12-1237

No. _____

In the Supreme Court of the United States

DANIEL T. MILLER; AMBER LANPHERE; PAUL M. MATHESON, Individually, and on behalf of others similarly situated,

Petitioners,

v.

CHAD WRIGHT, Puyallup Tribe Tax Department, Enforcement Officer; HERMAN DILLION, Sr., Chairman Puyallup Tribe of Indians; PUYALLUP TRIBE, a Federally recognized American Indian Tribe,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The core issue in this case is tribal sovereignty. Specifically, whether the Puyallup Tribe of Indians is immune from suits alleging federal anti-trust violations. It sells at retail in the same market area as Paul Matheson, its own tribal retailer. The Tribe sets minimum prices on Matheson's sales and makes him buy from wholesalers who charge $5.00 more per carton than other wholesalers. Both stores are located on the Puyallup Indian reservation. Their sales are almost completely to non Indian customers.

The questions presented in this case are:

1. Whether Indian tribal immunity from suit allows the Indian tribe, a price fixing competitor, to be immune from federal anti-trust laws?

2. Whether the officials of an Indian tribe, acting beyond their authority, can be protected by tribal immunity when prospective relief is sought?

LIST OF PARTIES

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The revised opinion of the United States Court of Appeals for the Ninth Circuit appears in the Appendix, App 1 to 19. It is reported at 705 F.3d 919 (9th Cir. 2013).

The Ninth Circuit original opinion was reported at 699 F.3d 1120 (9th Cir. November 13, 2012), but was withdrawn when the Puyallup Tribe objected to a footnote by Motion for Reconsideration filed November 26, 2012, App B, pages 21 through 39. The footnote (fn 4 App B, page 38) stated:

> Neither in the district court nor on appeal do Miller, Lanphere, and Matheson allege a separate and distinct claim for injunctive or declaratory relief against the officials *qua* officials. *See Maxwell,* ---- F.3d ----, 2012 WL 4017462, at *11. We therefore express no opinion as to the viability of such a claim against the officials themselves.

The footnote focuses on one of the reasons for granting the Writ. The issue is reviewed at pages 22-25 of this Petition.

The Court affirmed the opinion of the United States District Court, Western District of Washington No. 3:11-cv-05395 RBL (Oct. 6, 2011). The informal citation was withdrawn. This opinion appears at App C, pages 40 through 51.

JURISDICTION

The date in which the amended and superseding opinion, App 1 to 19, was filed is January 14, 2013. The Mandate took effect on January 23, 2012, App E, page 57.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was sought under 15 U.S.C. § 15, 28 U.S.C. § 1331 and Article III. Jurisdiction of the Court of Appeals was under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

There are no constitutional provisions, statutes and regulations that establish tribal immunity. It is a federal common law precept. The federal anti-trust statutes 15 U.S.C. 1, 13, 15 and 26 et seq. apply to the Puyallup Tribe's price fixing regulation of its retail competitor. The state law statutes regarding the state lawsuit settlement are Wash.Rev.Code 43.06.455(5)(b); 43.79.480(1); 70.157.005(e); and 70.157.020(a).

STATEMENT

This Petition seeks to reverse the Ninth Circuit's opinion upholding tribal and tribal officer immunity from suit. If tribal immunity is abrogated, officer immunity becomes moot as it is derived only from tribal sovereignty.

The Ninth Circuit erred in affirming Indian tribal sovereignty to alleged price discrimination by the

Puyallup Tribe, a cigarette retailer in the same market area competing with its own tribal member, Petitioner Paul Matheson. App G, page 73.

A. Background

The Puyallup Tribe Reservation comprises 491 acres *"Tiller's Guide to Indian Country",* page 990, Tiller, Veronica, ed. Bow Arrow Press (2005). It is located within the city limits of both Tacoma and Puyallup, Washington, cities of 200,000 and 37,000 residents, respectively (2012 census). See map, App K. Interstate 5 runs through the reservation. The reservation boundaries are outlined in yellow. The tribe's website indicates that it has 4,000 members who live both on and off the reservation.

