UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR, AND BARBARA SUEHEAD,

Petitioners-Appellants,

v.

GENE WHITEHOUSE, CALVIN MOMAN, BRENDA ADAMS, JOHN WILLIAMS and DANNY REY, in their official capacity as members of the Tribal Council of the United Auburn Indian Community,

Respondents-Appellees.

No. 14-15814

On Appeal from the United States District Court for the Eastern District No. 2:13-cv-02101-TLN-CKD; Hon. Troy L. Nunley

APPELLANTS' REPLY BRIEF

HANSON BRIDGETT LLP
Andrew W. Stroud, SBN 126475
Landon D. Bailey, SBN 240236
500 Capitol Mall, Suite 1500
Sacramento, California 95814
Telephone: (916) 442-3333
Facsimile: (916) 442-2348
astroud@hansonbridgett.com
lbailey@hansonbridgett.com

Attorneys for Petitioners/Appellants
JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR and BARBARA SUEHEAD

FRED J. HIESTAND, SBN 44241
Counselor at Law
A Professional Corporation
3418 3rd Avenue, Suite 1
Sacramento, California 95817
Telephone: (916) 448-5100
Facsimile: (916) 442-8644
fhiestand@aol.com

Counsel for Petitioners/Appellants
JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR and BARBARA SUEHEAD

Attorneys for Petitioners-Appellants

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INTRODUCTION

Law is a process of combining and separating concepts, of analytical conjunction and disjunction. To correctly apply the law in a given situation requires knowing how and when to invoke that process, whether to keep separate or integrate various concepts with the controlling facts. Respondents' ("appellees") answer brief, however, confounds these principles to sow confusion and contradiction.

When, for instance, it comes to the Indian Civil Rights Act (ICRA), respondents would have this court *separate* and view in isolation the punishment of banishment they inflicted upon petitioners (appellants) from both the *way* (no procedural due process or equal protection) and the *reason* (petitioners' exercise of their right to free speech and association) they did so, isolating informative facts from the ICRA's specific guarantees. They also tell the court it should look solely to the *length* of banishment imposed (10 years for Tavares) without regard for whether the *purpose* of that banishment was solely for punishment or related to issues of tribal membership or both.

Respondents, in other words, abjure the analysis approved by federal court opinions that decouple the concept of pure punishment – punishment per se – which is this case, from banishment for reasons of punishment *and* tribal membership; and incorrectly insist on separating the rights conferred by the ICRA from the fact of punishment by banishment. Respondents' arguments make no sense; the court should reject them and instead apply the facts to the provisions of the ICRA and view

this case for what it is — a severe detainment of petitioners' liberty by their banishment from the Tribe without due process solely as punishment (unrelated to tribal membership) in retaliation for petitioners' exercise of their rights to free speech and association in violation of the ICRA.

Respondents readily admit that "ICRA codified certain individual rights that no Indian tribe may infringe." Answer Brief, p. 25. Those individual rights include ICRA's specification of due process, equal protection, free speech and association, the very rights of petitioners violated by the conduct of respondents in this case. As petitioners allege that respondents violated their individual rights "that no Indian tribe may infringe," federal jurisdiction over petitioner's claims is proper.

Respondents' reliance on *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (*Santa Clara Pueblo*) and *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010) (*Jeffredo*) is misplaced. The restraints on petitioners' liberties in this action are not the same as the restraints on liberty found to be insufficient for habeas relief in *Santa Clara Pueblo* and *Jeffredo*. Those cases involved a challenge to tribal government decisions to either not enroll or to disenroll individuals as tribal members, while this action challenges punishment *per se* by way of banishment for exercising rights expressly protected by the ICRA. Congress did not authorize federal court jurisdiction over enrollment and disenrollment claims, which go to the heart of tribal sovereignty; but it did enact the ICRA to protect tribal members from deprivations inflicted on them by their tribal governments of specified rights. Moreover, the restraints on liberty in *Santa Clara*

Pueblo and *Jeffredo* were the collateral consequence of tribal government decisions on tribal membership. Here, however, the restraints imposed on petitioners' liberties are the direct result and purpose of their punishment via banishment. Petitioners are subject to restraints respondents inflicted on them that are not shared by other members of their Tribe. Petitioners, though members of their Tribe, cannot access tribal properties, participate in tribal meetings or attend tribal functions in contrast to all other tribal members. It is well-settled that such restraints on liberty are more than sufficient for habeas relief.

