No. 06-765

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW MEXICO,
Petitioner,
v.

DEL E. ROMERO and MATTHEW GUTIERREZ,
Respondents.

On Petition for Writ of Certiorari
to the New Mexico Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT DEL E. ROMERO

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SUMMARY OF ARGUMENT

The State of New Mexico has asked this Court to review the decision of the New Mexico Supreme Court in two consolidated criminal cases, *State v. Romero* and *State v. Gutierrez*. The sole question presented by these cases is whether various tracts of land that lie within the original boundaries of Pueblo Indian land grants that Congress confirmed and that this Court determined are Indian country--tracts that were later patented to non-Indians under the provisions of the Pueblo Lands Act, Act of June 7, 1924, ch. 331, 43 Stat. 636 ("PLA")--retain their "Indian country" status. In a soundly reasoned decision, the New Mexico Supreme Court answered that question in the affirmative. That decision is not in conflict with any decision of this Court or of any federal court of appeals. While the case was pending, moreover, Congress enacted legislation that confirmed the allocation of federal, state and tribal jurisdiction over such tracts for all future criminal cases, thus conclusively resolving the criminal jurisdiction issue. The State's contention that as a result of the decision below, "'prosecution-free' zones currently exist on certain parcels of land in New Mexico," Petition at 28, is therefore untrue. There is no need for this Court to exercise its extraordinary power of review on writ of certiorari in these cases.

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY APPELLATE COURT ON THE ISSUE PRESENTED.

In the decision below, the New Mexico Supreme Court carefully examined this Court's ruling in *United States v. Sandoval*, 231 U.S. 28 (1913), analyzed the history, purpose and meaning of the federal "Indian country" statute, 18 U.S.C. § 1151, and thoroughly reviewed the

terms of and the congressional intent behind the PLA, in light of the extensive body of case law from this Court examining the question whether a particular act of Congress that allowed the patenting of Indian lands to non-Indians had the effect of diminishing Indian country. The court reviewed in detail this Court's decision in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), and carefully applied the test laid down in that decision in finding that Pueblo lands are "dependent Indian communities" under that test. It also held that the two tracts of land at issue in these cases, that had been patented under the terms of the PLA, remain Indian country, as no "diminishment" intent could be discerned in the PLA, and it thus concluded that crimes committed by Indians on such lands remain subject to exclusive federal (or tribal), not state, jurisdiction. *State v. Romero*, 2006-NMSC-039, ¶ 26, 142 P.3d 887, 896.

The State contends that this Court should reverse the New Mexico Supreme Court, arguing that under the *Venetie* test the patented lands on which the crimes occurred in these cases could not be deemed to be Indian country. As will be explained, however, *infra*, Part II, the State simply misapplies the *Venetie* test, and nothing in that decision conflicts with the decision below. The State's claim that the federal district court for New Mexico and the Tenth Circuit Court of Appeals "have consistently decided that private, fee-simple land within the exterior boundaries of a Pueblo land grant is not a dependent Indian community," Petition at 28, is simply untrue. The only federal district court decision that supports the State's claim is *United States v. Gutierrez*, No. CR-00-M-376 H, slip op. (D.N.M. Dec. 1, 2000), a two-page unreported district court ruling on a motion, that is practically devoid of any analysis. *See* Petition at 14-15. The State's Petition also purports to rely on *United States v. Arrieta*, 436 F.3d 1246 (10th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2368 (2006), *see* Petition at 14, but that case does not discuss, and has no bearing

on, the issues addressed here, as the crime in that case occurred on land that has always been owned by the Pueblo. To counsel's knowledge, after extensive research, the Tenth Circuit has never ruled on this issue.

