No. 22-30198

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

QAYA MIKEL GORDON,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Idaho
No. 3:21-CR-305-DCN
Hon. David C. Nye

DEFENDANT-APPELLANT'S OPENING BRIEF

Sandy D. Baggett
P.O. Box 1069
Spokane, WA 99201
(509) 822-9022
sandy@sandybaggett.com

Attorney for Defendant-Appellant
Qaya Mikel Gordon

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions and Articles of Confederation

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

The district court asserted original jurisdiction pursuant to 18 U.S.C. § 113(a)(3) and 1153. This court has jurisdiction over this appeal from a final judgment pursuant to 28 U.S.C. § 1291.

The Appellant, Qaya Gordon, is currently in the custody of the Bureau of Prisons at FCI Ray Brook. His projected release date is January 26, 2027.

The judgment in the district court was entered on December 1, 2022. The notice of appeal was filed on December 12, 2022. This appeal is timely.

PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

On November 16, 2021, the Appellant was charged with two counts of Assault in Indian Country in violation of the Major Crimes Act, 18 U.S.C. § 1153. The Appellant proceeded to a jury trial, and the jury returned a guilty verdict on both counts. The district court sentenced him to 72 months on each count to run concurrently. Gordon now appeals his conviction.

ISSUES PRESENTED

1. Whether the conviction should be vacated because the District Court lacked jurisdiction because the Major Crimes Act, 18 U.S.C. § 1153, violates equal protection by discriminating against Indian criminal defendants based on race without a compelling governmental interest and without being narrowly tailored to achieve that interest.
2. Whether the conviction should be vacated because the District Court lacked jurisdiction because Congress exceeded its authority under the Indian Commerce Clause by enacting the Major Crimes Act, 18 U.S.C. § 1153.

STATEMENT OF THE CASE

On November 16, 2021, the Appellant was arrested and charged with assaulting Kyley Eugene Payne and Vashti Scott in a shed in an alleyway between 1st Street East and Main Street in Lapwai, Idaho, on November 1, 2021. The parties stipulated that during all relevant time periods, the Appellant 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. (Stipulation of Facts, ER-16-17). Further, the parties stipulated that the shed was located within the boundaries of

the Nez Perce Indian Reservation. (ER-16-17). The only basis for federal jurisdiction was that the Appellant and his victims were Indian.

STANDARD OF REVIEW

The constitutionality of a criminal statute is reviewed *de novo*. *See U.S. v. Gilbert*, 813 F.2d 1523, 1528–29 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987); *U.S. v. Tabacca*, 924 F.2d 906, 912 (9th Cir. 1991); *U.S. v. Morgovsky*, 827 Fed. Appx. 701, 706 (9th Cir. 2020).

ARGUMENT

I. THE MAJOR CRIMES ACT DISCRIMINATES AGAINST INDIANS ON THE BASIS OF RACE WITHOUT A COMPELLING GOVERNMENTAL INTEREST

The Major Crimes Act ("MCA") applies exclusively, as an element of each offense, only to Indians and accords federal criminal jurisdiction. The statute provides: "Any Indian who commits against the person or property of another Indian or other person any of the [listed offenses] within the Indian country, shall be . . . within the exclusive jurisdiction of the United States." 18 U.S.C.A § 1153(a). The MCA violates equal protection because it classifies people according to their race, discriminates against Indian criminal defendants based on race, and cannot survive strict scrutiny. The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. 14, § 1. This clause is

implicitly incorporated into the Fifth Amendment's guarantee of due process. *See, Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. *See id.* The Supreme Court has recognized that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

A. "Indian" under the MCA is a racial category

In the Ninth Circuit, to be considered an Indian under the Major Crimes Act, 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. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (*en banc*); *U.S. v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846).