Nor, as respondents erroneously contend, does petitioners' banishment need to be *permanent* for habeas relief under the ICRA to apply. The only requirement is that the restraint imposed on them must be *severe*, not that it be permanent. Banishment for a term of 10 years qualifies as severe under any reasonable definition.

Because petitioners seek redress of their individual rights expressly secured by the ICRA, they qualify for habeas relief; federal jurisdiction is present in this action and the trial court's order of dismissal must be reversed.

ARGUMENT

I. THE VINDICATION OF PETITIONERS' CIVIL RIGHTS FALLS WELL WITHIN THE JURISDICTION OF THE ICRA.

A. Congress Enacted the ICRA to Afford Protection to Native-Americans in Exactly this Type of Action.

Respondents devote a significant portion of their brief to a review of *Santa Clara Pueblo*, and its admonition that federal courts must respect the sovereign

immunity of Indian tribes. While this is undisputed, it has little bearing here because as made clear in *Santa Clara Pueblo*, this action is precisely the type of action that Congress intended to be adjudicated in federal court.

In *Santa Clara Pueblo*, a female member of that tribe sought declaratory and injunctive relief against it, asserting that a tribal ordinance denying tribal membership to the children of female members that married outside the tribe violated equal protection guarantee secured by ICRA. Although the lower courts both found that jurisdiction existed over plaintiff's action, the Supreme Court reversed, finding that ICRA did not create a federal action for declaratory and injunctive relief. *Id.* at 59. ("Nothing of the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief.")

In reviewing the legislative history of the ICRA, the Supreme Court made two determinations critical to this action. First, the Court determined that "a central purpose of the ICRA was to '[secure] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" That is precisely the issue in this action.

Second, the Supreme Court determined that the remedy to be afforded an individual Indian seeking to challenge an arbitrary act of her tribal council was the remedy of a habeas petition. As found by the Court, "Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas

corpus relief in § 1303." *Id.* at 60. That is precisely the remedy petitioners seek in this action.

As the Court made clear, limiting the individual rights secured by the ICRA to only certain rights analogous to those specified for all citizens in the Bill of Rights was in deference to tribal sovereignty. "Section 1302 rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Id.* at 62. The Court found that Congress limited the available remedies under the ICRA to habeas relief out of respect for tribal sovereignty as well. The congressional "provision for habeas corpus relief and nothing more reflected a considered accommodation of the competing goals of 'preventing injustices perpetrated by tribal governments, on the one hand, and on the other, avoiding undue or precipitous interference in the affairs of the Indian people.'" *Id.* at 66-67; *citing*, Summary Report II.

Thus, this action fits squarely within the jurisdiction of ICRA as enacted by Congress and interpreted by the Supreme Court in *Santa Clara Pueblo*. Petitioners seek to vindicate rights expressly incorporated into the ICRA and seek only habeas relief as provided for by the ICRA. Nothing in this action upsets the delicate balance between respect for tribal sovereignty and protection of individual rights purposefully struck by Congress.

B. *Santa Clara Pueblo* and *Jeffredo* Both Concern Disenrollment which is Distinct from Banishment Solely for Punishment as in this Action.

At issue in *Santa Clara Pueblo* and *Jeffredo*, two principle cases cited by respondents, was the question of tribal membership. In *Santa Clara Pueblo*, plaintiff' children had been denied admission to the tribe. *Id.* at 52. (The membership ordinance "bars admission of the Martinez children to the tribe because their father is not a Santa Claran.") Questions of tribal membership impact directly on tribal sovereignty. As recognized in *Santa Clara Pueblo*, 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." *Id.* at 72, n. 32. Likewise, this Court found in *Jeffredo* that at "its heart, this case is a challenge to disenrollment of certain members by the tribe." *See also Shenandoah v. United States DOI*, 159 F.3d 708 (2nd Cir. 1998) (seeking habeas relief due to lack of recognition as tribal leader).

Disenrollment actions such as *Santa Clara Pueblo*, *Jeffredo* and *Shenandoah* are not present in this action because petitioners were not disenrolled, they were banished. Indeed, in *Jeffredo*, this Court went to great lengths to distinguish between disenrollment and banishment. *Jeffredo*, 599 F.3d at 916. ("Disenrollment does not mean that a person is banished from the Pechanga Tribe.") In fact, this Court recognized that banishment was different because banishment could constitute a severe restraint on liberty:

> In the case before us, the denial of access to certain facilities does not pose a severe restraint on the Appellants' liberty. *Appellants have not been banished from the reservation.*

Id., at 919 (emphasis added).

