No.

IN THE SUPREME COURT OF OF THE UNITED STATES

October Term 2005

LORENA ACKERMAN, et. al.
Petitioners,

vs.

BARBARA MURPHY, et. al.
Respondents.

On Petition For Writ of Certiorari
To the Supreme Court of the State of California
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California is one of six states enumerated in 28 U.S.C.A. 1360, et seq., commonly referred to as Public Law 280, in which the courts of those states were mandated by Congress to exercise jurisdiction in suits between Indians or to which Indians may be parties. Congress subsequently guaranteed protection of certain civil rights to individual members of tribes against abuses by tribal officials and tribal governments. The question presented is:

Does Public Law 280 (28 U.S.C.A. Section 1360 et seq.) confer jurisdiction on Courts of California in suits by Indians against officials of their own Tribe to enforce their own Tribal Constitution and the Indian Civil Rights Act, 25 U.S.C.A. Section 1302 et seq.?

LORENA ACKERMAN, EDWARD "BOB" FOREMAN, LEON FOREMAN, SR., YVONNE WILSON, LYNETTE COOPER, TRACY LEROY, CHERYL FULLERTON, TANYA FOREMAN, ANTHONY GANNETT,

Petitioners,

vs.

BARBARA MURPHY, Chairperson, individually and in her official capacity as Chairperson of the Redding Rancheria, a Federally recognized Indian Tribe, HOPE WILKES, individually, and in her official capacity as Vice-chairperson of the Redding Rancheria, JACK POTTER, individually and in his official capacity as Treasurer of the Redding Rancheria, VIRGIL BAKER, Sr., individually and in his official capacity as an alternate member of the Redding Rancheria Tribal Council, PATTY SPAULDING, individually, and in her official capacity as an alternate Member of the Redding Rancheria Tribal Council,

Respondents.

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONS

MISCELLANEOUS

OPINIONS BELOW

The Opinion of the California Court of Appeals, District 3, (App.A, infra, 1a-13a) is reported at 121 Cal.App. 4th 946, 17 Cal. Rptr. 3d 517. The Judgment of Dismissal by the Superior Court of the State of California in and for Shasta County, (App.B, infra, 14a-15a, is unreported. The Ruling of the Superior Court (App.C, infra, 16a-19a is unreported. The Denial of Review by the Supreme Court of California, (App.D, infra, 19a) is unreported.

JURISDICTION

The Denial of a Petition for Review by the Supreme Court of California was filed on December 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. 28 U.S.C.A. 1360 et seq. (commonly referred to as Public Law 280) states:

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to

which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made

pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

2. 25 U.S.C.A. 1302, et seq. (Commonly referred to as the Indian Civil Rights Act) states:

No Indian Tribe in exercising powers of self-government shall-

(1) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a

witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesss against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in noevent impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000.00, or both;

(8) deny to any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

3. The Rights of the Members of the Redding Rancheria are set forth in the Constitution of the Redding Rancheria, Article III, which states:

The rights of the Redding Rancheria members are those which are guaranteed by the Indian Civil Rights Act of

1968. The Tribal Council in exercising powers of self-government shall not:

a) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assembly (sic) and to petition for a redress of grievances;

b) Take any private property for a public use without just compensation;

c) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

d) Violate the rights of the people to be secure in their homes.

Any and all other rights specified in the Indian Civil Rights Act, but not listed in this Constitution, shall be in effect when necessary and appropriate.

STATEMENT OF THE CASE

The Tribe's Enrollment Procedures Act (Act) had been adopted in 1987. Pursuant to the Tribe's Constitution, adopted that same year members of the Tribe consisted of all seventeen (17) original distributees listed on the plan of distribution of the Redding Rancheria, dated Oct. 8th and all lineal descendants of the seventeen (17) original distributees. Id. at par. 16.

Petitioners, Foreman family members all had been

accepted as grandchildren or great-grandchildren of an original distributee, Virginia Timmons.

In the summer of 2002, the Foreman family lineage was challenged, the Foreman family was required to establish that their grandmother had a child, and to establish that basic fact before the very tribal officials who were belatedly challenging that lineage. [A theory of those Tribal officials attempting disenrollment that the grandmother was instead a great-aunt, covering up a supposed ancient family scandal involving the purported pregnancy and delivery at age eleven by their grandmother's and great-grandmother's minor sister who had, by Foreman family memory and history, died childless, was required to be disproved, nearly a century after the birth of the grandmother.]

