No. 05-1614

In The
Supreme Court of the United States

RUSSELL MEANS,

Petitioner,

v.

NAVAJO NATION, a federally recognized Indian Tribe; RAY GILMORE, Judge of the Judicial District of Chinle, Navajo Nation, Arizona; ROBERT YAZZIE, Chief Justice of the Navajo Nation

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents restate the issues before this Court as follows:

1. Whether the Navajo Nation, exercising its inherent right to prosecute a nonmember Indian, as recognized and affirmed by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, provides appropriate procedural protections consistent with or greater than those required of the ICRA.

2. Whether the Navajo Nation, exercising its inherent right to prosecute a nonmember Indian, as recognized and affirmed by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, without violating the Navajo Treaty of 1868, 15 Stat. 667 and without violating the equal protection provisions of the United States Constitution.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY PETITION

This Court has previously affirmed Congress' broad constitutional plenary power to impose "benefits" and "burdens" on federally recognized Indian Tribes and their members. Recently the "plenary power" doctrine upheld Congress' constitutional authority to remove implied restrictions prohibiting federally recognized Indian Tribes from exercising inherent criminal jurisdiction over non-members Indians. Consequently, current federal law and federal policy support the Navajo Nation's prosecution of Petitioner. The Ninth Circuit Court of Appeals also properly concluded that the Navajo Treaty of 1868, Art. 1, 15 Stat. 667, and the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, are reconcilable and affirm, rather than prohibit the Navajo Nation's prosecution of Petitioner. This decision is consistent with existing federal policy given the unique political government-to-government relationship and trust responsibilities of the United States to the Navajo Nation. In addition, the Ninth Circuit Court of Appeals decision was correct that the Navajo Nation courts, "as a facial matter", provide Petitioner appropriate procedural protections consistent with those required of the Constitution. Consequently, the Navajo Nation provides procedural protections greater than those required by the ICRA. The Court should therefore deny the Petition because it does not qualify or otherwise merit review by this Court.

STATEMENT OF CASE AND FACTS

Respondents incorporate the discussion of the facts in the opinion of the Ninth Circuit Court of Appeals (*Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005)) and the discussion of the facts in the opinion of the Supreme Court of the Navajo Nation (*Means v. District Court of the Chinle Judicial District*, 2 Nav. App. R. 528, 26 I.L.R. 6083 (1999)).

ARGUMENT

> Like smallpox blankets, the Court's judgments create an immediate debilitating impact, confusion in Indian Country for tribal governments and their neighboring governments. The governmental neighbors who often work together on common concerns find that governance is now unnecessarily complex for tribes especially, governmental planning and economic development have become more problematic. An ordinary exigency, such as an accident somewhere in Indian Country, with an immediate need for emergency medical services, fire services, and possibly the need to arrest an offender, raises questions about which government has the authority to respond. The cumulative decisions of the Court do not engender optimism about the future of tribal jurisdiction when the cases eviscerate, albeit incrementally, the authority of the fist sovereigns within the borders of the United States. [Footnote omitted] Like the toxic blankets, the cases contain unacknowledged elements that in their maximum force could destroy the tribes as

> culturally, distinct nations governing their own lands.[1]

I. THE CONGRESS HAS BROAD CONSTITUTIONAL PLENARY POWER OVER INDIAN AFFAIRS AND IS EMPOWERED TO LEGISLATIVELY RECOGNIZE AND AFFIRM THE LONG-STANDING INHERENT CRIMINAL JURISDICTION OF FEDERALLY RECOGNIZED INDIAN TRIBES OVER NONMEMBER INDIANS

The Petitioner argues that the Congress lacks sufficient authority to impose ICRA burdens on members of federally recognized Indian Tribes. (Pet. 20). In spite of his assertion, the question whether Congress has plenary authority to legislatively "recognize and affirm" inherent Tribal court jurisdiction over members of federally recognized Indian Tribes has long been affirmed. *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903).

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce * * * with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

Morton v. Mancari, 417 U.S. 535, 551-552 (1979).

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[1] Gloria Valencia-Webber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 6 U. Pa. J. Const. L. 405, 409-10 (Jan. 2003).

In *Duro v. Reina*, 495 U.S. 676, 692 (1990), this Court stated clearly that Congress has "broad authority" to "impose burdens and benefits" on federally recognized Indian Tribes and their members. Recently the Court found that Congress' plenary power included the "constitutional power to lift restrictions on the tribes' criminal jurisdiction over nonmember Indians." *United States v. Lara*, 541 U.S. 193, 200 (2004), 124 S. Ct. 1628 (2004). Unquestionably, Congress has well-established "plenary and exclusive power" with regard to enacting legislation that singles out federally recognized Indian Tribes and their members, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979), that provide both benefits and burdens.

