# **SUPREME COURT OF THE UNITED STATES**

IN THE SUPREME COURT OF T	THE UNITED STATES
MERLE DENEZPI,	)
Petitioner,	)
V.	) No. 20-7622
UNITED STATES,	)
Respondent.	)

Pages: 1 through 73
Place: Washington, D.C.
Date: February 22, 2022

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ 3 MERLE DENEZPI, ) 4 Petitioner, ) ) No. 20-7622 5 v. 6 UNITED STATES, ) 7 Respondent. ) 8 9 10 Washington, D.C. 11 Tuesday, February 22, 2022 12 13 The above-entitled matter came on for 14 oral argument before the Supreme Court of the 15 United States at 11:35 a.m. 16 APPEARANCES: 17 18 19 MICHAEL B. KIMBERLY, ESQUIRE, Washington, D.C.; on 20 behalf of the Petitioner. 21 ERICA L. ROSS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf 22 23 of the Respondent. 24 25

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1 PROCEEDINGS 2 (11:35 a.m.) 3 CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-7622, Denezpi versus 4 5 United States. 6 Mr. Kimberly. 7 ORAL ARGUMENT OF MICHAEL B. KIMBERLY ON BEHALF OF THE PETITIONER 8 9 MR. KIMBERLY: Thank you, Mr. Chief Justice, and may it please the Court: 10 11 The Double Jeopardy Clause implicates 12 two distinct exercises of sovereign authority: first, the authority to say what an offense is, 13 14 and, second, the authority to put an individual 15 in jeopardy for committing an offense. 16 This Court has consistently assumed 17 the importance to the dual-sovereignty doctrine 18 of both expressions of sovereign power. The 19 analysis thus asks not only whether the two law-giving entities draw their authority from 20 21 separate sovereigns but also whether the two 2.2 law-enforcing entities do so. 23 The government disagrees. It says that the separateness of the offense-defining 24 25 entities is all that matters. But that position

would invite the precise abuses that the Double
 Jeopardy Clause was intended to prevent, and the
 CFR courts themselves provide the evidence.
 Assault, for an example, is an offense under
 both tribal law and the BIA's regulatory
 criminal code.

7 According to the government, if Petitioner had gone to trial rather than taking 8 9 a plea on the tribal offense and he had been 10 acquitted, the very same prosecutor would have 11 been free the very next day to bring a 12 successive prosecution for a substantively 13 identical offense, this time having honed his 14 case and refined his proof based on the lessons 15 learned in the first prosecution. That is not 16 an outcome that the framers of the Double 17 Jeopardy Clause would have thought tolerable. 18 In arguing otherwise, the government 19 focuses on a single word, "offense," which it takes entirely in isolation and to which it 20

takes entirely in isolation and to which it applies rigid dictionary definitions. But the Bill of Rights prevents not only transgressions of the amendment's literal terms but also governmental efforts to circumvent their protections.

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1	Blockburger itself embodies this
2	anti-circumvention principle. It holds that
3	technically different defenses codified in
4	different code sections comprising different
5	elements nonetheless may constitute conceptually
6	the same offense for double jeopardy purposes
7	when, for example, one is a lesser included of
8	the other.
9	And our position is that the same
10	Blockburger rule ought to apply anytime a single
11	sovereign undertakes successive prosecutions,
12	regardless whether separate sovereigns have
13	defined the respective offenses.
14	And I welcome the Court's questions.
15	JUSTICE THOMAS: Mr. Kimberly, just to
16	just so I understand what you mean by the
17	we have to take the prosecution, the source of
18	the prosecution into account, let's say, prior
19	to trial, the tribe charges Petitioner here and
20	on day one. On day two, the federal
21	government charges Petitioner.
22	Are those two separate offenses with
23	which he's being charged?
24	MR. KIMBERLY: These are both charges
25	in the CFR court?

1	JUSTICE THOMAS: One in CFR court, one
2	in federal district court.
3	MR. KIMBERLY: I think those are not
4	the same offense, Your Honor, because it would
5	be the tribe bringing the charge. I think what
б	distinguishes this case
7	JUSTICE THOMAS: No, no, that's not
8	what I'm saying. The the the tribe
9	there's a there's there's a charge under
10	tribal law
11	MR. KIMBERLY: Mm-hmm.
12	JUSTICE THOMAS: that's charged on
13	for the same activity, just what we're
14	talking about here, but, before trial, the in
15	the federal prosecutor charges under federal
16	law just as you have here, but there is no trial
17	yet. Are those two separate offenses?
18	MR. KIMBERLY: If I'm understanding
19	Your Honor's hypothetical correctly, it's a
20	tribe charging one offense; it's the federal
21	government charging a federal offense?
22	JUSTICE THOMAS: Exact same charge
23	MR. KIMBERLY: Exact same charge
24	JUSTICE THOMAS: as we have here.
25	MR. KIMBERLY: before jeopardy has

1 attached. It -- it sounds to me like those are 2 separate offenses to which the dual-sovereignty doctrine would apply. I --3 JUSTICE THOMAS: Okay. Now what 4 undoes that? If, let's say, after that, the --5 you reach a -- you're tried in the CFR court, 6 7 and we have what we have, the outcome we have here, then you have a trial in federal court. 8 9 What changes the fact that you have 10 two separate charge -- two separate offenses? MR. KIMBERLY: Well, I -- I think --11 12 so there are two ways of answering this. I think the first way of answering 13 14 this is to say that when the prosecuting entity, 15 the first time, is a federal instrumentality 16 that is relying on federal law to authorize a 17 federal officer to prosecute a tribal offense in 18 federal court, that is, in effect, the United 19 States making the offense its own. After all, we -- we -- we need in the 20 CFR court the operation of a federal law --21 2.2 here, it's 11 C.F.R. 11.108 -- to make the 23 tribal offense enforceable by a federal officer 24 in federal court. And that process, the Court 25 could -- could say, in a sense imbues the

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1 offense with at least in part a federal 2 character. And that is distinct, I think -- if I 3 was understanding Your Honor's hypothetical, 4 it's distinct from when a tribe in a tribal 5 6 court pursues a prosecution for that same 7 offense. 8 JUSTICE THOMAS: Thank you. 9 JUSTICE SOTOMAYOR: Is that your only difference? Going back to our decision in 10 11 Wheeler, the Court in Wheeler went through quite 12 a number of ways in which the Navajo tribal 13 court at issue was subject to ultimate federal 14 control, and I want to know what you see as the 15 difference between the federal control 16 recognized by us in Wheeler and the federal 17 control at issue here in CF -- CRT -- CFR 18 courts? 19 MR. KIMBERLY: Well, I think the 20 question in Wheeler, Your Honor, was just 21 whether the tribes actually constitute separate 2.2 sovereigns for purposes of the dual-sovereignty 23 doctrine. And so, in undertaking that analysis, the Court looked, as it later described it in 24 25 Sanchez Valle, as -- as the wellsprings of the

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1 authority that the tribe has both to define and 2 punish crimes. 3 The Court acknowledged that there is congressional control over the tribes in certain 4 actions that they can take, but that did not 5 extinguish the -- the core source of the 6 7 authority the tribes have for defining and prosecuting offenses. 8 JUSTICE SOTOMAYOR: So tell me what 9 10 distinguishes it here. 11 MR. KIMBERLY: The -- the question 12 here is -- is somewhat different. It's accepting that those -- that the tribes in the 13 14 United States are separate sovereigns. It's who 15 is bringing its sovereign -- which of those two 16 is bringing its sovereign authority to bear in 17 prosecutions brought in the CFR courts? 18 And our position is that it must be 19 federal because prosecutors in -- the prosecutor 20 in this case, the prosecutor in the Ute Mountain 21 Ute Tribe CFR court, is a federal officer 2.2 answerable to federal authorities. He is not a 23 tribal answer -- officer answerable to tribal authorities. He draws his authority in the CFR 24 25 to prosecute, and the CFR court draws its

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1 authority to punish from the Code of Federal 2 Regulations and from the United States Code 3 authorizing those -- the promulgation of those regulations. 4 JUSTICE SOTOMAYOR: So would it have 5 mattered if the tribe had contracted with the 6 7 government to provide the prosecutor? The tribe 8 had actually provided the prosecutor? MR. KIMBERLY: I -- I think -- I think 9 10 the answer may well be yes, Your Honor. If the 11 tribe were furnishing the prosecutor such that 12 the prosecutor was answerable to tribal 13 authorities, so that one could accurately say 14 that the prosecutorial discretion being 15 exercised, the decision what charges to bring, 16 what penalties to seek, what leniency to grant, 17 what plea deal to negotiate, were, in fact, 18 expressions of tribal sovereignty and tribal 19 authority, then I think the answer is we may well be in a different situation, but we know --20 21 JUSTICE SOTOMAYOR: So it would be an 2.2 easy fix if you were to win in this case? MR. KIMBERLY: I -- if -- if --23 JUSTICE SOTOMAYOR: CFR -- CFR courts 24 25 could continue so long as the prosecutor was

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1 tribally controlled? 2 MR. KIMBERLY: I -- I think that's right. And I would say that I think there are 3 two easy fixes, Your Honor, both of which are 4 5 substantially more respectful of tribal 6 sovereignty than what happened here. 7 First, you could have a 638 contract that allows the -- the tribe to control and 8 9 bring the prosecutions. 10 Beyond that, you could also just have 11 the simple administrative fix of reallocating 12 the resources for these CFR courts to grants to the tribes to establish their own judicial 13 14 system. 15 JUSTICE SOTOMAYOR: There already are. 16 These tribes are too small to make use of those 17 grants. 18 MR. KIMBERLY: Well, I think the 19 tribes --20 JUSTICE SOTOMAYOR: The grants aren't 21 big enough. 2.2 MR. KIMBERLY: I --23 JUSTICE SOTOMAYOR: They're not big 24 enough in light of the poverty of the tribes. 25 MR. KIMBERLY: Well, that's right, but

that -- so the suggestion is rather than the federal government spending money on CFR courts, the federal government can spend money to allow these tribes to band together the -- the way that they do under the CFR courts already to create tribal judicial systems of their own.

