No. _____

# In The
# Supreme Court of the United States

STATE OF NEW MEXICO,

*Petitioner,*

vs.

DEL E. ROMERO and MATTHEW GUTIERREZ,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of New Mexico**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the New Mexico Supreme Court misinterpreted and misapplied the exclusive federal definition of a dependent Indian community in 18 U.S.C. § 1151(b) and interpreted in the unanimous opinion, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998), for purposes of determining federal criminal jurisdiction, when the New Mexico Supreme Court concluded:

A. Alleged crimes committed by an Indian on private, fee simple lands within the original exterior boundaries of a Pueblo land grant in which all Indian and United States title had been extinguished pursuant to the Pueblo Lands Act of 1924 satisfied the federal set-aside requirement of land for the use and enjoyment of an Indian community; and,

B. The federal superintendence requirement of *Venetie* was satisfied because the alleged crimes occurred on lands located within the original exterior boundaries of Pueblo land grants even though no evidence of federal superintendence over the lands was established?

II. Whether the New Mexico Supreme Court created an intolerable jurisdictional quagmire where no federal or state criminal jurisdiction may be invoked because certain lands within the original exterior boundaries of a Pueblo land grant are effectively prosecution-free zones?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER CASES



CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

TABLE OF AUTHORITIES – Continued



OTHER AUTHORITIES

## PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of New Mexico, respectfully requests this Court issue a writ of certiorari to the New Mexico Supreme Court to review the Opinion entered on June 14, 2006.

## OPINIONS BELOW

The New Mexico Supreme Court issued an Opinion in the consolidated appeal, *State of New Mexico v. Del E. Romero* and *State of New Mexico v. Matthew Gutierrez*, 142 P.3d 887 (N.M. 2006). This Opinion is reprinted at App. 1. The New Mexico Supreme Court reversed the decisions of the New Mexico Court of Appeals in *State v. Gutierrez*, No. 24,731, slip op. (N.M. Ct. App. May 20, 2004) and *State v. Romero*, 84 P.3d 670 (N.M. Ct. App. 2004). The two opinions issued by the New Mexico Court of Appeals are reprinted at App. 30 and App. 33.

## JURISDICTION

The New Mexico Supreme Court issued the Opinion on June 14, 2006. The State of New Mexico filed a Motion for Rehearing on June 29, 2006. App. 91. An Order denying the State of New Mexico's motion was filed on August 30, 2006. App. 83.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) (2006), Supreme Court Rule 10(b), and Supreme Court Rule 13. Petitioner respectfully asserts the New Mexico Supreme Court Opinion directly conflicts with a controlling federal statute – 18 U.S.C.

§ 1151(b) – and *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3:

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Supremacy Clause:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

18 U.S.C. § 1151. Indian country defined.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and (c) all

Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

## STATEMENT OF THE CASE

### *State of New Mexico v. Del E. Romero*

Del E. Romero, a Taos Pueblo Indian, was indicted by a Taos County, New Mexico grand jury for one count of aggravated battery. The victim was Darrell Mondragon, a Taos Pueblo Indian. The alleged crime occurred in the parking lot of Pueblo Allegre Mall, 223 Pueblo del Sur, Taos, New Mexico. Pueblo Allegre Mall is on the main thoroughfare in Taos commonly referred to as United States Highway 68. The alleged crime occurred on January 25, 2001.

Mr. Romero moved to dismiss the state criminal charge and claimed that he was an Indian; that the Pueblo Allegre Mall is located in Indian country; and that New Mexico lacked subject matter jurisdiction to prosecute a criminal charge against an Indian for an offense committed in Indian country. Judge Nelson held a short evidentiary hearing. State's Exhibit 4, a warranty deed recorded December 7, 1998, and providing the legal description of the property, was admitted.

Judge Nelson concluded the crime occurred within Indian country. App. 85-90. This conclusion was reached even though Judge Nelson found that Pueblo Allegre Mall is located on privately owned property within the original exterior boundaries of the Taos Pueblo land grant and that any Pueblo title was extinguished pursuant to the Pueblo Lands Act of 1924, 43 Stat. 636. App. 87. Judge Nelson ruled the State of New Mexico lacked subject matter

jurisdiction. The criminal charge against Mr. Romero was dismissed. App. 89-90.

The State of New Mexico appealed to the New Mexico Court of Appeals. The argument focused on the definition of Indian country in 18 U.S.C. § 1151 and specifically the definition of a dependent Indian community in 18 U.S.C. § 1151(b). The New Mexico Court of Appeals reviewed the history of Pueblos in New Mexico, the enactment of the Pueblo Lands Act of 1924 involving the federal extinguishment of title held by Indians to certain lands within the original exterior boundaries of Pueblo land grants, the codification of a dependent Indian community in 18 U.S.C. § 1151(b) in 1948, and finally, *Venetie*. App. 36-48, ¶¶ 9-28. Based on the undisputed fact that any Indian or federal title was explicitly extinguished by Section 13 of the Pueblo Lands Act of 1924 and that the alleged crime was committed on privately owned, fee simple land in the Town of Taos, the New Mexico Court of Appeals decided the State of New Mexico had jurisdiction to prosecute the alleged crime. App. 33-53.

