No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL J. BRYANT, JR.,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND ADDITIONAL ADVOCACY ORGANIZATIONS FOR SURVIVORS OF DOMESTIC VIOLENCE AND ASSAULT IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Ninth Circuit's conclusion that the Sixth Amendment precludes the United States from exercising criminal jurisdiction over Michael J. Bryant ("Bryant" or "Respondent") based on his latest acts of domestic violence against two Native women compels the *Amici* identified herein to offer their view on the critical role 18 U.S.C. § 117(a) (the "Habitual Offender Provision") plays in ensuring the safety of Native women. As organizations committed to ending violence against Native women, *Amici* have a unique perspective on the relationship between Congress' authority over Indian affairs, the inherent sovereign authority of Tribal Governments to prosecute crimes committed against their own members, and safety for Native women and children.[1] The absence of indigent counsel in Bryant's preceding Tribal Court convictions in no way constitutionally precludes the Federal Government from subsequently exercising criminal jurisdiction over him for his latest, and hopefully his last, violent assaults perpetrated against Native women.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On January 12 and 19, 2016, counsel for Petitioner and Respondent, respectively, informed counsel for *Amici* of their consent to the filing of this *amicus* brief.

The leading signatory, the National Indigenous Women's Resource Center, Inc. ("NIWRC"), is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience working in Tribal Courts and Tribal Governments, as well as programmatic and educational work to end domestic violence against Native women.

NIWRC is joined by thirty-four additional organizations that share NIWRC's commitment to ending domestic violence, rape, sexual assault, and other forms of violence in the United States (collectively, the "NIWRC *Amici*").[2] The depth of the NIWRC *Amici*'s experience in working to end domestic violence renders them uniquely positioned to offer their views on the need to hold offenders accountable when they continue to abuse and batter women.

The NIWRC *Amici* know all too well that domestic violence is hardly ever a one-time occurrence. Instead, domestic violence is a recurring pattern of abusive and violent conduct that an offender uses to gain control over an intimate partner. When the pattern is not interrupted, the violence escalates, and the consequences often become deadly. For the NIWRC *Amici*, § 117(a) is a critical tool to disrupt a violent pattern of abuse committed by a class of offenders known to abuse and threaten the lives of Native women.

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[2] The thirty-four additional NIWRC *Amici* are identified and listed in Appendix A to this brief.

Because Bryant's attempt to undermine the efficacy of § 117(a) threatens the safety, welfare, and lives of Native women, the NIWRC *Amici* urge this Court to uphold the constitutionality of § 117(a)'s application to Bryant and overturn the decision of the Ninth Circuit.

SUMMARY OF THE ARGUMENT

Congress enacted 18 U.S.C. § 117(a) in response to a crisis. As Senator McCain noted just months before the bill's passage: "Indian women experience the highest rates of domestic violence compared to all other groups in the United States." 151 Cong. Rec. S4873, (daily ed. May 10, 2005) (statement of Sen. McCain).[3] Indeed, numerous studies indicate that Native women are more likely to be battered, raped, or sexually assaulted than any other population in the United States.[4] "Even the most conservative estimates indicate that it is an extremely serious problem."[5]

The very nature of domestic violence further compounds the extraordinarily high rates that Native women face; that is, domestic violence is a repeating

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[3] For instance, Indian women experience battery at a rate of 23.2 per 1,000, as compared with eight per 1,000 among Caucasian women. Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, §§ 902, 909, 199 Stat. 2960 (setting forth congressional findings).

[4] *See, e.g.,* Michele C. Black et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. For Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey 2010 Summary Report* (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf

[5] Ronet Bachman et al., U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 141 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

pattern of abuse that only increases in severity over time. At its core, "domestic violence is about gaining control of another person."[6] Thus, the first incident of abuse is usually not the last, and when less abusive acts fail to establish sufficient control, a perpetrator resorts to more dangerous acts.[7] Consequently, if the law allows a perpetrator to repeatedly abuse a Native woman without the imposition of a sufficient penalty, the violence is more than likely to increase in severity. It was with recognition of this grave reality that Congress enacted the Habitual Offender Provision. *See* 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain).

In addition to these extraordinarily high—and repetitive—rates of domestic violence, Congress enacted § 117(a) to address a specific void in federal law that, before 2006, prohibited the Federal Government from exercising criminal jurisdiction to prosecute many individuals who repeatedly abuse and

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[6] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see also* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007) (articulating the "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control.").

[7] *See, e.g.,* Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263, 291 (1987) ("The first instance of violence . . . is usually short and not terribly severe . . . . Later in the pattern of violence, however, the same victim faces a serious threat to life and health, and may be . . . too afraid to change the situation alone.").

batter Native women. Specifically, the Habitual Offender Provision constitutes a legislative response to three identified legal obstacles that undermined the safety of Native women.

First, in many instances—before the enactment of § 117(a)—the Federal Government could not exercise criminal jurisdiction over Native men who repeatedly abused Native women. As this Court concluded in *Crow Dog* and *Kagama*, the Federal Government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless or until Congress authorizes such jurisdiction.[8] As of 2006, Congress had only authorized federal criminal jurisdiction over "major crimes" committed by Indians against Indians, such as murder or assaults resulting in "serious bodily injury." *See* 18 U.S.C. §§ 1152-53. That is, as of 2006, the Federal Government could not exercise criminal jurisdiction to prosecute the acts of Indian-perpetrated domestic violence against Native women until such conduct resulted in *murder* or *serious bodily injury*—at which point prosecution is too late.[9]

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[8] *See Ex Parte Crow Dog*, 109 U.S. 556, 570 (1883) (the United States could not exercise jurisdiction over "the case of a crime committed in the Indian country by one Indian against the person or property of another Indian" unless so authorized by Congress); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States.")

[9] In the 2013 reauthorization of VAWA, Congress lowered the standard from "serious bodily injury" to "substantial bodily injury" in the Major Crimes Act, which continues to exclude federal criminal jurisdiction over Indian-perpetrated "simple assault" or other misdemeanor level domestic violence assaults. Thanks to the enactment of § 117(a), the Federal Government can now exercise criminal jurisdiction over these crimes if they are

Second, prior to the enactment of § 117(a), numerous federal laws, including Public Law 280 ("PL-280"), limited federal prosecutors in the charges they could bring against both Indian and non-Indian offenders who repeatedly committed domestic violence against a Native woman on a reservation located within certain States.[10] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67

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committed by "repeat offenders" as defined in § 117(a). *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (codified at 18 U.S.C. § 113); 18 U.S.C. § 117(a).

Of course, the United States has authority to exercise criminal jurisdiction over individuals who commit acts of domestic violence and "travel[] in interstate or foreign commerce." 18 U.S.C. § 2261. Domestic violence crimes committed while "[t]ravel[ing] in interstate or foreign commerce," however, are hardly ever prosecuted. *See, e.g.*, Matthew R. Durose et al., Bureau of Justice Statistics, Dep't of Justice, NCJ 207846, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, 51-52 (2005), http://www.bjs.gov/content/pub/pdf/fvs.pdf. That is, although over 2.1 million incidents of "family violence" were reported to police between 2000 and 2002 (*id.* at 2), only forty-seven individuals were convicted of interstate domestic violence during that time. *Id.* at 52. Section 2261 does not serve as a sufficient substitute for a statute creating unqualified federal criminal jurisdiction over individuals who repeatedly beat and abuse Native women.