The Congress, then, must have equal authority and responsibility to clarify relationships between federally recognized Indian Tribes and individuals. *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913) (Congress has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities). Accordingly, the ICRA amendments, in plain language, simply "recognize and affirm" a constitutionally recognized right of the Navajo Nation to enact and enforce its own laws, *United States v. Rogers*, 45 U.S. 567, 573 (1846), and clarifies the relationship between federally recognized Indians and nonmember Indians.

Applying sound federal Indian policy and following this Court's interpretation of Congress' broad constitutional authority over Indian affairs, the Ninth Circuit Court of Appeals correctly found that "it is settled law that, pursuant to the 1990 amendments to the Indian Civil Rights Act, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember

Indians for crimes committed on the tribe's reservation." *Means*, 432 F.3d at 931.

II. THE NAVAJO NATION'S CRIMINAL PROSECUTION OF PETITIONER, A NONMEMBER INDIAN, DOES NOT CONFLICT WITH THE NAVAJO TREATY OF 1868

The Petitioner encourages this Court to decide, contrary to well established legal principles,[2] that the Treaty of 1868 prohibits the Navajo Nation from exercising criminal jurisdiction over members of federally recognized Indian Tribes.[3] (Pet. 18-19) The Navajo Nation's understanding is that the authority to regulate activities of non-Navajos within its territorial jurisdiction was retained when it signed the Navajo Treaty of 1868 with the United States.[4]

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[2] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). ("Treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor.")

[3] "If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them. . . . "

[4] "The Navajo Nation, however, argues that a discussion between General Sherman and the Navajo Chief Barboncito during the treaty negotiations expresses an understanding that the Navajo were entitled to 'drive out' raiders from the Ute and Apache tribes who might molest them, and that the Indian 'bad men' clause thereafter meant to confer

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The Navajo Treaty of 1868 strengthens Navajo Nation jurisdiction over individuals and their activities within its territorial jurisdiction. *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir. 1969) (Navajo Nation retains exclusive jurisdiction over extradition of members of federally recognized Indian Tribes.) *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 597 (9th Cir. 1983) (Navajo Nation retains civil jurisdiction over non-Indians, saying that "the reservation of land to the Navajos by these treaties establishes Navajo lands as within the exclusive sovereignty of the Tribe under general federal supervision."). See also *Williams v. Lee*, 358 U.S. 217 (1950).

Given the unique political government-to-government relationship and trust responsibilities of the United States to the Navajo Nation, the Ninth Circuit Court of Appeals, while not accepting the Navajo Nation's understanding, reached the correct decision that the plain language within the Navajo Treaty of 1868 and the ICRA can be reconciled to affirm the Navajo Nation's long-held inherent authority to prosecute Petitioner for violating Navajo criminal law.

As the Ninth Circuit Court of Appeals also observed, "The United States has not demanded that the Navajo turn Means over for federal prosecution, and the Navajo, have chosen to prosecute Means themselves in tribal court, which the 1990 Amendments to the Indian Civil Rights Act recognize they have the power to do." *Means*, 432 F. 3d at 937.

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jurisdiction over nonmember Indians, not remove it." *Means*, 432 F.3d at 936.

III. LEGISLATION THAT CLARIFIES RELATIONSHIPS BETWEEN INDIVIDUALS AND FEDERALLY RECOGNIZED INDIAN TRIBES DOES NOT VIOLATE EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION

The Petitioner suggests that the Congress has exceeded its authority under the Indian Commerce Clause and has now violated his equal protection rights because Congress has singled out a whole race for purposes of federal legislation. (Pet. 7-10). The legislation actually focuses on the unique political government-to-government relationship between the United States and federally recognized Indian Tribes. As such, the question becomes whether the ICRA amendments, as they impose a burden on members of a federally recognized Indian Tribe, are rationally related, *Mancari*, 417 U.S. at 555, to the "congressional policy of Indian self-government", *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976). The ICRA amendments easily satisfy this requirement.

The United States and the Navajo Nation consecrated their political government-to-government relationship by signing the Navajo Treaty of 1868 more than a century ago. One hundred years later the Court announced that federally recognized Indian Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by **implication** as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) [Emphasis added]. Even though the Court recognized the continued inherent authority of federally recognized Indian Tribes to prosecute their own members, *Id.*, at 326, the Court held in *Oliphant v. Suquamish*, 435 U.S. 191 (1978) that federally recognized Indian Tribes were

implicitly divested of their inherent power to prosecute nonIndians. *Id.* at 206-212 (1978). [Emphasis added]. A mere twelve years later, the Court again **implicitly** divested federally recognized Indian Tribes of inherent governmental authority when it found that federally recognized Indian Tribes no longer had criminal jurisdiction over members of other federally recognized Indian Tribes. *Duro,* 495 U.S. at 684-696 (1990). [Emphasis added].

