No. 16-660

In the Supreme Court of the United States

TIFFANY L. AGUAYO, (HAYES), *et al.*,
Petitioners,

v.

S.M.R. JEWELL, Secretary, Department of the Interior; KEVIN K. WASHBURN, Esquire, Assistant Secretary, Department of the Interior - Indian Affairs; AMY DUTSCHKE, Regional Director, Department of the Interior; ROBERT EBEN, Superintendent of the Department of Indian Affairs, Southern California Agency; DOES, 1 through 10,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE DIRECTOR OF THE TRIBAL JUSTICE CLINIC OF THE INDIGENOUS PEOPLES LAW AND POLICY PROGRAM

James D. Diamond
Counsel of Record
Tribal Justice Clinic
Indigenous Peoples Law and Policy Program
University of Arizona Rogers College of Law
1201 E. Speedway Blvd.
Tucson, AZ 85721
(520) 626-9762
jamesdiamond@email.arizona.edu

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

MISCELLANEOUS

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, amicus curiae respectfully submits this brief to highlight the existing fundamental trust obligation between the Bureau of Indian Affairs and the members of the Pala Band of Mission Indians in regard to enrollment, and how, in this case, the troubling ruling below has allowed the historic trust obligation to be abrogated. The brief amicus curiae highlights the context of petitioner's claims in light of the national disenrollment epidemic and how the epidemic and the United States' failure to intercede severely negatively impacts American Indian health and welfare.[1]

Amicus curiae is the Director of the Tribal Justice Clinic of the Indigenous Peoples Law and Policy (IPLP) Program of the University of Arizona James E. Rogers College of Law. The IPLP has a long and distinguished history of scholarship and advocacy in federal Indian law. Amicus curiae teaches and writes in the areas of Indian law, tribal courts, criminal law and procedure. Prior to teaching he practiced law for 25 years.

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have been provided timely notice and have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to the Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Tribal membership is "the essence of one's identity, belonging to community, connections to one's heritage and an affirmation of their human being place in this life and world." *Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n*, No. 06-113-AP, 2007 WL 6900788 at 2 (Little River C.A., June 24, 2007). To strip away tribal membership--citizenship--from Native people extinguishes their identity and must demand the highest level of scrutiny from the courts.

Tribal disenrollment has been described as an epidemic within Indian Country that has caused severe hardship to disenfranchised Indians across the United States and the 63 petitioners in this case. Disenrollment can cause massive psychological, social, cultural, political, and economic consequences that can have a profound impact on the cultural identity and integrity of Native peoples. Many disenfranchised Indians are at risk of "high rates of suicide, homicide, accidental deaths, domestic violence, child abuse, alcoholism, as well as other social problems." Disenrollment exacerbates these social problems by stripping Native people of their social environment, health-care, housing, and opportunities in education and employment, which contributes to health problems. The historic policies of the United States with respect to tribal membership that have been adopted "to encourage... self-determination, cultural pluralism, and the revival of tribalism," have instead, in the current climate of tribal gaming revenues and membership disputes, impeded Indians' ability to preserve their culture by actively framing tribal membership. Thus,

federal courts should intervene by reviewing agency action and enforcing the BIA's fundamental trust obligation and responsibility to Indians.

The Bureau of Indian Affair's ("BIA") failure to fulfill its trust responsibility to the Pala Band of Mission Indians to ensure that a Constitution was validly enacted was arbitrary and capricious and directly contributed to improper disenrollments. The BIA has a duty to ensure that the interests of all tribal members are protected and that governing documents adopted by the tribal government reflect the will of a majority of the tribe's members. By recognizing and applying an improper tribal enrollment ordinance and an invalid constitution, the BIA abrogated its trust obligation to tribes. Moreover, the BIA's failure to ensure that the tribe's governing documents comported with legitimate ratification procedures constitutes a violation under the APA and undermines the importance of tribal membership.

The necessity to protect Indians from arbitrary tribal disenrollment outweighs the tribe's interest in restricting membership. The possibility of tribal members losing their culture, tradition, identity, health care, housing, educational programs, grants, stipends, land allotments, and per-capita payments due to arbitrary disenrollment outweighs the tribal interest in restricting membership.

