No. 21-1255

IN THE

Supreme Court of the United States

ACRES BONUSING, INC., *et al.*,

Petitioners,

v.

LESTER JOHN MARTSON, *et al.*,

Respondents.

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

REPLY BRIEF

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Respondents argue the petition fails to identify an issue meriting this Court's attention. Respondents are wrong. The petition identifies a creeping expansion of absolute judicial immunity across several circuits, shows how that creeping expansion is in tension with what this Court has termed "the ideal of the rule of law," and how it enables tortious conduct. The petition for certiorari should be granted so the Court can reverse the expansion of absolute immunity and reinforce the functional focus of its absolute immunity doctrine.

I. Respondents' conflation of this Court's §1983 jurisprudence with its absolute immunity doctrine provides an independent reason to grant the petition.

In their opposition brief, respondents argue the lack of allegations respondents "violated petitioners' constitutional rights" provides a "substantive reason for denying the petition" because "actions asserting violations of constitutional rights" are "where the distinction between absolute and qualified immunity is most relevant." Opp. Br., 13-14 [minor edits]. At first glance, respondents' argument appears to have special salience in the context of absolute immunity assertions by tribal officials. This is because as "separate sovereigns pre-existing the Constitution" tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978).

The question presented by this petition, however, focuses squarely on the nature of this Court's absolute judicial immunity doctrine. Pet., *i*. The doctrine "originated in medieval times" and "has never been denied … in the courts of this country." *Forrester v. White*, 484 U.S. 219, 225 (1988). This Court's absolute judicial immunity doctrine, like tribal sovereignty, is therefore a free-standing doctrine and exists outside the Constitution. It may be applied in tribal contexts regardless of whether tribes are constrained by the Constitution.

Respondents' argument shows the relationship of tribal governments with the Constitution can lead to an analytical trap when considering absolute judicial immunity. Clarifying that this Court's absolute judicial immunity doctrine applies in tribal contexts therefore provides an independent reason to grant the petition for certiorari.[1]

II. The Ninth Circuit broke with this Court's precedent and granted immunity based upon respondents' employment status as law clerks.

Respondents argue the law clerks were granted absolute immunity for their functions of "performing legal

1. Petitioner Acres filed a second petition with this Court arising from his California litigation over the same underlying controversy. *Acres v. Marston et. al.,* Case No. 21-____ (submitted May 20, 2022). The question presented by that petition is "What personal immunities are available to tribal officials?" If the Court wishes to address qualified immunity in tribal contexts, that petition presents an ideal vehicle, and can be consolidated with this petition.

research" and "drafting opinions and orders" for a judge,[2] and not because they happened to be law clerks. Opp. Br., 13-14. A simple hypothetical shows respondents are wrong.

Imagine the casino's attorneys from Boutin Jones or Janssen Malloy (see App.8a-9a [describing these defendants]) had secretly "performed legal research" or "drafted opinions and orders" for use by the judge presiding over the casino's case against petitioners. The Ninth Circuit would not afford these outside attorneys absolute judicial immunity because there would be "no good reason in law, logic, or policy for conferring immunity on private persons who persuaded the immune judge to exercise his jurisdiction corruptly." *Dennis v. Sparks,* 449 U.S. 24, 27 (1980).

Like Boutin Jones and Janssen Malloy, the law clerk respondents were also attorneys working for "Blue Lake entities."[3] But the Ninth Circuit found the law clerks were immune for performing legal research and drafting opinions and orders because a law clerk's duties are "intimately connected" with the "exercise of the judicial function." App.30a. This hypothetical makes clear that, for the Ninth Circuit, whether one is protected by absolute immunity when one drafts opinions and orders for a judge depends upon whether one has the employment status of being a "law clerk."

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2. These functions are not protected by absolute judicial immunity because this conduct does not directly "resolv[e] disputes between parties" or "adjudicat[e] private rights." *Antoine v. Byers Anderson,* 508 U.S. 429, 435-436 (1993); Pet., 16-18.

3. Based upon a review of Judge Marston's billing records to Blue Lake, the verified complaint alleges this included work for the Casino itself. *E.g.* Compl., ¶¶124-128.

One can easily imagine a high-stakes arbitration in which a corrupt party authors an opinion favorable to themselves and bribes their judge to adopt the opinion. Under the holding below, a corrupt judge could immunize his confederates from all civil liability by quietly hiring them as law clerks. This pernicious result shows why this Court should grant the petition and reinforce its functional absolute immunity doctrine.

III. There is a clear circuit split as to whether the conduct of court clerks filing documents is protected by qualified or absolute immunity.

Respondents assert several times that there is no circuit split as to whether court clerks are protected by absolute or qualified immunity for their conduct in filing documents. Opp. Br., 1, 15, 18. Respondents are wrong. The Ninth and D.C. Circuits consistently hold court clerks are protected by absolute immunity for "purely administrative acts." Pet., 9. Whereas the Eighth and Seventh Circuits hold court clerks are instead protected qualified immunity for their ministerial conduct. Pet., 10-11. And the Fifth Circuit reaches still a third result to hold court clerks are generally protected by qualified immunity, but that absolute immunity protects their non-discretionary conduct undertaken in strict compliance with judicial orders.[4] Pet., 11-12.

