UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Appeal No. **08-55037**

LOUISE VICTORIA JEFFREDO, JOYCE JEAN JEFFREDO-RYDER, CHRISTOPHER L. RYDER, JEREMIAH S. RYDER, JONATHAN B. RYDER, MICHAEL JOHN JEFFREDO, ELIZABETH VILLIANA JEFFREDO WARDEN, JACKIE M. MADARIAGA, KELLY M. MADARIAGA, CARRIE MADARIAGA, LAWRENCE MADARIAGA, WILLIAM A. HARRIS, STERLING HARRIS, APRIL HARRIS, MINDY PHENEGER, RICHARD HARRIS,

Petitioners-Appellants,

v.

MARK A. MACARRO, DONNA BARRON, MARK CALAC, MARC LUKER, ANDREW MASIEL, RUSSELL "BUTCH" MURPHY, KENNETH PEREZ, DARLENE AZZARELLI, CHRISTINE LUKER,

Respondents-Appellees.

OPENING BRIEF OF APPELLANTS

On Appeal from the United States District Court
for the Central District of California,
Hon. John F. Walter, No. CV-07-1851-JFW

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NON-CORPORATE DISCLOSURE STATEMENT

This section is not applicable to this appeal.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 25 U.S.C. §§ 1301-1303. The Motion to Dismiss was granted on December 4, 2007. A timely Motion of Appeal was filed on December 27, 2007. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

A. Did the lower court err in ruling that the Indian Civil Rights Act 25 U.S.C. §§ 1301-1303 does not provide federal jurisdiction to Appellants.

1. Did the lower court err in determining that no tribal membership issues can ever be reviewed under the Indian Civil Rights Act?
2. Did the lower court err in ruling that the Indian Civil Rights Act only applies to criminal proceedings?
3. Did the lower court err in ruling that the requirements for a detention were not factually or legally satisfied by Appellants?
4. Did the lower court err in ruling that the stripping away of tribal citizenship from its members in good standing (disenrollment) is not a basis for jurisdiction under the Indian Civil Rights Act?

STATEMENT OF THE CASE

An epidemic is sweeping through America, striking down Native Americans. But this time it is not the European borne illness of smallpox; this time it is casino-rich Indian officials turning against their own sisters and brothers. Greed and the desire to crush all political dissent have resulted in tribal administrators stripping away citizenship from its own members. A front page article in the San Francisco Chronicle quoted estimates of 5,000 Indians who have been disenrolled from their own tribes.[1] This tragedy occurs at a time when Indian gambling is a 10 billion dollar business in California alone, and when wealthy casino-tribes have exerted undue influence in the legislature through large donations.[2]

This action arose because the 16 Appellants were kicked out ("disenrolled") of their ancestral Native American Tribe—the Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation (hereinafter referred to as the "Pechanga Tribe"). Although the Appellants were in good standing in the Tribe, the Enrollment Committee ruled that they, and approximately 80 other adults and 100 children, were not truly Pechanga Indians because they were lineal descendants of a woman named Paulina Hunter. Since the Nineteenth Century and

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[1] Fagan, Kevin, Tribes Toss Out Members in High Stakes Quarrel, San Francisco Chronicle, April 20, 2008, *available at www.SFGate.com (search disenrollment)*

[2] See e.g., Lucas, Greg, Senate Approves Boost in Indian Slot Machines, San Francisco Chronicle, April 20, 2007, at B4, *available at* http://sfgate.com (go to archives), and Yu, Belinda, Coins in the Legislative Machine, Stanford Daily, February 2, 2007, *available at* http://stanforddaily.com (search title)

until March, 2006, Paulina Hunter, an original allottee of the Pechanga Reservation, had always been considered a Pechanga Indian and had accompanying citizenship within the Tribe[3].

After exhausting their Tribal remedy of appeal, 16 of the disenrolled adults filed a Petition for a Writ of Habeas Corpus under the Indian Civil Rights Act (ICRA) 25 U.S.C. § 1303 and a Summary Judgment Motion. Respondents filed a Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12 (b)(1) claiming lack of subject matter jurisdiction. The district court cancelled oral argument and filed a Memorandum and Order granting the Motion to Dismiss on December 4, 2007.

Appellant filed a timely Notice of Appeal on December 27, 2007. This opening brief was filed within the time limit set by the court.

[3] Back then, in most instances American Indians were only citizens of their tribe. In 1924, Congress granted U. S. citizenship to Native Americans (8 U.S.C. § 1401 (a)(2). Paulina Hunter, who lived her whole life as a Pechanga Indian was an official citizen of her Indian Tribe, even if she wasn't a citizen of the United States. To retroactively take away her Pechanga citizenship leaves the Hunter Family's founding matriarch without any historical citizenship whatsoever. This is nothing less than an assault on the true heritage of the Hunter Family and an abomination of the history of the Pechanga Tribe.

STATEMENT OF FACTS

The Pechanga Tribe, of which Appellees are Tribal Council members, owns one of the largest casinos in California. Over the last five years, they have disenrolled approximately 25% of the adult population of the Tribe, including the 16 Appellants.

California Indian Tribes are small, and unlike the larger, older tribes such as Navajo or Lakota, very few of them have tribal courts. Thus, in California, life-long tribal members have been denationalized without any due process and by simple hand votes of the membership in regularly scheduled, volatile meetings of the tribe[4], or as in this case, have been thrown out by a simple vote of an "Enrollment Committee."

Fortunately, Congress responded to the violation of the civil liberties of individual tribal members by passing the Indian Civil Rights Act (ICRA) 25 U.S.C. 1301. This Act provides to Indians on their reservations essentially the same rights protected by the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution. In the case before this court, Appellees violated all those rights of Appellants.

Appellants were members in good standing in the Pechanga Tribe, as they were all Tribal citizens pursuant to the Pechanga Constitution. Paulina Hunter's

[4] See e.g., Quair v. Sisco, 359 F. Supp. 2d 948, 954-955 (E.D.Cal. 2004)

descendants have been Pechangan for generations; in fact, there is a street on the Reservation named after her-Hunter Lane. Before the recent disenrollments of approximately 200 adults and 200 children (including Appellants' family and other Pechanga families), there were approximately 990 adult members of the Tribe.

