No. 02-281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2002

INYO COUNTY, A PUBLIC ENTITY; PHILLIP McDOWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF INYO COUNTY; AND DANIEL LUCAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF THE COUNTY OF INYO,
Petitioners,
v.
PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION
Respondents.

AMICI CURIÆ BRIEF ON THE MERITS IN SUPPORT OF INYO COUNTY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

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INTEREST OF AMICI CURIÆ

Amicus Curiæ, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this Brief for filing as the authorized law officer of the county, and on behalf of the California District Attorneys Association and the California State Association of Counties, pursuant to Supreme Court Rule 37, subdivisions 3(a) and 4.[1]

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[1] Los Angeles County Charter, Article VII, section 25 (1995)

There are 107 federally recognized Indian tribes and 95 federal Indian reservations in the state of California, with about 40 more Indian groups seeking to gain federal recognition. In 2000, according to the United States Census Bureau, 627,562 Californians claimed at least partial Indian ancestry.[2]

The District Attorney of Los Angeles County, his fellow 57 other elected district attorneys in this state, as well as

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states: "Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board or Commission."

It is provided in the California general law that: "The district attorney is the general prosecutor, except as otherwise provided by law. [¶] The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses." CALIFORNIA GOVERNMENT CODE, section 26500 (West, 2003).

The California District Attorneys Association (CDAA) is a California prosecutorial organization, counting among its 2400 members all of the 58 elected district attorneys in California. CDAA's Appellate Committee takes a proactive stance on matters of statewide concern to prosecutors.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state.

Copies of the consent letters have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.2(a).

[2] <http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=04000US06.html> (viewed Jan. 17, 2003).

the 58 counties represented by the California State Association of Counties, are very concerned by the Ninth Circuit's decision in this case. There are now 50 Indian casinos on Indian territories within the state of California. These casinos already represent potential serious trouble spots for state law enforcement officers throughout the state. If the law as set forth in this decision is allowed to remain, all persons who use and patronize these casinos will be at risk, because trained law enforcement authorities are in effect persona non grata. Worse yet, sheriffs and district attorneys who venture into Indian enclaves to enforce the law will be subject to debilitating civil lawsuits.

The decision by the Ninth Circuit, if not reversed by this Court, could result in the growing number of tribal casinos in California becoming completely isolated from any state and county law enforcement efforts or processes.

Counties with Indian casinos have an urgent need to protect Indians, as well as neighborhoods adjacent to reservations. An independent study of all 3,165 counties in the United States for the period between 1977 and 1996 established that there has been a rise in crime in counties which have casinos, including Indian casinos. While crime rates had dropped overall since 1991, the study found a divergence between crime rates in casino and non-casino counties. Specifically, three categories of property crimes (burglary, larceny, and auto theft), and three categories of violent crimes (rape, robbery, and aggravated assault), became more prevalent in casino counties about three years after a casino was opened. Grinols, Mustard & Dilley, *Casinos, Crime and Community Costs* (Sept., 2000).[3] The single greatest crime increase occurred in the category of automobile theft. We are all aware of the rapid mobility automobiles provide to criminals.

Even the counties in California without Indian casinos

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[3] <http://www.econ.uiuc.edu/papers/files/grinols-Casinos-Crime-15SEP00.pdf> (viewed Jan. 20, 2003).

have a strong interest in preventing fugitive flight to neighboring counties with tribal casinos. If criminals can conceal themselves, evidence, and proceeds of crimes in Indian territory without any fear of disclosure, this will have a substantial negative effect on the criminal justice system for Indians and non-Indians alike.

The decision by the Ninth Circuit has effectively established the foundation of extra-judicial enclaves within an hour's drive of immense urban areas, including San Francisco, Los Angeles and San Diego. Los Angeles County is within a two-hour driving radius of Indian casinos in Riverside, San Bernardino, and San Diego Counties. There are also Indian groups in Los Angeles County, such as the Gabrielino/Tongva Tribal Council in Covina, seeking federal recognition. It is foreseeable that in the future Indian casinos could be established within twenty-five minutes' driving time from downtown Los Angeles.

All Indian casinos seek to attract non-Indian customers, who are largely unaware that they are entering an enclave isolated from any state and county law enforcement protection.

If property owned by tribal governments is immune from lawful execution of search warrants or subpoenas, the potential impact on law enforcement throughout the state, not just in Indian country, could be substantial. If law enforcement authorities are to enforce state laws in Indian country, they cannot be stripped of the necessary tools for enforcement. To do so would be to render the justice system a hollow illusion in Indian country. Stolen money could be laundered, evidence could be hidden, and fugitives could become immune from lawful process. The vacuum created by the absence of law enforcement creates an environment where predators may flourish.

