IN THE SUPREME COURT OF THE UNITED STATES

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LUKE JOHN SCOTT, Sr.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the federal government have jurisdiction to prosecute a state felony assault on a minor under the Major Crimes Act (MCA), after Congress amended 18 U.S.C. § 1153(a) in 2013 to include felony assault on a person who has not attained 16 years of age in the list of enumerated offenses that may be prosecuted in federal courts pursuant to the MCA?

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

Petitioner, Luke John Scott, Sr. (hereinafter Scott) respectfully prays that a writ of certiorari issue to review the opinion from the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In a published opinion on October 6, 2023, the Ninth Circuit affirmed Scott's conviction under 18 U.S.C. § 1153, the Major Crimes Act IMAC), for a felony assault on a minor pursuant to Montana Code 45-5-212. The opinion, *United States v. Scott,* CA No. 21-30128, is attached in the Appendix (App.) at 1-16.[1] The Ninth Circuit entered an order denying a petition for rehearing and suggestion for rehearing en banc on December 28, 2023. App. 17.

[1] The Ninth Circuit's opinion is cited at 83 F.4th 796 (9th Cir. 2023).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). This petition pertains to the published Opinion entered by the Ninth Circuit Court of Appeals on October 6, 2023, for *United States v. Scott*, CA No. 21-30128. Appendix 1-16.

RELEVANT STATUTORY PROVISIONS

Section 3242, of Title 18, United States Code, states:

> **§ 3242. Indians committing certain offenses; acts on reservations**
>
> All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

18 U.S.C.A. § 3242.

Section 1153, of Title 18, United States Code, effective until July 26 ,2006, states in pertinent part:

> **§ 1153. Offenses committed within Indian country**
>
> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, *assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury* (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and

punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C.A. § 1153 (July 26, 2006) (emphasis added).

Section 1153, of Title 18, United States Code, effective July 27, 2006, states in pertinent part:

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, ... *assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury* (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, *felony child abuse or neglect* ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C.A. § 1153 (July 27, 2013) (emphasis added).

Section 1153, of Title 18, United States Code, effective March 7, 2013, states in pertinent part:

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely,... *a felony assault under section 113*, an assault against an individual who has not attained the age of 16 years, *felony child abuse or neglect*, ... within Indian country shall be subject to the

same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C.A. § 1153 (March 7, 2013) (emphasis added).

Section 113, of Title 18, United States Code states in pertinent part:

§ 113. Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

....

(7) Assault resulting in substantial bodily injury to ... an individual who has not attained the age of 16 years, by a fine under this title or imprisonment for not more than 5 years, or both.

....

(b) Definitions.--In this section--

(1) the term "substantial bodily injury" means bodily injury which involves–

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty;

18 U.S.C.A. § 113.

Section 45-5-212, of the Montana Code, states in pertinent part:

45-5-212. Assault on minor

> (1) A person commits the offense of assault on a minor if the person commits an offense under 45-5-201, and at the time of the offense, the victim is under 14 years of age and the offender is 18 years of age or older.
>
> (2)(a) ... a person convicted of assault on a minor shall be imprisoned in a state prison for a term not to exceed 5 years or be fined not more than $50,000, or both

Mont. Code Ann. § 45-5-212.

45-5-201. Assault

Section 45-5-201, of the Montana Code, states in pertinent part:

> (1) A person commits the offense of assault if the person:
>
> (a) purposely or knowingly causes bodily injury to another....

Mont. Code Ann. § 45-5-201.

Section 45-5-101 states in pertinent part:

45-2-101. General definitions

> (5) "Bodily injury" means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.

Mont. Code Ann. § 45-2-101.

STATEMENT OF THE CASE

1. Introduction.

Within the past two decades, Congress has amended the MCA, 18 U.S.C. § 1153, twice. These amendments to the MCA are significant to the question presented to this Court.

The MCA effective until July 26, 2006, Congress included within the list of enumerated offenses certain felony assault offenses. That version of the MCA included: (1) assault with

intent to commit murder; (2) assault with a dangerous weapon; and (3) assault resulting in serious bodily injury ..." in the list of enumerated offenses.[2] 18 U.S.C. § 1153 (July 26 2006), *supra*.

