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In the Circuit Court of the Second Circuit

State of Hawai‘i

In the Matter of the **Extradition of** **Carlos Jesus Moreno**	2CSP-23-013(1) Reply to Memorandum in Opposition to Motion to Dismiss Extradition Proceedings; Declaration of Counsel. Hearing Date: April 5, 2023 Hearing Time: 8:15 a.m. Hon. Judge Kirstin M. Hamman

Reply to Memorandum in Opposition to Motion to Dismiss Extradition Proceedings

The State claims that the Pascua Yaqui Nation can extradite people because it is a territory of the United States. The claim upends bedrock principles of tribal sovereignty, redefines what it means to be a territory, and runs afoul with the federal cases that have examined the failed extradition attempts between Indian nations and States. It must be rejected. The Pascua Yaqui Nation cannot use the interstate extradition process. These proceedings must be dismissed.

1. Indian nations are not territories of the United States because their prosecutorial power originates in their inherent sovereignty, not the federal government.

The State of Hawai‘i may only arrest and deliver up people wanted in another State or "Territory, organized or unorganized, of the United States[.]" Hawai‘i Revised Statutes (HRS)

§§ 832-1 and 832-2. There remain five[1] significant territories of the United States: American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico. *United States v. Vaello Madero*, ___ U.S. ___, 142 S.Ct. 1539, 1541 (2022). While territories can demand the extradition of a defendant wanted for violating territorial law, Indian nations cannot. Indian nations are not covered by HRS Chapter 832, the federal extradition statute, and the Extradition Clause.[2]

The State suggests that this Court should determine what is and what is not a United States territory by comparing the degree of control the United States has over a place and by noting the policies of harmonious interstate extradition. *See* Dkt. No. 21 at 10 n. 7. The State is wrong. Lands held by the United States are territories of the United States:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. Art. IV, Sec. 3, cl. 2. This Clause is "the foundation upon which the territorial governments rest." *United States v. Gratiot*, 39 U.S. 526, 538 (1840).

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[1] The United States also holds outlying territories that have no local government and have little to no people living there. These include Palmyra Atoll, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, and Wake Atoll. *See* Department of Interior, Office of Insular Affairs website: doi.gov/oia/islands/politicaltypes (last visited March 26, 2023).

[2] Article IV, Section 2 of the United States Constitution provides:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The federal legislation and the Uniform Criminal Extradition Act include territories of the United States, but do not expressly cover Indian nations. *See* 18 U.S.C. § 3182 and HRS § 832-1.

Territorial governments do not exercise their own independent and inherent sovereignty. Their power to act, regulate local affairs, and prosecute all originate with the federal government:

> **[A] territorial government is entirely the creation of Congress, and its judicial tribunals exert all their powers by authority of the United States.** When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government.
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> Thus, **in a federal Territory and the Nation, as in a city and a State, there is but one system of government, or of laws operating within its limits.** City and State, or Territory and Nation, are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone.

United States v. Wheeler, 435 U.S. 313, 321 (1978) (citations, brackets, and quotation marks omitted). This principle was established long ago. *See American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542-543 (1828) ("the power governing a territory belonging to the United States . . . has not . . . acquired the means of self-government . . . and is within the power and jurisdiction of the United States.").

The territory's "ultimate source" of its prosecutorial power is the federal government. *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 73 (2016) ("the 'ultimate source' of Puerto Rico's prosecutorial power . . . [is] the U.S. Congress."). *See also Tuaua v. United States*, 788 F.3d 300, 302 & 302 n. 1 (D.C. Cir. 2015) (American Samoa "remains under the ultimate supervision of the Secretary of the Interior;" despite the election of a bicameral legislature and governor, it is a "non-self governing territory").

Wolfe v. Au, 67 Haw. 259, 686 P.2d 16 (1984), is consistent with this principle. There, the Hawai'i Supreme Court held that the Federated States of Micronesia was a territory of the United States because although it was moving toward independence, "Micronesia [was still] part of the

Trust Territory of the Pacific Islands (TTPI) which is administered by the United States pursuant to a United Nations Security Council Trusteeship Agreement. **Primary responsibility for governing the TTPI rests with the Secretary of the Interior.**" *Id.* at 263, 686 P.2d at 20. At the time of the extradition, the FSM's government was still under American control. *See In re: Bowoon Sangsa Co., Ltd.*, 720 F.2d 595, 601 (9th Cir. 1983) ("The recent movement toward independence masks the extent to which the courts of Palau are still dominated by the United States.").

That is not the case here. Indian nations do not govern themselves pursuant to federal power and that is why they cannot be "territories, organized or unorganized,[3] of the United States" under HRS § 832-1.

