No. 15-420

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL BRYANT, JR.,
Respondent.

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

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the National Congress of American Indians ("NCAI") is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians. It frequently participates in matters before this Court that implicate the interests of Indians and Indian tribes. As relevant here, American Indian and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work.

SUMMARY OF ARGUMENT

This case warrants this Court's review not only because it has created a split among the circuits, but also because of its dire consequences for efforts to protect Native women from domestic abuse. The court below held that uncounseled tribal court convictions cannot serve as predicate offenses triggering the felony

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief. The parties' letters of consent to the filing of this brief are being filed herewith.

repeat offender provisions of the Violence Against Women Act ("VAWA" or "Section 117"). This decision was wrong for multiple reasons and, if allowed to stand, will have dangerous consequences for Native women. The petition should be granted and the decision reversed.

First, the Ninth Circuit's decision will seriously impede the ability of law enforcement to prosecute and prevent domestic violence against Native women. American Indian and Native Alaskan women experience domestic violence at far greater rates than other American women. Tribal governments, meanwhile, frequently lack the authority to impose felony sentences on repeat offenders. In enacting Section 117, Congress addressed this problem by authorizing federal criminal punishment for habitual domestic violence offenders in Indian country. Congress did so knowing that it had previously guaranteed counsel to defendants in tribal courts only at their own expense. The Ninth Circuit's decision undoes this congressional action by eliminating, as a practical matter, many predicate offenses from eligibility to trigger criminal punishment under Section 117. As a result, many repeat domestic violence offenders will not receive appropriate punishment. For Native women, the price will be steep.

Second, the Ninth Circuit's decision unduly interferes with the balance that Congress has struck between recognizing tribal sovereignty and protecting the rights of the accused. As this Court has repeatedly recognized, Indian tribes are sovereign nations whose actions are not constrained by the Constitution in the

same manner as states and local governments. Thus, for instance, it is long-settled that the Constitution does not require tribes to provide free assistance of counsel to criminal defendants. Congress, in turn, has never required tribes to pay for counsel in criminal proceedings where the defendant is indigent—even though it has made certain other constitutional guarantees, including the right to counsel at one's own expense, applicable in tribal court. Here, striking a balance between tribal interests and the rights of the accused, Congress enacted Section 117 knowing full well that not all predicate convictions would be counseled. The Ninth Circuit's decision disrupts that balance—and it does so without any actual basis for extending the Sixth Amendment to cover predicate convictions in tribal court.

In the end, the decision below has dangerous real-world consequences for American Indian and Native Alaskan women, who are disproportionately likely to be victims of domestic violence. More women are likely to be beaten, raped, and killed because of the Ninth Circuit's practical elimination of a crucial law enforcement tool. Even the court below recognized the need for this Court's review: "[G]iven the sharp division over the important issues at stake in this case, Supreme Court review may be unavoidable." Pet. App. 39a; *see also* Pet. App. 42a-43a (Owens, J., dissenting from denial of reh'g en banc) ("As our court has refused to take this case en banc, only the Supreme Court can rectify this terrible situation. I urge the Court to do so as soon as possible, before Michael Bryant, and the many more men like him, terrorize more women and their families."); Pet. App. 45a (O'Scannlain, J.,

dissenting from denial of reh'g en banc) ("[*E*]*very member of the panel* has acknowledged that this case requires the Supreme Court's attention.") (emphasis in original).

The Court should grant the petition for certiorari and reverse the Ninth Circuit's decision.

ARGUMENT

I. The Ninth Circuit's Decision Will Hinder Efforts to Address the Pervasive Problem of Domestic Violence in Indian Country.

The Ninth Circuit's decision—which, as the United States shows, directly conflicts with decisions of the Eighth and Tenth Circuits—will significantly impair efforts to prosecute and prevent domestic violence in Indian country. Native women experience domestic violence at far greater rates than other American women, and for far too long, federal law has left them with inadequate protections in either tribal or federal courts. Apprehending these problems, Congress passed Section 117 to authorize much-needed federal criminal punishment for repeat domestic violence offenders. The Ninth Circuit's decision undoes these protections for women at risk of domestic violence.

