No.

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IN THE SUPREME COURT OF THE UNITED STATES

QAYA MIKEL GORDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress exceeded its authority under the Constitution by enacting the Major Crimes Act, 18 U.S.C. §1153, as applied to crimes committed by Indians against Indians on tribal land, without the consent of the tribes.

2. Whether the legal standard of review, under the Fifth Amendment Due Process Clause, for legislation affecting Indians includes consideration of Congress' stated purpose behind the legislation and consideration of whether the legislation conforms to the trust obligations toward Native nations.

RULE 14.1(B)(iii) STATEMENT OF RELATED CASES

United States District Court (D. Idaho):

United States v. Gordon, No. 3:21-CR-00305-DCN (Dec. 1, 2022).

United States Court of Appeals (9th Cir.):

United States v. Gordon, No. 22-30198 (Nov. 20, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gordon, through court-appointed counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, App. 1a, is not designated for publication in the Federal Reporter but is available at 2023 WL 8014358.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the constitutional and statutory provisions are reproduced in the Appendix: the Major Crimes Act, 18 U.S.C. § 1153, App. 14a; U.S. Const. art. I, § 8, App. 14a; U.S. Const. amend. V, App. 17a.

INTRODUCTION

This is a case about the extent of Congress' plenary powers over the internal affairs of Native nations without their consent. It also raises a related issue of the appropriate standard of review, under the due process clause, for legislation related to Indians.

The Major Crimes Act provides exclusive federal jurisdiction over certain enumerated offenses when committed by any Indian against the person or property of another Indian or other person within the Indian country. 18 U.S.C.A § 1153(a). To be considered "Indian" under the MCA, one generally must have both some degree of Indian blood, whether or not traceable to a federally recognized tribe,

and sufficient connection to some tribe to be regarded by the tribe or the government as one of its members for criminal jurisdiction purposes. *U.S. v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846). Most tribal nations require a minimum percentage of blood quantum or a demonstration of direct descent for enrollment.

STATEMENT OF THE CASE

HISTORICAL BACKGROUND

The Major Crimes Act was enacted in 1885 with an explicit purpose of destroying tribal justice systems and tribal culture during the period of assimilation policy against Indians. "Before the arrival of Europeans in the Americas, Indian nations functioned under their respective and inherent principles of sovereignty. They governed, policed, regulated land use, and resolved internal conflict in accordance with their norms, values, and customs that had in many instances existed since time immemorial. They exerted complete and absolute jurisdiction over criminal matters occurring within their lands." Carol Chiago Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems: A Brief History,* 19 Wicazo Sa Review 9, 9 (2004). Native tribes had complex restorative justice systems that reflected their cultural values and priorities, and they resisted attempts by colonist to destroy those justice systems. *See,* Gregory Ablavsky & W. Tanner Allread, *We*

the (Native) People: How Indigenous Peoples Debated the U.S. Constitution, 123 Col. L. Rev. 243, 267-285 (2023) (describing indigenous separate legal systems that rested on fundamentally different principles, worldviews, authorities, and forms of recordation than Anglo-American law). Often, these systems went unnoticed by colonizers. However, even when white people did learn of these cultural norms, Indian customary or common law was so different in form and substance from the written and codified European legal systems that white European colonists disregarded their existence entirely. Vine Deloria Jr. & Clifford M. Lytle, *American Indians, American Justice* 80-82 (1983).

In the latter half of the nineteenth century, the Bureau of Indian Affairs used criminal jurisdiction as a weapon for assimilation policy. The BIA, established by the federal government in 1824, was ostensibly to assist Native peoples in managing their affairs under a trust relationship with the federal government, but in practice "the BIA became an instrument of subjugation, land appropriation, forced assimilation, and in some cases, extermination." Christopher Buck, "*Never Again," Kevin Glover's Apology for the Bureau of Indian Affairs*, 21 Wicazo Sa Review 97, 98 (2006). The BIA pushed for multiple policies that would work to destroy Indian culture and communities, such as their first goal of executing the removal of the southeastern tribal nations, and later massacres at Sand Creek, Washita River, and Wounded Knee. *Id.* "Congress responded to the continuance of Indian culture

through both legal and military aggression. In the process, U.S. policy bestowed federal agents with dictatorial powers, enabling them to control and regulate virtually every aspect of Indian life and governmental decision-making processes. The aim of this assimilation policy was to remake Indians in the image of white Americans by acts of coercion such as boarding school education and the criminalization of American Indian spirituality." Lujan & Adams, 14. These agents carried out a campaign of ethnocide against Indian life. *Id.* By the conclusion of the Indian Wars in 1886, the pre-Columbian Indian population had been reduced as much as 98%, and an Indian-free U.S. was not beyond possibility. Buck, 103 (citing William C. Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 Ohio State Law Journal 1, 6 (2005)).

