No. 05-1285

In The Supreme Court of the United States

THOMAS LEE MORRIS and
ELIZABETH S. MORRIS,

Petitioners,

v.

TANNER, Judge of the Confederated Salish and Kootenai Indian Tribal Court For the Flathead Reservation, and UNITED STATES OF AMERICA,

Respondents.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation (MSLF) respectfully moves this Court, pursuant to Supreme Court Rule 37, for leave to file the accompanying *amicus curiae* brief in support of Petitioners. Petitioners and Respondent, United States of America, granted consent to MSLF to file this *amicus* brief. Respondent Tanner, though, opposed the filing of this brief.

MSLF is a non-profit, public interest legal foundation that litigates in the public interest to promote and protect individual liberties guaranteed by the United States Constitution. It also litigates to ensure limited and ethical government that functions within the confines of lawful statutes and the Constitution. Moreover, MSLF has a long history of litigating in the areas of individual liberties and limited and ethical government, in such cases as *Adarand Constructors, Inc. v. Peña*[1] and *Wygant v. Jackson Board of Education*,[2] where it represented the Petitioners before this Court. Therefore, MSLF is particularly able to assist this Court in this case.

Furthermore, MSLF's members bring to this case a different and wider perspective than do Petitioners. MSLF has many members who live on or near Indian reservations. These members are concerned with the civil and criminal jurisdiction of Tribes and the impact that tribal jurisdiction has on their every-day lives and business dealings. This Court, in a series of cases, recognized limits

[1] 515 U.S. 200 (1995).

[2] 476 U.S. 267 (1986).

on the inherent sovereignty of Indian Tribes.[3] Nonetheless, this Court recently determined, in *United States v. Lara*,[4] that Congress, under its plenary power over Indian Tribes, may "restore" inherent sovereignty to the Tribes. The means Congress chose in that case was the 1990 amendment to the Indian Civil Rights Act, providing that Tribes may prosecute all Indians criminally, irrespective of tribal membership.[5]

Because Tribes' inherent sovereign power is not constrained by the Bill of Rights, or any other provision of the Constitution, Congress's power to "restore" sovereignty creates a grave constitutional crisis of significant concern

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[3] *Oliphant v. Suquamish Indians*, 435 U.S. 191 (1978) (no inherent jurisdiction to try and punish non-Indians); *United States v. Montana*, 450 U.S. 544 (1980) (no inherent jurisdiction to regulate non-Indian hunting and fishing on fee land owned by non-member within reservation); *Duro v. Reina*, 495 U.S. 676 (1989) (no inherent jurisdiction to prosecute non-member Indian criminally; *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (no inherent jurisdiction to zone fee land owned by non-Indians within "open" areas of reservation); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Flood Control Act abrogated Tribe's rights under treaty to regulate hunting and fishing by non-Indians in area taken for dam and reservoir project, so no inherent jurisdiction over non-Indian hunting and fishing in taken areas); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no inherent tort jurisdiction against non-members for accident on public highway running through reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (no inherent jurisdiction to adjudicate tort claims or § 1983 claims arising from state official's execution of process on reservation land for evidence of off-reservation crime); *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001) (no inherent authority to impose tax on non-member guests of hotel on non-Indian owned land within reservation).

[4] 541 U.S. 193 (2004).

[5] 25 U.S.C. § 1301(2) (104 Stat. 1892-93 and 105 Stat. 646 set out the amendment itself).

to MSLF's members.[6] It does so because that power allows Congress to strip U.S. citizens of basic constitutional rights and subject them to criminal prosecution by a third-party sovereign not envisioned by the Founding Fathers when they created the dual-sovereign constitutional structure. Consequently, this Court should hold that the Fifth Amendment Due Process Clause prevents Congress from depriving U.S. citizens of constitutional rights in this manner.