The resulting problems could not be hermetically sealed off from the neighboring communities even with a perimeter wall and a Brandenburg gate. The potential for very serious problems is not merely speculative. In 1995, Lake County in

California was thrust into turmoil as nearly seventy people fled the Elem Indian Colony when gun battles erupted over disputed casino profits. Nine people were wounded, five Indian houses were torched, and other houses were boarded up to shield against gunfire. Peace was not restored to the one-hundred-member reservation until sheriff's deputies entered the reservation to maintain order. Numerous arrests were made. [4] The Elem Indian Colony is only ninety miles from San Francisco.

The Chairman of the Bishop Paiute Tribal Council, Monty Bengochia, provided evidence supporting Amici's position in his recent testimony before the United States Senate Committee on Indian Affairs.

> Law enforcement services provided by the County on our reservation are inadequate and response time is very slow. State and federal drug enforcement on our reservation is virtually nonexistent. Our single biggest law enforcement problem is unsolved homicides and other unresolved fatalities, numbering at least half a dozen over the last ten to fifteen years.
>
> We feel both county and state law enforcement agencies provide us with a level of services that is inequitable and unfair compared to the level of services provided to non-Indians and off-reservation areas.

Hearing Testimony Before the Senate Committee on Indian

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[4] Kathleen Sullivan, *Pomo Indian truce shaky, as factions return*, SAN FRANCISCO EXAMINER, Oct. 25, 1995, at A-11; *A Year After Violence, Reservation Looks to Heal with Election*, ASSOCIATED PRESS, Nov. 29, 1996, *available in* LEXIS, News Library, US News Combined File.

Affairs, July 11, 2002.[5]

Chairman Bengochia was before Congress demanding greater law enforcement protection, but in federal court in California attempting to deny Inyo County law enforcement agents the tools, such as search warrants and qualified immunity, necessary to complete the tasks. Chairman Bengochia's position is similar to that of other myopic proponents of expanding Indian sovereignty who demand the imagined benefits of sovereignty without considering the consequences which would endanger Indians and non-Indians alike.

"Two centuries of often contradictory federal court decisions have ensured that the definition and boundaries of tribal sovereignty remain in flux." *National Gambling Impact Study Commission Report*, p. 6-1 (1999).[6] We are at a point which calls for a logical interpretation of precedent. As John Locke observed in 1690, every nation's survival and self-governance hinges on its ability to maintain law and order and secure "comfortable, safe and peaceable living among its citizens."[7] The problems Chairman Bengochia describes will only fester and expand to surrounding communities if the Ninth Circuit decision is not reversed.

Indeed, even potential terrorist activity would be immune. Federal authority over state crime has been completely consigned to the states in Public Law 280 states. The protection sought by tribal leaders against unreasonable searches and abuses of process is equally available to all Americans, but requires that Indian tribes, like everyone else,

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[5] Reported at <http://indian.senate.gov/2002hrgs/071102hrg/bengochia.PDF> (viewed Jan. 20, 2003).

[6] Congress created the National Gambling Impact Study Commission with Public Law 104-169, 110 Stat. 1482 (1996).

[7] *John Locke,* Second Treatise of Government *58 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) 1690.*

submit to the law of the land.

SUMMARY OF ARGUMENT

Historical Background

In 1607, Chief Powhatan of the Algonquin tribe traded food to the Captain of the first permanent British settlements in Virginia in exchange for whiskey. This archetypical drama replays itself to this day. Just as this continent's earliest settlers used objects of "vice" to entice the Indian communities into docility,[8] so the Indian Gaming Regulatory Act, 25 U.S.C. § § 2701-2721, compels the states to authorize via compacts contemporary tribes' operation of gambling casinos.

The justifications for doing so are largely sociological in nature: The status of Indian peoples has only relatively recently begun to square with this nation's constitutional ideals of justice and fair play; and the injustices of past generations are well-settled in the nation's collective psyche.

The legal basis for Congress's allowing Indian tribes to operate casinos, which would otherwise be prohibited by the states, is the concept of the tribes' sovereignty, vis-à-vis the states' governments. The historical basis for tribal sovereignty is one of sequestration and neglect: This continent's earliest European settlers sought land, but had little tolerance for the indigenous inhabitants. The reservation system, upon which the federal Bureau of Indian Affairs' present "trustee lands" authority is based, was established primarily to separate land from Indians; and secondarily to isolate Indians from the burgeoning colonial settlements.

