No. 06-361

In The

Supreme Court of the United States

DON WALTON,

Petitioner,

v.

TESUQUE PUEBLO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the applicability of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) to non-Indians is an unresolved issue justifying the grant of certiorari?

2. Whether the Tenth Circuit, by failing to address Petitioner's claims under 42 U.S.C. §§ 1981, 1985, and 1988, briefed by Petitioner only in his reply brief on cross-appeal, has "split" with the Ninth Circuit's decision in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1981)?

3. Whether revocation of an annual vendor's permit and expulsion from a tribally operated "flea market" is a deprivation of liberty sufficient to trigger *habeas corpus* relief under the Indian Civil Rights Act?

4. Whether Petitioner, who is not a party to an Indian Self Determination and Education Assistance Act ("ISDEAA") contract, may sue to enforce such a contract, despite the absence of provisions in the ISDEAA authorizing such a suit or waiving tribal sovereign immunity?

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I. INTRODUCTION

Petitioner has not presented an issue which satisfies this Court's standards for granting review by certiorari. The Rules of this Court indicate that a writ of certiorari will be granted "only for compelling reasons." SUP. CT. R. 10. The "character of the reasons" for which the Court will grant review include a conflict between circuits concerning an important matter, a departure from the accepted and usual course of judicial proceedings so significant that the Court's supervisory powers should be invoked, a decision on an important question of federal law that has not (but should be) settled by this Court, or a decision on an important federal question which conflicts with the relevant decisions of this Court. *Id.* Petitioner has satisfied none of these criteria.

First, Petitioner seeks review on the ground that the applicability of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), to non-Indians presents an important and unresolved issue. This Court and the lower federal courts have uniformly concluded, however, that the claims of non-Indians are subject to the holdings in *Santa Clara Pueblo.* The success of Petitioner's due process argument would require overruling *Santa Clara Pueblo.*

Second, the Tenth Circuit has not "split" with the Ninth Circuit in relation to the enforcement of 42 U.S.C. §§ 1981, 1985, and 1988, as suggested by Petitioner. The Tenth Circuit correctly treated Petitioner's civil rights claims as subsumed within his claims under the ICRA, or waived. Petitioner's argument that the Tenth Circuit opinion below somehow diverges from *Evans v. McKay,* 869 F.2d 1341 (9th Cir. 1989) is groundless.

Third, the Tenth Circuit correctly held that Petitioner had not shown a restraint on his liberty sufficient to warrant *habeas corpus* relief. The record confirms that Petitioner was expelled from the Pueblo Flea Market, but that in December 2003, the Governor of the Pueblo gave Petitioner express permission to enter and traverse the remainder of the Pueblo. Petitioner presented no evidence that he had been excluded from any part of the Pueblo other than the Flea Market after December 2003.

Finally, the Tenth Circuit correctly rejected Petitioner's arguments that the ISDEAA affords him a cause of action and a waiver of tribal sovereign immunity for claims like those asserted by Petitioner. Petitioner is not a party to an ISDEAA contract and his claims do not arise from any such contract. Petitioner has thus failed to present compelling reasons for granting review in connection with any of the issues raised in the Petition.

II. STATEMENT OF THE CASE

Petitioner sued the Pueblo of Tesuque and several tribal officials (collectively, the "Pueblo") following revocation of Petitioner's vendor's permit for the Pueblo Flea Market. *App.* at 4. The revocation resulted from an altercation Petitioner had with a neighboring vendor. *Id.* Petitioner first sued in tribal court. *Id.* The Pueblo moved for dismissal, arguing lack of subject matter jurisdiction and tribal sovereign immunity. *Id.* After briefing, a hearing, and oral argument on the motion to dismiss, the tribal court dismissed Petitioner's suit as barred by tribal sovereign immunity. *Id.* at 4-5. The tribal court of appeals affirmed. *Id.* at 5, 23-24. Petitioner's counsel, Mr.

Treisman, represented Petitioner in all of these proceedings. *Id.* at 4-5, 27.

Petitioner then sued in federal court, seeking *habeas corpus* relief, damages for deprivation of liberty and property without due process in violation of ICRA, and for breach of contract. *Id.* at 5. The Pueblo moved to dismiss on grounds of tribal sovereign immunity and lack of subject matter jurisdiction. *Id.* The district court denied the motion in part, finding that Petitioner's case fell within the narrow exception to *Santa Clara Pueblo* recognized in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes,* 623 F.2d 682 (10th Cir. 1980). Under *Dry Creek*, federal courts may entertain an ICRA suit against an Indian tribe if (1) the dispute involves a non-Indian, (2) the dispute does not involve internal tribal affairs, and (3) there is no tribal forum to hear the dispute. *Id.* at 7. The district court held that *Dry Creek* applied in this case because no tribal forum was available to Petitioner and that Petitioner's ICRA claims were therefore viable. *Id.* at 5. The district court rejected Petitioner's *habeas corpus* and ISDEAA claims.