7 In either event, either of those fixes would be more respectful of tribal sovereignty 8 9 than forcing tribes to accept the federal 10 government's taking over of responsibility to 11 bring prosecutions on behalf of the tribes, 12 which necessarily federalizes the prosecutions 13 because, again, the prosecutors are, in this 14 case and in the Ute Mountain Ute Tribe CFR 15 court, are answerable to federal authorities. 16 JUSTICE BARRETT: Mr. Kimberly, do you 17 think -- well, let me ask you this. Why aren't you making the argument that the tribal crimes 18 have been assimilated as federal crimes? 19 20 Because, if that were true, then you 21 have two federal crimes and you're just looking 2.2 at Blockburger, right, even under the 23 government's theory. Do you think that would be a winning argument if you made it? 24

25 MR. KIMBERLY: I think it would be a

12 is rather than the

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1 winning argument, Your Honor. And I think --2 I -- I would feel comfortable analogizing to the assimilation of state crimes under the 3 Assimilative Crimes Act or the Major Crimes Act. 4 I -- I think what's a little different 5 6 is, here, we know, for example, that Petitioner 7 was, in fact, charged with a violation of the Ute Mountain Ute code. When an individual is 8 9 charged under an assimilative crime under 10 federal law, he or she is charged actually with 11 the federal crime --12 JUSTICE GORSUCH: Well --MR. KIMBERLY: -- it having --13 14 JUSTICE BARRETT: So it's not assimilated. So you think it's not the same 15 16 thing? Sorry, Justice Gorsuch, I didn't --17 MR. KIMBERLY: Well, our -- I -- I'm 18 sorry. Our -- so, to be clear, our position is 19 that when a federal officer is exercising 20 federal authority in a federal court to prosecute the -- a -- a criminal offense of 21 2.2 another sovereign, it takes an exercise of 23 federal legal power to do that. And, again, we have that at 25 C.F.R. 11.108, and that, in 24 25 effect, imbues -- does imbue for double jeopardy

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purposes the offense with a federal --1 2 JUSTICE BARRETT: But I -- I thought 3 that you were making an -- an act and enforce argument. I -- I didn't understand you to be 4 disputing that this crime was a tribal crime. 5 Т 6 understood you to be seeing a distinction 7 between the regulatory crimes and the crimes that were crimes that came from the wellspring 8 of the tribe's law. 9 10 I just want to -- that is an important 11 point to me, so I want to make sure I understand 12 your position on it. MR. KIMBERLY: And -- and so I'm not 13 14 sure I understand the question. I'm sorry. 15 JUSTICE BARRETT: Are you seeing a 16 distinction between the federal regulatory 17 crimes and the tribal crimes, or are you arguing 18 that, say, you know, 25 C.F.R. 11.449 19 functionally assimilates the tribal crimes into federal law like the assimilation act does for 20 21 some state crimes? 2.2 MR. KIMBERLY: We're not making a 23 formal assimilation argument. I think it would 24 be perfectly acceptable --25 JUSTICE BARRETT: Okay.

1 MR. KIMBERLY: -- if the Court wants 2 to take that approach, but our -- our principal position is that it doesn't matter and that for 3 double jeopardy purposes, there's no meaningful 4 5 distinction. JUSTICE GORSUCH: Well, it may not --6 7 may not make a -- a meaningful distinction here, I -- I acknowledge that, but I -- I do want to 8 9 follow up on this question. And I don't want to revisit Gamble. I'm -- I -- I was in dissent 10 11 there, and so I must have been wrong. 12 But, here, am I correct that the --13 that the tribal crimes are only enforceable in 14 CFR court with the assent of the Secretary of 15 Interior? 16 MR. KIMBERLY: That's exactly right, 17 Your Honor, and that comes from -- it's -- it's duplicative of 25 C.F.R. 11.449. It's also 18 19 11.108, which is the provision that requires 20 approval of this --21 JUSTICE GORSUCH: And, historically, 22 as I understand it, that was an important feature of the law because the federal 23 government in its infinite wisdom didn't want 24 25 every tribal crime to be enforceable because

they thought some of them were not sufficiently worthy or -- of -- of -- of federal respect, is that right?

MR. KIMBERLY: I -- I think that's 4 part of it. If -- if I may supplement that --5 6 that answer, Your Honor, I think it's also 7 because the BIA itself has always understood 8 that the CFR courts and prosecutions taking 9 place within them are fundamentally federal and, therefore, must be consistent with federal law, 10 11 and, therefore, a review of tribal crimes to 12 ensure consistency with federal requirements for the operation of federal instrumentalities were 13 14 recognized.

15 JUSTICE ALITO: Can a federal criminal 16 statute include a racial classification? 17 MR. KIMBERLY: It's a fair question, 18 Your Honor. I -- I -- I think there is a 19 serious constitutional equal protection question 20 about whether or not that's the case. JUSTICE ALITO: So, if we were to hold 21 2.2 that this provision of the tribal code was 23 really federal law, we would have to confront 24 that question, wouldn't we?

25 MR. KIMBERLY: Well, I think you've

1 got to confront that -- one, I should be clear, 2 that isn't a question presented here. I think the Court would have to confront that question 3 perhaps in a future case regardless because 4 there is a federal regulatory criminal code 5 adopted by the BIA independent of tribal laws, 6 7 and that too has the same racial classification 8 as a precondition to its application.

9 JUSTICE GORSUCH: And if I might 10 return to the -- what I think of as the Bartkus 11 exception argument that I -- I take you to be 12 making that -- that the Court recognized that there are some instances where even if they are 13 14 nominally separate sovereigns, they function 15 hand in glove, to the point where we will -- we will find double jeopardy violations to occur 16 17 even if -- even if they are nominally pursued by 18 separate sovereigns.

And the -- the -- the federal government makes the argument here that the Bartkus exception shouldn't apply because they didn't really get two bites at the apple here, that your client pled guilty and that, therefore, there's no real worry, double jeopardy concern that we should attach to this

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1 case. 2 Can you respond to that argument? MR. KIMBERLY: Well, I -- this Court 3 in Green addressed the question whether it makes 4 any difference whether a criminal defendant is 5 acquitted or convicted and rejected that 6 7 distinction as relevant to the double jeopardy 8 question. So I -- there -- there's no basis 9 10 certainly in this Court's cases or I think sort 11 of our general understanding of the purposes of 12 the Double Jeopardy Clause to say it makes any difference whether he was convicted the first 13 14 time or acquitted. 15 You know, I -- I would say more 16 generally, of course, there's 25 U.S.C. 2810, 17 which calls on federal authorities to coordinate 18 these sorts of things. There's, I would submit, 19 no question that the BIA prosecutor is a federal prosecutor. He's directed by Congress to 20 21 coordinate with the U.S. Attorney's Office with 2.2 concurrent jurisdiction. That office with concurrent 23 jurisdiction, exercising the exact same 24 25 sovereign power, brought a -- under Bartkus a

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charge for the same offense, and that is -- that 1 2 is the heartland of the Double Jeopardy Clause. And -- and so I just don't see a distinction on 3 the basis that he was convicted the first time. 4 JUSTICE BREYER: Is the prosecutor --5 6 the prosecutor in the CFR court is appointed by 7 the federal government. And does he have to get 8 the federal government's approval for each case 9 that he brings under tribal law? 10 MR. KIMBERLY: In the sense that a 11 prosecutor has to get approval to bring 12 prosecutions, yes, he would seek it from the 13 federal government and not from the tribe. 14 JUSTICE BREYER: Well, I don't mean in 15 the sense that. I mean, does -- you are --16 imagine you are a CFR prosecutor, you've been 17 appointed by the federal government but 18 confirmed by the tribe, I take it, and now you 19 want to bring a case. Do you have to go to 20 Washington or somewhere or the U.S. Attorney and 21 say, can I do it? 2.2 MR. KIMBERLY: I -- I think -- I'm not 23 aware of any practical such requirement. 24 JUSTICE BREYER: All right. And is it 25 the case that the requirement there differs in

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1 any respect from the requirement of a prosecutor 2 in what is tribal courts throughout the nation? 3 MR. KIMBERLY: In other words, does a tribal prosecutor in tribal court have to get 4 tribal approval? 5 6 JUSTICE BREYER: Does the -- whatever 7 approval the individual needs, the CFR prosecutor needs to get, if he has to get any --8 now I think he doesn't have to get any. Does 9 his role differ in any way from a prosecutor in 10 11 a tribal court? 12 MR. KIMBERLY: I mean, not in --13 JUSTICE BREYER: Is the only thing 14 there that he's appointed by, or is there 15 something else? He's appointed by, with the --16 with the confirmation by the tribe, he's 17 appointed by the federal government. 18 Is there any other way in which he 19 differs from a tribal court prosecutor that you believe is important? 20 21 MR. KIMBERLY: Yes, and I think it 2.2 flows from the fact that he --JUSTICE BREYER: What is that? 23 24 MR. KIMBERLY: -- that he is appointed 25 by a federal official.

