No.

In the

Supreme Court of the United States

THE ALABAMA-COUSHATTA TRIBE OF TEXAS,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY; R. J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B. A. T. INDUSTRIES, PLC; PHILIP MORRIS INCORPORATED; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., Successor to the Tobacco Institute Research Committee; THE TOBACCO INSTITUTE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a federally-recognized Native American Indian tribe have standing to sue on its own behalf for the decimation of its discrete and narrow population?

II. Is a heightened standard being applied in determining whether Indian tribes have standing to sue on behalf of their tribal members?

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The Alabama-Coushatta Tribe of Texas respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported and is reproduced here in Appendix A. The opinion and judgment of the United States District Court for the Eastern District of Texas is unreported and is reproduced here in Appendix B. The order of the court of appeals denying the motion for petition for rehearing *en banc* is unreported and is reproduced in Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002. A timely petition for rehearing *en banc* was denied by that court on August 15, 2002. The jurisdiction of this Court is invoked under 28 § 1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. CONST. art. III, § 2 (Appendix D)

STATEMENT OF THE CASE

This case concerns the threshold standard that governs in determining whether a federally-recognized sovereign Indian tribe has standing to bring suit on its own behalf and on behalf of its members for injurious conduct that decreases its numerical strength and vitality; and, whether tribes are erroneously being held to a heightened standard. Petitioner, Alabama-Coushatta Indian Tribe of Texas ("The Tribe"), is a

federally-recognized Native American Indian tribe under 25 U.S.C. §§ 731-737. The Tribe occupies a 4600-acre reservation on U.S. Highway 190, ninety miles north of Houston and seventeen miles east of Livingston in Polk County, Texas. There are approximately 900 names on the Alabama-Coushatta tribal roll.

Although recognized as two separate tribes, the Alabamas and Coushattas have been closely associated throughout their history. The two tribes lived in adjacent areas in what is now the state of Alabama, followed similar migration routes westward after 1763, and settled in the same area of Southeast Texas. Culturally, these two tribes have always been one people. Intermarriage between the tribes has been practiced since the earliest times. In the early 1930s, the Alabama and Coushatta Indians organized under the Indian Reorganization Act as a single tribe. *See* 25 U.S.C. §§ 461 et seq.

Respondents are cigarette and tobacco product manufacturers and associated public relations and lobbying firms. The bad conduct of the tobacco industry in general, and of Respondents specifically, is well-documented and has been the subject of massive litigation in recent years. The litany of Respondents' bad acts is recounted in detail in Petitioner's Original Complaint. To summarize in the interest of brevity, Respondents, over the course of many years, have engaged in a persistent pattern and practice of deception and disinformation, resulting in the largest health care crisis in this country's history. Tobacco products are conclusively harmful, addictive, and lacking in beneficial effects and Respondents have knowingly deceived the public regarding the harmful and addictive nature of their products. Respondents have manipulated the nicotine levels in cigarettes in order to maximize profits through consumer addiction and have suppressed safer, less-addictive cigarettes.

Finally, Respondents have intentionally targeted children with their advertising campaigns to ensure new generations of addicted smokers.

Native Americans have been particularly vulnerable to Respondents' bad conduct. According to recent statistics published by the American Lung Association, among racial and ethnic groups, the prevalence of smoking is highest among American Indians. The percentage of American Indians who smoke is 40.8, compared to 24.3 percent of whites.[1]

The tobacco industry's massive marketing campaign geared to young audiences has had an especially powerful impact on Native Americans. The U.S. Surgeon General reports that, nationally, smokeless tobacco use by Native American youth on reservations is higher than that of other ethnic groups and that there is evidence of early, frequent, and heavy use of snuff and chewing tobacco by Native American children.[2] The significance of this is magnified by the fact that American Indian male and female populations, as measured by the 1990 Census, were younger than the corresponding all-race male and female populations in the United States.[3] Seventeen percent of Indian males were under age fifteen and 16 percent of Indian females were in this age group. For all races combined, this percentage was only 11 for both sexes.[4]

Tragically, life expectancy for Native Americans is considerably shorter than the general population. In 1990, only 6 percent of the Indian population was older than 64 years. For the population of all races within the United States combined, the corresponding percentage

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[1] American Lung Association Fact Sheet: *American Indians and Alaska Natives and Tobacco*, (last modified Nov. 8, 2002), http://www.lungusa.org/tobacco/native_factsheet99.html.
[2] 1994 SURGEON GEN. ANN. REP.
[3] 1990 U.S. CENSUS
[4] Id.

was 13. Overall morbidity rates are nearly twice as high for Indians as for the all-race U.S. population.[5] Because tobacco use is a risk factor for heart disease, cancer, and stroke – all leading causes of death among American Indians – the relatively high incidence of tobacco use among the Indian population is an obvious factor contributing to this life-expectancy gap.