Other courts also carefully distinguish disenrollment from banishment. In *Quair v. Sisco*, 2007 U.S. Dist. LEXIS 36858 (E.D. Ca. 2007) (*Quair II*), the court considered habeas claims based upon both disenrollment and banishment. Judge Levi found that the petitioner's disenrollment claims did not warrant habeas review but petitioner's banishment claims did. This was because, unlike banishment, disenrollment did not constitute "detention" for purposes of habeas jurisdiction. *Quair II*, at 16.

As recognized by these courts, banishment as a corollary consequence of disenrollment and banishment purely for punishment are distinct concepts when it comes to habeas jurisdiction. It is beyond dispute that banishment constitutes punishment. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 889 (2d Cir. 1996) ("Moreover 'banishment' has clearly and historically been punitive in nature."); *see also Id.* at 896-897 (discussing history of banishment as punishment); *Quair v. Sisco*, 359 F.Supp.2d 948, 967 (E.D. Cal. (2004) (*Quair I*) ("The Supreme Court has noted that banishment historically has been considered a punitive sanction."). However, disenrollment does not necessarily constitute punishment. A member of a tribe may be disenrolled for failing to sufficiently prove lineage or sufficient tribal blood quantum or for other non-punitive reasons.

Furthermore, banishment by definition constitutes a restraint on liberty. A banished tribal member no longer has full freedom of movement nor the communal rights shared by tribal members generally. Such restraints on liberty are the very purpose of banishment. Thus, banishment has been held to be a form of detention. *Quair II*, 359 F.Supp.2d at 971. In contrast, restrictions on liberty arising from disenrollment are not the direct object of the tribe's action but a collateral consequence of becoming a non-member. Such collateral consequences arising from a change in status do not satisfy the jurisdictional requirements for habeas relief. *See e.g.*, *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999) (denying habeas relief because registering as sex offender is collateral consequence of conviction).

At bottom, then, disenrollment and banishment are distinct because disenrollment raises questions that go to the heart of tribal sovereignty, the ability of a tribe to define its own membership, while banishment raises questions that go to the core of federal jurisprudence, the ability of a tribe to punish its members.

While federal courts are not well-suited to resolve disputes over tribal membership, they are charged with resolving disputes over tribal governmental punishment of their tribal members for exercising rights protected by the ICRA. This, indeed, is the warp and woof of the ICRA's federal jurisdiction.

II. PETITIONERS' BANISHMENT CONSTITUTES A SEVERE RESTRAINT ON THEIR LIBERTY THAT SATISFIES THE CRITERIA FOR HABEAS RELIEF.

The district court dismissed petitioners' writ petition because it felt the restraints on their liberty imposed by respondents were not sufficiently severe to invoke habeas relief. ER 530, 533. In so doing the district court ignored the Supreme Court's long standing precedent regarding the purpose and meaning of the writ of habeas corpus. The purpose of the writ is "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Peyton v. Rowe*, 391 U.S. 54, 65-66 (1968). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson,* 394 U.S. 286, 291 (1969). A writ of habeas corpus is not 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, 243 (1963).

Accordingly, the understanding of what constitutes a severe restraint on liberty for purposes of establishing habeas jurisdiction has been expanded to include circumstances other than actual, physical custody. *See Hensley v. Municipal Court,* 411 U.S. 345 (1973) (habeas jurisdiction applies to petitioner released on own recognizance). As articulated by respondents in their Answering Brief, it is now established that today:

> …severe restraints are those that are not 'shared by the public generally' and that 'significantly restrain [a] petitioner's liberty to do those things which in this country free men are entitled to do.' *Jones v. Cunningham,* 371 U.S. 236, 240, 243 (1963). A sufficient restraint also exists if the petitioner cannot 'come and go' as he pleases. *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). *Answering Br.* at p. 33-34.

Here, it is beyond dispute that the restraints suffered by petitioners qualify as severe under any test.

Respondents assert that although petitioners' "exclusion imposes *some* restraint" on petitioners, it "falls far short of the severe restraints needed to confer federal jurisdiction." Answer Brief at p. 37. Respondents then pick apart the multitude of restraints that have been imposed on petitioners in an attempt to prove that none of these restraints is sufficiently severe to warrant habeas jurisdiction. What respondents ignore is the fact that none of these restraints is imposed on any other member of petitioners' Tribe and that taken together they constitute the destruction of petitioners "social, cultural and political existence." *Poodry*, 85 F.3d at 897. As explained by petitioner Tavares:

> In fact, nothing could be more punitive than the discipline given to us who dared to speak out. One of the most important aspects of Tribe membership is the ability to participate in the ceremonies and events of the Tribe's culture and heritage. I cannot do so. The Tribe's annual cultural fair takes place on tribal lands. I cannot attend and participate. The other Petitioners and I have to sit outside the fence and look on, as if we were criminals or untouchables. ER 415.

In addition to these deprivations, petitioners could not attend many religious ceremonies, participate in meetings of the tribal council, enter the tribal senior center, in order to be amongst tribal elders, or even walk their grandchildren to school. ER 415. It is undisputed that Ms. Tavares banishment prevented her "from joining in the lives of my family and friends, from being a real member of the Tribe I once lead, and from celebrating my heritage along with the other members of the Tribe." ER 416.

Although respondents spend the first half of their brief reminding this Court of the importance of tribal culture, heritage and identity, in the second half of their brief respondents completely ignore the impact of their punishment on those very same aspects of petitioners' lives. They cannot be ignored. As demonstrated in *Poodry* and *Quair,* the restraints at issue in this action are severe not just because they apply only to petitioners and no other members of their Tribe but also because they strike at the very heart of petitioners' self-identity as Tribal members. While petitioners' bear the burden of establishing that their restraint is sufficiently severe to warrant federal jurisdiction, respondents offered *no evidence* from any member of the UAIC that petitioners' banishment does not constitute a severe restraint on liberty to a member of their Tribe. They did not because they could not. It simply cannot be disputed that depriving United State citizens, such as petitioners, of their freedom to associate in their native religious, cultural, political and social heritage constitutes a severe restraint of their liberty.

Respondents further contend that petitioners' banishment is not a severe restraint of their liberty because they are "free to visit any of the individually-owned parcels within the historic Rancheria" and retain certain other benefits of Tribal membership. Answer Brief at p. 38. Respondents again miss the point. At issue are the liberties petitioners lost, not what they retain. Petitioners' rights are independent. That petitioners still have the right to vote by absentee ballot does not offset the loss of their right to free speech when they were banished from Tribal Council meetings or loss of eligibility to run for tribal office or serve on tribal committees. That petitioners' grandchildren can still attend the tribal school does not make up for the fact that petitioners cannot go there to visit them or participate in school programs and activities that other tribal members can. It is well-established that the severity of a restraint is not measured by the places you can go, but by places from which you are banned. Thus, habeas jurisdiction exists for aliens excluded from entry into the United States even though they were "free to go anywhere else in the world." *Jones*, 371 U.S. at 239. That petitioners can travel to some parts of the reservation is not relevant because petitioners cannot come and go from others, including those parts that are the most communal.

It is undisputed that petitioners cannot "come and go" from their Tribal lands as they please, that petitioners do not have the same freedoms of the other members of their Tribe, and that petitioners cannot do those things that free citizens of this nation and their own tribal nation are entitled to do. Simply stated, the restraints on

petitioners' liberty are not just severe, they are intolerable. As such, petitioners easily satisfy the test for habeas jurisdiction.

The district court declined to follow *Poodry* in finding that petitioners' banishment constitutes a severe restraint on liberty for purposes of habeas jurisdiction. It did so primarily because it found that in *Poodry* the banishment was permanent. ER 536. However, neither the district court nor respondents have cited any habeas cases for the proposition that only a permanent restraint on liberty is sufficiently severe to qualify for habeas jurisdiction. It is simply not so. Habeas jurisdiction has been exercised to review a tribal court's sentence of five days in jail and a $15 fine. *See Wounded Knee v. Andesa*, 416 F. Supp. 1236 (D.S.D. 1976). And, this Court previously exercised habeas jurisdiction to review a fine and temporary suspension of fishing rights imposed by a tribal court of the Yakima Tribe. *See Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970). It was never asserted in these actions that the restraint on liberty was not sufficient because it was not permanent.

