No. 09-

IN THE

Supreme Court of the United States

JOSEPH H. PYKE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MATTHEW PYKE, MAY P. COLE, CHARLES BENEDICT, PATRICIA A. BENEDICT, JULIUS M. COOK, BEVERLY J. PYKE, EDWARD SMOKE, SELENA M. SMOKE, MARGARET PYKE THOMPSON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

MARIO CUOMO, THOMAS A. CONSTANTINE, ROBERT B. LEU AND RONALD R. BROOKS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a summary judgment motion which turns on the adequacy of plaintiffs' evidence of intentional discrimination must be denied where a "plausible" inference of invidious intent can be drawn from all of the evidence, circumstantial and direct, taken as a whole?

2. Whether this Court should resolve a conflict among the circuits on the issue of what standards to apply in considering the strength of summary judgment evidence in cases of alleged intentional discrimination?

3. Whether Congress's enactment of 25 U.S.C. §232 obviated any distinctions based on geography or sovereignty regarding New York's duty to provide police protection to Native Americans residents of reservations within the State?

PARTIES TO THE PROCEEDING

Petitioners are:

Joseph H. Pyke, individually and as a personal representative of the estate of Matthew Pyke
May P. Cole
Charles Benedict
Patricia A. Benedict
Julius M. Cook
Beverly J. Pyke
Edward Smoke
Selena M. Smoke
Margaret Pyke Thompson
A certified class comprised of all members of the Akwesasne community residing on the United States portion of the ancient Mohawk Indian reservation known as Akwesasne or St. Regis, during June, 1989 through May, 1990, other than those persons named as defendants in an action entitled *Joseph H. Pyke, et al. v. Anthony ("Tony") Laughing, et al.*, No. 92-CV-555, filed in the United States District Court for the Northern District of New York,

Respondents are:

Mario Cuomo
Thomas A. Constantine
Robert B. Leu
Ronald R. Brooks

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on May 27, 2009.

OPINIONS BELOW

The court of appeals' opinion affirming the district court's order granting Defendants/Respondents' motion for summary judgment is reported at 567 F.3d 74 (2d Cir. 2009), and appears at 1a.[1] The district court's order granting summary judgment is reported at 2006 WL 3780808 (N.D.N.Y. Dec. 21, 2006) and appears at 16a. The district court's order denying Petitioners' motion for reconsideration of summary judgment based on newly-disclosed evidence appears at 10a and is not reported. The district court's order granting class certification is reported at 209 F.R.D. 33 (N.D.N.Y. 2002). The court of appeals' opinion vacating and remanding the district court's first order granting summary judgment on the ground that Petitioners must establish disparate treatment of otherwise similarly situated non-Native American individuals to establish an Equal Protection claim is reported at 258 F.3d 107 (2d Cir. 2001). The district court's first order granting summary judgment is reported at 2000 WL 1456283 (N.D.N.Y. Sept. 20, 2000). The district court's order denying Respondents' second motion for judgment on the pleadings is reported at 1995 WL 694624 (N.D.N.Y. Nov. 22, 1995), and an earlier district court order denying in

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1. References to the Appendix to this Petition are in the form "___a". References to the record before the court of appeals are in the form "Pyke-App. ___".

part Respondents' first motion for judgment on the pleadings, and granting dismissal of Petitioners' due process claim, is not reported.

JURISDICTION

This court has jurisdiction under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on May 27, 2009. *See* 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions listed below are set out in the Appendix at 35a-38a:

U. S. Const., amend. XIV, § 1

25 U.S.C. § 232

42 U.S.C. § 1983

N.Y. Exec. Law § 223

INTRODUCTION

This is a class action on behalf of some 4,000 Native American residents of Akwesasne, the St. Regis Mohawk Indian Reservation in northern New York State. Petitioners, who were plaintiffs in the courts below, seek damages for the willful and discriminatory failure of Respondents to provide the most basic elements of police protection in a civilized society. For nine months in 1989-1990, the State ignored the pleas of Akwesasne's Native American residents, as well as outside

government officials, and adamantly refused to patrol the reservation. The State Police, under Respondents' direction, failed to intervene as violence escalated to the point of virtual civil war, forcing thousands of residents to flee for their lives and others to endure assault, arson and riot, among many other crimes. This extraordinary level of violence culminated on the night of April 30 – May 1, 1990, when two young Native American men were murdered by gunfire. Only then did Respondents order the State Police to enter the reservation in force, which immediately restored order.

