Supreme Court, U.S.
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No. 02-1853

In the
Supreme Court of the United States

EDWARD KENNEDY AND CATHERINE SINGER,
Petitioners,
v.

RICHARD HUGHES, WALTER DASHENO, EDWIN TAFOYA, DALE BACA, CHARLES SUAZO, JOSEPH VAL GUTIERREZ, C. ANTHONY SUAZO, JOSE N. CHAVARRIA, JOHN SHIJE, FRANCIS TAFOYA, ALVIN WARREN, DENNY GUTIERREZ AND GEORGE GUTIERREZ,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The order and judgment of the court of appeals (Pet. App. 7a–13a) is not reported. A complete copy of this order and judgment (including the footnotes omitted from the version provided by Petitioners) is included in Respondent's Appendix ("Resp. App.") at 25a-33a. This unreported order and judgment can also be found at 60 F. Appx. 734.

The district court's memorandum opinion (Pet. App. 2a-6a) is not reported. A complete copy of this memorandum opinion (including the footnotes omitted from the version provided by Petitioners) is attached at Resp. App. 19a-24a.

STATEMENT OF JURISDICTION

The court of appeals issued its order and judgment on March 20, 2003 (Resp. App. 25a) (not March 19, 2003, as stated in the Petition at 2). This Court's jurisdiction was invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents submit that the Statement of the Case in the Petition is incomplete and confusing, and contains misstatements as to the nature of this proceeding. For example, the opening sentence in the Statement of the Case in the Petition, that "Petitioner filed a civil complaint to contest the Santa Clara tribe's regulatory authority over him," (Pet. 2) is untrue, as is the implication contained in the next fragmentary sentence, that the case presented to this Court arose from Petitioner Kennedy's incarceration for contempt of court. As will be explained below, this case arose from a suit for damages filed by Petitioners claiming Petitioner Kennedy was injured by the Pueblo of Santa Clara Tribal Council's

enactment of a resolution reaffirming the Pueblo's sovereign immunity from unconsented suit. A complete and accurate account of the somewhat convoluted circumstances leading to the filing of the Petition follows.

1. Proceedings in the Santa Clara Pueblo Tribal Court

In 1993, Petitioner Edward Kennedy ("Kennedy"), a member of the Blackfeet Indian Tribe and long-time resident of the Santa Clara Pueblo married to Santa Clara Pueblo member and Petitioner Catherine Singer ("Singer"), was sued by two creditors in the Santa Clara Pueblo Tribal Court. None of Respondents herein were parties to those lawsuits. After Kennedy failed to pay the money judgments awarded the creditors, he was held in contempt of court and was incarcerated by order of Santa Clara Tribal Court Judge Dennis Silva for 33 days. (Pet. 2). Kennedy never appealed either judgment, or challenged the Santa Clara Tribal Court's jurisdiction in either proceeding, nor did he ever seek habeas corpus relief under 25 U.S.C. § 1303 of the Indian Civil Rights Act ("ICRA") to challenge the validity of his incarceration.

Instead, three years later, in August, 1996, Kennedy and Singer filed a suit for money damages in the Santa Clara Tribal Court against Judge Silva, styled *Kennedy, et al. v. Silva,* No. CV 96-436, alleging that Judge Silva had violated Kennedy's civil rights. (Resp. App. 26a). Judge Silva, represented by Respondent Hughes (who has been general counsel to the Pueblo since October, 1995), filed a motion to dismiss the complaint, asserting judicial immunity and failure to state a claim on which relief could be granted. The motion was heard by Tribal Judge Paul Tsosie, who, after full briefing and argument, dismissed the complaint in September,

1997. Kennedy appealed the dismissal to the Santa Clara Court of Appeals. (Resp. App. 26a-27a). That court vacated the order of dismissal and remanded the case for further proceedings in January, 1998, and it directed that the case be heard by a judge specially appointed by the Tribal Council. In the meantime, Kennedy filed a second amended complaint, in which he added as additional defendants the Pueblo Governor, Lieutenant Governor and all of the members of the 1994 Tribal Council, alleging wrongful failure to supervise Judge Silva as the claimed basis for their liability. (Resp. App. 3a, 26a).

