No. 02-281

In The
Supreme Court of the United States

INYO COUNTY, 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; AND BISHOP PAIUTE GAMING CORPORATION,

Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, FLORIDA, KANSAS, MISSOURI, NEBRASKA, NEVADA, OREGON, SOUTH DAKOTA, TEXAS AND UTAH IN SUPPORT OF THE COUNTY OF INYO, ET AL., PETITIONERS

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

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BRIEF OF *AMICI CURIAE*

The States of California, *et alia*, respectfully submit their brief as *amici curiae* through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The *Amici* States address only the first two questions presented by Petitioners.

INTEREST OF THE *AMICI CURIAE*

The decision below poses a real threat to the integrity of *Amici* States' sovereignty reserved by them under the Constitution, and to their authority to discharge their day-to-day governmental responsibility to investigate criminal activity. *Amici* States are obligated to enforce their criminal laws outside Indian country and to provide governmental services to non-Indians; in addition, the *Amici* States with authority under Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, must also enforce their criminal laws within Indian country. All *Amici* States are thus required to have a substantial and vital presence within Indian country. While this presence regularly exposes states to tribal assertions of sovereignty, and likely always will, tribal sovereignty should not be permitted to interfere with core state functions such as the investigation of criminal activity.

The court of appeals would establish another twist in the convoluted history of jurisprudence concerning state jurisdiction in Indian country. The United States Constitution grants to the federal government authority over Indian affairs. In the exercise of this authority, the federal government has, throughout the history of the United States, implemented dramatic shifts in its Indian policy

which have caused jurisdiction over Indian country to be among the most confounding issues in tribal-state relations. Following independence, the United States retained the British Crown's concept of Indian country, which drew a line along the Appalachian Ridge beyond which the sovereign claimed to exercise no political control. Later, the federal government segregated tribes by placing them on reservations that non-Indians were prohibited from entering without permission from the federal government. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (denying Indians personhood under the Fourth Amendment). Next, the federal government attempted to assimilate tribes into non-Indian society by abolishing reservations and tribal governments and selling tribal land to individuals. General Allotment Act, 24 Stat. 388 (1887). In the first half of the Twentieth Century, when the failure of the "allotment policy" was clear, the federal government began restoring its relations with tribal governments and returning lands to tribes. Indian Reorganization Act of 1934, 48 Stat. 984 (1934). The effects of these policy fluctuations were enormous. Under the allotment policy, for example, a substantial portion of reservation land passed out of tribal ownership. *See generally* Francis Paul Prucha, The Great Father 896 (1984) (summarizing the types and amounts of land transferred by 1934). Accompanying this destruction of exclusive tribal territory, was the elimination of tribal members' political separation through individual grants of United States citizenship in conjunction with the allotment process and, eventually, the extension of citizenship to all Indians in 1924. Act of June 2, 1924, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

These shifts in federal Indian policy, and their resultant transformation of Indian country, have resulted in a

jumbling of Indian and non-Indian lands, and a blurring of the laws that govern jurisdiction within Indian country. Non-Indians residing on former tribal lands may find themselves subject to claims of regulatory or taxing authority by tribal governments in which they have no right to participate. Meanwhile, tribal governments do not provide the full range of services and protections one generally expects a state government to provide. For example, tribal governments are barred from enforcing criminal laws against non-Indians. These voids are not insignificant. The 1990 census indicates that approximately 800,000 persons resided within Indian reservations or on trust land, of whom only 54.1 percent were identified as American Indian, Eskimo or Aleut. Bureau of Census, Dep't of Commerce, 1990 Census of Population, General Population Characteristics, United States 541 (Nov. 1992). In addition to non-Indians, tribal members also look to states and their political subdivisions to provide governmental services, including the provision of law enforcement services.

The decision of the Ninth Circuit Court of Appeals below presents these concerns in stark relief. The execution of a search warrant, issued on probable cause, in the course of an investigation of an off-reservation crime, for the search of tribal buildings and for the seizure of tribal property within the boundaries of Indian country, would appear to fall squarely within what this Court described only last year as the "inherent" authority of the State. *Nevada v. Hicks*, 533 U.S. 353, 366 (2001) ("*Hicks*"). Yet the decision of the court of appeals, that tribal *sovereign immunity* bars the execution of such a search warrant, has undermined *Hicks*' clear guidance – and in the process thickened the jurisdictional haze – hampering meaningful

enforcement of criminal laws within the boundaries of Indian country to the detriment of law abiding citizens everywhere.

