No. _____

In The

Supreme Court of the United States

IN RE KIMBERLEE PITAWANAKWAT, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS

AND FOR A WRIT OF PROHIBITION

TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND

TO THE DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

AND TO THE UNITED STATES DEPARTMENT OF JUSTICE

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QUESTION PRESENTED

Does it violate the Treaty of Fort Laramie (1868) and the Supremacy Clause of the United States Constitution to subject Indians to stand federal trial for alleged crimes in Indian country?

The General Crimes Act, the Major Crimes Act and many other federal statutes encroaching upon Indian rights in Indian country directly conflict with the Treaty of Fort Laramie (1868), 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." The Treaty of Fort Laramie (1868) is "the Supreme law of the Land" by virtue of the Supremacy Clause, Art. I, §8; Art. VI, cl. 2.

John Jay, founder and the First United States Supreme Court Justice, made clear in Federalist No. 64 that the consent of both parties to a treaty is required "ever afterwards [be] to alter or cancel them," John Jay, Federalist No. 64, The Powers of the Senate, The Independent Journal (Mar. 5, 1788). When faced with demonstrably erroneous precedent that defies John Jay's stricture in Federalist No. 64 that Treaty obligations are "just as far beyond the lawful reach of legislative acts now as they will be at any future period, or under any form of government," should this Court hold such legislative acts to be unconstitutional in violation of the Supremacy Clause, or should this Court continue to follow "demonstrably erroneous precedent," quoting Justice Thomas' eloquent concurrence discussing stare decisis in *Gamble v. United*

States, 139 S. Ct. 1960 (2019), at 1984, or should the Court simply "not follow it," as Justice Thomas suggests?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Kimberlee Pitawanakwat, appearing pro se in her individual capacity.

Respondents in this Court are the United States Court of Appeals for the Eight Circuit, the District Court for the District of South Dakota, and the United States Department of Justice.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court within the meaning of Rule 14.1(b)(iii): U.S. District Court for the District of Oregon, No. 620-mj-00243, *United States v. Dull Knife et al* (Sep. 24, 2020); U.S. District Court for the District of South Dakota, *United States v. Dull Knife et al*, No. 5:20-cr-50122 (Sep. 17, 2020); U.S. Court of Appeals for the Eighth Circuit, *United States v. Kimberlee Pitawanakwat* No. 23-2974 (Sep. 30, 2023); U.S. Court of Appeals for the Eighth Circuit, *United States v. Kimberlee Spring Pitawanakwat* No. 23-3250 (Oct. 10, 2023); U.S. Court of Appeals for the Eighth Circuit, *United States v. Kimberlee Pitawanakwat* No. 23-3295 (Nov. 1, 2023); U.S. Court of Appeals for the Eighth Circuit JCP No. 08-23-90099 *Complaint of Kimberlee Pitawanakwat -Judge Piersol*, Eighth Circuit No. 23-9599; U.S. Court of Appeals for the Eighth Circuit JCP No. 08-23-90100 *Complaint of Kimberlee Pitawanakwat -Judge Duffy*, Eighth Circuit No. 23-9600; U.S. Court of Appeals for the Eighth Circuit JCP No. 08-23-90101 *Complaint*

of Kimberlee Pitawanakwat -Judge Viken, Eighth Circuit No. 23-9601; JCP No. 08-23-90102 *Complaint of Kimberlee Pitawanakwat- Judge Wollman*, Eighth Circuit No. 23-9602; JCP No. 08-23-90108 *Complaint of Kimberlee Pitawanakwat- Judge Lange*, Eighth Circuit No. 23-9608; JCP No. 08-23-90109 *Complaint of Kimberlee Pitawanakwat- Judge Piersol*, Eighth Circuit No. 23-9609; U.S. Court of Appeals for the Eighth Circuit, *United States v. George Dull Knife* No. 21-2456 (Jun. 30, 2021); U.S. Court of Appeals for the Eighth Circuit, *United States v. George Dull Knife* No. 22-2884 (Sep. 6, 2022).