1 JUSTICE BREYER: Wait a minute. What 2 is that? MR. KIMBERLY: What it means is that 3 federal -- that the United States public --4 public policy and public safety prerogatives and 5 priorities are what drive that individual's 6 7 prosecuting --JUSTICE BREYER: Okay, I -- I've got 8 9 the same point. He's appointed by the federal -- he's appointed by the federal 10 government. Well, you have read, as I have 11 12 read, the scholars' brief, and it says, sure, there were a lot of tribal officials in 1883 13 14 appointed by the federal government. 15 And, moreover, they quote from the 16 history and reports and so forth and so on, and 17 you've read them, and they all say the Bureau of 18 Indian Affairs I guess this -- this person is 19 meant to be a tribal official in the CFR -- it 20 was then CFO, I guess -- is meant to be tribal in nature, just like the law is tribal in 21 2.2 nature. 23 Now, I mean, you've read all those 24 things. 25 MR. KIMBERLY: Sure.

1 JUSTICE BREYER: So what is your 2 response to that? Because we have on the other 3 side, on your side, he is appointed. And I take it at that time maybe the police chief in the 4 tribe was appointed. I don't know. But, 5 6 anyway, go ahead. 7 MR. KIMBERLY: Well, I think there are 8 two responses to it. The first is, in any context, for 9 10 instance, a federal prosecutor working within, 11 you know, a -- a large state will, of course, 12 also be a citizen of the state and, you know, have an interest in the same sorts of --13 14 JUSTICE BREYER: Well, that's not 15 quite what these quotes from the Bureau of 16 Indian Affairs say. In fact, they're 17 distinguishing. I mean, it's -- it's all in 18 this brief, and -- and I think it seems to be 19 quite different from what any U.S. Attorney seemed to be. All right. But go ahead. I 20 21 interrupted you and I'm sorry. 2.2 MR. KIMBERLY: Well, and -- and, 23 respectfully, Your Honor, I just -- I think the 24 -- the more direct answer is to say that it isn't -- that isn't the inquiry that the Court 25

1 makes under the Double Jeopardy Clause. 2 The BIA, in promulgating the regulations that are presently enforceable in 3 the CFR courts in 1993, dealt with a lot of 4 these same issues in comments during the notice 5 6 and comment period and it rejected all of them. 7 This is at 58 Federal Register 54,407. 8 And I'll read just a -- a -- a couple, 9 and this is all -- scattered all throughout the 10 preamble to this rule. It says: One comment 11 recommended deletion of secretarial approval of 12 tribal ordinances. This recommendation was not adopted because Courts of Indian Offenses are 13 14 federal instrumentalities, and, therefore, the 15 laws they enforce cannot be inconsistent with 16 federal law. 17 Several commenters objected to the 18 role that the -- the Assistant Secretary plays 19 in appointing judges. These recommendations 20 were not adopted because Courts of Indian 21 Offenses are federal instrumentalities and not 2.2 tribal bodies. Federal supervision is, therefore, mandatory. 23 24 Every aspect of what the federal 25 officers in these courts do is an exercise of

1 federal power, as recognized by the BIA itself. 2 JUSTICE KAGAN: Well, I guess, Mr. 3 Kimberly, I think Justice Breyer was asking you for examples of how it would matter. 4 I mean, it -- it seems to me you're in 5 6 a strange kind of position here. You're in a --7 a -- a sort of halfway house. On -- on the one 8 hand, the government has the formal argument on its side. Look, you know, this is not the same 9 offense because it's a -- because the laws are 10 11 different. So you want to say, well, you 12 shouldn't adopt that formal reading. 13 But then, on the other hand, you want 14 to not think about the practicalities of the 15 situation. So, when Justice Breyer says how does it matter, you says -- you say it doesn't 16 17 matter how it matters. 18 But I think you have to think it 19 matters, you know, that -- you know, not just 20 that there's a formal way in which the prosecutor is a federal official but, in fact, 21 2.2 that that makes a difference on the ground because, otherwise, why not just go back to the 23 24 government's formal position? 25 MR. KIMBERLY: Well, and -- and this

1 is what I was driving at, Your Honor, with 2 recognition that a federal prosecutor answerable 3 to federal authorities will necessarily pursue federal priorities. 4 So, for example, it may be a 5 6 prosecutorial priority to charge drug crimes, 7 but maybe the tribe doesn't actually care about prosecution of drug crimes. They really want to 8 9 focus prosecutorial resources on other issues, 10 like sexual assault crimes. Those sorts of 11 decisions in the system that has been set up by 12 the BIA are necessarily federal. 13 Now, you know, as a matter of comity, 14 of course, it's true that federal officials can 15 take into account the interests expressed by 16 tribes, but, nonetheless, those priority-setting 17 decisions are inherently federal and may reflect 18 different values --19 JUSTICE KAGAN: The -- the tribe seems 20 to think of these courts as very tribal. You know, I mean, there's a tribal brief, and the 21 2.2 tribal brief is on the government's side and it 23 says these are our courts. 24 And, I mean, you know, in a way, you 25 know, it's sort of like saying they're suffering

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1 from false consciousness, what -- your -- your 2 argument. 3 MR. KIMBERLY: Well, I --JUSTICE KAGAN: I mean, they believe 4 these are their courts. 5 MR. KIMBERLY: They believe -- it --6 7 it is certainly true that they rely on these courts to enforce their criminal laws. There's 8 no question about that. But -- and -- and a 9 tribe can make the sovereign decision to 10 11 allocate responsibility for enforcement of their 12 laws to the United States. But, when they do 13 that, that is, so far as the Double Jeopardy 14 Clause is concerned, that is so far as their 15 exercise of sovereignty goes. 16 JUSTICE BREYER: Why? Why? I 17 mean, look, if -- if we just look to what the 18 law is, I think it's -- the law is a tribal law. 19 Now, if we go back to 1400, tribal 20 laws were enforced by tribal officials. Now we jump to 1800 and they're still enforced by 21 tribal -- oh, oh, wait, there are some tribal 2.2 23 officials that the government wants to appoint. 24 Now that's why I'm puzzled, you see, 25 I'm actually puzzled, because you could look at

1 this individual that we're talking about and say 2 the origin of his authority is he's a tribal 3 official. And when the feds took over, they decided they'd appoint a few tribal officials, 4 in which case both the law and the root of the 5 6 prosecution are tribal. 7 Or you could say, no, we have a new official, it's going to be a fed official, and 8 9 they're going to really -- and there's some 10 evidence of this -- that we're really going to 11 get the tribe to be like Kansas City or 12 something, you know. And so how do I do the -- how -- do 13 14 you see where I'm driving at? How do I do this? 15 MR. KIMBERLY: I do, Your Honor, and 16 I'm -- I'm -- I quess I'm sympathetic to the 17 consideration. What I would say is the easy fix 18 here is just to allow the tribes actually to do 19 the job of appointing prosecutors to exercise 20 tribal authority directly and in an unambiguous 21 way. That is not what's happening here. 2.2 I would point the Court also if I may 23 to United States against Lara, which presented the question whether tribal courts -- tribal 24 25 prosecutors that were prosecuting non-member

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1 Indians for tribal offenses were, in effect, 2 acting as federal prosecutors, in other words, exercising delegated federal prosecutorial 3 authority or instead inherent tribal authority. 4 The premise of the question presented 5 6 in that case was that if the tribally appointed 7 prosecutors were -- even -- even the tribally appointed prosecutors could be exercising 8 9 federal powers so as to preclude a later federal 10 prosecution. 11 CHIEF JUSTICE ROBERTS: Counsel, I 12 don't understand why it's such -- so problematic to have different federal officials with 13 14 different perspectives on a particular matter 15 and why that necessarily means that their --16 they should be regarded -- why that is pertinent 17 on the double jeopardy question. 18 You know, in the federal government, the EPA and the Army Corps of Engineers often 19 have very different ideas about environmental 20 21 matters, and, yes, at the end of the day, they 2.2 answer to one authority and that's controlling. But I don't know why it's so -- so 23 24 surprising that here you would say to one 25 federal official, okay, we want you to represent