Foreman family members filed a petition for a writ of mandate in the trial court against the Council members, who would personally benefit from the reduced number of members sharing benefits of Tribal membership.

The Council members filed a motion to quash service of summons, motion to dismiss, and demurrer to the petition. Id. at par. 29.

The trial court granted the Council members' motion to quash finding that the Council members made a sufficient showing of entitlement to sovereign immunity (id. at par. 30) and finding that **Bryan v. Itasca County,** 426 U.S. 373, (1976) "...makes clear that the purpose of Public Law 280 was not to resolve disputes that affect the tribe and its ability to govern itself." Id at par. 32.

FEDERAL QUESTION RAISED

The Petition for a Writ of Mandate, (App. E) 20a-42a, *infra*, raised on its face the Federal question of the application of Public Law 280 to vindicate the Federally guaranteed rights of individual Indians pursuant to the Indian Civil Rights Act, 25 U.S.C.A. Section 1302 et seq., in enforcing those rights in the courts of those states, including the State of California, enumerated in 28 U.S.C.A. Section 1360 et. seq.

The trial judge considered the Petition and its Memorandum (App E, 20a-42*infra*) and ruled that the Tribal officials were protected by sovereign immunity. (App. C, 16a -18a, *infra*). The trial judge then dismissed the Petition by written Order. (App.B.14a-15a, infra)

The Court of Appeal of the State of California, Third Appellate District, affirmed the dismissal in a reported decision, (App. A. 1a-13a) rejecting Petitioners argument that the Federal Statute, Public Law 280, mandated jurisdiction to California Courts for such claims by individual Tribal members against Tribal officials. That Court reported that Petitioner, Ackerman, argued that "...the tribe's sovereign immunity is subject to the exception enunciated in **Ex Parte Young**, 209 U.S. 123 (1908) and reports that Ackerman "...seeks to enforce both the ICRA [Indian Civil Rights Act] and the tribe's constitution. App. 10a-12a.

The California Supreme Court denied Review in an unreported Order.

REASONS FOR GRANTING THE PETITION

The decision of the courts below, if unresolved, will create a vacuum which deprives injured Indians of any relief against Tribal officials, acting beyond the scope of their authority in violation of federal law and their own Tribal Constitutions.

Turner v. Martire, 82 Cal.App. 4th 1042, 97 Cal. Rptr.2d 863, 99 Cal.Rptr.2d 587, (Cal. App. 4th 2000) properly held that:

> Where an officer of a sovereign acts beyond his or her delegated authority, his or her actions "are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden.[internal citation omitted] Therefore, immunity does not attach to such conduct. Id. at par. 67

Inexplicably, the trial court misapplied and misread **Turner** to deny Petitioners of the **Ex Parte Young** exception to the sovereign immunity of governmental officials. App, *infra* at 18a.

Another Department of the California Court of Appeal did not deprive the plaintiffs in that action of a

remedy. The reasoning set forth in **Turner,** if properly applied, would have compelled a different conclusion in the instant action, in which the Third Appellate District ruled in an inconsistent manner. Defendants in **Turner** did not meet the first prong of the test set forth therein of having "policymaking functions" within or on behalf of the Tribe, so that Court found it unnecessary, *in that case*, to consider the second prong for tribal official immunity, i.e. that the official must have acted within the scope of his or her official authority.

DISCUSSION

This is not another in a chain of cases in which abused Petitioners complain to the Court that there is not a forum for their complaint.

Congress gave jurisdiction to the courts of California for suits between Indians. That grant of authority was not affected by the restriction, *in Federal Courts,* to habeas corpus as the sole relief available *in Federal Courts.*

Were it otherwise, Indian tribes in the State of California and in the other five states subject to PL-280, would be able to institute much mischief and unconstitutional abuses for which habeas relief is inadequate or unavailable without necessary and appropriate remedy from this or any court.

The Tribal Council members' and the California Court's theory of sovereign immunity is unsupported by the authority they cite and unsupportable by other authority.

There is a remedy when the Tribal Council does not comply with the Tribe's own Constitution or with the Indian Civil Rights Act–a Federal statute adopted as Tribal law by the Tribal Constitution.

