ORIGINAL

Case No. 22-5517

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LEE CUNGTION, JR.
Petitioner,

VS.

STATE OF IOWA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

Christopher Lee Cungtion, Jr.

QUESTIONS PRESENTED

The General Assembly of Iowa relinquished its concurrently held jurisdiction over criminal offenses involving Indians on the Meskwaki Settlement in Tama Iowa in 2016. Two and one-half years later, Congress repealed the State's jurisdiction over the same class of offenses. Did the State err by continuing to prosecute these offenses during the two and one-half years' period between Iowa's legislation of Iowa Code § 1.15A and Congress' legislation of Pub. L. 115-301? Did the General Assembly intend to include deferred judgments and suspended sentences in its abdication of jurisdiction in Iowa Code § 1.15A?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- Bradley M. Bender, Assistant State Appellate Defender (for appellant)
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  Des Moines, Iowa 50319

- Aaron Rogers, Assistant Attorney General (for appellee)
  Hoover St. Office Bldg., Second Floor
  Des Moines, Iowa 50319

- Lisa C. Williams, Assistant U.S. Attorney (as amicus curiae)
  111 7th Avenue SE
  Cedar Rapids, Iowa 52401

- Christopher M. Nydle, Sac & Fox Tribe Lead Prosecutor (as amicus curiae)
  349 Meskwaki Road
  Tama, Iowa 52339

Related Cases

- *State v. Cungtion*, No. FECR016068, Iowa District Court for Tama County. Motion to dismiss judgment entered Oct. 10 and Oct. 24, 2019.
- *Cungtion v. State*, No. PCCV008356, Iowa District Court for Tama County. Judgment not yet entered.
- *State v. Cungtion*, No. 20-0409, Supreme Court of Iowa. Judgment entered Jan. 28, 2022.
- *State v. Cungtion*, No. 21-0749, Supreme Court of Iowa. Judgment entered Mar. 14, 2022.

TABLE OF CONTENTS

INDEX TO APPENDICES

INDEX OF AUTHORITIES

Federal Cases: **Page:**

State Cases: **Page:**

Federal Statutes: **Page:**

Federal Rules/Regulations: **Page:**

State Statutes: **Page:**

Federal Constitutional Provisions: **Page:**

State Constitutional Provision: **Page:**

Other Authorities: **Page:**

Case No.

IN THE

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CHRISTOPHER LEE CUNGTION, JR.
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OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari is issued to review the judgments below:

1. The opinion of the Supreme Court of Iowa appears at Appendix A to the petition and has been published under *State v. Cungtion*, 969 N.W.2d 501 (Iowa 2022).
2. The opinion of the Iowa District Court for Tama County—order on motion to dismiss—appears at Appendix B to the petition and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

1. The date on which the highest state court decided this case was on January 28, 2022. A copy of that decision appears at Appendix A to the petition.

2. The date on which the district court ruled on the predicate motion to dismiss was October 10, 2019. The order was amended and enlarged on October 24, 2019. Copies of those orders appear at Appendix B to the petition.

3. The date on which the highest state court ruled on appellant's motion to extend deadline to petition for rehearing is March 22, 2021. A copy of the order appears at Appendix C to the petition.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

Federal:

U.S. Const. Art I, § 8, cl. 3:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes . . .

U.S. Const. Art II, § 2, cl. 2:

> The President shall be Commander in Chief of the Army and Navy of the United States . . . He shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators concur . . .

U.S. Const. Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be and made in pursuance thereof; and all Treaties made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

State:

Iowa Const. Art. III, § 1:

> The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Iowa Const. Art. III, § 16:

> Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated . . .

Iowa Const. Art. III, § 26:

> An act of the general assembly passed at a regular session of the general assembly shall take effect on July 1 following its passage unless a different effective date is stated in an act of the general assembly.

Iowa Const. Art. V, § 14:

> It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general practice in all the courts of this State.

STATEMENT OF THE CASE

I. Nature of the case:

The petitioner, Christopher Lee Cungtion, Jr. (Cungtion), seeks writ of certiorari review from the Iowa Supreme Court's affirmation of his convictions in Iowa District Court case no. FECR016068, on appeal from judgment, sentence, and denial of motion to dismiss.

II. Background Facts:

In the early hours of July 30, 2017, Christopher Cungtion, Jr., Jermell Petties, Raven Ellis, and Raelynn Shaver arrived at the Meskwaki Hotel intending to swim in the hotel's 24-hour pool. After briefly entering the hotel, Shaver realized that she did not have her cell phone, so the group returned to Ellis' car in the parking lot in search of Shaver's cell phone. At that time, Tyrell Roberts, Donovan Ward, and Winston Wolf arrived at the hotel, parked adjacent to where Cungtion and his friends were parked and standing, and started walking to the entrance of the hotel. The groups engaged in a friendly exchange of words in passing. For one reason or another, tension arose between the groups. Roberts became angry and—accompanied by Ward and Wolf—turned around and walked back to the parking lot to "confront" Cungtion and to fight "if it came down to it." In the split second before Roberts made contact with Cungtion, Petties handed him a Hennessey bottle, with which he struck Roberts. Cungtion and his friends immediately got in Ellis' car and drove away, narrowly escaping an attack from Ward and Wolf, who were wielding aluminum softball bats. Ward did, however, throw his bat at Ellis' car as they were driving away. Cungtion then assumed control of the vehicle. He drove toward the vehicle the opposing males arrived in. In attempt to get close enough to allow Petties to throw a bottle at the SUV—Cungtion mistakenly side-swiped the SUV.

