No. 20-7622

IN THE

Supreme Court of the United States

DENEZPI,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The National Indigenous Women's Resource Center ("NIWRC") is a national organization working to end sexual assault and domestic violence against Native women. The NIWRC's work is directly implicated by Petitioner's request that this Court overturn the Tenth Circuit Court of Appeals' decision finding that prosecutions for the same conduct in both the United States District Court and the Court of Indian Offenses do not violate the United States Constitution's prohibition on double jeopardy. A conclusion that criminal prosecutions in the Courts of Indian Offenses ("CFR courts") are undertaken pursuant to *federal*, and not *tribal* sovereign authority, would impede the ability of Tribal Nations to bring charges for crimes of sexual assault and domestic violence—threatening the already tenuous safety of Native women and children.

The NIWRC is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. The NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience in tribal courts, tribal governmental process, and programmatic and educational work to end violence

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[1] Pursuant to Supreme Court Rule 37.6, the NIWRC and NCAI state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from NIWRC, NCAI, and their counsel, made any monetary contribution toward the preparation or submission of this brief. On December 16, 2021, counsel for Respondent communicated consent for the filing of this brief. On January 6, 2022, counsel for Petitioner communicated consent for the filing of this brief.

against Native women and children, including domestic violence and sexual assault.

Amicus Curiae the National Congress of American Indians ("NCAI") is the oldest and largest national organization comprised of Tribal Nations and their citizens. Since 1944, NCAI has advised tribal, state, and federal governments on a range of issues, including the development of effective law enforcement policy that best protects the safety and welfare of individuals living in and around Indian country. NCAI is uniquely situated to provide critical context to the Court with respect to tribal law enforcement authority and the solemn responsibilities that tribal officers face daily in providing for the safety and welfare of tribal communities.

As two organizations committed to ending violence against Native women, the NIWRC and NCAI ("*Amici*") have a unique perspective on the harm that will result from obstructing the sovereign authority of Tribes to bring charges for crimes of sexual assault and domestic violence in their respective Courts of Indian Offenses.

SUMMARY OF THE ARGUMENT

As this Court has previously held, "the dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government." *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, "[w]hen a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, [the defendant] has committed two distinct 'offences.'" *Id.* (internal citations omitted); *see also Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("[O]ffences falling within the competency of different authorities to restrain or punish them" are properly "subjected to

the consequences which those authorities might ordain and affix to their perpetration.").

Petitioner's acts of domestic and sexual violence violated the laws of the Ute Mountain Ute Tribe. They also violated federal law. As this Court has already concluded, the federal government and Tribal Nations constitute separate sovereigns. And thus, in the context of dual federal and tribal prosecutions, this Court has determined that "prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *U.S. v. Wheeler*, 435 U.S. 313, 317 (1978) (quoting the Double Jeopardy Clause). For instance, in considering a federal prosecution of a Navajo Nation citizen that followed a criminal prosecution by the Navajo Nation, the Supreme Court determined that the Double Jeopardy Clause in no way prohibited the subsequent federal prosecution. *See id.* Instead, this Court concluded that "[s]ince tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." *Wheeler*, 435 U.S. at 329–30 (quoting the Double Jeopardy Clause).

This analysis does not change simply because a Tribe continues to utilize a CFR court. As discussed in greater detail in the Legal Historians *Amicus* Brief, the history of CFR courts mirrors the history of federal Indian law and policy. CFR courts began as a tool of assimilation, but as federal policy shifted away from eradicating Tribal Nations to supporting them, so too did the function of CFR courts. Today, CFR courts ensure that Tribal Nations are able to prosecute crimes committed on their lands in violation of their laws, and in many instances, CFR courts are the only

hope of imposing consequences when individuals like Petitioner harm Native women and children.

Accepting Petitioner's assertion that CFR courts exercise federal, and not tribal, authority would most certainly undermine the ability of Tribal Nations who use CFR courts to protect Native victims of domestic violence and sexual assault, crimes that, when left unaddressed, often escalate to homicide. Today, Native women and children face the highest rates of domestic violence, murder, and sexual assault in the United States. However, as described in greater detail below, the current federal legal framework limiting tribal jurisdiction and sentencing authority precludes the effective administration of justice in tribal and CFR courts. Many tribal prosecutors, therefore, bring charges under tribal law to ensure there is at least some modicum of justice—while simultaneously and steadfastly hoping the United States will likewise bring charges under federal law, charges that make possible a sentence that can command deterrence for future acts of domestic violence and sexual assault against Native victims. Unfortunately, the United States declines to prosecute the vast majority of violent crimes committed against Native victims in Indian country. Concluding that the Court's dual sovereign doctrine does *not* apply to concurrent CFR court and federal court prosecutions would preclude the effective prosecution of those who commit serious violent crimes against Native women and children and, ultimately, would not accomplish anything close to the original intent of the Double Jeopardy Clause drafters.

Amici, therefore, respectfully ask this Court to affirm the decision of the Tenth Circuit and ensure that Tribes who continue to use CFR courts are not precluded from protecting their women and children

from what has become an epidemic of domestic violence and sexual assault on tribal lands.

