No. 19-1414

IN THE

Supreme Court of the United States

UNITED STATES, PETITIONER,

v.

JOSHUA JAMES COOLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERF is primarily writing this *amicus curiae* brief to explain why federalism as engineered in the structure of the Constitution was fundamentally broken after the Civil War when the United States was allowed to retain what have become permanent federal territorial war powers over Native Americans. CERF appreciates the recent decision of *Financial Oversight Board of Puerto Rico v. Aurelius Investment LLC, et al.*, 140 S.Ct. 1649 (2020), limiting federal territorial power. CERF with this brief will explain why it is now necessary to fundamentally address the 1871 Indian policy and stop allowing separate territorial laws to apply to Native Americans and non-Indians. The United States effectively has two sets of laws. The first set of laws are the regular domestic laws that respect the constitutional limitations and apply to all. The second set of laws are those based on continuing territorial war powers over Indians deemed "plenary" powers of Congress that include the 1871 Indian war power policy.[1] These laws

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's

which began as laws that only applied in a territory are not subject to constitutional or individual rights constraints. Amicus submits this *amicus curiae* brief in this case because having two sets of contradictory laws is untenable.[2]

SUMMARY OF THE ARGUMENT

Petitioner United States endeavors to convince this Court that the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* (ICRA), is sufficiently protective of individual constitutional rights to allow the Crow Tribal government to exercise criminal jurisdiction over a non-Indian person. The Solicitor General argues that the ICRA affords sufficient protection to Mr. Cooley, a non-Indian, to allow an Indian tribal government to exercise general criminal jurisdiction over him when he stopped on the shoulder of a highway that is not under tribal jurisdiction per *Strate v. A-1 Contractor*s, 520 U.S. 438 (1997). By making this claim, the Solicitor General has raised the constitutional question of whether all non-Indians are due the protections of the Constitution and all the Amendments or only those rights granted by Congress under its plenary authority to treat all people like Indians.

Unlike previous federal arguments that have been based on the continuing territorial jurisdiction of the United States over Indian lands, the United States,

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members, or its counsel have made any monetary contribution to the preparation or submission of this brief. Both Petitioner Solicitor General and Respondent Cooley have consented by email letter to the filing of this *amicus curiae* brief.

[2] CERF dedicates this brief to the memory of Dennis Williams, a Navajo man and long time board member of CERA that fought his whole life for equal rights for Native Americans.

in this case, bases its claims of tribal sovereignty over a non-Indian solely on an unenforceable and legally questionable act of Congress that mimics, but is neither premised nor based upon the Constitution of the United States and its Amendments that comprise the Bill of Rights and Civil War Amendments. The ICRA is an application of Congress' "plenary authority over Indians" as allowed by this Court in *United States v. Kagama*, 118 U.S. 375 (1886). This federal plenary authority was established in what is generally referred to as the 1871 federal Indian policy which allowed the war powers preserved from the Civil War to be applied to all Indians and Indian tribes whether or not they had been hostile to the Union during the Reconstruction period. This Court, in the 1880's, recognized several Civil War era powers as plenary to avoid confronting the Congress and Department of Justice (DOJ) over the continuing use of war powers. Just like the authority over the federal territorial lands under the Property or Territory Clause (Art. IV, Sec. 3, Cl. 2), the plenary power over Indians is not constrained by any clause of the Constitution or Bill of Rights or the Civil War Amendments.

The 1871 Indian Policy was not the only set of Indian laws to emerge from the Civil War. President Abraham Lincoln did get an updated federal Indian policy enacted in 1862-1863. The updated policy not only included Indians and Indian tribes in the new definition of treason passed for the Civil War, but it also established a new general removal policy. *See* Act of March 3, 1863, 37th Cong. Sess. III, Ch. 99, 12 Stat. 792-794. The new general removal policy did not require the Indian tribes to be physically removed from their traditional land areas. Instead, in its application, it was made clear that Indian removal was really about

removing the "Indian country" designation to allow the Indians and Indian tribes to transition to and be governed under primary state jurisdiction. *See, e.g.*, Report of the Commissioner of Indian Affairs, Department of the Interior, Office of Indian Affairs (Oct. 31, 1863).[3]

Another major Civil War-era change engendered the transfer of responsibility over the Indian agents and the Indian tribes from the War Department to the Department of the Interior. *See* Act of March 1, 1873, 42nd Cong. Sess. III. Ch. 217, 17 Stat. 484. This statute, which facilitated the transfer of the war powers, was first unofficially codified as Revised Statute (R.S.) § 442, and later officially codified as 43 U.S.C. § 1458.

Secretary of War Stanton needed the Indians to be under continuing war powers in order to punish the defeated Southern States. It was no accident that first Stanton and then the DOJ buried the Lincoln Indian removal policy to prevent any challenge to the 1871 Indian Policy war power during Reconstruction. In fact, the book War Powers[4] written by the solicitor for the

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[3] *See Id.* at 33 ("As you are aware, an act of Congress was passed at the last session providing for […] the *peaceable* removal of Indians. In its execution, some of the members of the tribe were found unwilling to leave their homes, and as there was neither the disposition nor the power to compel them to accompany their brethren, they have remained upon their old reservation. The most of them are represented as having entirely abandoned the Indian habits and customs, and has being fully qualified by good conduct and otherwise for civilized life. Many of them are enlisted in the military service, and all are desirous of remaining upon and retaining possession of the homes allotted to them under the provisions of their treaty.") (emphasis in original).