III. Course of Proceedings:

After investigating the incident, the Meskwaki Nation Police Department (MNPD) filed a report accusing Cungtion of attempted murder and tendered the case to the U.S. Attorney's

Office for federal prosecution. Upon denial for federal prosecution, the MNPD filed complaints with the Tama County prosecutor, who charged Cungtion with:

(1) attempted murder (Iowa Code § 707.11(1));

(2) intimidation with a dangerous weapon (Iowa Code § 708.6);

(3) willful injury (Iowa Code § 708.4);

(4) assault with a dangerous weapon (Iowa Code § 708.2(3)); and

(5) driving while barred (Iowa Code § 321.560).

The charges were originally filed under case no. FECR015688.

Depositions were held on October 15, 2018. The proceeding consisted of testimony from: Tyrell Roberts; Donovan Ward; Winston Wolf; Raven Ellis; Raelynn Shaver; Tribal Officer Jacob Molitor; Tribal Officer Abdelshaid Mustafa; and a handful of Meskwaki Casino, Bingo, and Hotel employees. On November 30, 2018, the County Attorney dismissed the charges in FECR015688 and refiled a trial information excluding the attempted murder charge. Cungtion entered an *Alford*[1] plea to the four-count trial information, with a stipulation to defer judgment of counts one and two. Cungtion waived his right to delay prior to sentencing and requested immediate sentencing. The court proceeded to immediate sentencing and deferred judgments of count one and two for a period of five years and placed Cungtion on supervised probation. The court ordered Cungtion to pay a civil penalty of $750 on each count, which was then suspended. On counts three and four the court ordered Cungtion to serve an indeterminate term of imprisonment not to exceed two years and pay a fine of $625 on each count. The court

[1] See *North Carolina v. Alford,* 400 U.S. 25 (1970)

suspended the prison term and fine on each count and placed Cungtion on supervised probation.

On July 22, 2019, the County Attorney filed a report of probation violation and requested the court to revoke Cungtion's probation. Cungtion filed a motion to dismiss the application for probation revocation on September 19, 2019. Cungtion's motion to dismiss was based on the state legislation of Iowa Code § 1.15A and federal legislation of Pub. L. 115-301. Both statutes eliminated Iowa's concurrently held jurisdiction over offenses committed by or against Indians[2] on the Sac & Fox Tribe[3] in Tama, Iowa. The court denied the motion to dismiss on October 10, 2019. Pursuant to a joint motion to amend and enlarge the order, the court entered and amended and enlarged order on October 24, 2019, affirming its denial of the motion—reasoning that the statutes do not apply retroactively. The probation violation was eventually resolved by way of an agreement between the parties. The court revoked the deferred judgment of count two and ordered Cungtion to serve an indeterminate term of imprisonment not to exceed five years and imposed a fine of $750. The court suspended the prison term and fine and placed Cungtion on supervised probation with terms that he must reside at a residential correctional facility. The court extended Cungtion's probation on counts three and four for one year and ordered that the sentences on each count to run consecutively.

Cungtion filed a timely notice of appeal on March 5, 2020. Two months later, the Iowa Supreme Court issued an order denying Cungtion's request for discretionary review on counts

[2] The use of the term "Indian" and its inflections are purposed to maintain consistency with existing legalese. See *State v. Stanton,* 933 N.W.2d 244, 247 (Iowa 2019).

[3] The Sac & Fox Tribe of the Mississippi in Iowa is synonymously recognized as The Meskwaki Tribe. The names are used interchangeably hereinafter.

one, three, and four. The court did, however, conclude that Cungtion had the right to appeal the revocation of the deferred judgment on count two and allowed the appeal to proceed. The appellant proof brief was filed on October 29, 2020, under IA S. Ct. No. 20-0409. The proof brief for the appellee was filed on February 19, 2021. Cungtion then filed a reply brief on March 12, 2021. Cungtion's appellate counsel, Peter Stiefel, withdrew from the case on April 26, 2021. The court appointed Bradley A. Bender of the State Appellate Defender's Office as counsel of record. Pursuant to the court's request, the United States and the Sac & Fox Tribe filed briefs as amicus curiae in support of the State on July 20, 2021. Cungtion filed supplemental briefing on August 20, 2021. The court entered an order scheduling oral arguments for November 16, 2021. Bradley M. Bender argued on behalf of Cungtion; Aaron Rogers argued on behalf of the State; Ann O'Connell argued on behalf of the United States; and the Sac & Fox Tribe did not participate in oral arguments. The court issued an opinion affirming Cungtion's convictions on January 28, 2022.

During this course of proceedings, Cungtion violated his probation on two additional occasions. On both occasions Cungtion filed motions to dismiss based on the same grounds of the original motion. Both motions were denied by the district court. Cungtion filed a successive notice of appeal on May 28, 2021. The Iowa Supreme Court granted Cungtion's appeal and request for discretionary review in IA S. Ct. No. 21-0749 on July 28, 2021. Cungtion filed proof briefing on December 21, 2021. After the opinion was issued in IA S. Ct. No. 20-0409, the state moved to affirm pursuant to I. R. App. P. 6.1006(2) based on that opinion. The court entered an order granting the state's motion to affirm on March 14, 2022. Cungtion filed a motion

requesting a deadline extension to petition the court for rehearing, which was denied on March 22, 2022.