The result of course was certain, there was no sovereign with recognized authority to prosecute federally recognized nonmember Indians for misdemeanor crimes in Indian Country unless the criminal act fell within applicable federal law. States lacked authority to prosecute members of federally recognized Indian Tribes for their criminal conduct in Indian Country, (Ariz. Const. Art. XX, 36 Stat. 557, § 20; N.M. Const. Art. III, 28 Stat. 107, § 3; Utah Const. Art. XXI, §§ 2, 10, 36 Stat. 557, § 2[5]) See also *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Draper v. United States,* 164 U.S. 240, 242-243 (1896); *United States v. Kagama*, 118 U.S. 375, 384 (1886); *United States v. McBratney*, 104 U.S. 621, 623 (1882). The United States, while it had some authority to prosecute federal crimes in Indian Country, actually lacked jurisdiction over most minor crimes committed in Indian Country by members of federally recognized Indian Tribes. *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994); *Keeble v. U.S.*, 412 U.S. 205, 210-212 (1973); *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883); *United States v. Errol D. Jr.*, 292

[5] Enabling legislation of the States of Arizona, New Mexico, and Utah renouncing jurisdiction in Indian Country as a requirement for admission into the Union.

F.3d 1159, 1161-1162 (9th Cir. Mont. 2002); Indian Country Crimes Act, 18 U.S.C. 1152 (Prohibiting federal prosecution of crimes committed by members of federally recognized Indian Tribe against another member of a federally recognized Indian.); Major Crimes Act, 18 U.S.C. 1153 (Limiting criminal jurisdiction to only fourteen offenses); Assimilative Crimes Act, 18 U.S.C. 13 (Prohibiting federal prosecution of misdemeanor crimes committed by members of federally recognized Indian Tribe against another member of a federally recognized Indian Tribe).

By a simple stroke of a pen, the "smallpox blanket" was suddenly reintroduced into Indian Country. With federally recognized Indian Tribes being **implicitly** divested of its long-held constitutionally recognized inherent authority to prosecute nonmember Indians; the United States having only limited authority and lacking sufficient resources to prosecute misdemeanor crimes in Indian Country; and, the states being prohibited generally from prosecuting these Indians, nonmember Indians were granted clear authority to engage in criminal activities, especially domestic violence,[6] while evading prosecution for their criminal acts.[7] The ability to provide appropriate

[6] According to statistics reported by the Navajo Nation Judicial Branch, 63,127 new civil and criminal cases were filed in Fiscal Year 2005, including 3,484 civil actions, 11,198 criminal actions, and 5,052 domestic violence cases. Civil and criminal traffic offenses are not included here, nor are offenses involving juveniles. Judicial Branch of the Navajo Nation, Annual Report, Fiscal Year 2005 (October 1, 2004 – September 30, 2005) Released March 2006.

[7] It is not uncommon for the United States Attorney's Office for the District of Arizona, the District of New Mexico, and the District of Utah to decline a case, although working from three separate and distinct federal prosecutorial guidelines, because it does not involve "severe bodily injury or death", or does not involve a significant amount of illegal drugs, or does not involve a significant amount of money. It is

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public safety services was significantly impacted diminishing the quality of life in Indian country.

The Court acknowledged, however, the "ultimate [congressional] authority over Indian affairs" and expressly invited Congress to legislatively remedy the problem. *Duro* at 698. Almost immediately, Congress amended ICRA's definition of Tribes' "powers of self-government" with clear language to include, the inherent power of Indian tribes, "hereby recognized and affirmed, to exercise criminal jurisdiction **over all Indians**." 25 U.S.C. 1301(2). [Emphasis added]. The legislation went on to define "Indian" to mean any person subject to criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. See 25 U.S.C. 1301(4).

A person meets this definition if he is of Indian ancestry and enrolled in or affiliated with a federally recognized Indian Tribe. *United States v. Antelope*, 430 U.S. 641, 646-647, n.7 (1977); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). On the other hand, a person who is only of Indian descent but is not an enrolled member of a federally recognized Indian Tribe is not an "Indian" for purposes of this definition. *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1999); *State v. Sebastian*, 243 Conn. 115, 701 A.2d 13 (1997), *cert. denied*, 118 S. Ct. 856 (1998), *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974).

The Petitioner also attempts to compare the NAACP and its members with members of federally recognized Indian Tribes in an attempt to identify an equal protection argument. (Pet. 14). However, while the NAACP may be a voluntary organization with members and a "political" agenda, it is not a federally recognized government that

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common knowledge that the primary focus of the United States Attorney's Office is homeland security and border patrol.

possesses a political government-to-government relationship with the United States. The definition of "Indian" for determining criminal jurisdiction in Indian Country does not violate equal protection because it is based on a voluntary political affiliation with a federally recognized Indian Tribe, not one based on race as the Petitioner suggests. See *Antelope*, 430 U.S. at 645-650. *United States v. Holiday*, 70 U.S. (3 Wall.) 407, 419 (1866) (the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.). There can be no "Indian" without a federally recognized tribe. See *Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979). The reason then for subjecting an individual to criminal jurisdiction in Indian Country is the person must meet the specific requirements for voluntary membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (Federally recognized Indian Tribes have the right to "make their own laws and be ruled by them.")