This Court should also hold that Congress's adoption of the 1991 Amendments to the Indian Civil Rights Act violated the Constitution's equal protection guarantee. Any classification adversely affecting fundamental constitutional rights requires strictest scrutiny, which this legislation cannot survive. That Congress deprived a racial group – American Indians – of their constitutional rights is doubly damning, and should receive "doubly strict scrutiny," damning once because Congress created a classification that eradicates constitutional guarantees for some persons, and damning once again because the classification is race based.

Therefore, Congress deprived some United States citizens of both Due Process and Equal Protection, contrary to the Fifth Amendment to the Constitution. Even more shocking is that there is no principled reason, using this Court's rationale in *Lara*, that Congress may not "restore" tribal inherent sovereignty over all persons found in Indian Country, regardless of their race or tribal status, specifically including many of MSLF's members. Indeed,

[6] *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Congress might even restore sovereignty over capital crimes and the death penalty. What is more, the Tribe and the United States argue here that Congress's plenary power to provide for the group rights of Tribes, *vis-à-vis* the individual constitutional rights of U.S. citizens, permits just that. Plus, they argue that courts must review actions taken under Congress's plenary power using rational basis scrutiny only, when strict scrutiny clearly applies. If this argument proves correct, the implications for the rights of U.S. citizens, and the nation's constitutional system, are stunning.

Fortunately, *Lara* did not decide these issues. Rather, this Court wisely reserved them for another day. And, with this case, that day has arrived. This Court must resolve the conflict between Congress's plenary power to "restore" inherent sovereignty to Tribes, and the rights of all American citizens, including tribal members, under the Constitution. This case presents this Court with an opportunity to remove the confusion that surrounds this Court's Indian Law jurisprudence by declaring that Congress may not subject American citizens to prosecution by tribal courts that are not constrained by the United States Constitution, whether on the basis of race, political affiliation, or for any other reason.

MSLF is particularly able to assist the Court in understanding these issues and the critical importance of hearing this case. MSLF and its members take a much broader view of the importance of hearing this case than that presented by Petitioners, and believe that this Court should order that the attached *amicus curiae* brief be received and considered filed.

WHEREFORE, Mountain States Legal Foundation respectfully moves this Court for leave to participate in this Petition for *Writ of Certiorari* as *amicus curiae* in support of Petitioners and to file the accompanying *Amicus Curiae* Brief.

DATED this 9th day of June 2006.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS[1]

SUMMARY OF ARGUMENT

This Court must resolve the conflict between the group rights of Tribes, granted them by Congress, and the individual constitutional rights of U.S. citizens, guaranteed them by the U.S. Constitution. This Court must hear this case to declare that Congress, in promoting Indian Tribes' self-government, may not deprive any U.S. citizen of the fundamental guarantees of the Constitution and its Bill of Rights.

This conflict results because of the ambiguous Indian law jurisprudence of this Court and resultant congressional action. This Court holds that Indian Tribes possess inherent powers of sovereignty and that the U.S. Constitution does not apply to Tribes' exercise of these sovereign powers. Consequently, criminal prosecutions by Tribes do not afford U.S. citizens the constitutional guarantees afforded by the Bill of Rights.

Though originally unlimited, this sovereign power is now the subject of regulation by Congress, under its plenary power over Indian Tribes. Thus, Congress determines how much or how little sovereign power, for example, criminal jurisdiction, a Tribe enjoys. This case arose because Congress gave Indian Tribes criminal jurisdiction over all U.S. citizens of Indian ancestry. Worse yet, there is

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

no principled reason, under this Court's Indian law jurisprudence, why Congress may not extend tribal criminal jurisdiction to include all citizens, all crimes, and all punishments.

Congress's decision to grant Tribes the inherent sovereign power to prosecute U.S. citizens criminally deprives those citizens of their basic constitutional protections because it subjects them to the criminal jurisdiction of an extra-constitutional tribunal that the Constitution does not contemplate. As a result, they are denied Due Process of Law.

