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SUPREME COURT OF THE UNITED STATES

No. 20–7622

MERLE DENEZPI, PETITIONER *v.* UNITED STATES

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

[June 13, 2022]

JUSTICE BARRETT delivered the opinion of the Court.

The Double Jeopardy Clause protects a person from being prosecuted twice "for the same offence." An offense defined by one sovereign is necessarily different from an offense defined by another, even when the offenses have identical elements. Thus, a person can be successively prosecuted for the two offenses without offending the Clause. We have dubbed this the "dual-sovereignty" doctrine.

This case presents a twist on the usual dual-sovereignty scenario. The mine run of these cases involves two sovereigns, each enforcing its own law. This case, by contrast, arguably involves a single sovereign (the United States) that enforced its own law (the Major Crimes Act) after having separately enforced the law of another sovereign (the Code of the Ute Mountain Ute Tribe). Petitioner contends that the second prosecution violated the Double Jeopardy Clause because the dual-sovereignty doctrine requires that the offenses be both enacted *and* enforced by separate sovereigns.

We disagree. By its terms, the Clause prohibits separate prosecutions for the same offense; it does not bar successive prosecutions by the same sovereign. So even assuming that

petitioner's first prosecutor exercised federal rather than tribal power, the second prosecution did not violate the Constitution's guarantee against double jeopardy.

I

A

In 1882, Secretary of the Interior H. M. Teller wrote to his Department's Office of Indian Affairs (now known as the Bureau of Indian Affairs) to suggest that the Office "formulate certain rules for the government of the Indians on the reservations." Letter to H. Price, Comm'r of Indian Affairs (Dec. 2, 1882), in Dept. of Interior, Rules Governing the Court of Indian Offenses 3–4 (1883). In response, the Commissioner of Indian Affairs adopted regulations prohibiting certain acts and directing that a "Court of Indian Offenses" be established for nearly every Indian tribe or group of tribes to adjudicate rule violations. *Id.*, at 5. Given their basis in what is now the Code of Federal Regulations, the courts are sometimes called CFR courts.

Today, most tribes have established their own judicial systems, thereby displacing the CFR courts. See 25 CFR §11.104 (2021). But some tribes, often due to resource constraints, have not. Five CFR courts remain, serving 16 of the more than 500 federally recognized tribes. Their stated purpose is "to provide adequate machinery for the administration of justice for Indian tribes" in certain parts of Indian country "where tribal courts have not been established." §11.102. The Department's Assistant Secretary for Indian Affairs appoints CFR court judges, called magistrates, subject to a confirmation vote by the governing body of the tribe that the court serves. §11.201(a). The Assistant Secretary may remove magistrates for cause of his own accord or upon the recommendation of the tribal governing

body. §11.202.[1] Unless a contract with a tribe provides otherwise, a Department official appoints the prosecutor for each CFR court. §11.204.

CFR courts have jurisdiction over two sets of crimes. See §11.114. First, federal regulations set forth a list of offenses that may be enforced in CFR court. See §§11.400–11.454. In addition, a tribe's governing body may enact ordinances that, when approved by the Assistant Secretary, are enforceable in CFR court and supersede any conflicting federal regulations. §§11.108, 11.449.

B

The reservation of the Ute Mountain Ute Tribe spans over 500,000 acres in southwestern Colorado, northern New Mexico, and southeastern Utah. The Tribe has more than 2,000 members. It has not created its own court system, so it makes use of the Southwest Region CFR Court. The Tribe has, however, adopted its own penal code, which is enforceable in that court.

A violation of the tribal code lies at the heart of this case. Merle Denezpi and V. Y., both members of the Navajo Nation, traveled to Towaoc, Colorado, a town within the Ute Mountain Ute Reservation. While the two were alone at a house belonging to Denezpi's friend, Denezpi barricaded the door, threatened V. Y., and forced her to have sex with him. After Denezpi fell asleep, V. Y. escaped from the house and reported Denezpi to tribal authorities.