In other areas of the law, the Supreme Court has repeatedly instructed that classifications based on "Indian" or "Native American" status are racial classifications subject to strict scrutiny. *Adarand Constructors v. Pena*, 515 U.S. 200, 207–08, 213, 223–24 (1999) (classification of Native Americans is a classification based explicitly on race); *see also, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476, 478, 493 (1989) (plurality) (preference for

"Indians" is race-based measure); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 271 n.2, 273–74 (1986) (plurality) (preferential scheme that "operate[d] against whites and in favor of certain minorities," including "American Indian[s]," was "a classification based on race"); *Loving v. Virginia*, 388 U.S. 1, 2, 5 & n.4 (1967) (statutes prohibiting marriage between "white persons" and "Indians" were "racial classifications"). Such classifications treat Indians as a "discrete racial group" rather than "members of quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

Even where classifications are limited to membership or affiliation with a federally recognized tribe, those classification are still racial in nature because of the way membership or affiliation is defined. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 1 (2006); *see also Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) (describing claim premised on child's possession of 3/256ths Cherokee blood). In this context, tribal membership, affiliation, ancestry, and descent are simply proxies for race because tribes have requirements of lineal descent for membership. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000). For an Indian tribe to be recognized by the federal government, its membership must extend only to "individuals who descend from a historical Indian tribe." 25 C.F.R. § 83.11(e); *see also U.S. v. Candelaria*, 271 U.S. 432, 442 (1926) (considering "Indian tribe" to be "a body of Indians of the same or

a similar race"). Thus, when a law makes a classification based on tribal membership or affiliation, it is often making a racial classification subject to strict scrutiny because it uses ancestry as "a proxy for race." *Rice*, 528 U.S. at 514. In this case particularly, the Appellant's *tribal membership* was predicated on blood lineage. (See "Certificate of Indian Blood" ER-17, describing the Appellant's blood as 57/128 percent quantum). So, in other words, although both *Rogers* and *Zepeda* purport to set out two requirements for determining who is and is not Indian, because the second factor—membership or affiliation—is determined solely by blood quantum, there is, in reality, only a single determinative test which is blood quantum or ancestry. Thus, the second factor is not enough to ensure that Indian status is not a racial classification. *See also Zepeda*, 792 F.3d at 1117 (concurring opinion) ("the fact that Congress is permitted to create laws regulating tribe members doesn't mean that Congress can administer those laws in a discriminatory fashion. That would be like saying a federal law extending criminal penalties only to those with "African blood" isn't a racial classification because it can only be applied to people who engage in interstate commerce.").

As the Supreme Court has repeatedly held, ancestry and race are so closely intertwined that "[d]istinctions between citizens solely because of their ancestry" are interchangeable with "discrimination based on race alone." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943); *see also Saint Francis Coll. v. Al-Khazraji*, 481

U.S. 604, 613 (1987) (holding that "discrimination solely because of . . . ancestry or ethnic characteristics . . . is racial discrimination"). As the Supreme Court explained in *Rice*, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. at 517. "Ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id; Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *see also Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

Consistent with this rule, the Supreme Court has held that a state law giving preferential voting rights "to a class of tribal Indians, to the exclusion of all non-Indian citizens," is an impermissible "racial classification." *Rice*, 528 U.S. at 520, 522. Under that law, only descendants of people inhabiting the Hawaiian Islands in or before 1778 could vote in a statewide election for an agency that administered programs designed for the benefit those descendants. *Id.* at 498–99. The Court assumed that it could "treat Hawaiians or native Hawaiians as [Indian] tribes," but nevertheless held that this ancestral classification still functioned as a "proxy" for race because it sought "to preserve th[e] commonality of [these] people." *Id.* at 514–17, 519–20.

B. *Mancari* establishes an exception only where a statute promotes tribal self-government

The Supreme Court in *Mancari* established a limited exception to the general rule that classifications based on tribal status are racial in nature. As part of a broader attempt to allow "Indian tribes" to "assume a greater degree of self-government, both politically and economically," Congress accorded preference in hiring and promotion at the BIA to members of a Federally recognized tribe who had one-fourth or more degree Indian blood. *Mancari*, 417 U.S. at 542, 553 n.24. The Court concluded that the classification was "political rather than racial in nature," and thus subject to a relaxed standard of scrutiny. *Id.* at 553 n.24. The Court emphasized two distinct points leading to this conclusion. First, the Court noted that the preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Mancari*, 417 U.S. at 553 n.24, 554. Second, the Court emphasized the BIA's status as a "truly sui generis" agency responsible for "administer[ing] matters that affect Indian tribal life" and "the lives of tribal Indians." *Id.* at 542, 554. Like the requirement that members of Congress reside in the State they represent, see U.S. Const. art. I, § 2, cl. 2; id. § 3, cl. 3, the hiring preference for tribal members was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its

constituent groups," *Mancari*, 417 U.S. at 553–54. Thus, this preference was a political, not a racial, classification. *Id.* at 554.

