NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN ADRIAN SLOAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *United States v. Antelope*, 430 U.S. 641 (1977), should be overruled because the Major Crimes Act, 18 U.S.C. § 1153—which transforms certain acts committed in "Indian Country" into federal crimes only where the defendant is an "Indian"—denies those of Native American descent the equal protection of the law in violation of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brian Adrian Sloan, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on February 8, 2021.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Sloan* (19-2096) is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction in this criminal action, involving charges against a member of the Navajo Nation for crimes that allegedly occurred within the geographical boundaries of the Navajo Nation, pursuant to 18 U.S.C. § 1153, § 3231, and § 3242. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on February 8, 2021. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

1. The Fifth Amendment to the U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Major Crimes Act, 18 U.S.C. § 1153:

> **(a)** Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> **(b)** Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

STATEMENT OF THE CASE

This case involves decades-old allegations of sexual abuse on the Navajo Indian Reservation in New Mexico, and petitioner Brian Sloan stands convicted of being "an Indian" who committed crimes of aggravated sexual abuse "in Indian Country."[1]

As relevant here, Mr. Sloan was indicted on four sexual assault counts as "an Indian." Vol.1 at at 20-21. The district court exercised jurisdiction under 18 U.S.C. § 3242, which allows federal district courts to hear cases "punishable under section 1153"—the Major Crimes Act—involving "Indians" committing crimes in "Indian country." *Id.* At trial, the government introduced evidence that Mr. Sloan's tribal enrollment record says that he is "4/4 Degree Navajo Indian blood," meaning that he was "full Navajo," and that, having been enrolled with the tribe, he was "a federally recognized individual with the Navajo Nation." Vol. 4 at 417-21. The jury was instructed, in accordance with Tenth Circuit law, that "the term 'Indian' means a person who (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or the federal government." Vol. 1 at 148.

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page, and are provided in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

Mr. Sloan was convicted at trial of the four charged counts, and faced statutory mandatory minimum terms of imprisonment of 30 years (and up to life) on two counts, *see* 18 U.S.C. § 2241(c), and terms up to life on two others, *see* § 2241(a), § 2241(c) (2003)[2]. (Vol. 3 at 1-2.) The district court sentenced him to life imprisonment. (Vol. 4 at 894-96, 904-07; Vol. 1 at 169.)

On appeal, Mr. Sloan raised a series of evidentiary and sentencing challenges, which the Tenth Circuit rejected. *See* Appendix at 1. He also raised, for further review, a claim foreclosed by binding precedent, *United States v. Antelope*, 430 U.S. 641 (1977), namely, that the Major Crimes Act, 18 U.S.C. § 1153, is unconstitutional because it is based on an impermissible racial classification of who is an "Indian" subject to federal criminal jurisdiction. This petition follows.

[2] Although count 4 arose under § 2241(c), it involved conduct alleged to have occurred in 2003, before the addition of a statutory mandatory minimum of 30 years in 2006. *See* Adam Walsh Child Protection and Safety Act of 2006, Sec. 206, PL 109–248, July 27, 2006, 120 Stat 587.

REASONS FOR GRANTING THE WRIT

Mr. Sloan was convicted under the Major Crimes Act, which provides that "[a]ny Indian" accused of committing certain crimes in "Indian Country"—including aggravated sexual abuse—is "subject to the same law and penalties as all other persons committing" those offenses "within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a) (emphasis added); *see also* 18 U.S.C. § 3242 (granting district court jurisdiction over Major Crimes Act prosecutions).

But Mr. Sloan was not just a "person[]"committing an offense "within the exclusive jurisdiction of the United States." Rather, he was only subject to federal prosecution under the Major Crimes Act because he is an "Indian." Although this Court upheld the Major Crimes Act in *United States v. Antelope*, 430 U.S. 641 (1977), against a claim that it violates Native Americans' right to the equal protection of the law, free from invidious race discrimination, it should reconsider that holding now. Post-*Antelope* appellate rulings and scholarly commentary, as well as the evidence presented at Mr. Sloan's trial, make clear he was subject to federal criminal law and its more severe penalties because of his race.

I. This Court's attempt to distinguish between "Indian" as a political classification and "Indian" as a racial classification has proved unworkable.

In a series of cases in the 1970s, this Court distinguished between classifications of Native Americans as "members of quasi-sovereign tribal entities" and treatment involving "invidious racial discrimination." *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 552–54 (1974). As part of that line of cases, this Court approved of Bureau of Indian Affairs ("BIA") hiring preferences for "qualified Indians" because the "criterion" was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 537, 554. This Court also upheld the Major Crimes Act as a "[f]ederal regulation of Indian tribes" rather than "legislation of a racial group consisting of Indians." *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quotation marks omitted).

Since that time, it has become clear that the division that the Court was attempting to create—between political status on the one hand and racial status on the other—is unworkable in both theory and practice.

Indeed, the foundational assumption supporting Congress's supposed plenary power over Indians is that they are the "remnants" of a particular "race." *See, e.g.*, *United States v. Bryant*, 136 S.Ct. 1954, 1967–69 (2016) (Thomas, J., concurring)

(identifying no "sound constitutional basis" for the proposition "that Congress can punish assaults that tribal members commit against each other on Indian land . . . ," and rooting precedents as "based on the paternalistic theory that Congress must assume all-encompassing control over the 'remnants of a race' for its own good") (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886)). Moreover, the legal definition of Indian is inherently racial, as both Congress and Indian tribes themselves define who is Indian based—at least in part—on blood quantum. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian [by the Indian Child Welfare Act] because she is 1.2% (3/256) Cherokee."); 25 U.S.C. § 163 (2018) (authorizing Secretary of the Interior to create tribal membership rolls that must contain "quantum of Indian blood").