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

Petitioner respectfully petitions for a writ of mandamus to the United States Court of Appeals for the Eighth Circuit and the District Court for the District of South Dakota, mandating that the underlying trial case violated the Treaty of Fort Laramie (1868) and was therefore illegally prosecuted without jurisdiction; further, that the Eight Circuit be prohibited from prosecuting federal cases against Indians in Indian country in violation of said Treaty and the Supremacy Clause of the United States Constitution.

OPINIONS BELOW

The district's court's opinions denying Petitioner's motions to dismiss that are relevant to the question presented are all unreported and can be found in the trial court docket.[1] The district court denied Petitioner's motion to dismiss a superseding indictment raising the issues of the Treaty law and lack of federal jurisdiction, and were the subject of an interlocutory appeal in the United States Court of Appeals for the Eighth Circuit, *United States v. Kimberlee Spring Pitawanakwat* No. 23-3250; relief was denied in an unreported opinion on October 12, 2023, and *en banc* review was denied in *United States v. Kimberlee Pitawanakwat* No. 23-3295 on October 25, 2023.

The underlying trial case was ultimately dismissed without prejudice upon motion of the government based upon newly discovered *Brady* evidence at Docket No. 315 on October 16, 2023. Petitioner's former co-defendant pled guilty to a Major

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[1] *United States v. Dull Knife et al*, No. 5:20-cr-50122, ECF Docket No. 32 (December 4, 2020), Docket No. 264 (August 23, 2023), Docket No. 308 (October 13, 2023),

Crimes Act violation and filed a petition for habeas relief raising the issue of jurisdiction and treaty violation in *United States v. Dull Knife et al*, No. 5:20-cr-50122, that was denied as moot on July 14, 2021, in ECF Docket No. 85. Mr. Dull Knife also filed two appeals, one of which was dismissed, while the other is pending in the United States Court of Appeals for the Eighth Circuit, *United States v. George Dull Knife,* No. 21-2456 (Jun. 30, 2021); U.S. Court of Appeals for the Eighth Circuit, *United States v. George Dull Knife* No. 22-2884 (Sep. 6, 2022).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The All Writs Act, 28 U.S.C. § 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

A. Proceedings in the District Court

Petitioner is a former Defendant in *United States v. Dull Knife et. al*, Case No. 5:20-CR-50122, from the District Court in South Dakota. The case was indicted on September 17, 2020 (Docket No. 1). A superseding indictment was filed with the same charges on September 21, 2023 (Docket No. 281). The co-defendant, George Dull Knife, entered a guilty plea to one count in violation of 18 U.S.C. 113(a)(3), a Major Crimes Act violation, on January 11, 2022 (Docket No. 158).

The Petitioner was charged in one false statement count, alleging a violation of 18 U.S.C. §1001, and one count alleging that the defendant was an accessory after the fact in violation of 18 U.S.C. §3. Neither charge was an enumerated charge authorized for federal prosecution pursuant to the Major Crimes Act. The Petitioner pled not guilty, was on pretrial release without issue for three years, and has no criminal history. The Petitioner waived her right to counsel on June 5, 2023, and proceeded pro se. The Petitioner maintained her actual innocence of the charges and consistently asserted lack of federal jurisdiction and that the prosecution violated the Treaty of Fort Laramie (1868).

The Petitioner previously raised the issue of lack of federal court jurisdiction (Docket Nos. 29, 253, and 300). Petitioner first raised the issue of jurisdiction on November 30, 2020 (Docket No. 29), with no substantive ruling ever made. The Petitioner raised the issue of lack of jurisdiction extensively in Docket No. 253. The district court issued its ruling on Defendant's motions to dismiss in Docket No. 249 but did not even discuss jurisdiction. The government's only statement on jurisdiction exists in Docket No. 255. The government "agrees it has no jurisdiction over this defendant for offenses enumerated in the Major Crimes Act," at page 5. The government continued, "as explained in the following section, the United States has no evidence that the defendant is an Indian person," implicitly conceding a lack of jurisdiction if Petitioner is, in fact, an Indian. Petitioner has established (Docket Nos. 300 and 300-3), and the Court now conceded (Docket No. 297 at page 2): "Pitawanakwat is Native American."

