No. 02-

IN THE

Supreme Court of the United States

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), COMMISSIONER MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK/FARMER'S INSURANCE AND ATTORNEY DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

SUSAN ROSE
Counsel of Record
LAW OFFICES OF SUSAN ROSE
Attorneys for Petitioners
9553 South Indian Ridge Dr.
Sandy, Utah 84092
(801) 545-0441

(WM.P. BATTLES,
Navajo - Council
Assisting on Petition)

178759

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals, in remanding the case to Federal District Court, and in ruling that the Federal District court had no jurisdiction to enforce a judgment of the Navajo Tribal Court as against the defendants: (1) violate previous case precedence of this Court; (2) directly conflict within itself and other Circuit Courts; (3) act outside its own subject matter jurisdiction, by defining Tribal Court subject matter jurisdiction by immunizing non-Indians from Tribal government authority contrary to Treaties, statutes, Executive orders, regulations, policies and contracts?

PARTIES TO THE PROCEEDINGS

Petitioners are Navajo Court plaintiffs Fred Riggs, Donna Singer, Al Dickson. Respondents are San Juan County, San Juan Health District, County Commissioner J. Tyron Lewis, County Commissioner Lyn Stevens (official capacity only), Commissioner Manual Morgan (official capacity only)[1], Rick Bailey, County Attorney Craig Halls, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway (official capacity only), John Lewis, Lauren Schafer, Truck/Farmer's Insurance and Attorney Dennis Ickes, and as yet unnamed John and Jane Does, in their official and individual capacities, jointly and severally.

1. Under Rule 25(d), County Commissioners Lyn Stevens and Manual Morgan are automatically substituted due to an election.

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Petitioners Fred Riggs, Donna Singer, and Al Dickson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals Tenth Circuit (P. App. 2a) is docket no. 01-4001 entered on October 7, 2002. The opinions of the United States Utah District court dismissing the respondents from the Navajo Court action on October 30, 2000 (P. App. 26a) and December 13, 2000 (P. App. 52a) is docket no. 2:00 CV 0584. The Navajo Nation Preliminary Injunction Order of December 28, 1999 (P. App. 70a) and Order Denying the Defendants' Motion to Modify the Preliminary Injunction Order, of March 1, 2000, (P. L-1) ("Petitioners Lodging") (supporting Orders of the Navajo Nation District Court, Judicial District of Shiprock, (P. L-17-20,) are docket no. SR-CV-162-99-CV.

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on October 7, 2002. (P. App. 2a). A petition for rehearing was denied on November 8, 2002 (P. App. 105a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

The Treaty of 1868, *see* 15 Stat. 667, the **United Nations International Covenant on Civil and Political Rights**, (UNCPCR) Part I, Article 1, Sec. 3; Part III, Art. 14, Sec. 1. The law was signed by Pres. Jimmy Carter in 1977 and adopted by the U.S. Senate by 2/3 vote on April 2, 1992,

deposited by Pres. George Bush on June 8, 1992, becoming effective on Sept. 8, 1992.[2]

CONSTITUTIONAL PROVISIONS

Article I, Section 8, the Indian Commerce Clause. Article VI the Supremacy Clause

EXECUTIVE ORDERS AND PROCLAMATIONS INVOLVED

Executive Order 13175 signed by President Clinton on November 6, 2000, and

President Bush's Proclamation of November 12, 2001, supporting this Executive Order states,

> My Administration will continue to work with tribal governments on a sovereign to sovereign basis. . . . We will *protect and honor tribal sovereignty* and help to stimulate economic development in reservation communities.

(P. L-138, 139).

2. Hearing before the Senate Committee on Foreign Relations, 102d Cong., 1st Sess., Nov. 21, 1991, S. Hrg. 102-478; Report of the Senate Foreign Relations Committee, Exec. Rept. 102- 23, March 24, 1992; 102 Cong. Rec. S4781-4784 (daily ed. April 2, 1992).

STATUTORY PROVISIONS INVOLVED

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303.

25 U.S.C. § 1301(2) defines 'self-government' as

> (2) "powers of self-government" means and includes *all* governmental powers possessed by an Indian tribe, executive, legislative, and *judicial*, and all offices, bodies, *and tribunals* by and through which they are executed, including courts of Indian offenses; and means the *inherent power of Indian tribes*, hereby *recognized and affirmed*, to exercise criminal jurisdiction over all Indians;

25 U.S.C. § 1302(8) provides that

> No Tribe in exercising *powers of self-government* shall; . . . .
>
> (8) deny to any *person* within its jurisdiction the equal protection of its laws or deprive *any person* of liberty or property without due process of law.