The Tribe's governing document is a Constitution. (ER. Tab 11, Docket no. 31). The Tribal Council is elected by the General Membership and acts as the Tribe's day-to-day administrative body. All power of the Tribal Council or its offshoot, the Enrollment Committee, originates from the General Membership, as the General Membership is the Governing Body pursuant to the Pechanga Constitution. In 2002, the Enrollment Committee received a letter from a group of 22 members alleging that all the descendants of Paulina Hunter were not Pechanga and requesting that the Enrollment Committee initiate disenrollment proceedings against them to strip these members of their citizenship in the Pechanga Tribe. Their request for disenrollment proceedings was not accompanied by any evidence whatsoever of the Hunter Family's lack of Pechanga ancestry.

In order to investigate Pechanga lineage in a professional and independent way, the Enrollment Committee hired Dr. John R. Johnson, a noted anthropologist, and requested that he prepare a report investigating the genealogical background of Paulina Hunter. Mr. Johnson produced an extensive report and concluded that there is no "credible evidence that Paulina Hunter was not a member of the Pechanga

Temecula Tribe; in fact the preponderance of the genealogical evidence...would indicate that she was a descendant of both Pechanga and Temecula ancestors." (ER. Tab 7, Docket no. 31). However, despite these clear findings, the Enrollment Committee disregarded their own expert's conclusion and voted to initiate disenrollment proceedings against the entire Hunter family.

Concurrent to this process, the General Membership, upset by the many disenrollments that had been taking place, with some still pending, voted to approve a petition that would stop current and forbid future disenrollments of Tribal members. (ER. Tab 27, Docket no. 18, Bates 271). However, the Tribal Council and the Enrollment Committee decided (without the approval of the General Membership) that the moratorium on disenrollments would not apply to the Appellants (ER. Tab 29, Docket no. 2, Bates 417-418).

Appellants were required to meet with the Enrollment Committee in small groups where the burden of proof was placed on them to provide the Enrollment Committee "with facts" that proved that they meet the membership criteria and to rebut the evidence in possession of the Committee questioning their lineal descent. Appellants had no right to an attorney at that meeting. (ER. Tab 27, Docket no. 18, Bates 311-312).

All Tribal members that requested the institution of the disenrollment process against Appellants had their own prima facie financial and/or political motives to

get rid of them. Appellants were not allowed to confront or cross-examine the individuals who submitted requests for their disenrollment or who purported to have information adverse to their eligibility for Pechanga citizenship. In its decision, the Committee stated that it reviewed various documents containing alleged material that was adverse to Appellants' interests, but Appellants were not provided with copies of fifteen of those adverse documents so relied upon. (ER. Tab 27, Docket no. 18, Bates 312-315). In its Record of Decision, the Committee also did not account for approximately twenty-five significant documents that were submitted by Appellant Louise Jeffredo, who holds a Masters Degree in Anthropology from Stanford University and who did extensive and painstaking family lineage research, showing overwhelmingly, the family's Pechanga lineage and heritage.

On March 16, 2006, Appellants received a "Record of Decision" from the Enrollment Committee, notifying them that they were officially disenrolled from the Pechanga Tribe. Professor Johnson was so incensed by the Tribe's blatant disregard for his anthropological findings that he wrote the Tribal Council afterwards, stating that "(I)t was unfair to the descendants of Paulina Hunter to be disenrolled from the Temecula Band of Luiseno Mission Indians based on these incorrect conclusions contained in the Record of Decision of March 16, 2006." (ER. Tab 7, Docket no. 31, Bates 56). He also appeared on a KNBC television

news program in 2007 which reported on the Pechanga disenrollments. He stated: "There is no one today that has more of a right to be a Pechanga Indian than that (the Hunters' descendants) family." [5]

The only 'appeal' the Hunter family had to their disenrollment was an appearance before the Tribal Council. Again, Appellants were not allowed to bring a lawyer to that proceeding, which by its reading, was not an actual appeal, as the "hearing" did not provide for a reversal, even if the Tribal Council found the Enrollment Committee to be in error. (ER. Tab 31, Docket no. 2, Bates 427-429).

The Tribal Council considered Appellants' statements on appeal and the Enrollment Committee's actions and found that there were no procedural mistakes. Thus, the Enrollment Committees' decision remained unaltered. Having exhausted their legal remedies, Appellants filed a Petition for a Writ of Habeas Corpus pursuant to the Indian Civil Rights Act.

Disenrollment means that Appellants are no longer members of the Pechanga Tribe. This is a stripping of their citizenship. It denies them and all their future offspring more than a millennium of unbroken cultural heritage and Native American identity. Since they are now "non-members," they can be treated the same as any non-Pechanga person, which means they can be forbidden access to the Reservation. Tribal Ordinance Article 1(b) states: "The custom, tradition and

[5] KNBC 2007 news report entitled "Pechanga Membership Battle" can be found at http://video.knbc.com/player/?id-64156.

practice of the Pechanga Band has always been, and remains, that the Pechanga Reservation is closed to non-members. Access to and residency within the Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band." (ER. Tab 14, Docket no. 31).

Appellants have also been deprived of their tribal payments of at least $250,000 per year (ER. Tab 27, Docket no. 18, Bates 334-335).

Additionally, Appellants have lost their right to the benefits and use of the Elder Organization's facilities on the Pechanga Reservation. (ER. Tab 13, Docket no. 31, Bates 088). They have lost their right to use the free services of the Tribe's Indian Health Clinic (ER. Tab 17, Docket no. 31, Bates 99-100). Appellants' children and grandchildren are now denied the right to attend the pre-school and elementary school on the Reservation, where the language, culture and history of the Tribe is taught. Section 8 of the disenrollment procedures states: "when the individual has been disenrolled by the Enrollment Committee he/she and all of his/her offspring claiming lineal descent through this disenrolled member lose all privileges and rights accorded a member.... The minors of disenrolled members will lose Tribal membership." (ER. Tab 20, Docket no.27, Bates 123, see sec. 8).

Appellants also lost their right to educational payments, including an undergraduate and graduate school education at any university or college.

Further, as non-members, Appellants are restricted in their movements to and within the Reservation, and the few Appellants who continue to live on the Reservation may be restricted to certain parts of the Pechanga Reservation. (ER. Tab 21, Docket no. 27, Bates 130-131; ER. Tab 22, Docket no. 27, Bates 139).

SUMMARY OF ARGUMENT

A. The district court's conclusion that no tribal "membership" issues can ever be reviewed by the federal court is an extreme position which goes beyond the U.S. Supreme Court's decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

B. The district court's absolutist ruling that the Indian Civil Rights Act only applies to criminal proceeding is not supported by the facts or holding in Santa Clara Pueblo v. Martinez.