Although accorded state-like status under the well-established doctrine of tribal sovereignty, no Indian tribes were party to the collective litigation brought against the tobacco industry by the Attorneys General of many states in the late 1990s. The Attorneys General, recognizing they lacked authority to negotiate the potential future claims of the tribes, expressly excluded Indian sovereigns from the 1998 "Master Settlement Agreement" (MSA) that resulted from that litigation. The MSA expressly states, "The Settling States do not purport to waive or release any claims on behalf of Indian Tribes." Section XII(6) of the MSA. Likewise, the State of Texas' settlement with the industry did not purport to settle on behalf of the tribes located within its borders.[6] While some of the injunctive relief agreed to in the MSA has been determined to extend geographically to tribal lands, none of the compensation for damages inured to the benefit of the tribes. *See Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.* 256 F.3d 879 (9th Cir. 2001).

Because of their small and finite population, the Tribe has been particularly hard hit by the ravages of tobacco-related disease and death. In 2000, the Tribe filed a complaint alleging conspiracy and fraud against Respondents under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et

[5] Id.

[6] The State of Texas was one of four states that did not participate in the Master Settlement Agreement. *See Texas v. American Tobacco Co.*, 14 F.Supp.2d 956 (E.D. Tex. 1997).

seq., as well as claims of product liability, negligence, breach of express and implied warranties, and fraud. Respondents filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) arguing, inter alia, that the Tribe's claims were barred by remoteness. The district court agreed and, on August 30, 2001, granted Respondents' motion. The district court relied on three circuit decisions holding that trade unions' recoupment claims against tobacco companies failed to establish proximate cause. The court of appeals agreed that the trade union cases were controlling and affirmed.

REASONS FOR GRANTING THE WRIT

The ability of Indian tribes to protect their members and their organizations is paramount to the survival of Native Americans. Given the substantial importance of issues concerning Indian tribes' fair access to the courts, certiorari is warranted to establish clear and fair standards regarding tribes' standing to sue.

The Tribe seeks to establish standing, first, on its own behalf to redress injuries to the Tribal entity resulting from the bad acts of Respondents, and second, on behalf of its members to secure their rights to be compensated for their injuries and to be free from continued threats to their existence as a people.

I. THE TRIBE HAS STANDING TO SEEK REDRESS FOR INJURIES SUSTAINED BY THE TRIBAL ORGANIZATION.

This Court has long recognized that organizations are entitled to sue on their own behalf to redress injuries to themselves. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *Pierce v. Society of Sisters*, 268 U.S.

510 (1925). The Tribe satisfies the standards set forth in this Court's precedents regarding organizational standing.

A. The Tribe Satisfies the Test for Article III Standing Established by this Court.

When an organization seeks to establish standing to sue on its own behalf, the question is, as with other litigants, "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' [as] to warrant his invocation of federal court jurisdiction." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), *quoting Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), and *Baker v. Carr*, 369 U.S. 186, 204 (1962). As defined by this Court, this requirement means that a plaintiff must show that he personally has suffered some actual or threatened injury as a result of the defendant's conduct and that this injury is likely to be redressed by the relief requested. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

The Tribe has not here predicated its right to sue on an abstract concern but, rather, has alleged concrete injuries to the tribal entity resulting from Respondents' actions and practices. Native American Indian tribes are unique sovereign bodies that suffer redressable harm when members of their discrete and narrow populations are stricken by disease and death. Further, the tribal entity has been injured in fact by the diversion of limited health-care resources to smoke-related health care problems. The Tribe has satisfied the requisite harm to establish standing to sue on its own behalf.

B. The Tribe's Claims are Distinguishable from the Trade Union Cases Relied Upon by the Court of Appeals.

The Court of Appeals relied on three cases in finding the Tribe's claims too remote to support standing: *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001); and *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2nd Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000). The common thread among these suits is that all were brought by trade or labor unions seeking to recoup the smoking-related health care costs they had expended in a third-party payor capacity. In each case, the respective courts dismissed the union funds' claims as too remote to justify direct recovery by the organization.

