TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 5, 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 November 14, 2016, petitioners in *Lewis v. Clarke* filed their opening brief arguing that the sovereign immunity of an Indian tribe does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment. Specifically, petitioners argue:

> An Indian tribe has the power to enact statutes permitting the resolution of tort claims in tribal court, but it cannot expand its sovereign immunity from suit in other forums. Even within a reservation, a tribe has only limited authority to legislate with respect to nonmembers. In the circumstances of this case, a tribe does not have the authority to deprive nonmember tort victims of their state-law right to recover for their injuries.

On November 21, 2016, the United States filed an amicus brief supporting reversal in *Lewis v. Clarke* (see summary below). The Project is coordinating the development of three tribal amicus briefs in support of the Mohegan Tribe, asking the Court to affirm the lower court and to recognize the potential damage to Indian tribes if it were to adopt the broad rule suggested by petitioners.

On November 21, 2016, an amicus brief on behalf of Native American Organizations (NCAI, Morning Star Institute, Cherokee Nation, Navajo Nation, and Yocha Dehe Wintun Nation) was filed in *Lee v. Tam*, a case in which the Court will review 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. This case is directly related to the Project's participation in *Pro-Football v. Blackhorse* which is currently pending before the U.S. Court of Appeals for the Fourth Circuit on appeal from the decision of the District Court to affirm the Trademark Trial and Appeal Board's 2014 cancellation of the mark for the Washington Football team. A copy of the amicus brief is available at http://sct.narf.org/caseindexes/lee_v_tam.html.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case:

LEWIS V. CLARKE (NO. 15-1500) – On September 29, 2016, the Court granted review of a petition 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 petitioners—the Lewises—are a non-Indian couple who were rear-ended by a limousine owned by the Mohegan Tribal Gaming Authority on I-95 (outside the Tribe's reservation). The petitioners sued the Tribal Gaming Authority and Mr. Clarke (the driver and an employee of the Tribal Gaming Authority) in state court for negligence. However, prior to the filing of the motion to dismiss based on tribal sovereign immunity, the petitioners dropped their suit against the Tribal Gaming Authority, and proceeded against Mr. Clarke in his individual capacity. The trial court, relying on *Maxwell v. San Diego* (9th Cir. 2013), held that the doctrine of tribal immunity does not apply when the Tribe is neither a party, nor the real party in interest because the remedy, and the damages sought will be paid by the defendant himself, and not the Tribe. The Connecticut Supreme Court distinguished *Maxwell* (a case involving claims of gross negligence), reversed the trial court, and held that the doctrine of tribal sovereign immunity extends to the driver as an employee of a Tribe who was acting within the scope of his employment when the accident occurred.

The petitioners have specifically requested that the Court resolve this conflict among the lower courts. The question presented in the cert petition is: "Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." The petitioners' filed their opening brief on November 14, 2016. On November 21, 2016, the United States filed an amicus brief in support of reversing the lower court, arguing:

> The Connecticut Supreme Court . . . h[eld] that a claim directly related to a tribal employee's performance of his official duties is a claim against the sovereign and could not be considered a personal-capacity claim. Those holdings are directly contrary to the settled rule that distinguishing between a personal-capacity suit and an official-capacity suit turns not on the conduct that gave rise to the suit, but on the party against whom relief is sought.
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> Although sovereign immunity does not bar personal-capacity suits against employees of a sovereign, employees who are sued in their personal capacities may raise the related but distinct defense of official immunity. For negligence actions, this Court held that federal common law immunized federal employees from liability arising out of actions that involve the employee's exercise of "discretionary" judgment. *Westfall v. Erwin*, 484 U.S. 292, 295-297 (1988). That common-law rule reflects a balance between the benefits and costs of insulating government employees from suit.

The Tribe's response brief is due on December 14, 2016. The Project is working directly with the attorneys representing Mr. Clarke and the interests of the Mohegan Tribe and is preparing to file at least three amicus briefs in support of the Tribe on December 21, 2016.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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:

NISENAN TRIBE OF THE NEVADA CITY RANCHERIA V. JEWELL (NO. 16-616) – On November 3, 2016, the Nisenan Tribe, a non-federally recognized Indian tribe that was a party to the *Tillie Hardwick* class action litigation, filed a petition seeking review of a decision by the U.S Court of Appeals for the Ninth Circuit which affirmed the district court's dismissal of the Tribe from the *Tillie Hardwick* case effective, *nunc pro tunc*, as of 1983, and then dismissed its 2009 action as time-barred under the six-year statute of limitations. The United States brief in opposition is due on December 7, 2016.