C. The district court's ruling that the actual and potential restraints of Appellants' liberty did not constitute a "detention" was factually and legally erroneous.

D. The district court erred in ruling that disenrollment (loss of Tribal citizenship) without the presence of immediate banishment, cannot be a basis for jurisdiction under the Indian Civil Rights Act.

E. The trust relationship between the U.S. Government and Native American Tribes provides an independent basis for jurisdiction.

ARGUMENT

A. ICRA ALLOWS JURISDICTION IN SOME TRIBAL MEMBERSHIP ISSUES.

The standard of review in this case is *de novo*. See e.g., McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000) because Appellees filed their Motion to Dismiss under FRCP Section 12 (b) (1) . Since it is a *de novo* review, this court is free to disregard the factual findings and legal conclusions of the district court. However, it is useful to analyze the lower court's opinion as it accepted, in totality, the contentions of Respondents/Appellees.

The district court reiterated the Respondents' absolutist argument that so-called "membership issues" can never be subject to judicial review. This position is not supported by case law. If allowed to stand, it would give tribal administrations *carte blanche* ability to stifle dissent and to allow casino-rich tribes to kick members out of their tribes in order to increase personal revenue of the remaining members. In the present case each member of the Tribe receives a per capita of at least $250,000 a year and other monetary benefits. The Pechanga Tribe has disenrolled approximately 200 members in the last five years, saving the Tribe millions in per capita payments to Appellants. Since the disenrollment of 100 members of the Hunter Family two years ago, the remaining members have been enriched by approximately fifty million dollars ($50,000,000). And, as their

approximately 200 disenrolled children come of age, the increase of monies to the remaining tribal members becomes even more astounding.

The Appellees and the lower court relied almost exclusively on the ruling Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). However, that case does not hold that all proceedings touching on membership issues are beyond habeas review. The Second Circuit rejected the same extremist argument, stating clearly that "Santa Clara Pueblo obviously does not speak directly to the scope of Title I's habeas provision, which was not a matter raised in that case." Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 887 (2d Cir. 1996), *cert. den.*, 516 U.S. 1041 (1996).

Santa Clara Pueblo was a case involving declaratory or injunctive relief. Congress had not provided for such relief in ICRA, and consequently the Supreme Court's ruling only bars those types of claims. In Santa Clara, the Court does support the right of a tribe to define its membership, but, as Poodry pointed out, the Court was not considering Congress' limitations on tribal powers pursuant to a petition for habeas corpus. *Id.*

Furthermore, the facts of Santa Clara Pueblo are qualitatively different than those of the instant case. Santa Clara Pueblo involved Indian children who could not be enrolled into the Tribe because their father was a non-tribal member. The Tribe's enrollment criteria allowed a man who married outside the tribe to enroll

his children, but it did not allow a woman who married outside the tribe to enroll hers. So, an action was brought on the grounds that the enrollment requirements discriminated against women of the tribe. The relief sought was for non-members of the Tribe who were attempting to change a clearly defined and longstanding membership criteria of the Santa Clara Pueblo in order to judicially force the Tribe to enroll them.

In this case, all the Appellants were already members in good standing, all had been recognized as Pechanga Indians and had been receiving all the benefits of membership for many years. Lawrence Madariaga, for example, was a Tribal citizen for 90 years until his sudden loss of citizenship in 2006. He and the other Appellants were kicked out of the Tribe when the Enrollment Committee changed the Constitutionally enacted membership criteria and replaced them with requirements that were vague, ill-defined, historically inaccurate and without foundation in Pechanga Tribal law.

There is no question that the Pechanga Tribe has sovereign power to create its membership criteria. Once created, it can correct administrative mistakes or fraud in applications pursuant to its Construction. But it cannot use an enrollment committee as a façade to change the established criteria and to disenroll 100 of its adult members and all their offspring in perpetuity, all without judicial review under ICRA.

Appellants' claim is different than Santa Clara Pueblo because it is not related to the initial establishment of membership criteria or to the application for membership into a tribe by non-members. Appellants merely seek habeas review of a tribal disenrollment proceeding which revoked the Tribal citizenship of members who years before had met the enrollment qualifications enumerated in the Tribal Constitution.

The lower court cited only five cases in its ruling. Williams v. Gover, 490 F.3d 785,789 (9th Cir. 2007) is cited for a proposition that "an Indian tribe has the power to define membership as it chooses, subject to plenary power of Congress." This *dicta* in Gover does not foreclose jurisdiction in the instant case, for ICRA is an exercise of Congressional plenary power. "There is no question that Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which tribes otherwise possess. Title I of ICRA represents an exercise of that authority." Santa Clara Pueblo, 436 U.S. 49 at 56-57; Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 901-02 (9th Cir. 1988) (holding that a tribal member's due process rights under ICRA were violated when the Yakima Court of Appeals improperly dismissed petitioners' appeal). Therefore, membership issues must be analyzed in the context of ICRA's guarantees of an individual's tribal rights. And some membership issues, such as the ones in the instant case, are

subject to ICRA's test of jurisdiction, i.e., was there a "detention." Poodry, *supra* 85 F.3d at 886-87.

The second and third cases listed by the district court are not on point because they were decided one-hundred years ago, long before Congress passed ICRA. (Roff v. Burney, 168 U.S. 218 (1897) ; and Red Bird v. U.S., 203 US 76, 81-84 (1906)).

The fourth case cited by the lower court is In Re Sac & Fox Tribe of Mississippi Iowa/Meskwak Casino Litigation, 340 F.3d 749 (8th Cir. 2003). This is not an ICRA case. It was an action for injunctive and declaratory relief in which the Plaintiffs asked the court to interpret the Tribal Constitution and to determine who were the legitimate elected Tribal leaders. The court held that it had no general jurisdictional authority to interpret "(the tribe's) own constitution" and to interfere with the selection of "its own leaders." *Id.* at 750.

Unlike In Re Sac & Fox Tribe, in the present case Appellants have entered the courtroom pursuant to ICRA, a specific Congressional grant of authority to the courts in order to protect the rights of individual tribal members against tribal governments' misuse of their powers.

The fifth case cited by the lower court is Alvarado v. Table Mountain Rancheria, 509 F.3d 1008 (9th Cir. 2007). This case is cited for the proposition that one cannot bring an action against an "Indian tribe." (emphasis added). Appellants

agree; this petition for a Writ of Habeas Corpus was not brought against the Tribe; it was brought against the offending individuals who constituted the Tribal administration. This is the correct procedure under ICRA. See e.g., Quair v. Sisco, 359 F.Supp.2d 948, 973 (E.D.Cal. 2004)

In disenrollment cases the tribes have emphatically characterized their actions as "membership" decisions. And they are correct. For example, in Poodry, *supra,* the members were determined by their Tribe to have acted in a manner violative of acceptable Tribal membership and were disenrolled and banished (but not removed from the reservation). Quair also was a membership case. There, the Tribe disenrolled two members because by going to a lawyer for advice, they had acted in a manner inconsistent with the values and traditions of membership in the Tachi-Yokut tribe.[6]

In both of the above cases, the courts did not dispute that the tribes' right to determine membership was in issue. But they ruled that such a right is not absolute and could not shield the tribal administrations from judicial review pursuant to ICRA. Their reasoning and holdings should inform this court as it rejects the

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[6] After Judge Coyle who wrote the Quair decision retired, Judge Levi heard additional motions for summary judgment. He issued an unpublished opinion which Appellees have referred to as Quair II. This ruling makes it clear that the petitioners therein were disenrolled and banished for hiring an attorney to sue the Tribe: "The Tribe alleges that by hiring an attorney to sue the Tribe, Berna and Quair threatened tribal sovereignty and welfare." Quair v. Sisco, 2007 WL 1490571 at p.1., (E.D.Cal. May 21, 2007).

absolutist position of Appellees which was reiterated almost verbatim by the district court.

B. TRIBAL CIVIL PROCEEDINGS WHICH RESULT IN PUNITIVE CONSEQUENCES CREATE A BASIS FOR JURISDICTION

Appellees' major argument rests on the incorrect assertion that ICRA only applies to criminal cases. But Poodry points out that §1303 of ICRA does not use the words "criminal" or "civil." The *"sole"* requirement is that there is a detention. *Id.* 85 F.3d at 886, 887.

In Quair the Tribe correctly argued that because the disenrollment and banishment proceeding consisted of a meeting of the whole Tribe at which there were arguments and then a vote, it was obviously a civil proceeding involving internal membership criteria and no criminal charges were alleged. Appellees, in the instant case, misinterpreted Quair stating that it, like Poodry, was a criminal case because there were charges of "treason." (ER. Tab 26, Docket no. 25, Bates 173, l.8-9). Appellants, in our brief in the district court, corrected Respondents' erroneous argument by quoting the judge in Quair who had explicitly rejected such an argument. The court said: "the record does not establish facts similar to Poodry, i.e., a charge of treason." Quair, *supra*, 359 F.Supp.2d at 967. Nevertheless, the district court blindly disregarded this factual distinction and relied on the mistaken assertion that the charges in Quair were criminal "treason."

The proceeding itself in Quair was a civil proceeding. The charges against the two women were clearly described in Quair II where the judge stated that "[t]he Tribe alleges that by hiring an attorney to sue the Tribe, Berna and Quair threatened tribal sovereignty and welfare." Quair v. Sisco, No. 1:02-CV-589 DFL, 2007 WL 1490571 at p. 1 (E.D.Cal. May 21, 2007). Hiring an attorney to oppose a tribal action is not a criminal act and cannot be a basis for a criminal charge. If it was, then Indians everywhere could be disenrolled and banished for hiring attorneys to bring legal actions pursuant to ICRA. That would fly-in-the-face of Congress' intent and ICRA's language to provide protection for individual tribal members against their tribal officials.

In the instant case there was a "civil proceeding" in which the Enrollment Committee, without Tribal Constitutional authority, and in the face of historical truth, changed the requirements for continued membership in the Tribe. The correct test for federal court jurisdiction is not whether a proceeding is criminal or civil. The proper test is to review the consequences of the disenrollment and/or banishment. Poodry and Quair ruled that if the consequences of Tribal actions are punitive, there is jurisdiction. Quair emphasized that it does not matter if the charges are criminal or civil: "The court concludes that the disenrollment of a tribal member and the banishment of that tribal member constitutes a punitive sanction

irregardless of the underlying circumstances looking to those decisions." [Emphasis added]. Quair, 359 F.Supp.2d at 967.

Poodry also looked at the consequences of the disenrollment and/or banishment. There, the court specifically rejected the argument that there is no jurisdiction even if the disenrollment proceeding is "civil." ICRA's only criteria is that there is a "detention." *Id.*, 85 F.3d at 886-87. "(T)he inquiry into whether a petitioner has satisfied the jurisdictional prerequisites for habeas review requires a court to judge the 'severity' of an actual or potential restraint." *Id.* at 894. In order to make that determination, the court did an exhaustive study of the history of civil cases and particularly the denationalization case of Trop v. Dulles, 356 U.S. 86 (1958), which involved "the forfeiture of American citizenship...on a natural born U.S. citizen." Poodry, *supra*, 85 F.3d at 895.

Trop is analogous to this case because Appellants are natural born citizens of the Pechanga Tribe. Their disenrollment is equivalent to denationalization. Its result is the "total destruction of the individual's status in organized society." Trop, *supra*, 356 U.S. at 101-02 (1958).

The court in Poodry also analyzed the Supreme Court denaturalization cases, citing them with approval as analogous to the disenrollment and banishment of petitioners. In Schneiderman v. U.S., 320 U.S. 118, 122 (1943), the Court describes the effect of denaturalization: "In its consequences, it is more serious

than a taking of one's property or the imposition of a fine or other penalty." In Klapport v. U.S., 335 U.S. 601, 616-617 (1949) Justice Rutledge emphasized that "by the device of civil suit, carried forward with none of the safeguards of criminal procedure by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away, and in its wake may follow the most cruel penalty of banishment." [Emphasis added].

Poodry and Quair rely on these civil cases for their conclusion that the punitive consequences of any proceeding which results in the taking away of a form of citizenship satisfies ICRA's requirement for habeas jurisdiction. In the instant case the punitive consequences for the Appellants are the same as what the people suffered in Poodry, in Quair, and in the denationalization and the denaturalization cases: the deprivation of their citizenship and the resulting threat of potential banishment. These consequences are a severe restraint on their liberty and therefore a detention under section 1303 of ICRA, regardless of the fact that the proceeding itself was civil.

C. THE ACTUAL RESTRAINTS AND THE POTENTIAL RESTRAINTS ON APPELLANTS' LIBERTY CONSTITUTE A "DETENTION," THEREBY SATISFYING THE CRITERIA FOR JURISDICTION.

The key to understanding why disenrollment is a severe restraint on liberty is to look at how a tribe treats non-members. There is no dispute that when tribal citizens are disenrolled, they become "non-members" of the tribe, losing all rights

to which they were previously entitled. If one analyzes the Pechanga Tribe's rules of access to the Pechanga Reservation, we see that non-members are under a continuing threat of banishment/exclusion. Tribal Ordinance Article 1(b) states: "The custom, tradition and practice of the Pechanga Band has always been, and remains, that the Pechanga Reservation is closed to non-members." (ER. Tab 14, Docket no. 31).

In face of this clear language, the Appellees argued that this is not a potential restraint because there must be a separate act under the regulations in order to exclude/banish a non-member. However, access to the Reservation is more discretionary than Appellees suggest. According to the non-member Reservation Access & Rental Ordinance, Article 4, section (b), "Use by non-members of roads within the Pechanga Reservation...is subject to revocation at any time and for any reason." [emphasis added] (*Id.*) Access to the Reservation can also be denied unilaterally by the guard at the entrance of the reservation. (ER. Tabs 15, 16, Docket no. 31). Furthermore, the "Exclusion & Eviction Regulations" allow the exclusion of persons "without the consent and acquiescence of the General Council of the Pechanga Band." (ER. Tab 22, Docket no. 27, article I(b)). That means that since the Appellees themselves are the Tribal Council, they can themselves exclude Appellants without the consent of the Tribe. The Regulations go on to give the Tribal Rangers power to "exclude non-members" for up to seven days on the

basis of "suspicion" of various behavior. (*Id.* Bates 139, art. 11(a). And the Tribal Council (the Appellees) has the power to make that exclusion permanent. (*Id.* art. 11(c)).

Habeas law is well settled that a potential substantial restraint provides the court with jurisdiction. See Poodry, 853 F.3d at 894; Quair, 359 F.Supp. at 969; Jones v. Cunningham, 371 U.S. 236, 242-243 (1963; Hensley v. Municipal Court., 411 U.S. 345, 351-352 (1973); [illegible] lgers, 785 F.2d 1343, 1345 (5th Cir. 1986) (a suspended sentence carries a threat of future imprisonment and satisfies habeas jurisdiction); U.S. ex.rel. B. v. Shelly, 430 F.2d 215, 217-18 (2d Cir. 1970) : "We regard appellant's contention that a person on probation is not 'in custody' for the purposes of § 2241 as frivolous. Jones v. Cunningham clearly holds that parole is custody; we are directed to no reason or authority which would distinguish probation from parole in habeas corpus applications"; Williamson v. Gregoire, 151 F.3d 1180, 1182-83 (9th Cir. 1998).

Appellants, now non-members, can at any time be denied access to any part of the Reservation including access to the graveyard where their family members are buried. They have already been denied access to the Senior Citizens' Center (See ER. Tab 13, Docket no. 31), cannot go to the health clinic (see ER. Tab 27, Docket no. 18, Bates 338-39; Tab 17, Docket no. 31, Bates 101), and their children and grandchildren can no longer attend the Tribal school. As shown above, they can be

denied entrance to the Reservation. And as non-members, they can be summarily excluded, which in effect, is banishment. The claim that there are purported Pechanga due process regulations regarding exclusion from the Reservation does not change the fact that as non-members, Appellants face a potential threat of restraint on their liberty.

The U.S. Supreme Court has recognized the severity of a potential exclusion. It stated that "(t)he threat makes the punishment obnoxious...it subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated." Trop, *supra*, 356 U.S. at 101-02. This fear of discrimination that the Court warns against in Trop has already taken place on the Pechanga Reservation. The declaration of Appellant Michael Jeffredo shows that the Tribal Rangers have been harassing him (ER. Tab 17, Docket no. 31, Bates 099-100).

Lack of freedom of movement is one of the factors in determining a detention for habeas jurisdictional purposes. See, Hensley, *supra*, 411 U.S. at 351. Freedom of movement includes the right to "come & go as he please(d)," *Id.* Appellant Michael Jeffredo no longer has this right and, as such, falls within the purview of Hensley and the numerous cases cited therein. The fact that all the Appellants had not yet suffered the same harassment as Michael Jeffredo at the time the district

court ruled does not mean they are free to come and go as they please. As Poodry held, a "restraint" on liberty does not require "on-going supervision" or "prior removal." *supra*, 85 F.3d at 895. It is the consequence of disenrollment, which provides the constant threat of discriminatory treatment and/or exclusion which is the significant restraint on liberty, complained of herein.

The district court opinion cannot and did not take issue with the Supreme Court decisions of Hensley and Jones. Rather, in just two sentences, the lower court stated that the denial of access to the Reservation is theoretical and "mere speculation," and therefore does not support habeas jurisdiction, citing Edmunds v. Chang, 509 F.2d 39, 41 (9th Cir. 1975). (ER. Vol. 1, Docket no. 10, Bates 5). In Edmunds the only punishment was a mere $25 fine, and there was no provision of jail in case of non-payment. The appeals court properly found that given such facts, custody was only a "speculative possibility," and the insignificant fine was not a severe restraint on liberty. Contrasted to Edmunds, we find Dow v. Circuit Court of the First Circuit Through Huddy, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam), *cert. den.*, 510 U.S. 1110 (1994). in which requiring petitioners' attendance for 14 hours at an alcohol rehabilitation program satisfied federal habeas jurisdiction in that it "significantly restrain(ed) (his) liberty to do those things which free persons in the United States are entitled to do."

In the instant case, Appellants have already been restricted as to where they can go on the Reservation, have been harassed, and under the rules of the Tribe, face other restrictions and potential exclusion at any time. They are significantly restrained in their liberty to do those things which free citizens in their Tribe (which they once were) are entitled to do.

There is only one case in which disenrollment of a tribal member is held not to be a basis for jurisdiction; that case is Quair II, *supra*. The decision in that case is inapplicable on factual grounds.

The petitioners in Quair II had already been banished when they were disenrolled. To simply state the facts: petitioners were disenrolled and banished in the same vote in June 2000. Judge Coyle held in Quair, *supra*, that the consequences of this action were punitive and granted habeas jurisdiction. The Tribe, then, four years later, upheld the disenrollment and banishment of petitioners, but this time they did so in separate votes.[7] Therefore, the new judge in Quair II held that petitioners did not show that disenrollment, separate from banishment, restricted their physical freedom.[8] But such a showing was factually impossible, because they had already been continually banished from the

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[7] Appellants' attorneys were also the attorneys in Quair and Quair II. The facts stated can be found in Quair II, 2007 WL 1490571, footnote 5, pp. 4-5.

[8] The district court also cites Quair II for the proposition that the loss of per capita payments and all other financial benefits are not a basis for jurisdiction. We do not disagree with that part of the holding.

Reservation since 2000. Therefore, in that instance, it was impossible to prove or even discern what restraint on liberty their disenrollment without banishment would constitute.

Quair II is therefore distinguishable from the instant case. In that case since there was already a banishment in effect, the disenrollment itself did not create a potential physical restraint on liberty. In other words, unlike the denationalization and denaturalization cases relied on in Poodry, there was no threat of banishment precipitated by the subsequent 2004 disenrollment vote; there was an actual banishment by the Tribe. In the instant case the disenrollment of Appellants is exactly what causes the threat of their exclusion. This threat is the severe restraint on liberty that provides habeas corpus jurisdiction to the federal courts.

D. THE DISENROLLMENT OF APPELLANTS, WHICH IS THE STRIPPING OF PECHANGA CITIZENSHIP, EVEN WITHOUT BANISHMENT IS ENOUGH OF A SEVERE RESTRAINT ON THEIR LIBERTY TO CONSTITUTE A "DETENTION."

The stripping of a person's citizenship, which for all Appellants was a birthright, has been long acknowledged in case law as a severe deprivation. In Klapport v. U.S., *supra*, the Supreme Court stated in Judge Rutledge's concurrence, "To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others... It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the

development..." *Id.* at 616-617. The Supreme Court in Trop stated that losing citizenship causes the "total destruction of individual's status in organized society." Trop, *supra*, 356 U.S. at 101[9].

In Poodry the court does not distinguish between disenrollment and banishment. It states that the existence of banishment orders, even absent any attempts to enforce them, would be enough to satisfy the habeas custody requirement. *Supra*, 85 F.3d at 895.

Banishment does not terminate one's membership in a tribe--the loss of tribal citizenship which is accomplished through the vehicle of a disenrollment procedure causes that serious penalty. Poodry stated that the deprivation of one's long standing tribal membership created such an inherent restraint of liberty that it adequately satisfied the custody requirement, "(w)e deal here not with a modest fine or a short suspension of a privilege found not to satisfy the custody requirements for habeas relief but with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation." *Id.*, (emphasis added).

In Poodry, the court analogized the importance of citizenship within a Tribe to that within the United States. It quoted Klapport on the serious punitive nature of

[9] Trop is analogous to this case because Appellants are in essence natural born citizens of the Pechanga Tribe. Their disenrollment is exactly the same as denationalization.

taking away one's citizenship: "the Supreme Court has long recognized that a deprivation of citizenship is 'an extraordinarily severe penalty' with consequences that 'may be more grave than consequences that flow from conviction for crimes.'" *Id.* at 896-897.

See also Shenandoah v. U.S. Dept. of Interior, 159 F.3d 708, 714 (2d Cir. 1998) which although not a case about disenrollment, implies that habeas relief under ICRA addresses more than just physical custody and that "being deprived of tribal membership" is a severe restraint.

The Supreme Court was instructive in Trop when it said that denationalization of a natural-born citizen is even beyond the National Government's power to enact, and thus invalid if attempted. Justice Warren stated that (1) "citizenship is not subject to the general powers of the national government and therefore cannot be divested in the exercise of those powers," and (2) "use of denationalization as a punishment is barred by the Eighth Amendment." *Supra*, 356 U.S. at 92, 101. The Court also found that due to the inherent importance of citizenship, the only way one can lose natural-born citizenship is to voluntarily relinquish it. (Denationalization is the taking of citizenship of a natural-born citizen. Denaturalization is the taking of citizenship of an immigrant who was naturalized.) Justice Warren went on in Trop, "The right [of citizenship] may be voluntarily relinquished or abandoned either by express language or by language and conduct

that show a renunciation of citizenship. Under these principles, this petitioner has not lost his citizenship." *Id.* at 92. The Supreme Court has prohibited the use of denationalization of a natural born citizen as a punishment for any crime: "And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship...I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed." Trop, *supra,*356 U.S. at 92-93. Appellants have taken no actions that would indicate voluntary expatriation of their Pechanga citizenship. In fact, the opposite is true and they now seek protection of that status.

By analogizing the significance of Indian citizenship to U. S. citizenship, the Poodry court would not validate a proceeding that stripped a tribal member of his citizenship. Although the Pechanga Tribe adheres to its contention that this case presents only an 'enrollment issue' involving Appellants' failure to meet the Tribe's valid membership requirements, the Appellants disagree. Appellants assert, on the other hand, that they had their long standing Tribal citizenship stripped, not because they did not meet the enrollment criteria, but among other factors, because Appellants' family exercised free speech at General Council meetings and had

head-to-head run-ins with Tribal Council members. (ER. Tab 2, Docket no. 34, Bates 9-10).

The Supreme Court also addressed the issue of whether loss of citizenship is civil or penal in nature. Appellants contend it is clearly penal, regardless of how the Pechanga Tribe characterizes or labels it. The Court in Trop also addressed how a proceeding may be mislabeled by the entity that is conducting that proceeding where it inquired, "We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress said it, "technically is not a penal law." How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Id.* at 94. As Appellants argued earlier, the correct test of whether a disenrollment is civil or criminal is not to look at the label the Tribe puts on the proceeding or even the obvious nature of the proceeding; it is the resulting punitive consequences that determines whether a proceeding is penal in nature. Denationalization of Appellants by the Pechanga Tribe is a severe deprivation of their liberty causing permanent restraints; these restraints provide jurisdiction to the federal courts, as the consequences of Tribal disenrollment constitute severe penal sanctions. Adding to the insult and devastation caused by disenrollment is the historical truth that Native Americans have historically only been citizens of their particular tribe. This was changed

when Congress granted American citizenship to Indians in 1924 by federal legislation. (Indian Citizenship Act of 1924, 8 U.S.C. § 1401 (a) (2)).

Appellees argue that since Appellants are still "Indians", the new Pechanga restraints are not severe ones. But this disregards the essence of disenrollment—the taking away of their ethnic and cultural identity and political activity as citizens of their Tribe. [10] See e.g. Declaration of Madariaga, (ER. Tab 12, Docket no. 31).

Appellees further contend that disenrollment of Appellants is not a severe restraint because they are free to attend limited Tribal events and receive certain Tribal benefits. This again is a severe distortion and gross minimization of the loss that Appellants have suffered. Paulina Hunter's lineal descendents were all born Pechanga Indians. Many were raised on the Reservation and have a community of family and friends there. Suddenly now, even their Indian ancestors who are long dead and buried on ancestral grounds are suddenly no longer Pechanga Indians either. A living Pechanga Tribal elder, Lawrence Madariaga, who is 90 years old, was responsible for bringing infrastructure to the Reservation, including running water and electricity. He is a founding member of the modern Pechanga Tribe. Before his efforts, the land was basically "unlivable". *Id.* Following in his footsteps

[10] A person who identifies himself or herself as European does nothing to describe the source of their Nationhood; it merely describes the continent they are from. It is only when they are labeled as French or English that nationhood is identified. Wars have been fought over cultural and political differences between the French and English, or the Irish and English, or the Germans and Spanish, and many other examples.

over the years, many Pechanga Appellants have worked and held official positions in Tribal government and administration. (See e.g., ER. Tab 16, Docket no. 31). Stripping Appellants of their Pechanga citizenship eradicates the ethnic and cultural heritage that is tied to their past and it removes their ties to this identity for all time to come. Appellants all share an identity that is connected to these tangible and intangible elements of their Pechanga citizenship. These ties are to a unique and separate culture of their own. These ties are not just a part of an "Indian" identity; they are part of "my culture as a *Pechanga* Indian." (ER. Tab 12, Docket no. 31, Bates 87).

Appellees also argue that the restraints on Appellants, if any, are less than those suffered by the general public. This argument suggests that stripping Appellants of their rights, privileges and identity as a Pechangan is insignificant because the general public does not have those things—and thus, disenrolling Appellants simply puts them into a position similar to other American citizens. This reasoning is directly confronted by the court in Poodry where it stated "a deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence...[to argue] that the coerced loss of an individual's social, cultural and political affiliations is unimportant because other Americans do not share them...renders the concept of liberty hollow indeed." *Supra*, 85 F.3d at 897.

E. THE TRUST RELATIONSHIP BETWEEN THE U.S. GOVERNMENT AND NATIVE AMERICAN TRIBES PROVIDES AN INDEPENDENT BASIS FOR JURISDICTION.

Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) citing to Santa Clara Pueblo v. Martinez, *supra* 436 U.S. 49, 56. The holding in Santa Clara Pueblo v. Martinez does ratify a tribe's right to initially determine its own enrollment requirements, or prerequisites for citizenship. It does not hold that the federal courts can't review those requirements, once enacted, or the fair implementation of them. As far back as the 19th century, the federal courts have exerted jurisdiction over "enrollment" disputes of Indian Tribes, including the Cherokee Nation and the other "Civilized" Indian Tribes. It has been widely held and long understood that the U.S. Constitution provides the Federal Government with jurisdiction over Indian affairs (Indian Commerce Clause at U.S.C.A. Const. Art. I §8, cl.3, Cherokee Nation v. State of Georgia, 30 U.S. 1 (1831)).

"We note at the outset that a central purpose of ICRA and in particular of Title I was to 'secure for the American Indian the broad constitutional rights afforded to other Americans," and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments.' Santa Clara v. Martinez, *Id.* at 61-62. "Moreover, we have frequently recognized the priority of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in

purely declarative terms." (*Id.* at 62). "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." (*Id.* at 63). See also Morton v. Mancari, 417 U.S. 535, 551 (1974). When Santa Clara was decided, the Indian Gaming Regulatory Act had not been passed and the tribes that now bring in hundreds of millions of dollars each year, did not have huge gambling establishments. In disfavoring federal court intervention in a 'tribal enrollment' matter, the Court in Santa Clara said, "Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums (citations omitted), but it would also impose serious financial burdens on already "financially disadvantaged" tribes." (Santa Clara, *supra* 436 U.S. at 65). Clearly, the Santa Clara ruling did not envision a small Tribe, such as the Pechanga, marshalling an enormous financial windfall by the establishment of a Las Vegas-style casino on its Reservation; nor did the Court envision the Tribe's denationalization of its long-standing Tribal citizens by means of a simple vote of a small Tribal enrollment committee.

When ICRA was passed, the Court realized that Congress and the Executive Branch both felt the need for ICRA: "Both Senator Ervin...and President Johnson...explained the need for Title I on the ground that few tribal constitutions included provision of the Bill of Rights." *Id.* at 67. The Pechanga Tribe has no constitutional protections in its constitution, and it doesn't even possess a Tribal Court, in which to administer independent judicial decisions. Although, it is clearly stated in Santa Clara that the federal government's policy was to foster independent tribal governments, "As the Court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.... Title I of the ICRA (citation omitted) represents and exercise of that authority." *Id.* at 57-58. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." *Id* at 59. "Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." *Id.* at 67-68.

Thus, by providing habeas corpus relief, Congress felt it was protecting the rights of individual Indians, while also protecting the sanctity of tribal governments. In the present case, however, if the court does not find jurisdiction,

or "(i)f the reasoning of Santa Clara Pueblo forecloses federal habeas jurisdiction, the petitioners have no remedy whatsoever." Poodry *supra*, 85 F.3d at 886. Neither Congress nor the federal courts envisioned such a result, especially when the corpus of the dispute involves the distribution of hundreds of millions of dollars, by tribal officials who think they are beyond the reach of federal law, simply by claiming 'sovereign immunity' concurrent to an 'enrollment issue' of the tribe.

It is well settled that the Federal Government has a duty as trustee over Indian Tribes to act in Native Americans' best interests. This doctrine was established by Chief Justice Marshall in Cherokee Nation v. Georgia, over 170 years ago. Based on this responsibility some 70 years later, the Supreme Court took jurisdiction of a tribal enrollment dispute in Indian Territory. In Stephens v. Cherokee Nation, 174 U.S. 445 (1899), the Court heard the complaints of individual Indians who had been denied Cherokee citizenship after the passage of the Dawes Act. In that case, the Court acknowledged that Indian tribes have the right to determine their own tribal citizenship; however the Court took jurisdiction on the issue of the fair enforcement of those requirements. The Court stated, "and the rolls so prepared by them (Tribes) shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: provided, that if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to

the United States District Court." *Id.*, at 454-455. The Dawes Act provided federal legislation that provided a framework for implementation of responsibility over Indian affairs, but the underlying authority for that responsibility and even the Court's jurisdiction originated in the US Constitution and in Cherokee Nation v. Georgia and all the cases that follow it. Nothing in ICRA lessens the responsibility of the federal government over Native Americans, and ICRA should not be permitted to be used as a shield to allow the tribes to avoid federal oversight of Indian affairs, while they inflict severe punishments, such as denationalization upon legitimate citizens.