Consequently, federally recognized Indian Tribes, such as the Navajo Nation, have legislatively created enrollment requirements[8] and established procedures that make

[8] 1 N.N.C. § 701, "The membership of the Navajo Nation shall consist of the following persons:

A. All persons of Navajo blood whose names appear on the official roll of the Navajo Nation maintained by the Bureau of Indian Affairs.

B. Any person who is at least one-fourth degree Navajo blood, but who has not previously been enrolled as a member of the Navajo Nation, is eligible for membership and enrollment.

C. Children born to any enrolled member of the Navajo Nation shall automatically become members of the Navajo Nation and shall be enrolled, provided they are at least one-fourth degree Navajo blood."

Tribal membership completely voluntary[9], just as an individual's decision to enter into Indian Country and commit a criminal act is completely voluntary. If an individual does not care for the benefits or burdens of voluntary membership in a federally recognized Indian Tribe then that person has the right to relinquish or renounce their membership.[10] See *Duro v. Reina,* 495 U.S. 676, 694 (1990). Equally important, if an individual does not care to be subject to the laws of the Navajo Nation then they have the right not to enter within the territorial jurisdiction of the Navajo Nation, which has clear and defined legal boundaries.

The Petitioner admits that he is an enrolled member of the Oglala Sioux Tribe, a federally recognized tribe. (Pet. 3-4). As a result, it is his political status as a voluntary member of the Oglala Sioux Tribe that subjects him to Navajo Nation jurisdiction not his race. The Navajo Nation does not exercise criminal jurisdiction over individuals simply because they are genetically descendent from the mongoloid race without consent.[11]

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[9] 1 N.N.C. § 751, "Anyone wishing to apply for enrollment in the Navajo Nation may submit an application pursuant to 1 N.N.C. § 760. Such application must be verified before a notary public."

[10] 1 N.N.C. § 705, "Any enrolled member of the Navajo Nation may renounce his membership by written petition to the President of the Navajo Nation requesting that his name be stricken from the Navajo Nation roll. Such person may be reinstated in the Navajo Nation only by the vote of a majority of the Navajo Nation Council." According to records maintained by the Navajo Department of Vital Records, at least 1,417 individuals have voluntarily renounced or relinquished their membership with the Navajo Nation since 1947.

[11] See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Metrobroadcasting v. FCC*, 497 U.S. 547 (1990) (question reduced to "blood, not background and environment."

If the Petitioner was not a member of a federally recognized Indian Tribe but yet possessed some minor amount of genetic "Indian" heritage he could stand all day long on the top of the highest mountain screaming in his loudest voice that he was in fact an "Indian" without any hope of receiving any "benefit" or "burden" received by the most silent member of a federally recognized Indian Tribe. The act, therefore, of clarifying the relationship between federally recognized Indian Tribes and their members merely clarified the balance of "benefits" and "burdens" members of federally recognized Indian tribes receive in Indian Country. This Court has held that the Congress' broad constitutional authority over Indian affairs includes the ability to promulgate "legislation that might otherwise be offensive." *Yakima Indian Nation*, 439 U.S. at 500-501.

Accordingly, the Court has upheld other legislation that, like the ICRA, has provided both "benefits" and "burdens" to members of federally recognized Indian Tribes. The following are but a few: Removal Act (removing members of federally recognized Indian Tribes from their eastern homelands without their consent), Indian Citizenship Act (granting federal, and state citizenship through the 14th Amendment, to members of federally recognized Indian Tribes without their consent),[12] General Allotment Act (1987) (Distributing land holdings of federally recognized Indian Tribes among its members without their consent), See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), Indian Reorganization Act, 25 U.S.C. 461 et seq., (reversed the affects of the General Allotment Act and permitted tribes to design legal structures to aid in self-government), Indian Financing Act of 1974, 24 U.S.C. 1451

[12] *See generally*, Kenneth W. Johnson, Note, *Sovereignty*, *Citizenship, and the Indian*, 15 Ariz. L.R. 973 (1974).

et seq., (established a revolving loan fund to aid Indian Country development), Indian Self-Determination and Education Assistance Act, 25 U.S.C., 450 et seq., (authorized federally recognized Indian Tribes to assume administrative responsibility for federal Indian programs), Indian Tribal Government Tax Status Act of 1982, 96 Stat. 2607 (according federally recognized Indian Tribes federal tax advantages enjoyed by states), Indian Child Welfare Act, P.L. 95-608, see *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 490 U.S. 30, 104 L. Ed. 2d 79 (1989), *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976) (exclusive Tribal court jurisdiction over child custody proceedings); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976) (tobacco taxes); *Morton v. Mancari*, 417 U.S. 535, 552-554 (1974) (BIA hiring preference); see also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 673, n. 20 (1979) (exercise of treaty rights); *United States v. Antelope*, 430 U.S. 642-650 (1977).