ARGUMENT

I. The Current Rates of Violence Against Native Women Constitute a Crisis

In 2016, this Court acknowledged that Native women experience the highest rates of violence in the United States. *See United States v. Bryant*, 136 S.Ct. 1954, 1959 (2016). And since this Court's decision in *Bryant*, the National Institute of Justice ("NIJ"), an agency within the United States Department of Justice ("DOJ"), has released data revealing that Native women suffer rates of domestic violence and sexual assault even higher than those cited by this Court in 2016. In May 2016, the NIJ released its report, *Violence Against American Indian and Alaska Native Women and Men*, documenting the astonishingly high rates of violence against Native people.[2] The report includes facts that are almost incomprehensible. According to the NIJ's May 2016 report, more than 4 in 5 Native people have been victims of violent crime.[3] Over half (56.1%) of Native women report being victims of sexual violence.[4]

So severe is this crisis that the current and previous presidents have issued executive orders in efforts to combat it at the national level: In 2019, President Trump issued Executive Order No. 13,898, establishing the Task Force on Missing and Murdered American

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[2] *See* Andre B. Rosay, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Violence Against American Indian and Alaska Native Women and Men* 44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[3] *Id*.

[4] *Id.* at 43.

Indians and Alaska Natives to be co-chaired by the U.S. Attorney General and the Secretary of the Interior (or their designees) for purposes that include: "improving the way law enforcement investigators and prosecutors respond to the high volume of [missing and murdered American Indian and Alaska Native] cases"; "collecting and sharing data among various jurisdictions and law enforcement agencies"; and "facilitating formal agreements or arrangements among Federal, State, local, and tribal law enforcement to promote maximally cooperative, trauma-informed responses to cases involving missing and murdered American Indians and Alaska Natives." Exec. Order No. 13,898, 84 Fed. Reg. 66,059 (Nov. 26, 2019). More recently, on November 15, 2021, President Biden issued Executive Order No. 14,053, titled "Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People." President Biden emphasized that:

> Native Americans face unacceptably high levels of violence, and are victims of violent crime at a rate much higher than the national average. Native American women, in particular, are disproportionately the victims of sexual and gender-based violence, including intimate partner homicide. Research shows that approximately half of Native American women have experienced sexual violence and that approximately half have experienced physical violence by an intimate partner . . . . For far too long, justice has been elusive for many Native American victims, survivors, and families. Criminal jurisdiction complexities and resource constraints have left many injustices unaddressed.

Exec. Order No, 14,053, 86 Fed. Reg. 64,337 (Nov. 15, 2021). Ultimately, President Biden acknowledged that "more work is needed to address the crisis of ongoing violence against Native Americans — and of missing or murdered indigenous people." *Id*.[5]

The five States in which CFR Courts are presently located—New Mexico, Oklahoma, Colorado, Nevada, and Utah—are not strangers to the incredibly high levels of violent crime experienced by Native women or the crisis of missing and murdered Indigenous women and children since, cumulatively, they are home to 91 federally recognized Indian Tribes.[6] Indeed, according to a 2018 Urban Indian Health Institute ("UIHI") report, New Mexico had the highest number of missing and murdered Indigenous women in the

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[5] Federal agencies have acknowledged the depth and severity of this crisis as well. In April of 2021, Secretary of the Interior Haaland launched the Missing and Murdered Unit within the BIA's Office of Justice Services "to provide leadership and direction for cross-departmental and interagency work involving missing and murdered American Indians and Alaska Natives." Press Release, U.S. Dep't of the Interior, Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives (Apr. 1, 2021), https://www.doi.gov/news/secretary-haaland-creates-new-missing-murdered-unit-pursue-justice-missing-or-murdered-american.

[6] Of these 91 federally recognized Indian Tribes, 19 are located in Nevada, https://www.epa.gov/tribal/epa-region-9-pacific-southwest#nv, 9 are located in Utah, https://indian.utah.gov/tribal-nations/, 23 are located in New Mexico, https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/23-nm-federally-recognized-tribes-in-nm-counties/, 39 are located in Oklahoma, https://www.ou.edu/cas/nas/resources/tribal-information, and 2 are located in Colorado, https://www.cde.state.co.us/sites/default/files/documents/cdereval/download/pdf/race-ethnicity/nativeamericantribesofcolorado.pdf.

country, with Utah and Oklahoma coming in at eighth and tenth, respectively.[7] In response, New Mexico and Utah established task forces specifically to combat the crisis of missing and murdered Indigenous people within their borders,[8] and Oklahoma passed legislation seeking funding to establish such a task force.[9] New Mexico's task force subsequently found that in Farmington, New Mexico, one of the closer urban centers to the Ute Mountain Ute Reservation, nearly half of the missing persons cases from 2014-2019 were Natives, 66% of whom were women.[10]

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[7] Urban Indian Health Institute, Missing and Murdered Indigenous Women & Girls 10, https://www.uihi.org/resources/missing-and-murdered-indigenous-women-girls/.