The Bureau of Indian Affairs ("BIA") has a trust obligation to review the governing documents of Indian Tribes and to ensure enrollment decision are correct. Where a tribe has, in its governing documents given the BIA formal authority to review tribal actions, that authority must be construed narrowly and must be

undertaken in such a way as to avoid unnecessary interference with the tribe's right to self-government. *Wells v. Acting Aberdeen Area Dir.*, 24 IBIA 142, 145 (1993). When the BIA makes a decision, this decision must be done with procedural fairness because of the "overriding duty of the federal government to deal fairly with Indians" and the "distinctive obligation of trust incumbent upon the government" when dealing with Indians. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Morton v. Ruiz*, 415 U.S. 199 (1974). In this case, the BIA acted in an arbitrary and capricious manner when it took a highly deferential stance, reversed itself, and concluded it no longer had a trust responsibility to ensure the tribe's governing document was validly enacted by the tribe's ratification process.

Illegitimate tribal disenrollment is currently an epidemic within Indian country that has caused severe hardship to disenfranchised Indians. The urgency of protecting Indians from arbitrary tribal disenrollment outweighs the tribe's interest in restricting membership. Thus, this Court should protect the 63 petitioners and other Indians across the United States from arbitrary tribal disenrollment by granting certiorari in this case, reviewing tribal disenrollment procedures, and hearing cases from obviously disenfranchised Indians.

ARGUMENT

I. FEDERAL COURTS SHOULD PROTECT INDIANS FROM ARBITRARY DISENROLLMENT THAT HAS THE EFFECT OF DESTROYING THEIR SOCIAL, CULTURAL, AND POLITICAL EXISTENCE, AND THE NECESSITY TO PROTECT THE MEMBERSHIP RIGHTS OF INDIVIDUAL INDIANS OUTWEIGHS THE TRIBE'S INTEREST IN RESTRICTING MEMBERSHIP.

In this case the Pala Band of Mission Indians arbitrarily terminated citizenship of the 63 petitioning tribal members plus nearly 100 of their relatives over the debated Indian blood of their Pala ancestor, a woman born 160 years ago. Indian tribal disenrollment is an epidemic that is destroying the sacred Indian heritage of thousands of Indigenous people across the United States. Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 312-14, 320 (2010).

It has been recognized by scholars that the purpose of tribal disenrollment is to assimilate Indians into Anglo-American culture as part of an attempt to diminish self-governance by reducing the tribal land base and Indian cultural identity. Gabriel S. Galanda, Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of A Remedy*, 57 ARIZ. L. REV. 383 (2015). Tribal disenrollment, which is the equivalent of revoking citizenship, is an invented aspect of "sovereignty." It is worth noting that the U.S. government itself does not possess the power to deny or

revoke citizenship. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that under the 14th amendment, the government had no power to deny citizenship, as "the Fourteenth Amendment was designed to … protect every citizen against congressional forcible destruction of his citizenship, whatever his creed, color, or race.").

Treaty making persisted as the principal method of dealing with tribal governments until 1871, when Congress terminated the process, instead granting the authority to govern Indian affairs to itself, via legislation. *United States v. Kagama*, 118 U.S. 375, 382 (1886); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *See also, e.g.*, *The Cherokee Tobacco*, 78 U.S. 616, 618 (1870) (holding that a "treaty may supersede a prior act of Congress and an act of Congress may supersede a treaty."). In 1871, Congress passed the General Allotment Act (GAA), the purpose of which was to convert individual Indians into farmers. Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 1-2 (1997) ("The [GAA] had as its philosophical mandate the creation of the Indian farmer.").

Subsequently, in 1896, Congress created enrollment commissions to compile rolls that codified each tribe's citizenry. ACT OF JUNE 10, 1896, ch. 398, 29 Stat. 321 (1896). This legislation required commissions to determine the membership status "of all persons who may apply ... for citizenship" in any of the allotted tribal lands in respect to "blood quantum." *Id*.

