No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners

Petitioner Inyo County is a public entity and a County of the State of California. Petitioner Phil McDowell is an individual, and has been sued in both his individual capacity, as well as in the official capacity of the elected District Attorney of Inyo County. Petitioner Dan Lucas is also an individual, and he has also has been sued in both his individual capacity, as well as in the official capacity of the elected Sheriff of Inyo County. Petitioners were the defendants in the District Court, and the appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony is a federally-recognized Indian tribe. It uses the pseudonym "Bishop Paiute Tribe." The tribe is the sole owner of the respondent Bishop Paiute Gaming Corporation, a tribal corporation formed to conduct the business of a commercial gaming casino in Inyo County, California. The commercial gaming casino does business under the name of the "Paiute Palace Casino." Respondents were the plaintiffs in the District Court, and the appellants in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other:

INTRODUCTION

The core issue here is whether Respondents (or "Paiute") are immune from execution of a state search warrant issued in connection with the investigation or prosecution of off-reservation criminal conduct. They and the United States argue at length that such immunity does exist, although their positions are not entirely consistent. The Paiute, for example, contend that their business premises may not be searched; the United States sees no problem with such premises being searched and objects only to seizure of *tribal* property as a result of the search. The United States additionally asserts that tribes have no immunity from execution of federal warrants; the Paiute are notably silent on this important point.

These differences reflect the difficulty associated with expanding the tribal immunity doctrine to criminal process. That expansion finds no support in this Court's precedent and leads to wholly unacceptable practical results. The Paiute and United States thus would have this Court allow any of the more than 560 Indian tribes, even those with as few as five, seven or eight members, when in possession of exculpatory evidence, to at their discretion (or at the delegated discretion of others) thwart the constitutional rights of an accused, whether an Indian or non-Indian, in a criminal prosecution to due process and a fair trial, and deny the accused his constitutional right to compulsory process for obtaining witnesses or other exculpatory evidence under the Sixth and Fourteenth Amendments. The Government's approach would render this inherent wrong even less justifiable by burdening only state court defendants with the deprivation of these constitutional rights, while permitting federal court defendants to retain them. Their radical interpretation of a concededly questionable doctrine should be rejected.

I. TRIBAL COMMON-LAW IMMUNITY FROM CIVIL SUIT DOES NOT NOW BAR, AND SHOULD NOT BE EXTENDED TO BAR, EXECUTION OF STATE-COURT SEARCH WARRANTS ON OR DIRECTED TO TRIBAL PROPERTY.

A. The Paiute and United States advance an array of arguments in support of their proposition that the court of appeals properly found that execution of the search warrant was barred by tribal immunity from civil suit. In essence, they contend that tribes are immune not only from actual civil suit in state court, but also from any form of state judicial *process* – either criminal or civil – absent congressional or tribal authorization. *E.g.*, Br. Resp. 18; Br. U.S. 20. The Paiute specifically allege that "It is 'settled law' that tribes, as sovereign governments, are immune from judicial process unless the tribe or Congress waives the tribe's immunity." Br. Resp. 9. This is by no means settled, however, and the Paiute fail to cite any authority for this bold statement – other than to refer "for example" to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754, 756 (1998) (which dealt with tribal immunity from civil suit on commercial contracts). Br. Resp. 9.

The United States distinguishes *Nevada v. Hicks*, 533 U.S. 353 (2001) – which it concedes establishes the propriety of executing State search warrants with respect to individually-owned property even if located on reservation land owned or held in trust for a tribe (Br. U.S. 23) – from this case with the observation that "a general rule that state process may be served or executed on an Indian reservation does not mean that a state court may obtain jurisdiction over the Tribe itself, either in a civil suit naming the Tribe as a defendant or in a criminal prosecution of the Tribe, for 'it is settled that a state court may not exercise jurisdiction over a

recognized Indian tribe'" (*id.* 20). For this reason, asserts the United States, "[tribal] property, like the Tribe itself, is immune from attachment or other judicial process, such as a search warrant, issued by a state court." *Id.* 21; *see also* Br. Resp. 23.