Respondent Hughes had advised Pueblo Governor Walter Dasheno that in the course of working on the *Kennedy* case he had discovered that there was uncertainty from the documentation as to whether or not the Pueblo had or had not waived its sovereign immunity from suits asserting violations of civil rights. The problem arose from the fact that in 1981, the Tribal Council had enacted a comprehensive Law and Order Code, that included Section 60.4, which expressly waived the immunity of the Pueblo's "members, officers, employees and staff from suit in matters relating to alleged violation of civil rights." Two years later, however, by Resolution enacted on December 7, 1983, the Tribal Council repealed Section 60.4. Then, in 1985, it was discovered that the Code had not been submitted to the Bureau of Indian Affairs for approval, as required by the Santa Clara constitution. The Council therefore reenacted the Code, by Resolution No. 3-07-85, and the Bureau approved it. The question identified by Respondent Hughes was whether the reenactment and approval of the Code incorporated the repeal of Section 60.4. To clarify the situation, Governor Dasheno requested that Respondent Hughes prepare and present to the Tribal Council a resolution addressing the issue, which the Council enacted on November 10, 1998, as Resolution No.

98-29 (Resp. App. 27a-28a). That resolution confirmed the Council's original legislative intent that the 1983 repeal of Section 60.4 had been incorporated into the reenactment of the Code in 1985 (and further declared that the doctrine of judicial immunity was implicitly adopted by the Council when it created a tribal judiciary by its enactment of the Code). (Resp. App. 27a-28a, 34a-37a).

After enactment of Resolution No. 98-29, the Santa Clara Pueblo defendants again moved to dismiss *Kennedy, et al. v. Silva* on the grounds that Kennedy's and Singer's claims against Judge Silva were barred by judicial immunity, and that their claims against all defendants were barred by the Pueblo's sovereign immunity. Although the motion was fully briefed and argued, the *pro tem* judge never ruled on the motion, and he subsequently resigned. The case has thus never been resolved. (Resp. App. 27a, and n.2). Importantly, however, the claims raised in *Kennedy, et al. v. Silva* have nothing to do with the case Kennedy seeks to bring before this Court.

Just two weeks after the Tribal Council had enacted Resolution No. 98-29, and before the defendants in *Kennedy, et al. v. Silva, et al.* had filed their second motion to dismiss, Kennedy and Singer filed a new lawsuit in Santa Clara Tribal Court, naming as defendants the Pueblo's Governor, Lt. Governor and members of the 1998 Santa Clara Tribal Council, and attorney Hughes (the Respondents herein). *Kennedy, et al. v. Hughes, et al.*, No. CV 98-504. That suit claimed that the legislative action taken by the Tribal Council in enacting Resolution No. 98-29, and Respondent Hughes' role in drafting the resolution and advising the Council with respect to its passage, violated various provisions of the ICRA, the United States Constitution and the Santa Clara Pueblo Constitution. (Resp. App. 2a-4a, 28a). The suit sought $8 million in damages, plus other forms of relief.

The Santa Clara Tribal Court (through Tribal Judge *pro tempore* Frank DeMolli) ultimately dismissed the case on the merits in an opinion and order issued on September 19, 1999. (Resp. App. 1a-18a). Kennedy and Singer noticed an appeal from that ruling to the Santa Clara Court of Appeals, but as their counsel knew, that court had been abolished by the Santa Clara Tribal Council, and the Council had shifted appellate jurisdiction over final decisions of the Tribal Court to the Southwest Intertribal Court of Appeals, based at the University of New Mexico Law School. Kennedy and Singer never pursued an appeal to that appellate court. (Resp. App.28a, and n.3).

