No. 09-1137

In The
Supreme Court of the United States

LOUISE VICTORIA JEFFREDO, ET AL.,
Petitioners,

v.

MARK A. MACARRO, ET AL.,
Respondents.

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

PETITIONERS' REPLY BRIEF

PAUL HARRIS
Counsel of Record
PATRICK ROMERO GUILLORY
DOLORES PARK LAW OFFICES
503 DOLORES ST., 2ND FLOOR
SAN FRANCISCO, CA 94110
(415) 285-1882
PatrickRomeroG@yahoo.com

Attorneys for Petitioners

May 3, 2010

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

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STATEMENT OF THE CASE

The subtext of this case is the eligibility criteria of the Pechanga Tribe. Eligibility is based on direct lineage and not on blood quantum. Direct lineage is therefore, not difficult to trace or to prove. The Pechanga Tribe hired respected anthropologist, Dr. John Johnson[1], to investigate Pechanga bloodlines. He concluded that the Hunter clan was an original Pechanga family. The Tribe discarded his report and made "allegations" against Petitioners that they were not true Pechangans. In subsequent hearings, the Hunter clan presented over 150 pieces of evidence to prove lineal descent to an original Pechanga member[2]. That member is Paulina Hunter, an original Pechanga member in 1882 when the Reservation was created and one who received an original Federal Government allotment, #80, on the Reservation[3].

INTRODUCTION

The U.S. Supreme Court in *Hensley v. Municipal Court*, 411 U.S. 345, 349 (1973), reaffirmed that the purpose of habeas corpus was to rectify injustice:

> "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

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[1] Anthropology Dept. Head, Santa Barbara Museum of Natural History

[2] Louise Jeffredo Decl., ER Tab 8, Vol. II, at 059(7).

[3] Never denied by the Tribe.

> [citations omitted] Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."

In the instant case, Appellants suffered an irreparable harm. Congress has provided due process guarantees and a specific remedy, habeas corpus, to redress such injustice by passing the Indian Civil Rights Act (ICRA) 25 U.S.C. §1301-1303. If this Court allows this restrictive interpretation of habeas relief asserted by the Court of Appeal and District Court to stand, every Native American who is stripped of their tribal citizenship without due process will be shutout from judicial review.

This blocking of review by an impartial judiciary will continue to take place, even if the Native American is a teenager like Appellant Elizabeth Jeffredo, who was born a member of the tribe and whose parents, grandparents, and great-grandparents were members of the Tribe. Moreover, the doors will be locked shut even if the Native American is someone like 92 year-old Lawrence Madariaga, a disenrolled Petitioner who was officially honored by the Tribe for advancing the Reservation.

ARGUMENT

I. CHALLENGING THE MANNER IN WHICH APPELLANTS WERE DISENROLLED IS NOT BARRED BY TRIBAL SOVEREIGNTY.

The majority frame *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Lewis v. Norton*, 424 F. 3d 959 (9th Cir. 2005) as precedent, saying that the courts have heard cases involving "membership decisions" and found no jurisdiction over such decisions.[4]

The dissent correctly notes this as a mischaracterization of the issue and clarifies that the true nature of Appellants' argument attacks the procedural violations committed by Respondents. The dissent states:

> The majority, in dicta, implies that we may not hear Appellants' ICRA claims because we generally do not have jurisdiction to review tribal membership decisions. Here, Appellants are not directly challenging the merits of their disenrollment, i.e. whether they are direct descendants from the original Pechanga Temecula people. Rather, Appellants challenge under ICRA the ***manner*** of their disenrollment. ***The former would be barred by tribal sovereign immunity, whereas the***

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[4] *Santa Clara* is distinguishable on the facts and on the nature of the proceeding (not habeas corpus). See Pet., at 14-16.

Respondents confuse the matter by citing *Salinas v. La Mere*, 547 U.S. 1147 (2006), 131 Cal. App. 4th 1059 (2005). But *La Mere* concerned Public Law 280; it didn't involve ICRA.

> ***latter is not***. (Opp., at App. 27) [Emphasis added].