The Pascua Yaqui Nation's prosecutorial power "lies in its primeval or . . . pre-existing sovereignty" that is "attributable in no way to any delegation . . . of federal authority." *Puerto Rico v. Sanchez Valle*, 579 U.S. at 70. Like all Indian nations, the Pascua Yaqui Nation's sovereignty does not originate with the federal government:

> The powers of Indian tribes are . . . inherent powers of a limited sovereignty which has never been extinguished. Before the coming

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[3] The State also suggests that because HRS § 832-1 specifies both "organized" and "unorganized" territories of the United States, this Court can include Indian nations. Dkt. No. 21 at 14-15. This makes no sense. "An 'organized' Territory is one in which a civil government has been established by an Organic Act of Congress." *United States v. Standard Oil Co. of California*, 404 U.S. 558, 560 n. 2 (1972). An "unorganized territory" is a federal territory without an organic act delegating local control. American Samoa is "the only populated territory for which Congress has not passed an organic act" making it an unorganized territory of the United States "especially subject to American political control." *Fitisemanu v. United States*, 1 F.4th 862, 875 n. 15 (10th Cir. 2021).

Specifying organized and unorganized federal territories in HRS § 832-1 makes it clear that Indian nations are exempt from the extradition process. Tribal governments are not promulgated into existence by Congress through an organic act, resolution, or any other legislation. Their nationhood comes from their inherent tribal sovereignty predating the United States itself. *United States v. Wheeler, infra.* The Pascua Yaqui Nation cannot be deemed a territory—organized or unorganized—of the United States subject to the interstate extradition process.

> of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

United States v. Wheeler, 435 U.S. at 322-323 (citations omitted).

Tribal sovereignty may be diminished by treaty or federal legislation, but is not fully extinguished and remains the source of the Pascua Yaqui Nation's power to prosecute:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that **their claim to sovereignty long predates that of our own Government.** Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But **it is nonetheless still true, as it was in the last century, that the relation of the Indian tribes living within the borders of the United States is an anomalous one and of a complex character. They were, and always have been, regarded as having a semi-independent position** when they persevered their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but **as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.**

McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172-173 (1973) (footnotes, ellipses, and quotation marks committed) (citing *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)). The Pascua Yaqui Nation is not a federal territory. It cannot use the interstate extradition process to bring the accused to its tribal courts.

2. Construing the word "territory" to include Indian nations contradicts the federal cases that have examined failed attempts to extradite people between States and Indian nations and repeals by implication legislation in Arizona.

The State's invitation to adopt a factor-based test to determine a "territory" of the United States is an invitation to err. Federal courts have already held that Indian nations cannot use the interstate extradition process. This Court should adhere to them. *See Murray v. Burns*, 48 Haw.

508, 516-517, 405 P.3d 309, 315 (1965) (because interstate extradition governed Extradition Clause and federal implementing legislation, "**we must necessarily look to and are bound by the decisions of the United States Supreme Court**"); *see also Wolfe v. Au*, 67 Haw. at 262 n. 3, 686 P.2d at 20 n. 3 (same).

Indian nations are not territories of the United States for extradition purposes. In *Ex parte Morgan*, 20 Fed. 298 (W. D. Ark. 1883), the United States District Court rejected the Cherokee Nation's attempt to extradite someone who fled to Arkansas. *Id.* at 307. The District Court concluded that the Cherokee Nation is not a territory of the United States and defined territories of the United States as lands with governments running on federal power:

> A territory, under the constitution and laws of the United States, is an inchoate state—a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.

Id. at 305.

Because Congress had to enact treaties with the Cherokee Nation, it was neither a State nor territory that could invoke the federal extradition statute.

> The treaty-making power and the Cherokee Nation must have then understood that such tribe or nation was not either a state or territory. Has the status or relation of this Indian nation to the United States and the different states in the union changed since the time of this treaty? It has not. That relation is manifestly different from either a state or territory.

Id.

The State tries to distinguish *Morgan* by pointing out that Native Americans did not acquire birthright citizenship until 1924. *See* Dkt. No. 21 at 15 at n. 12. It is a distinction without a

difference. Decades after *Morgan*, the Supreme Court of the United States held that the same federal extradition statute that did not cover the Cherokee Nation in *Morgan* did apply to Puerto Rico. *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909). At the time, Puerto Ricans, like Native Americans, did not have birthright citizenship.[4] The Supreme Court still approved of the analysis in *Morgan* and adopted its definition of "territory."

> In the case of *Ex parte Morgan*, 20 Fed. 298, 305, the question involved was the right of the governor of Arkansas to honor a requisition for the surrender of a fugitive criminal, received from the principal chief of the Cherokee Nation, and the court, in holding that the governor was not authorized to honor such a requisition, for the reason that the chief of the Cherokee Nation was not the executive authority of any "state" or "territory," inasmuch as the Cherokee Nation or Indian territory was not an organized government, with an executive, legislative, and judicial system of its own, but was exclusively under the jurisdiction of the United States, defined a territory within the meaning of the extradition statute as follows:
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> "**A portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States.**"

Id. at 475 (quoting *Morgan*, *supra*.).