The trial court never addressed any of the Petitioner's arguments regarding jurisdiction, treaty law violations or the lack of application of the General Crimes Act.

The trial case was dismissed upon motion of the Government (Docket No. 315) on October 16, 2023, based upon newly discovered *Brady* evidence on the same day trial was due to start. The government told the district court that it no longer had any evidence to support presenting a prosecution case in relation to the Petitioner.

B. Proceedings in the United States Courts of Appeal for the Eighth Circuit.

Petitioner presented her arguments regarding Treaty law, lack of federal jurisdiction and lack of application of the General Crimes Act in two interlocutory appeals, which were denied initially as premature and then denied as moot, even though the case dismissal was without prejudice and therefore capable of repetition against the Petitioner and other similarly situated Indian defendants. The Eighth Circuit offered no opinion as to Petitioner's Treaty and lack of federal jurisdiction arguments.

The Petitioner's former co-defendant filed two appeals with the Eighth Circuit, the first of which was dismissed and the second of which is currently pending and raises sentencing issues.

C. The General Crimes Act provides no federal jurisdiction to charge Indians in Indian country and on its face can only apply to non-Indians committing crimes against Indians in Indian country.

It was undisputed in the trial court that Petitioner is an Indian, and it is agreed that the offenses for which Petitioner was prosecuted took place in Kyle, in Indian Country, on the land set aside for the exclusive use of the Oglala Sioux tribe in the Fort Laramie Treaty (1868). Petitioner has established (Docket No. 300 and 300-3), and the Court conceded (Docket No. 297, at page 2: "Pitawanakwat is Native American."

This Court recognized and accepted that the Fort Laramie Treaty is a binding treaty obligation of the government in *United States v. Sioux Nation of Indians*, 448 U.S. 371, (1980), where the Court upheld the Court of Claims' determination that the United States had effected a "taking" of the Black Hills for gold mining when that land had been reserved for the exclusive use of the Sioux tribe. Mr. Justice Blackmun delivered the opinion of the Court. The Court found that "the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named."

Three months before the Department of Justice brought their unlawful prosecution against Ms. Pitawanakwat, this Court decided *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), In *McGirt* this court overturned a state court conviction of Mr. McGirt, requiring that he be prosecuted in federal court pursuant to the Major Crimes Act (MCA) based upon the issue of jurisdiction.

Unlike *McGirt,* the federal government had no Major Crimes Act jurisdiction in the Petitioner's case.

Justice Gorsuch delivered the opinion of the Court, finding that the state court has no jurisdiction to try Indians for alleged crimes in Indian country. Justice Gorsuch, at 2459:

> Mr. McGirt's appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "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." 18 U.S.C. § 1153(a). By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." *Negonsott v. Samuels* , 507 U.S. 99, 102–103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993).

Justice Gorsuch made clear that the Major Crimes Act itself might violate Congress's promise (in other words, it violated the Treaty with the Creeks (1832)) to the Indians that they would be free to govern themselves, but found the violation limited in only applying to the enumerated MCA crimes. The Petitioner in this case was not charged with any MCA offenses and consistently raised the issue of lack of federal jurisdiction, violation of the Fort Laramie Treaty and *McGirt*, without any reasoned response on the part of the government or the trial court or the Eighth Circuit.

The only affirmative claim of jurisdiction made against the Petitioner exists in trial court docket No. 255, claiming a General Crimes Act jurisdiction exists

against the Petitioner. This claimed common-law jurisdiction was expressly rejected by the Supreme Court in *Kokkonen v. Guardian Life Insurance Company of America*, 114 S.Ct. 1673, 128 L.Ed.2d 391, 511 U.S. 375 (1994):

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, *see Willy v. Coastal Corp.*, 503 U.S., (1992) (slip op., at 4-5); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. President of Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

Unlike a Major Crimes Act case, jurisdiction can only exist pursuant to the General Crimes Act, 18 U.S.C. § 1152 (GCA), if the government establishes that Petitioner is not an Indian and that the tribe does not have exclusive jurisdiction, assuming any federal jurisdiction can be established at all. The Supreme Court in *Keeble v. United States* 8212 5323, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973), found the tribe has exclusive jurisdiction over non-Major Crimes act crimes:

> As the opinion of the Court demonstrates, the Major Crimes Act, 18 U.S.C. §§ 1153, 3242, was enacted in response to this Court's decision in *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030. The Act conferred jurisdiction upon federal district courts over certain enumerated crimes committed by Indians on an Indian reservation, leaving tribal jurisdiction intact as to all other crimes. Highlighting added.

