Nos. 20-0401 & 20-0409

In the Supreme Court of Iowa

STATE OF IOWA,
PLAINTIFF-APPELLEE

v.

HOLLIS JACY BEAR,
DEFENDANT-APPELLANT

STATE OF IOWA,
PLAINTIFF-APPELLEE

v.

CHRISTOPHER LEE CUNGTION, JR.,
DEFENDANT-APPELLANT

ON APPEAL FROM THE IOWA DISTRICT COURT FOR TAMA COUNTY

HON. PAUL D. MILLER & HON. FAE HOOVER-GRINDE (NO. 20-0401)

HON. MITCHELL E. TURNER & HON. FAE HOOVER-GRINDE (NO. 20-0409)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

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STATEMENT OF INTEREST

These cases involve criminal charges filed in Iowa state court for crimes involving an Indian victim, an Indian defendant, or both on land held by the United States in trust for the Sac and Fox Tribe of the Mississippi in Iowa (Tribe), also known as the Meskwaki Nation. The district court in each case determined that a federal statute enacted in 2018 that eliminated the State's authority to prosecute crimes involving Indians on the Tribe's land does not apply retroactively to cases that were pending when the statute was enacted. Bear App. 24-28; Cungtion App. 25-27; see Pub. L. No. 115-301, 132 Stat. 4395 (2018).

Criminal jurisdiction over offenses committed in Indian country "is governed by a complex patchwork of federal, state, and tribal law" that often depends on whether the defendant or the victim is an Indian. *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (quotation marks and citation omitted). As one of three sovereigns that exercises criminal jurisdiction in Indian country, the United States has a strong interest in this Court's interpretation of the recent federal statute addressing the State's criminal jurisdiction

on the Tribe's land. On May 7, 2021, this Court invited the United States, the Tribe, and any other interested parties to file amicus briefs. See Request for Amicus Briefs, *State* v. *Bear*, No. 20-0401 (May 7, 2021); Request for Amicus Briefs, *State* v. *Cungtion*, No. 20-0409 (May 7, 2021).[1]

STATEMENT OF THE ISSUE

In 1948, Congress conferred on the State of Iowa jurisdiction "over offenses committed by or against Indians" on the Meskwaki Settlement in Iowa to the same extent as its courts have criminal jurisdiction within the State outside of Indian lands. Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948 Act). On December 11, 2018, Congress repealed the 1948 Act, Pub. L. No. 115-301, 132 Stat. 4395 (2018) (2018 Act). The question presented is whether the State of Iowa must dismiss state criminal charges that were pending when the 1948 Act was repealed on December 11, 2018.

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[1] Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the United States certifies that this brief was not authored in whole or in part by a party's counsel and that no party or party's counsel contributed money to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

A. Procedural History

1. *State* v. *Bear*, No. 20-0401

On November 16, 2018, the State filed a trial information in the District Court for Tama County charging defendant Hollis Bear with third-degree sexual abuse, in violation of Iowa Code §§ 709.1, 709.4(1)(a), 903B.1; domestic-abuse assault causing bodily injury, in violation of Iowa Code § 708.2A(1), 708.2A(2)(b); and third-degree criminal mischief, in violation of Iowa Code §§ 716.1, 716.5. Bear App. 4-6. After Congress enacted the 2018 Act on December 11, 2018, Bear moved to dismiss the charges against him on the ground that the State no longer had jurisdiction over his offenses. *Id.* at 11-12. The district court denied the motion. *Id.* at 24-28.

Following a bench trial, Bear was convicted of domestic abuse assault, in violation of Iowa Code § 708.2A(1), 708.2A(2)(b); and fourth-degree criminal mischief, in violation of Iowa Code §§ 716.1, 716.6. Bear App. 40-41. The district court imposed a suspended sentence of one year on each count, to run consecutively, and placed Bear on probation for one year. *Id.* at 46.

2. *State v. Cungtion*, No. 20-0409

On November 30, 2018, the State filed a trial information in the District Court for Tama County charging defendant Christopher Cungtion with intimidation with a dangerous weapon with intent to injure, in violation of Iowa Code § 708.6; willful injury resulting in bodily injury, in violation of Iowa Code § 708.4(2); assault with a dangerous weapon, in violation of Iowa Code §§ 708.1(2)(c), 708.2(3); and driving while barred, in violation of Iowa Code §§ 321.560, 321.561. Cungtion App. 4-5.