[10] Congress enacted PL-280 in 1953, effectively "shifting federal criminal jurisdiction over Indian Country to [select] states regardless of tribal consent." M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 674 (2011). Since its inception, PL-280 has been criticized for creating "jurisdictional uncertainty" between Tribes and States, the effects of which have resulted in a lack of law enforcement responsiveness due to States' "inability or unwillingness" to perform their mandated responsibilities under the law. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1635-37 (1998).

Stat. 588 (codified as amended 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, & 28 U.S.C. § 1360). As of 2005, the federal criminal jurisdiction created in the Major Crimes Act was—and continues to be—deferred to certain State Governments as a result of PL-280 and other PL-280 like statutes, meaning that for assaults committed against Native women in those six States, the Federal Government simply cannot intervene or press charges. *See* 18 U.S.C. § 1162.[11]

In other similarly-situated jurisdictions, the then-existing federal assault statute allowed the Federal Government to charge only a six-month misdemeanor (for simple assault or assaults by striking, beating or wounding) or a ten-year felony if the assault resulted in "serious bodily injury." 18 U.S.C. § 113(a)(4)-(6) (incorporated through 18 U.S.C. § 1152). The six-month misdemeanor is often insufficient for serious, repeat domestic violence offenders who have not yet caused "serious" bodily injury. *See id.* § 113 (a)(4)-(5).

Third, when Congress enacted the Habitual Offender provision in 2006, federal law limited the ability of Tribal Governments to impose penalties sufficient to protect their citizens from habitual offenders. That is, the Indian Civil Rights Act ("ICRA") precluded Tribal Courts from imposing a prison term greater than one year for any criminal offense, including domestic

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[11] "States with Indian Country lands that do *not* appear to presently be affected directly or indirectly by P.L. 280 or P.L. 280-like statutes are Alabama, Arizona, Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota, and Wyoming." Leonhard, *supra*, at 692 (emphasis added); *see also id.* at 694 (listing other States "[s]imilarly [a]ffected" as those States that exercise jurisdiction under PL-280).

violence. 25 U.S.C. § 1302(7).[12] As is made clear in the case of Bryant, sentences of less than one year are often insufficient and fail to deter offenders from continuing to abuse Native women.

Taken together, this legal framework left no sovereign with a felony-level punishment that could be imposed in a case where a repeat domestic violence offender committed multiple assaults against a Native woman that resulted in something less than "serious" or "substantial" bodily injury. That is, prior to the enactment of the Habitual Offender Provision, perpetrators who abused Native women would "escape felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain). In response, Congress drafted the Habitual Offender Provision and created federal criminal jurisdiction over "habitual offender[s]" who commit acts of "[d]omestic assault." 18 U.S.C. §117(a). The statute identifies "habitual offender[s]" as those individuals with "at least 2 separate prior [convictions] in Federal, State, or Indian tribal court." *Id.*

The Habitual Offender Provision therefore addresses all three of the aforementioned jurisdictional and sentencing gaps by creating federal criminal jurisdiction over a class of offenders who pose a serious threat to the safety and welfare of Native women. The

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[12] In 2010, Congress passed, and the President signed into law, the Tribal Law and Order Act ("TLOA"). Tribal Law and Order Act of 2010, Pub. L.No. 111-211, Tit. II, 124 Stat. 2261. The TLOA amended the Indian Civil Rights Act to provide that Tribal Courts may impose sentences of up to three years of imprisonment for any one offense if certain requirements are met. *Id.* at § 234, 124 Stat. 2279-80 (codified at 25 U.S.C. § 1302). To date, very few Tribes have been able to implement the full enhanced sentencing authority conditionally granted in TLOA.

creation of such jurisdiction falls well within the ambit of Congress' exclusive authority over Indian affairs, and is, therefore, constitutional. *See United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as '*plenary* and *exclusive*'") (internal quotation marks and citations omitted) (emphasis added); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States.").

Moreover, a clear application of this Court's decisions in *Nichols v. United States*, 511 U.S. 738 (1994), and *Lewis v. United States*, 445 U.S. 55 (1980), reveals that §117(a)'s creation of federal criminal jurisdiction over a habitual offender's latest acts of domestic violence contains no constitutional infirmity—despite the fact that the offender's prior convictions giving rise to federal jurisdiction may have been uncounseled. As the Ninth Circuit, the Eighth Circuit, the Tenth Circuit, and Respondent all agree, uncounseled Tribal Court convictions for domestic violence do not violate the United States Constitution.[13] Furthermore, § 117(a) penalizes only the latest

[13] *See United States v. Bryant*, 769 F.3d 671, 675 (9th Cir. 2014) (stating that "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings"); *United States v. Cavanaugh*, 643 F.3d 592, 595-96 (8th Cir. 2011) ("[T]he Constitution does not apply to restrict the actions of Indian tribes as separate, quasi-sovereign bodies[,] . . . . [and] the Indian Civil Rights Act only requires the appointment of counsel for indigent criminal defendants in tribal court for prosecutions that result in a term of incarceration greater than one year."); *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (stating that

offense of domestic violence, and it does so in a federal criminal proceeding that affords the defendant assistance of counsel, in compliance with the Sixth Amendment. The Habitual Offender Provision, therefore, passes constitutional muster under both *Nichols* and *Lewis*.

To be sure, the present case carries significant consequences for Native women—in particular, for the women Bryant has continued to abuse. The unchallenged record establishes that Bryant habitually abuses women. Over the past seventeen years, he has hit, strangled, kneed, kicked, and bit Native women. *See* U.S. Suppl. Br. 10, 9th Cir., ECF No. 33 (detailing numerous convictions starting in 1998). In 1999, he strangled his girlfriend at the time and smashed a beer bottle on her head. U.S. Pet. for a Writ of Cert. 4. In 2007, he punched and kneed a girlfriend in the face. *Id*. More recently, in February 2011, he grabbed his then-girlfriend, pulled her hair, repeatedly punched her in the face and chest, repeatedly kicked her, bit her fingers, and threatened her. J.A. 37-38.

In May of that same year, Bryant violently assaulted another woman who was living with him at the time. One morning, when he awoke and could not find his truck keys, he grabbed his victim with both hands and strangled her until she almost passed out. J.A. 37-38; Crim. Compl. 3, D. Mont., ECF No. 1. These stories are only a small part of the picture. The full record identifies many more victims; Bryant has been convicted of committing crimes of domestic violence in January 1998, July 1998, March 2002,

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"because the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment"); Resp't Br. in Opp'n to Pet. for Writ of Cert. 21 ("The Sixth Amendment right to counsel 'd[oes] not obtain' in tribal court proceedings." (citation omitted)).

September 2002, July 2003, and February 2005, in addition to his most recent 2011 conviction in the United States District Court, District of Montana. Crim. Compl. 5, D. Mont., ECF No. 1; U.S. Suppl. Br. 11, 9th Cir., ECF No. 33.

Bryant does not deny that he abuses women. He has "more than 100 tribal-court convictions for various criminal offenses, including several misdemeanor convictions for domestic assault." U.S. Suppl. Br. 10, 9th Cir., ECF No. 33; Pet. Br. 7, 55 (citing Presentence Investigation Report (PSR) ¶ 81). In an interview related to the underlying charges in this case, he admitted that he physically assaulted his February 2011 victim at least five to six times during the year and a half they lived together. Crim. Compl. 4, D. Mont., ECF No. 1. He further admitted that he assaulted his May 2011 victim three times in a little over two months. *Id.* Bryant made these admissions in a federal court proceeding where he was provided counsel.

Despite this continuing pattern of violence and abuse, the Northern Cheyenne Tribal Court was never able to sentence Bryant to more than one year in prison—or as Judge Owens noted, "what someone who 'borrows' a neighbor's People magazine from the mailbox on two separate occasions could face." U.S. Pet. for a Writ of Cert. 40a (Owens, J., dissenting from denial of reh'g *en banc*).