The Pueblo appealed. The Tenth Circuit held that the *Dry Creek* exception did not exempt Petitioner's non-*habeas* ICRA claims from *Santa Clara* because Petitioner successfully availed himself of a tribal forum. *Id.* at 8. Although the tribal court's decision was unfavorable to Petitioner, the Tenth Circuit reasoned that dismissal from tribal court on tribal sovereign immunity grounds "is simply not the same as having no tribal forum to hear the dispute. . . . " *Id.*

On cross-appeal, the Tenth Circuit affirmed the district court's rejection of Petitioner's *habeas corpus* and ISDEAA claims. Petitioner's loss of a vendor's permit and

his expulsion from the Flea Market did not amount to a "detention," as required to trigger *habeas* relief. *Id.* at 8-9. The Tenth Circuit also concluded that the ISDEAA provided no cause of action or relevant waiver of tribal sovereign immunity for Petitioner, who had no ISDEAA contract. *Id.* at 10.

Petitioner sought rehearing and rehearing *en banc*. The Tenth Circuit ordered the Pueblo to respond. The Pueblo pointed out that all of the grounds asserted in the petition were reârguments of positions already considered and rejected, except the arguments relating to 42 U.S.C. §§ 1981, 1985, and 1988. These had been waived, the Pueblo argued, because they were not briefed until the reply brief on cross-appeal. The Tenth Circuit denied rehearing and rehearing *en banc*.

III. REASONS FOR DENYING REVIEW

A. The Court Should Not Revisit Or Overrule *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Petitioner's due process arguments conflict directly with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara Pueblo*, this Court held that the ICRA does not authorize suits against Indian tribes, waive tribal sovereign immunity, or create a private cause of action against tribal officials. *See* 436 U.S. at 59, 72. The *Santa Clara Pueblo* opinion further recognized that the Constitution of the United States does not constrain Indian governments. *Id.* at 56. This Court did not limit the effect of these holdings to claims asserted by tribal members or Indians. Instead, the *Santa Clara Pueblo* opinion pointed out that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication

of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* at 65 (citing *Fisher v. District Court*, 424 U.S. 382 (1976) and *Williams v. Lee*, 358 U.S. 217 (1959)).

Accordingly, this Court and the lower federal courts have consistently applied the holdings of *Santa Clara Pueblo* to cases brought by non-Indian litigants. *See, e.g., Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 759-760 (1998) (holding contract claims of non-Indian corporation were barred by tribal sovereign immunity, citing *Santa Clara Pueblo* in pointing out that Congress, subject to constitutional limits, can alter the limits of tribal sovereign immunity through explicit legislation); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311-1313 (10th Cir. 1984) (affirming dismissal of claims of non-Indian landowners against the Pueblo, relying on *Santa Clara Pueblo*); *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035 (9th Cir. 1999) (claims of non-Indian litigant asserting *Dry Creek* exception held barred by tribal sovereign immunity, following *Santa Clara Pueblo*); *Fillion v. Houlton Band of Maliseet Indians*, 54 F. Supp. 2d 50, 52-53 (D. Me. 1999) (holding that white, non-member's motion to amend her complaint to include ICRA claims was barred as futile by *Santa Clara Pueblo* and declining to apply the *Dry Creek* exception); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 394-397 (E.D. Wis. 1995) (granting motion to dismiss non-member's wrongful termination claim, following *Santa Clara Pueblo*). The Petitioner is therefore mistaken in claiming that the applicability of *Santa Clara Pueblo* to non-Indian parties is unresolved.

The relevance of the *Santa Clara Pueblo* holdings to claims asserted by non-Indians follows logically from the language of the statute the *Santa Clara Pueblo* opinion

addressed. *See* 25 U.S.C. § 1302(8) (stating that "no Indian tribe in exercising powers of self-government shall . . . deny to *any person* within its jurisdiction the equal protections of its laws or deprive *any person* of liberty or property without due process of law . . . ") (emphasis added). The ICRA thus protects any person, whether Indian or not. *See, e.g., White*, 728 F.2d at 1312 n.1 (recognizing that "the protections afforded to 'any person' under the ICRA are not limited to American Indians, but apply also to non-Indians."). The *Santa Clara Pueblo* ruling thus applies to non-Indians because the ICRA, the statute construed in *Santa Clara Pueblo,* applies to non-Indians.