As Respondents in this case correctly pointed out in their briefing to the court, and as the court's opinion stated, other circuit courts have relied upon these decisions in dismissing similar third-party claims. The courts of appeal are misguided in summarily applying this trilogy of trade union cases to any organization challenging the tobacco industry in a representational posture. In the instant case, the Tribe's claims are clearly distinguishable from the trade union cases.

1. A sovereign Indian tribe differs inherently from a trade union.

The organizational foundations, purposes, and characteristics of Indian tribes and trade unions are completely dissimilar. Labor unions were formed in the last century out of economic necessity. Tribes were

formed at the dawn of time in order to protect and perpetuate the survival of these extended families. Members of a labor union are related by business economics. Union membership is by choice and individuals can join, depart, or switch to another organization at will. Members of a tribe are related by blood and culture. Tribal membership is determined by birth and individuals always remain part of a specific tribe. Further, only the working person(s) of a nuclear family may be a member of a labor union, whereas husbands, wives, children, and most relatives are members of a tribe. Most importantly, the loss of a union member through death or poor health does not threaten any fundamental right of the organization; nor, since at least theoretically there are endless potential new members, does it threaten the union's long-term existence. Conversely, an Indian tribe is a threatened, self-contained microcosm of the human race and of our society. As with a family or an endangered species, the loss of any member's life or vitality is keenly felt by the tribe and threatens the tribe's very fundamental right of existence as an indigenous people.

The economic and "infrastructure" losses alleged by the unions and rejected by the courts are simply not analogous to the crippling and fundamental losses the Tribe has suffered due to smoke-related health problems. Further, because the plaintiffs in the union cases were union trust funds rather than the union organizations themselves, the harm was far more attenuated than is the case here.

2. The Tribe is not a third-party payor.

The Indian Health Service (IHS), an agency within the Public Health Service of the Department of Health and Human Services, provides health care for some 1.5 million American Indian people. The IHS

receives yearly lump-sum appropriations from Congress and expends the funds under authority of the Snyder Act codified at 25 U.S.C. § 13 and the Indian Health Care Improvement Act, codified at 25 U.S.C. § 1601 et. seq. The IHS is mandated to contract with tribes who choose to administer programs and facilities under the Indian Self-Determination Act. 25 U.S.C. § 450f et seq. However, even in cases where tribal organizations have so contracted (as Petitioner Tribe did in 1988), the IHS retains the authority to allocate the finite funds it receives.

In their briefing to the court of appeals in this case, Respondents argue that the trade union cases definitively establish that "the rule against derivative claims applies to any kind of remote payor" and, therefore, to the Tribe. Contrarily, Respondents point out elsewhere in their brief that the Tribe "did not actually spend any money on health care for tribal members" and thus does not have standing. While Respondents appeared to want it both ways, the relevant distinguishing point is this: the Tribe is not solely seeking recoupment of third-party expenditures, as were the unions, but rather damages exacted by tobacco on the tribal entity itself through the diminution of its health, vitality and numerical strength.

Respondents correctly point out that claims which are wholly derivative of damage to individuals but couched as direct injuries to an organization have been rejected by some circuit courts. *See e.g. Association of Wash. Pub. Hosp. Dists. v. Philip Morris*, 241 F.3d 702, (9th Cir.), *cert. denied*, 122 S. Ct. 207 (2001) (finding that, since no expenditures would have been made absent injury to smokers, injury to hospital was too indirect); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) (holding that damage alleged to fund's financial stability was too indirect). However, there is an immeasurable difference

between mere financial expenditures and the loss of tribal members essential to the vitality and continued existence of the Tribe.

3. The Tribe as an entity is harmed by the diversion of health care resources due to smoking in a way that trade unions are not.

The courts in the union cases rejected the plaintiffs' claims of damage due to diversion of health-care resources to smoke-related illness at the expense of other health care needs. Again, the Tribe's claims in this case are distinguishable. Health care benefits offered to members of trade unions are typically provided through a trust, which is funded by withholding employee wages at an amount negotiated through collective bargaining. Fund trustees may then elect to shift payout risk to underwriting insurance companies. Because both the funds and underwriting companies engage in the business of actuarial risk-balancing, beneficiaries can expect to be covered regardless of the incident rate of either smoke-related illness or other health care needs in their group. However, because of the statutory scheme under which the IHS operates, there is a finite and often inadequate amount of money to cover the health care costs for Indian tribes. Health care resources required to address smoke-related ailments are necessarily diverted from other health care needs. As the Court of Appeals for the Ninth Circuit recognized, in *Shoshone-Bannock Tribes v. Thompson*, the problem of tribal claims exceeding amounts appropriated for them is common. 279 F.3d 660 (2001). The *Shoshone* court further acknowledged that the appropriated amounts are the total amounts available. *Id.* Once the IHS's lump sum allocations are expended on a particular health-care sector, there is no limitless well to tap and other needs must simply go

unmet. This clearly exacerbates the direct and devastating consequences of smoke-related illness to an Indian tribe.