This version of the MCA did not include a felony assault on a minor offense in the list of enumerated offense.[3] Instead, the MCA include "assault against an individual who had not attained the age of 16 years" in 18 U.S.C. § 113(5), an offense punishable by a term of imprisonment of no more than one year, a Class A misdemeanor offense. 18 U.S.C. § 113 (a)(5); 18 U.S.C. § 3581 (B)(6) ("term of imprisonment ... for a Class A misdemeanor, not more than one year").

On July 27, 2006, a new version of the MCA became effective. In this version, Congress expanded the list of enumerated offenses to include "felony child abuse and neglect." 18 U.S.C. § 1153(a) (July 27, 2006), *supra*. Again, this version of the MCA did not include a felony assault against a minor.

The July 27, 2006, version of the MCA was the subject of the Ninth Circuit's decision, *United States v. Other Medicine*, 596 F.3d 677 (9th Cir. 2010). In *Other Medicine*, the Ninth Circuit held that the federal government had jurisdiction through the MCA to prosecute Native Americans under the Montana felony offense of assault on a minor in violation of Montana Code 45-5-212. MC § 45-5-212, *supra*.

There, the government charged the defendant who severely beat his nine-year-old step-

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[2] These assaults offense are set out in 18 U.S.C. § 113(a)(1), (3) and (6).

[3] *See*, 18 U.S.C. § 113(7) ("Assault resulting in substantial bodily injury to ... an individual who has not attained the age of 16 years," punishable as a felony).

son with two counts of felony child abuse pursuant to the July 27, 2006 version of the MCA. The charges incorporated the felony assault of a minor offense in Montana Code 45-5-212. *Other Medicine*, 596 F.3d at 679; *see* 18 U.S.C. § 1153(b) (" Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed..."), *supra*. At the time *Other Medicine* was decided, the MCA did not included as one of the enumerated offenses § 113(a)(7), felony assault resulting in substantial bodily injury ... to an individual who has not attained the age of 16 years..." 18 U.S.C. § 1153(a) (July 27, 2006).

The Ninth Circuit concluded that "[t]he addition of felony child abuse or neglect [in the MCA] allows prosecutors to reach more serious cases of child abuse, as well as severe neglect or sexual abuse not constituting [a Class A misdemeanor] assault." *Other Medicine*, 595 F.3d at 681 (explaining that prior to the July 27, 2006 amendment, "federal prosecutors could pursue child abuse cases on reservations only as misdemeanors."). The Ninth Circuit recognized that "[t]he government may use state law only when federal law does not define and punish the Major Crimes Act offense." *Id.* (citing 18 U.S.C. § 1153(b)).

The Ninth Circuit also recognized that "[t]he text of the [MCA] does not point to a federal definition of felony child abuse." *Id.* Thus, "[w]ithout a federal law defining and punishing felony child abuse, the government may look to applicable state law to define the crime." *Id.* As such, the Ninth Circuit determined that "there is federal jurisdiction under the [MCA] to prosecute cases of physical assault on a child either as a misdemeanor or – if the elements of a state-defined felony are present – as 'felony child abuse.'" *Id.* at 682.

Congress's March 7, 2013 amendment to § 1153(a) is significant. The amendment added a felony assault of a minor offense in the list of enumerated offenses in the MCA. Congress added the language, "*any felony assault under section 113*." 18 U.S.C. § 1153(a) (March 7, 2013), *supra* (emphasis added). This language the "assault resulting in substantial bodily injury ... to an individual who has not attained the age of 16 year" to the list of enumerated offenses in the MCA. *Id.*.

It is reasonable to conclude that, by adding assault resulting in substantial bodily injury to a person under 16 years old to the list of enumerated offense in the MCA, Congress authorized federal jurisdiction to prosecute felony assaults on minors under § 113(a)(7) and did so to the exclusion of federal jurisdiction over similar offenses defined by a state law on the same subject matter.

