No. 20-7622

IN THE

Supreme Court of the United States

MERLE DENEZPI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 counting 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 fair administration of justice. NACDL files numerous *amicus* briefs each year in this Court and in the lower state and federal courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, their lawyers, and the criminal justice system as a whole. As particularly relevant here, members of the *amicus* have experience that will shed light on why the Tenth Circuit's ruling is unfair to those Indian defendants whose tribes rely on the federal government to conduct criminal prosecutions.

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[1] No counsel for either party authored this brief in whole or in part. No counsel for either party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. This brief is being filed with the consent of the petitioner and respondent obtained on November 30, 2021, and December 1, 2021, respectively.

INTRODUCTION AND SUMMARY OF ARGUMENT

On July 17, 2017, there was an altercation between petitioner Merle Denezpi and his girlfriend. It took place at her home in Towaoc, Colorado, on the Ute Mountain Ute Indian Reservation. Mr. Denezpi and his girlfriend are both enrolled members of the Navajo Nation. Mr. Denezpi's girlfriend alleged that he sexually assaulted her; he claimed that the sexual intercourse was consensual. *See United States v. Denezpi*, 979 F.3d 777, 780 (10th Cir. 2020).

Three days later, Mr. Denezpi was charged in the Southwest Region CFR Court with assault and battery, in violation of Ute Mountain Ute Indian tribal law, and with making terroristic threats and false imprisonment, in violation of the Code of Federal Regulations. He later entered a plea to the assault charge under *North Carolina v. Alford*, 400 U.S. 25 (1970), and the other two charges were dismissed. He ultimately served a little more than four months in custody. *See Denezpi*, 979 F.3d at 780.

In mid-2018, six months after being released from tribal custody, a grand jury in the District of Colorado indicted Mr. Denezpi on one count of aggravated sexual abuse, in violation of 18 U.S.C. §§ 1153 and 2241(a). This indictment was founded on the same events that supported the charges that Mr. Denezpi faced in the CFR court. He moved to dismiss the indictment as violating his Fifth Amendment double-jeopardy protection, but the district court denied the motion. He was convicted at trial and sentenced to 30 years in federal prison. *See Denezpi*, 979 F.3d at 780–81.

Mr. Denezpi appealed his conviction to the Tenth Circuit, where he renewed his double-jeopardy claim. The Tenth Circuit affirmed, reasoning that the CFR Court and the federal district court were exercising the power of

different sovereigns—the Ute Mountain Ute Indian tribe first, followed by the United States federal government—when they convicted him first of assault and battery and then aggravated sexual abuse for the exact same course of conduct. "Congress's creation of CFR courts, then, did not divest the tribes of their self-governing power but instead merely provided the forum through which the tribes could exercise that power until a tribal court replaced the CFR court." *Denezpi*, 979 F.3d at 782–83. The "ultimate source of the power undergirding the CFR prosecution of Mr. Denezpi," the court said, "is the Ute Mountain Ute Tribe's inherent sovereignty." *Id.* at 783 (quoting *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 68 (2016)). Thus, the court concluded, there was no double jeopardy violation.

The Tenth Circuit never discussed whether the prosecution in the CFR court was a "tool of the federal authorities," and thus "sham and cover for" the later federal prosecution, such that the Double Jeopardy Clause would have barred the later prosecution. *See Gamble v. United States*, 139 S. Ct. 1960, 1994 n.3 (2019) (Ginsburg, J., dissenting); *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959). If it had, it should have come to the conclusion that federal authority controls both the jurisdiction of, and the conduct of prosecutions in, the CFR courts that those courts are effectively tools of federal prosecuting authorities. The Double Jeopardy Clause accordingly should have barred Mr. Denezpi's prosecution for aggravated sexual abuse in federal district court once he had been convicted of a lesser-included offense in the CFR court.

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment prohibits "more than one prosecution for the 'same

offence.'" *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 62 (2016). For nearly 90 years, this Court has held that two crimes are the "same offence" for double-jeopardy purposes unless "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Under this test, a greater offense is the "same offence" as any of its lesser-included offenses for double-jeopardy purposes. *See Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam). Here, there is no doubt that the assault crime to which Mr. Denezpi pleaded guilty in the CFR court is a lesser-included offense of aggravated sexual abuse under 18 U.S.C. § 2241(a). Both crimes have as an element the use or threatened use of physical force to cause unwanted physical contact; § 2241(a) has the additional element of sexual contact. Thus the two crimes are the "same offence" for double-jeopardy purposes.