The New Mexico Court of Appeals also cited *United States v. Pueblo of Taos*, 33 Ind. Cl. Comm. 82, *aff'd*, 515 F.2d 1404 (Ct. Cl. 1974), involving the extinguishment of title to 926 acres representing the Town of Taos. App. 40-41, ¶ 15.

Mr. Romero filed a petition for writ of certiorari in the New Mexico Supreme Court and argued that the alleged crime was committed in Indian country because "Taos Pueblo" is either a reservation, 18 U.S.C. § 1151(a), or a dependent Indian community, 18 U.S.C. § 1151(b). App. 7-8, ¶ 9. The New Mexico Supreme Court granted certiorari review and reversed the decision of the New Mexico Court of Appeals. App. 1-29.

***State of New Mexico v. Matthew Gutierrez***

Matthew Gutierrez, an enrolled member of the Pojoaque Pueblo, was charged by a Santa Fe County, New Mexico grand jury for aggravated battery with a deadly weapon, abuse of a child, and battery against a household member. The alleged crimes occurred on August 25, 2002. Two victims, Juan Carlos Garcia and Ben Garcia, are non-Indian relatives of Mr. Gutierrez. The child abuse charge involved Mr. Gutierrez's daughter, Brittany Gutierrez. The alleged crimes occurred on land owned in fee simple by Ben Garcia within the original exterior boundaries of the Pojoaque Pueblo land grant. The land was deeded to Jose Benito Garcia pursuant to the Pueblo Lands Act of 1924. State's Exhibit 1, the deed to the property commonly referred to as County Road J, House 14-A, in Pojoaque, County of Santa Fe, New Mexico, was admitted. Mr. Gutierrez was prosecuted in Pojoaque Tribal Court. App. 3-4, ¶ 3.

An extensive hearing on Mr. Gutierrez's motion to dismiss for lack of state court jurisdiction was held before Judge Vigil. Judge Vigil entered a Decision on February 18, 2004 which included findings of fact and conclusions of law. App. 69. Judge Vigil found that "all land within the Pueblo of Pojoaque, including private claim land, is 'Indian country.'" and "The State does not have criminal jurisdiction over Indians within the exterior boundaries of the Pueblo of Pojoaque." App. 81, ¶ 6 and ¶ 11.

The State of New Mexico appealed to the New Mexico Court of Appeals. The New Mexico Court of Appeals reversed. App. 30. In a memorandum opinion, the New Mexico Court of Appeals found that the State of New Mexico properly exercised criminal jurisdiction because the crime was not committed on land meeting the definition of

a dependent Indian community, 18 U.S.C. § 1151(b). App. 30-32.

The New Mexico Supreme Court granted certiorari review and consolidated the case with Mr. Romero's case. Mr. Gutierrez claimed "Pojaque Pueblo" was a dependent Indian community. App. 8, ¶ 9. The New Mexico Supreme Court reversed the decision of the New Mexico Court of Appeals. The State of New Mexico had no criminal jurisdiction to prosecute Mr. Gutierrez because the alleged crimes were committed in Indian country. App. 22-23, ¶ 26.

## REASONS FOR GRANTING THE WRIT

### I. THE NEW MEXICO SUPREME COURT IGNORED THE EXCLUSIVE DEFINITION OF A DEPENDENT INDIAN COMMUNITY IN 18 U.S.C. § 1151(B) AND CONCLUSIVELY INTERPRETED IN THE UNANIMOUS OPINION OF *ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT* IN DECIDING THE ALLEGED CRIMES WERE COMMITTED IN INDIAN COUNTRY.

Congress has plenary authority over Indian affairs. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973). Only the United States can extinguish original Indian title. 25 U.S.C. § 177 (2006); *United States ex rel. Hualpai Indians v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941). "Until the title of the Indian or Indian tribes has been extinguished said lands remain under the absolute jurisdiction and control of Congress." *Toledo v. Pueblo De Jemez*, 119 F.Supp. 439, 432 (D.N.M. 1954).

Congress has conferred on the federal courts criminal jurisdiction over certain offenses committed by an Indian in Indian country. 18 U.S.C. § 1151 (2006). A state court is

bound by federal law in interpreting the definition of Indian country for the exclusive determination of federal criminal jurisdiction. U.S. Const., art. VI.

The controlling federal law for interpreting a category of Indian country known as a dependent Indian community is 18 U.S.C. § 1151(b) and *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The majority opinion of the New Mexico Court of Appeals duly recognized that *Venetie* was applicable to decide the issue of criminal jurisdiction. App. 37-38, ¶ 11. Applying the *Venetie* set-aside requirement, the New Mexico Court of Appeals correctly found that the land where the alleged crimes were committed was not subject to a federal set-aside for use by an Indian community. App. 47-48, ¶ 26.

Reversing the New Mexico Court of Appeals, the New Mexico Supreme Court ignored its sole responsibility to construe 18 U.S.C. § 1151(b) according to federal law. The New Mexico Supreme Court manipulated the federal standard of statutory construction for interpreting the three separate categories of Indian country in 18 U.S.C. § 1151. *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (judicial assumption exists that in drafting legislation, "Congress said what it meant."). The interpretation of federal law by the New Mexico Supreme Court is simply wrong. *See New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 154-155 (1998) (rejecting New Mexico Supreme Court interpretation of Extradition Clause, U.S. Const. art. IV, § 2, cl. 2); *rev'g*, *Reed v. State ex rel. Ortiz*, 947 P.2d 86 (N.M. 1997).