25 U.S.C. § 450, *et seq.* the Indian Self-Determination Act. 25 U.S.C. § 450 makes formal Congressional findings as follows:

> (1) the prolonged *Federal domination* of Indian service programs *has served to retard* rather than enhance the progress of Indian people and their communities by *depriving Indians of the full opportunity to develop leadership skills crucial*

to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the *Indian people will never surrender their desire to control their relationships* both among themselves and *with non-Indian governments, organizations, and persons.*

Emphasis Added.

25 U.S.C. § 450(a) declaring Congressional policy, states,

(c) Declaration of national goal 'The Congress declares that a major national goal of the United States is to . . . to achieve the measure *of self-determination essential* to their social and economic well-being.

Emphasis Added.

25 U.S.C. § 450(e) provides for Indian Preference in Employment.

25 U.S.C. §§ 3601, 3602 The Indian Tribal Justice Act passed in 1993. 25 U.S.C. § 3601 is Congress' commitment to Tribal Courts and recognition of them as a vital part of Tribal governance:

The Congress finds and declares that —

(2) the United States has a trust responsibility to each tribal government that *includes the **protection** of the sovereignty of each tribal government*;

(3) Congress, through *statutes, treaties, and the exercise of administrative authorities*, has *recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes*;

(4) Indian tribes possess ***the inherent authority*** to establish their own form of government, *including tribal justice systems*;

(5) tribal justice systems are an *essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments*;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional *tribal justice practices* are essential to the *maintenance of the culture and identity of Indian tribes* and to the goals of this chapter;

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

Emphasis added.

25 U.S.C. §§ 3651, *et seq.* 'Indian Tribal Justice Technical and Legal Assistance Act of 2000' reiterates many of the findings above, but adds,

> (2) Indian tribes are sovereign entities and *are responsible for exercising governmental authority over Indian lands*; . . .
>
> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the *most* appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; . . .
>
> (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in *the development of strong tribal court systems*.

Emphasis added.

25 U.S.C. § 3665. Tribal authority

> Nothing in this chapter shall be construed to —
>
> (1) encroach upon or diminish *in any way* the *inherent sovereign* authority of each tribal government to determine *the role of the tribal justice system within the tribal government or to enact and enforce tribal laws*;
>
> (2) diminish in any way the authority of tribal governments to appoint personnel;

> (3) impair the *rights* of each tribal government to determine the *nature of its own legal system* or the appointment of authority within the tribal government;
>
> (4) *alter in any way any* tribal traditional dispute resolution fora;
>
> (5) imply that any tribal justice system is an instrumentality of the United States; or
>
> (6) diminish the *trust responsibility* of the United States to Indian tribal governments *and tribal justice systems* of such governments.

Emphasis Added.

25 U.S.C. §§ 3631 and 3665, among *many* other statutes and policies, states that these laws shall not diminish Tribal inherent sovereignty in their Courts or governments.

Contracts

Self-Determination Act Navajo Judicial Program — Annual Funding Agreement Between the Navajo Nation and the United States of America, Secretary of the Department of Interior, Page 1 and 2. (P. L-144-146) obligating the Navajo Nation Judicial Program to carry out its duties in "conformity with . . . *the Navajo Nation law and the Indian Civil Rights Act*." (P. L-145).

STATEMENT OF THE CASE

This case is about the Tenth Circuit Court's dismissal of Truck/Farmer's Insurance and Attorney Ickes: (1) conflicting with the standards set by this Court in *Montana v. United States*, 450 U.S. 544, 565 (1981) for exceptions of Tribal Court jurisdiction over non-Indians; (2) directly conflicting with and exactly opposite to the unanimous en banc decision in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert denied*, 122 S. Ct. 925 (2002) regarding the application of the Indian Civil Rights Act, and Supreme Court precedence prior to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); and (3) conflicting with Treaties, statutes, Executive Orders, regulations and policies that are in keeping with *Enas* reasoning, by *de facto* immunizing all non-Indians from Tribal governance.