[4] *See* William Whiting, War Powers Under the Constitution of the United States: Military Arrests, Reconstruction, and Military Government, 43rd Ed. (Lee, Shepard and Dillingham Publ. 1871).

War Department, William Whiting, explains that the power to punish both the Indians and the Southern States for their hostility was based on using the war powers to give Congress the power to declare "constructive treason." *Id.*, Chap. V at 95. Constructive treason was the wildly arbitrary and capricious power exercised by George III to eradicate, neutralize and punish any potential political rivals or persons he just did not like. All of our Founding Fathers had been declared to be treasonous as a matter of constructive treason. The 1871 Indian Policy is the source of the "plenary" power that now threatens the entire structure of the Constitution of the United States as a second basis of law. There cannot continue to be two distinct and contradictory sets of laws during peacetime if this country is going to survive another ten years as a self-governing republic.

ARGUMENT

Amicus has been arguing for more than twenty years that federal Indian law is schizophrenic and that two sets of distinct and conflicting laws over Native Americans have existed since the Civil War. CERF has argued consistently that President Richard Nixon and his primary attorney William Veeder deliberately used this duality of laws applying to Native Americans to abrogate, if not, to confront constitutional boundaries, deliberately attempting to increase the power of the national government against the States and People. Since William Veeder began making his arguments as a trial lawyer for the Department of Justice (DOJ), it is not known how much of the Promotion of Tribal Sovereignty agenda was attributable to Nixon or the DOJ, and it really doesn't matter. In the case at bar,

the Solicitor General presents the constitutional question of whether a non-Indian is due the protections of the Constitution and all the Amendments or only those rights Congress granted to Mr. Cooley pursuant to the ICRA under its plenary authority over Indians. This Court must finally decide whether we have one rule of law under the Constitution that applies to all people in the United States.

I. THERE ARE TWO DISTINCT AND CONTRADICTORY SETS OF LAW OVER NATIVE AMERICANS

Before the Civil War, this Court determined that Congress had plenary territorial war power and authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). As inherited from the law of Great Britain, constitutional government was not considered applicable in the wilderness. Until basic forms of government were in place, the King and Parliament exercised unlimited authority with all of the war powers conceivable under British law. The Framers were the victims of the territorial war powers of Britain. They fought the Revolutionary War to free themselves from the permanent territorial war powers of Great Britain. They intentionally tried to create a new system for domesticating new land areas by applying the principles of the Enlightenment Era.

Because constitutional law does not apply in a territory the Framers required that Congress "dispose of the territories." Property or Territory Clause, Art. IV, Sec. 3, Cl. 2. This Court defined the requirement to dispose of the territory and create new States, known

as the "Equal Footing Doctrine," as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was intended to prevent the United States from employing the territorial war powers in domestic law against the States and individuals within the States. In the aftermath of the Civil War, the Constitution's structural limitations on the sovereign authority of the federal government were intentionally broken to allow the Congress to punish the Southern States as they were punishing the Indian Tribes.

A. This Court has Known that There is a Second Set of Laws Denying all Constitutional Rights that Apply to Indians and Indian Tribes Since its 2004 Decision in *United States v. Lara*.

Since Justice Breyer's majority opinion in *United States v. Lara*, 541 U.S. 193 (2004), this Court has acknowledged that federal Indian law is at least schizophrenic. *See J. Thomas dissenting* at 219. As Justice Breyer made very clear in the *Lara* opinion, this Court has accepted the facts of the many preceding Indian cases as presented by the Solicitor General over the course of time. The *Lara* opinion also acknowledged that major changes have occurred over time both to the facts and claims of federal authority. During the last twenty years, CERF has challenged much of this assumed Indian law by performing extensive research in an effort to piece together why Indian law has remained separated from the main Constitutional objectives so clearly applied in civil rights litigation since this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

As decided in *Lara*, Native Americans are not entitled to raise any constitutional objection even as a defense to a criminal accusation. Mr. Lara had raised as defenses not only the Indian Civil Rights Act, 18 U.S.C. § 1301 et seq., but also the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. *Lara* at 207-210. Given Mr. Lara's status as an Indian, Justice Breyer simply reiterated that because the Indians are under the plenary authority of Congress these constitutional arguments are readily dismissed. *Id.* (citing *Wheeler*, *Oliphant* and *Duro*). *Id.* at 207. *See generally United States v. Wheeler*, 435 U.S. 313 (1978), *Oliphant v. Susquamish Tribe*, 435 U.S. 191 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990). In the case at bar, the Solicitor General is now asking this Court to treat Mr. Cooley, a non-Indian, as if he were an Indian, and therefore, to deny him the rights that were previously denied to Mr. Lara as the next expansion of the inherent sovereignty of an Indian tribe and of the federal government's plenary authority.

The Solicitor General's request to treat Mr. Cooley as this Court had treated Mr. Lara does not include any request or claim that either *Oliphant* or *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) needs to be overruled for this Court to extend Congress' plenary authority over Indians to non-Indians. As this Court may recall, Justice Rehnquist opined in the majority opinion of *Oliphant* that Indian tribes cannot have inherent criminal jurisdiction over non-Indians because it would deny the non-Indians all constitutional rights. *Oliphant* at 205 (quoting *Destroying Indian Boundary Markers and Trespassing on Indian Land*, U.S. Sen. Rpt. 1686, 86th Cong. 2d Sess. at 2 (June 24, 1960)). This means inherent tribal sovereignty cannot be applied to non-Indians in criminal proceedings, which is

exactly what the Solicitor General is requesting in this case. Similarly, the Crow Tribe cannot have jurisdiction over Mr. Cooley because the Crow tribe does not have Indian country jurisdiction over the highway right-of-way where Mr. Cooley was parked and taken into custody by the tribal officer who was not deputized by the County or State. *See Strate*, 520 U.S. at 442-443, 455-456. The Solicitor General is requesting this Court to make the plenary power over Indians the general law of the land that applies also to non-Indians.