The Ninth Circuit Opinion, *supra* at 922, notes that the Puyallup Tribe had a store "in the same vicinity" as Matheson. The opinion notes at page 923 that the Puyallup Tribe, ". . .agreed to require retailers to charge a tax equal to the amount of tax that would otherwise be charged by the state and that. . .the tribe agreed that tribal retailers would purchase only from Washington State tobacco wholesalers or state certified wholesalers". The Complaint alleges that the Puyallup Tribe forced Petitioner Matheson to pay more for the wholesale product than other non state certified wholesalers charge. Complaint App G, pages 100, 112, App G, page 105. It also alleges that the state law of Washington, Wash. Rev. Code 70.157.020 (a) and 70.157.005(e), Wash. Rev. Code 43.06.455(5)(b), and 43.79.480(1), requires that Matheson purchase only from state certified wholesalers who pay into the state fund. "Washington requires collection of the $5 fee to

comply with the Master Settlement Agreement (MSA) between the tobacco industry and numerous states, including Washington." *id* at 922. See M. Little: "*A Most Dangerous Indiscretion: The Legal Economic and Political Legacy of the Government's Tobacco Litigation*", 33 Conn.L.Rev. 1143 (2001). No Indian Tribe participated in or agreed to the settlement.

B. The Ninth Circuit Opinion failed to apply federal anti-trust laws to a retail competitor.

The unfair competition is that the Puyallup Tribe is immune to the MSA and is fixing prices as it sells at the same price as Matheson. It keeps its own higher price as it does not pay its own cigarette tax. However, it forces Matheson to pay the Puyallup tribe tax and sell at a minimum price. As at least one case, *State of North Carolina v. Seneca Cayuga Tobacco Co.,* 676 S.E.2d 579, 584 (N.C. 2009) has upheld tribal immunity against MSA charges. Thus, the tribe also obtains this wholesale price advantage and freedom from its own tax. To keep his license to sell issued by the Tribe, these costs must be added to Matheson's wholesale price and his customer's retail price.

The incidence of the MSA charge is on Matheson who has to buy from wholesalers who charge more. All wholesalers purchase their inventory off reservation. The MSA escrow is a charge of $5 or more per carton imbedded in the prices of licensed or certified wholesalers who sell in the State of Washington. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463, 480 (1976) prohibits state cigarette tax on Matheson. If the

incidence of state taxes is on Indians, it is void. *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 459 (1955). *U.S. v. State Tax Commission of Mississippi,* 421 U.S. 599, 610 (1975) also applies. The case invalidated a state mandated markup on military base tax exempt social clubs. The incidence of the liquor tax was on the social clubs operating on military bases and was prohibited by federal immunity. Matheson was unable to purchase from non MSA distributors who sold the same grade and quality of cigarettes for $5 less per carton. The restriction on competition by price fixing interferes with the market causing anti-trust price fixing, 15 U.S.C. § 1, 2, and 13; *U.S. v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 219 (1940). A civil remedy is available for horizontal price fixing. *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979, 986 (9th Cir. 2000). The MSA is not a tax but a lawsuit settlement addition that is paid to the state's escrow. The Ninth Circuit recited the MSA facts but never ruled on the incidence of the charge. 705 F.3d at 922. The upshot of the issue is that the Puyallup Indian Tribe, a market competitor of Matheson, imposed a charge upon Matheson when he would otherwise be exempt from it. The Petitioner's non Indian consumers had to pay more due to the unfair competition in the market area. *Texaco v. Hasbrouck,* 496 U.S. 543, 554 (1990); *FTC v. Morton Salt Co.,* 334 U.S. 37, 46-47 (1948).

The Complaint also alleges that the conduct violates federal anti-trust laws prohibiting price fixing of goods of like kind and quality. App G, pages 99, 104, 107, 112.

C. The Ninth Circuit Opinion also failed to apply *Jefferson County*.

Discrimination in price between purchasers of goods of like kind and quality is a *per se* violation of the anti-trust law. *Jefferson County Pharmaceutical Association v. Abbott Labs,* 460 U.S. 150, 152-3 (1983). The Ninth Circuit Opinion (705 F.3d at 927) adopted the reasoning of Justice O'Conner's dissent in *Jefferson County*. This holding conflicts with the Ninth Circuit's own pronouncement in *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2000), holding that the Ninth Circuit must follow this Court's case law.

