NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JEFFREY ANTONIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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December 2, 2019

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JEFFREY ANTONIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

I. Whether, when Congress relinquished all federal claims and extinguished all interest of the Pueblo of Sandia in privately held lands within pueblo boundaries, it terminated the basis for exercise of federal criminal jurisdiction and thereby "otherwise provided" within the meaning of the 2005 Pueblo Lands Act Amendment?

II. Whether the jurisdictional element of a charged crime is adequately proved by a district court "preliminary finding" that it has jurisdiction and a jury determination that the offense happened at a particular location.

NO. _____

SUPREME COURT OF THE UNITED STATES

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JEFFREY ANTONIO,

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Irma Rivas, Assistant Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for Petitioner Jeffrey Antonio and that I caused to be mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid, by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately ____p.m. on the 2nd day of December 2019.

_____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JEFFREY ANTONIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner Jeffrey Antonio respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming his second degree murder conviction and sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Antonio,* 10th Cir. No. 18-2118, affirming Mr. Antonio's conviction and sentence, is reported at 936 F.3d 1117 and attached hereto as Appendix ("App.") A. The district court Memorandum Opinion and Order is attached as App. C.

JURISDICTIONAL STATEMENT

The Tenth Circuit entered its judgment affirming Mr. Antonio's conviction and sentence on September 4, 2019. Petitioner did not request rehearing. This Court has jurisdiction under 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.1 and 13.3, this petition is timely if filed on or before December 3, 2019.

FEDERAL LAWS AT ISSUE

The Fifth Amendment of the United States Constitution provides, in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Indian Pueblo Land Act Amendments, 25 U.S.C. § 331 Note, provide:

SECTION 1. INDIAN PUEBLO LAND ACT AMENDMENTS.

The Act of June 7, 1924 (43 Stat. 636, chapter 331), is amended by adding at the end the following:

"SEC. 20. CRIMINAL JURISDICTION.

"(a) IN GENERAL.—Except as otherwise provided by Congress, jurisdiction over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section.

"(b) JURISDICTION OF THE PUEBLO.—The Pueblo has jurisdiction, as an act of the Pueblos' inherent power as an Indian tribe, over any offense committed by a member of

the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.

"(c) JURISDICTION OF THE UNITED STATES.—The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.

"(d) JURISDICTION OF THE STATE OF NEW MEXICO.—The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the United States.".

Approved December 20, 2005.

INTRODUCTION

In the 2005 Pueblo Lands Act Amendments, Congress provided for federal criminal jurisdiction over offenses committed by or against an Indian within the boundaries of any grant from a prior sovereign, "[e]xcept as otherwise provided by Congress." Like the other eighteen pueblos of New Mexico, the Pueblo of Sandia received a grant from a representative of the King of Spain. The offense in this case occurred on land that came into private ownership in 1933-34 under the provisions of the Pueblo Land Act of 1924 ("PLA"), 43 Stat. 636. The PLA established the Pueblo Lands Board and authorized it to determine the exterior boundaries of Pueblo lands and to settle conflicts involving title to lands claimed by New Mexico Pueblos and non-Indian citizens.

The Pueblo Lands Board issued patents to non-Indians whose adverse claims were found valid. The PLA provided that the Pueblos' rights to lands patented to non-Indians were extinguished and the United States relinquished all claims to those lands. When Congress provided in the PLA for termination of the pueblos' property interest, it would have done so with the understanding that it thereby terminated the basis for exercise of federal criminal jurisdiction over offenses occurring on lands patented to non-Indians. Congress thus "otherwise provided" with respect to privately held lands within the Pueblo of Sandia. This Court has recognized that prior to 1948, Indian country status was coextensive with Indian land ownership.

Because pueblos exist only in New Mexico, other circuits are unlikely to address the federal criminal jurisdiction issues presented by this case. The federal jurisdictional issues at stake here will inevitably arise in numerous future cases involving offenses occurring on privately held land within the nineteen New Mexico pueblos. The stakes are high for Native American defendants who often receive considerably higher sentences in federal courts than state court defendants convicted of similar offenses.

The proof necessary to establish that a crime occurred within the territorial jurisdiction of the United States also presents an issue of critical importance. Due process demands proof beyond a reasonable doubt of every element of a criminal offense. A district court's mere presumption that federal jurisdiction exists–followed by a legal ruling six weeks after conviction–does not comport with due process. This Court should address this issue now in order to guide the lower courts on the applicable constitutional principles and to protect Native American defendants from future convictions without adequate proof of the jurisdictional element of charged crimes.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Jeffrey Antonio was charged by indictment, filed in the United States District Court for the District of New Mexico, with one count of second degree murder in violation of 18 U.S.C. §§ 1153 and 1111. He was convicted after a three-day jury trial and was sentenced to a 240-month term of imprisonment..