The United States attempts to justify this broad view of tribal immunity from search on this Court's decisions that have held tribes immune from civil suit (Br. U.S. 20), and on the asserted notion that "[a] Tribe's interests are qualitatively different when a warrant is directed at the property of the Tribe itself, particularly its own internal documents" because "[s]uch a warrant would threaten 'the political integrity . . . of the tribe[]'" (*id.* 25; *see also* Br. Resp. 13, 34 n.24).

Two fundamental flaws accompany these arguments. *First*, the Paiute and the United States cite no apposite authority for the principle that tribal immunity from civil suit necessarily includes immunity from all manner of judicial "process" in both the criminal and civil law. Indeed, this Court's cases have *never* so held, and, as the Paiute concede (Br. Resp. 18), there is no settled authority in the lower courts on the issue.

Second, the policy justifications cobbled together by the Paiute and United States for extension of what the Court has characterized as a doctrine that "developed almost by accident" (*Manufacturing Technologies*, 523 U.S. at 756) do not withstand scrutiny. Perhaps most telling in this respect is the United States' position that, while State court search warrants and subpoenas are categorically impermissible, federal court warrants and subpoenas are categorically permissible. Br. U.S. 21 n.10, 29-30. Federal warrants and subpoenas, however, are no less "intrusive" than State process issued under comparable constitutional and procedural standards.

B. This Court has addressed directly the question of tribal immunity from suit in a total of six decisions since

the seminal opinion in *Turner v. United States*, 248 U.S. 354 (1919).[1] None involved the situation where a tribe was merely subjected to non-party process, such as a subpoena, or where law enforcement officers had been directed to conduct a search of tribal premises for documents or other property relevant to an ongoing criminal investigation. Rather, in each instance, a tribe or its representative was an actual party to the *civil lawsuit*. These cases thus fit squarely within the traditional rubric "that a suit is against the sovereign if 'the *judgment* sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the *judgment* would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citation omitted; emphasis supplied).

They also reflect, as the Eighth Circuit Court of Appeals reasoned in an early opinion relied upon by *Turner* itself, that the rationale for the doctrine was to exempt Indian tribes "from *civil suit*" because, "[i]f any other course were adopted, the tribes would be overwhelmed with civil litigation and judgments." *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908) (civil suit by attorney seeking specific performance of contract to serve as tribe's general counsel) (emphasis

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[1] *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 420 (2001) (construction contract's arbitration provision); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) (breach-of-contract claim); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991) (counterclaim for uncollected taxes); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (tribal member's claim under the Indian Civil Rights Act); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977) (state regulation re on-reservation exercise of treaty fishing rights); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940) (contract-based claim).

supplied); *see also Thebo v. Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895) (affirming dismissal of civil suit, on subject-matter jurisdiction grounds, of claim by tribe's attorney for fees). The "slender reed" rooted in *Turner* (*Manufacturing Technologies.*, 523 U.S. at 757) does not bear the weight of blanket immunity from execution of a search warrant or subpoena for criminal evidence.

Further, as Petitioners have stated previously, the warrant executed in this matter did not hale the Paiute into court seeking affirmative relief in a civil suit; it instead authorized law enforcement officials to conduct a search on casino premises and to seize certain payroll records if found. Br. Pet'rs at 8, 34. The Paiute were not directed to take any action or submit themselves to the jurisdiction of the issuing court. The warrant plainly exercised power over their property—in terms both of access and of potential seizure—but, just as plainly, not personal jurisdiction over them.

This alone is a distinction with a difference, for it parallels the recognized civil law dichotomy between *in rem* and *in personam* jurisdiction, and has constitutional significance. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 331 (1998); *United States v. Ursery*, 518 U.S. 267, 278 (1996).