No U.S. Statute has established a fiduciary duty to non-Indians, or states, but has recognized this high standard of trust under Treaties. 25 U.S.C § 3601(2), among others. Certiorari should be granted based upon issues of immunity, conflicts with Supreme Court and other Circuit Court precedence, and the issue is one of grave national importance to about 500 Indian Tribes in the United States in determining the scope of their ability to enact and enforce their laws. (*See* N.N. 7 § 253 Jurisdiction: "All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." (P. L-61 and 60-66).

Simply stated this case is about Plaintiff Navajo members, Riggs and Dickson, and a Navajo spouse and mother of Navajo children, Plaintiff Singer, covered by the *Navajo Preference in Employment Act* (P. App. 98a & L-37, 22-31, 25-26) seeking protection of *Navajo* Court, for *Navajo*

law violations , irreparably injuring them, and other Native Americans, while within the *Navajo Nation's* exterior borders, at Montezuma Creek Clinic operated by the Defendants on land held in trust for the *Utah Navajo* people by the Utah Navajo Trust Fund, by federal statute mandates.[3] The bad faith litigation, noted by the Navajo Court (Pet. App. 97-98a) involving Truck and Attorney Ickes, (P. L-21) often occurred in the Navajo Court's presence on Tribal trust land at Shiprock, New Mexico, within the exterior borders of the Navajo Nation.

The subject matter jurisdiction of the Navajo Court was briefed more than once in Tribal Court, once based upon the Navajo Preference in Employment Act. (P. L-37). The Tribal Court Issued an Injunction Order and dismissed the motion for reconsideration and the Plaintiffs ignored the Court. The Court issued orders in support of the Preliminary Injunction. (P. L- 17, 18-20). The Navajo Court aware of the damages to patients in the area threatened a fine of "$10,000 dollars a day," and "$1000 per day personally" for each day the Orders of the Court were not carried out. (P. L-16).[4]

3. Act of June 14, 1934, ch. 521, 48 Stat. 960-962. *Pelt v. Utah*, 104 F.3d 1534, 1540 (10th Cir. 1996).

4. The Navajo Court noted:

> The Court, despite previous denials, now attempt to justify their placing the Native American Patients in danger in a cloud of 'confusion' on the 14th day of May, 1999. The prior Temporary Restraining order directed the defendants not to interfere with the Clinic operations. This effort of the Defendants at this juncture lacks sincerity. The defendants' motion to dissolve the preliminary injunction lacked even so much as an

(Cont'd)

The Navajo Court found

> the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in 'repeated misrepresentations of fact and law,' had engaged in evidence spoliation, had intimidated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. (*Id.* at 80.) In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them 'to a trial by tabloid.'

(P. App. 97a). Then linked the harm to the political integrity of the Navajo Nation and its ability to protect people. (*Id.*)

(Cont'd)

> apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients' and families relying on the clinic for health care. Likewise such cold and insensitive and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants bad faith to these proceedings and presents a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of the harm of their malignant acts, and who lack any remorse for their harm to the plaintiffs, patients and this court.

(P. L-11).

> If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have been simply replaced by the Preliminary Injunction on May 14, 1999 with no further deprivations of the plaintiffs . . . numerous diabetic patients would not have continued to go without treatment for a life threatening disease.

(P. App. 95a).

"The defendants can not complain of damage due to large sums of back pay if the defendants could have cut the time short by telling the truth. . . ." (P. App. 92a). Injuries to the patients would escalate if the injunction did not issue. (P. App. 90a). Health and Employment are vital concerns of the Navajo government (P. L-22, *et seq.*) A significant step the Tenth Circuit avoided despite noting the Navajo Court noting a sharp (250%) drop in diabetic patient visits (P. App. 4a-5a) and other direct endangerment of Native American patients.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Court Defendant Dismissals Conflict with *Montana* and de facto immunizes Navajo Law violators based upon national origin

Montana at 565, states, First, "[a] tribe may regulate, through taxation, licensing, or *other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, *contracts*, leases, or other arrangements." *Montana*, supra. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within

its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Tenth Circuit Court relied upon this presumption against Tribal Court jurisdiction to dismiss the defendants. (P. App. 22a). This presumption is opposite Congress' presumption of Tribal Court jurisdiction found **25 U.S.C. §§ 3651**, *et seq*. "Indian Tribal Justice Technical and Legal Assistance Act of 2000" (2) and (6) and case law prior to the *Oliphant* "inherent divestiture" theory, and Navajo code (P. L-61, 64). The Tenth Circuit found no due process problems and relied upon no facts supporting any such claims.

