No. 05-1614

In the Supreme Court of the United States

RUSSELL MEANS, PETITIONER

v.

NAVAJO NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Indian Civil Rights Act of 1968, 25 U.S.C. 1301, 1302, restores to Indian Tribes their inherent power to try misdemeanor criminal offenses committed by non-member Indians in Indian country. The questions presented are:

1. Whether those provisions of the Indian Civil Rights Act of 1968 violate equal protection.

2. Whether those provisions of the Indian Civil Rights Act of 1968 violate due process.

3. Whether the assertion of Tribal jurisdiction in this case violates the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 432 F.3d 924. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on December 13, 2005. A petition for rehearing was denied on March 22, 2006 (Pet. App. 25). The petition for a writ of certiorari was filed on June 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Criminal jurisdiction over offenses committed in Indian country is governed by a complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*,

507 U.S. 99, 102 (1993) (internal quotation marks and citations omitted). The United States may prosecute federal crimes of nationwide applicability to the same extent in Indian country as elsewhere. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that, with certain specified exceptions, federal criminal laws that apply in enclaves under exclusive federal jurisdiction also apply within Indian country. One exception is that offenses committed by one Indian against the person or property of another Indian are not subject to prosecution under Section 1152. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. *Negonsott*, 507 U.S. at 103. States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. *United States* v. *McBratney*, 104 U.S. 621 (1881). In addition, Congress has granted a number of States authority to exercise general jurisdiction over crimes committed by or against Indians in Indian country. See, *e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1162).

Indian Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Tribes have inherent sovereign power to prosecute their own members for violations of tribal law. *Id.* at 326. By virtue of their dependant status, however, Tribes have been divested of their inherent power to prosecute non-Indians.

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978).

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, imposes a number of limitations on Tribes that are analogous to those that the Constitution imposes on the United States and the States. For example, ICRA extends due process and equal protection rights that parallel those arising under the Constitution. 25 U.S.C. 1302(8). ICRA also affords a habeas corpus remedy in federal court. 25 U.S.C. 1303. Tribal courts have jurisdiction only over misdemeanor offenses, and are limited by ICRA to imposing punishments of up to one year in prison and a fine of $5000. 25 U.S.C. 1302(7).

For many years, tribal courts exercised criminal jurisdiction over nonmember Indians. In *Duro* v. *Reina*, 495 U.S. 676, 686-687 (1990), however, the Court held that the Tribes' dependent status had divested them of that authority. *Duro* created a potentially significant jurisdictional gap in law enforcement in Indian country. After *Duro*, unless an offense committed by a nonmember Indian against an Indian fell within the Indian Major Crimes Act or a federal law of general applicability, the United States, States, and Tribes all lacked authority to prosecute it. That presented a significant problem because many reservations have a large population of nonmember Indians.

In response to *Duro*, Congress enacted legislation that reaffirmed inherent tribal jurisdiction over nonmember Indians, thereby closing the jurisdictional gap that *Duro* had created. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (25 U.S.C. 1301(2)). The legislation amended ICRA's definition of a Tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed,

to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). ICRA defines "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" under 18 U.S.C. 1153. 25 U.S.C. 1301(4).

The initial legislation was effective until September 30, 1991. § 8077(d), 104 Stat. 1893. After the legislation was enacted, Congress conducted "extensive hearings." S. Rep. No. 153, 102d Cong., 1st Sess. 12-13 (1991). As a result of those hearings, Congress made the legislation permanent. Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646. Congress decided that permanent legislation was appropriate because nonmember Indians "own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," receive many tribal services, and have other close ties to Tribes. S. Rep. No. 153, *supra*, at 7. Congress also relied on the fact that "[u]ntil the Supreme Court ruled in the case of *Duro*, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years." S. Rep. No. 168, 102d Cong., 1st Sess. 2 (1991).

In *United States* v. *Lara*, 541 U.S. 193, 200 (2004), the Court held that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." The Court did not decide whether tribal jurisdiction over nonmember Indians violates equal protection or due process. *Id.* at 208-209.

