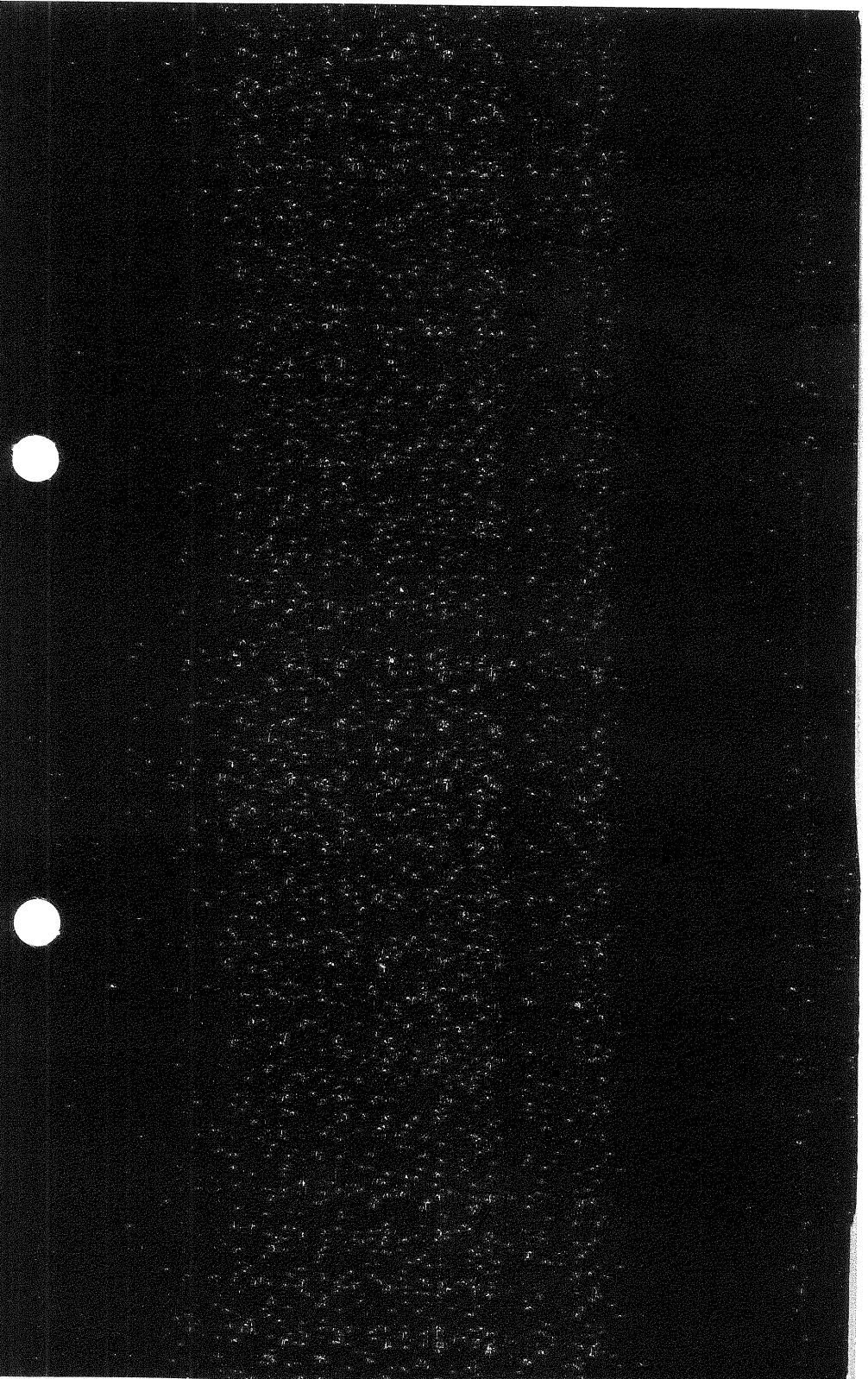

No. _____

In the Supreme Court of the United States

MARGARET A. PENN,

Petitioner,

v.