Whether well- or ill-intentioned, the reservation or "trustee lands" policy perpetuates an inherently segregationist status quo. Indians living on those lands are explicitly denied

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[8] Joseph Westermeyer, *Alcoholism among new world peoples – A critique of history methods, and findings*, 5 AMERICAN JOURNAL ON ADDICTIONS 2, at 110-123 (1996).

the protection of the laws of the states in which the Indians reside, on the basis of tribal sovereign immunity from the states' laws. Compare, e.g., the properly discredited "separate but equal" doctrine maintained in *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). Strictly applied, the concept of Indians' tribal sovereignty requires far less than that holding, in that tribal sovereignty (and the self-governance attendant thereto, contemplated but never obligatory) requires merely separation, not equality. Such application was intellectually sustainable, at the latest, prior to 1924, when Congress passed the Citizenship Act,[9] which unilaterally, albeit belatedly, conferred United States citizenship status upon Indians, regardless of whether they lived on- or off-reservation.

Indian "Sovereignty" Today

Sovereignty has been defined as:

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.
>
> The power to do everything in a state without accountability, to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form

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[9] Presently codified at 8 U.S.C. § 1401, hereinafter "Citizenship Act."

> treaties of alliance or of commerce with foreign nations, and the like.

BLACK'S LAW DICTIONARY, 1251 (5th ed. 1979).

Whatever definition the word "sovereignty" has in its routine context (if there can be such a thing; this nation's relationships with sovereign nations cannot be unvarying), it is presently well-settled that Indian tribes, their real property, held in trust by the federal Bureau of Indian Affairs, and their governing bodies, to the extent they exist, are subject to the plenary powers of Congress, and to the Constitution. In many instances, such as Public Law 280[10] and the Kansas Act,[11] Congress has established and delegated authority and power to specific states; power and authority which, to a degree, must impinge upon or limit the tribes' selfhood as "sovereign." To what degree is the question to be answered.

When Congress passed Public Law 280 in 1953, it consigned authority to enforce criminal law in Indian country to six states including California. As one of the fifty states, California has an inherent right to prosecute crimes in California outside Indian country. The Ninth Circuit in its decision on this case seemingly recognized this legislation, but then decided that the six states are to be denied the tools necessary to enforce the law. In doing so, it disregarded both common sense and the opinion of this Court in *Nevada v. Hicks,* 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

Because the state has the authority and duty to investigate and prosecute crimes in Indian country, the authority for the preliminary procedures in support of that process is necessarily mandated. To hold otherwise would be to render the duty to prosecute crimes in Indian country an empty shell. Reservations would become enclaves. These

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[10] 18 U.S.C. § 1162, hereinafter "Public Law 280."

[11] 18 U.S.C. § 3243, hereinafter "the Kansas Act."

enclaves would permit evidence of crimes, both on and off the reservation, to be concealed. Perpetuating the reasoning of this Ninth Circuit decision will expose the Indian residents of California reservations to increased danger from violent crime as the chilling effect upon law enforcement grows. If law enforcement officers are loathe to execute search warrants on tribal property due to fear of liability, they will also be reluctant to investigate crimes and arrest those reasonably suspected of committing crimes. The theoretical power to prosecute criminals who commit robbery at a casino is meaningless without the power to subpoena the victim clerk or issue a subpoena duces tecum for relevant records in an embezzlement case.

Ironically, the Ninth Circuit's application of its concept of sovereignty leaves the supposed beneficiaries of this doctrine, the Indians, most vulnerable to violence and exploitation. If an Indian man beats his wife in a casino parking lot monitored by video cameras, and she is rendered comatose by the beating, the only evidence available to prosecute the man, the videotape, would be denied to the responsible authorities. If an Indian is falsely accused of the same type of offense, the only exculpatory evidence could also be withheld by the tribe claiming sovereignty.

The Ninth Circuit disregarded Public Law 280, and attempted to create a Maginot line on the reservation border as a barrier to law enforcement. This issue of an imaginary border was addressed by the North Dakota Supreme Court in *Fournier v. Roed*, 161 N.W. 2d 458 (N.D. 1968). In that case, the court ruled that a sheriff may enter a reservation and, without a warrant, arrest an Indian for a felony committed off the reservation. The court found that the sheriff's actions did not interfere with tribal self-government. *Id.* at 467.