The Constitution of the Redding Rancheria has an impressive Bill of Rights, set forth in Article III of that Constitution, which adopts as Tribal Law the rights specified in the Federal Indian Civil Rights Act, 25 U.S.C. Section 1302 et seq.

Those guarantees are not mere pretty words conferring rights without a remedy.

Constitutions and constitutional and civil rights have not been developed and are not revered because they were developed and intended to protect the majority or to protect those in power at any particular time. The majority and the leadership in any government are always able to protect themselves.

Lawyers who came to their profession with a sense of history and purpose recognize that basic truth. In 1954, Linda Brown, her family, and her neighbors in Topeka, Kansas, did not have the advantage of a majority of the votes, influential lobbyists, or the overwhelming support of most of the press. They had a Constitution and a fair tribunal. **Brown v. Topeka Board of Education**, 347 U.S. 483 (1954). Without a tribunal willing and with jurisdiction to enforce them, constitutional and civil rights are mere pretty words.

The Court below, the Third District Appellate Court

asserts that sovereign immunity prohibits review of the Tribe's actions in any and all circumstances, and cites multiple cases in support of sovereign immunity for Indian tribes. Many of the cases cited, however, do not raise any tribal constitutional or **ICRA** claims. The Tribal Council Respondents boldly assert that the Tribe's own **BILL OF RIGHTS** and the **ICRA** constitute nothing more than a right without a remedy.

THE CALIFORNIA COURT ERRED ON AN IMPORTANT QUESTION OF LAW BY ITS FINDING THAT PL-280 DOES NOT REQUIRE THE ENFORCEMENT OF A TRIBAL CONSTITUTION AND A FEDERAL STATUTE ENSURING BASIC CONSTITUTIONAL RIGHTS TO INDIVIDUAL INDIANS IN CALIFORNIA TRIBES

California is one of a handful of states subject to what is commonly called Public Law-280 [28 U.S.C. 1360 et seq.]. PL-280 was enacted by Congress, mandating, *inter alia*, jurisdiction of suits between Indians in a limited number of states, to the courts of those states. The State of California's reluctance to perform this unfunded mandate has caused a vacuum not of jurisdiction but of the legitimate and necessary exercise of that jurisdiction.[1] It is one of those accidents of

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1. The vacuum has been both noticed and ignored, for decades. In 1997, the Sacramento Bee reported:

Every week, and sometimes more than once or twice

history that a statute enacted in 1953, during the era of termination of Indian tribes, is now available to protect individual tribal members from oppression by officials of their own tribal governments.

It is instructive that the leading case on the application of PL-280, **United States v. Wadena**, 152 F.3d 831 (Eighth Cir., 1998) arising from Minnesota, another State subject to PL-280, addresses well the true interplay

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a week, we get calls on jurisdictional issues and I end up telling the CHP, county sheriff's deputies and local police departments that Indians are entitled to the same level of police protection as any other citizen in California," said Mike Smith, deputy area director of the U.S. Bureau of Indian Affairs in California. ....

The BIA took Public Law 280 as a signal to get out of California. California's two federal Indian hospitals closed, and the BIA stopped providing health care, welfare and education to California's Indians. "California was cut clear out of the federal budget for three or four years," Smith said.... The BIA spends $15 million a year on 298 tribal courts nationwide. But California tribes see little of that money because for years the BIA claimed California's courts -- not the federal government -- were supposed to provide justice in California Indian country under Public Law 280. Sacramento Bee, *California's Lost Tribes, A Special Report*, Steve Magagnini, July 1, 1997.

between the ICRA and PL- 280.

Wadena and other defendants in that action challenged in Federal court their convictions for federal crimes which resulted from corruption by tribal officials on the White Earth [Chippewa] Reservation in northwestern Minnesota. The White Earth Band is one of the six constituent bands of the Minnesota Chippewa Tribe.

Wadena and his co-conspirators, after their convictions, unsuccessfully challenged the jurisdiction of the Federal Courts, insisting that criminal prosecution for any crime **could only be obtained through the State Court,** pursuant to PL-280.

The Eighth Circuit, in affirming the federal convictions, took the opportunity to discuss at length the interplay of the ICRA, PL-280 and the appropriateness and the propriety of jurisdiction over tribal officials who abuse their members.

