

# TRIBAL SUPREME COURT PROJECT

## MEMORANDUM

SEPTEMBER 21, 2016  
UPDATE OF RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (<http://sct.narf.org>).

On Monday, September 26, 2016, the Court will hold its long conference during which the Justices will consider nearly two-thousand petitions filed during its summer recess. During its long conference, the Justices will consider all six of the Indian law petitions currently pending before the court (see below). Then on Monday, October 3, 2016, the Court has scheduled a non-argument session which marks the beginning of October Term 2016 (OT16), and when it is likely to issue the order list from its long conference.

### PETITIONS FOR A WRIT OF CERTIORARI GRANTED

To date, the Court has not granted review in any new Indian law cases.

### PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, the following petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

**JONES V. NORTON (NO. 16-72)** – On July 13, 2016, the parents of Todd Murray, an enrolled member of the Ute Indian Tribe, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the district court’s dismissal of their §1983 claims against state law enforcement officials for violation of his rights under the 1868 Ute Treaty which resulted in his death. On August 9, 2016, the respondents filed a waiver of their right to respond, and the petition has been scheduled for conference on September 26, 2016.

**KELSEY V. BAILEY (NO. 16-5120)** – On July 7, 2016, a member of the Little River Band of Ottawa Indians filed a petition seeking review of a decision by the U.S. Court of Appeals for the Sixth Circuit which upheld his criminal conviction in tribal court for misdemeanor sexual assault against a tribal employee at the Band’s Community Center which is located on land owned by the Tribe but outside its reservation boundaries. On August 4, 2016, the Tribe’s filed its brief in opposition, and the petition has been scheduled for conference on September 26, 2016.

**FLUTE V. U.S. (NO. 15-1534)** – On June 20, 2016, a group of Native Americans who are descendants of the victims of the 1864 Sand Creek Massacre filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that their action for an accounting of funds held by the federal government in trust for payment of reparations to their ancestors is barred by the doctrine of sovereign immunity. On July 25, 2016, the U.S. filed a waiver of its right to respond, and the petition has been scheduled for conference on September 26, 2016.

**LEWIS V. CLARKE (NO. 15-1500)** – On June 13, 2016, a petition was filed seeking review of a decision of the Connecticut Supreme Court which held that doctrine of tribal sovereign immunity extends to an employee of the tribe who is acting within the scope of his employment. The brief in opposition was filed on July 13, 2016, and the petition has been scheduled for conference on September 26, 2016.

**TUNICA-BILOXI GAMING AUTHORITY V. ZAUNBRECHER (NO. 15-1486)** – On May 26, 2016, a petition was filed seeking review of a decision by the Louisiana Court of Appeals which held that state courts have subject matter jurisdiction over a tort suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment with the Tribe at the tribal-owned casino located on tribal trust land. The brief in opposition was filed on July 11, 2016, and the petition has been scheduled for conference on September 26, 2016.

**PRO-FOOTBALL, INC. V. BLACKHORSE (NO. 15-1311)** – On April 25, 2016, in response to a petition filed by the United States in *Lee v. Tam*, (No. 15-1293), seeking review of an en banc decision of the U.S. Court of Appeals for the Federal Circuit which held that the disparagement clause in § 2(a) of the Lanham Act is facially invalid under the free speech clause of the First Amendment, Pro-Football, Inc. filed a petition for writ of certiorari before judgment (by the Fourth Circuit) asking that if the Court grants review in *Tam*, then the Court should also grant review in *Pro-Football, Inc. v. Blackhorse* as “a necessary and ideal companion to *Tam*.” The response briefs of Amanda Blackhorse and the United States were filed on June 27, 2016, the petition has been scheduled for conference on September 26, 2016.

## **CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT**

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Sam Owl, 1516 P Street, NW, Washington, DC 20005.

**Please contact us if you have any questions or if we can be of assistance: John Dossett, NCAI General Counsel, 202-255-7042 ([jdossett@ncai.org](mailto:jdossett@ncai.org)), or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 ([richardg@narf.org](mailto:richardg@narf.org)).**