The extraordinary magnitude of violence perpetrated against Native women today constitutes one of the greatest threats to the integrity and continued existence of Tribal Nations and their people. Nothing in the Constitution precludes Congress from creating federal criminal jurisdiction over individuals that pose a serious and significant threat to Native women;

instead, Congress' trust duties and obligations compel congressional action. To conclude otherwise would call into question the legitimacy of a twenty-first century legal framework that precludes Tribal Governments from fully and effectively protecting their citizens from the criminals who repeatedly abuse them.

ARGUMENT

I. Section 117(a) is a Constitutionally Permissible Means by Which Congress Ensures the Safety of Native Women

A. The Crisis of Violence Against Native Women Demands Federal Action

Congress' power to authorize federal criminal jurisdiction over a class of individuals identified by Tribal Governments as having repeatedly abused and beaten Native women sits well within constitutional bounds. Respondent's attacks on the constitutionality of § 117(a)'s application to him, therefore, do not survive scrutiny.

1. Native Women Face Rates of Domestic Violence Higher than Any Other U.S. Population

> *We as Native women are faced with our own mortality every day, from the sexual assaults, stalking, domestic violence, human trafficking and murder, the rates of violence against us far exceed all other groups in this country. My question has been and continues to be: When will the courts of the United States uphold the ability of the U.S. Congress and our own sovereign Indian Nations to protect us?*
>
> **Survivor Lisa Brunner (White Earth Nation)**

In enacting § 117(a), Congress noted that "Indian women experience the highest rates of domestic violence compared to all other groups in the United States." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Senator McCain explained the congressional purpose behind the new tribal provisions as follows:

> [O]ne out of every three Indian women are victims of sexual assault; [] from 1979 to 1992, homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and [] 75 percent of those deaths were committed by a family member or acquaintance. These are startling statistics that require our close examination and a better understanding of how to prevent and respond to domestic violence in Indian Country.

151 Cong. Rec. S4873 (statement Sen. McCain); *see also Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11 (2005) ("I note the very heavy incidence of battering of Indian women. Almost one out of three Indian women will be raped. Indian women are shown to be three times as likely as non-Natives to be battered.") (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary). The crisis that Native women face cannot be understated; "on some reservations, Native women are murdered at more than ten times the national average."[14] Indeed, these

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[14] *Stand Against Violence and Empower Native Women Act: Hearing on S. 1763 Before the S. Comm. On Indian Affairs*, 112th Cong. 10 (2011) (statement of Thomas J. Perrelli, Assoc. Att'y Gen. of the United States), http://www.indian.senate.gov/sites/default/files/upload/files/TranscriptRecord-2.pdf (citing a

dire statistics led Congress to create not only §117(a), but also in 2005, Congress added an entirely separate title to address the epidemic of violence against Native women: Title IX Safety for Indian Women. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, Tit. IX, 119 Stat. 3077 (2006) ("VAWA 2005") (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.).

Numerous national studies support these congressional findings and establish that Native women experience some of the highest rates of domestic violence in the United States. When Congress passed VAWA 2005, the Department of Justice reported that sixty-one percent of American Indian and Alaska Native women (or three out of five) had been assaulted in their lifetimes, exceeding the rates of assault for every other group in the United States.[15] Since that time, multiple studies have drawn similar conclusions. For example, in 2010, the Centers for Disease Control and Prevention released a report that concluded that forty-six percent of American Indian and Alaska Native women have experienced rape, physical violence and/or stalking by an intimate partner in their lifetime.[16] In 2014, a literature review of published studies on violence against Native women concluded

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National Institute of Justice-funded analysis of death certificates).

[15] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women* 22 (2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

[16] Black, *supra*, at 3.

that "violence against women affects the majority of American Indian and Alaska Native women."[17]

National data, however, only allow for a generalized understanding of this pervasive problem. Localized studies paint an even grimmer reality. In one sample from a tribal community in the Southwest, ninety-one percent of community members reported they had experienced intimate partner violence in their lifetime.[18] In another local study focused on rural Tribes in California, study participants reported a domestic violence prevalence ranging from eighty to ninety percent.[19]

These local studies provide ample justification for the congressional action taken to enact § 117(a).

2. Domestic Violence Perpetrators are Likely to Reoffend

The Habitual Offender Provision is particularly important because it addresses repeat offenders. Domestic violence notoriously involves a high rate of recidivism. When Congress passed § 117(a), the Department of Justice noted that 65.5% of domestic

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[17] Katherine J. Sapra et al., *Family and Partner Interpersonal Violence among American Indians/Alaska Natives*, 1 Injury Epidemiology 7 (2014), www.injepijournal.com/content/pdf/2197-1714-1-7.pdf.

[18] Robert W. Robin et al., *Intimate Violence in a Southwestern American Indian Tribal Community*, 4 Cultural Diversity and Mental Health 335 (1998).

[19] Loring Jones, *The Distinctive Characteristics and Needs of Domestic Violence Victims in a Native American Community*, 23 J. Fam. Violence 113, 115 (2008).

violence victims reported being victimized multiple times by the same partner.[20]

More recent studies confirm the general principle that domestic violence is not a one-time event. For example, a ten-year study of a sample of domestic violence offenders reported that approximately half of domestic violence offenders were re-arrested during the study period.[21] A 2012 Bureau of Justice Statistics report found that "most female victims of intimate partner violence were previously victimized by the same offender, including seventy-seven percent of females ages 18-24, seventy-six percent of females ages 25-34, and eighty-one percent of females ages 35-49."[22] It is important to note that by the time a victim reports domestic violence to police, she has typically suffered "multiple assaults or related victimizations."[23] And as a survivor experiences repeated victimizations over time, the "time intervals between successive victimizations decrease."[24]

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[20] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence* 39 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[21] Tara N. Richards et al., *A 10-Year Analysis of Rearrests Among a Cohort of Domestic Violence Offenders*, 29 Violence and Victims 887, 897 (2014).

[22] Shannan Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 239203, *Intimate Partner Violence, 1993-2010*, 4 (2012), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf.

[23] Andrew R. Klein, Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 225722, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 6 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.

[24] Marie Mele, *The Time Course of Repeat Intimate Partner Violence*, 24 J. Fam. Violence 619, 620 (2009).

Prosecution is an important tactic to address the repetitive nature of domestic violence. For example, a 2009 National Institute of Justice Report indicated that "prosecution deters domestic violence if it adequately addresses abuser risk by imposing appropriately intrusive sentences."[25] Section 117(a), therefore, serves as the critical intervention needed to increase the likelihood that victims may find relief from a long-standing crisis in their lives—especially since federal law prohibits the majority of Tribal Courts from imposing sufficiently intrusive sentences to deter future assaults.

Congress, therefore, reasoned that without the Habitual Offender Provision, perpetrators could continue to repeatedly abuse Native women and "escape felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain). Given the staggering rates of repeated violence against Native women, Congress' considered judgment that § 117(a) was necessary to protect Native women is more than reasonable—and without a doubt—fully constitutional.

3. Violence Escalates Over Time

Furthermore, the repetitive nature of domestic violence is incredibly serious because perpetrators often increase the severity of violence with each repeated act of abuse. *See United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014) ("Domestic violence often escalates in severity over time. . . . "). Thus, when no intervention occurs, a victim typically experiences an

[25] Klein, *supra*, at 47.

ever-increasing severity of violence.[26] Moreover, even when victims are able to escape the relationship, the likelihood of additional violence increases.[27] The risk of lethal violence is particularly salient; spouses and partners commit a significant portion (thirty percent) of all homicides of women.[28] For Native women, this number is much higher; as Congress noted in 2005, "Homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and . . . *75 percent of those deaths were committed by a family member or acquaintance*." 51 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain) (emphasis added).