2. Proceedings in the Federal District Court.

In 2001, Kennedy and Singer filed a new lawsuit – this case -- in the United States District Court for the District of New Mexico, making claims identical to those they had asserted (and that had been disposed of on the merits) in *Kennedy, et al. v. Hughes, et al.*, in Santa Clara Tribal Court – that is, that their rights had been violated by the enactment of Tribal Council Resolution No. 98-29 -- and naming the identical parties defendant (Respondents herein). The complaint alleged jurisdiction under 28 U.S.C. §§ 1331 and 2201-2202, asserting that the claims arose under "the Laws and Constitution of the United States pursuant to the Indian Civil Rights Act of 1968. 25 U.S.C. § 1302 et seq." The district court granted Respondents' motions to dismiss the complaint, ruling that "it does not have jurisdiction over Plaintiffs' claims, or alternatively, that Plaintiffs fail to state claims upon which relief can be granted because ICRA does not authorize a cause of action such as Plaintiffs'," relying on *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). (Resp. App. 19a-24a). The district court did not reach or rule upon any of the other grounds for dismissal argued by Respondents

(legislative immunity, failure of Plaintiffs to exhaust tribal remedies and res judicata, and as to Respondent Hughes the additional defense of qualified immunity). (Resp. App.20a-21a). The district court did, however, reject Kennedy and Singer's attempts to bootstrap Kennedy's 1993 incarceration into a basis for federal jurisdiction over his 2001 federal court lawsuit. (Resp. App. 21a, n.1).

3. Proceedings in the Tenth Circuit Court of Appeals

Because Kennedy and Singer's federal suit was based solely on § 1302 of ICRA, the Tenth Circuit identified the threshold question on appeal to be "whether a private cause of action may be brought under that section." (Resp. App. 29a-30a). Applying this Court's ruling in *Santa Clara Pueblo,* 436 U.S. at 69, the Tenth Circuit held that "the District Court correctly dismissed this suit for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted" (Resp. App. 33a), since the only provision of ICRA that authorizes a private cause of action in the federal courts is 25 U.S.C. § 1303, the habeas corpus provision. (Resp. App. 29a-30a).

In so ruling, the Tenth Circuit rejected Kennedy's effort to evade dismissal by invocation of an anomalous "exception" to *Santa Clara Pueblo* recognized only in the Tenth Circuit decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). (Resp. App. 30a-33a). (*See* discussion *infra*, n.6). Kennedy and Singer[1] then filed the Petition in this

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[1]Kennedy and Singer are both listed as Petitioners in the caption of this matter as it appears on the front of the Petition and on page 1.

Court, seeking reversal of the Tenth Circuit's decision affirming the dismissal of the federal court suit.

REASONS FOR DENYING THE WRIT

1. Introduction.

Contrary to the suggestion in Petitioner's Questions Presented (Pet. i) and throughout the text of the Petition, *e.g.*, Pet. 2, 3, 6, 7, the decisions below have nothing whatever to do with tribal assertion of jurisdiction over non-members, or the requirement of exhaustion of tribal remedies. The only issue addressed or decided by either the district court or the court of appeals, and thus the only decided issue which could properly be subjected to *certiorari* review in this Court, is whether Petitioner may bring an action in federal court asserting claims for damages arising under the Indian Civil Rights Act, 25 U.S.C. § 1302 ("ICRA"). On that issue, the decision below – that there is no federal cause of action created by that Act, nor any federal court jurisdiction for

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The text of the Petition begins with the plural word, "Petitioners," and the same word appears in the Statement of Jurisdiction, Pet. at 2. Thereafter, however, although there is no explanation for the change, the Petition utilizes the singular form, "Petitioner," and a significant portion of the argument is premised on the "Petitioner" not being a member of Santa Clara Pueblo. Kennedy is not a member of the Pueblo, but Singer is (Resp. App.26a), and those arguments (had they any merit or relevance to this case) could not be asserted on her behalf. Since, however, it appears that both Kennedy and Singer are Petitioners in this matter, all arguments set forth in this Response should be understood as applying to both of them, except these points where Petitioners' argument depends on Kennedy's status as a non-member of the Pueblo, which would only apply to him.

claims arising under it -- is not in conflict with, and is completely in accord with, every decision of every other court of appeals to have addressed the question, and with the only decision of this Court to have addressed it. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). The issue has been regarded as completely settled as a matter of federal law for the past 25 years, since this Court's landmark decision in *Santa Clara Pueblo*. Petitioner offers no reason for departing from this settled and consistent body of decisional law, and instead resorts to a remarkable effort to recharacterize (and indeed, to thoroughly mischaracterize) the issues presented by the case.