Petitioner's suggestion that his case presents an unresolved issue, or one upon which the circuits are divided, is therefore untenable. *See Pet.* at 12 ("The question presented is whether and to what extent due process of law obtains for non-Indians in Indian country today."), 15 ("The undecided issue of civil rights of non-Indians in Indian country, on which the circuits differ . . . remain for this court to declare."). Petitioner has cited no authority departing from *Santa Clara Pueblo,* except perhaps *Dry Creek*. Only the Tenth Circuit has recognized the *Dry Creek* exception, but declined to apply it in Petitioner's case. Consequently, the success of Petitioner's due process arguments necessarily requires overruling *Santa Clara Pueblo*. Petitioner offers no sound reasons for doing so.

Stare decisis requires compelling reasons for overruling an existing precedent. The doctrine is so influential that, even in cases presenting important constitutional issues, this Court has always required some special justification for departing from precedent. *See, e.g., Dickerson v. United States,* 530 U.S. 428, 443 (2000); *United States v. IBM,* 517 U.S. 843, 856 (1996). As a

28-year old precedent construing the ICRA, *Santa Clara Pueblo* deserves particularly strong *stare decisis* deference. *See, e.g., Sheppard v. United States*, 544 U.S. 13, 23 (2005); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991).

Recently, this Court acknowledged the "fundamental importance" of *stare decisis* as a basic legal principle commanding respect for a court's earlier decisions and the rules of law they embody. *Randall v. Sorrell*, ___ U.S. ___, ___, 126 S.Ct. 2479, 2489 (2006) (rejecting arguments for overruling *Buckley v. Valeo*, 424 U.S. 1 (1976)). *Stare decisis* avoids the instability and unfairness that accompany disruption of settled legal expectations. *Id.* Congress has taken no action to reject this Court's interpretation of the ICRA in *Santa Clara Pueblo* and neither should this Court. Petitioner has not suggested any good rationale for discarding *Santa Clara Pueblo*.

B. No Split Between The Tenth And The Ninth Circuits Exists.

The Petitioner argues that, in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), the Ninth Circuit "held 42 U.S.C. §§ 1981, 1985, and 1988 applicable in Indian country" and that "[t]he law of the Tenth Circuit should be harmonized with the law of the Ninth Circuit." *Pet.* at 14. Petitioner did not address *Evans* or his claims under 42 U.S.C. §§ 1981, 1985, and 1988 in the briefing submitted to the Tenth Circuit until Petitioner's reply brief on cross-appeal. Accordingly, the Tenth Circuit correctly treated these claims as subsumed in Petitioner's ICRA claims or waived on appeal. *See, e.g., Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (stating that the Tenth Circuit does

not ordinarily review issues raised for the first time in a reply brief); *Kaw Nation v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004) (jurisdictional arguments not advanced in a party's initial brief, but raised for the first time in a reply brief, will not be addressed). On appeal, Petitioner did not separately argue for the recognition of civil rights claims, distinct from those asserted under the ICRA, until he submitted the last of the briefs on cross-appeal. The Tenth Circuit thus did not split with the Ninth Circuit by not addressing Petitioner's belated arguments based on *Evans*.

C. Petitioner Failed To Demonstrate A Detention Sufficient To Trigger *Habeas Corpus* Relief.

The Tenth Circuit held that Petitioner's case did not warrant *habeas corpus* relief because the Governor of the Pueblo wrote a letter to Petitioner in December, 2003, expressly permitting Petitioner to enter and traverse the Pueblo. *App.* at 9, n.2. Petitioner presented no evidence that he had been excluded from the Pueblo anytime after December 2003. *Id.* Accordingly, the Tenth Circuit rejected Petitioner's *habeas corpus* claim because he had shown no current detention. *Id.*

Petitioner has presented no precedents resembling the peculiar facts of his case and supporting a claim for *habeas corpus* relief. The Tenth Circuit's ruling rested on the absence in the record of any evidence of an actionable restraint on Petitioner's liberty after December 2003. Petitioner has failed to demonstrate why this ruling justifies certiorari review.

D. Petitioner, Who Was Not A Party To An ISDEAA Contract, Demonstrated No Relevant Cause Of Action Or Waiver Of Sovereign Immunity Under The ISDEAA.

The Tenth Circuit correctly rejected Petitioner's claims under the ISDEAA. Petitioner "is not a party to a self-determination contract and his claims do not arise from any such contract." *App.* at 10. Petitioner has cited no authority supporting the argument that the ISDEAA creates jurisdiction, a cause of action, or a waiver of immunity to permit such non-party claims. If Petitioner's contention is correct, any litigant in tribal court who suffers dismissal on tribal sovereign immunity grounds would have a federal cause of action under the ISDEAA. No precedent supports this result. Petitioner has not demonstrated that the ISDEAA issue warrants further consideration by this Court.

IV. CONCLUSION

The Pueblo respectfully asks that the Court deny review by certiorari.

Respectfully submitted,

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