IV. THE NAVAJO NATION COURTS PROVIDE INDIVIDUALS WITH PROCEDURAL PROTECTIONS CONSISTENT WITH OR GREATER THAN THOSE REQUIRED BY THE ICRA

Because this Court has determined that the Bill of Rights does not directly apply to federally recognized Indian Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Petitioner makes a broad allegation that he is being unconstitutionally subjected to a nonconstitutional forum that does not provide the "full panoply" of procedural protections required by the United States Constitution. (Pet. 16-18) This is simply incorrect.

The Navajo Nation's territorial jurisdiction includes approximately 27,000 square miles of rural country and

limited infrastructure spanning across the states of Arizona, New Mexico, and Utah. It is one of the largest federally recognized Indian Tribes within the United States with 255,543 enrolled citizens. (Navajo Nation Vital Records Office (2001)) Among the quarter million Navajos, almost 170,000, or close to three-fourths of these citizens live within the territorial jurisdiction of the Navajo Nation. Approximately 12,000 additional residents of the Navajo Nation are nonNavajo and there are hundreds of thousands visitors and guests who travel within the territorial jurisdiction of the Navajo Nation annually. The median population age is 22, with a per capita income of $6,804. In addition, 31.9 percent of tribal housing lacked complete plumbing, 28.1 percent lacked complete kitchen facilities, and 60.1 percent lacked telephone services. (United States Census (2000)) The Navajo Nation's unemployment rate is estimated at 58 percent. (Navajo Nation Economic Development Office). Consequently, all the right ingredients for civil disputes and criminal mischief are present on the Navajo Nation.

To address these issues appropriately, the Navajo Nation has developed a complex civil and criminal justice system that provides parties a fair[13] and neutral forum[14] to

[13] 1 N.N.C. § 3 (1995); "Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation . . . "

[14] "The right to an impartial judge is an essential element of due process and the basic right of a criminal defendant, *McCabe v. Walters*, 5 Nav. R. 43 (1985). The standard for the disqualification of a judge is that there must be facts which show bias and prejudice, which influences the judge so that there may not be a fair trial. Estate of Peshlakai, 3 Nav. R. 180 (Shiprock D. Ct. 1981); *Toledo v. Benally*, 4 Nav. R. 142 (Window Rock D. Ct. 1983)." *Navajo Nation v. MacDonald*, 7 Nav. R. 1, 2 (1992).

resolve civil disputes and prosecute crimes. To ensure that everyone is provided appropriate notice as to what is expected from them as citizens, visitors and guests, the Navajo Nation has enacted and published comprehensive laws that govern individuals and activities within its territorial jurisdiction.[15] To help guide the parties through this complex system, the Navajo Nation has adopted detailed rules and procedures for governing proceedings within its courts, including criminal prosecutions.[16]

The Navajo Nation, as a responsible democratic government,[17] has consciously taken appropriate steps to provide every criminal defendant with broad legal protections pursuant to the Navajo Bill of Rights.[18] These rights are consistent with those provided by state and federal courts and greater than those required by the ICRA.[19] The Navajo Nation Supreme Court has consistently issued decisions strongly defending these rights, especially as it applies to the right of criminal defendants to fair proceedings with appropriate procedural safeguards.

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[15] See Titles 1-24 of the Navajo Nation Code.

[16] The Navajo Nation Rules of Criminal Procedure were adopted by the Navajo Nation Supreme Court on December 29, 1986 and were approved by the Judiciary Committee of the Navajo Nation Council on January 9, 1987 and became effective March 1, 1987.

[17] The sovereign Navajo Nation has the powers to make laws, execute its laws, and interpret its laws. The Navajo Nation Council enacts the laws; the Executive Branch executes those laws; and the Navajo Nation Courts interprets these laws.

[18] 1 N.N.C. §§ 1-9

[19] The Navajo Nation provides appointed counsel to indigent defendants either from the Navajo Nation Public Defender's Office or by requiring pro bono services from members of the Navajo Nation Bar Association, Inc.