REASONS FOR GRANTING THE PETITION

I. Routing Statement:

The United States Supreme Court should grant certiorari in this case because the Iowa Supreme Court has decided an important question of federal law that conflicts with both its own and Eighth Circuit Court of Appeals precedent, as well as the general federal policy governing Indian sovereignty and self-governance. S. Ct. R. 10(b). The important question has not been, but should be settled by the United States Supreme Court. S. Ct. R. 10(c). Review of this issue is important because it involves fundamental principles of Indian sovereignty and the congruous aspirations of Congress, the Iowa Legislature, and the Sac & Fox Tribe to disengage the state from exercising criminal jurisdiction over offenses involving Indians on the Meskwaki Settlement. This case presents urgent issues of broad public importance which warrants prompt and superior determination by the United States Supreme Court. A prompt resolution of this issue will protect the interest of the federal government, the State of Iowa, and the Sac & Fox Tribe. A prompt resolution will also provide relief for persons whom have been prosecuted by the State of Iowa for crimes involving Indians on the Meskwaki Settlement after the enactment of Iowa Code § 1.15A.

II. Indian Law History:

A. General principles of jurisdiction in Indian country.

The foremost objective in any judicial proceeding is establishing jurisdiction. That objective is especially important in cases involving an issue of Indian sovereignty and should immediately call subject matter jurisdiction into question. See *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 754 (1998). Discerning questions of Indian involved law requires analysis of the history of Indian law in our Nation's jurisprudence. See *Sac & Fox Tribe of the Miss. In Iowa v. Licklider*, 576 F.2d 145, 147 (8th Cir. 1978) ("Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored.") (quoting *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 686 (8th Cir. 1973). Indian tribes have long been recognized as "distinct political communities, having territorial boundaries within which their authority is exclusive . . . 'which is not only acknowledged, but guaranteed by the United States,' a power dependent and subject to no state authority.'" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020) (quoting *Worcester v. Georgia*, 31 U.S. 515, 552 (1832)). "The policy of leaving Indians free from state jurisdiction is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). Tribal sovereignty and self-governance is an ancient axiom out-dating our Republic. See *The Cherokee Nation v. Georgia*, 8 L.Ed 25, 26 (1831) (citing Treaty of 1719). Congress does, however, have Constitutional power to grant state courts the authority to exercise jurisdiction over Indians in Indian country. See U.S. Const. Art. I, § 8 (Indian Commerce Clause); U.S. Const. Art. II, § 2, cl. 2 (Treaty Clause). See also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.").

Criminal jurisdiction over offenses committed in Indian country is "governed by a complex patchwork of federal, state, and tribal law" that often depends on whether the defendant or the victim is an Indian. *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (internal quotations omitted). Pursuant to "federal enclave laws" (18 U.S.C. § 1152); the Major Crimes Act (18 U.S.C. § 1153); and the Assimilative Crimes Act (18 U.S.C. § 13), the federal government has jurisdiction over practically all offenses committed in Indian country—whether serious or petty—irrespective of the ethnicity of the offender or victim. Thus, any jurisdiction attained by a tribe or state over such offenses is concurrently held with the federal government. There are, however, exceptions for minor crimes committed by Indians in Indian country "who [have] been punished by the local law of the tribe . . ." 18 U.S.C. § 1152(b). Those minor Indian-against-Indian and victimless crimes committed by Indians "typically are subject to the jurisdiction of the concerned tribe." *Negonsott*, 507 U.S., at 102. Likewise, non-Indian-against-non-Indian and victimless crimes committed by non-Indians generally fall within the jurisdiction of the state. See *State v. Stanton*, 933 N.W.2d 244, 248-251 (Iowa 2019). Non-Indian-against-Indian crimes are usually excluded from state and tribal jurisdiction—falling within the sole jurisdiction of the federal government, unless Congress has expressly provided otherwise. See *United States v. John*, 437 U.S. 634, 651 (1978); See also *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209-210 (1978); 25 U.S.C. § 1304 (providing tribes with criminal jurisdiction over non-Indians for certain domestic violence offenses). Tribal governments—subordinate factions and agencies included—"lack inherent sovereign power to exercise criminal jurisdiction over non-Indians." *United States v. Cooley*, 141 S. Ct. 1638, 210 L.Ed.2d 1, 6 (2021) (citing *Oliphant*, 435 U.S., at 212). "[T]he tribes have, by virtue of their incorporation into the American Republic, lost

'the right of governing . . . person[s] within their limits except themselves.'" *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 328 (2008) (citing *Oliphant*, 435 U.S., at 209). This general proposition, however, is not the end all be all, and there are certain situations in which tribes are permitted to exercise limited authority over non-Indians. See *Cooley*, 210 L.Ed.2d, at 6 explaining that *Montana*'s:

> "General proposition was not an absolute rule. [The court] set forth two important exceptions." First . . . a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, or leases, or other arrangements." Second a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some effect on the political integrity, the economic security, or welfare of the tribe."

(quoting *Montana v. United States*, 450 U.S. 544, 566 (1987)). The former exception provides dual protection for Indians and non-Indians in their interpersonal affairs. The latter exception allows tribal authorities to exercise temporary, restricted, civil authority over non-Indian conduct during exigencies and perilous situations of extreme magnitude. See *Plains Commerce Bank*, 554 U.S., at 341 ("The conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community. . . . '[The] elevated threshold of application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'") (quoting F. Cohen, *Handbook of Federal Indian Law*, § 4.02(3)(c), at 232, n. 220) (further internal quotations omitted); See also *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 658-659 (2001) ("*Montana*'s second exception grants Indian tribes nothing "'beyond what is necessary to protect tribal self-government or to control internal relations.'") (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *Montana*, 450 U.S., at 564).