In fact, the New Mexico Supreme Court decision is completely in accord with the only previous reported decision on point (besides the two New Mexico Court of Appeals decisions that were reversed by the decision below), *State v. Ortiz*, 105 N.M. 308, 731 P.2d 1352 (Ct.App. 1986). In short, the decision below merely reestablishes the longstanding understanding of the jurisdictional status of privately held tracts within Pueblo grants, rejecting the aberrant view taken in *Gutierrez.*

II. THE NEW MEXICO SUPREME COURT CORRECTLY HELD THAT PUEBLO GRANT LANDS ARE "DEPENDENT INDIAN COMMUNITIES," AND THUS INDIAN COUNTRY, UNDER THE *VENETIE* ANALYSIS, AND THAT THAT STATUS HAS NEVER BEEN DIMINISHED BY CONGRESS.

Contrary to the State's assertions, the New Mexico Supreme Court expressly relied on and correctly applied this Court's *Venetie* decision. The State's argument simply misapprehends the proper purpose and application of the test this Court approved in that case. In fact, the holding in *Venetie* has special significance with respect to Pueblo lands in New Mexico, a full understanding of which requires a brief account of the distinctive history of Pueblo lands and of the relationship of the Pueblo Indian tribes to the United States government.

A. The History of Federal Authority Over Pueblo Lands Demonstrates Their Indian Country Status.

When the United States acquired the territory of New Mexico from Mexico by the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (July 4, 1848), Congress acted quickly to assert the full

measure of federal protection and supervision over the Pueblo Indians and their lands. By the Act of Feb. 27, 1851, c. 13, §§ 5, 7, 9 Stat. 574, 587, Congress extended the provisions of the Indian Nonintercourse Act[1] to the Territory of New Mexico, and it authorized the appointment of four Indian agents for New Mexico. In 1854, as a first step in ascertaining the private titles that had been established under Spanish and Mexican rule, Congress created the office of Surveyor-General for New Mexico, and it directed the Surveyor-General, as one of his first tasks, to report on the location, population, and title status of each of the Pueblos and their land grants. Act of July 22, 1854, ch. 103, § 8, 10 Stat. 308, 309. The first Surveyor-General, William Pelham, reported back to the Secretary of the Interior on September 30, 1856, noting that most of the Pueblo Indian tribes had grants of land made by the Spanish territorial governor, and recommending the confirmation of those Spanish land grants held by thirteen Pueblos. Sen. Ex. Doc. No. 5, 24th Cong., 2d Sess. (1856), at 411.

Congress acted on that recommendation, confirming all of the Pueblo grants (including those of Taos and Pojoaque Pueblos, which are at issue in the instant cases) in 1858, Act of Dec. 22, 1858, ch. 5, 11 Stat. 374. Each Pueblo was then issued a patent for the lands embraced by its grant. Thereafter, Congress regularly included the Pueblo Indians among the Indian tribes and bands being served by the federal Indian Service. It maintained agents to oversee their needs, appropriated funds for schools, agricultural implements and seed, irrigation works and other purposes, and, at least as early as 1898, employed a Special Attorney for the Pueblos to represent them in litigation in the courts of the territory. *Sandoval*, 231 U.S. at 39-40 and n.1.

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[1]The Nonintercourse Act, now codified at 25 U.S.C. § 177, prohibits any loss or transfer of lands or any interest therein by any Indian tribe except with the approval of Congress.

In 1877, however, the federal judicial branch took a different course, one that was directly at odds with established federal policy and action. In *United States v. Joseph*, 94 U.S. 614 (1877), this Court held that the Pueblo Indians could not be considered "Indians" within the meaning of the Nonintercourse Act. That decision, which appeared to take Pueblo lands out from under the protection of federal law restrictions on alienation, exacerbated the flood of non-Indian encroachments onto Pueblo lands. During the ensuing decades, thousands of non-Indians, some with deeds obtained in various ways from the tribes, some without, established homes and farms on the Pueblo grants. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240-43 (1985). But as this Court explained in *Sandoval*, notwithstanding the *Joseph* decision Congress and the executive branch continued to treat the Pueblo Indians as Indians under federal authority and supervision, like all other Indian tribes. *Sandoval,* 231 U.S. at 40-44.