Citing to an undefined, ambiguous, and arbitrary 'nexus' problem first declared in *Atkinson Trading Post v. Shirley*, 121 S. Ct. 1825 (2001) the Tenth circuit court found that Truck's insurance contract with the San Juan Health Services district, [allowing Truck to voluntarily profit itself from each Navajo patients health care contract (of which Truck' policy was an inherent part)] at Montezuma Creek clinic, and Attorney Ickes' contract with the Navajo Nation bar association, [was an inherent aspect of his authority to voluntarily profit himself within the Navajo Nation by defending the respondents in Navajo Court in Shiprock] were 'too attenuated' to survive *Montana* scrutiny. (P. App. 14a).

As to the second, political integrity, public safety, health and welfare exception, the Federal District and Appellate Courts noting the bad faith litigation, abused their discretion and the U.S. fiduciary duty toward Indians as a whole, by failing to take the additional step, as did the Navajo Court, and Petitioners in their briefs below, of linking these acts with the harm (P. App. 97a- 98a) directly to the Navajo Nation plaintiffs, patients, and the government itself, under the *Montana* second exception.

The Tenth Circuit astutely noted, "By enrolling as a member of the Navajo Nation Bar Association, Ickes agreed to follow the American Bar Association's Model Rules of Professional Conduct, which have been adopted by the Navajo Nation Supreme Court. Rule 8.5(a) of the Model Rules provides, 'A lawyer admitted to practice in this jurisdiction *is subject to the disciplinary authority of this jurisdiction*. . . .'" (P. App. 15a). The Tenth Circuit then takes the unprecedented leap of defining "*this* jurisdiction" as New Mexico state and arbitrarily applies New Mexico interpretations of its state bar standards to the Navajo Nation Courts. (*Id.*) If anything, undisputably, Attorney Ickes is licensed in Utah. The Tenth Circuit replaces New Mexico's cultural ideals of fairness in this judgment for the Navajo Court's judgment. "In ***our judgment***, the power to discipline an attorney for alleged misconduct in court is distinct from the power to join the attorney as a defendant with the clients he is representing before that court." (*Id.*) The Court's rulings conflicted with previous rulings wherein parties in federal courts at times were paid by opposing counsel within the Federal Courts' contempt authority.[5]

Allowing the Navajo Bar to sanction the Attorney is *contra* the restorative justice principles of Navajo culture, and is no remedy as the Navajo Court, bound by this 'nexus'

5. *See Murphy v. Housing Authority and Urban Redevelopment Agency of the City of Atlantic City, et al.* (U.S. Dist. Crt. N.J.) 158 F. Supp. 2d 438; 2001 U.S. Dist. LEXIS 12918; 50 Fed. R. Serv. 3d (Callaghan) 1602 August 27, 2001; *Casillan v. Regional Transp. Dist.*, 1993 U.S. App. LEXIS 32668, Nos. 92-1009, 92-1039, 1993 WL 8732, at ** 6-7 (10th Cir. Jan. 15, 1993); *DeHerra v. City and County of Denver ex rel. Brd. of Water Comm'rs*, No. 95-110, WL 521053 (10th Cir. June 12, 1996); *Schutts v. Bently Nevada Corporation, et al.* (U.S. Dist. Crt. Nev.) 966 F. Supp. 1549, 1997; 1997 U.S. Dist. LEXIS 8459.

standard, could not enforce any Navajo order against him because he is white and not Indian, a condition of national origin. Based upon the foregoing, the Tenth Circuit dismissal of Truck and Attorney Ickes violated the first and second *Montana* exceptions, and codified express Congressional authority, and should be reversed.

II. The Tenth Circuit Court's Ruling as to the Applicability of the Indian Civil Rights Act to Tribal Court Jurisdiction Conflicts with and is Exactly Opposite of the Ninth Circuit unanimous en banc decision in *Enas*, and prior Supreme Court Precedence

If this Court adopts *Enas'* reasoning, *Montana*'s infamous test will be obsolete as Courts will have no subject matter jurisdiction to narrow the scope of Tribal Courts' jurisdiction. *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert denied*, 122 S. Ct. 925, 2002, the Ninth Circuit *en banc* held "We conclude that under the 1990 amendments to the Indian Civil Rights Act, Indian tribes prosecute non-member Indians pursuant to their inherent power." *Id.* The Court explained that Tribal Courts' exercise of inherent sovereignty is not a "Constitutional" issue wherein the *Courts* have the ability to restrict a Tribes inherent sovereign authority, but one of federal common law wherein "*Congress [not the Courts] has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.*" *Enas*, at 669-71 . A claim going to a court's subject-matter jurisdiction may be raised at any point in the litigation by any party, even the first time on appeal. *See Freytag v. Commissioner*, 501 U.S. 868, 894-895, 111 S. Ct. 2631, 2646-2647, 115 L. Ed. 2d 764 (1991) (Scalia, J., concurring in judgment).