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1 the interests of the Indian tribe in their 2 courts and their priorities, and that -- the idea that he's the same as some -- a U.S. 3 Attorney with a different set of priorities, I'm 4 not sure that follows. 5 MR. KIMBERLY: Well, I -- I -- it 6 7 would be, I think, an unusual situation where a federal official were made answerable to some 8 9 other government in his exercise of federal 10 authority. 11 We're not aware of any other 12 circumstance --13 CHIEF JUSTICE ROBERTS: Well, 14 answerable to, I suppose, I mean, but it's a 15 rare situation, I would think, when the U.S. Attorney comes in and he's got a set of 16 17 priorities and they can prosecute those 18 priorities in their office, but to then say to 19 the official officer, the officer who is 20 handling matters for the tribe, is that you've 21 got to follow these same priorities and just 2.2 because the tribe has -- in other words, it 23 seems to me you can sort of separate out the 24 particular areas there and the -- you know, the 25 tribal officer or the officer assigned to the

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1 tribal cases, you know, might have different priorities to be applied on the reservation. 2 3 And I don't know that that would necessarily cause such great consternation in 4 the U.S. Attorney's Office. 5 6 MR. KIMBERLY: As a matter of -- of 7 practicalities, Your Honor, I think I agree. As a matter -- the BIA prosecutor you might say 8 serves sort of a different role than the 9 prosecutor in the U.S. Attorney's Office. 10 And 11 the BIA prosecutor may take more heed of Indian 12 federal comity in the decisions that he or she 13 makes. 14 CHIEF JUSTICE ROBERTS: Well, that's 15 much more concisely presented than I did, but 16 that's my point, yes. 17 MR. KIMBERLY: But -- but, Your Honor, 18 that's exactly why Congress has 25 U.S.C. 2810. 19 It requires these prosecuting entities to 20 coordinate, not necessarily to -- to stand for 21 the proposition that they must all be, you know, 2.2 rowing in the same direction on the -- on the 23 public safety priorities that are driving their prosecutorial decisions, but it's to ensure 24 25 coordination so that, for example, a CFR court

prosecution doesn't preclude by operation of the
 Double Jeopardy Clause a -- a -- a subsequent
 prosecution.

4 There were charges here that could 5 have been brought that would have resulted in 6 the same sentence that did not violate the 7 Blockburger rule with respect to the later Major 8 Crimes Act prosecution. And if that sort of 9 coordination had taken place, we wouldn't be 10 here today.

11 CHIEF JUSTICE ROBERTS: Thank you. 12 Justice Thomas, anything further? JUSTICE THOMAS: It seems that your 13 14 argument with respect to the CFR court, that it 15 is basically federal, a federal entity, wouldn't 16 we -- if -- if we bought -- if we accept that 17 argument, wouldn't we have to then ask what 18 authority appears to be an Article I court has 19 over criminal laws or the enforcement of criminal laws? 20 21 MR. KIMBERLY: I -- I think that is a

22 subsequent question, just like Justice Alito's 23 question about the racial or nationalistic 24 categorization of the sorts of defendants who 25 can be brought before these courts would be an

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1 issue that the Court has to deal with. 2 JUSTICE THOMAS: So, I mean -- but, if we conclude from that that, well, there can't be 3 a conviction under an Article I court here, then 4 seems as though there would not be a double 5 6 jeopardy problem. 7 MR. KIMBERLY: Well, undeniably, there was a conviction in this case, and courts 8 martial are also Article I courts --9 10 JUSTICE THOMAS: I know it, but those 11 are traditional. I mean, those are -- those are 12 military, and I think we've made exceptions for 13 that, as well as territorial. 14 MR. KIMBERLY: That may be so. 15 Nevertheless, the -- it is precedent for an 16 Article I court entering a -- a criminal 17 judgment. Whether -- whether -- you know, the 18 sort of broader structural constitutional 19 questions about these courts, I think, are 20 ultimately distinct questions from the -- the 21 more limited question that's presented here, 2.2 which I think turns simply on the idea that the federal government is responsible for the first 23 24 prosecution and the second prosecution. 25 JUSTICE THOMAS: Yeah, but I think

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1 you're -- you're requiring us to accept an 2 assumption that this court is the -- almost the 3 equivalent either of a tribal court or another 4 federal court. I mean, we have to assume that it has the authority to -- to convict this 5 6 particular -- the -- the Petitioner here. 7 MR. KIMBERLY: That's -- that's true, Your Honor. That's --8 CHIEF JUSTICE ROBERTS: Justice 9 10 Breyer, anything further? 11 Justice Alito? 12 Justice Sotomayor? 13 JUSTICE SOTOMAYOR: Let me stop and --14 and backtrack. Are you saying that your win 15 necessarily raises these questions, or are you 16 saying how you win? 17 MR. KIMBERLY: No, I think these 18 questions are implicated entirely independent of how the Court resolves the question presented 19 20 here. 21 JUSTICE SOTOMAYOR: All right. 2.2 CHIEF JUSTICE ROBERTS: Justice Kagan? 23 Justice Gorsuch, anything further? 24 Justice Kavanaugh? 25 JUSTICE KAVANAUGH: Both the BIA

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1	prosecutor and the AUSA are in the executive
2	branch, correct?
3	MR. KIMBERLY: That's correct,
4	ultimately answerable to the President.
5	JUSTICE KAVANAUGH: Yeah. Thank you.
6	CHIEF JUSTICE ROBERTS: Justice
7	Barrett, anything further?
8	Thank you, counsel.
9	Ms. Ross.
10	ORAL ARGUMENT OF ERICA L. ROSS
11	ON BEHALF OF THE RESPONDENT
12	MS. ROSS: Mr. Chief Justice, and may
13	it please the Court:
14	Petitioner's violent sexual assault
15	violated the laws of both the Ute Mountain Ute
16	Tribe and the federal government. Petitioner
17	thus committed two offenses, and the Double
18	Jeopardy Clause poses no bar to two
19	prosecutions.
20	For nearly two centuries, this Court
21	has recognized that the clause only prohibits
22	two prosecutions for the same offense and that
23	violating the law of one sovereign is not the
24	same offense as violating the law of another.
25	The Court also has held that the

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1 tribes and the federal government are separate 2 sovereigns for these purposes because they derive their power to prescribe conduct from 3 different sources of authority. 4 Indeed, there's no question in this 5 case that if Petitioner had been convicted of 6 7 his tribal offense in a tribally operated court, his double jeopardy claim would fail, no matter 8 9 how much assistance that -- that tribally 10 operated court received. Petitioner argues for a different 11 12 result here only because the Ute Mountain Ute Tribe made the sovereign choice for its tribal 13 code to be enforced in a Court of Indian 14 15 Offenses. But the Double Jeopardy Clause 16 focuses on the offense, and it is silent as to 17 the forum of prosecution or the identity of the 18 prosecutor. 19 Reflecting the clause's text, this Court's decisions have likewise focused on the 20 ultimate source of authority for the offense, 21 2.2 which here is unquestionably tribal, as I take Petitioner to concede. 23 And the Court has rejected similar 24 25 inquiries that would turn on a sovereign's

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1 functional autonomy, explaining that they would 2 lead to unclear and inconsistent results. 3 But even if the nature of the court or the prosecutor mattered, Petitioner would fail 4 his own test. The authority for Petitioner's 5 first prosecution derived from the tribe's 6 7 preexisting power to prosecute offenses between 8 Indians, which the tribe still possesses today. 9 The tribe has simply made the sovereign choice for the time being, which it 10 11 can change, to use a Court of Indian Offenses to 12 help enforce its laws. That exercise of the 13 tribe's sovereignty warrants respect under the 14 Double Jeopardy Clause, as every relevant 15 sovereign, including the tribe itself, has 16 argued to this Court. 17 I welcome the Court's questions. 18 JUSTICE THOMAS: Ms. Ross, just to, 19 for my purposes, clarify the underlying facts in 20 this case, could you just explain why the -- the 21 first trial winds up or the first proceeding 2.2 winds up with 140 month -- 140 days -- was it 23 140 days or 140 months? 24 MS. ROSS: It was 140 days, Justice 25 Thomas. And --

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1 JUSTICE THOMAS: For a sexual assault, 2 and the -- and then the ultimate federal case winds up with -- is it 360? 3 MS. ROSS: I believe that's correct, 4 5 Your Honor. So -- so the reason why is because 6 \_ \_ 7 JUSTICE THOMAS: I'm sorry, 360 months. 8 9 MS. ROSS: Yes. JUSTICE THOMAS: Not 360 days. 10 11 MS. ROSS: Yes, Justice Thomas, 360 12 months. And the reason why is because, as this Court recognized in Wheeler, because it's 13 14 equally true, to go to some of Justice 15 Sotomayor's questions with respect to tribally 16 operated courts, Congress has limited the 17 sentence that can be imposed in either a Court 18 of Indian Offenses or a tribally operated court. 19 It has, in fact, defined Indian courts for 20 purposes of the Indian Civil Rights Act to 21 include Courts of Indian Offenses. 2.2 So, in either forum, the -- the cap 23 applies. That's generally one year, and I believe it's a \$5,000 fine. It can be a little 24 25 bit higher in some circumstances. But those