This question forces this Court to actually decide whether we are living during peacetime with one set of laws under the Constitution or two sets of laws: the general Constitutional law over all non-Indians and sometimes Indians; or the plenary authority of Congress over all Indians and maybe non-Indians. Most living Americans, including members of Congress and the members of this Court, do not remember and were not likely taught in school about how states were made out of territories because it has not happened in more than sixty years. No new States have been admitted since the Hawaii Territory became our nation's fiftieth state, on August 21, 1959.. In fact, most Americans do not have any understanding today that the territorial war powers were supposed to be separate powers to domesticate wilderness areas. This Court needs to explain to Congress and the Department of Justice, which includes the Solicitor General, that these are two distinct and contrary sets of laws emanating from separate sources of federal sovereign authority, and that territorial law cannot be applied in areas under State jurisdiction to diminish constitutionally protected rights. General Constitutional law guarantees all the rights and civil liberties of the Constitution and its Amendments. By contrast, plenary authority laws

protect no constitutional rights or civil liberties, as though we all continue to reside in Territories rather than States.

This last term, this Court interpreted the Property or Territory Clause in the case of *Financial Oversight Board of Puerto Rico v. Aurelius Investment LLC, et al.*, 140 S.Ct. 1649 (2020), as it applied to the Appointments Clause, Art. II, Sec.2, Cl.2. Throughout the opinion, Justice Breyer called the Property Clause the Territory Clause, Art. IV, Sec.3, Cl.2, just as Justice Kagan had in the case of *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863 (2016). Counsels do not disagree with either opinion or the importance of renaming the Property Clause as the Territory Clause. The name Territory Clause is a more accurate description of what the Framers intended the clause to be. The Territory Clause was intended to be the means for teaching new territories how to become self-governing states whether those states ultimately joined the union of the United States or became independent nations. These cases both explain that the Framers did not intend for the virtually unlimited territorial war powers of Congress over actual territories to become a part of domestic constitutional law within the boundaries of the United States, because such powers are, in fact, contradictory to the Constitutional structure.

Recognizing the truly separate and distinct sources of these laws, Justice Kagan, in her opinion in *Sanchez Valle*, concluded that the Double Jeopardy Clause did not apply to the decisions of the courts of the Territory of Puerto Rico. She also rightfully pointed out that this Court had deemed the Indian tribes to be sufficiently separate sovereigns that their tribal court decisions have been said to create Double Jeopardy under the Constitution. 136 S.Ct. at 1872 (citing *United*

States v. Wheeler, 435 U.S. 313, 323 (1978). Justice Kagan, furthermore, emphasized the contradictory reality of tribal sovereignty in the *Sanchez Valle* opinion, acknowledging that the Indian tribes are subject to the plenary authority of Congress while still being considered separate sovereigns. 136 S.Ct. at 1872. Both Justice Ginsburg and Justice Thomas took the opportunity to write a concurring opinion pointing out the flaws of the dual sovereignty doctrine and questioning its continued viability. Justice Thomas wrote a concurring opinion citing his concurring opinion in *Lara*, 541 U.S. at 214-226, in which he argued that Indian tribes should not be considered separate sovereigns for Double Jeopardy purposes. 136 S.Ct. at 1877. Justices Breyer and Sotomayor dissented in *Sanchez Villa*, pointing out that the dual sovereignty doctrine is particularly flawed because Congress, at any time, could withdraw the separate sovereign status of the Indian tribes. 136 S.Ct. at 1879-1880. This Court has sufficiently interpreted the Territory clause in these recent cases regarding Puerto Rico to enable it to now reconsider its prior interpretations, as applied in federal Indian law, of the Property or Territory Clause. In other words, this case presents this Court with the unique opportunity to explain to Congress and the Executive that the plenary authority to civilize a new land area can be exercised only in separate territories, and not as domestic powers under the Constitution.

B. What this Court Has Not Realized is that the 1871 Indian Policy was Used to Create the Power of Declaring Constructive Treason in the Congress to Punish the Southern States and Make the Territorial War Powers Permanent.

Following the Civil War, the territorial war powers were deliberately expanded against the Native Americans to punish all of them for the hostilities committed by Indian tribes that had chosen to fight for the Confederacy and that had otherwise raided communities during the course of the war. This became known as the 1871 Indian Policy, and it is still a significant part of federal Indian law today. Although a huge fight had broken out within the Congress over punishing the Southern States, there seems to have been very little controversy about punishing the friendly Indian tribes for the sins of the handful of Indian tribes that had joined with the Southern Confederacy.