LARRY A. BODIN, RICHARD ARMSTRONG, AND JOHN VETTLESON,

Respondents,

FRANK LANDEIS, SHERIFF FOR SIOUX COUNTY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), in an analysis supported by six justices, held that the Dawes Act, 25 U.S.C. §331, et seq. divested Indian tribes of the power to exclude non-members from their fees lands within reservations. *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978) held that tribes have no criminal jurisdiction over non-Indians. Margaret Penn, a non-Indian, was banished for fifty days from her home on fee land, located within the Standing Rock Sioux Reservation, pursuant to an *ex parte* tribal court order that was served and enforced, under threat of arrest, by a federal BIA officer and a county sheriff. The questions presented are:

1. Do a BIA officer and a county sheriff enjoy absolute immunity when enforcing an *ex parte* tribal court order banishing a non-Indian from her home on fee land, all other fee lands and public highways within a reservation?

2. Are a BIA officer and a county sheriff entitled to absolute immunity when enforcing a tribal court banishment order against a non-Indian when the officers threaten arrest, since the BIA officer had no authority to arrest a non-Indian, the county sheriff had no authority to enforce a tribal court order, and the federal statutory authority for enforcement of tribal court orders provides that such enforcement by the BIA officer is "subject to federal law" and the enforcement violates federal law?

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

PETITION FOR A WRIT OF CERTIORARI

Margaret A. Penn respectfully petitions for a Writ of Certiorari to review the Order granting summary judgment to the BIA officers and county sheriff in their individual capacity entered by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals (App., *infra*, 1a-9a) is reported at 335 F.3d 786 (8th Cir. 2003). The Eighth Circuit Court of Appeals subsequently denied the Petition for Rehearing and for Rehearing En Banc on September 11, 2003

(No. 02-1731, 02-2267) (App., *infra*, 31a). The opinion of the District Court for the District of North Dakota (Case No. A1-00-93, March 6, 2002) (J. Conmy) (App., *infra*, 10a-17a), which was reversed by the Court of Appeals is unpublished. Judge Conmy's Order of Clarification dated March 29, 2002 (Case No. A1-00-93) (App., *infra*, 18a) is unpublished.

JURISDICTION

The Order granting summary judgment by the Court of Appeals to the individual defendants was entered on July 10, 2003. A timely Petition for Rehearing and Rehearing En Banc was filed, which Petition was denied on September 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution are reproduced at App., *infra*, 32a-34a.

2. Section 2802 of Title 25 of the United States Code, §1983 of Title 42 of the United States Code, and the General Allotment Act of 1887 (Dawes Act), 24 Stat. 388 (current version at 25 U.S.C. §331, *et seq.*) are reproduced at App., *infra*, 35a-46a.

3. North Dakota Cent. Code 29-06.1-02 (1997) and Rule 7.2 of the North Dakota Rules of Court are reproduced at App., *infra*, 47a-49a.

STATEMENT

In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), six justices agreed that the Dawes Act, 24 Stat. 388 (1887), divested the tribes of the power to exclude non-members from their fee lands within a reservation. That holding followed the observation in *Montana v. United States*, 450 U.S. 544 (1981) that allotment dissolved tribal jurisdiction and the right to exclude feeholders from their lands. *Id.* at 560, n.9. In *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978), the Court held that tribes do not have criminal jurisdiction over non-Indians because of the Nation's "great solicitude that its citizens be protected...from unwarranted intrusions on their personal liberty." *Id.* at 210. There is a "general rule" or "presumption" that tribes lack civil jurisdiction over non-members. *Nevada v. Hicks*, 533 U.S. 353, 359, 383 (2001), *citing Montana v. United States*.

1. This case focuses on whether a federal BIA police officer and a county sheriff, who enforced an *ex parte* tribal court banishment order on a non-Indian, removing her from her home, all other fee lands and the public highways within a reservation, are protected from suit by quasi-judicial absolute immunity. To find that such immunity applies, the Court first must hold that tribal courts enjoy absolute judicial immunity for an order excluding a non-Indian from her home on fee land, which the Eighth Circuit held turns on whether a tribal court judge acts in the clear absence of all jurisdiction under *Stump v. Sparkman*, 435 U.S. 349 (1978). This Court has never extended absolute judicial immunity to tribal court judges in their dealings with non-member defendants. To the contrary, this Court pointedly noted in *Nevada v. Hicks*, it had "never held that a tribal court had jurisdiction over a non-member defendant." *Id.* at 358.

Because banishment is considered a criminal sanction and a "severe restraint on liberty" that triggers the right to habeas corpus relief, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 889 (2nd Cir. 1996), the tribal court clearly lacked jurisdiction to banish Margaret Penn from her home on fee land under *Oliphant*.

