INTERESTS OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. (USET) is a non-profit inter-tribal organization founded in 1968. USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands.[1] USET includes twenty-four federally recognized tribal governments from an area stretching from Maine to Texas.[2]

USET has a strong interest in the "immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 67 Fed. Reg. 46328. These immunities, privileges and powers include the "deeply rooted" freedom of tribal

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

[2] The members of USET are: the Eastern Band of Cherokees, the Mississippi Band of Choctaws, the Miccosukee Tribe, the Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the St. Regis Band of Mohawk Indians, the Penobscot Indian Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, and the Cayuga Nation. See 67 Fed. Reg. 46328 (July 12, 2002) (list of federally recognized tribes published pursuant to 25 U.S.C. § 479a-1).

governments from state jurisdiction. *Rice v. Olson*, 324 U.S. 786, 789 (1945). Inyo County's execution of a state search warrant for tribal records held in a tribal building on tribal land, in order to defeat the tribe's privacy policy, was an assertion of state jurisdiction over a tribal government without congressional authority. The assertion of state control over tribal governments undermines cooperation between tribal governments and state and local governments through compacts and other agreements that respect the sovereignty of both parties. It also interferes with the federal policy of strengthening tribal governments, including tribal law enforcement.

USET has a particular interest in the County's claim that the search was valid because it had "inherent jurisdiction" over a tribal government, a claim that echoes the one squarely rejected in *Worcester v. Georgia*, 31 U.S. 515 (1832). *Worcester* answered that claim with historical proof that states had no jurisdiction over Indian tribes on tribal lands before the Constitution, and did not acquire any under the Constitution. The early treaties and laws that defined the relationships between the state and federal governments and tribal governments consist, in large part, of the heritage of USET's members. USET's brief discusses the scope of state jurisdiction over tribal governments in light of that history and the decisions of this Court.[3]

[3] The brief will not address the second and third questions presented in the County's petition.

STATEMENT

The Bishop Paiute Tribe (the Tribe) is a federally-recognized tribe that governs tribal land located in Southern California. (JA 99). The Tribe conducts gaming under a compact with the State.[4]

The Tribe reported quarterly payroll information to the California Economic Development Department pursuant to its compact.[5] (CA RE 320). California maintains a system to compare employers' reports to income reported by persons receiving public assistance. That system noted a discrepancy between the earnings reported by the Tribe and the earnings reported to welfare authorities by three members of the Tribe employed in the tribal casino over the period of April to June 1998. (CA RE 266). A report of the discrepancy was sent to the Inyo County Department of Health and Human Services, which then forwarded the matter to the County District Attorney for investigation. An investigator in the District Attorney's office requested records for the employees from the Tribe. The Tribe responded in writing on February 28, 2000, that its long-standing policy was to release such records only with the written consent of the employee. (JA 103, ¶ 17).

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[4] The Tribe's compact recites that "the State enters into this Compact out of respect for the sovereignty of the Tribe; * * * [and, among other things] to initiate a new era of tribal-state cooperation in areas of mutual concern." (JA 7). See also JA 102 (complaint ¶ 16). The compact was approved by the Secretary of the Interior on May 16, 2000. 65 Fed. Reg. 31189.

[5] Compact, § 10.3(b), JA 60.

Rather than seeking records from the tribal member employees directly, or obtaining their consent to disclosure by the Tribe,[6] the investigator sought and obtained a search warrant from the Superior Court. On March 23, 2000, the investigator, accompanied by sheriff's deputies, used bolt-cutters to enter a tribal storage building on tribal land, disregarding the protests of tribal officials that the search was unlawful. (JA 104). She seized tribal records containing information regarding the three tribal member employees named in the warrant, as well as many other tribal member employees not under investigation. (JA 149; CA RE 263-65 (search warrant return); JA 104).

Charges of wrongfully obtaining public assistance and medical care were later filed against the tribal member employees. On August 15, 2001 the prosecution dismissed the charges for lack of probable cause. Motion to Dismiss, *People v. Dewey*, Case No. MBCRF01-0027942-002/3 (Aug. 15, 2001).

In July 2000, the District Attorney sought more personnel records from the Tribe. (JA 104). The Tribe, through its attorney, agreed to release the records if the County provided a redacted copy of the tribal member employees' county welfare applications, which included authorization to disclose employment records. The County declined to request the records in a manner consistent with the Tribe's requirement of written consent.

On August 4, 2000, the Tribe filed suit in federal court. (JA 96-119). The District Court dismissed the complaint on November 22, 2000. (JA 120-141). The Court

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[6] See Cal. Welf. & Inst. Code § 11004(a) (recipient is responsible for reporting facts material to correct determination of eligibility and grant).

of Appeals for the Ninth Circuit reversed in an amended opinion issued on May 20, 2002. (JA 145-179). This Court granted *certiorari* on December 2, 2002. (JA 180).

SUMMARY OF ARGUMENT

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 345 U.S. at 789. The County's forcible search of tribal government offices on tribal lands and its seizure of tribal records violated the Tribe's federally-protected rights to govern itself and to be free from unreasonable searches and seizures. State court warrants could not authorize the search and seizure of tribal government records from a tribal government building on tribal land because states do not have jurisdiction over tribal governments.

In this Court, the County has abandoned its reliance on Public Law 280, which gives some states jurisdiction to prosecute crimes by individual tribal members on some tribal lands, but does not confer any jurisdiction over tribal governments. It now claims it has "inherent jurisdiction" over the tribal government, derived from state sovereignty over all land within its borders, including Indian lands.