II. THE TRIBE HAS STANDING TO BRING THIS ACTION IN A REPRESENTATIONAL CAPACITY.

A. The Tribe Satisfies the Standard of Associational Standing Established by this Court

This Court set forth a three-prong test for associational standing in *Warth v. Seldin*, *supra*, and has reaffirmed this standard in subsequent cases. *See e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). An association has standing to bring suit on behalf of its members when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Warth* at 515.

The prerequisites to associational standing described in *Warth* are clearly present here. The Tribe's members would have standing to sue in their own right for smoke-related injuries, although, given the abject poverty of many Indians, it may be difficult for them to do so.[7] The interests the Tribe seeks to protect – the health and continued viability of its people – are unquestionably germane, in fact they are identical, to

[7] For the year preceding the 1990 Census, 31.6 percent of Indians lived below poverty level in contrast to 13.1 percent for the United States All-Races population.

the Tribe's organizational purpose. Finally, neither the claims asserted by the Tribe nor the relief it requests require that individual members participate in this suit.

B. The Tribe is a Unique Sovereign Entity with a Special Interest in the Well-being of its Members

Native American Indian tribes are a unique hybrid, combining aspects of a sovereign state-like political subdivision with characteristics of an extended family unit, bound by blood and culture. The Court of Appeals for the Tenth Circuit has recognized that the peculiarly close relationship between an Indian tribe and its members, coupled with the difficulties individual members encounter in asserting their rights in courts, provide sufficient justification for permitting the tribe to sue even when it is individual Indians who are affected. *See Pueblo of Isleta ex rel. Lucero v. Universal Contractors, Inc.*, 570 F.2d 300 (10th Cir. 1978) (finding that blast disturbance of private residences on Indian lands affected tribal as well as individual rights). Further, the *Isleta* court acknowledged the strong interest the United States has in seeing that, not only tribes, but individual members have even-handed justice. *Id.* at 303. Because of the paramount role that tribes play in protecting the interests of their members, a tribe is a uniquely qualified and appropriate representative in a suit to redress injuries to those members.

C. The Tribe Meets the Standard for Parens Patriae Standing Established by this Court.

This Court established the standard for parens patriae standing in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). In order

to maintain a parens patriae action, the state must articulate an interest apart from the interests of particular private parties, i.e. the state must be more than a nominal party. Further, the state must express a quasi-sovereign interest. The Court outlined two general categories of qualifying interests. First, a state has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Under this standard, the Tribe is the definitive parens patriae plaintiff. Because of the unique patriarchal character of the tribal organization, there can be no better exemplar of a "parent of the country." The Tribe's pleadings in this case establish it as more than a nominal party. The Tribe has clearly articulated that its survival as an entity has been threatened, an interest well apart from the injuries to particular members. Further, the Tribe has clearly established a quasi-sovereign interest in the health and well-being of its residents in general, both of which have been harmed and threatened by the bad acts of Respondents.

III. THIS CASE CONCERNS A THRESHOLD QUESTION OF FUNDAMENTAL IMPORTANCE TO THE FUTURE OF AMERICAN INDIAN JURISPRUDENCE AND SURVIVAL.

According to the U.S. Department of the Interior, there are more than 572 federally-recognized sovereign Indian tribes in the United States and approximately 245 unrecognized tribes, most of whom are petitioning for federal recognition. The erroneous decision of the courts below will have a significant negative impact on the ability of these tribes to advocate their interests and

those of their tribal members. If the decision below is not reversed, the potential deleterious impact on these tribes would be enormous. As the Montana Supreme Court has recognized, "Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture." *In the Matter of M.E.M.*, 635 P.2d 1313, 1316 (Mont. 1981). Indian tribes must be accorded standing to protect the interests of their members lest the culture of these first Americans be "lost and . . . relegated, at best, to anthropological examination and categorization." *Id.*

A. The Court of Appeals' Decision is Inconsistent with this Court's Precedents.

As discussed above, the court of appeals' decision in this case departs significantly from this Court's precedents for representational standing established in *Warth v. Seldin*, 422 U.S. 490 (1975) and *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). Further, as discussed below, the Court of Appeals for the Fifth Circuit is not alone in their departure from this Court's holdings.

B. The Circuit Courts are in Conflict With Respect to the Rights of Indian Tribes to Sue in a Representational Posture.

There are conflicts between the courts of appeal as to whether a tribe can sue in the posture of parens patriae under *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). Some courts below have correctly interpreted *Snapp* to permit parens patriae standing where a significant portion of the sovereign's population is directly or indirectly

affected by the injurious conduct alleged. These courts have recognized the fluidity that the *Snapp* Court intentionally left in this standard. However, some courts of appeals have incorrectly interpreted *Snapp* to require that all tribal members be affected in order to invoke parens patriae, thereby imposing a heightened standard on tribal litigants.

Citing *Snapp*, the Ninth Circuit has correctly stated that the doctrine of parens patriae allows standing when the sovereign alleges injury to a substantial segment of its population, articulates an interest apart from the interests of the injured private parties, and expresses a quasi-sovereign interest. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.* 256 F.3d 879, 885 (9th Cir. 2001). In that case, the court held that not enough members were affected to grant parens patriae status. *Id.* at 885. However, the court indicates that such status is "possible". *Id.*

The Court of Appeals for the Eighth Circuit held that the doctrine of parens patriae is "reserved for actions which are asserted on behalf of *all* of the sovereign's citizens." *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728 (8th Cir. 2001) (emphasis in original). The court found that only a portion of the tribe was affected in that case and, for that reason, denied standing.

The Court of Appeals for the Tenth Circuit also denied a tribe standing to bring suit on behalf of its members, but indicated that a tribe could sue in parens patriae posture if the rights of all tribe members were involved. The court errroneously stated that "cases in which the parens patriae doctrine applies have been limited to those involving the rights of tribe members as a whole, and not those of just one or several members." *Kickapoo Tribe of Okla. v. Lujan*, 728 F.Supp 644, 652 (10th Cir. 1990).

The Eighth and Tenth Circuit Courts' misapplication of current Supreme Court rulings on parens patriae to tribal standing may be traced to a Montana district court ruling which first applied the wrong standard in an Indian case. In *Assiniboine & Sioux Tribes v. Montana*, the district court held that, in order to sue as parens patriae, the Sioux Tribe was required to file on behalf of every member of the tribe, since the court was "convinced . . . that the entity purporting to advance the [parens patriae] claim must be acting on behalf of the collective interests of all of its citizens." 568 F.Supp. 269, 277 (D. Mont. 1983). Although the *Assiniboine* ruling was handed down a year after this Court's decision in *Snapp*, the district court did not follow that precedent; rather, it relied primarily on dicta in *Louisiana v. Texas*, a one hundred-year-old case that stated, "the state of Louisiana presents herself in the attitude of parens patrioe [sic], trustee, guardian, or representative of all of her citizens." 176 U.S. 1, 19 (1900).

This misinterpretation has taken root and continues to proliferate at the district court level. For example, the District Court for the Eastern District of Texas in the Fifth Circuit, the same district from which this case originated, failed to properly apply this Court's precedents in a post-*Snapp* case involving Petitioner Tribe. Instead, citing *Assiniboine* and *Kickapoo*, the court denied standing because "the Tribe is not representing the interests of all its member in this case, as the doctrine of parens patriae requires." *Alabama & Coushatta Tribes of Texas v. Big Sandy Independent School District*, 817 F. Supp. 1319, 1323 (E.D. Tex. 1993). In another Fifth Circuit district court case, the court cited *Assiniboine*, *Kickapoo*, and *Big Sandy* to support its assertion that the Tribe had not "demonstrated that it had standing under the parens patriae doctrine . . . because the rights which it seeks to

assert are primarily those of a small group of Tribe members and not those of the Tribe as a whole." *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F.Supp.2d 644, 652 (W.D. Tex. 1999). And a recent opinion from a district court in the Ninth Circuit cited to *Assiniboine*, *Kickapoo*, and *Big Sandy* in holding that the Navajo tribe had no parens patriae standing because it "failed to prove it was acting on behalf of all of its members." *Navajo Nation v. Superior Court of Washington for Yakima County*, 47 F. Supp.2d 1233, 1240 (E.D. Wash. 1999).