Cungtion entered a plea under *North Carolina* v. *Alford*, 400 U.S. 25 (1970), to intimidation with a dangerous weapon, in violation of Iowa Code § 708.6, and a guilty plea to willful injury resulting in bodily injury. Cungtion App. 8. The court granted deferred judgment on these counts. *Id.* at 8-9; see Iowa Code §§ 907.3(1), 901.5. Cungtion also entered an *Alford* plea to assault with a dangerous weapon and driving while barred. Cungtion App. 12. The court found him guilty on those counts, imposed a two-year suspended sentence on each count, and placed him on supervised probation for two years. *Ibid.*

On July 22, 2019, the State notified the court that Cungtion had violated his probation and asked the court to revoke Cungtion's deferred judgments and impose sentence. Cungtion App. 15-17. Cungtion moved to dismiss on the ground that the state court lacked jurisdiction to enter judgment against him after Congress enacted the 2018 Act. *Id.* at 19-21. The district court denied the motion. *Id.* at 25-27.

The district court revoked its deferred judgment on the willful injury count, adjudged Cungtion guilty, and imposed a five-year suspended prison sentence and a five-year term of supervised probation. Cungtion App. 32-33. The court amended the sentences previously imposed for the other counts. *Id.* at 33-34.

B. Criminal Jurisdiction Over Indian Country In Iowa

1. History of the Tribe's land

The Sac and Fox Tribe of the Mississippi in Iowa (Tribe), also referred to as the Meskwaki Nation, is a federally recognized Indian tribe. See 86 Fed. Reg. 7554-7558 (2021). In 1857, the Tribe purchased land that was then taken into trust for the Tribe's benefit by the Governor of Iowa. See *Sac and Fox Tribe of the*

Mississippi in Iowa v. *Licklider*, 576 F.2d 145, 147-148 (8th Cir. 1978). The Tribe continued to purchase land in Tama County, and the Governor of Iowa eventually held title to 2720 acres of land in trust for the Tribe. *Ibid.* In 1896, the State transferred the lands to the United States. 1894-1897 Iowa Laws ch. 110 (26th Extra Gen. Assembly). The United States "accept[ed] and assum[ed] jurisdiction over the Sac and Fox Indians of Tama County, in the State of Iowa, and of their lands in said State, as tendered to the United States." Act of June 10, 1896, ch. 398, 29 Stat. 321, 331. These lands, referred to as the Meskwaki Settlement, are currently held in trust by the United States for the Tribe's benefit. See *Licklider*, 576 F.2d at 147. The Meskwaki Settlement therefore constitutes "Indian country." See 18 U.S.C. § 1151(a) (defining Indian country); see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (trust land constitutes Indian country if the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government") (internal quotation marks omitted).

2. Criminal jurisdiction in Indian country

Criminal jurisdiction over offenses committed in Indian country "is governed by a complex patchwork of federal, state, and tribal law" that often depends on whether the defendant or the victim is an Indian. *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (quotation marks and citation omitted).

a. The federal government generally exercises jurisdiction over crimes committed by or against Indians in Indian country pursuant to 18 U.S.C. § 1152. Under that statute, Congress has extended so-called "federal enclave laws"—laws that define and punish criminal conduct committed "in any place within the sole and exclusive jurisdiction of the United States," 18 U.S.C. § 1152—to Indian country. See *United States* v. *Markiewicz*, 978 F.2d 786, 797-798 (2d Cir. 1992).[2] Section 1152 also extends to Indian country the Assimilative Crimes Act, 18 U.S.C. § 13, which allows the federal government to borrow state law when there is no

[2] The federal enclave laws define crimes such as arson, 18 U.S.C. § 81; assault, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; theft, 18 U.S.C. § 661; receiving stolen property, 18 U.S.C. § 662; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112; and sexual offenses, 18 U.S.C. §§ 2241 *et seq.*

applicable federal statute. *Williams* v. *United States*, 327 U.S. 711, 713-716 (1946); *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

Congress has enacted certain statutory exceptions to the United States' authority to prosecute federal enclave crimes and assimilated state-law crimes in Indian country. Section 1152 "shall not extend [1] to offenses committed by one Indian against the person or property of another Indian, nor [2] to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or [3] to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.[3] Absent an Act of Congress to the contrary, federal