Our brief presents historical evidence that the colonies, and later the states, did not exercise inherent jurisdiction to enforce their laws on tribal lands. The Court considered and rejected the argument that the states had inherent jurisdiction over Indian lands in *Worcester v. Georgia*, 31 U.S. 515 (1832). Chief Justice Marshall's opinion in *Worcester* was based on the history of relations between colonial, and later state and national governments with Indian tribes before and after the adoption of the Constitution. Although the tribes surrendered aspects of their

sovereignty to the federal government, becoming "domestic dependent nations," they retained the power of internal self-government and were not subject to state laws. The states could not retain jurisdiction under the Constitution, because they did not have it earlier. Indeed, the Constitution recognized that tribal Indians were outside the jurisdiction of the states, exempting "Indians not taxed," from the apportionment of electors and direct taxes. The Fourteenth Amendment retained that exemption, affirming the sovereignty of Indian tribes over their internal affairs.

The historical record also refutes the particular claim that states had jurisdiction to enter tribal lands at will to enforce their criminal laws. National and state treaties before the Constitution included provisions that are inconsistent with an inherent state power to enter tribal lands to enforce state laws, even for off-reservation crimes. After the Constitution, Congress exercised its power under the Indian Commerce Clause to provide for *federal* law enforcement on tribal lands, and to require tribes to deliver tribal members to *federal* authorities when they were sought for off-reservation crimes. Congress could not and would not have done so, if states themselves had jurisdiction over tribal lands.

Statements in the Court's recent decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), regarding "inherent" state jurisdiction on tribal lands do not control this case, which involves the search of a tribal government, not an individual member of a tribe, as in *Hicks*. The policy arguments offered by the County and its *amici* are without merit and should, in any event, be presented to Congress rather than to the Court.

ARGUMENT

STATES DO NOT HAVE JURISDICTION TO SEIZE TRIBAL RECORDS FROM TRIBAL GOVERNMENTS ON TRIBAL LANDS.

The execution of a search warrant by County officers for tribal records in a tribal government building on tribal land is an exercise of dominion and control over the Tribe. The Tribe adopted a general policy that it would not disclose personnel records without the employees' consent. That was an exercise of "the right of Indians to govern themselves," *Williams v. Lee*, 358 U.S. 217, 223 (1959), on their own land, not a regulation of non-Indians.

The search for and seizure of tribal records by means of a state court warrant infringes on tribal self-government in several ways. *First*, it directly overrides a tribal government decision to protect personnel records, which are tribal property. *Second,* it imposes the burdens of producing records and disrupting government activities on the Tribe. *Third*, it poses the risk of abuse for the purpose of harming the Tribe. "The power to tax is the power to destroy," *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 258 (1992) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)); so is the power to intrude into a government's office and to seize its property. Cf. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 187 (1988) (quoting *McCulloch* in the context of state regulation); *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). Bolt cutters wielded by armed officers are no less a threat to sovereignty than taxes.

The County attempts to recast this case as tribal regulation of non-members in the image of *Nevada v. Hicks*, 533 U.S. 353 (2001). See Pet. Br. 28-30, Calif. Br. 11-18. A

lawsuit in federal district court asserting the Tribe's federal law right not to be searched is not tribal "regulation" of the County, any more than a private individual who sues to vindicate federal rights is thereby regulating the state. *Hicks* involved tribal court jurisdiction over state officers; it did not call into question the Tribe's ability to seek redress in federal court. *Id.* at 373 ("the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts * * * to vindicate constitutional or other federal- and state- law rights.").[7]

The County no longer claims that a federal statute gave it the power to search tribal records in the possession of the tribal government on tribal land. Indeed, the County and its *amicus*, the State of California, abandon reliance on Public Law 280, 18 U.S.C. § 1162, which confers criminal jurisdiction over state offenses committed by tribal members within certain reservations, but has never been construed to apply to tribal governments. See Pet. Br. 25, n.11 ("Public Law 280 does not apply in this case; citing *Hicks*, 533 U.S. at 365); Calif. Br. 17 n.6 ("Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime.").[8] Instead, the County and its state *amici* invoke "inherent jurisdiction" as the basis for the

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[7] This Court has not treated tribal challenges to the exercise of state power over them as subject to analysis under *Montana v. United States*, 450 U.S. 544 (1981). See, e.g., *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

[8] To the contrary, in the context of civil regulation this Court has explicitly recognized that Public Law 280 is inapplicable to tribal governments. *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976). Cf. *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 172 (1977) (state court lacked jurisdiction over tribe, although it had jurisdiction over tribal members).

search, relying on language in *Hicks*. (Pet. Br. 31; Calif. Br. 11).

The discussion of "inherent" state jurisdiction in *Hicks* does not control this case. That discussion was not essential to the Court's holding that tribal courts cannot adjudicate federal claims against state officers.[9] Moreover, *Hicks* involved a search of private property in an individual residence on individual trust land, not the search of tribal records in a tribal government building on tribal land. The assertion of state jurisdiction over a tribal government presents very different considerations from the assertion of state jurisdiction over individual members of a tribe who violate state law. Congress has never conferred state jurisdiction over tribal governments.