[8] Missing and Murdered Indigenous Women and Relatives Task Force, New Mexico Indian Affairs Department, https://www.iad.state.nm.us/policy-and-legislation/missing-murdered-indigenous-women-relatives/; Alastair Lee Bitsóí, *Utah Missing and Murdered Indigenous Women task force hears about jurisdiction issues in first meeting*, THE SALT LAKE TRIBUNE (Nov. 24, 2021), https://www.sltrib.com/news/2021/11/24/utah-missing-murdered/. The New Mexico task force's results prompted it to propose the creation of a state office to coordinate the State's efforts in addressing the Missing and Murdered Indigenous Women crisis. Robert Nott, *Office to collect data on missing, murdered Indigenous women proposed in New Mexico*, SANTA FE NEW MEXICAN (Oct. 19, 2021), https://www.santafenewmexican.com/news/legislature/office-to-collect-data-on-missing-murdered-indigenous-women-proposed-in-new-mexico/article_8e119988-30f7-11ec-82b2-032efa7ce49a.html.

[9] Oklahoma Governor Kevin Stitt signed Ida's Law, Senate Bill 172, into law on April 20, 2021. Carmen Forman, *Gov. Kevin Stitt signs Ida's law to address missing, murdered Indigenous Oklahomans*, THE OKLAHOMAN (April 21, 2021), https://www.oklahoman.com/story/news/2021/04/21/missing-murdered-native-american-law-signed-by-oklahoma-governor/7299620002/.

[10] New Mexico Missing and Murdered Indigenous Women and Relatives Task Force, Report to the Governor and Legislature on

The high rates of violence against Native women and children constitute nothing short of an emergency that threatens the health, safety, welfare—and ultimately the sovereignty—of Tribal Nations. Widespread, commonplace sexual and domestic violence have taken a toll on Native communities. Victimization and the unresolved trauma that follows are directly linked to the significant mental and physical health disparities Native people experience in the United States.[11]

These disparities are most apparent in statistics documenting the high rates of Post-Traumatic Stress Disorder ("PTSD") that Native women and children suffer.[12] These high rates of PTSD are a consequence of the extraordinarily high rates of violent crimes committed against Native women and children. Indeed, PTSD has been declared "one of the most serious mental health problems faced by [Native] populations."[13]

In 2014, the United States Attorney General's Advisory Committee released a report documenting that Native children experience higher-than-average

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the Task Force Findings and Recommendations 24 (Dec. 2020), https://www.iad.state.nm.us/wp-content/uploads/2020/12/NM_MMIWR_Report_FINAL_WEB_v120920.pdf.

[11] *See* J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 Prog. Brain Res. 2 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3226705/.

[12] *See* Deborah Bassett et al., *Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature*, 49 Soc. Psychiatry & Psychiatric Epidemiology 417 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3875613/.

[13] *Id.* at 418.

rates of abuse.[14] The trauma in tribal communities is so significant that Native youth suffer PTSD at rates equivalent to soldiers returning from the wars in Afghanistan and Iraq.[15] And for Native American adults, the rate of PTSD is 4.4 times the national average.[16]

PTSD, however, is not the inevitable result of trauma. Instead, PTSD is a consequence of *unresolved* trauma—that is, trauma for which there has been no adequate intervention.[17] Unresolved trauma is the leading cause of PTSD, which in turn burdens the victim with a wide variety of mental and physical maladies,[18] such as mental illness, addiction, and even

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[14] U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Att'y Gen.'s Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive* 6 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf ("American Indian and Alaska Native . . . children suffer exposure to violence at rates higher than any other race in the United States.").

[15] *Id.* at 38 ("[O]ne report noted that [Native] juveniles experience post-traumatic stress disorder (PTSD) at a rate of ***22 percent***. Sadly, this is the same rate as veterans returning from Iraq and Afghanistan, and triple the rate of the general population.").

[16] *See* Teresa N. Brockie et al., *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, 2013 Nursing Res. & Prac. 1, 3 (2013).

[17] *See* Cheryl Regehr & Tamara Sussman, *Intersections Between Grief and Trauma: Toward an Empirically Based Model for Treating Traumatic Grief*, 4 Brief Treatment & Crisis Intervention 289, 294 (2004).

[18] *See generally*, Bremner et al., *supra* note 11.

chronic physical conditions such as heart, lung, and liver disease.[19]

For many survivors, the prosecution of his or her perpetrator is critical to resolving the trauma resulting from violent crime.[20] Laws that prevent prosecution of those who commit domestic violence and sexual assault against Native women and children, therefore, directly contribute to the staggering levels of PTSD in tribal communities.

II. Jurisdictional and Sentencing Limitations Imposed on Tribal Nations Render Tribal-Federal Collaboration Critical for the Safety of Native Women and Children

The incredibly high rates of violence that Native women and children suffer are exacerbated by the complex jurisdictional maze both federal and tribal sovereigns must navigate to determine which sovereign may prosecute when a Native person is victimized. Discerning which sovereign may exercise criminal jurisdiction over a particular crime in Indian country is rife with complications. The current state of federal law dictates that, before a sovereign may exercise criminal jurisdiction over a crime committed in Indian country, the sovereign must determine (1) the status of the land where the crime was committed; (2) whether the perpetrator is Indian; and (3) whether the victim

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[19] *See* Jitender Sareen et al., *Physical and Mental Comorbidity, Disability, and Suicidal Behavior Associated With Posttraumatic Stress Disorder in a Large Community Sample*, 69 Psychosomatic Med. 242, 244–45 (2007).