Moreover, the officers enforced the order by threatening to arrest Margaret Penn if she did not comply. If the officers threatened arrest in accordance with the tribal court order, this would place the order beyond the jurisdiction of the tribal court since the tribal court clearly lacks criminal jurisdiction over a non-member under *Oliphant*. Alternatively, if the tribal order did not provide for an arrest, the officers exceeded the available authority under the tribal court order and hence lost their right to claim absolute immunity by threatening arrest.

The federal BIA officer had no authority to arrest a non-member. While the county sheriff has authority to arrest non-Indians, he had no authority to do so under a tribal court banishment order. The authority of a BIA officer to enforce tribal law allows such enforcement only "subject to other applicable federal law." 25 U.S.C. §2802(c)(1). The question presented is whether the constitutional protections implicated by this Statute are rendered meaningless by the doctrine of quasi-judicial absolute immunity. That is, are federal and local law enforcement officers insulated from liability for violating the constitutional rights of a U.S. citizen because they are carrying out the edicts of a tribal court that is not subject to the requirements of the U.S. Constitution and a tribal political process in which a non-Indian cannot participate even as a resident. Penn submits that when enforcing a tribal court order, the BIA officer is exercising federal power and must assure the constitutional right of due process for a non-Indian defendant under 25 U.S.C. §2802(c)(1). *Compare, U.S. v. Lara*, 324 F.3d 635 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 46 (2003) (Sept. 30, 2003).

2. The events in this case occurred on July 24, 1998, on the Standing Rock Sioux Reservation in North Dakota. Two years earlier, Margaret A. Penn, a non-Indian, was fired as the tribal prosecutor after she filed a Petition for Writ of Mandamus/Prohibition alleging unethical conduct on the part of the Chief Judge of the Tribal Court. Penn in turn filed a wrongful termination suit in tribal court. Margaret Penn continued to live on fee land she rented from a non-Indian rancher, in Selfridge, North Dakota, and worked for a North Dakota non-profit corporation that operated a battered women's shelter. In the summer of 1998, recently terminated employees attempted to oust the director of the women's shelter, an individual that Ms. Penn supported. App., *infra*, 4a-6a; 10a-11a. Soon after, a former employee applied for an *ex parte* order banishing Margaret Penn from the Standing Rock Sioux Reservation. The unsworn petition stated that Ms. Penn had possession of a pistol, that she had made threats against several members of the tribe, and that she had filed a lawsuit against the Standing Rock Sioux Tribe. App., *infra*, 25a-28a.

Associate Tribal Judge Isaac Dog Eagle issued the *ex parte* "traditional Lakota banishment" order on July 24, 1998, "for a period of thirty days, at which time a hearing will be scheduled..." *Id.* The only accurate, non-conclusory allegation contained in the petition, however, was that Ms. Penn had filed suit against the tribe. Margaret Penn had given the pistol to the Sioux County Sheriff, Frank Landeis, for safekeeping several weeks before the petition was filed. This fact was made known to Judge Dog Eagle after he signed the order, but he told the officers to enforce it anyway. App., *infra*, 5a.

The order directed "any Police Officer" to "escort Margaret Penn from the Standing Rock Sioux Indian reservation boundaries." App., *infra*, 27a. There is no evidence of exigent circumstances. To the contrary, the officers knew Margaret Penn as the former prosecutor, knew she worked at a battered women's shelter, and believed she was peaceful and law abiding. App., *infra*, 55a, 73a. Before the

order was executed, BIA Officer Vettleson obtained the assistance of Sheriff Frank Landeis. Federal officers do not have the authority to arrest non-Indians, and Vettleson knew that Ms. Penn was not an Indian. App., *infra*, 74a, 70a. Only the Sioux County Sheriff had the authority to arrest non-Indians. App., *infra*, 64a. The boundaries of Sioux County are the same as the exterior boundaries of the Standing Rock Sioux Reservation in North Dakota. App., *infra*, 5a.

At around 2:00 p.m., BIA officer Vettleson and Sheriff Landeis went to the women's shelter, located on fee land, where Ms. Penn was at work. These uniformed, armed law enforcement officers enforced the order by threatening Margaret Penn with arrest if she did not comply. App., *infra*, 58a, 66a and 77a. Ms. Penn was also told that if she returned to her home in the town of Selfridge, she would be arrested, although her home was located on fee land. App., *infra*, 62a. The officers even made it clear that she could not drive on the public highways that cross the reservation. As Sheriff Landeis testified, she was not free to stay at her home or drive on public highways in Sioux County. App., *infra*, 67a. Ms. Penn, not wanting to go to jail, complied with the order, left her work and home, and did not return.

