No. 22-796

IN THE

Supreme Court of the United States

JOHNNY ELLERY SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to

[1] All parties received timely notice of this brief to its filing. No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, or its counsel made such a contribution.

ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Accordingly, NACDL is keenly interested in ensuring that Indian criminal defendants are afforded all the rights to which they are entitled – including protection from prosecution by the federal government for crimes that are subject to exclusive tribal jurisdiction.

SUMMARY OF ARGUMENT

Johnny Ellery Smith, an enrolled member of the Confederated Tribes of Warm Springs, led tribal police on a high speed car chase after they tried to initiate a traffic stop. In an exercise of its sovereign authority, the Confederated Tribes -- which has a statute criminalizing such conduct – declined to prosecute Smith. Unsatisfied with this outcome, the federal government stepped in and charged Smith with attempting to elude a police officer in violation of Oregon law, as assimilated under the Assimilated Crimes Act (ACA). In two separate opinions, the Ninth Circuit upheld Smith's conviction and determined that the ACA

applied to criminal acts committed by Indians on tribal lands. *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019) (*Smith I*); *United States v. Smith*, 2022 WL 3102454 (9th Cir. 2022)(*Smith II*).

The Ninth Circuit's decisions are wrong. The ACA was designed to apply to federal enclaves – such as military bases and national parks – not to tribal lands. Unlike a federal enclave, Indian reservations have their own governments and police who are fully capable of enforcing minor crimes such as that committed by Smith. In any given case, the federal government may be dissatisfied with a tribe's treatment of a tribal member who it deems to have committed a criminal act. But its dissatisfaction does not give the government license to subject the tribal member to state law under the ACA. Although subject to the authority of Congress, tribes remain sovereign entities that have retained the right to make and enforce their own laws. Their right to prescribe and enforce their tribal laws cannot be circumscribed without express Congressional authorization. The ACA does not provide that express approval and therefore does not authorize the federal government to impose state law on Indians committing crimes on tribal land.

This Court has warned the government on several occasions about bringing prosecutions based on overly expansive constructions of criminal statutes. Such prosecutions often upset the balance of power between the federal government and the states and give rise to federal prosecution for traditionally local criminal activity. That same concern arises in a case, such as this one, where the government has used an expansive interpretation of the ACA to prosecute a reservation Indian under state law. Prosecutions of this nature undermine the authority of tribal government and

runs the risk of violating treaty rights. To avoid these problems, this Court should grant certiorari and interpret the ACA narrowly to insure that tribes retain their authority to regulate their members and enforce their laws without outside interference.

ARGUMENT

Although ultimately subject to federal control, Indian tribes "remain a separate people with the power of regulating their internal and social relations. Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 332 (1978). Consistent with this principle, this Court has long recognized that tribes have the power to enforce – or decline to enforce – their criminal laws against their members. *Nevada v. Hicks*, 533 U.S. 353, 378 (2001)(noting that the powers of self-government include "the power to prescribe and enforce internal criminal laws").

It is true that Congress retains broad, plenary authority to regulate Indian affairs. *United States v. Cooley*, 221 S.Ct. 1638, 1643 (2021)("In all cases, tribal authority remains subject to the plenary authority of Congress."). But, that being said, the unique trust relationship between the United States and the tribes requires that ambiguities in federal law must be "construed generously" in favor of the tribes "in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). In order to apply state or federal law to the tribes, Congress must speak directly and unambiguously. *United States v. Quiver*, 241 U.S. 602, 605-606 (1916).

In derogation of this principle, the Ninth Circuit has, without Congressional authorization, exported state criminal law onto tribal lands through the Assimilated Crimes Act.

I. The Ninth Circuit's decision in *Smith I*, which held that Indian reservations are equivalent to federal enclaves and therefore subject to the Assimilated Crimes Act, is deeply offensive to and presents an unwarranted intrusion into tribal sovereignty.

