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2016 Case Law Update

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Supreme Court Decisions

Menominee Indian Tribe of Wisconsin v. United States, ___ U.S. ___, 136 S. Ct. 750 (2016):

Under the Indian Self Determination Act (ISDA), tribes may contract with federal agencies to take control of a variety of federally funded programs. The ISDA declares Congress's "commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole." 25 U.S.C. § 450a(b). Contracting tribes are eligible to receive the amount of money that the Government would have otherwise spent on the program plus reimbursement for reasonable administrative overhead, termed "contract support costs." The ISDA imports the Contract Disputes Act (CDA) dispute-resolution provisions, which include a 6–year statute of limitations.

Tribal contractors have repeatedly complained (including in a 1990 class action and 2001 putative class action) that the federal Government has not honored its obligation to pay contract support costs. After class status in the 2001 case was denied, the Menominee tribe sued separately for its own contract-support claims for contract years 1995-2004. The District Court dismissed the claims for 1995-1998 as time-barred.

The Supreme Court agreed, emphasizing that the U.S. trust relationship with tribes is "governed by statute rather than the common law." It held, *inter alia*, that because the ISDA points directly to the CDA (including the CDA's 6-year presentment deadline) to resolve disputes, the unambiguous statutes control, regardless of the "general trust relationship." The ISDA's statement of congressional commitment did not overcome the 6-year limitation.

Nebraska v. Parker, ___ U.S. ___, 136 S. Ct. 1072 (2016):

The Omaha Tribe governs a 300,000 acre reservation that was created by treaty in 1854 and overlaps the Village of Pender, Nebraska. In 2006, the Tribe amended its Beverage Control Ordinance to tax liquor sales throughout the reservation, including in mostly non-Indian Pender. The Pender retailers (eventually joined by the intervenor State of Nebraska) sued, arguing that an 1882 act diminished the reservation such that Pender actually lays outside the reservation boundary.

Applying the three-part diminishment test from *Solem v. Bartlett*, 465 U.S. 463 (1984), both the district court and Eighth Circuit ruled against Nebraska. The Supreme Court granted certiorari on the question of "Whether ambiguous evidence concerning the first two *Solem* factors forecloses any possibility that diminishment could be found on a *de facto* basis." Writing for a unanimous court, Justice Thomas reaffirmed the Court's reliance on the three-part *Solem* test, emphasizing that "only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." Under *Solem*'s first step, "the most probative evidence of diminishment is, of course, the statutory language." Nevertheless, because many turn-of-the-century surplus-lands-acts did not clearly distinguish between diminishment (which decreases a tribe's territorial jurisdiction) and mere opening (which only allows private ownership within a tribe's territory), *Solem*'s second step looks to any "unequivocal evidence" of the historical understanding of U.S. officials, tribal leaders, and tribal members concerning the legislation. Over time, the Court has also added a third step, evaluating the United States' subsequent treatment of the area and its modern-day demographics, but has emphasized that this step offers "the least compelling" evidence of diminishment.

Applying this test, the Court agreed that the original reservation boundaries survived the 1854 act, which lacked any "clear textual signal that Congress intended to diminish the reservation." The Court reasoned that at *Solem*'s second step, "[t]he mixed historical evidence relied upon by the parties cannot overcome" this first, most probative factor. Moreover, although the third-step subsequent-demographic history that Nebraska staked its case on can be "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers," the Court admonished that it "has never relied solely on this third consideration to find diminishment[,]" and refused to rely on such evidence to "rewrite" the 1882 Act.

***Dollar General Corporation v. Mississippi Band of Choctaw Indians*, ___ U.S. ___, 136 S. Ct. 2159 (2016):**

A non-Indian corporation leased a tribally owned building on trust land within an Indian reservation to operate a Dollar General store. In the lease, Dollar General expressly consented to the application of tribal law and to tribal-court jurisdiction. The Dollar General store participated in a tribal job-training program that placed tribal youth in unpaid internships to gain job experience. The tribe assigned a then-13-year-old tribal member to work at the leased Dollar General. The youth alleges that the Dollar General store's non-Indian manager sexually molested him while he was part of the job-training program. Federal Indian law blocks the tribe from bringing charges against the manager or store, and federal prosecutors did not bring charges. Without criminal-jurisdiction recourse, the youth sued the manager and Dollar General for civil damages in tribal court.

Under *Montana v. United States*, 450 U.S. 544 (1981), tribes generally lack jurisdiction over nonmembers, but can regulate nonmember conduct if: (1) the

nonmember enters a consensual relationship with the tribe or its members through commercial or other dealings; or (2) the nonmember activity threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Dollar General and the manager filed a federal case to enjoin the tribal-court action for lack of subject-matter jurisdiction over them as nonmembers. The district court allowed the case against Dollar General to proceed under *Montana*'s first exception. It found that Dollar General had multiple consensual relationships within the exception, including the tribe's lease with the corporation and the store's acceptance of the commercial benefit of the intern's services during the job-training program.