D. The Ninth Circuit also ignored its own cases of *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) and Paul Matheson's loss in *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) holding that an Indian tribe is bound by a law of general applicability unless one of three exceptions applies.

One of the exceptions relied on by the Court App A17 was (3) there is proof by legislative history on some other means that Congress intended the law not to apply to Indians on their reservation. In a complete error and a total non sequiter, the Ninth Circuit Opinion, without citation of authorities, stated, "As we have explained, federal anti-trust laws are not intended to apply to Indian tribes. . . *Donovan's* third exception is consistent with the precedent underlying our conclusion that Congress did not include Indian tribes within the entities subject to antitrust law". *id* at 927. The Ninth Circuit relied on dicta in *Krystal*

Energy v. Navajo Nation, 357 F.3d 1055, 1057 (9th Cir. 2004) for authority. *Krystal Energy,* according to *In re Whitaker,* 474 B.R. 687, 693 (8th Cir. BAP (Minn.) 2012) is not good law ". . .because the cases on which *Krystal* was based do not, in fact, support its holding." *Krystal* relied on a specific statute waiver 11 U.S.C. § 106(a). *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 178 (2nd Cir. 1996) follows *Donovan* and rejects the automatic exclusion reasoning as the "proposed test would invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them. We believe that so sweeping a conclusion is inconsistent with the limited sovereignty retained by Indian tribes". *Reich, id* at 179, concludes that an Indian tribe is dependant and subordinate to the federal government. If a federal state applies, the affected tribe has no sovereignty. *Smart v. State Farm Ins. Co.,* 868 F.2d 929, 932 (7th Cir. 1989) also follows *Donovan.* Matheson sought to rely on *Solis v. Matheson,* 563 F.3d 425, 429 (9th Cir. 2009) a case that found that none of the *Donovan* exceptions prevented the federal statutes on wages and hours to apply to his business. Matheson is now bound by federal wage and hours laws. The Ninth Circuit opinion never referred to this case. The juxtaposition of the case to this one is illogical. Compared together, one holds that federal laws of general application apply to Matheson, the on reservation Puyallup tribal member, but not federal price fixing laws disobeyed by the Puyallup Tribe, his competitor. *Florida Paraplegic v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126, 1129 (11th Cir. 1999) rejects the *Donovan* exceptions and holds that tribally owned businesses must comply with federal statutes of general applicability even if they may not be liable in damages

by private party suits. The Court stated, *id* at 1135, "As Indian tribes and their members become more integrated into the mainstream cultural and economic activities of American society, maintaining this balance becomes increasingly difficult". *San Manuel Indian Bingo and Casino v. NLRB,* 475 F.3d 1306, 1315 (D.C. Cir. 2007) followed *Donovan* and applied the national labor relations act to a tribe noting that no *Donovan* exception applied and that the casino operation was a commercial enterprise. *Miccosukee Tribe of Indians of Florida v. U.S.,* 698 F.3d 1326, 1331 (11th Cir. 2012) states "Tribal sovereign immunity would not bar a suit by the United States." The Ninth Circuit automatic exclusion applying the *Donovan* exception is completely and in total error. The anti-trust laws do not refer to any "legislative history or some other means that Congress intended the law not to apply to Indians on their reservations". *Miller,* 705 F.3d at 927. The opinion then states "As we have explained, federal anti-trust laws are not intended to apply to Indian tribes". *Id* at 927. The opinion never explained why *Donovan* did not apply. The opinion states "Nowhere does either statute employ the sort of language we and other circuits have held to unequivocally abrogate tribal sovereign immunity". The holding is also in direct contradiction to *U.S. v. Baker,* 63 F.3d 1478, 1486 (9th Cir. 1995). In *Baker* the Circuit held that even a congressional hearing reference was not intended to remove Indian immunity from state cigarette tax and did not come within the *Donovan* exceptions. 18 U.S.C. § 2342. The statutory language must be specific, *id* at 1485. The Ninth Circuit cannot ignore its own well established precedent followed by other circuits. If *Donovan, supra* at 1117-8, applies, the Puyallup Tribe has no sovereignty from suit and this case is reversed.

