No. 02-281

IN THE

Supreme Court of the United States

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY,
PHIL MCDOWELL, Individually and as District Attorney,
DAN LUCAS, Individually and as Sheriff,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY
OF THE BISHOP COLONY, *et al.*,
Respondents.

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

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Where Congress has not authorized states to issue or execute search warrants on Indian tribal governments or their property, does a County and its officials have authority to execute a search warrant issued by a state court and seize an Indian tribal government's property—confidential employee personnel records—on its reservation?

2. Whether the Tribe has a cause of action for compensation from the County and its officials under 42 U.S.C. § 1983 for violation of its rights under federal law?

3. Whether the County sheriff and district attorney who executed the search warrant are entitled to qualified immunity under 42 U.S.C. § 1983?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A. Statement of Facts

In February 2000, the Bishop Paiute Tribe (hereinafter "Tribe") received a written demand from the Inyo County district attorney for payroll records covering three employees in its gaming enterprise, all tribal members, in connection with an investigation of possible welfare fraud. The Tribe's attorney responded by letter to the district attorney that the Tribe's policies prohibit disclosing an employee's personnel

information without the written consent of the employee. J.A. 103.[1] The County did not respond to this letter in any manner.

On March 23, 2000 the Inyo County sheriff and district attorney, acting under a search warrant issued by the California Superior Court, forcibly entered restricted areas of the Bishop Paiute Tribe's gaming enterprise. Using deadbolt cutters, the sheriff and district attorney cut the locks and seized the Tribe's confidential employee personnel records, ignoring the Tribe's policies and despite the protests of tribal officials that the Tribe is not subject to state jurisdiction. J.A. 104.[2] These records consisted of time card entries, payroll registers, payroll check registers and quarterly payroll tax information for the three employees who were named in the warrant, as well as the same information for 78 other tribal employees.

The district attorney and sheriff did not allow the Tribe to remove the names and information regarding the 78 employees whose records were not within the terms of the search warrant, thereby substantially exceeding the scope of the warrant. J.A. 104. County officials later realized that the allegations of welfare fraud had been based on their simple

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[1] Since this case involves a motion to dismiss granted by the district court, the Court should accept all allegations in the Tribe's Complaint as true, *e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993), and construe them in the light most favorable to the Tribe. *Allen v. Wright*, 468 U.S. 737, 767 n.1 (1984) ("[b]ecause the District Court granted a motion to dismiss, we must accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party") (internal quotations and citations omitted).

[2] The County asserts that the Tribe had previously honored its requests for this kind of information. Brief for Petitioners at 6 n.2 (hereinafter "County Br."). The Tribe does not believe this is so. Disclosure of confidential information by tribal employees would violate the Tribe's personnel policies and could lead to dismissal.

mathematical error, and dismissed all charges against the three employees "due to lack of probable cause." *See State v. Dewey*, No. MBCRF01-0027942-002 (Inyo Cty. 2000).

The Tribe is a federally recognized Indian tribe that beneficially owns all lands within its 875-acre Reservation in eastern California, which are held in trust for it by the United States.[3] The Tribe owns and operates a gaming enterprise on trust lands within its Reservation, known as the Paiute Palace Casino.[4] This enterprise employs about 140 persons, of whom approximately 80 percent are Native American, mostly tribal members. The enterprise provides the principal source of

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[3] Reservations for this Tribe and other homeless Indians in eastern California were first established by Executive Order No. 1496 (1912), *reprinted in* III Kappler, Indian Affairs, Law and Treaties at 677-78. Pursuant to the Act of April 20, 1937, ch. 114, 50 Stat. 70, these reservation lands were exchanged for lands owned by the City of Los Angeles. The exchanged lands constitute the current Bishop Paiute Reservation and other Indian reservations in eastern California. The 1937 Act provides these lands "shall be held by the United States in trust for the Indian tribe, band, or group involved." The Bishop Paiute Tribe has approximately 1,200 members. About 950 tribal members and other Indians live on the Reservation.

[4] The Indian Gaming Regulatory Act requires that a tribe must "have the sole proprietary interest and responsibility for the conduct of any gaming activity," 25 U.S.C. § 2710(b)(2)(A), on Indians lands (except for a limited number of bingo facilities operating prior to the Act, *id.* § 2710(b)(4)(B)). The Tribe operates the gaming enterprise through a corporation which the Tribe chartered and wholly owns and controls. The Corporation is also a Respondent in this case. All parties, as well as the United States as *amicus curiae*, agree the Corporation is an arm of the Tribe, and shares its sovereign status. County Br. at 5 n. 1; Brief of United States as *Amicus Curiae* at 11-14 (hereinafter "United States Br."). *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753 (1998); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398-400 (1995); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n. 13 (1973); *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946).

employment and income for the Tribe's members, as well as the principal revenues the Tribe uses to fund governmental services on its Reservation.

Casino gaming by Indian tribes is authorized by and regulated under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, enacted by Congress in 1988 after this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). A primary purpose of IGRA is to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702(1);[5] *see also Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996).

IGRA requires any tribe conducting casino gaming on its reservation to enter into a bilateral compact with the State concerning the terms and conditions of that gaming. 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3); *see generally Seminole Tribe*, 517 U.S. at 47-49. The Tribe has entered into a Compact with California, which the Secretary of the Interior approved, 65 FED. REG. 31,189 (May 16, 2000), pursuant to IGRA. 25 U.S.C. § 2710(d)(3)(B). This Compact requires, *inter alia*, that the Tribe's gaming enterprise participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to its employees. J.A. 60. Pursuant to this Compact provision, the tribal enterprise provides state agencies regular information about its employees and their income. The Compact *does not* authorize state courts to issue search warrants on the Tribe or its gaming enterprise.

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[5] IGRA was also enacted "to shield [Indian gaming] . . . from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. §2702(2).

In July 2000, the district attorney once again requested personnel records, this time for six additional employees who are also tribal members. To avoid another confrontation, the Tribe offered to accommodate the district attorney's need for records in a manner that accorded with the Tribe's confidentiality policies and sovereign interests. Since in order to receive welfare a person must agree to permit review of any employment records by County officials, the Tribe proposed that it would release the records if the County would provide it with a copy of that portion of the signed welfare application submitted by each employee consenting to the County's review of employment records. Pet. App. 14a. The district attorney rejected this offer. Faced with the imminent threat of additional search warrants, the Tribe brought this action in federal district court.

B. Proceedings below

The Tribe's Complaint principally sought declaratory and injunctive relief against the County and its officers on the ground they had exceeded their jurisdiction, both because the warrant impermissibly interfered with the Tribe's sovereign immunity and its right to self-government as protected by federal law, and because neither Public Law 280, 18 U.S.C. § 1162, nor the Tribal-State Compact negotiated pursuant to IGRA conferred authority on the County to execute a search warrant on the Tribe.

The Tribe also sought compensatory damages pursuant to 42 U.S.C. § 1983 for violation of the Tribe's rights under the Fourth and Fourteenth Amendments and Indian Commerce Clause in the United States Constitution, its rights under federal law to self-government, and its rights under IGRA. The Tribe sought attorneys fees, costs, and expenses under 42 U.S.C. § 1988.

The district court granted the County's motion to dismiss three months after the Complaint was filed, without any

discovery or the introduction of any evidence except for several documents the court took judicial notice of. J.A. 120, 124-25. The district court held first that the County's search warrant was authorized under Public Law 280, J.A. 134-38, a position that the County has now abandoned, *see* County Br. at 25 n.11. The court recognized that the Tribe's claims of immunity "advance[] the Tribe's right to self-governance," J.A. 138, but nevertheless rejected the Tribe's contention that sovereign immunity barred execution of the warrant to seize tribal government property, principally because the district court believed that immunity would impinge on the State's "interest in a fair and uniform application of California's criminal law." J.A. 138. The court also held that nothing in IGRA eliminated the County's authority to search tribal government property. J.A. 138-39. The district court dismissed the Tribe's claim under Section 1983 against the County because it determined the district attorney and sheriff were acting as state officers and were thus immune from Section 1983 liability, J.A. 125-30, and against both officers because they had qualified immunity, J.A. 130-34.

The Tribe appealed. The Court of Appeals for the Ninth Circuit reversed the district court decision in all relevant respects. First, the court of appeals reversed dismissal of the Tribe's claims for declaratory and injunctive relief, holding that the County and its officials had violated the Tribe's sovereign immunity and its right under federal law to make its own laws and be ruled by them free from state interference. Noting that "[a]bsent a waiver of sovereign immunity, tribes are immune from processes of the court," J.A. 154, the Ninth Circuit determined that Public Law 280 did not authorize the warrant, because that Act "was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations," J.A. 152, and did not waive tribal sovereign immunity or grant states jurisdiction over tribes, J.A. 153-54 (citing *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976)). Finding no

other source of a waiver of the Tribe's immunity, the court of appeals concluded that sovereign immunity precluded the County's assertion of judicial jurisdiction over the Tribe. J.A. 154. The court of appeals rejected the County's argument that this Court's decisions construing the scope of tribal authority over non-Indians controlled the question presented here—whether the State could exercise authority over the Tribe itself and tribal property. J.A. 154-55.

