No. _____

In The
Supreme Court of the United States

LOUISE VICTORIA JEFFREDO, ET AL.,
Petitioners,

v.

MARK A. MACARRO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 18, 2010

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Writ of Habeas Corpus under the Indian Civil Rights Act limited solely to tribal criminal proceedings instead of also including tribal civil proceedings which result in the disenrollment of life-long tribal citizens?

2. Does the combination of "disenrollment," which is the stripping away of Appellants' life-long tribal citizenship and the current and potential restrictions placed on Appellants, constitute a severe restraint on their liberty so as to satisfy the "detention" requirement of Section 1303 of the Indian Civil Rights Act?

3. Does the disenrollment of life-long tribal members, by itself, constitute a severe restraint of liberty so as to satisfy the "detention" requirement of the Indian Civil Rights Act?

4. Did the Appellants exhaust their tribal remedies by going through every Pechanga Tribal appeal proceeding available to contest their disenrollment?

LIST OF PARTIES

The parties are as follows:

LOUISE VICTORIA JEFFREDO; JOYCE JEAN JEFFREDO-RYDER; CHRISTOPHER L. RYDER; JEREMIAH S. RYDER; JONATHAN B. RYDER; MICHAEL JOHN JEFFREDO; ELIZABETH VILLINA JEFFREDO; 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; MARC CALAC; MARK LUKER; ANDREW MASIEL; RUSSELL BUTCH MURPHY; KENNETH PEREZ; DARLENE AZZARELLI; CHRISTINE LUKER, *Respondents-Appellees.*

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Louise Victoria Jeffredo, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-captioned case on December 22, 2009.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit, entitled Louise Victoria Jeffredo, et al. *-v-* Mark A. Macarro, et al., can be found at No. 08-55037 D.C. No. CV-07-01851-JFW. A copy of the opinion is included in the appendix attached to this petition as Appendix A. The district court entered its final order on December 4, 2007 by granting Respondents' Motion to Dismiss with prejudice for lack of jurisdiction under the Indian Civil Rights Act (25 USC §1301-1303). A copy of the opinion is included in the appendix attached to this petition as Appendix B.

JURISDICTIONAL STATEMENT

On December 22, 2009 a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit issued a published opinion affirming the District Court's decision that jurisdiction does not exist under the Habeas Corpus provision of the Indian Civil Rights Act of 1968 (25 U.S.C. §1303) for forfeiture of American Indian tribal citizenship and the subsequent physical restraints. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

This petition for Certiorari is being timely filed by mailing on March 17, 2010 This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. §1254(1). The Solicitor General is being served a copy of this petition by mail on the same date it is being sent to the Court.

STATUTES, GUIDELINES, AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 8:

> The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes; ...

Title 25, United States Code, § 1301-1303, Indian Civil Rights Act §1303. Habeas corpus

> 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.

Title 18, United States Code §1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The Respondent's tribe, one of the wealthiest Casino-based tribes in the United States, has kicked

out approximately 25% of its members in the last six years. In 2006, the Pechanga Tribe's six member Enrollment Committee, appointed by abusive tribal officials, disenrolled 100 adults and 100 children. They stripped these life-long members of their tribal citizenship in violation of the due process guarantees of the Indian Civil Rights Act.

The only U.S. Supreme Court case interpreting the Act is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) which held that habeas corpus was the only remedy available for ICRA violations. Consequently, appellants (16 of the life-long members disenrolled in 2006)[1] exhausted their available tribal remedies and filed a petition for a writ of habeas corpus in district court pursuant to the Indian Civil Rights Act. This Act was passed in 1968 after Congressional hearings exposed the abuses that many tribal members were

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[1] In the present case each member of the Tribe receives a per capita of at least $250,000 a year and other monetary benefits. Since the disenrollment of 100 adult members of the Appellants' Hunter Family four years ago, the remaining members have been enriched by approximately one hundred million dollars. As the approximately 100 disenrolled children come of age, the increase of monies to the remaining tribal members becomes even more astounding.