A dependent Indian community refers to a "limited category of Indian lands that are neither reservations nor allotments and that satisfy two requirements." *Venetie*, 522 U.S. at 527. *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (18 U.S.C. § 1151 construed to provide three disjunctive categories of Indian

country). Following this Court's interpretation of 18 U.S.C. § 1151(b) in *Venetie*, no ambiguity exists about the meaning of a dependent Indian community. *See also State v. Frank*, 52 P.3d 404, 409 (N.M. 2002) (interpreting *Venetie* as providing "clear guidelines" and declining to incorporate a community of reference inquiry for a dependent Indian community).

The facts are undisputed in each criminal prosecution. In each case, the alleged crimes were committed on private, non-Indian, fee simple land within the original exterior boundaries of a Pueblo land grant. The fee-simple title was obtained following the extinguishment of Indian and federal title pursuant to the Pueblo Lands Act of 1924. The only dispute is legal: Whether or not the alleged crimes were committed in Indian country and, in particular, a dependent Indian community, as defined in 18 U.S.C. § 1151(b) and *Venetie*? App. 6, ¶ 17.

### A. The New Mexico Supreme Court wrongly construed the historical background and legal precedents impacting New Mexico Pueblo lands.

Petitioner submits the proper analysis and legal conclusion requires a brief review of the historical background for New Mexico Pueblo lands, a review of various congressional acts, and finally, the judicial interpretation of the phrase "dependent Indian community" in *Venetie*. Since time immemorial, Pueblo Indians have lived in the Southwest and, in particular, New Mexico. This unique history of Pueblos and Pueblo Indians is presented in Nell Jessup Newton, *Cohen's Handbook of Federal Indian Law* 319-336 (2005 ed.) (hereinafter *Cohen's Handbook*).

### 1. *United States v. Sandoval*

The second category of Indian country in 18 U.S.C. § 1151 – a dependent Indian community – and its legal meaning for criminal jurisdiction began with the decision in *United States v. Sandoval*, 231 U.S. 28 (1913). The Santa Clara Pueblo Indian community of New Mexico exhibited an entire dependency on the federal government. *Id.* at 39-40. Based on the factual circumstances of Pueblo communities, *United States v. Sandoval*, 231 U.S. at 46, held that New Mexico Pueblo Indians were wards of the federal government generally subject to federal law governing Indians. The term "dependent Indian communities" was adopted in *United States v. Sandoval* to describe New Mexico Pueblos. *Venetie*, 522 U.S. at 530, acknowledged that "the term 'dependent Indian communities' is taken virtually verbatim from *Sandoval*."

### 2. New Mexico Enabling Act of 1910

The New Mexico Enabling Act, 36 Stat. 557 (1910), defined Indian country as including the lands now owned or occupied by the Pueblo Indians of New Mexico, as of June 20, 1910. N.M. Const., art. XXI, § 2, provided the status of land depended on whether or not Indian title had been extinguished: " . . . and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States." Both provisions governing the admission of New Mexico as a State, established Congress expressly linked federal dominance and governance over Indian lands to the non-extinguishment of Indian title.

### 3. Pueblo Lands Act of 1924

Following *United States v. Sandoval*, the titles to land held by non-Indians within the boundaries of Pueblo land grants and transferred without the prior approval of the federal government were called into question. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 243-244 (1985). The Pueblo Lands Act of 1924, 43 Stat. 636, was enacted to resolve violence and conflict relating to the ownership of lands by non-Indians within the original Pueblo land grants. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. at 243 ("relying on the rule established in [*United States v.*] *Joseph* [94 U.S. 614 (1876)], 3,000 non-Indians had acquired putative ownership of parcels of real estate located inside the boundaries of the Pueblo land grants."). *See generally Cohen's Handbook* 325-327 (Pueblo Lands Act of 1924). The title of the Pueblo Lands Act of 1924 sets forth the congressional purpose and intent: "An Act To quiet title to lands within Pueblo Indian land grants, and for other purposes."[1]

The Pueblo Lands Act of 1924 established the Pueblo Lands Board to investigate the state of title of lands within the exterior boundaries of various Pueblo land grants and to provide a procedure whereby Pueblo title to tracts of land would be extinguished in favor of non-Indian claimants under certain conditions. *Mountain States Tel.*

[1] The Pueblo Lands Act of 1924 was amended. 119 Stat. 2573 (2005). App. 2-3, n. 1. The amendment has been interpreted to apply prospectively. *United States v. Arrieta*, 436 F.3d 1246, 1251 (10th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2368 (2006).

*& Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. at 244-245.[2] The Secretary of the Interior was required to file "field notes and plat for each pueblo showing the lands to which Indian title had been extinguished." 43 Stat. at 640, § 13. Certified copies of the field notes were to be "accepted in any court as competent and exclusive evidence of the extinguishment of all the right, title and interest of the Indians in and to the lands so described . . . and of any claim of the United States in or to the same." *Id*. A decree in favor of a non-Indian claimant had "the effect of a deed of quitclaim as against the United States and said Indians." 43 Stat. at 637, § 5.