The court of appeals also held that the search warrant violated "the more fundamental right of the Tribe not to have its policies undermined by the states and their subdivisions." J.A. 156 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)). The Ninth Circuit found that "[t]he Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines." J.A. 155. The Ninth Circuit explained that "[t]he enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it affects the Tribe's main source of income." J.A. 159. Accordingly, the court of appeals held that execution of the search warrant interfered with "the right of reservation Indians to make their own laws and be ruled by them." J.A. 156 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The court of appeals also determined that the County and its officials had less intrusive means available to them to enforce state welfare laws:

> The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of

> the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer.

J.A. 161.

The court of appeals held that the district attorney and sheriff acted on behalf of the County and not the State for purposes of Section 1983 liability. J.A. 169-73. Petitioners have not sought review of that determination.

Finally, the court of appeals held that the County was liable for damages under Section 1983, J.A. 164-69, and that county officials were not entitled to qualified immunity, J.A. 174-79. Applying this Court's standards for qualified immunity, *see Saucier v. Katz*, 533 U.S. 194 (2001), the court of appeals first held that the Petitioners' obtaining and execution of the search warrant violated the Fourth Amendment because it exceeded the County's jurisdiction. The court then determined that the law was sufficiently clear that a reasonable County officer would have known that he had no jurisdiction to search and seize a Tribe's personnel records as part of a criminal investigation. J.A. 178-79. At no point in any of the proceedings below did anyone contest the Tribe's status as a "person" under Section 1983 or the Tribe's inclusion in the category of "people" protected by the Fourth Amendment. Accordingly, neither the district court nor the court of appeals addressed (or even mentioned) those issues.

The County's request for a rehearing *en banc* was denied. Pet. App. 8a. This Court then granted the petition for a writ of certiorari filed by the County and its individual officers.

SUMMARY OF ARGUMENT

I. It is "settled law" that tribes, as sovereign governments, are immune from judicial process unless the tribe or Congress waives the tribe's immunity. *E.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 754, 756 (1998). It is equally well-established that sovereign immunity protects governments from all forms of judicial proceedings—however styled—that would affect their property interests, including in rem actions. *E.g., Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 704 (1949); *Missouri v. Fiske,* 290 U.S. 18, 28 (1933). A search warrant is in its very essence a judicial procedure. *E.g.*, *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Because Congress has not authorized a waiver of tribal immunity or conferred jurisdiction on state courts to issue search warrants over the Tribe, its enterprise or its property, the state court lacked jurisdiction to issue the warrant and the County and its officials had no authority to execute it and seize the Tribe's property.

II. Other settled principles of federal law also preclude the County from executing a search warrant against the Tribe and its property. Execution of a state search warrant against the Tribe and tribal records infringes upon the Tribe's right to self-government—to regulate its members and to control internal affairs on its reservation—a right consistently sustained by two centuries of this Court's jurisprudence. *E.g*., *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832). Here, exercising its right to self-government, the Tribe has established confidentiality policies concerning access to and use of its governmental records. Allowing states or their subdivisions to override tribal policies such as these would directly and severely intrude on the rights of tribes to govern themselves free from state interference. The Tribe's confidentiality policies are intended both to protect employee privacy

interests and encourage full disclosure by tribal employees of all relevant information, an especially critical matter in a heavily regulated gaming enterprise. As illustrated by the variety and complexity of the many different privacy laws enacted by the United States and the states—which define the precise circumstances under which they will release confidential information even for law enforcement purposes—a government's ability to operate and effectively provide government services often depends on the government's control over the use and dissemination of confidential information. Indian tribes, including the Bishop Paiute Tribe, provide a wide range of services, frequently operating federal programs pursuant to contracts under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-458bbb-2. Execution of state court search warrants against tribes would unavoidably and irrevocably interfere with tribes' federally protected right of self-government, by subordinating tribal law governing the control of tribal records and other tribal property to state law and by impeding tribes' ability to carry out vital governmental functions, operate programs and provide services—not only in its regulation of gaming, but in many other areas (such as health, education, child protection, and counseling programs). Moreover, the County had a number of alternative mechanisms to obtain this information that would not interfere with the Tribe's self-government.

IGRA authorizes and comprehensively provides for regulating tribal gaming operations. The Act offers states the opportunity to assume a measure of jurisdiction over tribal gaming that the state would not otherwise have to the extent agreed to in a tribal-state compact. *See Seminole Tribe v. Florida*, 517 U.S. 44, 48-49 (1996). Although in its gaming Compact with the Tribe, California sought and obtained significant jurisdiction over the Tribe's gaming enterprise in a wide variety of subject areas, the Compact does not authorize execution of a state court search warrant on the Tribe or its

enterprise. Accordingly, execution of the warrant is preempted by IGRA.

III. A decision by this Court that state courts have no jurisdiction to execute search warrants against tribal governments and their property will not convert Indian reservations into havens for fugitives or criminal activities. Pursuant to the federal government's exclusive power over Indian commerce, s*ee Seminole Tribe*, 517 U.S. at 72, Congress has enacted laws punishing virtually all criminal offenses on reservations, which the federal government has authority to prosecute. Congress in Public Law 280 also has authorized states, including California, to assume jurisdiction over offenses "by or against Indians" on reservations. 18 U.S.C. § 1162. As a result, California has jurisdiction to enforce state criminal law regarding offenses: "by or against Indians" on reservations, by non-Indians on reservations with non-Indian victims, *e.g., United States v. McBratney*, 104 U.S. 621 (1881); and by tribes and Indians outside the reservation, e.*g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

IV. While this question was not raised in the courts below and thus should not be heard here, *United States v. United Foods, Inc*., 533 U.S. 405, 416-17 (2001), Indian tribes are entitled to sue counties and their officials for compensatory damages under 42 U.S.C. § 1983. Section 1983 creates a cause of action to remedy state infringements of federal rights for a broad range of entities, including labor unions, and resident aliens, *e.g., Graham v. Richardson*, 403 U.S. 365 (1971), and has even been invoked by states suing as parens patriae. Tribes were especially vulnerable to infringement of their federally protected rights by states when Section 1983 was enacted, *e.g*., *Kansas Indians,* 72 U.S. (5 How) 737 (1867), as they are today. *E.g*., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). And tribes have been within the jurisdiction of the United States throughout the history of the Republic, by virtue of the Treaty and Indian

Commerce Clauses. Other broad remedial statutes have been construed to allow governments to sue as a "person" when their rights are violated, *e.g., Georgia v. Evans*, 316 U.S. 159, 161 (1942), and Section 1983 should be so construed on behalf of tribes.

The search and seizure violated the Fourth Amendment because it was beyond the County's jurisdiction and thus foreclosed as "unreasonable." Execution of the warrant also violated the Tribe's rights under the Indian Commerce Clause, *see Dennis v. Higgins*, 498 U.S. 439 (1991), its rights under federal common law to self-government and to immunity from state court processes, *see National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985), and its rights under IGRA.

The County officials lacked qualified immunity because in 2000, when the controversy arose, the Tribe's rights were "clearly established" in the Ninth Circuit. All reported cases denied states authority to serve compulsory processes on tribes, *e.g., United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), and the Ninth Circuit had just held state officers had no jurisdiction to execute a search warrant on individual Indians on a reservation. *State of Nevada v. Hicks*, 196 F.3d 1020, 1027-28 (9th Cir. 2000), *rev'd*, 533 U.S. 353 (2001).

ARGUMENT

Introduction

The dispositive question in this case is whether a state court has authority to issue a search warrant to be executed against another sovereign government and its property. The County argues that state court search warrants can be executed upon a tribal government and its property on the tribe's reservation trust lands even though Congress has not authorized either a waiver of the Tribe's sovereign immunity or any state court jurisdiction over the Tribe, its enterprise or its property. The County's argument is fundamentally incon-

sistent with this Court's longstanding precedents which hold that tribes as governments are immune from state judicial process—absent a waiver by Congress or the tribe—and that, except as specifically authorized by Congress, states have no authority to interfere with a tribe's exercise of its powers of internal self-government on its reservation.

The County and its supporting *amici* ask this Court to depart radically from these core principles, relying principally on this Court's recent decision in *Nevada v. Hicks*, 533 U.S. 353 (2001). But *Hicks* involved search warrants directed at and criminal jurisdiction over *individuals*, not a tribal government. Nothing in *Hicks* or any other decision of this Court even remotely suggests that a state court has jurisdiction to execute a search warrant against another sovereign government, whether it be the United States, a foreign government, a sister state, or an Indian tribe.

Indeed, *Hicks* is completely distinguishable from this case. *Hicks* concerned "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id*. at 355. The Court first considered whether tribes have legislative jurisdiction to "regulate state wardens executing a search warrant for evidence of an off-reservation crime," *id*. at 358, and determined that tribes do not, because "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them,'" *id*. at 364. Relying upon its prior holding in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *id*. at 453, the Court then concluded that, since the tribe could not regulate their conduct, the tribal court lacked jurisdiction over a suit against the state officers.

The Court recognized in *Hicks*:

> [W]here the issue is whether the [state law enforcement] 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 courts . . . to vindicate constitutional or other federal . . . law rights.

