Supreme Court of the United States.
Louise Victoria JEFFREDO, et al., Petitioners,
v.
Mark A. MACARRO, et al., Respondents.
No. 09-1137.
April 20, 2010.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief in Opposition

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***1** BRIEF IN OPPOSITION

The Petition should be denied because it presents no issue worthy of this Court's attention. The Ninth Circuit held that federal courts lack habeas corpus jurisdiction under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, over an appeal from a tribal appellate body's decision affirming the disenrollment of individuals who fail to meet the tribe's longstanding constitutional enrollment criteria.[FN1] That decision made no new law. To the contrary, the Ninth Circuit merely adhered to 150 years of consistent legal precedent that tribes have authority to make their own internal membership decisions in tribal forums. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Red Bird v. United States (Cherokee Intermarriage Cases)*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897).

FN1. Appendix A to the Petition ("Pet. App.") contains the lower court's initial opinion in this case. On March 22, 2010, four days after the Petition was filed, the Ninth Circuit issued an "Order and Amended Opinion." The Order and Amended Opinion (hereinafter "Amended Opinion") is attached as Appendix A (hereinafter "Opp. App.") to this Opposition Brief. Any citations in this brief are to the Amended Opinion found in the Opposition Appendix, unless otherwise noted.

The Amended Opinion makes denial of certiorari even more appropriate. The Amended Opinion removed all analysis of the civil-versus-criminal nature of the tribal proceeding and emphasized that any non-tribal remedy for tribal membership disputes ***2** must be created by Congress and not the courts. The Amended Opinion reaffirmed that mere disenrollment (with a resulting lack of access to certain tribal facilities), but with no banishment, no arrest, no imprisonment, no fine, no eviction, no destruction of property, no personal restraint, no restriction on movement within the Reservation, and only a speculative threat of future exclusion do not constitute detention under § 1303. The Amended Opinion reaffirmed that if Petitioners are ever excluded from the Reservation, they would first need to exhaust tribal remedies under the Pechanga Band's Exclusion and Eviction Regulations prior to seeking habeas relief.

The petition fails to identify any meaningful conflict between the Amended Opinion and a decision of another United States court of appeals or a state court of last resort. *See* Sup. Ct. R. 10(a). It also fails to articulate any meaningful departure from accepted precedent. *See id.* For these reasons, the Temecula Band of Luiseno Mission Indians of the Pechanga Indian Reservation (hereinafter "Pechanga Band" or "Tribe") respectfully requests that the Court deny the petition.

STATEMENT OF THE CASE

A. Factual Background.

Petitioners want federal court review of a final, internal tribal membership decision after full due process and appellate review were provided in tribal ***3** forums. Petitioners seek to use the habeas corpus provision of the Indian Civil Rights Act, 25 U.S.C. § 1303, to burden federal courts with an entirely new role as overseers of tribal enrollment disputes.

The Pechanga Band is a federally-recognized tribe. 72 Fed. Reg. 13648, 13649 (Mar. 7, 2007). Respondents Mark Macarro, Mark Calac, Marc Luker, Andrew Masiel, Sr., Russell Murphy and Kenneth Perez constitute the elected Tribal Council of the Pechanga Band. Respondent Darlene Azzerelli is the Tribal Secretary. Respondent Christine Luker was, at the time the suit was filed, Tribal Treasurer, and now remains a tribal member. Respondent Donna Barron was, at the time the suit was filed, a Tribal Council member, and now remains a tribal member.

The case's factual history is set forth in the Amended Opinion. Opp. App. at 4-9. In summary, the Pechanga Band's General Membership adopted the Pechanga Constitution in 1978 which includes the Tribe's membership criteria.[FN2] *See* Opp.

App. at 4. ***4** The General Membership adopted the Pechanga Enrollment Disenrollment Procedures ("Disenrollment Procedures")[FN3] in 1988 to provide due process and a procedure to correct mistakes that resulted when membership was mistakenly approved. Opp. App. at 5.

