IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

No. CR 21-1510 KWR

Plaintiff,

vs.

CHRISTOPHER MARQUEZ,

Defendant.

OPPOSED MOTION TO DISMISS THE INDICTMENT BECAUSE THE MAJOR CRIMES ACT VIOLATES THE U.S. CONSTITUTION

COMES NOW the Defendant Christopher Marquez, by and through his counsel Brian Pori, and over the objections of Assistant United States Attorney Mark Probasco, counsel for the United States, and respectfully petitions this Honorable Court to dismiss the charges in this case because the Court lacks subject matter jurisdiction over the offenses alleged in the Indictment. Mr. Marquez respectfully submits that this Honorable Court lacks the jurisdiction to try him for the crimes alleged in the Indictment because the Major Crimes Act (18 U.S.C. § 1153), which ostensibly grants this Honorable Court jurisdiction of the assimilated charges of assault and child abuse in the Indictment, violates the sovereignty of the Pueblos of New Mexico which was guaranteed in the Treaty of Guadalupe Hildago and the Act also violates the Fifth and Sixth Amendments of the United States Constitution. In support of this opposed Motion counsel states:

1. On October 14, 2021, a Grand Jury sitting in this District indicted Mr. Marquez, accusing him as an enrolled member of the Okay Owingeh Pueblo of harming a child under the age of 18 resulting in great bodily injury (in violation of 18 U.S.C. § 1153 and N.M.S.A. § 30-6-1 (D)), and with chocking and sexually battering an intimate partner (in violation of 18 U.S.C. §1153, 113(a)(8), 2266(7)(B), 2244(a)(2), 2246(3)). The crimes were alleged to have occurred in the Pueblo of Okay Owingeh, which the Indictment alleges is "Indian Country."

2. The Indictment was filed in this Court because the Major Crimes Act, 18 U.S.C. § 1153, provides federal courts with the exclusive jurisdiction to prosecute various, enumerated felonies allegedly committed by Native Americans in native enclaves.

3. Mr. Marquez contends that the Major Crimes Act is unconstitutional as applied in his case because Congress lacked the authority to divest the New Mexico Pueblos of their inherent sovereignty to prosecute their citizens for crimes committed in their Pueblos. This sovereignty was recognized by the Treaty of Guadalupe Hildago and is protected by the Bill of Rights of the New Mexico Constitution which provides, in part, that the rights guaranteed by the Treaty "shall remain inviolate."

4. Mr. Marquez submits further that the Major Crimes Act is unconstitutional as applied in his case because it is vague and does not give him clear notice of the crimes he was alleged to have committed or even if those crimes actually come within the purview of the Major Crimes Act. He also claims that the Act

deprives him of his right to be tried in the vicinage of the alleged offense and treats him far more harshly than a similarly situated non-native accused of the same offense in the District Courts of the State of New Mexico by divesting him of a panoply of procedural and substantive rights which are otherwise accorded to all citizens of New Mexico and by subjecting him to a more severe potential punishment, just because he is as a Native American, in violation of the equal protection clause inherent in the Due Process Clause of the Fifth Amendment and the fair trial portions of the Sixth Amedment,.

5. Assistant United States Mark Probasco, counsel of record for the United States has been informed of this Motion and Mr. Probasco reports that the United States opposes the Motion.

Memorandum in Support of Motion

Defendant Christopher Marquez is an enrolled member of the Okay Owingeh Pueblo in Northern New Mexico, which is located north of the City of Espanola. Okay Owingeh is a sovereign nation which predates the founding of the United States of America by hundreds of years. At the end of the Mexican-American war in 1850 Okay Owuingeh became part of the New Mexico territory after the United States and Mexico signed the Treaty of Guadalupe Hildago. When New Mexico was admitted to the Union as the 47th State in 1912, the New Mexico Constitution specifically guaranteed all citizens within the state, including the Pueblo Peoples, the rights which

were originally protected by the Treaty and declared that thoe rights would remain inviolate. N.M. Const., Art. II, § 5..