In the case presented here, however, Congress did not deprive all U.S. citizens of their constitutional rights, but only those citizens who are of Indian ancestry. Congressional classifications that deny some, but not all, citizens their constitutional rights are inherently suspect, whether those classifications are political (tribal) or racial (Indians). When those classifications are racial, as they are here (Indians and non-Indians), they are doubly suspect. Consequently, Congress, by subjecting only American Indians to tribal criminal jurisdiction, denied those citizens Equal Protection of Law, also guaranteed by the Fifth Amendment.

Historically, this Court has avoided these constitutional difficulties, with respect to Indian citizens who are members of the prosecuting Tribe, by utilizing the fiction that these citizens, by consenting to be, and to remain, tribal members, waive their constitutional rights. But this "consent" is illusory. It does not comport with the requirements of this Court for waiving constitutional rights. Furthermore, it infringes on the First Amendment Freedom of Association of citizens of Indian ancestry because

Congress conditions the freedom of those citizens to associate with Tribes on their waiver of basic constitutional protections.

The Ninth Circuit dodged the Due Process issues entirely and tried to avoid the Equal Protection claims by disingenuously designating tribal membership a political classification. Of course, such membership is not political; it is racial because only persons of Indian ancestry may join. In fact, non-Indians, though they may voluntarily choose to become tribal members, may not consent to tribal criminal jurisdiction; only persons of Indian ancestry may do so. Thus, the Ninth Circuit skirted the real issue – whether Congress's plenary power over Tribes, when exercised to deprive U.S. citizens of fundamental protections, justifies rational basis review instead of strict scrutiny. So phrased, the answer can only be no; strict scrutiny is required here.

In the past, this Court reserved the questions presented by these constitutional difficulties for another day. That day is at hand. This Court must take this case and this issue, which it has avoided for too long, and finally resolve the conflict between Congress's plenary power over Tribes and the limits of Congress's powers to affect adversely the individual constitutional rights of United States citizens.

REASONS FOR GRANTING THE PETITION

I. THIS COURT MUST RESOLVE THE CONFLICT BETWEEN INTERESTS OF INDIAN TRIBES, UNDER THEIR INHERENT SOVEREIGNTY, AND RIGHTS OF INDIVIDUAL AMERICAN CITIZENS, UNDER THE U.S. CONSTITUTION AND ITS BILL OF RIGHTS.

The federal republic created by the U.S. Constitution contemplates only two sovereign governments – the United States and the several States, which must each respect the proper sphere of the other. Moreover, citizens of one sovereign are citizens of the other, possessing rights and duties as to both.[2] And the Bill of Rights and the Fourteenth Amendment protect those citizens before the tribunals of both sovereigns.

The same is not true for citizens appearing before tribal tribunals because this Court recognizes that Indian Tribes retain inherent sovereignty to control their own internal relations and to preserve their unique customs and social behavior.[3] That is, tribal legislation and adjudication, pursuant to that inherent sovereign power, are not constrained by the Bill of Rights because Tribes pre-exist the Constitution and are neither States nor part of the federal government.[4] For example, no constitutional constraints apply to tribal courts that prosecute U.S. citizens criminally under the Tribes' inherent sovereignty. Moreover, this Court leaves the extent of the powers of

[2] *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J. concurring).

[3] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

[4] *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

those sovereigns to the discretion of Congress, under its plenary power to legislate with respect to Indian Tribes, which derives from the Indian Commerce and Treaty Clauses.[5] Consequently, under this Court's current jurisprudence, Congress may extend the reach of those sovereign powers to their original scope, including the rights to prosecute all persons in Indian Country criminally, regardless of the crimes, punishments, or constitutional rights denied the accused.

Congress, therefore, determines which U.S. citizens to subject to criminal prosecution by non-constitutional tribal courts and which U.S. citizens not to subject to such prosecution. So when this Court held in *Duro* that a Tribe's inherent sovereign jurisdiction extends only to its members,[6] Congress amended the Indian Civil Rights Act to extend that sovereignty to all Indians, regardless of tribal membership. When that Act was challenged in *Lara*, this Court held that Congress had acted within its authority to "restore" inherent sovereignty.[7] Moreover, under *Lara*, there is no principled reason why Congress may not "restore" tribal sovereign powers to include criminal jurisdiction over all persons in Indian Country, Indian and non-Indian alike.