[20] *See* Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceeding for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7 (1987).

is Indian. *See United States v. Lara*, 541 U.S. 193 (2004). Discerning these factual prerequisites to the exercise of jurisdiction impedes law enforcement's ability to respond promptly to the heightened crisis of a domestic violence call, thereby placing Native women and children at greater risk.

The legal obstacles to prosecutions in Indian country have been accumulating for more than a hundred years. In 1883, this Court concluded that the federal government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless and until Congress authorizes such jurisdiction. *See Ex Parte Crow Dog*, 109 U.S. 556, 570 (1883) (the United States could not exercise jurisdiction over "the case of a crime committed in the Indian country by one Indian against the person or property of another Indian" unless so authorized by Congress); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed . . . and ma[k]e it punishable in the courts of the United States.").

In response to *Crow Dog*, Congress enacted the Major Crimes Act in 1885, authorizing federal criminal jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person. *See* 18 U.S.C. §§ 1152-53; *see also* S. Rep. No. 90-841, 12 (1967) ("Congress enacted the 'Major Crimes Act' in 1885" in response to "an early Supreme Court case, *Ex parte Crow Dog*, 109 U.S. 556 (1883)").

The Major Crimes Act did not, however, give the federal government jurisdiction to prosecute an offense

not enumerated in the Act, nor did it work to divest Tribes of their inherent jurisdiction over the Act's enumerated crimes. As a result, many crimes involving Indian offenders and non-Indian victims, particularly misdemeanor level assaults, fall within the sole purview of the tribal government. Whereas more serious crimes involving only Indians,[21] and crimes involving a non-Indian victim and an Indian offender, may be prosecuted by both the tribal and federal government.

Yet, despite having the authority to prosecute, the federal government often simply does not bring charges against perpetrators in Indian country.[22] Indeed, "[d]eclination rates are higher for American Indians than for other racial groups,"[23] and Indian country cases are "more likely to be declined when compared to non-[Indian country] cases."[24] "One such reason is that overwhelmed federal agents are unable to complete the thousands of investigations in Indian Country

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[21] Crimes in Indian country that involve only non-Indians generally fall under state jurisdiction. *See United States v. McBratney*, 104 U.S. 621, 624 (1881).

[22] *See* 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, 679 (2013) ("Unfortunately, for a number of reasons, U.S. Attorneys often decline to prosecute crimes that occur in Indian Country.").

[23] Regina Branton et al., *Criminal justice in Indian country: Examining declination rates in tribal cases*, Social Science Quarterly, 5 (2021).

[24] *Id.* at 2. More specifically, Indian country cases are more than twice as likely to be declined compared to cases from the rest of the United States. From 2006-2016, "34.66 percent of the tribe cases were declined, while 16.82 percent of non-tribal cases were decline[d] . . . ." *Id.* at 7–8.

or supplement those investigations done by tribal police."[25] As one academic has noted:

> Many low-priority felonies never make it to federal prosecutors in the first place. According to data from the Interior Department and the Transactional Records Access Clearinghouse at Syracuse University, of the nearly 5,900 aggravated assaults reported on reservations in fiscal year 2006, only 558 were referred to federal prosecutors. Out of those 558, federal prosecutors declined to prosecute 320 of them.[26]

To be sure, "[t]hese high declination rates are attributed in part to a lack of federal resources and focus, the vast distances U.S. agents must travel, cultural or language difficulties, lack of evidence, and witness issues."[27] Another researcher has highlighted that federal prosecutions do not happen because federal prosecutors and investigators lack the ground level knowledge of the crimes that occurred and are not "the first responders when crimes occur."[28] This researcher explains that:

> [F]ederal prosecutors and investigators also may decline Indian Country crimes because federal officers are not the first responders when crimes occur in Indian Country. Typically, tribal law enforcement officers are

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[25] Hermes, *supra* note 22, at 679.

[26] *Id*.

[27] *Id.* at 680.

[28] Mary K. Mullen, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 St. Louis U. L.J. 811, 821 (2017).

