NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

KEVIN VIGIL,

Petitioner,

v.

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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a hearsay statement may be properly admitted as an excited utterance under Fed. R. Evid. 803(2) without evidence that the declarant was under a continuous state of excitement from the time of the startling event through the time of the statement.

II. Whether the issuance of patents to non-Indians for land within the exterior boundaries of the Ohkay Owingeh Pueblo under the 1924 Pueblo Lands Act, relinquishing all federal claims and extinguishing the interest of the pueblo, precluded the exercise of federal criminal jurisdiction in light of the understanding at the time that Indian country status was terminated.

RELATED PROCEEDINGS

1. *United States v. Vigil*, United States Court of Appeals for the Tenth Circuit, No. 20-2160.

2. *United States v. Vigil*, United States District Court for the District of New Mexico, No. 18-CR-739-MV.

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SUPREME COURT OF THE UNITED STATES

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KEVIN VIGIL,

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UNITED STATES OF AMERICA,

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

Petitioner Kevin Vigil respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in his case.

OPINIONS AND ORDERS BELOW

1. The unpublished opinion of the United States Court of Appeals for the Tenth Circuit in *United States v. Vigil*, 10th Cir. No. 20-2160, dated October 20, 2021, is included in the Appendix as Pet.App. A.

2. The unpublished Order on Motion in Limine of the United States District Court for the District of New Mexico in *United States v. Vigil,* No. 18-CR-739-MV, dated August 6, 2019, is included in the Appendix as Pet.App. B.

3. The unpublished Memorandum Opinion and Order of the United States District Court for the District of New Mexico, granting the government's Motion for Pre-trial Determination of Indian Country Land Status, dated August 16, 2019, is included in the Appendix as Pet.App. C.

JURISDICTION

Petitioner Kevin Vigil appealed his conviction of one count of engaging in a sexual act with a child. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. Its decision denying his appeal and affirming the district court judgment was issued October 20, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed within 90 days of the court of appeals' decision.

FEDERAL LAWS AT ISSUE

Fed. R. Evid. 803 states:

"The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . .

(2) **Excited Utterance.** A statement related to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

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

The courts of appeals are divided on the test for admissibility of statements as excited utterances under Fed. R. Evid. 803(2). There was no evidence in this case of the child declarant's state of excitement at the time of the startling event or in its immediate aftermath. The district court found merely that the nature of the event would have been startling. Under these circumstances, the presumed basis for reliability of statements as excited utterances–the declarant's continuous state of excitement from the time of the event through the time of the statement–is absent. Evidence of an excited state at the time of the statement is insufficient. While the child's statements would have been inadmissible under Seventh and Eighth Circuit jurisprudence, the court of appeals here applied a less stringent test and upheld the admissibility of the statements.

The flawed Rule 803(2) analysis here likely led to Mr. Vigil's conviction. The child declarant did not testify. The government presented no testimony from any witness with firsthand knowledge of the events that gave rise to the charges against Mr. Vigil. This case presents straightforward facts that plainly show the need for a uniform standard governing the application of Rule 803(2). This Court should grant certiorari to address the inconsistencies in the lower courts' application of the excited utterance hearsay exception that result in outcomes that turn on geographic boundaries.

This case also presents a critically important Indian jurisdiction issue. 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." There was no question in this case that the location of the offense was within the exterior boundaries of the Ohkay Owingeh Pueblo. Mr. Vigil contended that there was no federal jurisdiction because Congress "otherwise provided" in the Pueblo Land Act of 1924 ("PLA"), 43 Stat. 636, when it directed the issuance of patents to non-Indian citizens whose land claims were found valid, which led to extinguishment of the pueblos' interest and relinquishment by the United States of 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. As this Court has recognized, 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. This Court should grant certiorari to address the appropriate exercise of federal criminal jurisdiction on the New Mexico pueblos.