The distinction also was accorded significance for Indian law purposes in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), where this Court stressed the fact that the Burke Act proviso to section 6 of the General Allotment Act, 34 Stat. 182 (codified at 25 U.S.C. § 349), merely authorized taxation of fee-patented land held by allottees or their tribal successors in interest. 502 U.S. at 264. This Court rejected as inapposite the affected tribes and the United States' reliance on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which held that section 6 did not extend general

state taxation power over such allottees or successors, "because the jurisdiction [under the proviso] is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned." 502 U.S. at 265. Implicit in the Court's holding was the county's right to enforce the tax through, if necessary, foreclosure on the affected properties notwithstanding their ownership by a tribe. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 109 (1998).

This Court's formulation of tribal immunity from civil suit, in short, does not treat all actions or process affecting property as asserting jurisdiction over the property's owner, and shows that the *in rem* nature of a state regulation has a direct impact on whether tribal immunity from civil suit is implicated. *See Cass County*, 524 U.S. at 112 n.3 (noting that the challenged tax "involves only an *ad valorem* tax on land itself"). Given the animating purpose of the tribal immunity doctrine—protection of tribal governments from unlimited civil suit and liability—it makes no sense to extend the doctrine to criminal process that does not assert personal jurisdiction over tribes, does not seek a judgment against them, and does not dispossess them permanently of any property.

It is thus unsurprising that neither the Paiute nor the United States offers apposite decisional support for such an extension. The Paiute instead rely on several decisions that involve the proposition that States possess sovereign immunity against the service of any federal court process; and on other decisions that invoke the federal government's own sovereign immunity from unconsented civil suit in its own courts (which, of course, tribes may also do in *their* own courts). Br. Resp. 18-19. Substantial difficulty attends the Tribe's attempt to analogize tribal immunity from civil suit to the immunity of States confirmed by the Eleventh Amendment, not the least, of course, being that the Eleventh Amendment does not apply to tribes. The further obvious problem is that,

while the cases cited by the Tribe arose in different contexts, the animating immunity concern in each was the potential "*adjudication* of the State's *interest* in property." *California and State Lands Comm'n v. Deep Sea Research, Inc.*, 523 U.S. 491, 505 (1998) (Kennedy, J., concurring) (emphasis supplied); *e.g.*, *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1997) (quiet title action seeking in practical effect ownership of navigable lake's submerged lands); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (*in rem* admiralty proceedings directed to shipwreck artifacts in possession of State); *Missouri v. Fiske*, 290 U.S. 18 (1933) (supplemental bill of complaint filed against intervening State to enforce prior *quasi in rem* decree).

No comparable "adjudication" of the Tribe's interest in the seized documents is contemplated by the search warrant here, whose sole purpose is to acquire evidence pursuant to a judicial probable cause determination made in a criminal investigation or prosecution, not to assert a contrary claim to ownership, and where the property is subject to return. *See* Cal. Evid. Code § 1562 (copies of business records admissible into evidence); Cal. Penal Code §§ 1538.5, 1539, 1540 (providing procedures for party whose property has been seized pursuant to warrant to obtain return of property). The underlying object of the search warrant was thus to obtain *information* relevant to possible wrongdoing that was contained in the documents. This fact is implicitly acknowledged by the Paiute in that they identify interference with "control [ling] access to [their] own confidential records" (Br. Resp. 14) as the gravamen of the harm to tribal interests.[2]

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[2] The United States' analysis is similarly problematic. The Government points to lower court decisions that give effect to, or quote tribal constitutional provisions containing, prohibitions against garnishment or

The Paiute's reliance on the Eleventh Amendment decisions for immunity against "any legal process to which the sovereign has not given its consent" (Br. Resp. 18) additionally proves ill-taken because the exception carved out by *Ex parte Young*, 209 U.S. 123 (1908), with respect to prospective relief against State officers, has been recognized applicable to federal court process. *In re Missouri Dep't of Natural Res.*, 105 F.3d 434, 436 (8th Cir. 1997) (civil subpoena *duces tecum*); *cf. In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 295 (7th Cir. 2002) (rejecting assertion, predicated in part on Eleventh Amendment, of lawyer-client privilege by State official in grand jury investigation with respect to communications to State government lawyer).[3]