> What is involved is whether the state courts will be able to be effective in performing their functions or whether they will become helpless when an offense is committed off the

> reservation by an Indian who escapes to the reservation before he is apprehended.

Id. at 465.

ARGUMENT

I

PUBLIC LAW 280 CONFERS AUTHORITY UPON CALIFORNIA TO INVESTIGATE AND PROSECUTE FELONIES OCCURRING IN INDIAN COUNTRY OR INVOLVING INDIAN DEFENDANTS OR VICTIMS

A.
Sovereignty Of Indian Tribes Is Subject To The Powers Of Congress And May Be Limited By Congress

The history of Indian sovereignty as discussed by the United States Supreme Court begins in the 1830's with the Cherokee decisions. Indian tribes were then described as distinct dependent nations within whose boundaries state law has no application. The relationship with the Federal Government was described in a trust capacity, as a ward to a guardian.[12] The sovereignty of Indian tribes is subject to the broad powers of Congress to regulate.[13] This Court had

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[12] *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831); *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832).

[13] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1676, 56 L. Ed. 2d, 106, 114 (1978) [ruling that "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess."]; *Morton v. Mancari*, 417 U.S. 535, 551-552, 94 S. Ct. 2474, 2482-83, 41 L. Ed. 2d 290, 300-301 (1974) [basing

recognized that this power is plenary and that Congress has exclusive authority over Indians and tribal property.[14] This authority can be delegated to the states, as in 1953 when Congress passed Public Law 280. Crimes and Criminal Procedure, 18 U.S.C. § 1162; *Robinson v. Wolff*, 349 F. Supp. 514 (D.C. Neb. 1972), *aff'd*, 468 F.2d 438 (8th Cir. Neb. 1972). This act granted six states, including California, criminal jurisdiction over persons who commit crimes or who are victims of crimes in Indian country. Title 18 U.S.C. § 1162, provides in pertinent part:

> State jurisdiction over offenses committed by or against Indians in the Indian country
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over

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plenary power on treaty history with Indians and their guardianship status with the United States]; *Winton v. Amos*, 255 U.S. 373, 391, 41 S. Ct. 342, 3498, 65 L. Ed. 684, 694 (1921) [asserting that Congress has plenary power to legislate issues of tribal property because of the dependent relationship the Indians have with the United States government]; see also *Talton v. Mayes*, 163 U.S. 376, 384, 16 S. Ct. 986, 989, 41 L. Ed. 196, 199 (1896) [asserting that tribal sovereignty is subject to the "supreme legislative authority of the United States."]. The sovereignty retained by a tribe "exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086, 55 L. Ed. 2d 303, 313 (1978).

[14] See Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, at 317, 318 (Oren R. Lyons et al. eds., 1991) [defining the doctrine as that which allows Congress "to unilaterally intervene and legislate over a wide range of Indian affairs, including the territory of Indian Nations."].

> offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory *to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory*: [Alaska, *California*, Minnesota, Nebraska, Oregon, and Wisconsin.]

18 U.S.C. § 1162 (a), emphasis added.

When Congress enacted Public Law 280, nothing more was required from the six named states to assume jurisdiction over crimes committed in Indian country. 18 U.S.C. § 1162; see *People v. Miranda,* 106 Cal. App. 3d 504, 506, 165 Cal. Rptr. 154, 155 (1980) [no state legislation necessary to assume jurisdiction under Public Law 280 because states already had either concurrent or residual jurisdiction over offenses committed on Indian lands within their territory]; cf. *Anderson v. Gladden*, 293 F.2d 463, 467-468 (9th Cir. 1961), *cert. denied*, 368 U.S. 949, 82 S. Ct. 390, 7 L. Ed. 344 (1961) [no affirmative action required by Oregon to assume jurisdiction in Indian country even where there was a prior treaty between the tribe and the Federal Government providing for federal prosecution].

Prior to 1953, Congress had enacted two statutes which established federal authority to prosecute crimes in Indian country. These statutes are known as the General Crimes Act and the Major Crimes Act.[15] The Major Crimes

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[15] The General Crimes Act (18 U.S.C. § 1152), enacted in 1817, generally provided for federal prosecution of interracial crimes in Indian country, but precluded federal prosecution where an Indian was already being prosecuted under tribal law.