It applies as the Puyallup Tribe is selling cigarettes at retail of like kind and quality, a clearly commercial activity. The *"Donovan"* test is a national standard to determine jurisdiction, *Dish Network v. Tewa,* No. cv-12-8077-PCT-JAT, 2012 WL 5381437, page 9 (D.C. Ariz 2012). There is no proof of any intent of Congress to except Indian tribes.

E. The Tribal Officials were sued individually. They have no immunity of any kind when they act in violation of federal law.

Felix S. Cohen's Handbook of Federal Indian Law, § 7.05[1](a) at 638 (Nell Jessup Newton ed., 2012) states:

> The immunity protects tribal officials acting within the scope of their authority, as well as tribal employees, *Santa Clara Pueblo v. Martinez,* however, suggested that the doctrine of *Ex parte Young* extends to the tribal context, allowing suits against tribal officials in their official capacities for declaratory or injunctive relief.

A Tribal Officer can be enjoined from an ongoing violation of Federal Law. This issue is reviewed at page 12. The Ninth Circuit ignored the allegations of the Complaint, naming tribal officials and alleging individual liability. The Complaint, App G, page 78, states that "Defendant Chad Wright is the tax enforcement officer of the Puyallup Tribe" and "Defendant Herman Dillon Sr. is the Chairman of the Defendant Puyallup Tribe of Indians". The Complaint also states that each "acted beyond any authority that

could be bestowed on him" and "He acted beyond any lawful authority the Defendant Puyallup Tribe could confer on him by knowingly violating federal anti-trust and price control laws". The allegations are *qua* official acts and request prospective relief from them as officials going beyond their authority. The Complaint states "Defendants" and alleges separate conduct. The Complaint also requests separate relief from Defendant Chad Wright against tax collection. App G, page 117. The Complaint requests injunctive relief. App G, page 117. It states:

> Plaintiff Paul M. Matheson and those similarly situated, have no adequate remedy at law as the proposed action will irreparably harm Plaintiff Paul M. Matheson and those similarly situated, by driving away customers that will never return to his business. The Defendants have injured Plaintiff Paul M. Matheson's and those similarly situated continued customer patronage. This loss is an opportunity that cannot be quickly regained and is irreparable. Plaintiffs Daniel T. Miller and Amber Lanphere cannot afford to bring successive refund suits for each purchase. The Defendants also have sufficient resources and unlimited funds. The continued litigation alone will force Indian retailers out of business. Therefore, a preliminary and then permanent injunction against the tax collection must be issued.

Injunctions were also requested by other references in the Complaint App G, page 110, App G, page 107. Irreparable damage is alleged. App G, page 108 as is continuing unlawful conduct of Defendants.

F. Immunity of Tribal Officials does not apply to injunctive relief. Tribal Officials can be enjoined against future anti-trust conduct.

705 F.3d at 922 states, "Miller seeks. . . a permanent injunction against their future collection". The opinion also states: "Moreover to the extent the complaint seeks monetary relief, such claims are barred by *Ex Parte Young*". *id* at 928. Injunctions against anti-trust price fixing of goods of like kind and quality are specified in the anti-trust laws. 15 U.S.C. 26.

Baker Elec. Co-op v. Chaske, 28 F.3d 1466, 1471-2 (8th Cir. 1994) upholds enjoining tribal officers. *Vann v. Kempthorne,* 534 F.3d 741 (D.C. Cir. 2008) provides the partial answer. The Court noted, *id* at 747, that immunity is an attribute of sovereignty, but there is a difference between compliance with laws and enforceability. The decision was sent back to determine whether the suit could proceed against the officers, but not the Tribe.

The opinion, *id* at 750-1, states that tribal officials taking acts beyond their authority or acting unconstitutionally is not conduct of the sovereign. Petitioner's Complaint App G, page 78 states that the named tribal tax enforcement officer acted, "beyond any authority that could be bestowed on him by agreeing to force plaintiffs to charge and pay higher prices while employed as a competitor to Plaintiff Matheson. He also manages the Tahoma Market that competes with Plaintiff Matheson in the same market area". The Compliant App G, page 99, alleges price fixing beyond authority. The opinion cites the familiar

rule that factual allegations of the Complaint must be accepted as true for the purposes of reviewing a motion to dismiss. App A, page 4.