STATEMENT OF THE CASE

A. District Court Proceedings.

Defendant-Appellant Kevin Vigil was charged by indictment, filed in the United States District Court for the District of New Mexico, with two counts of engaging in a sexual act with a child, in violation of 18 U.S.C. §§ 1152, 2241(c), and 2246(2)(A) and (C). Record on Appeal ("ROA"), Volume ("Vol.") I, page ("p.") 28.

The government filed a pretrial motion in limine seeking admission at trial under Fed. R.Evid. 803(1) and (2)[1] of statements by six-year-old AW to her mother, Consuelo,[2] *id.* at 207, accusing Mr. Vigil of sexual abuse. AW was reported to have stated, "Mom, my cookie (AW's word for her vagina) hurts. He put his fingers in my cookie. I told him to stop and he said, 'be quiet.'" *Id.* at 208. The government also sought admission of Consuelo's testimony that AW told her that Mr. Vigil "put his pee-pee" in her butt, that AW told him, "stop, stop, that hurts," but that he continued to do it. *Id.* The government argued that the testimony was admissible under Rule 803(2) because "[t]he time lapse between the startling event and declarations was brief–likely a matter of minutes; A.W. had just been taken from the scene." *Id.* at 213.

Mr. Vigil argued in response to the government's motion that Consuelo's testimony concerning AW's statements was inadmissible hearsay that did not meet the

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[1] The district court admitted AW's statements under both rules; the court of appeals affirmed their admission under Rule 803(2) and did not address their admissibility under Rule 803(1).

[2] Because there were several trial witnesses with the same surname, Mr. Vigil refers to them here by their first names.

requirements of the cited exceptions. *Id.* at 326. He pointed to the absence of evidence that AW was under the continuous stress of excitement from the time of the described events through the time of her statements. *Id.* at 326, 328. He cited evidence that AW was not upset or exhibiting any sign of stress or excitement shortly after the abuse was said to have occurred. *Id.* at 329.

At the motions hearing, the government argued that AW's statements were admissible under Rule 803(2) because "I think it can be inferred that this child would still be under the stress of the excitement."*Id.* at 104. The government cited no evidence that AW was under the stress of excitement of the alleged startling event during or immediately after it occurred. It argued that the exclamation points in the description of Consuelo's account of the statements showed that AW was excitable when she made her statements. *Id.* Mr. Vigil reiterated his prior argument that AW's statements were inadmissible because the evidence did not reflect a continuous state of excitement from the time of the described event until AW made her statements. ROA Vol. III, p. 111.

The district court ruled that Consuelo's testimony recounting AW's statements was admissible under both Rules 803(1) and (2). Pet.App. B. It concluded that the event AW described "certainly would qualify as a startling event," *id.* at 5, but did not address the absence of evidence that AW exhibited a startled or excited reaction to the event when it took place or in its immediate aftermath. *Id.*

The government also filed a Motion for Pretrial Determination of Indian Country Land Status. ROA Vol. I, p. 72. AW is an enrolled tribal member; Mr. Vigil is a non-

Indian. The events of this case were alleged to have occurred on non-Indian land in Espanola, New Mexico, which the parties agreed was within the exterior boundaries of Ohkay Owingeh Pueblo. Pet.App. C at 2. Acting under the Pueblo Lands Act of June 7, 1924, the United States granted title to that land to non-Indians, Antonio David Salazar and Ramona B. de Salazar, in 1935. *Id.* at 2-3. The patent states that it "shall have the effect only of a relinquishment by the United States of America and the Indians of said Pueblo." *Id.* at 3. The property has remained in non-Indian ownership and under county jurisdiction since the patent was issued. *Id.*

Mr. Vigil argued that the court lacked jurisdiction because Congress "otherwise provided" within the meaning of the 2005 Amendments to the 1924 Pueblo Land Act, 119 Stat. 2573 (2005), *codified at* 25 U.S.C § 331 Note, when it provided for extinguishment of Pueblo title and relinquishment of all federal interest in the land in question. *Id.* at 89. He pointed to this Court's recognition that prior to 1948, the transfer of title to non-Indians was understood to terminate Indian country status. The district court rejected his argument and upheld federal jurisdiction. Pet.App. C.