The Major Crimes Act (18 U.S.C. § 1153) was enacted in 1885 and provided for federal concurrent jurisdiction over

Act delineates state and federal jurisdiction in states other than the six designated in Public Law 280 (which includes California). Public Law 280 explicitly withdrew federal law enforcement for criminal law in Indian country in those six states, relegating to those states exclusive criminal jurisdiction.

At the same time, Congress consigned the authority to prosecute crimes in Indian country to the six states pursuant to part (c) of 18 U.S.C. § 1162:

> (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

This Court recently addressed this issue in *Nevada v. Hicks,* 533 U.S. 353 (2001). In that case, the tribal court attempted to exercise jurisdiction through a federal tort action against state officials who served a search warrant on tribal land. In denying the tribal court jurisdiction, the Court discussed the sovereignty issue.

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Peters 515, 561 (1832)," *White Mountain*

Indians for enumerated crimes. This statutory structure allowed for either tribal prosecution or federal prosecution, or both. *United States v. Wheeler*, 435 U.S. 313, 325 (1978).

> *Apache Tribe v. Bracker*, 448 U.S. 136, 141, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980). "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U.S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962).

Nevada v. Hicks, 533 U.S. at 361-362, fn. omitted.

B.

California Has Jurisdiction And The Duty To Prosecute Welfare Fraud Committed On Or Outside Indian Land Within The State Of California

Since the passage of Public Law 280, there has been some litigation as to what acts fall under state jurisdiction and what acts are subject to regulation by tribal authorities. In *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 212, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), this Court ruled that an attempt by Riverside County to enforce California Penal Code provisions regulating poker and bingo inside reservation boundaries was an unauthorized extension of state civil regulatory power not granted under Public Law 280. In so holding, the Court declared that when a state tries to enforce one of its laws in Indian country, it must first determine if the law is, by nature, civil/regulatory or criminal/prohibitory. *Id.* at 208.

In *Cabazon*, the law was found to be merely civil/regulatory and therefore unenforceable by state authorities on the reservation. In determining whether the specific law was civil/regulatory or criminal/prohibitory, the Court sought to determine if the specific conduct was a subset of other permitted conduct or whether it was prohibited throughout the

state. In *Cabazon*, the Court determined that since bingo is an authorized activity by charitable organizations, and gambling is permitted at horse race tracks and through the state lottery, these specific violations were civil/regulatory rather than criminal/prohibitory. *Id.* at 210-211.

In this case involving the Bishop Paiute Tribe, the specific state law sought to be enforced is California Welfare & Institutions Code, section 10980, subdivision (c).[16] This section provides for potential state prison sentences where fraud and deceit are employed in the unlawful collecting of

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[16] California Welfare & Institutions Code § 10980, subdivision (c), provides:

> Whenever any person has, by means of false statement or representation or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows:
>
> (1) If the total amount of the aid obtained or retained is four hundred dollars ($ 400) or less, by imprisonment in the county jail for a period of not more than six months, by a fine of not more than five hundred dollars ($ 500), or by both imprisonment and fine.
>
> (2) If the total amount of the aid obtained or retained is more than four hundred dollars ($ 400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($ 5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars ($ 1,000), or by both imprisonment and fine.

welfare. Misconduct involving forgery or fraud "inherently involves dishonesty and readiness to lie, and thus involves moral turpitude." *People v. Flanagan*, 185 Cal. App. 3d 764, 771, 230 Cal. Rptr. 64, 68 (1986). In none of the cases interpreting *Cabazon* has a crime involving moral turpitude been defined as merely regulatory and beyond the states' purview of enforcement. When the crime requires fraud or deceit, as does welfare fraud, there is no doubt it is crimnal/prohibitory and subject to state jurisdiction.

II

THE AUTHORITY TO PROSECUTE INCLUDES THE AUTHORITY TO CONDUCT INVESTIGATIONS AND PREPARE FOR PROSECUTION

The authority to enforce the criminal laws in Indian country required in Public Law 280 must necessarily include the authority to investigate and utilize a search warrant to effectively prosecute a case. As discussed by the district court in *Sycuan Band of Mission Indians v. County of San Diego, et al.*, 788 F. Supp. 1498 (S.D. Cal. 1992), *aff'd*, 38 F.3d 402 (9th Cir. Cal 1994), this authority was affirmed by comparing the alternative scenario, in which there was no authority to issue a search warrant. In *Sycuan*, the state sought to prosecute the possession of gaming machines. Since this was determined to be a civil/regulatory class of offenses and *not* subject to state prosecution,[17] logically there was no authority to issue a search warrant where the state lacked the authority to prosecute any charges based on evidence resulting from that warrant.