In the fall of 2021, Mr. Marquez was arrested by Okay Owingeh tribal police and detained by the tribal court in the Santa Fe County Adult Detention Facility to answer for the charges which largely form the basis of Indictment in this case. Mr. Marquez was defending the charges against him in tribal court when the United States Attorney obtained a Writ of Habeas Corpus Ad Prosequendum directed, not to the Governor of the Okay Owingeh Pueblo, but to the Sheriff of Santa Fe County. (Doc. 2.) Mr. Arquez was brought into federal custody and he was arraigned on the charges set out in the Indictment.

The United States asserts jurisdiction to prosecute Mr. Marquez in this Court based on the Major Crimes Act, 18 U.S.C. § 1153. The Act provides federal courts with the exclusive jurisdiction to try Native Americans for the following felony crimes committed in a Native American enclave:

> "murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery and a felony under section 661 of this title." *United States v. Ganadenegro,* 854 F,Supp.2d 1068, 19075 (D.N.M. 2012).

The Major Crimes Act divests the Nation's first sovereigns of their inherent jurisdiction to try their own citizens for crimes committed in their state, even if that right was previously protected by a treaty between the United States and the Native

sovereign. The United States Supreme Court upheld the constitutionality of the Major Crimes Act in *United States v. Kugama,* 118 U.S. 375 (1886), reasoning that the United States' had inherent and implied federal powers over native tribes.

Mr. Marquez respectfully submits that in the nearly one hundred and fifty years since *Kugama* was decided, experience and awareness has shown that the reasoning of *Kugama* is seriously flawed. Today it plainly appars that the plenary power of the United States to regulate Native people does not provide the United States with either the moral or the legal authority to unilaterally divest native tribes of their jurisdiction to try their citizens for crimes committed in their country, especially when that sovereign right is guaranteed by treaty. Mr. Marquez submits further that, assuming *arguendo,* the Major Crimes Act continues to survive constitutional scrutiny, the Act is still unconstitutional as applied in his case because the Act is vague, it deprives him of his constitutional right to be tried in the vicinage of the crime and it divests him of a slew of procedural protections which are afforded to non-natives charged with the same crime in the State Courts of New Mexico solely on the basis of his race, in violation of the equal protection of the law which is fundamental to the Fifth Amendment's guarantee of due process. Mr. Marquez respectfully requests that this Honorable Court dismiss his case because, if the Major Crimes Act does not apply, the Court lacks subject matter jurisdiction over the offenses charged in the Indictment.

I. Congress' Plenary Power to Regulate Native Nations does not Authorize the United States to Unilaterally Divest Tribes of Their Sovereign Authority to Try Their Citizens in Their Courts for Crimes Committed within Their Jurisdiction.

Native tribes are inherently sovereign. "Although physically within the territory of the United Stat\es and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations." *United States v. Wheeler,* 433 U.S. 313, 322 (1978)

Federal jurisdiction over crimes committed by Native people is anomalous and of a complex character "due to the Indian (*sic)* tribes' status as quasi sovereign government entities." *United States v. English,* 658 Fed.Supp.3d 991, 994 (D. Colo. 2023). Although the sovereignty of the tribes is subject to regulation by Congress, Native nations retain their inherent, sovereign powers, including the jurisdiction to punish crimes occurring in their borders. *Ibid*, citing *United States v. Wheeler, supra,* 435 U.S. at 323. Even today, except for the specifically enumerated offenses in the Major Crimes Act, federal courts lack the authority to adjudicate every native crime and tribes retain their inherent sovereignty to prosecute their citizens for criminal offenses committed within their boundaries. *United States v. Antelope,* 430 U.S. 641, 643, n. 1 (1977), see also *English,* 658 Fed.Supp.3d at 994 (D.Colo. 2023).