As we demonstrate more fully below, states do not have "inherent jurisdiction" over tribal governments. The states did not have such power before the Constitution was adopted, and, therefore, could not reserve it. The Constitution did not confer any new state jurisdiction over Indian tribes, which retained the right of self-government, subject to federal

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[9] "[T]his Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). See also *BE & K Const. Co. v. NLRB*, 122 S. Ct. 2390, 2397 (2002). As Justice Souter's concurring opinion in *Hicks* shows, a determination whether the state officers had actual authority to enter tribal lands to execute a state search warrant was unnecessary to decide the question presented, which concerned the *tribe's* authority to regulate the conduct of state officers through its courts. See 533 U.S. at 375 ("while the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, I would go right to *Montana's* rule that a tribe's civil jurisdiction generally stops short of nonmember defendants," subject to two inapplicable exceptions.).

authority through the Indian Commerce Clause and the Treaty Clause.

A. States Do Not Have "Inherent Jurisdiction" Over Tribal Governments in Indian Country.

This Court has never held that states have inherent jurisdiction over tribal governments on tribal lands.[10] To do so now would overturn more than two centuries of federal Indian law based on the understanding that tribes are sovereigns subordinate to the authority of Congress, but not subordinate to the states. See, e.g., *Rice v. Olson*, 324 U.S. at 789; *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980) ("tribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States."). "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. at 219.[11] Indeed, Public Law 280, the federal statute on which the County relied in the courts below as a source of its power on the Tribe's land, would have been superfluous if state jurisdiction over tribal land arising from the states' pre-constitutional sovereignty, as the County now claims. Pet. Br. 31.

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[10] In *Hicks*, the state officers entered the reservation to execute the warrant with the consent and cooperation of the tribe. 533 U.S. at 397 (O'Connor, J., concurring in the judgment).

[11] For example, the tribal termination acts of the 1950s made tribes subject to state laws upon termination, reflecting the assumption that tribes are not otherwise subject to state laws. See, e.g., *South Carolina v. Catawba Tribe, Inc.*, 476 U.S. 498, 508-09 (1986).

1. The original understanding of state, federal and tribal relations is set forth in *Worcester v. Georgia*, 31 U.S. 515 (1832). See also *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965) ("from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves free from state interference."). In *Worcester*, the Court squarely confronted a state's claim to inherent jurisdiction over a tribal government and its land.[12] Frustrated with the Cherokee Nation's refusal to cede more of its land through a federal treaty, Georgia enacted laws intended to coerce the tribe's removal to the West by asserting direct state control over its territory.[13] See 31 U.S. 521-28 (reproducing laws including § 6 of the act of Dec. 19, 1829, authorizing service of state process on tribal land.). Georgia prosecuted Samuel Worcester, a missionary from Vermont, and sentenced him to four years at hard labor for violating one of those laws

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[12] The Court previously avoided deciding this politically contentious issue when it dismissed the Cherokee Nation's suit to invalidate the Georgia laws on jurisdictional grounds. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (Court has no original jurisdiction over suit between tribe and state because a tribe is a "domestic dependent nation," not a foreign state within the meaning of Article III). See Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics and Morality, 21 Stan. L. Rev. 500 (1969) (discussing background); Stephen Breyer, The Cherokee Indians and the Supreme Court, 25 J. Sup. Ct. Hist. 215 (2000).

[13] In 1802, Georgia became the last State to surrender its Western land claims in favor of the United States. In return, the federal government agreed to seek land cessions from the tribes within Georgia's borders. Laws of the Colonial and State Governments Relating to Indians and Indian Affairs from 1633 to 1831, Inclusive, 188-191 (1979 reprint). Congress ordered the compilation of colonial and state laws relating to Indian tribes in 1832 in response to the controversy over Georgia's imposition of its laws on the Cherokees. *Id.* at iv.

requiring non-Indians residing on the Cherokee reservation to obtain a state license.

The Court first addressed the contention that Georgia had territorial sovereignty over the Cherokee reservation. See *id.* at 596 (Baldwin, J., affirming the views expressed in his opinion in *Cherokee Nation v. Georgia*, 30 U.S. at 41-43). Chief Justice Marshall's opinion demonstrated that Georgia did not acquire sovereign jurisdiction over the Cherokee Nation as the successor to the British Crown, which treated the Indian tribes as "nations capable of * * * governing themselves under her protection." *Id.* at 548-49, 560 (the King could cede only what belonged to the Crown). Nor, as the Chief Justice explained, did Georgia acquire any power over tribes or tribal lands through the Constitution nor through national treaties, which placed the Cherokees under the protection of the national government.

The Court held that Georgia had no authority to extend its laws to the Cherokee reservation. 31 U.S. at 560. The Chief Justice recognized, however, that Georgia's lack of authority to apply its law to tribal land was insufficient to issue a writ of error. *Id.* at 561 (the Court would have no power to grant relief if the objection to the law "was confined to its extra-territorial operation"). He therefore went on to show that the state's laws were also "repugnant to the constitution, laws, and treaties of the United States," including the treaties with the Cherokees. *Id.* [14]

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[14] The *Worcester* Court's rejection of inherent state jurisdiction over the Indian tribal land was therefore not limited to land protected by treaties expressly exempting the lands from state control. Contra *Hicks*, 533 U.S. 361 n.4.

