No. 05-1285

# In the Supreme Court of the United States

THOMAS LEE MORRIS, A MINOR CHILD, ET AL.,
PETITIONERS

*v.*

JUDGE TANNER, JUDGE OF THE CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT FOR THE FLATHEAD RESERVATION, ET AL.

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

The Indian Civil Rights Act of 1968, 25 U.S.C. 1301, 1302, restores to Indian Tribes their inherent power to try misdemeanor criminal offenses committed by nonmember Indians in Indian country. The questions presented are:

1. Whether those provisions of the Indian Civil Rights Act of 1968 violate equal protection.

2. Whether those provisions of the Indian Civil Rights Act violate due process.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is *reprinted in* 160 Fed. Appx. 600. The opinion of the district court (Pet. App. 5-27) is reported at 288 F. Supp. 2d 1133.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 4) was entered on December 22, 2005. A petition for rehearing was denied on March 22, 2006 (Pet. App. 56). On March 13, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to

and including April 6, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. "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) (internal quotation marks and citations omitted). The United States may prosecute federal crimes of nationwide applicability to the same extent in Indian country as elsewhere. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that, with certain specified exceptions, federal criminal laws that apply in enclaves under exclusive federal jurisdiction also apply within Indian country. One exception is that offenses committed by one Indian against the person or property of another Indian are not subject to prosecution under Section 1152. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. *Negonsott*, 507 U.S. at 103. States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. *United States* v. *McBratney*, 104 U.S. 621 (1882). In addition, Congress has granted a number of States authority to exercise general jurisdiction over crimes committed by or against Indians in Indian country. See, *e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1162).

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). Tribes have inherent sovereign power to prosecute their own members for violations of tribal law. *Id.* at 326. By virtue of their dependant status, however, Tribes have been divested of their inherent power to prosecute non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978).

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, imposes a number of limitations on Tribes that are analogous to those that the Constitutions imposes on the United States and the States. For example, ICRA extends due process and equal protection rights that parallel those arising under the Constitution. 25 U.S.C. 1302 (8). ICRA also affords a habeas corpus remedy in federal court. 25 U.S.C. 1303. Tribal courts have jurisdiction only over misdemeanor offenses, and are limited by ICRA to imposing punishments of up to one year in prison and a fine of $5000. 25 U.S.C. 1302(7).

For many years, tribal courts exercised criminal jurisdiction over nonmember Indians. In *Duro* v. *Reina*, 495 U.S. 676, 687-686 (1990), however, the Court held that the Tribes' dependent status had divested them of that authority. *Duro* created a potentially significant jurisdictional gap in law enforcement in Indian country. After *Duro*, unless an offense committed by a nonmember Indian against an Indian fell within the Indian Major Crimes Act or a federal law of general applicability, the United States, States, and Tribes all lacked authority to prosecute it. That presented a significant problem because many reservations have a large population of nonmember Indians.

In response to *Duro*, Congress enacted legislation that reaffirmed inherent tribal jurisdiction over nonmember Indians, thereby closing the jurisdictional gap that *Duro* had created. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (25 U.S.C. 1301(2)). The legislation amended ICRA's definition of a Tribe's "powers of self-government" 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). ICRA defines "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" under 18 U.S.C. 1153. 25 U.S.C. 1301(4).

The initial legislation was effective until September 1991. § 8077(d), 104 Stat. 1893. After the legislation was enacted, Congress conducted "extensive hearings." S. Rep. No. 153, 102d Cong., 1st Sess 12-13 (1991). As a result of those hearings, Congress made the legislation permanent. Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646. Congress decided that permanent legislation was appropriate because nonmember Indians "own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," receive many tribal services, and have other close ties to Tribes. S. Rep. No. 153, *supra*, at 7. Congress also relied on the fact that "[u]ntil the Supreme Court ruled in the case of *Duro*, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years." S. Rep. No. 168, 102d Cong., 1st Sess. 2 (1991).