During the late 1940's through the 1950's, Congress fatally attempted to assimilate Indians into their state communities. During this "termination era" Congress conferred jurisdiction over offenses committed by or against Indians in Indian country on a handful of individual states, including: Kansas, Iowa, New York, and North Dakota. See *Negonsott*, 507 U.S., at 105. "In 1953 . . . Congress set a goal of removing federal jurisdiction over Indian country and making Indians subject to general state law as quickly as possible." Robert T. Anderson, *Negotiating Jurisdiction; Retroceding State Authority Over Indian Country Granted by Public Law 280*, 97 Wash. L. Rev. 915, 930 (2012). Congress quickly recognized Indian assimilation was not ideal and passed a series of Acts in harmony with the Indian Reorganization Act of 1934, 25 U.S.C. § 5101 et seq. The Acts include, but are not limited to: The Indian Civil Rights Act of 1968, 25 U.S.C § 1301 et seq.; the Indian Financing Act of 1974, 25 U.S.C. § 1451; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 2501 et seq.; and most recently, the Tribal Law and Order Act of 2010, 25 U.S.C. § 2801 et seq. Since as early as the 1960's, the Congressional scheme governing Indian sovereignty has consistently promoted an improved relationship with Indian tribes by implementing a "government-to-government" affiliation with tribes. The federal government elected to assist Indians in their economic development, and instead of "terminating" what sovereignty Indians have left, the government "officially encourages tribal self-determination and self-governance." Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779, 784 (2006).

B. Statutory history specific to the Sac & Fox Tribe of the Mississippi in Iowa.

The Sac & Fox Tribe of the Mississippi in Iowa is a federally recognized Indian tribe. See C.F.R. §§ 7554-7558 (2021). Following a brief migration to Kansas, the tribe returned to Iowa and purchased a tract of land that was taken into trust for the tribe's benefit by the Governor of Iowa in 1857. See *Licklider*, 576 F.2d, at 147-148. After accruing 2720 acres of land purchased by the tribe, the state transferred the lands to the United States. See 1896 Iowa Acts Ch. 110, § 1, providing in full:

> That, except as hereinafter provided, exclusive jurisdiction of the Sac & Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them, and of all lands now or hereafter owned by or held in trust for them as a tribe, be and the same is hereby tendered to the United States, and that as soon as the United States shall accept and assume such jurisdiction, all such jurisdiction on the part of the State of Iowa shall cease.

Section 3 of the Act purports an unjustified claim of criminal jurisdiction over the tribe, providing in part:

> Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this State or judge thereof, or prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon by said Indians or others, or of such crimes committed by said Indians in any part of this State . . .

1896 Iowa Acts Ch. 110, § 3. The Act was passed during an era when it was common for states to unlawfully assert claims of authority over Indians on their reservations. See *McGirt*, 140 S. Ct., at 2471. Within the year, the United States accepted the state-tendered jurisdiction, stating in part:

> The United States hereby accepts and assumes jurisdiction over the Sac & Fox Indians of Tama County, in the state of Iowa, and of their lands in said state, as tendered to the United States by the act of legislature of said state passed on the sixteenth day of January, eighteen hundred and ninety-six, subject to the limitations therein contained . . .

Act of June 10, 1896, Ch. 398, 29 Stat. 321, 331. In 1937, the tribe adopted a constitution and bylaws pursuant to the Indian Reorganization Act of 1934. See *Licklider*, 576 F.2d, at 148. Congress, in the Act of June 30, 1948, conferred jurisdiction over offenses involving Indians on the Meskwaki Settlement on the State of Iowa. The Act has been commonly referred to as Pub. L. 846, and provides in full:

> That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac & Fox Reservation in the State to the extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian Reservation: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offense defined by the laws of the United States committed by or against Indians on Indian Reservations.

Act of June 30, 1948, Ch. 759, 62 Stat. 1161.

In 1953, Congress passed what is commonly referred to as Pub. L. 280. The Act was Congress' first general grant for states to assume jurisdiction in Indian country. See *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 488 (1979). Section 2 of the Act mandated state assumption of jurisdiction over offenses committed by or against Indians in Indian country in five (eventually six) states, not including Iowa. Sections 6 and 7 of the Act permitted the other forty-four states the option to assume jurisdiction over the same class of offenses. In 1967, "Iowa accepted full Public Law 280 jurisdiction, using language nearly identical to that found at 25 U.S.C. § 1322, tailored to fit civil causes of action." *State ex rel. Dep't of Human Serv's v. Whitebreast*, 409 N.W.2d 460, 462 (Iowa 1987) (quoting Iowa Code § 1.12). See also *Licklider*, 576 F.2d, at 148-149.

The General Assembly of Iowa relinquished its jurisdiction over crimes involving Indians as either the perpetrator or the victim on the Meskwaki Settlement in 2016 Iowa Acts Ch. 1050, § 1 (codified at Iowa Code § 1.15A). The statute provides in full:

> Notwithstanding any other provision of the law to the contrary, the State of Iowa tenders to the United States any and all criminal jurisdiction which the State of Iowa has over criminal offenses committed by or against Indians on the Sac & Fox Indian Settlement in Tama, Iowa, and that as soon as the United States accepts and assumes such criminal jurisdiction previously conferred on the State of Iowa or reserved by the State of Iowa, all criminal jurisdiction on the part of the State of Iowa over criminal offenses committed by or against Indians on the Sac & Fox Indian Settlement in Tama, Iowa shall cease.