"Despite the bitter criticism and defiance of Georgia which refused to obey this Court's mandate in *Worcester*, the broad principles of that decision came to be accepted as law." *Williams v. Lee*, 358 U.S. at 219. The Court has adhered to the "basic policy" of *Worcester*, although, "[o]ver the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Id.*[15]

2. *Worcester* is solidly grounded in history. Under the British Crown, tribes exercised self-government within their own territories and entered into treaties with colonial authorities as sovereigns.[16] In the Proclamation of 1763, the Crown stripped the individual colonies of power to enter into treaties with Indian nations, centralizing responsibility in two superintendents. At the same time, the Crown pursued a policy of separation, establishing definite borders between the land controlled by the colonial

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[15] The Court has recently "shift[ed] its approach" towards federal preemption rather than relying solely on tribal sovereignty. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 n.9 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). The cases in which the Court has done so, however, involved balancing the three sovereigns' interests in regulating the on-reservation activities of non-Indians. The Court has never "balanced" state jurisdiction over the tribe itself. Moreover, the Court continues to acknowledge the tribes' "right of internal self-government." *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[16] The colonies relied on the tribes to turn over offenders. See, e.g. Laws of the Colonial and State Governments Relating to Indians and Indian Affairs from 1633 to 1831, Inclusive, 37, 40 (Connecticut 1672). Colonial governments extended their authority over Indians only after some tribes ceased to govern their land and their members. See *Worcester*, 31 U.S. at 580 (M'Lean, J.) (Massachusetts, Connecticut and Rhode Island and others extended state laws over remnants of tribes that had lost the power of self-government).

governments and available for settlement on the one hand and tribal lands on the other. See Robert N. Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs, 69 B.U. L. Rev. 329 (1989).

After Independence, the state and national governments contested responsibility for Indian affairs. The Articles of Confederation left room for debate over whether the states, or only the national government, could enter into treaties with the Indian nations to acquire land. The states claimed the authority to enter into such treaties as the successors to the right of preemption, which was an exclusive right to buy land from the tribes for resale to non-Indians. Most importantly for present purposes, neither the states nor the national government claimed inherent jurisdiction to enforce their criminal laws *within* the territory occupied by the tribes.

Punishments of crimes in Indian country were governed by treaty, not by domestic state law. The new nation's first treaty was with the Delaware. Article IV of that treaty provided that neither the United States nor the tribe would punish "citizens of the other" except by a joint trial "by judges or juries of both parties." Treaty with the Delawares, 7 Stat. 13 (Sept. 17, 1778) (App. 56a); see also Treaty with the Cherokee, art. 4th (July 22, 1779), *reprinted in* 1 Documents in American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979 (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1980), pp. 79-81. After the Revolutionary War ended, national treaties specifically required the tribes to deliver members who committed crimes against non-Indians

to the national government for punishment.[17] Before the Constitution became effective, states also entered into similar treaties with tribes.[18] Those treaties did not assert inherent

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[17] See, e.g., Treaty with the Wyandot, 7 Stat. 16, art. IX (Jan. 21, 1785); Treaty with the Cherokee, 7 Stat. 18, arts. VI and VII (Nov. 28, 1785); Treaty with the Choctaw, 7 Stat. 21, arts. V and VI (Jan. 3, 1786); Treaty with the Chickasaw, 7 Stat. 24, arts. V and VI (Jan. 10, 1786); Treaty with the Shawnee, 7 Stat. 26 , art. III (Jan. 31, 1786); Treaty with the Wyandot, 7 Stat. 28, art. V (Jan. 9, 1789); Treaty with the Six Nations [Treaty of Ft. Harmar], 7 Stat. 33, separate art. (Jan. 9, 1789).

[18] See 1 Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979 (Vine Deloria, Jr. & Raymond J. DeMallie, eds. 1980), e.g., Treaty between the St. John's and MicMac and Massachusetts, arts. 3rd & 4th (July 19, 1776) (mutual promises of tribe and state to make satisfaction to party injured by its citizens), pp. 68-69; Treaty between the Cherokee and Georgia and South Carolina, art. V (May 20, 1777) (Cherokees agree to apprehend and deliver Indians who murder whites on tribal land; State agrees to execute whites who murder Indians in the presence of the tribe), p. 72; Treaty between the Overhill Band of Cherokee and North Carolina, art. 4th (July 20, 1777) (Cherokees agree to execute tribal member who commits murder in the presence of justices of the peace; state agrees to try and execute whites who murder Indians), p.74; Treaty between the Overhill Band of Cherokee and Virginia, art. 4 (July 20, 1777) (same); Treaty between the Creek and Georgia, arts. IV and V (Nov. 12, 1785) (Creek agree to give notice to the governor of punishment to be inflicted on a member of the tribe who commits a capital crime against a white; State agrees to give tribe notice of punishment of white who commits a capital crime against an Indian), p. 87(App. 39-40a); Treaty Between the Creek and Georgia, arts. Fifth and Sixth (Nov. 3, 1786) (same) (App. 42a); Treaty of Ft. Schuyler, 1788, art. IV (Sept. 22, 1788) (Oneida Nation agrees to apprehend non-Indian intruders, felons and offenders at the Governor's request so they can be brought to justice), pp. 97-99 (App. 38a); Treaty between the Onondaga and New York, art. Sixth (Sept. 12, 1788) (same), pp. 94-95. The pre-constitutional state treaties, like federal treaties, were understood to be agreements with sovereign governments. See 2 Op. Atty. Gen. 110 (July 28, 1828) (Georgia is bound by its pre-constitutional treaties extinguishing its claims for property destroyed earlier; Creeks are an independent nation

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state sovereignty over tribal lands. See Robert N. Clinton, There is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L. Rev. 113, 119-120 (2002). This course of treaty-making is inconsistent with the claim that the states acquired sovereignty over tribes within their borders upon Independence.