In 1934, Congress passed the Indian Reorganization Act ("IRA") "to encourage…self-determination, cultural pluralism, and the revival of tribalism." 25 U.S.C. § 476

(2012). However, the United States government continued to actively frame and dictate tribal membership requirements; the IRA mandated that only descendants of persons residing on a reservation in 1934 and persons "of one-half or more Indian Blood" were entitled to tribal membership. *Id*.

The Secretary urged tribes to adopt these regulations "based on the notion that it was paramount to their tribal welfare to weed out those Indians seeking membership who possessed a low blood quantum." Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership,* 30 HAMLINE L. REV. 97, 99 (2007) (noting that "although the federal government recognizes the right of tribes to make this determination, Congress retains the power to supersede that authority when it deems necessary" and that "through federal legislation such as the Indian Civil Rights Act, the Indian Reorganization Act, and the Indian Gaming Act, coupled with regulations imposed by the Bureau of Indian Affairs, over time the federal government has influenced what it means to be a tribal member."). Restricting tribal membership by blood quantum has become a reoccurring theme within Indian country that has caused great harm to both disenrolled and other tribal members. While the former lose their benefits and identity, the latter fear being stripped of the same rights.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. §§ 2701-21. Although the purpose of IGRA was to promote tribal economic development, self-sufficiency, and tribal government, it also was the spark that ignited a disenrollment crisis

in Indian Country. IGRA allowed per-capita payments to tribal members; and, while only one-fourth of gaming tribes have elected to distribute per-capita payments, many of those tribes have experienced heated internal dissent regarding "who qualifies for membership and thus is eligible for payments." CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005). As tribes became more dependent on the free-market economic system, tribal mass disenrollment also became a viable option to protect per-capita payments, thereby reinvigorating the federal government's assimilation and termination policies. Galanda, *supra*, at 7. This dilemma has directly contributed to a mass tribal disenrollment crisis.

Some federal circuit courts have also recognized that employing mechanisms that encourage restricting tribal membership, such as the IGRA, has created an epidemic within Indian Country that has contributed directly to mass disenrollment. *See Jeffredo v. Macarro*, 590 F.3d 751, 761 (9th Cir. 2009) (Wilken, J., dissenting) (noting that "Tribal Council did not begin disenrolling large numbers of members until recently, when the Tribe's casino profits became a major source of revenue."); *See also* Painter-Thorne, *supra,* 312-14, 32 (noting that tribes in California alone have disenrolled over 5000 members since 2002).

Disenrollment may be a punishment for political opposition, troublemaking, drug abuse, improper lineal descent, treason, or other perceived violations of tribal unity. Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941 (2011).

While some disenrollments are legitimate, many are suspect. *See* Marc Cooper, *Tribal Flush: Pechanga People "Disenrolled" en Masse*, LA WEEKLY, Jan. 3, 2008 (discussing how tribes have disenrolled thousands of members in recent years due to gaming corruption and greed). Some tribes use disenrollment as a retaliatory mechanism against members who speak out against the tribal government. *See*, *e.g.*, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 876-78 (2d Cir. 1996); *See also Sweet v. Hinzman*, 634 F. Supp. 2d 1196, 1198-99 (W.D. Wash. 2008); Lynda V. Mapes, *A Tribe Divided: Snoqualmie Members Fight for Control of Government, Casino*, SEATTLE TIMES, Apr. 25, 2008. Thus, mechanisms used to encourage disenrollment, without judicial intervention, have allowed the mass disenrollment epidemic to spread, creating great harm and injustice to individuals whose citizenship was terminated arbitrarily.

Disenrollment can cause massive psychological, social, cultural, political, and economic alterations that can have a profound impact on the central identity of Native peoples. *See* David E. Wilkins, *A Most Grievous Display of Behavior: Self-Decimation in Indian Country*, MICH. ST. L. REV. 325 (2013). The ramification of disenrollment may result in the "destruction of one's social, cultural, and political existence." *Jeffredo*, 599 F.3d at 922 (quoting *Poodry*, 85 F.3d at 897). It works destruction, in part, because disenrolled Indians lose all benefits of tribal membership and may even have to physically move off Indian reservations. JAMES D. DIAMOND, *Who Controls Tribal Membership, The Legal Background of Disenrollment and Tribal Membership Litigation in BEST PRACTICE FOR DEFENDING TRIBAL MEMBERSHIP CASES* (2013). In some circumstances,

"even respected elders – among the last tribal members who remember the tribal culture, traditions, or language – have been disenrolled." *Id*. (noting that a tribal member lived for eighty-seven years with the belief that she was a Chukchansi Indian before being disenrolled).

Disenrollment leads to an increased concern over mental health for Indians because they rely on relatives, culture, and tradition for a healthy life. *See* Karina L. Walters, Jane M. Simoni & Teresa Evans-Campbell, *Substance Use Among American Indians and Alaska Natives Incorporating Culture in an "Indigenist" Stress-Coping Paradigm*, PUB. HEALTH REP., 117 (Supp. 1): S104-S117 (2002). In the "Indigenist model of health," poverty has been described "as being without relatives" and reconnecting the 'sick' person "with family and community is central to the healing process." *Id*. Disenrollment thus perpetuates historical trauma by creating a loss of community, culture, tradition, and identity that is associated with historical loss. Historic loss has been strongly associated with depression, Post-Traumatic Stress Disorder, and poly-drug use in Native youth. Les B. Whitebeck, et al., *Depressed affect and historical loss among North American indigenous adolescents*, AM. INDIAN ALASKA NATIVE MENTAL HEALTH RES. 16(3): 16–41 (2009); Brockie & Dana-Sacco, et al., *The Relationship of Adverse Childhood Experiences to PTSD, Depression, Poly-Drug Use and Suicide Attempt in Reservation-Based Native American Adolescents and Young Adults*, 55 (3-4) AM. J. COMMUNITY PSYCHOL., 1-11 (2015).

The psychological and healthcare consequences of disenrollment are significant because they include "high rates of suicide, homicide, accidental deaths, domestic violence, child abuse, alcoholism, as well as other social problems." *Id*. Thus, disenrollment increases the likelihood of health risks because it strips Native people of their social environment, health care, housing, opportunities in education and employment, which are known social detriments and contributors to health disparities. *See* U.S. Dept. of Health & Human Services, *Healthy People 2020: An Opportunity to Address Societal Determinants of Health in the United States*, Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 Submitted to the U.S. Dept. of Health & Human Services, July, 2010. http://www.healthypeople.gov/2010/hp2020/advisory/societaldeterminantshealth.htm#one (last visited December 6, 2016). Thus, federal courts should intervene to minimize health risks by reviewing agency action and enforcing the BIA's fundamental obligation and responsibility to tribes.

Federal courts should protect Indians from arbitrary tribal disenrollment that has the effect of destroying Indians' social, cultural, and political existence that was centuries in development. The BIA's failure to effectuate its trust responsibility with the Pala Band of Mission Indians to ensure that a Constitution was validly enacted was arbitrary and capricious because it allowed questionable disenrollments. The BIA has a duty to ensure that the interests of all tribe members are protected and that governing documents reflect the will of a majority of the tribe's members. *California Valley Miwok Tribe v.*

United States, 424 F. Supp. 2d 197, 202 (2006). By recognizing and applying a void, revised tribal enrollment ordinance and a void constitution, the BIA abrogated its trust obligation to tribes.

Indeed, adopting void documents and encouraging illegitimate disenrollments is contrary to what the BIA claims its purpose to be – enhancing the quality of life, promoting economic opportunity, protecting and improving trust assets of American Indians, and assisting tribes in creating their own documents. Bureau of Indian Affairs, http://www.bia.gov/WhoWeAre/BIA/index.html (last visited Dec. 6, 2016). The BIA's failure to ensure that the tribe's governing documents comported with adequate ratification procedures should give rise to a successful claim under the APA's arbitrary and capricious standard because the BIA failed to fulfill the trust responsibility. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (holding that the assignment of the superintendent without consultation with the Tribe violated the APA, BIA Guidelines, and the "trust responsibility"). Thus, this Court should grant review to correct the BIA's actions and protect Native people's vested right to tribal membership.

The deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: "it often works a destruction of one's social, cultural, and political existence." *Jeffredo*, 599 F.3d at 922 (quoting *Poodry*, 85 F.3d at 897). Tribal membership for Indian people is more than mere citizenship in an Indian tribe. It is "the essence of one's identity, belonging to community, connections to one's heritage and an affirmation of

their human being place in this life and world." *Samuelson*, No. 06-113-AP, 2007 WL 6900788 at 2. In fact, it is not an overstatement to say that tribal membership is everything for Indian people because it "completes the circle for the member's physical, mental, emotional, and spiritual aspects of human life." *Id*. Thus, to strip away tribal membership is an extraordinarily serious matter and demands the highest level of scrutiny. *Id*.

Tribal citizenship to an Indian is as important as is U.S. citizenship to an American, therefore demanding a heightened standard of proof to extinguish. *See Fedorenko v. United States*, 449 U.S. 490, 505 (1981). In *Fedorenko*, for example, this Court recognized that the "right to acquire American citizenship is a precious one and that once citizenship has been acquired, its loss can have severe and unsettling consequences." *Id*.; Those consequences include the loss of the freedom to belong to a community, which brings a sense of identity, culture and tradition. That is why the *Fedorenko* Court held that evidence justifying revocation of citizenship must be "clear, unequivocal, and convincing" and not leave "the issue in doubt." *Id*. Here, the consequences of disenrollment are similar to the consequences of losing U.S. citizenship, as the unwelcome member loses the right to belong to their traditional heritage with a corresponding tragic loss of personal identity. Thus, tribal governments must be held to the highest of standards when attempting to terminate citizenship and disenroll a tribal member.

The necessity to protect Indians from arbitrary tribal disenrollment far outweighs the tribe's interest in restricting membership. There is a very real

possibility of tribal members such as the 63 petitioners in this case losing their culture, tradition, identity, health care, housing, educational programs, grants, stipends, land allotments, and per-capita payments due to arbitrary disenrollment. While disenrolled tribal members essentially lose their identity as a result of arbitrary citizenship decisions, the tribe reduces per capita payments and, thus, saves revenue by limiting membership. Although there may be occasional legitimate tribal membership control activities, there is no formal judicial remedy for a tribal member whose membership has been extinguished as Congress has not chosen to provide an effective external means of enforcement for the rights of tribal members. *LaMere v. Superior Court of the County of Riverside*, 131 Cal. App. 4th 1059, 1063 n.2 (Cal. Ct. App. 2005). Thus, as in the case at the bar, a victim of an improper disenrollment is left without any remedy whatsoever to appeal an arbitrary, wrongful and devastating decision.

Faced with horrific results of a massive epidemic and without legal remedies, Indigenous peoples in the United States have already begun taking matters into their own hands. This is sadly what happened recently in another California community. In 2014 the Cedarville Rancheria first removed Cherie Rhoades as Chairperson. James D. Diamond, *The Deadly Trend of American Indian Disenrollment*, CONNECTICUT HEARST NEWS BLOG (March 13, 2014) http://blog.ctnews.com/diamond/2014/03/13/the-deadly-trend-of-american-indian-disenrollment/ (last visited December 6, 2016). They next took action to disenroll her and evict her from tribal housing. At the appeal hearing before the very same tribal council that removed and evicted her,

Rhoades opened fire, killing four people. *Id.* At the time of this writing Rhoades is scheduled for a four-count capital murder trial in California. *People v. Cherie Rhoades*, Case No.: F-l4-073 (Cal. Super. Ct.).

The purpose of the Indian Civil Rights Act was to "secure for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 61 (1978). Still, the unjust actions of tribal governments may disenfranchise tribal members through arbitrary disenrollment. Despite the evolution of tribal-federal Indian law and international human rights in the United States, there still exists no effective legal remedy to address the widespread crisis. Galanda, *supra*, at 7. Although the disenrollment epidemic sweeps across the Nation, this Court has never granted certiorari in a tribal disenrollment case. The time is ripe for the Court to address the crisis.

II. THE BIA HAS A HISTORIC TRUST OBLIGATION TO REVIEW THE GOVERNING DOCUMENTS OF INDIAN TRIBES AND ACTED IN A WHOLLY ARBITRARY AND CAPRICIOUS MANNER WHEN IT TOOK A HIGHLY DEFERENTIAL STANCE, CONCLUDING IT ONLY HAD AN ADVISORY FUNCTION AND FAILED TO GUARANTEE THAT THE PALA BAND OF MISSION INDIANS' CONSTITUTION WAS VALIDLY ENACTED BY THE TRIBE'S RATIFICATION PROCESS.

The BIA was established in 1824 and is the oldest bureau of the United States Department of Interior. It's

obligation since its inception has been the BIA's job and obligation to help tribes by providing guidance. The BIA's mission "is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian Tribes, and Alaska Natives." Bureau of Indian Affairs, *supra*, at 10. One of the fundamental responsibilities of the BIA has always been to assist tribes to create their governing documents. *Id.*

The historic trust responsibility of the United States was first recognized when the Court stated that the tribes "relation to the United States resemble[d] that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831). This Court later stated that the United States' "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation*, 316 U.S. at 297. The limitations and parameters of the BIA's trust responsibility are defined by Congress and must be based on a specific statute, treaty, or agreement which helps define or limit the relevant trust duty. *See United States v. Mitchell*, 445 U.S. 535 (1980); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). Any federal government action, like the BIA action in question here, must be conducted in the context of the United States' fundamental and historic trust responsibility.

The Indian Reorganization Act of 1934 ("IRA") provided a way for Tribes to revitalize tribal governments by adopting constitutions which would be subjected to the approval of both the tribal membership and the Secretary of the Interior. 25 U.S.C. § 461, 48

Stat. 984 (1934). However, tribes retain their inherent sovereign power to adopt governing documents under different procedures than those in the IRA.

The purpose of the IRA was to re-establish tribal sovereignty and self-government after decades of counterproductive assimilation policies. 28 A.L.R. Fed. 2d 563. A tribe has the ability to organize for the common tribal community welfare and adopt a constitution according to specific procedures. 25 U.S.C. § 476(c). The Pala Band of Mission Indians held a special election on December 18, 1934 and voted against becoming an IRA recognized tribe. *Aguayo*, 827 F.3d at 1218. However, in 1997, the Pala Band of Mission Indians decided to enact a new governing document in the form of a constitution. Here, the BIA's fundamental obligation and responsibility was to ensure that the tribe's governing document complied with the tribe's ratification process. It is this failure of review and confirmation that makes the BIA's final agency determination a clear violation under the Administration and Procedures Act ("APA"). 5 U.S.C. §§ 551-559 (West).

According to the witness King Freeman, a tribal member of the Pala Band of Mission Indians who served as the Band's Executive Committee as Secretary, Treasurer, Vice-Chair and Chairman over the course of his career, the custom and tradition of the Pala Band of Mission Indians was to hold a referendum election where all eligible voters had the right to vote by ballot whenever there was a major amendment to their governing documents. Appellant's Excerpts of Record Volume 1 at 55, Declaration of King Freedmen, *Aguayo v. Jewell*, No. 14-56909, (U.S. June 19, 2013).

Mr. Freeman provides historical support that the tribe complied with custom and tradition when it amended the Articles of Association on June 6, 1973, for the second time. *Id.* at app. 136. After this election, the tribe's Bill of Rights was adopted by vote at a General Council meeting, as the BIA required and insisted that the tribe have the provision in its Articles of Association; this amendment was done as an administrative correction. *Id.* The same process of calling a referendum election was accomplished when the tribe made a third amendment to the Articles of Association because it modified the governing document. *Id.* Ultimately, the Pala Band, in 1997, abandoned their own procedures when they retroactively changed their constitution and membership requirements.