The creation of a new very harsh military policy towards all the Indian tribes began almost immediately after the war ended. Multiple acts to punish the Indians were passed by Congress and signed into law by the President, culminating with the Act of March 3, 1871, 41st Cong. Sess. III, Ch.120, 16 Stat. 544, 566, which formally separated the Indians from being protected by the Constitution as dependent wards of the United States. The 1871 Indian Policy, which is attached to[5] an

[5] Just as Secretary Stanton and the DOJ, approximately 150 years ago, hid the 1871 Indian Policy in the 1871 Appropriations Act, the Interior Department and DOJ enlisted their congressional allies, during late December 2020, for similar reasons, to bury deep within the Consolidated Appropriations Act of 2021, the Montana Water Protection Act (MWRA) (S.3019), which federalizes the

1871 Appropriations Act, is set forth on page 566 in the last paragraph above the section entitled, "General Incidental Expenses of the Indian Service." It begins with the words "*Provided*, That hereafter no Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*…" (emphasis in original). This policy that ended treaty making with the Indian tribes and placed them under the direct war power authority of Congress became known as the Indian Policy of 1871. It was the source and justification for the Indian War period of our history. The 1871 Indian Policy formally ended the assimilation policy of the Northwest Ordinance of July 13, 1787, and it began a much harsher direct war power policy toward the Indians. *See Lara*, 541 U.S. at 201. The Indian Policy of 1871 was based on all Indians and Indian tribes as a race being deemed potential belligerents against the authority of the United States, even though only about ten Indian tribes from the South had formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War. *See* (25 U.S.C. §§ 71 and 72; Rev. Stat. § 2079 and § 2080) [6] They were the same powers needed

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Montana-Confederated Salish and Kootenai Tribes (CSKT) Water Compact (85-20-1901 MCA) that the Interior Secretary and the DOJ had previously executed in April 2015, pursuant to their respective territorial war power authorities under 43 U.S.C. § 1457 and 28 U.S.C. §§ 516-17.

[6] *See* Federal Statutes Annotated, Second Edition, Containing all the Laws of the United States of a General, Permanent and Public Nature in force on the first day of January 1916, Vol III,

to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) at p. 470-8.

The territorial war power to punish the Indians was needed to create the legal basis for punishing the defeated Southern States. This was required because the Framers had structurally placed many checks and balances in the Constitution o prevent the federal government from ever passing domestic laws intended to punish persons for political acts known in Great Britain as "constructive treason." Constructive treason in Great Britain was a virtually unlimited sovereign power that had been used by the monarchs to punish persons and their families for politically opposing or simply upsetting the vanity of the monarch. Unlike actual laws stating the elements of treason, the declarations of "constructive treason" were made by the Sovereign without any requirement of prior notice and without any legal limitations. As explained in the Whiting War Powers treatise, the 1871 Indian Policy was used to actually justify the power of constructive treason in the Congress to punish not only the Indians as perpetual belligerents against the United States, but to also punish the Southern States in Reconstruction.

Mr. Whiting includes on pages 76-78 of his War Powers treatise parts of the debate of May 26, 1836 regarding the removal of the Indians from Alabama, Georgia, and Florida. Whiting uses the stated opinion of Representative and former President John Quincy

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(McKinney Ed., Edward Thompson Co. Publ. (1917), 3 Fed. Stat. Ann. 2d 770-771; Federal Statutes Annotated: Containing all the Laws of the United States of a General or Permanent Nature in force on the first day of January, 1903, Vol. III (McKinney and Kemper, Eds., Edward Thompson Co. Publ. (1904) at 357-358.

Adams to explain the limitations placed upon the general domestic power over the Indians and the slaves and how those powers become virtually unlimited when there exists a state of war because of Indian hostilities. Mr. Whiting's argument continues by discussing the express constitutional limitations that the Founders had placed upon bills of attainder and *ex post facto* laws to prevent the federal government from acquiring and exercising the power to declare and punish "constructive treason." War Powers at 84-92. But, as Chapter 5 of that treatise, including its Introduction, argued, Congress possesses the right "to declare by statute the punishment of treason and its Constitutional limitations." *Id.* at 93-95. Mr. Whiting devoted an entire chapter to explaining that, while the Constitution requires that the power of treason be defined by an actual statute, once Congress passed such a statute it could declare by other laws what the punishments for treason will be, without limitation, including attainder. *Id.*, Chap. 5, at 95-111. Since its enactment, the 1871 Indian Policy has continued all of the punishments for all Indians as an attainder, which, as of this filing, spans a period of approximately 150 years.

The Congress enacted the Indian Civil Rights Act (ICRA), 25 U.S.C.§§ 1301-1304, based on its plenary territorial powers to punish the Indian tribes. Just a cursory examination of the ICRA text and the statute's overall design reveals its true origins. Pursuant to 25 U.S.C.§ 1304(b)(4)(A)-(B), for example, a tribe may exercise special domestic violence criminal jurisdiction over a non-Indian defendant if the alleged victim is an Indian, or if the defendant resides or is employed in the Indian country of the participating tribe. The exercise of tribal jurisdiction under the

ICRA has the effect of depriving non-Indians of all constitutional rights, because neither the Indian tribe nor any tribal officer is subject to the Constitution of the United States under this Court's ruling in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). In *Martinez*, this Court held the ICRA to be unenforceable except by habeas corpus petition. 436 U.S. at 60-61, 66. ICRA Section 1303 limits the habeas corpus petition "to test the legality of his detention by order of an Indian Tribe," potentially blocking a constitutional challenge of the ICRA's validity even by a non-Indian. 25 U.S.C. § 1303.

The territorial plenary power to make general laws that deny all constitutional rights will exist as long as the 1871 Indian Policy exists. This Court underestimated this continuing territorial plenary power against the Southern States in the opinion of *Shelby County v. Holder*, 570 U.S. 529 (2013), in striking down part of the Voting Rights Act. The need to reaffirm this virtually unlimited power to punish for treason, the American version of constructive treason, is the reason that the *Shelby County* decision has been so contested, and it is likely the reason the United States filed the Petition for Certiorari for this case. *See J. Thomas concur.* at 557-559.