2. Petitioner is an enrolled member of the Oglala-Sioux Indian Tribe. Pet. App. 3. Petitioner lived on the Navajo Reservation from 1987 to 1997. *Id.* at 4. During that period, petitioner was married to a woman who was an enrolled member of the Navajo Nation. *Ibid.* In De-

cember 1997, while on Navajo reservation lands, petitioner allegedly threatened and battered his father-in-law, who is an Omaha Indian, and threatened another man, who is a Navajo Indian. *Id.* at 3. Petitioner was prosecuted in Navajo tribal court for those alleged offenses. *Ibid.*

Petitioner moved to dismiss the proceedings, asserting that the court lacked jurisdiction over him because he was not a Navajo Indian. Pet. App. 3. After the trial court denied the motion, petitioner appealed to the Navajo Supreme Court. *Id.* at 4. The Navajo Supreme Court denied relief. *Means* v. *District Court of the Chinle Judicial Dist.*, No. SC-CV-61-98 (May 11, 1999); C.A.E.R. 6. Petitioner then filed a petition for habeas corpus in the United States District Court for the District of Arizona, asserting that the tribal court lacked jurisdiction to prosecute him. Pet. App. 2. The district court denied the petition. *Means* v. *Navajo Nation*, No. 99-1057 (Sept. 20, 2001); C.A.E.R. 19.

3. The court of appeals affirmed. Pet. App. 1-24. The court first rejected petitioner's contention that the ICRA Amendments create an impermissible racial classification. *Id.* at 12-19. The court held that when the ICRA amendments state that they apply to "all Indians," that means "all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." *Id.* at 10. The court noted that under *Morton* v. *Mancari*, 417 U.S. 535 (1974), such a distinction is political rather than racial and does not violate equal protection provided that it can be tied rationally to the fulfillment of Congress's unique obligations toward Indians. Pet. App. 14-15. The court held that the ICRA amendments satisfy that standard because they further

the Tribes' ability to maintain order within their reservation boundaries. *Id.* at 15-16.

The court also relied on the holding in *United States* v. *Antelope*, 430 U.S. 641 (1977), that the application of the Indian Major Crimes Act to tribal members is constitutional even when it results in less favorable treatment than that accorded to persons prosecuted under the Assimilative Crimes Statute, 18 U.S.C. 13, because the Indian Major Crimes Act applies to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign political entities." Pet. App. 17 (quoting *Mancari*, 419 U.S. at 554). The court perceived "no sound distinction in principle between *Antelope* and this case." *Ibid.* The court added that petitioner had the option to renounce tribal membership and thereby avoid tribal jurisdiction. *Id.* at 17-18.

The court of appeals held that petitioner's as-applied due process challenge was premature because his prosecution had been stayed. Pet. App. 19. The court also held that the ICRA amendments are not facially invalid under the Due Process Clause. *Id.* at 19-20. The court observed that (1) ICRA affords all criminal protections conferred by the Constitution except for the right to grand jury indictment and the right to appointed counsel, (2) the right to grand jury indictment does not apply to misdemeanors, and (3) the right to appointed counsel is conferred by the Navajo Bill of Rights. *Ibid.*

The court also rejected petitioner's contention that the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, barred his prosecution. Pet. App. 20-23. In making that contention, petitioner relied on a clause in the Treaty that provides that "[i]f bad men among the Indians shall commit a wrong * * * upon the person or property of any one, * * * subject to the authority of the

United States," the Navajo Nation "will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws." *Id.* at 21. The court of appeals held that the Treaty obligates the Navajo Nation to turn over an Indian wrongdoer when the United States makes that request, but it does not deprive the Tribe of authority to prosecute an Indian wrongdoer when there has been no such request. *Id.* at 22-23.

ARGUMENT

1. Petitioner contends (Pet. 7-16) that the amendments to the Indian Civil Rights Act of 1968 (ICRA) violate equal protection because they subject Indians to tribal jurisdiction on the basis of race. That contention is without merit and does not warrant review.

This Court has consistently rejected equal protection challenges to Acts of Congress that treat tribally-affiliated Indians differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The Court has explained that such laws are based not on "impermissible racial classifications," but on "the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646-647.