In Stephens the Supreme Court invoked its trust obligation to enforce the legitimate enrollment requirements of the Cherokee Tribe. In doing so, it guarded the valid citizenship criteria of the Cherokee Tribe and also protected the individual rights of its Tribal citizens. In the present case Appellants complain of the unfair loss of their citizenship at the hands of a small group of Tribal administrators that actually altered the legitimate enrollment requirements of the Tribe. By doing so, the Pechanga Tribal Council has shown disrespect of their Pechanga Constitution and has corrupted the fair enforcement of Tribal law. A scenario strikingly similar to this one occurred in the Stephens case. In finding that there was no limit to the repression that a tribe could enforce against its own citizens, the Court quoted the Indian Commission's investigation of the time

regarding recent tribal actions in the Territories, "(T)he commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship, the manipulation of the rolls, and proceedings in Indian tribunals, stated: 'The commission is of the opinion that, if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize (disenroll) at will, the greatest injustice will be perpetrated, and many good and law abiding citizens reduced to beggary." *Id.* at 452 There, the court took jurisdiction to prevent a pending citizenship catastrophe among the Tribes, and it should do so here to prevent the unwarranted destruction of the Pechanga Tribe's citizenry by a small group of Tribal officials.

In Stephens the Court supported the Indian Commissioner's authorization to adjudicate and give final approval to the citizenship rolls of the Tribes. It said, the "said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled; provided, however, that such application shall be made to such commissioners within three months after the passage of this act." Stephens, *Id.* at 454. Here, Appellants seek the same thing as the Indians of the 19th century sought: Fair execution of the requirements for Pechanga citizenship, with oversight protection from the federal courts.

Why have the federal courts felt empowered, even duty bound, to oversee the fairness of a Tribe's enrollment process? One reason is that it is the U.S. Government itself that has created the Indian's new form of government. The Court, quoting the Dawes commission, said in Stephens, "There is no alternative left to the United States but to assume the responsibility for future conditions in this territory. It has created the forms of government which have brought about these results." *Id.* at 452.

The Federal Government in Stephen's day had a more paternal, if not even sometimes racist attitude towards Indians. Despite this, independent citizenship in Indian nations was known to be critical to a tribe's survival. The fair gathering of citizenship rolls by the Tribes was seen as a founding first step in nation building and protection. The U.S. is inextricably bound with Indians and has been so bound since their first formal meeting. Passage of ICRA in 1968, has not lessened the federal court's role or responsibility in protecting the interest of Indian tribes and Indian people. That is why it is very appropriate for the federal court to take jurisdiction in a case such as this. In the alternative, if Tribes are left to devise ways in which an errant tribal council can disenroll large numbers of their membership at will, individual Indians and Indian Tribes will both suffer, and the United States will have shirked its historical and legal responsibility.

CONCLUSION

The disenrollment of Appellants is tantamount to the "coerced & peremptory deprivation of (their) membership in the Tribe & their social and cultural affiliation." Poodry, *supra*, 85 F.3d at 895. "It is the total destruction of the individual's status in organized society." Trop, *supra*, 356 U.S. at 101-02. It created a situation where banishment hangs over Appellants' heads like the infamous Sword of Damocles. The lower court, accepting the arguments of Appellees almost verbatim, tries to avoid the realities caused by the disenrollment by taking refuge in two absolutist positions not supported by case law.

First, except for the lower court's opinion, there are no ICRA cases holding that all tribal membership issues effecting members in good standing are immune from judicial review. In contrast to the district court's ruling, Poodry and Quair 1 considered tribal membership issues and found jurisdiction pursuant to ICRA.

Second, the lower court mistakenly ruled that ICRA only applies to criminal proceedings. But Poodry, *supra*, 85 F.3d at 886-87 emphasized that the "sole jurisdictional prerequisite for federal habeas review" is a "detention." Established habeas law is that "custody" or "on-going supervision" is not a requirement for what constitutes a detention. Hensley, *supra*, 411 U.S. 345; Jones, *supra*, 371 U.S. 236; U.S. ex.rel. B. v. Shelly, *supra*, 430 F.2d 215, 217-18 (2d Cir. 1970).

Quair, *supra*, 359 F.Supp.2d at 967, involved an obvious civil proceeding, and the court held that the consequences of a disenrollment and banishment were the foundation for jurisdiction, regardless of the "underlying circumstances" leading to those punitive consequences.

The proper test for jurisdiction under settled habeas law and ICRA is whether the detention is a severe "actual or potential restraint on liberty." Poodry, *supra*, 85 F.3d at 894. "Potential restraints" suffered by those on probation, parole, or those who have been denationalized or denaturalized, have been held as severe restrictions on liberty allowing habeas jurisdiction. See e.g., Hensley, Jones, Poodry and all the cases cited therein. As Chief Justice Warren stated: "(t)he threat makes the punishment obnoxious...it subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated." Trop, *supra*, 356 U.S. at 101-02.

Appellants have shown the potential and actual restrictions on their movements within the reservation (Opening Brief at 31-32). They have also shown the Tribal Guard's harassment of Appellant Michael Jeffredo (*Id.* at 24). These restrictions combined and with Tribal regulations that allow Tribal Rangers or Appellees the discretionary power to exclude non-members at-will without the approval of the

General Membership create restraints on Appellants' liberty which are real and substantial.

The threat of continued geographical restrictions combined with the threats of harassment and banishment is not mere speculation. It constitutes a severe restraint on liberty which is the basis for jurisdiction under ICRA.

As Professor Johnson, the expert anthropologist (hired by the Tribe who then disregarded his report) stated: "There is no one today that has more of a right to be a Pechanga Indian than that family (Appellants)." (Opening Brief at fn.5).

Dated: May 15, 2008

By: _____
Patrick Romero Guillory
Paul Harris
Josephine Weinberg, Law Clerk

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 9811 words

May 15, 2008
Date

Patrick Romero Guillory

Paul Harris
Paul Harris

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