This dynamic makes it even more important for federal prosecutors to intervene under § 117(a) following a minimum of two domestic violence convictions, as studies indicate that domestic violence escalates over time. It was in response to this dangerous reality that Congress created the Habitual Offender Provision.

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[26] Matthew Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 W. St. U. L. Rev. 173, 184-185 (2007).

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

[28] Lawrence Greenfeld et al., Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ-167237, *Violence by Intimates* 6 (1998), http://bjs.gov/content/pub/pdf/vi.pdf. In fact, physical violence is the "primary risk factor for intimate partner femicide." Jacquelyn C. Campbell et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 American J. of Public Health 1089, 1091 (2003).

B. Congress Created Federal Criminal Jurisdiction over Habitual Offenders to Close the Jurisdictional and Sentencing Gaps that Previously Left Many Native Women with No Protection

Deciphering which sovereign may exercise criminal jurisdiction over a domestic violence crime committed against a Native woman is rife with complications—complications that impose significant barriers to ensuring the safety of Native women. Congress recognized the consequences of this framework when it created the Habitual Offender Provision. As Senator McCain noted two months before the bill's passage, "due to the unique status of Indian tribes," Tribal Governments face numerous legal "obstacles" in working to protect Native women from domestic violence and homicide. 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain; *see also Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 449 (2005) (testimony of the National Coalition Against Domestic Violence) (noting that the "current jurisdictional limitations have only exacerbated the disproportionate rates of violence, [and thus] it is essential that the Senate address these loopholes.") (Written Testimony on the Violence Against Women Act of 2005 on behalf of The National Coalition Against Domestic Violence). Congress, therefore, enacted the Habitual Offender Provision to address this maze of criminal jurisdiction, specifically, the gaps that left Native women without protection.

To be sure, the legal obstacles Congress sought to address in 2005 have been accumulating for more than a hundred years, beginning in 1883, with this Court's

interpretation of the General Crimes Act. The backdrop for § 117(a) originates in *Ex Parte Crow Dog*, wherein this Court interpreted § 2146 of the General Crimes Act as exempting from federal criminal jurisdiction any "crime committed in the Indian country by one Indian against the person or property of another Indian." 109 U.S. 556, 570 (1883) (citing Act of Feb. 18, 1875, c. 80, sec. 1, § 2146, 18 Stat. 318 (codified as amended at 18 U.S.C. § 1152)). In *Crow Dog*, the United States had charged Crow Dog with the murder of another Indian. *See id.* at 557. However, this Court concluded that the exercise of federal criminal jurisdiction would not be permissible absent "a clear expression of the intention of congress" that the Court was "not [] able to find." *Id.* at 572. Because Congress had exempted Indian-on-Indian crime from federal criminal jurisdiction, only Congress could act to restore it. *See id.*

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

One year later, in 1886, this Court reviewed the congressional establishment of federal criminal jurisdiction over Indian-on-Indian crime and found the enactment of such jurisdiction to be well "within the competency of congress." *United States v. Kagama*,

118 U.S. 375, 383 (1886). According to the Court in *Kagama*, when legislating with regards to Indian affairs, Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States." *Id*. Deemed a constitutional exercise of congressional power in *Kagama*, the Major Crimes Act affords the Federal Government criminal jurisdiction over certain felony assaults committed by Indians in Indian country. *See* 18 U.S.C. § 1153.

As of 2005, however, "the Major Crimes Act [did] not include provisions to provide Federal prosecutors the ability to prosecute domestic violence assaults unless they rise to the level of serious bodily injury or death." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain).[29] Consequently, Congress enacted § 117(a) "[t]o close existing gaps in Federal criminal laws . . . [that fail] to address incidents of domestic violence" perpetrated against Native women. *Id.* at S4874. That is, the Habitual Offender Provision is premised on the precept that repeat offenders should be subject to federal criminal prosecution *before* the violence escalates to the level of permanent, substantial injury.

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[29] In the 2013 re-authorization of VAWA, Congress lowered the standard in the Major Crimes Act from "serious bodily injury" to "substantial bodily injury." *See* note 9, *supra.* The term "substantial bodily injury" means "bodily injury which involves—(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113(b)(1). Section 117(a), therefore, signals Congress' intent that Native women not be required to wait until their body is disfigured or they lose the function of a bodily member and/or organ to witness their perpetrator's federal prosecution.

Congress also enacted § 117(a) to close jurisdictional gaps in relation to non-Indian offenders who abuse Native women. Section 117 grants the Federal Government jurisdiction over recidivist Indian and non-Indian offenders in what are commonly referred to as PL-280 States, as well as those States otherwise similarly situated. *See* note 11, *supra.* Public Law 280 grants six States[30] criminal jurisdiction over "offenses committed by or against Indians" in Indian country. 18 U.S.C. § 1162. At the same time, it revokes the Federal Government's jurisdiction over crimes committed under the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153. 18 U.S.C. § 1162(c). This includes assault and domestic violence committed by non-Indians and Indians against Native women and children. 18 U.S.C. §§ 1152-1153; 18 U.S.C. § 113 (by incorporation). Therefore, prior to the enactment of § 117(a), the Federal Government could not intervene and prosecute domestic violence against a Native woman in these States, even if the violence was committed by a non-Indian.[31]

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[30] The six States are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, subject to a few exceptions. 18 U.S.C. § 1162. The Metlakatla Indian community on Annette Islands, Alaska can exercise concurrent jurisdiction, and the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon are excluded. *see id.* Minnesota retroceded authority over Bois Forte in 1975. Boise Forte Indian Reservation - Nett Lake; Acceptance of Retrocession of Juridsiction, 40 Fed. Reg. 4026 (Jan. 15, 1975)).

[31] Although prosecutions under 18 § U.S.C. 2261 are certainly possible, they are not practical, and in practice, hardly ever happen—as establishing that the defendant "travels in interstate or foreign commerce" is a burden many prosecutors determine they cannot, or simply fail, to meet. *See* note 9, *supra*.

Finally, Congress created federal criminal jurisdiction over repeat offenders based on its conclusion that the one-year sentence limitation imposed in the Indian Civil Rights Act ("ICRA") permitted repeat offenders to continue their abuse against Native women without receiving anything more than a slap on the wrist. At the time of § 117(a)'s enactment, ICRA precluded Tribal Courts from imposing a prison term greater than one year for any criminal offense. 25 U.S.C. § 1302(7).[32]

As this Court concluded in *Crow Dog* and *Kagama*, the Federal Government has no inherent criminal jurisdiction to prosecute Indian-on-Indian crimes—unless Congress authorizes such jurisdiction pursuant to its constitutional authority over Indian affairs; likewise, the Federal Government's power to prosecute crimes involving both Indians and non-Indians is generally constrained by the General Crimes Act unless Congress acts to expand it. *See Kagama*, 118 U.S. at 383; *Crow Dog*, 109 U.S. at 572. Here, Congress has done just that—and accordingly, § 117(a) falls well "within the competency of congress." *Kagama*, 118 U.S. at 383.