2. The Tenth Circuit's ICRA Rulings Do Not Conflict with the Rulings of this Court or Any Other Federal Circuit.

A. The Tenth Circuit Correctly Adhered to the Rule of *Santa Clara Pueblo v. Martinez* in Affirming the Dismissal For Lack of Subject Matter Jurisdiction or Failure to State a Claim

The Tenth Circuit's ruling that § 1302 of ICRA does not authorize a private cause of action in the federal courts does not conflict with any decision of this Court or with any decision of any other federal court of appeals. Indeed, that ruling was compelled by this Court's holding in *Santa Clara Pueblo,* and is in complete accord with the decisions of every other federal court of appeals to have faced cases under the ICRA since *Santa Clara Pueblo. E.g., Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) ("With exceptions for habeas corpus relief, Congress did not intend in the Indian Civil Rights Act to create implied causes of action to redress substantive rights in federal court"); *Garcia v. Akwesasne*

Housing Authority, 268 F.3d 76, 86 (2nd Cir. 2001) ("The Indian Civil Rights Act, for instance, imposes numerous substantive obligations on tribal governments but does not explicitly provide a private cause of action in federal court except via the writ of habeas corpus."); *Crowe v. Eastern Band of Cherokee Indians Inc.*, 584 F.2d 45, 45-46 (4th Cir. 1978) ("We find it unnecessary to reach the merits of the appeal since we conclude that under the Supreme Court's decision in *Santa Clara Pueblo v. Martinez* . . . the district court was without jurisdiction to entertain the action") (internal citations omitted); *TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999) (under Santa Clara Pueblo, federal court lacked subject matter jurisdiction for actions brought under Indian Civil Rights Act); *Sandman v. Bradley Dakota*, 816 F.Supp. 448, 451 (W.D. Mich 1992), ("Congress did not provide a private right of action in the Indian Civil Rights Act, but provided only the remedy of habeas corpus."), *aff'd* 7 F.3d 234 (6th Cir. 1993) (table); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757, 764 (7th Cir. 1991) (citing *Santa Clara Pueblo v. Martinez* for ruling that Congress did not authorize the federal courts to adjudicate civil actions under ICRA except for those seeking *habeas corpus* relief); *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996) ("The district court correctly noted that there is no private right of action under the Indian Civil Rights Act . . ."); *Demontiney v. United States*, 255 F.3d 801, 814 (9th Cir. 2001) (". . . we have generally found federal court jurisdiction for alleged violations of ICRA only in habeas corpus actions, not in civil actions."); *R. J. Williams Co. v. Ft. Belknap Hsg. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983), (*Santa Clara Pueblo* "foreclosed any reading of [the Indian Civil Rights Act] as authority for bringing civil actions in federal court to request . . . forms of relief [other than habeas corpus]"), *cert. denied*, 472 U.S. 1016 (1985); *Florida*

Paraplegic v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1130, 1134 (11th Cir. 1999) (citing *Santa Clara Pueblo* for the proposition that in enacting ICRA Congress had imposed "substantive limitations on Indian tribes without providing any means for most individuals to enforce their rights in federal court."). Thus, this case does not involve "a decision in conflict with the decision of another United States court of appeals on the same important matter" nor a decision in conflict with any decision of this Court, which might warrant certiorari review under Sup. Ct. R. 10(a) or (c).

B. *Santa Clara Pueblo v. Martinez* Applies With Equal Force to All Persons Whether Indian or Non-Indian

Kennedy[2] argues that the Tenth Circuit's adherence to *Santa Clara Pueblo* was error since that Court "failed to recognize that the rule in *Santa Clara* does not apply to this case because Petitioner is not a member of the Santa Clara Indian Tribe but resides on the reservation." (Pet. 4). This argument primarily rests on Kennedy's assertion that "[I]n *Santa Clara* . . . all parties to the suit were members of the Santa Clara Indian Tribe." (Pet. 4).

[2] As explained *supra*, n.1, although the text of the Petition appears to treat Edward Kennedy, who is not a member of Santa Clara Pueblo, as the only Petitioner here, the caption and the beginning sections of the Petition indicate that Catherine Singer is also a Petitioner. Ms. Singer, however, is a Pueblo member, and thus none of the arguments set forth in the Petition dealing with the applicability of the ICRA to non-members, or the Pueblo's authority over non-members, could properly be raised on her behalf. The following discussion, and the discussion in sections 4 and 5.B., *infra*, should therefore be understood as applying only to the arguments raised on behalf of Petitioner Kennedy.

Kennedy's contention is wrong. The plaintiffs in *Santa Clara Pueblo* were Julia Martinez, who was a tribal member, and her adult daughter Audrey, who was not a member[3] (and, indeed, though 100% Indian by blood, was not a member of *any* Indian tribe). The point of their suit was that children of female tribal members married to non-members were denied membership in the Pueblo solely because their fathers were not Pueblo members. (Children of male members who married outside the Pueblo were fully eligible for membership.) They had sued under the ICRA seeking to compel their admission to membership in the Pueblo on an equal protection theory:

> Although the children were raised on the reservation and continue to reside there now that they are adults, *as a result of their exclusion from membership* they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

436 U.S. at 52-53 (emphasis added).

[3] Each of them sued in her own capacity, but also as representative of a class of persons similarly situated. The class represented by Audrey consisted of all children of female Pueblo members who had married outside of the Pueblo, and which children were, thus, denied membership in the Pueblo. *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 12 (D.N.M. 1975).

The other federal circuits addressing this issue have (like the Tenth Circuit, with one exception[4]) uniformly followed *Santa Clara Pueblo*, ruling that § 1302 of ICRA does not authorize a private right of action in federal district court irrespective of whether the plaintiff is or is not a member of the Indian tribe whose officials are alleged to have contravened some provision of that statute, and whether the plaintiff is Indian or non-Indian. The ICRA applies equally to "any person". (Pet. App.13a) (25 U.S.C. § 1302(8)); *Santa Clara Pueblo,* 436 U.S. at 65 ("Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." (Footnotes omitted.)); *Garcia v. Akwesasne Housing Authority,* 268 F.3d at 78, 88 (2nd Cir. 2001) (remanding non-member plaintiff's civil rights suit against tribal housing officials in part to give her an opportunity to show that there was some statutory basis upon which to found a private cause of action in federal court other than the ICRA which "does not explicitly provide a private cause of action in federal court except via a writ of habeas corpus"); *Dement v. Oglala Sioux Tribal Court*, 874 F.2d 510, 515 (8th Cir. 1989) (noting that ICRA's habeas corpus provision was available to "any person"); *R. J. Williams Co.,* 719 F.2d at 9811-982 (ICRA protects due process rights of "all persons", but district court should have dismissed non-Indian's ICRA action under *Santa Clara Pueblo)*; *White v. Pueblo of San Juan*, 728 F.2d 1307,

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[4] *See* discussion *infra*, at n.6 and accompanying text, concerning *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

1312, n.1 (10th Cir. 1984) ("The protections afforded to 'any person' under the ICRA are not limited to American Indians, but apply also to non-Indians,"); *Dodge v. Nakai*, 298 F. Supp. 17, 24 (D. Az. 1968) (noting legislative history of ICRA regarding use of term "any person" instead of language limiting its protections to Indians only); *Florida Paraplegic*, 166 F.3d at 1134. (quoting § 1302 language extending ICRA's protections to "any person" regarding suit against tribe by non-Indian advocacy organization).

3. Since Neither Lower Court Ruled On Any Issue Respecting Exhaustion of Tribal Remedies, This Case Is Not a Suitable Vehicle For Addressing Such Issues

Petitioners also seek review on the ground that the Tenth Circuit somehow misapplied this Court's rulings respecting exhaustion of tribal remedies, citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Nevada v. Hicks*, 533 U.S. 353 (2001). Petitioners assert that "[t]he Tenth Circuit held that Petitioner had not exhausted his remedies as regarding [*sic*] other courts and, therefore, it had no jurisdiction to hear the claims." (Pet. 7). Petitioners framed their "question presented" based on this issue as "whether the District Court incorrectly interpreted this Court's rule regarding the requirement to exhaust remedies." (Pet. i).