Counseling against the Tribe's immunity claim, moreover, is the United States' position that the tribal property would be subject to search warrant or subpoena in a *federal* criminal proceeding, re either on- or off-reservation federal crime, or an on-reservation State crime under 18 U.S.C. §§ 1152 or 1153. And this is so notwithstanding that there is no explicit abrogation of tribal immunity from suit in

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attachment of a tribe's property, which are traditional *quasi in rem* remedies. Br. U.S. at 20. A predicate for *quasi in rem* relief is establishing a claim against the property's owner that entitles the complainant to dispossess the owner of *title* to the property. *See generally Restatement (Second) of Judgments* § 32 (1982). Such relief, again, is not at issue here.

[3] This Court has noted the possibility that tribal immunity from suit does not extend for any purpose to claims against individual officers. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). There is no reason to believe tribal officials enjoy immunity against prospective relief exceeding that established with respect to state officers.

the Federal Rules of Criminal Procedure. *Cf. Citizen Band Potawatomi*, 498 U.S. 508-09 (Fed. R. Civ. P. 13(a) does not abrogate tribal immunity against mandatory counterclaims). Petitioners agree with the Government on this score but do so on the ground that no immunity requiring abrogation in the first place exists with respect to evidence-gathering process, such as subpoenas *duces tecum* or search warrants.[4] Any other conclusion results in the anomaly of State court defendants being denied access to exculpatory evidence when similarly-situated federal court defendants would not be, and States being denied information material to determining whether to expose an individual to criminal prosecution when the United States would not be. Regardless of whether this anomaly must be accepted as a Supremacy Clause or other constitutional matter where a federal agency or official possesses the relevant evidence, it ought not be fostered by a purely judge-made rule. *See generally* Milton Hirsh, *"The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years After United States ex rel. Touhy v. Ragen*, 30 Fla. St. U.L. Rev. 81, 135 (2002) ("the inability of a state defendant to enforce his subpoena frustrates

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[4] Lower courts have varying views on this issue in both criminal and civil litigation. *Compare United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992) (tribal immunity found); and *Catskill Devel., L.L.C. v. Park Place Enter. Corp.*, 206 F. Supp. 2d 78, 86-87 (S.D.N.Y. 2002) (same), *with United States v. Velarde*, 40 F. Supp. 2d 1314, 1316-17 (D.N.M. 1999) (no immunity); and *United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995) (same). The decisions finding no immunity did not rely on the abrogation under the federal rules but instead found denial of access to tribal records inconsistent with due process and other constitutional guarantees or the existence of criminal jurisdiction over Indian country generally. *Velarde*, 40 F. Supp. 2d at 1315-16; *Snowden*, 879 F. Supp. at *id.*; *see also United States v. Boggs*, 493 F. Supp. 1050, 1054 (D. Mont. 1980).

more than that defendant's constitutional rights; it also frustrates the state court's truth-seeking function").

The analogy drawn by the United States between a State's inability to serve process on the Federal Government within federal enclaves and on an Indian tribe within its reservation is inapt. Br. U.S. 22-23. The Constitution and laws in pursuance thereof are superior to State laws by virtue of the Supremacy Clause; and "the activities of the Federal Government are free from regulation by any state" absent congressional authorization. *Mayo v. United States*, 319 U.S. 441, 445 (1943). Tribes, in contrast, have no Supremacy Clause rights, and are subject to nondiscriminatory state law with respect to conduct outside the reservation unless Congress explicitly provides otherwise. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Even within the reservation, they are subject to state regulation in certain circumstances. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). Tribal sovereign immunity thus differs significantly from United States' immunity not only in its source—judicially-declared federal common law rather than constitutional—but also in its scope, because it is limited to adjudicatory proceedings and leaves state regulatory authority unaffected. *Manufacturing Techs.*, 523 U.S. at 755 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331-32). There is no statutory authority or precedent for establishing tribal enclaves that parallel federal enclaves, and attempting to do so would result in confusion and conflict with the Court's established jurisprudence in matters of tribal self-governance, its limitations, and the limited retained civil authority of tribal governments to regulate activities of nonmembers – here State law enforcement officers – upon the reservation. *E.g., Montana v. United States,* 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 538 (1997); *Nevada v. Hicks,* 533 U.S. 353 (2001).