3. The adoption of the Constitution did not confer any state jurisdiction over Indian tribes. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985)(citations omitted); see also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). The Framers of the Constitution were aware of, and sought to end the uncertainty about responsibility for Indian affairs under the Articles of Confederation. James Madison, The Federalist No. 42, 268-69 (Clinton Rossiter ed., 1961) (describing Articles as "obscure and contradictory"); see also 2 The Founders' Constitution 529 (P. Kurland & R. Lerner eds., 1987)(reprinting exchange of letters between James Madison and James Monroe); *Cherokee Nation v. Georgia*, 30 U.S. 1, 36 (1831) (opinion of Marshall, Ch. J.); 2 Joseph Story, Commentaries on the Constitution § 1094 at 550 (1833).

Tribal sovereignty and the freedom of Indian tribes from state jurisdiction are implicit in the structure of the Constitution. Cf. *Alden v. Maine*, 527 U.S. 706, 729 (1999)(state sovereign immunity is implicit in the structure of the Constitution). Article I, Section 8, Clause 3, the "Indian Commerce Clause," assigns to Congress the power to regulate

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whose "territory is inviolable by any other sovereignty" and "governed solely by their own laws.").

commerce "with the Indian tribes." This language was simplified by the Committee of Style from commerce "with Indians, within the Limits of any State, not subject to the laws thereof." 2 The Founders' Constitution at 530 (reprinting excerpts from the records of the Constitutional Convention). The streamlined language reflected the understanding that tribal Indians were, by definition, governed by the law of the tribe, and not by state law. Kenneth W. Johnson, Sovereignty, Citizenship and the Indians, 15 Ariz. L. Rev. 973, 983 (1973); see also Clinton, No Federal Supremacy Clause, 34 Ariz. St. L. Rev. 130-32; Robert N. Clinton, The Dormant Indian Commerce Clause, 27 Conn. L. Rev. 1056, 1147-1164 (1995). Art. I, Section 2, Clause 3, excluded "Indians not taxed" from State populations for purposes of apportionment of the House of Representatives and direct taxes. That provision also recognized that tribal Indians were not subject to state laws. Handbook of Federal Indian Law 388 (1982 ed.). Art. I, Section 10, Clause 1 forbade the States to enter into treaties. Thus, when Georgia at last agreed to cede its Western land claims to the United States in 1802, it did so in exchange for a promise from the United States to "extinguish the Indian title" to lands within Georgia, because the state could no longer do so for itself. Laws of the Colonial and State Governments at 188, 190.

5. Beginning in the First Congress, the federal government exercised its power to regulate Indian affairs by statute as well as by treaty. See generally Francis P. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834, 188-212 (1962) (describing the history of criminal jurisdiction in Indian country). The first Indian Trade and Intercourse Act provided:

> That if any citizen or inhabitant of the United States or of the territorial districts of the United States, shall go into any town,

> settlement or territory belonging to any nation or tribe of Indians, and there shall commit any crime upon, or trespass against, the person or property of any peaceable or friendly Indian or Indians, which, *if committed within the jurisdiction of any state*, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof. 1 Stat. 137, § 5 (July 22, 1790) (App. 2-3a) (emphasis added).

Section 6 of the Act assigned jurisdiction of offenses by non-Indians on tribal lands to the federal courts under the procedures established in the First Judiciary Act. The plain language of the Act acknowledges that the states did *not* have jurisdiction over tribal lands, and that the federal government, not the state governments, had responsibility for law enforcement, just as it did within federal enclaves. See Prucha, American Indian Policy at 190.[19]

When Congress renewed the Indian Trade and Intercourse Act in 1793, it included federal authority to prosecute non-Indians for crimes against Indians within "any town, settlement or territory belonging to any nation or tribe

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[19] As this Court expressly recognized in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), the Indian Trade and Intercourse Acts applied to Indian lands within the existing states, as well as to federal lands organized as territories.

of Indians" which would be punishable under the law of the state or territory if committed "within the jurisdiction of any state, or within the jurisdiction of either of such [territorial] districts." 1 Stat. 330, §§ 4, 10 (March 1, 1793) (App. 5a, 7a). In addition, Congress added a new section authorizing the President (within the existing states), or the territorial governors (within the territories) to cause non-Indians subject to prosecution under the Act for crimes "within any town, settlement or territory belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States or of the said [territorial] districts." (App. 8a) That special rendition provision confirms that state criminal jurisdiction did not extend to land "belonging to any nation or tribe of Indians." See also *id.*, § 13 (differentiating trade with "Indians living on land surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states" from trade with tribal Indians, who were not) (App. 9a).

The 1796 renewal of the Act responded to criticisms of the previous versions for extending federal law to crimes against Indians, but not to crimes by them. See Prucha, American Indian Policy, at 192; 5 Annals of Congress at 902 (April 9, 1796). The Act established a procedure for non-Indians to seek redress if "any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States" and commit crimes there. *Id.* § 14. (App. 15-16a). The injured party was required to apply to federal officials, who would in turn seek satisfaction from the tribe. The federal government promised to indemnify the injured party as long as the injured party refrained from "crossing over the line on any of the Indian

lands."[20] See Prucha, American Indian Policy at 194-98 (describing operation in practice).[21] That authority would have been superfluous at best and a serious encroachment on state sovereignty at worst, if states had had jurisdiction to enter tribal lands to enforce the law themselves.[22]

Congress did not extend federal power to crimes by Indians *inside* Indian country until 1817. 3 Stat. 383; Prucha, American Indian Policy at 193.[23] That provision was amended in the final Indian Trade and Intercourse Act of

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[20] Section 14 did not limit the power to arrest Indians if found outside Indian lands.

