IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. CHRISTOPHER CUNGTION, JR. Defendant-Appellant	Supreme Court No. 20-0409

APPEAL FROM THE IOWA DISTRICT COURT
FOR TAMA COUNTY
HONORABLE MITCHEL TURNER (MOTION) and
HONORABLE FAE HOOVER-GRINDE (ADJUDICIATION OF GUILT AND SENTENCING), JUDGES

APPELLANT'S SUPPLEMENTAL BRIEF

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CERTIFICATE OF SERVICE

On the 20th day of August, 2021, the undersigned certifies that a true copy of the forgoing instrument was served upon the Defendant-Appellant by placing on copy thereof in the United States mail, proper postage attached, addressed to Christopher Cungtion Jr., Linn County Jail, P.O. Box 608, Cedar Rapids, Iowa 52406.

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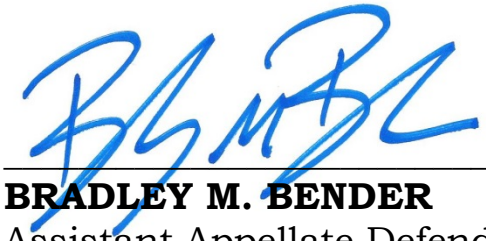

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STATEMENT OF THE CASE

The Defendant-Appellant Christopher Cungtion, Jr. submits this brief pursuant to the Supreme Court's order June 18, 2021 which indicated any party may file a supplemental brief responding to any amicus briefs filed in this matter. While Cungtion's brief adequately addresses the issues presented for review, a supplemental brief is necessary to respond to certain contentions raised in the amicus briefs.

ARGUMENT

I. When a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law. Public Law No. 115-301 strips Iowa courts of jurisdiction over criminal cases that involved offenses committed by or against Indians on the Sac and Fox Indian Reservation. Did the district court err in denying Cungtion's Motion to Dismiss?

A. The United States Code Saving Statute is Not Applicable to Public Law No. 115-301. Both the United States and the Sac & Fox Tribe of the Mississippi in Iowa in their amicus briefs argue that the United States Code's general saving statute in 1 U.S.C. § 901 supports a conclusion that Public Law No. 115-301 dos not apply to pending cases, such

as Cungtion's case. (USA Brief pp. 24-29; Sac & Fox Brief pp. 15-16).

The general saving statue in 1 U.S.C. § 901 states the following:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 901.

The United States Supreme Court explained that because the general saving statute "only has the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enaction." *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). Furthermore, the United States

Supreme Court also has stated explicitly that "the general saving clause does not ordinarily preserve discarded remedies or procedures." *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974). The reference to "remedies or procedures" means only that the Saving Statute does not cover situations in which a repealing statute does not affect the "penalties, forfeitures, or liabilities" imposed by the repealed statute, but rather only alters the procedures whereby substantive rights are adjudicated. *See United States v. Obermeier*, 186 F.2d 243, 253-55 (2d Cir. 1950).

The United States argue that the "criminal penalties" incurred for Cungtion when he committed the underlying offense that subjected him to prosecution by the State of Iowa. (United States Brief p. 29). As such, the United States argues that because Cungtion incurred state law penalties while the 1948 Act was in effect, the saving clause in 1 U.S.C. § 901 permits the State of Iowa's prosecution to proceed after its repeal in Public Law No. 115-301 on December 11, 2018. (United States Brief p. 29). Furthermore, Sac & Fox Tribe of the Mississippi in Iowa argued that the repeal of the 1948 Act

directly affects the criminal liabilities and accrued penalties, and does not simply shift tribunals. (Sac & Fox Brief p. 16).

The amicus briefs' arguments are misplaced and are contrary to the well-settled principles articulated by the United States Supreme Court. The United States Supreme Court has held that a congressional withdrawal of jurisdiction deprived it of the power to act on the pending as well as future cases. *See Ex parte McCardle*, 7 Wall. 506, 19 L.Ed. 264 (1868); *see also Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 544, 18 L.Ed. 540, 541 (1867) ("It is clear that, when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction . . . . And it is equally clear that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction."); *Gates v. Osborne*, 9 Wall. 567, 575, 19 L.Ed. 748, 751 (1870) ("Jurisdiction . . . was conferred by an Act of Congress, and when that Act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause,

all pending actions fell, as the jurisdiction depended entirely upon the Act of Congress.").

Furthermore, when a statute that is purely jurisdictional is repealed or expires, the general saving statute in in 1 U.S.C. § 901 does not apply. *See De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953). "This rule that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law has been adhered to consistently by this Court." *Bruner v. United States*, 343 U.S. 112, 116-117 (1952). In *Bruner*, the United States Supreme Court further rejected the contention that the general savings statute preserved the power to act on pending cases: "Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.* at 117. Thus, it is clear that while the general savings statute may preserve an accrued right, it does not preserve the right to have a claim heard by any particular tribunal. *See Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d

168, 171–72 (5th Cir. 1976) (citing *Bridges v. United States*, 346 U.S. 209, 227 n. 25 (1953)).

