IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. **CHRISTOPHER MARQUEZ**, Defendant.	)))))))))	Cr. No. 1:21-01510 KWR

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BECAUSE THE MAJOR CRIMES ACT VIOLATES THE U.S. CONSTITUTION

The United States respectfully asks the Court to deny Defendant's motion to dismiss. Doc. 92 ("Motion"). Defendant's Motion is largely a retread of over a hundred years of well-settled precedent and should be denied.

BACKGROUND

On October 14, 2021, a federal grand jury indicted defendant Christopher Marquez for the following: (1) abuse of a child, in violation of N.M. Stat. Ann. §. 30-6-1(D); (2) assault of a spouse or intimate partner by strangling or suffocation, in violation of 18 U.S.C. §§ 1153, 113(a)(8) and 2266 (7)(B); and (3) abusive sexual contact, in violation of 18 U.S.C. §§ 1153, 2244(a)(2) and 2246(3). Doc. 2. Defendant's crimes are federal offenses under the Major Crimes Act because the United States charged that Defendant, an "Indian," committed these crimes against another "Indian" in "Indian Country," as defined in 18 U.S.C. § 1151(a). *See* 18 U.S.C. §§ 1152, 1153(a).

DISCUSSION

I. *Congress's Plenary Power Authorizes Prosecution of Defendant, an Indian, for Child Abuse as to Jane Doe 1 and Assault and Sexual Abuse Against Jane Doe 2 in Indian Country*

It is well settled that Congress has plenary authority to regulate Indian affairs. *See United States v. Kagama*, 118 U.S. 375, 369 (1886). This absolute power "to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). *See also* William C. Canby, Jr., American Indian Law 2, 11-12 (2d ed.1988) (discussing federal power over Indian affairs).

In the Indian Major Crimes Act of 1885, Congress chose to "place[ ] under the jurisdiction of the federal courts Indian offenders who commit certain specified major offenses." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 (1978) (*citing* Act of Mar. 3, 1885, § 9, 23 Stat. 385, now codified, as amended, 18 U.S.C. § 1153). The Indian Major Crimes Act "authorizes the prosecution in federal court of an Indian charged with the commission on an Indian reservation of certain specifically enumerated offenses." *Keeble v. United States*, 412 U.S. 205, 205-06 (1973). In 1886, the Supreme Court upheld the Indian Major Crimes Act as within the power of Congress to regulate Indian criminal activity in Indian Country. *Kagama*, 118 U.S. at 384-85. The Court's decision in *Kagama* is absolute. *See, e.g., United States v. Antelope*, 430 U.S. 641, 648 (1977), *Keeble*, 412 U.S. at 209; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-67 (1903); *United States v. Thomas*, 151 U.S. 577, 585 (1894). Even in more recent years, the Court has assumed the constitutionality of the Indian Major Crimes Act. *See, e.g., Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Oliphant*, 435 U.S. at 203-04 & n. 14. For example, in *Negonsott* the Court stated: "[a]s

the text of § 1153 . . . and our prior cases make clear, federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction." *Negonsott*, 507 U.S. at 103, 113 S. Ct. at 1122 (citations omitted).

II. *Defendant's As-Applied Challenge Fails Where Classification in Statute is Premised on Political Status of Indians*

As conceded by the defense, the Supreme Court has answered the question about whether Federal classification runs afoul of equal protection – it does not. Doc. 92 at 21. Congressional legislation concerning Indian affairs is not racial because it is based on political status of Indians. *Antelope*, 430 U.S. 641 at 646 ("federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as a 'separate people' with their own political institutions ...") (quoting *Morton*, 417 U.S. at 553, n.24); *see also Felix Cohen*, Cohen's Handbook of Federal Indian Law § 14.01[2][b][ii] ("The unique status of Indian tribes under the Constitution and treaties establishes a legitimate purpose for singling out Indians as a class.") Defendant's argument runs contradictory to well-established Supreme Court precedent holding that the Major Crimes Act is not based on impermissible racial classifications. *Antelope*, 430 U.S. 641 at 646-47. Because Defendant's argument is foreclosed by precedent, it should be summarily denied.

III. *Defendant's Void-for-Vagueness Challenge Fails Where State Criminal Statutes Provide Appropriate Notice of What is Condemned by the Law*

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *United States v. Kim,* 449 F.3d 933, 941 (9th Cir. 2006) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). Vague laws that do not infringe upon First Amendment rights have two principle evils: (1) they do not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly";

and (2) they encourage arbitrary and discriminatory enforcement by not providing explicit standards for policemen, judges, and juries. *Id.* at 941-42 (quoting *Grayned,* 408 U.S. at 108-09) (footnote omitted). "[V]agueness challenges to statutes that do not involve First Amendment violations must be examined as applied to the defendant." *Id.* at 942 (citing, *inter alia, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 n.7 (1982)).