Respondents' policies implemented by the State Police during this 1989-90 period amounted to express classifications on the basis of race and national origin. For example, Respondents enforced a policy of physical segregation, under which Native Americans were permitted to enter Akwesasne, while non-Indians were stopped at police roadblocks on State Route 37 (which runs though the reservation) and detoured because the reservation was too dangerous. Yet that danger resulted from two other State Police policies: (i) ceasing all regular police patrols within the reservation, and (ii) giving advance notice when the police did enter to a criminal gang called the "Warriors." As the court of appeals recognized, "[v]iewed at its worst," the latter was "horribly misguided policing that effectively meant caving in to the demands of a criminal organization and ceding to it control over thousands of Mohawks." (7a-8a). Respondents have never even attempted to justify these policies as effectuating a compelling state interest using the least restrictive means.

The complaint alleged that Respondents' failure to provide equal police services to Akwesasne as compared to all other areas of New York violated the Equal Protection Clause and 42 U.S.C. § 1983. Similarly, Federal and State statutes impose on the State Police the "duty . . . to prevent and detect crime" (N.Y. Exec. Law § 223) on Indian reservations "to the same extent . . . as elsewhere within the State." 25 U.S.C. § 232.

All of the Respondents have made distinguished contributions as public servants for many years and they claimed their actions were motivated by respect for Indian sovereignty, not racial bias. There is, however, record evidence in this particular situation from which it is entirely plausible to conclude that unlawful discrimination was a motivating factor in the intentional denial of police services. Given the public importance of this case, certiorari should be granted to clarify the standards under which summary judgment may be granted where discrimination claims turn on questions of the defendants' intent.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The Petitioners are Native Americans affected by widespread violent unrest on the Akwesasne Mohawk Indian Reservation. Plaintiffs' injuries flowed from New York State Police policies that discriminated against Native Americans by withholding vital police services for many months. At that time, Respondents were the Governor of New York, the Superintendent of the New York State Police, and the State Police Troop Commanders responsible for the Akwesasne area.

Prior to the summer of 1989, the State Police had furnished the same police services to Native Americans living in Akwesasne as they provided to all other unincorporated areas in the State. This equal treatment was in accord with State Police policy enunciated by Respondent Cuomo: "to apply law enforcement intelligently, fairly. To accomplish the purpose of enforcing the law, while at the same time risking as little as possible the lives" of all citizens. (Pyke-App. 409). Such treatment was required by the combined effect of 25 U.S.C. § 232, which gives New York jurisdiction over offenses committed by or against Indians on reservations within the state, and N.Y. Exec. Law § 223, which imposes on the State Police the "duty . . . to prevent and detect crime." Adopted in 1948 at the State's request, 25 U.S.C. § 232 resolved jurisdictional and sovereignty issues with respect to State law enforcement on Indian reservations.

The State Police were able to provide equal services to Akwesasne even though, by the late 1970s, various factions and internal political interests had led to increased criminal activity and violence. Such difficulties did not prevent the State Police from fulfilling their policing duties by preventing crime through routine patrols and a constant presence on the reservation.

In mid-1989, however, the Respondents adopted new, discriminatory policies. On July 20, 1989, an armed criminal racketeering organization known as the "Warrior Society" or "Warriors" established an illegal road barricade at a single location on the reservation in order to prevent the arrest of operators of privately-owned gambling casinos that were open to the general

public in blatant violation of federal and state law. Rather than step in and arrest the criminals, Respondents allowed the Warriors and their barricade to remain, while the State Police withdrew. Thereafter, the State Police essentially abandoned physical law enforcement control of the reservation. (*See* Pyke-App. 298, 326, 566, 574, 676-78).

This retreat of police presence allowed the threat of violence posed by the Warriors to expand without restraint, until it engulfed the reservation. Rather than stopping the escalating violence, the State Police surrounded the reservation and denied entry to everyone except Native Americans, despite repeated requests for protection from within. This policy was maintained even after the Warriors' reign of terror drove hundreds of residents from their homes and shut down schools and businesses. (*See* Pyke-App. 130, 298, 465, 567). The residents of Akwesasne were essentially left to fend for themselves against heavily armed criminal gangs.

The State Police actions (or inaction) were taken pursuant to express policies that denied Native Americans equal treatment compared to policies in existence at all other times and places in the State:

- The State Police ceased all regular police patrols on the Reservation for nine months (Pyke-App.-583, 589-90), although the State Police website acknowledges that patrols are one of the "critical and frequent tasks of a trooper." (Pyke-App. 1318-19).

