CAAP No. 23-352

In the Intermediate Court of Appeals

State of Hawai‘i

In the Matter of the **Extradition of** **Carlos Jesus Moreno**	2CSP-23-013 Interlocutory Appeal from Findings of Fact, Conclusions of Law, and Order Denying Motion to Dismiss. Hon. Judge Kirstin M. Hamman

Opening Brief

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Opening Brief

The extradition process is limited to the States, the District of Columbia, and federal territories. When a Native American tribe demanded local authorities to arrest, remove, and deliver up someone living on Maui, the lower court ruled that it was a "territory" that could extradite. This interpretation runs afoul with the plain language of the extradition statutes, undermines tribal sovereignty, and interferes with congressional authority over tribes. The lower court should have dismissed these proceedings.

1. Statement of the Case

The Pascua Yaqui Nation is a federally recognized Indian[1] tribe located within the boundaries of the State of Arizona. On December 3, 2021, the tribal court issued a warrant for the arrest of Carlos Jesus Moreno. Record on Appeal (Docket No. 7) at 4; Cir. Ct. Dkt. No. 1 at 6.[2] On September 30, 2022, the tribe filed a criminal complaint alleging that Mr. Moreno committed various offenses[3] in its penal code. Cir. Dkt. No. 1 at 9-10. Tribal police suspected Mr. Moreno moved to Maui. Cir. Ct. Dkt. No. 1 at 4.

On January 20, 2023, tribal prosecutors invoked the interstate extradition process and demanded the State of Hawai‘i to arrest and deliver Mr. Moreno. *Id.* at 4-5. Local prosecutors

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[1] The term "Indian" is antiquated and problematic, but remains the applicable legal term used by Congress and the courts. *See* Pub. L. No. 103-454 § 102 ("Indian tribe" means "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."). *See also* 18 United States Code § 1151 (defining "Indian country.").

[2] These page numbers refer to the page numbers as they appear in the pdf format.

[3] Although the State refers to these offenses as felonies, each offense is punishable for no more than one year of imprisonment. *See* 4 Pascua Yaqui Tribal Code § 4-20 (2016) attached in the Appendix No. 1.

alerted the Maui Police Department on February 28, 2023. *Id.* at 2. The police arrested the Accused[4] in Wailuku on March 7, 2023. *Id.* at 1.

The Accused challenged the extradition and moved to dismiss the proceedings. *Id.* at 6; Cir. Ct. Dkt. No. 19. The Accused asserted that the extradition process is limited to the States, the District of Columbia, and territories of the United States. Cir. Ct. Dkt. No. 19 at 4. Native American tribes are sovereign entities that are not covered by the United States Constitution and the federal and state extradition statutes. *Id.*

The State responded that the Pascua Yaqui Nation was a territory of the United States under the Hawai‘i extradition statute, and, thus, it could demand the arrest and deliverance of the Accused. Cir. Ct. Dkt. No. 21 at 2. The Circuit Court of the Second Circuit[5] agreed with the State and denied the motion. Dkt. No. 7 at 7; Cir. Ct. Dkt. No. 30; Transcript of Proceedings on April 5, 2023 (Dkt. No. 18) at 12-13. This interlocutory appeal followed. Dkt. No. 1; Cir. Ct. Dkt. No. 36 & 41.

2. Point of Error

The circuit court erred when it ruled that the Pascua Yaqui Nation was a territory of the United States that could use Hawai‘i extradition statutes to demand the arrest and delivery of a person living on Maui.

The circuit court erred when it denied the motion to dismiss at the hearing on the motion:

THE COURT: All right.

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[4] In extradition proceedings, the burden is on the State of Hawai‘i to show that the accused is the person sought by the demanding state. *See generally Murray v. Burns*, 48 Haw. 508, 515, 405 P.2d 309, 314 (1965). The Accused has not conceded that he is Carlos Jesus Moreno and the pleadings should not be construed by the State or any court as a concession of fact.

[5] The Honorable Judge Kirstin M. Hamman presided.