[21] Section 19 of the 1834 Act made it the duty of federal Indian superintendents and agents to arrest "all Indians accused of committing any crime, offence or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory and have fled into the Indian country" either by demanding the tribe to produce them or "by such other means as the President may authorize." (App. 26a). See S. Rep. No. 20-72, at 43 (1829) (Secretary of War's submission explaining need to authorize federal officials to aid in the apprehension of Indians sought for off-reservation crimes).

[22] The relevant provisions were re-enacted in 1799 and as permanent legislation in 1802. Prucha, American Indian Policy at 192. 1 Stat. 743; 2 Stat. 139.

[23] Justice McLean, as Circuit Justice, reported that the 1817 statute was passed in response to an 1816 decision dismissing an indictment of two Indians for killing a non-Indian on a public road within the Cherokee reservation. *United States v. Bailey*, 24 F. Cas. 937 (C.C.D. Tenn. 1834). In *Bailey*, Justice McLean ruled that the Indian commerce clause did not authorize Congress to apply federal law to crimes by non-Indians against non-Indians committed on Indian lands. 24 F. Cas. at 940.

1834, 4 Stat. 729, and is now codified at 18 U.S.C. § 1152.[24] (App. 28a).

6. The Fourteenth Amendment reaffirmed the constitutional status of tribal governments, again excluding "Indians not taxed," from the apportionment of electors and direct taxes. In 1870, the Senate Committee on the Judiciary issued a report on the effect of the Fourteenth Amendment on the citizenship of tribal Indians. S. Rep. 41-268, at 9-10 (1870). After surveying the history of federal Indian law, the Committee opined that the Fourteenth Amendment did not extend citizenship to members of the Indian tribes, because they were not "subject to the jurisdiction" of the United States:

> In the opinion of your committee, the Constitution and the treaties, acts of Congress, and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution. The Government has asserted a political supremacy over the Indians, and the treaties and laws quoted from present these tribes as "domestic dependent nations," separated from

[24] Congress exempted crimes by Indians against Indians. § 25. The House report regarding the 1834 Act explained that crimes by Indians against Indians had been covered by the 1817 Act, which applied "to all persons in the Indian country, without exception," but "it is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, at any place within their own limits." H.R. Rep. No. 23-474, at 13 (1834).

> the States of the Union within whose limits they are located, and exempt from the operation of State laws; and not otherwise subject to the control of the United States than is consistent with their character as separate political communities or states.

There is no room within this framework for inherent state jurisdiction over an Indian tribal government on tribal land.

7. This Court's decisions of the immediate post-Civil War era reflect the same understanding. In *The Kansas Indians*, 72 U.S. 737, 754 (1867), the Court held that members of three Indian tribes were not subject to state taxes. That decision rested on the general rule that states lacked jurisdiction over tribal lands, not on a specific prohibition in a federal treaty. Although one of the tribes had a treaty promising that its land would remain outside state jurisdiction, (Treaty with the Shawnee, 10 Stat. 1053 (May 10, 1854)), the other two tribes did not have such a guarantee. See *id.* at 759 (rejecting distinction between the Shawnee and the Wea based on Treaty with the Kaskaskia, 10 Stat. 1082 (May 30, 1854)); *id.* at 760 (same as to Miami tribe based on Treaty with the Miami, 10 Stat. 1093 (June 5, 1854)). Similarly, in *The New York Indians*, 72 U.S. 761 (1867), the Court held that Seneca reservation land was exempt from state taxation because the tribe had not yet relinquished jurisdiction, even though the specific parcels had been sold to non-Indians and the federal government had approved the eventual transfer of the reservation. In a related case involving the same 1838 federal treaty, the Court also held that the *State* had no authority to remove Seneca Indians from land that had been ceded in the treaty, and that removal was the sole responsibility of the federal government. *Fellows v.*

Blacksmith, 60 U.S. 366 (1856). The Senecas' treaty reserved the land for the Senecas' "free use and enjoyment."[25] Thus, the holdings in *The New York Indians* and *Fellows v. Blacksmith* cannot have been based on an express guarantee that "their lands would never be subjected to the jurisdiction of any State or Territory." Cf. *Hicks*, 533 U.S. at 362 n.4.

8. The sole authority directly cited by the County and its state *amicus* for the contrary proposition that states have inherent jurisdiction over tribal governments and tribal lands is *Hicks*. It would be surprising that an "inherent" state power "mandated by the nature of American federalism" (Calif. Br. 18) made its first appearance in 2001. And, as we have shown, it is not true (as to Indian country) that "as sovereigns succeeding to Great Britain's territorial sovereignty, the States have had inherent authority to perform core governmental functions, like the investigation of crimes, throughout their territory from the time of the Constitution's framing." (Calif. Br. 19). The discussion of "inherent jurisdiction" in *Hicks* is not based on historical evidence contradicting Chief Justice Marshall's account of relations among colonial, then state and federal governments on the one hand, and Indian tribes on the other. Rather, it appears to be based on late nineteenth century cases that tie state jurisdiction over *non-Indians* to the language of the treaties that create particular Indian reservations. See also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962), cited in *Hicks*, 533 U.S. at 362. A closer examination of those cases shows that they do not support fundamentally inverting

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[25] 7 Stat. 44, Art. III (Nov. 11, 1794). Article VII of the Treaty of Canandaigua did provide for the resolution of disputes arising from the "misconduct of individuals" between the tribal government and the federal government, recognizing the absence of state jurisdiction to enforce state laws on tribal land.

federal Indian law to allow states to exercise jurisdiction over tribal governments unless expressly forbidden by treaty.