The Tenth Circuit found the Petitioners Indian Civil Rights Act arguments, and thus the Navajo Courts' finding of its jurisdiction within the Indian Civil Rights Act (P. L-10) that jurisdiction must apply based upon the equal protection mandates of 25 U.S.C. § 1302, applicable to all the defendants, particularly here counterclaiming, unpersuasive. "Appellants contend that the Navajo court's actions respecting Ickes [actually to all the defendants' Navajo counterclaims] are sanctioned by federal law, namely 25 U.S.C. § 1302. This argument is utterly devoid of any merit." (P. App. 16a).

The *Enas* court found unanimously 25 U.S.C. § 1302 did most certainly apply to defendants in a criminal context, so that Supreme Court decisions of *Duro v. Reina*, 495 U.S. 676 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); and *United States v. Wheeler*, 435 U.S. 313, 328 (1978), (based on the "implicit divestiture" theory that narrowed Tribal Court jurisdiction beginning with *Oliphant*), were not based upon a Constitutional, but federal common law, and the Congressional clear and unambiguous enactments were the authority in defining a Tribal Court's exercise of the Tribe's inherent sovereignty.[6]

Similarly to *Enas'* application of the Indian Civil Rights Act Courts' jurisdiction to *Duro*; *Oliphant*; and *Wheeler*, the Plaintiffs here argue that the clear wording of the Indian Civil Rights Act takes precedence over the tribal jurisdictional narrowing theories found *Montana* (presumption against tribal jurisdiction over non-Indians), and its progeny in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no tribal jurisdiction

6. *Enas'* certiorari petition was denied about one week after this case had oral argument, and briefing at the appeals court was closed. It was discovered recently.

over dangerous driving by non-Indians); *Atkinson Trading Post v. Shirley*, 121 S. Ct. 1825 (2001) (a ill defined and ambiguous and arbitrarily applied "nexus" test), and *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) ("inherent state jurisdiction" over tribes), originating in *Oliphant*'s *theory* of "implicit divestiture" that is unmoored from previous precedence and statutes, and now the 1992 ratified treaty of the United Nation International Covenant on Political and Civil Rights that has become the "supreme law of the land". U.S. Constitution, Article VI, Supremacy Clause. Congress has never granted any immunity from Tribal jurisdiction to *non-Indians*, based primarily on their national origin, as *Montana*.

III. The Tenth Circuit Court's Dismissal and Remand Conflicts with the "Supreme Law of the Land"

Notably, both the 1993 and 2000 Tribal Justice Support Acts, *after Oliphant* and *Montana*, and help implement the June 8, 1992 ratification of the United States treaty of the **United Nations International Covenant on Civil and Political Rights**, (UNICPCR) 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49. The United States has committed to this international body to "promote the realization of the *right* of self-determination and shall respect that *right*, in conformity with the provisions of the Charter of the United Nations." for *persons* on trust lands. UNICPCR Part 1, Article 1, sec. 3. The Courts shall apply the laws to "everybody" equally. Part III, Article 14, Sec.1. The Navajo Courts are bound in their dependant status to uphold this Treaty, that no "state", or "anything in the Constitution" can violate. So is Utah and its political subdivisions and federal courts in the protection of Navajo laws.

> **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and** *all Treaties* **made, or** *which shall be made*, **under the Authority of the United States,** *shall be the supreme Law of the Land*; **and the Judges in every State shall be bound thereby,** *any Thing in the Constitution* **or** *Laws of any state* **to the Contrary notwithstanding.**

U.S. Constitution, Article VI. Emphasis added.

In fact, the Department of State in 1994, in a report on this treaty to the United Nations, ignored *Oliphant* and its progeny.[7] "The trust obligation is *a strict fiduciary standard* that applies to all departments of the government that deal with Indians, not just the departments specifically charged with responsibility for Indian affairs."[8] (P. L-143). *See also* CHAPTER XI, DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES, Article 73, charging the United States with a "sacred trust obligation".