In 1883, the BIA launched a direct assault on traditional systems of Indian justice by establishing Court of Indian Offenses on most reservations. "These courts sought to force Indian peoples to abandon traditional heathenish practices, to take up a plow, and to assimilate." Lujan & Adams, 15; Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze,"* 18 Arizona Law Review 553 (1976); Lindsey Kingston, *The Destruction of Identity: Cultural Genocide and Indigenous Peoples*, 14 Journal of Human Rights 63, 67 (2015). While this policy did significantly undermine Indian culture and traditional justice systems, many Native nations resisted and continued with their

customary practices for resolution of all criminal issues on tribal land. Lujan & Adams, 15. This was not an acceptable outcome for the BIA.

Ex parte Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556 (1883), then became the next part of the BIA's efforts to eliminate Native people and culture using criminal jurisdiction. It was just one of several "test cases" cultivated by the BIA to convince Congress to grant federal criminal jurisdiction over Indian tribes because BIA officials believed that they needed the coercive power of the criminal law to help force assimilation of Indians. Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 American Indian Law Review 191, 195 (1989). Although current conventional wisdom is that the MCA was enacted following an "outcry" over the *Crow Dog* decision, that is not the whole historical truth. The BIA had been attempting to get such a bill through Congress for a decade prior, and they concocted the notion of outcry to exert more pressure on Congress. Harring, 224. In fact, the Senate had rejected the BIA's original 1874 MCA bill because it was *inconsistent with existing notions* of tribal sovereignty. *Id*.

The actions of the BIA during this period revealed a great deal about the process of implementing their assimilationist policy and about the purpose behind enacting the MCA. By the early 1880's, policy toward American Indians had changed, reflecting the national expansionism that had provided the last of the

major Indian wars. There was no more tolerance for any notion of Indian sovereignty, the Indian nations were simply in the way of white expansion, and their treaty rights interfered with the Black Hills gold rush, railroad lines, and the westward expansion of agriculture. Harring, 224.

As soon as the day after Crow Dog shot and killed Spotted Tail, the BIA began manipulating the facts of the actual case to make it a more compelling argument to Congress. *Id.* Before the federal trial, there had been a tribal council meeting following Brule law to order an end to any trouble and to send peacemakers to both families. Harring, 199. The families, also following Brule law, agreed to a payment of $600, eight horses, and one blanket, which Crow Dog's people promptly paid Spotted Tail's people. *Id.* "Brule law effectively and quickly redressed the killing and restored tribal harmony." *Id.* Despite this tribal process, Crow Dog was arrested by federal authorities and put on trial in federal court. The killing appeared to be in self-defense, but the federal court disallowed the defense, and Crow Dog was convicted of murder. *Id.* at 206.

Because of the importance of the case as a test case, the federal government paid for Crow Dog's appeal so that the BIA could push the case speedily forward. Harring, 214. A unanimous Supreme Court reversed the conviction and upheld tribal sovereignty over the crime based on well-developed concepts of federal Indian law and the Sioux treaties of 1869 and 1877. *Ex parte Crow Dog*, 109 U.S.

556, 572 (1883); Harring, 219. "In many ways it is fair to see the *Crow Dog* opinion as representing a watershed, the divide where a traditional Indian policy that recognized the equality of tribal peoples and respected their national sovereignty first stood strongly against the rise of the new BIA policy of assimilation that was to dominate national Indian policy for the next fifty years." Harring, 219.

In the BIA's pleas to Congress for legislation following the Supreme Court case, there is a clear link and relationship between extension of criminal law to Indians and the broad assimilationist goals of the Indian service. Harring, 230. The bill was introduced with reasoning taken directly from the BIA's Annual Report:

> I believe it is not necessary for me to say that this amendment is in the direction of the thought of all who desire the advancement and civilization of the Indian tribes. It is recommended very strongly by the Secretary of the Interior in his annual report. I believe we all feel that the Indian, when he commits a crimes, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard to the law, but amendable to its penalties.

Harring, 231 (citing 16 Cong. Rec. 934 (1885), Commissioner of Indian Affairs Ann. Rep. (1884) at xiv-xv.). In *Keeble v. United States*, this Court affirmed the legislative history of the MCA: "Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under [federal criminal] laws and

taught to regard life and their personal property of others.'" 412 U.S. 205, 211-12 (1973) (quoting Rep. Cutcheon).

In this context, once enacted, the Major Crimes Act was a clear departure from existing practice and policy based on treaty rights recognizing Indian sovereignty, to a new policy of dependency and forced assimilation. Harring, 230. Not surprisingly, the following year, the Supreme Court followed suit in *Kagama* and adopted a concept of plenary power of guardian-ward relationship to uphold the law, without any acknowledgement of the tribal justice systems that had been destroyed in its wake. The imposition of this form of Anglo law, strikingly punitive and adversarial in nature, was intentionally devastating to tribal culture. Ablavsky & Allread, 257.

