding areas and anyone passing through Indian country." Sonny Lee Hodgin, *Elder Wisdom: Adopting Canadian and Australian Approaches to*

Prosecuting Indigenous Offenders, 46 Valparaiso U. L. Rev. 939, 979–80 (2012).

Nor does crime magically stop where Indian country ends, especially as disputes arise as to which land is in a reservation. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399 (1994) (determining whether Congress diminished a reservation to decide whether Utah had criminal jurisdiction over a defendant). States maintain an interest in preventing and deterring crimes on reservations, just as States maintain that same interest for crimes committed off reservations. But accepting Petitioner's proposed double jeopardy rule would weaken the deterrence of on-reservation crime by allowing only the federal or CFR Courts to convict individuals. That lack of deterrence would inevitably affect surrounding communities because future, undeterred criminals could commit their crimes both on- and off-reservation.

II. States lack the authority to prosecute most crimes committed in Indian country and generally fail to do so even when authorized.

At present, most States cannot step in to fill the vacuum left by Petitioner's proposed rule. Few States have the legal authority to prosecute crimes in Indian country, and therefore could not serve the same purpose as the federal government does now. And those that do often fail to use that authority to serve as effective law enforcement. Petitioner's preferred result exploits the States' inability and unwillingness to prosecute crimes in Indian country and would create a prosecution gap that could be remedied only by federal legislation.

The federal government has largely reserved prosecutorial power in Indian country for itself and tribal governments. Indian country criminal jurisdiction can best be summarized as a complex patchwork of overlapping jurisdiction.[1] But ultimately, most

[1]

RACE OF OFFENDER/VICTIM	**CRIMINAL JURISDICTION**	**LEGAL AUTHORITY**
Crimes committed by Native American with a Native American victim	If Major Crime: Federal and Tribal (concurrent jurisdiction)	Concurrent Jurisdiction: Indian Major Crimes Act, 18 U.S.C. § 1153 (2000)
	If Non-Major Crime: Tribal (exclusive jurisdiction)	Exclusive Jurisdiction: Inherent tribal Sovereignty
Crimes committed by Native American with non-Native American victim	If Major Crime: Federal and Tribal (concurrent jurisdiction)	Concurrent Jurisdiction: Indian Major Crimes Act, 18 U.S.C. § 1153
	If Non-Major Crime: Federal and Tribal (concurrent jurisdiction)	Concurrent Jurisdiction: Indian General Crimes Act, 18 U.S.C. § 1152 (2000) (federal); Inherent Tribal Sovereign Authority (tribal)
Crimes committed by non-Native American with a Native American victim	Federal (exclusive jurisdiction [with exceptions for the Violence Against Women Act])	Indian General Crimes Act (incorporates nonfederal state offenses via the Assimilative Crimes Act, 18 U.S.C. § 13 (2000))
Crimes committed by non-Native American with a non-Native American victim	State (exclusive jurisdiction)	*United States v. McBratney*, 104 U.S. 621 ([1881])

States only have jurisdiction over crimes in which both the offender and the victim are non-Indians. *United States v. McBratney*, 104 U.S. 621 (1881).

Thus, when a crime involves an Indian citizen, either as the offender or as the victim, tribes and the United States share either exclusive or concurrent jurisdiction depending on the severity of the crime and whether the offender, victim, or both were Indian citizens. Indian Major Crimes Act, 18 U.S.C. § 1153 (giving the United States concurrent jurisdiction with tribal governments over some crimes committed by Indians including "murder, manslaughter, kidnapping, maiming, … incest … felony child abuse or neglect, arson, burglary, [and] robbery"); Indian General Crimes Act, 18 U.S.C. § 1152 (extending federal criminal statutes to Indian country, thus granting the United States concurrent jurisdiction over non-major crimes committed by Indians with a non-Indian victim and exclusive jurisdiction over all crimes committed by non-Indians against Indians in Indian country); *see also Wheeler*, 435 U.S. at 324 (stating that tribes retain jurisdiction over their own members unless Congress legislates otherwise). Though notably, States continue to lack jurisdiction.

Tribal governments are also limited as to who they can prosecute. An Indian tribe lacks criminal jurisdiction over non-Indians and can only prosecute an offender who is an Indian citizen. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211–12 (1978).

Tyler Kennedy, *Expanding Jurisdiction: Increasing Tribal Ability to Prosecute Criminal Behavior on Native American Land*, 15 Seattle J. for Soc. Just. 465, 479 (2016).

Thus, if a non-Indian offender commits a crime in Indian country, prosecution will be left to the federal government if the victim is Indian or to the States if the victim is non-Indian. *See McBratney*, 104 U.S. 621.