1	apply
2	JUSTICE THOMAS: But I guess my
3	question is more why spend time on that when
4	there's a more serious underlying offense?
5	MS. ROSS: Oh. Certainly, Justice
6	Thomas. So I think because, as some of the
7	questions suggested earlier, the the Court of
8	Indian Offenses is concerned with violations of
9	tribal law and offenses between Indians on the
10	reservation, and and so, because the tribe
11	still has a sovereign interest as expressed
12	through the criminalization of this conduct, I
13	think, you know, the fact that a lesser sentence
14	is available doesn't necessarily mean that there
15	isn't an interest to be served there.
16	I would also point out that the the
17	Court of Indian Offenses prosecution in this
18	case happened much more quickly, and so that
19	that prosecution also provided immediate
20	incapacitation in a way that a federal
21	prosecution that comes later may not.
22	CHIEF JUSTICE ROBERTS: Well
23	JUSTICE THOMAS: Thank you.
24	CHIEF JUSTICE ROBERTS: or or
25	one reason to do is to get a dry run on the

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1 federal trial, right? There's a lot at stake 2 here. The sentence shows that. You -- you want to make sure you have as effective a prosecution 3 as you can, so, you know, run a prosecution 4 through the CFR court, see what evidence they 5 6 has, whatever, and then take -- take a much 7 stronger case when there's more at stake. MS. ROSS: So, respectfully, Mr. Chief 8 9 Justice, I don't think there's any suggestion or 10 evidence that that happened either in this case 11 or more generally. I would point the Court --12 and I think this is responsive to some of the 13 questions from Justice Kagan and Justice 14 Sotomayor and others about how this works on the 15 ground. 16 I'd point the Court to page 5 of the 17 former United States attorneys' brief, where 18 those former United States attorneys who had 19 jurisdiction over districts that include crime -- Courts of Indian Offenses make very clear 20 21 that they did not supervise BIA prosecutions and 2.2 they did not -- to their knowledge, none of the 23 AUSAs did either. There just simply isn't this 24 commingling --

25 CHIEF JUSTICE ROBERTS: Well, I'm not

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1	suggesting any anything happened like that
2	here, but it certainly is a possibility. And
3	I'm not suggesting there's anything wrong with
4	it. I mean, that's how the Double Jeopardy
5	Clause works with respect to state prosecutions.
6	But but I I guess I share, if it was
7	Justice Thomas's concern, that it seems unusual
8	that you waste time on a serious offense with
9	such a small possibility small possible
10	sentence when there's a lot more at stake in
11	what would follow?
12	MS. ROSS: So so, respectfully, I
13	don't think it's a waste of time from the
14	tribe's perspective. The tribe has criminalized
15	this conduct. This Court has recognized that
16	the tribe still has the power to criminalize
17	this conduct. And so that expression of the
18	tribe's displeasure with this conduct and
19	condemnation of this conduct, I think, is a
20	significant aspect of sovereignty itself.
21	The other
22	CHIEF JUSTICE ROBERTS: Well, you can
23	
24	MS. ROSS: point I would make
25	CHIEF JUSTICE ROBERTS: say that,

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1 but I suppose the tribe if -- it may be more 2 interested, or somebody, in the fact that the guy is going away for 30 years as opposed to 140 3 days, if I've got the math right. And, I mean, 4 yes, the 140 days, or, really, it was time 5 served, might show that the tribe has these 6 7 particular interests, but I suspect their interests are being more served by the 30-year 8 sentence in the other forum. 9 10 MS. ROSS: So -- so, again, because 11 the same limitations on sentences apply in 12 tribally operated courts, precisely the same thing happened in Wheeler, when the limits were, 13 14 in fact, even lower on tribal prosecutions. 15 There was an initial tribal prosecution with a 16 limited sentence because of that limitation and 17 then a subsequent federal prosecution with a 18 greater sentence. 19 I think that's sort of the common fact 20 pattern and, indeed, is a reason why having the 21 -- the federal prosecution not be barred by the 2.2 prosecution for a tribal offense is a good 23 thing, not a bad thing. JUSTICE GORSUCH: Well, Ms. Ross, 24 25 these CFR courts have long been -- sit uneasily

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1 with our separation of powers, as Justice Thomas 2 pointed out and the BIA has acknowledged for a 3 century. But we can avoid all that, it seems to me, if we -- if we apply our existing double 4 jeopardy jurisprudence under Bartkus. 5 6 And -- and my first question to you 7 is, does the government -- does the government acknowledge that there is what -- what I've 8 9 called the Bartkus exception, that though there 10 may be nominally two separate sovereigns 11 involved, even in those circumstances, sometimes 12 double jeopardy can be implicated? 13 MS. ROSS: So, Your Honor, I -- I 14 think Bartkus left open what Justice Ginsburg 15 described as I think the possibility or -- or 16 the -- the possibility of that exception. I 17 don't think that's borne out in the last 60 years of precedents --18 19 JUSTICE GORSUCH: Okay. But you --20 you --21 MS. ROSS: -- since Bartkus. 2.2 JUSTICE GORSUCH: -- the government acknowledges that possibility exists? 23 MS. ROSS: No. No, Justice Gorsuch. 24 25 So -- so I would say that that possibility has

1 essentially just not borne fruit and it should 2 not be taken -- it was not a holding of --3 JUSTICE GORSUCH: Well, it's actually 4 been applied in the lower courts, right? I mean 5 \_ \_ 6 MS. ROSS: So --7 JUSTICE GORSUCH: -- lower -- lower 8 courts have applied that exception? MS. ROSS: -- so the lower courts have 9 10 considered the -- the exception. To our 11 knowledge, there's no court of appeals decision 12 actually finding it satisfied. 13 And I think that combined with the 14 fact that the Court itself has not cited Bartkus 15 for this proposition and that it sets -- sits 16 uneasily with the -- the remaining very --17 JUSTICE GORSUCH: Are you asking us to 18 overturn that language in Bartkus or reject it? 19 MS. ROSS: So -- so I don't think it 20 would require an overturning. I think it wasn't a holding at the time. And, in fact, Justice 21 2.2 Brennan in dissent noted that if the facts there 23 didn't qualify, nothing would. 24 And so --25 JUSTICE GORSUCH: Okay. Okay. Let --

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1 so let's assume it exists then. At least it's a 2 possibility you're not asking us to reject it. 3 That's how I'll take your -- your answer. Why wouldn't this circumstance qualify 4 if -- and if it doesn't, maybe nothing would, I 5 6 guess, is my question to you. 7 MS. ROSS: So -- so --JUSTICE GORSUCH: You have --8 9 MS. ROSS: Sorry. JUSTICE GORSUCH: You have a law that 10 11 has to be approved by a federal executive 12 officer, a federal prosecutor before a federal 13 forum. And, as I believe you pointed out, this 14 initial prosecution, if it isn't strictly 15 speaking a dry run or a hand-in-glove sort of 16 thing, provides for immediate incapacitation in 17 a way that might not be possible in federal 18 court. If -- if this doesn't qualify, would 19 anything? 20 MS. ROSS: So, respectfully, Justice 21 Gorsuch, I actually think that the Bartkus 2.2 "exception" does not exist as -- as a matter of 23 sort of binding law, I don't think. JUSTICE GORSUCH: Okay. But, if we --24 25 if we -- if we disagree with you about that and

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we take our language in Bartkus seriously. 1 2 MS. ROSS: Certainly. So I don't 3 think this would qualify and it's for many of the reasons that I was providing to the Chief 4 Justice. There is no coordination on the 5 6 ground. There's no suggestion that there has 7 been any attempt to circumvent anything here. 8 Really, the tribal prosecutor or the BIA prosecutor is enforcing the tribe's interest in 9 10 having its own law enforced, and the federal 11 prosecutor is looking at whether federal 12 interests have still been vindicated under 13 federal law. 14 JUSTICE GORSUCH: Can you imagine --15 JUSTICE KAGAN: So --16 JUSTICE GORSUCH: Can you imagine --17 I'm sorry. 18 JUSTICE KAGAN: No, please. 19 JUSTICE GORSUCH: Just one last 20 question. Can you imagine a circumstance in which that Bartkus exception would apply? 21 2.2 MS. ROSS: No, Your Honor. I think 23 the better -- the better way to handle that would be to use what this Court has developed 24 25 since Bartkus, namely the -- the Ashe versus

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1 Swenson Doctrine when you have a prior acquittal 2 giving that collateral estoppel effect. And I 3 think the reason why is because Ashe is already a very fact-intensive --4 5 JUSTICE GORSUCH: So --MS. ROSS: -- doctrine. 6 7 JUSTICE GORSUCH: -- two convictions 8 can -- can never implicate Bartkus? 9 MS. ROSS: I think that's right, Your 10 I think that's consistent with this Honor. 11 Court's decision in Dixon where Justice Scalia 12 explained that so long as you have two separate 13 offenses, as we think you clearly do here, under 14 the text of the Double Jeopardy Clause, you 15 would be able to bring two separate 16 prosecutions. The -- the government --17 JUSTICE SOTOMAYOR: Ms. Ross? 18 MS. ROSS: Yes. 19 JUSTICE SOTOMAYOR: I count at least 20 five or six Supreme Court cases that emphasize not over the -- not only the power to enact 21 2.2 criminal law but also the power to enforce it, 23 to prosecute it. So we have a long history of over 100 24 25 years of recognizing that it's not just the

source of the power, the law, but the power to
 prosecute it, which is what your -- your
 plaintiff is saying.