The *Santee*, *Kickapoo*, *Big Sandy*, *Chacon*, and *Navajo* courts all cited to the *Assiniboine* court's misinterpretation of this Court's enunciation of the parens patriae doctrine. The *Snapp* Court clearly stated that the entirety was not required to invoke the parens patriae doctrine of standing. The Court expressly declined to draw any definitive limits on the proportion of the population of a sovereign that must be adversely affected by the challenged behavior in order for the sovereign to assume representational capacity. *Snapp*, *supra* at 607. The Court clearly recognized that what constitutes a sufficiently substantial segment of a sovereign's population is too dependent on the facts of each specific case to be reduced to a bright-line percentage. But the *Snapp* decision cannot be read to require that all, or even most, of a sovereign's population be directly affected in order to warrant granting parens patriae standing. Indeed, in that case, a relatively small amount of individuals were directly impacted, yet the Court held the interests of Puerto Rico were sufficiently affected to support a parens patriae action.

It is important to Indian jurisprudence that this conflict be addressed. Because of the repeated reliance on the mistake in *Assiniboine*, tribes have been incorrectly barred from litigating as parens patriae. It is

challenging enough for Native Americans to achieve redress in the courts without subjecting their tribal organizations to a heightened and virtually impossible standard of associational standing.

C. The Court of Appeals' Decision is Inconsistent with the Government's Long-Established Policy Regarding Protection of Native American Indian Rights.

Recognizing the lamentable state of Indian health care, Congress, in the statement of purpose for the Indian Health Care Improvement Act, states that "it is the policy of this Nation, in fulfillment of special responsibility and legal obligation to the American Indian people, to meet the national goal of providing the highest possible health status to Indians . . ." 25 U.S.C. § 1602(a). Further, as this Court has recognized, the essential promise by the United States to the tribes, in every treaty and statute is "we will protect you against extinction." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960). The analysis adopted by the court of appeals below could scarcely be more at odds with these objectives. The resolution of this case will have a significant impact on the ability of tribes to advocate interests that are crucial to their survival. Imposing a heightened hurdle for standing will seriously hamper the ability of tribes to seek redress for damages to the health of their members and threats to the continued existence of Native American Indians.

D. The Court of Appeals' Dismissal of the Tribe's claims was Premature.

1. The Tribe's complaint was sufficiently pled to overcome the standard for survival of a Motion to Dismiss under Federal Rule of Procedure 12(b)(6).

Dismissal with prejudice of a party's complaint is a harsh sanction to be resorted to only in extreme cases, and is within the court's sound discretion; the court must give full regard for the severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Courts may not dismiss a complaint for insufficiency unless it clearly appears that, by no stretch of the imagination, is the plaintiff entitled to any relief for claims asserted in his complaint. *Kazlowski v. Ferrarra*, 117 F.Supp. 650 (1954).

In challenging the Tribe's standing to sue on behalf of its members, Respondents do not contest the palpability of the alleged injuries to individuals, but rather, the sufficiency of the pleadings with respect to the causal connection between the injuries to members and the harm to the Tribe. It is important to consider the procedural posture of this case. The Tribe's complaint was dismissed for want of standing before any opportunity was afforded for submission of supporting proofs. This Court has held that, when reviewing a decision granting a motion to dismiss, the appellate court must accept as true all factual allegations in the complaint. *Leatherman v. Tarrant*

County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993). Further, this Court has stated that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim'." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) *quoting Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Accepting its allegations as true, the Tribe's complaint was sufficiently pled to satisfy the threshold requirement of direct injury established by this Court's precedents. The court of appeals' premature dismissal with prejudice of the Tribe's complaint denies the Tribe the right to supply "further particularized allegations of fact deemed supportive of [their] standing." *Warth v. Seldin*, 422 U.S. at 501-02 (1975). Further, the court of appeals' premature dismissal circumvented the opportunity for development of facts and references important to current and future Indian litigants.

CONCLUSION

The Indian tribe plays an indispensable role in preserving the heritage and existence of Native Americans and in protecting the rights of its members. It is crucial that the Alabama-Coushatta Tribe be accorded standing to bring this action to ensure that it, and all other Indian tribes, may continue to adequately perform that historic role. The right of tribes to seek judicial redress on behalf of themselves and of their tribal members is a necessary corollary to Indian sovereignty. Because the basic questions presented here are of an important and recurring nature, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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