Therefore, statutes that apply exclusively to tribal members may be considered "political rather than racial" only if they are closely tied to "Indian self-government." *Mancari*, 417 U.S. at 553-54. Outside of that "limited exception," the Constitution prohibits discrimination between "tribal Indians" and "non-Indian citizens" in the context of "critical state affairs." *Rice*, 528 U.S. at 520-22. As the Supreme Court has noted in other statutes such as the Indian Child Welfare Act, such preferences "raise equal protection concerns." *Adoptive Couple,* 570 U.S. at 655-56. This court has accordingly rejected the notion that a classification of tribal Indians must necessarily be regarded as political rather than racial. *See e.g., Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (finding that the classification was political because the statute dealt with the legal relationship between political entities, not the rights of individuals); *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997). The Major Crimes Act does not advance tribal self-government. In fact, it does the opposite and removes all self-government over the prevention and prosecution of major crimes on tribal land without any compelling governmental interest in doing so, therefore determining individual rights as opposed to determining any political relationship between tribes and the federal government.

C. The MCA does not advance a compelling or legitimate government interest

Because the MCA classifies citizens by race and ancestry, it must face "the most rigid scrutiny." *Fisher v. Univ. of Tex.,* 570 U.S. 297, 309-10 (2013). The government must therefore prove that the MCA's racial classifications is the least restrictive means to achieve a compelling government interest furthered by that specific classification. *Johnson v. California*, 543 U.S. 499, 505 (2005). This rule applies to both malicious and benign racial classifications, whether it benefits or burdens Indians. *Id.*

The MCA does not advance even a legitimate government interest—let alone a compelling one. The MCA fails strict scrutiny at the outset because from the beginning, it advanced an avowedly patriarchal, racially condescending purpose best articulated in the attitude expressed in *Rogers*: "from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices." *Rogers*, 45 U.S. at 572. The statute was originally passed because the federal government did not believe that tribes were capable of administering criminal law on their own lands (or at least, criminal law that looked and sounded like the

administration of criminal law by white men). *See* Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. Gender Race & Just. 109, 114 (2012) (discussing that the Major Crimes Act was passed as a direct response to *Ex parte Crowe Dog* in which an Indian received what Congress considered a lenient sentence from a tribal court). The MCA also fails strict scrutiny because it is insufficiently tailored. The MCA is and has always been a blunt instrument: it is overbroad, lacks any exceptions, has nationwide application, and has indefinite duration. First, this court's definition of "Indian" is overbroad. It sweeps into the Act's ambit people who are not even members of Indian tribes. Second, Congress made no effort to limit the MCA's requirements to tribes whose practices supposedly incited the Act.

Even under *Mancari*, the government still must show that the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555. That review is not a rubber stamp. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985). The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446

The MCA's "Indian" definition and application unconstitutionally discriminate on the basis of race in violation of the Constitution's guarantee of

equal protection. The statute is unconstitutional, and therefore did not confer jurisdiction on the District Court in this case.

II. CONGRESS EXCEEDED ITS AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE BY ENACTING THE MAJOR CRIMES ACT

The Supreme Court has vacillated on the sources for the exercise of federal jurisdiction over Indians and federal criminal jurisdiction. 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's authority to regulate Indian affairs under the Indian Commerce Clause, U.S. Const. art. I, § 8 cl. 3. The Court has also frequently stated that Congress has "plenary" authority over Indians, without reference to any specific Constitutional provision. None of these purported authorities confers on Congress the power to regulate crimes committed by one Indian on another Indian on tribal land.