No hearing on the banishment order was ever scheduled by the Tribal Court. App., *infra*, 5a. Eventually the Standing Rock Sioux Tribe intervened and moved to vacate the banishment order. App., *infra*, 50a. The Tribal Court lifted the banishment order on September 14, 1998, fifty days after its issuance. App., *infra*, 29a. Ms. Penn tried to obtain relief by filing a *habeas corpus* action in federal district court under the Indian Civil Rights Act, 25 U.S.C. §1302, *et seq.*, but that suit became moot once the trial court lifted its banishment order. App., *infra*, 19a-24a.

Penn was deprived of the right to her home, possessions and employment for a period of two months. Ms. Penn never returned to live in her home in Selfridge, because of the fear generated by the banishment order and its enforcement by

federal and county officials. She had no one, including federal and local law enforcement, to protect her rights as a United States citizen even in her home on privately owned fee land.

3. Ms. Penn filed this suit in United States District Court against the parties involved in the service and enforcement of the order for violation of her constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution. Ms. Penn asserted claims under 42 U.S.C. §1983, direct constitutional violations and other claims. The individual law enforcement officers asserted claims of both quasi-judicial absolute immunity and qualified immunity, seeking protection from liability for their actions. The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1346(d).

4. The District Court denied their motions for summary judgment, App., *infra*, 10a, and defendants appealed. The jurisdiction of the Court of Appeals arose under 28 U.S.C. §1291. The Court of Appeals reversed the district court and dismissed the individual defendants, finding the officers enjoyed absolute immunity in enforcing the tribal court banishment order. App., *infra*, 1a. Although the Eighth Circuit found that there were "legitimate questions about [the] legality" of the tribal court banishment order, the court found it was "facially valid." App., *infra*, 9a. The Petition for Rehearing and Rehearing En Banc was denied. App., *infra*, 31a.

5. There are several reasons why quasi-judicial absolute immunity does not extend to this Tribal Court order. First, tribal courts are not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). Tribal courts are not subject to the United States Constitution, and are not subject to federal court appellate review. *Id.* The general rule grants absolute immunity to state and federal law enforcement officers carrying out state or federal court orders, unless there is a "clear absence of all jurisdiction," *Stump v. Sparkman*,

435 U.S. 349 (1978). That doctrine should not extend to tribal courts in this circumstance because there is a "presumption against" jurisdiction over non-members and their fee lands. *Hicks* at 383. Additionally, tribal court orders are considered the equivalent of the order of a "foreign nation" under North Dakota's Constitution and Rule 7.2 of the North Dakota Rules of Court. App., *infra*, 48a. The Sheriff was prohibited from enforcing a tribal court order unless it had been filed and recognized by the state court.

If the "clear lack of jurisdiction" test from *Stump v. Sparkman* is applied, the Supreme Court has ruled by solid majorities in *Brendale*, 492 U.S. at 424-437; *South Dakota v. Bourland*, 508 U.S. 679 (1993); and *Montana v. United States*, 450 U.S. at 560, n.9 that Indian tribes clearly lack jurisdiction to exclude non-members from access to fee lands. In *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), the court established that tribal courts lack jurisdiction over non-member activities on public highways which are used to access fee lands. The Tribal Court clearly lacked jurisdiction to banish Margaret Penn from her home on fee land.

6. Additionally, the Tribal Court's order banishing Margaret Penn was either a criminal punishment or an "unwarranted intrusion on her personal liberty" for which the Tribal Court lacked jurisdiction under *Oliphant*, 435 U.S. at 208 and *Duro v. Reina*, 495 U.S. 676 (1990). Banishment itself has been held to be a criminal sanction. *Poodry* and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Because the banishment was enforced by threat of arrest if Margaret Penn did not comply, either the Tribal Court authorized such arrest, making the banishment clearly criminal, or the officers exceeded their authority under the Tribal Court's order, negating their right to rely upon the directives of the Tribal Court for quasi-judicial absolute immunity. *Robinson v. Freeze*, 15 F.3d 107 (8th Cir. 1994).