This Court has recognized an important exception to the Fifth Amendment's double-jeopardy protection. Under the dual sovereignty doctrine, "when the same act transgresses the laws of two sovereigns, it cannot truly be averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852)). However, if the first sovereign's prosecution is "merely a tool of the federal authorities," such that the first prosecution is "a sham and a cover for a federal prosecution," this Court has suggested, the dual sovereignty exception does not allow for successive prosecutions for the same offense. *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959). Because of the intense cooperation between federal and tribal authorities that is the hallmark of Indian country law enforcement, the "tool or sham" exception to the dual sovereignty doctrine should always bar a prosecution

under the Major Crimes Act when the defendant has already been convicted in a CFR court.

1. The Double Jeopardy Clause allows successive prosecutions by different governments only if each of them exercises sovereignty in two different aspects.

Six Terms ago this Court reiterated that "when the entities that seek successively to prosecute a defendant for the same source of conduct are separate sovereigns," the "Double Jeopardy Clause… drops out of the picture." *Sanchez Valle*, 579 U.S. at 67 (quoting *Heath*, 474 U.S. at 88). The "dual sovereignty concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities." *United States v. Wheeler*, 435 U.S. 313, 318 (1978). Where the dual-sovereigns exception does not apply, the Double Jeopardy Clause has an important role to play in limiting the government's power to hale a criminal defendant into court more than once on the same charge.

"Sovereignty" in this context, this Court said, "does not bear its ordinary meaning." *Sanchez Valle*, 579 U.S. at 67. This Court's primary conception of "sovereignty" in this context looks to the "ultimate source of the power undergirding the respective prosecutions." *Id.* at 68 (citing *Wheeler*, 435 U.S. at 320). Looking at the "deepest wellsprings, not the current exercise, of prosecutorial authority," the dual-sovereigns doctrine asks whether the power to punish an offender derives from "wholly independent sources," in which case successive prosecutions are permitted, or from "the same ultimate source," in which case they are not. *Id.* So even though Indian tribes may be "domestic dependent nations" under our constitutional framework, *United States v. Lara*, 541 U.S. 193, 204 (2004), the "ultimate source of a tribe's

power to punish tribal offenders" comes from "its primeval or, at any rate, pre-existing, sovereignty," *Sanchez Valle*, 579 U.S. at 70 (quoting *Wheeler*, 435 U.S. at 320, 322, 328). For that reason, this Court has held, the dual-sovereigns doctrine allows successive prosecutions in tribal and federal courts. *See Lara*, 541 U.S. at 210.

Most of the federal courts of appeal further recognize a second conception of "sovereignty" that involves a functional, rather than historical, inquiry. Picking up on the "tool or sham" language in *Bartkus*, 359 U.S. at 123–24, these courts say that a "limited exception" to the dual-sovereignty doctrine exists "where a state prosecution is merely a tool of the federal authorities and thus one sovereign was a pawn of the others." *United States v. Lara*, 970 F.3d 68, 82 n.6 (1st Cir. 2020) (quoting *United States v. Dowdell*, 595 F.3d 50, 63 (1st Cir. 2010)); *see also United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 494 (2d Cir. 1995). "In such a case, collusion between federal and state officials might blur their distinction such that the defendant is effectively prosecuted twice by the same sovereign." *United States v. Angleton*, 314 F.3d 767, 773 (5th Cir. 2002) (quoting *United States v. Harrison*, 918 F.2d 469, 474 (5th Cir. 1990)). Federal authorities "are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves." *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). "To fit within the exception, the defendant must show that one sovereign was so dominated, controlled, or manipulated by the actions of the other that it did not act of its own volition." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994); *see also In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990).

To be sure, three Terms ago Justice Ginsburg referred to the "tool or sham" exception as merely a

"potential" exception to the dual-sovereigns doctrine. *See Gamble v. United States*, 139 S. Ct. 1960, 1994 n.3 (2019) (Ginsburg, J., dissenting). And some of the federal courts of appeal are likewise skeptical that the exception is part of this Court's precedent. They characterize the "tool or sham" language as having merely "alluded to the possibility that dual federal and state prosecutions" might violate the Double Jeopardy Clause. *United States v. Berry*, 164 F.3d 844, 846 (3d Cir. 1999). "The *Bartkus* Court's failure to identify a particular instance of a sham prosecution may mean that the exception does not exist." *United States v. Angleton*, 314 F.3d 767, 773–74 (5th Cir. 2002) Nevertheless, "most courts… treat the *Bartkus* limitation as sound law." *United States v. Ayala*, 47 F. Supp. 2d 196, 200 (D.P.R. 1999); *see also United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005). Because the "tool or sham" exception aptly describes the relationship between the successive prosecutions of Mr. Denezpi in this case, this Court should clarify that the "tool or sham" exception is more than theoretical.