533 U.S. at 373. The present case is just such a suit in federal—not tribal—court. It challenges a state court search warrant executed *against a tribal government and its property*, not an individual Indian. And, unlike the situation in *Hicks*, this case does not deal with any assertion of tribal legislative or judicial authority over state or county officials. Instead, here the State seeks to assert such authority over a tribe. The Tribe seeks simply to vindicate its right to promulgate its own internal laws governing its relationships with its members and employees, control access to its own confidential records, and operate its gaming enterprise on its reservation in the manner authorized by a federal statute.

I. AS A MATTER OF FEDERAL LAW, SOVEREIGN IMMUNITY BARS THE SEARCH AND SEIZURE OF A TRIBE'S PROPERTY PURSUANT TO A STATE COURT SEARCH WARRANT

This Court has consistently held that federal law protects the immunity of tribes, like other sovereigns, from judicial authority absent their consent or authorization by Congress. *E.g.*, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[6] The Court has determined that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, Inc.,* 476 U.S.

[6] Federal courts have recognized tribal sovereign immunity for over a century. *See Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895).

877, 890 (1986) (hereinafter *Three Affiliated Tribes II*), and held that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity," *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

On repeated occasions, this Court has specifically held that the immunity doctrine protects tribes against compulsory state court orders. *E.g.*, *Kiowa,* 523 U.S. at 755-56; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991); *Three Affiliated Tribes II,* 476 U.S. at 891; *Puyallup Tribe v. Dep't of Game of State of Washington*, 433 U.S. 165, 172-73 (1977). In *Kiowa* the Court applied the rule that "tribal immunity is a matter of federal law and is not subject to diminution by the States" and held that a tribe could not be sued in state court in a contract action absent its consent or congressional authorization. 523 U.S. at 756.

In *Three Affiliated Tribes II*, the Court made clear that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." 476 U.S. at 891. The Court struck down a state statute conditioning the availability of state courts to tribes and Indians for civil claims on the waiver by the Tribe of sovereign immunity for all civil suits, holding the statute "unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws." *Id.* at 891.

In *Puyallup Tribe*, which involved the exercise of treaty fishing rights by tribal members, the Court also applied the principle that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172. The Court consequently invalidated a Washington state court order directing the Tribe to file with the court a list of tribal members

authorized to exercise treaty fishing rights and the number of fish caught by such fishermen because it infringed on the Tribe's sovereign immunity and exceeded the state court's jurisdiction. The Court *expressly distinguished* between the power of a state court to issue orders against individual tribal members and against the Tribe, holding that the state court had jurisdiction over the individual members but not the Tribe. *Id*. at 171-72.

In *Citizen Band Potawatomi*, the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine. *See*, *e.g*., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq*., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq*. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

498 U.S. at 510.

As noted by the County in its Brief, the Court in *Kiowa* expressed concerns about the wisdom of perpetuating the tribal immunity doctrine,[7] but nonetheless reaffirmed that

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[7] Sustaining the Tribe's immunity here does not "extend[] beyond what is needed to safegueard tribal self-governance." *Kiowa*, 523 U.S. at 758. *See* Part II.A, *infra*. This is not a case involving "purely off-reservation conduct . . . that has no meaningful nexus to the tribe's land or its sovereign functions." *Id*. at 764 (Stevens, J., dissenting). *See also Citizen Band Potawatomi*, 498 U.S. at 515 (Stevens, J., concurring) (questioning whether "the rule of tribal sovereign immunity extends to

tribal sovereign immunity is "settled law" and once again declined an invitation to revise it, citing Congress' past reliance on the doctrine and power to alter it. 523 U.S. at 758-59. Congress has continued to take an active role in assessing the tribal immunity doctrine. For example, at the time of the *Kiowa* decision, bills had been introduced in Congress to limit the scope of tribal sovereign immunity, and Congress has considered similar proposals since. *See* S. 615, 106th Cong. (1999); S. 1691, 105th Cong. (1998); S. 2097, 105th Cong. (1998). None of these bills has been enacted. While Congress has amended a prior statute to require that certain tribal contracts waive or otherwise address tribal immunity, *see* 25 U.S.C. § 81, *amended by* Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. No. 106-179, § 2, 114 Stat. 46 (2000),[8] it has otherwise reaffirmed that tribal immunity should continue to apply with full force, *see* Tribal Self-Governance Amendments, Pub. L. No. 106-260, § 516, 114 Stat. 711 (2000).[9]

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cases arising from a tribe's conduct of commercial activity outside its own territory").

[8] In the amendment, Congress—perhaps mindful of this Court's observation in *Kiowa*, that "[i]n the economic context, immunity can harm those who are unaware that they are dealing with a tribe, [or] who do not know of tribal immunity," 523 U.S. at 758,—provided that any tribal contract the Secretary approves must include provisions that either: (1) define remedies in the event of a breach; (2) reference tribal laws that disclose the tribe's right to assert sovereign immunity; or (3) include an express waiver of the tribe's sovereign immunity and any limitations on that waiver. 25 U.S.C. § 81(d)(2) (as amended). As the Committee Report states, one purpose of this amendment is "to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes." S. REP. NO. 106-150, at 1 (1999).

[9] In this Act, Congress reaffirmed its approval of the tribal sovereign immunity doctrine by requiring that provisions of the Indian Self-Determination and Education Assistance Act, including the Act's recognition of the immunity doctrine, 25 U.S.C. § 450n, apply to tribal

Although no decision from this Court squarely addresses the application of sovereign immunity to the attempted execution of a state court search warrant on a tribe or any other government or its property, established principles of sovereign immunity leave no doubt that the doctrine fully protects tribes from such a warrant.

First, sovereign immunity protects the operation of governments and their property from any legal process to which the sovereign has not given its consent. *E.g., Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). The Court has consistently rejected arguments that the availability of a sovereign's immunity may be made to turn on the form of judicial process, or the remedy sought. Thus, this Court has declined to find exceptions to the sovereign immunity doctrine based on arguments that the proceedings are in rem, *see Missouri v. Fiske*, 290 U.S. 18, 28 (1933) ("[t]he fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a nonconsenting state"); *see also United States v. Shaw,* 309 U.S. 495, 502-03 (1940); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992), or where the judicial proceedings at issue would, as a practical matter, affect a sovereign's rights to or interests in its property, s*ee Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1997); *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 489 n.21 (1987).[10] The question of

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health programs covered by the 2000 Amendments. *See* H. REP. NO. 104-477, at 32 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 589.

[10] In *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), a plurality of the Court upheld a federal court warrant for seizure of property salvaged from a shipwreck in possession of a State on the ground that the State had no colorable claim of title to the property. *Id.* at 699. The plurality opinion pointed out that the State's prior title claim had been litigated and rejected by this Court in another suit to which the State was a party. *Id.* at 694-96. A separate opinion, authored by Justice White speaking for four members of the Court, disagreed with the plurality's

immunity does not turn on how a legal proceeding is styled, but upon "the essential nature and effect of the proceeding," *Idaho v. Coeur d'Alene*, 521 U.S. at 277, (*quoting Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945)), and whether the proceeding is the "functional equivalent" of an action against the sovereign, *id*. at 281; *see id.* at 289 (O'Connor, J., concurring). *See also Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 n. 11 (1984).

These basic principles were set forth in *Larson*. Rejecting arguments that sovereign immunity should not be available to suits in equity that seek "specific relief, *i.e.* the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant's officer's actions," *Larson,* 337 U.S. at 688, the Court relied on the vital importance of sovereign immunity to a government's ability to carry out its duties to the community it is obligated to serve. The Court in *Larson* concluded, as it recently did in *Kiowa*, 523 U.S. at 758-59, that because of the impact that a waiver of sovereign immunity has on a government's ability to carry out its functions, the question of whether to waive that immunity, and if so, the nature of the proceeding to which the waiver should extend, are matters for Congress and not the courts to decide. *Larson*, 337 U.S. at 703-04.

Second, the courts have held that these principles of immunity, and their purpose in protecting governments from the disruption and interference that would result from assertions of judicial authority to which the government has not consented, apply to bar all forms of state judicial process against governments. The federal courts have held that federal agencies or officials are immune from state court

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view that enforcement of process against the res could be divorced from the State's immunity from a suit to determine the State's right to the res. *Id.* at 703 (White, J., concurring in part and dissenting in part).

subpoenas in cases where the agency is not a party, unless the agency's own regulations provide procedures by which the information sought by the court can be obtained and effect a waiver of immunity. *See, e.g., In re Elko County Grand Jury*, 109 F.3d 554, 556-57 (9th Cir. 1997); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 315-17 (7th Cir. 1994); *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989); *Swett v. Schenk*, 792 F.2d 1447, 1452 (9th Cir. 1986); *see also United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-69 (1951) (holding that a subordinate federal official acted lawfully and should not have been held in contempt for refusing to honor a federal court subpoena where an agency regulation barred disclosure).

Likewise, this Court has long recognized that sovereign immunity bars other forms of state court process issued against federal agencies and officials absent an express waiver of sovereign immunity. *See Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 516-17 (1984) (holding that a state tax levy was enforceable against a federal agency only because Congress had enacted a "sue and be sued clause," thereby waiving the agency's immunity); *Federal Housing Administration Region No. 4 v. Burr*, 309 U.S. 242, 245-46 (1940) (finding that a writ of garnishment issued by a state court against funds in possession of a federal agency was enforceable only because Congress had expressly waived the agency's sovereign immunity; "[c]learly the words 'sue and be sued' in their normal connotation embrace all civil process"); *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846) (holding that a state court order for attachment of wages in possession of federal disbursing agent and due to be paid to federal employee unenforceable against the federal officer).