An officer with the federal Bureau of Indian Affairs filed a criminal complaint in CFR court. That complaint charged Denezpi with three crimes: assault and battery, in violation of 6 Ute Mountain Ute Code §2 (1988); terroristic threats, in violation of 25 CFR §11.402; and false imprisonment, in

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[1] The CFR court at issue in this case serves only the Ute Mountain Ute Tribe. Some CFR courts, however, serve multiple tribes. In that event, the governing bodies of all affected tribes participate in the confirmation and removal of magistrates. 25 CFR §§11.201(a), 11.202.

violation of 25 CFR §11.404. Denezpi pleaded guilty to the assault and battery charge, and the prosecutor dismissed the other charges. The Magistrate sentenced Denezpi to time served—140 days' imprisonment.

Six months later, a federal grand jury in the District of Colorado indicted Denezpi on one count of aggravated sexual abuse in Indian country, an offense covered by the federal Major Crimes Act. 18 U. S. C. §§2241(a)(1), (a)(2), 1153(a). Denezpi moved to dismiss the indictment, arguing that the Double Jeopardy Clause barred the consecutive prosecution, but the District Court denied the motion. After a jury convicted Denezpi, the District Court sentenced him to 360 months' imprisonment.

The Tenth Circuit affirmed. It concluded that the second prosecution in federal court did not constitute double jeopardy because the Ute Mountain Ute Tribe's inherent sovereignty was the ultimate source of power undergirding the earlier prosecution in CFR court. 979 F. 3d 777, 781–783 (2020). We granted certiorari. 595 U. S. ___ (2021).

II

A

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Clause by its terms does not prohibit twice placing a person in jeopardy "'for the same *conduct* or *actions*.'" *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (slip op., at 3). Instead, it focuses on whether successive prosecutions are for the same "offence."

That term, we have explained, "'was commonly understood in 1791 to mean "transgression," that is, "the Violation or Breaking of a Law."'" *Ibid.*; see, *e.g.*, 2 R. Burn & J. Burn, A New Law Dictionary 167 (1792) ("OFFENCE, is an act committed against law, or omitted where the law requires it"). An offense, then, is "defined by a law." *Gamble*,

587 U. S., at ___ (slip op., at 4); see *Moore* v. *Illinois*, 14 How. 13, 19–20 (1852). And a law is defined by the sovereign that makes it, expressing the interests that the sovereign wishes to vindicate. *Gamble*, 587 U. S., at ___ (slip op., at 4); see *United States* v. *Lanza*, 260 U. S. 377, 382 (1922) ("Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other"). Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign. See *Gamble*, 587 U. S., at ___ (slip op., at 4); *Moore*, 14 How., at 20. That means that the two offenses can be separately prosecuted without offending the Double Jeopardy Clause—even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign. See *Gamble*, 587 U. S., at ___, n. 1, ___ (slip op., at 3, n. 1, 4); cf. *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932) (offenses defined by a single sovereign are distinct offenses only if each "requires proof of a different element").

This dual-sovereignty principle applies where "two entities derive their power to punish from wholly independent sources." *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 68 (2016). The doctrine has come up most frequently in the context of the States. See, *e.g.*, *Heath* v. *Alabama*, 474 U. S. 82, 88–90 (1985) (States are separate sovereigns from one another); *Lanza*, 260 U. S., at 382 (States are separate sovereigns from the United States). It applies, however, to Indian tribes too.

United States v. *Wheeler*, 435 U. S. 313 (1978), is the seminal case. There, a member of the Navajo Tribe was convicted in tribal court of violating a provision of the Navajo Tribal Code; he was later charged in federal court with violating a federal statute based on the same underlying conduct. *Id.*, at 314–316. Citing the dual-sovereignty doctrine, the Court rejected Wheeler's double jeopardy argument.

We explained that before Europeans arrived on this continent, tribes "were self-governing sovereign political communities" with "the inherent power to prescribe laws for their members and to punish infractions of those laws." *Id.*, at 322–323. While "Congress has in certain ways regulated the manner and extent of the tribal power of self-government," Congress did not "*creat[e]*" that power. *Id.*, at 328. When a tribe enacts criminal laws, then, "it does so as part of its retained sovereignty and not as an arm of the Federal Government." *Ibid.* Thus, Wheeler's prosecution for a tribal offense did not bar his later prosecution for a federal offense.