And I read Bartkus as basically acknowledging that, that the Bartkus exception was borne on the presumption that the Double Jeopardy Clause doesn't want one prosecutor to decide the sequence of prosecution to give itself an advantage in the way that Justice Roberts pointed out.

Here, we have one federal prosecutor deciding whether or not to give itself the potential of a pre-run of a case by choosing a lesser crime to preview the criminal prosecution and then, sequentially, that same prosecutor, a federal prosecutor, to decide to prosecute a federal crime.

18 And so that's where I'm having my 19 problem, which is you want a reading of the 20 Double Jeopardy Clause that takes away a century of decisions that say it's not just the source 21 2.2 of law, it's the source of who's prosecuting it. MS. ROSS: So, Justice Sotomayor, I 23 think there's a lot in that question, and I'd 24 25 like to sort of try to get to all of the points.

The first is that, you know, I -- I 1 certainly acknowledge that this Court has talked 2 3 about the power to prosecute at times. I think that was in cases where, as is often true, the 4 power to prosecute and the power to prescribe 5 6 ran together and traveled together. 7 And so I don't read those decisions to necessarily adopt a second test in the way that 8 9 Petitioner suggests. I think that's particularly clear if you look at --10 11 JUSTICE SOTOMAYOR: No, it's one test. 12 MS. ROSS: Well --JUSTICE SOTOMAYOR: You have to have 13 14 both, as he says, a source of law and a source 15 of prosecution that are different. 16 MS. ROSS: So I think --17 JUSTICE SOTOMAYOR: If you have the 18 same, then you're going to have a double 19 jeopardy problem. 20 MS. ROSS: I think the problem with 21 that understanding, Justice Sotomayor, though I 2.2 do want to get to why I think we would win even 23 under that understanding, but I think the problem with that understanding is that 24 25 Petitioner has not even tried to find a -- a

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1 hook for the prosecutorial power prong in the 2 text of the Double Jeopardy Clause. 3 As this Court explained most recently in Gamble when it was asked to reconsider and, 4 in fact, reaffirm the -- the dual-sovereignty 5 doctrine, the -- the doctrine is based on the 6 7 word "offense." 8 JUSTICE SOTOMAYOR: Except Bartkus 9 focused in on it by noting the exception. So it 10 understood that double jeopardy had something to 11 do both with offense and who's enforcing it. Is 12 it the federal government or is it the state? And, here, we have a hybrid situation 13 14 and we're being asked to figure out who's 15 enforcing the law, the tribe or the federal 16 prosecutor? And, here, let's not forget that 17 the federal prosecutor charged this as a federal crime, the U.S. versus this defendant. He 18 19 didn't charge it as the tribe versus the 20 defendant. 21 MS. ROSS: So, Justice Sotomayor, I'd 2.2 like to take one more run at sort of the first 23 half of the question and then pivot to the second half. 24 25 I think, on the first half, there's

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1	just nothing in the text of the clause that
2	speaks to the power to prosecute. It's phrased
3	in the passive voice. It's focusing on the
4	offense. It says nothing about the form of the
5	prosecution or the identity of the prosecutor.
6	I think that's particularly
7	significant because it's common ground here that
8	at the time of the framing, it was entirely
9	possible that state courts would, in fact, be
10	the form of prosecution
11	JUSTICE SOTOMAYOR: So how does
12	MS. ROSS: for federal offenses.
13	JUSTICE SOTOMAYOR: the tribe here
14	does the tribe have any voice in what charges
15	tribal charges the tribe brings?
16	MS. ROSS: Absolutely, Justice
17	Sotomayor, and that gets to the second half of
18	the question. I want to emphasize the many ways
19	in which the tribe does have control here. And
20	I think this brings up the administrability
21	problems that were discussed earlier because I
22	take it on Petitioner's view, anytime one of
23	those levers was switched in a different
24	direction, you would need a new analysis.
25	So, to to to talk about how this

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1 actually works in practice, the tribe has the 2 decision in the first instance whether to have a Court of Indian Offenses or whether to use its 3 own tribally operated court. 4 JUSTICE SOTOMAYOR: No, no, no. 5 6 MS. ROSS: It then has --7 JUSTICE SOTOMAYOR: Does the tribe 8 decide -- have any input into the charges the 9 federal prosecution brings? 10 MS. ROSS: Yes, Justice Sotomayor. 11 JUSTICE SOTOMAYOR: Does it say yes, 12 you can charge this individual with this crime? MS. ROSS: So I do not -- there's 13 14 nothing in the regulations on this. My sense is 15 that that is not done on a charge-by-charge 16 basis. It is done at a broader level of 17 generality. So the tribe can choose to have its 18 ordinance enforced in the first place. It can 19 obviously change the way its ordinance is 20 written if it thinks it's being applied in --21 improperly, and it can convey just the sorts of 2.2 prosecutorial priorities that I think my friend stated it could not. 23 24 So the tribe can say, you know, yes, 25 we want DUI prioritized. Yes, we want --

1 JUSTICE SOTOMAYOR: Where do I look --2 JUSTICE KAGAN: So --3 JUSTICE SOTOMAYOR: -- to see that? MS. ROSS: I'm sorry? 4 JUSTICE SOTOMAYOR: What do I look at 5 6 to see that? 7 MS. ROSS: So that last point I think 8 is just simply an absence of any evidence in the 9 -- the regulations to the contrary. I mean, I have been informed that that is how this works. 10 I think it's also clear from the tribe's own 11 12 brief. 13 JUSTICE SOTOMAYOR: I cede my time to 14 \_ \_ 15 JUSTICE KAGAN: I mean, Ms. -- Ms. 16 Ross, what would happen if the facts were 17 different? I -- I mean, I think you -- you -you have a good case that -- and the -- the 18 19 tribe backs you up on this, that the tribe seems 20 to think that this is a quite tribal enterprise 21 at its heart, but -- but I see nothing to 22 prevent it from turning into something entirely 23 different. 24 I mean, suppose you had a case in 25 which the prosecutors for this Court were all

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1	detailed from the regular U.S. Attorney's Office
2	for a period of a year, had established
3	relationships with the U.S. Attorney's Office,
4	there was, you know, a practice of every week
5	the prosecutor would come in and talk to the
6	U.S. Attorney about what was going on in the
7	trial court, there was a list of tribal laws
8	that the U.S. Attorney was comfortable about
9	enforcing and a list that the that the U.S.
10	Attorney was not comfortable about enforcing,
11	that the tribe really had no say in this
12	whatsoever, that it was top to bottom a U.S.
13	Attorney-run decisionmaking as to which tribal
14	laws would be applied in what ways.
15	I mean, would you still be here saying
16	the same thing?
17	MS. ROSS: So so, Justice Kagan, I
18	take the the hypothetical to suggest that the
19	regulations would have changed tremendously
20	because that none of that would be possible
21	under the current regulations.
22	So, you know, I just want to be clear
23	that under the current regulations, the tribe
24	can pull out of the system, the tribe can
25	appoint the prosecutor, it can pull its own

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1 ordinances out, et cetera. It has a lot of 2 control. 3 In the -- the hypothetical world of regulations that -- that I think you're 4 imagining, I think we would still be making the 5 6 same argument, and I think that that argument 7 just comes down to the text of the Double 8 Jeopardy Clause, but --9 JUSTICE GORSUCH: Isn't -- isn't that 10 a problem, I mean, and, in fact, isn't historically -- I mean, historically, these 11 12 courts have not always been so friendly to 13 tribes. They were not created to be friendly to 14 tribes. And the hypothetical Justice Kagan 15 posited was, in fact, true for much of our 16 history. 17 So why should our double jeopardy 18 analysis turn on the graces of the government's 19 regulations today? And on what basis do you 20 really want to make the argument that double 21 jeopardy wouldn't attach, say, a hundred years 2.2 ago the way these courts were operated? 23 MS. ROSS: So, Justice Gorsuch, I 24 think the -- the reason why we would make that 25 argument is because, so long as the tribe still

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1 had the authority to say yes, you know, we're 2 adopting a criminal code, and that code is being 3 enforced --4 JUSTICE GORSUCH: But that code only pertains to the extent that an Assistant 5 6 Secretary of the Department of Interior says it 7 pertains, right? MS. ROSS: So, Justice Gorsuch, that 8 was equally true in Wheeler. The -- the tribe 9 there had to have its tribal code approved 10 11 before it could have a Court of Indian --12 JUSTICE GORSUCH: But that's right? MS. ROSS: -- or, excuse me, a tribal 13 court. 14 15 JUSTICE GORSUCH: I'm -- that --16 that's true, correct? 17 MS. ROSS: I'm sorry? 18 JUSTICE GORSUCH: That -- that is 19 true, that it's up to the Secretary of the 20 Interior or the Assistant Secretary of the 21 Interior? 2.2 MS. ROSS: So it is true that there 23 has to be tribal -- that there has to be 24 Assistant Secretary approval. I believe it's 25 under 11.449. But, again, that was equally true