The Court acknowledged that prior opinions had seemed both confusing and inconsistent. It rejected the convicted tribal officials' claims that only crimes within the Indian Country Crimes Act and the Indian Major Crimes Act may be the basis for federal court jurisdiction. Id. at para. 40-1. In upholding the convictions, the Court did not find nor hold that there was no jurisdiction in the state court pursuant to PL-280. It found instead that there was concurrent jurisdiction to enforce violations of the specific federal criminal statutes involved in their prosecutions.

In its discussion, the Court explained the interrelationship of PL-280 and the ICRA and the impact of

assertions of sovereign immunity by the conspiring tribal officials. Id. at para. 56-61. The Court found that there was: "...no challenge to the legitimate actions of the tribe or its representatives. The charge is directed toward the individual members of the RTC [Tribal Council] who conspired to deprive the members of the Band of their civil rights guaranteed by the ICRA. The Band's right to self determination, which the court sought to protect in Santa Clara, is not being threatened by ensuring that voters are not defrauded. In fact, the Band's right to free and open elections is vindicated by the present criminal action. Id. at para. 64.

The California appellate court below holds that merely because a federal court cannot grant relief to these Petitioners, that Congress must not have intended to give jurisdiction to the Courts of California. If Congress had intended to set up tribal courts in California and four other states in 1953 (Alaska was added in 1958), Congress would have passed some other statute than PL-280.

THE CALIFORNIA COURT OF APPEAL ERRED ON AN IMPORTANT QUESTION OF LAW BY ITS FINDING THAT EX PARTE YOUNG DOES NOT APPLY TO TRIBAL OFFICIALS WHO ACT IN EXCESS OF THEIR AUTHORITY IN VIOLATION OF THEIR OWN CONSTITUTION AND FEDERAL LAW

The doctrine of **Ex Parte Young**, 209 U.S. 123 (1908) applies and has been applied by other courts in which abusive or overreaching officials have attempted to shield themselves in a cloak of sovereign immunity. Edward T. Young had been sued in his capacity as the Attorney General of the State of Minnesota by stockholders of a railroad company who sought to enjoin a statute passed by the legislature which reduced tariffs. The facts regarding jurisdiction mirror this controversy:

> Edward T. Young, attorney general, who appeared specially and only for the purpose of moving to dismiss the bill as to him, on the ground that the court had no jurisdiction over him as attorney general; and he averred that the state of Minnesota had not consented, and did not consent, to the commencement of this suit against him as attorney general of the state, which suit was in truth and effect a suit against

the said state of Minnesota, contrary to the 11th

Amendment of the Constitution of the United States. Id at 132.

Dawavendewa v. Salt River Project, 276 F.3d 1150 (9th Cir. 2002) is in accord with this conclusion. Dawavendewa, a member of the Hopi Tribe, attempted to bring an action in Federal Court challenging the Navajo preference required by that Tribe at the Navajo Generating Station. He asserted that his action could proceed against individual tribal officers because of the sovereign immunity of the Tribe itself. He did not allege that the tribal officials were acting in violation of their own Constitution nor of the ICRA. The Ninth Circuit, **because of the absence of such circumstances**, declined to allow actions to proceed against those officials. **But they specifically reaffirmed the propriety of such action if tribal officials acted beyond their authority or against the law or Tribal constitution.** The Ninth Circuit held:

> [52] In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases. Dawavendewa, undaunted, argues that tribal sovereign immunity does not exist because the suit could be sustained against tribal officials.
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> We disagree.

> [53] To support this proposition, Dawavendewa relies heavily on **Burlington N. R.R., v. Blackfeet Tribe**, 924 F.2d 899 (9th Cir. 1991), and **Arizona Pub. Serv. Co. v. Aspaas** , 77 F.3d 1128 (9th Cir. 1996). **In Blackfeet Tribe, we extended the doctrine of Ex Parte Young, 209 U.S. 123 (1908), to tribal officials. In particular, we held that, in cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute.** See **Blackfeet Tribe**, 824 F.2d at 901.
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> [54] In [**Arizona Public Serv. Comm'n v.**] **Aspaas**,[77 F.3d (9th Cir., 1996] the Navajo Supreme Court had determined that the Arizona Public Service Company's ("APS") anti-nepotism policy violated Navajo employment discrimination law. APS then filed suit in federal district court seeking injunctive relief against the Navajo Nation, its executive agencies, Navajo Supreme Court Justices, and tribal officials challenging their authority to regulate APS's employment practices. **The defendants argued that they enjoyed sovereign immunity from suit. We held that the Nation and its executive**

agencies were immune from suit, but reaffirming our decision in Blackfeet Tribe, we held that sovereign immunity did not bar prospective relief against the individual tribal officials acting beyond the scope of their authority in violation of federal law. See Aspaas, 77 F.3d at 1133-34.
[55]..... **Rather, the doctrine announced in Blackfeet Tribe and reaffirmed in Aspaas permitted suits against officials allegedly acting in contravention of federal law.** (Emphasis supplied) Id. at para. 52-5