Appellants' argument is *not* that the court has jurisdiction to put itself in place of the Enrollment Committee or make membership decisions for the Tribe. Rather, Appellants challenge Respondents' violation of their procedural rights granted to all Native Americans by ICRA. Congress has granted federal courts the authority to hear applications for habeas by any person claiming to be detained in violation of the Constitution or laws or treaties of the United States. *Rasul v. Bush*, 542 U.S. 466 (2004). Appellants' liberty has been restrained as a result of proceedings riddled with procedural defects. Where a defect involving denial of a constitutional right invalidates the proceeding, habeas ordinarily lies.[5] In determining whether these defects invalidate the proceedings, courts have looked to the totality of circumstances, including an examination of the existing procedural safeguards, in relation to the penalty faced by the habeas petitioner. In this case, Petitioners were facing the stripping of their life-long tribal identity and citizenship, as well as stripping it from their descendants for all time. Virtually every procedural right under ICRA that should have been afforded to Petitioners, was blatantly violated during their disenrollment hearings.

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[5] *Mitchell v. Youell*, 130 F.2d 880 (C.C.A. 4th Cir. 1942).

a. Petitioners' Due Process Rights Were Violated Resulting In A Severe Restraint On Their Liberty.

Section 1302(8) of ICRA guarantees that, "no Indian tribe in exercising powers of self-government, shall deny to any person within its jurisdiction the equal protection of its laws or **deprive any person of liberty** or property **without due process of law**." [Emphasis added]. Whether or not the proceeding used to disenroll Petitioners is considered "civil" or "criminal," Petitioners are still guaranteed due process rights. The right to confront unfavorable witnesses, the right to call witnesses in one's behalf and the right to view all submitted evidence are all part of the "fundamental fairness" which is at the heart of due process. All of these rights were denied to Petitioners when the Enrollment Committee relied on numerous statements, declarations, and documents unfavorable to Petitioners but did not allow them to see or cross-examine any of these persons. In some instances they were told that they would not be informed of the names of the persons who made "allegations against" them. They were also denied the right to view all adverse documents used by the Tribe to rule against them.[6]

The Tribe specifically prohibited Appellants from having an attorney at the hearings and further, they didn't receive advance notice of allegations against them, that is, why that they weren't qualified as Pechangans. Without knowing the allegations

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[6] See Jeffredo Decl., ER Tab 27, Vol. III, at 311, detailing many due process violations.

beforehand, Petitioners had no way of refuting them. It wasn't until they received the Tribe's *Record of Decision* that Petitioners discovered the alleged reason they were disenrolled.

Respondents ignored basic notions of due process in disenrolling Petitioners and caused severe restraints on their liberty. Petitioners are not asking this Court to modify notions of tribal sovereignty, but rather to recognize the already existing habeas provision in ICRA and enforce Petitioners' due process rights.

b. Lewis v. Norton Is Not Binding On This Case.

The majority relies on *Lewis v. Norton* (Opp., at App. 17) for the proposition that federal courts have no jurisdiction over "membership decisions," however such a holding is inapplicable factually and legally to the present case. The plaintiffs in *Lewis* were not seeking federal court jurisdiction under ICRA, nor were they disenrolled life-long members. They instead, urged the court to make them newly enrolled members of the tribe, seeking declaratory and injunctive relief. While the majority states that they do not wish to minimize the impact of the Tribe's membership decision on Appellants (Opp., at App. 17), they accomplish just this by comparing this case, which involves the involuntary taking of life-long Tribal citizenship, with a case concerning persons who were never members of a tribe in the first place.

II. THE LOWER COURT'S IMPROPER RESTRICTION OF HABEAS CORPUS IS NOT MOOT.

In its initial opinion, the court below contradicted years of established law by ruling that habeas corpus only applied to criminal proceedings. This is a crucial issue because most disenrollment hearings are accomplished in tribal civil proceedings; thus the ruling would foreclose future judicial review of any disenrollments throughout the country.

Because it was deleted, Respondents claimed that the issue of habeas' applicability to civil proceedings is now moot. Nonetheless, they continued to argue that ICRA's habeas provision does not apply to civil proceedings (Opp., at 10). In support of their argument they cite the District Court and the Court of Appeals' original opinion holding that habeas "does not apply to civil proceedings" (Opp., at 8 & 10).