And in practice, state and federal courts continue to rely on an antebellum test that includes a "blood quantum" prong (alongside a tribal affiliation prong) to determine who is Indian for criminal jurisdiction purposes. *See United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984) ("some degree of Indian blood"); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("some Indian blood"); *United States v. Zepeda*, 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc) ("some quantum of Indian blood"); *United States v. Prentiss*, 273 F.3d 1277, 1282 (10th Cir. 2001) ("degree of

Indian blood"); *State v. Sebastian*, 243 Conn. 115 (1997) ("some Indian blood"); *State v. LaPier*, 242 Mont. 335, 340, 342 (1990) ("Indian by race"; "significant amount of Indian blood"); *State v. Salazar*, 2020-NMCA-021, ¶ 8 ("Indian blood"); *State v. Nobles*, 373 N.C. 471, 476 (2020) ("some Indian blood"); *State v. Reber*, 2007 UT 36, ¶¶ 21–22, 26 (2007) ("significant degree of Indian blood"); *State v. Daniels*, 104 Wash. App. 271, 280 (2001) ("Indian in the racial sense"). This blood quantum requirement is taken quite explicitly from *United States v. Rogers*, a Taney Court opinion about a predecessor statute to the Major Crimes Act that makes clear that it (like the law it is interpreting) uses the word "Indian" to mean "of the race generally" and not "members of a tribe." 45 U.S. 567, 573 (1846).

Moreover, even if the blood quantum prong were eliminated from the Major Crimes Act analysis, the remaining tribal affiliation test—whether it looks for tribal enrollment, tribal affiliation, or federal government recognition—is itself based on blood quantum and ancestry. This is because "virtually all tribes are simultaneously constituted as both racial and political bodies." David C. Williams, "The Borders of the Equal Protection Clause: Indians as Peoples," 38 UCLA L. Rev. 759, 761 (1991). Reocognition of this fact has led to scholars to suggest that the legal classification of Indian cannot be entirely separated from race. *See id.* at 762 (explaining that "Indian law really is an aberration in American law: a legally

condoned system that treats individuals differently—at least in some cases and to some extent—because of their race"); Matthew L.M. Fletcher, "Politics, Indian Law, and the Constitution," 108 Cal. L. Rev. 495, 499 (2020) (noting that "the legal classification of Indians requires governments to make classifications on the basis of race").

These issues are readily apparent in Mr. Sloan's case, where evidence of his "blood quantum" was presented and argued, and the jury was required to determine whether he had any "Indian blood." And even if the jury had only been asked to consider Mr. Sloan's tribal membership, that would still have served as a proxy for race. The Navajo Nation requires proof of Indian "blood" for tribal membership. Vol. 4 at 415-16; *see, e.g.*, Navajo Nation Code Ann. Tit. 1, § 701 (requiring members have "at least one-fourth degree Navajo blood"); *see also id.* § 702 (explaining that no one "can ever become a Navajo, either by adoption, or otherwise, except by birth").

Antelope hung its hat on its understanding of "Indian" to refer to the political status of a tribally enrolled person. But the origins of the Major Crimes Act are racial. Lower courts continue to look to blood quantum, an explicitly racial basis for the exercise of federal criminal jurisdiction. And tribal membership eligibility itself is predicated on race via blood quantum. This Court should grant a writ of certiorari

to address the equal protection problems with why and how federal courts exercise jurisdiction under the Major Crimes Act.

II. The Major Crimes Act exposes Native Americans to the much harsher outcomes of the federal justice system.

Additionally, this is an important and recurring issue, as prosecution under the Major Crimes Act exposes Native Americans to the much harsher outcomes of the federal justice system. Indeed, had Mr. Sloan not been Native American, he'd have been charged by the State of New Mexico, where he would have faced noticeably lower sentencing ranges than the 30 years to life he faced in this case.[3]

He is not alone. All across this country, "Indians are convicted at higher rates than non-Indians to federal prison [and] sentenced to disproportionately longer prison sentences than non-Indians for the same crimes." Fletcher, *supra*, at 527 n. 218. In fact, the "disparity . . . between sexual abuse offense sentences in the federal courts and those in state courts" not only "disproportionately affects Native Americans" as a result "of the jurisdictional framework that places a far higher proportion of Native Americans in federal court"—but it does so "by design." U.S.

[3] Under New Mexico law, for example, criminal sexual penetration of a child under thirteen years of age is a first degree felony. *See* N.M.S.A. § 30-9-11(D)(1). The basic sentence for this offense currently is eighteen years' imprisonment. N.M.S.A. § 31-18-15(A)(3).

Sentencing Comm'n, Report of the Native American Advisory Group 19–20 (Nov. 4, 2003).[4] Federal sentences for these crimes were deliberately "set at their present levels to address egregious sexual abuse cases that arose in Indian Country." *Id.* at 20; *see also* David Heska Wanbli Weiden, "This 19th Century Law Helps Shape Criminal Justice in Indian Country," *New York Times* (July 19, 2020) (arguing that Major Crimes Act "hasn't helped Native Americans"). The breadth of the Major Crimes Act's reach, and the consequences of falling under it, further weigh in favor of this Court's review here.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf.