Appeal No. **08-55037**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

RESPONDENTS' ANSWERING BRIEF

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

JOHN SCHUMACHER, WY Bar # 6-2635
Law Office of John Schumacher, LLC,
420 E. Washington Ave., Riverton, WY 82501
Telephone: (307) 857-0300
Facsimile: (307) 857-5765

FRANK LAWRENCE, CA Bar # 147531
Holland and Knight 633 West Fifth Street, 21st Floor,
Los Angeles, CA 90071
Telephone: (530) 478-0703
Facsimile: (530) 478-0723

Counsel for Respondents- Appellees

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Telephone: (530) 478-0703
Facsimile: (530) 478-0723

Counsel for Respondents- Appellees

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement for the Respondent is required by Rule 26.1.

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I. INTRODUCTION

Internal tribal membership decisions are within the exclusive jurisdiction of tribal governments. The United States Supreme Court in *Santa Clara Pueblo* held that federal courts do not have jurisdiction to hear challenges to tribal civil membership decisions based on alleged violations of Title I of the Indian Civil Rights Act, 25 U.S.C. § 1301-1303.

Based on unsupported statements of fear, hysteria, and perceived outrageous conduct, Petitioners wrongly urge the Court to create federal court remedy that lacks any support in the law and has been rejected by Congress. The record shows that the Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation ("Pechanga Tribe") undertook to and did provide Petitioners with full due process and reached a considered, reasoned, and documented decision that Petitioners fail to meet the Pechanga Band's membership criteria.

The district court correctly held that there is no bases in the law federal court jurisdiction over Petitioners' claims.

II. JURISDICTIONAL STATEMENT

The federal district court lacks jurisdiction to consider Petitioners' appeal of an internal tribal enrollment matter pursuant to 25 U.S.C. § 1303, the habeas corpus provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303. The district court had jurisdiction, pursuant to 28 U.S.C. § 1331, to reach that decision because this case involves interpretation of federal statutory law, 25 U.S.C. § 1303,[1] and questions of federal Indian common law regarding the

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[1] The habeas corpus provision of ICRA states that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to

authority of the Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation ("Pechanga Tribe") over internal enrollment matters.

Petitioners have brought this action as a habeas corpus petition. A final decision of the district court was issued on December 4, 2007. The final order of the district court is subject to review by this court pursuant to 28 U.S.C. § 2253. This Court also may have jurisdiction pursuant to 28 U.S.C. § 1291. A timely Motion of Appeal was filed on December 27, 2007.

III. STATEMENT OF ISSUE PRESENTED

Does the habeas corpus provision of the Indian Civil Rights Act, 25 U.S.C. § 1303, provide the federal courts with authority to consider an appeal of an internal tribal disenrollment decision?

IV. STATEMENT OF THE CASE

This case involves an effort by Petitioners to get the federal courts to review a final internal membership decision of the Pechanga Tribe after full due process and appellate review were provided in tribal forums. Petitioners seek to use the criminal habeas corpus provisions of the Indian Civil Rights Act, 25 U.S.C. § 1303, to provide the district court with jurisdiction to review a non-criminal, non-punitive membership decision.

In late 2002 and early 2003, the Enrollment Committee of the Pechanga Tribe received allegations that a number of members of the Tribe failed to meet the Pechanga Constitution's membership qualifications. On March 16, 2006, the Enrollment Committee, after review of the full record and in accordance with full

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test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. Habeas corpus relief under ICRA is no broader than the statutory provisions governing habeas corpus review of state and federal actions.

due process, held that the Petitioners were disenrolled for failure to prove lineal descent from an original Pechanga Temecula person. (ER Vol. II, pp. 149-150, ¶¶ 4-5; ER Vol. III, p. 424, ¶ 9).[2] On July 21, 2006, after consideration of arguments at the appeal hearings and the record before the Committee, the Tribal Council upheld the Committee's decision. (*See* E.R Vol. III, p. 430).[3]

A petition for writ of habeas corpus was filed on May 22, 2007. (ER Vol. III, p. 353). An Order To Show Cause Re: Dismissal For Lack Of Prosecution was entered on August 9, 2007 and discharged on August 20, 2007. A Motion For Summary Judgment was filed by Petitioners on October 4, 2007. Respondents filed a Motion To Dismiss Pursuant To FRCP 12(b)(1) on October 12, 2007. (ER Vol. II, p. 152). Petitioners filed an Opposition on November 14, 2007. (ER Vol. II, p. 041). Consideration of the Motion For Summary Judgment was stayed in order that the Motion to Dismiss could be considered first by the Court.

An Order Granting Respondents Motion To Dismiss Pursuant to F.R.C.P. Rule 12(b)(1) was issued on December 4, 2007. (ER Vol. I, p. 001).

V. STATEMENT OF FACTS

A. Background and Tribal Law

1. *Tribal Government*

The Pechanga Tribe is a federally-recognized Indian tribe. 72 Fed. Reg. 13648, 13649 (Mar. 7, 2007). Respondents Mark Macarro, Donna Barron, Mark Calac, Marc Luker, Andrew Masiel, Sr., Russell Murphy and Kenneth Perez constitute the elected Tribal Council of the Pechanga Tribe. Respondent Darlene

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[2] "ER" refers to Appellants' Excerpt of Record

[3] Petitioners incorrectly assert that tribal forums, other than tribal courts, cannot dispense justice *See Santa Clara Pueblo*, 436 U.S. at 66 (Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.)

Azzerelli is the Tribal Secretary. Respondent Christine Luker is a tribal member. These persons are collectively referred to hereinafter as "Tribal Parties."

2. *Tribal Membership Law*

On December 10, 1978, the Pechanga Tribe's General Membership adopted the Pechanga Constitution. Constitution and Bylaws of the Temecula Tribe of Luiseño Mission Indians, Art. V ("Pechanga Constitution"). (ER Vol. II, p. 112). The General Membership is the Tribe's ultimate governing authority and consists of all adult members of the Tribe. (ER Vol. II, p. 107, Art. III). The Pechanga Constitution provides:

> ARTICLE II
> MEMBERSHIP
>
> Membership is an enrolled member documented in the Tribe's Official Enrollment Book of 1979.
>
> Qualifications for membership of the Temecula Tribe of Luiseno Mission Indians Are:
>
> A. Applicant must show proof of Lineal Descent from original Pechanga Temecula people.
> B. Adopted people, family or Tribe, and non-indians cannot be enrolled. Exception: People who were accepted in the Indian Way prior to 1928 will be accepted.
> C. If you have ever been enrolled or recognized in any other reservation you cannot enroll in Pechanga

(ER Vol. II, p. I, Art. II). The qualification for membership applicable to the facts of this case is "proof of Lineal Descent from original Pechanga Temecula people." (*See* ER Vol. II, p. 107, Art. II; ER Vol. III, pp. 423-424, ¶¶ 8-9).

The General Membership adopted the Pechanga Enrollment Disenrollment Procedures ("Disenrollment Procedures") on October 2, 1988. (ER Vol. II, p. 120). The Disenrollment Procedures were in effect at the

time of the Petitioners' disenrollment. The Disenrollment Procedures were adopted to correct mistakes made in enrolling persons in the Pechanga Tribe. (ER Vol. II, p. 121, § 1). The Enrollment Committee is elected by the General Membership and is responsible for processing disenrollment allegations. The Disenrollment Procedures provide for: (1) identification of a possible enrollment mistake in Section 2; (2) notice to affected individuals in Sections 3 and 5; (3) an opportunity to respond to the allegations and present evidence in Sections 5 and 7; (4) a written decision stating bases for disenrollment in Section 6; and (5) appellate review to the Tribal Council in Section 9. (ER Vol. II, p. 121). The Tribal appellate record contains the exact information that was before the Enrollment Committee. (ER Vol. II, p. 121, § 9). If the Tribal Council notes any infraction of the procedures or any unfair and/or impartial handling of the case, it is required to instruct the Enrollment Committee to reevaluate the case. (ER Vol. II, p. 121, § 9).

3. *Pechanga Reservation Access Law*

On May 1, 1996, the Pechanga Tribe enacted the Non-Member Reservation Access and Rental Ordinance ("Access Ordinance"). (ER Vol. II, p. 129). The Access Ordinance describes the conditions and procedures for access to Reservation lands, including non-member access to their own fee land, access to leased land, access as a guest of a tribal member, and access as a family member or domestic partner of an enrolled member. (*See* ER Vol. II, p. 129). Non-members are permitted access to facilities open to the general public such as the Pechanga Tribe's casino.

In 2000, the Tribe adopted its Exclusion And Eviction Regulations ("Exclusion Regulations"). (ER Vol. II, p. 134). The Exclusion Regulations

provide for exclusion and eviction from the Reservation for one of the following causes:

1. Violating tribal laws and ordinances;
2. Creating conditions which pose a threat to the public health, safety and welfare.
3. Engaging in criminal activities on the Pechanga Reservation, by finding of the Tribal Council, or being convicted of one or more felonies;
4. Being declared a public nuisance by the Tribal Council;
5. Creating a breach of peace, including but not limited to public drunkenness.

Both the Access Ordinance and the Exclusion Regulations provide for due process. (*See* ER Vol. II, p. 129; Vol. II, p. 135). Due process is provided by notice, hearing, appeal and decision. (*See, e.g.* ER Vol. II, p. 137-138).

4. *Tribal Enforcement of ICRA*

ICRA is enforced in tribal civil proceedings by applicable law-applying tribal entities. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). California state criminal law applies on the Reservation and is enforced by the State of California and relevant political subdivisions pursuant to 18 U.S.C. § 1162. The Pechanga Tribe has enacted no criminal laws.

B. Processing Of Disenrollment Allegations Specific To Petitioners.

. Actions to disenroll tribal members have occurred at various times since 1988 by enforcement of the requirements of the Pechanga Constitution through the Disenrollment Procedures.

In late 2002 and early 2003, the Enrollment Committee received allegations that a number of members of the Pechanga Tribe failed to meet the Pechanga Constitution's membership qualifications. (ER Vol. III, p. 412). The Enrollment Committee was required to investigate and evaluate the allegations pursuant to Section 2 of the Disenrollment Procedures. (ER Vol. II, p. 121, § 2).

In response to concerns raised by the General Membership and in order to ensure that the Disenrollment Procedures would be followed in a "fair and impartial" manner, the Tribal Council issued a Notice and Order on March 7, 2003 regarding pending disenrollment matters. (ER Vol. II, p. 141). The Notice and Order directed that individual Enrollment Committee members, who were themselves the subject of disenrollment allegations, could not participate in Committee matters until such time as the allegations against them were resolved. The Tribal Council also mandated that the Enrollment Committee: (1) "use a fair and impartial decision by a majority of the committee to review a file;" (2) follow Robert's Rules of Order; and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures. (ER Vol. II, p. 143).

As of the date of the Notice and Order, there were allegations that five lines of descent did not qualify for membership. (*See* ER Vol. III, p. 413-414). For the first three lines of descent, the Enrollment Committee after full review held that the affected tribal members, of whom there were hundreds, met the Pechanga Tribe's membership criteria. (*See* ER Vol. III, p. 413-414). Enrollment Committee members whose membership status was confirmed were allowed to participate in future Committee matters in

accordance with the Tribal Council's Notice and Order of March 7, 2003. (*See* ER Vol. III, p. 414; ER Vol. II, p. 141).

The Enrollment Committee proceeded to consider the allegations against Petitioners and others similarly situated who claimed lineal descent through Paulina Hunter. (ER Vol. III, p. 414). The Committee reviewed the allegations, pre-initiation submissions by Petitioners challenging the correctness of the allegations, and the Enrollment Committee's historical records. (ER Vol. III, p. 414).

On May 3, 2005, after a proper vote of the Enrollment Committee, individual summonses were sent notifying Petitioners that the Committee believed grounds existed for initiating the disenrollment process. (*See, e.g.*, ER Vol. II, p. 144). The summonses notified Petitioners that: (1) the Disenrollment Procedures had been initiated; (2) additional information was requested concerning Petitioners' family history; and (3) Petitioners were required to contact the Committee to set up an Initial Meeting. (ER Vol. II, p. 144-146). A copy of the Disenrollment Procedures was included with each summons. (ER Vol. II, p. 144).

The Committee held an Initial Meeting with Petitioners to explain why the Disenrollment Procedures were initiated. (ER Vol. II, p. 121, §§ 3 and 5). Each Petitioner was provided a copy of all the factual records in the Enrollment Committee's possession concerning that Petitioner's enrollment. (*See* ER Vol. II, p. 149, ¶ 4). In accordance with Section 5 of the Disenrollment Procedures, the Committee stated its concerns about each Petitioner's claim of lineal descent. (*See* ER Vol. II, p. 149, ¶ 4). Each Petitioner was notified that he or she could submit information supporting a claim of lineal descent from any original Pechanga Temecula person. (*See*

ER Vol. II, p. 149, ¶ 4). Petitioners were informed their enrollment would be measured against the Pechanga Constitution's membership qualifications. (*See* ER Vol. II, p. 149, ¶ 4). Petitioners were informed that they had thirty (30) days to submit additional information, orally or in written form, in support of their qualification for membership. (ER Vol. II, p. 121, § 5). The Petitioners were advised that allegations would be processed individually, but that Petitioners and others similarly situated could submit one set of common original documents to reduce the financial cost of participation in the disenrollment process. (*See* ER Vol. II, p. 149, ¶ 4). The Committee advised each Petitioner that no decision would be made until the Committee received the additional information and the Committee had an opportunity to review all information. (*See* ER Vol. II, p. 150, ¶ 5). Petitioners timely submitted additional information.

On March 16, 2006, the Enrollment Committee, after review of the full record, held that the Petitioners were disenrolled for failure to prove lineal descent from an original Pechanga Temecula person.[4] (ER Vol. III, p. 398-414; Vol. III, 424, ¶ 9). The Enrollment Committee limited its decision to a determination of qualification for membership, noting that "[n]othing in the Committee's findings shall be construed or interpreted that the Committee is making a determination of the 'Indian' or 'Native American' status of Paulina Hunter or her descendants." (ER Vol. III, 424, ¶ 11).

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[4]The Enrollment Committee reviewed the historical information prepared by Dr. Johnson The Committee, however, did not hire Dr. Johnson to substitute his opinion for that the Committee, but rather evaluated his documentation in conjunction with other records provided to the Committee. *See* ER Vol III, pp 431-432

Petitioners exercised their right to appeal to the Tribal Council. Hearings were held for all those who appealed. On July 21, 2006, after consideration of arguments at the appeal hearings and the record before the Committee, the Tribal Council found that: (1) there was no evidence of unfair or partial treatment of the Petitioners by the Enrollment Committee; (2) there was no evidence of negligence in the handling of the Petitioners' case by the Enrollment Committee; and (3) there was insufficient proof that the Enrollment Committee violated the Disenrollment Procedures. (*See* ER Vol. III, p. 430).

Despite the disenrollment decision, the Pechanga Tribe has not taken any action to deny Petitioners access to the Reservation. Petitioners concede that they have not been banished from the Reservation. (ER Vol. II, p. 052:14-15). Two Petitioners, Mr. Michael Jeffredo and Mr. Lawrence Madariaga state that they in fact reside on the Reservation. (ER Vol. II, p. 099, ¶ 2; Vol. II, p. 086, ¶ 1).

VI. SUMMARY OF ARGUMENT

The Petition fails to establish the three criteria for habeas corpus jurisdiction under ICRA: (1) the claim arises from a criminal proceeding, (2) there is an unlawful detention, and (3) tribal remedies have been exhausted.

The Supreme Court recognized in *Santa Clara Pueblo* that a tribe's right to define its own membership for tribal purposes is central to its existence as an independent political community. *Santa Clara Pueblo*, 436 U.S. at 72. "Efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a

tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* "Given the vast gulf between the tribal tradition and those with which federal courts are more intimately familiar, the judiciary should not rush to create courses of action that would intrude on these delicate matters." *Id.* "Efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."

This Court lacks jurisdiction because Petitioners' admit that the disenrollment proceeding was civil in nature, the Petitioners admit they have not been banished and are not detained in that they have access to their homes on the Reservation and have not been denied access to the Reservation, and the Petitioners have not exhausted their tribal remedies for alleged denials of access, if any, to the Reservation.

VII. ARGUMENT

A. Standard of Review.

The same standard of review is applicable to all issues. The district court's decision to deny the petition for writ of habeas corpus is reviewed *de novo* by the Court of Appeals. *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1987), *certiorari granted* 490 U.S. 1034, *reversed on other grounds* 495 U.S. 676, *on remand* 910 F.2d 673. The district court's findings of fact are reviewed for clear error. *Richter v. Hickman*, 521 F.3d 1222 (9th Cir. 2008).

Lack of subject matter jurisdiction is never waived and can be raised by any party or the court at any time. *See Insurance Corporation of Ireland, Ltd v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982). The

Petitioners bear the initial burden of proving that subject matter jurisdiction exists. *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992). There is a presumption against jurisdiction unless the Petitioners prove otherwise. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. The Federal Courts Do Not Have Jurisdiction Pursuant To The Indian Civil Rights Act To Review Tribal Membership Decisions.

1. *Membership Decisions Are Within The Exclusive Jurisdiction Of The Pechanga Tribe.*

Internal tribal membership decisions are exclusively within the jurisdiction of the Pechanga Tribe. The courts, Congress, and the Executive Branch have long recognized an Indian tribe's sovereign right to make membership decisions for tribal purposes.

"The courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.), p. 20.[5] In *Santa Clara Pueblo*, the Supreme Court recognized that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at p. 72, n.32. "Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the

[5] *Cohen* is undisputedly the leading treatise on the subject of federal Indian law, and has consistently and routinely been cited by the United States Supreme Court in federal Indian law cases since publication of its first edition. *See, e.g., Duro v. Reina*, 495 U.S. 676, 689 (1990); *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191, 199 n. 9, (1978); *Santa Clara Pueblo*, 436 U.S. at 55.

district courts." *In re Sac & Fox Tribe of Mississippi Iowa/Meskwak Casino Litigation,* 340 F.3d 749, 763 (8th Cir. 2003).

In *Sac & Fox Tribe*, the Eighth Circuit Court of Appeals was faced with an issue similar to *Santa Clara Pueblo* where it was required to analyze the interplay between a federal statute imposing governmental burdens on Indian tribes, *i.e.*, the federal gaming laws, and the tribe's sovereign right to interpret its own constitution. *See Sac & Fox*, 340 F.3d at 750. The Eighth Circuit recognized that federal courts do not have authority to resolve internal tribal disputes even when the facts may be interconnected with a federal statute applicable to Indian tribes.. *Sac & Fox*, 340 F.3d at 763. To the extent a claim existed, the Eighth Circuit held that it must be resolved in another forum. *Id.* In this case, Pechanga law provides an appeal remedy that satisfies ICRA's due process requirements.

The United States Supreme Court has long acknowledged the paramount right of a sovereign tribe to determine its own membership. In *Red Bird v. United States*, 203 U.S. 76 (1906) (*"Cherokee Intermarriage Cases"*), the Court considered the claims of certain white men, married to Cherokee Indians, to participate in the common property of the Cherokee nation. Although the claimants had been recognized as citizens for certain purposes, the Court held the Cherokee Nation had complete authority to qualify the rights of citizenship and had, in the exercise of this authority, provided for the revocation or qualification of citizenship rights. *Cherokee Intermarriage Cases*, 203 U.S. at 81-82, 84.

In *Roff v. Burney*, 168 U.S. 218 (1897), the Supreme Court held that a tribe's authority over membership decisions includes the right to revoke that membership:

> The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred.

Roff, 168 U.S. at 222.

Petitioners would have the Court disregard the *Cherokee Intermarriage Cases* and *Roff* because they were decided before passage of ICRA. What Petitioners fail to note is that the United States Supreme Court continues to cite each case as precedent. *See, e.g.*, *Wheeler v. United States*, 435 U.S. 313, 322 n. 18 (1978). Importantly, the Supreme Court recognized the continuing validity of these cases when it cited to them post-ICRA in *Santa Clara Pueblo*, the seminal case on lack of federal court jurisdiction over internal tribal membership decisions. *Santa Clara Pueblo*, 436 U.S. at 55, 72 n. 32; *see also Williams v. Gover*, 490 F.3d 785, 789 n. 7 (9th Cir. 2007).

Like the Supreme Court, Congress has consistently affirmed tribal authority over tribal determinations. For example, tribal authority over membership decisions has received statutory recognition in 25 U.S.C. § 184, which provides that the children of a white man and an Indian woman by blood shall be considered members of the tribe if, and only if, "said Indian woman was . . . recognized by the tribe." (Emphasis added).

The Executive Branch also has long recognized that "[t]he power of the tribe to determine its membership must be considered limited only by the express terms of congressional enactments." *See* Solicitor's Opinion of May 17, 1941, 1 Opinions of the Solicitor 1048; 55 I.D. 14, 33. "A tribe may provide for special formalities of recognition, and it may adopt such rules as

seem suitable to it, to regulate the abandonment of membership, the adoption of non-Indians or Indians of other tribes, and the types of membership or citizenship which the tribe may choose to recognize for tribal purposes." Handbook of Federal Indian Law (1958 ed.), p. 414. Section 62.2(b) of Title 25 of the Code of Federal Regulations provides enrollment appeals may not be filed with the Secretary unless: "(1) The adverse enrollment action is incident to the preparation of a tribal roll subject to Secretarial approval; or (2) An appeal to the Secretary is provided for in the tribal governing documents."

In contrast to the longstanding principles set forth in the previous paragraph, Petitioners mistakenly rely on *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899). *Stephens* dealt with a Congressional enactment, Act of July 1, 1898, that gave the court authority to review tribal membership decisions incident to dispersal of lands held by the federal government in trust. *See Stephens*, 174 U.S. at 476. There is no such statute applicable to this case. *Stephens* also did not deal at all with the tribe's right to determine membership for its own purposes. Moreover, the issue before the Court was the constitutionality of the act authorizing such review. *Stephens*, 174 U.S. at 492. This case is not about the constitutionality of 25 U.S.C. § 1303, but about whether Congress authorized federal court review of tribal membership decisions when it enacted § 1303.

Statutes, regulations, and case law all recognize and uphold exclusive tribal sovereignty over internal enrollment matters. Therefore, the district court correctly held that federal courts do not have jurisdiction to second guess the Pechanga Tribe's determination of Tribal membership status. Moreover, Congress in the exercise of its plenary powers over Indian tribes

vested jurisdiction to hear claims of alleged ICRA violations, other than habeas corpus claims, in Indian tribes – not the federal judiciary. *See Santa Clara Pueblo*, 436 U.S. at 56.

2. *The Indian Civil Rights Act Vests Jurisdiction In Tribal Law-Applying Bodies For Enforcement Of Its Substantive Provisions.*

The seminal case involving the scope of federal judicial review of alleged violations of ICRA is *Santa Clara Pueblo*, 436 U.S. 49. *Santa Clara Pueblo* involved an attempt to seek federal judicial review of membership actions of an Indian tribe under ICRA. The Supreme Court resoundingly rejected a federal cause of action for alleged violations of ICRA in non-criminal proceedings.

Santa Clara Pueblo involved a challenge to a tribal membership ordinance whereby a female child was denied membership in the tribe because her mother had married a non-member Indian. *Santa Clara Pueblo*, 436 U.S. at 51-51. In contrast, children of males who married non-member Indians were allowed to have their children enrolled. *Id.* Like this case, respondents alleged that the tribal action violated provisions of 25 U.S.C. § 1302. The non-member respondent was raised on the reservation, resided on the reservation as an adult, but, due to the tribe's action to prevent enrollment, could not vote in tribal elections, hold secular office in the tribe, could not remain on the reservation absent an enrolled family member living on the reservation, and could not inherit interests in communal property. *Santa Clara Pueblo*, 436 U.S. at 52. As in this case, the respondents unsuccessfully sought to persuade the tribe to change its membership decisions. *Santa Clara Pueblo*, 436 U.S. at 52.

Petitioners attempt to distinguish the clear holdings of *Santa Clara Pueblo* claiming it was limited to cases for injunctive or declaratory relief. Importantly, the decision was not based on the form of relief requested but on the substantive question of federal court review of internal tribal membership decisions. Petitioners' effort to distinguish *Santa Clara Pueblo* as a membership case versus a disenrollment proceedings also must be rejected. The Supreme Court decision cited both the *Cherokee Marriage Cases* and *Roff*, which upheld a tribe's right to revoke membership, as good law. *Santa Clara Pueblo*, 436 U.S. at 55, 72 n.32.

Santa Clara Pueblo asked whether ICRA impliedly authorized federal judicial actions to enforce its substantive provisions. *Santa Clara Pueblo*, 436 U.S. at 51. The Act itself contains no express provision. While Congress could have exercised its plenary power to expressly abrogate the tribes' immunity from suit in the ICRA, it did not do so. *Santa Clara Pueblo*, 436 U.S. at 58-59. The Supreme Court held that ICRA did not explicitly or impliedly authorize actions in federal court for violations in the context of tribal civil membership decisions. *Santa Clara Pueblo*, 436 U.S. at 72.

In reaching its holding, the Court contrasted relief for alleged violations of ICRA in the tribal civil membership context with habeas corpus relief in criminal matters. The Court held that limiting habeas corpus remedies to criminal proceedings through § 1303:

> [R]eflected 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 Indian people." Summary Report 11. In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed.

Santa Clara Pueblo, 436 U.S. at 66-67 (emphasis added). The Court went on to state "[s]imilarly, and of more direct import to the issue in this case [federal review of tribal membership decisions], Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context." *Santa Clara Pueblo*, 436 U.S. at 67 (emphasis added). The Supreme Court recognized in *Santa Clara Pueblo* that limited habeas corpus relief under ICRA was the exception rather than the rule:

> *A fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case [a tribal membership decision], cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has the power to authorize civil actions against tribal officials and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.

Santa Clara Pueblo, 436 U.S. at 60-61 (citations and footnote omitted).

Without deciding the issue, one lower court intimated these clear statements by the Supreme Court might not limit § 1303 relief to tribal criminal matters. *Poodry v. Tonawanda Tribe of Seneca Indians*, 85 F.3d 874, 887 (2nd Cir.) *cert. denied* 519 U.S. 1041 (1996). Importantly, *Poodry* did not take into account that *Santa Clara Pueblo* was litigated because the parties acknowledged that habeas corpus was not an available remedy for alleged ICRA violations in the context of membership decisions.

Petitioners effort to obtain habeas corpus relief is so outside the intended scope of IRCA and federal Indian law that all parties agreed in *Santa Clara Pueblo* that habeas corpus was not a remedy for those dissatisfied with internal tribal enrollment decisions. The respondents in *Santa Clara Pueblo* had pushed for an implied remedy because tribal membership, loss of land use rights, and banishment were correctly

understood to be non-detention or non-custodial matters. *Santa Clara Pueblo*, Respondents' Brief, at 4 and 15, 1977 WL 189106. The United States took the same position before the Court: "[h]abeas corpus actions under Section 203 of the Act, 25 U.S.C. 1303, while providing an effective remedy against deprivation of rights in most criminal cases, cannot provide adequate redress for loss of rights in noncustodial situations." *Santa Clara Pueblo*, United States' Brief, at 9, 1977 WL 189113 (emphasis added).

The Supreme Court has held that there is no federal court jurisdiction to review ICRA violations in the context of tribal civil membership decisions. *Santa Clara Pueblo*, 436 U.S. at 72. The district court should be affirmed because the Pechanga Tribe has exclusive jurisdiction over its enrollment decisions.

C. The Court Lacks § 1303 Habeas Corpus Jurisdiction In This Case

1. *Habeas Corpus Is An Extraordinary Remedy And Its Relief Is Limited.*

The habeas corpus provision of ICRA states: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. Habeas corpus is an extraordinary remedy. *Bousely v United States*, 523 U.S. 614, 621 (1998). Section 1303 is no broader than the cognate statutory provisions governing habeas corpus review of state and federal action. *Shenandoah v. U.S. Department of Interior* ("*Shenandoah*"), 159 F.3d 708, 713 (2nd Cir. 1998). Federal court jurisdiction only exists under § 1303 if Petitioners can establish that: (1) the disenrollment proceeding is criminal and not civil in nature; (2) the

Pechanga Tribe is detaining them; and (3) Petitioners have exhausted all available Tribal remedies. *Quair v. Sisco* ("*Quair I*"), 359 F.Supp.2d 948, 963 (E.D.Cal. 2004); *Alire v. Jackson*, 65 F.Supp.2d 1124, 1127 (D.Ore. 1999).

Under ICRA, habeas corpus relief may only be granted from a tribal criminal proceeding which poses a "severe actual or potential restraint on [Petitioners'] liberty." *Shenandoah*, 159 F.3d at 714. Habeas corpus relief "will not be allowed to do service for an appeal." *Bousely*, 523 U.S. at 621. While tribal membership is an important privilege, relitigation of an important interest is insufficient to establish habeas corpus jurisdiction. Habeas corpus, representing as it does a profound interference with the fundamental right of tribes to self-governance, is reserved for those instances in which the federal interest in liberty is so strong that it outweighs finality concerns for membership decisions and the overriding federal policy of protecting tribal self-governance and cultural identity. *See Santa Clara Pueblo*, 436 U.S. at 60-61; *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 516 (1982).

2. *Habeas Corpus Jurisdiction Does Not Exist Because The Pechanga Tribe's Disenrollment Proceedings Are Civil In Nature.*

The district court dismissal should be affirmed because Petitioners admit that the Pechanga Tribe's action to disenroll is a civil action. Appellants' Brief at 19. The district court correctly found that habeas corpus jurisdiction under the ICRA only applies to tribal criminal proceedings. Order Granting Respondents' Motion to Dismiss Pursuant To F.R.C.P. at 4 (ER Vol. I, p. 004); *see Santa Clara Pueblo,* 436 U.S. at 66-67; *Alire*, 65

F.Supp.2d 1124 (D. Ore 1999); *accord Shenandoah v Halbritter* ("*Halbritter*"), 275 F. Supp. 2d, 279, 285-87 (N.D.N.Y. 2003).

Congress has consistently understood § 1303 relief to be limited to criminal proceedings. ICRA's legislative history contains extensive discussions of Congress's treatment of habeas corpus as a criminal remedy. *See Santa Clara Pueblo*, 436 U.S. at 66-68; *Poodry*, 85 F.3d at 882-882. Congress' subsequent treatment of § 1303 shows that Congress still understands habeas corpus relief to be limited to criminal proceedings.

Congress considered § 1303 during enactment of Pub. L. 101-379, the Indian Law Enforcement Reform Act. Congress noted that, in addition to civil remedies under ICRA through tribal authorities, "in the area of criminal law, Federal review may be invoked through a writ of habeas corpus." S. Rep. 101-167, 101st Cong. 1st Sess. 1989 (emphasis added). In 1991, during the consideration of legislation responding to the decision in *Duro*, 495 U.S. 676, Congress noted that habeas corpus review is available to tribal prisoners under § 1303 like it is to state prisoners under 28 U.S.C. 2254. S. Rep. 102-168, 102nd Cong. 1st Sess. 1991. Congress clearly intended and continues to understand that § 1303 is limited to criminal matters.

In the anomalous cases suggesting that habeas corpus jurisdiction may exist in connection with disenrollment, it was material that disenrollment was a criminal punishment and the disenrolled persons were considered criminals. *See Poodry*, 85 F.3d at 888-89; *Quair I*, 359 F.Supp.2d at 953.

In *Poodry*, petitioners were tribal members who were summarily convicted of "treason" and sentenced to disenrollment and permanent banishment from the reservation. *Poodry*, 85 F.3d at 876. The tribe claimed petitioners had engaged in "unlawful activities," including "actions to

overthrow, or otherwise bring about the removal of, the traditional government" and for these reasons the petitioners were "convicted of treason." *Poodry*, 85 F.3d at 889. In contrast to this case, the petitioners in *Poodry* concededly satisfied the general criteria for membership. *Poodry*, 85 F.3d at 889.

Contrary to Petitioners assertions, *Quair I* did involve a criminal proceeding. In *Quair I*, petitioner was informed and believed that "attempts to seek redress of her grievances or appeal the criminal charges and penalties against her" would be pointless because the persons who disenrolled her were the same parties who refused to hear her appeal. *Quair I*, 359 F.Supp.2d at 953. *Quair I* held that "the disenrollment of a tribal member and the banishment of that tribal member constitutes a punitive sanction." *Quair I*, 359 F.Supp. at 967. No court has held that all disenrollment actions are inherently criminal in nature, or that a disenrollment decision based strictly on tribal membership criteria somehow constitutes a criminal proceeding. Moreover, later in *Quair II*, involving separate tribal actions of banishment and disenrollment, the court rejected habeas corpus jurisdiction over the disenrollment action stating:

> In interpreting § 1303, courts should hesitate to so expand the meaning of "criminal" and "detention" such that, as a practical matter, all tribal decisions affection individual members in important areas of their lives become subject to review in federal court. Such a result would be inconsistent with the principal of broad, unreviewable tribal sovereignty in all but criminal cases involving physical detention.

Quair v. Sisco ("Quair II"), 2007 WL 1490571 at *2.

Randall v Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) supports the Tribal Parties position that habeas corpus relief under ICRA is appropriate in the criminal context. Petitioners wrongly infer that *Randall*

stands for the proposition that all alleged violations of due process by a tribal government are subject to appellate review in the federal courts. *Randall* was a habeas corpus action reviewing appeal of a tribal criminal decision.

Importantly, Petitioners analogy to denaturalization is inapposite. In *Tropp v. Dulles*, 356 U.S. 86 (1958), the issue was the constitutionality of a statute that revoked United States citizenship for desertion during wartime even if the desertion was unrelated to any actions on behalf of foreign government. The statute at issue left the defendant stateless. The Court in holding the statute unconstitutional contrasted it with a statute where loss of citizenship was based on voting in a foreign election. *Tropp*, 356 U.S. at 93. In this case, Petitioners are not left stateless because they still retain their United States citizenship and may be eligible for membership in another tribe. Importantly, in *Tropp* the Court defined when a statute is penal versus nonpenal:

> If the statute imposes a disability for the purposes of punishment – that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate state purpose.

Tropp, 356 U.S. at 96. Here the Pechanga Band has a legitimate governmental purpose in ensuring that only those persons who meet the Pechanga Constitution's membership requirements are members of the Tribe, vote in Tribal elections, and receive tribal benefits. There is nothing in the record of the proceedings before the Pechanga Tribe to show that action was taken in an effort to punish the Petitioners.

Klapport v. United States, 335 U.S. 601 (1949) and *Schneiderman v United States*, 320 U.S. 118 (1943), likewise do not support habeas corpus

jurisdiction. The Tribal Parties do not dispute that loss of membership has significant consequences. However, unlike in *Klapport*, the Pechanga Tribe did not disenroll Petitioners summarily, by default, and without an opportunity to respond to or present evidence. *Schneiderman* was a direct appeal on the merits of the case – not a habeas corpus proceeding. As the Supreme Court held in *Bousely*, habeas corpus relief "will not be allowed to do service for an appeal." *Bousely*, 523 U.S. at 621.

Contrary to their position before the district court, Petitioners now concede at page 19 of their Opening Brief that their disenrollment was a civil proceeding. This is consistent with the record below. The Record of Decision makes it clear that the Disenrollment Procedures are civil in nature. Petitioners were disenrolled for failure to meet the Pechanga Constitution's requirements. (ER Vol. III, p. 423-424, ¶¶ 8-9). Disenrollment was not a punishment for any action of Petitioners, criminal or otherwise. The factors to be considered for initiating the Disenrollment Procedures all focus on mistakes or errors in the initial enrollment. (ER Vol. Vol. II, p. 121, § 2). Importantly, the Pechanga Constitution, Art. XIII, establishes a separate action where loss of membership privileges may be imposed as a punishment for violations of tribal law. (ER Vol. II, p. 119, Art. XIII). No charges have been brought against Petitioners under this Article.

While Petitioners conceded before the district court that they have not been banished (ER Vol. III, p. 203:8), it is important to note that the Access Ordinance and the Exclusion Regulations under which someone might be denied access to the Reservation are civil in nature. In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (1985), the Ninth Circuit held that exclusion was an exercise of a tribe's civil jurisdiction.

The Supreme Court in *Duro* recognized the civil nature of exclusion and eviction remedies in contrast to a tribe's criminal jurisdiction. The Court held that although tribes lack criminal jurisdiction over nonmembers under *Oliphant*, they possess "their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro*, 495 U.S. at 696.

Petitioners admit the Disenrollment Procedures are a civil proceeding. Habeas corpus under § 1303 is not available to appeal from a civil proceeding and the district court decision should be affirmed.

3. *Petitioners Have Not Been Detained*

To be eligible for habeas corpus relief, Petitioners must be in "detention." 25 U.S.C. § 1303; *Poodry*, 85 F.3d at 899. The detention requirement is designed to limit the availability of habeas corpus review "to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Quair I*, 359 F.Supp.2d at 967 (*citing Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973)). The courts have held that the detention language in § 1303 is interpreted interchangeably with "custody" as that term is used in other federal habeas corpus statutes. *Poodry*, 85 F.3d at 891. What matters is that the restrictions "must significantly restrain petitioners' liberty to do those things which in this country free men are entitled to do." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). Importantly, collateral consequences even in a criminal proceeding are not themselves sufficient to render an individual detained. "Some of the typical collateral consequences of a [detention] include the inability to vote, engage in certain businesses,

hold public office, or serve as a juror." *Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) *cert. denied* 525 U.S. 1081 (1999); *Maleng v. Cook*, 490 U.S. 488, 491 (1989). Petitioners' Opening Brief makes it clear that their real complaint is that they no longer receive per capita payments and other monetary benefits of enrollment. *See* Opening Brief, pp. 3, 10, 12, 23, 35.

In *Alire*, the court held that there was no protectable liberty interest for § 1303 jurisdiction purposes where petitioner failed to explain "actual or potential severe restrictions" on liberty. *Alire*, 65 F.Supp.2d at 1129. Petitioners admit in their Motion For Summary Judgment at page 10 that the "Petitioners herein have been disenrolled, but not banished." (Emphasis added). There is no allegation that Petitioners have been subjected to any sanction under the Tribe's Access Ordinance or Exclusion Regulations. While the Tribal Rangers may exclude someone from the Reservation without prior Tribal Council action and opportunity for a hearing, such authority is limited to exclusion for a maximum of seven days, limited to specific circumstances and subject to review by the Tribal Council. (ER Vol. II, p. 139, Art. 11).

Moreover, exclusion alone is not a protected liberty interest. In *Alire*, the petitioner was excluded from the reservation seven months after her criminal conviction based on three other violations of tribal law in addition to the criminal conviction. Habeas corpus jurisdiction in *Alire* was denied because the separate violations did not rise to the level of a special and urgent situation requiring habeas corpus relief. *Alire*, 65 F.Supp.2d at 1129. As in this case, the petitioner in *Alire* was not stripped of her Indian name or her lands. *Alire*, 65 F.Supp.2d at 1129. She was not banished from her

reservation. *Id.* She also had the right to seek employment and health care benefits elsewhere. *Id.*

In *Quair I*, the court held initially that there was § 1303 jurisdiction where the tribe had banished and disenrolled a petitioner accused of "betrayal" and "treason." *Quair I*, 359 F.Supp.2d at 953. Later in the same case, the tribe afforded the petitioner notice and an opportunity to respond. The general council at the rehearing addressed the issues of disenrollment and banishment separately. Under those subsequent circumstances, the court ruled that because petitioners "failed to show that disenrollment affects their physical freedom to a degree that it may be considered tantamount to detention," the court dismissed the disenrollment claims for lack of jurisdiction under § 1303. *Quair II*, 2007 WL 1490571 at *4 (emphasis added).

Restraints on Petitioners, if any, are less those on the general public. Unlike the public, Petitioners who own or rent Reservation land, are married to or are family members of tribal members, or are friends of a tribal member may access the Reservation, whereas members of the general public would need special permission. (*See* ER Vol. II, p. 129). Petitioners are free to go almost any where they were able to go prior to their disenrollment. Unlike *Poodry,* there is no allegation in the Petition that Petitioners have been threatened by Tribal Parties or anyone acting on their behalf. The fact that Petitioners may not have access to all tribal facilities to the same extent as tribal members is insufficient to trigger § 1303 jurisdiction. *Halbritter*, 275 F.Supp.2d at 286 *citing Shenandoah*, 159 F.3d at 715.

A possibility for future exclusion which depends on Petitioners' future actions does not create a severe actual or potential detention for habeas

corpus review. *Williamson*, 151 F.3d at 1184; *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975). It was important to the court in *Poodry* that "petitioners have no ability to predict if, when, or how their sentences will be executed." By contrast, the Pechanga Tribe's Exclusion Regulations clearly set forth standards for removal. (*See* ER Vol. II, p. 134). Exclusion would require future actions by the Petitioners which trigger one or more of the conditions for exclusion listed in the Exclusion Regulations. Moreover, the Exclusion Regulations provide independent due process by requiring separate notice, an opportunity to be heard, and appellate review. (*See* ER Vol. II, p. 135, Art. 5 and p. 137 Art. 8). Petitioners cite to no facts in the record that establish they have been detained in any manner.