Since the amended opinion below affirmed the district court (and both opinions remain published), the district court's rulings remain as good law. The Opposition's repeated claim that the district court's ruling means that habeas does *not* apply to tribal civil proceedings, ominously foreshadows how lawyers for abusive tribal officials would use *Jeffredo v. Macarro* to circumvent the protections of ICRA and lockout judicial review.

To restrict habeas solely to criminal proceedings has no basis in the Congressional history or in the

well-settled law of habeas corpus. (See Pet., at 8-14 for analysis).[7]

III. THE LOWER COURT MISAPPLIED A PROPERLY STATED RULE OF LAW BY USING THE WRONG LEGAL TEST FOR DETENTION.

Section 1303 of ICRA has one requirement for jurisdiction – a "detention." The Supreme Court has laid out the proper test to determine when a non-custodial detention can be the basis for habeas jurisdiction. See *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963), *Hensley v. Municipal Court, supra.* A court must look at the combined effects of the various conditions which restrain a person's freedom. The majority below incorrectly isolated each restraint and concluded that none of them is severe enough by itself to constitute a detention. In contrast, the dissent followed the correct legal test:

> "The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty. The majority analyzes each of these grounds

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[7] The Opposition at 12 also argues that Congress has limited, habeas review since the passage of ICRA. They only cite the Antiterrorism and Effective Death Penalty Act. Congress' limiting of habeas in that specific area of law is irrelevant to ICRA. Congress has not changed the habeas provision of ICRA since its initial passage in 1968. In the years following its passage, the courts have actually expanded the writ of habeas corpus. See e.g. *Hensley* and its progeny. Cf., *Bournedine v. Bush*, 553 U.S. 723 (2008).

> separately, instead of collectively, and determines that none amounts to a detention. I respectfully disagree with this approach" (Opp., at App. 22).

In *Jones v. Cunningham, supra*, at 242-43, the High Court analyzed the various "conditions which significantly confine and restrain his freedom." The Court has established that this inquiry is not narrow, but one of degree requiring an examination of the totality of restraints being imposed upon the Petitioner. This Court in *Jones* examined all of the restraints placed upon a parolee; from the physical geographical restraints, to the personal restraints involving even whom the Petitioner could socialize with. It is without question that some of these "conditions" when taken alone would not be enough to render the Petitioner "in custody" but rather, it is all of these restraints together that amount to a severe restraint upon Petitioner's liberty.

As stated in dissent below, "When viewed together, the act of stripping Appellants' Tribal citizenship and the current and potential restrictions placed upon Appellants constitute a severe restraint on their liberty. Therefore, Appellants have been detained within the meaning of § 1303." (Opp., at App. 27-28).

If one uses the proper combination of factors, therefore, the conclusion would coincide with the dissent's below; that habeas jurisdiction under ICRA exists in this case.

IV. THE LOWER COURT'S RULING IS INCONSISTENT WITH THE SUPREME COURT AND THE SECOND CIRCUIT.

Trop v. Dulles, 356 U.S. 86 (1958) held that stripping away of American citizenship is the most severe of penalties. Respondents claim that *Trop* is "inapposite" because "Appellants have not been left stateless," as stated below (Opp., App at 13). This ruling is in conflict with *Poodry v. Tonawanda Band of Seneca Indians*, 853 F.3d 874 (1996), which specifically rejected the "*have not been left stateless*" argument. It made clear that the loss of a person's tribal citizenship can only be viewed in terms of that person's cultural identity and not in relation to the fact that the "public at large" or "other Americans" do not share this identity. The court stated that, "...a 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. To measure whether summary banishment from a tribe constitutes a severe deprivation solely by reference to the liberties of other Americans is tantamount to suggesting that the petitioners cannot live among members of their nation simply because other Americans cannot do so; and that the coerced loss of an individual's social, cultural, and political affiliations is unimportant because other Americans do not share them. Such an approach renders the concept of liberty hollow indeed" *Poodry* at 897.