C. Section 117(a) Constitutes a Constitutional Exercise of Congress' Authority over Indian Affairs

Section 117(a), therefore, constitutes a constitutional exercise of Congress' power over Indian affairs because it supports, and does not undermine, the inherent right of Indian Nations to protect their citizens. In exercising its authority, Congress must take care not to intrude on what this Court has

[32] In 2010, Congress passed, and the President signed, the Tribal Law and Order Act into law. *See* note 12, *supra*.

recognized as a Tribe's "inherent power necessary to [sustain] tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). The Habitual Offender Provision more than meets this challenge, as it builds on "respect both for tribal sovereignty itself and for the plenary authority of Congress. . . ." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (internal citation and quotation marks omitted). Accordingly, the congressional enactment of § 117(a) is constitutional.

"Indian nations ha[ve] always been considered as distinct, independent political communities . . . ." *Talton v. Mayes*, 163 U.S. 376, 383 (1896) (citation and quotation marks omitted). Despite a regrettable history of policies that sought to exterminate Tribal Governments and their citizens, Indian Nations have survived and remain a "separate people, with the power of regulating their internal and social relations. . . ." *United States v. Kagama*, 118 U.S. 375, 381–82 (1886). One of the attributes of sovereignty that Indian Nations maintain today is the "power to prescribe and enforce internal criminal laws. . . ." *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

This Court has described the authority of Tribes to prosecute and punish their own members as "'inherent.'" *United States v. Lara*, 541 U.S. 193, 204 (2004) (quoting *Wheeler*, 435 U.S. at 322–23). In discussing the historical context of tribal prosecutions, the *Wheeler* Court explained that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *Wheeler*, 435 U.S. at 322-23 (internal citation omitted); *see also Lara*, 541 U.S. at 204

(affirming Tribal Nations' "authority to control events that occur upon the tribe's own land").

The inherent authority of Indian Nations to proscribe their own criminal laws for crimes committed on their lands, therefore, is not constrained by either the Bill of Rights or the Fourteenth Amendment, as neither of their own force apply to Indian Nations. *See Talton*, 163 U.S. at 384; *see also Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *see also Lara*, 541 U.S. at 205 ("[T]he Constitution does not dictate the metes and bounds of tribal autonomy. . . ."). Rather than being subject to the United States Constitution, Tribal Governments are instead subject to their own Constitutions, and as such, their inherent sovereignty is constrained only by "the supreme legislative authority of the United States." *Talton*, 163 U.S. at 384. Accordingly, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal citations and quotation marks omitted).

Indeed, the constitutionality of § 117(a)'s creation of federal criminal jurisdiction over repeat offenders cannot be construed separate and apart from ICRA, 25 U.S.C. § 1302. In enacting ICRA, "Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57 (citing 25 U.S.C. § 1302). That is, although "ICRA requires tribes to accord all

persons within their jurisdiction enumerated rights akin to the federal Bill of Rights" (*Kelsey v. Pope*, Case No. 14-1537, 2016 WL 51243, at *11 (6th Cir. 2016)), Congress elected not to incorporate the Bill of Rights as a whole and instead "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62.

In order to "avoid[] undue or precipitous interference in the affairs of the Indian people," Congress declined to require Tribal Courts to provide for the "appointment of counsel for indigents in criminal cases." *Santa Clara Pueblo*, 436 U.S. at 63. Congress' election to exclude the appointment of counsel in ICRA's requirements, therefore, constitutes a constitutional exercise of Congress' exclusive power over Indian affairs—one with which this Court should not interfere. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Congress' authority over Indian affairs "has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (the Court has "consistently described [Congress's authority] as *plenary and exclusive* to legislate [with] respect to Indian tribes") (internal citations and quotation marks omitted) (emphasis added).

Because "Congress' authority over Indian matters is extraordinarily broad, the role of *courts* in adjusting relations between and among tribes and their members [is] correspondingly restrained." *Santa Clara Pueblo*, 436 U.S. at 72 (emphasis added). In this instance, Congress determined that the extraordinarily high rates of domestic violence against Native

women required the creation of federal criminal jurisdiction over individuals identified to be "repeat" or "habitual offenders." In crafting this newfound federal criminal jurisdiction, Congress considered (1) the domestic violence crisis that Native women and their Tribal Nations face; (2) the contemporaneous legal framework that precluded Tribal Nations and the Federal Government from effectively and fully prosecuting individuals who repeatedly beat and abuse Native women; and (3) the unique trust duties and obligations that compelled Congress to assist Tribal Governments in ensuring the safety of Native women. *See generally* 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Such considerations are more than rational, and well-within the scope of Congress' constitutional power over Indian affairs.

D. Congress Determined That Trust Duties and Obligations Compelled the Creation of Federal Criminal Jurisdiction Over Repeat Offenders

The Federal Government's "trust responsibility to assist tribal governments in safeguarding the lives of Indian women" compelled Congress to establish federal criminal jurisdiction over repeat offenders. VAWA 2005, § 901. Congress' considered judgment in the execution of the Federal Government's trust responsibility should not be disturbed. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011).

As a result of the numerous treaties signed with Indian Nations to acquire the majority of the lands that constitute the United States today, the Federal Government "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation*

v. United States, 316 U.S. 286, 296-97 (1942). Since this Court's decision in *Seminole Nation*, these "moral obligations" grounded in treaties have evolved into "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). This Court has reaffirmed that management of this trust relationship is assigned to Congress. *See Jicarilla Apache Nation*, 131 S. Ct. at 2323 ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

As *Jicarilla Apache Nation* further recognized, this trust relationship vests Congress with the constitutional authority to legislate over Indian affairs. *See id.* at 2323-24 (noting that Congress has the authority to "define[] . . . the trust relationship between the United States and the Indian tribes"); *see also Blackfeather v. United States*, 190 U.S. 368, 374 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize. . . .").

In enacting § 117(a), Congress reviewed numerous "national studies indicat[ing] that Indian women experience domestic and sexual assaults at a far greater rate than other groups of women in the national population." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Congress further considered "the unique legal relationship of the United States to Indian tribes," and concluded that the Government's "trust responsibility to assist tribal governments in safeguarding the lives of Indian women" compelled the creation of federal criminal jurisdiction over individuals that Tribal Governments

have identified as repeat offenders. VAWA 2005, § 901. Respondent's attempt to eviscerate the application of § 117(a) to repeat offenders such as himself, therefore, threatens not only the safety of Native women, but the integrity and ability of Congress to fully effectuate its trust responsibility to Indian Nations and their citizens.

II. Section 117(a)'s Federal Criminal Jurisdiction over Indian Habitual Offenders Comports with This Court's Decisions in *Nichols* and *Lewis*

Furthermore, § 117(a) fits well within the constitutional framework this Court articulated in *Nichols* and *Lewis* concerning the use of prior, uncounseled convictions in subsequent federal proceedings. When understood in its proper and full context, it is clear that § 117(a) extends no new or additional punishment for any prior domestic violence convictions. Any sentence imposed pursuant to § 117(a) constitutes a punishment for the perpetrator's latest—and hopefully final—act of domestic violence. The fact that individuals are identified as threatening the safety and welfare of Native women in a Tribal Court proceeding without the provision of indigent counsel in no way constitutionally precludes Congress from authorizing the exercise of criminal jurisdiction over them when they subsequently act on the identified threat and do in fact, once again, abuse a Native woman.