The Court continued:

> It is a commonplace that federal courts are courts of limited jurisdiction, and that there are no common-law offenses against the United States. 'The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.' United States v. Hudson, 7 Cranch 32, 34, 3

> L.Ed. 259. 'It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.'... (Highlighting added.)

The plain language of the General Crimes Act, 18 U.S.C. §1152, excludes the case charged against the Petitioner, because she is an Indian, the charged crimes that were ultimately dismissed occurred in Indian country, and the alleged victim was the United States, not an individual and not an Indian. §1152 specifically states:

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively,"

clearly excluding any federal prosecution of this Petitioner for non-MCA offenses.

D. The General Crimes Act and the Major Crimes Act are Unconstitutional Violations of the Supremacy Clause and the Treaty of Fort Laramie (1868).

The United States Constitution directs that the Constitution, the laws of the United States and federal treaties are "the supreme Law of the Land." Art. I, §8; Art. VI, cl. 2. The plain language of the Supremacy Clause is that federal treaties are co-equal with the Constitution and federal statute, and that "the Judges in every State shall be bound thereby."

The founders of the federal Constitution debated the meaning of the Supremacy Clause and Treaty law at length. The accepted view at that time was that Treaty law was superior to conflicting federal statute and that it was a violation of the Supremacy Clause for later legislation to conflict with an underlying Treaty unless both parties to the Treaty agreed. This view is most clearly expressed

by the first Supreme Court Chief Justice, John Jay, writing as Publius, in Federalist No. 64:

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

John Jay, The Power of the Senate, Federalist No. 64, The Independent Journal (Mar. 5, 1788).[2]

It is clear from Chief Justice Jay's statement that the founders' original intent was that no change to a treaty, once made, could occur without the consent of both parties and, further, that such treaties were beyond the reach of future legislative acts then or in the future.

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[2] All quotations from The Federalist papers were obtained from The Project Gutenberg eBook of The Federalist Papers, by Alexander Hamilton, John Jay, and James Madison, at https://www.gutenberg.org/files/1404/1404-h/1404-h.htm.

John Jay's view is also consistent with William Blackstone's Commentaries on the Laws of England discussing the irrevocable nature of the king's treaty power as follows:

> In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. For prerogative consisting (as Mr Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the king may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded.

William Blackstone, Commentaries on the Laws of England, Book 1, Ch.7, Of the King's Prerogative (1765-1769).

In Federalist No. 22 from the New York Packet (Dec. 14, 1787), Alexander Hamilton, writing as Publius, stated:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.

Alexander Hamilton, Other Defects of the Present Confederation, The Federalist No. 22, the NY Packet (Dec 14, 1787).

In Federalist No. 22 the Court can discern originalist intent from Hamilton that the Supreme Court should make determinations regarding treaty disputes, such as the case made by this instant petition. This suggests that it is this Court alone that must make legal determinations about Treaty law. There are

considerable questions about the validity of inconsistent precedent that developed through the circuit courts, such as *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855). Justice Curtis ignored the view of the framers and viewed potential conflict between the treaty and contrary legislation as a political, rather than judicial question. Both of these positions were clearly in error and do not address the binding earlier precedent in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244 (1796), holding that the Definitive Treaty of Peace between the United States and Great Britain, which affirmed all debts held by Americans to Great Britain, superseded a preexisting Virginia statute that had allowed Virginians to satisfy their debts to British subjects by paying them to the state treasury.