A. Violence Against American Indian and Alaska Native Women is a Serious Problem.

American Indian and Alaska Native women experience domestic violence at startling rates. *See* Pet. 24-25. Sixty-one percent of American Indian and Alaska Native women have been assaulted. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and

Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 22 (2000). American Indian and Alaska Native women are 2.5 times as likely to experience violent crimes as women of other races. Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime* 4-5 (2004). One local study found that 1 in 12 Native women experience violence perpetrated by their husband every year.[2] On some reservations, the murder rate of Native women is 10 times the national average.[3]

Rape and sexual assault are particularly prevalent. One-third of Native women will be raped in their lifetimes. Attorney General's Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 38 (2014). American Indian and Alaska Native women are 2.5 times as likely to be raped or sexually assaulted as women in the United States in general. *Id.*; *see also* Michele C. Black et al., Ctrs. for Disease Control and Prevention, Nat'l Ctr. For Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3 (2011). When Native women are raped, they are more likely to

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[2] Ronet Bachman, et al, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* at 54 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

[3] *Id.* at 5.

experience other physical violence during the attack, their attacker is more likely to have a weapon, and they are more likely to have injuries requiring medical attention.[4]

Much of this violence is at the hands of intimate partners. Forty-three percent of American Indian women, and forty-six percent of Alaska Native women, will be subjected to rape, physical violence, or stalking by an intimate partner in their lifetimes. Black, et al., *supra*, at 39.

As shocking as these numbers are, they may not even capture the true scope of the problem: violence against women is systematically underreported. According to one study, between fifty and seventy-five percent of intimate-partner assaults are never reported. *See* Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 27 (2008). Women may distrust police, may fear that they will take too long to respond, or may believe the law will not be enforced. *Id.* at 104. They also may fear breaches of confidentiality or retaliation. Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 4 (2007).

Repeat offenders are commonplace, with domestic violence "often escalat[ing] in severity over time." *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014). One recent study found that women who were physically assaulted by an intimate partner averaged

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[4] *Id.* at 36.

nearly *seven* physical assaults by the same partner. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, at iv (2000). Indeed, the defendant in this case has at least eight prior domestic abuse convictions. *See* Presentence Investigation Report ("PSR") ¶ 81; Petition for Certiorari ("Pet.") 4-5.

Frequent violent episodes, moreover, are a harbinger of deadly violence in the future. *See* Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1091 (2003). That is true regardless of the severity of prior violent episodes; rather, the risk factor is the pattern of controlling and abusive behavior. As a result, the availability of felony-level sanctions for repeat offenders—even where any particular incident might not otherwise be so severe as to constitute felony assault—is an important tool to respond to an ongoing pattern of violence.

Federal law and policy, however, have undermined tribes' authority to punish and deter repeat offenders themselves. Indeed, until passage of the Tribal Law and Order Act of 2010 (TLOA), federal law limited tribal courts' sentencing authority to only one year. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258,

2279-80 (2010) (codified at 25 U.S.C. § 1302(a) and (b)).[5] The responsibility to punish felony-level crimes was left to the federal, or in some cases, the state government. As the United States notes in its petition, however, the federal government generally could not prosecute assaults unless they involved serious bodily injury, a standard that did not account for the pattern of attacks that domestic violence victims commonly encounter. Pet. 25.

B. Congress Enacted Section 117 to Assist Tribal Courts in Addressing Domestic Violence Against American Indians and Alaska Natives.

To ensure the availability of an appropriate response to habitual domestic violence, Congress enacted 18 U.S.C. § 117. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 2960, 3077-78 (2006) (setting forth findings regarding severity of domestic violence problem among American Indians and Alaska Natives). Section 117 imposes criminal penalties on a person who commits domestic assault in Indian country[6] and "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" of offenses equivalent to

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[5] Under TLOA, tribes can sentence offenders to up to three years. *Id.* Only a handful of tribes, however, have elected to make use of this provision (which is not at issue in this case).

[6] Section 117(a) also applies where the domestic assault takes place "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 117(a).

federal "assault, sexual abuse, or [a] serious violent felony against a spouse or intimate partner." 18 U.S.C. § 117(a). Section 117 thus created a new federal offense "to charge repeat domestic violence offenders before they seriously injure or kill someone" and "use tribal court convictions for domestic violence for that purpose." 151 Cong. Rec. 8983, 9061 (2005) (statement of Sen. McCain).

In enacting Section 117, Congress responded directly to the constraints on tribal and federal authority to adequately address domestic violence in Indian country. Congress recognized that, as a result of "the unique legal relationship of the United States to Indian tribes," the federal government had a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women." Violence Against Women and Dep't of Justice Reauthorization Act of 2005 § 901, 119 Stat. at 3077-78. Section 117 was necessary, Congress found, precisely because "Indian tribes require[d] additional . . . resources to respond to violent assaults against women." *Id.* Introducing Section 117, Senator McCain noted that although domestic violence was a national problem, combating it in Indian communities was particularly challenging: "[D]ue to the unique status of Indian tribes, there are obstacles faced by Indian tribal police, Federal investigators, tribal and Federal prosecutors and courts that impede their ability to respond to domestic violence in Indian Country." 151 Cong. Rec. 9062 (statement of Sen. McCain). As a result, Senator McCain continued, "perpetrators may escape felony charges until they seriously injure or kill someone." *Id.*

Section 117 struck directly at this problem. Specifically, Congress aimed to "ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." Violence Against Women and Dep't of Justice Reauthorization Act of 2005 § 902. With Section 117, federal prosecutors are able to effectively intervene in the cycle of abuse to prevent serious injury or even death. Even a single federal criminal prosecution under Section 117 can send a strong deterrent message on a reservation: habitual domestic violence offenders will be brought to justice and meaningfully punished.

C. The Ninth Circuit's Decision Will Severely Undermine the Efficacy of Section 117.

If allowed to stand, the Ninth Circuit's decision will severely hamper prosecution of habitual domestic violence offenders exactly where it is most needed. The court below recognized that uncounseled convictions in tribal courts do not themselves violate the Constitution. Yet it held that if indigent defendants do not receive appointed counsel in tribal court, those same convictions cannot "count" as predicate offenses for purposes of Section 117. The upshot is that many tribal court convictions in the Ninth Circuit cannot give rise to Section 117 convictions. The reason, quite simply, is that many tribal courts do not appoint counsel for indigent defendants as a matter of course—a fact that is unsurprising in light of a federal law that gives defendants the right to counsel in tribal court only at their own expense.

By largely eliminating Section 117 as a tool to punish and deter domestic violence among Native Americans and Alaska Natives, the Ninth Circuit's decision leaves tribes to address the problem—once again—on their own and subject to limitations on their authority imposed by federal law. Without effective recourse to Section 117, prosecutors will have to wait for substantial bodily injury—or worse—before they can intervene to hold a known repeat domestic violence offender accountable. *See* 18 U.S.C. §§ 113(a)(7), 1152, 1153. Meanwhile, Native women trapped in cycles of abuse will again be left with no protection under federal law until they are seriously injured, regardless of how often they are harassed or abused. These far-reaching consequences warrant this Court's review.

II. The Ninth Circuit's Decision Undermines the Deliberate Balance Congress Has Struck Between Tribal Sovereignty and Defendants' Rights.

The devastating consequences of the Ninth Circuit's decision for efforts to combat domestic violence in Indian communities are reason enough to grant the petition. Equally significant, however, is the opinion's disruption of the delicate balance that Congress has struck between tribal sovereignty, on one hand, and the rights of criminal defendants, on the other.

A. Congress Has Repeatedly Addressed the Intersection of Tribal Sovereignty and Defendants' Rights, and Has Declined to Require the Appointment of Counsel for All Tribal Court Defendants.

Indian tribes retain inherent sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *superseded by statute on other grounds*, *United States v. Lara*, 541 U.S. 193 (2004). As sovereigns, tribes possess the power to prosecute crimes by and against Indians within the limits of their jurisdiction. *See* Cohen's Handbook of Federal Indian Law § 9.04 (2012). In such prosecutions, tribes are not restrained by the Bill of Rights, for their "powers of local self government . . . existed prior to the [C]onstitution." *Talton v. Mayes*, 163 U.S. 376, 384 (1896). At the same time, however, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (quotation marks omitted); *see also United States v. Celestine*, 215 U.S. 278, 285 (1909); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962). In exercising this power, Congress has extended an appointed-counsel right to tribal court defendants in certain limited circumstances—but it has never done so across the board.

In 1968, Congress enacted the Indian Civil Rights Act (ICRA). Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1301-1303). ICRA, which balances tribal sovereignty against

the rights of criminal defendants, requires tribes to adhere to various criminal procedural requirements similar to those found in the Bill of Rights. *See* 25 U.S.C. § 1302; Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657, 673 (2013). For instance, ICRA statutorily bars tribes from trying a person twice for the same offense, from compelling any person in a criminal case to be a witness against himself, or from denying a criminal defendant the right to a speedy trial. 25 U.S.C. § 1302(a). ICRA also limits tribal courts' sentencing authority to one year in prison unless they provide certain additional procedural guarantees. *Id.* § 1302(a)(7).

ICRA does not, however, confer an across-the-board the right to appointed counsel in criminal proceedings. Instead, ICRA provides only that a tribal court defendant may have the assistance of counsel *at his own expense*. 25 U.S.C. § 1302(a)(6). This is so even though ICRA's passage followed *Gideon v. Wainwright*, 372 U.S. 335 (1963), the landmark decision guaranteeing appointed counsel in state criminal proceedings, by just five years. In declining to extend a right to appointed counsel, Congress may have recognized—as Justice O'Connor has observed—that "the decision-making process[es used] by tribal courts need not, and sometimes do not, replicate the process undertaken in State and Federal courts." Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 3 (1997). Thus, in some cases, tribal justice systems rely on lay advocates, and in others the judge or other decisionmaker plays a larger role in protecting the rights of the accused than

is typical in Western justice systems. Regardless of its motives, however, it is clear that Congress considered the right to counsel, yet deliberately decided *not* to require appointed counsel in all tribal court criminal proceedings.