The U.S. Supreme Court and the U.S. Court of Appeals for the Tenth Circuit have both recognized that the Major Crimes Act violates promises of tribal self government which the United States made to numerous tribes in the 374 treaties it

signed with indigenous nations. With the passage of the Major Crimes Act, the United States Government simply broke all of the treaty promises it made to assure tribes that they would retain the authority of self government, including the right to try their own citizens for crimes committed within their' jurisdiction. See, e.g., *U.S. v. McGirt,* 1 F.4th 755 (10th Cir. 2023). See, e.g., *U.S. v. McGirt,* 71 F.4th 755 (10th Cir. 2023), *McGirt v. Oklahoma*, — U.S. —, 140 S.Ct. at 2480, see also *id.* at 2459 ("By subjecting Indians (*sic*) to federal trials for crimes committed on tribal lands Congress may have breached its promise to tribes . . . that they would be free to govern themselves.") Instead, both the Supreme Court and the Tenth Circuit have determined that "the breach of a promise, the significance of which we do not minimize, does not nullify Congress' grant of criminal jurisdiction in the Major Crimes Act." *United States v. McGirt, supra,* 71 F.4th at 773. The result is that the United States' shameful history of unilaterally abrogating the promises it made to every Native tribe in every "Indian" treaty it ever signed has been condemned with words but it has not diminished the scope of the United States' plenary authority over the ancestors of people who have lived her for thousands of years.

This result is utterly inconsistent with the common law of contracts and the international law of Treaties and is, in fact, proof of nothing more than an ongoing fraud. Under the Rule of Law pomises made in treaties are biding. Treaties may only be ratified by 2/3 of the U.S> Senate and, when ratified, they become the Supreme Law. At home the United States Government is obligated to ensure compliance with

its Treaty obligations to other nations and abroad the United States has consistently rejected the notion that signatories to its treaties may unilaterally revoke the Treaty and free themselves from the promises they made which induced the Treaty. Instead, both the executive and judicial branches of our government have insisted that a Treaty between the United States and a foreign power may not be unilaterally abrogated without the consent of the United States. *Terlinden v. Ames,* 184 U.S. 270, 287 (1902). Our Government points to the international law of Treaties to describe its position when a signatory to a treaty attempts to break its promises:

> "where a treaty is violated by one of the contracting parties, it rests alone with the injured party to determine if the treaty is broken, the treaty being, in such a case, not absolutely void but voidable at the election of an injured party who may . . . demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture." *Id.* at 287-288.

The general notion that the United States never had the right to remove the sovereign power of Native tribes to regulate their own affairs and prosecute their own crimes is even stronger when analyzed under the treaties (or more accurately the lack of treaties) affecting the Pueblo people of Northern New Mexico. During the Spanish colonial rule there were special laws for the Pueblo people, including laws protecting the integrity of Pueblo lands. After the Pueblo Revolt of 1860 although Native peoples were not thought to be citizens of Spain, they were readily recognized as citizens of their unique Pueblo. When Mexico obtained its independence from Spain, the notion of citizenship changed: every person in Mexico was considered to be equal

under the law, the Pueblo people were regarded as full citizens, protective laws were eliminated and communal Pueblo land could be converted to private ownership. Beverly Rosen, *Pueblo Indians and Citizenship in Territorial New Mexico,* New Mexico Historical Review, Viol. 78, no. 1, p. 1. fn. 1 (2003).

These were the settled practices which the United States encountered when it went to war with Mexico in 1846. At the end of the Mexican-American war, the United States signed the Treaty of Guadalupe Hildago with Mexico. The Treaty provided that the property and civil rights of Mexican nationals, including Pueblo people, living in the territory of New Mexico would be guaranteed. It was envisioned that these former citizens of Mexico would become full citizens of the territory of New Mexico and they were allowed to continue to freely reside in the lands where they lived, their property rights remained intact and they were guaranteed the free enjoyment of liberty. See National Archives at archives.gov/milestone-documents/treaty-of-guadalupe-hildago.

When the Northern Pueblos joined the Union, treaties between Native nations and the United States were limited in scope. Most treaties operated on the premise that all rights not granted to the United States were reserved to the tribes and its citizens. R. Rodriquez et al., "The Treaty of Guadalupe Hildago; Still Relevant Today" *Dialogo,* DePaul University Library, Vol. 3, no. 1, Article 6 (1996). In addition to these reserved rights retained by the people of the Northern Pueblos, there

were never amy ratified treaties and few extant laws which regulated Pueblo life and nothing to diminish the Pueblos' role as a "sovereign within a sovereign.".

The United States, through its territorial governors and Indian agents, regarded the Pueblos of Northern New Mexico differently from people from other native tribes, many of whom were considered to be "savages." Instead, the officials who were charged with "administering" the newly incorporated ancient tribes regarded the Pueblo people as "half civilized" due to the fact that they lived a settled life in towns, they supported themselves through agriculture instead of hunting and they had a stable political structure which allowed them to maintain peace with their neighbors. B Rosen, *supra,* pp. 2-3. Thus, rather than regulating the tribes and oppressing them under the benevolent notion of a "special relationship," when it came to the Pueblo peoples there were virtually no federal statutes which were directed at regulating the commerce and intercourse between Pueblo people and the Government. The few laws which were specific to the new citizens of the Northern Pueblos recognized the Pueblo people's right to sue in the courts of the United States to defend their land, did not subject the Pueblo people to the "wardship" of the federal government, and exempted the Pueblo people frm the Trade and Intercourse Acts because they lived on land acquired from Mexico. In addition the sole treaty which a Territorial Governor negotiated with the Pueblo peoples to bring them within the special "protection" offered by the United States was never ratified by the U.S. Senate. Thus, by the mid-

1860s many officials in the federal government assumed that no part of the Northern Pueblos were "Indian Country." *Id.* at pp. 5-6.

The sovereign status of the Northern Pueblos was recognized at the time New Mexico became a state in 1912. The rights of the Pueblo people as they existed when Mexican land was ceded to the United States were enshrined in the Bill of Rights of the New Mexico Constitution. In particular, Article II, section five provides "that the rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hildago shall be preserved inviolate."

Taken together, the laws, history and practical experience of the Northern New Mexico Pueblos make it clear that the Pueblos never surrendered their sovereign rights at any point while living in the United States and are not subject to the "special protection" the United States accords other native people. Because the Pueblo people have maintained local rule through their extant political system since they became a part of the United States, there is no basis for requiring the Pueblos to be subsumed within the requirements of the Major Crimes Act, and no authority which will allow the federal government to defy the Treaty of Guadalupe Hildago or divest New Mexican citizens of the rights enshrined in the New Mexico Constitution.

II. The Major Crime Act, as Applied in this Case, Violates the Fifth and Sixth Amendments of the United States Constitution.

Mr. Marquez respectfully submits that the Major Crimes Act, as applied to his case, violates the Fifth and Sixth Amendments of the United States Constitution for

multiple reasons. First he contends that, with the inclusion of crimes "assimilated from state court" the crimes charged are vague, do not give him fair notice of the alleged criminal conduct and may even exceed the narrow scope of the Major Crimes Act. Second he submits that by wresting jurisdiction of the case from the Okay Owingeh tribal court and transferring the case to this Court he has been denied his constitutional right to be tried in the vicinage where the crime is alleged to have occurred. Finally he submits that he is being subjected to less procedural safeguards and a more severe potential sentence in this prosecution solely because of his status as a Native person, in violation of his right to enjoy the equal protection of the law, free from invidious racial discrimination.

A. The Major Crime Act Offenses Alleged in the Indictment are Unconstitutionally Vague.

Mr. Marquez alleges that he is being denied his Fifth Amendment right to the Due Process of Law because the Major Crimes Act and its concomitant assimilative state crimes are unconstitutionally vague. Mr. Marquez submits further that the vagueness which permeates the Act has infected the Indictment in this case, rendering the four charged counts so unclear and confusing so that he cannot say with certainty what criminal offenses he has allegedly committed.[1]

[1] Mr, Marquez has filed a Motion for a Bill of Particulars as a part of his efforts to challenge what he argues is an inadequate indictment and remedy his confusion surrounding the charges so that he can prepare his defense (Doc. 89)

The void-for-vagueness doctrine requires that a penal statute define a criminal offense with sufficient clarity so that an ordinary person can understand what acts are prohibited and so that the law is not interpreted in a manner that encourages arbitrary or discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Of these two, the more important aspect is to ensure that all legislation is sufficiently clear so as to provide guidelines for law enforcement, juries and courts to follow in discharging their responsibility of identifying and evaluating allegedly illegal conduct." *United States v. Gaudreau,* 860 F.2d 357, 360-61 (10th Cir. 1988). A statute is unconstitutionally vague if its language and construction by the Court vests authority in law enforcement officers, prosecutors and juries to assign their own, subjective meaning to an element of a criminal offense. *Kolender,* 461 U.S. at 358. The Court in *Kolender* was concerned about the potential to exploit vague laws and thereby "furnish a tool for harsh and discriminatory enforcement by local prosecuting authorities against particular groups deemed to merit their displeasure." *Id.* at 360.

A law can be unconstitutionally vague on its face or in its application, but most courts will not entertain a facial challenge to a purportedly vague law unless the law threatens First Amendment interests. *United States v. Walker,* 4 F.4th 1163, 1184 (10th Cir. 2023). In all other instances, "vagueness challenges . . . must be examined in light of the facts of the case at hand." *Ibid*.

Mr. Marquez contends that with the inclusion of "assimilative" crimes in the Major Cries Act, Congress transformed a narrow law which was meant to apply in

rare and serious cases into a general law which vastly expanded federal jurisdiction over the lives of Native people without any accompanying guidelines to prevent arbitrary or discriminatory enforcement of the law. By adding assaults with a deadly wepon, assault with serious bofily injury and assault on a person who has not reached the age of18, Congress expanded the Major Crimes Act, further intruded on Native American sovereignty and made every case of felony assault by a Native a federal offense without any limitation.

Mr. Marquez contends that this case is the result of the expansion of the Major Crimes Act without limit or restraint. In addition to the obvious vagueness of the Indictment which Mr. Marquez has sought to correct with a Motion for a Bill of Particulars (Doc. 89) Mr. Marquez also contends that the law is vague in its enforcement. Mr. Marquez does not know why his case of alleged assault is in federal court or how the United States Attorney's Office for the District of New Mexico decides which cases of felony assault it chooses to prosecute, or even if the U.S. Attorney simply prosecutes all felony assaults committed by Native people in any Natie enclave in this District. What he does know is that the U.S. Attorney for this District has the discretion to prosecute alleged violations of the Major Crimes Act and that the Office exercises that discretion without any clear guidelines. Therein lies the evil sought to be prevented by vague laws and the proof of a constitutional violation., making the assimilative crimes 'the tool for harsh and discriminatory enforcement" which was condemned in *Kolender.*

B. The Major Crimes Act Deprives Mr. Marquez of his Sixth Amendment Right to be Tried in the Venue Where the Crime Was Alleged to Have Been Committed With a Jury Drawn from the Appropriate Vicinage.

Mr. Marquez contends that, as applied, the Major Cries Act violates his Sixth Amendment rights to a public trial held in the venue where the crime was allegedly committed with a jury drawn from the appropriate vicinage. Mr. Marquez submits that because most Native enclaves are so remote and because the distances between Native communities and the major metropolitan centers where most federal trials take place make compliance with the venue and vicinage clauses of the United States Constitution practically impossible**.**

The Venue Clause of the U.S. Constitution mandates that **"**the Trial of all Crimes . . . shall be held in the State where the . . .crimes shall have been committed. U.S. Constitution, Art. III, cl. 2., The Vicinage Clause goes even farther and guarantees the right to an impartial jury drawn from the State and District where the crimes were committed. Considered together the Venue Clause and the Vicinage Clause make it clear that all criminal trials in the United Stats must take place in the state where any part of the crime was said to have occurred and that the jury must be drawn from the district within the state where the offense took place.

At common law the vicinage right presumptively entitled defendants to a jury drawn from the "neighborhood "where the crime allegedly occurred. *Smih v. Unied States,* 599 U.S. 236*,* 246 (2023). The right was deeply rooted in the "inestimable

privilege of being tried by the peers of the vicinage." *Id.* at 247. Consequently, when the nation was founded the venue and vicinage clauses created a venue requirement which was constitutionally mandated: trials were to be held at the location of the crime and the "inhabitants whereof" were to be summoned to serve on the jury. The venue and vicinage "rights" are fundamental and became an essential part of the Sixth Amendment

One of the principal failings of the Major Crime Act is that it often compels Native Defendants to stand trial in communities which are far from the place where the crime was allegedly committed before jurors who are alien to them and who have no knowledge or understandi**n**g of their traditional values. Instead, Native Defendants accused of major crimes are often committed to federal pre-trial custody and detained in jails and tried in a federal courtrooms that can be,as in this case, hundreds of miles from their home. The Major Crimes Act can even imperil the simple mandate for a public trial because the significant distance between a Native enclave and the major metropolitan center where most trials are held prevents family members and other concerned citizens from participating in the trial process.

When Mr. Marqez was detained by tribal authorities he was facing a trial in the venue where the crime was alleged to occur and, even if he did not receive a jury trial, he was certain to face a trier of fact from the Okay Owingeh Pueblo to sit in judgment in his case. Now that the case has been transferred to this Court, 95 miles awayu from the Pueblo, the venue and vicinage have shifted so that it is practically certain that, if

the case proceeds to trial, not one of the jurors will be from Okay Owingeh and it isquite possible that not one of the jurors will even be from any of the Northern Pueblos. Mr. Marquez contends that his fundamental right to a jury of hs peers drawn from the vicinage of the crime has been violated and that the only way to ameliorate the harm is to either empanel a jury drawn from the Pueblo or dismiss the case.

C, By Denying Mr. Marquez the Myriad of Benefits he Would Receive if he Were Tried in State Court, Mr. Marquez is being Treated Differently than a Similarly Situated Non-Native Defendant Charged with the Same Crime.

The prosecution of a felony offense in a United States District Court is as different from a prosecution in the District Courts of the State of New Mexico District Courts as night is from day. If Mr. Marquez's trial on assimilative state charges were held in the state courts of New Mexico, he would be entitled to a myriad of procedural protections which have been stripped away from him now that he is awaiting trial in this Court. As a result, Mr. Marquez is being treated differently than other non-Native defendants charged with the same offense based solely on his status as a Native American in violation of his constitutional right to the equal protection of the laws.

The Fifth Amendment does not contain an express equal protection clause, but the United States Supreme Court has held that the Amendment prohibits all acts of discrimination by the federal government which are so unjustifiable as to violate due process. *United States v. Boone,* 347 F.Supp. 1031, 1034 (D.N.M. 1972), citing *Bolling v. Sharpe,* 347 U..S. 497 (1984). The Supreme Court has also recognized that

any classification based on race or national origin is subject to strict judicial scrutiny and will only survive such review if the challenged law is narrowly tailored and justified by a compelling state interest. *Ibid*, see also *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200,227 (1995)

In *U.S. v. Boone* the District Court confronted a case where the racial differentiation between Native people facing a charge of aggravated assault in U.S. District Court and all other defendants facing the same charge in state courts resulted in a lowered burden of proof for federal prosecutors. *Boone,* 347 F.Supp. at 1034 District Court. Judge Bratton was convinced that the only reason for the disparate treatment was to specifically disadvantage Native defendants and make it easier to convict them. He commented that this differentiation "results in disadvantages to the defendant and it is difficult to see any benefits to Indians (*sic*) generally." *Id.* at 1035. Although the United States argued that the distinction was a part of its plenary power over Native Americans, Judge Bratton determined that the Fifth Amendment prevents the Government from acting arbitrarily, particularly in criminal law cases: "In this context where the power of the State weighs most heavily on the individual or the group, [a court] must be particularly sensitive to the policies of the Equal Protection Clause." *Id.* Judge Bratton concluded his analysis by holding that the lower standard of proof in federal court was based solely on the Defendant's status as a Native American and that this race-based classification was not reasonably related to a

compelling state interest and, therefore, violated the Due Process Clause therbyjustifying a dismissal..

Mr. Marquez contends that the same result should follow in this case. If Mr. Marquez were tried in a District Court in the state of New Mexico instead of a U.S. District Court he would enjoy a number of more expansive rights which are favorable to the Defendant than the procedural rights he would have in this Court. First and foremost he would have the opportunity to conduct pre-trial witness interviews with the complaining witnesses. He would also be entitled to impose a peremptory challenge to the assigned judge. Finally he could ensure that his potential jury panel is drawn from a more representative cross section of the community through the use of voter registration rolls (as in this Court) **and** driver's license records (unlike this Court).

In addition to the advantages a Defendant enjoys in New Mexico District Court which are not provided in this Court, Mr. Marquez also faces the prospect of a more severe federal sentence than the sentence he would face if he \was convicted in the New Mexico District Court. In 2003 the Native American Advisory Group reported to the United States Sentencing Commission that, given similar conduct, Native American aggravated assault defendants received longer sentences in federal courts than in state courts. Because Native Americans are usually prosecuted federally for assaults, the result is that Native Americans often received significantly longer sentences for assault convictions than their non-Native counterparts in state court,

sometimes four times longer.[2] Although precise sentencing data is sparse, in 2016 the Tribal Issues Advisory Group confirmed that Native Americans sentenced in federal court for felony assault consistently received longer sentences than non-Natives sentenced for the same or similar offense in the surveyed state courts.

There can be no doubt that Mr. Marquez will be seriously disadvantaged by a trial in this Court in comparison to a trial in a New Mexico District Court. Mr. Marquez will likely be afforded fewer potentially beneficial procedural rights and he will be denied a jury f his peers while at the same time facing the likelihood of a far more severe sentence if he is convicted in federal court. All of these disadvantages are solely attributable to Mr. Marquez's status as a Native American. Consequently, Mr. Marquez respectfully submits that, as in *Boone*, this facially discriminatory statute, replete with an explicitly racial categorization, cannot be reconciled with the promise of the equal protection of the law as provided by the Fifth Amendment of the United States Constitution and Article II, section 18 of the New Mexico Constitution.

However, despite the clear reasoning of *Boone* and its factual similarities to this case, apposite authority allows Courts in our country to reject equal protection challenges to federal jurisdiction over major crimes in Native enclaves by relying on a

---

[2] In *United States v. Begay* 974 F.3d 1172 (10th Cir. 2020) the Office of the Federal Public Defender compiled a list of sentences for first time offenders convicted of the felony offense of assault with great bodily injury in the Second Judicial District Court in Albuquerque. This survey disclosed that a signifiant majority of first time offenders received a sentence of probation; in contrast under the United States Sentencing Guidelines first offenders convicted of felony assault received sentences ranging from 41 to 51 months.

rhetorical sleight of hand. Although Mr. Marquez contends that the Major Crimes Act is facially discriminatory because it imposes an unjust trial and sentencing scheme which is explicitly directed at "Indians.," and consistently punishes them more severely than their non-Native counterparts, the United States Supreme Court has consistently rejected these types of challenges by holding that the designation "Indian" is a political rather than a racial classification and that political classifications are not suspect classes for purposes of Equal Protection analysis. *United States v. Antelope,* 430 U.S. 641 (1977). Therefore, despite the explicit racial classification of "Indians" in the Major Crimes Act and the seemingly intentional effort to punish Natives more severely than non-Natives by exclusively prosecuting some serious felonies in federal court, the Supreme Court does not believe these efforts violate the Equal Protection Clause.

Nevertheless the Constitution is not static and that transcendent document is not a dead letter. On the contrary, the terms of our national compact are subject to reassessment and reconsideration with the passage of time based on "the evolving standards of decency which mark a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The Constitution embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency. *Ibid.* Therefore, Mr. Marquez seeks to set aside existing precedent by arguing that the notion that Native people are not a suspect class is not only factually incorrect, there would be no impediment to recognizing Native peoples "political" identity while still permitting equal protection challenges to

attack racuist laws in those situations where laws which target Native people seriously disadvantage Natives without providing any benefits to Native people.

The suggestion that Native people are a political class but not a race is not only nonsensical, it ignores the enduring power of racism which has shaped the United States' relations with its Native people since the founding of this country. Indeed the very existence of a "special relationship" with "trust obligations" was born in, and has been nurtured by, racism. To deny Native American citizens the right to pursue an equal protection challenge in the face of a racist law which targets Native people is to perpetuate, not ameliorate, an ignoble history of discrimination based on race.

At the nation's founding "Indian affairs were more the product of military or foreign policy than a subject of domestic or municipal laws." *Haaland. v. Brackeen,* 599 U.S. 255, 274 (2023). Over time Congress' power over Native peoples grew with laws affecting the Indian Commerce Clause, and the exercise of Congress' authority under the Treaty Clause. *Ibid*. Informing all of Congress' legislative efforts in "Indian Country" was an ostensibly special "trust relationship between the United States and the Indian people." *Id.* at 274-275. Ideally the federal government has charged itself "with moral obligations of the highest responsibility and trust" toward "these dependent and sometimes exploited people." *Ibid.*

The notion that the affairs of Native people need to be "managed" or "regulated" or "administered" is as old as the nation itself and was born in racist misconceptions of Native people. When the Framers of the Constitution, spoke of the

need to regulate and protect the affairs of indigenous people they were not acting out of an enlightened respect for an traditional culture which has existed in this country for more than 2000 years. Instead when the federal Government assumed a "special" relationship with indigenous people and exercised plenary power over "Indians" the United States' motives were avaricious not altruism.

Prior to the formal creation of the United States of America Native people were given small pox infested blankets and were often tricked or swindled out of property. For the first 100 years of our country following its founding at best Native people were seen as "half civilized" and, at worst, they were regarded as "savages." After the Civil War when the United States Government confronted the challenges in "Indian Country" the primary focus of federal authorities was to either segregate Native people from non-native People (thus the "long march" from Dine to Fort Sumner) or to wage war against countless Native people in an effort to end the war of attrition between tribes and travelers. With the passage of the Dawes Act, the United States Congress enabled the largest transfer of Native property to non-Natives in our Nation's history. Then came more segregation, boarding schools and efforts to prevent Native people from voting.

It can be argued that the Major Crimes Act is a vestige of these racist policies and the 21st Century equivalent of smallpox-infested blankets. That is why the suggestion that Native people are a political class and not a race make no sense and why it is particularly unjust to deny Native people the most powerful weapon this

Country has ever produced to end racism (the Equal Protection of the Laws) in the battle to challenge a law which seriously disadvantages Native people solely on the basis of their race without providing them a single, identifiable benefit.

WHEREFORE, for all of the foregoing reasons, Defendant Christopher Marquez respectfully requests that this Honorable Court dismiss this case because the Major Crimes Act violates his Fifth and Sixth Amendment rights by depriving him of his right to be free from vague laws, to be tried in the vicinage were the alleged offense was to have occurred and to enjoy the equal protection of the laws.

Respectfully submitted,

/s Brian A. Pori 4/15/24
Brian A. Pori
Attorney at Law
204 Bryn Mawr NE
Albuquerque, NM 87106

Counsel for Christopher Marquez

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2024 I filed the foregoing Motion through the District Court CM/ECF electronic filing program which caused a copy of the pleading to be electronically delivered to counsel for the United States addressed as follows:

Mark Probasco Esq.
United States Attorney's Office
P.O. Box 607
Albuquerque, NM 87103

/s Brian A. Pori 4/15/24
Brian A. Pori