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision conflicts with numerous decisions of this Court that have never recognized that a tribal court has jurisdiction over a non-member defendant. *Hicks*, at 358. *Brendale* and *Montana* both held that tribes lack jurisdiction to prohibit non-member access to their fee lands within the boundaries of a reservation. Because the Court of Appeals decision leaves U.S. citizens open to *ex parte* removal from their home without any effective remedy, the case is one of exceptional urgency and importance. Due process and other rights secured by the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution are at issue.

The statute under which the BIA officer acted, 25 U.S.C. §2802(c)(1), only gives the BIA officer authority to enforce tribal laws "subject to other applicable federal law." This is consistent with the constitutional limitations on the exercise of federal power. When federal officers act, even in enforcing a tribal court order, the power exercised is federal in origin and must, therefore, be transcribed by the limitations and requirements of the Constitution. The tribal court, however, is not subject to the Constitution. Because the tribal court does not have jurisdiction to either deny a non-Indian access to her home on fee land, or to restrain her personal freedom with regard to non-tribal lands under *Oliphant*, the tribal court clearly lacked jurisdiction over Margaret Penn when it attempted to banish her from her home on fee land. Since the tribal court clearly lacked jurisdiction in these circumstances, the tribal court did not enjoy absolute immunity, nor did the officers enforcing the tribal court order.

The Eighth Circuit's decision conflicts with the Second Circuit's decision in *Poodry*, which held that banishment is a criminal punishment. Even though the Eighth Circuit decision in this case found that Margaret Penn was free to seek habeas corpus relief under the Indian Civil Rights Act, a recognition

that there was a severe restraint on her liberty of the type that implicates *Oliphant*, the Court of Appeals failed to recognize the core issue that banishment from private lands is a criminal sanction, clearly beyond the jurisdiction of the tribal court.

A. The Court of Appeals Erred by Failing to Recognize that the Dawes Act Eliminated Tribal Jurisdiction Over Non-Member Access to Their Fee Land.

The Eighth Circuit erroneously concluded that the exceptions to the general prohibition against jurisdiction over non-members from *Montana* provided a colorable basis for jurisdiction so that it was "not apparent that Judge Dog Eagle was acting in the clear absence of jurisdiction". App., *infra*, 9a. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). To the contrary, the tribal court clearly lacked jurisdiction to exclude a non-member from her home on fee land. *See, Bourland* and *Montana*. *Compare, Stump v. Sparkman*.

The Appellate Court failed to apply the decision by six justices in *Brendale* that the Dawes Act, by opening reservation lands to sale to non-members, eliminated the power of the tribe to exclude fee owners from fee lands.

> [As a result of the Dawes Act] the Yakima Nation no longer has the power to exclude fee owners from its land within the boundaries of the Reservation... [T]he tribal authority to exclude was necessarily overcome by, as Justice Stevens puts it, an "implici[t] grant" of access to the land. *Id.* at 424 (J. White Opinion for Plurality).

> A statute [Dawes Act] that authorizes the sale of a parcel of land in a reservation must implicitly grant the purchaser access to that property. *Id.* at 437 (J. Stevens Opinion).

The tribal court order banishing Margaret Penn from her home on fee land was facially invalid under *Brendale* and the Dawes Act.

Tribal jurisdiction over non-members is not inherent. *South Dakota v. Bourland*, 508 U.S. at 694. No federal grant of jurisdiction to the Tribal Court to banish a non-member from her home on fee land exists.

> The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large...Section 6 [of the Dawes Act specified] that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 24 Stat. 390. "[With the passage of the Indian Reorganization Act] Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints upon the ability of Indian allottees to alienate or encumber their fee patented lands, **nor impaired the rights of those non-Indians who had acquired title to over 2/3 of the Indian lands allotted under the Dawes Act."** *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254-56 (1992). [emphasis added]

The ownership of the Standing Rock Sioux Reservation mirrors tribal reservation lands across the United States following the enactment of the Dawes Act. Of the 2.3 million acres in the original Standing Rock Sioux Reservation, approximately 1.4 million acres are fee or privately owned lands. App., *infra*, 82a. "Lands to which the Indians did not have any property rights were never considered Indian

Country." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (1999), *cert. den.* 530 U.S. 1261 (2000).