Congress' determination to continue to apply federal Indian country laws to the Pueblos and their lands ultimately led this Court to reconsider the Pueblos' status. In *Sandoval*, this Court acknowledged that, in the face of *Joseph*, Congress had consistently treated the Pueblos as "dependent communities entitled to [the government's] aid and protection, like other Indian tribes," and it held that that determination "must be regarded as both authorized and controlling." 231 U.S. at 46-47. That being so, the Court upheld Congress' authority to control the entry of liquor into Pueblo grant lands, under the statute, the modern version of which is codified at 18 U.S.C. § 1154, prohibiting the introduction of intoxicating beverages into "Indian country."

By undermining the premise of *Joseph*, and holding that the Pueblo Indians were indeed Indians, whose lands were fully subject to federal superintendence, *Sandoval* "cast a pall" over the titles of the non-Indians who had settled on Pueblo lands, "suggesting that the Pueblos had

been wrongfully dispossessed of their lands." *Mountain States*, 472 U.S. at 243. The non-Indians' worst fears were soon realized. Within a few years after the decision in *Sandoval*, the United States Attorney began filing thousands of ejectment suits against non-Indians who had settled on Pueblo grant lands. The ensuing political uproar led to the enactment of the PLA in 1924, to "'settle the complicated questions of title and to secure for the Indians all of the lands to which they are equitably entitled.'" *Mountain States*, 472 U.S. at 244 (quoting S. REP. NO. 492, 68th Cong. 1st Sess. at 5 (1924)).

The PLA allowed non-Indians residing on Pueblo lands to file claims to the lands they were occupying, and if they could show that they satisfied certain criteria as to length and exclusiveness of occupancy, color of title, and payment of taxes, they would receive the equivalent of quitclaim deeds from the United States for those lands, with the Pueblos receiving compensation at fair market value. PLA, §§ 4, 6, 13. This compensation was available to be used by the Secretary of the Interior to acquire replacement lands, preferably through reacquisition of patented lands within Pueblo grants, evincing Congress' purpose to preserve the Pueblos' land bases as much as possible. *Id.*, § 19. Today, virtually all remaining non-Indian-owned lands within the exterior boundaries of Pueblo grants in New Mexico–including the tracts on which the crimes in the instant cases occurred--derive from quitclaim deeds issued to claimants under the PLA.

Two years after Congress enacted the PLA, this Court decided *United States v. Candelaria*, 271 U.S. 432 (1926), in which it expressly held that the Pueblos were "Indian tribes" within the meaning of the Nonintercourse Act, and that their lands were Indian country, fully protected by federal law. *Candelaria* expressly overruled *Joseph* and put to rest the unfortunate

aberration that it had represented. *See also United States v. Chavez*, 290 U.S. 357 (1933) (holding that Pueblo grant lands are "Indian country" within terms of predecessor to Indian Country Crimes Act, 18 U.S.C. § 1152).

B. This Court's Ruling in *Venetie* Confirmed that Pueblo Lands are "Dependent Indian Communities."

As this Court noted in *Venetie*, when Congress enacted a definition of "Indian country" at 18 U.S.C. § 1151[2] in 1948, the drafters lifted the "dependent Indian community" language of § 1151(b) "virtually verbatim" from *Sandoval*. 522 U.S. at 530. *Venetie* was this Court's first occasion to consider that language, however. The various courts of appeals had developed elaborate tests for determining whether lands owned or occupied by Indians, that could not be considered reservations or allotments, and thus were not Indian country under § 1151(a) or (c), constituted "dependent Indian communities."[3] This Court rejected that approach, and instead examined the two factors that it had traditionally relied upon in its Indian country jurisprudence,

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[2]Section 1151 reads, in pertinent part, as follows:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

That section constituted the first legislative definition of Indian country since the 1834 Indian Nonintercourse Act, *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 183-89 (Nell Jessup Newton, ed., 2005). It was actually enacted as part of the Indian Major Crimes Act, 18 U.S.C. §§ 1151-53, but it has repeatedly been cited by this Court as defining Indian country for all jurisdictional purposes, both civil and criminal. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208 n.5 (1987); *DeCoteau v. Dist. County Court,* 420 U.S. 425, 427 n.2 (1975).