The Constitution expressly identifies "Indian Tribes" as distinct entities, Art. I, § 8, Cl. 3, and this Court has consistently held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes." *United States* v. *Lara*, 541 U.S. 193, 200 (2004). Furthermore, in contrast to "immutable characteristic[s]" such as race, sex, and national origin

that are "determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.), tribal membership is voluntary, and it may be relinquished at any time. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990). Accordingly, the Court has held that laws that treat tribally-affiliated Indians differently from others withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Section 1301(2), as amended after *Duro*, regulates the relationship among Tribes and the individual Indians affiliated with those Tribes. Just as Congress may define the attributes of Indians' membership in their own Tribe to include entitlement to services provided by another Tribe on whose reservation they reside, see 25 U.S.C. 450j(h); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120-1124 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000), Congress may define the attributes of Indians' tribal affiliation to include submission to the criminal jurisdiction of any other Tribe whose laws they violate. Indeed, Congress has long excepted "crimes committed by one Indian against the person or property of another Indian" from the scope of general federal criminal jurisdiction in Indian country, see Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; 18 U.S.C. 1152, choosing to leave Indians "as regard[s] their own tribe, *and other tribes also*, to be governed by Indian usages and customs." *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (emphasis added).

Petitioner contends (Pet. 14) that the ICRA amendments create a racial classification rather than a political classification because Indian status is a "proxy for race."

That contention is incorrect. The ICRA amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18." 25 U.S.C. 1301(4). In *Antelope*, the Court held that the term "Indian" in Section 1153 creates a political classification rather than a racial classification. 430 U.S. at 645-647. The Court explained that the term "Indian" in Section 1153 does not refer to all persons who are racially Indians, but to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. *Id.* at 646 & n.7. The Court further explained that the criminal defendants in that case "were not subjected to federal criminal jurisdiction because they [were] of the Indian race but because they [were] enrolled members of the Coeur d'Alene Tribe." *Id.* at 646.

Because the ICRA amendments incorporate the definition of Indian in 18 U.S.C. 1153, the analysis in *Antelope* is controlling here. Like Section 1153, the ICRA amendments do not apply to all persons who are racially Indians, but only to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. Furthermore, petitioner is not subject to tribal jurisdiction because of his race, but because he is an enrolled member of the Oglala-Sioux Tribe. See Pet. App. 3.

The direct relationship between Section 1301(4) and 18 U.S.C. 1153 is not a matter of mere definitional convenience. Section 1301(4) forms an essential component of the comprehensive jurisdictional regime in Indian country, and thereby closes the jurisdictional gap created by *Duro*. Under that regime, as restored by ICRA, specified major crimes committed by one tribally-affili-

ated Indian against another in Indian country are subject to federal prosecution under Section 1153, while more minor crimes are subject to prosecution by the Tribe on whose reservation the crime was committed. The power of Congress, recognized in *Antelope*, to provide protection for Indians by ensuring that violators are subject to prosecution, applies equally to the provision for federal prosecution under 18 U.S.C. 1153 and the provision for tribal prosecution under 25 U.S.C. 1301(4).

Petitioner's reliance (Pet. 14) on *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), is misplaced. In *Adarand*, the Court held that all racial distinctions are subject to strict scrutiny. *Id.* at 227. Because the ICRA amendments create a political classification rather than a racial classification, *Adarand* is inapposite. Nor does the decision in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), assist petitioner. In that case, the Court held that the State of Hawaii violated the Fifteenth Amendment when it limited the right to vote in a state-wide election to persons of Hawaiian ancestry. The Court found that while the classification was framed in terms of Hawaiian ancestry, the State had an express racial purpose in enacting the limitation and the actual effects of the classification were racial as well. *Id.* at 516-517. In this case, by contrast, the classification was enacted by Congress, rather than a State; it concerns tribal jurisdiction, not eligibility to vote in a state or federal election; and, most important, as the controlling decision in *Antelope* makes clear, it has both a political purpose and a political effect. *Rice* therefore has no application here.