In fact, however, neither the district court nor the Tenth Circuit made any ruling respecting failure to exhaust tribal remedies. The decisions in both courts were strictly limited to the issue of lack of jurisdiction over claims arising under ICRA, or alternatively, failure to state a claim upon which relief can be granted, both arguments having been raised in Respondents' Motions to Dismiss. The district court noted

that Respondents (defendants below) had also argued *inter alia* that "Plaintiffs' claims should be dismissed based on . . . failure of Plaintiffs to exhaust tribal remedies . . . ." (Resp. App. 20a). But (in view of its ICRA rulings), the District court held that it "need not address and will not decide the other issues raised by Defendants."(Resp. App. 20a-21a).

Likewise, the Tenth Circuit simply affirmed the district court's alternative rulings that it had no jurisdiction to entertain Petitioners' claims under ICRA or that Petitioners had failed to state a claim upon which relief can be granted. (Resp. App.31a-32a, 35a). Thus, there is no Tenth Circuit (or district court) ruling on exhaustion of tribal remedies to review in this case.[5]

Since there was no decision in either court below respecting the tribal exhaustion doctrine, that issue is not properly before this Court.

4. Kennedy's Status as an "Indian" or "Non-Indian" is Irrelevant to the Decision in This Case.

Kennedy concedes he "is for all intent [*sic*] and purposes considered an 'Indian' under the ICRA as a member of the Blackfeet Indian Tribe" (a federally recognized Tribe) (Pet.

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[5] Petitioner's argument also overlooks a critical aspect of the tribal exhaustion doctrine – it never applies unless there is already present some basis for the exercise of federal court jurisdiction to decide the claim presented. *National Farmers Union*, 471 U.S. at 853-854 (1985); *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 16, n.8 (1987). Since neither lower court found any basis for jurisdiction in this case, neither court could properly have reached the "exhaustion of tribal remedies" defense, and neither did.

4), and that he is a resident of the Pueblo married to a tribal member. *Id.* Nonetheless he claims the Tenth Circuit erred in treating him as an "Indian" rather than a "non-member Indian" or "non-Indian" in affirming the district court's dismissal under *Santa Clara*.

This "Indian," "non-member Indian" or "non-Indian" issue arose in connection with Kennedy's attempt to invoke the Tenth Circuit's discredited *Dry Creek Lodge* "exception" to this Court's holding in *Santa Clara Pueblo*. (Resp. App.22a-23a, 30a-33a).[6] Plaintiffs attempting to invoke this

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[6] *Dry Creek Lodge* appears to be the only decision of a federal court of appeals that, contrary to this Court's ruling in *Santa Clara Pueblo*, found a private cause of action under § 1302 of the ICRA, federal jurisdiction to hear the claim, and (apparently) an abrogation of tribal sovereign immunity. The case was originally filed in 1974, by non-Indian plaintiffs claiming that the tribes had barred them from access to their privately-owned land within the Wind River Reservation, the day before the opening of a hunting lodge that the plaintiffs had constructed on the property. The district court had dismissed the complaint, but the Tenth Circuit reversed. *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975). On remand, the case was tried to a jury, which returned a substantial verdict. The district court granted a new trial, but before the trial could occur this Court decided *Santa Clara Pueblo*, and the district court thereafter dismissed the complaint, viewing that decision as having eliminated any basis for a federal cause of action or federal court jurisdiction. In the second appeal, the Tenth Circuit erroneously observed that *Santa Clara Pueblo* dealt with a problem that was "strictly an internal one between tribal members and the tribal government relating to the policy of the Tribe as to its membership." 623 F.2d at 685. It also saw the decision in that case as hinging on the availability of ICRA enforcement by the Santa Clara tribal court, even though, as the opinion in *Santa Clara Pueblo* notes, at the time of that litigation

the only "court" at Santa Clara was the Tribal Council itself. *Santa Clara Pueblo*, 436 U.S. at 66 n.22. Noting that the Wind River tribal court had refused to hear the complaint of the plaintiffs in *Dry Creek Lodge*, the Tenth Circuit lamented that "[t]here has to be a forum where the dispute can be settled," 623 F.2d at 685, and it reversed the dismissal of the complaint. Judge Holloway dissented.