The idea that state jurisdiction depends on the specific terms of a federal statute or treaty, rather than on the general tribal sovereignty principle proclaimed in *Worcester*, seems to have originated in *Langford v. Monteith*, 102 U.S. 145 (1880). *Langford* held that a *territorial* court had territorial jurisdiction over a suit to evict a tenant from Indian land, overruling *Harkness v. Hyde,* 98 U.S. 476 (1878) (process from a territorial court cannot be served on a defendant on an Indian reservation). Because *Langford* involved a territorial court exercising Congress' plenary powers over the territories, it provides no support for *state* jurisdiction, inherent or otherwise. But see *Organized Village of Kake*, 369 U.S. at 72 (citing *Langford* as support for the proposition that "a reservation was in many cases a part of the surrounding State or Territory.").[26] The same is true of *Utah*

[26] Justice Miller's opinion for the Court in *Langford* cites his opinion as Circuit Justice in *United States v. Ward*, 28 F. Cas. 397 (C.C.D. Kan. 1863), which holds that a non-Indian could not be tried in federal court for killing a non-Indian on an Indian reservation because it was not within the "exclusive" jurisdiction of the United States and was within the jurisdiction of the state of Kansas. The Circuit Court relied on the absence of an explicit promise in the treaty recognizing the tribe's reservation that it would remain outside the jurisdiction of the state. The full Court rejected this contention four years later in *The Kansas Indians*. Furthermore, the Indian Trade and Intercourse Act did not require federal jurisdiction to be exclusive. It created federal jurisdiction over Indian country on the *same basis* as federal jurisdiction over lands within the exclusive jurisdiction of the United States. Thus, the existence of state jurisdiction was arguably irrelevant to the availability of federal criminal jurisdiction under the Act. Cf. 25 U.S.C. § 233 (statute conferring concurrent jurisdiction on the state). *Ward* nevertheless "may have had an important influence" on the Court's later decision in *McBratney*. Handbook of Federal Indian Law 264 n.44 (1982 ed.).

& N. Ry. Co. v. Fisher, 116 U.S. 28 (1885), which held that the *territory* of Idaho had jurisdiction to tax land within the boundaries of an Indian reservation set aside by Congress for the railroad. But see *Hicks*, 533 U.S. at 362 (citing *Utah & N. Ry.* as support for the proposition that an Indian reservation is now ordinarily considered part of the territory of the state).[27]

A year after *Langford*, the Court decided *United States v. McBratney*, 104 U.S. 621 (1881). *McBratney* involved a murder by a non-Indian of a non-Indian on the Ute reservation in Colorado. The Court held that the state courts, not the federal district court, had jurisdiction to try the case. The Court read the statute admitting Colorado as a state as "necessarily repeal[ing]" the provisions of the federal treaty with the Utes precluding state jurisdiction, because Congress had expressly exempted Indian land from the state's jurisdiction when it wished to do so. *Id*. at 623. The Court was careful, however, to stress that its decision was not about the rights of tribal governments. *Id.* at 624.

The Court's focus in *McBratney* on federalism rather than tribal sovereignty was understandable. Congress had provided for federal jurisdiction over crimes by non-Indians on Indian reservations in 1817, but there were questions about whether Congress could legislate with respect to crimes that

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[27] *Hicks* also cites the 1958 edition of the Handbook of Federal Indian Law 510 & n.1. The 1982 (and most current) edition of this treatise reads: "tribal lands within the boundaries of state or organized territories have always been considered to be *geographically* part of the respective state or territory. *This was so even when the state had no jurisdiction over the tribal lands*." p. 649 (emphasis added; footnotes omitted). The authors of the 1982 edition caution against reliance on the 1958 edition, which was written at a time when the Department of the Interior was firmly committed to a policy of terminating tribal governments. Handbook of Federal Indian Law at *ix* (1982 ed.).

did not involve Indians under the Indian Commerce Clause. See n. 23, *supra*. This was unimportant in the territories, where Congress exercised legislative jurisdiction over crimes by non-Indians, but became important in the new states. Reading the act of admission as shifting that jurisdiction to the newly-admitted state when it would not affect tribal members or tribal self-government was an attractive solution. *McBratney's* reading of federal statutes and federal treaties may not be entirely convincing, but the decision clearly rests on federal law, not on inherent pre-constitutional jurisdiction over a tribal government.[28]

Subsequently, in *Draper v. United States*, 164 U.S. 240 (1896), the Court held that the state courts of Montana rather than the federal courts also had jurisdiction over crimes involving non-Indians on the Crow reservation, notwithstanding a provision in the act of admission leaving Indian lands "under the absolute jurisdiction and control of the congress." The Court explained that, '[a]s equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise construed." *Id.* at 244-45. With that principle of construction in mind, the Court read the statutory reservation of federal jurisdiction as limited to preventing lands allotted to the Indians in severalty from falling under state law so as to impair federal restrictions on alienation, but not as barring state criminal jurisdiction over crimes involving non-Indians. In *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946), the Court

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[28] *McBratney* has been criticized as unclear and inconsistent with general principles of statutory construction. Handbook of Federal Indian Law 264-66 (1982 ed.) (doubting "that the same result would be reached today in a case of first impression). *McBratney* should, in any event, not be extended.

reasoned that because Colorado had been admitted on an "equal footing" with the original states, *McBratney* must imply that the original states also had jurisdiction to prosecute offenses involving only non-Indians on tribal lands.