C. The Paiute and the United States suggest,

directly or indirectly, several policy justifications for extending tribal immunity from civil suit to enable tribal prohibition of a state court search warrant. They include most notably interference with tribal self-governance, the compromise of confidential information, and the potential for state officers to secure evidence through consensual arrangements with tribes, or through prevailing on federal agencies to use their investigative or enforcement authority. Br. Resp. 27-34; Br. U.S. 25-27. Petitioners do not dispute the underlying values embodied in these suggestions, but they do not merit unvarnished immunity from the execution of a state search warrant.

This Court has established flexible preemption standards designed to vindicate "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1958); *see Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980) ("[t]he principle of tribal self-government...seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other"). This was precisely the standard applied in *Hicks*, and although the fact that the onus of the search warrant falls on tribal, not member, property may be germane to assessing the relative strength of the Tribe's interests, it does not support the categorical approach adopted below. As discussed above, significant rights depend upon the availability of criminal process; however, the Tribe and the United States ignore them and discount them to zero. This Court should not subscribe to such a result absent Constitutional compulsion – and there is none here.

As for confidentiality concerns, no persuasive argument can be advanced for the proposition that search warrants issued on probable cause or subpoenas will compromise unduly confidential or otherwise privileged communications. Federal and State courts routinely address

and resolve comparable concerns in the course of overseeing civil and criminal proceedings. Nonparties in California criminal proceedings, for example, may intervene for the purpose of asserting a privilege with respect to documents seized under a warrant. *E.g.*, *People v. Superior Court (Laff)*, 23 P.3d 563 (Cal. 2001); *see also Gravel v. United States*, 408 U.S. 606 (1972). Petitioners further feel compelled to observe that the concerns expressed in this regard encompass any judicial proceeding, and that it is therefore striking for the United States to suggest that, while federal courts presumably are institutionally capable of adjudicating these privilege issues, State courts are not.

Lastly, Petitioners have the responsibility to enforce California criminal statutes with respect to conduct by any person, regardless of Indian status. This duty extends not only to territory outside the Paiute's reservation but also to the reservation itself by virtue of 18 U.S.C. § 1162. This responsibility is shared by numerous other counties and law enforcement personnel in the State with respect to other reservations. It is, of course, conceivable that cooperative agreements over matters such as execution of search warrants can be reached with some—and perhaps many—tribes, but mandatory criminal investigatory functions simply cannot be compromised by either the delay attendant to case-specific or en masse negotiation of such arrangements or the possibility that negotiations will prove unsuccessful. [5]

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[5] Petitioners do not suggest that § 1162 authorizes Public Law 280 States to enforce criminal laws against Indian tribes themselves. The statute refers only to "Indians." 18 U.S.C. § 1162(a). The absence of such an authorization may or may not have bearing on the question of whether a tribe, as opposed to a tribal officer, can commit a criminal offense. *Cf. United States v. Price*, 383 U.S. 787, 805 (1966) (noting congressional debate on the Fourteenth Amendment that acknowledged "the States as such were beyond the reach of the punitive process, and that the legislation

II. THE TRIBE'S ATTEMPT TO ESTABLISH AN EXEMPTION FROM EXECUTION OF STATE SEARCH WARRANTS UNDER *WILLIAMS V. LEE* SHOULD BE REJECTED.