But in 1953, Congress enacted Public Law 83-280, 67 Stat. 588 ("P.L. 280"). P.L. 280 granted a select few States the legal authority to prosecute crimes with an Indian offender or victim occurring in Indian country:

> Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such a State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such a State shall have the same force and effect within such Indian country as they have elsewhere within the State.

18 U.S.C. § 1162(a). In P.L. 280 States, the State government assumes all prosecutorial authority in Indian country that the federal government has in non-P.L. 280 States. P.L. 280 States can therefore prosecute major crimes where both the offender and victim were Indian, and all crimes where either the victim or offender was Indian.

Although P.L. 280 greatly expands the authority of states to prosecute crimes on reservations, it applies as summarized above to only six States in total: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.[2] *Id.*; *see also* 28 U.S.C. §1360 (granting the

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[2] Congress initially limited its application to these six States due to a perceived lawlessness on reservations within these

same States jurisdiction over civil causes of action). It applies to hardly any States in which CFR courts operate, including Colorado and Oklahoma, where two of five regional courts sit. A non-P.L. 280 State lacks the authority to prosecute crimes involving an Indian citizen and is restricted to only prosecuting crimes in Indian country in which the offender and the victim are both non-Indians.

States and the "absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 379 (1976); *see also id.* at 380 ("As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility." (quoting H. R. Rep. No. 848, 83rd Cong., 1st Sess., 5–6 (1953), U.S. Code Cong. & Admin. News 1953, pp. 2409, 2411–12)

Between 1953 and 1968, nine States (Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington), now known as "optional P.L. 280 States," expanded criminal jurisdiction into Indian country. U.S. Dep't of Justice Dist. of Minn, *Frequently Asked Questions about Public Law 83-280*, https://www.justice.gov/usao-mn/Public-Law%2083-280 (last visited Jan. 15, 2021). However, not all States accepted total jurisdiction over Indian country. Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States* 2, n. 4 (July 2005), https://www.ojp.gov/pdffiles1/nij/grants/209926.pdf. North Dakota made its acceptance of jurisdiction contingent on tribal consent, which never came, so never exercised jurisdiction in Indian country. *Id.* Arizona limited its acceptance of jurisdiction to air and water pollution. *Id.* In 1968, P.L. 280 was amended to require tribal consent to state jurisdiction. No tribe has given its consent. *Id.* at 2.

But in P.L. 280 States, the States have in large part been unable to provide effective law enforcement in Indian country. Even Congress has acknowledged that the law has failed: "Public Law 280 . . . [has] resulted in a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law." Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1636–37 (1998) (quoting Senate Comm. on Interior and Insular Affairs, 94th Cong., Background Report on Pub. L. 280, 29–30 (Comm. Print. 1975) ("Public Law 280 Report")). Thus, even when States have the authority to prosecute cases in Indian country, they have often been unwilling to dedicate their scarce resources to effective law enforcement within Indian country. *See id.* at 1636–37 (1998) ("Public Law 280 actually serves to increase lawlessness in Indian country."); *see generally* Carole Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280 (1997) (detailing federal and state fiscal neglect of tribal justice systems in California, resulting in the underdevelopment of these systems and the increased risks to public safety and community welfare).

While Congress hoped States would fill a law enforcement gap, the States largely failed to do so, leaving a law enforcement vacuum and denying some Indians the peace and security that accompanies crime prevention and deterrence. *See* Public Law 280 Report.

Thus, "States are [either] unable or unwilling to fill the prosecution gap." *Bryant*, 579 U.S. at 146. Most States cannot prosecute any crime involving an Indian

citizen in Indian country. And, "[e]ven when capable of exercising jurisdiction, . . . States have not devoted their limited criminal justice resources to crimes committed in Indian country." *Id.* (citations omitted).

Congress has so limited States' authority to prosecute crimes in Indian country that any change to the current double jeopardy rule would create a prosecution gap that could be bridged only by federal legislation. The problem is heightened by the limitations Congress has placed on tribal and CFR courts' sentencing authority. Although Congress has increased the length of sentences for habitual sexual offenders in Indian country, CFR and tribal courts remain severely limited in the sentences they may give. *See supra* Section I.B. To ensure that a "sentence in a criminal case [is] appropriate for the defendant in light of his background and the crime committed and also serve[s] the interests of society which underlie the criminal justice system," *McClendon*, 611 P.2d at 729, it is sometimes necessary that an individual is prosecuted in both the CFR Court and another court. But because States are so limited in their statutory ability or willingness to prosecute in Indian country, embracing Petitioner's claim would require drastic changes to Indian country jurisdiction to ensure effective and appropriate prosecution.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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