Under the Enclave Clause of the United States Constitution, see Article I, Section 8, Clause 17, Congress may, by either purchase or donation, acquire exclusive jurisdiction over an enclave in any state when the acquisition is with the consent of the state.[2] Consistent with the Enclave Clause, 18 U.S.C. § 7(3) defines the "special maritime and territorial jurisdiction of the United States" as:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The Assimilated Crimes Act (ACA), 18 U.S.C. § 13, makes state law applicable to conduct occurring on federal enclaves acquired or reserved by the federal

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[2] Article I, Section 8, Clause 17 states, in pertinent part: "The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings."

government under 18 U.S.C. § 7 when the conduct is not criminalized under federal law. The basic purpose of the ACA is to borrow state law to "fill in any gaps" where there is no federal criminal law governing conduct on a federal enclave. *Lewis v. United States*, 523 U.S. 155, 160 (1998). In order to apply the ACA, a court must ask whether the defendant's conduct is punishable under federal law. If the answer to this question is no, the matter is closed and the ACA will assimilate and apply state law. If the answer is yes, the court must determine whether the federal statutes that apply to the conduct preclude application of the state law in question. *United States v. Rocha*, 598 F.3d 1144 (9th Cir. 2010).

Normally, the ACA is applied to crimes committed in areas such as military bases and national parks.[3] But occasionly, as in this case, it is applied to tribal land. The problem with such application is that tribal lands are different from and do not have the same status as military bases and national parks, which are not considered sovereignties. Military bases and national parks may house employees. But, unlike tribes, they do not have their own governments and do not pass criminal laws governing the conduct of those employees. *United States v. Wheeler*, 435 U.S. 313, 322 (1978)(noting that the inherent sovereignty of a tribe "includes the right to prescribe laws applicable to

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[3] In *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022), this Court held that the General Crimes Act, 18 U.S.C. § 1152, does not "purport to equate Indian country and federal enclaves for jurisdictional purposes." *Castro-Huerta*, 142 S.Ct. at 2495. It made this observation in response to Castro-Huerta's argument that the General Crimes Act preempted state authority to prosecute non-Indians against Indians in Indian country.

tribe members and to enforce those laws by criminal sanctions").

Indian reservations, by contrast, have their own governments, laws, and police who have the authority to maintain order and punish those who violate tribal law. *Denezpi v. United States*, 142 S.Ct. 1838, 1845 (2022)(explaining that tribes are "self-governing political communities with the inherent power to prescribe laws for their members and to punish infractions of those laws"). Thus, in the ACA context, state laws are forced upon Indian people even though they enjoy sovereign status and are clearly capable of enforcing their own laws. *United States v. Sharpnack*, 355 U.S. 286, 299 (1958)(Under this Assimilated Crimes Act, it is the State, not [the Tribe] that is exercising legislative power . . .").

The ACA subjects Indian tribes to state public policy and norms, which often times differ dramatically from tribal policy and norms. At times it may subject a tribal member to prosecution for conduct that the tribe chose not to criminalize. At other times, as in this case, it may subject a tribal member to punishment for conduct that has been criminalized but the tribe, in an exercise of its sovereign authority, has chosen not to prosecute. In either case, it intrudes on the tribe's "right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Such a result cannot be reconciled with this Court's repeated admonition recognizing that Indian tribes are self-governing entities that have "the right . . . to make their own laws and be ruled by them." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001)(quoting *Williams v. Lee*, 358 U.S. 217, 220 (1958)).

II. In applying the Assimilated Crimes Act to Indian country, the Ninth Circuit has stretched its reach well beyond its underlying purpose and function at the expense of tribal sovereignty.

As indicated above, the ACA was enacted to fill in the "gaps" in federal criminal law to cover offenses committed on federal enclaves by adopting state law. Traditionally – and in accordance with Article I, Section 8, Clause 17 of the Constitution -- enclaves are lands that have been obtained from the States for use by the federal government. It is true that 18 U.S.C. § 7 defines the term "special maritime and territorial jurisdiction of the United States" broadly to include guano islands, boats, airplanes and rocket ships. But it makes no mention of Indian reservations. Nor does the ACA.

Sovereignty concerns are generally not present when the ACA is applied to federal enclaves because they are usually owned and managed by the United States. But when, as here, it is used to stretch federal jurisdiction to cover offenses committed by Indians on an Indian reservation, it presents a grave threat to tribal sovereignty.