7. "The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation." *Fisher v. District Court*, 424 U.S. 382 (1976). Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, and, as a result, "[c]ivil jurisdiction over such activities *presumptively lies* in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) . . . The United States also has a more general trust relationship with the Indian people, *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (Mitchell II), and that relationship creates an overriding duty to *deal fairly* with all Indians. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). (P. L-143).

8. U.S. Department of State report to the United Nations. http://dosfan.lib.uic.edu/ERC/law/Covenant94/Specific_Articles/01.html.

IV. The Tenth Circuit Court Dismissal Conflicts with Statutes

In 1968, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03.[9] The history of this act shows, as Navajo Nation Supreme Chief Judge Yazzi points out (P. L-40), that the Senate Judiciary Committee purposefully and selectively used the words "any persons" instead of "members of the tribe" for whom the equal protection provisions of the Navajo government applies, equal to the provisions of the Fourteenth amendment.[10] Congress need not rewrite another amendment to express clearly its intent when it used "any person" in 25 U.S.C. § 1302. It is unambiguous. "Any" is an all encompassing word meaning

9. The Indian Civil Rights Act was originally passed by the Senate on December 7, 1967, as a stand-alone measure containing six titles. S. 1843 (as amended), 90th Cong. (1967); *see* 113 Cong. Rec. 35,473 (1967). The bill was finally enacted as Titles II through VII of a broader civil rights measure, the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 77. We refer to the Title designations in S. 1843. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 n.1 (1978); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881 n.9 (2d Cir.), *cert. denied*, 117 S. Ct. 610 (1996).

10. "Originally the Department of Interior's proposed equal protection provision applied only to 'any member of the tribe' within the jurisdiction of the tribal government's equal protection under the tribe's laws, a lesser standard than that of the Fourteenth Amendment." The Judiciary Committee decided instead to guarantee "*any person*" located within the tribe's jurisdiction equal protection under the tribe's laws, S. Rep. No. 90-841, at 2, thereby making the scope of the clause equal with that of the Fourteenth Amendment. Comments of Chief Judge Yazzi before the Senate Committee on Indian Affairs. *See also Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968) for this history of the Indian Civil Rights Act.

"asserting without limitation". WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913).

Under *Enas*'s holding, and the clear and unambiguous language of statutes, this Court can sustain, under principals of full faith and credit, the Navajo Court Orders as an exercise of 'inherent sovereign' rights (**25 U.S.C. § 1301(2)**) to "enact and enforce laws" (**25 U.S.C. § 3665**) within the confines of due process and equal protection, to "any person" (**25 U.S.C. § 1302**) in "Indian lands" the Tribes are "responsible" for governing, as the "most appropriate" Courts for resolving civil disputes in "suits at law" (**25 U.S.C. § 1351**), based upon the Navajo Nation's right to enact and enforce their laws (**25 U.S.C §§ 3665(1), 3601, 3602**), for Indians and non-Indians alike.[11] If the intent of Congress is clear and unambiguous, judicial inquiry stops.[12] Congress again used

11. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 & n.21 (1978); *see, e.g.*, 25 U.S.C. §§ 450, 450a (Indian Self-Determination and Education Assistance Act, funding and assistance for tribal government institutions, including courts); 25 U.S.C. § 476, *et seq.* (Indian Reorganization Act, reorganization of tribal governments); 25 U.S.C. § 1301, *et seq.* (Indian Civil Rights Act of 1968, recognizing powers of tribal self-government, establishing bill of rights, and providing for development of model code of Indian offenses for tribal courts); 25 U.S.C. § 3601, *et seq.* (Indian Tribal Justice Act, establishing Office of Tribal Justice Support within Bureau of Indian Affairs to assist tribal courts). *See* Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (1996).

12. *Burke Mountain Recreation, Inc. v. Vermont Development Credit Corporation* (In re Burke Mountain Recreation, Inc.), 64 B.R. 799, 802 (Bkrtcy. D. Vt. 1986) ("If the language is plain, the intent must be ascertained from the language itself.") (citations omitted);

(Cont'd)

its plenary powers in the year 2000 "Indian Tribal Justice Technical and Legal Assistance Act of 2000" amending the previous Indian Tribal Justice Support Act, 25 U.S.C. §§ 3601, 3602 (1993).[13] (P. L-56-59). 25 U.S.C. §§ 3651, *et seq.*

(Cont'd)
In re Keinath Brothers Dairy Farm, 71 B.R. 993 (Bkrtcy. E.D. Mich. 1987) (conflicting United States Supreme Court and Federal cases representing both schools, *i.e.*, those that permit further inquiry, and those that do not, when plain meaning rule is applicable; held plain language would be given effect notwithstanding contrary language in legislative history).