Among these rights are the right to a speedy trial[20] and public trial, the right to be informed of the nature of the charges against them, the right against self-incrimination,[21] the right to confront witnesses against them, the right to compulsory process to obtain witnesses on their behalf, the right to counsel,[22] and the right to a

[20] "Under the Navajo Bill of Rights criminal defendants have a right to a speedy trial. 1 N.N.C. § 6 (2005). In determining whether the right to a speedy trial has been violated, the court applies four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant caused by the delay. *Navajo Nation v. MacDonald*, 7 Nav. R. 1, 11 (Nav. Sup. Ct. 1992); *Navajo Nation v. Bedonie*, 2 Nav. R. 131, 139 (Nav. Ct. App. 1979). The Court interprets these factors in light of Dine' bi beenahaz'a'anii. *Navajo Nation v. Badonie*, No. SC-CV-06-05 slip op. at 4 (Nav. Sup. Ct. March 7, 2006). They are related factors and the Court must consider them together with the relative circumstances, 'engaging in a difficult and sensitive balancing process.' *Id.* Further, 'the right of a speedy trial is necessarily relative,' as 'it is consistent with delays and depends upon circumstances, and secures rights to a defendant, but does not preclude the rights of public justice.' *Id.* at 4-5." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 5.

[21] "We therefore hold that the police, and other law enforcement entities and agencies, must provide a form for the person in custody to show their voluntary waiver. They must also explain the rights on the form sufficiently for the person in custody to understand them. Merely providing a written English language form is not enough. (citations omitted). The sufficiency of the explanation in a Navajo setting means, at a minimum that the rights be explained in Navajo if the police officer or other interviewer has reason to know the person speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence." *Navajo Nation v. Rodriguez*, No. SC-CR-03-04.

[22] "The right to counsel is in the Navajo Bill of Rights including the right to effective assistance of counsel. This right is also guaranteed by the Navajo common law. The traditional Navajo "trial" involved affected individuals "talking" about the offense and the offender to resolve the problem. The alleged offender had the right for someone to speak for

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trial by jury[23] if the offense carries jail-time upon conviction.[24] See also 25 U.S.C. 1302(6) and (10). Unlike the several states that place burdens or restrictions on non-citizen participation in the legal system, the Navajo Nation also allows nonmembers, including non-Indians, the opportunity to help develop Navajo law by serving on juries.[25]

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him. *Boos v. Yazzie*, 6 Nav. R. 211, 214 (1990). The effectiveness of the speaker (and there could be more than one) was measured by what the speaker said. If the speaker spoke wisely and with knowledge while persuading others in their search for consensus, that indicated effectiveness. If the speaker was hesitant, was unsure, or failed to move others, that person was not a good speaker and thus was ineffective. This Navajo culture standard is stronger than that required by the Indian Civil Rights Act, just as the Navajo courts have gone beyond that Act by appointing members of the Navajo Nation Bar Association to provide pro bono defense services to indigents. (citations omitted). *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 436 (1991).

[23] *George v. Navajo Tribe*, 2 Nav. R. 1 (1979) (criminal defendants provided prospective Navajo and non-Navajo jurors from Navajo Nation and Arizona's Navajo and Apache counties.)

[24] 1 N.N.C. § 7. Rights of accused; trial by jury; right to counsel: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him or her; and shall have compulsory process for obtaining witnesses in their favor. No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under 7 N.N.C. § 651 shall be denied the right, upon request, to a trial by jury of not less than six persons; nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

[25] 7 N.N.C. § 654. Eligibility of jurors: Any person residing within the territorial jurisdiction of the Navajo Nation over the age of 18 years, of at least ordinary intelligence, and not under judicial restraint, shall be eligible to be a juror. "The requirement that a jury must be a fair

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If an individual claims a violation of due process or equal protection he or she has the right to request judicial review.[26] The Petitioner's case, however, does not raise any

cross-section of the community comes from the United States Supreme Court ruling in *Glasser v. United States*, 315 U.S. 60 (1942). The rule was applied to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The standards for the rule are found in *Taylor v. Louisiana*, 419 U.S. 522 (1975), and they are as follows: 1) juries must be drawn from a source which is fairly representative of the community, but need not mirror it; 2) all defendants may assert the right, including people who are not members of an excluded group (i.e., Indians can challenge the exclusion of non-Indians from juries); 3) a defendant can prevail by showing a systematic exclusion of distinctive groups of people; but not an occasional mistaken exclusion. The groups which must not be excluded include 'large distinctive groups' and '[i]dentifiable segments playing major roles in the community.' 2 LaFave & Israel, Criminal Procedure § 21.2(d) (1984). Those rules will be applied in Navajo Court." *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 434 (1991) "A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Jurors are a part of the fundamental principles of participatory democracy, where people came together to resolve issues by "talking things out" *Downy v. Bigman*, 7 Nav. R. 176, 177-178 (Nav. Sup. Ct. 1995). "Through this process community members in disharmony are brought back into a state of hozho. See *Navajo Nation v. Blake*, 7 Nav. R. 233, 234 (Nav. Sup. Ct. 1996) (discussing purpose of dispute resolution as bringing persons back into hozho in the context of resolving criminal matters). The participation of the community in resolving disputes between parties is a deeply-seated part of our collective identity and central to our ways of government. As such, we must apply restrictions on the right to a jury trial narrowly, as they turn us away from our traditional ways of dealing with harmony. Given the importance of juries, we will interpret Section 651 to restrict the right to a jury only when such restrictions are clear. Only if the Navajo Nation Council found it absolutely necessary, and clearly articulated the types of cases it deemed necessary to restrict the right to a jury trial, will we deny the right to a litigant that requests it." *Duncan v. Shiprock District Court*, No. SC-CV-51-04 (October 28, 2004).