Similar immunity is accorded to foreign sovereigns. Under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, adopted by the United States and several other countries, the premises of

diplomatic and consular facilities "shall be inviolable," and States cannot serve search warrants or other process on consulates or missions of foreign nations or of international organizations within their borders. Vienna Convention on Diplomatic Relations, April 18, 1961, art. 22, cl. 1, 23 U.S.T. 3227; Vienna Convention on Consular Relations, April 24, 1963, art 31, cl. 1, 21 U.S.T. 77. The "archives and documents" of such facilities "shall be inviolable at any time and wherever they may be." Vienna Convention on Diplomatic Relations, art. 24; Vienna Convention on Consular Relations, art. 33; *see also*, Restatement (Third) Foreign Relations, § 466 cmt. c (1987) ("Diplomatic and consular premises are immune from search, requisition, attachment or execution"). Similarly, the property, assets and archives of international organizations having offices in the United States are "immune from search, unless such immunity be expressly waived, and from confiscation." 22 U.S.C. § 288a(c). In fact, while an embassy or consulate is deemed to be within the territorial jurisdiction of a state, such jurisdiction does not render the premises and property of that embassy or consulate subject to search or seizure by the state. *See* Restatement (Third) Foreign Relations, § 466 cmt. a (1987).

Third, while the County argues that "this Court's judicially established doctrine of tribal sovereign immunity from civil suit . . . should [not] be extended to include immunity from state criminal process," County Br. at 32, nothing in this Court's Indian law or sovereign immunity jurisprudence supports such a dichotomy between civil and criminal cases. *See, e.g., Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (holding that the definition of "Indian country" in federal criminal law (18 U.S.C. § 1151) circumscribes the reach of state tax jurisdiction). It is unthinkable that the State of Washington could have circumvented the Court's holding in *Puyallup* that the Tribe's immunity protected it from a state court order to provide a list of its members by bringing a criminal prosecution against indi-

vidual Indians engaged in fishing and then executing a search warrant against the Tribe for its membership list. Forcible execution of a search warrant, to which a tribe has no opportunity to object, is even more invasive of tribal sovereignty than a civil subpoena or discovery request which a tribe can oppose, or than civil litigation against it which a tribe can move to dismiss.[11]

Fourth, the County's argument flies in the face of the fact that a search warrant is by its very nature a judicial process. As the Court explained in *United States v. Jeffers*, 342 U.S. 48 (1951), discussing the warrant clause of the Fourth Amendment: "[t]he mandate of the Amendment requires adherence to judicial processes." *Id*. at 51 (citations omitted); s*ee also United States v. Leon*, 468 U.S. 897, 913-917 (1984);

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[11] There is no question that, while a search warrant may be directed at a particular place or property, a warrant also runs against the owner of that property whose rights and interests are invaded. *See, e.g., Nevada v. Hicks*, 533 U.S. at 355 (search warrants were "executed against a tribal member"); *Bond v. United States*, 529 U.S. 334, 337-39 (2000); *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Rakas v. Illinois*, 439 U.S. 128, 134-35, 142-43 (1978); *Katz v. United States*, 389 U.S. 347, 351 (1967). Where the owner of the property is a sovereign and has not consented to the judicial process, execution of the warrant—the search and seizure of the sovereign's property—irretrievably deprives the sovereign of its right of immunity from judicial process. Without injunctive relief (as the Tribe sought in this action), the sovereign's immunity from such judicial process, as well as its right of self-government, is simply lost and cannot be vindicated after the warrant is executed. *See, e.g.*, *Puerto Rico Aqueduct Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 144-46 (1993) (finding that because a sovereign's immunity is an immunity from the judicial proceedings, and not "a mere[] defense to liability," the sovereign's interest in its immunity cannot be vindicated if litigation is allowed to proceed); *see also Ex parte New York*, 256 U.S. 490 (1921) (allowing State to bring writ of prohibition in this Court to compel dismissal of federal admiralty proceeding on grounds that the action was barred by the state's immunity under the Eleventh Amendment—even though the objection to federal jurisdiction might have been raised in appeal from that action).

Connally v. Georgia, 429 U.S. 245, 250 (1977). Since a search warrant is a judicial act, a court can issue a warrant only where it has jurisdiction. *See, e.g., United States v. Scott,* 260 F.3d 512, 515 (6th Cir. 2001); *United States v. Baker*, 894 F.2d 1144, 1146 (10th Cir. 1990) (per curiam); *see generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 4.2(f) (3d ed. 1996); Susan W. Brenner, *Need For Reciprocal Enforcement of Warrants and Subpoenas in Cybercrime Cases*, PROSECUTOR, Jan/Feb. 2003, at 29 (recognizing that states lack jurisdiction to enforce search warrants in other states even against individuals).

Taken together, these principles lead to but one conclusion. The issuance of a search warrant constitutes the exercise of judicial authority over the Tribe and its property. As with other judicial process, a tribe's sovereign immunity bars this judicial authority. Only Congress or a tribe can waive tribal immunity. No Act of Congress waives tribal immunity or confers jurisdiction on state courts to issue search warrants over either the Tribe or its property. The County does not contend otherwise. In fact, it now[12] concedes that Public Law 280 does not authorize the warrant in this case. County Br. at 25 n. 11. Public Law 280 does not apply here because it only authorizes state jurisdiction over crimes committed "by or against Indians" on reservations. *See Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) ("there is notably absent any conferral of state jurisdiction *over the tribes themselves*" in Public Law 280) (emphasis added); a*ccord Three Affiliated Tribes II*, 476 U.S. at 892 ('[w]e have never read Pub[lic] L[aw] 280 to constitute a waiver of tribal sovereign immunity, nor found Public Law 280 to represent an abandonment of the federal interest in guarding Indian self-governance").

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[12] The County argued below that Public Law 280 *did* authorize the search warrant in the Ninth Circuit, J.A. 154, and district court, J.A. 134.

Nor is the warrant against the tribal enterprise or tribal property authorized by the Compact negotiated pursuant to IGRA. IGRA requires that tribes like Bishop Paiute wishing to conduct "Class III gaming"—non-bingo type games such as slot machines, banking card games and the like—must conclude a compact with the State that must be approved by the Secretary of the Interior. 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3)(B). IGRA provides that a compact may cover a broad range of subjects concerning the conduct of Indian gaming, including the application of tribal and state criminal and civil laws regulating the gaming activity and the allocation of state and tribal criminal and civil jurisdiction necessary to enforce those regulatory laws. *Id*. § 2710(d)(3)(C). The Tribe's Compact with California provides for substantial regulatory jurisdiction over the Tribe's Class III games by the State and its agencies. *See* Part II.B, *infra*. However, the Compact does *not* require the Tribe to provide employee personnel records to county officials investigating violations of state welfare law or authorize execution of search warrants against the Tribe or its gaming operation.

Accordingly, because the Tribe has not waived its immunity and consented to the search warrant and because Congress has not authorized the state court to issue a warrant against the Tribe, its enterprise or its property, the state court was without jurisdiction to issue the warrant and the County and its officers had no authority to execute it.

II. OTHER PRINCIPLES OF FEDERAL LAW PRECLUDE EXECUTION OF A STATE COURT SEARCH WARRANT AGAINST THE TRIBE OR ITS PROPERTY

Separate, equally forceful principles of federal law protect the Tribe and its property from the execution of a state court search warrant. While the legal relationships between tribes, states, and the United States have been described by this Court as "anomalous" and "complex," *White Mountain*

Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (citation and quotation omitted), the law remains anchored in certain time-honored principles. First, "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) (construing U.S. CONST. art. I, § 8, cl. 3 and citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)); *accord Seminole Tribe v. Florida*, 517 U.S. 44, 62, 72 (1996). As a result, tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

For these reasons, the Court has determined that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). Thus, "in the absence of federal authorization, . . . all aspects of tribal sovereignty [are] privileged from diminution by the States." *Three Affiliated Tribes II*, 476 U.S. at 891. Importantly, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character . . . [which] exists only at the sufferance of Congress and is subject to complete defeasance . . . [but] *until Congress acts, the tribes retain their existing sovereign powers*." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added).

The Court has also recognized that Congress has acted "consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Bryan v. Itasca County*, 426 U.S. at 376 n. 2 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Because of the breadth of Congress' exclusive power over Indian Commerce, this Court has held that a federal statute need not *expressly*

preempt state jurisdiction over tribes and their members on reservations. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-17 (1987), *Three Affiliated Tribes II*, 476 U.S. at 885; *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

The Court has summarized the rules for federal preemption in the Indian context as follows:

> [A]ssertion of state authority over tribal reservations remains subject to "two independent but related barriers." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). First, a particular exercise of state authority may be foreclosed because it would undermine "'the right of reservation Indians to make their own laws and be ruled by them.'" *Ibid*., quoting *Williams v. Lee*, 358 U.S. at 220. Second, state authority may be preempted by incompatible federal law . . . (citations omitted).