- The State Police notified the "Warrior Society," a known criminal gang, before they entered Akwesansne in response to Native American residents' calls for assistance. No such policy has ever existed, before or since, in any other community in New York State. (Pyke-App. 641, 651-52).

- The State Police abandoned Akwesasne and blockaded the Reservation because the lack of regular patrols and notification of the Warrior Society meant that the police could no longer guarantee public safety. The police permitted Native Americans to enter the danger zone, while turning non-Native Americans away – a policy that as a practical matter enforced actual physical segregation between Native Americans and all other citizens. (Pyke-App. 566-69, 706-07, 1309).

Respondents claimed that this differential treatment was based on considerations of "residency," "geography" and "sovereignty." But it is indisputable that the geographic area in question – the Akwesasne Reservation – has been defined for over two centuries by the Native American race and national origin of its citizens. *See* Treaty of May 31, 1796, 7 Stat. 55 (establishing the lands that became the reservation for occupancy by St. Regis Indians). The destructive impact of the State's policies on public safety fell almost entirely on Native Americans.

Nor were Respondents' policies merely temporary, emergency measures. Respondents enforced them for over *nine months*. By Respondent Constantine's admission, the policies forced Native American members of the plaintiff class to live in a "very serious and dangerous situation," where "little kid[s] [were] sleeping under [their] bed[s] for fear they would be shot." (Pyke-App. 442a). Unlike anywhere else in New York, thousands of rounds of automatic gunfire terrorized Akwesasne residents, and they were forced into evacuation shelters. For those nine months Petitioners lived in daily fear of being killed, while doubting there would be any evidence to make arrests because there were no police – a concern that proved well-founded when no one was ever charged in the April 30, 1990 murders. As the district court recognized, there was "no question that the level of strife, discord and violence . . . was extraordinary." (30a).

Respondents maintained these discriminatory policies despite repeated pleas from both Petitioners and outside government officials. For example, U.S. Senator Daniel Inouye, Chairman of the Select Committee on Indian Affairs, urgently wrote to defendant Cuomo on April 2, 1990, that "clear threats of deadly violence [to Native Americans] . . . would not be tolerated by the state or federal government in any other community or under any other circumstances." (Pyke-App. 1520b-c).

B. PROCEDURAL HISTORY

This case was filed on April 30, 1992. For over nine years, until August 2001, the case was delayed by Respondents' fatuous argument that no Equal Protection claim was stated because Petitioners had not alleged that a similarly-situated "mirror-image" group of non-Native persons had been threatened with severe internal community violence, but received adequate police protection. Respondents pursued the argument through two Rule 12(c) motions, obtained a stay of merits discovery, and ultimately won summary judgment. That ruling was promptly reversed by the Second Circuit. *See Pyke v. Cuomo I*, 258 F.3d 107, 109 (2d Cir. 2001) ("If the rule were as framed by the district court, police authorities could lawfully ignore the needs of Native Americans for police protection on the basis of discriminatory anti-Indian animus. This is clearly not the law.")

In 2002, the district court granted class certification and discovery on the merits finally began. Respondents again moved for summary judgment, which was granted by the district court in December 2006.

The decision below affirmed the grant of summary judgment. The court of appeals held that Petitioners had not shown either (i) an express racial classification, or (ii) racially discriminatory intent. Ignoring contrary evidence and crediting Respondents' explanation that their actions were motivated out of respect for the sovereignty and geographic borders of the reservation, these holdings principally turn on findings of fact that effectively weigh disputed evidence in violation of Rule

56 and conflict with decisions of this Court and other circuits.

More than twenty years after Respondents' discriminatory policies began, Petitioners stand before this Court seeking their day in court to redress the "indisputable tragedy" (9a), caused by discriminatory State policies that permanently impacted the lives of thousands of Native Americans.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY THE APPLICATION OF RULE 56 TO QUESTIONS OF INTENT IN DISCRIMINATION CASES

This case exemplifies the need for this Court to clarify the standard that should be applied by the lower courts in granting summary judgment under Rule 56, Fed.R.Civ.P., where there is material evidence opposing the motion. Although the basic rule is clear – there can be "no genuine issue of material fact" (6a, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)); and that in making that determination, the court must never "weigh the evidence and determine the truth of the matter," *Anderson*, 477 U.S. *at* 249, but must "look at the record . . . in the light most favorable to . . . the party opposing . . . the motion' . . . [and] indulge all inferences favorable to the party opposing the motion." *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988) (quoting *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), quoting *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), and citing *United States v. Diebold*, 369 U.S. 654, 655 (1962)) –

the decisions below demonstrate that the rule can too easily be paid lip service while violating its precepts.