[3]For example, the Ninth Circuit, in the decision under review in *Venetie*, applied a "six-factor balancing test" for interpreting that phrase. *Venetie*, 522 U.S. at 525.

specifically, whether the lands were validly "set aside" for Indian use and occupancy by some affirmative act of the government, and whether they remained under "federal superintendence." *Venetie*, 522 U.S. at 527. That test was derived directly from this Court's earliest Indian country decisions, including cases such as *United States v. Pelican*, 232 U.S. 442, 449 (1914) and *United States v. McGowan*, 302 U.S. 535, 538-39 (1938).

Because the language under consideration was taken from *Sandoval*, however, this Court examined Congress' treatment of Pueblo lands, to confirm that its view of the intent of the phrase was consistent with the holding in *Sandoval*. It noted that although the Pueblos owned their lands in fee, Congress had acted quickly to assert federal authority over those lands by extending the provisions of the Nonintercourse Act to them, and it found that that amounted to a federal "set aside" of those lands under federal superintendence. 522 U.S. at 528 and n.4. *Venetie* thus confirms that Pueblo lands were formally recognized as Indian country almost immediately after the United States acquired the territory of New Mexico.

A principal thrust of the State's argument is that the *Venetie* test of whether an area should be considered a "dependent Indian community" should be applied to each individual tract that was patented under the PLA. *See* Petition at 25-26. But the Tenth Circuit Court of Appeals has repeatedly held that the *Venetie* test properly looks to the entire Indian community, not just individual tracts, in making the Indian country determination. *United States v. Arrieta*, 436 F.3d at 1250; *HRI, Inc. v. Envtl. Prot. Agency,* 198 F.3d 1224, 1249 (10th Cir. 2000). That was likewise the conclusion of the court below, *Romero*, 2006-NMSC-039, ¶ 16, 142 P. 3d at 892, and that conclusion is of course fully consistent with the statutory language itself.

More importantly, the *Venetie* test is directed at the question of whether, *in the first*

instance, lands allocated to Indians constitute Indian country. That was the situation presented in *Venetie*, which involved the jurisdictional status of lands that were patented to Alaskan native village corporations under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. ("ANCSA"). ANCSA imposed a new and unique regime with respect to Alaskan native land holdings, clearing the way for construction of the Alaska pipeline. It expressly abolished all claims of aboriginal title to Alaskan lands and all Indian reservations in the state (except one), and created 13 regional and over 200 village native corporations, chartered under state law, the stock in which is held by the native residents of the regions and the villages, respectively. *Id*. at §§ 1603, 1606, 1607, 1618(a). Approximately 38 million acres of land were patented to the various regional and village corporations, allocated according to a complex formula. *Id*. at §§ 1611-15. The lands are owned by the corporations in fee; the United States has no interest in them, and the lands are freely alienable. *Id*. at § 1613. Although many Alaska native villages are themselves federally recognized Indian tribes, and are organized under the provisions of the Indian Reorganization Act ("IRA"), especially 25 U.S.C. § 477, the IRA entities were given no role in the scheme of ANCSA.

The question presented in *Venetie* was whether this brand new regime of Indian land holdings warranted "Indian country" designation for the lands patented to the village corporations, thus immunizing the Alaskan natives and their activities on those lands from state authority and regulation. The argument of the Alaskan natives was that the villages constituted "dependent Indian communities" within the meaning of §1151(b), and that their lands were thus Indian country under that subsection. This Court disagreed. The ANCSA lands, the Court determined, failed both prongs of the "set aside" and "superintendence" test. *Venetie*, 522 U.S.

at 532.

In contrast, as this Court specifically noted, the lands that were granted to the Pueblos by the Spanish territorial government have long since been determined to be "dependent Indian communities," and thus Indian country, based on facts that this Court viewed as fully satisfying its *Venetie* test. 522 U.S. at 528. There is thus no reason to apply the *Venetie* test *again* to the Pueblos.