Our reasoning in *Wheeler* controls here. Denezpi's single act transgressed two laws: the Ute Mountain Ute Code's assault and battery ordinance and the United States Code's proscription of aggravated sexual abuse in Indian country. The Ute Mountain Ute Tribe, like the Navajo Tribe in *Wheeler*, exercised its "unique" sovereign authority in adopting the tribal ordinance. *Id.*, at 323. Likewise, Congress exercised the United States' sovereign power in enacting the federal criminal statute. See *Lanza*, 260 U. S., at 382. The two laws, defined by separate sovereigns, therefore proscribe separate offenses. Because Denezpi's second prosecution did not place him in jeopardy again "for the same offence," that prosecution did not violate the Double Jeopardy Clause.

B

Denezpi agrees with much of this—that sovereigns define distinct offenses, that the Tribe and the United States are separate sovereigns, and that his prosecutions involved a tribal offense and a federal offense respectively. See Reply

Brief 3–4.[2] But he argues that the dual-sovereignty doctrine is concerned not only with who defines the offense, but also with who *prosecutes* it. In *Wheeler*, the defendant was initially prosecuted in a tribal court; Denezpi, by contrast, was initially prosecuted in a CFR court. While tribal prosecutors in tribal courts indisputably exercise tribal authority, Denezpi claims that prosecutors in CFR courts exercise federal authority because they are subject to the control of the Bureau of Indian Affairs. He concludes that he was therefore prosecuted twice by the United States. And that, he insists, violated the Double Jeopardy Clause because "the dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign, regardless of the source of the power to adopt the criminal codes enforced in each prosecution." Brief for Petitioner 16–17.[3]

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[2] The dissent, unwilling to accept Denezpi's framing of the case, asserts that his first conviction was for a federal offense because CFR court regulations assimilated the Tribe's assault and battery ordinance. *Post*, at 6–9 (opinion of GORSUCH, J.). The dissent is right that we do not address that point. Instead, we take the case as it comes to us: No party pressed the assimilation argument, here or below, and no lower court addressed it. Moreover, the answer to the question is not as obvious as the dissent claims. For example, while the dissent says that the relevant regulations "could not be plainer," *post*, at 6, they are much less clear than the Assimilative Crimes Act, which makes a person who violates a state law on a federal enclave situated in that State "guilty of a like offense and subject to a like punishment." 18 U. S. C. §13(a). Nor, despite the dissent's argument to the contrary, is it dispositive that the Assistant Secretary must approve a tribal ordinance before it can be enforced in CFR court—the Secretary of the Interior had to approve the Tribal Code at issue in *Wheeler* too. 435 U. S., at 327. In short, the assimilation question is complex, making it particularly imprudent to raise and resolve it *sua sponte* as the dissent proposes to do.

[3] At times, the dissent suggests that the source of the trial court's power, rather than (or perhaps in addition to) the source of the prosecutor's power, matters in the dual-sovereignty analysis. See *post*, at 10–

We need not sort out whether prosecutors in CFR courts exercise tribal or federal authority because we disagree with Denezpi's premise. The Double Jeopardy Clause does *not* prohibit successive prosecutions by the same sovereign. It prohibits successive prosecutions "for the same offence." And as we have already explained, an offense defined by one sovereign is different from an offense defined by another. Thus, even if Denezpi is right that the Federal Government prosecuted his tribal offense, the Clause did not bar the Federal Government from prosecuting him under the Major Crimes Act too.

1

Denezpi does not even try to reconcile his position with the text of the Clause. Instead, he presents the dual-sovereignty doctrine as "a carveout to the rule against double jeopardy" and argues that the carveout does not extend to successive prosecutions by a single sovereign. Brief for Petitioner 15–17. But Denezpi is wrong to treat the dual-sovereignty doctrine as an exception to the Clause. *Gamble* was very clear on this point: "Although the dual-sovereignty rule is often dubbed an 'exception' to the double jeopardy right, it is not an exception at all. On the contrary, it follows from the text that defines that right in the first place." 587 U. S., at ___ (slip op., at 3). The Clause does not ask who puts a person in jeopardy. It zeroes in on what the person is put in jeopardy for: the "offence." And again, in 1791, "offence" meant the violation of a law. *Supra,* at 4–5. We have seen no evidence that "offence" was originally understood to encompass both the violation of the law and the identity of the prosecutor.

