Supreme Court, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

No. 12-1237

IN THE

Supreme Court of the United States

DANIEL T. MILLER; AMBER LANPHERE;
PAUL M. MATHESON,
Petitioners,

v.

CHAD WRIGHT, PUYALLUP TRIBE TAX DEPARTMENT, ENFORCEMENT OFFICER; HERMAN DILLON, SR., CHAIRMAN PUYALLUP TRIBE OF INDIANS; PUYALLUP TRIBE OF INDIANS, A FEDERALLY RECOGNIZED INDIAN TRIBE,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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May 13, 2013

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QUESTIONS PRESENTED FOR REVIEW

1. Where a tribe, in accordance with a government-to-government agreement with the state, collects a valid tribal tax on all cigarette sales to non-Indians on trust land within the tribe's reservation – including the tribe's own cigarette sales to non-Indians – is the tribe a "price-fixing competitor" subject to federal antitrust laws, and do those laws implicitly waive the tribe's sovereign immunity from suit in an action brought by a cigarette dealer and its customers to avoid payment of these taxes?
2. Are the tribal officials who collect and enforce a valid tribal tax acting outside the scope of their official authority and thus subject to the *Ex parte Young* exception to immunity from suit?

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RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Petitioner has presented the constitutional provisions, statutes and regulations involved, except for a relevant state statute regarding the Cigarette Tax Agreement between the State of Washington and the Puyallup Indian Tribe, which is found at WASH.

REV. CODE § 43.06.465. That provision is set forth in the Supplemental Appendix to this Opposition (hereafter "Supp. App.").

STATEMENT OF THE CASE

This petition, in the guise of an antitrust action, seeks to return to the days when renegade tribal retailers sold bootleg cigarettes without collection of either state or tribal cigarette tax. Petitioners' complaint and arguments throughout this and earlier cases have insisted that they should be subject to neither tribal nor state cigarette taxes. That is what this is all about, and not an antitrust issue.

This Court made very clear what the law is on taxation of cigarettes: the State of Washington has authority to impose its cigarette tax on purchases made by non-Indians even when the cigarettes are sold by an Indian tribe (or individual Indian) on an Indian reservation. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150-52 (1980); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991).

State and tribal governments battled for years over enforcement of that requirement with no satisfactory resolution, since tribal sovereign immunity prevents direct state enforcement on Indian reservations, *see Okla. Tax Comm'n*, 498 U.S. at 509, and halfway measures such as seizures of cigarettes en route to reservations were imperfect. Individuals who sold cigarettes without collecting tax did face the danger of federal criminal prosecution and prison sentences under the federal Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §§ 2341-46. *See, e.g., United*

States v. Baker, 63 F.3d 1478 (9th Cir. 1995) (Indian defendants sentenced for selling cigarettes without collection of state tax). The unresolved battle left the situation unsatisfactory from both state and tribal perspectives.

In the midst of that warfare, this Court observed that solutions to the problem of collecting applicable cigarette taxes are available. "States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." *Okla. Tax Comm'n*, 498 U.S. at 514. The Puyallup Indian Tribe and the State of Washington entered into such an agreement in 2005 that now ensures the collection of cigarette tax in a manner that puts all parties, including the retailer, in compliance with federal, state and tribal law. Cigarette Tax Agreement Between the Puyallup Tribe of Indians and the [Washington] Department of Revenue, Appendix H to Petition for Writ of Certiorari, App. 129.

The 2005 Agreement recognizes that collection of the Tribal tax will be deemed in compliance with state law and therefore with the CCTA. *See* WASH. REV. CODE § 43.06.465(2), Supp. App. 1. The Tribal ordinance imposes the tax equally on all subject retailers including the Tribe: "[T]he Tribe ... shall impose Tribal cigarette taxes on all sales by the Tribe as retailer and by Tribally-licensed retailers of cigarettes to retail purchasers within Indian country" Petition Appendix H, Part IV(2)(a), App. 139 (hereafter "Pet. App."). It gives neither the Tribe nor any other party any tax advantage over the other. The record below demonstrates that the Tribe in fact collects the tax on its own retail sales. The Agreement provides for revenue sharing of the tax

collected between the tribal and state governments. Pet. App. H, Part IV(3), App. 140.

This lawsuit is Puyallup Tribal member Paul Matheson's fourth attempt to circumvent that agreement and sell untaxed cigarettes. The Washington state courts dismissed his first case based on the Tribe's sovereign immunity. *Matheson v. Gregoire*, 161 P.3d 486 (Wash. Ct. App. 2007), *review denied*, 180 P.3d 1292 (Wash. 2008), *cert. denied*, 555 U.S. 881 (2008). The second attempt was a similar case in Puyallup Tribal Court and was dismissed for the same reason, with the dismissal upheld on appeal. The third attempt was an earlier case in federal district court, dismissed for failure to exhaust tribal court remedies. *Lanphere v. Wright*, C09-5462BHS, 2009 WL 3617752 (W.D. Wash. 2009), *aff'd*, 387 F. App'x 766 (9th Cir. 2010). This fourth case was dismissed by the district court based on the Tribe's sovereign immunity. The Ninth Circuit affirmed.

The Puyallup Tribe licenses individual tribal members to sell cigarettes at retail. None of the approximately twenty licensees has joined the Petitioners in this or any of their previous lawsuits challenging the Tribal tax. The other licensees understand that the 2005 Agreement between the Tribe and the State, although not their first choice, keeps them in compliance with federal law and therefore out of federal prison.

REASONS FOR DENYING THE PETITION

Neither of the questions presented by the petition merits review by this Court.

I. Federal Antitrust Laws Do Not Overrule the Tribe's Immunity from Suit, Nor Are They Applicable to the Facts of This Case.

The holding below is consistent with the long-established sovereign immunity of Indian tribes from suit absent any waiver or abrogation of that immunity, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 172-173 (1977), and with the protection that immunity affords to tribal officials acting in their official capacities and within the scope of their authority. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Matheson v. Gregoire, supra.*

Petitioners suggest, however, that federal antitrust law applies to regulatory action by tribal governments and abrogates sovereign immunity. The court below held that the Sherman Act, 15 U.S.C. §§ 1-7, 12-27, does not apply to tribal regulations. The court properly relied on this Court's decision in, *Parker v. Brown*, 317 U.S. 341, 351 (1943), and the decision of the Ninth Circuit in *Sanders v. Brown*, 504 F.3d 903 (9th Cir. 2007), both of which hold that the Sherman Act does not apply to states acting as sovereign governments. The court below properly ruled that, based on these precedents, the Sherman Act similarly does not apply to tribal regulations.

Petitioners relied on *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983), maintaining that it essentially overruled this

Court's decision in *Parker*. *Jefferson County* involved a state institution using price advantages given to it by pharmaceutical companies to gain a marketing advantage over private parties with whom it was competing. 460 U.S. at 152. There is nothing like that here, and the courts below properly held that *Jefferson County* is not applicable. The 2005 Agreement entered into by the Puyallup Tribe with the State of Washington does not give the Tribe any price advantages, and the Petitioners allege none. The Tribal tax, the focus of Petitioners' objection, is collected on sales made by the Tribe just as it is on sales made by other licensees such as Petitioner Matheson. This is a totally different situation from *Jefferson County*.

That this Court still considers *Parker* the governing standard is made clear in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), decided well after *Jefferson County*. In *City of Columbia*, the Court refused to apply the Sherman Act to a municipality's regulation of billboards, even though a conspiracy had been alleged, and no state regulation was involved. In ruling for the municipality and finding the Sherman Act inapplicable, the Court referred to *Parker* as a controlling "landmark case" holding that the Sherman Act does not apply to regulations "imposed by States 'as an act of government.'" *Id.* at 370.

Even if it were contended that federal antitrust laws were applicable to tribes, this case would not provide a suitable fact situation in which to examine that issue. The only allegation in the Complaint concerning antitrust law identified the Tribal ordinance that requires collection of the Tribal cigarette tax, consistent with the agreement between the tribal

and state governments. "The retail sale price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of the cigarette tax imposed on the cigarette." Pet. App. H, Part V(3), App. 141.

The sole purpose of that provision is to ensure collection of the tribal tax as required by the Agreement. As the record in the district court demonstrated, the Tribe collects the tribal tax on retail sales made by its own businesses and thus gains no price advantage from that provision. The Complaint alleged no facts indicating price-fixing by any party; it suggested only that bare legal conclusion. As this Court has held, that is insufficient to maintain the contention in the face of a motion to dismiss. *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 563 n.8, 555 (A "complaint must allege facts suggestive of illegal conduct . . . [not simply] labels . . . conclusions and a formulaic recitation of the elements of a cause of action . . . .").

Thus, because the antitrust laws do not waive tribal immunity from suit, and because even if they did they would not apply to the 2005 Agreement between the State and the Tribe on cigarette tax collection, there is no error in the decision below and no reason for this Court to grant review.[1]

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[1] At page 7 of their petition, the Petitioners cite *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F. 3d 1126, 1129 (11th Cir. 1999) for the proposition that a statute of general application such as the Americans with Disabilities Act or the Sherman Act apply to Indian tribes whether the Act or its legislative history refers to tribes or not. Even if this were so, *Florida Paraplegic* makes it clear that such a statute does not waive the Tribe's immunity from suit by a private citizen. *Id.* at 1130. The case leaves open whether the United States could

II. Assessing a Tribal Cigarette Tax Is, as a Matter of Law, Within the Scope of the Tribe's, and Therefore Tribal Officials', Authority and Thus Does Not Raise an *Ex Parte Young* Issue.

The second question petitioners present does not merit review because the court below followed established precedent to reject Petitioners' argument that Tribal officials acted outside the scope of their authority. As this Court held in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980), it is squarely within a tribe's authority to impose its cigarette tax on sales of cigarettes to non-Indians from on-reservation trust land. Tribal officials thus act fully within the Tribe's authority when they collect the Tribal tax. Those actions do not create an *Ex parte Young* exception to the protection afforded Tribal officials by the Tribe's sovereign immunity.

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bring such a suit. No suit has been brought by the United States here. Thus, *Florida Paraplegic* refutes Petitioners' argument rather than supporting it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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