The Fifth Circuit affirmed. It rejected Dollar General's arguments: (1) that the consensual relationship must be commercial to fit within the exception; and (2) to collapse the two exceptions into the single circumstance where a consensual relationship threatens tribal governance. The Supreme Court granted certiorari, but deadlocked in its review. The justices' 4-4 vote affirmed the Fifth Circuit decision without opinion, and the case will proceed against Dollar General in tribal court. In an official statement, the U.S. Commission on Civil Rights applauded the affirmance, recognizing that civil suits in tribal court bridge a criminal-jurisdiction gap in Indian country.

***United States v. Bryant*, ___ U.S. ___, 136 S. Ct. 1954 (2016):**

Congress enacted 18 U.S.C. § 117 in response to an epidemic of on-reservation domestic violence against native women. The statute makes it a felony for a person to commit domestic assault in Indian country if that person has at least two prior final convictions for domestic violence in federal, state, or tribal court. But because tribes are pre-constitutional sovereigns, the Sixth Amendment right to counsel does not apply in tribal courts. Instead, tribal courts apply tribal laws (which may or may not include a right to counsel) and apply the Indian Civil Rights Act, 25 U.S.C. ch. 15. That statute provides a right to counsel for tribal-court crimes carrying a year-or-more sentence.

The Eighth and Tenth Circuits rejected constitutional challenges to convictions based on uncounseled prior convictions. The Ninth Circuit disagreed, reversing a federal conviction that relied on five separate prior tribal-court convictions. The Supreme Court granted certiorari and reversed the Ninth Circuit, holding that so long as the convictions were valid when entered, they may be used as 18 U.S.C. § 117 predicate offenses. The earlier proceedings complied with ICRA, which sufficiently ensured the reliability of the predicate convictions. The Court also reasoned that there was no Sixth Amendment violation because repeat-offender laws punish only "the last offense committed by the defendant," that is, the counseled federal offense.

Petitions for Certiorari Granted

***Lewis v. Clarke*, No. 15-1500:**

Question presented: "Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment."

Ruling below: The Supreme Court of Connecticut "conclude[d] that the doctrine of tribal sovereign immunity extend[ed] to the plaintiffs' claims against the defendant because . . . he was an employee of the tribe and was acting within the scope of his employment when the [claim arose]." *Lewis v. Clarke*, 135 A.3d 677 (Conn. 2016).

***Lee v. Tam*, No. 15-1293:**

Question presented: "Section 2(a) of the Lanham Act, 15 U.S.C. 1052(a), provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it '[c]onsists of * * * matter which may disparage * * * persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.' The question presented is as follows:

Whether the disparagement provision in 15 U.S.C. 1052(a) is facially invalid under the Free Speech Clause of the First Amendment."

Ruling below: The Federal Circuit Court of Appeals "h[e]ld that the disparagement provision of § 2(a) is unconstitutional because it violates the First Amendment." *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

Petitions for Certiorari Pending

***Tunica-Biloxi Gaming Authority v. Zaunbrecher*, No. 15-1486:**

Question presented: "It is well established that 'Indian tribes are domestic dependent nations that exercise inherent sovereign authority. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Michigan v. Bay Mills Indian Community*, U.S._, 134 S.Ct. 2024, 2030, 188 L.Ed.2d 1071 (2014). 'Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . That immunity, we have explained, is a necessary corollary to Indian sovereignty and self-governance.' *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, P.C., 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).

In *Michigan v. Bay Mills Indian Cmty.*, *supra*, this Court explained that the 'baseline position . . . is tribal immunity; and [t]o abrogate [such] immunity, Congress must unequivocally express that purpose. . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.' (Citations omitted; internal quotation marks omitted.) *Id.*, 134 S.Ct. at 2031-32.

In this case, the Louisiana Third Circuit Court of Appeal found subject matter jurisdiction was proper over a tort suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment with the Tribe at the tribal-owned casino located on tribal trust land. (App. 1).

The question presented is:

Whether tribal sovereign immunity extends to individual tribal employees to bar suit against them in state district court for alleged negligent service of alcohol to a lawful purchaser at a tribal-owned casino on tribal trust land."

Ruling below: The Louisiana Court of Appeals "f[ound] that sovereign immunity . . . d[id] not bar the suit against the . . . Casino employees in their individual capacity." *Zaunbrecher v. Succession of David*, 181 So. 3d 885 (La. App. 2015), *cert. denied*, 187 So. 3d. 1002 (La. 2016).

***Patchak v. Jewell*, No. 16-498:**

Questions presented: "Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land ('the Bradley Property') near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his 'suit may proceed.' *Match-E-Be-Nash-She-Wish Band of*

Pottawatomi Indians v. Patchak, 132 S.Ct. at 2199, 2203 (2012) ('*Patchak I*'). While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case 'relating to' the Bradley Property 'shall be promptly dismissed,' but did not amend any underlying substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

1. Does a statute directing the federal courts to 'promptly dismiss' a pending lawsuit following substantive determinations by the courts (including this Court's determination that the 'suit may proceed')—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?"

2. Does a statute which does not amend any generally applicable substantive or procedural laws, but deprives Petitioner of the right to pursue his pending lawsuit, violate the Due Process Clause of the Fifth Amendment?"