> Well, having considered the arguments made by the parties, as well as the pleadings submitted. And the Court has—as it indicated—reviewed those.
>
> The Court agrees that the Court is bound by the *Wolfe v. Au* case. And the Court is persuaded by the arguments made by the States in this—that his—the Pascua Yaqui tribe should be considered and is considered a territory under the state's extradition statute.
>
> The Court is—has reviewed—although not binding on this Court, the Court was persuaded by the analysis that was conducted in *Tracy v. Superior Court of Maricopa County*, an Arizona case cited to by the State, and the analysis that they did in that particular case, and finding that Indian tribes do posses a unique political status.
>
> However, tribal governments are comparable to states and territories in many ways. And Indian tribes may be considered territories within the meaning of certain statutes.
>
> In that case, they were looking at the Uniform Act to Secure the Attendance of Witnesses from Without a State. In this case, we're looking at the extradition statute. And the Court agrees that, while not formally a territory, the Indian tribe that congress does retain plenary authority over the Indian tribes and—or Indian Nations. They are not independent nations.
>
> And given the broad definition of territory, as either organized or unorganized, the Court does find that the Pascua Yaqui tribe is a territory for purposes of the extradition statute.
>
> And, therefore, the motion is denied.

Dkt. No. 18 at 12-13.

The same error arises in the circuit court's findings of fact, conclusions of law, and order entered on April 18, 2023. Cir. Ct. Dkt. No. 30. Conclusions of Law Nos. 2, 4, 6, 7, 9, 10, 11, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, and 46 reflect this error.[6] *Id.* Objections to this error are in the motion to dismiss, the reply to the memorandum in opposition, and at the hearing on the motion. Cir. Ct. Dkt. Nos. 19 and 23; Dkt. No. 18 at 4-9 and 11-12.

[6] Relevant and lengthy portions of the record on appeal are found in Appendix 2 pursuant to Hawai'i Rules of Appellate Procedure Rule 28(b)(4).

3. Standards of Review

Conclusions of Law, Statutory Interpretation, and Constitutional Questions

A conclusion of law is reviewed *de novo* and is examined "without being required to give any weight to the trial court[.]" *State v. Meyer*, 78 Hawai'i 308, 311, 893 P.2d 159, 162 (1995). The interpretation of statutes and constitutional questions are reviewed under the same standard. *Mount v. Apao*, 139 Hawai'i 167, 174-75, 384 P.3d 1268, 1275-76 (2016) (brackets omitted).

No deference is given to the lower court's legal conclusions, statutory construction, and constitutional analysis. *State v. Canosa*, 152 Hawai'i 145, 155, 523 P.3d 1059, 1069 (2023); *State v. Tsujimura*, 140 Hawai'i 299, 306-07, 400 P.3d 500, 508-09 (2017) ("Questions of constitutional law are reviewed *de novo*, and this court exercises its independent judgment in considering such questions.").

4. Argument

The circuit court erred when it ruled that the Pascua Yaqui Nation was a territory of the United States that could use Hawai'i extradition statutes to demand the arrest and delivery of a person living on Maui.

The circuit court's expansive reading of the term "territory . . . of the United States" to let Native American tribes extradite people in Hawai'i is wrong. The circuit court's construction strays beyond the plain language of the extradition statute. Moreover, it departs from well-established precedent set by federal courts, and it interferes with congressional power.

4.1 The plain language in the United States Constitution and State and federal statutes limit extradition for the States, federal territories, and the District of Columbia—not tribal governments.

Interstate extradition comes from the United States Constitution:

> 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.

U.S. Const. Art. IV, Sec. 2, Cl. 2. The Extradition Clause is not self-executing. *Roberts v. Reilly*, 116 U.S. 80, 95 (1885). *See also United States ex rel. Silver v. O'Brien*, 138 F.2d 217, 218 (7th Cir. 1943) ("Unquestionably, the source of all authority for the extradition of an alleged fugitive from justice is found in Art. IV, Sec. 2, clause 2 of the Constitution of the United States, which is not self-executing").

In the Extradition Act, Congress allowed United States territories to make extradition demands:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, . . . charging the person demanded with having committed treason, felony, or other crime, . . . the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured . . . and shall cause the fugitive to be delivered to such agent when he shall appear.