13. The Senate Report accompanying that Act explained that "**tribal courts are permanent institutions *charged with resolving the rights and interests of both Indian and non-Indian individuals***." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). Emphasis added. And the Conference Report stated that "civil jurisdiction on an Indian reservation '*presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.*'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (*quoting Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). *See also* Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3651, §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559, 114 Stat. 2778 amended the Indian Tribal Justice Act by stating "(2) Indian tribes are sovereign entities and *are responsible for exercising governmental authority over Indian lands*; . . . (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the *most* appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; . . ." Further, Congress in section (11) of the act authorized appropriations to build *strong* Tribal Court systems. Congress made no distinctions regarding inherent sovereignty jurisdiction of Tribal Courts based upon national origin of the entities or persons. *See* the Navajo Contract amounts. (P. L-56-59).

If there was a statutory ambiguity, in keeping with the fiduciary relationship of tribes, the Supreme Court has stated frequently, these statutes are to be, "liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). Congress has determined the Tribe's are "responsible" for the governance of Indian lands, and their courts are the "most" appropriate forums for doing so. 25 U.S.C. §§ 3601, 3602, 3651, and 3665.

The Navajo Nation is a federally recognized Indian Tribe[14] signing the Treaty of 1868.[15] The Navajo Nation's Courts are essential to self-governance, and ability to define itself with self-determination and to "determine *the role of the tribal justice system within the tribal government or to enact and enforce tribal laws.*"[16] 25 U.S.C. § 3665(1).

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14. "The Navajo Nation is the largest Indian nation in the United States [w]ith a citizenship of almost 300,000 enrolled members the Navajo Nation courts provides services to almost thirteen percent of all the federally recognized Indians within the United States." Testimony of Navajo Nation Supreme Court Chief Judge Yazzi before the Senate Committee on Indian Affair, 2002. (P. L-41).

15. The Treaty of 1868 stated in Article 10. *No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same.* No part of the Treaty of 1868 alludes to any control over Indians without their permission of any entity other than the United States.

16. The **Navajo** courts process roughly 90,000 cases annually. In fiscal year 2001, statistics illustrate that **Navajo** courts dealt with a caseload of 88,000 cases. The **Navajo judicial** system is a two-tiered

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For that reason, this Court has recognized that tribal courts are an "appropriate forum[]" — **sometimes the exclusive forum** — for the adjudication of "disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). The Court has rejected attacks on the institutional competency of tribal courts as "contrary to. . . . congressional policy," *Iowa Mut.*, 480 U.S. at 19, and to its own precedents, *Santa Clara Pueblo*, 436 U.S. at 65-66.

V. The Tenth Circuit Dismissals Conflict with the Laws of Territories

The Navajo Court also found that its authority over non-Indian defendants was based upon a "territorial" premise. *Enas*' reasoning is consistent with prior Supreme Court rulings that U.S. territories are subject to the ultimate control of *Congress*. *Binns v. United States*, 194 U.S. 486, 491 (1904) ("It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a

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> system. . . . There are seven district courts or trial courts located throughout the **Navajo** Nation. These courts generally have four divisions: (1) District Court; (2) Family Court; (3) Small Claims Court; and (4) the Peacemaker Division. . . . Eighteen judges make up the **Navajo** judiciary. . . . Three appellate judges preside in the Supreme Court. One appellate judge is the Chief Justice and the other two are Associate Justices.

Comments of Navajo Nation Chief Judge Yazzie before the Senate Committee on Indian Affairs, 2002. (P. L-41). Undisputably, the Navajo Rules of Civil Procedure nearly mirror the Federal Rules of Civil Procedure and the Navajo Nation has adopted the ABA Model Rules of Professional Conduct. (Pet. App. 15a).

legislature elected by the citizens of the territory"); *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (Congress "has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states."); *Mormon Church v. United States*, 136 U.S. 1, 42-43 (1890) (Having rightfully acquired said territories, the United States government was the *only one* which could impose laws upon them, and its sovereignty over them was complete. *No state of the Union had any such right of sovereignty over them*; no other country *or government* had any such *right*.); *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885).

> But in ordaining government for the territories, and the people who inhabit them, *all* the discretion which belongs to legislative power is vested in congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular territory, and the qualification of those who shall administer it.