Citizenship is not determinative. Native Americans and Puerto Ricans at the time of these decisions did not have birthright citizenship. The Supreme Court applied the extradition statute to Puerto Rico because it was a "territory" as defined in *Morgan*. *Id.* at 476. Territories of the United States run on the power of the federal government. Indian nations do not. They exercise their tribal sovereignty. The State's attempt to use citizenship to ignore federal cases that have examined this issue must fail.

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[4] American citizenship was not extended to Puerto Ricans until 1917. Pub. Law No. 64-368.

The State's claim that Indian nations are territories of the United States also conflicts with the Ninth Circuit. In *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), the United States Court of Appeals held that Oklahoma and Arizona could not use the extradition process to compel the Navajo Nation to arrest and deliver up someone living on the reservation. *Id.* at 685. The Ninth Circuit explained that the Navajo Nation's tribal sovereignty shields it from the constitutional mandate imposed by the Extradition Clause and statute on the states and federal territories. *Id.*

The State's proposed definition of a territory undermines *Turtle*. Making Indian nations a "territory" subjects them to the federal extradition statute and the Uniform Criminal Extradition Act in all fifty states. *See Wolfe v. Au*, 67 Haw. at 262 n. 3, 686 P.2d at 20 n. 3. It would make Indian nations unwilling asylum states forced to arrest and deliver up its members to demanding States—in stark contrast to *Turtle*. The State's proposed definition of the term "territory" runs afoul with *Morgan*, *Bingham*, and *Turtle.* It must be rejected.

3. Congress's plenary power does not turn Indian nations into United States territories, it prevents States from using the Uniform Criminal Extradition Act to interfere with tribal sovereignty.

The State argues that Congress's plenary power over Indian nations makes them so dependent on the federal government that they have become territories of the United States. Dkt. No. 21 at 4-7. Not so. Congress has never extended the extradition process to Indian nations and the Court must avoid construing the Uniform Criminal Extradition Act to allow the State to interfere with Indian nations.

Congress has the sole power to regulate "Commerce with foreign Nations, and among the several States, and with the Indian tribes[.]" U.S. Const. Art. I, Sec. 8. This is the basis for its plenary power. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. at 172 n. 7.

"[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, **not the States.**" *Rice v. Rehner*, 463 U.S. 713, 719 (1983). Without authorization from Congress, the States cannot regulate Indian affairs. *Williams v. Lee*, 358 U.S. 217, 271 (1959). To do so would infringe upon "the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). In one of his many landmark rulings, Chief Justice John Marshall wrote that the States must respect tribal sovereignty:

> The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Worcester v. Georgia, 31 U.S. 515, 561 (1832).

Congress, in implementing the Extradition Clause, did not include Indian nations. *See* 18 U.S.C. § 3182; *New York ex rel. Kopel v. Bingham*, *supra*. The State's proposed interpretation of HRS § 832-2 would give itself the right to do something to Indian nations that Congress has never authorized.

The Court must refrain from allowing the State disregard tribal sovereignty. Allowing Indian nations to use the extradition process also means they are subject to it. It would give the State an unprecedented "right to enter" Indian country, *Worcester*, *supra*, and undermine the Indian nations' right to "make their own laws and be ruled by them." *Bracker*, *supra*.[5]

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[5] It also repeals Arizona law. After *Turtle*, Arizona promulgated legislation allowing extradition with Indian nations existing within its borders. Arizona Revised Statutes § 13-3869. Letting Indian nations demand extradition as a territory of the United States renders the Arizona statute superfluous because Arizona has adopted the Uniform Criminal Extradition Act for other

The Supreme Court has recently found such intrusions by States unacceptable:

> Under our Constitution, **States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided**, and, with enough time and patience, nullify the promises made in the name of the United States. **That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8; Art. V, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.**

McGirt v. Oklahoma, ___ U.S. ___, 140 S.Ct. 2452, 2462 (2020).

Congress's plenary power does not convert Indian nations into territories subject to interstate extradition. It protects them from unauthorized State interference.

Conclusion

The State's test to determine territories of the United States undermines tribal sovereignty, contradicts the federal decisions that have already examined extradition attempts between States and Indian nations, and creates more problems than solutions. The Pascua Yaqui Nation is neither a State nor territory that can invoke or be subject to the interstate extradition process. It is respectfully requested that the motion to dismiss be granted.

Dated: Wailuku, Maui, Hawai'i: March 30, 2023.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Attorney for the Accused

States and federal territories. *See* ARS Chapter 38, Art. 5. Courts try to avoid construing statutes that implicitly repeal other laws. *See State v. Obrero*, 151 Hawai'i 472, 480, 517 P.3d 755, 763 (2022) ("Repeal by implication is disfavored."). The Court must construe HRS § 832-1 to allow ARS § 13-3869 "to remain in force." *Id.*

Declaration of Counsel

State of Hawai‘i)
) ss.
County of Maui)

I, Benjamin E. Lowenthal, declare under penalty of law that the facts in the above memorandum are true and correct and based to the best of my knowledge and belief.

Dated: Wailuku, Maui, Hawai‘i: March 30, 2023.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Attorney for the Accused