In *Nichols*, this Court determined that the Constitution does not prohibit a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in determining his sentence for a subsequent offense. *See Nichols v. United States*, 511 U.S. 738, 747 (1994). The Court based its decision on

two findings. *See id.* at 747-49. *First*, the *Nichols* Court reasoned that the use of the prior conviction in the subsequent sentencing was constitutionally sound because the prior conviction, despite being uncounseled, did not itself violate the Constitution. *See id.* at 749 (concluding that "because no prison term was imposed" the prior "uncounseled misdemeanor conviction" was "valid under *Scott*" and did not violate the Constitution) (citing *Scott v. Illinois*, 440 U.S. 367 (1979)). *Second*, the Court reasoned that the use of a constitutionally compliant prior conviction for enhancement purposes in a later, separate conviction did not violate the Constitution because "[e]nhancement statutes, ...or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." *Id.* at 757. Taken together, these two factors led the Court to conclude that the reliance on a prior uncounseled misdemeanor for enhancement/recidivist purposes in no way violates the Constitution because the misdemeanor conviction itself did not violate the Constitution, and furthermore, the recidivist "repeat-offender law[] penaliz[ed] only the last offense committed by the defendant." *Id.*

Therefore, § 117(a)'s Habitual Offender Provision fully complies with the constitutional framework the Court articulated in *Nichols*. Like the prior conviction at issue in *Nichols*, Respondent's prior uncounseled convictions in Tribal Court in no way violate the Constitution. *See United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) ("Use of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment . . . *because the Sixth Amendment was never violated in the first instance*.") (emphasis added) (internal citation omitted). That is, the Bill of Rights and the Fourteenth Amendment do

not of their own force apply to Indian Nations, as Indian Nations are separate sovereigns governed by their own separate Constitutions. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896). Because "it is the fact of a constitutional violation that triggers a limitation on using a prior conviction in subsequent proceedings," (*United States v. Cavanaugh*, 643 F.3d 592, 601 (8th Cir. 2011)), the absence of a constitutional violation in Respondent's prior domestic violence convictions precludes his reliance on those proceedings to establish a constitutional infirmity in subsequent proceedings.

Even if Bryant could establish a constitutional violation inherent in his prior convictions, he remains unable to demonstrate that the sentence the United States District Court imposed in any way "change[s] the penalty imposed for the earlier conviction[s]." *Nichols*, 511 U.S. at 747. Like the enhancement statute at issue in *Nichols*, § 117(a) does not punish repeat offenders for their earlier convictions. Instead, Bryant's current prosecution is strictly for his most recent acts, specifically: on February 28, 2011, when he grabbed C.L.O. and dragged her off their bed onto the floor and then proceeded to "pull[] [her] hair, repeatedly punch[] and kick[] her," and "bit[e] her fingers"; and on May 28, 2011, when he choked a woman he was living with, D.E., "until she almost passed out." J.A. 37-38. Because he pled guilty to the aforementioned acts of domestic violence, Bryant was sentenced to forty-six months imprisonment—for those acts—and those acts alone. *See* J. 2-3, D. Mont., ECF No. 34.

Respondent has offered no argument to support the conclusion that a sentence of forty-six months is not commensurate with the violent assaults he committed

against two separate women in February and May of 2011. Accordingly, when considered in the context of this Court's decision in *Nichols*, it is clear that § 117(a)'s Habitual Offender Provision is a "repeat-offender law [that] penalize[es] only the last offense committed by the defendant." *Nichols*, 511 U.S. at 747. This Court's decision in *Nichols* alone affirms the constitutionality of § 117(a)'s reliance on Tribal Court convictions to identify a class of repeat offenders who, because of the threat they impose to the safety of Native women, should be subject to federal criminal jurisdiction for any subsequent acts of violence they commit.

Section 117(a) also passes constitutional muster under *Lewis*. In *Lewis*, this Court considered whether a defendant's prior uncounseled conviction "may constitute the predicate for a subsequent conviction under § 1202(a)(1) . . . of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. § 1202(a)(1)." *Lewis v. United States*, 445 U.S. 55, 56 (1980). Ultimately, the Court concluded that the "[u]se of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction," did not violate the Constitution's Sixth Amendment. *Id.* at 67. The Court based its decision on the conclusion that "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational." *Id.* Likewise, Congress' judgment that an individual convicted of multiple counts of domestic violence is among a class of persons who pose a significant threat to Native women and thus should be prosecuted under federal criminal jurisdiction for any subsequent acts of violence is, like the congressional

judgment this Court considered in *Lewis*, entirely rational.

Indeed, as Judge Watford explained below, it would be "illogical" to conclude that, in contrast to this Court's decision in *Lewis*, "the 'mere fact' of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence." Pet. App. 19a. As Judge Watford further noted, the exercise of federal criminal jurisdiction pursuant to § 117(a) does not "imping[e] upon anyone's rights" nor does the statute enhance penalties for "domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with." *Id.*

Because Respondent's prior convictions did not violate the Sixth Amendment, and because those prior convictions simply constitute the basis for federal criminal jurisdiction over his *subsequent* acts of domestic violence, § 117(a)'s application to Respondent's recent criminal conduct in 2011 fully complies with the United States Constitution. To conclude otherwise would abrogate Congress' considered judgment in the exercise of its power over Indian affairs, and furthermore, would serve to insulate repeat offenders who continue to abuse Native women.

III. The Failure to Reverse the Ninth Circuit Would Have Devastating Consequences for Native Women

A finding that Congress cannot rely on Tribal Court convictions to establish federal criminal jurisdiction over a class of individuals who pose a serious threat to Native women would seriously undermine Congress' ability to effectuate its authority over Indian affairs. Likewise, the conclusion that the Constitution precludes the application of § 117(a) to violent repeat

offenders like Bryant would place a significant number of Native women in grave danger.

Nothing in the United States Constitution condones the perpetuation of a legal framework that leaves Native women without sufficient legal protection to deter repeat offenders. As a result of "the unique legal relationship of the United States to Indian tribes," the Federal Government has a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women." VAWA 2005, § 901. This Court should reverse the decision of the Ninth Circuit and affirm the ability of Congress to create federal criminal jurisdiction over individuals who repeatedly beat, batter, and abuse Native women.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully Submitted,

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APPENDIX

APPENDIX

STATEMENTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *amici curiae* in support of Petitioner.

American Indians Against Abuse ("AIAA") is a Wisconsin not-for-profit incorporated in 1991. AAIA is a statewide sexual assault and domestic violence tribal coalition serving Wisconsin's eleven Tribes and member programs by providing education, support, and technical assistance to enhance and strengthen the response to victims of domestic violence, sexual assault, dating violence, and stalking. AIAA's trainings, community awareness, and collaborative events are designed to be reflective of and have relevance to our local, regional, and nationwide indigenous people and culture.

The **Avellaka Program** is a La Jolla Band of Luiseno Indians not-for-profit organization incorporated in 2009. The Avellaka Program is dedicated to educating and organizing for social change, upholding the Tribe's authority as a sovereign Indian Nation to protect its women citizens and create the laws, policies, protocols, and advocacy services addressing violence against Native women on the La Jolla Reservation.

The **Battered Women's Justice Project** ("BWJP") is a Minnesota not-for-profit organization incorporated in 2015 (http://www.bwjp.org). The BWJP is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence ("IPV"). The BWJP promotes systemic change within the civil and criminal justice

systems to ensure an effective and just response to victims and perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of IPV on women and children and to fashion safe outcomes that hold batterers accountable.

Domestic and Sexual Violence Services is a Montana not-for-profit organization incorporated in 1999 (www.dsvsmontana.org). Domestic and Sexual Violence Services' mission is to serve individuals, families, and communities impacted by physical, sexual and emotional abuse, and to promote healthy, equitable, violence-free relationships. Domestic and Sexual Violence Services uses a three-pronged approach: providing guidance and resources to individuals experiencing violence; CCR training and support to systems professionals to provide comprehensive services and hold perpetrators accountable; and violence prevention education through the Power Up, Speak Out! program.