18 United States Code § 3182.[7]

In addition to federal law, Hawai'i adopted the Uniform Criminal Extradition Act. Hawai'i Revised Statutes Chapter 832. That requires the Governor to arrest and "deliver[] up to the executive authority of **any state** of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found" in Hawai'i. HRS § 832-2. Like the Extradition Act, the Hawai'i statute limits demanding governments to States, the District of Columbia, and United States territories:

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[7] The Extradition Act of 1793 allowed extradition demands from "any state in the Union, or . . . either of the territories northwest or south of the river Ohio[.]" 1 Stat. 302, Sec. 1. *See* Appendix 2. The Second Congress did not include Native American tribes.

> Where appearing in this chapter . . . **the term "state" includes any state other than this State, the District of Columbia, or a Territory, organized or unorganized, of the United States.** The term "interstate" means between this State and any other state.

HRS § 832-1.

The statutes are clear: a Native American tribe like the Pascua Yaqui Nation is not a territory—organized or unorganized—of the United States.

> [W]here the statute is clear and unambiguous, wee are bound by its plain and unambiguous language. We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws. Even when the court is convinced in its own mind that the legislature really meant and intended something not expressed by the phraseology of the act, it has no authority to depart from the plain meaning of the language used.

Carlisle v. One (1) Boat, 119 Hawai'i 245, 256, 195 P.3d 1177, 1188 (2008) (brackets and emphasis omitted).

The circuit court's reliance on Arizona's analysis of a statute unrelated to extradition in *Tracy v. Superior Court of Maricopa Cty*, 168 Ariz. 23, 810 P.2d 1030 (Ariz. 1991), departs from this bedrock rule of statutory construction. Cir. Ct. Dkt. No. 30 at 13-15; Dkt. No. 18 at 12-13. There, a bare majority[8] on the Supreme Court of Arizona held that the phrase "any territory of the United States" was broad enough to include the Navajo Nation. *Id.*, 168 Ariz. 23, 810 P.2d at 1051.

[8] Two of the five justices dissented and reminded the majority that "[c]ourts will not enlarge the meaning of simple English words in order to make them conform to their own peculiar sociological and economic views." *Tracy v. Superior Court of Maricopa Cty*, 168 Ariz. 23, 80 P.2d 1030, 1052 (Moeller, J. dissenting). Their views align with the general rule in Hawai'i requiring courts to adhere to the plain and unambiguous meaning of the statute. *Carlisle v. One (1) Boat*, 119 Hawai'i 245, 256, 195 P.3d 1177, 1188 (2008).

The circuit court's reliance on *Tracy* is misplaced. While the statute in *Tracy* refers to "any territory," HRS § 832-1 identifies territories, "organized and unorganized, of the United States." *Id.* Specifying "organized or unorganized" territories is significant.

"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 federal territory without an organic act.[9] The definition in HRS § 832-1 is not a generic catchall meant to encompass Native American tribes. The language in our statute is clear, precise, and unmistakable. *See State v. Thompson*, 150 Hawai'i 262, 267, 500 P.3d 447, 452 (2021). Thus, "we are not at liberty to look beyond that language for a different meaning." *State v. Haugen*, 104 Hawai'i 71, 76, 85 P.3d 178, 183 (2004). The Court's "sole duty is to give effect to the statute's plain and obvious meaning." *Id.* Tribes are neither organized nor unorganized territories of the United States.

Arizona itself recognizes this. Like Hawai'i, Arizona promulgated the Uniform Criminal Extradition Act. Arizona Revised Statutes § 13-3841 et seq. The term "State" in its extradition statutes is nearly identical to HRS § 832-1. It limits extradition to "any other state or territory, organized or unorganized, of the United States." ARS § 13-3841.4.

Because tribes like the Pasqua Yaqui Nation are not included, the Arizona legislature promulgated separate legislation to create an extradition process for Native American tribes located within its borders. *See* ARS § 13-3869.A. No equivalent permitting tribal extradition exists in Hawai'i. The circuit court's reliance on Arizona's interpretation of a non-extradition

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[9] American Samoa remains "the only populated territory for which Congress has not passed an organic act" making it the last remaining unorganized territory of the United States. *Fitisemanu v. United States*, 1 F.4th 862, 875 n. 15 (10th Cir. 2021).

statute and departure from the plain, unambiguous, and unmistakable language in HRS § 832-1 is erroneous.