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[3] Those exceptions apply only to those laws extended to Indian country by Section 1152—the federal enclave laws and assimilated state laws. The exceptions do not exempt Indians from the general criminal laws of the United States that apply to acts that are federal crimes regardless of where they are committed, such as bank robbery, counterfeiting, sale of drugs, and assault on a federal officer. See, *e.g.*, *United States* v. *Young*, 936 F.2d 1050, 1055 (9th Cir. 1991) (per curiam), overruled on other grounds by *United States* v. *Vela*, 624 F.3d 1148 (9th Cir. 2010); *United States* v. *Blue*, 722 F.2d 383, 385-386 (8th Cir. 1983).

jurisdiction over crimes involving Indians is exclusive of state jurisdiction. *United States* v. *John*, 437 U.S. 634, 651 (1978).

b. Offenses by one Indian against the person or property of another Indian within Indian country "typically are subject to the jurisdiction of the concerned Indian tribe," *Negonsott*, 507 U.S. at 102, but the Indian Major Crimes Act, 18 U.S.C. § 1153(a), gives the federal government jurisdiction over certain serious offenses—such as murder, kidnapping, burglary, and robbery—when an Indian is the perpetrator. Tribal courts do not have criminal jurisdiction over non-Indians unless Congress has provided to the contrary. *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 209-210 (1978); see 25 U.S.C. § 1304 (providing tribes with criminal jurisdiction over non-Indians for certain domestic violence offenses).

c. Within Indian country, absent an act of Congress, state jurisdiction generally extends only to those state-law crimes committed by non-Indians against other non-Indians and victimless crimes committed by non-Indians. See *Duro*, 495 U.S. at 680 n.1; *State* v. *Stanton*, 933 N.W.2d 244, 248-251 (Iowa 2019).

"For Indian country crimes involving only non-Indians, longstanding precedents of [the Supreme] Court hold that state courts have exclusive jurisdiction despite the terms of § 1152." *Duro*, 495 U.S. at 680 n.1 (citing *People of New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *United States* v. *McBratney*, 104 U.S. 621 (1882)).

3. Federal laws specific to Indian country in Iowa

a. In 1948, Congress conferred jurisdiction on the State "over offenses committed by or against Indians on the Sac and Fox Indian Reservation in [Iowa] to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation." Act of June 30, 1948, ch. 759, 62 Stat. 1161. In other words, in addition to the authority already possessed by the State to prosecute crimes involving only non-Indians on the Tribe's land, the State was also given the authority to prosecute crimes involving an Indian defendant or victim.

The 1948 Act further provided 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." 62 Stat. 1161. The Supreme Court held with respect to a similar statute enacted for Kansas, see 18 U.S.C. § 3243, that Congress, through these enactments, had conferred plenary jurisdiction on specific States over state-law crimes in Indian country, but that the federal government continued to exercise concurrent jurisdiction over offenses subject to federal jurisdiction under 18 U.S.C. §§ 1152 and 1153. *Negonsott*, 507 U.S. at 105.[4]

b. In 2016, the Iowa legislature indicated to Congress that it no longer wished to exercise criminal jurisdiction over crimes involving Indians on the Meskwaki Settlement. It enacted Iowa Code § 1.15A, which states that Iowa "tenders to the United States any and all criminal jurisdiction which the State of Iowa has over criminal offenses committed by or against Indians on the [Meskwaki Settlement], and that as soon as the United States accepts and assumes such criminal jurisdiction previously

[4] In addition to the Meskwaki Settlement in Iowa and the tribes in Kansas, Congress enacted a similar statute for the tribes in New York. See 25 U.S.C. § 232.

conferred to the state of Iowa or reserved by the state of Iowa, all criminal jurisdiction on the part of the state of Iowa over criminal offenses committed by or against Indians on the [Meskwaki Settlement] . . . shall cease." *Ibid.*

c. In 2018, Congress repealed the 1948 Act, thereby eliminating the State of Iowa's authority to prosecute crimes by or against Indians on the Meskwaki Settlement. See Pub. L. No. 115-301, 132 Stat. 4395 (2018). The 2018 Act provides in full: "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." 132 Stat. 4395.