In Federalist No. 42, James Madison wrote of the powers "lodged in the general government, consist[ing] of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls...," expressing the founders' intent that treaties would be made with foreign nations, in other words, separate sovereigns. James Madison, The Powers Conferred by the Constitution Further Considered, The Federalist No. 42, the NY Packet (Jan. 22, 1788). In Federalist No. 47 , James Madison wrote of the British Constitution and the power of the executive magistrate, who "has the prerogative of making treaties with foreign sovereigns." James Madison, The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts, The Federalist No. 47, The Independent Journal (Jan. 30, 1788). Then, in Federalist No. 53, Madison wrote again concerning treaties:

> A branch of knowledge which belongs to the acquirements of a federal representative, and which has not been mentioned is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations.

James Madison, The Same Subject Continued (the House of Representatives), The Federalist No. 53, the Independent Journal (Feb. 9, 1788)

It is apparent from the Federalist papers that the Constitutions' founders viewed the Treaty power existing within the executive and legislative branches to reach contractual agreements with sovereign foreign nations. Thus, to enter into treaty obligations with the United States, the Indian nations, including the Sioux, were considered sovereign foreign nations, not the wards of the federal government that they later became in cases such as the Marshall trilogy, *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832), establishing federal primacy in Indian affairs without addressing the conflict that caused treaty rights guaranteed Indians by the Supremacy Clause and the promises made to countless tribes by binding Treaty obligation.

In no Indian law or treaty jurisprudence that the Petitioner can find has the Court reviewed the meaning of Justice Jay's language in Federalist No. 64 (John Jay, The Powers of the Senate, Federalist No. 64, The Independent Journal (Mar. 5, 1788) regarding conflicts between treaty law and later federal legislation and how it can be reconciled with the General Crimes Act, the Major Crimes Act and a host of other federal statutes that violate the 377 treaties signed between Indian tribes and

the United States between 1774 and 1871. The National Archives lists thirty treaties signed between the Sioux tribe and the United States between 1815 and 1868, culminating in the Treaty of Fort Laramie (1868).

In The Federalist No. 75, Alexander Hamilton famously differentiated between laws and treaties. Laws, he argued, "prescribe rules for the regulation of the society." By contrast, treaties "are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith." Alexander Hamilton, The Treaty-Making Power of the Executive, The Federalist No. 75, the Independent Journal (Mar. 26, 1788). Statements like these reflected the view of the majority of the founders that government's power was limited by treaty and by fundamental principles of international law. Alexander Hamilton, John Jay, and James Wilson were proponents of this position, which was accepted at the time of the Constitutional convention and was debated when the "Jay Treaty" (Treaty of Amity, Commerce and Navigation, Nov. 19, 1974) U.S.-Great Britain, 8 Stat. 116, T.S. No. 105. During the House debate on the treaty and in presenting the Federalist position, Hamilton specifically discussed the Jay treaty acting in restraint of inconsistent acts of the legislative body; *see also* Jules Lobel, "The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law," 71 Va. L. Rev. 1071, 1098 (1985):

> Though Congress, by the Constitution, have power to lay taxes, yet a treaty may restrain the exercise of it in particular cases. For a nation, like an individual, may abridge its moral power of action by agreement; and the organ charged with the legislative power of a nation may be restrained in its operation by the agreements of the organ of its federative power, or power to contract. . . . [I]t will be more correct. . . to

> say that the power of treaty is the power of making exceptions, in particular cases, to the power of legislation. The stipulations of treaty are, in good faith, restraints upon the exercise of the last-mentioned power.

Professor Lobel's review of the founders' view that legislative acts were subordinate to treaty obligations can be found ibid at pages 1076-1104.

E. The Treaty of Fort Laramie (1868) Is Self-Executing And Directly Enforceable By This Court And Binding Upon The Executive Branch.

A formulation of the general nature of treaties was cited more recently in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), rev'd, 126 S. Ct. 2749 (2006), and is consistent with the original intent of the Founders, for example, John Jay in Federalist 64: "It was wise, therefore, in the Convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them." Alexander Hamilton wrote, in Federalist No. 66: "The security essentially intended by the Constitution against corruption and treachery in the formation of treaties is to be sought for in the numbers and characters of those who are to make them." Alexander Hamilton, Objections to the Power of the Senate to Set as a Court for Impeachments Further Considered, The Federalist No. 66, The Independent Journal (Mar. 8. 1788). And in Federalist No. 75, Alexander Hamilton wrote:

> The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements

> between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

Alexander Hamilton, The Treaty-Making Power of the Executive, The Federalist No. 75, The Independent Journal (Mar. 26, 1788).

In *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017), Circuit Judge Pillard, in construing the applicable extradition Treaty, held in his concurrence that it was the Court's "duty under the Supremacy Clause to apply treaty law just as we are bound to apply a federal statute or the Constitution itself." U.S. Const. Art. VI Cl. 2; *see United States v. Rauscher*, 119 U.S. 407, 430–31, 7 S.Ct. 234, 30 L.Ed. 425 (1886). Carlos Manuel Vázquez, Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 Harv. L. Rev. 599, 601-02 (2008)." In Professor Vázquez's comprehensive review of the Treaty power, he argues that the Supremacy Clause directs courts to give treaties effect and that the Supremacy Clause establishes a default rule that treaties are directly enforceable in court like other laws.

In *Rauscher,* the Court made clear that because the Constitution declares treaties to be the supreme law of the land, "the courts are bound to take judicial notice of [them], and to enforce in any appropriate proceeding the rights of persons growing out of [them]." *Ibid* at 419, making it quite clear that this petitioner can sue individually for violation of her treaty rights.

In addition, this Court has struck down the actions of the executive branch in derogation of a treaty. In *Cook v. United States*, 288 U.S. 102, 120-122 (1933), the Court found executive power limited by treaty. Coast Guard officers seized a British liquor-smuggling ship outside the limit for such seizures as set by an Anglo-American treaty. The government argued that the executive had ratified the seizure and therefore the ship should be forfeited despite the violation. The Supreme Court responded:

> The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority.... Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

This line of precedent is supported by dicta in *In United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1802). Chief Justice Marshall reasoned that a treaty, as law of the land, superseded a prior presidential commission authorizing seizure of French ships:

> [W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress ....

Id. at 110.

Similarly, in *Kennett v. Chambers*, 55 U.S (14 How.) 38 (1852), the Court held a Mexican-American treaty binding prior to a U.S. determination that Texas had

achieved its independence. The Court quoted a presidential statement that so long as Mexico complied with the treaty,

> any act on the part of the Government of the United States, which would tend to foster a spirit of resistance to her [Mexico's] government and laws . . . would be unauthorized and highly improper.

Id. at 47; *see also United States v. Decker*, 600 F.2d 733, 737 (9th Cir.), cert. denied, 444 U.S. 855 (1979) (court has power to decide whether presidential action accorded with treaty). This line of cases raises a separate issue and treaty claim directly against the executive branch and its law enforcement agencies for a direct violation of the Fort Laramie Treaty.

F. Stare Decisis and its application to this Petition

This petition asserts that much of the Court's Indian jurisprudence violates the Supremacy Clause of the Constitution and the clearly stated original intent of the Founders; (*see* Section D, above). There is a clear inconsistency between this original intent (Federalist No. 64), early Supreme Court precedent expressed in *Ware v. Hylton* and later cases such as *Head Money Cases*, 112 U.S. 580 (1884), that Congress may abrogate a duly ratified treaty by normal Article I legislation. The cases following the *Head Money* line are arguably wrongly decided, in violation of the Supremacy Clause and inconsistent with clear original intent. Those cases generally did not address the inconsistent earlier history, or application of natural law, but relied upon nationalist views of sovereignty prevalent during the period, or

they relied upon improper deference to Congress or the view that such issues were political or beyond judicial review. These views are directly contradicted by the Supremacy Clause itself, which instructs that judges in every state are bound thereby.

This Court has been open to review existing precedent and stare decisis in cases such as *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), overturning *Roe v. Wade,* 410 U.S. 113, finding no constitutionally protected right to an abortion.

In 2019 the Court conducted a comprehensive review of double jeopardy case law in *Gamble v. United States*, 139 S. Ct. 1960 (2019). Writing in concurrence with the majority opinion upholding existing precedent, Justice Thomas wrote separately to address *stare decisis* and to express his view that the existing formulation of the standard:

> does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. It is always "tempting for judges to confuse our own preferences with the requirements of the law," *Obergefell v. Hodges* , 576 U.S. ——, ——, 135 S.Ct. 2584, 2612, 192 L.Ed.2d 609 (2015) (ROBERTS, C.J., dissenting).

Justice Thomas' clearly expressed opinion in *Gamble* is that "The role of a federal judge is thus "modest": to "interpret and apply written law to the facts of particular cases." *Gamble*, 139 S. Ct. at 1984, and:

> if the Court encounters a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling

> the precedent. Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law. A demonstrably incorrect judicial decision, by contrast, is tantamount to making law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power." *Id.*

The Petitioner asserts that Supreme Court authority cited for the proposition that the Treaty of Laramie (1868) is amended by later federal statute is wrongly decided, violates the Supremacy Clause and the founders' clear intent (see D above), and this Court should declare that it is "demonstrably erroneous precedent," and should not follow it, as Justice Thomas suggests.

G. Dismissal Of The Trial Case Based Upon Petitioner's Actual Innocence Does Not Moot Petitioner's Arguments In This Petition.

The Eighth Circuit panel erred in its judgment that the case is moot. This Court is bound by Supreme Court precedent in *Turner v. Rogers*, 131 S. Ct. 2507, 180 L. Ed. 2d 452, 564 U.S. 431 (2011). In the words of the Supreme Court:

> [T]his case is not moot because it falls within a special category of disputes that are "capable of repetition" while "evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911). A dispute falls into that category, and a case based on that dispute remains live, if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (per curiam).

The government twice charged this defendant with the same offense without any legitimate explanation of jurisdiction, and the case was ultimately dismissed without prejudice on October 16, 2023. Without this Court reviewing these issues,

this case is absolutely "capable of repetition, yet evading review." *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546–547, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (internal quotation marks omitted).

In addition, there is a long line of Supreme Court civil precedent that holds that a party's voluntary cessation of an unlawful practice will not moot its opponent's challenge to that practice. This exception to the mootness doctrine exists because if a litigant could defeat a lawsuit simply by temporarily ceasing its unlawful activities, there would be nothing to stop that litigant from engaging in that unlawful behavior again; after the court dismissed the case, the litigant would effectively "be free to return to [its] old ways." *Allee v. Medrano*, 416 U.S. at 811 (quoting *Gray v. Sanders*, 372 U.S. 368, 376 (1963)). *See also, e.g., Friends of the Earth v. Laidlaw Environmental*, 528 U.S. 167,.at 189 (same).

The Department of Justice, as part of an illegal pattern and practice, prosecutes cases based upon a theory of general jurisdiction that is directly contradicted by binding Supreme Court precedent in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). The United States government has no jurisdiction to prosecute Indians in Indian country for non-Major Crimes Act offenses; the precedents provided in defendant's docket No. 300 and the language of the General Crimes Act are both clear. When the government gets caught doing so, as it did in this case, it then uses its dismissal power to deliberately evade superior court review. This is directly equivalent to the voluntary cessation doctrine line of

precedent, and this defendant should not be provided less rigorous appellate review than a civil petitioner because liberty interests are at stake.

REASONS FOR GRANTING THE PETITION

The Court may "issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

A writ of mandamus is warranted where "(1) no other adequate means exist to attain the relief [the party] desires, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*quoting Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380–81 (2004)) (internal quotation marks and alterations omitted).

Mandamus is reserved for "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Cheney*, 542 U.S. at 380 (citation omitted). Exceptional circumstances are present here because the Eighth Circuit Court of Appeals and the South Dakota District Court allowed the prosecution of a case in direct violation of existing Supreme Court precedent in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020); *Keeble v. United States* 8212 5323, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973); *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883), The Treaty of Fort Laramie (1868) and the Supremacy Clause of the United States Constitution.

I. PETITIONERS' RIGHT TO ISSUANCE OF THE WRITS OF MANDAMUS AND PROHIBITION IS CLEAR AND WILL AID THE COURT'S APPELLATE JURISDICTION.