In addition, with this Court having now clearly spelled out that the "plausibility" of the plaintiff's allegations is the touchstone for ruling on motions to dismiss, *see Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), consistency of logic compels that on summary judgment, where "[t]he facts . . . admit of more than one plausible inference," *Greenburg v. Puerto Rican Maritime Shipping Auth.*, 835 F.2d 932, 936 (1st Cir. 1987), the motion similarly should be denied.

Such clarification is particularly appropriate in the context of § 1983 and discrimination cases, given the special role of the federal courts in vindication of constitutional rights. For example, the First Circuit has repeatedly held that the summary judgment standard is "particularly rigorous when the disputed issue turns on a question of motive or intent. *See Poller, 368 U.S. at 473* ("summary judgment procedures should be used sparingly . . . where motive and intent play leading roles"); *cf. Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982)* (whether a defendant's behavior reflected an intent to discriminate is a pure question of fact). 'Under such circumstances, jury judgments about credibility are typically thought to be of special importance.' *Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir.1983)." Lipsett*, 864 F.2d at 895. "[P]articularly" in a discrimination case "a plaintiff 'will rarely, if ever be able to produce a 'smoking gun' that provides direct, subjective evidence of [discriminatory animus]. Rather, a plaintiff must try

to convince the fact-finder to draw an inference from a broad array of circumstantial and often conflicting evidence . . . .' *Stepanischen*, 722 F.2d at 929." *Lipsett*, 864 F.2d at 895. Similarly, the Third Circuit has endorsed proving intent in discrimination cases, in the absence of a "smoking gun," by "combining the factors" to meet the "evidentiary burden . . . by the introduction of circumstantial evidence." *See, e.g., Dewitt v. Penn-Del. Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997); *Eichorn v. AT&T Corp.*, 248 F.3d 514, 523 (3d Cir. 2001).

In conflict with the "rigorous" approach of the First and Third Circuits to questions of intent in discrimination cases, the Second Circuit in the instant case expressly weighed the evidence, failed to consider all "plausible" inferences "in the light most favorable to" Petitioners, and failed to take into account the "broad array of circumstantial and often conflicting evidence." While this may be explainable by the fact that Respondents Cuomo and Constantine are prominent public servants and Respondents Brooks and Leu dedicated police officers, equal treatment under law compels the same "rigorous" application of Rule 56 standards without regard to Respondents' position or other distinguished accomplishments.

The court of appeals here plainly weighed the evidence of intent – in conflict with the First and Third Circuit approaches – in deciding that the challenged State Police policies did not constitute express racial classification subject to strict scrutiny under the Equal Protection Clause. The court of appeals stated: "[A]bsent some *greater showing of an intent* to classify based on race, the roadblocks policy is saved by *the fact*

that it was aimed at an area, not a racial class . . . ." (6a (emphasis added)). The court concluded its discussion with the magic words: "Plaintiffs have not produced sufficient evidence to raise a material issue" that the roadblocks were implemented with discriminatory intent. (7a). Yet in finding as a "*fact* that [the policy] was aimed at an area, not a racial class," the court relied entirely on what "[d]efendants explained" and what defendants said they "believed." (6a). Without meaningful explanation, it discounted or ignored substantial evidence bearing on Respondents' intent which leads to "plausible" inferences of discrimination.

The court of appeals then went on, with essentially no analysis or explanation, to reach the same conclusion with respect to the policies suspending police patrols on the reservation and notifying the Warriors before entering, although it did acknowledge that the latter policy might be characterized as "horribly misguided policing." (7a-8a).

Other than the *ipse dixit* conclusion that each "policy was not an express racial classification" (8a), the decision below contains no meaningful explanation of why plaintiffs' evidence of discriminatory intent is not sufficient. To the extent that the court of appeals' silence indicates it was relying on the district court's discussion of evidence, that court plainly violated Rule 56 by weighing the evidence. *See, e.g.*, 27a (finding that record on discriminatory intent "taken as a whole, reveals no such thing;" "the bulk" of Petitioners' evidence "consists of surmise, conjecture, and of statements taken out of context and given new meaning").