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 147 (1984) (*Three Affiliated Tribes I*); *see also Rice v. Rehner,* 463 U.S. at 718-19; *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142-45. The search warrant in this case transgressed both these barriers. First, the warrant interferes with the Tribe's right to govern its internal affairs—by disrupting the Tribe's ability to control access to its confidential records and operate a vital enterprise on its reservation pursuant to its confidentiality policies. Second, Congress has already legislated in the area, setting forth a comprehensive structure—negotiation of a tribal-state compact—pursuant to which states can regulate tribal gaming enterprises. The absence of any compact provision authorizing a state court warrant in these circumstances precludes its validity.

A. The search and seizure of tribal property pursuant to a state court warrant interferes with the Tribe's right of self-government

The principle that Indian tribes have the right to self-government and regulatory power over their internal relations is established by two centuries of this Court's precedents. As the Court held in the historic Cherokee cases, an Indian tribe is a "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and retains the "right of self-government," free from state interference. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832). While the Court has modified the principles of the Cherokee cases, principally in matters involving authority over non-Indians, *e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), it has consistently recognized that with respect to its members on its reservation, a tribe has "the right . . . to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. at 220; and that state action may not infringe upon that right. *See also White Mountain Apache Tribe*, 448 U.S. at 141-43; *United States v. Wheeler,* 435 U.S. 313, 322 (1978); *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *McClanahan,* 411 U.S. at 171-73.

A more direct threat to a tribe's self-governing powers and political integrity can hardly be imagined than the seizure of tribal property by County officers over the Tribe's objections and in violation of tribal policies protecting the confidentiality of tribal records. The Tribe's policies prohibit third party access to tribal employee personnel records without the written consent of the employee to whom the records relate, except as provided by its gaming Compact or federal law. The court of appeals found that the Tribe's policies and procedures regarding its records are "in many instances based on federal and state guidelines." J.A. 155, 159. Like the

United States, *see* 5 U.S.C. §§ 552, 552a, and many states,[13] including California, CAL. GOV'T. CODE §§ 6250, 6254(c), the Tribe has exercised its governmental authority to adopt privacy policies to govern its employees and operations. The purpose of those policies is both to protect employees' privacy interests and encourage full and accurate disclosure of all relevant information by tribal employees in matters related to their employment.

Protecting information disclosed by its employees against release without their consent is especially critical for a highly regulated tribal gaming enterprise. The Tribe is required by IGRA and regulations issued under it by the National Indian Gaming Commission [14] to conduct background investigations

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[13] In *Detroit Edison Company v. National Labor Relations Board*, 440 U.S. 301, 318 n. 16 (1979), the Court found:

> A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record keeping activities of public employers and agencies. *See e.g.,* Privacy Act of 1974, 5 U.S.C. § 552a (written consent required before information in individual records may be disclosed unless the request falls within explicit statutory exception) . . . *See also* U.S. Privacy Protection Study Comm'n, Personal Privacy in an Information Society (1977) (recommending that all employers should be under a duty to safeguard the confidentiality of employee records).

(citations omitted).

[14] This Commission was established by IGRA to regulate Indian gaming. The Commission or its Chairman are empowered to approve tribal gaming ordinances, 25 U.S.C. § 2710(d)(1)(A)(iii), temporarily and permanently close tribal games, *id.*, § 2713(b), inspect all papers, books and records and subpoena documents relating to tribal gaming, *id.*, §§ 2706(b)(4), 2715, and promulgate regulations governing tribal gaming. *Id.* § 2706(b)(10). *See generally* 25 C.F.R. Part 500. Under its authority to issue regulations, the Commission has promulgated detailed minimum internal control standards for all tribal gaming to safeguard the honesty and financial integrity of tribal games. 25 C.F.R. § 542.

of and then license virtually all its gaming employees.[15] 25 U.S.C. §§ 2710 (b)(2)(F), 2710(d)(2)(A); 25 C.F.R. §§ 556.4, 556.5, 558.3. Under these provisions, after conducting complete background investigations, the Tribe must submit the investigations and proposed licenses to the Commission,[16] which may object to or suspend any tribal license. 25 C.F.R. §§ 558.4, 558.5; *see also* 25 U.S.C. § 2710(b)(2)(F). The Commission must treat this information as confidential, except for providing any information that indicates a violation of federal, state or tribal law to appropriate enforcement authorities. 25 U.S.C. § 2716. *See* United States Br. at 27.

Enforcement of state court process against Indian tribes or tribal property in their operation of governmental programs and activities would unavoidably and irrevocably interfere with tribes' right of self-government. In this case, enforcing the search warrant would subordinate tribal policies to protect the confidentiality of tribal records to potentially inconsistent state law and state judicial processes.[17] The County's single-minded focus on its perceived law enforcement needs ignores the host of legitimate policy reasons that a tribal government might have for withholding sensitive information from State and County authorities. The United States and the

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[15] The employees who must be investigated and licensed are broadly defined in the Commission's regulations. 25 C.F.R. § 502.14. The Tribe has adopted stricter requirements and mandates the licensing of all employees.

[16] The Tribe must retain those records and investigative reports for at least five years, and at least three years after termination of employment for any key employee. 25 C.F.R. §§ 558.1(b), 571.7.

[17] In *Touhy*, the Court recognized the important interest that governments have in their records, stating "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious." *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951).

states, including California, have adopted numerous statutes addressing access to confidential public records[18] in which the federal and state governments have made deliberate and specific decisions on the precise circumstances under which confidential information may be released—even when access to the records is sought for law enforcement purposes. These statutes carefully balance the need to preserve the privacy of the records as necessary to carry out the government's objectives with the need to make the records available for other purposes.

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[18] Federal statutes protect the confidentiality of records in the government's control, limiting even law enforcement access to such records. *E.g.* 26 U.S.C. § 6103 (protecting confidentiality of federal tax returns and strictly limiting their dissemination to other federal and state agencies, allowing their release to state agencies for only specifically enumerated purposes and uses); 42 U.S.C. § 290dd-2(c) (strictly limiting search and seizure of records relating to substance abuse treatment, and barring seizure of such records for purposes of criminal investigation of the patient).

California has also adopted a variety of laws defining specific terms and conditions when confidential information may be released, even for law enforcement purposes. *See e.g.*, CAL. REV. & TAX. CODE §§ 19542 - 19566 (protecting the confidentiality of tax returns subject to specifically enumerated exceptions); CAL. HEALTH & SAFETY CODE §§ 120292, 121025(d), 121050 (generally prohibiting release of public health records regarding AIDS in any criminal, civil or administrative proceeding except where necessary to protect health and safety); CAL. PENAL CODE §§ 1524 (c), (d) (restricting search warrants for documentary evidence in the possession of any attorney, physician, psychotherapist or clergyman who is not the subject of a criminal investigation, by requiring appointment of a special master to accompany execution of the warrant, and the placement of any records designated as privileged under seal subject to further special judicial proceedings); CAL. HEALTH & SAFETY CODE §§ 11977(c)(5), (d) (extending the special requirements of Penal Code § 1524(c) to search warrants for records of narcotic and substance abuse patients, whose records cannot otherwise be used by law enforcement to initiate or substantiate criminal charges against the patient).

Indian tribes must do precisely the same in operating their governments. Tribes provide a myriad of services on their reservations. In so doing they often operate federal programs on reservations pursuant to intergovernmental agreements with the United States authorized by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458bbb-2. Tribes, for example, contract with federal agencies to operate hospitals, health clinics, schools, police and law enforcement programs, and public assistance programs. United States Br. at 26. The Bishop Paiute Tribe (either directly or through intertribal organizations) operates health care facilities (providing clinical outpatient services, dental care, substance abuse counseling, dialysis treatment, and optometry), educational (including head start and job training), and child protection, elder care, welfare,[19] and low and moderate income housing programs. Like the states and the federal government, tribes necessarily collect and main-

[19] As noted by the Government, United States Br. at 18 & n. 9, one of the government programs currently provided by the Bishop Paiute Tribe is the federally-funded TANF program, Temporary Aid to Needy Families, 42 U.S.C. §§ 601-681, under which the Tribe provides basic welfare services. Tribes operating TANF programs have an independent interest in and obligation to prevent welfare fraud. 45 C.F.R. § 286.75(f). And consistent with Congressional recognition of tribal rights of self-government independent of state jurisdiction, the statute authorizing the TANF program encourages states to enter into cooperative agreements with tribes on issues of common concern in implementing their respective TANF programs, s*ee* 42 U.S.C. §§ 654(7), (33), which offers another mechanism by which tribes and counties or states could exchange information related to welfare fraud. In addition, by this statute, Congress recognized that tribes may exercise jurisdiction to issue child support orders, and required that states and tribes give full faith and credit to child support orders issued by the other. *See* 28 U.S.C. § 1738B(b), 42 U.S.C. § 666(a)(9). *See also* S. REP. NO. 103-361, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3259, 3263.

tain highly confidential information about their employees as well as the individuals receiving these tribal services.[20]

In this case, moreover, the County had ample alternatives by which it might have obtained these records and which would not have interfered with the Tribe's right to govern itself.[21] *See Oklahoma Tax Comm'n v. Citizen Band Pota-*

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[20] These include: patients' medical records, Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. §§ 2401-2471; records of all persons employed in positions of contact with children, Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201-3210, and reports of alleged child abuse and prevention of family violence, *id.* §§ 3203, 3205, 3210; student performance records, Tribally Controlled School Grants Act, 25 U.S.C. §§ 2501-2511; and adoption and foster care placement records, Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963.