Ruling below: The District of Columbia Circuit Court of Appeals "conclude[d] that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim [w]as thus validly . . . withdrawn." *Patchak v. Jewell*, 828F.3d 995 (D.C. Cir. 2016).

***R.P. v. Los Angeles County Department of Children and Family Services*, No. 16-500:**

Questions presented: "The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.*, applies to any state custody proceeding involving an 'Indian child.' In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), this Court held that the Act's parental termination provisions may not be invoked by an Indian parent who never had custody under state law. The Court further held that the Act's placement provisions—which typically require placement with a relative, a member of the child's tribe, or any 'other Indian'—were inapplicable to Baby Girl's adoption proceedings, because no preferred placement had come forward at the relevant time. *Id.* at 2564. The Court recognized that a contrary reading of the Act 'would raise equal protection concerns,' *id.*, because it 'would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian,' *id.* at 2565.

Adoptive Couple thus left open a question on which more than a dozen state courts have been openly divided for decades: Whether ICWA and its placement preferences apply where the child was not removed from an existing Indian family. Here, application of the placement preferences resulted in the removal of a child from an otherwise fit adoptive home where she had resided for more than four years. The child has never been domiciled on Indian lands, and neither the child nor her parents had any preexisting connection to a tribe beyond ancestry.

The questions presented are:

(1) Whether ICWA applies where the child has not been removed from an Indian family or community.

(2) Whether ICWA's adoptive placement preferences, 25 U.S.C. § 1915(a), require removal from a foster placement made under 1915(b), for the purpose of triggering the adoptive placement preferences contained in 1915(a).

(3) Whether the state courts erred in holding that 'good cause' to depart from ICWA's placement preferences must be proved by 'clear and convincing evidence'—contrary to the text and structure of the statute and the decision of at least one other state court of last resort—or otherwise erred in their interpretation of 'good cause.'"

Ruling below: The California Court of Appeals rejected arguments that, under *Adoptive Couple*, "the ICWA cannot constitutionally apply to a case where an Indian father never had custody of the child" and that, "once an Indian child is placed in foster care under section 1915(b), the only way for a court to consider adoptive placement preferences under section 1915(a) is if the child is 'removed' from the foster placement under section 1916(b)." The court also "conclude[d] that in spite of the absence of express statutory language, the party asserting the good cause exception to the ICWA's placement preferences must demonstrate good cause by clear and convincing evidence." *In re Alexandria P.*, 176 Cal. Rptr. 3d 468 (2014), *cert denied* (Cal. Oct. 29, 2014); *see also In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. App. 2016), *cert. denied* (Cal. Sept. 14, 2016).

***Wolfchild v. Redwood County*, No. 16-286:**

Question presented: "Certain Mdewakanton Indians saved white settlers from slaughter during an 1862 Minnesota Sioux uprising. In response to the uprising, Congress enacted the February Act of 1863, neither repealed nor amended to date, to award a statutorily-identified group of loyal Mdewakanton with public land. The public land was set aside. Section 9 of the Act mandated that the public land set apart 'shall be an inheritance to said Indians and their heirs forever.' After the lands were set apart for permanent occupancy, white settlers physically, not legally, prevented the Indians from reaching their granted inheritance. Over 150 years later, lineal descendants of the loyal Mdewakanton filed federal common law claims of trespass and ejectment. The Eighth Circuit dismissed the claims because the American Indian group represented by the Petitioners had no federal common law causes of action under *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) because the lands set apart were not aboriginal title and the Petitioners were not a tribe. The question presented is:

Whether federal common law claims of trespass and ejectment are available to American Indians when Congressional acts specifically identify the American Indian group to which land is awarded and when the public lands are actually set apart for their permanent occupancy."

Ruling below: The Eighth Circuit Court of Appeals concluded that "the 1863 Act does not provide a private remedy and the loyal Mdewakanton cannot rely on the 1863 Act to seek a declaration of possessory rights" and, therefore, "have no property rights upon which to base federal common law claims for ejectment and trespass." *Wolfchild v. Redwood County*, 824 F.3d 761 (8th Cir. 2016).

***Mackinac Tribe v. Jewell*, No. 16-539:**

Questions presented: "Whether the Court of Appeals deviated from this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) which held that the Secretary of Interior's Federal Acknowledgment Process (FAP) established in 25 C.F.R. Part 83 is not determinative as to whether Indian Tribe is 'recognized' for the purposes of the Indian Reorganization Act (25 U.S.C. § 479)?

Whether the Secretary of Interior can avoid performing her mandatory non-discretionary duty under the Indian Reorganization Act (25 U.S.C. § 476) to call elections to ratify tribal constitutional documents within a reasonable time by requiring a tribe to exhaust administrative remedies estimated to require 30 years to complete?"

Ruling below: The Sixth Circuit Court of Appeals concluded that "when a court is asked to decide whether a group claiming to be a currently recognized tribe is entitled to be treated as such, the court should for prudential reasons refrain from deciding that question until the Department [of the Interior] has received and evaluated a petition under Part 83" and "decline[d] . . . to order the Secretary to call and conduct an election to ratify the Mackinac Tribe's constitution." *Mackinac Tribe v. Jewell*, 829 F.3d 754 (6th Cir. 2016).

Petitions for Certiorari Denied or Dismissed

***Decker v. United States*, No. 15-733:**

Questions presented: "In a prosecution under 18 U.S.C. § 2241, for 'aggravated sexual abuse by an Indian in Indian territory,' occurring in Battle Mountain, Nevada, where a victim testifies to unconsented sexual penetration and the defendant denies any sexual contact; and a Nevada case, *Crawford v. State*, 107 Nev. 345, 351, 811 P.2d 67, 70-71 (1991), mandates that the giving of an attempted sexual assault jury instruction under those circumstances constitutes reversible error; does the Assimilated Crimes Act, 18 U.S.C. § 13(a), or 18 U.S.C. § 1153(b) mandate that federal courts are constrained to follow *Crawford* and either not give the attempt instruction or be reversed if they do?

The question of whether case law viz. state substantive lesser-included offenses must be assimilated into a prosecution where the state case law prohibits the giving of the instruction, was not addressed either in *Keeble v. United States*, 412 U.S. 205 (1973) or in *Lewis v. United States*, 523 U.S. 155 (1998); and *United States v. Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), *cert. denied*, 507 U.S. 1019 (1993) presents both sides of the issue. Is the *Walkingeagle* dissent correct as a matter of law?"

Ruling below: The Ninth Circuit Court of Appeals "conclude[d] that the district court did not err in instructing the jury on both aggravated sexual abuse and attempted aggravated sexual abuse," without addressing the question presented in the petition for certiorari. *United States v. Decker*, 624 Fed. App'x 959 (9th Cir. 2015).

***Alaska v. Organized Village of Kake*, No. 15-467:**

Question presented: "In the waning days of the Clinton administration, the United States Department of Agriculture adopted a nationwide rule prohibiting logging and road construction in roadless areas of the national forests. The Department considered exempting the Tongass National Forest of Southeast Alaska from this rule but ultimately chose not to, concluding that the ecological benefits of applying it to the Tongass outweighed the socio-economic harms it would cause local communities. Two years later the Bush administration changed course and exempted the Tongass from the rule, concluding that the socio-economic well-being of local communities outweighed the value of additional environmental protections for a forest with many roadless areas already protected by existing law. In a 6-5 decision, the *en banc* Ninth Circuit struck down the Tongass exemption, ruling that the Department failed to provide sufficient justification for the policy change.

The question presented is: whether the Ninth Circuit's decision contravenes the basic administrative law principle, established by this Court's decisions, that an executive agency may change the policies of a previous administration based on the new administration's different values and priorities, even though the relevant facts are unchanged."

Ruling below: The Ninth Circuit Court of Appeals "conclude[d] that [an exemption to a federal regulation, promulgated by the Department of Agriculture,] [wa]s invalid because the Department failed to provide a reasoned explanation for contradicting [previous factual findings regarding the same action in promulgating the exemption]," which amounted to a policy change. *Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956 (9th Cir. 2015).

***Wasatch County v. Ute Indian Tribe*, No. 15-641:**

Question presented: "In *Hagen v. Utah*, 510 U.S. 399, 409 (1994), this Court granted certiorari 'to resolve the direct conflict between' the Tenth Circuit and the Utah Supreme Court over whether Congress has diminished the lands of the Uintah Valley and Uncompaghre Indian Reservation. This Court adopted the state court's holding that the lands have been diminished, such that those lands are not Indian Country.

The Tenth Circuit is not giving up, however. It has held that its prior precedent justifies expressly refusing to follow *Hagen*, except to the limited extent absolutely compelled with respect to the precise facts of this Court's ruling. In this case, the Tenth Circuit went substantially further still and held that its earlier (admittedly erroneous) holding that the reservation has not been diminished binds even petitioner Wasatch County, which was not a party to any of the prior litigation. Despite this Court's determination to resolve the conflict between the federal and state courts in *Hagen*, that conflict continues to persist.

The Question Presented is:

Did the court of appeals err in defying this Court's decision in *Hagen v. Utah* and enjoining a proper state court prosecution of a tribal member on lands that this Court has held have been diminished by Congress?"

Ruling below: The Tenth Circuit Court of Appeals stated, "The defendants may fervently believe that *Ute V* drew the wrong boundaries, but that case was resolved nearly twenty years ago, the Supreme Court declined to disturb its judgment, and the time has long since come for the parties to accept it." *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015).

***White v. Regents of the University of California*, No. 15-667:**

Questions Presented: "The Native American Graves Protection and Repatriation Act (NAGPRA), which governs repatriation of human remains to Native American tribes, contains an enforcement provision that states, 'The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.' 25 U.S.C. § 3013. Over a strong dissent, a divided Ninth Circuit panel held that a party can prevent judicial review of controversial repatriation decisions by claiming a tribe is a 'required party' under Rule 19 of the Federal Rules of Civil Procedure, if the tribe invokes tribal immunity. The questions presented are:

1. Whether Rule 19 of the Federal Rules of Civil Procedure mandates that a district court dismiss any case in which a Native American tribe with immunity is deemed to be a 'required party.'