In fact, there was substantial evidence lending support to a "plausible' inference of discriminatory intent. First, as noted above, the residents of the geographic area at issue are Native American, as they have been since the founding of the United States. *See* Treaty of May 31, 1796, 7 Stat. 55. State policies that are unique to residents of that area – as all three policies indisputably were – by definition disadvantage Native Americans as compared to all other New Yorkers. While the court of appeals analogized the policing policies here to a curfew or cordoning off a crime scene or riot area (6a), it ignored that those types of actions are (at least in this country) invariably limited to emergency situations lasting a few hours or days, while Akwesasne's residents suffered from the discriminatory abandonment of police protection for *nine months*. Furthermore, unlike the court's analogies, where the police have little or no ability to prevent or control the conditions leading to the emergency measures, at Akwesasne the conditions resulted in significant part from police decisions to withdraw and accede to Warrior demands in the first place, and there was ample time to formulate alternative responses.

While the court below recognized that "seemingly neutral geographic distinctions may in fact be being used as insidious proxies for suspect racial classifications. *See, e.g., United States v. Bishop*, 959 F.2d 820, 825-26 (9th Cir. 1992)" (7a), it ignored that in juror selection cases such as *Bishop*, where, as here, geography is an obvious proxy for race, a hearing must be held to assess the credibility of alternative explanations. *See also, e.g., United States v. Briscoe*, 896 F.2d 1476, 1488-89 (7th Cir. 1990). To the extent that Respondents' policies treated

In sum, undisputed circumstantial evidence alone is sufficient to raise a "plausible" inference of discriminatory intent –

- The policies at issue applied to a geographic area inhabited almost exclusively by Native Americans.

- The policies were highly unusual, if not unique, in the history of the New York State Police.

- The policies were maintained for nine months, not merely used on a temporary emergency basis.

- The policies' impact on Native Americans was particularly onerous; they were placed in forced, literal physical segregation and denied the fundamental protections of a civilized society.

In addition to this general circumstantial evidence, there is evidence directly relating to Respondents that bears on their intent. Although the district court belittled the evidence (*see* 27a) and the court of appeals found, with no explanation, "that it does not suffice to raise a material issue" (8a), this conclusion is insupportable for at least two reasons.

In this first place, under clearly established law, all of the evidence must be considered as a whole, not treated in an isolated, piecemeal fashion. "[A]n invidious discriminatory purpose may often be inferred from the *totality of the relevant facts*, including the fact . . . that the [practice] bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976)

Akwesasne as a "geographic" entity, the Native American residents of that area were the only citizens of New York who had to face a constant, grave danger in the form of incessant gunfire, arson and beatings. They were physically segregated, and treated differently from, all other people in New York.

The court of appeals also recognized that discrimination might be shown if "the roadblocks were so onerous that they could only be explained as a result of racial classification or racial animus" (6a). Again without explanation, it concluded "[t]hat is not the case here." (*Id.*) The court could reach this conclusion, however, only by improper piecemeal consideration of the evidence. In fact, when the impact of all three of the policies is considered together – as it must be because that is how Respondents effectuated them and that is how they impacted on Petitioners – the "onerous" impact does plausibly support an intent finding.

The undisputed record shows that none of the three policies was ever implemented anywhere else in the State, if at all, for such an extended period. And the impact on plaintiffs, of which Respondents were fully aware, was extraordinarily "onerous." Residents endured a state of civil war in their community for months. Businesses and schools closed for weeks at a time. Buildings and cars were burned. Hundreds fled their homes. Automatic weapons fire, arson and beatings occurred with impunity. These conditions persisted for weeks, conditions that would not be allowed to last for a day in any other community in New York.

(emphasis added). *See also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 U.S. 266-67 (1977) ("whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available;" the totality of circumstances may include: (1) disproportionate impact; (2) historical background of the challenged practices; (3) specific antecedent events; (4) departures from normal procedures; and (5) contemporaneous statements of decision-makers).