A. The Paiute ask this Court to sanction a *per se* prohibition on the execution of State court-issued search warrants upon "the Tribe and its property" under the state law infringement preemption standard in *Williams v. Lee*, 358 U.S. 217, 220 (1959)—"the right of reservation Indians to make their own laws and be ruled by them." Br. Resp. at 24. They contend that "[a] more direct threat to a tribe's self-governing powers and political integrity can hardly be imagined than the seizure of tribal property...in violation of tribal policies protecting the confidentiality of tribal records." *Id.* 27. Those policies forbid the disclosure of personnel records without the employee's written authorization. *Id.* 1-2. The Paiute advance this claim without reference to the balancing of State, federal and tribal interests required when *Williams*-based preemption is alleged. *See* Br. Pet'rs 27-31 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); and *Nevada v. Hicks*, 533 U.S. 353, 364 (2001)). They plainly err in so doing.

In the related context of federal law-based preemption under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court explicitly eschewed adoption of such a

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must therefore operate upon individuals"). The possibility that tribes may not be capable of committing a crime does not mean, however, that their property can never be relevant to possible criminal conduct or subject to search and seizure in the same manner as other nonparties. Any other conclusion creates an enforcement gap under Public Law 280 that would not exist were the United States proceeding under § 1152 or § 1153—a result which Congress obviously did not intend given § 1162(c).

categorical approach other than "[i]n the special area of state taxation of Indian tribes and tribal members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.17 (1987); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258-59 (1992). The Paiute cite no authority for the proposition that tribal records, or at least common payroll records related to both tribal and non-tribal gaming casino employees, should be exempted automatically from State process as an impermissible infringement on tribal authority. To be sure, independent federal legislation may achieve that objective, subject to Tenth Amendment/Constitutional scrutiny and perhaps challenge, but the Paiute's lengthy treatment of various statutes that extend confidentiality to employer or governmental records identifies no such legislation that applies here. Br. Resp. 27-32.[6]

B. *Hicks* teaches that the question raised by the Tribe's *Williams* claim is whether the requisite "'accommodation'" of State, federal and tribal interests leads to the conclusion that enforcement of the search warrant *in this matter* improperly trenched upon tribal self-governance rights. *Hicks*, 533 U.S. at 362. The State interest in enforcement of criminal process within Indian country with respect to alleged off-reservation crimes is exceedingly strong. *See* Br. Pet'rs 30-32.

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[6] Just as important, the Paiute fail to explain what those statutes have to say about the inherent *tribal* authority that the *Williams* standard is aimed at protecting. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *accord Hicks*, 533 U.S. at 360-61. Had any of the statutes relied upon by them been applicable, the Tribe instead could have pursued whatever remedies were available to remedy violation of the particular *statute*. It is nonetheless unsurprising that they adopt this categorical tack given *Hicks*' dispositive reasoning and result.

Not only does the presence of this State interest and authority prevent a reservation from becoming "'an asylum for fugitives from justice'" (*Hicks*, 533 U.S. at 364)—*i.e.*, a locus beyond the reach of ordinary State law enforcement processes—but the absence of such authority also would interfere, in certain cases at great prejudice, with the ability of both State prosecutors and defendants to marshal evidence probative of guilt or innocence. So, as discussed above, the records seized from the tribal shed possessed the potential to exculpate and not simply to inculpate the involved employees. The rule proposed by the Paiute thus would leave the availability of fundamental constitutional rights, such as under the Sixth Amendment and Fourteenth Amendment, as well as the exercise of the police power of the States, to the sole discretion of tribal or tribal-delegated decision-makers. The Paiute's characterization of a State's gathering of facts that bear upon a tribal member employee's or nonmember employee's potential criminal culpability under State law as a "direct threat" to tribal political integrity cannot obscure the weighty interests dependent upon the unencumbered operation of criminal procedural mechanisms.