[26] "This Court's standard of review in criminal cases focuses upon the essential fairness of the proceedings. The Court will examine any

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procedural issues for review. Aside from his initial pro se motion to dismiss in the Chinle District Court, the Petitioner has been represented by legal counsel. He has yet to be formally prosecuted by the Navajo Nation and it is uncertain he will be because of the significant amount of time that has lapsed since the alleged incident and the alleged victims have since been reported to have changed their minds about the events that occurred and their desire to prosecute the matter.

The Petitioner does not face any excessive fine or a large sentence if convicted.[27] In accordance with Navajo due process[28], the Petitioner continues to be released from custody on his own recognizance[29] and he does not allege

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error, whether or not it is raised by a defendant, which is plain and affects substantial rights, or if review is necessary to avoid grave injustice." *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 433 (Navajo 1991) (citing *Navajo Nation v. Platero*, 6 Nav. R. 422, 428 (1991)

[27] At the time of the Petitioner's arrest, the Navajo Nation had not adopted the 1986 ICRA amendments authorizing tribes to increase their penalties from a $500 fine or no greater than six months imprisonment or both to a $5000 fine or no greater than one-year imprisonment or both. As a result, the Petitioner will be facing the lesser sentencing provisions.

[28] The Navajo principle of k'e is important to understanding Navajo due process. K'e contemplates one's unique, reciprocal relationship to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony, k'e stresses the duties and obligations of individuals relative to their community. (Footnote omitted). The importance of k'e to maintaining social order cannot be overstated. In light of k'e, due process can be understood as a means to ensure that individuals who are living in a state of disorder or harmony, are brought back into the community so that order for the entire community can be reestablished." *Atcitty and Begay v. W.R. Dist. Ct.*, 7 Nav. R. 227, 230, (1996).

[29] It should be noted that recently the Petitioner found gainful employment within the Navajo Nation. As an actor, he played a major role portraying a Navajo boxing coach in the motion picture, "Black

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any specific procedural defects in his prosecution. More importantly, he has been provided numerous opportunities to present his position at various levels and before various tribunals through habeas corpus proceedings. And should Petitioner by convicted[30] and sentenced; he once again has the right to seek habeas corpus review of the detention, if any[31]. 25 U.S.C. 1303.

While this Court in *Lara*, expressed concerns about a defendant's rights being protected in tribal courts, *Id.* at 207, the Ninth Circuit Court of Appeals found that "as a

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Cloud", that was filmed primarily within the territorial jurisdiction of the Navajo Nation.

[30] "The Navajo Nation must prove each element of each statutory violation charged beyond a reasonable doubt. The defendant's innocence is presumed. 17 N.T.C. § 206, *Platero*, Nav. R. 422, 429." *Navajo Nation v. MacDonald*, *Sr.*, 6 Nav. R. 432, 442 (1991).

[31] "A habeas corpus proceeding allows this Court to review whether a person is being illegally detained. If, based on the allegations in the defendant's petition, the Chief Justice believes there is a reasonable likelihood of illegal detention, the Chief Justice issues the writ to have the defendant produced to the Court. See *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 4 (Nav. Sup. Ct. May 24, 2004) (Detention is illegal if the court that ordered the detention violated that person's rights under the Navajo Bill of Rights. See e.g., *id.* slip op. at 8, (violation of right against cruel and unusual punishment); *Martine v. Antone*, no. SC-CV-48-02, slip op. at 3 (Nav. Sup. Ct. August 13, 2003) (same); *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 6-7 (Nav. Sup. Ct. May 4, 2001) (violation of right to liberty). The writ simply orders the person holding the defendant to appear before the Court, as the Court may not release the defendant without a hearing before three justices. See *Thompson*, No. SC-CV-29-04, slip op. at 4; Navajo Rules of Appellate Procedure, Rule 14(d) (footnote omitted). At the hearing, the respondent . . . must justify the detention, Thompson, slip op. at 4. If the detention is not justified, the remedy is the defendant's release from the illegal detention. In re H.M., No. SC-CV-63-04, slip op. at 6 (Nav. Sup. Ct. October 13, 2004)." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 2-3 (Nav. Sup. Ct. March 28, 2006).

facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution." *Means*, 432 F.3d at 935. The Navajo Nation, therefore, is providing "the full panoply" of procedural protections to the Petitioner in a manner consistent with those provided by state and federal courts and greater than those required by the ICRA.