"Through the work of the Pueblo Lands Board, about eighty percent of non-Indian claims within the Pueblos, involving some 50,000 acres were approved."[3] *Cohen's Handbook* 327 and n. 985. The GAO Report 158, at Table 28, indicated that approximately $130 million (in constant 2001 dollars) was paid to settle land claims for Pueblo land grants in New Mexico processed by the Pueblo Lands Board (for the period 1927-1939), the Indian Claims Commission and the United States Court of Federal Claims.

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[2] The Bureau of Land Management officially maintains the surveys and plats showing the private claims made, acknowledged, and recorded pursuant to the Pueblo Lands Act of 1924. 25 U.S.C. § 176 (2006).

[3] The Pueblo Lands Act of 1924 and the extinguishment of title for various parcels of land within the original exterior boundaries of each Pueblo land grant are more fully described and documented in the United States General Accounting Office, *Treaty of Guadalupe Hidalgo*, *Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*, GAO 04-59 (June 2004) (hereinafter GAO Report).

In a separate action, the extinguishment of Indian title to 926 acres occupied by the Town of Taos and, originally part of the southwest corner of the original Taos Pueblo land grant, was confirmed. *United States v. Pueblo of Taos*, 33 Ind. Cl. Comm. 82, *aff'd*, 515 F.2d 1404 (1974).

### 4. Enactment of 18 U.S.C. § 1151

Prior to the enactment of 18 U.S.C. § 1151, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest[.]" *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). In 1948, 18 U.S.C. § 1151 codified the three categories of Indian country for determining federal criminal jurisdiction. Congress defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. at 123. Congress explicitly uncoupled reservation status from Indian ownership in 18 U.S.C. § 1151(a). *Solem v. Bartlett*, 465 U.S. at 468.

Regarding the codification of the term "dependent Indian communities" in 18 U.S.C. § 1151(b), the following analysis made the distinction between a dependent Indian community and a reservation:

> The likelihood is that the codifiers included the second category [dependent Indian communities] precisely to include those communities, like Yahta-Hey (and like the Pueblos), that grow up without federal involvement or encouragement, and outside of established reservation boundaries, but that primarily consist of Indians living in the

> tribal relationship and subject to federal protection.

Richard W. Hughes, *Indian Law*, 18 N.M. L. Rev. 403, 461 (1988). *See generally Cohen's Handbook* 192-195 (history of 18 U.S.C. § 1151(b) and dependent Indian communities).

### 5. *Alaska v. Native Village of Venetie Tribal Government*

*Venetie* was the first occasion for this Court to interpret the term "dependent Indian communities" in 18 U.S.C. § 1151(b). *Venetie*, 522 U.S. at 527. The unanimous decision held the phrase "dependent Indian communities" had a specific meaning, distinct from the remaining two categories of Indian country (reservations and allotments) in 18 U.S.C. § 1151:

> We now hold that it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

*Id.* This interpretation of the phrase "dependent Indian communities" was supported by the following rationale:

> The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.

*Venetie*, 522 U.S. at 531 and nn. 6 and 7.

Specific reference to the title and the use of the land for a dependent Indian community analysis is critical. *Venetie*, 522 U.S. at 530 n. 5. *See Blatchford v. Sullivan*, 904 F.2d 542, 544 (10th Cir. 1990) (considering the land title for determining whether a crime was committed within a dependent Indian community), *cert. denied*, 498 U.S. 1035 (1991) and *United States v. Arrieta*, 436 F.3d at 1247 (focusing on the fact that title had not be quieted in favor of a non-Indian). Unlike a reservation analysis in 18 U.S.C. § 1151(a), title to the land is critical to determine whether or not the land is subject to a federal set-aside for the use of Indians as Indian land. *See State v. Dick*, 981 P.2d 796, 798 (N.M. Ct. App. 1999) (*Venetie* unequivocally shifted "the emphasis from the inhabitants and their day-to-day relationship with the government to a land-based inquiry"), *cert. quashed*, 4 P.3d 36 (N.M. 2000).

*Venetie* has been consistently applied in federal cases from New Mexico involving Pueblo land grants. *See United States v. Arrieta*, 436 F.3d 1246 (10th Cir.), *cert. denied*, ___ U.S. ___, 2006 WL 1221978 (2006); *United States v. M.C.*, 311 F.Supp.2d 1281 (D.N.M. 2004); and *United States v. Gutierrez*, No. CR-00-M-376 H, slip op. (D.N.M. 2000). App. 101-102. The first New Mexico federal district court interpretation and application of *Venetie* to private, non-Indian land within the original exterior boundaries of a Pueblo land grant was *United States v. Gutierrez*, an order of dismissal for lack of federal criminal jurisdiction, issued by Judge Hansen. App. 101. Judge Hansen ruled:

> As I stated on the record, the controlling case in this matter is *Alaska v. Native Village of Venetie Tribal Gov't*, which sets forth the federal set-aside and superintendence requirements for a finding of Indian Country status. 522 U.S. 520 (1998). *While the land in question may at one*

> *time have been Indian country, the Pueblo Lands Act of 1924 (43 Stat. 636) clearly and intentionally quieted title to the land in question against the Pueblo of Santa Clara. Consequently, the land in question no longer satisfies the federal set-aside requirement necessary for a finding of "Indian Country" and this Court cannot exercise subject matter jurisdiction in this case*.