G. The ongoing violation of federal law of general applicability also waives Tribal Immunity.

Crowe and Dunlevy v. Stidham, 680 F.3d 1140 (10th Cir. 2011) joins the Eighth, Tenth and Eleventh Circuits in upholding the principle that an ongoing violation to federal law waives tribal immunity. Petitioners' Complaint App G, pages 102, 107 and throughout alleges an ongoing violation of federal anti-trust law. The Complaint also alleges that cigarette sales are proprietary, App G, page 89. The Ninth Circuit and the District Court did not follow the four sister circuits. The conflict should be resolved by this Court.

REASONS FOR GRANTING THE PETITION

A. Sovereign Immunity must be abrogated where price fixing and other unfair competition is willfully applied by a tribe, a market competitor.

The states have sovereign immunity against suit. Each state is a sovereign entity in our federal system. It cannot be sued without its consent. This immunity is conferred by the Eleventh Amendment to the U.S. Constitution. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54 (1996).

The United States government cannot be sued without its consent. U.S. Constitution, Art III § 2. *Minnesota v. Hitchcock,* 185 U.S. 373, 386 (1902). States, foreign nations and the federal government have by various federal laws and statutes selectively waived and been denied sovereign immunity, especially where claims result from commercial activities. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.,* 523 U.S. 751, 765 (1998). The tribal sovereign immunity asserted in this case is immunity from suit by the tribe. No constitutional provision or Indian treaty addresses tribal sovereign immunity. This country allows many organizations to reside on communal lands in segregation, i.e. Amish, Hutterites and others. However, their organizations have no sovereign immunity. Holding the Puyallup Tribe immune from federal price fixing and other unfair competition, federal laws allow a competitor to control the market. 15 U.S.C. § 1, 13, 15 and 26 prevent these unfair practices. *Hays v. United Fireworks Mfg.,* 420 F.2d 836 (9th Cir. 1969). Indian tribes are now super sovereigns greater than the states or foreign countries. Recently, this Court in *Madison County, New York v. Oneida Indian Nation of New York,* 131 S.Ct. 459 (2010) granted certiorari to review a decision upholding Indian tribe immunity against state foreclosure of land for failure to pay taxes owed on the land. When the Oneida tribe waived its immunity, this Court vacated the grant of certiorari and remanded the case to the Second Circuit, 131 S.Ct. 704 (2011). This Court upheld tribal sovereign immunity in *Kiowa Tribe of Oklahoma,* 523 U.S. 751 (1998) forbidding collection of a commercial note executed by the tribe. The Court, *id* at 758, suggested "a need to abrogate tribal immunity". The intervening 14 years have magnified the illogic and

unjust results. The need to abrogate sovereign immunity in this case reaches far beyond collecting a promissory note or taxing parcels of land. The decision of the Ninth Circuit in this case carved a regulatory hole in the State of Washington. The Puyallup Indian Tribe, a market competitor in a highly populous metropolitan area, is now unlimited. The tribe can add to its convenience stores, its marina, its cargo container repair and storage operation, gas stations, cigarette sales outlets, casinos and other businesses. All these businesses compete in the same market area as non Indian off reservation businesses. The Complaint alleges that the Puyallup Tribe netted 275 million dollars in 2007 from its casino operation alone. App G, page 88. Indian tribes had $27.4 billion in gaming revenue in 2011. "*More Chips on the Table*", Indian Country Today, Vol 3, issue 11, March 27, 2013, pages 24-25 (quoting the 2013 Casino City Indian Gaming Industry Report). A good example of then and now is the statement in *Keweenaw Bay Indian Community v. Naftaly,* 452 F.3d 514, 527 (6th Cir. 2006) that in 1854, at the time their treaty was signed, ". . . the Chippewa Indians did not have much hard currency." The Puyallup Tribe can undercut any business by price fixing, unfair competition and freedom from all other state and federal anti-trust laws. The damage is not interracial as almost all customers are non Indians. The Puyallup Tribe is now a super sovereign without limits to engage in all types of commercial retailing. It is immune from federal income tax, all state taxes, including real property tax, and can assess excise taxes on its Indian competitors. After this case was decided, the Puyallup Tribe is now pursuing loss of profits from other Indian retailers. See App I and App J. They are combining with other tribes to fix prices. Judge

Cabranes wanted law and logic to be reunited by abrogating tribal immunity. *Oneida Indian Nation v. Madison County,* 605 F.3d 149, concurring opinion at 104 (2nd Cir. 2010) (rev'd 665 F. 3d 408 (2nd Cir. 2011)). Lack of anti-trust compliance has blossomed into a nightmare.