In *United States* v. *Lara*, 541 U.S. 193, 200 (2004), the Court held that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." The Court

did not decide whether tribal jurisdiction over nonmember Indians violates equal protection or due process. *Id.* at 208-209.

2. Petitioner Thomas Lee Morris is an enrolled member of the Minnesota Chippewa Tribe. Pet. App. 6. On June 13, 1999, petitioner was cited for speeding on the Flathead Indian Reservation, the home of the Confederated Salish and Kootenai Indian Tribes. *Ibid.* Petitioner was ordered to appear in the Flathead Reservation Tribal Court. *Ibid.*

Petitioner filed a motion to dismiss, claiming that the tribal court lacked jurisdiction over him. Pet. App. 6. The tribal court denied the motion. *Ibid.* Petitioner filed an action in the United States District Court for the District of Montana against respondent Judge Tanner, the judge in the tribal proceeding against petitioner. *Id.* at 40-42. Petitioner alleged, *inter alia*, that the ICRA amendments that give Tribes jurisdiction over nonmembers, 25 U.S.C. 1301(2), violate due process and equal protection. *Id.* at 44-45.

The district court granted respondent Tanner's motion to dismiss without considering petitioner's constitutional claims. Pet. App. 38-39. The court of appeals vacated and remanded for the district court to consider those claims. *Id.* at 30-37. On remand, the United States intervened to defend the constitutionality of the ICRA amendments. *Id.* at 8-9.

The district court then rejected petitioner's equal protection and due process claims. Pet. App. 5-27. The court held that under *Morton* v. *Mancari*, 417 U.S. 535 (1974), "Indian [status] for the purpose of federal legislation is a political rather than racial designation," Pet. App. 19, and that the ICRA amendments are therefore subject to rational basis review. *Id.* at 22. The court

held that the ICRA amendments satisfy the rational basis test because they eliminate a gap in the enforcement of the laws against nonmember Indians who commit crimes on reservations. *Id.* at 22-23. The court rejected petitioner's due process claim on the ground that ICRA provides due process protections and includes a habeas remedy in federal court. *Id.* at 23-25.

3. The court of appeals affirmed. Pet. App. 1-3. The court held that its recent decision in *Means* v. *Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), had rejected equal protection and due process challenges to the ICRA amendments and that it was "bound by *Means* to reject [petitioner's] challenges as well." Pet. App. 2-3.

In *Means*, the court of appeals held that when the ICRA amendments state that they apply to "all Indians," that means "all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." 432 F.3d at 930. The court noted that under *Mancari*, such a distinction is political rather than racial and does not violate equal protection provided that it can be tied rationally to the fulfillment of Congress's unique obligations toward Indians. *Id.* at 932-933. The *Means* court held that the ICRA amendments satisfy that standard because they further the Tribes' ability to maintain order within their reservation boundaries. *Id.* at 933.

The *Means* court also relied on the holding in *United States* v. *Antelope*, 430 U.S. 641 (1977), that the application of the Indian Major Crimes Act to tribal members is constitutional even when it results in less favorable treatment than that accorded to persons prosecuted under the Assimilative Crimes Act, 18 U.S.C. 13, because the Indian Major Crimes Act applies to Indians "not as a discrete racial group, but rather, as members of quasi-

sovereign political entities." 432 F.3d at 934 (citing *Antelope*, 430 U.S. at 645 (citation omitted)). The *Means* court perceived "no sound distinction in principle between *Antelope* and this case." *Ibid.* The *Means* court added that petitioner had the option to renounce tribal membership and thereby avoid tribal jurisdiction. *Ibid.*

In *Means*, the court of appeals also held that Means' as-applied due process challenge was premature because his prosecution had been stayed. 432 F.3d at 935. The *Means* court held that the ICRA amendments are not facially invalid under the Due Process Clause. The court observed that (1) ICRA affords all criminal protections conferred by the Constitution except for the right to grand jury indictment and the right to appointed counsel, (2) the right to grand jury indictment does not apply to misdemeanors, and (3) the right to appointed counsel is conferred by the Navajo Bill of Rights. *Ibid.*

## ARGUMENT

1. Petitioner contends that the ICRA amendments violate equal protection because they subject Indians to tribal jurisdiction on the basis of race. That contention is without merit and does not warrant review.