III. III. THE INFLICTION OF "BANISHMENT" SOLELY FOR THE PURPOSE OF PUNISHMENT IS PROPERLY CONSIDERED A "CRIMINAL" SANCTION FOR WHICH ICRA PROTECTIONS APPLY.

Respondents seek to evade federal judicial review of their punitive actions by eschewing analysis and replacing it with labels. Thus they tell us that the "proceedings in this case were not criminal," but "civil," thereupon invoking the *ipse dixit*

conclusion that the court lacks jurisdiction to review their action to "banish" from all tribal lands Jessica Tavares for 10 years and the remaining petitioners for two years. Answer Brief, p. 53. But "labels do not control [the court's] analysis in this context; rather, the substance of a court's decision does." *Evans v. Michigan*, 133 S.Ct. 1069, 1076 (2013).

While the district court here did not reach the issue of whether the punishment meted out to petitioners was criminal or civil, the controlling decisions on the issue are *Poodry* and *Quair I* and *II*. All three opinions hold that the conduct by tribal government officials in banishing members of their tribes for speaking critically of them (*i.e.*, here for allegedly "defaming" the Tribe by speaking critically to those outside a tribal forum about the actions of tribal officials and the retained tribal attorney) is sufficiently "criminal" in nature to invoke the protections of the ICRA.[1] *Poodry*, for instance, stated, "We reject the respondents' claim that all tribal actions affecting membership are necessarily 'civil' in nature and conclude that the *orders of permanent banishment constitute punitive sanctions imposed for allegedly criminal behavior*." *Poodry*, 85 F.3d at 879; emphasis added.

[1] Habeas jurisdiction has been evoked to review actions that are "civil" in nature. *See, e.g. Klapprott v. United States*, 335 U.S. 601(1949) (denaturalization proceeding); *Trop v. Dulles,* 356 U.S. 104 (1958) (same). In these actions the Supreme Court recognized that the loss of the petitioner's citizenship "may be more grave than the consequences that flow from conviction for crimes." *Klapprott* , 335 U.S. at 611-612. Therefore, it is the nature of the judgment imposed that determines the existence of habeas jurisdiction, not the label applied to the claim.

Moreover, *Poodry* clarified that "'banishment' has clearly and historically been punitive in nature." *Id.* at 889. It is "wrong to suggest[, as respondents do,] that a bright line always separates criminal from civil sanctions. Courts sometimes deem nominally civil sanctions as criminal for certain purposes …." Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability* (1996) 58 *U. PITT. L. REV.* 1, 4. Here, respondents imposed upon Jessica Tavares what it called "*enhanced discipline*" in the form of a punitive order of banishment "from tribal lands and facilities for a period of ten (10) years," and threatened her with "disenrollment" if she continued to make statements critical of them that they felt defamatory, statements, in other words, that respondents may decide at any time are "contrary to our directives to you." ER 171. This was all done, of course, absent any notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Similarly, *Quair I*, relying heavily upon *Poodry*'s analysis, concluded that "the disenrollment of a tribal member and the banishment of that tribal member constitutes a punitive sanction irregardless of the underlying circumstances leading to those decisions." *Quair I*, 359 F.Supp.2d at 967. Further, *Quair I* also observed that "[t]he Supreme Court has noted that banishment historically has been considered a punitive sanction. Therefore, even if the circumstances leading to imposition of the sanction are not considered criminal conduct *per se,* the imposition of that sanction renders those proceedings criminal for purposes of habeas corpus relief." *Id.*

In *Quair II*, Judge Levi further clarified the crucial distinction between a decision like *Jeffredo* to *disenroll* a tribal member (which has not yet happened here and for which habeas relief is unavailable if done for reasons other than punishment for exercising rights protected by the ICRA) and *banishment* (which has happened here and, because it restricts a tribal member's freedom of geographic movement, is subject to habeas relief under the ICRA). Judge Levi explained that though "petitioners contended that disenrollment was 'worse' than banishment because it stripped them of valuable benefits and of their tribal identity, [t]his misses the mark because the jurisdictional issue is whether the tribal action amounts to 'detention,' not whether it affects some other important interest." 2007 WL 1490571 *4 (E.D.Cal.).

> Section 1303 grants federal courts jurisdiction to review the 'legality of [petitioner's] detention' and not penalties that, while harsh, do not constitute detention. Therefore, the court finds that § 1303 is simply inapplicable to the *disenrollment* of petitioners.