A. Tribal dependent or ward status is not a legal basis for federal jurisdiction over criminal conduct on reservations

In 1886, the United States Supreme 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; thus, the federal government had a duty

to protect the tribes. *Id.* at 382-84. However, the advent of the self-determination policy in 1970 created an atmosphere that challenged long-held beliefs about the tribes' ability to govern themselves. H.R. Doc. No. 91-363 (1970). Consistent with this vision of decreased federal interference in tribal affairs, the Supreme Court in *McClanahan v. Arizona State Tax Commission* held that congressional authority to regulate Indian affairs was limited to Congress's treaty-making and Commerce Clause powers under the Constitution. 411 U.S. 164, 172 (1973).

Since *McClanahan*, 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. 641, 648 (1977). 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's power to regulate Indian affairs under the Indian Commerce Clause. *Id.*

B. The Indian Commerce Clause does not give Congress the power to regulate crimes committed by one Indian on another Indian on tribal land

The Supreme Court has repeatedly cited the Indian Commerce Clause as a primary source of Congress's authority over Indian affairs. *U.S. v. Lara*, 541 U.S. 193, 200 (2004); *Mancari*, 417 U.S. at 551-52. The Indian Commerce Clause provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," U.S. Const\. art. I, § 8, cl. 3, which "means commerce with the individuals composing those tribes." *U.S. v. Holliday*, 70 U.S. 407, 417 (1865). As originally understood, "commerce" with Indian tribes meant buying, selling, and transporting goods. *Adoptive Couple*, 570 U.S. at 659-66 (Thomas, J., concurring); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U.L. Rev. 201, 210-17 (2007). "Commerce" in the late 1700's was understood as "Intercourse; exchange of one thing for another; interchange of anything; trade; traffick." 1 Samuel Johnson, A Dictionary of the English Language 361 (4th rev. ed. 1773) (reprint 1978). Thus "commerce with Indian tribes" meant "trade with Indians." *See, e.g.,* Natelson, at 215-16 & n.97 (citing 18th-century sources). And "tribe" referred to a "distinct body of the people," not the individual people themselves. 2 S. Johnson, A Dictionary of the English Language at 980. The Constitution's grant of authority to regulate commerce with Indian "Tribes" is thus, along with "States" and "foreign Nations," a reference to trade with three

distinct "classes" of govern-mental bodies. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831).

The Articles of Confederation and its influence on the Constitution's drafting confirm that the Indian Commerce Clause cannot be understood to grant Congress unlimited authority over any matter that involves an Indian. Under the Articles, the Continental Congress had the "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians." Articles of Confederation art. IX, cl. 5. At the Constitutional Convention, James Madison proposed giving Congress this same broad power to "regulate affairs with the Indians as well within as without the limits of the U[nited] States." 2 Records of the Federal Convention of 1787, at 324 (M. Farrand rev. 1966). The Convention, however, adopted a much narrower provision: "Commerce . . . with the Indian Tribes." Congress thereby "lost a power upon the Constitution's ratification"—specifically, the broader power to "manage all affairs with Indians." Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1089–90 (2004). The Framers of the Constitution were alert to the difference between the power to regulate trade with the Indians and the power to regulate all Indian affairs. By limiting Congress' power to the former, the Framers declined to grant Congress the same broad powers over Indian affairs conferred by the Articles of Confederation.

See Prakash, at 1090; *Adoptive Couple*, 570 U.S. at 663-64 (Thomas, J., concurring).

The power over commerce with Indian tribes enabled Congress to regulate "the trade with Indians." The Federalist No. 42, at 265 (C. Rossiter ed. 1961) (Madison). Such "trade" would be "with the Indian nations." The Federalist No. 24, at 158 (Hamilton). For the first 100 years of the country, whenever the federal government "dealt with [Indians], it [was] in their collective capacity as a state, and not with their individual members." S. Rep. No. 41-268, at 10 (1870).

Assaults by one Indian on another Indian on tribal land do not constitute trade with Indians, and the MCA far exceeds Congress's Indian Commerce power. Further, crimes under the MCA do not deal with tribes as such, or even simply with tribal members. To the contrary, as this court has held, those penal laws apply to individuals, including those who are not and may never even become tribal members. The power to regulate commerce "with Indian tribes" "does not give Congress the power to regulate commerce with Indian persons any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States." *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring).