Additionally, the court of appeals failed to recognize, in conflict with the First and Third Circuits that, in discrimination cases a plaintiff "will rarely, if ever be able to produce a 'smoking gun' that provides direct, subjective evidence" of intent. *Lipsett*, 864 F.2d at 895, quoting *Stepanischen*, 722 F.2d at 929; *see Eichorn*, 248 F.3d at 523, *citing Dewitt*, 106 F.3d at 523. This admonition is doubly appropriate when the defendants are highly sophisticated and politically astute senior government or police officials. In the instant case, what is perhaps striking is the extent to which such evidence does exist, including the following –

First, there are handwritten notes that Respondent Cuomo made on April 28, 1990, as pressure mounted on the State Police to intervene just two days before two Native Americans were murdered. Governor Cuomo wrote: "Have any 'Americans' who are not NATIVE-AMERICANS been injured?" (Pyke-App. 1617 (quotes and capitalization in original)). From this question, it is plausible to infer discriminatory intent in Mr. Cuomo's failure to ensure that the State Police did not discriminate in protecting Akwesasne residents. It is a

plausible inference that Governor Cuomo would have taken additional or different action if "Americans" who "are not NATIVE-AMERICANS" had been injured. Why else would one ask such a question? Certainly, discriminatory intent would be inferable if the question were "Have any 'Americans' who are not AFRICAN-AMERICANS [or JEWISH-AMERICANS] been injured?"

Second, Respondents expressed fear of Native Americans and made stereotypical remarks. For instance, Respondent Constantine testified at deposition that "virtually everybody up there was involved in smuggling activities" (Pyke-App. 436) and compared State Police fears about "Indians" to concerns about "drug dealers." (Pyke-App. 564). In comparing Akwesasne to other municipalities in the State, Respondent Leu described it as "a different animal" (Pyke-App. 675), and compared the situation at Akwesasne to "the middle of Iraq in the middle of Baghdad." (Pyke-App. 624 (comparing troopers' fears to "our young GIs . . . in Iraq")). Although threats to police officers unfortunately did occur at Akwesasne, it is also true that many kinds of danger are a daily part of any policing job; what a jury could find significant is the manner in which Respondents chose to characterize those circumstances. Petitioners are not "animals," criminals, or Iraqi terrorists – they are citizens of New York whom Respondents were sworn to protect. While innocent inferences are also plausible, Rule 56 required the courts below to decide the motion by taking the inferences most favorable to plaintiffs.

Third, the lower courts ignored or discounted documents produced in discovery by Respondents and by the State Police from which discriminatory intent may plausibly be inferred –

- A poem apparently written by a State Police officer that extolled the machismo of Respondent Leu in the face of an "Akwesasne engulfed in gunfire and flames, and referred to Native American Warriors as a "crowd of psychos and sots." Mr. Leu forwarded this doggerel to Respondent Constantine, with a personally initialed cover note saying: "Thought you would get a laugh out of this." (Pyke-App. 1506-08).[2]

- The last page of the same document portrays a person apparently wearing a Ku Klux Klan hood "on the phone with the Field Commander." (Pyke-App. 1508). Respondents' submission of an affidavit claiming that the hat was merely a "dunce cap" (Pyke-App. 1521-23), highlights a fact question.

- An overtly racist and sexist document – acknowledged by Respondent Constantine as "reprehensible" (Pyke-App. 455-56) – that was maintained at State Police headquarters in Albany. (Pyke-App. 1298). The document was a checklist,

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2. A plausible inference of intent arises from the fact that Mr. Leu considered it appropriate to "laugh" at the tragic events at Akwesasne, as well as from the fact that he not only thought Mr. Constantine would join him, but that Mr. Constantine would not discipline such inappropriate comments.

apparently prepared by State Police as they manned roadblocks, which kept account of, among other categories, the number of "UGLY INDIAN WOMAN [sic] UNDER 40"[3] and the number of "FAT INDIAN CHILDREN WITH NOTICEABLE PHYSICAL ABNORMALITIES" entering Akwesasne. (Pyke-App. 1298).[4] Although Respondent Constantine now asserts the document's author "[s]houldn't be a trooper," there was in fact no investigation during Mr. Constantine's watch, when the document was passed up "the chain of command" to Albany. (*See* Pyke-App. 356). This fact supports an inference that overt expressions of bias were accepted by the entire State Police command, from Respondents Brooks and Leu to Superintendent Constantine.

- An official Briefing Memorandum issued by State Police Troop B, which instructed briefing officers preparing other officers to serve on the Reservation, in stereotypical language, to "call attention to videotapes regarding the viciousness [sic] of the Mahwk [sic] females in confrontations." (Pyke-App. 1296).