C. Pueblo Land Grants Are Equivalent to Reservations, and Were Not Diminished by the PLA.

Rather, the question to be asked in the instant cases is whether, by authorizing the patenting of individual tracts of Pueblo lands within Pueblo grants to non-Indians under the provisions of the PLA, Congress intended to *diminish* Pueblo Indian country. That question, as the New Mexico Supreme Court correctly reasoned, must be answered by examining the text of and congressional intent behind the PLA, in the light of this Court's extensive body of "Indian country diminishment" case law, including *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. Dist. County Court,* 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent*, 368 U.S. 351 (1961). As this Court observed in *Solem*, 465 U.S. at 470, the Indian country status of land, once established, may be altered only by Congress.[4] And diminishment, this Court cautioned, "will

[4]As a prominent Indian law scholar put it in a frequently-cited article on Indian country jurisdiction, "[o]nce a reservation has been established, or a dependent Indian community shown to exist, it will remain 'Indian country' until terminated by Congress, irrespective of the nature of the land ownership." Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 513 (1976).

not be lightly inferred." *Id.* Indeed, "[w]hen both an Act [allowing patenting of Indian lands to non-Indians] and its legislative history fail to provide *substantial and compelling evidence* of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Id.* at 472 (emphasis added).

The New Mexico Supreme Court closely examined the PLA's language and history, and could find no indication whatever that Congress intended any diminishment of Pueblo Indian country by the patenting of individual tracts to non-Indians. *Romero,* 2006-NMSC-039 ¶ 25, 142 P.3d at 896. But the State's Petition ignores this analysis altogether. The State insists that applying the *Venetie* test to Pueblo lands that were patented to non-Indians demonstrates that these lands cannot be considered "dependent Indian communities." *See, e.g.*, Petition at 16. As noted *supra*, p. 9, the State errs fundamentally in urging the application of the test to individual tracts conveyed to non-Indians. The State's premise is equally flawed, however, in its insistence that solely because Pueblo grant lands are not "reservations," a change in the title of a tract within a Pueblo grant, alone, automatically changes the tract's Indian country status.

Were Pueblo grant lands formally designated "reservations" there would be no dispute here at all as to the correctness of the decision below: the Indian country statute expressly declares that "*all land* within the limits of any Indian reservation . . . , notwithstanding the issuance of any patent, . . ." is Indian country. 18 U.S.C. § 1151(a) (emphasis added). By that language "Congress uncouple[d] reservation status from Indian ownership," by statutorily defining Indian country "to include lands held in fee by non-Indians within reservation boundaries." *Solem*, 465 U.S. at 468. The State urges that no such "uncoupling" applies to Pueblo grants, and that the decision below erred by blurring "the important distinctions between

a reservation and a dependent Indian community." Petition at 18. The State argues that since 18 U.S.C. § 1151(b) contains no language comparable to the "notwithstanding the issuance of any patent" phraseology in § 1151(a), patented lands within Pueblo grants are not Indian country. Petition at 18-19 and n.5. There are two fundamental errors in this proposition: first, there are *no* "important distinctions" between Pueblo grant lands and other Indian reservations for federal Indian law purposes; and second, the State's reading of § 1151(b) turns a major purpose of that statute on its head.

Although, as explained above, the history of Pueblo land grants is distinctive, once *Candelaria* clearly established that those lands are Indian country, and once Congress had enacted the PLA to deal with the problem of non-Indian trespass on Pueblo lands, Congress thereafter made sure that Pueblo lands were treated exactly the same as Indian reservations for virtually all federal law purposes. The decision below contains a lengthy catalogue of congressional enactments demonstrating that the full array of federal laws affecting Indians and their lands have been applied to Pueblo grant lands just as they have been applied to other Indian lands, and that, indeed, Congress has frequently used the term "reservations" to refer to Pueblo grants themselves. *Romero*, 2006-NMSC-039 ¶ 19, 142 P.3d at 894. As the court noted, "[t]he State does not provide any example of Congress treating a pueblo distinctly from a reservation, especially not for the purposes of criminal jurisdiction in Indian country." *Id*. Nor does the State offer anything new on that score in its Petition.[5] The State's suggestion, thus, that Congress

[5]The State's Petition frequently cites the leading treatise in the field, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2005) ("COHEN"), *see, e.g.,* Petition at 19 n.5, but it fails to quote this critical passage from the text following the footnote that the State does cite:

deliberately intended § 1151 to subject Pueblos (and other "dependent Indian communities") to a different jurisdictional regime from that applicable to Indians living on reservations has no basis in fact or in law, and is contrary to consistent congressional practice both before and since the enactment of that statute.