> the first to respond when a crime is reported. As a result, these tribal officers are the first to observe evidence and interview initial witnesses . . . . [Often], federal investigators and prosecutors collect their own separate evidence and interviews, and this distance in time prevents accuracy in the evidence. Additionally, it prevents federal officers from finding witnesses who are willing to speak and are able to accurately recall the criminal events. With these problems, federal prosecutors often determine that Indian Country crimes are nearly impossible to properly prosecute.[29]

Another factor inhibiting the assurance of public safety on tribal lands is that federal law severely restricts the sentencing authority of Tribal Nations. The Indian Civil Rights Act ("ICRA") prohibits tribal courts from imposing a prison term greater than one year for any criminal offense. 25 U.S.C. § 1302(a)(7).[30] And as this Court noted in *Bryant*, in the context of domestic violence, "a year's imprisonment per offense . . . [is] insufficient to deter repeated and escalating abuse." *United States v. Bryant*, 136 S.Ct. 1954, 1961 (2016); *see also* S. Rep. 111-93, 55 (Oct. 29, 2009) (accompanying S. 797, "'The lack of a system of graduated sanctions through tribal court . . . directly contributes to the escalation of adult and juvenile criminal activity.'") (quoting former U.S. Attorney General Janet Reno). But at least under the "separate sovereigns" framework there is *some punishment.* If this Court were to rule that the "separate sovereigns"

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[29] *Id.*

[30] The CFR court regulation at 25 C.F.R. § 11.315(a)(1) imposes this one-year imprisonment limitation.

framework does not apply in CFR courts, then any tribal prosecution in the CFR court would preclude a subsequent federal prosecution—and thus preclude the issuance of any kind of meaningful sentence. This is a risk many tribal prosecutors cannot afford to take.

III. CFR Courts Play a Critical Role in Addressing Sexual Assault and Domestic Violence Crimes Committed Against Native Women and Children

Given the epidemic of violence against Native women, and the jurisdictional maze that leaves the majority of the violence unaddressed and unresolved, there is no question that CFR courts play a critical role in providing a resolution to Native victims of sexual and domestic violence. For instance, last year 51% of assault cases brought in the Southwest Region CFR court included domestic violence charges, the overwhelming majority of which have not and may not ever be pursued by the United States Attorney's Office ("USAO").[31] The facts of these cases include a victim who was pursued on foot by the abuser and "tackle[d]" after jumping from a vehicle to escape a car ride during which the abuser drove "recklessly" for over 50 miles while threatening to kill them both by driving into oncoming traffic;[32] a victim with a protective order in place whose grandchildren witnessed the abuser "slam[her] to the ground," hit her repeatedly in the face, and bite her finger causing an open, bleeding wound;[33] a victim who was pursued to her car when

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[31] CFR Court Assault Cases as of December 3, 2021, Southwest CFR Court Record.

[32] *United States v. Kendall Anagal*, No. 2021-0081-CR, Criminal Complaint (Mar. 10, 2021).

[33] *United States v. Robert Bancroft*, No. 2021-0078-CR, Criminal Complaint (Mar. 8, 2021).

fleeing verbal abuse, pushed out of the driver's seat, and picked up from the ground by her hair;[34] a victim whom police located outdoors "crawling on his stomach" with both eyes swollen and "entire face and head[] covered in fresh blood" after they had encountered the abuser covered in the victim's blood and saw blood "smeared" and "pool[ed]" around the home;[35] and a victim who refused to give her cell phone to the abuser and was pursued into her bedroom, pinned face down onto her bed by the abuser's body, had her arm wrenched behind her back, and was repeatedly bitten forcefully enough to leave bite marks on her body.[36] Justice for these victims of domestic violence and others like them should not be placed in jurisdictional limbo simply because they live on the reservation of a small Tribal Nation that continues to use a CFR court, and certainly not where that Nation's Tribal Council has directly addressed domestic violence by enacting and implementing its own expansive ordinance designed to address this epidemic of violence.[37]

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[34] *United States v. Larenson Lehi*, No. 2021-0388-CR, Criminal Complaint (Sept. 27, 2021).

[35] *United States v. Jake Mills*, No. 2021-0367-CR, Criminal Complaint (Sept. 13, 2021).

[36] *United States v. Jourdain Orange*, No 2021-0400-CR, Criminal Complaint (Oct. 4, 2021).

[37] *See* Ute Mountain Ute Tribal Law and Order Code § 41.A(1), Ordinance No. 98-02 (Sept. 30, 1998) (authorizing the prosecution of "Indians," as defined by 25 C.F.R § 11.106, who commit or threaten to commit violence against family members including other crimes used as "a method of coercion, control, punishment, intimidation, or revenge" against a family member); *id.* at § 41.C(1) (recognizing that "domestic violence situations often involve cycles of violence which can consist of escalating harm" and allowing evidence of other acts of domestic violence to be submitted to the court).

Petitioner protests that CFR courts cannot be tribal courts because they are "established by the Department of the Interior. . . ." Pet'tr Br. 8 (internal quotations omitted). The history behind this establishment, however, reveals that CFR courts initially served a purpose that Congress has now fully nullified, that is, CFR courts were initially intended to function as a tool for assimilation. As then-Secretary of the Interior John W. Noble noted, CFR courts were considered to be a mechanism by which citizens of Tribal Nations could become "more rapidly and suitably prepared for the citizenship in the United States. . . ."[38] The rules of the Courts of Indian Offenses around that time reflected this purpose, labelling traditional cultural practices as "offenses," including participation in ceremonial dances and feasts and practices of medicine men that might "prevent Indians from abandoning their barbarous rights and customs."[39] Truly, the initial creation of CFR courts envisioned the complete extinguishment of tribal governments and tribal sovereignty.