The next year, Congress further eroded tribal justice systems with the Dawes Severalty Act of 1887 (General Allotment Act), opening reservation land to non-Indians which made it increasingly more difficult for Indians to continue customary justice systems. Finally, in the 1903 decision in *Lone Wolf v. Hitchcock*, the Court paved the way for Congress to completely dissolve anything that remained of tribal governments and their traditional justice systems. Lujan & Adams, 16.

FACTUAL HISTORY AND THE PETITIONER'S CASE

On November 16, 2021, the Petitioner was charged in the United States District Court for the District of Idaho with two counts of Assault in Indian Country in violation of the Major Crimes Act, 18 U.S.C. § 1153, for assaulting Kyley Payne and Vashti Scott. App. 12a. Kyley was the abusive boyfriend of the Petitioner's mother, Vashti. When the Petitioner confronted Kyley about getting his mother addicted to methamphetamine and abusing her by dragging her behind his car, Vashti tried to intervene and was also injured. The case was what most people would call a domestic dispute.

In the district court, the parties stipulated that during all relevant time periods, the Petitioner was an enrolled member of the Nez Perce Indian Tribe; Kyley Eugene Payne was an enrolled member of the Coeur d'Alene Indian Tribe; and Vashti Scott was an enrolled member of the Nez Perce Indian Tribe. C.A. ROA 12-13. Further, the parties stipulated that the shed where the assault occurred was located within the boundaries of the Nez Perce Indian Reservation. C.A. ROA 12-13. The government also produced documentation of the Petitioner's blood quantum as a trial exhibit, describing the Petitioner's blood as 57/128 percent quantum. C.A. ROA 17. The only basis for federal jurisdiction was that the Petitioner and his victims were Indian.

On appeal, the Petitioner challenged the jurisdiction of the District Court, arguing that the Major Crimes Act is unconstitutional because it (1) violates equal protection and (2) exceeds Congress' powers under the Constitution. The Ninth Circuit Court of Appeals denied the appeal, holding that it was bound by Supreme Court precedent on both issues, namely: (1) Indian laws, including the MCA, are not based on racial classifications, but instead, are rooted in the unique status of Indians as 'a separate people' with their own political institutions, *United States v. Gordon*, 2023 WL 8014358 at *2 (citing *U.S. v. Antelope,* 430 U.S. 641, 645-646 (1977)), App. 2a, and (2) Congress' plenary power allows it to legislate criminal laws regarding Indian affairs that occur in Indian country, *Id.* (citing *U.S. v. Kagama*, 118 U.S. 375, 384 (1886)), App. 3a.

REASONS FOR GRANTING THE PETITION

This Court has vacillated on the sources for the exercise of federal jurisdiction over Indians. At times, the court has considered the tribes' dependent or ward status. *U.S. v. Kagama,* 118 U.S. 375, 383-84 (1886). Other times, the Court has cited Congress' authority to regulate "Indian affairs" under the Indian Commerce Clause. *U.S. v. Antelope*, 430 U.S. 641, 645 (1977). The Court has also frequently stated that Congress has "plenary" authority over Indians, without

reference to any specific constitutional provision. *Haaland v. Brackeen*, 599 U.S. 255, 279 (2023).

However, in recent years, the Court has also repeatedly called into question the validity of the underpinnings for the Major Crimes Act as applied to Indian against Indian crime on tribal land without the consent of Native nations. For example, in *McGirt v. Oklahoma*, the court noted that by subjecting Indians to federal trial for crimes committed on tribal lands, Congress has breached its promises to tribes that they would be free to govern themselves. 140 S. Ct. 2452, 2459 (2020). The Court also stated that repeatedly breaking a treaty over a century does not suddenly confer a constitutional power that was never there, even though a government may exercise jurisdiction over Native Americans with such persistence that the practice seems normal. *Id.* at 2474. "When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes. . . to try their own members." *Id.* at 2480.

More recently, in *Haaland v. Brackeen*, the Court remarked that the history and construction of the Constitution do not support the plenary authority recognized in *Kagama*. 599 U.S. at 326 (J. Gorsuch, concurring opinion). Although *Brackeen* raised the constitutionality of the Indian Child Welfare Act of 1978, the Court also took the opportunity to address its precedent regarding the MCA and Indian criminal jurisdiction more generally. In castigating the *Kagama* decision,

the Court acknowledged that it had misplaced the original meaning of the Indian Commerce Clause in *Kagama*, and in the process, the Court "stepped off the doctrinal trail" and sent "the Court's Indian-law jurisprudence into a tailspin." *Id*. The Court stated that the power referred to in *Kagama* and subsequent cases did not follow from a reasoned analysis derived from the text or history of the Constitution. *Id.* at 327; *see also, Adoptive Couple v. Baby Girl,* 570 U.S. 637, 663-64 (2013) (Thomas, J., concurring).