CITIZENS AGAINST RESERVATION SHOPPING V. JEWELL (NO. 16-572) – On October 27, 2016, a non-Indian group filed a petition seeking review of a decision by the U.S. Court of Appeals for the District of Colombia Circuit which affirmed the district court and upheld the decision of the Secretary to take land in trust for the Cowlitz Tribe based on *Chevron* deference applicable to the two-part inquiry in concluding that the Cowlitz Tribe is a "recognized Indian tribe now under Federal jurisdiction." On November 28, 2016, an amicus brief in support of Citizens Against Reservation Shopping was filed by the California Tribal Business Alliance, the Mooretown Rancheria of Maidu Indians and the United Auburn Indian Community. The United States' and the Cowlitz Tribe's briefs in opposition are due on December 28, 2016.

MACKINAC TRIBE V. JEWELL (NO. 16-539) – On October 17, 2016, the Mackinac Tribe filed a petition seeking review of a per curiam opinion of the United States Court of Appeals for the District of Colombia Circuit which held that the Tribe must exhaust its administrative remedies for federal acknowledgement under Part 83 prior to making a claim of federal recognition for purposes of requiring the Secretary of the Interior to conduct an IRA election under Part 81. On November 21, 2016, the United States filed a waiver of its right to respond.

PATCHAK V. JEWELL (NO. 16-498) – On October 11, 2016, David Patchak, a non-Indian landowner (who successfully argued before the Supreme Court in 2012 that he had prudential standing to bring an APA action challenging the acquisition of trust land for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians/Gun Lake Tribe) filed a petition seeking review of a decision by the U.S. Court of Appeals for the D.C. Circuit which held that the Gun Lake Trust Land Reaffirmation of 2014, a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, was constitutionally sound and removed jurisdiction from the federal courts over any actions relating to that property. On November 14, 2016, a group of Federal Court Scholars filed an amicus brief in support of the petitioner. On November 14, 2016, the United States filed a waiver of its right to respond, and the Court has scheduled the petition for conference on January 6, 2017.

R.P. V. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES (NO. 16-500) – On October 7, 2016, the non-Indian foster parents of Alexandria P. ("Lexi") filed a petition seeking review of a decision by the Court of Appeal of the State of California which affirmed the lower court and held that the foster parents failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA). The questions presented are: (1) whether ICWA applies where the child has not been removed from an Indian family or community; (2) whether ICWA's adoptive placement preferences, 25 U.S.C. § 1915(A), require removal from a foster placement made under 1915(b), for the purpose of triggering the adoptive

placement preferences contained in 1915(a); and (3) whether the state courts erred in holding that "good cause to depart from ICWA's placement preferences must be proved by "clear and convincing evidence." On November 7, 2016, the Goldwater Institute and the Cato Institute filed an amicus brief in support of the petitioners. On November 14, 2016, the American Academy of Adoption Attorneys filed an amicus brief in support of the petitioners. The respondents' briefs in opposition are due on December 14, 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 was scheduled for conference on September 26, 2016, and the Court has not yet taken any action.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

WOLFCHILD V. REDWOOD COUNTY (NO. 16-286) – On November 7, 2016, the Court denied a petition filed by the lineal descendants of the loyal Mdewakanton which sought review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that they did not have cause of action under federal common law for violation of possessory rights to aboriginal land, and that the 1863 Act that authorized the Interior Secretary to set apart land for loyal Mdewakanton did not create private remedy.

PRO-FOOTBALL, INC. V. BLACKHORSE (NO. 15-1311) – On October 3, 2016, the Court denied the petition for writ of certiorari before judgment (by the Fourth Circuit) filed by Pro-Football. However, the Court did grant the petition filed by the United States in *Lee v. Tam*, No. 15-1293, in which it will review 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.

KELSEY V. BAILEY (NO. 16-5120) – On October 3, 2016, the Court denied review of a petition filed by a member of the Little River Band of Ottawa Indians 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.

JONES V. NORTON (NO. 16-72) – On October 3, 2016, the Court denied the petition filed by the parents of Todd Murray, an enrolled member of the Ute Indian Tribe, 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.

FLUTE V. U.S. (NO. 15-1534) – On October 3, 2016, the Court denied review of a petition filed by a group of Native Americans who are descendants of the victims of the 1864 Sand Creek Massacre 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.

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), or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 (richardg@narf.org).**