App. 101-102 (emphasis added). The United States Attorney in New Mexico has uniformly followed this *Venetie* analysis in deciding whether to pursue or decline a federal prosecution of an Indian defendant, subject to the limitations of 18 U.S.C. § 1153 (2006), for crimes committed within the original exterior boundaries of a Pueblo land grant. *See* App. 63, ¶ 54 (Sutin, J. *dissenting*) (commenting on Judge Hansen's order).

### B. The New Mexico Supreme Court wrongly decided that private, fee simple land within the original exterior boundaries of a Pueblo land grant satisfied the definition of a federal set-aside of land for use by an Indian community.

Without question, the lands where the alleged crimes were committed are within the original exterior boundaries of each respective Pueblo land grant and were, at one time, Indian country. The title and status of the land was changed by the Pueblo Lands Act of 1924, a Congressional act that extinguished title in Indians and the United States by the entry of a fee simple title. *See Cohen's Handbook* 328 ("Nonmembers and municipal entities also hold fee title to some lands within the original Pueblo land grants, largely because of quitclaims issued to successful claimants under the Pueblo Lands Act."). Contrary to the

holding of the New Mexico Supreme Court, the original exterior boundary of each Pueblo land grant does not necessarily signify the entire property is a Pueblo, a dependent Indian community, or a reservation. App. 11, ¶ 13. The extinguishment of Indian title and transfer of the title in fee simple to a private individual effectively negates any finding that the land is subject to a federal set-aside for the use and enjoyment of an Indian community as required by *Venetie*.[4]

The federal set-aside requirement of land for use by an Indian community was not met because private, fee simple land within the original exterior boundaries of a Pueblo land grant is not land set-aside by the federal government for the use and enjoyment of an Indian community. By definition, land in which title has been quieted in favor of a non-Indian or, stated otherwise, land to which the Pueblo Indians and United States title has been extinguished pursuant to the Pueblo Lands Act of 1924, cannot satisfy the set-aside requirement of *Venetie*. Following *Venetie*, the term "original exterior boundaries" has historical significance but no current, binding legal effect for purposes of determining whether a crime was committed in the dependent Indian community category of Indian country.

[4] The linkage between Pueblo title and Indian country status was recognized and reaffirmed in the Santo Domingo Pueblo Claims Settlement Act, 114 Stat. 1890 (2000). As previously stated, extinguishment of Indian title for 926 acres representing the Town of Taos was acknowledged in *United States v. Pueblo of Taos*, 33 Ind. Cl. Comm. 82, *aff'd*, 515 F.2d 1404 (1974).

The parking lot of the Pueblo Allegre Mall and Mr. Garcia's private residence are not subject to the federal set-aside requirement mandated by 18 U.S.C. § 1151(b). It is an undisputed fact that titles to Pueblo Allegre Mall and Mr. Garcia's land are not held by the United States in trust for the benefit of any Pueblo or by any Pueblo. This uncontroverted fact is further supported by *United States v. Taos*, 515 F.3d 1404 (Ct. Cl. 1975); *United States v. Wooten*, 40 F.2d 882 (10th Cir. 1930), and the GAO Report. Simply stated, the federal set-aside of land for use by an Indian community has not been met. *See Venetie*, 522 U.S. at 533 (federal set-aside requirement was not met; Congress contemplated that non-Indians would own the former Venetie Reservation land and that the Tribe was free to use the land for non-Indian purposes); *United States v. M.C.*, 311 F.Supp.2d at 1295 (land was not set-aside for use by an Indian community); and *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 920-921 (1st Cir. 1996) (where land was privately held, even if by a tribe, courts have found that there was no dependent Indian community).

It is illogical for Indian and federal title to be extinguished, yet at the same time, find that the land has been the subject of a federal set-aside for use by an Indian community. App. 19-22, ¶¶ 23-25. Land that is held in fee simple by a non-Indian is not subject to the unique relationship between the federal government and an Indian community. *See also* GAO Report 156 ("In contrast to land grants to non-Indians, the U.S. government currently has a fiduciary duty, or "trust responsibility," to protect Indian lands that the U.S. government holds in trust for the Pueblos in New Mexico).

### 1. The New Mexico Supreme Court blurred the important distinctions between a reservation and a dependent Indian community.

The New Mexico Supreme Court essentially redefined a dependent Indian community as that term is used in 18 U.S.C. § 1151(b) and *Venetie* by blurring the legal, historical, and judicial distinctions between a reservation and a dependent Indian community. Without due deference to the proposition that only federal law controls the definition of Indian country, the New Mexico Supreme Court not only declined to fully adopt the *Venetie* analysis but also decided to employ a tortured analysis using both reservation and dependent Indian community factors to reach the conclusion that the alleged crimes occurred in Indian country.