Antonio was driving while intoxicated on a state road that runs through Sandia Pueblo when he drifted into an oncoming lane of traffic and collided with another vehicle.

The driver of the other car sustained foot and ankle injuries; her passenger sustained fatal injuries and died shortly after the accident.

Mr. Antonio's Motion to Dismiss for Lack of Jurisdiction and the Court's Ruling.

Antonio filed a pretrial motion to dismiss for lack of subject matter jurisdiction. The district court heard evidence pertaining to the motion at two pretrial hearings. More than six weeks after Antonio was convicted, the court ruled that it had subject matter jurisdiction. It made fourteen factual findings and numerous legal findings in support of its jurisdictional ruling. Appendix ("App.") C.

The parties agreed that the accident giving rise to this case occurred on non-Indian owned land east of the Rio Grande River near the intersection of Wilda Dr. and State Road 313, which traverses the length of Sandia Pueblo between its northern and southern boundaries. The property on which the accident took place had been patented in the 1930s to Pedro C. Garcia and his heirs ("the Garcia tract"). Patent Number 1069186, dated April 26, 1934, and Patent Number 1067360, dated December 20, 1933, relinquished to Garcia, respectively, one hundred eleven acres and nine hundred twenty-six thousandths of an acre and fifty-one acres and six hundred sixty-five thousandths of an acre "within the Pueblo of Sandia." The patents stated that they were "a relinquishment by the United States of America and the Indians of said Pueblo."

Mr. Antonio's Motion for Judgment of Acquittal.

At the conclusion of the government's case, Antonio moved for a judgment of acquittal under Fed. R. Crim. P. 29. He argued that there was insufficient proof that the accident occurred within Indian country and thus insufficient proof of the federal jurisdictional element. The government argued in response that the district court had indicated its intent to instruct the jury that the accident site is within the territorial jurisdiction of the United States.

The District Court's Ruling.

The district court indicated that it was "still working on the jurisdiction." App. B. Nonetheless, it stated that it would instruct the jury "that the land is Indian Country, so that they will have – they will make their decision based on my instruction that the court has jurisdiction." The district court denied Antonio's motion. *Id.*

Mr. Antonio's Tenth Circuit Appeal and the Court's Ruling.

In his appeal to the Tenth Circuit, Mr. Antonio argued that the district court wrongly held that it had jurisdiction in this case because Congress "otherwise provided" when the United States relinquished all claims and extinguished all right, title, and interest of Sandia Pueblo to private lands within pueblo boundaries. The court of appeals rejected Antonio's argument because it concluded that Congress had not thereby issued a "clear directive [ ] exempting certain lands from jurisdiction." App. A at 6.

Mr. Antonio also argued on appeal that even if Congress had not "otherwise provided," there was insufficient proof of the legal component of the jurisdictional

element–that his offense took place "within the territorial jurisdiction of the United States"–to support his conviction. Although the jury made the factual finding that the accident occurred in the location agreed upon by the parties, proof of the jurisdictional element also required a legal ruling that was not issued by the district court until six weeks after Mr. Antonio was convicted.

The court of appeals pointed out that "the district court gave a preliminary ruling that the site of the accident fell within Indian Country." It decided that even without that preliminary ruling, "the jury still had sufficient evidence to convict Antonio because the jurors answered the factual question of whether the offense occurred at the intersection of Highway 313 and Wilda Drive." App. A at 8.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. This Court should grant certiorari to decide the important statutory interpretation issue raised by this case.

As the district court found, the land on which the accident in this case occurred came into Pedro Garcia's ownership under the provisions of the Pueblo Lands Act ("PLA"), 43 Stat. 636 (1924). App. C at 4 ¶ 6. The PLA established the Pueblo Lands Board and authorized it to determine the exterior boundaries of Pueblo lands and to settle conflicts involving title to lands claimed by New Mexico Pueblos and non-Indian citizens. *Id.* at 36; PLA § 2, 6, 43 Stat. at 633-37; *Mountain States Tel. & Tel.Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240, 244 (1985). Congress instructed the Board to award compensation to Pueblos for losses suffered due to failure of the United States to

protect their rights, PLA § 6, 43 Stat. at 638, and to report on possible purchases for the Pueblos of some lands validly held by non-Indians. PLA § 8, 43 Stat. at 639. The PLA provided for judicial determination of the area and value of lands where non-Indian claims based on Spanish or Mexican grants were superior to Indian claims. PLA § 14, 43 Stat. at 641. If non-Indian claims to land that had been occupied and improved in good faith were not upheld, the court was to make findings as to the value of the improvements and the Secretary of the Interior was to submit a report to Congress with recommendations concerning compensation. § 15, 43 Stat. at 641. Congress's passage of a statute that provides for surrender of tribal land claims, along with compensation, "creates an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Nebraska v. Parker*, – U.S. –, 136 S.Ct. 1072, 1079 (2016) (internal quotation omitted).