The district court stated, "[a] state is without authority to engage in preliminary law enforcement activities if the state is without jurisdiction to prosecute a violation." *Sycuan*, 788 F.

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[17] Subject only to federal regulation.

Supp. at 1507. By necessary inference, the authority to prosecute crimes in Indian country would be meaningless if the traditional tools for prosecutors were left at the gates to Indian country.

As an example, a robbery committed against an Indian casino employee inside the casino cannot be prosecuted if the prosecutor is unable to subpoena the victim casino employee. Likewise, embezzlement committed against a tribe's casino cannot be prosecuted if a prosecutor cannot issue a subpoena duces tecum for casino records for use in the prosecution of an embezzler. If exculpatory or inculpatory evidence is located inside a casino, which is owned by the tribe, in a case where the state has the authority to prosecute, the casino and its owner/employees are subject to the same laws as the rest of the state. But, they also enjoy the same constitutional protections. A murder suspect who flees to an Indian casino should not expect sanctuary, or that evidence of his crime will find a safe repository; he should expect a lawful arrest. To permit casinos to become enclaves immune from the execution of lawful search warrants will result in condemning Indian casinos to inordinate pressure from organized crime to conceal evidence and proceeds from criminal activities.

The district court in the *Sycuan* case went further and added overly expansive dicta suggesting that a sheriff exceeds his jurisdiction by serving a warrant on tribal land inside his county. *Sycuan Band of Mission Indians v. County of San Diego, et al.,* 788 F. Supp. at 1508. The district court was incorrect in that assessment. California magistrates have the authority to issue search warrants to peace officers in their counties to search anywhere in the state. *People v. Fleming,* 29 Cal. 3d 698, 703-707, 631 P.2d 38, 41-45, 175 Cal. Rptr. 604, 607-611 (1981). A sheriff enforcing criminal/prohibitory laws pursuant to state law is executing authority granted to the states by Public Law 280. Only if he is attempting to enforce civil/regulatory laws, would he be acting outside that authority. To hold otherwise would result in deprivation of all people in

Indian country in the six Public Law 280 states of any protection under the states' criminal justice system.

The authority of the state to execute search warrants in Indian country was clearly explained in the majority opinion in *Nevada v. Hicks*, 533 U.S. 353. The Court stated that the process of state courts may extend to an Indian reservation where there is subject-matter or controversy within their cognizance. The Court explained:

> The Court's references to "process" [citation], and the Court's concern [citation] over possible federal encroachment on state prerogatives, suggest state authority to issue search warrants in cases such as the one before us. ("Process" is defined as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property," Black's Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.* at 1085.) It is noteworthy that [*United States v.*] *Kagama* [118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886)] recognized the right of state *laws* to "operate . . . upon [non-Indians] found" within a reservation, but did not similarly limit to non-Indians or the property of non-Indians the scope of the *process* of state courts. This makes perfect sense, since, as we explained in the context of federal enclaves, *the reservation of state authority to serve process is necessary to "prevent [such areas] from becoming an asylum for fugitives from justice.*" [Citation.]

Nevada v. Hicks, 533 U.S. at 363-364, last emphasis added.

This Court applies the same constitutional protections all Americans enjoy to those living in Indian country in California. The Court forcefully stated this position:

> We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control. . . . Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights.

Nevada v. Hicks, 533 U.S. at 373.

To hold otherwise would serve as a clarion call to all criminals, announcing a judicial vacuum and inviting potential anarchy, since the state would lose the necessary tools to prosecute serious felonies and the Federal Government now lacks the authority to do so, having consigned it to the states.

While addressing the issue of qualified immunity as to the officers serving the search warrant, the Ninth Circuit included a dismissive footnote suggesting that the authority of the states to execute search warrants had already been clearly decided against local law enforcement. In footnote 5 of its opinion, it cited two cases, neither of which involve Public Law 280 states.[18] Indeed, one of those cases clearly distinguishes

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[18] Footnote 5 states:

> The Tenth Circuit has also addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), state authorities executed a search warrant on a tribal reservation. The Tenth Circuit concluded that the search warrant was invalid, and therefore the evidence should have been suppressed,

itself from any case arising in California.

> Congress has *granted general criminal jurisdiction to some states over Indian country within their borders*, see, e.g., 18 U.S.C. §§ 1162 (various states), 3243 (Kansas), but no such provision has been made for Oklahoma.

Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. Okla. 1990), emphasis added.