II. THE LINCOLN INDIAN POLICY WAS IN PLACE BEFORE THE 1871 INDIAN POLICY AND HAS NEVER BEEN ADDRESSED BY THIS COURT

As President Lincoln promised in his December 1, 1862 annual address, he was going to promote a new federal Indian policy that would include all Native Americans in the major changes he was starting to

make to end slavery and restore and expand the principles embodied in the Constitution. In his December 8, 1863 annual address he proclaimed that he had accomplished the creation of this inclusive federal Indian policy. The main statute of the Lincoln Indian policy was passed in 1863 attached to the Indian appropriations act. *See* Removal Act of March 3, 1863, 37th Cong. Sess. III, Ch. 99, 12 Stat. 792-794. The policy was very much a modernized assimilation policy to give Native Americans a real path to land ownership and full state and federal citizenship. The Lincoln Indian policy was passed after the Sioux uprising in Minnesota in 1862. The Lincoln Indian policy is and was the alternative to the 1871 Indian Policy.

A. The Lincoln Indian Policy was Intended to End the Territorial Power Over Indians and to Confer Full Citizenship Rights to All Native Americans

The Lincoln Indian policy expanded upon and softened the harsh assimilation policy of the Removal Act of May 28, 1830, 21st Cong. Sess. I, Ch. 148, 4 Stat. 411-412. The Lincoln Indian policy begins with the paragraph starting with the words "For Intercourse with the various Indian Tribes," and it runs to the end of the statute. *See* 12 Stat. 792-794. Its first section of the Lincoln Indian policy (i.e., the Removal Act of March 3, 1863) makes three major changes. It places the Secretary of the Interior with the President over the Indians, thereby removing the Indians from being under the Secretary of War. It created a whole new kind of treaty making, treaties made solely to maintain peaceful relations with the Indian Tribes that did not require any land cessions or even discussion of land cessions. It also vested the President and Secretary of

the Interior with the discretion to negotiate as they saw fit with different bands of Indians instead of lumping all the various Indian bands that composed one Indian Tribe together under a single tribal treaty negotiation. This allowed each Indian band to be treated individually by the United States greatly enhancing the ability to make a treaty that maintained peaceful relations.

The majority of the Lincoln Indian policy statute deals with the actual physical displacement of specific Indian tribes that occurred during the Civil War. Sections 4 and 5 provided specific relief to the Indians that had been removed to Kansas and had their allotments overrun after the passage of the Kansas Nebraska Act of 1854. It serves as the basis of the *Kansas* Indians case. *See The Kansas Indians*, 72 U.S. 5 Wall. 737 (1866). The other significant part of the statute addresses what was supposed to happen in the Indian Territory once hostilities ceased and loyal Indians could be relocated – namely, "the extinction of their titles to lands held in common within the State." 12 Stat 793 at Sec. 4. Last term, the Solicitor General actually argued for state jurisdiction to apply over the Choctaw Indians in *McGirt v. Oklahoma*, 140 S. Ct 245 (2020), but he failed to cite the Lincoln Indian policy statute as the basis for continuing to make the Indians in the Indian Territory state citizens following the Civil War.[7] A separate statute was passed following the Civil

[7] The United States amicus brief did an excellent job of describing the intent of Congress and President Lincoln in the new policy of trying to make all the Indians state citizens. *See* Brief for the United States as Amicus Curiae Supporting Respondent, *McGirt v. Oklahoma*, Docket No. 18-9526, at 8-11 ("Congress concluded that the law-enforcement and other challenges in the Indian Territory had a single solution – statehood. It therefore acted to

War extending the Lincoln Indian policy to other Indian tribes that had been hostile to the United States just before Secretary of War Stanton convinced the Radical Republican Congress to switch to the Indian war policy of 1871. *See* Act of July 20, 1867, 40th Cong. Sess. I, Ch. 32, 15 Stat. 17-18. This act is actually discussed in the Response Brief of Mr. Cooley at pp. 31-32.

The Lincoln Indian policy was first applied to the peace treaties with the Mille Lacs Band of Minnesota Chippewa. None of the Minnesota Chippewa Bands had joined in the Sioux uprising. The 1863 Treaty with the Mille Lacs Band of Chippewa specifically says that the Indians need not be physically removed from the lands they occupy but can remain where they are. *See* Treaty of March 11, 1863, 12 Stat. 1249. The 1863 Treaty generally rewards the Band for their loyalty. When the Band decided that they had not gained enough benefit for their loyalty, they renegotiated a year later for additional benefits. *See* Treaty of May 7, 1864, 13 Stat. 693. *See also United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 499-501 (1913) discussing the terms of both treaties). This demonstrates how the peace treaties allowed a continuing dialogue between the Indian tribes and the President and Secretary of the Interior. This also meant that the Indian tribes had a means to complain when they were not receiving what they had been

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replace the separate domains and governments of the Five Tribes with a single state domain and state and municipal governments that would govern *all* persons, Indians and non-Indians alike. In particular, Congress saw the breaking up of the Five Tribes' territories as a critical prerequisite to statehood.") (emphasis in original). *Id.* at 11.

promised under existing treaties without relying entirely on appointed and often corrupt Indian agents.

The Lincoln Indian policy as the continuation and expansion of the federal Indian assimilation policy gives an explanation for the phrase "Indians not taxed" in the Fourteenth Amendment. Since the Indians were being assimilated it was only a matter of time before they would own their own lands and be subject to state taxes as the Indian country designations were removed. "Indians not taxed" were Indians that were not yet full citizens under the assimilation policy and still being treated as being under the federal territorial authority. Since this designation under the assimilation policy was considered a temporary designation allowing the Indians time to adjust to the required changes and to be educated to join the citizenry, the phrase was intended to stop the instant inclusion of all Indians as full citizens.