C. The Decisions Below

1. *State v. Bear*, No. 20-0401

On October 10, 2018, at their shared residence on the Meskwaki Settlement, defendant Bear assaulted his girlfriend Rosie Youngbear and broke her iPhone. Bear App. 13-15, 39. On November 16, 2018, the State filed a trial information charging

Bear with third-degree sexual abuse, in violation of Iowa Code §§ 709.1, 709.4(1)(a), 903B.1; domestic abuse assault causing bodily injury, in violation of Iowa Code § 708.2A(1), 708.2A(2)(b); and third-degree criminal mischief, in violation of Iowa Code §§ 716.1, 716.5. *Id.* at 4-6.

After Congress enacted the 2018 Act on December 11, 2018, Bear moved to dismiss the charges against him on the ground that the State no longer had jurisdiction over his offenses, which occurred on the Meskwaki Settlement and involved an Indian victim and defendant. Bear App. 11-12; see *id.* at 13-17, 39. The district court denied the motion. *Id.* at 24-28.

The district court determined that the 2018 Act does not apply retroactively. Bear App. 26-27. It explained that Congress did not expressly provide whether the statute should apply to pending cases, so it was necessary to determine whether the statute would have a retroactive effect if applied to pending cases, which would give rise to a presumption that the statute does not govern absent clear congressional intent. *Ibid.*

The district court determined that applying the 2018 Act to Bear's case would have a retroactive effect because "it would impair rights possessed by the State at the time it acted." Bear App. 26-27. The court explained that the State had jurisdiction over Bear's crimes when the prosecution was commenced, and under 1 U.S.C. § 109, "incomplete prosecutions are not abated by repeal where the repealing statute does not provide for such abatement." *Id.* at 27. Accordingly, the court determined that the 2018 Act "d[id] not . . . divest[] the State of Iowa of jurisdiction over this matter." *Ibid.* This Court denied Bear's request for interlocutory appeal. *Id.* at 29-30.

Following a bench trial, the district court found Bear guilty of domestic abuse assault, in violation of Iowa Code § 708.2A(1), 708.2A(2)(b); and fourth-degree criminal mischief, in violation of Iowa Code §§ 716.1, 716.6. Bear App. 34-36, 41. The court sentenced Bear to a suspended sentence of one year on each count, to run consecutively, and placed him on probation for one year. *Id.* at 46.

2. *State v. Cungtion*, No. 20-0409

On July 30, 2017, defendant Christopher Cungtion (a non-Indian) offered the services of two female companions to three men (who are identified as Indians) in the parking lot of the Meskwaki Bingo Casino and Hotel. State's Cungtion Br. 10, 14. When the men declined, Cungtion hit one man in the face with a liquor bottle and thew the bottle at his car. *Ibid.* Cungtion then got into a car, tore around the parking lot, and drove at the same man, narrowly missing him and sideswiping his car. *Ibid.*

On November 30, 2018, the State filed a trial information charging Cungtion with intimidation with a dangerous weapon with intent to injure, in violation of Iowa Code § 708.6; willful injury resulting in bodily injury, in violation of Iowa Code § 708.4(2); assault with a dangerous weapon, in violation of Iowa Code §§ 708.1(2)(c), 708.2(3); and driving while barred, in violation of Iowa Code §§ 321.560, 321.561. Cungtion App. 4-5.

On the same day, Cungtion entered an *Alford* plea to intimidation with a dangerous weapon (a lesser-included offense to the first count alleged in the information), in violation of Iowa Code

§ 708.6, and a guilty plea to willful injury resulting in bodily injury. Cungtion App. 8. The court granted deferred judgment on these counts, meaning that it would refrain from entering judgment for five years while Cungtion was on supervised probation and would not enter final judgment if Cungtion successfully completed his probation. *Id.* at 8-9; see Iowa Code §§ 907.3(1) and 901.5. Cungtion also entered an *Alford* plea to assault with a dangerous weapon and driving while barred. Cungtion App. 12. The court found him guilty, imposed a two-year suspended sentence on each count, and placed him on supervised probation for two years. *Ibid.*

On July 22, 2019, the State notified the court that Cungtion had violated his probation. Cungtion App. 15-17. The State requested that the court revoke the previously entered deferred judgments, adjudicate Cungtion guilty on those counts, and impose sentence. *Id.* at 15.

Cungtion moved to dismiss on the ground that the state court lacked jurisdiction to enter judgment against him after Congress enacted the 2018 Act because his crimes occurred on the Meskwaki Settlement and the victim was an Indian. Cungtion App. 19-21.