This Court has consistently warned the Department of Justice about prosecutions based upon overly expansive constructions of criminal statutes. For example, in *Bond v. United States*, 572 U.S. 844 (2014), the government prosecuted a woman who used toxic chemicals against her husband's lover under the Chemical Weapons Convention Implementation Act of 1998, which is codified at 18 U.S.C. § 229. After Bond entered a conditional guilty plea, she challenged her conviction and this Court voted unanimously to grant her relief. In doing so, the Court held that prosecution

of Bond under § 229 would "'alter sensitive federal-state relationships'" and convert far too much "'traditionally local criminal conduct'" into a matter for federal enforcement. *Id* at 863 (citing *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

Observing that the "background principle that Congress does not normally intrude upon the police power of the States is critically important," the Court rejected the use of § 229 to punish Bond's crime because it did not implicate traditional federal interests, such as "assassination, terrorism, and acts with the potential to cause mass suffering." Cataloguing several state statutes that also existed to punish Bond, the court rejected the government's argument in favor of prosecution that the state only charged her with a single minor offense, noting that the "exercise of state officials' prosecutorial discretion" is a "valuable feature of our constitutional system." *Id.* at 865. The Court observed that the federal government's efforts to prosecute Bond operated to displace the "'public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign'" that the defendant did not belong in prison for this offense. *Id*. Importantly, the Court also acknowledged in its analysis that a "sweeping reading" of the statute to prosecute a single criminal defendant would "fundamentally upset the Constitution's balance between national and local power." *Id* at 866. See, also, *Bond* at 882-83 (Thomas, J. concurring, joined by Alito, J., and Scalia, J. As to parts I, II, III observing the court has "'*always*...rejected readings of...the scope of federal power that would permit Congress to exercise a police power.'").

Similarly, in *Jones v. United States*, 529 U.S. 848 (2000), the Court vacated a defendant's conviction under the federal arson statute for burning down an

owner-occupied private residence. In doing so, it "rejected the Government's 'expansive interpretation' under which 'hardly a building in the land would fall outside the federal statute's domain.'" *Bond*, 572 U.S. at 859 (quoting *Jones*, 529 U.S. 857). The Court went on to note that applying the federal statute to buildings that are not used "in active employment for commercial purposes," *Jones*, 529 U.S. at 855, would "significantly change[] the federal state balance" and give rise to federal prosecutions for traditionally local criminal activity. *Id.* at 858 (quoting *United States v. Bass*, 404 U.S. 336, 349-50).[4]

Indian Tribes – perhaps to even a greater degree than the states – have a strong interest in maintaining sovereignty over their citizens and their territory. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). As this Court has noted, the tribes have a "claim to sovereignty [that] long predates that of our own Government." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). While their authority is subject to the plenary authority of Congress, *United States v. Cooley*, 141

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[4] In *Bass*, the Court interpreted a statute that prohibited convicted felons from possessing firearms to require proof that the defendant's possession had a connection to interstate commerce. A contrary reading of the statute, the Court observed, would "render[] traditionally local criminal conduct a matter for federal law enforcement and would also involve a substantial extension of federal police resources." *Bass*, 404 U.S. at 350; *see also United States v. Lopez*, 513 U.S. 549 (1995)(striking down the Guns-Free School Zones Act because it dealt with a crime that was one of traditional state concern); *McDonnell v. United States*, 579 U.S. 550, 576-77 (2016)(rejecting "boundless interpretation of the term "official act" to avoid "significant federalism concerns of federal bribery statute").

S.Ct. 1638, 1643 (2022), tribes maintain their historic sovereign authority unless it is expressly abrogated. *Washington v. Confederated Bands and Tribe of the Yakima Indian Reservation*, 439 U.S. 463 (1979).

The inherent sovereignty of the tribes, "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanction." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). As this Court has long held, state law can be applied "within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *see also Worcester v. State of Georgia*, 31 U.S. 515 (1832).

Contrary to these principles, the Ninth Circuit has held that the federal government can subject tribes to the state criminal law wholesale through the ACA. The federal government can intrude on tribal sovereignty in this manner even if a tribe has a law that reaches the same criminal conduct as that defined by the imported state statute. Equally troubling, it can apply state law to conduct committed on Indian land that a tribe, in the exercise of its sovereignty, has declined to criminalize.

The ACA was enacted in order to "fill in any gaps" where there is no federal criminal law governing conduct on a federal enclave. There is no indication that it was intended to apply on Indian reservations. Its application to tribal land severely undermines "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. It is hard to imagine a greater intrusion into tribal sovereignty. Application of the ACA to reservation Indians not only undermines the authority of tribal

governments, it also runs the risk of violating Indian treaty rights. An intrusion of this magnitude requires an express act of Congress. It cannot be imposed by judicial fiat.

CONCLUSION

Amicus respectfully urges the Court to grant certiorari to consider the important issues in this case.

Respectfully submitted,

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