Fortunately, *Lara* decided only the double jeopardy question, and left for another day the critical issue of the

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[5] *Lara*, 541 U.S. at 200-02 (U.S. Const., art. I, § 8, cl. 3, and art. II, § 2, cl. 2, respectively).

[6] *Duro*, 495 U.S. at 694-95.

[7] *Lara*, 541 U.S. at 200-02.

conflict between tribal sovereignty and individual constitutional rights.[8] That day has arrived, and this Court should now resolve that conflict. The critically important issue now presented, and what this Court must grant *certiorari* to decide, is whether Congress may subject any U.S. citizen to criminal prosecution by a sovereign that was not contemplated by the Constitution, thereby depriving that citizen of the protections guaranteed, not only by the basic structure of the Constitution, but also by the Bill of Rights.

This question presents three crucial issues:

- Whether Congress violates the Due Process Clause of the Fifth Amendment by subjecting a U.S. citizen to criminal prosecution by a non-constitutional tribunal?

  Whether Congress violates the Equal Protection component of the Due Process Clause by subjecting some U.S. citizens, but not others, to criminal prosecution by a non-constitutional tribunal?

  Whether Congress's act of subjecting some U.S. citizens, but not others, to criminal prosecution by a non-constitutional tribunal requires strict scrutiny?

[8] *Id.* at 209.

A. Congress Violates The Due Process Clause By Subjecting Any U.S. Citizen To Criminal Prosecution By Indian Tribal Courts.

The constitutional power that Congress exercises over Indian Tribes does not empower Congress to deprive individual U.S. citizens of rights protected by the Constitution. That is, the power to regulate and protect group interests does not empower Congress to deprive individuals of their fundamental constitutional rights. Tribal group interests, protected by Congress, simply may not trump individual rights that the Bill of Rights protects.

The federal government is one of enumerated powers:

> The Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. See, *e.g., McCulloch v. Maryland,* 4 Wheat, 316, 405, 4 L.Ed. 579 (1819) ("This government is acknowledged by all to be one of enumerated powers"). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. Cf. *New York v. United States,* 505 U.S. 144 (1992).[9]

There is no text in the Constitution that allows Congress to deprive individual U.S. citizens of fundamental constitutional rights simply because Congress has the power to regulate and protect Indian Tribes. Indeed, some argue

[9] *Printz v. U.S.*, 421 U.S. 898, 936 (1997) (Thomas, J. concurring).

that there is no textual support at all in the Constitution for Congress's plenary power over Tribes.[10]

In fact, even if there were such text, the Bill of Rights is explicit in protecting "persons" from overreaching congressional regulation under Congress's other powers.[11] In other words, the power conferred on Congress to regulate Indian Tribes, "like the other great substantive powers of Congress, is subject to the Fifth Amendment."[12] Thus, Congress may not protect Tribes, or any group, at the expense of an individual's constitutional rights.

Let us be clear. When a Tribe acts extra-constitutionally upon anyone, it does so only because Congress subjected that U.S. citizen to tribal jurisdiction. One may not argue that the Tribe, not Congress, prosecuted the individual criminally; when the Tribe exercises inherent sovereignty over an individual it does so only by grant of Congress. Thus, because Congress subjects U.S. citizens to criminal prosecution by a sovereign outside the basic structure of the Constitution, a sovereign that is unconstrained by the Constitution, it is Congress, not the Tribe, that deprives the citizen of his constitutional rights under the Due Process Clause and the equal protection guarantee. Yet, beyond its plenary power regarding Indian Tribes, the United States and the Tribe are unable to provide this Court any constitutional basis for denying any American citizen the rights set forth in the Bill of Rights.

[10] *Lara*, 541 U.S. at 215 (Thomas, J. concurring).

[11] "No person shall be. . . . " U.S. Const., amend. V. "[T]he accused shall enjoy. . . . " U.S. Const., amend. VI.