The circuit split identified by petitioners is entrenched, widespread, and can only be mended by this Court.

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4. This Court would not protect such non-discretionary conduct with absolute immunity. See *Snyder v. Nolen,* 380 F.3d 380 F.3d 279, 288-289 (7th Cir. 2004).

IV. Respondents' argument this petition is premature is without merit.

Respondents argue this petition is premature because several defendants who remain in the case have renewed motions to dismiss on remand,[5] and, if those motions are granted "there no longer would be a live case" for this Court to adjudicate. Opp. Br., 12-13. But of course, if this Court were to grant the petition, then the case would remain "a live case for this Court to adjudicate."

V. The relevant facts and issues in this case are clear, and the problems this case highlights are likely to reoccur.

Respondents argue the relevant facts in this case are disputed and unclear. For instance, respondents dispute petitioners' statement that "The Law Offices of Rapport and Marston has a longstanding relationship with the Blue Lake Rancheria." Opp. Br., 8-9. To support their position, respondents point to Rapport's declaration in the record. *Id.* If the Court were to review the declaration (Dkt. 32-6) it would find Rapport and Marston represented Blue Lake in its effort to gain federal recognition as a tribe in the 1980s (*Id.,* ¶2), that Rapport's current contract with the tribe dates back to 1995 (*Id.,* ¶3), and that Marston became

5. The district court heard the motions to dismiss on May 18, 2022. Prior to argument, the district court stated its inclination to find the attorney defendants were protected by prosecutorial immunity for their conduct on behalf of the casino, and to find RICO had not been adequately pled against the non-attorneys. If this becomes the district court's ruling, petitioners intend to appeal as to prosecutorial immunity and amend their complaint to cure any RICO defects.

Blue Lake's Chief Judge in 2007 (*Id.,* ¶4). A disagreement over whether a relationship spanning four-decades is a "longstanding relationship" is not material to this petition.

Respondents also dispute petitioners' statement that Ramsey, who was the casino's CEO, supervised the day-to-day work of the tribal court clerk. Opp. Br., 9-10. While respondents concede Ramsey supervised the court clerk, they insist Ramsey did so in her capacity as Tribal Administrator, and not in her concurrent capacity as CEO of the casino.[6] *Id.*

This second disagreement frames the core issue in dispute: Can one cloak oneself in absolute immunity by acquiring an employment title?

Respondents operated a corrupt court. The judge was the plaintiff's attorney, and he hired other attorneys working for the plaintiff to help him manage the case. The rot ran so deep even the court clerk was supervised by the plaintiff's CEO. Respondents convinced the Ninth Circuit that, because respondents donned a judge's robe when working their corruption, respondents cloaked their work with a judge's immunity too. But this is not the law. Absolute immunity only protects "judicial acts," and does not protect all acts that "happen to have been done by judges." *Forrester,* 227. And so while petitioners concede a judge's issuance of a corrupt judgment is absolutely immune conduct, petitioners insist the conduct

6. Respondents also concede Ramsey was a tribal court judge and Vice-Chair of the tribe (Opp. Br., 9-10), and that the court clerk was employed by the tribe in several roles concurrently (*Id.,* 10). Some of the clerk's other roles included generating revenue for the tribe. Compl., ¶15.

of corrupting a court so that corrupt judgments will be produced is tortious conduct for which one may be held civilly liable, no matter who one happens to be. *Cf. Dennis,* 27 [there is "no good reason in law, logic, or policy for conferring immunity" on those who help a judge "to exercise his jurisdiction corruptly"].

Respondents also argue the circumstances described in the petition are not "likely to reoccur with sufficient frequency as to present a problem serious enough to warrant this Court's attention." Opp. Br., 17.

But as petitioners have shown, the analytical error which led the Ninth Circuit astray often leads to the inappropriate extension of absolute immunity to court employees whose conduct can adequately be protected by qualified immunity. Pet., 7-20. Because there is an "undeniable tension between official immunities and the ideal of the rule of law" this Court has been "quite sparing in its recognition of absolute immunity." *Forrester,* 223-224. Correcting the widespread and persistent departures from the ideal of the rule of law identified in the petition is a task worthy of this Court's attention.

Finally, left unchecked, the circumstances described in the petition are likely to reoccur in a tribal context. Just as operating a usurious pay-day lending operation without civil liability presented opportunities for tremendous profit, the ability to operate a corrupt court without civil liability presents tremendous opportunities for illicit gain. Usurious tribal pay-day lending grew rapidly until it was checked by civil liability. *E.g., Williams v. Big Picture Loans,* 929 F.3d 170 (4th Cir. 2019); *People ex rel. Owen v. Miami Nations Enterprises,* 2. Cal.5th 222 (Cal. 2016).

If the scheme pioneered by respondents is left unchecked by civil liability, there is every reason to believe it will be emulated many times over.[7]

CONCLUSION

The petition for writ of certiorari should be granted.

May 24, 2022

Respectfully submitted,

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7. Such emulation need not be limited to corrupting tribal courts. Arbitration forums are susceptible to the same corruption.