Therefore, courts and Indian criminal defendants around the country are now uncertain as the current status of *Kagama* and its progeny as valid precedent for plenary congressional power over Indians in general or in support of the MCA more specifically. This court has an opportunity to clarify the limitations on Congress' so called "plenary powers" and to repudiate one of the remaining vestiges of colonial extermination of native culture during the assimilation period.

This Court has also vacillated on the standard of review under the due process clause for legislation related to Indians. For example, in *Morton v. Mancari*, the Court applied a standard of review that took into consideration the purpose of the legislation as articulated by Congress and whether the legislation was related to government's trust or protection obligations. 417 U.S. 535, 555 (1974). However, in *Delaware Tribal Business Committee v. Weeks*, instead of relying on an articulated legislative intent, the Court conjectured on an underlying

purpose and ignored the tenuous link between the ascribed intent and the statutory scheme. 430 U.S. 73, 85-86 (1977). In contrast, in *United States v. Antelope*, the Court did not look at the purpose for the legislation at all, instead holding that all federal legislation affecting Indians is "governance" of Indians which must be a necessary and appropriate consequence of federal guardianship. 430 U.S. 641, 646-47, 47 n.8 (1977).

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE MAJOR CRIMES ACT, AS APPLIED TO CONDUCT BY INDIANS AGAINST OTHER INDIANS ON TRIBAL LAND, IS UNCONSTITUTIONAL BECAUSE IT EXCEEDS CONGRESS' POWERS TO ACT ON THE INTERNAL AFFAIRS OF NATIVE NATIONS WITHOUT THEIR CONSENT.

a. *Kagama* and its progeny were wrongly decided during the period of assimilation policy

In 1886, the Court held in *United States v. Kagama*, that a tribe's dependent status provided the source of congressional authority for the enactment of the Major Crimes Act. 118 U.S. 375, 383-84 (1886). The Court reasoned that the tribes were "wards" of the nation and largely "dependent" upon the federal government for their very survival. *Id.* at 382-84. The court found that the federal government had a duty to protect the tribes, without referencing any source of power other than "dependency." *Id.* Since then, the Court has considered the source of federal power in exercising jurisdiction over Indians under the Major Crimes Act. In 1977, in *United States v. Antelope*, the court held that "Congress has undoubted

constitutional power to prescribe a criminal code applicable to Indian country.…" 430 U.S. at 648. The Court relied exclusively on *Kagama* for its authority, notwithstanding the fact that *Kagama* stands for the exercise of an *extraconstitutional* dependency power, not Congressional power under the Indian Commerce Clause. A year later, in *United States v. John*, the Court again found that the exercise of federal jurisdiction under the Major Crimes Act was constitutional. 437 U.S. 634, 652-53 (1978). Unlike *Antelope*, however, the Court did not rely exclusively on *Kagama*. Instead, the Court relied on Congress' power to regulate Indian affairs under the Indian Commerce Clause. *Id.*

The Court's doctrinal conclusions in *Kagama*, based on Native dependency, particularly limitations on tribal jurisdiction and sovereignty over their internal affairs, are unsupported by the text or history of the Constitution, and the case was wrongly decided during the assimilation policy period. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale Law Journal 1012, 1014 (2015).

b. The notion of "plenary power" over tribal internal matters does not arise from the text or history of the Constitution

The Court has routinely invoked a "plenary power" over Native tribes, that includes internal affairs, but this assertion does not find support either in the text of the Constitution or in any discussion of tribes' status in the drafting and adoption history. *See* Ablavsky, *Beyond the Indian Commerce Clause*, 1021. Instead, this

doctrine in the courts arose from historical necessity during the period of "assimilation policy" when, to the consternation of federal authorities, Native Americans did not, in fact, assimilate or vanish. *Id.* at 1053.

In the recent decision *Haaland v. Brackeen*, Justice Gorsuch stated that the Indian Commerce Clause "gives Congress a robust (but not plenary) power to regulate the ways in which non-Indians may interact with Indians," 599 U.S. 255, 307 (2023), but that "Indian Tribes remain independent sovereigns with the exclusive power to manage their *internal matters*," *Id.* (emphasis added). He noted, for example, that early laws covering crimes by non-Indians against Indians in Indian Country were within Congress' power to regulate dealings between non-Indians and Indians because an offense by a non-Indian against an Indian could disrupt commerce and dealings between the U.S. government and the tribe. *Id.* at 324. His reasoning articulated a difference between Congress' power to regulate dealings and activities between non-Indians and Indians, where Congress' power is plenary, versus dealings and activities by and amongst Indians on tribal land, where the tribes remain independent sovereigns with the exclusive power to control their internal affairs.