[12] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

In fact, there is no constitutional basis for denying any American citizen the benefit of the very structure of the Constitution: "political freedom guaranteed to citizens by the federal structure is a liberty both distinct from, and every bit as important as, those freedoms guaranteed by the Bill of Rights."[13] Consequently, any prosecution of a U.S. citizen by tribal courts is unconstitutionally void. This Court should hear this case to hold just that.

Moreover, this Court should not limit its holding to non-members of the prosecuting Tribe or to Indians. It should declare that no citizen, including members of the prosecuting Tribe, may be prosecuted criminally by tribal courts. Even though this Court has sanctioned Congress's decision to subject tribal members to criminal jurisdiction of their own Tribe, it has done so based on the chimera of "consent of the governed."[14] But this consent is only illusory. This Court may no longer seriously hold that a tribal member voluntarily consents to the loss of his constitutionally guaranteed rights by becoming and remaining a tribal member.

This is so because U.S. citizens may not waive their constitutional rights so easily. That is, courts may "not presume acquiescence in the loss of fundamental rights."[15] Courts are obliged, therefore, to establish that citizens make any such waivers knowingly and voluntarily.[16] Thus, any waiver of fundamental constitutional rights may occur only "with a full awareness both of the nature of the right

[13] *Lara*, 541 U.S. at 214 (Kennedy, J., concurring).

[14] *Duro*, 495 U.S. at 694.

[15] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[16] *Id.* at 464-65.

being abandoned and the consequences of the decision to abandon it."[17]

Merely joining a Tribe, or remaining a tribal member, cannot meet this standard for waiving basic constitutional rights. Most tribal members are enrolled by their parents at birth. Such enrollment hardly constitutes a knowing, intelligent waiver of constitutional rights. In reality, this so-called waiver by consent is no more than a contrived fiction to promote tribal self-government at the expense of the individual constitutional rights of a Tribe's members. Congress may not rely on this fiction because, under this chimera, tribal members lose their constitutional rights, possessed by all other U.S. citizens, upon their tribal enrollment at birth. Moreover, in order to regain these constitutional rights, they must reject their Tribe, their culture, and their heritage, and forego any right to participate politically or economically in their Tribe.

Furthermore, the Court's reasoning threatens a person of Indian ancestry's First Amendment right of Freedom of Association. That is, with the sanction of this Court, Congress conditions the right of a citizen of Indian ancestry to associate with an Indian Tribe and take part in its political life, governance, benefits, culture, and otherwise, upon the waiver of his fundamental constitutional rights. Additionally, Congress implies that the only manner in which an American Indian may reclaim the constitutional rights implicitly waived for him in his infancy, by his parents on his enrollment as a tribal member, is for him, as an adult, to resign his tribal membership. That which Congress demands of American Indians – that to be

[17] *Colorado v. Spring*, 479 U.S. 564, 573 (1987).

full citizens of this country and enjoy the constitutional guarantees of citizenship, they must refrain from associating with those with whom they share a common racial and cultural heritage – Congress could demand of no other group of citizens.[18]

That this action is unconstitutional is evident from the fact that, under current law, only Indians may consent to the loss of constitutional rights by becoming tribal members.[19] If the non-Indian in *Rogers*, who consciously chose tribal membership as an adult may not consent to the loss of his constitutional rights, then an Indian, whose parents enrolled him as a child, may not be presumed to have knowingly waived his constitutional rights by failing to disclaim his tribal membership as an adult. Indeed, one could better support tribal jurisdiction by proposing that a person consents to the waiver of constitutional rights by his mere voluntary presence in Indian Country, than by this illusory "consent of the governed" theory. Nonetheless, neither presumption survives strict scrutiny.

Therefore, this Court must grant the Petition and resolve the conflict between the inherent sovereignty of Tribes and the constitutional rights of individual United States citizens, including Indian citizens.

[18] *NAACP v. State of Alabama*, 357 U.S. 449, 460-61 (1958) ("Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty assured by the Due Process Clause' . . . It is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious, or cultural matters.").