The Lincoln Indian policy reflects the investigation that President Lincoln began after the Sioux uprising in Minnesota in 1862. *See* Lincoln and the Indians, David A. Nichols, © 1978, 2000, 2012, Minnesota Historical Society Press.[8] The Indian agent in Minnesota had actually reported in his annual report that he expected an Indian uprising in 1862 because the Southern States were encouraging the Indians to fight.

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[8] As noted previously, since Stanton and the DOJ had so well hidden the Lincoln Indian removal policy incorporated within the Act of March 3, 1863, neither graduate philosophy student David Nichols, in either his 1975 Philosophy Ph.D thesis entitled, "The Other Civil War: Lincoln and the Indians" (1975) or his later book noted above, nor established western Civil War and Lincoln scholar, Don E. Fehrenbacher, who had signed Dr. Nichol's graduate thesis in approval, had known that the Lincoln Indian removal policy had been passed by Congress in 1863.

See Report of the Commissioner, Department of the Interior, Office of Indian Affairs (Nov. 22, 1862) at 25-26. Upon investigation this report turned out to be completely false. The real reason for the Sioux uprising was that they were starving because the Indian agent was taking the federal money from their treaty annuity and instead of buying food and other goods for the Indian tribes was simply pocketing the money for himself. The United States Army that had finally put down the Sioux uprising was preparing to hang over three hundred Sioux warriors as convicted per the newly enacted treason statute for the Civil War. *See* Act of July 17, 1862, 37th Cong. Sess. II, Ch. 195, 12 Stat. 589-592. This new statute defining treason allowed United States District and territorial courts to try all persons accused of treasonous acts. *Id.* at Secs. 7-8, 14. The new treason statute included all Indian tribes that had treaties with the United States. *See* United States Senate, *Annuities of Certain Sioux Indians*, Sen. Rpt. No. 1441, 55th Cong. 3d Sess. (Jan. 5, 1899), at 17-19 (citing Rev. Stat. 5331, *Revised Statutes of the United States, Part 2*, 43rd Cong. 1st Sess. at 1041 (1875); *See also* Act of April 30, 1790, 1st Cong. Sess. II, Ch. 9, 1 Stat. 112-113 at Secs. 1-2. Congress had decided that the Indian treaties were evidence of an existing relationship of amity between the United States and Indian tribes pursuant to which treaty tribes were deemed to owe allegiance to the United States, thereby rendering them subject to treason if they fought against it. *Id.* at 19. The treason statute gave the President the authority to review the military convictions. President Lincoln commuted the death sentences for all but 38 of the Sioux warriors that had been convicted.

The Sioux warriors that were all hung together is the largest single hanging ever done in the United States. The Sioux tribe was harshly punished by Congress in specific legislation passed in 1862, removing them from Minnesota and cancelling all treaties that had been entered with the Sioux Tribe. Cite. The actions taken against the Sioux were not a part of the Lincoln Indian policy as was implied after the Civil War. The Lincoln investigation also found that Congress, in its 1854 enabling statute for the 1855 treaty with the Chippewa, had decided that once all the Chippewa lands in Minnesota and Wisconsin had been ceded upon execution of the Chippewa treaty, said lands "shall cease to be 'Indian country.'" *See* Act of Dec. 19, 1854, 33rd Cong. Sess. II, Ch. 7, 10 Stat. 598-599.[9] There was no Indian country in Minnesota at the time of the Sioux uprising in 1862. Without the change in the Lincoln Indian policy allowing for peace treaties the Chippewa Bands could not have been rewarded for their loyalty.

B. The 1871 Indian Policy Requires Preserving "Indian country" as Separate Federal Territory Solely Subject to the Territorial War Powers.

The Indians or Indian tribes that had remained in the original 13 States following the Constitution's ratification presented the new federal government with a major problem in applying the territorial war powers.

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[9] The December 1854 statute enabling the Chippewa treaty negotiations for the 1855 Treaty is mentioned in Justice O'Connor's majority opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172, 183-184 (1999), but never given its legal citation. Somehow the whole December 1854 statute was never read.

The Framers and our early politicians all understood the difference between domestic law and the territorial laws because of the difficulties they had posed during in the Revolutionary War and during the process of forming new States from the territorial lands of the United States. The Territory Clause, Art. IV, Sec.3, Cl. 2 made it very clear that Congress possessed virtually unlimited temporary territorial power to establish future States, which power had been derived from British law. But what were we supposed to do with the Indian tribal areas within the existing original States? The Constitution gave the United States government direct power over commerce with the Indians, Art.1, Sec 8, Cl. 3, but it did not, in any way, define the status of Indian occupied lands within the original States. The Territory Clause, Art. IV, Sec. 3, Cl. 1, however, limited the territorial power by specifically stating that "no new State shall be formed or erected within the jurisdiction of any other State or parts of State without the consent of the legislatures of the States concerned as well as of the Congress." This meant that Indian lands could not be considered a separate State within a State.

Although Indian lands could not be considered a separate State, it remained uncertain whether the State or federal government had primary jurisdiction over those Indian lands. This Court finally resolved that issue in *Fletcher v. Peck*, 10 U.S. 87, 118-121, (1810). It held that a State possesses primary jurisdiction over Indian lands within it, by recognizing the state's sovereign preemptive right to such lands inherited from Great Britain.