Since then, though the Tenth Circuit has regularly (as in the instant case; *see* Resp. App. 30a -33a) looked at whether an effort to sue a tribe or tribal official under the ICRA meets the requirements of the "*Dry Creek Lodge* exception" to *Santa Clara Pueblo*, no such case has ever been found, and the "exception" exists as a viable doctrine (if at all) only in the narrowest of cases that precisely track its factual elements. *See, Ordinance 59 Ass'n v. United States Dept. of the Interior Secretary*, 163 F.3d 1150, 1159 (10th Cir. 1998) (citing cases rejecting invocation of exception) ("With the exception of *Dry Creek* itself, we have *never* found federal jurisdiction based on the *Dry Creek* exception.") (emphasis in original). No other federal appellate court has ever followed the decision, and it has been criticized as at least questionable, if not plainly wrong, in light of the clear holding of *Santa Clara Pueblo. See, e.g., Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035, n.2 (9th Cir. 1999) (declining to apply *Dry Creek Lodge* and noting the Ninth Circuit recognizes habeas corpus action as only exception to exclusive tribal jurisdiction over ICRA claims); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 885, n.14 (2nd Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996) . The Tenth Circuit itself has repeatedly narrowed the decision's application, to the point of crediting it with "minimal precedential value." *Ordinance 59 Ass'n.*, 163 F.3d at 1158; *see also, Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982) (recognizing exception only in cases involving "particularly egregious allegations of personal restraint and deprivation of personal rights"); *White*, 728 F.2d at 1312 (10th Cir. 1984) (noting necessity of construing *Dry Creek Lodge* narrowly to avoid conflict with *Santa Clara*). To be sure, consistent with its

anomalous exception in the Tenth Circuit must show that their case meets three requirements: "the dispute involves a non-Indian party; a tribal forum is not available; and the dispute involves an issue falling outside internal tribal affairs." (Resp. App. 30a). The claim, moreover, must also involve "particularly egregious allegations of personal restraint and deprivation of personal rights." (Resp. App. 30a, n.4). The district court found that Kennedy had failed to establish the "no tribal forum" and "not an internal tribal matter" elements, hence he could not invoke *Dry Creek Lodge* even if he "were found to be a non-Indian." (Resp. App. 22a-23a). The Tenth Circuit affirmed, primarily on the ground that Plaintiff had failed to demonstrate that no tribal forum was available to him, noting that "As to the existence of a tribal forum, the district court concluded that a tribal forum is available in this case, as plaintiffs have filed two actions before the Santa Clara Tribal Court, the second of which involved the same claim as in the instant federal case. . . . Plaintiffs have taken advantage of that forum, not once but twice. They did not prevail on the merits, but that does not entitle them to take their claim to federal court."(Resp. App. 31a-33a).

Whatever the merits of Kennedy's "Indian," "non-member Indian" or "non-Indian" argument in other contexts, this case is not a proper vehicle for addressing it, since neither the district court nor the Court of Appeals ever ruled upon it. Both courts expressly declined to reach that issue since each ruled that other grounds existed for dismissing Petitioners'

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avoidance of any mention of the arguments actually presented by Petitioners to the lower courts in this case, the Petition makes no reference to *Dry Creek Lodge*.

suit under *Santa Clara Pueblo* even if Kennedy were "found to be a non-Indian." (Resp. App.22a-23a, 31a).