Mr. Vigil received a jury trial, at which Consuelo testified about AW's statements accusing him of sexual abuse. AW did not testify. The jury found Mr. Vigil guilty of one count involving digital penetration of the victim's genital opening and acquitted him on the remaining count. ROA Vol. I, p. 381.

The district court sentenced Mr. Vigil to the mandatory minimum term of imprisonment of 30 years, to be followed by a three-year term of supervised release.

B. The Court of Appeals' Ruling.

Mr. Vigil appealed his conviction to the United States Court of Appeals for the Tenth Circuit, which rejected his arguments that the district court improperly admitted the child's statements to her mother under Fed.R.Evid. 803(1) and (2) and upheld federal jurisdiction. Pet.App. A. The court of appeals ruled AW's statements were properly admitted under Rule 803(2) as excited utterances in light of the fairly short lapse of time between the event and the statements and AW's state of excitement at the time of her statements. *Id.* at 9-10. It affirmed Mr. Vigil's conviction.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Resolve the Divide between Circuits concerning the Applicable Standard for Determining the Admissibility of Statements under Fed.R.Evid. 803(2) as Excited Utterances and to address the Important Question whether the Issuance of Patents to non-Indians under the 1924 Pueblo Lands Act Terminated the basis for Exercise of Federal Criminal Jurisdiction, as was Understood at the time of the Title Transfer pertinent to this case.

A. *The Circuits are divided on whether Admissibility of a Statement under the Excited Utterance Exception Requires Evidence of a Continuous State of Excitement from the Occurrence of a Startling Event through the time of a Declarant's Statement.*

Fed. R. Evid. 803(2), known as the excited-utterance exception, provides a hearsay exception for "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." The courts of appeals have long been divided over its application, leading to disparate results in cases with analogous facts. This case presents ideal facts for this Court to address a vitally important and frequently recurring evidentiary issue.

The excited utterance exception derives from the premise that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Fed. R. Evid. 803 Advisory Committee Notes to 1972 Proposed Rules (citing 6 Wigmore § 1747, p. 135). "[T]he agitated mind is much less likely to engage in conscious fabrication than the reflective mind." *United States v. Ledford*, 443 F.3d 702, 711 (10th Cir. 2005), *abrogated on other grounds by Henderson v. United States*, 575 U.S. 622 (2015) (citing Fed. R. Evid. 803(2) advisory committee's note). "The rationale underlying the 'excited utterance' exception is that 'excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self interest and therefore rendered unreliable.'" *United States v. Alexander*, 331 F.3d 116, 122 (D.C. Cir. 2003)(quoting *United States v. Brown*, 254 F.3d 454, 458 (3d Cir. 2001)).

"The basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." *Idaho v. Wright*, 497 U.S. 805, 820 (1990). The key to admissibility of an excited utterance is the contemporaneity of the excitement of the startling event and the statement. *See United States v. Wesela*, 223 F.3d 656, 663 (7th Cir.2000). "Thus, to qualify as an excited utterance, 'the declarant's state of mind at the time that the statement was made [must] preclude[ ] conscious

reflection on the subject of the statement.'" *Alexander*, 331 F.3d at 122 (quoting *United States v. Joy*, 192 F.3d 761, 766 (7th Cir. 1999) (alterations in *Alexander*)).

The court of appeals' Rule 803(2) ruling here is contrary to both the requirements of the rule and other circuits' rulings. The court of appeals upheld the admission of AW's statements despite the absence of evidence that she exhibited an excited reaction to the underlying event when it occurred or in its immediate aftermath. Without such evidence, Rule 803(2) affords no basis for presuming the statement reliable.