The first statutory definition of Indian country was defined in the Indian Trade and Intercourse Act of 1802, as being all the lands within the territories as

designated by Congress. *See* Act of March 30, 1802, 7th Cong. Sess. I, Ch. 13, 2 Stat. 139-146 at Secs. 1-2, n.(a). The Seneca uprising in New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." *See generally United States v. Donnelly*, 228 U.S. 243 (1913). Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher*, *supra*. As a matter of federal law, the Seneca lands in the State of New York had never left state jurisdiction *United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925), which supported the notion that individual Indians would one day become full citizens and Indian country would cease to exist.

This was the law and policy when the Indian Removal Act of 1830, May 28, 1830, 21st Cong. Sess. I, Ch. 148, 4 Stat. 411-412, was adopted. The United States was trying to make a new public lands and Indian policy as the nation grew. The Framers of the Constitution had every reason to reject the British model that never would have allowed them to be equal citizens to the persons born in the British Isles. And, unlike how it is now portrayed by the DOJ and the Solicitor General, that is precisely what Congress and President Jackson had intended with its passage. This meant that federal negotiators had been given a lot of discretion to accomplish the objective of "removal." From the time the 1802 statute was enacted, the original States had objected to the definition of Indian country interfering with their jurisdiction. With the passage of the Louisiana Purchase Act in 1804, this

objection was actually included in the statute, along with a promise from the Congress that the Indian tribes that did not want to assimilate would be removed to the Louisiana Territory lands. *See* Act of March 26, 1804, 8th Cong. Sess. I. Ch. 38, 2 Stat. 283-289, at Sec. 15. This was the reason the State of Georgia was so upset with the federal government allowing the Cherokee Nation to start organizing its own tribal government on lands within the State. This also was the reason President Jackson promised the Cherokee Tribe that they would be given the ability to organize their own government in the Indian territory when they removed there per the 1830 Removal Act.

Counsels are not seeking to justify the treatment the United States Army had accorded the Cherokee along the trail of tears. We are merely seeking to emphasize that the United States had then literally made up the gaps in the law as new situations arose in order to accomplish the novel objective of ensuring equality of citizenship for all Americans. Granted, many mistakes were made as this policy evolved, but after they were made with the Cherokee the federal Removal Act negotiators became more flexible. Indeed, as the result of the negative publicity over the trail of tears, no more military forced removals were undertaken. In *New York Indians v. United States*, 170 U.S. 1, 27-28 (1898), for example, only a small number of the Indians of the New York State-based Iroquois Confederacy chose to remove to lands in Kansas, as provided for by the Treaty of Buffalo Creek. *See* Act of Jan. 15, 1838, 7 Stat. 550.

Prior to the passage of the Removal Act of 1830, about half of the New York Indians had decided to move to the Territory of Wisconsin. The United States had purchased land for the New York Tribes from the

Menominee in 1831 and 1832. *See* Treaty with the Menominee, Feb. 8, 1831, 7 Stat. 342 and Oct. 27, 1832, 7 Stat. 405. The purchased lands in Wisconsin did not meet the terms of the Removal Act that was fulfilling the promise made to the States in the Louisiana Purchase Act to remove the Indians to the lands acquired for the new territory "West of the Mississippi River." The Treaty of Buffalo Creek, the main Removal Act Treaty for all of the New York Indians, not only includes the terms of removal for the Indians that remained in New York but also for the Indians in Wisconsin.[10] Jan.15, 1838, 7 Stat. 550. The Treaty of Buffalo Creek says that other treaties with the various Indian groups would be done to complete the removal process. All of these secondary treaties allowed for the creation of individual Indian allotments on the lands where the Indians chose to remain in New York and Wisconsin. *See* Treaty for Oneidas of Green Bay, Feb. 3, 1838, 7 Stat. 566. The United States in the Removal Act treaties established Indian allotments that set a term of years before those allotments could be sold. They stated that the lands remained under federal trust until the set term expired and the individual land patents were issued to individual Indians. Since the Indians were not being physically removed from the States East of the Mississippi, Congress kept its promise to the States by enacting the Indian Trade and

[10] In all of the New York land claim cases against the State of New York that began in the 1960's the United States and Tribes refused to allow the Treaty of Buffalo Creek, Jan.15, 1838, 7 Stat. 550, to be discussed as a defense for the State. They claimed that the treaty was not authorized by any act of Congress including the Removal Act of 1830 even though the treaty was ratified by the Senate and proclaimed by the President. The Treaty of Buffalo Creek cites the Removal Act of 1830 as its authority.

Intercourse Act of 1834, June 30, 1834, 4 Stat. 729, which defined Indian country as only existing West of the Mississippi River. This long explanation is intended to prove that the main purpose of the 1830 Removal Act was to remove the Indian country designation to allow the States to exercise their jurisdiction without federal interference. Before and throughout the Civil War period, all had agreed that the definition of Indian country would only be a temporary designation, because the federal Indian policy was an assimilation policy. Once the Indian country definition was removed there was no dispute that the Constitution also applied to the remaining Indian lands.

Amazingly, the unlimited territorial power was not grossly abused until Abe Fortas, serving as Assistant Secretary of the Interior, assisted Congressman Richard Nixon and DOJ attorney William Veeder to codify the term "Indian country" as a permanent territorial designation in 1948. It is not until the territorial designation of Indian country appears to be transformed into a fully constitutional domestic law, in 18 U.S.C. §1151-1153, that Congress assumes that the territorial war powers are within their constitutional powers. As the debate over the Federal Quiet Title Act, 28 U.S.C. § 2409a, demonstrated, there were members of Congress that were aware of the constitutional danger posed by unlimited federal territorial power. The McCarran Amendment, 43 U.S.C. § 666 was passed to protect state water rights from federal confiscation through the federal reserved rights doctrine. *See* Act of July 10, 1952, Ch. 651, 66 Stat. 560. Congress enacted Indian termination laws in the 1950's to prevent the unlimited power from growing.