The Board issued patents to non-Indians whose adverse claims were found valid. App. C at 36. "The Pueblos' rights to such land were extinguished." *Id.* (quoting *United States v. Arrieta*, 436 F.3d 1246, 1249-50 (10th Cir. 2006) (citing PLA, § 4; 43 Stat. at 637*; Mountain States Tel. & Tel.*, 472 U.S. at 244)). The United States relinquished all claim to those lands. PLA § 13, 43 Stat. at 640. The Pueblos retained title to lands not patented to non-Indians. App. C at 36.

As a result of the Pueblo Lands Board determination, Pedro Garcia was found entitled to two patents to the tract of land on which the accident in this case took place. *Id.* at 4 ¶ 6. The patents issued to Pedro Garcia state that they effect "a relinquishment by

the United States of America and the Indians of said Pueblo." The supplemental plat containing the tract of land conveyed to Pedro Garcia states that it "represents the survey of certain tracts of land within the Sandia Pueblo Grant to which the Indian title has been extinguished . . . "

By extinguishing Pueblo title to the Garcia tract and relinquishing all federal interest, Congress removed the land from federal jurisdiction and thereby "otherwise provided" within the meaning of the Indian Pueblo Land Act Amendments of 2005, 25 U.S.C. § 331(a) Note. There can be no dispute that when Congress enacted the PLA in 1924, it would have been fully aware that it was terminating federal criminal jurisdiction by extinguishing Pueblo title and relinquishing all federal interest. As this Court recognized in *Solem v. Bartlett*, 465 U.S. 463 (1984), there was no question prior to 1948 that the extinguishment of Indian title terminated Indian country status.

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest . . . See *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877); *Ash Sheep Co. v. United States*, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920). Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.

Id. at 468 (citing 18 U.S.C. § 1151).

In *Bates*, this Court recognized that Indian country status turns entirely on Indian title to the land. "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be

Indian country so long as the Indians had title to it, and no longer." *Id.* at 208. In *Ash Sheep Co.*, this Court upheld a judgment against the Sheep Company, which had pastured 5,000 sheep on Montana lands that this Court determined retained "Indian land" status in light of the trusteeship that the government maintained of the lands for the benefit of the Crow Tribe. *Id.* at 166.

Cases decided around the time the PLA was enacted consistently held that Indian country status and, in turn, federal criminal jurisdiction, turned on whether Indian title to the land in question had been extinguished. In *United States v. Soldana*, 246 U.S. 530 (1918), for example, defendants were charged with introducing liquor within the exterior boundaries of the Crow Reservation upon the station platform of the Chicago, Burlington & Quincy Railway Company. This Court's decision turned on whether the act of Congress granting the right of way for the station platform extinguished Indian title. "If the Indian title to the soil on which the platform stands was extinguished by that grant, the platform was not within Indian country." *Id.* at 531. Because this Court determined that "it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right of way," defendants were held to have been properly indicted for introducing intoxicating liquors into Indian country. *Id.* at 532-33.

Employing the same rationale, this Court reached the opposite result in *Clairmont v. United States*, 225 U.S. 551 (1912), which also involved charges against a train passenger for introducing liquor into the Indian Territory. This Court found that the grant of the railway company right of way extinguished Indian title to that strip of land.

> Our conclusion must be that the right of way had been completely withdrawn from the reservation by the surrender of the Indian title, and that in accordance with the repeated rulings of this court, it was not Indian country. The District Court, therefore, had no jurisdiction of the offense charged, and the judgment must be reversed."

Id. at 560.

It is undisputed that the PLA and the issuance of a patent under the PLA to Pedro Garcia extinguished Sandia Pueblo's title to the land at issue in this case. By extinguishing pueblo title, Congress exempted that land from federal criminal jurisdiction. Congress thus "otherwise provided" with respect to criminal jurisdiction within the meaning of 25 U.S.C.A. § 331 Note, subsection (a). This Court should grant certiorari in this case and instruct the lower courts on the interpretation and enforcement of statutory language.

It is the well established prerogative of Congress to determine "what land is Indian country subject to federal jurisdiction." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)). " . . . [T]he questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865)).

Congressional intent to extinguish Indian title must be "plain and unambiguous." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941). The 1924 Pueblo Lands Act unambiguously removed the Garcia tract from the exterior boundary of the

land set aside for Sandia Pueblo and thereby removed it from federal control. Congress clearly extinguished all rights of the Pueblo to the Garcia tract, relinquished all federal claims, and removed that tract from federal trust responsibility and protection.

The Enabling Act of New Mexico of June 20, 1910, 36 Stat. 557, supports the conclusion that the extinguishment of Pueblo rights to land effected removal of that land from federal jurisdiction and control. It states in Section 2:

> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that *until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; ...*

Id. at 558-59 (emphasis added).

The government argued below that the extinguishment of pueblo title was an act of the Pueblo Land Board rather than Congress. The Pueblo Lands Board was created by Congress and acted at the direction of Congress. Congress, through its creation and direction of the Pueblo Lands Board, "otherwise provided" with respect to federal criminal jurisdiction by legislation that extinguished pueblo title and relinquished all federal claim to non-Indian land. § 13, 43 Stat. at 640.

Where statutory language is clear, it is controlling. "In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112

L.Ed.2d 449 (1990) (citation and internal quotation marks omitted). Legislative history may be consulted only if statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Arguments about policy, statutory purposes, and legislative history cannot overcome clear statutory language. *Trump v. Hawaii*, 138 S.Ct. 2392, 2408 (2018); *Sandoz Inc. v. Amgen Inc.*, 137 S.Ct. 1664, 1678 (2017) (citing *McFarland v. Scott*, 512 U.S. 849, 865 (1994)(Thomas, J., dissenting).

This case presents fundamental issues concerning both Indian law and criminal law. This Court should grant certiorari to instruct the lower courts on the correct construction and application of the Indian Pueblo Land Act Amendments of 2005.

II. This Court should grant certiorari to address the exceptionally important due process and sufficiency-of-the-evidence issues this case presents.

It is well established that federal courts have power to hear only cases within the judicial power of the United States—as set forth in the Constitution or laws passed by Congress. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). "The requirement that jurisdiction be established as a threshold matter is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884)). The necessity that courts ensure that they have subject matter jurisdiction in a given case "is not a mere nicety of legal metaphysics, [and] rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect

citizens from the very wrong asserted here, the excessive use of judicial power." *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

A federal court must presume that it does not have subject matter jurisdiction; where jurisdiction has been challenged, the party seeking to invoke it must demonstrate that jurisdiction is proper by a preponderance of the evidence. *Vaden v. Discover Bank*, 556 U.S. 49, 69-70 (2009). When jurisdiction has not been proved, courts are without power to proceed and must dismiss the cause. *Steel Co.*, 523 U.S. at 94.

The Tenth Circuit has recognized that the question whether an offense occurred within the territorial jurisdiction of the United States has both legal and factual components. *United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999). The *Roberts* court determined that the jurisdictional element has a legal component that may be proved by the district court's ruling that federal jurisdiction exists over the tract of land where the charged offense occurred. *Id.* at 1139.

Due process requires the government to prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). In deciding this case, the court of appeals shrugged off the fundamental due process guarantee that a criminal conviction may not stand in the absence of proof beyond a reasonable doubt of every element of the charged offense.

When the district court instructed the jury "that the alleged murder occurred within the territorial jurisdiction of the United States [] if you find beyond a reasonable doubt that such offense occurred at the intersection of Highway 313 and Wilda Drive, . . . " the

legal component of the jurisdiction element had not been proved–it had merely been presumed. The district court erred by instructing the jury that "the alleged murder occurred within the territorial jurisdiction of the United States," App. D, in the absence of an underlying legal ruling. The district court's conjecture about an essential element of Antonio's criminal offense constituted an insufficient basis for his conviction.

This Court should grant certiorari to guide the lower courts on application of federal jurisdictional principles in the criminal law context as they affect Native American defendants in New Mexico. Good intentions are no substitute for criminal due process safeguards. *Winship*, 397 U.S. at 365-66. Antonio's conviction of second degree murder, based merely on a presumption of jurisdiction, "conflict[s] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Sandstrom*, 442 U.S. at 522 (quoting *Morisette v. United States*, 342 U.S. 246, 274-75 (1952)). This Court should ensure that such due process violations do not recur.

CONCLUSION

Although the statutory interpretation issue presented by this case is unlikely to arise in other circuits, it is certain to recur many times in New Mexico. The due process and sufficiency-of-the-evidence issues raised by this case also have broad application. This Court should grant certiorari to address the exceptionally important issues this case presents and to instruct the lower courts on the important legal issues at stake here. For all the reasons stated above, Petitioner Jeffrey Antonio respectfully requests that this Court grant his petition for writ of certiorari.

In the alternative, this Court should grant certiorari, vacate the judgment of the court of appeals, and remand this case for further proceedings.

Respectfully submitted,

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