The decision below raises two immediate concerns for Californians and for the residents of many of the *Amici* States. First, the conflict between the decision below and the *Hicks* decision renders uncertain the extent of state authority to serve search warrants in Indian country. Secondly, the court of appeals' faulty analysis of Public Law 280, and the related finding of personal liability in the county officers, will chill the conduct of on-reservation law enforcement activities in all states. It is often the case in California and in other Public Law 280 states, where the federal government has no regular law enforcement presence, that county sheriffs are the only providers of law enforcement within Indian country. If the *Bishop Paiute* decision is not reviewed, it will remain a strong disincentive to sheriffs' deputies considering entering Indian country – with profound public safety implications for reservation populations.

The decision below also raises the specter of Indian country becoming a safe haven for criminals operating under the cloak of tribal status. The widespread potential for abuse is difficult to overstate. Within the ten continental states of the Ninth Circuit, there are 398 Indian tribes occupying approximately 36 million acres of territory. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). In California alone, the Bureau of Indian Affairs has before it 87 pending applications for the acceptance of land into trust for the benefit of Indian tribes, totaling approximately 9,000 acres. *Internal BIA Memo*, October 11, 2002. Under the court of appeals' decision, any number of criminal enterprises could conceal themselves on this, and all other tribal land.[1]

Finally, the court of appeals' decision would also allow the Tribe to recover damages against county officers for the asserted violation of its sovereign immunity under 42 U.S.C. § 1983 ("§ 1983"). However, the notion that a tribe is a "person" within the meaning of § 1983 defies the statute's plain language, legislative history and purposes. This aspect of the ruling below heightens the decision's restraint upon the provision of law enforcement services within Indian country. The court of appeals' decision effects an ill-conceived and unwarranted extension of the concept of tribal sovereign immunity and erroneously grants to the Tribe previously unrecognized authority to bar the prosecution of an otherwise legitimate criminal investigation and to hold law enforcement officers personally liable for any abridgement of that purported authority. For these reasons, the *Amici* States respectfully request that review be granted.

SUMMARY OF ARGUMENT

Amici States believe that the issues presented in this case were resolved by this Court's decision last year in

[1] Because the court of appeals identified the Tribe's *sovereign immunity* as the source of its power to bar the execution of a search warrant, there may be no geographic limitations to a tribe's authority to evade state process. *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (holding that tribes enjoy sovereign immunity with respect to governmental and commercial activities, whether they occur on or *off a reservation*).

Nevada v. Hicks. Apparently not, according to the Ninth Circuit Court of Appeals. The decision below turned Public Law 280 on its head and trumped this Court's *Hicks* analysis by limiting state jurisdiction to investigate *off-reservation* crimes. Yet Public Law 280, which extends state jurisdiction to *on-reservation* crimes, has no relevance whatsoever to crimes occurring off-reservation and so is not a basis for *limiting* the scope of state authority. In fact, states have "inherent" jurisdiction to execute search warrants, or any other form of process, within Indian country. *Nevada v. Hicks*, 533 U.S. at 366. No provision of federal law preempts the State of California's authority to do so. Nevertheless, the court of appeals concluded that, because the warrant was executed against the Tribe – rather than against an individual tribal member or non-member on tribal lands – state jurisdiction is categorically preempted absent tribal waiver or congressional authorization. *Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony v. Inyo County* (*Bishop Paiute*), Pet. App. 22a-23a. This ruling cannot be reconciled with *Hicks*.

The court of appeals also erred in its decision to attach personal liability to county law enforcement officials who conducted a search in a manner approved by this Court in *Hicks*. *Bishop Paiute*, Pet. App. 42a. Even assuming that this Court's *Hicks* decision is distinguishable from this case, and the execution of the search warrant violated the Tribe's sovereign immunity, the *Tribe* may not sue the county officers for a violation of its sovereign immunity under 42 U.S.C. § 1983. The plain language, legislative history, and the purposes of § 1983 all establish that a sovereign entity is not a "person" within the meaning of the statute and so has no standing to assert rights under it.