C. Crimes under the MCA, by definition, have no nexus to interstate commerce

Crimes under the MCA fall outside even more expansive definitions of "commerce." For example, in the Interstate Commerce Clause context, the Supreme Court has defined "commerce" to include (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *U.S. v. Morrison*, 529 U.S. 598, 608-09 (2000). Further, the Supreme Court, in *United States v. Lopez,* significantly narrowed the scope of the Interstate Commerce Clause in such a way that *Antelope* would likely be decided differently post-*Lopez*. In *Lopez*, the Court held that federal regulation of criminal activity without some link to interstate commerce was constitutionally impermissible. 514 U.S. 549, 565 (1995). Where a criminal statute does not establish a sufficient nexus between the criminal activity to be regulated and interstate commerce, that statute is constitutionally infirm. *Id.* at 1630-31. The Court held that to allow the exercise of powers outside the scope of those enumerated in the Constitution would undermine the inherent sovereign power of the states to define and punish criminal offenses. *Id.* The Court then held that for a statute to be valid under the Interstate Commerce Clause, the regulated activity must substantially affect interstate commerce. *Id.* Although the Court's decision in *Lopez* involves the Interstate

Commerce Clause, the Court's logic is equally applicable to cases involving the Indian Commerce Clause. The criminal activities listed in the Major Crimes Act do not have any bearing on commerce between the tribes and the federal government. The enumerated felonies are traditional common law crimes that have little or nothing to do with economic activity and are, therefore, outside of Congress's reach under the Indian Commerce Clause.

In addition, the jurisdictional limitation of the statute requires that the crime be committed within Indian Country. The Major Crimes Act, therefore, limits its regulation of criminal activities to those that take place within, not across, jurisdictional lines. Therefore, utilizing the Indian Commerce Clause as the source for the exercise of federal jurisdiction under the Major Crimes Act is unconstitutional. Additionally, the exercise of this jurisdiction conflicts with the tribes' inherent sovereign powers to define and punish criminal offenses. This intrusion is inconsistent with the notion that the federal government is a government of enumerated powers.

D. The mythical "plenary powers" over Indians does not provide legal authority for Congress to regulate criminal activity by Indians against Indians on tribal land

"The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). Even in the

realm of interstate commerce, where Congress's powers are among their broadest, the Supreme Court has held that "[t]he Constitution confers on Congress not plenary legislative power but only certain enumerated powers." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). Congress possesses no enumerated power authorizing it to generally legislate regarding Indians. The Constitution does not empower Congress to regulate criminal conduct just because an Indian may be involved.

The Supreme Court's references to a "plenary power" over Indians are of dubious origin. Because its plenary-power precedents are untethered from specific constitutional language, the Supreme Court has never been consistent in describing it—let alone applying it. The Court originally hewed to the Indian Commerce Clause's text, understanding that it did not give Congress plenary power over Indian affairs. Considering whether the clause authorized the exercise of federal criminal jurisdiction over acts committed by Indians on a reservation, the Court stated "[W]e think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate

commerce with the Indian tribes." *Kagama*, 118 U.S. at 378-79. While the Court ultimately upheld the law under a guardian/ward theory that one scholar has called "a tour de force in judicial constitutional creativity," it did not rest its holding on either the Indian Commerce Clause or an all-encompassing plenary power over Indians. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 172 (2002).

The earliest reference to a plenary power over Indians appears to be from when the Court, discussing Congress's creation of a legislative court to hear certain cases arising in Indian territory, "**assum[ed]** that [C]ongress possesses plenary power of legislation in regard to" Indian tribes. *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) (emphasis added). Since then, the Court has varied in how broadly it has described this purported power. For example, it has frequently referred to Congress as having a plenary power to oversee "tribal property" and "tribal relations." *Winton v. Amos*, 255 U.S. 373, 391 (1921); *Williams v. Johnson*, 239 U.S. 414, 420 (1915); *Sizemore v. Brady*, 235 U.S. 441, 449 (1914); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). But it has also occasionally referred to a plenary power to legislate regarding "Indian tribes." *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306 (1902). Likewise, this Court has described "[t]he plenary character of this legislative power" as applying during "various phases of Indian affairs,"

Bd. of Cnty. Comm'rs v. Seber, 318 U.S. 705, 716 (1943), but also spoken of a "plenary power over Indian affairs," *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

Seeking a textual hook for such a broad power, the Court departed from its earlier, more textually faithful interpretation of the Indian Commerce Clause beginning in the last quarter of the Twentieth Century. In 1989, it declared that "the central function of [the clause] is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Court cited only its prior opinion in *Mancari* for this assertion. *Id. Mancari,* in turn, claimed such a plenary power derived from the Indian Commerce Clause, Treaty Clause, and the Court's view that a plenary power was "implicit[]" in the Constitution. 417 U.S. at 551-52.

