

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

SEPTEMBER 24, 2014
UPDATE OF RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org/sct/index.html).

The Court's October Term 2014 ("OT14") is set to begin on Monday, October 6, 2014. At present, the Court has accepted 40 cases for review, roughly half of the cases that will be decided during the upcoming term. The Court has not granted review in any Indian law cases, but has held-over the petition filed in *Knight v. Thompson*. In *Knight*, several Native American male inmates in the custody of the Alabama Department of Corrections (ADOC) are seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that ADOC carried its burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that its hair-length policy is the least restrictive means of furthering its compelling governmental interests, including safety and security within the prison system. The ADOC requires all male prison inmates to wear a "regular haircut," defined as "off neck and ears," with no exemptions, religious or otherwise. The Native American male inmates seek a religious exemption based on wearing long hair as a central tenet of their religious faith. The petition was scheduled for conference on May 15, 2014, but no action was taken, probably due to the fact that the Court granted review in another case, *Holt v. Hobbs*, involving a RLUIPA challenge by a Muslim prisoner to the grooming policy of the Arkansas Department of Corrections. In *Holt*, the Project prepared and filed an amicus brief on behalf of NCAI and Huy supporting the petitioner and highlighting issues in the *Knight* case. The Court will hear oral argument in *Holt* on October 7, 2014.

The Court's long conference will be held on September 29, 2014, during which the Court will consider nearly 2000 petitions filed before and during its summer recess. At present, five petitions are pending in Indian law cases—three of which will be considered during the long conference (see below). The Project is carefully monitoring each petition, in particular the petition filed in *Dollar General Corporation v. Mississippi Band of Choctaw Indians* in which a non-Indian corporation is seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the Tribal Court has jurisdiction over tort claims brought by a tribal member based on a consensual relationship between the store owned by Dollar General and the Tribe. The store is located on tribal trust land leased to the non-Indian corporation and the store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the program brought an action in Tribal Court alleging that he was assaulted by the store manager. In its petition, Dollar General frames the question presented as follows: "The case accordingly presents the issue left open in *Hicks* and the Question the Court granted certiorari to decide in *Plains Commerce*: Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against

nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.”

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, several petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

HICKS V. HUDSON INSURANCE CO. (NO. 14-283) – On September 3, 2014, a non-Indian employee of a tribal casino filed a petition seeking review of a decision by the Oklahoma Supreme Court to dismiss her workers compensation claims brought in state court against the insurer for the Muscogee Creek Nation based on the doctrine of tribal sovereign immunity. The question presented is: “Whether an insurance company doing business with a federally recognized American Indian Tribe is entitled to sovereign immunity for the acts and omission it takes in furtherance of the business of insurance.” The insurance company’s brief in opposition is due on October 10, 2014.

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS (NO. 13-1496) – On June 12, 2014, Dollar General Corporation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the Tribal Court has jurisdiction over tort claims brought by a tribal member based on the consensual relationship between the store owned by Dollar General and the Tribe. The store is located on tribal trust land leased to the non-Indian corporation and the store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the program brought an action in Tribal Court alleging that he was assaulted by the store manager. The Tribe’s brief in opposition was filed on August 21, 2014. Dollar General filed its reply brief on September 2, 2014, and **the petition has been scheduled for conference on September 29, 2014.**

MARCUSSEN V. BURWELL (NO. 13-1447) – On May 27, 2014, Lana Marcussen filed a petition (pro se) seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which granted summary affirmance under the Rooker Feldman doctrine in relation to a federal court challenge to pending state court proceedings involving ICWA. Specifically, the questions presented are: (1) Whether the Rooker Feldman doctrine should be overruled for denying all judicial relief by removing the subject matter jurisdiction of the federal courts to hear any civil action brought against federally mandated statutes enforced in the state courts; and (2) Whether Congress has the authority to adopt laws intended to be primarily or exclusively enforced in the state courts. On June 27, 2014, the United States filed a waiver of its right to respond, and **the petition has been scheduled for conference on September 29, 2014.**

YOWELL V. ABBEY (NO. 13-1049) – On January 17, 2014 Raymond Yowell, an 84-year-old Western Shoshone Indian and cattle rancher, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which reversed a district court order denying the Bureau of Land Management (BLM) and Department of Treasury’s motion to for summary judgment regarding his civil rights action against state and federal officials and vacating the injunction issued against BLM. Throughout his life, Mr. Yowell had let his livestock graze on the “historic grazing lands associated with the South Fork Indian Reservation.” In the 1990s, the BLM accused him of trespassing and in 2002, without a warrant or court order, seized and sold his cattle. The Ninth Circuit held that the district court had abused its discretion in granting the injunction and had erred in denying the motion for summary judgment based on the qualified immunity of the state and federal officials. The brief in opposition was filed on June 4, 2014, and **the petition has been scheduled for conference on September 29, 2014.**

KNIGHT V THOMPSON (NO. 13-955) – On February 6, 2014, several Native American male inmates in the custody of the Alabama Department of Corrections (ADOC) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that ADOC carried its burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that its hair-length policy is the least restrictive means of furthering its compelling governmental interests, including safety and security within the prison system. The ADOC requires all male prison inmates to wear a “regular haircut,” defined as “off neck and ears,” with no exemptions, religious or otherwise. The Native American male inmates seek a religious exemption based on wearing long hair as a central tenet of their religious faith. In the lower courts, the United States had intervened and filed an amicus brief in support of the Native American inmates. The Project worked with the attorneys for the prisoners to prepare and file a tribal amicus brief in support of the cert petition on behalf of NCAI and Huy. Amicus briefs in support were also filed by the Sikh Coalition and the International Center for Advocates against Discrimination. The ADOC filed their brief in opposition on April 11, 2014, and the petition was scheduled for conference on May 15, 2014, but no action has been taken. (Note: The Court did grant review in another case, *Holt v. Hobbs*, No. 13-6827, involving a RLUIPA challenge by a Muslim prisoner to the grooming policy of the Arkansas Department of Corrections. In *Holt*, the Project prepared and filed an amicus brief on behalf of NCAI and Huy highlighting issues raised in the *Knight* case and supporting petitioner. **The Court will hear oral argument in *Holt* on October 7, 2014.**)

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court has not yet denied or dismissed the any petitions for writ of certiorari in Indian law cases.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Sam Owl, 1516 P Street, NW, Washington, DC 20005.

Please contact us if you have any questions or if we can be of assistance: John Dossett, NCAI General Counsel, 202-255-7042 (jdossett@ncai.org), or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 (richardg@narf.org).