Not only is the decision below incorrect on the law, but it places county law enforcement officers charged with the execution of warrants in Indian country in an untenable position. Unable to distinguish with certainty between tribal facilities immune to search and non-tribal facilities subject to search, law enforcement officers will forego conducting investigations in Indian country to avoid the potential of personal liability under § 1983. As a result, citizens everywhere face a substantial likelihood that they will be denied effective law enforcement whenever an investigation leads to Indian country.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER A TRIBE'S SOVEREIGN IMMUNITY BARS THE EXECUTION OF A SEARCH WARRANT, ISSUED ON PROBABLE CAUSE, FOR THE SEIZURE OF TRIBAL PROPERTY, BY COUNTY LAW-ENFORCEMENT OFFICERS INVESTIGATING OFF-RESERVATION CRIMINAL ACTIVITY

This Court's decision in *Hicks* should have been dispositive of the issues presented to the court of appeals in this case. Yet the *Hicks* decision was ignored in the ruling. The Ninth Circuit's analysis is distorted by the faulty premise that Public Law 280 governs the exercise of all state law-enforcement activity within Indian country – even that which relates to the commission of an off-reservation crime. Through this clouded lens, the court of appeals analyzed the lawfulness of the county's execution of the search warrant in terms of Congress' intent to

abrogate tribal sovereign immunity under Public Law 280. But Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime. Public Law 280 grants that "Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . ." 18 U.S.C. § 1162(a). *See also Hicks*, 533 U.S. at 366 (noting that PL-280 applies only to crimes committed in Indian country). Accordingly, this case has nothing whatsoever to do with attributes of tribal sovereignty Congress may have intended to preserve under Public Law 280 as a matter of statutory interpretation. Rather, this case concerns whether, and to what extent, state sovereignty is diminished by tribal sovereignty as a matter of constitutional law.

In *Nevada v. Hicks*, this Court concluded that neither a tribe's inherent sovereignty, nor its delegated authority, permits it to "regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Hicks*, 533 U.S. at 358. Under the *Hicks* analysis, the court of appeals' decision should have been rooted in the principles established by *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and *Montana v. United States*, 450 U.S. 544 (1981), that "[w]here nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Hicks*, 533 U.S. at 359 (quoting *Montana v. United States*, 450

U.S. at 564, emphasis added in *Hicks*). Thus, under *Hicks* the proper approach presumes that the tribe has no civil authority to regulate the execution of a state search warrant, unless it is "necessary to protect tribal self-government or to control internal relations" or unless such jurisdiction has been conferred by Congress. *Hicks*, 533 U.S. at 360. In *Bishop Paiute*, however, the court of appeals expressly rejected this approach and in doing so adopted the "more categorical approach" found in this Court's jurisprudence controlling state efforts to *tax* Indian tribes, a line of authority that addresses other concerns. *Bishop Paiute*, Pet. App. 22a-23a.

In determining the powers that are necessary for a tribe to protect self-government and control internal relations, the *Hicks* decision considered the tribal powers referred to in *Montana*: "tribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'" *Hicks*, 533 U.S. at 360-61 (quoting *Strate v. A-1 Construction*, 520 U.S. 438, 459 (1997)). On the other hand, this Court acknowledged that its decisions make clear that Indian tribes' right "to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 362. To the contrary, generally an Indian reservation is considered part of the territory of the state and so "state sovereignty does not end at a reservation's border." *Id.* at 361-62 (stating that the Court long ago departed from the platonic notions of tribal sovereignty articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). And when "state interests outside the reservation are implicated, States may regulate the activities even of tribe

members on tribal land . . . ." *Hicks*, 533 U.S. at 362. In *Hicks* this Court concluded that the power to regulate state officers in the execution of process related to the off-reservation violation of state law is not essential to tribal self-government or internal relations, but that such state jurisdiction over reservations is "inherent," and carries with it authority for state officers to execute process on tribal lands. *Id.* at 363-65. "The State's interest in executing process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs State government." *Id.* at 364.

II. CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER A TRIBE MAY SUE UNDER 42 U.S.C. § 1983 TO REMEDY AN ALLEGED VIOLATION OF SOVEREIGN IMMUNITY BY COUNTY LAW ENFORCEMENT OFFICERS

In this case, the Bishop Paiute Tribe seeks redress in its capacity as a domestic dependent sovereign, a status that is incompatible with "personhood" within the meaning of 42 U.S.C. § 1983. Because only a "person" may sue under the statute, the Tribe has no standing to maintain this claim.[2] A tribe is not a "person" within the meaning of

[2] The Tribe's standing under § 1983 has not been raised in the courts below. Nevertheless, the Court is obliged to examine standing *sua sponte* where standing has erroneously been assumed below. (*See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (" '[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no

(Continued on following page)

§ 1983 when it seeks a remedy for a violation of its sovereign powers. Congress' original purpose in enacting § 1983 was "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961). The purposes of the Fourteenth Amendment were first explained by the United States Supreme Court in *The Slaughter-House Cases*, in which the Court ruled that the Equal Protection Clause of the Fourteenth Amendment was never intended to protect business or contractual interests from an exercise of a state's police powers. *The Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872). This decision was rooted in the understanding that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Fourteenth Amendment], and by it such laws are forbidden." *Id.* at 81. Section 1983 was expressly authorized in the final section of the Fourteenth Amendment, U.S. Const., amend. XIV, § 5, and was intended to provide a remedy when states failed to conform their laws to the Fourteenth Amendment's requirements. *Id.* at 81. Even though § 1983 has, since *The Slaughter-House Cases*, been used to remedy a broad range of *individual* rights violations, there is no precedent, other than this case, for § 1983 being recognized as a remedy for a perceived violation of an attribute of sovereignty.

contention concerning it.' " (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936))).

Section 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity . . . ." 42 U.S.C. § 1983. It is established beyond any doubt that under § 1983, a sovereign or a governmental entity is not subject to suit as a "person" within the meaning of the statute. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989) (*Will*) (stating that neither states nor state officials acting in their official capacity are "persons" *subject* to suit under § 1983). There is no reason to believe that the term "person" was intended by Congress to have two different meanings within the same sentence of § 1983. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 597 (1995) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."). Accordingly, if "person" within the meaning of § 1983 may not include a governmental entity for the purpose of being subjected to suit, it may not include a governmental entity for the purpose of bringing suit either.

Although this Court's leading precedent establishing that a state is not a "person" within the meaning of § 1983 related to the State of Michigan's status as a defendant, the decision's discussion of concepts of sovereignty is just as applicable to Indian tribes and to the concept of tribal sovereignty. *See Will*, 491 U.S. at 71. This Court noted that in common usage the term "person" does not include a sovereign, and statutes employing the word "person" are

ordinarily construed to exclude sovereigns. *Id.* at 64. In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), the Court's review of § 1983's legislative history led it to determine that the Territory of Guam is not a "person" within the meaning of the statute. The Court found that Congress was concerned with enforcing the provisions of the Fourteenth Amendment and in particular was concerned about the insecurity of life and property in the South during the Era of Reconstruction. *Id.* at 187-88. "[T]he remedy provided by § 1983 was designed to combat the perceived evil . . . . ('Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.'" *Id.* at 189 (quoting *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973)). The Court in *Ngiraingas* also relied upon the Dictionary Act, which originally defined "person" to include the phrase "bodies politic and corporate." However, the Act's amendment in 1874 omitted those three words and substituted "partnerships and corporations," eliminating any confusion that the word "person" may be generally understood to include sovereign political entities. *Id.* at 190-91; *see also Will*, 491 U.S. at 69 ("[W]e disagree with Justice BRENNAN that at the time the Dictionary Act was passed 'the phrase "bodies politic and corporate" was understood to include the States.' . . . Rather, an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States . . . . (In our view, the Dictionary Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable.").

The text, legislative history and purposes of § 1983 establish that Congress excluded sovereignties from the

definition of "person." The Ninth Circuit's conclusion that the Tribe is a person that may remedy the county officers' purportedly extra-jurisdictional search under § 1983 is error, and should be reversed by this Court.

CONCLUSION

For all the reasons stated above, the *Amici* States urge the Court to grant the petition for certiorari.

Respectfully submitted,

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