The fact that California possesses mandatory criminal jurisdiction over Indian country crimes under 18 U.S.C. § 1162 also weighs heavily against the Tribe. The impetus for § 1162's enactment was to improve law enforcement on reservations by extending the specified States' criminal laws and processes to Indian country and thereby to create a seamless and integrated criminal justice enforcement regime. *See generally* Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1659 (1998). It runs counter to common sense to suggest that Congress intended a State's ability to police Indian country crimes to be *less* robust than would be the Federal Government's under 18 U.S.C. §§ 1152 and 1153, and it makes no more sense to suggest that a State's

power to enforce its laws with respect to off-reservation crimes should be less robust than with respect to on-reservation offenses. The symmetry of on-reservation and off-reservation state law enforcement authority envisioned by Public Law 280 thus gives federal weight to the State interest.[7]

The Paiute's claimed self-government interest is correspondingly weak. First, the search warrant did not attempt to regulate the membership relationship between Respondents and the affected employees; it only sought to acquire certain payroll records. Second, the tribal policy at issue is unrelated to matters of "internal" governance, for the Paiute admit that many of the approximately 140 casino employees are nonmembers. Br. Resp. 3. Third, the records themselves did not deal with tribal self-government or "internal relations" (*Hicks*, 533 U.S. at 364) even as to tribal members; they were instead common payroll records generated and used solely for commercial business purposes. Br. Resp. 2. Fourth, the Tribe's asserted confidentiality requirement is unconnected with internal governance, for it is simply one feature of an employment policy that applied to members and nonmembers alike and can be waived at the *employee's* discretion. No practical difference therefore exists between this matter and *Hicks*, since in both cases the

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[7] Respondents argue that California's Public Law 280 jurisdiction, together with other federal law, will preclude reservations from becoming "lawless enclaves." Br. Resp. 38-41. Petitioners do not disagree. The issue, however, is whether criminal evidence or proceeds of crime will be allowed to rest free from search if a tribe so desires, and whether the core procedural tool of the authority to issue search warrants directed to the property of persons or entities with potentially material evidence – either inculpatroy or exculpatory – will be compromised, with a concomitant adverse impact on the State's ability to discharge responsibilities with respect to both on- and off-reservation law enforcement.

individual member ultimately controlled access to the material or objects sought by the warrant. Respondents' *Williams*-based claim fails.[8]

III. NO RIGHTS PROTECTED UNDER 42 U.S.C. § 1983 ARE IMPLICATED BY TRIBE'S CLAIM.

A. The Paiute initially suggest that their "person" status for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983 is not properly before this Court because the issue was not raised below. Br. Resp. 41-42. They are incorrect.

The Ninth Circuit raised and decided, *sua sponte,* the issue of whether the Tribe may state a claim for violation of its civil rights arising from the alleged unlawful search. It did

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[8] The claim by Respondents that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, independently preempted execution of the search warrant merits brief mention. Br. Resp. at 35-38. This theory was rejected by the district court (JA 138-39) and the court of appeals (Pet. 26a, 43a). Insofar as Respondents seek to modify the judgment below on this issue, their claim is barred jurisdictionally for failure to seek review through a petition or cross-petition for writ of certiorari. *E.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). In any event, the lower courts were plainly correct. *Cf. Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 485 n.5 (9th Cir. 1998) (rejecting IGRA-based preemption claim directed to state records disclosure law given statute's silence). Respondents' claim under IGRA is flawed further because the statute does not create an implied private right of action and Respondents possess no enforcement rights under 42 U.S.C. 1983. *E.g.*, *Hartman v. Kickapoo Tribal Gaming Comm'n*, No. 01-3400, 2003 WL 294982, at *2 (10th Cir. Feb. 11, 2003); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256 (9th Cir. 2000); *Florida v. Seminole Tribe*, 181 F.3d 1237, 1248 (11th Cir. 1999); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

this when it determined that Petitioners *violated* the Fourth Amendment. Pet. 6a, 42a. (It presumably meant the Due Process Clause of the Fourteenth Amendment. *See Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).) Implicit in this ruling is a determination that the Tribe is a "person" with due process rights under section 1 of the Fourteenth Amendment. As a result, all arguments addressing these issues are properly before this Court, whether or not they were a subject of the proceedings below. *Virginia Bankshares, Inc. v. Sandburg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