Congress, however, changed its mind, and federal Indian policy subsequently evolved away from the

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[38] Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. at 25–26 (1892), https://digitalcommons.law.ou.edu/indianserialset/5813/ (last visited Dec. 10, 2021); *see, e.g., United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888) ("These 'courts of Indian offenses' are . . . but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition in these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there . . . for the purpose of acquiring habits, ideas and aspirations which distinguish the civilized from the uncivilized man.").

[39] *Id.* at 29.

eradication of Tribal Nations and assimilation of their citizens to the implementation of federal policies that support and uphold tribal self-determination. In 1928, 45 years following the creation of CFR courts, the Institute for Governmental Research issued the Merriam Report.[40] The Merriam Report offered a scathing review of the federal government's assimilationist policies, concluding that the attempts to eradicate tribal sovereignty, culture, and traditions had brought about significant trauma and harm to tribal citizens.[41]

In response, Congress passed the Indian Reorganization Act ("IRA") in 1934. The IRA was intended to:

> [E]nd the long, painful, futile effort to speed up the normal rate of Indian assimilation by individualizing tribal land and other capital assets[, and to] . . . provide the means, statutory and financial, to repair as far as possible, the incalculable damage done by the allotment policy and its corollaries.[42]

The IRA was drafted by President Roosevelt's appointed Commissioner on Indian Affairs, John Collier, and he made clear to Congress that the main focus of the IRA was to restore the inherent authority of Tribal Nations to engage in tribal self-government. In his memorandum of law to the House concerning his initial draft of the IRA, Collier stated that the grant of powers of tribal self-government in the IRA

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[40] Francis Paul Prucha, The Great Father: The United States Government and the American Indians 808 (1984).

[41] *Id.* at 209–10.

[42] Memorandum from John Collier, Comm'r of Indian Affairs, A New Deal for Native Americans (1934), https://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=3&psid=716.

did not "constitute a grant of new powers,"[43] but rather, as he explained, "the charters granted under this bill to Indian communities will be a recognition of tribal powers which Congress has never seen fit to abrogate."[44] Collier further noted that "[t]he right of an Indian tribe to deal with many matters affecting the lives and property of its members has repeatedly been upheld by the federal courts," and ultimately, the IRA was necessary "to clarify and define the relations of an Indian tribe to its members."[45]

Congress continued to build on the IRA's restoration of tribal sovereignty and authority when, in 1968, Congress passed the Indian Civil Rights Act and directed the Secretary of the Interior to recommend a new model code that would govern CFR courts, and further mandated that the Secretary "consult with the Indians [and] Indian tribes" in doing so. Pub. L. No. 90-284, title II, § 301, Apr. 11, 1968, 82 Stat. 78. Thus, today, CFR courts are "viewed as vehicles for the exercise of tribal jurisdiction."[46] They "provide adequate machinery for the administration of justice . . . where tribal courts have not been established to exercise that jurisdiction," 25 C.F.R. § 11.102, and are now required to apply—rather than prohibit—tribal customs, 25 C.F.R. § 11.110. Accordingly, the current Code of Indian Offenses itself is merely a framework that

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[43] Memorandum from John Collier, Comm'r of Indian Affairs, The Purpose and Operation of the Wheeler-Howard Indian Rights Bill, to the Senate and House Comms. on Indian Affairs (Feb. 19, 1934), http://cdm15019.contentdm.oclc.org/cdm/ref/collection/p4005coll11/id/513.

[44] *Id.*

[45] *Id.*

[46] Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law, § 4.04[3][c][iv][B] (2012).

tribal governments routinely supersede and supplement with tribal law and civil procedure. *See* 25 C.F.R. § 11.108(b) ("The governing body of each tribe . . . may enact ordinances which . . . [s]upercede any conflicting regulation in this part."); 25 C.F.R. § 11.104(a)(2) ("The regulations in this part continue to apply . . . until . . . [t]he tribe has put into effect a law-and-order code. . . ."); *see also* Law and Order on Indian Reservations, 58 Fed. Reg. 54,406 (October 21, 1993) (noting that "[t]he[se] regulations [] provide . . . for the local tribal government to enact ordinances that will be enforced in . . . the tribe's Indian country [and m]any tribes have taken advantage of this provision to supplement the existing regulations extensively.").[47]

This nearly-century-long movement to restore the sovereignty of Tribal Nations over their own justice systems has been amplified most recently by Congress's decision to restore tribal jurisdiction over non-Indian perpetrated crimes of domestic violence and dating violence on reservations. In doing so, Congress has recognized its trust duty and obligation to respect and uphold the connection between tribal sovereignty and safety for Native women. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. 109-162, tit. IX, § 901, 119 Stat. 3077 ("Congress finds that . . . the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."); *see also* Tribal

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[47] A Tribal Nation's choice to use the federally provided "machinery" is itself an exercise of sovereignty. *See* United States Government Accountability Office, Missing and Murdered Indigenous Women: New Efforts are Underway but Opportunities Exist to Improve the Federal Response, Report to Congressional Requesters 11 n.34 (Oct. 2021) (citing 25 U.S.C. § 2802(c)(1)).

Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 202, 124 Stat. 2262-63 ("Congress finds that the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country[,] . . . and [thus Congress has a duty to] effectively provide public safety in Indian Country[] to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women"). There is no reason to conclude that this trust duty and responsibility does not extend to Tribal Nations utilizing CFR courts.

Furthermore, it is clear that when Tribal Nations utilizing CFR courts outlaw domestic violence within their borders, they are exercising their inherent sovereignty and not federal authority. The connection between sovereignty and safety for Native women is no less for a Tribe utilizing a CFR court than it is for a Tribe that has been able to restore a tribal justice system that functions outside of the BIA's administration. In the instant case, for example, the Ute Mountain Ute Tribe has passed its own domestic violence ordinance and prosecutes violations of this law, like all violations of its Law and Order Code, in the Southwest Region CFR court.[48] In fact, the Ute Mountain Ute Tribe is the only Tribal Nation that uses the Southwest Region CFR court and, with the exception of the prosecutor and chief magistrate judge, the Southwest Region CFR court is entirely staffed and overseen by employees of the Ute Mountain Ute

[48] *See* 25 C.F.R. § 11.114; Ute Mountain Ute Tribe, CFR Court, https://www.utemountainutetribe.com/CFR%20courts.html (last visited Dec. 14, 2021).

Tribe.[49] In other words, the Southwest Region CFR court is simply the "machinery" the Ute Mountain Ute Tribe has chosen to utilize in exercising its inherent sovereign authority to ensure domestic violence crimes are curbed within its community. *See* 25 C.F.R. § 11.102.[50]

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[49] Interview of Priscilla Rentz, Court Administrator, Southwest Region CFR Court (Dec. 3, 2021); *see also*, Court of Indian Offenses, U.S. Department of the Interior, Indian Affairs, https://www.bia.gov/CFRCourts (last visited Dec. 14, 2021).

[50] For small Tribal Nations like the Ute Mountain Ute Tribe, choosing to use a CFR court as its tribal court is prudent. CFR courts are funded by the BIA and justice systems are expensive. *See* Written Testimony of Elizabeth A. Reese, Ass't Professor of Law, Stanford Law School, before the Senate Committee on Indian Affairs, "Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction" 3 (Dec. 6, 2021). For example, it cost the Pueblo of Santa Clara seven years and at least $2,237,480 in federal grants alone just to implement VAWA's special domestic violence criminal jurisdiction into its existing justice system. Written Testimony of J. Michael Chavarria, Governor of Pueblo of Santa Clara, New Mexico, before the Senate Committee on Indian Affairs, "Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction" 3–4 (Dec. 6, 2021). Expenditures included improving facilities to comply with federal standards, maintaining federal services standards, and drafting a special domestic violence criminal jurisdiction compliant domestic violence code. *Id.* While States, counties, and local municipalities are allowed to collect various forms of taxes to fund their governmental institutions, federal law precludes Tribal Nations from collecting most forms of taxes that could fund their governmental institutions. Written Testimony of Elizabeth A. Reese, Ass't Professor of Law, Stanford Law School, before the Senate Committee on Indian Affairs, "Restoring Justice: Addressing Violence in Native Communities through VAWA Title IX Special Jurisdiction" 3 n.9 (Dec. 6, 2021). Thus, for smaller Tribal Nations that do not have significant economic develop-

IV. Excluding CFR Courts from the Separate Sovereigns Exception Would Undermine Safety and Justice for Native Women and Children

The exclusion of CFR courts from the "separate sovereigns" doctrine would considerably hinder the effective prosecution of violent crimes against Native women and children. As discussed in greater detail above, given the jurisdictional and sentencing limitations of CFR courts, the U.S. Attorney will, in some instances, be able to more effectively secure a sentence that reflects the gravity of the crime committed, and ultimately, deters the subsequent commission of domestic violence or sexual assault crimes against a Native victim. Unfortunately, if a Tribal Nation elects to forego prosecution in CFR court in the hopes that the U.S. Attorney will conclude his or her investigation and bring federal charges, the victim may face a situation where no charges are brought at all. That is, if tribal prosecutions in CFR courts no longer fall under the "separate sovereigns" exception to the Double Jeopardy Clause, then Tribes who use CFR courts will be forced to choose between two frustrating outcomes: (1) risk the tolling of the tribal statute of limitations and federal declination to wait and see if federal charges will be filed against a defendant so that his sentence might match the severity of the crime; or (2) bring tribal charges in CFR court to ensure some sort of justice, thereby precluding the possibility of a federal prosecution and a meaningful sentence that could prevent future violent crimes committed by the same, or additional, offenders. Concluding that CFR courts are federal courts will

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ment, prosecuting domestic violence crimes in CFR courts is the only feasible means of exercising their inherent sovereignty.

only perpetuate the cycle of violence that Native women and children currently face.[51]