4.2 Federal courts interpreting the Extradition Act distinguish Native American tribes powered by their independent and inherent sovereignty from territorial governments running on delegated federal power.

Expanding the term "Territory, organized or unorganized, of the United States" to include the Pascua Yaqui Nation is also out of step with federal law. When construing HRS Chapter 832, Hawai'i courts defer to federal decisions about the Extradition Clause and its implementing federal legislation:

> The Uniform Criminal Extradition Act is ancillary to and in aid of the Extradition Clause U.S. Const. art IV, §2, cl. 2, and the federal implementing statute, 18 U.S.C. § 3182. **The courts of an asylum state are bound by decisions of the United States Supreme Court in construing and applying the Extradition Clause and the federal implementing statute. The mechanics of the extradition process within a particular state are governed by the provisions of the Uniform Criminal Extradition Act insofar as they do not conflict with federal constitutional and statutory provisions.**

Wolfe v. Au, 67 Haw. 259, 262 n. 3, 686 P.2d 16, 20 n. 3 (1984) (citations and quotation marks omitted). *See also Murray v. Burns*, 48 Haw. 508, 516-17, 405 P.2d 309, 315 (1965) ("Since interstate extradition is governed primarily by the . . . provisions of the United States Constitution and federal statute, we necessarily must look to and are bound by the decisions of the United States Supreme Court" when construing the Uniform Criminal Extradition Act).

The Hawai'i Supreme Court applied these principles in *Wolfe* when it held that the Federated States of Micronesia was a territory of the United States that could demand the arrest and delivery of a criminal defendant in Hawai'i. *Id.* at 261, 868 P.2d at 19. The Court reached this

decision by examining federal law to see if Congress meant to include the FSM in the extradition process:

> **[T]he retention and exercise of control by the United States did not of itself render the FSM a 'territory' of the United States within the meaning of** our interstate rendition law, **HRS Chapter 832, and the federal statute implementing the Extradition Clause, 18 U.S.C. § 3182**, from which the state law must take meaning and be consistent with. Nor could we have assumed from a mere absence of independent status that the state-federal rendition scheme applied in this instance; for federal legislation is not automatically applicable to the Trust Territory. Instead, **Congress must manifest an intention to include the Trust Territory within the coverage of a given statute before the courts may apply its provisions.** Still, **we think the necessary congressional design to include territories like the FSM within the ambit of the federally governed system of interstate extradition has been found by the Supreme Court.**

Id. at 264-65, 686 P.2d at 21-22. Relying on *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909), the Court held that the FSM was akin to Puerto Rico, a federal territory, and Congress must have intended to allow the FSM to use the extradition process. *Id.* at 266, 686 P.2d at 22.

The circuit court misconstrued *Wolfe* by comparing the relationship between the United States and the FSM in the 1980s with Congress's plenary power over Native American tribes. Cir. Ct. Dkt. No. 30 at 9-13. The Hawai'i Supreme Court was careful to point out that the extent of federal control does not determine territorial status. *Id.* at 264-65, 696 P.2d at 21 ("**retention and exercise of control by the United States did not of itself render the FSM a 'territory' of the United States within the meaning . . . HRS Chapter 832**, and the federal statute implementing the Extradition Clause, 18 U.S.C. § 3182, from which the state law must take meaning").

The circuit court had to look at federal law to determine if Congress meant to extend the extradition process to Native American tribes. *Id.* at 265, 696 P.2d at 22. Unlike the FSM, federal courts have established a key distinction between Native American tribes and federal territories. When it comes to extradition, they are not the same. Congress did not allow tribes to use the extradition process.

Native American tribes retain their independent sovereignty, which predates the formation of the United States. Long ago, the Supreme Court of the United States held that "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial[.]" *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). *See also Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (Indian nations are not States, but "domestic dependent nations").