As shown in *Ross*, Oklahoma is a state which has not been granted criminal jurisdiction under the Major Crimes Act. Oklahoma's situation is distinct from California's, in which there is no federal jurisdiction to prosecute crimes, because the duty to prosecute crimes was expressly delegated to California and five other states.

Qualified immunity serves to shield government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). When ruling on qualified immunity, a court considers two questions: first, "[t]aken in the light most favorable to the party asserting the

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> because the state had no jurisdiction over the reservation to enforce its laws – including the execution of a search warrant – unless Congress consented to the state's jurisdiction. *Id.* at 1147. See also *Ross v. Neff*, 905 F.2d 1349, 1354-55 (10th Cir. 1990) (holding that the arrest of an Indian on Indian land was illegal because the state had no jurisdiction over the reservation to enforce its laws – including the execution of a search warrant – unless Congress consented to the state's jurisdiction).

Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 911, fn. 5 (9th Cir. Cal. 2002).

injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 281 (2001). Second, a court "is to ask whether the right was clearly established." *Id.* The plaintiff bears the burden of showing that the right was "clearly established." *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). Surveying the legal landscape at the time of the alleged act, a court must ask, were "[t]he contours of the right...sufficiently clear that a reasonable officer would understand that what he [was]doing violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987).

A decision in the Tenth Circuit in 1996 could have indicated to the Inyo authorities the validity of a search warrant. In *Kaul v. Stephan*, 83 F.3d 1208 (10th Cir. 1996), the Kansas attorney general authorized a search warrant for a store on an Indian reservation. The storeowner argued that the state of Kansas lacked jurisdiction due to Indian sovereignty.

The *Kaul* court recognized that,

> in general, "federal protection of tribal self-government precludes either criminal or civil jurisdiction over Indians or their property absent the consent of Congress." Felix S. Cohen, Handbook of Federal Indian Law 349 (1982 ed.). However, "at times Congress has retained Indian country status but has delegated partial jurisdiction over areas of Indian country or over specific legal subjects." Id. at p. 361.

Kaul v. Stephan, 83 F.3d at 1216. Congress had delegated jurisdiction to Kansas in the Kansas Act, which delegated authority to Kansas over offenses committed by or against Indians on Indian reservations to the same extent as its courts have jurisdiction over offenses committed elsewhere within the state in accordance with the laws of the state. "Because Stephan was acting to enforce a criminal law under a federal grant of criminal jurisdiction, we believe that Stephan

possessed jurisdiction to execute the warrants at Kaul's store." (*Kaul v. Stephan*, 83 F.3d at 1218.)

This congressional delegation of authority is functionally identical to Public Law 280 which delegated the same authority to California.

The Ninth Circuit acknowledged the duty of the county district attorney to prosecute, but presumed to dictate to law enforcement alternatives to a search warrant in prosecuting welfare fraud. These included serving a search warrant on the offenders in the hope that each offender kept accurate pay stubs, or seeking consensual disclosure from the tribes of the offenders.

These suggestions encroach on the separation of powers doctrine and demonstrate a woeful lack of experience in the gathering of admissible evidence necessary to prove a criminal case beyond a reasonable doubt. The pay stubs would need to be authenticated with business records and testimony of a custodian of records obtained from the tribe. Further, the authority cited for this approach, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) is a civil case wherein the tribe was being sued civilly for payment of taxes. Furthermore, once again, the Ninth Circuit attempted to use a case from a state which is not required to prosecute major felonies involving tribal lands. It is not in any way analogous to a situation in which a state is required to prosecute crimes but is deprived of a necessary tool to accomplish this goal.

III

IMMEDIATE PROBLEMS AND PROBLEMATIC ATTEMPTS AT COMPROMISE IN THE WAKE OF THE NINTH CIRCUIT'S DECISION

Charles Dudley Warner, who quipped that politics makes strange bedfellows, would take note. Since the Ninth

Circuit's decision – but prior to this Court's grant of certiorari – the Office of the Attorney General of California, with and on behalf of the state's concerned sheriff's departments, has tried to address the vacuum created by that court's decision. The challenge for law enforcement is to deal with the competing forces of Congress (as evident in Public Law 280) and the Ninth Circuit. Also of obvious concern is the protection of deputies and prosecutors, to whatever degree the Ninth Circuit's decision allows, from the threat of personal liability and potential financial ruin.