2. Relevant Facts.

Scott is a Native American, an enrolled member of the Fort Peck Indian Reservation, a reservation located in Montana. On April 19, 2019, the government obtained an indictment that charged Scott with two counts of assault under the MCA. App. 19. The first Count was charged under 18 U.SC. § 113(a)(6), assault resulting in serious bodily injury. *Id.* Count 2 charged assault on a minor under the same Montana assault of a minor statute at issue in *Other Medicine*, Montana Code § 45-5-212. *Id.*

On November 19, 2020, a jury returned a verdict of guilty on both counts, including the "offense of Felony Child Abuse as charged in Count II of the indictment." App. 21-23. Scott appealed his convictions.

Scott maintained "that by adding 'a felony assault under section 113,' Congress added *all*

felony assaults under § 113, including '[a]ssault resulting in substantial bodily injury to ... an individual who has not attained the age of 16 years' under § 113(a)(7)." App. 11 (emphasis in original). Scott maintained that the change in the MCA required the government to charge the felony assault under § 113(a)(7), and could no longer incorporate Montana's felony assault of a minor offense since an assault of a minor is defined and punished under federal law.[4]

The Ninth Circuit rejected Scott's position, stating, "[i]f Congress intended § 113(a)(7) to replace felony child abuse, it would have deleted felony child abuse from the [MCA] ... [and] Congress did not do so." App. 11. The Ninth Circuit concluded that "[b]ecause the 2013 amendments had no effect on the separate offense of felony child abuse under the [MCA], *Other Medicine* controls." *Id.*

It is requested that the Court grant this petition for writ of certiorari and resolve the question of whether Congress's inclusion of a felony assault of a minor offense, defined in § 113(a)(7), in the list of enumerated offenses in the 2013 amendments to § 1153(a), excludes federal jurisdiction over similar felony assault of minor offenses defined by state law.

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether the federal government has jurisdiction to prosecute a state offense for felony assault on a minor under the Major Crimes Act (MCA), after Congress amended 18 U.S.C. § 1153(a) in 2013 to include the offense of felony assault on a person who had not attained 16 years of age in the list of enumerated offenses that may be prosecuted in federal courts pursuant to the MCA, is an important question relating federal

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[4] The Ninth Circuit misconstrued the issue. The decision states that "according to Scott, the government must charge felony child abuse under § 113(7) and may no longer use state law to define the crime. More specifically, Scott maintained that Montana's felony assault on a minor offense could no longer support federal jurisdiction since the MCA was amended in 2013 and added a felony assault on a minor offense to the list of enumerated offenses and the offense, now defined under § 113 (7), must be applied to the exclusion of any other state law relating to an assault on a minor. App. 10.

jurisdiction in Indian country that has not, but should be, resolved by this Court. The Ninth Circuit's decision conflicts with *United States v. Quiver*, 241 U.S. 602 (1916), and conflicts with the Fourth and Second Circuits' application of the MCA in relation to incorporating the definition of a state law offenses under its provisions.

The Court has long held that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country." *United States v. Antelope,* 430 U.S. 641, 648 (1977) (citing *United States v. Kagama*, 118 U.S. 375 (1886)). "The [MCA] of 1885, authorizes the prosecution in federal of an Indian charged with the commission on an Indian reservation of certain specifically enumerated offenses." *Keeble v. United States*, 412 U.S. 205, 205-06 (1973).

"Congress has plenary authority to alter these jurisdictional guideposts, *see Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–471 ... (1979), which it has exercised from time to time." *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993). As the Ninth Circuit observed,

> The Act originally allowed for prosecution of seven offenses. *See United States v. Tyndall*, 400 F.Supp. 949, 950–51 (D.Neb.1975). Congress has added other crimes over time, and in 2006 it added a fifteenth: "felony child abuse or neglect." 18 U.S.C. § 1153(a); Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109–248, § 215, 120 Stat. 587, 617 (2006). The addition of this particular crime was originally proposed in the Indian Child Protection and Family Violence Prevention Amendments of 2006 "to close the gap that exists in addressing the full range of crimes that may be inflicted on children." S. Rep. 109–255, at 5 (2006).
>
> Before the addition of felony child abuse or neglect, the Major Crimes Act did provide jurisdiction to prosecute "assault against an individual who has not attained the age of 16 years." See Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103–322, § 170201(e), 108 Stat. 1796, 2043 (1994); 18 U.S.C. § 1153(a) (2000). Because assault on a minor is defined and punished by a federal misdemeanor provision, however, federal prosecutors could pursue child abuse cases on reservations only as