2. Whether tribal immunity extends to cases where Rule 19 is the only basis for adding a tribe, no relief against the tribe is sought, and no other forum can issue a binding order on the dispute; and if so, whether Congress abrogated tribal immunity as a defense to claims arising under NAGPRA."

Ruling below: The Ninth Circuit Court of Appeals stated that "the district court correctly noted, 'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity" and concluded that "NAGPRA did not abrogate the Tribes' sovereign immunity." *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014).

***Zepeda v. United States*, No. 15-675:**

Question presented: "The Indian Major Crimes Act, 18 U.S.C. § 1153, makes it a federal crime for an 'Indian' to commit any one of thirteen enumerated acts in 'Indian country.' In this case, the en banc Ninth Circuit held that an element of the offense in prosecutions under this statute is proof that the defendant has 'Indian blood,' whether or not that blood tie is to a federally recognized tribe. The question presented is:

Whether, as construed by the Ninth Circuit, Section 1153 impermissibly discriminates on the basis of race."

Ruling below: The Ninth Circuit Court of Appeals "h[e]ld that in order to prove Indian status under [Section 1153], the government must prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, a federally recognized tribe," that "a defendant must have been an Indian at the time of the charged conduct," and that "a tribe's federally recognized status is a question of law to be determined by the trial judge." *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015).

***Crow Allottees v. United States*, No. 15-779:**

Questions presented: "Can the water rights owned by individual Crow Indian allottees—which this Court in *United States v. Powers,* 305 U.S. 527 (1939) recognized as distinct individual rights, separate from water rights possessed by the Crow Tribe—be awarded to the Crow Tribe in negotiations between the United States, the tribe, and the State of Montana?

Further, do the Montana Courts have jurisdiction to decide these questions of federal law related to allottees' rights?"

Ruling below: The Supreme Court of Montana, concluding that "the McCarran Amendment, 42 U.S.C. § 666, specifically allows state courts to adjudicate federal and

Indian reserved water rights" and affirmed the district court's application of "*Powers* to determine that the Allottees' have water rights that are derived from the reserved rights of the Crow Tribe, and that they are entitled to use a just and equitable share of the Tribe's rights." *In re Crow Water Compact*, 354 P.3d 1217 (Mont. 2015).

***Seminole Tribe v. Stranburg*, No. 15-1064:**

Question presented: "Florida imposes a tax on gross receipts from utility services that are delivered to retail customers. Under express statutory authority, utility providers may separately itemize this utility tax on a customer's bill and add it to the total charge for utility services. If the utility provider does so, the customer is legally required to remit the tax to the utility provider, which then transfers the payment to the State. Here, petitioner is a federally recognized Indian tribe that has purchased utility services delivered to tribal reservations. Petitioner's utility providers have exercised their statutory right to separately itemize the utility tax when billing the Tribe for such services.

The question presented is:

When a utility provider exercises a state-law right to expressly pass on a utility tax to a federally recognized Indian tribe for utility services delivered to the tribe's reservations and the tribe is therefore legally obligated to pay the tax, is the tax an impermissible direct tax on the tribe?"

Ruling below: The Eleventh Circuit Court of Appeals "conclude[d] that the district court erred in placing the legal incidence of the Utility Tax on the Tribe and f[ou]nd that, on this record, the Tribe ha[d] not demonstrated that the Utility Tax [wa]s generally preempted by federal law." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015).

***La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. United States Department of the Interior*, No. 15-826:**

Question presented: "Whether there is a Religious Freedom Restoration Act violation when the Government denies Native Americans access to land necessary for religious rites by the threat of civil or criminal trespass prosecution."

Ruling below: The Ninth Circuit Court of Appeals stated that the plaintiff's, which relied on "declarations . . . that provide[d] little more than conclusory statements," "ha[d] not shown that they [we]re either 'forced to choose between following the tenets of their religion and receiving a governmental benefit,' or 'coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions' as th[e] court requires to establish a substantial burden under the RFRA." *La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee v. United States Department of the Interior*, 603 Fed. App'x 651 (9th Cir. 2015).

***Citizens Against Casino Gambling v. Chaudhurai*, No. 15-780:**

Questions presented: "1. Whether Congress, by enacting legislation permitting an Indian tribe to purchase land on the open market and to hold it in 'restricted fee,' created 'Indian country,' thereby completely divesting a state of its territorial sovereignty over that land, despite the absence of any explicit statutory language reflecting congressional intent to transfer sovereignty to the tribe?

2. Whether the Indian Commerce Clause (U.S. Const., art. I, § 8) gives Congress authority to completely divest a state of the sovereignty it had previously exercised over land for more than two centuries and transfer that sovereignty to an Indian tribe by enacting legislation permitting an Indian tribe to buy such land on the open market and to hold it in 'restricted fee.'

3. Whether the mere congressional designation of 'restricted fee' status on tribally-owned land pursuant to the Indian Nonintercourse Act (25 U.S.C. § 177) implies an intent to transfer governmental power over that land to the tribe?"

Ruling below: The Second Circuit Court of Appeals stated that "the district court did not err in upholding the [DOI's and NIGC's] determination that the . . . Parcel is 'Indian lands' within the meaning of IGRA," that "'[t]he limitation on state power in Indian country stems from the Indian commerce clause, which vests exclusive legislative authority over Indian affairs in the federal government,'" and that "Congress intended lands purchased with [Seneca Nation Settlement Act] funds and held in restricted fee to be subject to Seneca Nation's tribal jurisdiction." *Citizens Against Casino Gambling v. Chauduri*, 802 F.3d 267 (2d Cir. 2015).

***Knight v. Thompson*, No. 15-999:**

Question presented: "In *Holt v. Hobbs*, 135 S.Ct. 853 (2015), this Court held that the Religious Land Use and Institutionalized Persons Act of 2000 ('RLUIPA'), renders unlawful an absolute ban on inmates' wearing a beard for religious reasons. The Eleventh Circuit, subsequent to and despite this Court's decision in *Holt*, rejected a RLUIPA challenge to Alabama's similarly inflexible policy prohibiting all male inmates from wearing long hair for religious reasons. A vast majority of states, the District of Columbia, and all federal prisons accommodate inmates whose religious practices include wearing beards or long hair.

The Question Presented is:

Whether Alabama's grooming policy violates RLUIPA, 42 U.S.C. § 2000cc, *et seq.*, to the extent that it prohibits Petitioners from wearing unshorn hair in accordance with their sincerely held religious beliefs."

Ruling below: On remand, the Eleventh Circuit Court of Appeals "reinstate[d] [its] prior *Knight I* opinion," in which it "affirmed the district court's entry of judgment in favor of the [Alabama Department of Corrections]." *Knight v. Thompson*, 796 F.3d 1289 (11th Cir. 2015).

***Jensen v. EXC, Incorporated*, No 15-64:**

Questions presented: "1. Whether federal courts are free to ignore congressionally confirmed Indian treaty rights that impliedly reserve tribal jurisdiction over nonmember conduct within an Indian reservation, thereby effecting an impermissible judicial abrogation of those treaty rights.

2. Whether federal courts may disregard the Supreme Court's multifactor analysis for determining the status of a roadway existing on tribal trust land when deciding if an Indian tribe has inherent sovereign jurisdiction to adjudicate a collision occurring on that roadway between a tribally regulated tour bus and a passenger vehicle carrying tribal members.

3. Whether federal courts may decline to apply the consensual relationship exception of *Montana v. United States*, 450 U.S. 544 (1981), because nonmember conduct occurred on land deemed to be equivalent of non-Indian fee land, where (a) the Supreme Court has indicated that *Montana*'s consensual relationship exception can justify tribal jurisdiction over nonmember conduct occurring on non-Indian fee land or its equivalent, and (b) there exists a consensual relationship of the qualifying kind between the tribe and the nonmembers.

4. Whether federal courts may deny that an Indian tribe has inherent civil jurisdiction, pursuant to the second *Montana* exception, over nonmembers' commercial touring of tribal lands that results in a fatal tour bus/auto collision where (a) the nonmembers' conduct implicates the tribe's interests in governing itself, controlling internal relations, and superintending land use, and (b) the impact of the commercial touring activity, unconstrained by tribal regulatory authority, is demonstrably serious imperils the tribe's sovereign interests."

Ruling below: The Ninth Circuit Court of Appeals affirmed "the district court's holding that the Navajo Nation tribal courts may not exercise adjudicatory jurisdiction over a highway accident that occurred on a stretch of . . . an Arizona state highway . . . within the exterior boundaries of the Navajo Reservation." *EXC Incorporated v. Jensen*, 588 Fed. App'x 720 (9th Cir. 2014).

***Little River Band of Ottawa Indians v. National Labor Relations Board*, No. 15-1024:**

Question presented: "Whether the National Labor Relations Board exceeded its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective bargaining activities of tribal government employees working on tribal trust lands."

Ruling below: The Sixth Circuit Court of Appeals "f[ou]nd no indication that Congress intended the NLRA not to apply to a tribal government's operation of tribal gaming, including the tribe's regulation of the labor-organizing activities of non-member employees" and "h[e]ld that the Act applie[d]." *National Labor Relations*

Board v. Little River Band of Ottawa and Chippewa Indians Tribal Government, 788 F.3d 537 (6th Cir. 2015).

***Soaring Eagle Casino & Resort v. National Labor Relations Board*, No. 15-1034:**

Questions presented: "For more than sixty years, the National Labor Relations Board correctly declined to exercise jurisdiction over tribal operations on tribal lands. But in recent years, the Board has belatedly asserted the extraordinary power to regulate the on-reservation activities of sovereign Indian tribes, precipitating a three-way circuit split in the process. Nothing in the text of the National Labor Relations Act changed in that interval; it contains no language granting the Board authority over Indian tribes. Nor has the language of various Indian treaties, like those between the Saginaw Chippewa Indian Tribe and the United States, changed; they continue to recognize the Tribe's authority to exclude non-members. And despite the Board's complete lack of expertise in Indian law, the Board now dictates that some tribal operations are subject to the NLRA and others are not based on its evaluation of the centrality of certain functions to tribal sovereignty and subtle differences in treaty language.