Federal declination rates substantiate the harm that will result from a determination that CFR courts constitute federal courts for Double Jeopardy purposes. In 2019, the DOJ released its Indian Country Investigations and Prosecutions report under Section 212 of the Tribal Law and Order Act ("TLOA") which requires the Attorney General to send Congress information regarding ongoing cross-jurisdictional collaboration efforts between federal, state, and tribal law enforcement entities, as well as the Federal Bureau of Investigation's ("FBI") Indian country safety efforts and the disposition of matters which the United States Attorneys' offices have under their Indian country responsibilities.[52] TLOA Section 212 requires the Executive Office for United States Attorneys to compile case-specific declination information on the type of crime(s) alleged, whether the accused is Indian or non-Indian, whether the victim is Indian or non-Indian, and the reason for deciding to decline, refer, or terminate the prosecution.[53] In 2019, of the 2,426 Indian

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[51] No Indian Tribe should have to face these horrible options and forego the exercise of its inherent sovereignty. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("To deny a [sovereign] its power to enforce its criminal laws because another [sovereign] has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the [sovereigns] to maintain peace and order within their confines.'").

[52] U.S. Department of Justice, Indian Country Investigations and Prosecutions (2019), https://www.justice.gov/otj/page/file/1405001/download.

[53] *Id*. at 2.

country matters, 32 percent were declined by the USAO.[54]

Declination by the USAO is not without consequence. Prosecution is vital to addressing the cyclic nature of domestic violence, which has been demonstrated to increase in severity with each repeated act of abuse. *See United States v. Castleman*, 134 S.Ct. 1405, 1408 (2014) ("Domestic violence often escalates in severity over time. . . . "). It is particularly important that the separate sovereigns doctrine enables a tribal prosecution in CFR court to immediately go forward while leaving the door open for a federal prosecution to achieve a meaningful sentence because often, even when domestic violence victims are able to escape the relationship, the likelihood of additional violence still increases.[55] In Indian country, the overwhelming majority of violence against Native women and children is committed by spouses and partners of Native women; as Congress noted in 2005, "homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and . . . *75 percent of those deaths were committed by a family member or acquaintance*." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain), 2005 WL 1106816 (Westlaw) (emphasis added). This Court took notice of this high rate of violence in *Bryant*, when Justice Ginsburg acknowledged that "[a]ccording to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner."

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[54] *Id*. at 3.

[55] Ruth E. Fleury et al., *When Ending the Relationship Doesn't End the Violence*, 6 Violence Against Women 1363, 1364 (2000).

United States v. Bryant, 136 S.Ct. 1954, 1959 (2016), *as revised* (July 7, 2016) (internal citations omitted).

Tribal-federal coordination in investigating and prosecuting crimes committed against Native women and children is, therefore, critical. The separate sovereigns doctrine facilitates this coordination by allowing both sovereigns to share information and collaborate without foregoing the ability to prosecute the case in their own court. In May of 2015, the Indian Law and Order Commission, an intergovernmental body created by TLOA, released its final report, noting an example of the success, and increased safety, resulting from interjurisdictional coordination. The report highlighted a specific case from the Ute Mountain Ute Reservation, where the instant case arose. Specifically, the report noted that:

> Even the most basic forms of interjurisdictional cooperation can save money and lives. For example, on the Ute Mountain Ute Reservation in Colorado, the late Chairman Ernest House, Sr. fought back when violence threatened to overwhelm his community. In 2005–06, reported homicide rates on the Ute Mountain Ute Reservation ranged between 250 and 300 per 100,000 people, as compared to a statewide rate of 4 out of 100,000. Stated another way, had the city of Denver experienced the same homicide rates as the Ute Mountain Indian Reservation, Denver would have had more than 1,900 murders instead of the 144 that actually occurred.
>
> In response, Chairman House convened the Ute Mountain Ute Law Enforcement Working Group, chaired by Gary Hayes, who was then Tribal Council vice chair. The working group

> met at least monthly to prevent and combat crime. This group quickly gained momentum and began focusing on better coordination across jurisdictional lines . . . . According to Mr. Hayes, who is now chairman, violent crimes rates have fallen in virtually every major category, and the reservation experienced just one homicide in the past two years. "Working together is saving our people," he said.[56]

For Tribes that continue to utilize CFR courts such as Ute Mountain Ute, interjurisdictional cooperation saves lives.

Continued coordination is predicated on this Court's recognition that tribal prosecutions of tribal criminal law offences in CFR courts constitute an exercise of tribal, not federal, authority. CFR courts constitute an extension of the sovereign tribal governments they serve. Forcing Tribal Nations who utilize CFR courts to choose between effective prosecution and sentencing, or risking no prosecution at all, places Tribal Nations in a dilemma that would not serve a constitutional purpose under the Double Jeopardy Clause, and ultimately would place Native women and children in even greater danger.

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[56] Indian Law and Order Comm'n, *A Roadmap for Making Native America Safer, Report to the President and Congress of the United States* 113 (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer_Full.pdf.

CONCLUSION

The Tenth Circuit's decision below should be affirmed.

Respectfully submitted,

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