The loss of the power to exclude carried with it the loss of tribal regulatory authority. *Bourland*, 508 U.S. at 691, n. 11. Adjudicatory jurisdiction cannot exceed, and may not equal, regulatory authority. *Hicks* at 357-58,374.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983); *Duro*, 495 U.S. at 696-97; and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 144 (1982) stand only for the proposition that tribes have the ability to "exclude non-Indians from Indian lands" or the "power to exclude [non-members from] tribal lands". *Merrion* at 141; *Duro* at 696-97, *citing Brendale* and *New Mexico*. "[A]llottment [dissolved tribal] jurisdiction . . . Congress could [not] have imagined . . . feeholders could be excluded from . . . their acquired property." *Montana* at 560, n.9. *Brendale* and *Bourland* affirmed this point.

The Eighth Circuit erroneously found that Penn "voluntarily involve[d] [herself] with tribal activities." App., *infra*, 8a. The Panel found she (1) lived on the reservation, (2) had worked for the tribe, (3) had a large civil suit against the tribe, and (4) had various other professional and personal ties to the tribe and its members. Under a summary judgment analysis, the facts are to be viewed most favorable to Penn, the non-moving party. *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) [party opposing summary judgment benefits from all reasonable doubts].

Penn had not worked for the tribe for over two years. Suing for wrongful employment termination cannot create a consensual relationship or a jurisdictional basis for banishment. It is not "in for a penny, in for a Pound." *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Four hundred thousand non-members live on

reservations as a result of the Dawes Act.[1] This **divested**, not created, tribal jurisdiction. *See, County of Yakima, Brendale*, and *Yankton Sioux Tribe v. Gaffey*. Penn had no "professional tie" to the tribe; she worked for a North Dakota non-profit corporation. She worked with and provided services to tribal members and non-members alike. So does every grocer, doctor, hospital and rancher on a reservation. The hotel/trading post in *Atkinson* had tribal member employees, used tribal fire services and bought tribal crafts. Those are insufficient to create jurisdiction for regulatory, much less adjudicatory, purposes.

"We have never held that a tribal court had jurisdiction over a non-member defendant." *Hicks*, at 358, n.2.

> Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over non-members on non-Indian lands.

Id. at 360. The one "minor exception" was *Brendale* where this Court specifically held that the Dawes Act granted a non-member access to fee land in which he enjoyed a property interest and the tribe had no jurisdiction to exclude.

B. A Banishment Order is a Criminal Sanction and a "Severe Restraint on Liberty" Which Divests Tribal Jurisdiction Over a Non-Indian Defendant's Access to Her Fee Land.

The Court of Appeals' decision failed to recognize that the banishment order was a criminal sanction that operates as

[1] Bureau of the Census, U. S. Department of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas*, 3 (1990)

an intrusion on personal liberty. In American Indian cultures, banishment historically has been a criminal punishment.[2] Under this Court's decisions in *Oliphant* and *Duro*, tribal courts clearly lack jurisdiction to enforce a criminal sanction against a non-member.

The Eighth Circuit held that a tribal court "order excluding a non-member from a reservation is subject to review in federal district court under the habeas corpus provisions of 25 U.S.C. §1303," *citing Santa Clara Pueblo v. Martinez*, 439 U.S. 49, 67-68 (1978). But if the exclusion of a non-member from a reservation[3] is subject to habeas corpus review under the Indian Civil Rights Act, then the exclusion must be criminal in nature. The Second Circuit in *Poodry* held that "banishment has clearly and historically been punitive in nature" and a "severe restraint on liberty" which triggers the right to habeas corpus review. *Id.* 85 F.3d at 889, 895. Because habeas corpus proceedings are available to a banished non-member, banishment is a criminal sanction and the tribal court clearly lacks jurisdiction.

Tribal authorities "do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208. The BIA officers admit that they also lacked criminal jurisdiction over Ms. Penn. App., *infra*, 70a, 79a and 80a. Non-members "are

[2] *See, e.g.*, Stephanie Kim, "Sentencing and Cultural Differences: Banishment of the American Indian Robbers." 29 J. Marshall L. Rev. 239 (Fall, 1995); William C. Bradford, "Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution." 76 N. Dak. L. Rev. 551 (2000). Tribes still use banishment for the purpose of punishing criminals. *See,* Robert D. Cooter & Wolfgang Fikentscher, "Indian Common Law: The Role of Custom in American Indian Tribal Courts." 46 Am. J. Comp. L. 287 (1998) (Part I), 509 (Part II).