Emphasis added. In *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) the idea of "inherent state jurisdiction" over Indian territories is *exactly opposite* to any Congressional findings and the Treaty of 1868 that cited *only* the United States would govern the Tribe, mentioning nothing of State authority over Indian Country.

Congress found in the Indian Self-Determination Act, that § (2) "the *Indian people will never surrender their desire to control their relationships* both among themselves and *with non-Indian governments, organizations, and*

persons." 25 U.S.C. § 450(2). Emphasis added.[17] Some states do not afford full faith in credit to Tribal decisions, others agree and do[18] jurisdiction is defined by statute. Here, the Tenth Circuit Court did not cite to or rely upon any evidence contrary to the Navajo Court findings that there were no due process violations of any type. (P. L-4, 5).

VI. The Tenth Circuit Dismissal Conflicts with the Spirit of Executive Orders

Further clarifying the scope of Indian Tribes over non-Indians, Executive Order 13175 signed by President Clinton on November 6, 2000[19], and President Bush's Proclamation

17. Many of today's great, or great-great grandchildren of a Indian tribal member can attest to the idea of pioneer intermarriage, trapping, hunting schools, farming, and business arrangements with tribes by non-Indian persons, subject completely to Indian rule while traveling, living, or working in Indian territory. With today's sophisticated Court systems in the Navajo Nation, often staffed by college trained or very experienced and mature lawyers and advisors, full due process equal protection for *all persons*, as is demanded by the Navajo Nation Bill of Rights, are in keeping with the Navajo cultural norms of politeness and hearing each person speak.

18. *See Fredericks v. Eide-Kirschmann Ford, Inc.*, 462 N.W.2d 164 (N.D. 1990); *Barrett v. Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); *cf. Jones v. Meehan*, 175 U.S. 1, 31-32 (1899).

19. **Sec. 2.** Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

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of November 12, 2001, supporting this Executive Order states, "My Administration will continue to work with tribal governments on a *sovereign* to *sovereign* basis. . . . We will protect and honor *tribal sovereignty* and help to stimulate economic development in reservation communities."

Unquestionably, Executive Departments are carrying out Congress' affirmatively avowed goal in the Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq*. and 2000 amendments, that Tribes possess "inherent authority to establish their own form of government, including tribal justice systems," which are "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. §§ 3601(4)-(6). (P. L-122, 123, 124, 126, 128). The current Contract between the United States and the Navajo Nation to carry out its laws and the Indian Civil Rights act, (P. L-144-145) is in keeping with all of the foregoing, and using full faith and credit, these

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> 1. . . . . The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a *trust relationship* with Indian tribes.
>
> 2. . . . . Indian tribes exercise inherent sovereign powers over their members *and territory*. The United States continues to work with Indian tribes on a *government-to-government basis* to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
>
> 3. The United States recognizes the right of Indian tribes to self- government and supports *tribal sovereignty* and self-determination.

Navajo Court orders, any ambiguities being construed favorably by the Tribes, should be carried out by all Federal Courts, as to all the defendants that caused "an action to occur" within Indian Country as defined by the Navajo Nation Title 7 Chapter 253. Supreme Court cases point in opposing directions. *Compare United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (holding that the Cherokee Nation was a "territory" for purposes of a federal letters of administration law), *with New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909) (citing, with approval, *Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883).

VII. This Issue is One of Great Governmental Importance

The Tribal Court, as inherent authority within their governments must protect its citizens from harm from perpetrators that are "like a scavenging parasite of people ignorant of the harm of their malignant acts, and who lack any remorse for their harm" (P. L-1) be they drunk drivers on state roads, spouses, parents, business persons, or, as here, health care providers breaking the terms of their IHS contract, and Utah State Merit system act because they are non-Indians and immune, chilling Navajo rights and confidence in their government. (P. App. 92a)

"In short, the **Navajo** Nation is faced with nothing less than a threat of cultural, economic, and political genocide. In the end, we are talking about territorial integrity." Navajo Nation Chief Justice Robert Yazzi, (P. L- 40).

CONCLUSION

Based upon the foregoing, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SUSAN ROSE
Counsel of Record
LAW OFFICES OF SUSAN ROSE
Attorneys for Petitioners
9553 South Indian Ridge Dr.
Sandy, Utah 84092
(801) 545-0441

(WM.P. BATTLES,
Navajo - Council
Assisting on Petition)