[19] *United States v. Rogers*, 45 U.S. 567, 772-73 (1846) (Tribe has no jurisdiction to try non-Indian, married to Indian and adopted by Tribe, who kills another non-Indian adopted by another Tribe, in Indian Country).

B. Congress Violates The Equal Protection Component Of The Due Process Clause.

1. A Classification Depriving Any U.S. Citizen Of Fundamental Rights Requires Strict Scrutiny.

Congress now subjects all Indians to the criminal jurisdiction of tribal courts, thereby depriving Indians of the fundamental rights guaranteed to all other U.S. citizens by the Bill of Rights. That is, to determine who receives the protection of the Bill of Rights in a criminal prosecution by tribal governments, and who does not, Congress classifies persons as Indians or non-Indians. Yet where "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications that might invade or restrain them must be closely scrutinized and carefully confined."[20] Thus, if Congress, in enacting the "*Duro* Fix," adversely affects fundamental rights, it must demonstrate a compelling interest for doing so, and that the means chosen to promote that interest is narrowly tailored to achieve that interest. This is true whatever the classification may be.

As a result, Congress's action here cannot pass constitutional muster. Counsel can find no case in which Congress was held to have an interest so compelling that it may justify stripping a U.S. citizen of the basic constitutional protections afforded by the Bill of Rights in a criminal prosecution. Congress's power over Indian Tribes does not empower Congress to deprive some classes of

[20] *Harper v. Virginia State Board of Elections*, 393 U.S. 663, 670 (1966); *accord*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Classifications . . . affecting fundamental rights are given the most exacting scrutiny.").

citizens, and not others, of basic constitutional rights, by subjecting them to the jurisdiction of a non-constitutional tribunal. Promoting a tribal group's interest in self-government is not sufficiently compelling to terminate the individual citizen's constitutional rights when prosecuted by that tribal government.

Furthermore, that Tribal membership in the prosecuting Tribe, much less membership in some other Tribe, constitutes an informed, voluntary waiver of constitutional rights has no more merit in the equal protection context than in the due process context. Additionally, that presumption restricts First Amendment rights of Freedom of Association.

2. A Racial Classification Is Constitutionally Suspect.

Courts must strictly scrutinize all racial classifications:[21]

> [A]ll racial classifications . . . must be analyzed . . . under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[22]

Congress's distinction between Indians and non-Indians is a constitutionally suspect racial classification requiring strict scrutiny even if fundamental constitutional rights were not involved. But even if limited to tribal Indians, or

[21] "Racial discrimination is that which singles out 'identifiable classes of persons solely because of their ancestry or ethnic characteristics.'" *Rice v. Cayetano*, 528 U.S. 495, 496 (2000).

[22] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

to tribal members of the prosecuting Tribe, the classification remains racial because all tribal members must have Indian ancestry traced to a particular group of tribal Indians.[23] Indeed, only Indians may "consent" to the criminal jurisdiction of any tribal criminal court; a non-Indian cannot, even if a tribal member.[24] Thus, Congress's classification here, distinguishing between Indians and non-Indians, or based on tribal membership, is a suspect racial classification subject to strict scrutiny.

Congress may not justify this classification simply by its power to regulate and protect Indian Tribes. After all, the Bill of Rights protects individuals from congressional action regarding groups, such as Indian Tribes, not the other way around:

> [T]he Fifth . . . Amendment[ ] . . . protects *persons* not *groups*. It follows that all governmental action based on a race – a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' [cite omitted] – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.[25]

[23] "Discrimination on the basis of tribal membership constitutes national origin discrimination for purposes of Title VII, [which] prohibits . . . discriminating on the basis of 'race, color, religion, sex, or national origin.'" *Dawevendewa v. Salt River Project Agricultural Improvement and Power District*, 154 F.3d 1117, 1119 (9th Cir. 1998). "National origin includes not only nation of birth but also the place from which one's ancestors came, regardless of whether that place is now a nation." *Id.*

[24] *Rogers*, 45 U.S. at 772-73.

[25] *Adarand*, 515 U.S. at 227 (emphasis in original).