In 2018, Congress repealed the Act of June 30, 1948 by passing Pub. L. 115-301. The Act provides in full:

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled. That the Act of June 30, 1948, entitled 'An Act to confer jurisdiction on the State of Iowa over offenses committed by or against Indians on the Sac & Fox Indian Reservation' (62 Stat. 1161, Chapter 759) is repealed.

Act of December 11, 2018, Pub. L. 115-301, 132 Stat. 4395.

III. Argument:

A. When Iowa Code § 1.15A became effective on July 1, 2016, the State of Iowa surrendered all power to interpret and apply the law over offenses committed by or against Indians on the Meskwaki Settlement.

1. Pub. L. 846 and Pub. L. 280: Effects in Iowa.

It is clear that Iowa had preexisting jurisdiction when Congress enacted Pub. L. 280. That preexisting jurisdiction, however, did not preclude the state from assuming jurisdiction under the provisions of Pub. L. 280. Section 6 of the Act provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent is hereby given to the people of any State to amend, where necessary, their State Constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to the assumption of jurisdiction by any such State until the people thereof have appropriately amended their State Constitution or statutes as the case may be.

Act of August 15, 1953, Pub. L. 280, Ch. 505, § 6, 67 Stat. 588. See also *Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S., at 481 (holding that there "are two distinctive provisions of Pub. L. 280 [that] are potentially applicable" to optional states). As mentioned, Iowa accepted full Pub. L. 280 jurisdiction. The Iowa Supreme Court, in the opinion below, asserts that Iowa is not a Pub. L. 280 state. That assertion is erroneous and contradictory to its previous opinion that the court has synonymously recognized the grants of jurisdiction in Pub. L. 846 and Pub. L. 280. See *State v. Lasley*, 705 N.W.2d 481, 489 (Iowa 2005), providing:

> [T]he grant of criminal jurisdiction under Pub. L. 846—offenses committed by or against Indians on the Sac & Fox Indian Reservation—mirrors the language under section 2 of Pub. L. 280. As mentioned, at the invitation of Congress we accepted through Iowa Code § 1.12, by nearly identical language found in section 4 of Pub. L. 280, jurisdiction over civil causes of action. . . . [W]e see no difference in the scope and intent of the grant of authority regarding criminal jurisdiction in Pub. L. 846 and our acceptance of Congress' invitation to accept civil jurisdiction in Iowa Code § 1.12 from that contained in Pub. L. 280.

The State of Iowa, "by affirmative political action express[ed] the willingness and ability to discharge responsibilities in order to make effective the assumption of jurisdiction." *Enterprise Mgt. Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 768 P.2d 359, 366 (Okla. 1988). The State of Iowa employed the same affirmative political action to reverse its assumption of jurisdiction by enacting Iowa Code § 1.15A.

In any event, Congress' conferral of jurisdiction in Pub. L. 846 provides a slight difference than what may govern in states who assumed jurisdiction based solely on Pub. L. 280. In passing Pub. L. 280, Congress intended to remove federal oversight in Indian country. See *Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S., at 488 (holding that Pub. L. 280 was "without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's."). Conversely, in Pub. L. 846, Congress

expressly asserts the retention of federal jurisdiction. See Act of June 30, 1948, Ch. 759, 62 Stat. 1161, Supra at 11. As the United States explained in its amicus brief:

> The United States conferred criminal jurisdiction on the State over crimes involving Indians on the Meskwaki Settlement, it did not "cede" its own jurisdiction to the State. . . . Because Cungtion's victim was an Indian, the United States has always had authority to prosecute him for federal enclave crimes or assimilated state law crimes.

(citing 18 U.S.C. § 1152; 18 U.S.C. § 13; *Williams v. United States*, 327 U.S. 711, 713-716 (1946); *Duro v. Reina*, 495 U.S. 676 (1990). Thus, the assessment of the court and all other parties, including Cungtion's appellate counsel, that Iowa Code § 1.15A is a retrocession of jurisdiction is a misinterpretation of the law—a misinterpretation that has substantially affected the outcome of this case. The United States alluded to, but did not address squarely, the fact that Iowa Code § 1.15A provides relief for Cungtion and other defendants similarly situated. See United States Amicus Brief at 31:

> Whether state law provides any barrier to the state's authority to complete these prosecutions is beyond the scope of the United States' amicus participation. But it may be helpful for the court's analysis to clarify the United States' understanding of its own jurisdiction on the Meskwaki Settlement.

Instead of deluding the court because of appellate counsel's misstatement of issues, the United States should have addressed the issue regardless of whether it was outside of the scope of its amicus participation or not.

The opinion below repudiates Iowa's legislation of Iowa Code § 1.15A and characterizes the statute as "a joint effort by the Tribe and the State to allow the Tribe to exercise jurisdiction over its people and its land without being subject to duplicate punishment from the State." See App. A at 10. The court goes on further and asserts that Iowa Code § 1.15A is preempted by the lack of Congressional action creating a "mechanism for Iowa to retrocede its criminal jurisdiction on the Meskwaki Settlement to the Federal Government," and thus, "Iowa Code §

1.15A is nothing more than a statement of the State's desire to relinquish its criminal jurisdiction." Id., at 10-12. The court failed to acknowledge the fact that the Tribe and the State did not only aspire to allow the Tribe to exercise jurisdiction over its people and its land without being subject to duplicate enforcement from the State—the parties also aspired to allow the federal government to exercise jurisdiction over non-Indian offenders whose victims are Indian without being subject to state prosecution. The court was completely remiss in its under-appreciation for Iowa Code § 1.15A. The statute is not a retrocession of jurisdiction, and it is not merely a statement expressing the state's desire to relinquish its criminal jurisdiction. The General Assembly of Iowa employed its Congressionally encouraged authority to disburden the state from exercising jurisdiction over this class of cases. The legislature, with the Governor's approval, passed the statute expecting it to be wholly effective on July 1, 2016. See:

- Iowa Const. Art. III, § 16 ("Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve [sic], he shall sign it . . .") (statutory provisions at Iowa Code § 3.4);
- Iowa Const. Art. III, § 26 ("An act of the general assembly passed at a regular session of the general assembly shall take effect on July 1 following its passage unless a different effective date is stated in an act of the general assembly.") (supplementary provisions at Iowa Code § 3.7); and
- Iowa Code § 4.4:

> In enacting a statute, it is presumed that: (1) compliance with the Constitution of the State and of the United States is intended; (2) the entire act is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; [and] (5) public interest is favor over any private interest.

Iowa Code § 1.15A's effectiveness was not contingent on the repeal of Pub. L. 846. If that were so, the General Assembly would have been require to express so within the Act. The only prerequisite stated for the statute's effectiveness is the United States accepts and assumes jurisdiction to prosecute crimes involving Indians on the Meskwaki Settlement. As expressed hereinbefore, that requirement was explicitly pre-established when Congress "accept[ed] and assume[d] jurisdiction over the Sac & Fox Indians of Tama County" in the Act of June 10, 1896, Ch. 398, 29 Stat. 321, 331. The requirement was implicitly pre-established by the Major Crimes Act of 1948 (codified at 18 U.S.C. § 1153), and the Assimilative Crimes Act of 1948 (codified at 18 U.S.C. § 13). Congress provided in 18 U.S.C. § 1152 that "the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian country." "In enacting § 1153 of the Major Crimes Act, Congress expressly authorized the federal prosecution of Indians for certain serious crimes within Indian country, including: [murder; manslaughter; kidnapping; maiming . . . incest; felony assault; assault, neglect, or abuse against a child; arson; burglary; and robbery]." *United States v. Stately*, 2021 U.S. Dist. LEXIS 62999, 11 (8th Cir. 2021) (citing 18 U.S.C. § 1153). The series of Congressional acts leading up to the codification of 18 U.S.C. § 13 "demonstrate[d] a consistent Congressional purpose to apply the principle of conformity to State criminal laws in punishing most minor offenses committed within federal enclaves." *United States. v. Sharpnack*, 355 U.S. 286, 291 (1958). Congress fully satiated the United States' criminal jurisdiction over essentially every conceivable offense committed in Indian country, irrespective of the ethnicity of the perpetrator or victim and regardless of the magnitude of the offense. Yet

another acceptance of the same jurisdiction would be redundant and unnecessary to the effectiveness of Iowa Code § 1.15A.

Iowa has displayed diligence in governing the state in accordance with the Congressional scheme in regards to Indian sovereignty and self-governance. That fact is evident in the statutory history of Iowa Code §§ 1.12-1.14. The General Assembly continued its Congressionally guided involvement with the Sac & Fox Tribe with the legislation of Iowa Code § 1.15A. Thus, the court erred in its assessment that federal law, or the lack thereof, preempted the effectiveness of Iowa Code § 1.15A.

2. Federal preemption of State law.

Federal enactments generally preempt existing or subsequent State legislation pursuant to the Supremacy Clause (U.S. Const. Art. VI, Cl. 2) in three forms: (1) express preemption; (2) implied preemption; and (3) conflict preemption. See *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). The United States Supreme Court developed a comprehensive inquiry doctrine to determine whether or not federal law preempts state law in regards to questions of Indian law. The Court explained the doctrine in-depth in a series of cases decided throughout the 1980's. See *Three Affiliated Tribes of Berthold Res. v. Wold Engineering*, 476 U.S. 877, 884 (1986), holding that the Court has:

> Formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law" . . . In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires an express congressional statement to the effect." Rather, we have found that

> where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, without more, may be pre-empted by federal law.

(quoting *White Mtn. Apache Tribe v. Braker*, 448 U.S. 136, 145 (1980); *New Mexico v. Mascalero Apache Tribe*, 462 U.S. 324, 344 (1983); citing *Warren Trading Post Co. v. Arizona Tax Com'n*, 380 U.S. 685 (1965)).

When analyzing Iowa Code § 1.15A in conformity with the foregoing principles, it is evident that the statute is not preempted by any federal law, or lack thereof. For the past fifty years the federal government, through its statutory provisions and express declarations has displayed a strong interest in reestablishing self-governance in tribal communities. Explained best by former President Richard M. Nixon:

> It is long past time that the Indian policies of the Federal Government began to recognize and build upon the capacities and the insights of the Indian people. Both as a matter of justice and enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

Pres. Nixon, *Special Message on Indian Affairs to Congress*, 213 Pub. Papers 564, 564 (July 8, 1970). Congress responded by passing a series of Acts, enacting the entire title 25 of the United States Code. Each Act of Congress contains an express declaration pledging our country's intent to assist and promote the educational, political, medical, and overall economic development of Indian tribes.

The Department of the Interior, in its 2016 notice accepting the State of Washington's retrocession of jurisdiction in Indian country, expressed the United States' paramount interest in aiding Indians in their voyage back to self-governance. See *State v. Zack*, 413 P.3d 65, 80 (Wash. App. 2018), providing:

> Tribal self-governance is more important in this area of public policy and government service than perhaps any other. It would be difficult for this office to reject an agreement reached between the State of Washington and the Yakima Nation, especially one that seeks to facilitate greater tribal self-governance over a matter as important as law enforcement and public safety.