McBratney, *Draper* and *Martin* do not recognize a broad "inherent" general state jurisdiction over tribal governments on Indian lands. None of the cases involve tribes or Indians. From the Court's perspective, it may have seemed of little importance to the tribe whether prosecutions of non-Indians for crimes against non-Indians took place in state or federal court, so long as no tribal interests were perceived to be at stake.

When the Court saw tribal interests at stake, it adhered to the rule forbidding state jurisdiction. In *United States v. Kagama*, 118 U.S. 375 (1886), the Court upheld the constitutionality of the Indian Major Crimes Act. *Kagama* involved the murder of one Indian by another Indian within the Hoopa Valley reservation in California. The Court acknowledged that murder is "in most all cases of its commission punishable by the laws of the states." *Id*. at 383. That could not be so of tribal Indians, however, who "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *Id.* The Court expressly reaffirmed *Worcester* as the rule applicable to state power over tribal Indians within reservation lands. *Id.* at 384. The common thread uniting *Kagama* to *Worcester* is that tribes have a government-to-government relationship with the federal government, and are not subordinate to the states. States therefore do not have jurisdiction when tribal interests are at stake. *Donnelly v. United States*, 228 U.S. 243, 271-72 (1913) (holding *McBratney* inapplicable to crimes by or against Indians); *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946) (Arizona may have jurisdiction over offenses between non-Indians, but not offenses by an

Indian against a non-Indian); *Williams v. Lee*, 358 U.S. 217, 219 (1959) (same). Those cases are inconsistent with the idea that states have the same jurisdiction over tribal lands as over non-tribal lands within their borders.[29]

B. *Hicks* Should Not Be Extended to Searches of Tribal Governments.

The County and its *amici* do not make a serious effort to identify an historical basis for an "inherent" state jurisdiction to execute search warrants for tribal government records in tribal government offices on tribal land. Nor could they. Instead, they extrapolate the rule they want from language in *Hicks*. Thus, they are arguing for a new judicially-constructed rule that is in conflict with the many decisions of this Court based on the general principle that states do not have sovereignty over tribes.

If the Court has common law power to change the relationship between state and tribal governments without legislation, it should only exercise it in accord with the federal Indian policies adopted by the political branches of

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[29] It is also incorrect to reason from state authority to serve process within federal enclaves that states must also have such authority within tribal lands. But see U.S. Br. 22. State authority to serve process in federal enclaves is based on an express reservation in the state's cession of land to the United States and the acceptance of those terms by the United States pursuant to Art. I, § 8, cl. 17. Absent such a reservation, a state would not have such power. See Joseph Story, Commentaries on the Constitution §§ 1219-20 (1833), *reprinted in* 3 The Founders' Constitution 237 (1987). Indian tribes do not enter into such agreements with states as a condition of occupying their lands.

government.[30] The policies of the allotment era reflected in *McBratney*, and the policies of the termination era reflected in *Martin*, have been discredited.[31] See *Moe v. Confederated Tribes*, 425 U.S. 463, 479 (1976) (allotment); Handbook of Federal Indian Law 180-88 (1982 ed.) (termination). Today, congressional Indian policy supports tribal sovereignty and stronger tribal institutions. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985) ("Our cases have recognized that Congress is committed to a policy of supporting tribal self-government and self-determination"); 25 U.S.C. §§ 450-450n (Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§ 1901-1963 (Indian Child Welfare Act). The Court should not adopt by its judgment a rule of law that is at odds with that congressional policy.

Five years ago, this Court declined to reexamine the doctrine of tribal sovereign immunity, recognizing that Congress was free to do so if it chose, and that the Court should hesitate to act where Congress has refrained from acting within its sphere. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758-60 (1998). The same considerations should constrain the Court in this case. The County and its *amici* make policy arguments about the need to extend state jurisdiction throughout reservations. As the brief for the National Congress of American Indians shows, those public safety arguments are

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[30] This point is developed in Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over NonMembers, 109 Yale L. J. 1, 79 (1999).

[31] To say that the Court should not breathe new life into discredited policies is not to say that the Court does not apply the statutes Congress enacted during the allotment era. See *Brendale v. Confederated Tribes of the Yakima Nation*, 492 U.S. 408, 427 (1989) (opinion of White, J.).

unfounded. When Congress was faced with similar arguments for extending state sovereignty over tribal gaming, it declined to do so. S. Rep. No. 100-446, at 1-3, 5 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075. Instead, Congress chose to respect tribal sovereignty and to permit states to regulate only within the framework of federal law by means of a compact negotiated with the tribe as a co-equal sovereign. The same respect for tribal sovereignty required the County to seek records from the Tribe by means consistent with the Tribe's policies and its right of self-government.

In this case, as in *Kiowa*, the Court should be reluctant to diminish tribal sovereignty because "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" through legislation. 523 U.S. at 759.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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