Justice Gorsuch's articulation in *Brackeen* of a distinction between plenary powers over trade and intercourse between non-Indians and Indians, versus exclusive tribal sovereignty over internal affairs is consistent with the history of

affairs and dealings between the Native tribes and the new American republic, later the federal government, and as enshrined in the U.S. Constitution. From first contact through the Constitution and up until enactment of the Major Crimes Act, the United States considered Native tribes exclusive sovereigns over conduct by Indians on tribal land. Following a brief period where the United States attempted and failed to aggressively assert authority against Native nations, particularly their lands, through conquest, the Indian Commerce Clause reflected a diplomatic model for negotiating with Native tribes as independent polities. Ablavsky, *Beyond the Indian Commerce Clause,* 1054. The new American republic that formed in the 1770's adopted the English model of colonialism that recognized Indian Nations as sovereign, and treaty making became an important aspect of the federal-Indian relationship. Lujan & Adams, 12. "The Constitution obliquely endorsed a significant and simultaneous shift in Anglo-Americans' thought about Natives' status: the repudiation of a theory of Native peoples as conquered in favor of a grudging acknowledgment of Native independence." Ablavsky, *Beyond the Indian Commerce Clause,* 1058.

For example, the Treaty of Wyandot allowed for U.S. law to punish Indians committing crimes on U.S. land and Indians to punish settlers committing crimes on Indian land as each government saw fit. Deloria & Lytle, 164. Other treaties between the Washington administration and Native nations disclaimed authority

over Natives or their self-governance, and the Attorney General recognized that Indian Country lay outside the scope of federal legislative jurisdiction. Ablavsky, *Beyond the Indian Commerce Clause,* 1062. The successive Trade and Intercourse Act asserted personal jurisdiction only over citizens of the United States who ventured into Indian Country. *Id.* These acts either explicitly or implicitly regulated only the non-Indians who ventured onto Indian country to deal with Indians, and "did not purport to regulate the tribes or their members" in any way. Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 134 (2002). Even as late as 1817, Congress enacted the General Crimes Act granting federal jurisdiction over non-Indians who commit federal offenses against Indians in Indian Country. Act of March 3, 1817, ch. 92, 3 Stat. 383. That statute allowed jurisdiction over Indians who commit federal crimes against non-Indians only if that person had not already been charged by his tribe and only if there was not a treaty provision providing for jurisdiction by the tribe. *Id.* The statute excluded federal jurisdiction over all crimes involving only Indians on tribal land. *Id.*

Granted, following adoption of the Constitution, the federal government did not view or treat Native tribes as *entirely* free and independent nations, but the focus of federal authority was almost entirely on obtaining land, not on regulating Indians' internal affairs. Ablavsky, *Beyond the Indian Commerce Clause,* 1055-56.

The Washington administration asserted that the United States possessed "territorial title" or territorial sovereignty over Indian Country. *Id.* at 1063. This resulted in a right of preemption and restriction on the sale of tribal land and in limitations on Native power to ally with foreign nations. But even then, the right of preemption was focused primarily on preventing foreign nations from taking possession of U.S. territory, not on limiting tribal sovereignty. *Id.* at 1068-70. During that time period, "the concept that Native nations possessed extensive sovereignty within the sovereignty of the United States was not alien. In fact, Native nations' position within the United States was conceived similarly to federalism." *Id.* at 1076. "The authority that the United States originally claimed over Indian tribes was importantly different from later, more aggressive invocations of federal power. It was *not* plenary; it acknowledged tribal sovereignty and restricted the authority of the United States to the regulation of Natives' international alliances and land sales. . . . Unbridled, unchecked federal power over Indians has not always been with us." *Id.* at 1084.

c. Congress' power over Indian affairs is limited to the trust/protection doctrine which does not include powers over the internal affairs of Native nations

Following the Revolution, U.S. government officials tried to reconcile U.S. and Native sovereignty rights by defining the relationship between the two as

"protection." Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783-1795*, The Journal of American History 591, 601 (2019). This was based on "the settled doctrine of the law of nations" that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government. *Worchester v. Georgia*, 31 U.S. 515, 551-56, 560-61 (1832). For the early U.S. government, "protection" meant that Native nations within the territory of the United States could no longer negotiate or ally with other foreign powers. Ablavsky, *Species of Sovereignty*, at 602. For Native nations, it meant the federal government would prevent incursions onto their lands and recognize tribal nationhood, sovereignty, and self-government. *Id.* at 612. So, the doctrine embodied a promise from the U.S. to (1) restrain intrusions and provide protection from external forces, particularly from white settlers, and (2) support tribal sovereignty, in exchange for vast cessions of land by Native people. *See,* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1496 (1994). Many treatises between the U.S. and Native nations recognized these principles and contained them as express assurances. *Id.*; *see also,* Matthew L.M. Fletcher, *Federal Indian Law* (2016) at 173-78.