The New Mexico Supreme Court failed to recognize the three distinct categories of Indian country and, instead, eroded the definitions of a reservation and a dependent Indian community. The New Mexico Court of Appeals in *State v. Romero*, App. 36-38, ¶¶ 9-11 and App. 43-45, ¶¶ 18-22, correctly made the historical, political, and legal distinctions between a reservation and a dependent Indian community. Historically, Indian reservations generally represent a federal policy mandating the forced relocation of Indians from aboriginal lands and a reservation of federal public domain land for a specific Indian tribe. *Cohen's Handbook* 64-65. Unlike reservations, New Mexico Pueblos retained aboriginal lands. *Cohen's Handbook* 319-336. The history of New Mexico Pueblos shows that Pueblo land grants are not reservations within the meaning of federal Indian law. Congress did not reserve the Pueblo lands out of lands ceded by the Pueblo Indians to the United States or out of public

lands owned by the United States. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1388 (Ct. Cl. 1975). This inconsistent interpretation of private, fee simple lands within the original exterior boundaries of a Pueblo land grant by New Mexico appellate courts is noted in *Cohen's Handbook* 335-336, n. 1062 and n. 1063.[5]

Instead of concentrating exclusively on 18 U.S.C. § 1151(b), the New Mexico Supreme Court decided to use the broad term and meaning of Indian country and confused the definitions of a dependent Indian community and an Indian reservation, 18 U.S.C. § 1151(a). This manipulation of 18 U.S.C. § 1151 justified the erroneous conclusion that the State of New Mexico had no criminal jurisdiction to prosecute an Indian for alleged crimes committed on private, fee-simple land within the original exterior boundaries of a Pueblo land grant. The New Mexico Supreme Court relied on New Mexico state cases issued prior to *Venetie* in holding, "Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap." *Blatchford v. Gonzales*, 670 P.2d 944, 946 (N.M. 1983), *cert. denied*, 464 U.S. 1033 (1984). *See State v. Ortiz*, 731 P.2d 1352, 1355-1356 (N.M. Ct. App. 1986) (no distinction between 18 U.S.C. § 1151(a) and 18 U.S.C. § 1151(b); finding that crime committed on private fee land or a public thoroughfare in a non-Indian town (Espanola, New Mexico) was Indian country). App. 17-18, ¶ 20 and ¶ 22.

[5] "If they are treated as 'reservations,' fee patent lands are still Indian country within the meaning of the Indian country statute. However, if they are 'dependent Indian communities,' the fee lands may not be considered part of the communities."

Contrary to the New Mexico Supreme Court's imprecise interpretation of 18 U.S.C. § 1151, only a dependent Indian community analysis applies and not a reservation analysis, 18 U.S.C. § 1151(a). Pueblos and land within the original exterior boundaries of a Pueblo land grant are not, and have never been, reservations. Equating the history and policy of Indian reservation lands with the aboriginal context of Pueblos is erroneous and contorts the three distinct categories of Indian country set forth in 18 U.S.C. § 1151. *Venetie*, 522 U.S. at 527.

### 2. The Pueblo Lands Act of 1924 explicitly extinguished all Indian and federal title, right and interest to certain parcels of land within the original exterior boundaries of the Pueblo land grants.

The New Mexico Supreme Court relied on "congressional silence" to find that the alleged crimes were committed in Indian country and not subject to State criminal jurisdiction:

> Thus, given the overlapping nature of the terms reservation and pueblo and the overlapping nature of §§ 1151(a) and (b), we think it is fair to conclude, in the face of *congressional silence* that the fee land within a § 1151(b) dependent Indian community is Indian country just like the fee land within a § 1151(a) reservation.

App. 18, ¶ 22 (emphasis added) and App. 7, ¶ 8 ("We note, however, that any ambiguity in § 1151 or the Pueblo Lands Act . . . is to be resolved in favor of the Defendant Indians."). The New Mexico Supreme Court rejected the State of New Mexico's argument: "Due to the lack of substantial and compelling evidence of congressional intent to change

Indian country status, we must reject the State's overly-broad interpretation that the Pueblo Lands Act extinguishes Indian country status merely by allowing non-Indians to have fee title to certain parcels." App. 22, ¶ 25.

The apparent motivation for an analysis of a dependent Indian community based on "congressional silence" developed from legal precedent discussing the reservation category of Indian country. In this endeavor, the New Mexico Supreme Court cited *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962); *Hilderbrand v. Taylor*, 327 F.2d 205 (10th Cir. 1964); and *DeCoteau v. Dist. County Ct.*, 420 U.S. 425 (1975). App. 11, ¶ 13; App. 12-13, ¶ 16; App. 19, ¶ 23; and App. 20, ¶ 24. In addition, the New Mexico Supreme Court concluded: "We decide that Congress has not shown clear intent to extinguish Indian country status, so Indian country status for the privately-held parcels within the Taos and Pojoaque Pueblos' exterior boundaries has not been extinguished." App. 19-20, ¶ 23. "In sum, location within the exterior boundaries matters more than who holds title." App. 21, ¶ 24.

The New Mexico Court of Appeals correctly interpreted congressional intent and how the congressional action changed the jurisdictional status of certain lands within the original exterior boundaries of a Pueblo land grant:

> We conclude that in enacting the PLA, Congress clearly understood that it was altering the jurisdictional status of those lands as to which title was quieted in favor of a non-Indian, and that unless Congress subsequently acted to restore the Indian country status of these lands they remain outside Indian country.

App. 43, ¶ 17.