While here, Appellants have been disenrolled and not banished, this reasoning still applies because tribal citizenship is at issue. For centuries, Appellants and their ancestors have developed a social, political and

cultural identity as Pechangans. It is absurd to claim that Appellants' American citizenship, which came long after their ancestors were settled, makes the loss of their Indian citizenship less severe. Such reasoning is counter to the idea that, "there is something distinct and important about Indian nationhood and culture that the ICRA is designed to promote and sustain." *Poodry* at 897.

The dissent below also rebuts the "not stateless" ruling, "although with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans[sic]. This is more that just a loss of a label, it is a loss of a political, ethnic, racial and social association." (Opp., at App. 26.)

The second part of Respondents' argument relies on the majority's use of an incorrect legal test to deny jurisdiction. The majority rules that "nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants" (Opp., at App. 13). The correct legal test is to analyze the *consequences* of the tribal officials' action, not their intent. Without a habeas hearing we cannot know whether the Enrollment Committee's intent was to correct the rolls; or to consolidate the Tribal Council's political power by disenrolling 100 voting members; or even to secure an additional $25,000,000 annually, simply by excluding the Hunter clan. Whether or not they intended to punish -- the result was a punishment. As *Trop* makes crystal clear, the taking of national citizenship "is a form of punishment more primitive that torture, for it destroys for the individual the political existence that was centuries in the

development" *Trop,* at 98. A deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes." *Klapprott v. United States,* 335 U.S. 601, 611-612 (1949).

Unlike the Opposition, the court in *Quair v. Sisco,* 359 F. Supp. 2d 948 (2004) employed the correct test in an ICRA case ruling that, "the disenrollment and the banishment of that tribal member constitutes a punitive sanction irregardless of the underlying circumstances leading to those decisions."

If a tribal court had imposed a sentence of permanent disenrollment in a criminal proceeding, it would be a clear reviewable violation of ICRA.[8] However, by simply not having a tribal court, the Pechanga Tribe has been authorized to mete-out a punishment which "is offensive to cardinal principles for which the Constitution stands" *Trop* at 101-02, and a punishment that a tribal court could not impose.

V. THE RULING BELOW CONFLICTS WITH ESTABLISHED LAW CONCERNING THE EXHAUSTION OF TRIBAL REMEDIES.

The Opposition chose not to address substantively, the "exhaustion of remedies" holding of the majority below. Failing to do so demonstrates just how illogical

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[8] §1302(7) No tribe may "require excessive bail, impose excessive fines, inflict cruel and unusual punishments... (or) impose any penalty...greater than imprisonment for ...one year and a fine of $5,000, or both."

and contrary to the fundamental law of *exhaustion of remedies*, that section is. The majority ruled that the Hunters failed to exhaust their tribal remedies because they did not appeal their exclusion from the reservation.

Appellants were not officially excluded, but the majority mistakenly states that Appellants equate their "disenrollment" with "exclusion." But their "claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion. Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment." (Opp., at App. 27).

It would be futile to try to appeal their exclusion because they haven't been officially excluded. It is well established that "futility" is an exception to the exhaustion of tribal remedies doctrine[9]. Requiring Appellants to appeal a non-existent exclusion would be futile, and permitting the holding below to stand would directly conflict with case law concerning the futility exception[10] and disregard the grueling appeals that the Tribe subjected Appellants.

CONCLUSION

Although the Pechanga Tribe is one of the richest tribes in America, it has no tribal court to review

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[9] 186 A.L.R. Fed. 71 Construction and Application of Federal Tribal Exhaustion Doctrine.

[10] See *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (1975).

injustices. If this Court denies jurisdiction, then the entire Hunter family will have its citizenship stripped away forever and will be restricted from full access to their homeland. They will never have their day-in-court, in *any* jurisdiction. This is a violation of the spirit and letter of the law found in the Indian Civil Rights Act, 25 U.S.C. 1301, et seq.

Respectfully Submitted,

Paul Harris
Counsel of Record
Patrick Romero Guillory
Dolores Park Law Offices
503 Dolores St., 2nd Floor
San Francisco, CA 94110
patrickromerog@yahoo.com
(415) 285-1882
Attorneys for Petitioners