This Court also recognized this protection doctrine as limited to the external relations in cases coming before the period of allotment and assimilation. Most notably, in *Worchester v. Georgia*, the state of Georgia sought to seize Cherokee lands, abolish the tribe and its laws, and apply its own criminal laws to tribal lands. 31 U.S. (6 Pet.) 515, 525-528 (1832). Although the case involved a challenge to *state* powers over Native nations, the Court discussed at length limitations on federal powers over the internal affairs of Native nations. The Court first noted a foundational principle that, while tribes are necessarily dependent on the United States under "the settled doctrine of law of nations, a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection." *Id.* at 560-61. The Court explicitly rejected the doctrine of discovery. The Court found that in treaties between the U.S. and Cherokees, provisions stating that the U.S. would have the exclusive right to trade with the Indians and manage all their affairs did not mean a surrender of self-government, and that would be a "perversion" of their necessary meaning. *Id.* at 554. "It is equally inconceivable that [the Cherokee] could have supposed themselves, by a phrase thus slipped into an article on another and more interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade." *Id.* The Court found that relationship of protection did not

mean that tribal nations had abandoned their national character and submitted as subjects to the laws of a master. *Id.* at 555.

Early acts of Congress aimed at upholding treaty promises also demonstrated that the protection doctrine between the U.S. and Native nations was limited to external relations. Between 1790 and 1834, Congress passed a series of Trade and Intercourse Acts which generally prohibited non-Indians from entering Indian territories, provided for the removal of intruders, regulated white man's trade with the tribes, and denied non-Indians and local governments the right to purchase Indian lands. Francis P. Prucha, *American Indian Policy in the Formative Years, The Indian Trade and Intercourse Acts, 1790-1834*, at 1-3, 43-50 (1962). The acts had been passed largely in response to worsening frontier conditions characterized by aggressive whites infringing on the territory of tribes in violation of the treaties. *Id.* at 45. These Acts were framed as prohibitions and restraints against non-Indians, not as assertions of power *over* Indians. *Id.* at 48; *see also,* Ablavsky & Allread, 271.

Native tribes also viewed their relationship to the federal government as limited to their external relations. Native peoples actively participated in ratification debates and advocated for a constitution that granted the federal government authority to regulate land sales and restrain the avarice of white settlers. Ablavsky & Allread, 267-284. They did not view this form of protection

by the United States as submitting to plenary federal powers over their internal affairs or abrogating their right to self-government. *Id.* at 286-302. This position of Native nations was most evident during the Removal debates. In the face of removal from lands east of the Mississippi, Native nations contended that the Constitution, as well as treaties, bound the United States to protect them from the laws of the states and to honor its commitment to maintain tribal sovereignty and land ownership. *Id.* at 292-93. Following congressional ratification of removal, the Cherokees argued that the President and Senate have no constitutional power to accomplish their noncensensual expulsion. *Id.* at 298. The submission of the Cherokees to removal was not a sign that they conceded tribal sovereignty rights under both treaties and the Constitution, but that they simply yielded to physical force. *Id.* at 300. *Worchester* itself endorsed Native readings of the U.S. Constitution, as the Court affirmed tribal sovereignty and the supremacy of treaties and federal law. *Id.* at 288 (citing *Worchester* at 595 (noting that treaties and laws between the United States and the Cherokee Nation were the "supreme laws of the land" and "guaranteed to [the Cherokee Nation] their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained in their humble condition").

Therefore, *Kagama* and *Worcester* rest doctrinally at opposite ends of the spectrum of federal-Indian relations. At one end is the protection model which

presumes native sovereignty, limits on federal power over internal affairs, and obligates the federal government to protect and preserve the separatism of Native nations. At the other end of the spectrum is the *Kagama* "guardian-ward" model which draws on tribal dependency to support nearly unchecked federal power over tribes. The *Kagama* decision announced a far more sweeping authority than ever previously asserted—by claiming that Congress could interfere with internal tribal affairs *at will*—and was not concerned with assuring viable separatism and preservation; it was only concerned with promoting assimilation. Ablavsky, *Beyond the Indian Commerce Clause*, 1081.

d. Congressional power over tribal internal affairs was historically limited by consent

Although consent of the governed had been a cardinal principle of the founders and the Constitution, the U.S. government entirely abandoned those principles during the allotment and assimilation periods. However, before that period, Indian consent through negotiated treaties was an important aspect, albeit imperfect, of Native nations and the early American republic. For a long time, the United States hesitated to claim authority over Native nations without their approval. Ablavsky & Allread, 266, 313. Early laws, such as the Northwest

Ordinance and 1790 Trade and Intercourse Act explicitly required consent of Native nations.