The State of New Mexico submits that Congress has overwhelmingly demonstrated that private, fee-simple lands within the original exterior boundaries of Pueblo land grants are not Indian country and, specifically, not dependent Indian communities. The entire chronology of congressional actions impacting New Mexico Pueblo lands and the mandatory requirements for dependent Indian community status establishes the jurisdictional status of certain lands within the original exterior boundaries of the Pueblo land grants was effectively changed.

### 3. The New Mexico Supreme Court discounted *Venetie* because *Venetie* addressed Alaska Native lands.

The New Mexico Supreme Court decided that *Venetie* did not necessarily apply to New Mexico's dependent Indian communities because *Venetie* addressed Alaska Native lands, a system "which has no bearing on the land ownership system for New Mexico pueblos." App. 9, ¶ 11; App. 10, ¶ 12 ("This may be perfectly apt when construing the Alaska Native Claims Settlement Act as in *Venetie*, but the Court likely was not considering the unique circumstances of New Mexico's pueblos."); and App. 24, ¶ 29 (Chavez, J., *specially concurring*) ("I write separately because I respectfully believe" *Venetie* "goes beyond what is necessary for resolution of this case," and "The *Venetie* analysis and its two prong test is not necessary when a crime is committed within the exterior boundaries of a New Mexico pueblo, since pueblos have already been recognized as Indian country.").

The New Mexico Supreme Court ignored the fundamental rules regarding federal statutory construction as well as the Supremacy Clause, U.S. Const., art. VI, in

discounting the applicability of *Venetie* to New Mexico Pueblo lands. The controlling federal law is 18 U.S.C. § 1151(b) and *Venetie*. Unlike the New Mexico Supreme Court declarations, *Venetie* must equally govern and resolve the question of criminal jurisdiction in any dependent Indian community within the United States.

#### 4. The New Mexico Supreme Court refused to acknowledge specific legal terms used in federal Indian law.

In order to reach the wrong legal conclusion that the alleged crimes were committed in Indian country, the New Mexico Supreme Court misapprehended that the terms and definitions of "original exterior boundaries", "diminishment", and "extinguishment" are consistently used in federal Indian law statutes, cases, treatises, and texts.[6] Each term has a specific definition for interpreting the three different categories of Indian country in 18 U.S.C. § 1151. The term "extinguishment' has been consistently used to describe Indian title in federal statutes and federal cases. *Bates v. Clark*, 95 U.S. 204, 208 (1877) and 43 U.S.C. § 1603(c) (2006) (express language of extinguishment of aboriginal claim). In particular, the Pueblo Lands Act of 1924 and the Santo Domingo Pueblo Claims Settlement Act, 25 U.S.C. § 1177d(b) (2006), provide direct evidence of an expressed congressional intent concerning

[6] *See* App. 19, ¶ 23 and n. 3 (noting the State relied on the word "extinguish" because that is the word used in the Pueblo Lands Act; rejecting distinction between "extinguish" and "diminish" because for purposes of "resolving whether the land in question is currently Indian country in general and beyond the State's criminal jurisdiction, the extinguish versus diminish debate is "not significant") and App. 25-26, ¶ 31 and n. 4 (discussing creation of Indian reservations).

Pueblo lands in New Mexico and the impact of extinguishment of Indian title to lands within the original exterior boundaries of a Pueblo land grant.[7]

#### 5. The New Mexico Supreme Court wrongly considered other, irrelevant federal statutes involving federal Indian lands.

The New Mexico Supreme Court refused to acknowledge the only applicable federal statute for the determination of federal criminal jurisdiction is 18 U.S.C. § 1151(b). The New Mexico Supreme Court relied on other and irrelevant federal statutes impacting various areas of Indian law. App. 15-17, ¶ 19. Definitions impacting Indians and Indian lands contained in other federal statutes, exclusive of 18 U.S.C. § 1151(b), are not controlling for purposes of determining federal criminal jurisdiction. *Arizona Pub. Serv. Co. v. Envtl. Protection Agency*, 211 F.3d 1280, 1293 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 970 (2001).

### C. The New Mexico Supreme Court wrongly decided that the alleged crimes were committed on land that was subject to pervasive federal superintendence.

The second requirement of *Venetie* for the determination of a dependent Indian community, and thereby invoking federal criminal jurisdiction, is federal superintendence. The definition of federal superintendence was presented in *Venetie*, 520 U.S. at 534:

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[7] 25 U.S.C. § 1777d(b) (2006) states the limitation: "Any lands or interests in lands within the Santo Domingo Pueblo Grant, that are not owned or acquired by the Pueblo, shall not be treated as Indian country within the meaning of section 1151 of Title 18."

> Our Indian country precedents, however, do not suggest that the mere providing of "desperately needed" social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid; considered either alone or in tandem with ANSCA's minimal land-related protections, *they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence.*

(Emphasis added). "Superintendence over the land requires the active involvement of the federal government." *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993). *See also Weddell v. Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) ("it would be unwise to expand the definition of a dependent Indian community to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance"), *cert. denied*, 451 U.S. 941 (1981). Federal superintendence is shown only "where the degree of Congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d at 920. "It is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal government." *Venetie*, 522 U.S. at 531 n. 5.