Id.; emphasis added. When banishment is uncoupled from disenrollment, however, as the facts show has occurred in this case, that *punishment* constitutes a deprivation of petitioners' liberty and is subject to habeas relief. It does not matter that respondents assert their "enhanced discipline" inflicted upon petitioner Tavares and her similarly situated tribal colleagues constitutes a "civil" rather than "criminal" punishment. As *Poodry* explains:

> [Respondents] supply no basis for concluding that Congress intended courts to adopt a relativistic view of what constitutes a "crime" when it enacted § 1303: such a

> reading would permit a tribal government to evade the federal court review specifically provided in the Indian Civil Rights Act simply by characterizing every tribal government action as "civil" or non-punitive.

Poodry, 85 F.3d at 889.

Respondents' assertion that habeas relief is unavailable because the tribal proceedings at issue were civil rather than criminal fulfills the prophecy of *Poodry* and is nothing more than a bald faced attempt to bar the application of habeas relief to any of their tribal proceedings, ever. As respondents advise this Court, the UAIC does not "investigate, enforce or adjudicate criminal actions." Answer Brief at 53. Therefore, in respondents' world no action undertaken by them against any tribal member, no matter how punitive, would ever be subject to habeas review because respondents label it "civil." According to this line of argument, respondents can permanently banish petitioners or even sentence them to hang because of their "defamatory" speech and federal courts would be powerless to exercise habeas jurisdiction under the ICRA. Respondents' assertion exposes both the ridiculousness and arrogance of their position.

IV. PETITIONERS HAVE EXHAUSTED ALL TRIBAL REMEDIES REQUIRED OF THEM FOR THE CLAIMS ASSERTED.

Respondents contend that the facts alleged in the complaint about their illegal establishment of the multi-million dollar slush fund solely to benefit themselves and their overpaid lawyer, along with the equal protection claim asserted against them, must fail because appellants did not, in contrast to their due process and freedom of

speech and association claims, bring these matters before tribal authorities. Answer Brief, p. 63.

Petitioners do not dispute that exhaustion of tribal remedies is a prerequisite to enforcing an ICRA right through a habeas petition. Significantly, however, this exhaustion requirement typically arises and is enforced in the context of tribes that have established tribal courts. The United Auburn Indian Tribe has no tribal court: executive, legislative and judicial authority is vested solely with respondents. ER 98, 101, 103, 106, 108, 113, 115, 120, 127. They act, as they have consistently done in this case, as prosecutor, judge and jury; and even control the so-called Appeals Board by appointing and removing all of its members at their discretion. ER 127, 438, 447-451. As *Quair I* observed, "exhaustion of tribal remedies has been excused as futile in the absence of a tribal court." *Quair I*, 359 F.Supp.2d at 972, *citing Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir.1999).

Nor can it be reasonably said that petitioners' equal protection claim was not properly before appellees any more or less than their freedom of speech and due process claims, which respondents concede satisfy the exhaustion requirement. Indeed, petitioners were punished by banishment *before* they were allowed to bring any arguments before respondents. The only hearing they were afforded was *after the fact* and solely with respect to respondents' decision to withhold all of their per capita income based entirely on the already rendered predicate decision to banish them from the Tribe. ER 98, 103, 108, 113, 120, 127, 462-463. If an "after the fact hearing" on

the withholding by respondents of petitioners' per capita payments is, for the sake of argument, to be considered an adequate tribal forum for the rendering of a theoretical remedy over banishment, then the essence of petitioners' equal protection claim was argued before appellees and rejected along with all their other claims. That is because petitioners' contention that they were impermissibly punished by respondents in retaliation for exercising their rights under the ICRA to freedom of speech, association and due process,[2] is implicitly a claim of "selective prosecution," a violation of the right to equal protection guaranteed by the ICRA. Under the Court's selective prosecution doctrine, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as … the exercise of protected statutory rights …." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Just as the due process clause of the federal constitution incorporates and makes applicable to the state's other provisions of the Bill of Rights, so does the due process guarantee in the ICRA incorporate and make applicable to tribal governments the ICRA rights of tribal members from abuses by tribal officials, including the guarantee to equal protection. *See*, *e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.); *In re Oliver*, 333 U.S. 257, 278 (1948). *Compare* also, *Brown v. Board of Education*, 347 U.S. 483 (1954) (segregation of public school students based on race violates equal protection) with *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregation in federally maintained and financed

[2] ER 184-199.

public schools violates the guarantee to equal protection implicit in the Fifth Amendment's guarantee to due process).

Neither are detailed facts about the slush fund in petitioners' complaint[3] a matter to which this court should shut its eyes and pretend ignorance as judges of what it knows as people[4] because of the "exhaustion of tribal remedies" defense. In fact, respondents were notified of petitioners' concerns about the secret slush fund, but declined to do anything about it. ER 416-417. Thus there was no Tribal remedy to exhaust. After all, as the Court has stated, "[E]quitable principles have traditionally governed the substantive law of habeas corpus," and "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command. [Citation]." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1934 (2013). When a petitioner seeks to invoke the court's equitable principles through habeas, she "must plead [her] claims in reasonable detail." *Ostrander v. Green* 46 F.3d 347, 353 (4th Cir. 1995). This is especially so when, as here, "some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason' [or for defamation of tribal officials]." *Poodry*, *supra*, 85 F.3d at 897. Details about the slush fund properly inform the court

[3] ER 10-12, 18-34.

[4] "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949).

of just how "rotten" things are under the arbitrary and abusive authority of respondents and why habeas relief for petitioners is warranted.

V. THIS CASE IS NOT MOOT AS TO ANY OF THE COMPLAINING PARTIES.

Respondents argue that the petition is "moot" as to petitioners Dolly and Barbara Suehead and Donna Caesar because the orders of banishment as to them expired *after* they filed their petition but *before* this motion could be determined. This contention slights the importance of *Carafas v. LaVallee,* 391 U.S. 234 (1968)(*Carafas*), to which respondents make only passing reference. Answer Brief, p. 59. *Carafas* holds that for federal habeas petitions challenging state infringements on personal liberty, the expiration of a state prisoner's sentence and his unconditional release from state prison before final adjudication of federal habeas proceedings do not terminate federal jurisdiction. *Id.* at 238-39. The petitioner in *Carafas* had been convicted of burglary and grand larceny in New York state court; and, because of his conviction, he could not serve as a labor union official, vote in state elections, or serve as a juror. The Supreme Court concluded, "On account of these 'collateral consequences,' … petitioner's habeas claim [was] not moot." *Id.* at 237-38. The Court reasoned that, because of the "disabilities or burdens" that may have resulted from the petitioner's conviction, he possessed "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Id.*

Carafas elaborated that a habeas petitioner "should not be … required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence." 391 U.S. at 240. Consequently," [a]s long as the habeas corpus petition was filed in federal court at a time when the petitioner was in custody, an action challenging that custody is not necessarily mooted by the petitioner's release from custody prior to … adjudication of the petition." Randy Hertz & James S. Liebman, *1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 428-29 (6th ed. 2011) (internal citations omitted). Once the convict's sentence has expired, courts may "presume" that the criminal conviction has continuing collateral consequences that prevent mootness. *Spencer v. Kenna*, 523 U.S. 1, 8-12 (1998) (noting this presumption).

In short, petitioners' claims are not moot because the banishment orders had not expired before their petition was filed with the court, have lingering collateral consequences and are "capable of repetition" while "evading review." All petitioners, for instance, received notices of "Tribal Council Findings & Action" from respondents warning them that they

> [M]ust cease and desist this behavior. … You have repeatedly used and published information that is blatantly incorrect and false. Your materials contain misrepresentations against the Tribe, defame the Tribe, and are harmful to all our efforts to build and sustain a successful tribal Casino and government. … [W]e have a responsibility to … ensure this type of harmful and inappropriate conduct does not harm the standard of living that we have all worked so hard to develop. This is why

> there are tribal laws and ordinances prohibiting this type of conduct. *That is why we cannot and will not stand by and watch this continue to happen.*

ER 138-139, 149-150, 161, 172.