Mancari appears to be the first time the Court linked a "plenary" power over Indians to the Indian Commerce Clause, but the transformation of the Indian Commerce Clause from one source of federal power to a repository of plenary federal power was supported by nothing more than the Court's *ipse dixit*. It was also unnecessary to the Court's conclusion and mere *dicta*: *Mancari* considered the federal government's power to prefer Indians in federal hiring. 417 U.S. at 537. Congress does not depend on the Indian Commerce Clause to regulate how the federal government hires federal employees.

The various Indian tribes were once independent and sovereign nations, and their claim to sovereignty long predates that of our own government. *McClanahan*, 411 U.S. at 172. In its original treaties with Indian nations, the federal government promised that no state or territory shall ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves. As recently noted by Justice Gorsuch, 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. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (Gorsuch, J., majority opinion). Repeatedly breaking a treaty over a century does not suddenly confer a constitutional power that was never there. A government may exercise jurisdiction over Native Americans with such persistence that the practice seems normal. *Id.* at 2474. However, "when Congress adopted the MCA, it broke many treaty promises that had once allowed tribes. . . to try their own members." *Id.* at 2480.

Even if the Supreme Court's precedents squarely recognized a plenary congressional power to legislate regarding "Indian affairs," that would not resolve the scope of such a power—and whatever that power's scope, it does not include the power to enact the MCA. The Court has referred to several powers as "plenary" while nonetheless recognizing limits on Congress's authority to legislate under those powers. For example, the Court has stated that Congress has "plenary power"

under the Interstate Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); *Hodel v. Indiana*, 452 U.S. 314, 324 (1981); *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939). Yet that description has not stopped the Court from holding that various laws exceeded Congress's interstate-commerce authority. *See, e.g., Sebelius*, 567 U.S. at 552 (Roberts, C.J., concurring); *Morrison*, 529 U.S. at 617; *Lopez*, 524 U.S. at 551. Similarly, the Court has described Congress's power to enforce the Fourteenth Amendment as "plenary," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), but has held that multiple laws enacted pursuant to that enforcement authority exceed Congress's power, *see, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

If Congress has a plenary power regarding Indian affairs, it is as limited as these other "plenary" powers. As the Supreme Court has already recognized, "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977); *U.S. v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality). Thus, the Court has analyzed Indian-specific laws under the Fifth Amendment's Takings Clause. *U.S. v. Creek Nation*, 295 U.S. 103, 109-10 (1935). It has applied the due-process and equal-protection guarantees of the Fifth Amendment to congressional enactments regarding Indians. *Weeks*, 430 U.S. at 84. And it has held that Congress's power under the Indian Commerce Clause does not extend to abrogating state sovereign

immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996). "Plenary" or not, Congress's power to legislate regarding Indians is limited.

If assaults by one Indian on another Indian on tribal land are "Indian affairs" simply because they involve Indians, then Congress could create different rules for any state-court proceeding involving an Indian. As Justice Thomas has noted, such an interpretation would create "absurd possibilities," *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring), including a power to create Indian specific rules for all state prosecutions or for the enforcement of contracts, *id.* This Court should not countenance that result: "the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians." Id.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be vacated because the District Court lacked jurisdiction.

Date: May 17, 2023

Sandy D. Baggett
P.O. Box 1069
Spokane, WA 99203
(509) 822-9022
sandy@sandybaggett.com
Attorney for Appellant Qaya Mikel Gordon

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number 22-30198

The undersigned attorney or self-represented party states the following:

I am unaware of any related cases currently pending in this court.

Signature s/Sandy D. Baggett **Date** May 17, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 22-30198

I am the attorney or self-represented party.

This brief contains 6798 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Sandy D. Baggett **Date** May 17, 2023