FN2. Petitioners' false assertion that the enrollment criteria were illegally changed (Pet. at 16) is without support anywhere in the record. The court below specifically noted that the subsection A criteria was the standard applied in this case. Opp. App. at 6. Petitioners for the first time in the Petition assert that they qualify for enrollment under subsection B (Pet. at 24 n. 16), a claim they have not raised previously and one which the Committee put them on notice was available to them. ER Tab 24, Vol. III, at 145 (Summons: "you should provide the Committee with all information that you believe shows you meet the Pechanga Band's eligibility requirements").

FN3. The due process provided under the Disenrollment Procedures that were followed leading up to the decision to disenroll Petitioners and the tribal appellate process are identical to those in *Salinas v. LaMere*, where this court denied certiorari. *See* 547 U.S. 1147 (2006).

In late 2002 and early 2003, the Tribe's Enrollment Committee[FN4] received allegations that tribal members from five separate lines of descent failed to meet the Pechanga Constitution's membership qualifications.

FN4. The members of the Enrollment Committee were appointed by the Tribe's General Membership. ER Vol. II, Tab 25, at 149. As adult members of the Tribe at the time of the appointment, Petitioners were part of the General Membership. Consequently, the Petition's false statement that the Committee was "appointed by abusive tribal officials," Pet. at 3, 8, would, if true, apply equally to Petitioners.

The Tribal Council, exercising its responsibility under the Constitution and Bylaws "to uphold the individual rights of each member without malice or prejudice," ER Tab 11, Vol. II, at 077, directed the Committee to (1) use a fair and impartial decision process by a majority of the Committee to review the files, (2) follow Robert's Rules of Order, and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures. *See* Opp. ***5** App. at 7. After reviewing the facts concerning the first three lines of descent, the Enrollment Committee found that the affected tribal members did in fact meet the Pechanga Band's membership criteria. Review of the fourth line of descent resulted in a decision, affirmed on appeal, that members of that line did not meet the Pechanga Constitution's membership criteria. This Court denied a writ of certiorari from a state court appeal of that decision in *Salinas v. LaMere*, 547 U.S. 1147.[FN5]

FN5. The lower court's decision is consistent with the decision of the California Court of Appeal in *Salinas v. LaMere*, 131 Cal.App.4th 1059 (Ct. App. 4th Dist. 2005), that state courts lack jurisdiction in the same context. *Salinas* involved the same tribal constitutional membership criteria, the same procedural history, and the same tribal appellate process as this case. This Court declined to review *Salinas v. LaMere*, 547 U.S. 1147 (2006), just as it did *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996), a case involving habeas corpus jurisdiction under the ICRA of the disenrollment and banishment of tribal members and which was relied on by the lower court. The Petition provides even less compelling reasons than were unpersuasively asserted in *Salinas*

and Poodry.

The Enrollment Committee then reviewed allegations against Petitioners. After months of review, on May 3, 2005, the Enrollment Committee issued summonses to Petitioners stating the Committee believed grounds existed to initiate disenrollment procedures. *See* Opp. App. at 7-8. Pursuant to the Disenrollment Procedures, the Committee held Initial Meetings with Petitioners at which the Enrollment Committee ***6** provided all available documentation supporting the allegations and explained why the documentation raised questions regarding the Petitioners' constitutional membership qualifications. *See* Opp. App. at 8.

On March 6, 2006, the Enrollment Committee issued a 28-page Record of Decision, *see* ER Tab 29, Vol. III, at 398, that addressed all the available factual information from Tribal enrollment records, submissions by Petitioners, and a genealogical study prepared by Dr. Johnson.[FN6] The Record of Decision disenrolled Petitioners for failure to prove lineal descent from an original Pechanga Temecula person as required by the Pechanga Constitution. Opp. App. at 8.

> FN6. The Petition falsely claims that the Tribe fired Dr. Johnson who had been hired to research historical records for the Enrollment Committee. The quote in the Petition attributed to Dr. Johnson's report is found nowhere in the report. His report states in pertinent part that "the identity of Paulina Hunter's father can be narrowed down to four men … Paulina's mother's identity is less certain" and her ancestors may have been from two communities only one of which was relevant to the constitutional enrollment criteria. ER Tab 27, Vol. III, at 243-244.

Petitioners exercised their right of appeal to the Tribal Council which affirmed the Enrollment Committee's decision. Opp. App. at 8-9. 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 ***7** Enrollment Committee; and (3) there was insufficient proof that the Enrollment Committee violated the Disenrollment Procedures. Opp. App. at 8-9.

B. District Court Proceedings.

Petitioners filed a writ of habeas corpus in the District Court on May 22, 2007, alleging jurisdiction based on the ICRA habeas corpus provision, 25 U.S.C. § 1303. Respondents moved to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and Petitioners opposed. *See* Pet. App. at 31a.

The district court granted the Tribe's motion, acknowledging 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." Pet. App. at 36a (citing *Santa Clara Pueblo*, 436 U.S. at 72); *see also Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). The right to determine its own membership includes "the power to revoke that membership." Pet. App. at 37a; *Roff*, 168 U.S. at 222.

The district court found Petitioners' assertion that they had been "detained" within the meaning of 25 U.S.C. § 1303 was "not supported by the law or the facts." Pet. App. at 39a. The district court found that two of the Petitioners admitted in declarations that "they still reside on the Reservation, and none of the declarations contain allegations that Petitioners have ***8** been denied access to the Reservation or otherwise physically detained." Pet. App. at 40a. The district court held that loss of privileges and mere speculation about some hypothetical future denial of access to the Reservation do not support habeas jurisdiction. Pet. App. at 41a. Quoting this Court's discussion of the ICRA habeas review of civil proceedings in *Santa Clara Pueblo*, the district court held that § 1303 does not apply to civil proceedings. Pet. App. at 38a.

The district court granted Respondents' motion to dismiss and Petitioners appealed to the Ninth Circuit.

C. United States Court of Appeals For The Ninth Circuit Decision

The Ninth Circuit issued its original opinion on December 22, 2009. Pet. App. at 1a. That first opinion affirmed based on three factors: (1) Petitioners were not detained, (2) Petitioners did not exhaust their tribal remedies, and (3) Petitioners' disenrollment was the result of a civil proceeding not subject to review under § 1303. Pet. App. at 19a.

On March 22, 2010, the Court of Appeals issued an Order and Amended Opinion. Opp. App. at 1. The Amended Opinion reaffirmed the district court's holding of lack of jurisdiction because of no detention and failure to exhaust tribal remedies.

***9** Relying on *Santa Clara Pueblo* and the *Cherokee Intermarriage Cases*, the Amended Opinion recognized two baseline principles. First, "[o]rdinarily, federal courts lack jurisdiction to consider an appeal from a decision of an Indian Tribe to disenroll one of its members." Opp. App. at 9. Second, "[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." Opp. App. at 9 (quoting *Santa Clara Pueblo,* 436 U.S. at 72 n.32, and *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906)). The Court of Appeals then turned to Petitioners' unprecedential attempt to use habeas corpus to collaterally attack their disenrollment. Opp. App. at 9-10.

The Court of Appeals correctly held that federal jurisdiction under § 1303 requires a detention. Opp. App. at 10. The court found no banishment, no arrest, no imprisonment, no fine, no eviction, no destruction of their property, no personal restraint, no restriction on movement within the Reservation, and only limited denial of access to certain facilities.[FN7] Opp. App. at 12-13. The court rejected Petitioners' efforts to equate disenrollment with denaturalization, finding Petitioners "have not been left stateless, and ***10** nothing in the record indicates that the disenrollment proceedings were undertaken to punish [Petitioners]." Opp. App. at 17. The lower court could "find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303." Opp. App. at 15.

> FN7. The Petition alleges wrongly that Lawrence Madariaga "can no longer use the Health Clinic." Pet. at 5. Mr. Madariaga's declaration in the court below states: "I have limited use of the clinic." ER Tab 12, Vol. II, at 088.

The court also rejected Petitioners' assertion that disenrollment with potential banishment is equal to detention under § 1303. Speculative future exclusion or eviction under tribal law is not detention for which habeas relief is available. Opp. App. at 14. If the Tribe were ever to banish Petitioners, they would have tribal remedies available and would need to exhaust those before attempting to seek habeas corpus review. Opp. App. at 18 *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987) .

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's attention. The Petitioner's main contention is that ICRA's habeas corpus provision applies to civil as well as criminal proceedings. Pet. at i, 8-16. While the Pechanga Band agrees with the Court of Appeals' original opinion on this issue (Pet. App. at 16a-19a), the Amended Opinion removed all analysis of the civil-versus-criminal nature of the tribal proceeding. Therefore, Petitioners' primary rationale for certiorari is moot.

***11** 2. The Petition does not allege there is a split on any issue raised in the Amended Opinion. Detention under the ICRA is interpreted consistently with the same requirement in non-tribal habeas corpus law. Opp. App. at 10. The Amended Opinion is

consistent with the Second Circuit's decision in *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708 (2d Cir. 1998), holding that loss of a "voice" in the tribal community, loss of health insurance, loss of access to certain facilities, and loss of place on the membership roll do not constitute detention for purposes of habeas jurisdiction under the ICRA. It is also consistent with *Poodry*, 85 F.3d at 876, 878, holding that conviction for treason, permanent banishment, and permanent loss of all tribal rights represented a significant enough intrusion on liberty to constitute detention sufficient for habeas review under the ICRA. *See* Opp. App. at 12. The lower court's decision also is consistent with the decision of the Court of Appeal for the State of California in *Salinas*, 131 Cal.App.4th 1059, which held that state courts do not have jurisdiction under similar facts. *Salinas* involved the same constitutional membership criteria, the same procedural process, and the same tribal appellate process as existed in this case.

3. The Amended Opinion did not decide an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, the Amended Opinion rests on two well-settled principles long affirmed by this Court. First, "[a] tribe's right to ***12** define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Opp. App. at 9; *see Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). Second, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." Opp. App. at 10; *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Consistent with *Santa Clara Pueblo*, 436 U.S. at 60, the amended opinion recognized that "while Congress may have authority in these matters, in the complete absence of precedent, we cannot involve the courts in these disputes." Opp. App. at 16. Since passing the ICRA, Congress has limited, not expanded, habeas review. *See, e.g.*, 28 U.S.C. §§ 2254, 2255 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, § 104, 112 Stat. 1214 (1996).

4. The Petition at most seeks review based on the contention that the court below misapplied a properly stated rule of law. This is not a persuasive basis for granting *certiorari*. Sup. Ct. R. 10. The Petition concedes that the court below used the proper test for detention articulated in *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). Pet. at 17; Opp. App. at 14. Petitioners simply disagree with the lower court's application of the law to the facts. Under the standard in *Hensley*, denial of access to a senior center and a health clinic, and potential banishment ***13** in the future are simply not a severe restraint on individual liberty warranting the extraordinary remedy of habeas corpus. Opp. App. at 15.

Similarly, the Petition urges the court to review the lower court's application of *Trop v. Dulles*, 356 U.S. 86 (1958), not because the lower court used the wrong standard, but simply because Petitioners would prefer a different result. The court below correctly found *Trop* to be inapposite to this case. "Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants." Opp. App. at 17.

The Pechanga Band, like the court below, recognizes that tribal enrollment determinations have significant consequences, both for the effected individuals and for the Tribe. That is why the Tribe has an independent Enrollment Committee and codified tribal laws governing enrollment issues. The Pechanga Band's Disenrollment Procedures, as accurately outlined in the Amended Opinion, afford due process consistent with the requirements of the ICRA, 25 U.S.C. § 1302(8). The ICRA's habeas provision does not provide unhappy tribal litigants with a means to defeat primary tribal jurisdiction over internal enrollment determinations where, as here, no detention exists. "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,* at 20 (1982 ed.).

***14** CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

Jeffredo v. Macarro
2010 WL 1626428 (U.S.) (Appellate Petition, Motion and Filing)

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