The **Domestic Violence Legal Empowerment and Appeals Project** ("DV LEAP") is a Washington, D.C. not-for-profit organization incorporated in 2003 (http://www.dvleap.org). DV LEAP was founded by one of the nation's leading domestic violence lawyers and law professors to advance safety and justice for

abused women and children through appellate litigation. Despite numerous legislative and policy reforms designed to protect victims of domestic violence, many abused women and children are deprived of legal protections and rights in court. The appellate review process is the only way to correct these trial court errors, but appeals are rare because they are costly and require scarce appellate and domestic violence expertise. DVLEAP responds to this vital need through *pro bono* appellate representation as well as training and strategic assistance to lawyers and courts.

The **First Nations Women's Alliance** is a North Dakota not-for-profit organization incorporated in 2008 (http://www.nativewoman.org/). It is the mission of the First Nations Women's Alliance to strengthen tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. The Alliance is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating the provision of those services by others in our communities.

Futures Without Violence ("FUTURES") is a national not-for-profit organization incorporated in 1984 (www.futureswithoutviolence.org). For more than thirty years, FUTURES has been providing groundbreaking programs, policies, and campaigns that empower individuals and organizations working to end violence against women and children around the world. Providing leadership from offices in San Francisco, Washington D.C. and Boston, FUTURES has established a state-of-the-art Center for Leadership and Action in the Presidio of San Francisco to

foster ongoing dialogue about gender-based violence and child abuse.

Globalmother is a Tanzania not-for-profit organization incorporated in 2011 (www.globalmother.org). The purpose of Globalmother is to provide protection for mothers suffering from physical, water, and food insecurity.

The **Hopi-Tewa Women's Coalition to End Abuse** is an Arizona not-for-profit organization incorporated in 2009. The Coalition is a tribal domestic violence and sexual assault coalition located on the Hopi Reservation in northeast Arizona. The coalition provides training, technical assistance, policy development, advocacy support and education to the Tribal Government, program partners and community. The Coalition's mission is to advocate for a coordinated and effective response system that creates a safety net towards building healthy communities, while embracing the strength of Hopi cultural values and traditions.

The **Lower Elwha Klallam Tribe Family Advocacy Program** ("FAP") is a Lower Elwha Klallam Tribe not-for-profit organization incorporated in 2000 (http://www.elwha.org/tribalprograms/family advocacy.html). FAP operates within the Tribal Government of the Lower Elwha Klallam Tribe, a federally recognized Indian Tribe located in the Olympic Peninsula of the State of Washington. The mission of FAP is to ensure victim safety and autonomy through advocacy and community awareness. Using reservation based advocacy, FAP delivers direct services such as crisis intervention, individual advocacy (legal; medical; financial), community referrals, accessing safehouses/shelters, relocation and/or transitional housing to victims/survivors of

domestic violence, dating violence, sexual violence, and stalking. FAP also empowers the Elwha Tribal community by facilitating community awareness and prevention activities.

Mending the Sacred Hoop is a Minnesota not-for-profit organization incorporated in 2006 (www.mshoop.org). Mending the Sacred Hoop works from a social change perspective to end violence against Native women and children while restoring the safety, sovereignty, and sacredness of Native women. Mending the Sacred Hoop is committed to strengthening the voice and vision of Native peoples through grassroots organizing, as well as restoring the leadership of Native women in addressing and ending domestic and sexual violence.

The **Monument Quilt** is a Maryland not-for-profit organization incorporated in 2013 (www.themonumentquilt.org). The Monument Quilt is an on-going collection of stories from survivors of rape and abuse. Written, stitched, and painted onto red fabric, our stories are sewn together to create and demand public space to heal. The Quilt builds a new culture where survivors are publicly supported, rather than publicly shamed.

The **National Coalition Against Domestic Violence** ("NCADV") is a Colorado not-for-profit organization incorporated in 1978 (www.ncadv.org). The vision of NCADV is to create a culture where domestic violence is not tolerated; and where society empowers victims and survivors, and holds abusers accountable. NCADV's mission is to be the voice of victims and survivors. NCADV is the catalyst for changing society to have zero tolerance for domestic violence. NCADV does this by effecting public policy, increasing understanding of the impact of domestic

violence, and providing programs and education that drive that change.

National Coalition of Anti-Violence Programs ("NCAVP") is a New York not-for-profit organization incorporated in 1995 (www.ncavp.org). NCAVP works to end all forms of violence within and against lesbian, gay, bisexual, transgender, queer, and HIV-affected communities. NCAVP is a national coalition of local member programs and affiliate organizations who create systemic and social change. We strive to increase power, safety, and resources through data analysis, policy advocacy, education, and technical assistance.

The **National Domestic Violence Hotline** is a Texas not-for-profit organization incorporated in 1996 (www.thehotline.org). Every day, 24/7/365, the National Domestic Violence Hotline provides confidential, compassionate, and practical help to the more than 400,000 people who contact the Hotline for help with domestic and dating violence issues every year via phone, chat, and text. With a database of more than 5,000 providers and resources in the United States, Puerto Rico, the U.S. Virgin Islands, and Guam, the Hotline and its youth component (www.Loveisrespect.org), provide confidential conversations and crucial information to help guide survivors to appropriate programs and safety. Since 1996, more than 3.7 million people have received help from The Hotline.

The **National Indian Justice Center** ("NIJC") is a California not-for-profit incorporated in 1983 (www.nijc.org). The NIJC is an Indian-owned and operated not-for-profit corporation with principal offices in Santa Rosa, California. The NIJC was established in 1983 through the collective efforts of the

National American Indian Court Judges Association, the American Indian Lawyer Training Program, and the Bureau of Indian Affairs in order to establish an independent national resource for Native communities and Tribal Governments. The goals of NIJC are to design and deliver legal education, research, and technical assistance programs which seek to improve the quality of life for Native communities and the administration of justice in Indian country.

The **National Resource Center on Domestic Violence** ("NRCDV") is a Pennsylvania not-for-profit organization incorporated in 1993 (www.nrcdv.org). The mission of the NRCDV is to strengthen and transform efforts to end domestic violence. Since 1993, the NRCDV has provided comprehensive and individualized technical assistance, training and resource development related to domestic violence intervention and prevention, community education and organizing, and public policy and systems advocacy. The NRCDV strives to be a trusted national leader and sustainable organization, renowned for innovation, multidisciplinary approaches, and a commitment to ensuring that policy, practice, and research is grounded in and guided by the voices and experiences of domestic violence survivors and advocates.

The **Native Alliance Against Violence** is an Oklahoma not-for-profit organization incorporated in 2009 (www.oklahomanaav.org). The Native Alliance Against Violence is Oklahoma's only tribal domestic and sexual violence coalition. Through the Spirit of respect and cooperation, the Native Alliance Against Violence strives to unify tribal service programs throughout Oklahoma by providing culturally appropriate technical assistance, training and support

to eliminate domestic violence, sexual violence, dating violence, stalking, and sex trafficking to restore balance and safety for Native communities.

The **Native Women's Coalition** is an Idaho not-for-profit organization incorporated in 2009. The Coalition provides awareness through education, training and technical assistance to Native and non-Native service providers to stop domestic violence and sexual assault against Native women and children, both on reservation and in rural and urban off-reservation communities. The Coalition believes it is essential that all providers understand the unique need for the delivery of culturally appropriate services to victims, especially child victims.