The Pechanga Tribe is the second highest donor to political coffers in the entire State of California. (San Francisco Chronicle, "State's Gaming tribes are top campaign donors." Nov. 29, 2009 at 1). Indian gambling is a 7.7 billion dollar business in California. (San Francisco Chronicle, "Tribes Toss Out Members in High-Stakes Conflict," April 20, 2008 at 1). (Available at www.sfgate.com). See also: Lucas, Greg, "Senate Approves Boost in Indian Slot Machines," San Francisco Chronicle, April 20, 2007, at B4, *available at* www.sfgate.com (in archives), and Yu, Belinda, "Coins in the Legislative Machine," Stanford Daily, February 2, 2007, *available at* www.stanforddaily.com (search title).

enduring at the hands of occasionally corrupt, incompetent, or tyrannical tribal officials.[2]

The effect of the Act was to impose upon Indian tribal governments, most of the same kind of restrictions against abridging the civil rights of its citizens that are applicable to federal and state governments. The legislative history of ICRA reflects a Congressional intent to protect the individual rights of Indians, while at the same time also fostering tribal self-government and cultural identity, thus the statue has twin, and seemingly conflicting goals. The High Court here is asked to find the balance between ICRA's individual's protections, including tribal voting rights, versus an unbridled acceptance of tribal autonomy, regardless of the potential transgressions of tribal governments.

To understand this case one must distinguish "banishment" from "disenrollment." In the instant case the Petitioners were disenrolled but not formally banished. Banishment is the temporary or permanent physical exclusion from tribal grounds. With banishment, one still retains his/her tribal citizenship and benefits. Disenrollment is more extreme for it strips away forever, one's tribal citizenship; takes away all related benefits and sets up the disenrollee for future banishment without the protections enjoyed by other tribal members.

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[2] [ICRA Legis. History S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). See also 1968 U.S. Code Cong. & Admin News, pp. 1837, 1863-1867.) ICRA, also known as the Indian Bill of Rights, was enacted by Congress in language taken from the United States Constitution. (82 Stat. 77, 25 U.S.C. 1302, 1303).

To grasp the impact of disenrollment let us briefly look at what happened to tribal elder and Appellant Lawrence Madariaga. This 92 year-old life-long member of the Pechanga Tribe is an important Pechangan, as he personally designed and built the Health Center. He brought a water system to the Reservation and in 2005 he was praised for his life-long tribal work. There is even a road on the Reservation named for his ancestor, Paulina Hunter, an original U.S. government allottee of the Pechanga Reservation. But now he can no longer use the Health Clinic that he built, or enjoy the Pechanga Senior Citizen Center. His grandchildren and great-grandchildren cannot attend the tribal pre-school and elementary school where the language, culture and history of the Tribe are taught. When Sophia, his wife of over 70 years died, they were denied the use of Reservation facilities for her memorial and sadly, she was denied burial with her ancestors on the Reservation.

When the Hunter family's lineage was questioned, the (Tribe) Enrollment Committee hired noted California anthropologist, Dr. John Johnson, to investigate. His investigation concluded that, "There is no one today that has more of a right to be a Pechanga Indian than that family (the Hunter Family)."[3] Dr. Johnson's report was rejected; the Tribe then fired him and soon thereafter disenrolled almost 200 descendants of Paulina Hunter.

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[3] KNBC 2007 news report entitled "Pechanga Membership Battle," http://www.nbclosangeles.com/news/Pechanga_Membership_Battle_Los_Angeles.html. Also see Dr. Johnson's letter to Tribe after disenrollment of Paulina Hunter's clan, dated June 20, 2006 attached as Appendix C.

The district court ruled for Respondents on jurisdictional grounds. The Ninth Circuit, in a 2-1 opinion, upheld the lower court and added a new failure-to-exhaust tribal remedies ruling. The court also, on a crucial issue of "first impression," restricted ICRA solely to tribal criminal proceedings, even though almost all disenrollments are done by civil proceedings.

Judge Wilken's articulate and persuasive dissent serves as a template for the reasons for the High Court to grant review.

REASONS FOR GRANTING THE WRIT

1. Restricting Federal Jurisdiction Under The Indian Civil Rights Act Solely To Tribal Criminal Proceedings Destroys The Guarantees Of The Act By Allowing Abusive Tribal Governments To Strip Away The Citizenship Of Life-Long Tribal Members Without Any Due Process Protections.

2. The Court's Restrictive Interpretation Of The ICRA Allows Abusive Tribal Officials *Carte Blanche* To Stamp Out Any Dissent To Their Policies, To Drastically Reduce The Tribal Electorate And To Increase The Share Of Casino Profits To Themselves And Their Families And Friends.

3. Disenrollment Is The Harshest Penalty A Tribal Member Can Suffer As It Is Analogous To Denationalization And Is A Severe Restraint On One's Individual Liberty As A Citizen Of The Tribe.

4. The Lower Court's Interpretation Of The Exhaustion Of Internal Remedies Requirement Is

So Extreme That No Native American Who Is Disenrolled (But Not Banished) From Their Tribe Could Contest That Loss Of Tribal Citizenship And Its Restrictions In Any State Or Federal Court.

1. Restricting Federal Jurisdiction Under The Indian Civil Rights Act (ICRA) Solely To Tribal Criminal Proceedings Destroys The Guarantees Of The Act By Allowing Abusive Tribal Governments To Strip Away The Citizenship Of Life-Long Tribal Members Without Any Due Process Protections.

The Appellate Court correctly described the question of whether there is habeas relief under 25 U.S.C. §1303 of the Indian Civil Rights Act ("ICRA") in a non criminal context as a "an issue of first impression for the court." (Majority at 16a, headnote 12). Unfortunately the majority also makes the protections of ICRA virtually meaningless by ruling that habeas relief may not be granted from any tribal civil proceeding. (Majority at 16a)

Terrible consequences flow in the real world from this restrictive ruling. In California approximately 5,000 tribal members have been disenrolled in the last few years.[4] The vast majority of California tribes do not have tribal courts. Therefore, they will continue to disenroll members without due process in General Council meetings like in *Quair I*[5] or through enrollment committees appointed by abusive tribal officials like the Tribe did here. In both situations tribal officials will be immune from the guarantees of ICRA and tribal members will be locked out of any judicial review. This is a tragic result.

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

[5] *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004)

The other tragic consequences of the majority's mistaken interpretations of habeas law will take place nationally. Large tribes who have tribal courts will be advised by their lawyers to circumvent their court structure and disenroll members in "civil proceedings." This legal maneuver will deny their disenrolled citizens any judicial means of reviewing the lack of due process.

On the face of §1303 the *only* requirement to invoking habeas review is a "detention." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 886, 887 (2d Cir. 1996).[6] Section 1303 simply provides, "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." The majority's decision to restrict §1303 to criminal proceedings is not supported by the legislative history of the Act, the limited case law that has interpreted the provision, or even the history of the writ of habeas corpus.

a. The Court Must Examine Traditional Habeas Law In Determining The Scope Of §1303 Because Legislative History Of ICRA Is Not Conclusive.

The legislative history of ICRA does not conclude that Congress intended habeas review to be restricted solely to criminal convictions or whether other

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[6] The court in *Poodry* held that disenrolled and banished members of an Indian Tribe accused of treason, could invoke habeas corpus under §1303 because they demonstrated a sufficiently severe restraint on liberty to be "in custody" for purposes of habeas jurisdiction. *Id.*

circumstances of "detention" by a tribal court order can trigger habeas review. *See Poodry, supra* at 888. The majority's lack of analysis of ICRA's legislative history demonstrates the court's inability to find legislative support for their holding. In determining the scope of §1303, courts have in the past consistently looked to the development of the federal writ of habeas corpus (28 U.S.C. 2254) for guidance.[7] The court in *Poodry* stated, "We conclude that we must conduct the **same inquiry** under §1303 as required by other habeas statutes, but we find that...§1303 supplies a jurisdictional basis for federal court review of the tribal government action alleged in this case." *Poodry, supra* at 890. (emphasis added). Further, the court states that Congress did not "in adopting §1303, intend to create jurisdictional requirements different from those associated with traditional habeas remedies." (*Id.* at 893). There appears no reason in the plain language of §1303 to give it a more restrictive "reach than [the] cognate statutory provisions governing collateral review of state and federal action[s]." *Id.* at 879-80, dissent at 22a. Thus, in determining the scope of §1303, a reviewing court *must* examine traditional habeas corpus remedies.

The majority opinion in this case recognizes the necessity for examining traditional habeas law, but also contradicts itself by later refusing to look at other habeas precedent on this issue of inclusion of civil proceedings. The court states "The term 'detention' in

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[7] "This court has consistently found the law which has developed with respect to actions for habeas corpus relief under 28 U.S.C. §2254 to be applicable by analogy to actions founded upon 25 U.S.C. § 1303." *Weatherwax on Behalf of Carlson v. Fairbanks,* 619 F. Supp. 294, 296 (D.Mont. 1985) at fn.2.

§1303 must be interpreted similarly to the 'in custody' requirement in ***other habeas contexts***." *See Moore v. Nelson,* 270 F.3d 789, 791 (9th Cir. 2001), majority at 9a, hn [1] (emphasis added). However, the court later contradicts itself by rejecting the dissent's argument which points to *Duncun v. Walker,* 533 U.S. 167, 176 (2001) as persuasive on interpretation of §1303. The dissent stated that,

> "The Supreme Court has held more recently that nothing in the language of the provisions for federal habeas relief for a person in custody pursuant to the judgment of a state court 'requires that the state court judgment pursuant to which a person is in custody to be a criminal conviction."

Dissent at 22a, citing *Duncun v. Walker,* 533 U.S. at 176. The majority inexplicably rejects this argument stating, "We do not find that this precedent bears on whether ICRA habeas petitions are available in civil proceedings." Majority at 17a fn. 2. The majority's holding simply cannot be supported if relevant and established habeas law is examined.

b. The History Of Habeas Corpus Includes Civil Proceedings

The writ of habeas corpus has traditionally been available to challenge detentions resulting from civil or criminal proceedings.

> "Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under

> arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*."

Wales v. Whitney, 114 U.S. 564, 571 (1885). The essence of the Writ is to protect individuals against erosion of their right to be free from wrongful restraints upon their liberty and the remedy has evolved through time to meet this objective.[8] Thus, the central inquiry of a court determining habeas jurisdiction has historically been into the *severity* of the restraint suffered by the Petitioner[9] and not the mere label on the proceeding. Courts have heard cases challenging civil commitment to a mental institution and challenges to civil contempt orders for failure to pay child support, in the form of habeas corpus actions.[10] The underlying state court judgments in these cases were not criminal convictions.

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[8] "It [the Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham,* 371 U.S. 236 (1963).

[9] *Id.* at 238-239.

[10] *Francois v. Henderson,* 850 F.2d 231 (CA5 1988) (entertaining a challenge brought in a federal habeas petition under §2254 to a state court's commitment of a person to a mental institution upon a verdict of not guilty by reason of insanity); *Leonard v. Hammond,* 804 F.2d 838 (CA4 1986) (holding that constitutional challenges to civil contempt orders for failure to pay child support were cognizable only in a habeas corpus action).

The majority wrongly rejects Judge Wilken's persuasive analysis regarding the historical context of habeas corpus pointing to inclusion of civil proceedings. See dissent at page 21a-22a and majority at 17a. This history shows that habeas application to civil proceedings is not an "extension" of habeas corpus but rather well within the scope of habeas absent clear legislative intent and accompanying language to the contrary. Thus, the majority's statement that habeas relief should not be "extended" to civil proceedings is a misstatement of the nature and history of habeas corpus law.

It appears that the majority simply refuses to recognize the application of this history as specifically relevant to the interpretation ICRA. This oversight is a dangerous one if left standing, as it threatens the way courts construe statutory provisions of habeas in other contexts. Presently the law respecting the Writ is largely statutory and the legislature normally determines the proper scope of the Writ. If the legislature wishes to limit a courts' habeas jurisdiction however, the repeal must not violate the Suspension Clause, and it must be made in clear and unambiguous language.[11] In the instant case, the Appeals court has overstepped its powers in restricting habeas jurisdiction by effectively repealing habeas from tribal civil proceedings absent *any* clear and unambiguous language from Congress.

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[11] *Chmakov v. Blackman*, 266 F.3d 210, 214-215 (3d Cir. 2001).

c. Restricting §1303 Destroys The Purpose And Proper Application Of The Provision.

In restricting habeas to "criminal proceedings" the court not only fails to recognize the essence of habeas but it also fails to recognize the complex and diverse tribal decision making entities to which ICRA must necessarily be applied. In the current case, the Pechanga tribe has no criminal code and no tribal court. Therefore, it could be said that every action that the tribe takes could be construed to be civil no matter how severe or punitive the result. Thus, the majority has rendered ICRA effectively unenforceable by Petitioners and for many other Indians nationally.

d. The Supreme Court Decision In *Santa Clara Pueblo* Is Not Binding On This Case.

Citing support for their finding that ICRA only applies to criminal proceedings, the court cites three cases, *Alire*,[12] *Quair I*[13] and *Santa Clara Pueblo v.*

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[12] *Alire v. Jackson,* 65 F. Supp. 2d 1124 (D. Ore. 1999). This case dealt with a nonresident, nonmember of a tribe seeking to use §1303. *Alire* is distinguishable because case law is clear that non-members do not have the same rights as tribal members and therefore cannot establish a detention under §1303. See *Quechan Tribe of Indians v. Rowe,* 532 F.2d 408, 410 (9th Cir. 1976); *Liska v. Macarro et.al.*, No. 08-CV-1872IEG(POR), 2009 WL 2424293 (S.D. Cal. Aug. 5, 2009).

[13] The court drastically misinterprets *Quair,* 359 F. Supp. 2d 948 "Quair I", both factually and legally. Factually there were no criminal charges. The basis of the disenrollment was that the Petitioners went to a lawyer outside the tribe for advice. Petitioners were then disenrolled in a civil proceeding (a General Council meeting of the Tribe). And legally, the district court ruled

Martinez, 436 U.S. 49 (1978). However, these cases cannot be read to hold that ICRA applies to only civil proceedings as they differ factually and legally from the present case. The court in *Quair I* addresses the inapplicability of *Santa Clara Pueblo* stating, "Santa Clara Pueblo simply does not compel the conclusion that all membership determinations are 'civil in nature' and therefore insulated from federal habeas review." (*Id.* at 965). Yet, the court cites these cases as the basis for restricting §1303.

Santa Clara Pueblo was a case involving declaratory and injunctive relief. Congress had not provided for such relief in ICRA, and consequently the Supreme Court's ruling only bars those types of claims. *Santa Clara Pueblo, supra* at 58-59. The court in *Poodry* clearly states 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*, 85 F.3d at 887. The dissent below said that *Santa Clara,* "does not preclude habeas review of civil proceedings that result in detention." Dissent at 23a. 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

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that regardless of the nature of the proceedings (civil or criminal) it was the consequences of the tribe's decision that determined jurisdiction under ICRA. The court granted federal habeas jurisdiction. *Quair II* (*Quair v. Sisco*, No. 1:02-cv-5891 DFL, 2007 WL 1490571 (E.D. Cal. May 21, 2007)), also cited, can be read to support the majority's position.

allow a woman who married outside the tribe to enroll hers. Thus, 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 for many years until the enrollment committee illegally changed the membership criteria and selectively applied that new criteria to Appellants. The Court in *Santa Clara* was not called upon, and did not consider Congress' limitations on tribal powers pursuant to an ICRA petition for a writ of habeas corpus.

The majority below states it is valuing tribal sovereignty, however in making such a sweeping restriction of ICRA the court takes away a vital remedy provided to Native Americans by Congress in passing ICRA. By restricting habeas relief, the court below has rewritten the law of the Great Writ.

2. The Court's Restrictive Interpretation Of ICRA Allows Abusive Tribal Officials Carte Blanche To Stamp Out Any Dissent To Their Policies, To Drastically Reduce The Tribal Electorate And To Increase The Share Of Casino Profits To Themselves And Their Families And Friends.

Section 1303 of ICRA has one requirement for jurisdiction – a "detention." The U.S. Supreme Court

is clear that a non-custodial detention can be the basis for habeas jurisdiction. See e.g. *Jones v. Cunningham*, *supra* at 239-40. A requirement that a person is no longer free to "come and go" as they did previously satisfies jurisdiction. See *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Even a requirement to attend fourteen hours of alcohol rehabilitation constituted custody. See *Dow v. Circuit Court*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) *cert. denied*, 510 U.S. 1110 (1994).

The test of detention is whether the restraint is a "severe" actual or potential limitation on liberty. See, *Hensley* 411 U.S. at 351-52. *Poodry*, 85 F.3d at 894-95. Appellants suffer numerous severe restraints. One, they have been stripped of their citizenship rights (described fully in Section 3). Two, they cannot go to the Senior Citizens Center, the Health Clinic, the Tribal school, and other places on the Reservation that are available only to members. Three, because they are now "non-members" of the Tribe they can be instantly excluded from the Reservation for seven days. This action can be taken by the Tribal Rangers on their own authority. "This is a severe restraint to which members of the Pechanga Band are not generally subject." Dissent at 27a, citing the freedom to "come and go" test of *Hensley*, *supra*. Fourth, Appellants are no longer members of the Tribe and having brought this case are viewed with antagonism by the tribal officials. Appellant Michael Jeffredo and others have already been harassed by Tribal Rangers. (Declaration of Michael Jeffredo) (ER. Tab 17, Docket no. 31, Bates 099-100). If any Appellant is excluded for seven days by a Ranger, the Tribal Council can make this exclusion permanent *without* the consent of

the Tribe (Non-member Ordinance, Article 4 (f) (ER. Tab 22, Docket no. 27, Bates 139, Article 11(c)).

Appellants, viewed as a hostile political force, and representing approximately 100 Hunter family adults and former tribal voters, are under a potential threat of exclusion/banishment

> "(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 v. Dulles, 356 U.S. 86, 101-02 (1958).

The majority analyzed each restraint separately and found that none amounted to a detention. But the correct test is used by the dissent which analyzed the restraints collectively. See dissent at 25a. Appellants have been stripped of their citizenship; are restricted to where they can go to on the Reservation; they face potential physical restraints and discrimination and are under a constant potential threat of banishment. The combination of these factors satisfy the detention requirement of ICRA and should allow federal court jurisdiction in this case.

3. Disenrollment Is The Harshest Penalty A Tribal Member Can Suffer As It Is Analogous To Denationalization And Is A Severe Restraint On One's Individual Liberty As A Citizen Of The Tribe.

Loss of citizenship is a sweeping and severe deprivation of one's rights. In an instant, the person changes from a protected national citizen, to a resident alien. Once citizenship is gone, the individual loses all of the rights and privileges that the other citizens of that country enjoy. One cannot devise a more personally devastating event than to take away one's nationality, to erase one's place in their own ethnic group. In her dissent, Judge Wilken quoted *Trop v. Dulles*, 356 U.S. 86,

> "To take away a man's citizenship deprives him of a right no less precious than life or liberty (itself)... 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...". Dissent at page 28a.

Petitioner, Lawrence Madariaga's 90 plus years as a Pechangan citizen has been extinguished, yet he has committed no crime. The High Court has stated that losing citizenship brings the "total destruction of individual's status in organized society." *Trop*, 356 U.S. 86, 101. Here, the Hunter Family's standing in their community and within their original homeland of over 10,000 years has been trampled. "Our roots sunk deep into the land. The ashes of our ancestors cover

the place where the sun is."[14] Lawrence will never participate in sacred Pechanga ceremonies or be amongst the respected Tribal elders again. He will never again hold tribal office or even vote in a Pechangan election. That right has been lost forever to Lawrence and his whole family, whose voting influence has been diluted to the point of non-existence within their own tribe of people. (See Voting Rights Act, 42 U.S.C. §1973; *Voinovich v. Quilter*, 507 U.S. 146 (1993) where it was held illegal to dilute a minority's voting influence.)

a. The United States Government Cannot Take Away Citizenship From A Natural-Born Citizen And The Pechangan Government Should Not Be Permitted To Take Away The Citizenship Of Natural-Born Pechanga Citizens.

There is an ocean of difference between the denial of an individual application for citizenship as in *Santa Clara*, 436 U.S. 49 (1978), and stripping of it from a natural-born citizen who has enjoyed it for life and even for generations before that, as occurred in this case. The Pechanga Tribal government took away Appellants' citizenship and claimed that they were never rightful citizens in the first place. The result is a punishing blow to the entire Hunter clan, especially when the sentence is without factual grounds or legal foundation. A central purpose of ICRA was to " 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary

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[14] from Pechanga Website: www.pechanga-nsn.gov/ see History

and unjust actions of tribal governments.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978); Legis. History S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). The current trend of the Courts is to accord as much Tribal sovereignty as possible which is a compassionate realization of the modern world, but such deference itself, will not rein in the excesses of errant Tribal governments. That is why the ICRA and its protections were created in the first place.

The forfeiture of citizenship was considered so extreme, so severe that it has been banned as a cruel and unusual punishment by the High Court. "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress." Dissent at 28a-29a, quoting *Poodry*, 85 F.3d at 896.

The Supreme Court elucidated in *Trop* what many of us take for granted, that our American citizenship is inviolate. But it was not until 1958 that the High Court declared that *denationalization* of a natural-born citizen (compared to the *denaturalization* of an immigrant) under any circumstances is so severe a penalty that it is beyond the federal government's exercise of power, and thus is invalid if attempted. In confirming the strength of United States citizenship, Justice Earl Warren ruled that, "citizenship is not subject to the general powers of the national government and therefore cannot be divested in the exercise of those powers". It is also so dear to us as Americans, that the "use of denationalization as a punishment is barred by the Eighth Amendment." *Trop*, 356 U.S. 86, 101. [Hn15]

The Supreme Court has stated that when one gives up their citizenship, it must be a clear and unequivocal denunciation, made voluntarily, even when they have committed horrendous acts

> "The deprivation of (natural-born) 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."

Trop, supra, 356 U.S. at 92-93.

Although not couched as a punishment but as a correction of the rolls, and accomplished in a civil setting, the effects on Lawrence Madariaga's clan is devastating nonetheless, causing them to live like virtual outcasts in their own land. All of this was accomplished in demoralizing proceedings that appeared to have a simple administrative purpose and effect. Appellants, all natural-born citizens of Pechanga, have not voluntarily relinquished their status as citizens and continue to seek federal protection of their Pechanga citizenship. *Poodry* exalted the importance of Indian Tribal citizenship and the severe price that is paid when it is taken away,

> "(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."

Poodry, 85 F.3d 874, 895.

Poodry also articulated the likeness between American Indian tribal membership and United States citizenship. Of course, Indians were citizens of their own tribe long before they were formally granted US citizenship by an Act of Congress in 1924 (43 Stat. 253; 8 U. S. C. §1401 (b). The *Poodry* court quoted a cogent statement from *Klapprot* concerning the grave and punitive nature of taking away national 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.'", *Klapprot v. United States*, 335 U.S. 601, 611-12 (1949) *Poodry*, *supra* at 896-897 Dissent at 28a. Lawrence Madariaga has committed no crime, yet he has been summarily disenrolled without any real due process to aid him.

b. Due Process Was Not Provided At Petitioners' Disenrollment Hearings.

The Tribe's characterization of the Hunters' disenrollments as a simple correction of the rolls, made in a civil setting with due process guarantees was in reality, like a *kangaroo court*, where the final outcome precedes the trial. The due process provided by the Tribe did not include the right to a lawyer at the disenrollment hearings; it did not include the right to confront adverse Tribal witnesses and the burden of proof was placed on Petitioners, not on a tribal prosecutor. The Enrollment Committee established no

standard of proof for their disenrollments and the Tribe did not give advance notice of the charges, namely, the basis upon which the Hunter clan did not meet the tribal requirements for membership. Without knowing the allegations against them beforehand, the Hunters had no way to refute any of the so-called charges.[15] It wasn't until they received the Tribe's *Record of Decision* that they discovered the so-called reason they were disenrolled.[16]

The results have proven extremely punitive although the hearings were 'civil' in nature. "But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable." *Trop*, 356 U.S. 86, 93. But, regardless of the label: civil or criminal; regardless of the reason: treason or correcting the rolls; the loss of life-long tribal citizenship is the ultimate punishment and the ultimate destroyer of a person's identity and their national standing.

Labels are certainly not a substitute for analysis, as Justice Warren said in *Trop*, "How simple would be the tasks of constitutional adjudication and of law

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[15] Nonetheless, the Hunters produced over 150 items showing their true Pechanga heritage. (Louise Jeffredo's declaration, Tab 8 Docket 31 v.2 pg 57.)

[16] The majority lists three separate enrollment criterion found in the Constitution (see 4a) but only addresses the requirement in Section A. Assuming, arguendo, that the Hunters do not qualify under Section A, they do qualify under Section B because Paulina Hunter's descendants have been accepted as Tribal members "since 1928 in the Indian way" at the very least.

generally if specific problems could be solved by inspection of the labels pasted on them!" (*Trop*, *supra* at 94.)

c. The Appellate Court's Statement That Petitioners Are Not "Stateless" Disregards The Nature Of Pechanga Citizenship.

Congress granted Unites States citizenship to all Native Americans after WWI, by passing the Indian Citizenship Act of 1924 (43 Stat. 253, 8 U.S.C. § 1401(b). The assertion that loss of Indian identity is not significant because Lawrence Madariaga still holds his U.S. citizenship misses the point that Tribal life and indigenous living on Pechanga soil is his personal livelihood and that lifestyle existed long before the founding of the United States. Clearly, American citizenship came later to the culture of the Madariaga clan, and it did little to alter Lawrence's way of life.

The majority below discerned that Lawrence Madariaga was not left stateless and is still "Indian" in the broader sense, his loss as a *Pechanga* Indian is not a severe one, nor is it accompanied by any real physical and emotional restrictions. This view disregards the essence of Pechanga disenrollment—the taking away of his ethnic identity, his culture and even his political activity as a member of his Tribe. "The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty" Dissent at page 25a.

Lawrence can never show his face again at a meeting of other respected Tribal elders. The

Pechanga Reservation and its traditional practices are closed to the outside world.

> "The custom, tradition and 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 Pechanga Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band."

Dissent at 13a-14a, quoting the Tribe's Non-Member Ordinance.

As *Poodry* eloquently concluded, "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. *Poodry*, 85 F.3d at 897. Lawrence Madariaga was born a Pechangan and he wants to die one. He is asking for federal protection so that he does not die a non-Pechangan in the midst of an ever growing monetary enterprise known as the Pechanga Tribe.

4. The Lower Court's Interpretation Of The Exhaustion Of Internal Remedies Requirement Is So Extreme That No Native American Who Is Disenrolled (But Not Banished) Could Contest Their Loss Of Tribal Citizenship And Its Restrictions In Any State Or Federal Court.

Both parties agreed that Appellants had exhausted their tribal remedies regarding their disenrollment. The issue of failure to exhaust was not even discussed

in the district court opinion. However, the majority below ruled, in one paragraph, that Appellants did not exhaust their "claim of banishment." Majority at 16a. The only basis for this surprising ruling is the court's faulty contention that "Appellants argue that disenrollment is similar to banishment." *Id.* But Petitioners never put forth such an argument.

Petitioners clearly distinguished between disenrollment and banishment. Their argument, which the dissent understood, was that once they were disenrolled from their Tribe, they became non-members instantly and were treated antagonistically by tribal officials and tribal rangers who guard the entrance to the closed Reservation. Therefore, they now face a potential threat of banishment or exclusion.

The dissent accurately states Appellants' claim: "Appellants are not asserting jurisdiction based on any exclusion or eviction from the Pechanga Reservation. Rather, Appellants' claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion." Dissent at 30a.

In her dissent, Judge Wilken then cogently continues to explain why Petitioners had exhausted all possible tribal remedies.

> "Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment. Further, there does not appear to be any remedy available to Appellants if they were to be given a seven-day exclusion without warning.

> Appellants have exhausted their claims and their habeas petition is ripe for adjudication."

Dissent at 30a.

The consequence of the majority holding that for exhaustion purposes banishment is the same as disenrollment is to put an unbearable and unreasonable burden on tribal citizens (most of whom do not have resources) who are stripped of their citizenship, but not excluded from the reservation. It forces the disenrollee to go through the expense and time of a useless act of appealing their "banishment" even though they have not been banished. Such a ruling is illogical and contrary to the fundamental law of exhaustion of remedies.

CONCLUSION

For the foregoing reasons, Petitioners request that the High Court grant this Petition for Writ of Certiorari.

Respectfully Submitted,

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