Using state criminal statutes to define crimes enumerated in the Major Crimes Act provides "appropriate notice of what was condemned by law." *United States v. Burnside,* 831 F.2d 868, 870 (9th Cur, 1987). Although felony child abuse is not a common law crime, its constituent characteristics are easily understood. "Felony" limits the prohibited acts to "serious crime[s] usu[ally] punishable by imprisonment for more than one year or by death" and expressly distinguishes misdemeanors. *Black's Law Dictionary* 694 (9th ed. 2009); *accord* 18 U.S.C. § 3559(a)(1)-(5) (classifying felonies as offenses punishable by imprisonment of "more than one year"). "Child abuse" limits the crime to "[i]ntentional or neglectful physical or emotional harm inflicted on a child." *Black's Law Dictionary* 11; *accord* 18 U.S.C. § 3509(a)(3) ("[T]he term 'child abuse' means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.").

Defendant's conduct falls squarely within these parameters. A reasonable person would anticipate that severely beating a young child to the point of causing the kinds of injuries Jane Doe suffered would violate a law barring intentional physical harm inflicted on a child in a manner serious enough to warrant imprisonment of a year or more. Certainly under New Mexico law, child abuse has survived such scrutiny. *Santillanes v. State*, 115 N.M. 215, 1993-NMSC-012, ¶ 24 (there is no basis for declaring the child abuse statute unconstitutional under the void for vagueness or overbreadth doctrines, both of which find their genesis in the due process clause. Major Crimes

Act crimes have long been interpreted to criminalize categories of conduct, rather than to incorporate only crimes sharing the same title. *See Burnside*, 831 F.2d at 871.

IV. *Defendant's Vicinage Argument Fails to Meet the Stringent Standard for the Extraordinary Relief Requested*

Article III of the Constitution, supported by Rule 18 of the Federal Rules of Criminal Procedure protects the Defendant's and the community's interest in reasonable access to the adjudicatory process. U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."); Fed. R. Crim. P. 18. Rule 18 requires the court to "set the place of trial within the district with due regard for the convenience of the defendant, any victim and the witnesses and the prompt administration of justice." Neither this Constitutional provision nor Rule 18 provide for empaneling a jury drawn exclusively from any single tribal polity or subdivision of the United States. Nor does it stand for dismissing the case. *Motion* at p. 17. Notably, Defendant appears to seek through court order a rewrite of the Jury Selection and Service Act of 1968 ("the Act"), 28 U.S.C. §§ 1861-1878. This statute "governs the selection of grand and petit juries in federal court, and 'seeks to ensure that potential grand and petit jurors are selected at random from a representative cross section of the community and that all qualified citizens have the opportunity to be considered for service.' " *United States v. Contreras*, 108 F.3d 1255, 1265 (10th Cir. 1997) (internal citation omitted). Again, this retread has already been answered.

In *Duren v. Missouri*, the United States Supreme Court established a three-prong test to challenge the composition of a jury pool: (1) that the group alleged to be excluded is a "distinctive"

group in the community; (2) that the group's representation in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 363 (1979).

This test just does not require what the Defendant proposes: that vicinage is violated unless the venire is drawn exclusively from one specific tribe within the district for the jury. Defendant makes no attempt to meet the stringent standard of *Duran* and so the request for relief should be denied. Trials are necessarily conducted with a venire drawn without the exclusion based on political class sought by Defendant. Defendant fails to demonstrate the systematic exclusion of any group by a jury properly drawn within this district.

V. *Defendant's Equal Protection Argument Fails*

Federal law would not have applied if a non-Indian had committed these offenses in "Indian country" against a non-Indian. *See Antelope,* 430 U.S. at 643 n. 2, 644 & n. 4, 97 S. Ct. 1395. In *United States v. Antelope*, 430 U.S. 641, 645 (1977), the Court held "that federal legislation with respect to Indian Tribes, although relating to Indians as such, is not based upon impermissible racial classifications." Defendant believes A*ntelope* was wrongly decided and preserves for Supreme Court review his argument that the racial classification created by the Major Crimes Act, 18 U.S.C. § 1153, renders the statute unconstitutional. Squarely answered by the Supreme Court, this issue has been decided and, thus, Defendant's motion should be denied.

CONCLUSION

For the reasons explained above, the United States respectfully asks the Court to deny Defendant's Motion to Dismiss, Doc. 92.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, I filed the foregoing document electronically through the CM/ECF system, which caused the forgoing to be served on defense counsel.

/s/
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