The court of appeals found adequate the district court's determination that the event at issue was of a startling nature–without finding that the event was startling to AW. *See* Pet.App. B at 5 ("First, A.W.'s alleged experience as a six-year-old being sexually assaulted by an adult certainly would qualify as a startling event."). If the declarant does not have an excited reaction to an event at the time it occurred–even if other persons would have–there is no basis for presuming the statement reliable under Rule 803(2). The district court found only that the child "made the statement while under the stress of the event's excitement," *id.*, not that she was under a continuous state of excitement from the time of the event through the time of the statement.

The courts of appeals are divided over the test that governs admissibility of statements under Rule 803(2). Some have expressly disagreed with the Tenth Circuit's broad interpretation of what Rule 803(2) requires. In *Wesela*, the court ruled the district court abused its discretion in admitting statements under Rule 803(2) because:

> . . . [A]lthough Wesela engaged in a pattern of threatening behavior, one cannot say that Mrs. Wesela was under continuous, uninterrupted stress and excitement. By accepting a lesser state of mental angst as enough to satisfy Rule 803(2), the district court applied the wrong legal standard. It thus abused its discretion in admitting Mrs. Wesela's statements . . .

223 F.3d at 664. In *United States v. Marrowbone*, 211 F.3d 452 (8th Cir. 2000), the court similarly decided that the district court abused its discretion when it admitted statements under Rule 803(2). It pointed to the absence of evidence of a "continuous excitement or stress from the time of the event until the time of the statements." *Id.* at 455.

There is a compelling need for this Court to resolve differences between the courts of appeal with respect to the admissibility of statements as excited utterances under Rule 803(2). There is no rational justification for admitting hearsay statements as excited utterances in the absence of evidence of the declarant's continuous state of excitement from the time of the startling event through the time of the statement. Mere evidence of the declarant's excited state at the time of the statement does not ensure the statement's reliability.

Mr. Vigil's conviction likely turned on the mistaken admission at trial of the child's statements. AW did not testify. The government presented no testimony from any witness with firsthand knowledge of the events that gave rise to the charges in this case. The child's wrongly admitted statements were the foundation of the government's case. Once the jury heard that a young child in considerable pain made graphic accusations of sexual penetration against Mr. Vigil, his conviction was all but inevitable. The government emphasized AW's statements in both its opening and

closing argument. *See* transcript of opening statements at 7, 8; ROA Vol. III at 1002, 1031, 1036.

The Court's grant of certiorari is necessary to address the critically important evidence issue at stake in this case on which criminal convictions often turn. The facts here are particularly straightforward and plainly show the need for a uniform standard governing the application of Rule 803(2). Under Seventh and Eighth Circuit precedent, AW's statements would likely have been inadmissible. This Court should grant certiorari to address the inconsistencies in the lower courts' application of the excited utterance hearsay exception that result in outcomes that turn on the serendipity of geographic boundaries.

B. *Federal Criminal Jurisdiction was Improper because Pueblo Title to the land in question had been Extinguished and All Claims of the United States had been Relinquished, as provided by Congress in the 1924 Pueblo Lands Act. It was Understood at the time of the 1935 Title Transfer in this case that it had the effect of Terminating Indian Country Status. This Court Should Grant Certiorari to Address the Important Statutory Interpretation Issue pertaining to the Exercise of Federal Criminal Jurisdiction on the New Mexico Pueblos.*

In the Indian Pueblo Land Act Amendments of 2005, Congress provided for federal criminal jurisdiction over offenses committed within the exterior boundaries of a grant from a prior sovereign "except as otherwise provided by Congress." Mr. Vigil did not dispute that the land where the offense in this case occurred was within the exterior boundaries of the Ohkay Owingeh Pueblo. He contended that federal jurisdiction was nonetheless improper because Congress "otherwise provided" in the 1924 PLA, under which patents were issued to non-Indians whose land claims were found valid, the Pueblo interest in the land was extinguished, and federal claims were

relinquished. As this Court has recognized, prior to 1948, it was understood that the extinguishment of Indian title terminated Indian country status. The title transfer at issue here occurred in 1935. Pet.App. C at 2.