In 2010, Congress revisited the right to counsel in tribal court proceedings when it raised the sentencing limitation on tribal courts. Again, however, it declined to categorically require appointment of counsel. Specifically, the Tribal Law and Order Act of 2010 amended ICRA to permit tribes to impose penalties of up to three years for a single offense. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279-80 (codified at 25 U.S.C. § 1302(a), (b)). Together with this authorization of increased penalties, Congress provided additional rights to criminal defendants: *If* a tribe imposes a term of imprisonment of more than one year, it must provide the defendant with certain added protections, including indigent counsel. 25 U.S.C. § 1302(c). That right to appointed counsel for indigent defendants applies only in these limited circumstances. If the defendant's punishment is less severe, Congress determined, appointed counsel is not required.

Just two years ago, Congress once again addressed these issues, and once again declined to give all tribal court criminal defendants the right to appointed counsel. The Violence Against Women Reauthorization Act (VAWA) of 2013 "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over all persons, including non-Indians, who commit domestic violence offenses against an American Indian or Alaska Native on tribal lands. Pub. L. No. 113-4,

§ 904, 127 Stat. 54, 120-23 (codified at 25 U.S.C. § 1304(b)(1)). VAWA of 2013 then created a "special domestic violence criminal jurisdiction" over non-Indians that a tribe could not otherwise exercise. 25 U.S.C. § 1304(a)(6). While thus providing tribal courts with more power, Congress granted defendants additional rights: To impose a term of imprisonment of any length under this special domestic violence criminal jurisdiction, tribes must guarantee defendants the right to appointed counsel. 25 U.S.C. § 1304(d)(2). Again, however, Congress did not see fit to extend an appointed-counsel right to *all* tribal court criminal defendants—and in any event, whether to exercise jurisdiction under VAWA is completely optional for a tribe.

In short, Congress has—over a period of nearly five decades—balanced tribal sovereignty against the rights of criminal defendants. It has never required the appointment of counsel in all tribal court criminal proceedings. Indeed, when Congress passed Section 117 in 2006, and thus allowed tribal court convictions to be used as predicate offenses for a habitual-offender prosecution, it was well aware that tribal court criminal defendants had no right to appointed counsel. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (presumption that "Congress is aware of existing law when it passes legislation"). They had only the more limited right that Congress itself afforded under ICRA: the right to retain (and pay for) counsel oneself.

B. The Ninth Circuit's Decision Flouts Congressional Intent and Undermines Tribal Sovereignty.

The decision below holds that, subject to a narrow exception not applicable here, "tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." Pet. App. 12a. Thus, the Ninth Circuit requires tribal courts to provide indigent defendants with appointed counsel if their convictions are to "count" for purposes of Section 117.

That requirement disrupts the balance that Congress has struck between tribal sovereignty and the rights of criminal defendants. In ICRA and its subsequent amendments, Congress decided "that not all provisions of the Constitution" would "be imposed upon the freedom of Indian tribes to conduct themselves in accordance with their own tribal laws." *United States v. Ant*, 882 F.2d 1389, 1398 (9th Cir. 1989) (O'Scannlain, J., dissenting). Rather, Congress has handled this question in a nuanced fashion, repeatedly refining the interaction of tribal court jurisdiction and the Bill of Rights' criminal procedure protections. Each time, Congress has declined to extend the right to appointed counsel to all tribal court defendants.

The Ninth Circuit's decision disregards Congress's deliberate choice, in the exercise of its plenary power over Indian country, *not* to require tribal courts to provide appointed counsel outside the limited circumstances set forth in ICRA as amended. In doing so, the opinion deprives Indian tribes—sovereign

nations—of the flexibility that Congress intended them to have. As Judge O'Scannlain explained in his dissent in *Ant*: "Had Congress intended that the full panoply of sixth amendment protections be imposed upon tribal courts, it clearly could have said so in the ICRA." *Id.*; *see id.* ("Because the nature of comity between tribal courts and federal courts ... is so sensitive and so delicately balanced, it is up to Congress, not [a court], to change the rules if they should be changed at all."). In enacting Section 117, Congress allowed tribal court convictions to count as predicates, knowing that those convictions may not have resulted from proceedings where the defendant was guaranteed appointed counsel. The choice was Congress's to make.

* * *

As the petition for certiorari demonstrates, the Ninth Circuit's decision contravenes Supreme Court precedent, *see Nichols v. United States*, 511 U.S. 738 (1994), creates a circuit split, and is wrong on the merits. Moreover, as explained above, the opinion will hinder efforts to address the pervasive problem of domestic violence in Indian country. Not only that, but it undermines the deliberate balance Congress has struck between tribal sovereignty and defendants' rights.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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