2. When a prosecution in a CFR court is followed by a prosecution in federal district court, the federal government's control over both proceedings establishes that the CFR court prosecution is merely a tool of the federal government.

During the colonial period, "the British Crown dealt with the Indian tribes formally as foreign sovereign nations." William C. Canby, *American Indian Law in a Nutshell* 15 (7th ed. 2020). After Independence, under the Constitution, Congress was given the power to regulate commerce with the Indian tribes, while the President was given the power to make treaties with them. *Id.* at 16 (citing U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2). Under the treaty regime, the federal government "generally

reserved tribal sovereignty and jurisdiction over intratribal matters" to the tribes themselves. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 522 (1976). This reservation continues today in 18 U.S.C. § 1152, the Indian Country Crimes Act, under which "the body of federally defined crimes which Congress has established for other federal enclaves" applies in Indian country. Clinton, *supra*, at 523. That statute expressly excepts from federal prosecution "offenses committed by one Indian against the person or property of another Indian" and situations where the tribe has already punished the defendant under its own law. 18 U.S.C. § 1152 ¶ 2.

In 1871, Congress declared that henceforth no "Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." 25 U.S.C. § 71. This enactment "effectively end[ed] the making of Indian treaties by serving as notice that none would thereafter be ratified." Canby, *supra*, at 22. And to further exert federal control over the tribes, in 1885, Congress vested the federal courts with exclusive jurisdiction over certain serious crimes committed by Indians in Indian country. Under the Major Crimes Act, any "Indian who commits against the person or property of another Indian" certain enumerated serious offenses "within the Indian country, shall be subject to the same law and penalties as all other persons committing" those serious offenses "within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). These defendants "shall be tried in the same courts and in the same manner as are all other persons committing such offense[s] within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242. While the original Major Crimes Act included only 7 enumerated

crimes, over time Congress has expanded that list to 14. The "reason for this listing of crimes" in the Major Crimes Act was a "deliberate effort to preserve exclusive tribal court jurisdiction over lesser offenses not covered by" the Act. Clinton, *supra*, at 540 n.173. At the same time, this Court has held that federal courts may enter convictions on lesser-included offenses of those enumerated in § 1153(a), notwithstanding any overlap with tribal authority, in order to equalize the treatment of Indian and non-Indian defendants charged with federal crimes. *See Keeble v. United States*, 412 U.S. 205, 212 (1973).

Alongside the federal government's arrogation of criminal prosecution authority in Indian country to itself stands the constriction of tribal prosecution authority, beginning with the creation of the Courts of Indian Offenses, commonly known today as "CFR courts." Originally the "clan or extended family often served as the primary institutions for the imposition of sanctions for the violation of tribal law." Clinton, *supra*, at 553. In 1883, the Secretary of the Interior established the Courts of Indian Offenses in order to "force the Indian tribes to abandon traditional 'heathenish' practices" and thus "break down traditional tribal government structures." *Id.* These courts "administer a code promulgated by the Secretary of the Interior, and the judges are Indians appointed by, and responsible to, the BIA [Bureau of Indian Affairs], which has exerted a heavy influence on these courts throughout their development." Vincent C. Milani, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 Am. Crim. L. Rev. 1279, 1281 (1994).

Creating the Courts of Indian Offenses was "a valid exercise of the power of the Secretary of the Interior as delegated to him by the Congress which holds plenary power over Indian tribes." *Tillett v. Lujan*, 931 F.2d 636,

639 (10th Cir. 1991) (approvingly quoting *Tillett v. Hodel*, 730 F. Supp. 381, 383 (W.D. Okla. 1990)). The Bureau of Indian Affairs's model criminal code, first promulgated in 1935, "establish[es] or define[s] a complete judicial system" for these courts, and was the model for early tribal courts, some of which borrowed the federal regulations as their own tribal criminal code. *Colliflower v. Garland*, 342 F.2d 369, 374 (9th Cir. 1965). These Courts of Indian Offenses thus were an example of "ultimate federal control" over tribal affairs before the establishment of tribal courts. *United States v. Wheeler*, 435 U.S. 313, 327 (1978).

Beginning in the 1950s, the federal government started to encourage tribal governments to set up their own courts, rather than rely on the Courts of Indian Offenses. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 222 (1959); Clinton, *supra*, at 554 (explaining that the federal regulations governing CFR courts "are designed to encourage tribes to set up their own courts"). "These courts are established by the tribes themselves under their own self-governing powers, but are externally limited in their powers by federal regulations relating primarily to the appointment, qualifications, and removal of judges, and the provisions of the Indian Civil Rights Act of 1968." *Id.* at 554–55. Once a tribe establishes its own courts, though, the Courts of Indian Offenses are "entirely displaced" by the tribal courts. *MacArthur v. San Juan County*, 405 F. Supp. 2d 1302, 1310 (D. Utah 2005).