In this case, this is not a case where the enforcing provisions have a special relation to the accrued right. Whether a court has criminal jurisdiction over offenses committed in "Indian country" "is governed by a complex patchwork of federal, state, and tribal law" that often depends upon whether the defendant or the victim is an Indian. *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (quoting *Duro v. Reina,* 495 U.S. 676, 680 n.1 (1990), *superseded by statute on other grounds,* Department of Defense Appropriations Act of 1990, Pub. L. No. 101-511, 104 Stat. 1856, as recognized in *Lower Brule Sioux Tribe v. South Dakota*, 917 F. Supp. 1434, 1444 n.8 (D.S.D. 1996)). Prior to 1948, the precedents of the United States Supreme Court consistently held that state courts have jurisdiction over "Indian country" crimes involving non-Indians unless there is a treaty provision or clause in a state's enabling act prohibiting such jurisdiction. *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499–500 (1946); *Draper v. United States*, 164 U.S. 240, 242–43 (1896); *United States v. McBratney*, 104 U.S. 621,

622–24 (1881). Further, many other cases stand for the proposition that states have criminal jurisdiction over criminal acts by non-Indians in "Indian country" that are not committed against Indians. *See, e.g., Hilderbrand v. United States*, 261 F.2d 354, 356 (9th Cir. 1958); Lasley, 705 N.W.2d at 490; *State v. Kurtz*, 350 Or. 65, 249 P.3d 1271, 1276 n.5 (2011); *State v. Reber*, 171 P.3d 406, 408 (Utah 2007).

In 1948, Congress conferred criminal jurisdiction over offenses committed "by or against Indians on the Sac and Fox Indian Reservation" located in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161. The statute, commonly known as Public Law 846, reads:

> Jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Id. Therefore, "after 1948, Iowa district courts had preexisting jurisdiction over crimes committed on the Meskwaki Settlement

involving non-Indians and, in addition, over offenses committed by or against Indians." *State v. Stanton*, 933 N.W.2d 244, 249 (Iowa 2019).

In 2018, Congress reversed course and repealed the 1948 Act. The 2018 Act in full provides,

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of June 30, 1948, entitled "An Act to confer jurisdiction on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation" (62 Stat. 1161, chapter 759) is repealed.

Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395 (2018).

The Iowa Supreme Court last year concluded that the impact of the 2018 Act is clear:

> It simply repealed the 1948 expansion of state court jurisdiction. The 2018 legislation left undisturbed state court criminal jurisdiction involving criminal acts involving non-Indians existing prior to the passage of the 1948 Act. And the law prior to the enactment of the 1948 Act provided state court jurisdiction over crimes committed in "Indian country" involving non-Indians.

Stanton, 933 N.W.2d at 249. The Iowa Supreme Court in *Stanton* also recognized that section 1.15A which was recently

enacted in 2016 tenders to the United States "any and all criminal jurisdiction ... over criminal offenses committed by or against Indians" on the Meskwaki Settlement. *Id.*[1]

The 1948 Act clearly granted State of Iowa jurisdiction and Public Law No. 115-301 just as clearly takes jurisdiction away. Most importantly, Public Law No. 115-301 only alters the procedures whereby substantive rights are adjudicated. As such, the general saving statute does not apply. *See Pro. & Bus. Men's Life Ins. Co. v. Bankers Life Co.,* 163 F. Supp. 274, 294 (D. Mont. 1958). Any reliance on the general savings clause of the United States Code is erroneous.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). Indian Tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive ... which is not only acknowledged, but guaranteed by the United States," a power

[1] Section 1.15A relates solely to crimes "by or against Indians," and not to crimes by non-Indians or to crimes that are victimless or have a non-Indian victim. *See* Iowa Code 1.15A.

dependent on and subject to no state authority. *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); *see also McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168–169 (1973). "And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020).[2] For all these reasons, the United States Supreme Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *Id.* (citing *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)).

Reaching this conclusion does not mean there is a jurisdictional gap in prosecuting crimes committed on the Meskwaki Settlement. There is federal jurisdiction over the offenses covered by the Indian Major Crimes Act is "exclusive"

[2] In *McGrit*, the United States Supreme Court recently held that the State of Oklahoma lacked jurisdiction to prosecute an enrolled member of the Seminole Nation given the defendant's status as an Indian and the fact that the crimes in question occurred within the historical boundaries of the Creek Nation, which had not been disestablished. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-82 (2020),

of state jurisdiction. *McGirt*, 140 S. Ct. at 2478; *see also United States v. John*, 437 U.S, 634, 651,(1978) ("a state does not have jurisdiction over an offense that is subject, to federal prosecution under § 1153). "States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country." *McGirt*, 140 S. Ct. at 2479. But if the crime is by or against an Indian, tribal jurisdiction has remained exclusive. *See id.* Even if there is a jurisdictional gap that is "hardly foreign to this area of the law." *Id.* at 2478.