Even after treaty making ended, the government continued to deal with tribes through "treaty substitutes" or forms of lawmaking that involved Native nations informally, although still through negotiated agreements on issues such as land cessions, reservation borders, and regulation of internal matters such as prohibitions on liquor. *See* Maggie Blackhawk, *Forward: The Constitution of American Colonialism*, 137 Harv. L. Rev. 1 (Nov. 2023) 108; Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 311-22 (1994). Many statutes after 1871 occupied a middle ground between treaties and unilateral, direct legislation by requiring Indian consent before they took effect. Prucha, 320. Those statutes required the secretary of the interior to seek consent before, for example, securing other reservation lands, removing to a new reservation, and imposing certain spending. *Id.*

Indian consent did not disappear entirely as an element of U.S. tribal relations until the General Allotment Act (Dawes Act). Even then, although the House of Representatives wanted the law to require consent of the majority of the tribe before the law's provisions were applied, in the struggle in Congress to get approval of the bill, that provision was discarded. *Id.*

Following recognition of the failed Indian policies of assimilation, in the 1920s, Congress again resumed consensual law making with Native nations. The Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934), aimed to mitigate treatment of Indians by providing a framework that would formalize and stabilize relations between the United States and Native nations, recognize the inherent sovereignty of Native nations, and foster self-governance by providing a formal framework through which the national government, states, and tribal governments would interact and engage. *Id.* at 987. The statute required affirmative consent by each Native nation in order to take effect within that jurisdiction. *Id.* at 988. Legislation following the Indian Reorganization Act has followed the same pattern of recognizing Native nation sovereignty and requiring consent to laws over their own education, safety, housing, and health services. 1 Cohen's Handbook of Federal Indian Law § 1.07 (2019); *see also* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 Yale L.J. 2205, 2241-42 (2023).

Throughout the history of relations between the federal government and Native nations, consent was an important feature and recognition of the separateness and independent sovereignty of Native nations. That principle was rooted in the law of nations and in the Constitution. The MCA was enacted during a period where those principles were abandoned. The MCA purposefully destroyed tribal justice systems and conferred exclusive federal jurisdiction over matters

entirely within the internal affairs of Native nations without their consent. Congress exceeded its authority under the Constitution in doing so.

II. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER REVIEW OF LEGISLATION AFFECTING INDIANS REQUIRES CONSIDERATION OF CONGRESS' UNIQUE DUTY OF TRUST TOWARDS INDIANS

a. Review of legislation related to Indians requires a showing that the articulated purpose for the legislation is rationally related to Congress' trust obligations toward Indians

The Fifth Amendment Due Process Clause of the Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This clause contains an implicit guarantee of equal protection in federal laws identical to what the Fourteenth Amendment guarantees in state laws. *See Sessions v. Morales-Santana*, 582 U.S. 47, 78 n.1 (2017). Under the Fifth Amendment, this Court has developed a unique form of rational-basis review for legislation related to Indians, where the government must show that the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. at 555. Rather than assuming a hypothetical purpose for the legislation under a normal rational basis review, where the legislation involves Indians, the Court looks to Congress' actual

articulated purpose behind the legislation, then determines whether that purpose is related to Congress' trust obligations toward Indians, and then whether it was done in good faith. *Id.* at 554; *U.S. v. Sioux Nation*, 448 U.S. 371, 416-17 (1980).

For example, in *Mancari*, the Court held that a BIA hiring preference for Indians did not violate due process because it was rationally designed to further Indian self-government—Congress' stated, long-standing policy—and was a close fit in the means to effectuate that purpose. *Mancari*, 417 U.S. at 554. The Court analyzed the actual, stated purpose by Congress for enacting the legislation and the historical context for why such legislation was important. *Id.* at 542. The Court noted that Congress' concerns were to increase tribal self-government while continuing the active role of the BIA so that the Bureau could be more responsive to the interests of the people it was created to serve. *Id.* at 542-43. The Court found that the legislation was designed to remedy an overly paternalistic approach of prior years that were exploitative and destructive of Indian interests, and it was therefore reasonably designed to further the cause of Indian self-government. *Id.* at 553-54. So, the Court looked at Congress' stated purpose behind the legislation, whether that purpose was related to the government's trust obligations, and whether it was reasonably designed to fulfill that purpose. This is a distinctly different type of review than regular rational basis review. *See also, United States v. Sioux Nation*, 448 U.S. 371, 415-16 (1980) ("We do mean to require courts, in

considering whether a particular congressional action was taken in pursuance of Congress' power to manage and control tribal lands for the Indians' welfare, to engage in a thoroughgoing and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry."). The Court has therefore moved away from a wholly deferential standard of review used in *Kagama*. *Id.* at 416-17.