Petitioner is entitled to a writ directing the Eighth Circuit to decide the issues presented by the Petitioner regarding the application of the General Crimes Act, 18 U.S.C. § 1152, in her case, the lack of federal jurisdiction and the application of the Treaty of Fort Laramie and the Supremacy Clause to Petitioner's case. This Court must require that lower courts, including the Eighth Circuit and the District Court for the District of South Dakota, follow existing binding Supreme Court precedent and dismiss cases where the federal court has no criminal jurisdiction over this case and remand it to the district court for further proceedings consistent with this Court's opinion.

This Court only has the time to hear approximately eighty cases a year and cannot be improperly burdened by lower courts that are unable or unwilling to follow the Constitution or binding Supreme Court precedent. Having lower Courts consistently and correctly apply the Constitution and binding precedent will aid in this Court's appellate jurisdiction and reduce the number of unnecessary applications for relief that are presented to this Court for review when the lower courts could have appropriately addressed the issue.

The Eight Circuit has previously held that the issues presented by this Petitioner are moot, but such a decision is inconsistent with binding precedent from this Court discussed at length in Section E, above.

This Court should also prohibit the Eighth Circuit, the South Dakota District Court, and the Department of Justice from prosecuting cases pursuant to the General Crimes Act and the Major Crimes Act where they do not have jurisdiction or where such prosecutions violate the Supremacy Clause and binding U.S. Treaty obligations.

II. WRITS OF MANDAMUS AND PROHIBITION ARE WARRANTED GIVEN ONGOING TREATY VIOLATIONS AND THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE.

Because the Eighth Circuit Court of Appeals and the South Dakota District Court, as well as the United States Department of Justice, are acting in conspicuous violation of existing Supreme Court precedent in *McGirt*, ignoring existing case law regarding the application of the General Crimes Act, 18 U.S.C. § 1152, and ignoring limits of federal jurisdiction based upon the Supremacy Clause and treaty law, as discussed in D above, the Petitioner is entitled to a Writ of Mandate ordering the Eighth Circuit to dismiss the Petitioner's underlying case upon the correct grounds. The Petitioner raised the issues addressed in this petition long before newly discovered *Brady* evidence presented by the prosecution on the day of trial caused the trial court to order the case dismissed. The Court dismissed the case without prejudice, so the Petitioner remains at risk of federal prosecution for offenses for which the federal government has absolutely no jurisdiction.

Other similarly situated criminal defendants are also at risk of false prosecutions based upon the Department of Justice's reading of the General Crimes Act that is completely contrary to existing precedent. Federal courts are courts of

limited jurisdiction, yet the Department of Justice, at least within the Eighth Circuit, presently ignores this.

III. ADEQUATE RELIEF FROM THIS UNCONSTITUTIONAL CONDUCT CANNOT BE OBTAINED ELSEWHERE AND WILL OTHERWISE EVADE REVIEW.

This Petitioner has diligently tried to obtain relief from the Eight Circuit Court of Appeals, from the District Court in South Dakota, and from the Department of Justice to no avail. The lower courts did not respond in any way to Petitioner's motions and wrote not one word about federal jurisdiction, the Supremacy Clause or treaty law. The Department of Justice claimed a common-law General Crimes Act jurisdiction that was so broad (*see* section C above) it would encompass prosecutions for General Crimes Act offenses everywhere in Indian country and against every Indian. Such a proposition is completely contrary to existing precedent, but the Petitioner was completely without remedy and was thirty minutes from trial in a case where the government never had jurisdiction.

CONCLUSION

The General Crimes Act, on its face, excludes the prosecution of an Indian in Indian country, and its application here is in violation of existing Supreme Court precedent and the Treaty of Fort Laramie (1868) and the Supremacy Clause.

The United States Constitution is the Supreme law of the United States of America. Article VI of the United States Constitution clearly establishes Treaty Law, including all thirty Sioux Nation Treaties, as the law of this land that must be upheld by the judges of every state and is just as binding upon the Executive

Branch. The law is clear in this regard, and any federal statute that conflicts with Article VI and the Treaty of Fort Laramie's promise to set apart that land "for the absolute and undisturbed use and occupation of the Indians herein named" is unconstitutional and void.

Dated this 5th day of February 2024

Respectfully,

/s/ Kimberlee Pitawanakwat

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