This Court has consistently upheld against equal protection challenges Acts of Congress that treat tribally-affiliated Indians differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The Court has explained that such laws are based not on "impermissible racial classifications," but on "the unique status of Indians as 'a separate people' with their own political institutions."

*Antelope*, 430 U.S. at 646-647. The Constitution expressly identifies "Indian Tribes" as distinct entities, Art. I, § 8, cl. 3, and this Court has consistently held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes," *United States* v. *Lara*, 541 U.S. 193, 200 (2004). Furthermore, in contrast to "immutable characteristic[s]" such as race, sex, and national origin that are "determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.), tribal membership is voluntary, and it may be relinquished at any time. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990). Accordingly, the Court has held that laws that treat tribally-affiliated Indians differently from others withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Section 1301(2), as amended after *Duro*, regulates the relationship among Tribes and the individual Indians affiliated with those Tribes. Just as Congress may, for example, define the attributes of Indians' membership in their own Tribe to include entitlement to services provided by another Tribe on whose reservation they reside, see 25 U.S.C. 450j(h); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120-1124 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000), Congress may define the attributes of Indians' tribal affiliation to include submission to the criminal jurisdiction of any other Tribe whose laws they violate. Indeed, Congress has long excepted "crimes committed by one Indian against the person or property of another Indian" from the scope of general federal criminal jurisdiction in Indian country, see Act of June

30, 1834, ch. 161, § 25, 4 Stat. 733; 18 U.S.C. 1152, choosing to leave Indians "as regard[s] their own tribe, *and other tribes also*, to be governed by Indian usages and customs," *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (emphasis added).

Petitioner contends (Pet. 11) that the ICRA amendments create a racial classification rather than a political classification because they apply to "all Indians." That contention is incorrect. The ICRA amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18." 25 U.S.C. 1301(4). In *Antelope*, the Court held that the term "Indian" in Section 1153 creates a political classification rather than a racial classification. 430 U.S. at 645-647. The Court explained that the term "Indian" in Section 1153 does not refer to all persons who are racially Indians, but to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. *Id.* at 646 & n.7. The Court further explained that the criminal defendants in that case "were not subjected to federal criminal jurisdiction because they [were] of the Indian race but because they [were] enrolled members of the Coeur d'Alene Tribe." *Id.* at 646.

Because the ICRA amendments incorporate the definition of Indian in 18 U.S.C. 1153, the analysis in *Antelope* is controlling here. Like 18 U.S.C. 1153, the ICRA amendments do not apply to all persons who are racially Indians, but only to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. Furthermore, petitioner is not subject to tribal jurisdiction because of his race, but because he is an enrolled member of the Minnesota Chippewa Tribe. See Pet. App. 6.

This direct relationship between Section 1301(4) and 18 U.S.C. 1153 is not a matter of mere definitional convenience. Section 1301(4) forms an essential component of the comprehensive jurisdictional regime in Indian country, and thereby closes the jurisdictional gap created by *Duro*. Under that regime, as restored by ICRA, specified major crimes committed by one tribally-affiliated Indian against another in Indian country are subject to federal prosecution under 18 U.S.C. 1153, while more minor crimes are subject to prosecution by the Tribe on whose reservation the crime was committed. The power of Congress, recognized in *Antelope*, to provide protection for Indians by ensuring that violators are subject to prosecution, applies equally to the provision for federal prosecution under 18 U.S.C. 1153 and the provision for tribal prosecution under 25 U.S.C. 1301(4).