This Court apparently recognized tribal immunity 94 years ago in *Turner v. United States,* 248 U.S. 354, 358 (1919). However, the immunity issue was dicta. Similar logic as used in *U.S. v. Lara,* 541 U.S. 193, 206 (2004) should be applied here. ". . .sources as they existed at the time" must be considered. If historic practices were different when the decision was rendered, current decisions can change the law. In 1919 tribal business competition, if any, was minimal. Tribal immunity is now out of regulatory control and is a monster in the business community, growing more powerful every day. *Turner*, without extensive reasoning, is credited with tribal sovereign immunity. The language of *Grider v. Cavazos,* 911 F.2d 1158, 1164 (5th Cir. 1990) applies. "This case illustrates the danger posed by a line of jurisprudence which, like Topsy, 'just grew' as the result of stacking one inapposite citation upon another until, in the aggregate, they take on the appearance of valid precedent". This Court controls common federal law legal precedent. Indian tribes, different from the federal government and states, now may indiscriminately compete in the retail marketplace. Recent examples are *Center for Biological Diversity v. Pizarchik,* 858 F.Supp.2d 1221, 1227 (D.C. Colo 2012) holding that sovereign immunity barred a suit under the endangered species act disputing a renewal of a coal mining lease. The lease had previously yielded 39 million dollars in royalties to

the affected tribe. A suit by the State of Michigan. In *Michigan v. Bay Mills Indian Community,* 695 F.3d 406 (6th Cir. 2012), a suit questioning whether the tribe was on Indian land, seeking to stop a small casino started by an Indian tribe, was barred by sovereign immunity. In *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005), a non Indian billboard company approached the Indian tribe and loaned the tribe the money to buy land adjoining an interstate highway. The tribe bought the land, leased it to the billboard company on a long term lease and put the land in trust. The Court held that the state could not enforce its highway beautification act against the tribe as it was immune by tribal sovereignty, *id* at 982. If economic stability and parity is to be achieved, this Court must subject the Puyallup Tribe to marketplace laws. Like *Lakoduk v. Cruger,* 287 P.2d 338, 340 (Wash. 1955), the test is governmental versus proprietary "Whether the act performed is for the common good of all, that is for the public, or whether it is for the special benefit or profit of the corporate entity". (Quoting *Hagerman v. City of Seattle,* 66 P.2d 1152, 1155 (Wash. 1937)). If not checked, the Indian tribes will unfairly wind up with all the marbles. Neither the colonial tribes nor English settlers could envision this result. The Ninth Circuit decision creates a radical act of largesse and another windfall to Indian tribes. Indian tribes are having a major role in state and federal economies. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 U.S. 751, 754 (1998) established the current standard "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity".

Jeff M. Kosseff, note: "*Sovereignty for Profits; Court's Expansion or Sovereign Immunity to Tribe Owned Businesses*" 5 Fla. A & M U.L. Rev. 131, 138 (2009) reviews 71 court opinions, post *Kiowa,* applying tribal sovereign immunity to commercial businesses that are tribally owned. The large number of cases indicates widespread competition creating unfair business practices.

Petitioners urge this Court to nudge the law in the logical direction. When an Indian tribe competes in the marketplace at the retail level, its immunity to suit is waived. It must comply with applicable federal laws of general applicability in the same manner as its competition. The pendulum of tribal sovereignty must swing back, at least where retail sales competition is the issue.