CLOSING

As George Catlin, an 18th Century attorney and famous early American painter of "North American Indians", wrote, "Amongst the numerous historians, however, of these [Indians] they have had some friends who have done them justice; yet as a part of all systems of justice, whenever it is meted to the poor Indians, it comes invariably too late, or is administered at an insufficient distance; and that too when his enemies are continually about him, and effectually applying the means of his destruction."[32] These words continue to hold true.

As it stands, "Criminal jurisdiction over offenses committed in Indian Country is governed by a complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (citations omitted); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Which of these sovereigns have the authority to prosecute a criminal act in Indian Country largely depends on the nature of the offense, the existence of applicable law, and whether the victim or the alleged

[32] Letter from George Catlin, in 1 *Letters and Notes on the North American Indian* 8 (JG Press 1995).

perpetrator is a member of a federally recognized Indian tribe.

With the passage of ICRA, as amended, the Congress properly exercised its broad constitutional authority to respond to the health, safety and welfare of all citizens, visitors and guests within Indian Country while providing members of federally recognized Indian Tribes adequate procedural protections. The Ninth Circuit Court of Appeals correctly affirmed the Navajo Nation's inherent authority to prosecute the Petitioner, a member of a federally recognized Indian Tribe, applying well-reasoned precedent interpreting the Congress' broad constitutional authority over Indian affairs and considering the procedural protections provided by the Navajo Nation to criminal defendants.

Should this Court determine that the Navajo Nation cannot prosecute nonmember Indians, then much like the smallpox infected blankets that once spread disease and destruction throughout Indian Country, the health, welfare and safety of citizens, visitors and guests of Indian Country would be in great jeopardy. An adverse ruling would once again greatly diminish the quality of life and opportunity for social, economic, and political development in Indian Country and leave in its place uncoordinated, ineffective and inefficient public safety services. Correspondingly, it would foster greater opportunity for crime and chaos with little or no ability to respond, especially for acts of domestic violence.

Sons and daughters from almost every federally recognized Indian tribe throughout Indian Country proudly serve in every branch of the United States military and unselfishly give their lives on foreign soil fighting

for the right of others to defend themselves from oppression.[33] They should not be required to return to sleep in the midst of "smallpox blankets" as the inherent rights of Indian Nations are slowly eroded through the legal fiction of "implicit divestiture."

"By re-shaping the definition of tribal sovereignty, the Court has struck at the heart of governmental independence for tribes at a time when economies are at their strongest. . . . Thus, as the tribes become active players in the political arena and increasingly able to assert jurisdictional powers, the Court weakened their political bargaining position by undercutting their jurisdictional authority."[34] As one writer has noted, "As broad as the extension of Congressional power over Indian affairs was intended to

[33] "By 1880, only 250,000 Indians remained and this gave rise to the "Vanishing American" theory. By 1940, this population had risen to about 350,000. During World War II more than 44,000 Native Americans saw military service. They served on all fronts in the conflict and were honored by receiving numerous Purple Hearts, Air Medals, Distinguished Flying Crosses, Bronze Stars, Silver Stars, Distinguished Service Crosses, and three Congressional Medals of Honor. * * * As the 20th century comes to a close, there are nearly 190,000 Native American military veterans. It is well recognized that historically, Native Americans have the highest record of service per capita when compared to other ethnic groups." American Indians in World War II, http://www.defenselink.mil/specials/nativeamerican01/wwii.html. The Department of Navajo Veterans Affairs reports that there are presently 11,621 Navajo veterans officially recorded who have served honorably in the United States military of which 8,175 are still alive. (Department of Navajo Veterans Affairs)

[34] E. Andrew Long, Article, The New Frontier of Federal Law: The United States Supreme Court's Active Divestiture of Tribal Sovereignty, 23 Bluff. Pub. Int. L.R. 1, 48 (2005)

be, it was not the purpose of the government, in claiming or exercising that power, to destroy tribal sovereignty."[35]

CONCLUSION

The Navajo Nation is a responsible democratic government. While it may pre-date the Constitution and not be bound by its Bill of Rights, and while there may be procedural errors from time to time within its judicial system, the Navajo Nation provides all individuals with an opportunity to present their claim before a fair and impartial court with appropriate procedural safeguards and in a manner consistent with its state and federal counterparts, including review by habeas corpus. If necessary, it is time for the Court to distinguish the Navajo Nation from other Indian Nations. The Petition for writ of certiorari should be denied.

Respectfully Submitted,

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[35] David Getches, *Beyond the Law: The Renquist's Court's Pursuit of State's Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L.R. 267, 271 (Dec. 2001)