[3] The exterior boundaries of the Standing Rock Sioux Reservation encompass 3,593 square miles, a larger area than the states of Rhode Island and Delaware. App., *infra*, 82a.

embraced within our Nation's 'great solicitude that its citizens be protected... from unwarranted intrusions on their personal liberty.'" *Duro* at 692, quoting *Oliphant* at 210. Because banishment is a "severe restraint on liberty," *Poodry*, 85 F.3d at 889, this banishment order crossed the line drawn by *Oliphant* and *Duro* that tribal jurisdiction cannot "intrud[e] on [a non-member's] personal liberty." Enforcing the *ex parte* banishment as to Penn's home on fee lands was clearly unlawful for both the federal and tribal authorities.

C. By Threatening to Arrest Penn if She Failed to Comply with the Tribal Court Order, the Officers Lost Any Claim to Absolute Immunity.

If an officer carries out a judge's orders in a manner not specifically ordered by the judge, absolute immunity does not prevent further scrutiny of the officer's actions. *Robinson v. Freeze*, 15 F.3d at 109. The defendants are caught on the horns of a dilemma regarding the nature of the tribal court order and the arrest threat made to obtain compliance with the banishment order. If the Tribal Court order authorized the officers to arrest Margaret Penn, then there can be no question that the order was criminal in nature. If the officers went beyond the directive of the Tribal Court order by threatening arrest, they destroyed any claim to absolute immunity.[4] Here the Court of Appeals erred by finding that Penn did not complain about how the order was carried out, by ignoring the

[4] Once Margaret Penn was threatened with arrest if she did not comply with the Tribal Court order, she had no alternative but to comply with the directives of the police officers. First, the officers were both in uniform and armed. App., *infra*, 15a; 57a. Additionally, the common law right to resist an unlawful arrest, recognized by the U.S. Supreme Court in *John Bad Elk v. United States*, 177 U.S. 529 (1900) has been abolished in most states, including North Dakota. N.D. Cent. Code 12.1-05-03 (1997); *see,* Andrew P. Wright, "Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?", 46 Drake L.Rev. 383 (1997).

critical significance of compliance coerced through threat of illegal arrest.

D. The BIA Officer Must Protect the Rights of a Non-Indian Under Federal Law When Enforcing a Tribal Court Order.

The Eighth Circuit erred by determining that a BIA officer and a county sheriff are in the same position when considering enforcement of a tribal court order as they would be when presented with a federal or state court order. Based on that misperception, the Appellate Court felt it was unfair to require these officers to make the "difficult choice 'between disobeying the court order or being haled into court to answer for damages.' *Patterson [v. Von Riesen],* 999 F.2d 1235, 1240 (8th Cir. 1993)." App. *infra*, 9a. That analogy is inapplicable. The federal officer's authority arises under 25 U.S.C. §2802(c)(1), which provides for enforcement of tribal law "subject to other applicable federal law." Congress did not direct BIA officers to enforce tribal law without question, but rather in plain language directed them to enforce tribal law **subject to other applicable federal laws**. The Dawes Act is such "other federal law" and *Brendale* held that the Dawes Act prohibited the exclusion of a non-member from fee land. A BIA officer cannot be charged with "disobeying the court order" when that order was facially invalid under federal law.

When a federal officer enforces a tribal court order pursuant to a federal statute, the source of power is the federal government. *Compare, U.S. v. Lara.* The BIA officer cannot rely on the tribal court, which is not subject to the Constitution, but must separately assure that the due process rights of the non-Indian are protected. The Constitution is plainly "other applicable federal law."

25 U.S.C. §2802(c)(1) codifies this requirement. The BIA officers in this case acknowledged they had discretion on carrying out the tribal court order. App., *infra*, 79a-80a.

As to Sheriff Landeis, he did not have authority to banish or arrest a non-Indian pursuant to a tribal court order. North Dakota law treats Indian tribes as "the equivalent of foreign nations for the purposes of recognizing the orders and judgments of the tribal courts in this state." Rule 7.2 of the North Dakota Rules of Court. App., *infra*, 48a. The tribal court order must be filed with the state court and is subject to the notice of filing and stay of enforcement provisions established by North Dakota Statutes. *Id.* Sheriff Landeis had no authority to enforce a tribal court order, and he could not arrest anyone pursuant to a tribal court order except upon a tribal court warrant for a crime. *See*, N.D. Cent. Code 29-06.1-02 (1997) App., *infra*, 47a [only arrest if warrant for a crime and person is brought before state district court without delay]. A tribal court warrant to arrest a non-Indian, however, would clearly violate *Oliphant* and *Duro*.