In the wake of the Ninth Circuit's decision, earnest but desperate state executive agencies' attempts at implementing the decision have been misguided and constitutionally strained. For instance, on August 29, 2002, the California Attorney General's Office presented a four-day "Tribal and State Justice Summit," at which it was generally agreed that "[t]he source of many of the problems [of tribal and state justice] is Public Law 280." Agnes Diggs, *Tribes, police seek solutions*, NORTH COUNTY TIMES, Nov. 3, 2002. This premise is patently false. Public Law 280 is the solution to the problem of tribal and state justice. Public Law 280 clearly makes California responsible for law enforcement in Indian country.

San Diego County Sheriff's Lieutenant Maury Freitas, who participated as a panel member in the "Tribal and State Justice Summit," affirmed that "[w]ith the casinos came an increased number of customers and the element that preys on customers." Agnes Diggs, *Tribes, police seek solutions*, NORTH COUNTY TIMES, Nov. 3, 2002.[19] San Diego County contains more Indian reservations than any other county in the Union. Rather than abandon Indian country law enforcement altogether – a slippery and short slope from the Ninth Circuit's conclusion – the San Diego Sheriff's Department has

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[19] See Grinols, Mustard & Dilley, *Casinos, Crime and Community Costs*, (Sept., 2000). Also see discussion under "Interest of Amici Curiæ," beginning on p. 1 of this Brief.

considered the unsatisfactory solution of extending academy training and conferring peace officer status to selected members of Indian tribes' security teams.

Similarly, California's State Legislature's attempts to accommodate the Ninth Circuit have been frustrated. In the beginning of 2002, a dialogue between tribal authorities and the California State Legislature, exploring the possibility of introducing legislation that would grant P.O.S.T.[20] certification and peace officer status upon Indian security personnel, fell apart. The proposed legislation, SB 911, died in committee. The reason, according to Marla Marshall, Special Assistant to San Diego Sheriff Bill Kolender, was the unreasonable demands of the Indian tribes. " 'They wanted to have law enforcement authority, but not be subject to the penal code that every other law enforcement officer in the state is subject to.' " James P. Sweeney, *California tribes' push for full police powers is shelved*, COPLEY NEWS SERVICE, Jan. 13, 2002.[21]

The reality of the lack of proper law enforcement and abuse of authority in Indian country without any legal restraints or consequences for excesses is exemplified by *Linneen v. Gila River Indian Com.*, 276 F.3d 489 (9th Cir. 2002). In 1996, Ross and Kim Linneen were walking their dogs on the Gila River Indian Reservation in Arizona when they were detained by a Ranger from the tribe. The detainees provided the following uncontested account, when Indian Ranger Andrews was dispatched to investigate.

> When Andrews arrived, he jumped out of his truck, drew his gun, and crouched behind the truck door. He ordered Ross to turn around

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[20] "Peace Officer Standards Training." Statutory provisions for peace officers, as defined by CALIFORNIA PENAL CODE § 830.1 (West 2003) and CALIFORNIA LABOR CODE § 95 (West 2003) include statewide authority to make arrests, and partial exemption from civil liability.

[21] Available in *LEXIS, News Library, News Group File.*

> and put his arms on his head. He searched the Linneens and their car. He kept the Linneens in custody for three hours, during which time he told them that they were guilty of various offenses that would result in jail time; told them that their possessions would be impounded and their dogs destroyed; held a gun to their heads; complained about injustices suffered by Native Americans at the hands of Caucasians; and lectured them on religious doctrine. Andrews finally released the Linneens after citing them for criminal trespass. The charges against the Linneens were later dismissed.

Id. at 491.

The Linneens sued the Ranger and the Tribe in federal court, but the case was dismissed due to sovereign immunity enjoyed by the tribe and the Ranger. This result was upheld by the Ninth Circuit.

CONCLUSION

The clear intent of Congress is to combat lawlessness in Indian country. Since California is required to assume the responsibility of protecting all persons against crimes in Indian country as it does for the rest of the state, the effective tools of law enforcement cannot be discarded. The Ninth Circuit Court's decision to the contrary should be reversed.

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What Amici Curiæ respectfully request is simply that for which Chief Joseph of the Nez Perce tribe asked of President Rutherford B. Hayes, in 1879:

> Whenever the white man treats the Indian as they treat each other then we shall have no more wars. We shall be all alike -- brothers of one father and mother, with one sky above us and one country around us and one government for all.[22]

Respectfully submitted,

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[22] Chief Joseph, *That All People May be One People, Send Rain to Wash the Face of the Earth* (Mountain Meadow Press 1995) 1879.