The State's view of § 1151(b) is moreover directly contrary to a major purpose of that statute. This Court explained the point in *Seymour*, in response to an argument that the "notwithstanding the issuance of any patent" language in § 1151(a) should be interpreted to mean only patents to Indians:

> [W]here the existence or nonexistence . . . of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. *Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151* and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate the confusion Congress specifically sought to avoid.

368 U.S. at 358 (footnote omitted; emphasis added). That passage speaks directly to the State's contention here. It is highly improbable that Congress would have acted specifically to avoid "checkerboard" jurisdiction in subsection (a) of § 1151, but would have carefully preserved the checkerboard in subsection (b). The State offers no plausible policy or legal justification for such a result, yet that is the plain consequence of the State's argument.

> The inclusion of Pueblos in numerous federal statutory schemes, such as the Indian Reorganization Act, and the federal environmental laws, that apply only to "reservations" strongly suggests that Congress has intended that Pueblo lands be equated with reservations.

COHEN at 336 (footnotes omitted); *and see id.* at 195 ("Thus, patented parcels of land and rights-of-way may also be within Indian country, if they are within a dependent Indian community.").

In short, there is simply no error in the decision below. The State's repeated invocation of *Venetie* misses the point that Pueblo grant lands were long ago found to be Indian country, as *Venetie* confirms, and there is thus no occasion to reapply the *Venetie* test to individual tracts within those grants. The proper approach to the question posed by these cases is found in this Court's Indian country "diminishment" analysis, and as the New Mexico Supreme Court found, there is no evidence of congressional intent to diminish Pueblo Indian country in the PLA. The State's insistence that Congress must have intended that "dependent Indian communities" be subjected to a checkerboarded jurisdictional regime under 18 U.S.C. § 1151, while carefully avoiding that confusion in the case of Indian reservations, makes no sense, and is directly contrary to Congress' treatment of Pueblo lands in every other context.

III. CONGRESS' RECENT AMENDMENT OF THE PUEBLO LANDS ACT CONCLUSIVELY DEMONSTRATES THE CORRECTNESS OF THE DECISION BELOW, AND RENDERS THE STATE'S PETITION ACADEMIC.

The State's Petition fails to inform the Court that while the instant cases were pending before the New Mexico Supreme Court, Congress enacted Pub.L. 109-133, 119 Stat. 2573 (2005) ("Pub.L. 109-133"), as an amendment to the PLA, that conclusively establishes that crimes committed by or against Indians "anywhere within the exterior boundaries" of a Pueblo grant are subject to federal (and, with respect to crimes by Indians, tribal) jurisdiction. This congressional determination is completely consistent with the ruling of the New Mexico Supreme Court herein, and overrides the contrary arguments of the State.[6]

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[6]The State's Petition notes that Congress amended the PLA, Petition at 10 n.1, but fails to give any information as to the substance of the amendment. It does note that the amendment "has been interpreted to apply prospectively," citing *Arrieta*, but as noted above, the amendment

Properly construed, Pub.L. 109-133 ought to be viewed as a clarification of Congress' original intent as to the jurisdictional effect of the issuance of patents under the PLA itself, and thus should control the outcome of the instant cases.[7] Regardless, it unquestionably establishes the jurisdictional rules for all future such cases, and thus eliminates any jurisdictional confusion as to these tracts. As a result, there is no remaining "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Congress has settled the question.