> misdemeanors. *See* 18 U.S.C. §§ 113(a)(5), 1153(b); see also *United States v. Dando*, 287 F.3d 1007, 1008 (10th Cir.2002) (using § 113(a)(5) to define the Major Crimes Act crime of assault against an individual who has not attained the age of 16 years); *cf. United States v. Bruce*, 394 F.3d 1215, 1217 (9th Cir.2005) (using § 113(a)(5) to define assault on a "person who had not attained the age of 16 years"). The addition of felony child abuse or neglect allows prosecutors to reach more serious cases of child abuse, as well as severe neglect or sexual abuse not constituting assault.

Other Medicine., 596 F.3d at 680–81.

In 2013, Congress amended the MCA to include all felony offenses defined in 18 U.S.C. 113. 18 U.S.C. § 1153 (2013). This resulted in Congress adding to the list of enumerated offenses "assault resulting in substantial bodily injury to ... an individual who has not attained the age of 16 years..." 18 U.S.C. § 113(a)(7). Since the 2013 amendments, the government now has discretion and the ability to file assault charges perpetrated against minors, either as a felony or as a misdemeanor, depending on whether the victim sustained substantial bodily injury. 18 U.S.C. 113(a)(5) and (7).

Rather than defer to the felony assault offense defined in 18 U.S.C. § 113(a)(7), the government here charged Count 2, an assault of a minor offense defined and punished in Montana Code § 45-5-212. This application of § 1153(b) runs contrary to the plain language of subsection (b) of the MCA. Subsection (b) of § 1153 permits "[a]ny offense referred to in subsection (a) ... that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United Staes ... be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense." 18 U.S.C. § 1153(b).

As a result of the 2013 amendment, any assault resulting in substantial bodily injury to a

person under 16 years old is defined and punished accordance with § 113(a)(7), a "Federal law within the exclusive jurisdiction of the United States" at the time of Scott's offense conduct between July 2018 and March 16, 2019, as charged in Count 2. App. 19. Montana's assault of a minor offense defined in § 45-5-212, therefore, now falls outside of federal jurisdiction due to the 2013 amendment to § 1153(a). The Court's decision in *United States v. Quiver*, 241 U.S. 602 (1916), is on point.

In *Quiver*, the defendants were charged with "adultery committed on of the Sioux Indian Reservations in South Dakota." under a general statute of the United States. *Id.* at 603. The general statute made "no mention of Indians." *Id.* The question before the Court was whether the general statute "embrace[d] adultery committed by one Indian with another, on an Indian reservation." *Id.*

The Court explained Congress's policy on Native Americans during the early years of the United States that lead to the enactment of the original MCA:

> At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian intercourse acts of 1796 (chap. 30, 1 Stat. at L. 469), and 1802 (chap. 13, 2 Stat. at L. 139), provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other; and the act of 1834 (chap. 161, 4 Stat. at L. 729, Comp. Stat. 1913, § 4148), while providing that 'so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country,' qualified its action by saying, 'the same shall not extend to crimes committed by one Indian against the person or property of another Indian.' That provision with its qualification was later carried into the Revised Statutes as

> §§ 2145 and 2146, Comp. Stat. 1913, §§ 4148, 4149. This was the situation when this court, in *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*) 109 U. S. 556, 27 Led. 1030, 3 Sup. Ct. Rep. 396, held that the murder of an Indian by another Indian, on an Indian reservation, was not punishable under the laws of the United States, and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885 (chap. 341, § 9, 23 Stat. at L. 385, Comp. Stat. 1913, § 10,502), now § 328 of the Penal Code, Congress provided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny, when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before. After South Dakota became a state, Congress, acting upon a partial cession of jurisdiction by that state (chap. 106, Laws 1901), provided by the act of February 2, 1903, (chap. 351 32 Stat. at L. 793, Comp. Stat. 1913, § 10,503), now § 329 of the Penal Code, for the punishment of the particular offenses named in the act of 1885 when committed on the Indian reservations in that state, even though committed by others than Indians; but this is without bearing here, for it left the situation in respect of offenses by one Indian against the person or property of another Indian as it was after the act of 1885.