The Ninth Circuit, in its discussion of the impact of violation of federal law, for purposes of its discussion the very ICRA which is implicated here, affirms the viability and applicability of **Ex Parte Young** to tribal officials in appropriate cases.

Tribal Courts, in states in which PL-280 has not mandated that the courts of the state exercise jurisdiction, have protected individual tribal members from the abuses of officials of their own tribes. **Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners,** 23 Indian Law Rptr. 6045 (Cheyenne River Sioux Tribal Court of Appeals, 1996). **Thompson** squarely holds that for injunctive and declaratory relief suits against tribal officials no waiver of sovereign immunity is required since the scope of tribal sovereign immunity under tribal law does not extend to such actions." *Id.* at 23 ILR 6048.

The Court in **Thompson**, *supra,* the Court of Appeals of the Las Vegas Paiute Tribe in **Terry-Carpenter et al. v. Las Vegas Paiute Tribe,** 29 Indian Law Rptr. 6041, (Ct. App. LV Paiute Tribe, 2002) and the United States Supreme Court in **Marbury v. Madison**, 5 U.S. (1Cranch) 137 176-77 (1803) all share and are based upon the principle that judicial review is not a mere consequence of direct legislative delegation of powers to the courts but is based upon the very nature and theory of having a written constitution.

In accord is the decision of the Fort Peck Tribal Court of Appeals in *Ft. Peck Sioux Council v. Ft. Peck Tribes,* (Appendix F, 43a, *infra*), a court in another jurisdiction in which tribal members have access to an independent court. The Ft. Peck Court held squarely that the Fort Peck Tribes do not enjoy sovereign immunity when a provision of the Tribal Code is challenged as unconstitutional. That court noted and accepted the argument: "

> (t)o say that the Tribes and its elected officials cannot be sued creates chaos, discontent (and) an atmosphere ripe for abuse of power and authority..creating a new class of individuals that become simply...above the law. App.. at 48a.

In California tribes, the Courts of California are the Courts designated by Congress by PL-280 to adjudicate disputes between Indians and to protect individual Indians utilizing their own Constitutions and the ICRA.

Unless courts in those states where jurisdiction has

been either ignored or exercised for decades pursuant to Public Law 280, there will be more mischief, chaos and discontent. There is a crisis in Indian country that has resulted from the failure of some tribal officials to respect the rights and property of their members.

A commentator friendly to tribes, and to their members, addressed the issue. In discussing the steady erosion of the sovereignty that tribes so jealously protect, L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty after Atkinson and Hicks*, 37:3 New Eng. L. Rev. 669, lays much of the blame at the failure of courts to protect individual members of tribes from abuses by their own governments.

> Among the proposals to overcome **Atkinson [Trading v. Shirley**, 532 U.S. 645 (2001)] and [**Nevada v.] Hicks** [533 U.S. 353 (2001), many center on efforts to protect tribal courts from federal review, or to expand their jurisdiction, or to protect them with a constitutional amendment. Yet proposals that focus only on tribes, not individuals, are bound to fail. This is because tribe-centered proposals rely on the doctrines of inherent sovereignty and congressional trust responsibility–doctrines that themselves have failed.
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> In the hands of Congress and the Court, these two doctrines, virtually lacking in constitutional support, have disappointed

> tribes and members, helping to isolate tribes within their reservations and to trivialize the constitutional rights of Indians as individuals. Tribes that would embrace a new awakening of sovereignty should avoid these doctrines. They should instead seek solutions that recognize that tribal sovereignty is best protected by first protecting individuals.
> *Id* at 692-3

In view of what has happened in the nearly three decades since *Martinez* was decided, this Court may want to revisit that doctrine. It should in any event require those courts which have jurisdiction over suits to which Indians are parties to protect individual members of tribes in those states.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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