Equally important, Petitioners' claim that the Paiute have *no* rights under the Due Process Clause presents the question whether they allege injury in fact to an interest within the zone of those protected by the Clause. *E.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 448-49 (1992). This standing challenge implicates subject matter jurisdiction, cannot be waived, and may be raised at any time. *Id.* at 465 (Scalia, J., dissenting); *see also City of East St. Louis v. Circuit Court*, 986 F.2d 1142, 1144 (8th Cir. 1993). Indeed, this Court has an independent obligation to assure itself that such jurisdiction exists. *E.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998).

No one disputes, moreover, that the term "person" in § 1983 is bound inextricably to the same term in the Due Process Clause and that, if the Paiute are not "persons" within the scope of the latter, they are not "persons" under the former. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); *see* Br. U.S. 9-10. Accordingly, all of these issues are properly before the Court.

B. The merits of the Paiute's argument on "person" status require little comment in addition to the prior discussion in Petitioners', California's, et. al., and the United States' briefs.

The Paiute's claim that a State can be a proper § 1983 plaintiff when suing in a *parens patriae* capacity (Br. Resp. 43), is not relevant as the Tribe is not suing in such capacity.

The Paiute's claim that while individual Indians were not intended to be "persons" within the meaning of the citizenship clause of Section 1 of the Fourteenth Amendment, nor "persons…subject to the jurisdiction" of the United States thereunder (Br. Resp. 43-44), but that Indian tribes were somehow "surely within the jurisdiction of the United States" pursuant to the Indian Commerce Clause (Br. Resp. 44), confuses the right to regulate commerce *with* someone (here the Tribes) with the exercise of *jurisdiction over* them. Further, foreign nations, which are subject to the parallel Interstate Commerce Clause, have been determined not to have standing to maintain an action under § 1983. *Breard v. Greene*, 523 U.S. 371, 378 (1998).

The Paiute's claim that because *Georgia v. Evans*, 316 U.S. 159 (1942), and the Sherman and Clayton Acts, support the proposition that the term "person" includes States or foreign governments, and that therefore tribal governments should be included within the meaning of "person" in § 1983, is without merit. The statutory definition of the term "person" in those acts was drafted for that specific legislation – not for § 1983. The Paiute's reliance on *Evans* also effectively asks this Court to read the same term differently depending upon whether a tribe is a plaintiff or a defendant. That proposed reading of the antitrust statutes has been rejected (*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 (1978)), and the Paiute advance no grounds for a different result where § 1983 liability is at stake.

Even if "person" status was present for § 1983 purposes, the Tribe's claim of possessing a right or immunity secured by the "Constitution and laws" that supports a § 1983 action is meritless. Br. Resp. 47-48. It is settled that, although the Indian Commerce Clause is a source of federal power, it is the Supremacy Clause that serves as the basis for invalidating State law where tribal self-government has been infringed upon impermissibly. *Compare Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 845 (1982) (rejecting United States' suggestion that "we modify our pre-emption analysis and rely on the dormant Indian Commerce Clause"), *with Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). Because the Supremacy Clause "'is not a *source* of any federal rights'" (*Golden State Transit*, 493 U.S. at 107 (emphasis supplied)), it provides no basis for § 1983 relief.

The Paiute's claim that the term "laws" in § 1983 includes federal common law-based rights likewise is supported by no apposite authority. Br. Resp. 47. The reason is plain: "Laws" refers to statutes adopted by Congress. *E.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)("the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law"); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

Finally, the Paiute's invocation of IGRA as a basis for § 1983 relief is foreclosed jurisdictionally and lacks substantive merit. *See* n. 8 *supra*.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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