[21] The Court has determined that "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Cabazon*, 480 U.S. at 215 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). These exceptional cases have most often permitted state jurisdiction to ensure the collection of sales taxes owed a state by non-Indians purchasing cigarettes and other commodities on reservations from tribal or Indian businesses. In these cases, the Court has concluded that the State's governmental interest is substantial and the burden on the countervailing tribal and federal interests "minimal." *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980); *see also New York Tax Dep't. v. Milhelm Attea & Bros.*, 512 U.S. 61, 71-72 (1994).

No exceptional circumstances that would justify state jurisdiction are presented here for several reasons. First, both the tribal and federal interests protecting the Tribe's operation of its gaming enterprise and enforcement of its privacy policies as to its tribal member employees are very substantial, as discussed *supra*. *See also Cabazon*, 480 U.S. at 216-19. Second, the State has a number of less intrusive alternatives to obtain the information. Third, Congress in IGRA enacted comprehensive legislation addressing how jurisdictional issues may be resolved with respect to tribal gaming operations. *See* Part II.B *infra*. And fourth, the chief interest the County asserts to support its claimed

watomi Indian Tribe, 498 U.S. 505, 514 (1991) ("sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). As the court of appeals determined, J.A. 161, the County could have obtained a search warrant for the property of the individual tribal employees under investigation. Or the County could have provided the Tribe with the consent of the employees for the release of the records found in the welfare application that the Tribe indicated that it was willing to accept. California's own laws require a welfare recipient to waive the privacy of employment records. *See* J.A. 161. If the County had provided it to the Tribe, this entire confrontation would have been avoided.

Other options are also available which would have shown proper respect for the Tribe's government. The State might seek to amend its Compact with the Tribe to add provisions governing the sharing of this kind of information in the possession of the gaming enterprise.[22] Alternatively, the State and County might avail themselves of the Compact provision that requires the Tribe and State to confer and agree on protocols to release information to other law enforcement agencies. J.A. 42 (Compact 7.4.3(b)(ii)). Finally, the County could seek to negotiate a cooperative intergovernmental agreement with the Tribe concerning the exchange of records

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authority is that otherwise reservations would become lawless enclaves. As we show in Part III, *infra*, that is not so of the comprehensive framework Congress has enacted for law enforcement on reservations.

[22] The Compact has a term of twenty years, but may be amended at any time by agreement of the parties. J.A. 65-66 (Compact 11.2.1, 12.1). Certain provisions are specifically subject to renegotiation prior to the expiration of the term. J.A. 64, 19, 66 (Compact 10.8.3(b), 4.3.3, 12.2).

and sharing of resources needed for effective law enforcement concerning welfare fraud, as is common between states and tribes.[23]

Contrary to the County's argument, County Br. at 27-29, *Nevada v. Hicks* is fully consistent with protecting the Tribe from the state court warrant in this case. In *Hicks,* "*[s]elf*-government and *internal* relations . . . [were] not directly at issue, since the issue . . . [was] whether the Tribe's law will apply, not to their own members, but to a narrow category of outsiders." 533 U.S. at 371 (emphasis in original). *Hicks* reinforces that tribes retain inherent authority "necessary to protect tribal self-government or to control internal relations." *Id*., at 359.[24] Even in cases where the Court has denied tribal

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[23] "Some States have formally sanctioned the creation of state-tribal agreements [and] there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement." *Hicks*, 533 U.S. at 393 (O'Connor, J., concurring) (citations omitted); *see also People v. Superior Court (Jans),* 224 Cal. App. 3d 1405, 1408 (1990) (holding that an Indian tribe comes within Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, Cal. Penal Code §§ 1334-1334.6). *See generally* Brief of *Amicus Curiae* National Congress of American Indians *et al.* (hereinafter "NCAI Br."); Brief of *Amicus Curiae* State of New Mexico *et al.*

[24] The *Hicks* Court relied upon three nineteenth-century precedents to find a limited exception in that case to the general rule that states have no jurisdiction over reservation Indians: *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); and *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885). None of these cases sustained service of state process on the United States or a tribe and, like *Hicks*, none undermines the longstanding rule guarding the right of a tribe, as a government, to be free from state intrusion. *See Utah & Northern*, 116 U.S. at 31 (limiting the Idaho territory's process, which "may run into an Indian reservation . . . where the subject matter or controversy is otherwise within their cognizance" to "matters not interfering with" federal protection of the tribe and holding that "[t]o uphold [territorial] jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the Treaty stipulations, and

jurisdiction to regulate the on-reservation activities of non-Indians, the Court has recognized an exception—and thus the existence of tribal jurisdiction—where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). As the Court observed in *Strate*, this exception allows such tribal authority as "is necessary to protect tribal self-government or to control internal relations" and permits tribes to "make their own laws and be ruled by them." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). In the operation of its gaming enterprise on its reservation in the manner provided by IGRA and enforcement of its policies protecting the confidentiality of its records dealing with its tribal members employed there, the Tribe is exercising this federally protected right to govern its internal affairs.

B. State authority to issue and execute this warrant is incompatible with federal law

As this Court explained in *Seminole Tribe*, 517 U.S. 44, 73-74 (1996), IGRA provides a "carefully crafted and intricate remedial scheme" allowing states a power withheld from them under the Constitution to assume jurisdiction over tribal gaming through the compacting process. *See also id*. at 58. IGRA also specifically waives tribal sovereign immunity and allows states to sue tribes for violations of compacts. 25 U.S.C. § 2710(d)(7)(a)(ii). California did not avail itself of this procedure to authorize execution of state court search warrants on the Tribe and its enterprise. The lack of state

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might thus defeat provisions designed for the security of the Indians"); *Fort Leavenworth*, 114 U.S. at 533 (upholding service of process on a corporation operating on a federal military reservation related to matters arising outside the reservation but within the State where the process did not "interfer[e] . . .in any respect with the Supremacy of the United States" over the fort).

authority pursuant to the procedures provided in this comprehensive statute establishes that state jurisdiction to execute the search warrant on the Tribe is preempted by federal law. *See also Three Affiliated Tribes II*, 476 U.S. at 885 ("where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law").[25]

The Bishop Paiute Compact provides considerable jurisdiction to California and its agencies over the Tribe's gaming enterprise in other subject areas. For example, it permits the State to participate in a dual licensing process for gaming employees *in addition to* the tribal-federal licensing proce-

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[25] The Senate Committee Report on the bill that became IGRA evinced an intent to strictly limit state authority over tribal gaming facilities to the powers agreed to in the Compact:

> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.
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> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S.555 [which was enacted as IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.

S. REP. NO. 100-446 (1988), at 5-6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76. The courts of appeals have uniformly concluded that states have no authority over Indian gaming enterprises except as provided in a compact. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th Cir. 1997); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 545-47 (8th Cir. 1996); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990).

dure described *supra*. J.A. 37-38 (Compact 6.5.6). The Tribe must file all relevant personnel information and background investigations of employees with the State Gaming Agency (as well as the National Indian Gaming Commission), which must itself also license key tribal employees on a biennial basis. J.A. 27-28, 32-34, 37-40 (Compact 6.4.4., 6.4.8, 6.5.6). The State Gaming Agency may also inspect the enterprise and copy any books, papers and records at any time to monitor compliance with the Compact. J.A. 41 (Compact 7.4). The Compact provides, however, that the State Gaming Agency must keep this information confidential and may only release it with the consent of the employee. J.A. 32-34 (Compact 6.4.8) (requiring releases from employees permitting furnishing of background information to State Gaming Agency); J.A. 43 (Compact 7.4.3(b)) (requiring the State Gaming Agency to "exercise utmost care in the preservation of the confidentiality of any and all information and documents received from the Tribe and . . . apply the highest standards of confidentiality expected under state law to preserve such information and documents from disclosure"); J.A. 43 (Compact 7.4.3(c)) (records received from Tribe in compliance with the Compact are exempt from disclosure under California Public Records Act).

The Compact covers a broad range of other subject areas as well and grants the State substantial authority in those areas. It requires the Tribe to adopt standards for building and safety codes, food and beverage handling and water quality and drinking water standards that are as stringent as state standards, and to allow state and county inspectors access to the tribal enterprise to ensure compliance with these provisions. J.A. 24-26, 56-57 (Compact 6.4.2, 10.2(a)-(c)). State inspecttors are also given access to the Tribe's facility to ensure compliance with federal workplace and occupational safety and health standards. J.A. 57 (Compact 10.2(e)). The Tribe is required to participate in the State's workmen's compensation program or adopt a comparable one of its own, J.A. 59-60

(Compact 10.3(a)), and to adopt a specific labor-management statute as a condition to the Compact's validity, J.A. 61, 78 (Compact 10.7, as amended). The Compact also prescribes standards and procedures concerning tort liability, employment discrimination, check cashing, unemployment compensation, withholding state income taxes for certain employees, and off-reservation environmental impacts that either apply or generally mirror state law. J.A. 57-65 (Compact 10.2(d), 10.2(g), 10.2(h), 10.3(b), 10.3, 10.8).

As noted, however—although California could have negotiated with the Tribe for such an arrangement—the Compact does *not* subject the Tribe or its enterprise to search warrants or other legal process from state courts. California's failure to provide itself this authority by the mechanism provided in IGRA for states to assume jurisdiction over the enterprise—a negotiated compact between the State and Tribe—demonstrates that this warrant is preempted by federal law.