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3. State Police officers counted 108 Native Americans fitting this appalling description. The large number of check marks in each of the categories on this document – which show it was kept over a significant period of time – belie an argument that it was a harmless prank.

4. This document also tallied the number of: "LARGE BREASTED WOMAN ALL INCLUSIVE, ANY RACE (CONFIRMED);" "FAT UGLY AMERICAN WOMAN;" and "(ALL RACES) GOOD LOOKING WOMAN." (Pyke-App. 1298).

The foregoing evidence could, as a matter of law, support an inference that each of the Respondents authorized policies whereby State Police whom they supervised discriminated in the provision of law enforcement services. *See Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) ("A supervisory official [may be 'personally involved' in a constitutional deprivation if], after learning of the violation through a report or appeal, [he has] failed to remedy the wrong"), *citing Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975). There is thus evidence to "support a claim that [the supervising Respondents] knew or should have known of the events of which [Petitioners] complain." *Colon v. Coughlin*, 58 F.3d 865, 873-74 (2d Cir. 1995).

Fourth, a jury could infer discriminatory intent from the fact that Respondent Cuomo, immediately after three days of rioting occurred in African-American and Jewish communities in Crown Heights, Brooklyn in 1991 (and shortly after the events at Akwesasne), ordered a comprehensive investigation into how that matter was handled by New York City's Mayor and Police Department. The subsequent public report issued by the State Director of Criminal Justice (who serves in the Governor's Executive Office), harshly criticized Mayor Dinkins and the NYPD for their failure to intervene aggressively to stop the violence. Yet defendant Cuomo failed to conduct any investigation whatever following the far more serious civil disorders at Akwesasne. A jury applying the same standards for Executive Branch accountability to Akwesasne that the Governor's Office used in the Crown Heights report, could find that Respondents' conduct was objectively unreasonable.

In light of the public importance of the underlying events in this case, certiorari is appropriate to clarify the legal standards applicable to summary judgment where the motion turns on evidence of the defendants' intent to discriminate on grounds prohibited by the Equal Protection Clause or by statute.

II. UNDER THE APPLICABLE STATUTORY AND CASE AUTHORITY, RESPONDENTS' DISCRIMINATION AGAINST NATIVE AMERICANS CANNOT BE JUSTIFIED BY CONSIDERATIONS OF GEOGRAPHY OR SOVEREIGNTY

The court of appeals' determination that Respondents' policies can be justified as either a political accommodation or a showing of respect for Native American "sovereignty" (6a-7a), conflicts with long-standing law of this Court. Unlike *United States v. Antelope*, 430 U.S. 641, 646 (1977) and *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976), the discriminatory policies at issue in this case were not enacted by Congress, which has a unique status with respect to Indian law. *See Antelope*, 430 U.S. at 645-49; *Fisher*, 424 U.S. at 386-87, 391. Differing treatment of Native Americans is allowed only when: (i) the treatment is "preferential;" and (ii) it "can be tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Although Congress may *prefer* (but not discriminate against) Native Americans through "particular and special treatment," *id.*, there is no legal authority that allows a state to *affirmatively harm* Native Americans based upon that status.

Indeed, to the extent that Congress has acted here, it was to grant New York jurisdiction to enforce criminal laws on Native American reservations in New York by statute, 25 U.S.C. § 232. Unlike most states, where policing is a federal or tribal responsibility, under § 232 Congress has directed that "New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations . . . to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State." 25 U.S.C. § 232.

Section 232 was enacted after the State "urgently requested" Congress to act, so that "law and order should be established on the reservations when tribal laws for the discipline of its [sic] members have broken down." *See* H.R. Rep. No. 80-2355, 1948 U.S.C.C.A.N. 2284-85. Of course, such a "breakdown" of law and order is precisely what occurred here. Through the statute, Congress, acting under its plenary power over Indian affairs, effectively wiped away the limits of tribal sovereignty and reservation boundaries from New York's criminal jurisdiction over reservations. Since "the laws of the State" that are covered by reference in § 232 include N.Y. Exec. Law § 223, which provides that "[i]t shall be the duty of the State Police to prevent and detect crime and apprehend criminals," § 232 has the effect of putting Native American reservation residents on identical legal footing to all other citizens with respect to State law enforcement.

The court of appeals' acceptance of the policies at issue here as "geographic" distinctions based on "sovereignty" ignores this history and the express

obligations imposed on Respondents by statute. Certiorari should be granted to address the apparent conflict between the State Police's actions and Congressional intent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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