The New Mexico Supreme Court addressed the question of federal superintendence by reference to the wrong land: "Instead, we look to the pueblo as a whole and determine if the pueblo is under federal governmental superintendence. Considering the pueblo as a whole is also

consistent with congressional intent in enacting § 1151 because it discourages checkerboarding." App. 12-13, ¶ 16.

The Pueblo Allegre Mall and Mr. Garcia's private residence fail to satisfy this legal requirement of federal superintendence over land for the benefit of an Indian community. Federal superintendence was not established because the primary purpose of the Pueblo Allegre Mall is a privately owned, commercial enterprise. The federal government does not actively control the land acting either as a guardian or trustee for an Indian community. Unlike the Pueblo of Taos where federal superintendence is undisputed, the Town of Taos and the State of New Mexico – not the federal government – renders basic services to the general public, not an Indian community.

Federal superintendence was not established on the land where Mr. Gutierrez committed the alleged crimes. No Indian or Indian community received any of the pervasive federal oversight and benefits required to establish federal superintendence. The most compelling evidence about the lack of federal superintendence was presented during the state evidentiary hearing in *State v. Gutierrez*. Kevin Gover, a member of the Pawnee Tribe of Oklahoma, testified on behalf of Mr. Gutierrez. Mr. Gover, an attorney, was appointed to the post of Assistant Secretary for the Interior, Indian Affairs in October 1997. Mr. Gover was admitted as an expert witness in the area of federal Indian law and on the policy and administration of Indian affairs. Mr. Gover testified:

> Q: Mr. Gover, does the Federal government today superintend all land within the exterior boundaries of the Pueblo [of Pojoaque]?

> A: It does not superintend the land itself in the case of land owned by non-Indians. [The] United States has no authority, frankly, to control the disposition of land, for example by a non-Indian within the reservation.

The New Mexico Supreme Court failed to properly evaluate and apply the *Venetie* federal superintendence standard. App. 13-14, ¶ 17. No federal superintendence was exercised over the two separate land parcels where the alleged crimes occurred.

## II. THE CONFLICTING NEW MEXICO STATE AND FEDERAL OPINIONS INTERPRETING A DEPENDENT INDIAN COMMUNITY HAVE RESULTED IN "PROSECUTION FREE" ZONES ON CERTAIN PARCELS OF LAND IN NEW MEXICO.

This Court should grant this petition because the conflicting New Mexico state and federal decisions interpreting a dependent Indian community have resulted in "prosecution-free" zones on certain lands within the original exterior boundaries of the Pueblo land grants. Both the New Mexico Supreme Court and the New Mexico Court of Appeals offered invitations to this Court to decide the important question of criminal jurisdiction for private, fee-simple land owned within the original exterior boundaries of the Pueblo land grants. App. 10, ¶ 12 and n. 2 and App. 63-64, ¶ 54 (Sutin, J., *dissenting*). The jurisdictional confusion is also reflected in *Cohen's Handbook*: "One unresolved question is whether non-Indian owned fee land within the outer boundaries of Pueblo grant lands constitute Indian country for purposes of federal law delineating the scope of federal, tribal, and state jurisdiction." *Cohen's Handbook* 335 and n. 1061.

The State of New Mexico respectfully submits that the current law in New Mexico presents two conflicting judicial perspectives. Since *Venetie*, the United States District Court for the District for New Mexico and the Tenth Circuit Court of Appeals have consistently decided that private, fee-simple land within the original exterior boundaries of a Pueblo land grant is not a dependent Indian community. Federal criminal jurisdiction is not invoked. Contrary to the federal decisions, the New Mexico Supreme Court has concluded the State had no criminal jurisdiction to prosecute the alleged crimes on the same property. The practical impact of the mutually exclusive federal and state court decisions is that "prosecution-free" zones currently exist on certain parcels of land in New Mexico: An Indian defendant is not prosecuted in either federal or state court if the alleged crime was committed on private, fee simple land within the original exterior boundaries of a Pueblo land grant.

Jurisdictional tests should be clear, easy to apply and capable of producing predictable results. The two-prong analysis of *Venetie* provides a clear, easy to apply and predictable outcome for the determination of federal criminal jurisdiction in New Mexico. The New Mexico Supreme Court created unnecessary havoc and chaos by rejecting the *Venetie* analysis and, instead, resorting to a general definition of Indian country and confusing both reservation and dependent Indian community definitions. As of today's date, Mr. Romero and Mr. Gutierrez have never been prosecuted in either federal or state court for the alleged crimes. Four victims have been denied justice.

A damning and haunting portrayal addresses the urgency and need for the ultimate resolution of the criminal jurisdictional issue by this Court: "Unfortunately,

the intricate web of laws governing criminal jurisdiction in Indian country can hinder law enforcement efforts." *Cohen's Handbook* 730 and nn. 1 and 2 (statistics reveal that American Indians are victims of violent crime at least twice as often as other racial groups; approximately seventy percent of these crimes are interracial). This Court should grant the writ and address this important criminal jurisdictional issue. *See Williams v. Lee*, 358 U.S. 217, 218 (1959) (certiorari review appropriate because lower court opinion "was a doubtful determination of the important question of state power over Indian affairs").

## CONCLUSION

The State of New Mexico respectfully asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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