> They were, and always have been, regarded as having a semi-independent position when they preserved 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.

United States v. Kagama, 118 U.S. 375, 381-82 (1886). "[T]hey remain separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 789 (2014).

This independent and inherent sovereignty is the source of a tribe's prosecutorial powers. "The ultimate source of a tribe's power to punish tribal offenders . . . lies in its primeval or, at any rate, pre-existing sovereignty." *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 70 (2016).

> Originally, this Court has noted, the tribes were self-governing sovereign political communities, possessing (among other capacities) the inherent power to prescribe laws for their members and to punish infractions of those laws. After the formation of the

> United States, the tribes became "domestic dependent nations," subject to plenary control by Congress—so hardly "sovereign" in one common sense. But **unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form. The "ultimate source" of a tribe's power to punish tribal offenders thus lies in its "primeval" or, at any rate, "pre-existing" sovereignty: A tribal prosecution, like a State's, is attributable in no way to any delegation of federal authority."**

Id. (citations and some quotation marks omitted).

Territories—in contrast—have no inherent sovereignty. They run on federal power. *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.").

> **[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.
>
> 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).

Accordingly, the source of a territory's prosecutorial power lies in the federal government. *Puerto Rico v. Sanchez Valle*, 579 U.S. at 73 ("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"). They "are not sovereigns distinct from the United States." *Puerto Rico v. Sanchez Valle*, 579 U.S. at 72. Unlike tribal prosecutors, "federal and territorial prosecutors do not derive their powers to prosecute from independent sources of authority." *Id.* (quoting *Heath v. Alabama*, 474 U.S. 82, 90 (1985)).

Federal courts have applied this fundamental distinction to extradition cases for more than a century. In *Ex parte Morgan*, 20 F.298 (W.D. Ark. 1883), the Cherokee Nation demanded the governor of Arkansas to arrest and deliver a suspected murderer. *Id.* at 302-03. The accused challenged the tribe's extradition demand. *Id.* at 302.

The United States District Court ordered his release because the Extradition Act did not cover Native American tribes. The Court noted that a territory as an entity set up by Congress that had no sovereign power of its own:

> **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.

Tribes, on the other hand, retain their sovereignty and were not territories of the United States under the Extradition Act:

> **[A Native American tribe] is manifestly different from either a state or territory.** By the word "state" and the word "territory" have attached to them, under the constitution and laws of the United States, a technical meaning. The Cherokee Nation does not come within this meaning, but it is a part of what is called "Indian country." Early in the life of the country a certain section of the domain of the nation was set apart as Indian country. By the

> advancing tide of white population and the formation of new territories first, and then states, much of what was then Indian country has ceased to be such, and has become states in the Union; but **the Cherokee Nation maintains the same status to-day in its relations to the federal government as it did when first set apart by such government—not as a state or territory, but as the home of the Indian.** These Indians have, from the foundation of the government, been treated as being separate and apart from the states and territories of the Union, and this tribe as well as all others are contradistinguished by a name appropriate to themselves, and one different from either a state or a territory. **They belong to the republic, though they are neither a state or territory in it.**

Id. at 305-06. The Cherokee Nation was "neither a state nor territory, in the sense to be attached to the words when used in the clause of the constitution and in the act of congress relating to interstate extradition[.]" *Id.* at 307.

The Supreme Court adopted this distinction when it examined an extradition demand by Puerto Rico. New York City police officers arrested the accused because he was wanted in Puerto Rico. *Kopel v. Bingham*, 211 U.S. at 471. The accused challenged the extradition. *Id.* After examining the State's extradition statutes, the Extradition Act, and the Extradition Clause, the Court held that Puerto Rico could demand the arrest and delivery of the accused because it was a "territory of the United States" covered by New York[10] and federal statutes. *Id.* at 472-74. The Court adopted the reasoning and distinction in *Morgan* between federal territories and Native American tribes. *Id.* at 474-75.

The distinction works both ways. The States are barred from making extradition demands on Native American tribes. In *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), the

[10] The New York statutes were also limited to states and territories and did not expressly include Native American tribes. *See New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 473-74 (1909).

State of Oklahoma—after tribal authorities in the Navajo Nation refused to comply with its extradition demand—requested the Governor of Arizona to enter tribal lands and arrest a man living on the reservation. *Id.* at 683-84. The Governor sent Arizona sheriffs into the Navajo Nation. *Id.* at 684. The accused successfully challenged Arizona's intrusion. *Id.* at 684. The United States Court of Appeals for the Ninth Circuit affirmed. The sheriffs had no authority to enter the Navajo Nation:

> **Article IV, Section 2, read literally, purports to impose upon the governor of each State a duty to deliver up fugitives charged with a crime in a sister state.** The constitutional mandate requires exercise of the state's lawful jurisdiction in responding to the extradition demands of sister states, but it does not itself attempt to define the reach of that jurisdiction. **We have found no authority bearing directly upon the relationship between Article IV, Section 2, and treaty-protected Indian lands and conclude that with regard to the exercise of extradition jurisdiction over Indian residents of the Navajo Reservation, the constitutional mandate must be interpreted in light of the of the Treaty of 1868 and the long history of the principle of retained tribal sovereignty.**

Id. at 685. The Ninth Circuit ultimately held that neither Oklahoma nor Arizona could use the extradition process to arrest and deliver someone in the Navajo Nation. *Id.* at 686. *See also City of Farmington v. Benally*, 119 N.M. 496, 892 P.2d 629, 630 (N.M. App. 1995) (holding city government's attempt to extradite defendant living in the Navajo Nation must fail).

For over a century, federal courts have recognized that because tribal and territorial prosecutorial powers come from different sources, Congress did not intend to include tribes with the Extradition Act. Unlike the FSM in *Wolfe*, Native American tribes are not the same as federal territories. The circuit court has erred. The Pascua Yaqui Nation is not a territory of the United States and its extradition demand must be set aside.

4.3 The circuit court's expansion of HRS § 832-1 interferes with Congress's plenary power and its relationship with Native American tribes.

The circuit court justified its expansion of HRS § 832-1 by using Congress's plenary power over Native American tribes. Cir. Ct. Dkt. No. 30 at 11-12. The circuit court concluded that because the federal government maintains dominance and control over Native American tribes, the States must honor their extradition demands as though they were federal territories. *Id.* This is wrong.

Congress has never subjected Native American tribes to the Extradition Act. 18 USC § 3182. *See Merrill v. Turtle*, *above*. Nor has the Supreme Court adopted the circuit court's expansive definition of the term "territory" in the Extradition Act to include them. *Kopel v. Bingham*, *above*. By expanding the extradition process to include the Pascua Yaqui Nation, the circuit court allows the State of Hawai'i to make extradition demands on Native American tribes.

Congress is the sole regulator of Native American affairs. U.S. Const. Art. I, Sec. 8, Cl. 3; *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 n. 7 (1973) (Commerce Clause source of the "federal responsibility for regulating commerce with Indian tribes and for treaty making."). The Supreme Court has long viewed the federal government as the gatekeeper against State interference:

> 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).

It also means that the States cannot infringe on the tribe's right "to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

> 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). *See also Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the **states have no power to regulate the affairs of Indians on a reservation**.").

The circuit court's reliance on Congress's plenary power is an impermissible interference with that power. States cannot meddle with tribal sovereignty without congressional approval. This expansive reading of HRS § 832-1 does just that. The circuit court erred by using Congress's special relationship with Native American tribes to justify the extradition demand.

5. Conclusion

The circuit court has erred. The plain and inescapable language of the State and federal extradition statutes and the United States Constitution do not authorize the Pascua Yaqui Nation to make extradition demands on Hawai'i. The tribe's power to prosecute criminal defendants stems from its inherent sovereignty making it distinguishable from is any territory of the United States. Finally, the circuit court's ruling allows the States to interfere with tribal affairs and undermines Congress's plenary power over them.

These errors cannot stand. It is respectfully requested that this Court vacate the order denying the Accused's motion and remand the case with instructions to dismiss the proceedings below.

Dated: Wailuku, Maui, Hawai'i: August 16, 2023.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Attorney for Appellant