The **Native Women's Society of the Great Plains** is a South Dakota not-for-profit organization incorporated in 2008 (www.nativewomenssociety.org). The Coalition's mission is to promote the safety of Native women. The Coalition is comprised of organizations that provide shelter and services to Native women experiencing violence in their homelands.

Restoring Ancestral Winds, Inc. ("RAW") is a Utah a 501 (c)(3) non-profit organization incorporated in 2013 (www.restoringancestralwinds.org). The mission of RAW is to support healing in our indigenous communities. RAW will advocate for healthy relationships; educate communities on issues surrounding stalking, domestic, sexual, dating and family violence; collaborate with Great Basin Region community members and stakeholders; and honor and strengthen traditional values with all our relations.

Sacred Spirits First Nations Coalition ("Sacred Spirits") is a Minnesota not-for-profit corporation incorporated in 2001. Sacred Spirits is a non-

profit that has been addressing domestic violence and sexual assault of Native American and Alaska Native Women for 14 years. Sacred Spirits' mission is to reclaim the sacred spirits of women, men, and their families for the next seven generations by healing the effects of historical trauma through culturally competent practices utilizing traditional Anishinaabe values and beliefs. Sacred Spirits is dedicated to unifying the safety response on behalf of Native women, men and their families being victimized by sexual and domestic violence. Sacred Spirits, in its mission, vision, and strategic plan, keeps a priority to reduce or eliminate domestic violence, dating violence, sexual assault in the White Earth area or surrounding area.

The **South Dakota Coalition Ending Domestic & Sexual Violence** is a South Dakota not-for-profit organization incorporated in 1978 (http://sdcedsv.org). The Coalition's mission is to provide assistance to the local domestic violence programs in South Dakota in order to keep women and their children safe.

The **Southwest Indigenous Women's Coalition** ("SWIWC") is an Arizona not-for-profit organization incorporated in 2006 (www.swiwc.org). SWIWC is located in Mesa, Arizona, and works to end domestic and sexual violence against Native women. Through training, technical assistance, policy development, and outreach education, SWIWC helps to build the capacity of Tribes in Arizona to better address and respond to the violence occurring in their communities.

The **Strong Hearted Native Women's Coalition, Inc.** is a California not-for-profit organization incorporated in 2006 (www.strongheartedwomen.org). Strong Hearted Native Women's Coalition was founded in 2005 to bring awareness against Sexual

Assault, Domestic Violence, Youth Violence, and Stalking in North County of the San Diego County. Native women from the Indian reservations of Rincon, Pauma, Mesa Grande, Santa Ysabel, La Jolla, San Pasqual, Los Coyotes, Pala, and Inaja/Cosmit make-up the Coalition's membership. Over the years, the Coalition has expanded to include Tribes from all of Southern California as well as other Tribes throughout the state of California. The purpose of the Coalition is to enhance the capacity of survivors, advocates, Indian women's organizations, and victim services providers to form non-profit, non-governmental tribal domestic violence and sexual assault coalitions to advance the goal of ending violence against American Indian and Alaskan Native women. The overarching goal of the Strong Hearted Native Women's Coalition program is to increase the amount of dedication to improving systemic and community responses to victims; to raise awareness, educate; and to provide technical assistance, training, and supportive services for victims of sexual assault, domestic violence, dating violence, stalking, and human/sex trafficking, including addressing the cultural and unique barriers facing Native women. By honoring our women ancestors, the Strong Hearted Native Women's Coalition advocates for women and their families and promotes safety and a traditional non-violent lifestyle. The Coalition works towards empowering women with the tools for independence, courage, and a strong direction to make healthy life choices for herself, her children, and family.

The **Tribal Law and Policy Institute** is a California not-for-profit organization incorporated in 1996 (www.home.tlpi.org). The Tribal Law and Policy Institute is a 100% Native American operated non-profit, organized to design and deliver education,

research, training, and technical assistance programs which promote the enhancement of justice in Indian Country and the health, well-being, and culture of Native peoples.

Uniting Three Fires Against Violence ("UTFAV") is a Michigan not-for-profit organization incorporated in 2009 (www.unitingthreefiresagainst violence.org). UTFAV is a statewide tribal coalition against domestic and sexual violence. UTFAV's mission is "[t]o support Michigan Tribes in promoting the social change necessary to address the disproportionate rates of violence impacting our communities." UTFAV envisions: (1) empowered Native American survivors with access to essential and culturally appropriate services throughout the State of Michigan; (2) tribal communities that have access to the resources necessary to provide the identified services: and (3) tribal, state and federal responses that are guided by culturally appropriate and trauma informed practices.

The **Wabanaki Women's Coalition** ("WWC") is a Maine not-for-profit organization incorporated in 2013 (www.wabanakiwomenscoalition.org). The mission of the WWC is to increase the capacity of tribal communities to respond to domestic and sexual violence and influence tribal, national, and regional systems to increase awareness, safety, justice, and healing for all our relations. The WWC's vision is to guide the evolution of systems and policies that reflect the WWC's Wabanaki voice on behalf of survivors of domestic and sexual violence. The vision is also to create a technical resource center that affirms Wabanaki cultural values and tribal sovereignty, and empowers tribal service providers to serve, educate and influence their communities in an effective and

uniform way. The WWC also seeks to be recognized as the informed resource for issues on Wabanaki survivors of domestic and sexual violence.

Washington State Coalition Against Domestic Violence ("WSCADV") is a Washington not-for-profit organization incorporated in 1990 (www.wscadv.org). WSCADV is the leading voice for ending domestic violence in Washington State. WSCADV mobilizes member programs and allies to end domestic violence through advocacy and action for social change. WSCADV recognizes the sovereignty of Tribes and the critical role Tribal Courts and Tribal Governments have in ending domestic and sexual violence against Native women.

The **Washington State Native American Coalition Against Domestic Violence & Sexual Assault** is a Washington not-for-profit organization incorporated in 2005 (www.womenspirit.net). The Coalition envisions a Nation where Native women live safely and where all citizens embrace these core values as they strive towards a collective vision of safety. The Coalition believes in the empowerment of survivors, restoration of spiritual and traditional practices, human rights advocacy, restorative justice, and promoting healing from trauma.

Wiconi Wawokiya, Inc., ("Wiconi Wawokiya") is a South Dakota not-for-profit organization incorporated in 1987 (www.wiconiwawokiya.org). Wiconi Wawokiya's (Helping Families) mission is to reduce violence in the homes, workplace, schools, and the communities in which we live. Wiconi Wawokiya strives to provide safety to the victims of domestic violence, dating violence, stalking, adult and child sexual assault victims. Wiconi Wawokiya empowers those who are oppressed by providing information,

encouragement and support. Wiconi Wawokiya works to promote respect for individual differences and diversities. Wiconi Wawokiya educates society on the dynamics of domestic violence and sexual assault in intimate relationships, stalking, rape, human trafficking, and child sexual assault.

Wind River SAFESTARS is a non-profit organization of first responders serving the Eastern Shoshone and Northern Arapaho community in Wyoming. Trained and certified in 2014, SAFESTARS are the first line of protection for a victim of sexual violence and domestic violence in our communities on the Wind River Reservation.

Women of Color Network, Inc., is a Pennsylvania not-for-profit organization incorporated in 2009 (www.wocninc.org). The Women of Color Network, Inc. is a national grassroots organization amplifying the leadership and voices of women of color and tribal women seeking to end oppression and violence across all communities.

Women's Crisis Support Team is a Siletz Tribe not-for-profit organization incorporated in 1983 (www.wcs tjoco.org). Women's Crisis Support Team is dedicated to breaking the cycle of DV & SA through intervention, prevention and safe shelter.

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