III. CONGRESS HAS ENACTED A COMPREHENSIVE FRAMEWORK FOR LAW ENFORCEMENT ON INDIAN RESERVATIONS WHICH BELIES THE COUNTY'S ASSERTION THAT UNLESS STATES HAVE AUTHORITY TO ISSUE AND EXECUTE SEARCH WARRANTS UPON A TRIBE AND ITS PROPERTY, RESERVATIONS COULD BECOME LAWLESS ENCLAVES

While it is true that states have extensive law enforcement powers and responsibilities in our federal system, County Br. at 31-34, under the Indian Commerce Clause of the Constitution "the regulation of Indian Commerce . . . is under the exclusive control of the Federal Government." *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996); *see also County* of *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law"); *Montana v.*

Blackfeet Tribe, 471 U.S. 759, 764 (1985). In the exercise of its plenary and exclusive Indian Commerce power, Congress has provided for federal prosecution of most crimes occurring on reservations. 18 U.S.C. §§ 1152, 1153. *See, e.g., United States v. Antelope*, 430 U.S. 641 (1977). Tribes, of course, have concurrent jurisdiction to prosecute crimes by Indians on reservations. *See United States v. Wheeler,* 453 U.S. 313, 323-24 (1978). Congress has also permitted states to assume considerable jurisdiction over Indians on reservations. This federal, state and tribal authority eliminates any possibility that reservations can become havens for fugitives or lawless activities. *See* United States Br. at 16-19; *see generally* NCAI Br.

For example, in Public Law 280, 18 U.S.C. § 1162, Congress has authorized California and a number of other states to exercise criminal jurisdiction "over offenses committed by or against Indians" on reservations. In states not covered by Public Law 280, the United States has jurisdiction to prosecute these criminal offenses. The United States also has jurisdiction to prosecute illegal gambling on reservations by tribes or anyone else (unless a compact places this jurisdiction in the State), 18 U.S.C. § 1166, *see* United States Br. at 17, and to prosecute thefts from Indian gaming establishments by their officers, employees or any other person. 18 U.S.C. §§ 1167, 1168.

This Court has also long recognized that states may try and punish offenses committed by non-Indians against non-Indian victims on reservations because no federal or tribal interests are implicated by such crimes. *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881). Most recently, the Court in *Hicks* recognized a criminal investigative power in states and their law enforcement officials over tribal members and other individuals on reservations. This Court also held Indians or tribes outside reservations are generally subject to state law. *E.g., Mescalero*

Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Finally, as detailed in the NCAI *amicus* brief, States also have substantial investigative powers arising from the numerous cooperative agreements that have been negotiated to ensure effective law enforcement in Indian country. *See generally* NCAI Br.

These broad federal and state powers conclusively refute the claims by the County and its supporting *amici* that unless state law enforcement officers are allowed also to execute search warrants against tribal governments and their property, reservations would somehow become lawless enclaves for fugitives and criminals. County Br. at 23-24. If an individual Indian commits a crime on a reservation in California, the State can prosecute that crime pursuant to Public Law 280, because Congress has authorized that jurisdiction. If a non-Indian commits a crime on a California reservation, California also can prosecute that crime either under Public Law 280 or under the Court's holdings in *Draper* and *McBratney*, depending upon whether the victim is Indian or non-Indian. If Indian or non-Indian individuals—such as "the Washington area sniper suspects," County Br. at 23—should commit an off-reservation offense and then seek refuge in a casino or elsewhere on a reservation, California can arrest them pursuant to Public Law 280.[26] In a non-Public Law 280 state, the United States could arrest the fugitive. Finally, *Hicks* recognizes some state power to execute search warrants on individuals or their property on reservations when investigating crimes over which the state has jurisdiction. These

[26] This case involves the protection of a tribe, its governmental operations and property used in connection with those operations from seizure or interference by the State. It does not concern individuals who occupy tribal lands or facilities. Tribal immunity does not extend to such individuals. Whether federal law might preclude state authority over some individual Indians on tribal land would depend on the particular factual circumstances and the relevant federal laws involved.

extensive federal and state law enforcement powers preclude any danger that reservations could become havens for criminals or criminal activities. If any changes in this framework should become necessary, these should be made by Congress.

IV. THE TRIBE IS ENTITLED TO COMPENSATORY DAMAGES IN THIS CASE UNDER 42 U.S.C. § 1983.

The Tribe's Complaint contains a cause of action seeking compensatory damages against the County and its officers under 42 U.S.C. § 1983.[27] As we show below, compensatory damages in this case are appropriate under Section 1983.

The County raises two issues in resisting the Tribe's claim to damages that were not briefed or considered at all in the courts below. This Court should accordingly not address them here. The County raised the question of whether an Indian tribe is a "person" under Section 1983 for the first time in its petition. This is a serious issue and the County offers no reason why it failed to present this contention below. *See*

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[27] The Tribe also pled separate causes of action for declaratory and injunctive relief because: (1) the warrant exceeded the County's jurisdiction under federal law, including Public Law 280, and impermissibly interfered with the Tribe's right to self-government under federal law (Count 1); (2) IGRA preempted any authority the State might have to execute a search warrant on the Tribe's gaming enterprise (Count 2); and (3) federal law barred any future warrants and required return of the Tribe's records (Count 4). J.A. 105-110. Neither the County nor its supporting *amici* challenge the jurisdiction of the courts below to grant the Tribe declaratory and injunctive relief under 28 U.S.C. § 1331. Such jurisdiction clearly exists to declare unlawful or enjoin actions by State or County officials contrary to federal law or not authorized by Congress. *E.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *see generally Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S.114 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

United States v. United Foods, Inc., 533 U.S. 405, 416-17 (2001); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981)(stating that although an argument was presented in the certiorari petition, "that question was not raised in the Court of Appeals and is not properly before us"). In addition, the County has significantly reformulated its theory concerning violation of the Fourth Amendment, claiming for the first time in its merits brief that the Tribe as a sovereign is not protected under the Amendment. This contention also should not be considered for the first time here. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

A. The Tribe is a "person within the jurisdiction" of the United States"

Section 1983 was enacted for the broad purpose of remedying deprivation of federal rights by persons acting under the authority of state law. Tribes have been especially vulnerable to infringement of their federally protected rights by states. This was true at the time Section 1983 was enacted in 1871, *see Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and it is true today, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *California v. Cabazon Band of Mission Indian*s, 480 U.S. 202 (1987); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

To fulfill its purposes, Section 1983 has been held to authorize suits by a broad range of potential plaintiffs, including corporations, *Grossjean v. American Press Co.*, 297 U.S. 233, 244 (1936), labor unions, *Allee v. Medrano*, 416 U.S. 802, 814 (1974), and aliens residing in the United States, *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

The Tribe is of course a sovereign government, not an individual, but—contrary to the County's argument, County Br. at 36-38—its governmental status should not bar it from suing as a "person" under Section 1983. Lower courts have held that a State may bring suit under Section 1983 in its *parens patriae* capacity, *see Pennsylvania v. Porter*, 659 F.2d 306, 316 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), which the Tribe has done here, J.A. 96. Various courts of appeals that have addressed the question have treated tribes as persons for purposes of Section 1983, *Native Village of Venetie v. Alaska*, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998); *see also, Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1159 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), as have most federal district courts, *e.g., Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F.Supp. 1118, 1127 (D. Minn. 1994), *aff'd on other grounds*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Lac Courte Oreilles Band v. Wisconsin*, 663 F. Supp. 682, 691 (W.D. Wis. 1987), *appeal dismissed*, 829 F.2d 601 (7th Cir. 1987).

The legislative history of the 1871 Civil Rights Act gives no indication that Congress intended to exclude Indian tribes from the category of "persons" capable of bringing an action under the Act. The 1870 Senate Judiciary Committee Report, S. REP. NO. 41-268 (1870), relied on by the United States, in fact provides no evidence of such an understanding. The Report concluded that *individual* Indians were not "persons . . . subject to the jurisdiction" of the United States within the meaning of the *citizenship clause* of Section 1 of the Fourteenth Amendment, and therefore were not citizens. *Id*. at 1. Similarly, in *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court held that individual Indians were not "persons . . . subject to the jurisdiction," *id*. at 102, of the United States as that phrase is used in the Fourteenth Amendment, and therefore did not become citizens of the United States under that Amendment. This was because they "owed immediate allegiance to their

several Tribes and were not part of the people of the United States." *Id*. at 99.[28] But in contrast to individual Indians, at the time Section 1983 was enacted, tribes were surely within the jurisdiction of the United States pursuant to the constitutional powers "to regulate Commerce . . . with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and conclude treaties, *id*. art. II, § 2. *See also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribes are not foreign states but domestic dependent nations "completely under the sovereignty and dominion of the United States").[29]

This Court's holding that a state is not a "person" *subject to suit* under Section 1983, *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), does not preclude an Indian tribe from *bringing suit* under Section 1983. On the contrary, *Will*

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[28] Tribal members, having been made citizens by Congress, can sue as plaintiffs today under Section 1983. *See* United States Br. at 10.