The abrogation of the BIA's trust responsibility is also evidenced by the Declaration of Elsie Lucero, a tribal member of Isleta Pueblo who worked for the BIA in California as an enrollment specialist for 21 years, who stated that the revised 1997 Constitution would only become effective after a majority of the Pala Band tribal members approved it in a duly-called election. Petition for Writ of Certiorari at 130, Appendix E, *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016), *petition for cert. filed* (U.S. Nov. 14 2016).

When the BIA makes a decision, the process should be done with procedural fairness, because of the "overriding duty of the federal government to deal fairly with Indians" and the "distinctive obligation of trust incumbent upon the government" when dealing with Indians. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Morton*, 415 U.S. at 199. Courts have

held that there are situations where the BIA must act and that the DOI has the authority and responsibility to ensure the Nation's representatives are valid representatives of the Nation as a whole. *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002); *See also Seminole Nation*, 316 U.S. at 297.

Courts have found that the BIA violated either the APA, its historic trust responsibility, or their own Guidelines when that agency failed to fulfill the trust responsibility. *See Oglala Sioux Tribe of Indians*, 603 F.2d at 707 (holding that the assignment of the superintendent without consultation with the Tribe violated the APA, BIA Guidelines, and the "trust responsibility"). The BIA also has a trust responsibility to ensure an enrollment decision is right and to make a correction when an individual's enrollment status is incorrect, ambiguous, or based on incorrect facts or a mistake of law. *Potter v. Acting Deputy Assistant Sec'y-Indian Affairs*, 10 IBIA 33, 39, 1982 WL 42970 at *4 (1982) (Muskrat, J., dissenting) ("[W]hen BIA has information in its possession indicating that an enrollment decision is incorrect, ambiguous, or is based on incorrect facts or a mistake of law, BIA is obligated by its trust responsibility to inform the tribe of the problem and to seek clarification or correction of the individual's enrollment status.").

The BIA itself has acknowledged that its duty is to ensure the interests of all tribal members are protected and that the governing documents reflect the will of a majority of the tribe's members. *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 202 (2006). It follows that the BIA has a trust responsibility

to ensure that governing documents reflect the majority of an Indian tribe and when it fails to fulfill this responsibility it has violated not only the trust obligation but likely the APA.

The BIA has a trust responsibility to review the governing documents of Indian tribes. In this case the Pala Band of Mission Indians gave the BIA the authority to approve the Constitution and also established when the Constitution would become effective. According to King Freeman, the Pala Band of Mission Indians had a history of holding a referendum election when making major changes to its governing documents. *Supra*, Appellant's Excerpts of Record Volume 1 at 55, Declaration of King Freeman. It is apparent from trial evidence that the BIA abrogated its trust responsibility when it neglected to guarantee the 1997 Constitution that properly reflected the majority of the tribe, retroactively approved the 1997 Constitution, and issued a Certificate of Approval on July 2000. The BIA acted in an arbitrary and capricious manner when it took a highly deferential and prejudicial stance, reversing itself and concluding it only had an advisory role in reviewing the tribal constitution, and guaranteeing that the Pala Band of Mission Indian's new Constitution was validly enacted by the tribe's ratification process. The result was the elimination of tribal citizenship and all of the sacred benefits of tribal citizenship belonging to the 63 petitioning tribal members.

Federal Courts should protect Indians from arbitrary disenrollment as disenrollment has the devastating effect of destroying an individual's social, cultural, and political existence. It is imperative that

the Federal government honor its historic trust responsibility to protect Indians. The Court should not turn a blind eye to the widespread disenrollment epidemic sweeping Indian Country.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully Submitted,

James D. Diamond
Counsel of Record
Tribal Justice Clinic
Indigenous Peoples Law and Policy Program
University of Arizona Rogers College of Law
1201 E. Speedway Blvd.
Tucson, AZ 85721
(520) 626-9762
jamesdiamond@email.arizona.edu

Counsel for Amicus Curiae