Treating the identity of the prosecutor as part of the definition of "offence" is as odd as it sounds. An offense has

11. Again the dissent strays from Denezpi's argument, which has focused on the source of the prosecutor's authority. See, *e.g.*, Tr. of Oral Arg. 9–11.

always referred to the crime itself, which is complete when a person has carried out all of its elements. See, *e.g.*, *The Rugen*, 1 Wheat. 62, 74 (1816) ("[T]he offence of trading with the enemy was complete the moment the [ship] sailed from Savannah with an intention to carry her cargo to Kingston, in Jamaica"); *United States* v. *Norris*, 300 U. S. 564, 574 (1937) (the "crime of perjury . . . is complete when a witness's statement has once been made"); *Toussie* v. *United States*, 397 U. S. 112, 117 (1970) (draft registration "was thought of as a single, instantaneous act to be performed at a given time, and failure to register at that time was a completed criminal offense"). The law has long recognized, then, that an offense is committed before it is prosecuted. For example, the Constitution says that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, §2, cl. 3; see Amdt. 6 ("In all criminal prosecutions, the accused shall" be tried "by an impartial jury of the State and district wherein the crime shall have been committed"). And Sir Matthew Hale could say of a man who breaks into a house and steals something: "[I]f indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are several offenses, tho committed at the same time." 2 History of the Pleas of the Crown 245–246 (1736). In addition, Chief Justice Marshall, speaking for the Court, described a section of the Crimes Act of 1790 as providing that "if manslaughter be committed in [certain places], the offender may be prosecuted in the federal Courts." *United States* v. *Wiltberger*, 5 Wheat. 76, 98 (1820). So Denezpi's proposal would put us in the position of holding that a person's single act constitutes two separate offenses at the time of commission (because the act violates two different sovereigns' laws) but that those offenses later become the same offense if a single sovereign prosecutes both. He offers no textual justification for this nonsensical result.

2

With the text against him, the best Denezpi can do is stitch together loose language from our precedent. For example, we have said that "two offenses 'are not the "same offence"' for double jeopardy purposes if 'prosecuted by different sovereigns.'" *Gamble*, 587 U. S., at ___ (slip op., at 2) (emphasis deleted); see *Wheeler*, 435 U. S., at 329–330 ("Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence'"). In another case, we stated that "[i]f an entity's authority to enact and enforce criminal law ultimately comes from Congress, then it cannot follow a federal prosecution with its own." *Sánchez Valle*, 579 U. S., at 77; see *id.*, at 62 ("[T]he issue is only whether the prosecutorial powers of the two jurisdictions have independent origins"). And we have remarked that "the crucial determination [under the dual-sovereignty doctrine] is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns." *Heath*, 474 U. S., at 88.

Read in isolation, these statements help Denezpi's position that the identity of the prosecuting sovereign matters under the dual-sovereignty doctrine. Read in context, their helpfulness dissipates. None of these cases involves or even mentions the unusual situation of a single sovereign successively prosecuting its own law and that of a different sovereign. This language appears in the context of the usual situation: a sovereign (or alleged sovereign) prosecuting its own laws.[4] Because enactment and enforcement almost always go hand in hand, it is easy to overlook that they are

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[4] In *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59 (2016), Puerto Rico sought to enforce its own territorial laws; the question, which we answered in the negative, was whether Puerto Rico was an independent sovereign from the United States for purposes of the Clause. *Id.*, at 65–66; see also *Waller* v. *Florida*, 397 U. S. 387, 392–395 (1970) (cities are not separate sovereigns from States).

occasionally separated. That is particularly good reason to take the language Denezpi offers with a healthy sprinkling of salt. Where it was not important to attend to the difference between enactment and enforcement, it is understandable why we did not. In any event, imprecise statements cannot overcome the holdings of our cases, not to mention the text of the Clause—and those authorities make clear that enactment is what counts in determining whether the dual-sovereignty doctrine applies. See Part II–A, *supra*.