Thereafter, Richard Nixon and Robert Kennedy worked together to convince the Congress to incorporate the Civil War powers preserved in the 1871 Indian Policy into the general law in the Government Organization and Employees Act of 1966. See Act of Sep. 6, 1966, 80 Stat. 378 et seq. This law contains 43 U.S.C. § 1457 that was directly copied from 1 Rev. Stat. § 441, the first provision of the codified Indian policy of 1871. With the Nixon Indian policy all thought of assimilation ceased and the deliberate promotion of tribal sovereignty began. Nixon Memorandum "Native Americans: At What Level Sovereignty" https://nebula.wsimg.com/d083a39e636dbaa2f431530646218f65?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1 It is 43 U.S.C. § 1457 that is most cited by the Department of Justice in litigation against state jurisdiction. *See, e.g.*, n. 5, *supra*.

III. THE BILL OF RIGHTS AND CIVIL WAR AMENDMENTS MAKE INDIVIDUAL RIGHTS ENFORCEABLE AGAINST FEDERAL TERRITORIAL WAR POWERS.

The Framers of the Constitution believed that keeping the territorial war powers separated from the operation of the domestic laws of a constitutional government was crucial to protect individual rights. The Framers had learned that they had to find a way to limit the national government's authority to make a war or national emergency that suspended constitutional governance. An entire constitutional structure separating powers and creating checks and balances was designed to prevent the power of the people from being usurped. Even then, George Mason

did not think it was enough given the fact of slavery and the Indians being treated separately from the majority of the people. He insisted that an affirmative Bill of Rights was necessary to further protect individual rights. By declaring and including specific individual rights as part of the Constitution, those individual rights became directly enforceable in the courts to allow the courts to limit the powers of government over individuals, literally creating the power to interpret the constitution and declare what the law is in the Supreme Court of the United States. *See Marbury v. Madison*, 5 U.S. 137 (1803).

In this case, the United States is asking this Court to subject Mr. Cooley to the unenforceable Indian Civil Rights Act and the unlimited territorial powers to deny him every natural and constitutionally protected right. This means the United States is actually arguing to extend the unlimited plenary authority of the territorial war powers over a non-Indian because the Solicitor General and Department of Justice think promoting tribal sovereignty to increase the power of the national government is more important than protecting individual constitutional rights. This Court can use the recent decisions in *Puerto Rico v. Sanchez Valle* and *Financial Oversight Board of Puerto Rico v. Aurelius Investment LLC, et al.*, 140 S.Ct. 1649 (2020) that limit the authority of Congress over the territorial war powers to explain why the federal territorial designation of "Indian country" cannot be a permanent definition as if the territorial laws can be applied as part of normal domestic law within the constitutional structure. the arbitrary will of Congress to decide when and if to ever allow Native Americans the rights of full citizens of the

United States also cannot be considered a permanent authority.

Political accountability federalism can be used in this case by this Court to explain why a non-Indian cannot be treated as an Indian subject to the war powers of the 1871 Indian Policy, by declaring that the United States has no continuing power to commandeer the rights of any individual person under the Fourteenth Amendment as incorporated through the Fifth Amendment. This extends the rationale in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) that protects state processes and States for individual persons to protect their due process and equal protection rights. The Tenth Amendment fully supports this concept in reserving all powers to the States and to the People. This Court has a choice in deciding this case based on how the Solicitor General has presented it. It can either apply the Indian Civil Rights Act to all non-Indians, or it can explain why applying the Indian Civil Rights Act to a non-Indian is unconstitutional and beyond the authority of Congress, since it would sanction the commandeering of this United States citizen's constitutionally protected Fourteenth Amendment rights to due process of law and equal protection under the law, as incorporated through the Fifth Amendment of the Bill of Rights. It seems fitting to apply the Fourteenth Amendment so fought for by President Lincoln to undo the 1871 Indian War Policy of Secretary of War Edwin Stanton.

Because of how this Court approved of the plenary territorial war powers existing in Congress over the Indians in *United States v. Kagama*, 118 U.S. 375 (1886), just applying the Fourteenth Amendment in the case at bar may not be sufficient to prevent Congress from trying to override the decision. This

Court needs to explain why it was wrong in allowing the Congress' plenary territorial powers over the Indians. This means that *Kagama* will eventually have to be reversed. Similarly, the designation of "Indian country" must eventually be declared unconstitutional because the Indian reservations are within the boundaries of the United States and subject to the Constitution. One case, no matter how well explained the opinion is, will barely begin to re-educate Congress on its limited authority to use the territorial war powers. These territorial war powers are now so intermingled with the normal constitutional domestic authority that it will take significant time and many cases to restore the constitutional limitations. This case can be used to reset fundamental constitutional principles protecting individual rights without actually having to reverse the 1871 federal Indian Policy. CERF hopes this Court will take the opportunity this case presents and begin to explain why the territorial war powers cannot be used as domestic law. This Court cannot allow Edwin Stanton, Richard Nixon and William Veeder to successfully displace all constitutional rights.

CONCLUSION

The decision of the Ninth Circuit should be upheld.

Respectfully submitted,

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