That statement alone gives clear understanding of the federal scheme in place in 2016 when Iowa Code § 1.15A was enacted. It also illuminates the court's misfeasance in rejecting the statute—a capitulation between the State of Iowa and the Meskwaki Tribe "that seeks to facilitate greater self-governance over a matter as important as law enforcement and public safety."

Indian sovereignty and self-governance are principles that existed before our Nation's Declaration of Independence. Despite the distortion and manipulation of these principles, our fore-founders remained consistent in recognizing Indians as proprietors of this land. Congress' grotesque experiment with Indian assimilation for less than ten years in the 1940's and 1950's certainly cannot outweigh 300 years of cemented provision. The Indian assimilation ideology was notoriously reprehended and lost its momentum almost immediately. Congress formally relented by passing the Indian Civil Rights Act of 1968, reverting the federal scheme governing jurisdiction in Indian country back to the long-standing, intrinsic policy of leaving Indian tribes unencumbered by state government's uninvited exercise of authority. The court is obligated to construe and apply the law with rectitude and thus acknowledge Iowa Code § 1.15A as authoritative law, in harmony with the interest of the involved parties, and progressive of the federal regulatory scheme, which was never preempted by any federal law, or lack thereof.

3. The State's prosecution of Cungtion and companion case defendant Bear[4] was done devoid of legislative authority.

Simply put, our judicial system—in 2017 (2018 regarding Bear)—had no place for the State of Iowa to prosecute the likes of Cungtion or Bear. Bear is an Indian man who allegedly assaulted his girlfriend, who is also an Indian, at his home on the Meskwaki Settlement. There is nothing in federal policy for at least the past fifty years that would even remotely support the notion that the state acted in good faith in prosecuting Cungtion or Bear. These cases epitomize the affliction on tribal self-governance caused by the overzealousness of state courts. The Meskwaki Tribe has a fully functioning government including: "its own police force, prosecutors, a Tribal court, and an appellate court." App. A, at 9. The tribe undoubtedly possessed the wherewithal to prosecute Bear if it so desired. The decision to forgo the prosecution of Bear was the tribe's business and should have been free from state disturbance. Even more so than the tribe, the federal government had the wherewithal to prosecute Cungtion if it so desired. For one reason or another, the federal government did not seek indictment against Cungtion. The U.S. Attorney's preponderant discretion was sufficient and the unlawfully interjection of state authority was unnecessary.

There is a peculiar enigma shadowing the state's persistent effort to preside over the prosecution of offenses that its very own legislature disburdened the state of. In *McGirt*, the United States Supreme Court, albeit regarding a slightly different issue, provided inferential insight regarding this sort of judicial pretentiousness. In that case the state urged the court to

[4] Hollis Bear is the appellant in companion case IA S. Ct. No. 20-0401.

rule in favor of its jurisdiction in Indian country because the state had exercised jurisdiction in those areas for an extensive amount of time. The state argued that an adverse ruling "could upset an untold number of convictions . . ." 140 S. Ct., at 2479. In the instant case, the pool of convictions that may be affected is substantially less than that in *McGirt*, because the time period in question is only a bit more than two years—from July 1, 2016 to December 18, 2018. Nevertheless, the fear of "opening Pandora's box" may be the impetus behind that state's illegitimate claim to authority over this case. The Supreme Court explained that "[t]he judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void [is] surely strong." Id., at 2478. The Court rejected this sort of action stating that:

> The magnitude of a legal wrong is no reason to perpetuate it . . . [We] proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day . . . [T]he spirit of good faith . . . will [not] be impaired by an adverse decision for the state today any more than it may be by a favorable one.

Id., at 2480-2481. The same principles apply to Cungtion's case and weigh heavily in favor of a finding that the state did not have jurisdiction—and should not have had any desire to prosecute Cungtion, Bear, or any other person similarly situated.

B. If the court were to disagree with the proposition that the United States' acceptance and assumption of jurisdiction was pre-established, the combination of Pub. L. 115-301 and Iowa Code § 1.15A still prevented the state from entering judgments of convictions or imposing sentences in cases involving Indians on the Meskwaki Settlement after July 1, 2016.

1. Retroactive analysis of Pub. L. 115-301 and Iowa Code § 1.15A.

The opinion below employed a presumption against retroactivity to refute Cungtion's appeal by relying on the federal general savings clause, which provides in full:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. The court is correct in its assessment that Congress did not expressly provide for retroactive application of Pub. L. 115-301. The court, however, failed to acknowledge that the General Assembly did expressly provide a statement to that effect in Iowa Code § 1.15A, stating: "criminal jurisdiction previously conferred on the State of Iowa or reserved by the State of Iowa . . . shall cease." The "reserved by the State of Iowa" clause in the statute displays the legislature's intent to relinquish its jurisdiction over reserved criminal proceedings involving Indians on the Meskwaki Settlement.

Deferred judgments and suspended sentences are examples of jurisdiction reserved by the State of Iowa. These judicial actions allow the court to delay the entry of judgment or imposition of sentence for a specified reason in the future. Thus, *reserving* its jurisdiction to take such judicial action if the defendant fails to comply with the stipulations of the deferred judgment or the suspended sentence. See Iowa Code §§ 907.3(1)(a), 907.3(1)(b), and 907.3(3). See also *Barker v. State*, 479 N.W.2d 275, 278 (Iowa 1991); App. A, at 23 ("Critically, the district court retains jurisdiction over the defendant's case during the period of his probation.") Generally, a district court would retain jurisdiction during a defendant's probation period, however, the Iowa legislature expressly provided that it would not continue to exercise judicial authority over this sort of *reserved* jurisdiction after the United States accepted and assumed such jurisdiction.

