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No. _____

OFFICE OF THE CLERK

In the
Supreme Court of the United States

ROSS B. LINNEEN, HUSBAND;
KIM ANN LINNEEN, WIFE,
Petitioners,

v.

GILA RIVER INDIAN COMMUNITY, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL: JAMES P. MUELLER
Counsel of Record
TOM RAWLES DOUGLAS V. DRURY
LINDA RAWLES MUELLER & DRURY, P.C.
11000 NORTH SCOTTSDALE ROAD
SUITE 181
SCOTTSDALE, AZ 85254
(480) 368-5511

Counsel for Petitioners

Questions Presented for Review

Petitioners sought redress in the courts below for the violation of their fundamental civil liberties. However, because Respondents asserted tribal sovereign immunity, Petitioners have been denied any forum in which to seek relief.

Question: Should tribal sovereign immunity be limited to the extent necessary to provide Petitioners with an opportunity and a mechanism for seeking redress for the violation of their fundamental civil liberties?

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Writ	3
I. The United States Has a Duty to Protect Petitioners' Fundamental Civil Liberties	3
II. Fundamental Civil Liberties do not Depend Upon a Legislative Majority	5
Conclusion	8
Appendix	1a
Appendix A 9 th Circuit Opinion - 01/07/02	1a
Appendix B District Court Order - 03/02/99	7a

Table of Authorities

<u>CASES</u>	<u>Page</u>
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	passim
<i>Johnson v. M'Intosh</i> , 8 Wheat. 534, 574, 5 L.Ed. 681 (1823)	4
<i>Board of Trustees of the Sisseton-Wahpeton Community College v. Wynde</i> , 18 Ind.L.Rptr. 6033, (N. Plains Intertribal Ct. (App. 1990))	5
<i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.</i> 523 U.S. 751 (1998)	5, 8
<i>Bush v. Gore</i> , ___ U.S. ___, 121 S.Ct. 525, 557 (2000)	7
<i>Talton v. Mayes</i> , 163 U.S. 376 (1896)	8
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	8
<i>Gideon v. Wainright</i> , 372 U.S. 335 (1963)	7
<i>Miranda v. Arizona</i> , 384 U.S. 386 (1966)	7

New York Times v. Sullivan,
376 U.S. 254 (1964) 7

Engle v. Vitale,
370 U.S. 421 (1962) 7

Petition For Writ of Certiorari

Petitioners Ross Lineen and Kim Lineen respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The district court’s opinion granting summary judgment in favor of respondent Gila River Indian Community is unpublished (Appendix “A”). The court of appeals’ opinion upholding the grant of summary judgment is reported at ___ F.3d ___ (2002) (Appendix “B”).

Statement of Jurisdiction

The Court of Appeals entered its opinion and order January 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statement of the Case

I. The Violation of Petitioners’ Fundamental Civil Liberties

After inadvertently wandering onto the Gila River Indian Community’s land on January 1, 1996, while exercising their dogs, Petitioners were confronted by a tribal officer. During the ensuing three to four hour encounter, the tribal officer:

1. Threatened to shoot the Petitioners and bury their bodies in the desert where they would never be found;

2. Held Petitioners at gun point, including holding a gun to their heads, and unlawfully and unjustifiably refused to let them leave;
3. Threatened to seize and/or destroy their property, including their two dogs;
4. Told them of their need to discover/accept Jesus Christ as their personal Lord and Savior, especially because they were going to die that day; and
5. Railed against the outrages that have been perpetrated upon Native Americans by the White Man over hundreds of years.

These facts, which Respondents acknowledged in their brief below “portray a tale of abuse . . .” (Respondents’ Ninth Circuit Answering Brief, at 11), have been accepted as true in the courts below for the purpose of resolving Respondents’ tribal sovereign immunity claim. Thus, this Court too must accept this tale of abuse and terror as its starting point, as the foundation for the legal analysis which follows.

There is no doubt that these accepted facts constitute violations of Petitioners’ fundamental civil liberties. Petitioners’ freedom of religion, freedom of speech, freedom of association and due process protections were all callously cast aside during these terrorizing acts of a governmental entity. Furthermore, the fact that these abuses and terrors

were inflicted upon Petitioners because they are White constitutes a violation of their equal protection rights.¹

In short, and to the point, some of America’s most cherished and time-honored liberty interests were trampled this day. These fundamental civil liberties were not bestowed upon Americans by the United States Constitution; rather, the Constitution acknowledged their pre-Constitutional existence and pledged the Government’s protection and preservation of these liberties. As Thomas Jefferson wrote in the Declaration of Independence, after noting that Man possesses certain God-given and inalienable rights: “To secure these rights, governments are instituted among men” Thus, governments exist to protect and secure the fundamental civil liberties directly at issue here, and Petitioners ask this Court to do exactly that – protect their liberties.