This case presents two questions, both of which have divided the courts of appeals:

(1) Does the National Labor Relations Act abrogate the inherent sovereignty of Indian tribes and thus apply to tribal operations on Indian lands?

(2) Does the National Labor Relations Act abrogate the treaty-protected rights of Indian tribes to make their own laws and establish the rules under which they permit outsiders to enter Indian lands?"

Ruling below: The Sixth Circuit Court of Appeals stated, "[T]he general right to exclude described in the 1855 and 1864 Treaties, standing alone, [do not] bar[] application of the NLRA to the Casino" and "in light of our prior panel decision in *Little River*, we are bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort." *Soaring Eagle Casino & Resort v. National Labor Relations Board*, 791 F.3d 648 (6th Cir. 2015).

***Shinnecock Indian Nation v. New York*, No. 15-1215:**

Questions presented: "Petitioner's case is the last in a long line of Indian land claim cases arising in the State of New York in which Indian tribes have been denied access to the courts by the U.S. Court of Appeals for the Second Circuit. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *see also, Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012); *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014). Based on its *Cayuga* 'laches' defense, the court of appeals summarily dismissed all claims of Petitioner for legal and equitable relief for the loss of their lands in violation of the Trade and Intercourse Act of 1790, also known as the Indian Non-Intercourse Act,

25 U.S.C. § 177. Recently, however, this Court affirmed the general rule in equity that courts may not override Congress' judgment and apply laches to summarily dispose of all claims filed within a statute of limitations established by Congress, thereby foreclosing the possibility of any form of relief. *Petrella v. Metro-GoldwynMayer, Inc.*, 134 S. Ct. 1962, 1975 (2014). In *Petrella*, this Court recognized that only equitable remedies may be foreclosed at the outset of litigation due to delay in commencing suit in 'extraordinary circumstances.' *Id.* at 1977. The questions presented are:

1. Whether at the outset of litigation a court may apply 'laches' to foreclose an Indian tribe from bringing its federal statutory and common-law claims, including one for money damages, if brought within the statute of limitations established by Congress.

2. Whether a court violates the Fifth Amendment's Due Process and Takings Clauses when it retroactively applies a new, judicially-formulated rule to dismiss an Indian tribe's viable claims *ab initio*, thereby extinguishing established property rights."

Ruling below: The Second Circuit Court of Appeals stated, "The District Court held that the Nation's claims are foreclosed by the equitable considerations, including laches, crystallized in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir.2005). . . . We find no error in the District Court's holding." *Shinnecock Indian Nation v. New York*, 628 Fed. App'x 54 (2d Cir. 2015).

***Pauma Band of Luiseno Mission Indians v. California*, No. 15-1291:**

Question presented: "One of the statutory elements for establishing a *prima facie* case of bad faith negotiation against a state under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, is that 'a Tribal-State compact has not been entered into.' 25 U.S.C. § 2710(d)(7)(B)(ii)(I). In this case, the United States Court of Appeals for the Ninth Circuit interpreted this language according to the *status quo ante*, holding that an Indian tribe who sought and obtained a declaration rescinding a compact could not pursue a claim for latent bad faith negotiation against a state that induced the compact through material misrepresentations in order to increase its tax receipts (*i.e.*, 'revenue sharing') by 2,460%. With this holding seeming to violate deep-rooted principles of retroactivity and interpretive norms for the Indian Gaming Regulatory Act set forth within this Court's precedent, the question presented is:

Whether an Indian tribe can pursue a bad faith negotiation claim against a state under Section 2710(d)(7)(A)(i) of the Indian Gaming Regulatory Act after rescinding a compact induced by misrepresentation or other latent bad faith conduct, and thus bringing its circumstances into compliance with the statutory requirement that 'a Tribal-State compact has not been entered into.'"

Ruling below: The Ninth Circuit Court of Appeals concluded that "[t]he relief Pauma seeks in its cross-appeal is not available under the plain statutory language of IGRA," because it had "actually agreed to the 2004 Amendment and did not challenge

the negotiation process under IGRA." *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155 (2015).

***California v. Pauma Band of Luiseno Mission Indians*, No. 15-1185:**

Question presented: "In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court held that a waiver of state sovereign immunity must be 'stated "by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction."' *Id.* at 673 (alteration omitted). This case concerns a gaming compact between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation. Both parties waived their sovereign immunity from suits arising under the compact, but only to the extent that '[n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought) . . . .' App. 28a. A divided panel of the Ninth Circuit held that this limited waiver, which also appears in gaming compacts between California and 57 other tribes, waived the State's immunity with respect to an award of $36.2 million in restitution. The question presented is:

Whether, under *Edelman*, the language of the limited waiver—which expressly excludes claims for 'monetary damages' and references only injunctive relief, specific performance, and declaratory relief—waived the State's sovereign immunity with respect to the district court's monetary award."

Ruling below: The Ninth Circuit Court of Appeals concluded that "the contractual waiver clearly envision[ed] restitution as falling within its purview, and only actions for monetary *damages* or actions not arising from the Compact itself to be excluded." *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155 (2015).