Because the classification at issue here is political, the sole equal protection question is whether the ICRA amendments are rationally tied to the fulfillment of Con-

gress's obligations toward Indians. See *Mancari*, 417 U.S. at 555. The ICRA amendments satisfy that standard in two ways. First, Section 1301(2) advances "the congressional policy of Indian self-government," *Fisher*, 424 U.S. at 391 (citation omitted), by enhancing the authority of tribal laws and tribal institutions. It enables a Tribe to enforce its criminal laws not only against its own members, but also against members of other Tribes who voluntarily enter its territory. A Tribe's exercise of criminal jurisdiction over all such Indians comports with "the reality and practice of reservation life," in which "non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," and "receive the benefits of programs and services provided by the tribal government" to all Indians. S. Rep. No. 168, *supra*, at 6-7.

Second, Section 1301(2) protects Indians, as well as others who reside in or visit Indian country, against lawlessness by nonmember Indians. See *Duro*, 495 U.S. at 696. Because the United States and the States often lack jurisdiction to prosecute misdemeanor offenses committed by one Indian against another in Indian country, a "jurisdictional void" would otherwise exist when such offenses were committed by nonmember Indians. S. Rep. No. 168, *supra*, at 4. And even aside from questions of jurisdiction, the United States or a State might lack the resources to prosecute misdemeanors by nonmember Indians. Accordingly, the ICRA amendments are rationally related to the legitimate goals of advancing tribal self-government and protecting the safety of the reservation community, and they do not violate the Constitution's equal protection guarantee.

2. Petitioner's due process claim (Pet. 16-18) is equally without merit. ICRA guarantees protections to criminal defendants in tribal court that are analogous to the protections that the Constitution guarantees criminal defendants in federal and state courts. See 25 U.S.C. 1302. Among other protections, criminal defendants in tribal court are entitled to a speedy and public trial; they must be informed of the nature of the charges against them; they have a right to confront the witnesses against them; they have a right to compulsory process to obtain witnesses on their behalf; they have the right, at their own expense, to the assistance of counsel; and they have the right to a trial by jury for any offense punishable by imprisonment. 25 U.S.C. 1302(6) and (10). Criminal defendants also have a right to seek federal habeas corpus review to challenge detentions that are ordered by an Indian Tribe. 25 U.S.C. 1303.

ICRA does not expressly provide a right to appointed counsel for persons who cannot afford an attorney. But the Navajo Bill of Rights provides a right to appointed counsel. Pet. App. 19-20. In addition, while ICRA does not guarantee the right to an indictment by a grand jury for infamous crimes, that right is not implicated by petitioner's offenses. *Ibid*. The Navajo Nation also permits nonmembers to serve on juries. *Id*. at 5.

Petitioner contends (Pet. 18) that Congress lacks power to "subject nonmember Indian citizens to a trial by a foreign government that is not controlled by the United States Constitution." But in any proceeding in the courts of the Navajo Nation, petitioner is entitled to the same protections that the Constitution affords to citizens in a United States court. Indeed, petitioner has not identified any specific protection that would be lacking were he to be tried in the courts of the Navajo Na-

tion. Moreover, ICRA also provides a procedural mechanism for vindicating those protections, a federal habeas corpus remedy. See 25 U.S.C. 1303. Petitioner's due process claim is therefore without merit.

3. Petitioner argues (Pet. 18-19) that the Treaty with the Navajo Indians (Treaty), June 1, 1868, 15 Stat. 667, bars the Navajo Nation from exercising jurisdiction over non-member Indians. The text of the Treaty, however, provides no support for that contention. The Treaty provides, in relevant part, that "[i]f bad men among the Indians shall commit a wrong * * * upon the person or property of any one, * * * subject to the authority of the United States," the Navajo Nation "will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws." Pet. App. 21. As the court of appeals explained, that language in the Treaty requires the Navajo Nation to turn over an Indian wrongdoer when the United States initiates a process to secure that wrongdoer, but it has no effect on tribal jurisdiction to try a wrongdoer when the United States has not initiated such a process. *Id.* at 22-23. Because the United States has not initiated a process to secure petitioner for a trial under United States laws, the Treaty is inapplicable here.

4. Finally, petitioner contends (Pet. 20) that the ICRA amendments exceed Congress's powers under the Indian Commerce Clause. That argument is foreclosed by this Court's decision in *Lara*. In that case, the Court expressly held that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." 541 U.S. at 200.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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