Reasons for Granting the Writ

I. The United States Has a Duty to Protect Petitioners’ Fundamental Civil Liberties

Protecting fundamental civil liberties, albeit different ones, is exactly what this Court did when it decided Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In Oliphant, the tribe tried to exercise criminal jurisdiction over non-Indians for crimes committed on the reservation. The tribe in Oliphant argued that the exercise of criminal jurisdiction was a result of and necessary to protect its “retained national sovereignty.” Id. at 196. This Court disagreed.

¹ Petitioners’ claim includes other, more traditional common law causes of action as well.

Citing Johnson v. M'Intosh, 8 Wheat. 534, 574, 5 L. Ed. 681 (1823), the Oliphant Court noted that a tribe's right to complete sovereignty is necessarily diminished when its assertion of sovereignty conflicts "with the interests of this overriding sovereignty (the United States)." Oliphant, 435 U.S. at 209. The Court was very clear in identifying the interest the overriding sovereignty needed to protect.

From the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.

Id. at 210. Thus, even though the passage of the Indian Civil Rights Act of 1968 attempted to provide some form of due process protections (id. at 197-98), those protections were not enough to satisfy the Oliphant Court. The need for the United States to protect Non-Indians' fundamental civil liberties overrode the tribe's need for absolute sovereignty. Tribal sovereignty had to yield to personal freedoms and to the United States Government's duty to protect those freedoms.

In the case sub judice, Respondents argue that the tribe's assertion of sovereign immunity is necessary to protect its absolute and total sovereignty. They contend that sovereign immunity is essential to the preservation of "tribal self-governance." Respondents' Ninth Circuit Answering Brief, at 12. They even rely upon and quote from a tribal decision that equates the two, that demands total sovereignty for tribes and urges assertions of sovereign immunity as the vehicle for obtaining and/or preserving that complete

sovereignty. Id. at 10-11; Board of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Ind. L. Rptr. 6033 (N. Plains Intertribal Ct. (App. 1990)).

Yet, since Oliphant, tribal sovereignty has been less than absolute when confronted with the personal liberty interests, the fundamental civil liberties of non-Indians. Tribal sovereignty has already been made to yield to the civil liberties of non-Indians. The question before this Court is whether the fundamental civil liberties at stake here also require a diminishment of the tribe's sovereignty.

On their face, there is nothing less significant about these liberties than those involved in Oliphant. The right to be free from a threatened summary execution is just as important as the right to have non-Indians on a jury. The right to be free from compulsive, governmental evangelism is equally as sacred as the right to confront and cross-examine witnesses. The due process protections against the deprivation of liberty and the loss of property are just as cherished as the privilege against self-incrimination. All are cut from the same cloth; all arise from the same source; all deserve the same protection.

II. Fundamental Civil Liberties Do Not Depend Upon a Legislative Majority

No analysis of the pending issue can proceed any further without a discussion of Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). In Kiowa, this Court declined to abrogate tribal sovereign immunity in a suit over a commercial transaction that occurred off Indian lands. The majority of the Court noted that: (1) tribal sovereign immunity developed almost by accident; (2) that it was created by the judiciary and can be

abrogated or limited by the judiciary; and (3) that there are serious doubts about the continuing validity of tribal sovereign immunity in light of the emergence of tribes into the mainstream of the nation's commerce. 523 U.S. at 756-58. The Court also reflected upon the fact that tribal sovereign immunity can be particularly harsh, even unjust, when the person seeking relief is a tort victim who had no opportunity to negotiate a potential waiver of the tribe's immunity.² *Id.* at 758.

Despite these hesitations, the Court decided the issue of tribal sovereign immunity should be deferred to Congress. The Court felt that the balancing of the competing economic and policy matters was best left to the legislative process. *Id.* at 759.

Petitioners respect that deference in the context of a commercial transaction.³ The legislative process, as imperfect and imprecise as it is, is designed to identify and implement the will of the majority. However, fundamental civil liberties are never subject to the whims and pressures of

² It is instructive to note that the two non-Indians the tribes desired to exercise criminal jurisdiction over in *Oliphant* were residents of the reservations. They chose to live on the reservations; thus, their claim for this Court's protection of their fundamental civil liberties would appear to be weaker than Petitioners', who made no voluntary choice and had no opportunity to negotiate a waiver of the tribe's immunity.

³ Petitioners bemoan the growing legal distinction between personal liberty interests and property rights, but recognize that that distinction is not an issue in this case and need not, therefore, be addressed.

majority will. They stand above the legislative process, sacred and inviolate.