Where an individual tribe has not acted to establish its own tribal court system, the CFR courts continue to adjudicate criminal cases. 25 C.F.R. §§ 11.100, 11.102. A tribe may even pass ordinances that, once they are approved by the Secretary of the Interior, are "enforceable in the Court of Indian Offenses having

jurisdiction over the Indian country occupied by that tribe." *Id.* § 11.108(a). Thus the federal government effectively enforces tribal law on behalf of the tribe. The Secretary of the Interior appoints the judges of these courts, and only the Secretary can remove them. *Id.* §§ 11.201, 11.202. These courts may only impose a maximum sentence of one year in custody and a $5,000 fine, *id.* §§ 11.315(a); 11.450, the same limitation that applies to other tribal courts, *see* 25 U.S.C. § 1302(a)(7)(B). Thus the federal government controls the nature and the ultimate outcome of any prosecution in a CFR court.

Through their governing regulations, the CFR courts punish some crimes that are enumerated in the Major Crimes Act. For example, sexual assault is punished both under 25 C.F.R. § 11.407 and chapter 109A of title 18 of the United States Code, a chapter specifically enumerated in the Major Crimes Act. Under the regulations, sexual assault can include sexual contact with a person who, by virtue of mental illness or intoxication, is incapable or appraising the nature of the sexual contact or whose ability to do so is substantially impaired. *See* 25 C.F.R. § 11.407(a)(2), (5). Those acts amount to felonies under Chapter 109A. *See* 18 U.S.C. § 2242(2)(A), (B); *United States v. Fasthorse*, 639 F.3d 1182, 1184–85 (9th Cir. 2011); *United States v. Carter*, 410 F.3d 1017, 1028 (8th Cir. 2005); *United States v. Morgan*, 164 F.3d 1235, 1237–38 (9th Cir. 1999). The regulations likewise punish statutory rape, which they define as having sexual contact with a person under the age of 16 when the actor is at least four years older than the victim. 25 C.F.R. § 11.407(a)(6). That too is a felony under Chapter 109A. *See* 18 U.S.C. § 2243(a).

But even though a CFR court may seek to punish the same crimes enumerated in 18 U.S.C. § 1153(a), *cf., e.g.*,

Alvarez v. Lopez, 835 F.3d 1024, 1026 (9th Cir. 2016) (tribal-court prosecution for an assault covered by § 1153), federal law nevertheless presumptively limits the punishment that the court may mete out to one year in custody and a $5,000 fine. 25 C.F.R. §§ 11.315(a); 11.450; *cf. Miranda v. Anchondo*, 684 F.3d 844, 851 (9th Cir. 2012) (explaining that a "tribal court may impose up to a one-year sentence for each violation of a criminal law"). Thus the federal government limits the CFR courts' power to such an extent that those prosecutions cannot result in the full extent of punishment available in federal district court. *Cf. United States v. Bryant*, 579 U.S. 140, 148 (2016) (characterizing a maximum sentence of one year in custody as "insufficient to deter repeated and escalating [domestic] abuse").

The federal government's control over how prosecutions are conducted in the CFR courts is extensive. Petitioner has explained how the CFR courts are "federal instrumentalities, in which federal prosecutors exercise federal prosecutorial discretion." (Petr's Br. at 23) The federal government can unilaterally establish a CFR court, but the tribe cannot unilaterally terminate it. (Petr's Br. at 24) Prosecutions are brought in the name of the United States. (Petr's Br. at 25) The federal government implements any sentence meted out and collects any fine imposed. (*Id.*) The federal government pays for the defendant's counsel in CFR court if he is indigent, 25 C.F.R. § 11.309(c)(2), just as it does for defendants in federal district court, 18 U.S.C. § 3006A(a). In short, the federal government is deeply involved on all three sides of the triangle—the judge, the prosecutor, and defense counsel are all on the payroll of the federal government, all arguing from or applying federal law.

These features all operate together to make a prosecution in a CFR court a tool of the federal government. Federal law creates the court; federal law limits the punishment those courts may mete out, even for crimes listed in the Major Crimes Act; federal actors play the three important roles in those courts; and federal authorities implement prison terms and collect fines imposed by those courts. Undoubtedly, then, when a defendant is prosecuted in a CFR court for a lesser-included offense of a crime later charged in federal district court, the Double Jeopardy Clause should forbid the second prosecution. *See Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959).

CONCLUSION

The decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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