Pub.L. 109-133 added a new Section 20 to the PLA, that reads, in its entirety, as follows:

> Section 20. Criminal Jurisdiction
>
> (a) *In General*.--Except as otherwise provided by Congress, jurisdiction over offenses committed *anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico*, shall be as provided in this section.
>
> (b) *Jurisdiction of the Pueblo*. – The Pueblo has jurisdiction, as an act of the Pueblo's inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.
>
> (c) *Jurisdiction of the United States*. – The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or

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would have had no impact in *Arrieta* regardless, inasmuch as the land on which the crime in that case occurred is and always has been tribally owned land. *Arrieta*'s comments on the applicability of the enactment, thus, were *dicta*, and in any event were based solely on the fact that the United States and Mr. Arrieta both agreed that the amendment should only apply prospectively. *See* 436 F.3d at 1251.

[7]The New Mexico Supreme Court was made aware of the enactment of Pub.L. 109-133 after these cases had been briefed and argued, but it did not ask for further briefing on its effect, if any, on the cases before it. It stated in a footnote that it viewed the enactment as helping to "clarify congressional intent regarding jurisdiction," but not as being directly applicable to the cases before it inasmuch as it was enacted after the alleged crimes had occurred. 2006-NMSC-039, ¶ 1 n.1, 142 P.3d at 888 n.1. *But see infra* pp. 19-20.

> against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.
>
> (d) *Jurisdiction of the State of New Mexico.* – The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the United States.

Pub.L. 109-133 (emphasis added). These jurisdictional rules, by their terms, apply "anywhere within the exterior boundaries" of the Pueblo grants, and thus resolve the jurisdictional issue with respect to lands within grant boundaries that were patented to non-Indians.

In the course of consideration of the bill that became Pub.L. 109-133, Rep. Radanovich of California, who led the floor discussion of the bill in the House of Representatives, gave a detailed explanation of the circumstances that gave rise to the need for the legislation:

> Mr. Speaker, S.279, a bill sponsored by Senator Domenici [of New Mexico], clarifies the uncertainty and potential law enforcement jurisdiction problems on all 19 Indian Pueblo reservations in the State of New Mexico.
>
> From 1913 to 2001, the United States Government prosecuted crimes committed by or against the New Mexico Pueblo Indians within the exterior boundaries of their reservation lands in the State of New Mexico. However, in 2001, a federal judge, relying on a case about tribal jurisdiction in the State of Alaska, ruled that felonies committed by Indians on private lands within the boundaries of New Mexico Pueblos are not subject to Federal jurisdiction. The U.S. Attorney for New Mexico did not appeal the decision and, therefore, has failed to prosecute any felonies by or against Indians on these lands.
>
> At the same time that the Federal Government was declining to prosecute any felonies on Indian Pueblo lands, a New Mexico State court ruled that the State of New Mexico lacked jurisdiction to prosecute felonies committed by an Indian defendant against a non-Indian on private lands within the Pueblos. As a result, there is currently a large void in criminal jurisdiction at the Federal, State and tribal levels.
>
> S.279 corrects this void of jurisdiction by clarifying that, one, the United States will have jurisdiction over crimes defined under the Major Crimes Act committed by or against any Indians; two, the State of New Mexico will have

> jurisdiction clarified as to non-member Indians or non-Indians for all non-Major Crimes Act offenses; and three, the New Mexico Pueblo governments will have jurisdiction over their individual members or other Indians for other offenses.

151 Cong. Rec. H11047 (daily ed., Dec. 6, 2005). Congressman Udall of New Mexico further elaborated on the need for and purpose of the bill:

> This legislation addresses confusion over criminal jurisdiction on Pueblo lands in New Mexico that arose out of the holding in *United States v. José Gutierrez*, an unreported decision of a federal district court judge in the district of New Mexico that overturned prior precedent regarding the jurisdictional status of the lands within the exterior boundaries of Pueblo grants.
>
> The *Gutierrez* decision created uncertainty and the potential for a void in criminal jurisdiction on Pueblo lands. Some call these prosecution-free zones. Because of the risk to public safety and law enforcement arising out of this uncertainty, it is important that we clarify the scope of criminal jurisdiction on Pueblo lands.
>
> Nothing in this legislative clarification is intended to diminish the scope of Pueblo civil jurisdiction within the exterior boundaries of Pueblo grants, which is defined by federal and tribal laws and court decisions.
>
> This legislation also does not, in any way, diminish the exterior boundaries of these grants.