As the court explained in *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006), the New Mexico pueblos acquired title to their lands by a grant from the King of Spain. *Id.* at 1249. In the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), Mexico ceded to the United States a large land mass which included the lands in the territory of New Mexico on which the Pueblo Indians resided. *Id.* at 929. The treaty "provided that Mexican property rights in the ceded lands 'shall be inviolably respected.'" *Sanchez v. Taylor*, 377 F.2d 733, 735 (10th Cir. 1967) (quoting 9 Stat. 922, 929).

The land tract involved in this case was patented to non-Indians Antonio David Salazar and Ramona B. de Salazar under the 1924 PLA, which established the Pueblo Lands Board and authorized it to ascertain the exterior boundaries of the pueblos, to determine land status, and to settle conflicting land claims by New Mexico Pueblo members and non-Indian citizens. *Id.* at 36; § 2, 43 Stat. 636; *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240, 244 (1985). 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. 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. 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).

As directed by Congress, the Pueblo Lands Board issued patents to non-Indians whose adverse claims were found valid and "[t]he Pueblos' rights to such land were extinguished." *Arrieta*, 436 F.3d at 1249-50 (citing PLA, § 4; 43 Stat. at 637*; Mountain States Tel. & Tel.*, 472 U.S. at 244)(explaining that § 4 of the PLA set forth the conditions that "sufficed to extinguish a Pueblo's title."). The United States relinquished its claims to those lands. PLA § 13, 43 Stat. at 640. The Pueblos retained title to lands not patented to non-Indians. *Id.*

By providing for the extinguishment of Pueblo title to the tract at issue here and relinquishing all federal interest, Congress removed the land from federal jurisdiction and "otherwise provided" within the meaning of the Indian Pueblo Land Act Amendments of 2005, 25 U.S.C. § 331(a) Note. Congress enacted the PLA in 1924 with the awareness 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). The extinguishment of Indian title to the land at issue in this case removed its Indian country status. Congress did not restore that status in the 2005 amendments.

In *Bates*, this Court recognized that Indian country status turned 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 of the 1924 PLA 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," it held defendants were 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 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)).

"[T]he exclusive right of the United States to extinguish Indian title has never been doubted." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 343-44 (1941). 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). Pursuant to the direction of Congress in the 1924 PLA, all rights of the Pueblo to the Salazar tract were extinguished, all federal claims were relinquished, and the land was removed 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 in the lower courts that the extinguishment of pueblo title was an act of the Pueblo Land Board rather than Congress; the district court pointed to the fact that the patent was not issued by Congress. Pet.App. C at 11. However, the Pueblo Lands Board was created by Congress and acted pursuant to congressional authorization. The Salazar patent was issued pursuant to provisions dictated by Congress. Through its creation and direction of the Pueblo Lands Board,

Congress "otherwise provided" for extinguishment of pueblo title and relinquishment of all federal claims to lands patented to non-Indians. § 13, 43 Stat. at 640. The lower courts failed to consider this Court's jurisprudence holding that prior to 1948, extinguishment of Indian title was understood to remove the land in question from federal jurisdiction.

Although the offense in this case took place "within the exterior boundaries of [a] grant from a prior sovereign," there was no federal criminal jurisdiction under the 2005 amendments to the PLA because Congress "otherwise provided" by extinguishing pueblo title and relinquishing the United States claim to non-Indian land. This Court should grant certiorari and instruct the lower courts on the proper construction and application of the Indian Pueblo Land Act Amendments of 2005.

CONCLUSION

This case presents issues of fundamental importance concerning evidence law and federal criminal jurisdiction. For the reasons stated, Petitioner Kevin Vigil respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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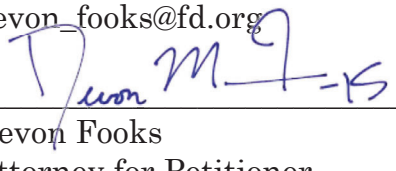

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