Judge Gould in *Cook v. AVI Casino Enterprises,* 548 F.3d 718, 727 (9th Cir. 2008) suggests that a new rule of immunity, at least where the gaming industry is involved, should be supplied by this Court. In *AVI*, an Indian casino was held immune from a damage action by a non-Indian casino employee hit by a vehicle driven by a drunk driver who became intoxicated. Even more tragic is *Furry v. Miccosukee Tribe of Indians of Florida,* 685 F.3d 1224 (11th Cir. 2012). The Indian tribe bar patron who died was an alcoholic and known to casino employees to be an alcoholic. On multiple occasions the tribe served her "a substantial amount of alcohol" *id* at 1227. "Employees of the defendants witnessed Ms. Furry get in her car and leave the premises in an obviously intoxicated condition", *id* at 1227. A short time later, she was killed as a result of a head-on collision with another vehicle. "After the

accident Ms. Furry's blood alcohol level was measured at .32 four times Florida's legal limit of .08" *id* at 1227. Her father's lawsuit for dram shop liability was dismissed on the grounds of tribal sovereignty.

These cases and others make a mockery of the nationwide effort to prevent driving, drinking and other limits on business and human misconduct. The constitutional system of checks and balances between branches seems unable or unwilling to prevent these tragic results even in life or death situations. Limits must be allowed by an abrogation of tribal sovereignty in commercial situations.

B. If the Court declines to hear the immunity issue, the conflict between the D.C. Circuit in *Vann* and this case should be resolved.

Without allowing Petitioners to respond, the Ninth Circuit in eliminating the reference to lack of official immunity compounded the oversight and granted the Motion *ex parte*. The Court eliminated the footnote. The Ninth Circuit case cited in the footnote, *Maxwell v. County of San Diego,* 697 F.3d 941, 954 (9th Cir. 2012) states, ". . .allegations of acts outside an officer's authority are by definition individual capacity claims. . .In short, our tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities. . .Suits over plainly unlawful acts are individual capacity suits".

In this case, separate and distinct claims *were* alleged against tribal officials Wright and Dillon. A conflict in circuits has developed in the case of *Vann v.*

U.S. Dept of Interior, 701 F.3d 927 (D.C. Cir. 2012). *Vann* holds that a suit against the chief of an Indian tribe in his official capacity for declaratory and injunctive relief could proceed without the tribe as a party. The reasoning of the court in *Vann* is unequivocal stating on 929:

> The *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities-notwithstanding the sovereign immunity possessed by the government itself. . .Nor is there any basis for distinguishing this case involving an American Indian tribe from a run-of-the-mill *Ex parte Young* action.

In the final version of *Miller v. Wright,* 705 F.3d at 928, the Court stated, "The Tribe's sovereign immunity thus extends to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation".

Defendant Chad Wright's individual conduct was alleged. App G, page 100. Acts beyond authority were alleged. App 78, App 118. Constitutional rights were alleged as violated.

The ex parte grant of the action violated due process. *Guenther v. C.I.R.,* 889 F.2d 882, 884-6 (9th Cir. 1989); *Hormel v. Helvering,* 312 U.S. 552, 560 (1941). It was materially wrong.

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505,

514 (1991), while upholding tribal sovereignty against collectors of the state cigarette taxes from a tribally owned cigarette store, notes that *Ex Parte Young,* 209 U.S. 123 (1908) may allow suits against tribal officers or agents.

The Ninth Circuit Opinion also failed to apply the Supreme Court case of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978) and its own opinions in *Dawavendewa v. Salt River Project,* 276 F.3d 1150, 1159-61 (9th Cir. 2002); *Burlington Northern Railway v. Vaughn,* 509 F.3d 1085, 1092 (9th Cir. 2007); *Arizona Public Service v. Aspaas,* 77 F.3d 1128, 1134 (9th Cir. 1995); *Big Horn Electrical Co-op v. Adams,* 219 F.3d 944, 953 (9th Cir. 2000); *Maxwell v. County of San Diego,* 697 F.3d 941, 954 (9th Cir. 2012) goes a step further and holds that the tribal employees are not immune from damage awards where gross negligence is alleged. All uphold injunctions and declaratory judgment claims against tribal officials acting in violation of law.

> . . .A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must. . . Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.

Hart, supra at 1171.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED this 9th day of April 2013.

Respectfully Submitted,

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