Petitioner's reliance (Pet. 18) on *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), is misplaced. In *Adarand*, the Court held that all racial distinctions are subject to strict scrutiny. *Id.* at 227. Because the ICRA amendments create a political classification rather than a racial classification, *Adarand* is inapposite, and the sole equal protection question is whether the ICRA amendments are rationally tied to the fulfillment of Congress's obligations toward Indians. See *Mancari*, 417 U.S. at 555.

The ICRA amendments satisfy that standard in two ways. First, Section 1301(2) advances "the congressional policy of Indian self-government," *Fisher*, 424 U.S. at 390-391 (citation omitted), by enhancing the authority of tribal laws and tribal institutions. It enables a Tribe to enforce its criminal laws not only against its own members, but also against members of other Tribes who

voluntarily enter its territory. A Tribe's exercise of criminal jurisdiction over all such Indians comports with "the reality and practice of reservation life," in which "non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," and "receive the benefits of programs and services provided by the tribal government" to all Indians. S. Rep. No. 168, 102d Cong., 1st Sess. 6-7 (1991).

Second, Section 1301(2) protects Indians, as well as others who reside in or visit Indian country, against lawlessness by nonmember Indians. See *Duro*, 495 U.S. at 696. Because the United States and the States often lack jurisdiction to prosecute misdemeanor offenses committed by one Indian against another in Indian country, a "jurisdictional void" would otherwise exist when such offenses were committed by nonmember Indians. S. Rep. No. 168, *supra*, at 4. And even aside from questions of jurisdiction, the United States or a State might lack the resources to prosecute misdemeanors by nonmember Indians. Accordingly, the ICRA amendments are rationally related to the legitimate goals of advancing tribal self-government and protecting the safety of the reservation community, and they do not violate the Constitution's equal protection guarantee.

2. Petitioner's due process claim is equally without merit. ICRA guarantees protections to criminal defendants in tribal court that are analogous to the protections that the Constitution guarantees criminal defendants in federal and state courts. See 25 U.S.C. 1302. Among other protections, criminal defendants in tribal court are entitled to a speedy and public trial; they must be informed of the nature of the charges against them; they have a right to confront the wit-

nesses against them; they have a right to compulsory process to obtain witnesses on their behalf; they have the right, at their own expense, to the assistance of counsel; and they have the right to a trial by jury for any offense punishable by imprisonment. 25 U.S.C. 1302(6) and (10). Criminal defendants also have a right to seek federal habeas corpus review to challenge detentions that are ordered by an Indian Tribe. 25 U.S.C. 1303.

ICRA does not expressly provide a right to appointed counsel for persons who cannot afford an attorney. But since petitioner is charged with a traffic offense that carries a penalty of a $100 fine, see Pet. App. 48, the right to appointed counsel is not implicated in this case. *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (right to appointed counsel applies when a term of imprisonment is imposed). In any event, the Confederated Salish and Kootenai Indian Tribes provide counsel to indigent defendants. See Aff. of James Taylor 1. In addition, while ICRA does not guarantee the right to an indictment by a grand jury for infamous crimes, that right is not implicated by petitioner's traffic offense. See *Means* v. *Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005).

Petitioner complains (Pet. 13) that he will not receive a jury trial in tribal court. But the constitutional right to a jury trial does not apply to petitioner's "petty" traffic offense. *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543-545 (1989); *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970). As noted above, in cases in which an offense is punishable by imprisonment, ICRA protects the right to a jury trial. See 25 U.S.C. 1302 (10).

Petitioner asserts (Pet. 17) that there are nonmember Indians in tribal jail facilities who have not received the protection of the Constitution. But petitioner fails

to identify the constitutional protections that such persons have been denied. In any event, persons who are incarcerated may challenge their incarceration through federal habeas corpus review. See 25 U.S.C. 1303. Petitioner is not subject to incarceration and lacks standing to raise claims on behalf of those who are.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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