Id. Importantly, the *Gutierrez* case, the federal district court decision that both Rep. Radanovich and Rep. Udall cite as having been contrary to prior law and having created the jurisdictional "void" on private lands within Pueblo grants that this legislation was needed to correct, is the very case that the State cites and relies upon in its Petition. *See* Petition at 14; *and see supra* p. 3.

Pub. L. 109-133 confirms that the very same jurisdictional rules that apply to Indian reservations under 18 U.S.C. § 1151(a) likewise apply to Pueblo grant lands, that is, that federal Major Crimes Act jurisdiction extends to *all* lands within the exterior boundaries of Pueblo grants. Wholly apart from the question whether the legislation should be deemed to control the

outcome of the instant cases, *see infra* pp. 18-19, it unquestionably resolves the "unnecessary havoc and chaos" of which the State complains, Petition at 28, for all cases arising after its enactment. At the very most, then, this Court's consideration of these cases would affect only these two defendants.

The character of, and the circumstances leading up to, the enactment of Pub.L. 109-133, moreover, make clear that the measure was intended to clarify the original congressional intention in the PLA itself, and it thus should be deemed to apply to the instant cases as well as to future ones. Federal courts recognize that legislative enactments that "are only 'clarifying,' as opposed to 'substantive,'" may be applied to cases that arose prior to the enactment. *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1079 (9th Cir. 2005); *United States v. Groves*, 369 F.3d 1178, 1182 (10th Cir. 2004);[8] *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1056 (9th Cir. 2002); *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1308 (5th Cir. 1991). This Court has "sanctioned the application to all pending and future cases of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction.'" *Austria v. Altman*, 541 U.S. 677, 693 (2004) (*quoting Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994)).

By definition, an enactment that merely serves to clarify what was intended all along as the legal rule is not being applied "retroactively," even where it is cited as authority in a case that arose prior to the enactment, since by its terms it is not changing the pre-existing law. *Western Security Bank v. Superior Court*, 15 Cal.4th 232, 243, 933 P.2d 507, 514 (1997) ("a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied

[8]Though a sentencing guidelines case, the case was decided according to constitutional principles arising from the *ex post facto* clause, and those principles should apply equally here.

to transactions predating its enactment . . . Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.") (emphasis in original; citations omitted).

There can be little doubt that Pub.L. 109-133 was intended to "clarify" criminal jurisdiction following the issuance of patents under the PLA, not to make new law. The fact that Congress amended the PLA, rather than simply enact a free-standing law, indicates that its intent was to make clear what was originally intended by that 80-year-old statute. Statements on the floor of the House of Representatives by Rep. Udall of New Mexico and Rep. Radanovich of California, quoted above, consistently referred to the bill as one that would "clarify" the jurisdiction of the State, the United States and Pueblos within the exterior boundaries of Pueblo grants. They also noted that the bill was needed to correct a recent, aberrant court decision, to make clear that the earlier, and longstanding, understanding of the law was correct. *Cf.* 1A SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 22.31, p. 279 (5th ed. 1993) ("An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.") (footnote omitted).

In short, Pub.L. 109-133 is a congressional declaration intended to clarify what Congress had originally intended as the jurisdictional consequence of the patenting of isolated parcels of lands to non-Indians under the PLA, demonstrating that the patenting effected no change in the Indian country status of those lands. While it should thus authoritatively settle the jurisdictional issue for all cases, whenever they arose, at a minimum it resolves the issue presented by the

instant cases for all future purposes, and should render unnecessary the expenditure of this Court's time and resources in addressing this issue.

CONCLUSION

For the foregoing reasons, Respondent Romero respectfully urges that this Court should deny the State's Petition.

Respectfully submitted,

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