Indeed, Congress may not deprive even aliens of the constitutional rights it here denies to its own citizens.[26]

The Ninth Circuit disregarded this Court's Fifth Amendment equal protection jurisprudence, which establishes three important principles that courts must apply to equal protection cases. First, courts must treat all classifications involving race with skepticism. In other words, "*any* preference based on racial or ethnic criteria must necessarily receive a most searching examination."[27] Second, the courts must treat such classifications with consistency. That is, "the standard of review does not depend on the race of those burdened or benefited."[28] And third, courts must observe congruence. That is to say, "equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment."[29]

Instead, the Ninth Circuit, relying on *Morton v. Mancari*, reasoned that there was no racial classification involved here, only a political classification;[30] therefore, it did not require strict scrutiny. But *Mancari* either does not apply or should be overruled. First, *Mancari* did not deal with the Due Process Clause issues here, so it is inapposite

[26] *Flemming v. Nestor*, 363 U.S. 603 (1960) (bill of attainder, *ex post facto* law); *Silesian Am. Corp. v. Clark*, 332 U.S. 469 (1947) (Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135 (1945) (First Amendment); *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923) (Fourth Amendment); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912) (Sixth Amendment); *Wong Wing v. U.S.*, 163 U.S. 228 (1896) (Fifth, Sixth, and Eighth Amendments).

[27] *Adarand*, 515 U.S. at 223 (emphasis supplied).

[28] *Id.*

[29] *Id.*

[30] 417 U.S. 535 (1974).

to that extent. Second, *Mancari* did not deal with a classification that deprives individuals of their basic constitutional rights, which requires strict scrutiny regardless of the character of the classification. In such a case as this, a political classification is no different from a racial one. Third, *Mancari* deals strictly with the *sui generis* issue of Congress's power to promote tribal self-government relative to the Bureau of Indian Affairs, and should be limited to its special facts.[31] Finally, to the degree that *Mancari* may stand for the proposition the Ninth Circuit ruled it does, then this Court must hear this case and overrule *Mancari* for the reasons stated above. That is, Congress's plenary power to protect Tribes' group rights does not permit Congress to escape strict scrutiny when making racial distinctions between and among individuals.[32]

Given the failure of the Ninth Circuit to apply this Court's equal protection jurisprudence, this Court must grant *certiorari* and resolve the conflict between Congress's power to assist, protect, and regulate Indian Tribes (group rights) and the limitations placed on that power with respect to the constitutional rights of individual U.S. citizens, guaranteed by the First and Fifth Amendments.

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[31] *Mancari*, 417 U.S. at 554 (the "lives and activities [of Indians] are governed by the BIA in a 'unique fashion.'" Thus, "the legal status of the BIA is truly *sui generis*."); *Rice*, 528 U.S. at 520 ("[*Mancari*] was careful to note, however, that the case was confined to the authority of the BIA, an agency described as '*sui generis*.'").

[32] *Adarand*, 515 U.S. at 227.

CONCLUSION

There exist grave constitutional conflicts surrounding Indian Tribes. They are a third sovereign, not contemplated in this nation's dual-sovereign constitutional structure. They exist outside of, and are not constrained by, the Constitution. Their inherent sovereignty, though, extends only as far as Congress dictates. Congress has plenary power over Tribes and responsibilities toward them. But Congress's authority to exercise that power, or to fulfill those responsibilities, is subject to the protections afforded by the U.S. Constitution to all U.S. citizens. Congress may not act with respect to Tribes if doing so violates the constitutional rights of any individual U.S. citizen.

When Congress confers inherent sovereignty on Tribes to define and prosecute crimes, it deprives any U.S. citizen prosecuted by Tribes of the liberties guaranteed both by the U.S. Constitution itself and by its Bill of Rights. Moreover, Congress does so here by means of the additionally prohibited criteria of race. This Court must take this case and definitively resolve the conflict between the constitutional rights of individual U.S. citizens and the inherent sovereign powers granted Indian Tribes by Congress.

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