Quiver, 241 U.S. at 603-05; *see also*, *Keeble*, 412 U.S. at 210 ("The [MCA} was passed by Congress in direct response to the decision of this Court in *Ex Parte Crow Dog*, 109 U.S. 556 ... (1983).").

After analyzing the statutory framework applicable to the federal prosecution in *Quiver*, the Court expressed the "true view" that "the policy reflected by the legislation of Congress and its administration for many years, that the relations of Indians among themselves – the conduct of one toward another – is to be controlled by the custom and laws of the tribe, *save when Congress expressly or clearly directs otherwise.*" *Quiver*, 241 U.S. at 605-06 (emphasis added). Since there was no clear provision by Congress, the Court concluded that the federal government could not apply the general adultery statute to the Native American defendants. The Court reasoned that

"the enumeration in the acts of 1885 [the MCA], of certain offenses as applicable to Indians in the reservations, carries with is some implication of a purpose to exclude the others." *Id.* at 606.

The Ninth Circuit did not apply this principle of exclusion from *Quiver* and upheld application of the felony assault on a minor offense in Montana. The Fourth Circuit's decision, *United States v. Welch*, 822 F.2d 460 (4th Cir. 1987) is consistent with *Quiver*.

There, the defendant was charged in federal court with first degree rape and a first degree sexual offense with a child under 13 years of age. *Id.* at 461. The prosecution brought the charges under the Assimilative Crimes Act, 18 U.S.C. § 13 and under the MCA, § 1153. *Id.* Both charges applied criminal statues under North Carolina law, and did not allege any offenses defined under the laws of the United States. *Id.* at 461-62.

The defendant claimed that the "North Carolina statutes do not apply and that he should have been charged only under 18 U.S.C. § 1153, because the alleged acts were those of one Indian against another within Indian country." *Id.* The Fourth Circuit concluded that "neither the Assimilative Crimes Act nor the North Carolina statutes" applied. *Id.* at 462.

The Fourth Circuit concluded that "[b]ecause the alleged crimes are those of one Indian against another Indian in Indian coutnry, 18 U.S.C. § 1153, is applicable." *Id.* The Court referenced subsection (b) of the MCA, stating, "with the exception of burglary and incest, the offenses contained in the first paragraph of § 1153 and other crimes not defined by federal law, are determined by the specific federal statute which defines and punishes the crime." *Id.* at 463.

Welch recognized that, at the time, rape was defined and punishable under 18 U.S.C. § 2031 and "carnal knowledge of a female under the age of sixteen" was defined and punished under 18 U.S.C. § 2032. The Fourth Circuit observed that the "essential elements" in the North

Carolina criminal statutes and the sex offense elements defined under federal law were different. *Id.* The Fourth Circuit held that cases involving "crimes committed by one Indian against another Indian in Indian country, ... must involve one of the offenses set forth in the [MCA] ... for the United States District Court to have jurisdiction." *Id.* In addition, the Fourth Circuit stated:

> The Major Crimes Act has been amended many times in the last hundred years, but its present language, which is the language that was in effect at the time of the offenses were committed in the present case, does not include any language or description of an offense that is similar to a "first degree sexual offense" under the North Carolina General Statutes § 14–27.4(a)(1).

Id. at 465. The same is true here.

The Montana assault on a minor charged against Scott has elements that are different than the elements in 18 U.S.C. § 113(a)(7). Montana law requires that a person, at least 18 years of age, assault a "victim under 14 years of age," and the defendant "purposely or knowingly causes bodily injury...." to the victim. *See,* Mont. Code. Ann. § 45-5-201 and § 45-5-212. "'Bodily injury' means physical pain, illness, or an impairment of physical condition and included mental illness or impairment." Mont. Code. Ann. § 45-5-101(5), supra..