5. Kennedy's *Nevada v. Hicks* Arguments Were Not Timely Raised and Are Without Merit

A. Kennedy Did Not Timely Raise and Neither Lower Court Ruled On Any Issue Relevant to *Nevada v. Hicks*

Petitioners did not raise any argument based on *Hicks* before the district court, nor did they even cite to *Hicks* in any pleading or legal memorandum filed with that court. Since they had failed to raise this argument in the district court, and its outcome did not affect the Tenth Circuit's appellate jurisdiction, the Tenth Circuit did not consider or rule upon Petitioners' belated *Hicks* argument. Once again, Petitioners now seek review on an issue not decided below, hence not suitable for review by this Court in this case.

B. *Hicks* is Irrelevant to the Issues in This Case, as There Was No Assertion of Jurisdiction Over Kennedy by Santa Clara Pueblo in the Action of Which Petitioners Complain, and Nothing in *Hicks* Changed the Jurisdictional Rules Respecting ICRA.

Even had Kennedy timely raised his *Hicks* argument, and had the Tenth Circuit ruled on it, the argument is utterly without merit. As presented in the Petition, (Pet. 5-6), the argument is obscure, but it appears to be that the Pueblo's "exercise of tribal authority over petitioner" was not necessary to protect the Pueblo's "interests of self-government" and "in no way relate[s] to . . . principles of

necessary tribal authority." Yet, the specific tribal action at which Petitioners' complaint in this case was directed was the Tribal Council's enactment of Resolution No. 98-29, by which the Council simply reaffirmed the vitality of the Pueblo's sovereign immunity defense. This act cannot logically be characterized as an exercise of jurisdiction over Kennedy at all; rather, it was an appropriate and purely defensive measure, intended to limit the exercise of court jurisdiction over the Pueblo and its officers and employees. *Cf. Pyca Industries, Inc. v. Harrison Co. Waste Water Mgt. Dist.*, 81 F.3d 1412 (5th Cir. 1996); *Grimes v. Pearl River Valley Water Supply Dist*, 930 F.2d 441 (5th Cir. 1991), both recognizing that governmental sovereign immunity is a legitimate subject of legislative consideration; and, that changes in the law of immunity, even those that may affect pending litigation, do not amount to actionable violations of rights of litigants.

Moreover, as the district court found, Petitioners' claims were directed at issues, in particular tribal legislation respecting its sovereign immunity from suit, that "are plainly internal matters and are at the very heart of tribal self-governance and self-determination." (Resp. App. 22a-24a). Even if it could be somehow seen as an assertion of jurisdiction over Kennedy, the resolution would still pass the *Hicks* standard, which permits the exercise of tribal power over non-Indians that "'*is necessary to protect tribal self-government*.'" 533 U.S. at 359 (*quoting Montana v. United States*, 450 U.S. 544, 564 (1981)) (emphasis in *Hicks*). If Kennedy's *Hicks* argument is actually directed at the exercise of tribal court jurisdiction over him, the obvious answer to that complaint is that he invoked the jurisdiction of the Santa Clara Tribal Court himself, at least twice, and never challenged its jurisdiction to adjudicate his disputes with the Pueblo.

Finally, this Court expressly limited its jurisdictional rulings in *Hicks* to circumstances in which Indian tribal courts attempt to exercise civil jurisdiction over state officials sued for their official conduct:

> Our holding in this case is limited to the question of tribal court jurisdiction over State officers enforcing state law.

Hicks, 533 U.S. at 359, n.2. Thus, nothing in *Hicks* altered this Court's ICRA ruling in *Santa Clara Pueblo*.

This Court did in *Hicks* reiterate the tribal court jurisdictional principles established under "the path-marking case" of *Montana* applicable when a non-Indian defendant is involuntarily subjected to the exercise of a tribal court's jurisdiction. *Hicks,* 533 U.S. at 359. But here, the only tribal court lawsuit affected by the exercise of the Pueblo's legislative authority via enactment of Resolution 98-29 was the suit for money damages Kennedy and Singer filed in the Santa Clara Tribal Court in 1998 against Respondents. Having themselves invoked the jurisdiction of the Santa Clara Tribal Court, neither can complain that they were involuntarily subjected to the exercise of that court's jurisdiction.

CONCLUSION

We therefore respectfully request that the Court deny the Petition for Writ of Certiorari sought by Petitioners.

Respectfully submitted,

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