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1 in Wheeler, and this Court said and I think it 2 reemphasized --3 JUSTICE GORSUCH: So let's -- let's -let's just take Justice Kagan's hypothetical, 4 which wasn't so hypothetical, and the Assistant 5 6 Secretary says, I find many of these tribal laws 7 to be savage and we will not enforce them. And, instead, we're going to enforce only our written 8 9 code, written by bureaucrats at the Department 10 of Interior, enforced by an executive officer 11 who may report fully to the U.S. Attorney's 12 Office before -- and another executive employee who happens to be the "judge" in the case. 13 14 No double jeopardy then? 15 MS. ROSS: There would be double jeopardy then, Justice Gorsuch, because the key 16 17 difference there is that the federal government 18 has defined the offense using its own sovereign 19 authority. 20 The difference, and what I took to be Justice Kagan's hypothetical, was that you still 21 2.2 have a choice of the tribe to use a tribal court 23 or, excuse me --24 JUSTICE GORSUCH: So then --25 MS. ROSS: -- a Court of Indian

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1 Offenses for --2 JUSTICE GORSUCH: -- so then, if 3 that's true, your -- your -- your concerns about 4 administrability rear their ugly head again, 5 don't they, because now double jeopardy turns on whether the offense being charged comes from the 6 7 Assistant Secretary's choice of a tribal law or his own criminal code. 8 9 MS. ROSS: I don't think that raises a 10 -- an administrability problem, Your Honor, any more than the fact that, you know, state law 11 12 versus federal law raises an administrability 13 problem. 14 JUSTICE GORSUCH: Well --15 MS. ROSS: That's sort of always true. 16 JUSTICE GORSUCH: -- okay, okay. So 17 you -- so it does, though. You'd say that in 18 those cases where we have federal law, the 19 Assistant Secretary's personal code that he's 20 written, that's a double jeopardy problem, 21 right? 2.2 MS. ROSS: Yes, Justice Gorsuch. 23 JUSTICE GORSUCH: Okay. 24 MS. ROSS: And that flows from the 25 text.

1	JUSTICE GORSUCH: And if that's if
2	that's true, then why isn't his selection of
3	which tribal offenses shall be enforceable and
4	which shall not be subject to the same rule?
5	MS. ROSS: Because each of those
6	offenses is still an exercise of the tribe's own
7	authority. I want to be clear I don't think
8	this is actually happening on the ground, that
9	the Assistant Secretary is saying, well, you
10	know, I don't like this ordinance, so I'm not
11	going to allow its enforcement.
12	But I think either way that it's still
13	the tribe's own sovereign authority in enacting
14	that.
15	JUSTICE GORSUCH: But just so I'm
16	clear, the the Assistant Secretary can curate
17	the tribal code and there would be no double
18	jeopardy problem according to the government?
19	MS. ROSS: I think that's correct,
20	Your Honor. Of course, the tribe could still
21	have the authority to pull out of the Court of
22	Indian Offenses altogether, to pull its offenses
23	out.
24	And so, again, this just goes and I
25	think does go to the administrability problem on

1 Petitioner's rule that, in each of these ways, 2 the tribe has authority here to sort of calibrate how much or how little of a role it 3 wants to have. 4 I think one important point here is 5 6 that this tribe actually used to have a -- its 7 own tribally operated court. It chose to opt into the Court of Indian Offenses. It could 8 9 equally choose tomorrow to opt out of the Court 10 of Indian Offenses, and that's because this is a 11 prosecutorial power, to those who think that 12 that is significant here, that resides with the tribe, just as it has, as Sanchez Valle notes in 13 14 Footnote, I believe it's 5, from sort of 15 primeval times. 16 JUSTICE KAGAN: I mean, Ms. Ross --17 JUSTICE BREYER: You were going to 18 list some others -- you were going to list some 19 others in -- when Justice Sotomayor was talking 20 to you, other respects in which the tribe can 21 control either the presence of the prosecutor 2.2 and the judge -- who appoints the judge? 23 MS. ROSS: The -- the judge is 24 federally appointed. 25 JUSTICE BREYER: Federal, okay. So

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1	the prosecutor, they can opt in or out.
2	MS. ROSS: Mm-hmm.
3	JUSTICE BREYER: And you said at one
4	point, I thought, that they can decide who the
5	prosecutor will be, and I thought you said they
6	could decide whether this prosecution would go
7	forward. Are either of those things true?
8	MS. ROSS: So the first one is true,
9	Justice Breyer.
10	JUSTICE BREYER: Yeah.
11	MS. ROSS: 11.204, I believe it is,
12	provides for the
13	JUSTICE BREYER: And that's in your
14	brief?
15	MS. ROSS: Yes. Provides for
16	JUSTICE BREYER: Okay. Anything else?
17	Okay. Got that, go ahead.
18	MS. ROSS: So I I want to clarify.
19	I I am not aware of it being true on the
20	ground that the prosecutor would or that the
21	tribe would say we don't want you to prosecute
22	Mr. X or we do want you to prosecute Mr. Y.
23	JUSTICE BREYER: Okay, not that. Is
24	there anything else you want to bring up they
25	can do?

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1	MS. ROSS: Yes. So there are sort of							
2	the broad prosecutorial priorities that I							
3	mentioned earlier from the regulations.							
4	JUSTICE BREYER: How?							
5	MS. ROSS: They can also							
6	JUSTICE BREYER: How do they set the							
7	priorities?							
8	MS. ROSS: So I think there's two							
9	ways. There's one, there's just sort of							
10	conversations, but two, of course, because the							
11	tribe maintains the ability both to rewrite the							
12	law and to pull the prosecutor function if it							
13	wants to contract for that instead entirely, it							
14	does exercise a fair amount of control over the							
15	prosecutor him or herself.							
16	The others that I would note, you							
17	know, they can contract for the clerks here,							
18	they contract for the public defender service							
19	and a bunch of other administrative							
20	capabilities. They also decide whether, as I							
21	was mentioning earlier, tribal law is enforced							
22	in this forum at all. And, of course, they							
23	always have the option to to choose to have a							
24	tribally operated court.							
25	TUCTICE KACAN: Who are there							

25 JUSTICE KAGAN: Who are these

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1 prosecutors? 2 MS. ROSS: So I -- I -- I 'm not 3 sure if I'm understanding the question correctly, but --4 JUSTICE KAGAN: I mean, you know, how 5 6 do they get picked? 7 MS. ROSS: So --JUSTICE KAGAN: You know, you could --8 9 you could imagine a couple of different systems. You know, one is very tribe-centric. 10 The tribe 11 gives a list to the BIA and the BIA says those 12 look like good people. Or, on the other hand, you could imagine a world in which they were all 13 14 detailed from the U.S. Attorney's Office. Or 15 you could imagine things in between. 16 What are they? 17 MS. ROSS: So, per regulation, Your 18 Honor, they have to be approved by a vote of 19 two-thirds of the tribal council. And so I think, you know, I apologize I don't know 20 21 exactly the details. My sense is that it 2.2 probably does differ between different Courts of 23 Indian Offenses because these are spread out, 24 you know, a -- a little bit. 25 But the -- the tribe has to give its

approval through a two-thirds vote. And I think it -- it seems as though, you know, given that that there is a fair amount of discussion about -- about these things. And, of course, again, the -- the prosecutor can be chosen by the tribe if the tribe elects to contract for that function.