"Assault resulting in substantial bodily injury to ... an individual who has not attained the age of 16 years" has different elements than Montana's felony assault on a minor statute, § 45-5-212.. The Montana assault statute does not require the government to prove substantial bodily injury, "injury which involves – (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty...." 18 U.S.C. § 113(b)(1), *supra.*

As this case illustrates, the federal statute requires a heightened degree of injury in order to sustain a conviction, above the degree of injury required under Montana state law. Allowing the government to prosecute defendant's for a state offense for felony assault on a minor would permit the government to obtain a conviction on lesser proof than is required under the federal felony offense enumerated in the MCA. This runs afoul of the MCA wherein it states that Native American defendants charged with an enumerated offense "shall be subject to the same law and penalties as all other persons committing any of the above offenses, with the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a), *supra*.

Furthermore, allowing a federal prosecution of a state offense that has different elements than the federal offense, runs afoul of 18 U.S.C. § 3242. *See*, *supra.* This is the precise problem identified in *Welch* where the federal prosecution for North Carolina sex offenses against a minor ran contrary to Congress's directive that Native American defendants "be tried in the same courts, *and in the same manner, as any other person committing any of the* [*enumerated*] *crimes within the exclusive jurisdiction of the United States*. *Welch*, 822 F.2d at 464 (quoting § 3242) (emphasis in original).

In *United States v. Markiewicz*, the Second Circuit analyzed both *Quiver* and *Welch* in determining whether the federal government had jurisdiction to prosecute various federal offenses against Native American defendants for crimes arising out of illegal activities in the Oneida Nation in New York. 978 F.2d 786, 793. 799-800 (2d Cir. 1992). A bingo hall on the reservation was the center of the alleged illegal activities. *Id.* at 793-97.

The Second Circuit ultimately held that the government had jurisdiction on all the federal offenses charged against the defendants. *Id.* at 800-03. In doing so, the Second Circuit recognized

the Court's principle in *Quiver* - "Congress's inclusion of certain crimes in the major crimes act 'carries with it some implication of a purpose to exclude other[]' crimes." *Id.* at 799 (quoting *Quiver*, 241 U.S. at 606). The Second Circuit recognized the Fourth Circuit's decision in *Welch. Markeiwicz*, 978 F.2d at 799.

The Second Circuit wrote:

> The fourth circuit in *United States v. Welch*, 822 F.2d 460 (4th Cir.1987), followed this alternative rationale [in *Quiver*] when it reversed the conviction of an Indian who had been prosecuted under the assimilative crimes act, 18 U.S.C. § 13, for raping another Indian on Indian territory, the court in *Welch* said that the government could not invoke the assimilative crimes act in order to apply North Carolina criminal law, noting that "[w]hen there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts."

Markiewicz, 978 F.2d at 799 (quoting *Welch*, 822 F.2d at 464 (citing *Antelope*, 430 U.S. at 643). The Second Circuit concluded that under *Quiver*, "federal jurisdiction does not exist over Indian-against Indian crimes that congress fails to enumerate..." *Markiewicz*, 978 F.2d at 800 (citing *United States v. Wheeler*, 435 U.S. 313, 331 (1978)).

The combined effect of the principles announced in *Quiver*, *Welch* and *Markiewicz* support the notion that the MCA does not authorize a federal prosecution for a felony assault on a minor that are defined and punished under state law. Since March 6, 2023, the MCA includes in the list of enumerated offenses the "assault resulting in serious bodily injury to ... an individual who has not attained the age of 16 years." The inclusion of felony assault of a minor offense, 18 U.S.C. § 113(a)(7), to the MCA, operates to exclude the government's use of similar state felony offenses under *Quiver*. Therefore, this Court should grant this petition for writ of certiorari and

resolve the question presented.

a. This case presents the Court with an ideal vehicle to resolve an important federal question relating to the federal government's power to prosecute a felony assault on a minor defined and punished under a state's law after Congress, in 2013, added to the list of enumerated offenses the felony assault resulting in serious bodily injury to a minor who has not reached 16 years of age.