The definition given the term "reserved" is: "2: kept or set apart or aside for future or special use." Merriam Webster's Collegiate Dictionary, 11th Ed., (2003). The definition given the term "deferred" is: 1: withheld for or until a stated time 2: charged in cases of delayed handling. Id. The definition given the term "suspended" is: 1: to debar temporarily especially from a privilege, office, or function. 2a: to cause to stop temporarily. b: to set aside or make temporarily inoperative. 3: to defer to a later time on specified conditions. 4: to hold in an undetermined or undecided state awaiting further information. Id. On the subject of statutory interpretation, it is well understood that terms undefined in a statute are given "their ordinary and common meaning by considering the context within which they are used." *State v. Zacarias*, 958 N.W.2d 573, 582 (Iowa 2021) (internal quotations omitted). The court is expected to analyze and apply the law based on the syntax provided by the General Assembly, not based on the court's opinion of what the law should be. See *Haman v. Branstad*, 887 N.W.2d 153, 170 (Iowa 2016). Against the backdrop of Iowa's consistent provisions regarding statutory interpretation—in accordance with the synonymous definitions given the terms: "reserved", "deferred", and "suspended"—a reasonably minded person would conclude that the General Assembly intended to include jurisdiction over deferred judgments and suspended sentences in its abdication of jurisdiction in Iowa Code § 1.15A.

The opinion below's reliance on 1 U.S.C. § 109 to preserve the jurisdiction reserved by the State of Iowa subverts the statue and diminishes the Iowa legislature as composers of the law. The quintessential purpose for the general savings statute is to ensure fairness; allowing parties to rely on the law as it is at the time they make their decisions and assume that it will not shift beneath their feet. See App. B (citing *In re ADC Telecom's, Inc. Securities Litigation*, 409

F.3d 974, 976 (8th Cir. 2005). The instant case presents no merit in victimizing the state in this sense. Iowa Code § 1.15A was passed nearly three years prior to the entry of judgment of conviction in Cungtion's case. The law did not "shift beneath their feet". The state was well aware—long before the charges were filed against Cungtion—that all jurisdiction reserved by the State of Iowa would cease the moment Congress repealed the Act of June 30, 1948.

a. Jurisdiction in Indian country: Matters of state law v. Matters of federal law.

The Eighth Circuit Court of Appeals has addressed this issue on several occasions. Its decision in *Tyndall v. Gunter* has been the frequent standard controlling this issue. In that case the court held that the validity of a state's retrocession of jurisdiction is a matter of federal law, while the extent of the jurisdiction relinquished is a matter of state law. 840 F.2d 617, 618 (8th Cir. 1988). Iowa did not need to retrocede its jurisdiction over this class of cases because its jurisdiction was attained through conferral rather than cession. Nevertheless, the principles in *Tyndall* provide sound logic to assist the court in comprehensively determining the authority of Iowa Code § 1.15A. Congress' repeal of the Act of June 30, 1948 served as federal validation for Iowa to relinquish its jurisdiction. The General Assembly's decision to include "jurisdiction reserved by the State of Iowa" was a matter of state law and was certainly within the purview of the Legislature's law-making authority. This action was not dependent on a Congressional "mechanism" as the opinion below suggests. The court's assertion that Iowa had to be a Pub. L. 280 state in order to validly relinquish its jurisdiction to the extent it desired is an equivocal mendacity. Irrespective of whether a state is a Pub. L. 280 state, a Pub. L. 846 state, or neither; as long as there is no federal bar in place and the action does not conflict with the federal

regulatory scheme, the state legislature may decide the extent of its jurisdiction over any subject matter.

2. Principles of separation of powers.

The legislative branch of the Iowa government upheld its obligation to comply with federal policy governing criminal jurisdiction in Indian country. The judicial branch, however, is having trouble doing the same. The Distribution of Powers Clause in section 1 of Article III of the Iowa Constitution exists to prevent the issues presented in this case. The three branches of government are intended to operate congruously and in support of one another, not in contention. It is the duty of the legislative branch to compose the laws of this state and it is the duty of the judicial branch to interpret and apply those laws in the manner prescribed by the legislature. See *State v. Thompson*, 954, N.W.2d 402, 411 (Iowa 2020), holding:

> It is "the duty of the general assembly . . . to provide for a general system of practice in all the courts of this state." The judicial department's constitutional, statutory, inherent, and common law authority to regulate practice and procedure in its courts must give way where the legislative department has acted. . . . [T]he content of all three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed.

(quoting Iowa Const. Art. V, § 14). The legislative department acted to relinquish its criminal jurisdiction—reserved jurisdiction included—in Indian country in 2016. The judicial department's subordinate authority must concur with the action of the legislative department.

CONCLUSION

The pernicious effect on the fundamental principles of Indian sovereignty and self-governance caused by state courts has long been illuminated. Reconciliation of these fundamental principles and critical jurisdictional boundaries began fifty years ago. This case is the epitome of the paternalism that has diminished the protections promised to both Indians and non-Indians for many years. The State of Iowa, by its own action, did not have authority to prosecute offenses committed by or against Indians on the Sac & Fox Settlement after July 1, 2016. The Iowa Supreme Court has failed to remedy this evil. Thus, this petition for writ of certiorari should be granted.

August 19, 2022
Respectfully submitted

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