NO. 01-55

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL L. ENAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SEP 5

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respectfully submitted,

SIGMUND G. POPKO, Esq.
Arizona Bar # 011947
P.O. Box 877906
Tempe, Arizona 85287-7906
(480) 965-6557
Attorney for Petitioner Enas

DATE MAILED: September 25, 2001.

QUESTION PRESENTED

This Court previously held that the Indian tribes do not possess "inherent authority" to prosecute an Indian who is not a member of the tribe and that such authority could only come from a delegation by Congress. Congress then enacted a statute giving the tribes that authority. Proceeding under that statute, an Indian tribal court convicted petitioner of assault committed on the tribe's reservation. Petitioner is an Indian, but not a member of the tribe. Petitioner was subsequently indicted for the same offense in the U.S. District Court.

I.

The question presented is whether the successive federal prosecution under these circumstances violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner, MICHAEL L. ENAS, respectfully asks that a writ of certiorari be issued to review the judgment and *en banc* opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on June 29, 2001.

OPINION BELOW

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported as *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (attached as Appendix A). The opinion of the three-judge panel which originally heard the case

was reported, but later vacated. 204 F.3d 915 (9th Cir.), *vacated*, 219 F.3d 1138 (9th Cir. 2000). The judgment and order of the district court is unreported.

JURISDICTION

A federal grand jury indicted petitioner on charges of assault with a dangerous weapon and assault resulting in serious bodily injury in violation of 18 U.S.C. § 1153, 18 U.S.C. §§ 113 (c) and 113(f).[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231. After the district court dismissed the indictment, the government appealed. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The judgment and opinion at issue was issued on June 29, 2001. This petition is timely pursuant to Rules 13 and 29, Rules of Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V: The Fifth Amendment of the United States Constitution provides in relevant part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

25 U.S.C. § 1301, a part of the "Indian Civil Rights Act" and as amended by Congress in 1990, provides:

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[1] Subsections 113(c) and 113(f) have since been recodified at 18 U.S.C. §§ 113(a)(3) and (a)(6), respectively.

For purposes of this subchapter, the term –

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which the section applies.

(Emphasis added).

STATEMENT OF THE CASE

1. History of the Case

This federal prosecution of petitioner Enas raises issues of tribal sovereignty, double jeopardy and the separation of powers between Congress and the judiciary. This Court's landmark decisions in *Oliphant v. Suquamish Indian Tribe*,

435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), inform the present controversy.

Petitioner, a member of the San Carlos Apache Tribe in Arizona, was convicted in a White Mountain Apache tribal court on assault charges. He later was indicted for the same offenses in federal district court. In the district court, petitioner moved to dismiss the indictment on double jeopardy grounds arguing that the tribal and federal courts both derived their power to prosecute him from the same, single federal source. The district court granted the motion, and the government appealed. The U.S. Court of Appeals for the Ninth Circuit, acting via a three-judge panel and subsequently *en banc*, reversed the district court.

II. Statement of Facts

The federal government alleges that on or about August 18, 1994, petitioner, an enrolled member of the San Carlos Apache Tribe, assaulted another Indian while on the Fort Apache Indian Reservation in Arizona. The Fort Apache Reservation is the home for the White Mountain Apache Tribe. Count 1 of the indictment alleges assault with a dangerous weapon (a knife) with intent to do bodily harm. Count 2 alleges assault resulting in serious bodily injury. *See generally Enas*, 255 F.3d at 665.

II. Course of Proceedings

A. The Tribal Prosecution

In August 1994, petitioner pleaded guilty to tribal charges of assault with a deadly weapon and was sentenced to six months in the tribal jail and a fine of $500.00. In October 1998, he pleaded guilty to the remaining charge of assault with intent to do serious bodily injury and to an escape charge for a prior failure to return from a work release program. The tribal court added an additional fine of $680.00 for these two offenses. *See generally Enas*, 204 F.3d at 917. The tribe's authority to prosecute petitioner, an Indian who is not a member of the tribe (a "non-member Indian"), for these criminal offenses is found in a provision of the federal Indian Civil Rights Act. See 25 U.S.C. § 1301(2) (2000).

B. The Federal Prosecution

A federal grand jury indicted petitioner on June 21, 1995. Petitioner filed a motion to dismiss alleging a violation of the Double Jeopardy Clause. The district court granted the motion, and the government appealed. A three-judge panel reversed the district court. Later, on petitioner's motion for rehearing, that panel opinion was withdrawn and an *en banc* panel heard the cause, but also reversed the district court. *See generally Enas*, 255 F.3d at 665. Petitioner now seeks a writ of certiorari from this Court to review the *en banc* panel's opinion and judgment.

REASONS FOR GRANTING THE PETITION

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that, absent a delegation from Congress, an Indian tribe does not possess the inherent authority to prosecute non-member Indians for criminal offenses allegedly committed on the tribe's reservation. See also *Enas*, 255 F.3d at 668 (agreeing that *Duro* so held). Congress responded to *Duro* by enacting such legislation in 1990. It amended the federal Indian Civil Rights Act to provide tribal courts with criminal jurisdiction over "all Indians" regardless of tribal membership. 25 U.S.C. § 1301(2) (2000) (the "Act"). Petitioner's tribal prosecution was conducted under the authority of the Act.

The Court of Appeals for the Ninth Circuit rejected petitioner's double jeopardy claim on the rationale that Congress could and did, via the Act, expand the Indian tribes' inherent authority to prosecute non-member Indians. Congress could do this, the court reasoned, because this Court's prior decisions on inherent tribal authority were merely federal common law. *Enas*, 255 F.3d at 673 ("*Duro* is not a constitutional decision but rather, like *Oliphant* and *Wheeler*, a decision founded on federal common law."). This rationale, in turn, furnished the foundation for applying the dual sovereignty exception to the Double Jeopardy Clause. The court's rationale, however, lacks it own foundation and conflicts with this Court's constitutionally-

based conclusions in *Oliphant*, *Wheeler*, and *Duro* that a tribe's power to prosecute a non-member Indian is not inherent and emanates solely from Congress.

This issue is one of importance to the relationship of the tribes to the States, the United States and non-members (Indian and non-Indian alike). If, as held by the court below, Congress can redefine the tribes' inherent powers without regard to this Court's prior decisions, then the delicate balance this Court has struck among the tribes, States and all non-members will be undone. If, as the Ninth Circuit holds, Congress can "enact its [own] vision of tribal [inherent] sovereignty, one that was at odds with [this Court's] historical narrative," the implications are staggering.

For example, Congress presumably could grant full sovereignty to the tribes commensurate to that enjoyed by the States. Yet, would such an act of Congress be subject to the restrictions of Article IV, § 3 of the United States Constitution?

As another example, consider whether Congress could now overrule this Court's recent decision in *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001). That decision held that the States could not be sued under the Americans with Disabilities Act because Congress did not identify a "pattern of irrational state discrimination in employment against the disabled" where that pattern was necessary to trigger Congress's powers under § 5 of the Fourteenth Amendment to the United States Constitution. 531 U.S. at ___, 121 S. Ct. at 965, 967-68. Could

Congress now use its newly bestowed power to rewrite history to find that such a pattern does exist?

The *Enas* decision has far reaching consequences beyond Indian law jurisprudence. Any decision with such consequences warrants review by this Court.

Review in this case is also important to ensure the protection of individual rights in the administration of criminal justice. For instance, this Court in *Oliphant* held that the tribes do not have the power to prosecute non-Indians for criminal offenses occurring on the reservation. 435 U.S. at 195. Yet, if the reasoning of the court below stands, that decision, too, is only common law and subject to legislative revision. Hence, Congress is then free to subject non-Indians, like it has already subjected non-member Indians, to American tribunals not offering the full protections of the Bill of Rights without regard to the constitutional consequences of such action. This Court has already taken note of the constitutional difficulties with such a result. *Duro*, 495 U.S. at 693-94 (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

As this case demonstrates, any revision of inherent authority affects not only tribal power, but the rights of citizens like petitioner who come into contact with the tribes. Any holding that Congress may indiscriminately redefine tribal inherent authority leaves the rights of these citizens vulnerable to the whim of elected officials. Our nation's founders specifically rejected a system of government that would leave

such important rights to "shifting legislative majorities." *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). This Court should not accept such a system with respect to inherent tribal authority. This Court should grant this petition.

ARGUMENT

I. The Court Below Erred When it Held That Congress Is the Final Arbiter of the Tribes' Inherent Authority

Neither the parties nor the court below disagree on the fundamentals of double jeopardy law or even the basics of this Court's pronouncements in *Oliphant*, *Wheeler*, and *Duro*. All agree that the tribal and federal offenses at issue are one and the same for double jeopardy purposes. All agree that the "dual sovereignty exception" to the Double Jeopardy Clause permits separate prosecutions by separate sovereigns for the same offenses. All agree that if a tribe's power to prosecute a non-member Indian flows from Congress rather than its own "inherent" authority, then the federal prosecution at issue violates the Double Jeopardy Clause. *See generally Enas*, 255 F.3d at 665-68.

The core of the legal disagreement lies in the scope of a tribe's authority to prosecute a non-member Indian and whether Congress can alter that scope. Petitioner contends that this Court has already held that such authority is not inherent and that the authority necessarily emanates from Congress. The court below agreed

that this Court has so held. *Enas*, 255 F.3d at 668 ("That is, the [Supreme] Court concluded [in *Duro*] that the tribes' inherent authority never included such powers [to prosecute non-member Indians]."). The court below further held, however, that Congress has the power to override this Court's pronouncements on the scope of a tribe's inherent authority and exercised that power when it amended the Indian Civil Rights Act in 1990 and authorized criminal prosecutions of non-member Indians. *Id.* at 675 ("We conclude that Congress had the power to determine that tribal jurisdiction over nonmember Indians was inherent.").

Effectively, and only by overruling a decision in an earlier case, the court below decreed Congress was the final arbiter of the nature of the tribes' inherent authority. *Enas*, 255 F.3d at 674-75 & n.8, *overruling in part, Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998). This holding is unsupported by any authority and is at odds with this Court's prior decisions.

A. This Court's prior decisions concerning tribal inherent authority are not common law decisions.

This Court's prior decisions concerning the scope of tribal inherent authority are not common law decisions. They are constitutionally-based decisions articulating the tribes' position within the constitutional constellation. This Court, and only this Court, has the power to define the scope of the tribes' inherent authority.

Congress, if it disagrees with that scope, may delegate additional powers to the tribes, subject to the restraints of the Constitution. *See Duro*, 495 U.S. at 686. Congress cannot, however, "pretend (successfully)" that this Court never defined the scope of inherent authority. *Means*, 154 F.3d at 946.

The court below cites only certain law review articles as authority for its holding that *Duro* and the other landmark inherent authority cases (*Oliphant* and *Wheeler*) are common law decisions. *Enas*, 255 F.3d at 674 (citing various law review articles). The court below cites no opinion of this Court or any other court so holding.[2] Other than the law review articles, the appellate court's only basis for denying the constitutional basis of *Duro* and the other inherent authority opinions is this Court's alleged failure to state explicitly that those decisions were constitutionally based. *Id.* at 674.

Yet, in many cases, this Court has stated that even though Congress may have "plenary" power over Indian tribes, that power is not immune from constitutional restraint. *See Delaware Tribal Business Comm'n v. Weeks*, 430 U.S. 73, 84-85 (1977).

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[2] The court does cite Judge Arnold's dissenting opinion in a vacated Eighth Circuit opinion on this same legal issue, but that dissent does not cite any case authority holding that this Court's prior inherent authority decisions were only common law and not constitutional law. *Enas*, 255 F.3d at 675 (citing *United States v. Weaselhead*, 156 F.3d 818, 825 (8th Cir. 1998) (M.S. Arnold, J., dissenting) *vacated by an equally divided court*, 165 F.3d 1209 (8th Cir. 1999) (*en banc*)).

See also Weaselhead, 156 F.3d at 824 n.5 (collecting cases). These cases establish the principle that questions regarding Indian tribes have a constitutional dimension, Congress's plenary authority notwithstanding.

Further, any conclusion that *Duro* is not a constitutionally-based decision is at odds with *Duro* itself. A fair reading of *Duro* leaves no doubt that the lack of criminal jurisdiction over non-member Indians is not a matter of common law, but is instead motivated by constitutional concerns.

These constitutional concerns include, for example, the due process problems which arise whenever Congress subjects American citizens to "criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Duro*, 495 U.S. at 694. As the Court explained, these concerns are mitigated when a tribe prosecutes one of its own members because those members have consented to tribal membership and enjoy a "concomitant right of participation in a tribal government." *Id.* There is no similar constitutional justification, however, for intrusions upon the liberty of non-members regardless of their ancestry. *Id.* Recognizing an "inherent" tribal authority over non-members constitutes an unwarranted interference with due process rights.

Duro also considered equal protection issues. As this Court aptly noted, recognizing inherent tribal authority over non-member Indians would "single out" a group of American citizens – non-member Indians – "for trial by political bodies that do not include them." *Id.* at 693. Such an approach compromises the Constitution's aversion to race-based divisions. On the other hand, the concept of criminal jurisdiction this Court does adopt in *Duro* recognizes differences based on consent and tribal affiliation – factors which are acceptable grounds for differing treatment. *See Morton v. Mancari*, 417 U.S. 535 (1974). This Court's acceptance of the latter option is a decision to comply with the Constitution, not some election of common law alternatives. In the Court's own words, the *Morton* approach is one that is consistent with the "equal treatment of Native American citizens." *Duro*, 495 U.S. at 698.

Finally, the restricted scope of inherent authority recognized in *Duro* is compelled by our overall constitutional framework. Even some of the academic reviews cited by the court below acknowledge this fact. *See e.g.*, Alex Tallchief Skibine, *Duro v. Reina* and the Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 Cal. L. Rev. 767, 782 (1993) (recognizing the argument that *Duro* may be "constitutionally based, at least in an organic or structural sense. That is because it may be based on the Court's interpretation of the tribes' status and powers within the constitutional framework."). Within this framework, this Court

bears the responsibility to protect citizens from "unwarranted intrusions" upon their personal liberties, particularly those as serious as a criminal trial and punishment. *Duro*, 495 U.S. at 692. *Duro* gives notice that these obligations to American citizens will not cease simply because the threatened intrusion comes from Congress acting under a plenary power to regulate commerce with the Indian tribes. U.S. Const. art. I, § 8, cl. 3. *Duro*'s recognition that the tribes do not possess inherent authority over non-member Indians does not thwart Congress's plenary power; it does preserve this Court's role within the nation's constitutional structure.

B. Even under the common law, Congress cannot successfully pretend that this Court never defined the scope of tribal inherent authority.

Even if, however, the court below correctly concluded that decisions about the tribes' inherent authority were decisions of federal common law, Congress is still not free to disregard this Court's pronouncements that inherent authority did not and does not include the power to prosecute non-member Indians. Even in the common law realm where Congress's legislative prerogatives are at their most potent – the common law interpretations of statutes – this Court has held that its opinions interpreting those statutes "'finally decided what [the statute] had always meant.'" *Means*, 154 F.3d at 946 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)) (alteration in original). As aptly put by the *Means* court,

> While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law. In other words, once the Supreme Court has ruled that the law is "X," Congress can come back and say, "no, the law is 'Y,'" but it cannot say that the law was never "X" or always "Y." The Court's decision is the correct statement of what the law always was, even if no one knew it until the Supreme Court so held.

154 F.3d at 946 (citing *Rivers*, 511 U.S. at 313 n. 12). This unremarkable proposition of law applies just as much to any federal common law of tribal inherent authority as it does statutory interpretation.

For these reasons, the court below erred when it held that Congress and not this Court was the final arbiter of the scope of the tribes' inherent authority.

II. The Court Below Rejected This Court's Numerous Holdings That a Tribe's Authority to Prosecute Non-Member Indians Is Not Inherent and Can Only Come from an Affirmative Delegation of Authority by Congress

This Court has held numerous times that a tribe's inherent authority does not include the power to prosecute a non-member Indian and that a tribe may do so only pursuant to a congressional grant of authority. For example, in *Montana v. United States*, 450 U.S. 544 (1981), this Court discussed at length the scope of a tribe's inherent authority. The Court repeated its earlier pronouncements that a tribe

had inherent authority to prosecute its own members as part of its power to "protect tribal self-government or to control internal relations." *Id.* at 564. And, relying on *Oliphant*, this Court wrote,

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

Montana, 450 U.S. at 565 (footnote omitted).

Duro itself is replete with pronouncements that a tribe's inherent authority reaches only members of the tribe and that criminal authority over non-member Indians can come only from Congress. Significantly, *Duro* cited with approval the language quoted above from *Montana* and reaffirmed the prior holdings that inherent tribal authority does not extend to non-members of the tribe. *Duro*, 495 U.S. at 687 (quoting *Montana*, 450 U.S. at 565). See also *id.* at 685 ("We think the rationale of our [prior] decisions . . . compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members."); *id.* at 688 ("In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members.").

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), decided after the Act, this Court again reaffirmed its prior holding in *Montana* that authority for tribal

actions that go beyond tribal self-government or controlling internal relations does not exist absent "express congressional delegation" and "is therefore not inherent." *Id.* at 695 & n.15.

These holdings are clear. They provide that only through an express delegation of authority from Congress to the tribes can tribes prosecute non-member Indians. Remarkably, the court below rejects the precedential nature of these clear pronouncements.

CONCLUSION

For the above stated reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: September 25, 2001.

SIGMUND G. POPKO, Esq.
Attorney for Petitioner Enas