The district court denied the motion. *Id.* at 25-27. It determined that "[r]etroactive application [of the 2018 Act] would impair the rights of the State to enforce the violations of law which it had jurisdiction over at the time the violations allegedly occurred" and the 2018 Act therefore should not be applied retroactively. *Id.* at 26-27.

The court revoked its deferred judgment on the willful injury count, adjudged Cungtion guilty, and imposed a five-year suspended prison sentence and a five-year term of supervised probation. Cungtion App. 32-33. The court did not revoke its deferred judgment for the intimidation with a dangerous weapon count but amended the terms of Cungtion's probation by requiring him to reside at a residential reentry center. *Id.* at 32. For the assault and driving while barred convictions, the court extended Cungtion's probation until November 30, 2021. *Id.* at 33-34.

ARGUMENT

FEDERAL LAW PROVIDES NO BAR TO THE STATE'S AUTHORITY TO COMPLETE ITS PROSECUTIONS OF BEAR AND CUNGTION

The United States Code contains a saving statute, 1 U.S.C. § 109, which provides that the repeal of "any statute" shall not have

the effect of extinguishing penalties or liabilities "incurred under such statute" unless Congress expressly so provides, "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." *Ibid.* The federal repealing statute (the 2018 Act) does not state that it applies to pending cases. Federal law therefore provides no bar to the State's authority to complete its prosecutions of Bear and Cungtion, who incurred criminal liability under state law while the 1948 Act was in effect. Whether state law provides any barrier to the State's authority to complete these prosecutions is beyond the scope of the United States' amicus participation.

A. The 1948 Act Conferring Jurisdiction Over State-Law Crimes Committed By Or Against Indians On The Meskwaki Settlement Applies To Conduct That Occurred While That Statute Was In Effect

1. The federal saving statute provides that "[t]he 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." 1 U.S.C. § 109. Accordingly, a statute that has been repealed and does not provide

otherwise is "treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement" of any penalty, forfeiture, or liability incurred under the statute. *Micei Int'l* v. *Department of Comm.*, 613 F.3d 1147, 1152 (D.C. Cir. 2010) (internal quotation marks omitted).

Congress enacted the saving statute in 1871 "to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974) (quoting *Bradley* v. *United States*, 410 U.S. 605, 607 (1973)). At common law, abatements "resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties." *Ibid.* Congress enacted Section 109 to avoid such abatements, which were "often the product of legislative inadvertence." *Ibid.*

2. The saving statute operates to "perpetuate the jurisdiction granted in a statute" that has been repealed, *Micei Int'l*,

613 F.3d at 1152 (citing *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 389-391 (1953)), if the liability that is the subject of the suit was "incurred under [the] statute," 1 U.S.C. § 109. Penalties are "'incurred'" for purposes of the saving statute when an offender becomes subject to them, *i.e.*, when the offender commits the underlying conduct that makes him liable. *Dorsey* v. *United States*, 567 U.S. 260, 272 (2012). And penalties are incurred "'under'" the statute if they are incurred "while the statute was in effect." *Micei Int'l*, 613 F.3d at 1152; cf. *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 554-555 (1954) ("The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration.").

3. Applying those principles to these cases, the 2018 Act does not prevent the State from completing its prosecution of Bear or revoking its deferred judgment on Cungtion's willful injury offense and imposing judgment.

The 1948 Act "confer[s]" "jurisdiction" on the State over offenses committed by or against Indians on the Meskwaki Settlement "to the same extent as its courts have jurisdiction generally over offenses committed within [the] State outside of any Indian reservation." 62 Stat. 1161. The 2018 Act "repeal[s]" the 1948 Act, 132 Stat. 4395, which has the practical effect of repealing the applicability of all state laws and penalties on the Meskwaki Settlement for crimes involving Indians.[5]

Congress did not expressly provide that the repeal of the 1948 Act would release or extinguish any state-law criminal liability incurred while that statute was in effect. Accordingly, the 1948 Act should "be treated as still remaining in force for the purpose of

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[5] Under the Assimilative Crimes Act, 18 U.S.C. § 13, the United States may assimilate and enforce state law for crimes committed by or against Indians on the Meskwaki Settlement when there is no applicable federal statute, subject to the exceptions set out in 18 U.S.C. § 1152; *Williams* v. *United States*, 327 U.S. 711, 713-716 (1946); *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990). But state law offenses that are assimilated into federal law are federal offenses. See *United States* v. *Christie*, 717 F.3d 1156, 1172-1173 (10th Cir. 2013) (stating that "an assimilated charge is a federal charge" and "[o]ffenses properly assimilated into federal law are . . . part of federal law") (emphasis omitted).

sustaining any proper action or prosecution" for the enforcement of penalties under state criminal law that were incurred before December 11, 2018. 1 U.S.C. § 109.