Denezpi points to only one case in which the Court dealt with an argument in the neighborhood of his. In *Bartkus* v. *Illinois*, 359 U. S. 121 (1959), the defendant argued that his acquittal in federal court for a federal offense barred his later conviction in state court for a state offense based on the same underlying conduct. There was a threshold issue of whether to analyze the claim under the Fifth Amendment's Double Jeopardy Clause or the Fourteenth Amendment's Due Process Clause. The Double Jeopardy Clause had not yet been incorporated against the States, but the defendant argued that federal authorities had run his state prosecution, making it federal action to which the Clause applied. The Court rejected that argument, seeing no basis to say that "Illinois in bringing its prosecution was merely a tool of the federal authorities," rendering the "state prosecution . . . a sham and a cover for a federal prosecution." *Id.*, at 122–124. That resolution meant that the Court had no occasion to consider whether the Double Jeopardy Clause would have barred the Federal Government from separately prosecuting Bartkus for a violation of state law. Instead, we considered whether Bartkus' successive federal and state prosecutions violated due process. See *id.*, at 124.

Bartkus does not give Denezpi much to go on—as Denezpi himself recognizes. See Brief for Petitioner 16–17 (*Bartkus* "suggest[s]" that the dual-sovereignty doctrine will not apply if "a second prosecution by an apparently separate sov-

ereign is 'in essential fact' just a 'cover' for a second prosecution by the first sovereign"). At most, *Bartkus* acknowledged that a successive federal prosecution would raise a double jeopardy question. Yet it did not begin to analyze, much less answer, that question. In the end, then, *Bartkus* is no more help to Denezpi than the other cases on which he relies.

3

Denezpi advances a few other arguments for why the Double Jeopardy Clause barred his second prosecution. None succeeds.

First, he notes that the United States has excluded from the string of federal regulatory offenses enforceable in CFR court those "[f]elonies that are covered by the Major Crimes Act." 58 Fed. Reg. 54406 (1993). And it has done so "to avoid the possibility that someone who has committed a serious offense may be immunized from federal prosecution [under that Act] because of the prohibition against double jeopardy by a prosecution in a Court of Indian Offenses." *Ibid.* Denezpi asserts that this "limitation borders on a concession that the Double Jeopardy Clause bars [his] second prosecution." Brief for Petitioner 29. We disagree. Federal regulatory crimes are defined by the Federal Government, so successive prosecutions for a federal regulatory crime and a federal statutory crime present a different double jeopardy question from the one presented here.

Next, Denezpi argues that permitting successive prosecutions like his "does not further the purposes underlying the dual-sovereignty doctrine," namely, advancing sovereigns' independent interests. *Id.*, at 28–29. Purposes aside, the doctrine "follows from" the Clause's text, which controls. *Gamble*, 587 U. S., at ___–___ (slip op., at 3–4). In any event, the Tribe's sovereign interest *is* furthered when its assault and battery ordinance—duly enacted by its governing body as an expression of the Tribe's condemnation of

that crime—is enforced, regardless of who enforces it.

Finally, Denezpi asserts that the conclusion we reach might lead to "highly troubling" results. Brief for Petitioner 30–32. He suggests that sovereigns might more broadly assume the authority to enforce other sovereigns' criminal laws in order to get two bites at the apple. But if there is a constitutional barrier to such cross-enforcement, it does not derive from the Double Jeopardy Clause. As we have explained, the Clause does not bar successive prosecutions of distinct offenses, even if a single sovereign prosecutes them.

* * *

Denezpi's single act led to separate prosecutions for violations of a tribal ordinance and a federal statute. Because the Tribe and the Federal Government are distinct sovereigns, those "offence[s]" are not "the same." Denezpi's second prosecution therefore did not offend the Double Jeopardy Clause. We affirm the judgment of the Court of Appeals.

It is so ordered.