And I think, just to take Petitioner's 8 concession that, you know, that would make a 9 difference here, I think that sort of brings up 10 11 precisely the administrability points that you 12 noted in your opinion for the Court in Sanchez Valle in Footnote 3 that, you know, the historic 13 14 analysis allows us to classify what this Court 15 referred to as broad classes of governments for 16 purposes of the Double Jeopardy Clause, whereas, 17 on Petitioner's view, I think you would need a 18 new analysis not only for every Court of Indian 19 Offenses but for every time they changed 20 something like the prosecutor, perhaps, you 21 know, like the --

JUSTICE KAGAN: But, I -- I mean, it strikes me that the Petitioner has a fairly simple administrable rule, and it would go something like this. You know, with respect to

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1 these courts, you know, they all differ on the 2 ground and maybe some of them are functioning perfectly, maybe all of them are functioning 3 perfectly, but -- but there are dangers here, 4 you know, of the kinds that I was trying to 5 6 suggest in the hypothetical I gave you. 7 And in order to forestall those dangers, we just have one simple rule, which is 8 9 that the tribe has to pick the prosecutor. I 10 mean, that's a perfectly administrable rule. 11 Why not? 12 MS. ROSS: So -- so I think the why 13 not is really the text of the clause. I think 14 that the -- the Double Jeopardy Clause does not 15 protect against everything that one could 16 envision as a jeopardy in theory. It protects 17 against double jeopardy for this -- or -- or two 18 prosecutions for the same offense. 19 JUSTICE KAGAN: Right. But that 20 really makes your argument just like here is 21 what the text says. The text is all about law. 2.2 It's all -- it's all about law. It doesn't 23 really matter what the facts are, what the 24 dangers are, whether every one of these 25 prosecutions becomes a dress rehearsal for the

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1 next bigger prosecution. We just close our eyes 2 to all of that and it's just like is it the same 3 law? MS. ROSS: So I -- I do think that 4 that is a perfectly appropriate way to resolve 5 the case. To take the -- the very -- the -- the 6 7 much more practical concern about the prosecutor, you know, I think, if you had a rule 8 9 in which the -- the tribe, as long as it 10 selected the prosecutor, it was fine to have 11 these two separate offenses prosecuted 12 separately, you know, I think there are good 13 reasons why tribes choose not to have -- choose 14 not to appoint the prosecutor themselves. That. 15 is a choice that's available to them under the 16 regulations. And I think, you know, the fact that 17 18 this tribe has chosen not to do that is itself a 19 sovereign choice that warrants respect. If I could -- if I could make one 20 21 other point with respect to sort of the -- the 2.2 animating principles of the clause here, I think 23 it's important to think about this case in the context of other criminal defendants and public 24 25 safety and victims.

1	If Petitioner Petitioner is a
2	member of the Navajo Nation, as was his victim.
3	If Petitioner had stayed on the Navajo Nation
4	reservation and committed this sexual assault,
5	there's no question that he would be subject to
6	one prosecution for a tribal offense and one
7	prosecution for a federal offense. That's
8	essentially the facts of Wheeler with a slightly
9	different crime.
10	And so I think what Petitioner is
11	asking for here is really a different rule based
12	on the happenstance that he went to the
13	reservation of a tribe that uses a different
14	form of tribal court. And and I don't think
15	that there's anything
16	JUSTICE ALITO: Suppose someone you
17	mentioned that the defendant is a I'm sorry,
18	the Petitioner is a member of the Navajo Nation.
19	Suppose someone who is of Indian ancestry has
20	not associated at all with a tribe and says, I
21	don't I don't identify as an Indian. Can
22	that person be tried before a CFR court?
23	MS. ROSS: I apologize, Justice Alito.
24	I'm not sure the answer to that question. I
25	think it goes to how the code defines an Indian.

1 And I just -- I haven't sort of run that because 2 it hasn't been presented in this case. 3 JUSTICE SOTOMAYOR: Counsel, I am -- I am a little concerned with your answer to 4 Justice Kagan because I understand, 1999, 2000, 5 the United States took the position with a --6 7 not this tribe but another tribe that it could unilaterally establish a CFR court without the 8 9 tribe's permission and appoint a magistrate without any need for confirmation by the tribal 10 11 governing body. 12 I've been looking for it in my notes 13 and just forgotten, but assume that that example 14 does exist. Your answer leads me to believe 15 that Justice Kagan's simple rule is much more 16 administrable than us writing an opinion today 17 that says because -- and I'm not even sure we 18 have enough facts to say this -- all of these 19 things exist, the tribe has enough control over 20 these CFR decisions or being a part of this 21 process, that having a prosecutor in this case 2.2 is okay. That seems to be the opinion we'd have 23 to write if you're maintaining that the U.S. could do what it did at the -- at the turn of 24 25 this -- a few years ago.

1	MS. ROSS: So, Justice Sotomayor, that						
2	example in the brief is the Kewa Pueblo.						
3	JUSTICE SOTOMAYOR: Yes.						
4	MS. ROSS: And what happened there						
5	actually doesn't implicate the issues in this						
6	case at all because that court, when it was						
7	constituted by the Secretary of the Interior						
8	because the tribe was unable to provide the						
9	basic due process rights required by the Indian						
10	Civil Rights Act, that court could not apply the						
11	tribe's own law. So the Secretary did waive the						
12	requirement for the the institution of a						
13	Court of Indian Offenses and the the						
14	selection of the magistrate, but not with						
15	respect to the ability to to prosecute the						
16	tribe's own offenses.						
17	So you just simply wouldn't get that						
18	situation from this case.						
19	JUSTICE THOMAS: I have no questions.						
20	CHIEF JUSTICE ROBERTS: Thank you,						
21	counsel.						
22	No questions?						
23	Justice Breyer, anything further?						
24	Justice Alito?						
25	Justice Sotomayor?						

1 Justice Gorsuch? 2 JUSTICE GORSUCH: So I -- I just want 3 to make sure I understand your -- your position, that the Assistant Secretary could create his 4 own court, appoint his own prosecutor, tell him 5 6 to report to the Department of Justice, appoint 7 the judge, and then curate the tribal code and choose which tribal offenses can be prosecuted, 8 9 and there would be no double jeopardy problem, right? 10 11 MS. ROSS: I think that is right, 12 Justice Gorsuch, with a very serious and substantial caveat, that it would depend on 13 whether the tribe retained the authority to not 14 15 have a tribal code that is enforceable in the 16 Court of Indian Offenses. 17 JUSTICE GORSUCH: And then I -- I take 18 it the government does agree, though, that under 19 the Assimilative Crimes Act, when it assimilates a state law, state -- that becomes federal law 20 21 and double jeopardy attaches, right? 2.2 MS. ROSS: That's correct, Your Honor, 23 for precisely the reasons that Petitioner 24 provided, that does become an offense under 25 federal law.

1 JUSTICE GORSUCH: And then, finally, 2 there was a -- a Judge Calabresi opinion, United 3 States versus All Assets, in which he did find the Bartkus exception potentially applied and 4 5 remanded because the state would receive certain assets in forfeiture. Do you think that case is 6 7 wrongly decided? MS. ROSS: Your Honor, you know, I --8 I think it sort of holds out the prospect of 9 10 there being a Bartkus exception. I'm not sure 11 that --12 JUSTICE GORSUCH: No, it found a 13 Bartkus exception and it remanded to see whether 14 it applied on the facts of that case. 15 MS. ROSS: So -- so, to the --16 JUSTICE GORSUCH: And I'm just asking, 17 do you think it's correctly decided? 18 MS. ROSS: So, to the extent that it 19 would mean that there would be a Bartkus exception which would bar the second 20 prosecution, then, yes, I think it's incorrectly 21 2.2 decided. 23 JUSTICE GORSUCH: Thank you. 24 CHIEF JUSTICE ROBERTS: Justice 25 Kavanauqh?

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1 Justice Barrett? Thank you, counsel. 2 3 MS. ROSS: Thank you. CHIEF JUSTICE ROBERTS: Mr. Kimberly, 4 5 rebuttal? 6 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY 7 ON BEHALF OF THE PETITIONER MR. KIMBERLY: Thank you, Mr. Chief 8 Justice. Just a few clarifications. 9 10 First, our position, to Justice 11 Kagan's question, is, indeed, that if the tribe 12 controls the prosecutor, we don't have this problem. To be clear, it's not just the 13 14 appointment, but it's also that the prosecutor 15 in turn is controlled by and answerable to the 16 tribe so that the prosecution properly can be 17 called a tribal prosecution. In the words of 18 Sanchez Valle, that the prosecuting entity 19 derives its power from the tribe. 20 That manifestly did not happen here because the prosecutor is answerable to federal 21 2.2 authorities under the Code of Federal 23 Regulations and the United States Code. 24 There was some attention in my 25 friend's presentation to whether or not these

tribes have the authority to pull out from these
 CFR courts, and both factually and legally, they
 really don't.

First, as a factual matter, Justice Sotomayor, as you -- as you noted -- and this is cited on page 8 of our blue brief -- is the Kewa Pueblo was required to assume jurisdiction under a CFR court, and that was in 2020, just 18 months ago. It was very, very recent.

10 Beyond that, the Assistant Secretary 11 for Indian Affairs has to approve, under the Ute 12 Mountain Ute Code's constitution, any ordinance 13 that the Ute Mountain Ute Tribe purports to 14 adopt. And so, in order for it to adopt the 15 kind of judicial system that would be necessary 16 to do away with the CFR courts, it would require 17 the BIA's approval.

18 And beyond that, in any event, we have 19 at page 8 of the tribe's brief and page 9 of the United States' brief an observation that these 20 courts really are only made available to the --21 2.2 the tribes and Pueblos that cannot afford 23 judicial systems of their own. Just as a 24 factual matter, they don't really have a choice 25 to do away with these courts.

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1	And so, as I said in my opening
2	presentation, far more respectful of tribal
3	sovereignty would be simply to allow the tribes
4	to appoint their own prosecutors to act in these
5	courts in the interests and exercising the
6	sovereign authority of these tribes or otherwise
7	just to give them the resources necessary to
8	establish their own systems.
9	If the Court doesn't have any further
10	questions, I'm happy to rest on our briefs.
11	CHIEF JUSTICE ROBERTS: Thank you,
12	counsel. The case is submitted.
13	(Whereupon, at 12:41 p.m., the case
14	was submitted.)
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