Petitioners only assert that they have been denied access to services, not detained. *See* Appellants' Brief at 23 (denied access to Senior Citizens services, health care, and schooling at tribal facilities or programs). Having conceded in footnote 8 of their brief that loss of per capita payments and other financial benefits are not a basis for jurisdiction, it is not clear what if any relief Petitioners even seek. The Petition asserts that Petitioners are restrained from traveling to, occupying or residing on real property owned by the Petitioners. (ER Vol. III, p. 361:16-21). However, Petitioners' affidavits admit they have not been denied access to their homes. (ER Vol. II, p. 099, ¶ 2; Vol. II, 086, ¶ 1). The only remaining assertion of detention in the Petition is the right to travel and move within tribal facilities and properties on the Reservation. However, Petitioners have not cited to a single incidence where access has been denied, except for access to services to which they are not entitled as non-members.

The Enrollment Committee took great pains to ensure that its decision was limited to Petitioners' membership status, and did not impact unnecessarily on Petitioners' Indian status. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974) (tribal membership is distinct from racial classification). The Record of Decision provides the Committee's findings shall not be construed as "a determination of the 'Indian' or 'Native American' status of Paulina Hunter or her descendants." Record of Decision, p. 27, ¶ 11 (Petition Ex. 1). For example, Petitioners or their children may still be eligible as Indians for educational services under 25 U.S.C. § 2007. Likewise, the Indian Health Service does not require formal enrollment, but rather looks at Indian descent, residence on tax-exempt property, and other factors to determine eligibility. *See* 42 C.F.R. § 136.12(a). Petitioners are free to attend cultural events on the Reservation on the same basis as other Native Americans, and other events and facilities open to the general public.

4. *Petitioners Have Not Exhausted Their Tribal Remedies For Any Claims Of Banishment*

Petitioners have completed the appeal process under the Disenrollment Procedures. However, as shown above, disenrollment without more is not a basis for jurisdiction under § 1303.

With respect to any assertions of jurisdiction based on exclusion from the Reservation or denial of access, Petitioners have failed to comply with the review procedures established under the Access Ordinance or the Exclusion Regulations. (*See* ER Vol. II, p. 129; Vol. II, p. 134). Indeed, no proceedings at all have occurred under either of those Tribal laws. Petitioners fail to allege any instances where they were actually denied

access to the Reservation by the Pechanga Tribe. Therefore, the court does not have jurisdiction because Petitioners have not exhausted their tribal remedies related to exclusion or eviction. *Quair I*, 359 F.Supp.2d at 963; *Alire*, 65 F.Supp.2d at 1127.

D. The Congress Has Rejected Creation Of A Federal Law Remedy That Provides For Direct Federal Court Appeals of Internal Tribal Enrollment Decisions.

Petitioners for the first time on appeal urge the Court to create a new federal common law remedy that would provide for broad federal court review of tribal decisions. Courts of Appeal generally do not consider an issue raised for the first time on appeal. *Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004). The Court should not consider Petitioners new argument because it was not raised below and Congress rejected just such a remedy when enacting ICRA. *See Santa Clara Pueblo*, 436 U.S. 49. Moreover, Congress in 1993 rejected even a study of federal court review of tribal court decisions because, in part, it was contrary to findings of the United States Commission on Civil Rights. 139 Cong. Rec. H10259-01 (1993).

Petitioners urging for creation of a new common law remedy makes it clear that the real issue is not detention, but a desire to relitigate their membership status and, bottom line, to obtain improperly some of the Pechanga Tribe's gaming revenues. Contrary to the record before the Pechanga Tribal forums (see ER Vol. p. 398 to 425), Petitioners *apparently* do not believe that Indian tribes can be trusted to provide due process and make thorough and reasoned decision when money is involved. Petitioners ignore the fundamental principle relied on by the Court in rejecting federal

court review of internal tribal enrollment decisions – "plainly [federal court review] would be at adds with the congressional goal of protecting tribal self-government." *Santa Clara Pueblo*, 436 U.S. at 65. No court has ever ruled that there is federal court jurisdiction to review internal tribal enrollment decisions, absent some grant from Congress. This Court should not make such a ruling in this case.

VIII. CONCLUSION

Petitioners fail to meet their burden of establishing subject matter jurisdiction. The disenrollment of Petitioners was made as part of the civil administration of the Pechanga Band which Petitioners admit was a civil proceeding. The disenrollment was not done as the result of or to punish any wrongful act of Petitioners, criminal or otherwise. The disenrollment has meant the loss of membership privileges, but it has not resulted in any material limits on the Petitioners' access to the Reservation. Petitioners admit they have not been banished from the Reservation, restricted from access to their homes, or otherwise denied access to the Reservation. If at some future point in time the Petitioners were to have their access materially limited under the Access Ordinance or Exclusion Regulations, the Petitioners would need to exhaust their tribal remedies under these Tribal laws prior to seeking relief from a federal court.

For all the foregoing reasons, this Court should affirm the decision of the District Court.

DATE: July 17, 2008

LAW OFFICE OF JOHN SCHUMACHER, LLC
HOLLAND & KNIGHT LLC

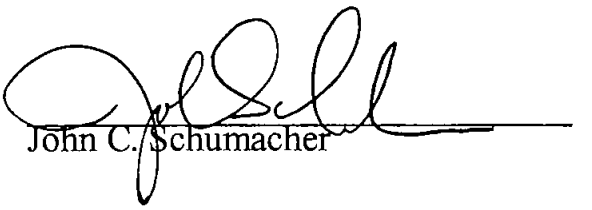
John C. Schumacher
Attorneys for Respondents

Certificate of Compliance

I certify that:

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionally spaced, has a typeface of 14 points or more and contains 9635 words.

DATED: July 17, 2008



John C. Schumacher

CERTIFICATE OF SERVICE

I am employed in Fremont County. My business address is 420 E. Washington Ave, Riverton, Wyoming, 82501, where this mailing occurred. I am over the age of 18 years and am not a party to the within action.

On the date signed below, I served the foregoing document, bearing the title.

RESPONDENTS' ANSWERING BRIEF for U.S.C.A Appeal No. 08-55037

on all the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows (or as described otherwise below).

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SERVICE LIST:
Paul Harris
Patrick Romero Guillory
Dolores Park Law Offices
503 Dolores St., 2nd Floor
San Francisco, CA 94110