This Court should conclude that United States Code's general saving statute in 1 U.S.C. § 901 is not applicable to Public Law No. 115-301. As such, this Court should conclude that the district court erred in denying Cungtion's Motion to Dismiss. The district court's conclusions were erroneous and contrary to the case law as outlined above. Consequently, this Court should remand Cungtion's case for an entry of an order for dismissal.

B. Reliance on Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) *is Not Applicable to Public Law No. 115-301.

Sac & Fox Tribe of the Mississippi in Iowa argues in its amicus brief that *Landgraf* test is relevant to determine whether Public Law No. 115-301 applicative retroactively. (Sac & Fox Brief pp. 11-15). Specifically, the Sac & Fox Tribe of the Mississippi in Iowa contends because the 2018 Act affects the rights and obligations for the State of Iowa, the Landgraf dictates that Public Law No. 115-301 should not be applied retroactively.

The Sac & Fox Tribe of the Mississippi in Iowa reliance on *Landgraf* as well by the State of Iowa and the district court is clearly misplaced and erroneous. A retroactively analysis is unnecessary in this case because Public Law No. 115-301 is a jurisdictional statute. When interpreting a statute, the United States Supreme Court normally presumes that the statute does not apply retroactively — that is, to cases pending on the date of the law's enactment—absent clear congressional intent to the contrary. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). This presumption against retroactivity, however, does not apply to

statutes that only alter jurisdiction. "[S]tatutes 'conferring or ousting jurisdiction' that 'speak to the power of the court rather than to the rights or obligations of the parties' generally do not raise concerns about retroactivity." *Henry v. Ashcroft*, 175 F.Supp.2d 688, 693 (S.D.N.Y.2001) (quoting *Landgraf*, 511 U.S. 244, 274).

Application of "a jurisdiction-conferring or jurisdiction-stripping statute usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Hamdan*, 548 U.S. at 576–77 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). Thus, "no retroactivity problem arises because the change in the law does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Hamdan*, 548 U.S. at 577 (quoting *Landgraf*, 511

U.S. at 280). "And if a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted." *Id.*

As previously mentioned in the above subsection, the United States Supreme Court has long held that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law." *Bruner v. United States*, 343 U.S. 112, 116–17 (1952). The Court reaffirmed this "consistent practice" in *Landgraf*, noting that it has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274.

Clearly, Public Law No. 115-301 strips Iowa courts of jurisdiction over criminal cases that involved offenses committed by or against Indians on the Sac and Fox Indian Reservation. Therefore, Public Law No. 115-301 withdraws the jurisdiction that it previously conferred on Iowa under 1948 Act. When a statute confers jurisdiction and Congress repeals that statute, "the power to exercise such jurisdiction [is] withdrawn,

and ... all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress." *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575, 19 L.Ed. 748 (1870). Therefore, contrary to the Sac and Fox Tribe of Mississippi in Iowa's argument, Public Law No. 115-301 affects only the power of the court rather than the rights and obligations of the parties and thus revokes Iowa jurisdiction to resolve Cungtion's criminal case in this matter.

Furthermore, the jurisdiction stripping statute in Public Law 115-301 differs markedly from the one that was confronted by the United States Supreme Court in *Hamdan*. The United Supreme Court in *Hamdan* was confronted with a statute that included provisions that made it expressly applicable to pending cases whereas the jurisdiction stripping section omitted such language. *See Hamdan*, 548 U.S. at 584, 126 S.Ct. 2749 (drawing the negative inference that Congress did not intend to eliminate jurisdiction over pending detainee habeas petitions where the statute was silent about whether its jurisdiction-stripping subsection applied to cases even though it expressly made two other subsections retroactive). By contrast, Public

Law No. 115-301 is a statute in which Congress was completely silent about the effective date of the jurisdiction stripping statute. *See* Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395 (2018). Therefore, Public Law No. 115-301 is not conflicting and does have a retroactive effect.

This Court should conclude that Public Law No. 115-301 should be applied retroactive. As such, this Court should conclude that the district court erred in denying Cungtion's Motion to Dismiss. The district court's conclusions were erroneous and contrary to the case law as outlined above. Consequently, this Court should remand Cungtion's case for an entry of an order for dismissal.

CONCLUSION

For all of the reasons discussed in the Division I above and in Cungtion's Brief, Cungtion respectfully requests the Court vacate his conviction and remand his case for an entry of an order for dismissal.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true costs of producing the necessary copies of the foregoing Brief and Argument was $0.00, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,057 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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