The decision in *United States v. Antelope*, 430 U.S. 641 (1977), although seeming relevant, presents a different issue from the question presented here. The defendants in *Antelope* challenged the MCA on the basis of (1) a racial classification that (2) treated them differently than they would have been treated under state criminal laws. *Antelope*, 430 U.S. at 644. They did not challenge the authority of Congress to enact the MCA or challenge whether the Court should consider the purpose behind the MCA and whether it furthered the government's trust obligations of preserving tribal self-government. The Court simply assumed that Congress, in the exercise of its plenary power over Indian affairs, may restrict *any* retained sovereign powers of Indian tribes for *any* purpose, citing *Kagama*. *Id.* at 648. Under the Court's analysis, such sweeping, indifferent deference would allow Congress to enact legislation bringing back tribal boarding schools. Because the claims raised by the defendants in *Antelope* were distinctly different from the claims raised here, the case is distinguishable.

b. The Major Crimes Act is not rationally related to Congress' unique duty of trust to Native nations because it removes all tribal self-government without consent

The Major Crimes Act does not advance tribal self-government. In fact, it purposefully does the opposite and removes all self-government over the prevention and prosecution of major crimes on tribal land. From the beginning, Congress and the Court used the MCA to advance an avowedly patriarchal, racially condescending purpose that followed from the views expressed in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). Following the death of Chief Justice Marshall, President Jackson appointed Chief Justice Taney to replace him, and Taney went on to author not only *Dred Scott* but also *Rogers*. To Taney, "Indian" was not a political classification but a racial one, and Indians could never have sovereign governments. *Rogers* at 572-73. Like *Dred Scott*, *Rogers* was deeply inflected with theories of race, racism, and racial hierarchy. *Id.* at 572. Following the Court's sanction of plenary powers in *Rogers*, the federal government began building detention camps, criminalized Native political organizations, spiritual practices, and familial structure, built off-reservation boarding schools to remove native culture from Indian children, and fought violent wars without legal limit. *See* Blackhawk, *Legislative Constitutionalism*, 2233-36. The MCA was

intentionally enacted as another piece of this policy and effort by the entire federal government to eradicate Indian culture and tribes.

> Having obtained such a judicial seal of approval for the exercise of its power, Congress proceeded to treat the previously semi-independent Indian tribes as subject peoples. The dissolution of tribal governing structures was a cardinal aim of the Allotment Period. For instance, in 1906, Congress denied the legislatures of the Five Civilized Tribes the right to meet more than thirty days per year, and their legislative action was made subject to veto by the President of the United States. Legislative intervention even extended to federal power over tribal money. Statutes provided that money due to tribes from tribal assets could be appropriated at the discretion of Congress. The Secretary of the Interior's power over disbursement of Indian money enabled him to manipulate the tribe with a concomitant weakening effect on tribal sovereignty. Moreover, Congress, not the tribes, had the ultimate authority to determine who was a tribal member for purposes of distributing property, annuities, and trust money, and how that money was spent. Finally, Congress even authorized the consolidation of tribes with no ethnological ties—even some who were ancient enemies. As one commentator has noted, by these and other measures, "the Indian Agent and his staff were 'the government' for most tribes from the cessation of treaty-making to the 1930's." While the courts did not explicitly endorse every erosion of tribal political sovereignty occurring during this time, they certainly shared responsibility for it, because *Kagama* and its progeny had eviscerated any litigation strategy to protect tribal sovereignty rights.

Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 223-224 (1984) (internal citations omitted).

The MCA was not enacted with the purpose of protecting Native nations or tribal sovereignty and self-governance. It violated every promised principle of protection given to Native nations by the United States, and the Act is an unconstitutional violation of equal protection and due process.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

Today, the MCA still does not further tribal self-governance or sovereignty. Instead, it destroys and prevents tribal peacemaking and restorative justice systems that were once a vital and important part of tribal culture, existence, and sovereignty. As a result, Native people are now significantly overrepresented in the criminal justice system. The latest incarceration data shows that American Indian and Alaska Native people have high rates of incarceration in both jails and prisons as compared with other racial and ethnic groups. In jails, Native people had more than double the incarceration rate of white people, and in prisons this disparity was even greater. Leah Wang, *U.S. Criminal Justice System Disproportionately Hurts Native People: the Data, Visualized*, Prison Policy Initiative, 2 (2021) at https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/. Native people made up 2.1% of all federally incarcerated people and about 2.3% of people on federal supervision, while their share of the U.S. population is less than one percent. *Id.* at 3. Native nations should be granted their sovereign rights to govern their own people on their own land. As this Court so aptly stated "the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential

attributes of sovereignty." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J., dissenting opinion).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 16, 2024