Criminal penalties for Bear and Cungtion were "'incurred'" when they committed the underlying offenses that subjected them to prosecution by the State. *Dorsey*, 567 U.S. at 272. Bear assaulted Youngbear and broke her iPhone on October 10, 2018. Bear App. 13-15, 39. And Cungtion's crimes in the casino parking lot occurred on July 30, 2017. State's Cungtion Br. 10, 14. Because Bear and Cungtion incurred state-law penalties while the 1948 Act was in effect, the saving clause permits the prosecutions to go forward after its repeal on December 11, 2018.

B. The Effect Of Any State Law On The State's Authority To Prosecute Bear And Cungtion Is Beyond The Scope Of The United States' Amicus Participation

The parties' briefs in *Cungtion* make additional arguments about the Iowa courts' jurisdiction to hear these cases under state law. Relying on *Tyndall* v. *Gunter*, 840 F.2d 617 (8th Cir. 1988), the State takes the position that its authority to revoke Cungtion's deferred judgment depends on the scope of Iowa Code § 1.15A, in

which the Iowa legislature "retroceded" its criminal jurisdiction over crimes involving Indians on the Meskwaki Settlement to the United States. State's Cungtion Br. 18-36. Cungtion contends that Iowa Code § 1.15A eliminated the jurisdiction of state courts on December 11, 2018, because it provides that the State's jurisdiction "shall cease" as soon as the United States "accepts and assumes such criminal jurisdiction previously conferred on the State." Cungtion Br. 12-14.

Whether state law provides any barrier to the State's authority to complete these prosecutions is beyond the scope of the United States' amicus participation. But it may be helpful for the Court's analysis to clarify the United States' understanding of its own criminal jurisdiction on the Meskwaki Settlement.

In 1948, when the United States conferred criminal jurisdiction on the State over crimes involving Indians on the Meskwaki Settlement, it did not "cede" its own criminal jurisdiction to the State. Congress explicitly provided in the 1948 Act 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." 62 Stat. 1161. The federal government has always continued to exercise concurrent jurisdiction on the Meskwaki Settlement over offenses subject to federal jurisdiction under 18 U.S.C. §§ 1152 and 1153. See *Negonsott* v. *Samuels*, 507 U.S. 99, 105 (1993).

Pursuant to that concurrent jurisdiction, the United States has (and has always had) jurisdiction over Bear only if any of his crimes qualified as major crimes under 18 U.S.C. § 1153. See 18 U.S.C. § 1152 (limiting the United States' jurisdiction over crimes committed by one Indian against another). The Tribe has authority to prosecute Bear because he and Youngbear are both Indians. *Negonsott*, 507 U.S. at 102; see *United States* v. *Lara*, 541 U.S. 193, 210 (2004).

Because Cungtion's victim was an Indian, the United States has always had authority to prosecute him for federal enclave crimes or assimilated state law crimes. 18 U.S.C. § 1152, see 18 U.S.C. § 13; *Williams* v. *United States*, 327 U.S. 711, 713-716 (1946); *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990). The Tribe has no jurisdiction over Cungtion, who is a non-Indian and committed

crimes that do not fall within the jurisdiction Congress has conferred on Indian tribes over non-Indians for certain domestic violence offenses. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209-210 (1978); 25 U.S.C. § 1304.

CONCLUSION

To the extent the judgments in this case turn on the 2018 Act, the judgments of the District Court for Tama County should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

If oral argument is granted, the United States intends to request leave to participate in the argument as amicus curiae.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4,560 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced, 14-point Century Schoolbook typeface using Microsoft Word.

Dated: July 20, 2021

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CERTIFICATE OF SERVICE

I certify that, on the 20th day of July, 2021, I served this document on all parties to these cases by electronically filing the foregoing with the EDMS system on this same date.

Respectfully submitted,

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