Throughout our nation's history, the Court has taken many opportunities to review and resolve questions of relating to federal jurisdiction or authority where the question touches upon the nation's relationship with the many Native American tribes. This includes: *Ex parte Kan-Gi-Shun-Ca, (otherwise known as Crow Dog)*, 109 U.S. 556 (1883) (whether the federal government has jurisdiction to prosecute an Indian for the murder of another Indian occurring in Sioux country); *United States v. Kagama*, 118 U.S. 375 (1886) (whether the original MCA of 1885 conferred federal jurisdiction to prosecute an Indian for murder of another Indian in the Hoopa Valley reservation in California); *United States v. Quiver*, 241 U.S. 602 (1916) ("whether the government had jurisdiction to prosecute adultery committed by one Indian with another Indian under a general criminal statute); *Keeble v. United States*, 412 U.S. 205 (1973) ("whether an Indian prosecuted under the [MCA] is entitled to a jury instruction on a lesser included offense where that lesser include offense is not one of the crimes enumerated in the Act."); *United States v. Antelope*, 430 U.S. 641 (1977) ("whether ... federal criminal statutes violate Due Process of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as an Indian."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (whether "Indian tribal courts have criminal jurisdiction over non-Indians"); *United States v. Wheeler*, 435 U.S. 313 (1978) (whether "the Double Jeopardy Clause of the Fifth Amendment bars prosecution of an Indian in a federal district court under the [MCA] ... when he has previously been convicted in

tribal court of a lesser included offense arising out of the same incident."); *United States v. John*, 437 U.S. 634 (1978) ("whether the lands [of the Choctaw Indians in Mississippi] are 'Indian Country, as defined in 18 U.S.C. § 1151 ... and as it was used in the [MCA] of 1885 ..., later codified as [§ 1153], and if so, whether these federal statutes operate to preclude the exercise of state jurisdiction over the offenses."); *Duro v. Reina*, 495 U.S. 676 (1990) ("whether an Indian tribe may assert criminal jurisdiction over a defendant who is an Indian but not a tribal member."); *Negonsott v. Samuels*, 507 U.S. 99 (1993) ("whether the Kansas Act, 18 U.S.C. § 3243, confers jurisdiction on the State of Kansas to prosecute ... a Kickapoo Indian, for the state-law offense of aggravated battery committed against another Indian on an Indian reservation."); *United States v. Lara*, 541 U.S. 193 (2004) ("whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."); *McGirt v. Oklahoma*, 591 U.S. –, 140 S. Ct. 2452 (2020) ("whether the land [the Creek] treaties promised remains an Indian reservation for purposes of federal criminal law."); and *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022) (whether the State and Federal government have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

This case presents the Court with another important question relating to the federal government's reach in prosecuting a new category of offenses enumerated in the MCA since July 27, 2006, "felony child abuse and neglect." 18 U.S.C. § 1153(a) (effective July 27, 2006), *supra*. This category of offenses was broad and left undefined by Congress in the July 27, 2006, amendments. Therefore, the Ninth Circuit concluded that Montana's felony assault on a minor offense could be used to define and punish the defendant through the MCA, subsection (b).

Other Medicine, 596 F.3d at 680-82. At that time, a felony assault of a minor as defined in 18 U.S.C. § 113(a)(7) was not an enumerated felony assault offense in the MCA. Therefore, *Other Medicine*'s analysis made sense.

However, *Other Medicine*'s holding is no longer viable. Congress's inclusion of "assault resulting in substantial bodily injury ... to an individual that has not attained the age of 16 years," § 113(a)(7), as an enumerated offense in the MCA, excludes federal jurisdiction to charge state felony assault on minors offenses through § 1153(b). *Quiver*, 241 U.S. at 606.

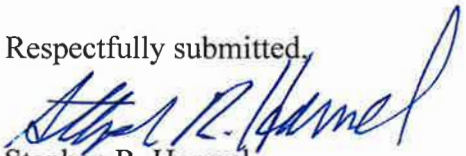
The Ninth Circuit decided this case in a manner that is contrary to the proper application of federal jurisdiction set out in § 1153, particularly as set out in subsection (b). The Ninth Circuit also decided this case in a manner the conflicts with the Court's *Quiver* decision, Second Circuit's *Welch* decision and the Fourth Circuit's *Markiewicz* decision.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 22nd day of March, 2024.

Respectfully submitted,



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