[29] The United States places inordinate emphasis on a statement at the end of a report by the Senate Judiciary Committee in 1870 that Indian tribes "are not, within the meaning of the fourteenth amendment, 'subject to the jurisdiction of the United States.'" *See* United States Br. at 9 (quoting S. REP. NO. 41-268 (1870)). The specific question that the 1870 Report addressed and analyzed was whether individual Indians were "subject to the jurisdiction of the United States" within the meaning of the citizenship clause of the Fourteenth Amendment. The Judiciary Committee did not address—and could not have addressed—the question whether Indian *tribes* were "subject to the jurisdiction of the United States" within the meaning of that clause, because tribes were neither "born" nor "naturalized" and thus could not possibly have been citizens.

In any case, it is clear that tribes today are "subject to the jurisdiction of the United States" by virtue of the plenary power of Congress. This Court so held in *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) and *Lone Wolf v. Hitchcock*, 187 U.S. 533, 565 (1903), and has continued since then to sustain plenary—though not absolute or unreviewable—federal jurisdiction over tribes and tribal Indians. *E.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-86 (1977). There is, accordingly, no reason to read Section 1983 as excluding tribes today as potential plaintiffs.

shows that whether a sovereign entity like a state comes within the meaning of "person" as used in a given statute requires a close contextual analysis of congressional purpose, the legislative context, sovereign immunity doctrine, and whether a particular construction would subject the entity to liability and potentially alter the constitutional balance. *Id*. at 64-67, 71 n.10. Applying this contextual approach, the *Will* Court held that subjecting states to liability under Section 1983 would disturb the states' Eleventh Amendment immunity and alter the federal-state balance, and that the legislative history did not indicate such a purpose on the part of Congress. *Id*. at 65-67.

This Court has held that Congress intended Section 1983 to provide a powerful civil remedy "against all forms of official violation of federally protected rights." *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 700-01 (1978), and should be "broadly construed" to achieve its remedial purposes. *Id.* at 684-85. In addressing similar statutes, this Court has construed those "persons" for whom the statutory remedy was made available as including sovereign entities. In *Georgia v. Evans*, 316 U.S. 159 (1942), for instance, this Court held that a State constituted a "person" capable of bringing a treble-damages suit under Section 7 of the Sherman Act. *Id*. at 161-62. The Court concluded that "[n]othing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State," from "all redress . . . when mulcted by a violator of the Sherman Law, merely because it is a State." *Id.* at 162-63. Similarly, in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), this Court held that a foreign government was a "person" authorized to bring a treble-damages suit under Section 4 of the Clayton Act, "[i]n light of the [antitrust] law's expansive remedial purpose." *Id*. at 313. Section 1983 should likewise be read to allow Indian tribes to sue as "persons" because that best comports with the remedial purposes of Section 1983 to protect federal rights

against infringement by those purporting to act under color of state law.

B. The County and its officers deprived the Tribe of "rights, privileges or immunities secured by the Constitution and laws" of the United States

The Ninth Circuit correctly held that executing the search warrant violated the Tribe's rights because it was beyond the County's jurisdiction. J.A. 147. Since the County did lack jurisdiction for the reasons discussed *supra*, and because the County had a number of available alternatives for securing this information in a manner that would not interfere with the Tribe's right to self-government, search and seizure of the Tribe's property was "unreasonable" under the Fourth Amendment.[30]

The Ninth Circuit rejected the Tribe's argument that the Tribe's right to self-government also provided it a right to sue under Section 1983 because that court's own precedent had rejected that argument. J.A. 178 n. 7 (citing *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661-663 (9th Cir. 1989). In fact, however, infringement of the Tribe's right to self-government and its sovereign immunity from state court processes are rights under the Constitution and laws of the United States enforceable under Section 1983.

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[30] For the first time in this case the County questions whether the Tribe is "within the concept and meaning of 'the people' as that term is used in the Fourth Amendment," County Br. at 40, as does the Government, United States Br. at 28-29, relying on this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Because this issue was not raised below, it should not be considered in this Court for the first time. *E.g.*, *United Foods*, 533 U.S. at 416-17. In any event, *Verdugo-Urquidez* is inapposite since it concerned whether a citizen and resident of Mexico was protected by the Fourth Amendment from seizure of his property in Mexico by federal drug enforcement officers working in concert with Mexican authorities.

First, these rights are within the protection of the Indian Commerce Clause, because "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause . . . [since] the States . . . have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996). This Court has held that Section 1983 creates a cause of action for violations of the Commerce Clause. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991). In *Dennis*, this Court specifically rejected the view that the Commerce Clause only allocates power between the United States and states. Rather, the Court held it creates rights by limiting state power to unduly burden or restrict commerce protected by the Clause. *Id*. at 446-49.

Second, these rights are protected by federal common law and statutes, and thus the "laws" of the United States. The statutory grant of jurisdiction of "all civil actions arising under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331, includes "claims founded upon federal common law as well as those of a statutory origin." *Illinois v. City of Milwaukee*, 406 U.S 91, 100 (1972). In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), this Court, citing *City of Milwaukee*, held federal common law governs the extent of a tribe's power to regulate non-Indian activities, and thus such cases are properly brought under Section 1331. *Id*. at 850-53; *accord County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985). In the present case, the Tribe claims that federal law—the Tribe's immunity from suit and its right to self-government—curtails the power of the County to execute a search warrant on it. The Tribe's right to be free from that exercise of power is accordingly protected by "laws" of the United States and is properly asserted under 42 U.S.C. § 1983. As the Court observed in *Dennis:*

> A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "*any* rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.) Accordingly, we have "repeatedly held that the coverage of [§ 1983] must be broadly construed." The legislative history of the section also stresses that as a remedial statute, it should be "liberally and beneficently construed."

498 U.S. at 443 (citations and footnotes omitted). *See also Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 700-701 (1978) (Section 1983 "provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights").

Moreover, the Tribe has the right under IGRA to be free of state control of its gaming operation except for such control that it has agreed to in its Compact with the State. Just as the collective bargaining process under the National Labor Relations Act is protected from state infringement, *see Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), the bilateral Compact under IGRA is the exclusive mechanism by which tribal gaming can be made subject to state authority, and the Tribe thus has a right pursuant to federal law to be free from any additional interference in its gaming operations by the County, which right can be asserted under Section 1983.

C. The Sheriff and District Attorney lack qualified immunity

The County and its supporting *amici* as well as the United States argue that even if the facts alleged by the Tribe show that execution of the search warrant violated the Tribe's federally protected rights—thus satisfying the initial threshold inquiry in determining whether qualified immunity applies, *see Saucier v. Katz*, 533 U.S. 194 (2001)—the second part of the test this Court established in *Saucier* is not met because the Tribe's rights were not "clearly established," *id*. at 201, at

the time the warrant was executed. *See also Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002).

To prevail under this standard, the Tribe does not need to identify case law with "'materially similar' facts," *Hope,* 536 U.S. at __, 122 S.Ct. at 2515-16, and the "very action in question," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), need not have been determined to be unlawful. Although no court had specifically prohibited executing a state court search warrant against a tribal government, sometimes the "easiest cases don't even arise." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citations omitted).

The state of the law in the Ninth Circuit as of March 2000 gave the sheriff and district attorney "fair warning" that the warrant was unlawful, such that no reasonable district attorney would have sought the warrant against the Tribe or its property and no sheriff should have executed it. In the few reported cases where states had sought to serve compulsory process on tribes, courts had denied this authority to states. J.A. 178-79; *see also Sycuan Band of Mission Indians v. Roache*, 788 F.Supp 1498, 1508 (S.D. Cal. 1992), *aff'd* 54 F.3d 535 (9th Cir. 1995); *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990) (per curiam).[31] Moreover, in January 2000, two months before these search warrants were executed, the Ninth Circuit held that a state court had no jurisdiction to issue a search warrant on an individual Indian on a reservation when that individual was charged with an

[31] *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) invalidated a federal court subpoena *duces tecum* issued on behalf of a defendant in a federal criminal prosecution to a tribal government official for confidential medical information in a tribe's possession. While the United States suggests *James* is "flawed," United States Br. at 30, the law in the Ninth Circuit as of 2000 was that the power of even federal courts to serve compulsory process on Indian tribal governments was significantly limited, and state court authority to serve process on Indians as well as tribes on reservations was precluded.

off-reservation crime. *State of Nevada v. Hicks*, 196 F.3d 1020, 1028 (9th Cir. 2000), *rev'd*, 533 U.S. 353 (2001).[32]

There was, finally, no emergency where a quick decision on the spot was required. The Tribe's attorney had advised the district attorney of the Tribe's confidentiality policies and the County's lack of jurisdiction, and a number of less intrusive methods were available for the County to obtain the information. In these circumstances, a reasonable sheriff and district attorney would not have sought and forcibly executed a search warrant.

CONCLUSION

The judgment of the court of appeals should be affirmed.

[32] The County claims that two other decisions—*United States v. Snowden*, 879 F.Supp. 1054 (D. Or. 1995), and *United States v. Velarde*, 40 F.Supp.2d 1314 (D.N.M. 1999)—are inconsistent with the Ninth Circuit's conclusion that the contours of the law were clearly established. County Br. at 43-44. In *Snowden* and *Velarde* however, the courts found that the tribe had voluntarily waived its immunity with respect to the records subject to subpoena. *Snowden*, 879 F.Supp. at 1057; *Velarde*, 40 F.Supp. 2d at 1317.

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