***Pro-Football, Incorporated v. Blackhorse*, No. 15-1311:**

Questions presented: "The 'disparagement clause' in § 2(a) of the Lanham Act bars the registration of a trademark that 'may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.' 15 U.S.C. § 1052(a).

The questions presented are:

1. Whether § 2(a)'s disparagement clause violates the First Amendment.

2. Whether § 2(a)'s disparagement clause is impermissibly vague, in violation of the First and Fifth Amendments.

3. Whether the government's decades-long delay between registering a trademark and cancelling the registration under § 2(a)'s disparagement clause violates due process."

Ruling below: The District Court for the Eastern District of Virginia concluded that "[b]ecause the federal trademark registration program is government speech, it is

exempt from First Amendment scrutiny," that "Section 2(a) of the Lanham Act is not void for vagueness," and that the "Due Process Clause claim[] fail[s] because [the plaintiff] has no property interest in the registration of its marks." *Pro-Football, Incorporated v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *appeal docketed* (4th Cir. Aug. 6, 2015).

***Kelsey v. Bailey*, No. 16-5120:**

Questions presented: "In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that Indian tribes' power to prosecute for offenses committed within the tribe's territory extends only to members of the tribe. In so doing, the Court reaffirmed its earliest tribal-law rule, that 'the limitation upon [a tribe's] sovereignty amounts to the right of governing every person within their limits except themselves.' *Fletcher v. Peck*, 10 U.S. 87, 147 (1810). In this case, Petitioner Norbert Kelsey was prosecuted by the Little River Band of Ottawa Indians (the Band), of which he is a member, for acts taking place outside the tribe's territory that is, outside the Band's 'limits.' *Id.* The first question presented is:

(1) Whether Indian tribes may prosecute their members for acts that occur outside the tribe's territory absent Congressional authorization.

In addition, Petitioner Kelsey's conduct was, at the time of its alleged commission, plainly outside the Band's prosecutorial reach as defined by its own criminal jurisdiction statutes. To uphold the prosecution, the Tribal Court of Appeals rewrote the Band's law by jettisoning an unambiguous statutory limitation on its power and asserting jurisdiction over extraterritorial conduct not previously reached by its laws. Therefore, the second question presented is:

Whether the Band's retroactive expansion of a narrow and precise jurisdictional statute to encompass an extraterritorial act previously outside its plain terms violates the due process protections of the Indian Civil Rights Act, 25 U.S.C. § 1302(a), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964)."

Ruling below: The Sixth Circuit Court of Appeals held that "the Band has jurisdiction because it has not been expressly or implicitly divested of its inherent sovereign authority to prosecute members when necessary to protect tribal self-government or control internal relations" and that "[the plaintiff's] due process challenge under the Indian Civil Rights Act fail[ed]." *Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016).

***Jones v. Norton*, No. 16-72:**

Questions presented: "1. Where it is undisputed that Plaintiffs/Petitioners Debra Jones and Arden Jones, and their deceased son Todd R. Murray, all had individual rights under the 1868 Ute Tribe treaty with the United States, and where, under the procedural posture of this case, it is undisputed that Plaintiffs' and their Decedent son's

individual rights under the Treaty were violated, did Plaintiffs state a claim for relief under 42 U.S.C. § 1983 based on the violation of their treaty rights?

2. Where State police officers have pursued an Indian within Indian country without either probable cause or jurisdictional authority can they be relieved of the common law duty to preserve evidence simply because the officers' tortious conduct giving rise to the claims against them arose within Indian country?"

3. Where there are disputed material facts, can a district court grant summary judgment based upon the court's opinion that a reasonable jury would decide the case in favor of the summary judgment movant?"

Ruling below: The Tenth Circuit Court of Appeals concluded that "the Ute Treaty does not provide for a § 1983 remedy," that the district court did not abuse its discretion by denying sanctions for spoliation of evidence at a crime scene under the FBI's jurisdiction," and affirmed the district court's judgments on the claims of unlawful seizure, excessive force, and failure to intervene. *Jones v. Norton*, 809 F.3d 564 (10th Cir. 2015).

***Flute v. United States*, No. 15-1534:**

Questions presented: "The questions presented are:

Whether a treaty promise to pay reparations to a group of Native Americans in the form and amount that is 'best adapted to the respected wants and conditions of' said group of Native Americans, and subsequent appropriation of funds by Congress to pay such reparations, create a fiduciary relationship between the United States and said group of Native Americans.

Whether the Administrative Procedures Act waives the United States' immunity from suit for accounting claims regarding trust mismanagement that begun before the enactment of the Act.

Whether a set of Appropriations Acts by Congress that defer the accrual of trust mismanagement claims against the United States operates as a waiver of the United States' immunity from suit."

Ruling below: The Tenth Circuit Court of Appeals concluded that "the relevant treaty . . . here did not [create a trust relationship]," that [the Administrative Procedures Act] does not operate retroactively to waive sovereign immunity for claims accruing prior to its effective date," and that "the Appropriations Acts . . . contain no express language waiving sovereign immunity." *Flute v. United States*, 808 F.3d 1234 (10th Cir. 2015).

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