As previously noted, governments exist to protect these fundamental civil liberties, not to subject them to a referendum, not to subject them to, in James Madison's words, the "tyranny of the majority." No vote of Congress was necessary to establish these fundamental civil liberties and no vote of Congress, no matter how overwhelming, can detract from them. There is no weighing or balancing of competing policy issues when fundamental civil liberties are at stake. When it comes to fundamental civil liberties, the legislative process is not just irrelevant, it is dangerous.

The role of ultimate protector of fundamental civil liberties has always been the one assigned to the federal judiciary, especially this Court. Indeed, this Court's protection of basic human liberty has been called a "fundamental constitutional principle." *Bush v. Gore*, ___ U.S. ___, 121 S. Ct. 525, 557 (2000) (Breyer, J., dissenting). Whether it involved the right to counsel,⁴ the right to remain silent,⁵ freedom of speech⁶ or freedom of religion,⁷ this Court, not Congress, has been the branch of the federal government that has afforded protection and preservation of fundamental civil liberties. This Court, not Congress, has taken the lead in ensuring that fundamental civil liberties are not diluted by statute or practice. This Court, not Congress, played this indispensable role of protector in *Oliphant*. This Court, not Congress, stands as the watchman on the walls of

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ *Miranda v. Arizona*, 384 U.S. 386 (1966).

⁶ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁷ *Engle v. Vitale*, 370 U.S. 421 (1962).

freedom. And this Court, not Congress, should protect Petitioners' fundamental civil liberties now.

Petitioners do not ask this Court to overrule Kiowa or any other prior case. Unlike the Petitioner in Talton v. Mayes, 163 U.S. 376 (1896), who was a tribal member being subjected to tribal justice, Petitioners are non-Indians seeking a ruling that there is a remedy for the violation of their fundamental civil liberties. Unlike the Petitioner in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), who was a tribal member asking this Court to rewrite internal tribal laws on membership, Petitioners do not seek to limit the tribe's legitimate exercise of local, self-government power. Instead, they merely ask the Court to allow the tribe to be held accountable for the governmental abuse of power inflicted on non-Indians.

Petitioners do not even ask this Court to limit the application of Kiowa to its facts. Kiowa may, in fact, continue to be the guiding precedent in cases that differ from it. But, that guiding precedent should not reach these facts, should not apply so as to leave these Petitioners' fundamental civil liberties unprotected and their violation unredressed. The importance of fundamental civil liberties to our cherished notions of freedom merely requires that this Court hold that in cases such as this, a tribe's sovereign immunity must yield. Immunity must yield to the time-honored commitment of the higher sovereign to protect non-Indians "from unwarranted intrusions on their personal liberty." Oliphant, 435 U.S. at 210.

Conclusion

The United States of America is the only country in the history of the world to have been founded upon a

philosophical ideal: individual human liberty. It was this commitment to freedom that spawned a revolution and it was the listing of these freedoms in the Bill of Rights that led to the ratification of our Constitution. Our Government's protection of basic human liberties has precipitated the spillage of American blood and the erection of monuments to the glory and sustaining value of human freedom.

This Court has played an honorable and notable role in the perpetual protection of those freedoms we, as a people, hold dearest. Petitioners ask this Court to take one more step along that storied path. Petitioners ask that this Court recognize, yet again, that the United States' commitment to the fundamental civil liberties of its people surpasses Respondents' need for total and absolute sovereignty. Individual freedoms do not stand, can not stand, on the shifting sands of majority will. It is up to this Court, not Congress, to vindicate the fundamental constitutional principle of protecting basic human liberty.

Petitioners humbly request this Court to reverse the decisions below and hold that Respondents' immunity must yield to Petitioners' fundamental civil liberties.

Respectfully Submitted,

James P. Mueller
Counsel of Record
Douglas V. Drury
Mueller & Drury, P.C.
Linda Rawles
Tom Rawles
11000 N. Scottsdale Rd.
Suite 181
Scottsdale, Arizona 85254
(480) 368-5511

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15120

[Filed January 7, 2002]

ROSS B. LINNEEN, husband;)
KIM ANN LINNEEN, wife,)
Plaintiffs-Appellants,)
)
v.)
)
GILA RIVER INDIAN COMMUNITY;)
MARY THOMAS, Governor of the)
Gila River Indian Community;)
RALPH ANDREWS, Gila River Tribal)
Ranger, in his official and individual capacity;)
UNITED STATES OF AMERICA;)
INTERIOR, DEPARTMENT OF;)
BUDDY SHAPP, BIA Officer, in his individual)
and official capacity;)
INDIAN AFFAIRS, Bureau of,)
Defendants-Appellees.)

On Appeal From
United States District Court
for the District of Arizona
D.C. No. CV-97-02708-RGS
Roger G. Strand, District Judge, Presiding