Even the filing of this petition with the court apparently constitutes an independent ground for further punishment by respondents of petitioners. Within days of the filing of this petition, for instance, respondent Whitehouse sent a letter to all tribal members stating that by filing this lawsuit "these four disgruntled Tribal members are putting your per capita payments and the future of our Tribe at risk." ER 472. Whitehouse warned recipients of his letter that respondents are "united in [their] commitment to uphold the laws of our Tribe. … The Tribal Council will respond to the lawsuit, and we anticipate it will be instantly dismissed as it lacks legal merit and is full of lies and misrepresentations. [¶] I hope you will take the time to review … and think about the potential consequences of the actions of [petitioners]. As I stated above, *the information that [petitioners] made public put all of our security at risk and exposed our Tribe's finances.* Unfortunately, once that information is made public, it is impossible to take it back." ER 475-476.

There are other "collateral consequences" to petitioners if these orders of banishment are not overruled. Licenses required to engage in businesses or practice professions as diverse as operating a bar, selling real estate or insurance, operating a day care center, becoming a nurse or a notary public can be and are denied to those convicted of, or who had a judgment entered against them, for "dishonesty," "fraud,"

or "moral turpitude." See, e.g., Cal. B. & P. Code § 480 ("(a) A board may deny a license … on the grounds that the applicant has … done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another."). Should petitioners seek licenses for any such business or profession and are asked on their applications if any judgment has been rendered against them in any jurisdiction, prudence dictates they disclose respondents' orders. These orders find that petitioners' made "misrepresentations … with reckless disregard for the truth and with malice." See e.g. ER 292. This facially looks like grounds for denial of a license.

Further, respondents recently obtained amendments to the Tribe's Constitution that limit the right of appeal to members banned for more than 1 year within any 2 year period; or who have their per capita payments withheld for a period of time exceeding 6 months within any 2 year period. (The amendments are not retroactive.) ER 414. Thus future punishments respondents impose on petitioners for the same kind of expression involved here and in the same way respondents did so here, would be "moot" under respondents' theory. For example, respondents' withholding of a petitioner's per capita for slightly more than 6 months or banishment for just over 1 year, would be completed by the time a petitioner exhausted her tribal administrative remedies (a prerequisite for seeking habeas relief under the ICRA).

Thus this case is not "moot" because of the lingering collateral consequences of their "banishment" and "because it is "capable of repetition" while "evading

review." A case remains live if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (*per curiam*).

CONCLUSION

For the aforementioned reasons, the Court should reverse the judgment of the district court and issue a writ of habeas corpus to vacate the 10-year order of banishment as to petitioner Jessica Tavares and the case be remanded back to the district court for reconsideration as to the other petitioners.

Respectfully submitted,

DATED: June 15, 2015

By: /s/ *Fred J. Hiestand*
FRED J. HIESTAND
Attorneys for Petitioners/Appellants JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR and BARBARA SUEHEAD

ANDREW W. STROUD
Attorneys for Petitioners/Appellants JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR and BARBARA SUEHEAD

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,232 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a 14-point, proportionally-spaced typeface in Microsoft Word 2010.

DATED: June 15, 2015

By: /s/ *Fred J. Hiestand*
FRED J. HIESTAND
Attorneys for Petitioners/Appellants JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR and BARBARA SUEHEAD

ANDREW W. STROUD
Attorneys for Petitioners/Appellants JESSICA TAVARES, DOLLY SUEHEAD, DONNA CAESAR and BARBARA SUEHEAD

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

***Jessica Tavares, et al. v. Gene Whitehouse, et al.*;**
Case No. 14-15814

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 500 Capitol Mall, Suite 1500, Sacramento, CA 95814.

On **June 15, 2015**, I served true copies of the following document(s) described as **APPELLANTS' REPLY BRIEF** on the interested parties in this action as follows:

Elliot R. Peters
Jo W. Golub
Steven A. Hirsch
Jesse P. Basbaum
Keker & Van Nest LLP
633 Battery Street
San Francisco CA 94111

[*Attorneys for Respondents-Appellees GENE WHITEHOUSE, CALVIN MOMAN, BRENDA ADAMS, JOHN WILLIAMS and DANNY REY, in their official capacity as members of the Tribal Council of the United Auburn Indian Community*]

Telephone: 415.391.5400
Facsimile: 415.397.7188
E-Mail: epeters@kvn.com
jgolub@kvn.com
shirsch@kvn.com
jbasbaum@kvn.com

BY NEF: The foregoing document will be served by the court via NEF and hyperlink to the document. I checked the CM/ECF docket for this civil case and determined that the persons listed on the attached Service List are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated on the service list.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **June 15, 2015**, at Sacramento, California.

/s/ *Margie Francis*
MARGIE FRANCIS