E. The Policy Rationale for Absolute Judicial Immunity Does Not Support Extending that Doctrine to Tribal Court Orders Concerning Non-Indian Defendants.

While the Court of Appeals relied upon *Sandman v. Dakota,* 816 F.Supp. 448 (W.D. Mich.1992) for authority that a tribal court is entitled to the same judicial immunity as state and federal judges, that reliance is misplaced, App., *infra*, 7a. In *Sandman,* the tribal court clearly had jurisdiction under the Indian Child Welfare Act, 25 U.S.C. §§1901-1963. Plaintiff Sandman was an "Indian" since she pled guilty to a criminal charge in tribal court. *Sandman* does not address the doctrine of quasi-judicial absolute immunity for a BIA officer and county sheriff carrying out the *ex parte* banishment of a non-Indian from her home on fee land.

Tribal Courts are **not** courts of "general jurisdiction." *Hicks* at 357. "[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action;..." *Stump* at 357, n. 7.

This Court has been "sparing" in recognizing absolute immunity, putting the burden of justification on its proponent. *Antoine v. Byers & Anderson*, 508 U.S. 429, 432-33 (1993). The Eighth Circuit extended the absolute judicial immunity doctrine under the mistaken belief that this was justified under *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). Tribal courts are not courts authorized by the Constitution, *see e.g. Hicks* at 366-67. Applying absolute judicial immunity to courts outside of our constitutional system and engrafting that immunity on police officers who must operate in accordance with our constitutional system is not justified by the policy underlying absolute immunity. Ms. Penn did not lose her right to full constitutional protections by living on fee land within a reservation. The Dawes Act opened reservation lands to settlement by citizens and by design those citizens brought with them local governments and full constitutional rights.

The Court of Appeals recognized that many of the policy reasons that underlie the grant of quasi-judicial absolute immunity are simply inapplicable to tribal courts. App., *infra*, 6a. The Eighth Circuit nevertheless swept aside the policy reasons that support absolute immunity for state and federal judges.

> Judges, all of whom take an oath to uphold the Constitution and are bound by codes of judicial conduct, are not often likely to act maliciously from the bench. Moreover, unscrupulous judges are not totally insulated from the public will. Even judges are subject to professional discipline, constitutional or statutory removal, or in more egregious cases, criminal prosecution under 18 U.S.C. §242, for willful deprivations of

> constitutional rights. *Valdez v. City & County of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

None of these factors apply to tribal courts who are fully insulated from the political will of non-members.

The Court of Appeals relied on the "long-standing federal policy supporting the development of tribal courts" to encourage tribal self-government and self-determination, *citing Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850 (8th Cir. 2003). Absolute immunity for banishing a non-Indian from her home on fee land does nothing to advance self-government or self-determination. The civil liberties of U.S. citizens cannot be exchanged for the policy of encouraging tribal self-government.

The fundamental problem with the Eighth Circuit's decision is its failure to recognize the profound policy implications of its holding. The Dawes Act intentionally opened up tribal lands for sale to non-members, and non-members were encouraged by federal policies to move on to those lands, open farms and businesses, interact with their neighbors, form political entities such as cities and counties, and live as though they resided anywhere else within the United States. *See, County of Yakima*, 502 U.S. at 254-56. The Appellate Court's decision means that any person who hires a tribal member, works with tribal members, provides goods or services in their business to tribal members or perhaps brings a lawsuit in tribal court to collect a debt from a tribal member, can be banished from their home without a hearing, by a tribal court order enforced by the federal BIA, and absolutely no one is accountable for the gross violation of due process and other constitutional rights.

Since the founding principle of the United States Constitution is that the just powers of government are only derived from the consent of the governed, granting such a power to a tribal government unaccountable to non-members

residing on fee lands within a reservation violates this core principle. *See, Yick Wo v. Hopkins*, 118 U.S. 356 (1886) which held that "sovereignty remains with the people" and is expressed through the "political franchise of voting" which secures all other rights. *Id.*, at 370. To say that a non-Indian banished from a reservation can seek habeas corpus relief is no consolation. By the time Penn got a habeas corpus hearing in federal court for her banishment, it was dismissed as moot, with no remedy for being deprived of her home for fifty days. The Eighth Circuit opinion will exacerbate relations between Indian and non-Indian neighbors, contrary to the goals of the Dawes Act. The Eighth Circuit's decision allows a U. S. citizen to be banished ex parte from her home by federal and county law enforcement officers with no meaningful remedy for the denial of due process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX