No. 14-1521

In the Supreme Court of the United States

VINCENT TORRES,
Petitioner,

v.

THE SANTA YNEZ BAND OF CHUMASH INDIANS,
Respondent.

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

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

SUMMARY OF RELEVANT FACTS AND PRIOR PROCEEDINGS OCCURRING BELOW

As set out in Petitioner's original Petition for Writ of Certiorari, Respondents current tribal chairman seized control of Respondent tribe in December 1999 by claiming the contracts made by the prior tribal chairman and government were illegal and that Petitioner's work was defective and Petitioner overcharged the tribe in some conspiracy between the former chairman and business committee members.

Once seated as chairman, Mr. Armenta refused to pay the outstanding invoices for work done, refused to allow Petitioner to retrieve his equipment and material from tribal land. To bolster his reasons for deposing the previous tribal chairman, Mr. Armenta circulated defamatory statements about Petitioner to the tribal membership and obtained a tribal ordinance banning petitioner from tribal lands. When a material supplier came to retrieve and restock unused drainage pipe, Chairman Armenta made false and defamatory statements about Petitioner and told him he was going to run petitioner out of business.

When petitioner refused to give up efforts to collect the $700,000 in unpaid overdue invoices, Chairman Armenta filed a lawsuit in the U.S. District Court in Los Angeles, claiming Petitioner was living on tribal land and seeking an order to have him evicted by U.S. Marshals. When the District court denied the tribe's Motion for Summary Judgment Chairman quickly dismissed that complaint to avoid any trial.[1]

[1] See Santa Ynez Band of Mission Indians v. Torres [U.S.D.C. Cal. 2002] 262 Fed.Supp.2d 1038.

Chairman Armenta then filed a complaint in State Superior Court first claiming Petitioner breached the contracts with the tribe and performed negligent and defective work.

Petitioner's material suppliers and sub contractors began suing Petitioner and he had to file a Petition for protection under Chapter 11 of the Bankruptcy Act. Chairman Armenta then filed a "creditor's claim" for $3,000,000 in Petitioner's Chapter 11 with no supporting documents, stating under oath ***"contract for construction – Breach/caused creditor additional expense."*** [2]

Petitioner objected to that unsupported claim and noticed Chairman Armenta's deposition with a subpoena for all records.

At deposition Chairman Armenta refused to identify anyone the tribe paid money to because of Petitioner's work, gave vague, unresponsive answers, produced no documentation or evidence of payment to others, often stating he didn't know or would have to resort to "documents" which he did not produce. When asked where those documents were, he replied "I don't know, anywhere from Buellton to Boston."[3]

Chairman Armenta and his attorney then unilaterally ended the deposition walking out, saying answers would be provided in the pending State Court lawsuit not Bankruptcy discovery proceedings.

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[2] That claim was nearly twice the amount paid for all the work Petitioner had completed.

[3] Buellton, California and Boston, Massachusetts are over 2,200 miles apart.

Respondents then made a Motion to Lift the Stay of the State Court lawsuit. Petitioner moved the court to allow him to raise the unpaid overdue invoices in state court and allow the objection to the frivolous unsupported $3,000,000 creditor's claim to be determined by State Court at the same time.

Respondent objected to the Petitioner's counterclaim asserting sovereign immunity. The court overruled that protest and granted Petitioner's Motion citing Krystal Energy Co. v. Navajo Nation [2004] 357 F.3d 1055.

Based on Chairman Armenta's dismissal of the frivolous District Court complaint he filed, falsely claiming Petitioner was living on tribal land and seeking "eviction", Petitioner filed a State Court complaint for Malicious Prosecution and Abuse of Process. Chairman Armenta and members of the new business Committee involved in the tribal coup were named individually. Respondents moved to dismiss that complaint claiming "tribal sovereign immunity" and the case was dismissed without any trial or hearing on the merits. On appeal that dismissal was upheld on the basis of "tribal immunity."[4]

Respondent's case proceeded to trial in State Court. Respondent once again immediately claimed in State Court they had sovereign immunity from any counterclaim of Petitioner. The State Court refused to limit Petitioner's counterclaim. Respondent then went back to Bankruptcy Court and notwithstanding the unambiguous order, reasserted sovereign immunity under the guise of seeking "clarification." That Motion

[4] There was never any hearing or trial before which the claim of "tribal immunity" could be tested.

was denied out of hand by the Bankruptcy Court. This caused additional delay and expense to Petitioner.

The State Court trial commenced and after the first week the court granted non-suit for all the claims made of fraud, conversion and overbilling. The remaining claims of breach of contract and negligence related to Petitioner's work proceeded through another 7 weeks of trial during which the testimony revealed, incidentally, the scheme to oust the former tribal chairman using the contracts with Petitioner. Upon conclusion of the trial the court found for Petitioner and against Respondent on all issues. Found the experts called by the tribe were paid advocates with no credibility and in connection with the remaining causes of action for breach of contract stated:

> *"Defendant assails Plaintiff's new tribal chairman as essentially conducting a personal vendetta against Defendant. Motive is not relevant to an inquiry regarding breach of contract other than as it may bear upon the credibility of witnesses to factual matters which constitute the breach or establish legal excuse....."*

Judgment was entered against Respondent in State Court which included the determination that the $3,000,000 creditor's claim for breach of contract was meritless.

Lastly the State Court awarded Petitioner some $525,000 in unpaid invoices including legal interest for the 4 ½ years since they should have been paid but only awarded costs Petitioner incurred in that case and no attorneys fees.

The bankruptcy order had retained jurisdiction of the Debtor's Chapter 11 case.

When petitioner sought to execute his money judgment, Respondents made another Motion in Bankruptcy Court, claiming Petitioner and his counsel should be held in contempt because Petitioner was required to go back to Bankruptcy Court for permission to execute his judgment. The Court denied that Motion.

Respondents then appealed the State Court judgment to the Court of Appeals, once again asserting the tribe had sovereign immunity.

Petitioner learned later the tribal council[5] had voted to pay Petitioner's money judgment, 73 in favor and 3 opposed. Despite this tribal mandate the chairman refused to abide by it, and pay the judgment as directed but instead prosecuted the appeal.

The State Court of Appeal affirmed the Superior Court judgment but Chairman Armenta still did not withdraw the meritless $3,000,000 claim, forcing Petitioner to make a motion to disallow it.

Petitioner moved the Bankruptcy Court for an order for sanctions for the long pattern of dilatory, delaying and frivolous actions and litigation by Chairman Armenta ostensibly done for the Respondent tribe. At that hearing the court recognized that the question of sanctions was not before the State Court and that Petitioner had no other recourse stating,

> THE COURT: Okay. "Motive was irrelevant" to whatever was there. But they haven't done a

[5] The ultimate authority of the Respondent tribe is exercised through a tribal council of all the adult members.

> darn thing in my Court. And to use my inherent authority to enter sanctions, they've got to offend the Court, the integrity of the Court. They haven't offended me one iota. This is not the place to have raised this. I know I'm the only place left where you can raise it. But I think Mr. Torres is without a venue.

The Bankruptcy Court did not consider the imposition of sanctions personally on Chairman Armenta individually and should have done so.

Rather the bankruptcy Court erroneously refused to consider the long pattern of dilatory, delaying tactics and harassment, intended to evade paying Petitioner his money simply because the court concluded all the events and dilatory actions did not occur in her court and that the false and frivolous $3,000,000 creditor's claim was the only thing she could consider, pointing out parenthetically it was not unique for creditors to submit erroneous, false and exaggerated creditor's claims.

ARGUMENTS WHY REHEARING SHOULD BE GRANTED AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE ACCEPTED AND ISSUED

The Brief opposing Petitioner's Petition for Writ of Certiorari claimed sovereign immunity was not an issue in this case, despite the fact that chairman Armenta asserted tribal "sovereign immunity" at least 9 times while engaging in a long 10-year pattern of dilatory actions to reduce Petitioner to a position of exhaustion and give up being paid for the work he had done in 1999.

In their brief in opposition Respondents simply tried to reassert numerous matters from their state court case, all of which were decided against them after an 8 week trial.

The waiver of immunity created by the filing of the frivolous $3,000,000 claim in Bankruptcy was limited and did not include the long 10 year pattern of sanctionable conduct of Chairman Armenta. As set out in his Petition it was reversible error, under Chambers v. Nasco [1991] 501 U.S. 32, for the Bankruptcy Court to have refused to consider Petitioner's sanction Motion just because many of the dilatory actions of the tribal Chairman Armenta occurred "outside of her court."

The hearing on Petitioner's sanction motion occurred before this court decide Michigan v. Bay Mills Indian Community [2014] 572 U.S. ____ 134 S.Ct. 2024. Therefore the automatic blanket immunity of the tribe still cloaked Chairman Armenta with immunity depriving Petitioner any forum before which he could

challenge the ultra vires and tortuous acts of Chairman Armenta.

Because a substantial number of those acts, including the filing of a meritless and frivolous $3,000,000 creditor's claim by Chairman Armenta filed in Bankruptcy under oath, Petitioner should have been allowed to impose sanctions upon the tribal chairman individually even if the tribe was immune from vicarious liability for his actions.

Prior to this court's suggestion in Bay Mills, it was enough for a tribal tortfeasor to simply claim they were colorably acting on behalf of the tribe and obtain dismissal of all claims made before there was ever any hearing on the merits or any determination if in fact he was really acting for the tribe or had tribal authority for such ultra vires and tortuous acts.

Although numerous cases have traced the authority of Congress over commerce with Indians and Indian tribes to Article I section 8 of the United States Constitution (the commerce clause) there is no exemption anywhere granting a Constitutional immunity from the laws of the land. To the contrary, Article III section 2 extends the judicial powers of the United States '---to all cases in Law and Equity ***arising under this Constitution***,---' (presumably that would include the commerce clause) and that power includes ambassadors, consuls, and disputes between citizens of one state and a foreign state or its citizens, and includes the powers set out in the commerce clause which are stated to apply to foreign nations and Indian tribes alike.

Indians are only mentioned one other place, in Article I section 2 which provision prohibits the counting of Indians who do not pay taxes in the census to determine the number of representatives sent to Congress.

Moreover such an extensive Indian legal immunity for Indian tribes is inconsistent with the Supremacy Clause in Article VI clause 2 and it is difficult at best to find authority for it in the cases merely because Indian tribes are sometimes described as having sovereignty more than a century ago. Following the Indian Appropriations Act of 1871 (25 U.S.C. § 71) Indian tribes were specifically prohibited from being acknowledged as independent sovereign nations.

It is abundantly clear the synthetic immunity discussed by this court in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. infra is purely a creation of case law which was likely established for good reasons and the protection of nascent Indian tribes and their meager assets at the time, but is a doctrine that has no place in the modern world of commerce between Indian tribes and millions of non-Indian American citizens today.

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. 523 U.S. 752 supra., this court recognized the outdated application of the court-created immunity doctrine even admitting it arose "almost by accident," by the decision in Turner v. United States [1919] 248 U.S. 354.

Tribal casinos and businesses are open to millions of members of the public, routinely hire thousands of non-Indian employees and contract with non-Indian

businesses daily. The anachronistic nature of this court created doctrine, ***has no place in the stream of commerce now engaged in by many Indian tribes***. After recognizing the obsolescence of this court created immunity doctrine, the majority of this court opined, it should be up to Congress, to undo what courts had created.

The court suggested, by dicta, it could be eliminated or modified by adding Indian tribes to the Foreign Sovereign Immunity Act 28 U.S.C. § 1605.

Since that 1998 Kiowa decision supra, Congress has done nothing.

The only federal independent agency heeding this court's advice was the National Labor Relations Board, using this court's opinion and the language from Kiowa almost verbatim, they held the National Labor Relations Act applied to employees of Indian casinos and businesses.

Currently Indian tribes and their officers are free to do as they please, operating in a lawless environment at the pain and sufferance of other citizens. What more important question could possibly be presented to this court?

Tribal officers sued individually, can simply claim the tribe is a necessary and indispensible party who cannot be joined because of tribal "sovereign immunity" and actions brought against named individual officials must be dismissed for failing to join an indispensible tribe.[6]

[6] This was the procedure followed in F.O.A.C. v. Salazar where this court refused to grant a Petition for Writ of Certiorari in December 2014.

Respondent, through Chairman Armenta, engaged in improper conduct to harass and intimidate Petitioner in an effort to force him to give up and surrender his right to be paid. In Chambers v. NASCO 501 U.S. 32 supra this court described such sanctionable acts as:

> "...to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance," *id.* at 136.

CONCLUSION

It was clear that the egregious conduct of Chairman Armenta should be subject to sanctions even *though most occurred outside of the Bankruptcy Court but directly related to it, as this court stated in Chambers v. Nasco* 501 U.S. 32 supra.

All other attempts to hold chairman Armenta responsible for his tortuous and ultra vires acts were blocked by claims of tribal immunity at every turn and Petitioner never had any forum in which the merits and nature of Chairman Armenta's ultra vires actions or his lack of authority, could be challenged because of the broad application of tribal immunity case law prior to Bay Mills.[7]

Petitioner should have been allowed a full hearing before the Bankruptcy Court on his Motion for sanctions including the sanctioning of Chairman Armenta if appropriate and a hearing to determine whether Chairman Armenta's actions both in and

[7] Jurisdiction is almost always challenged at the outset by claiming the action is barred by tribal sovereign immunity resulting in immediate dismissal.

outside of Bankruptcy were actually authorized by the tribe and created any entitlement to the court made immunity doctrine.

This Petition raises important issues beyond what happened to Mr. Torres. What is the extent of Indian tribal immunity where officials can simply claim they were acting for or on behalf of an "Indian tribe" while engaging in all manner of *ultra vires* acts?

This question has been left unanswered since Bay Mills. How does a Plaintiff establish that individually sued tribal officers are liable, when they merely claim to be acting for the tribe and can obtain a dismissal? How, and in what form, can a Plaintiff determine if these individuals ***are in fact acting for or on behalf of the "tribal entity"***? At what point does an individual tribal officer become the *alter ego* of the tribe, rendering the tribe vicariously liable for *ultra vires* acts notwithstanding tribal "sovereign immunity"?

This court needs to answer these important questions left unanswered after Bay Mills. Under the current state of the law this court's suggested remedy of a lawsuit against the offending individual tribal officers is *illusory* at best.

Respectfully Submitted,

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CERTIFICATION OF GOOD FAITH

I James E. Marino, attorney for Petitioner, certify this Motion is made in good faith and not for any purpose of delay.

Prior to this court's recent decision in Michigan v. Bay Mills Indian Community 572 U.S. ____ 134 S.Ct. 2024 [2014] the mere assertion of the immunity created by case law was sufficient to cloak individual officers or tribal employees with immunity from lawsuit or responsibility for torts, ultra vires acts (or sanctions) where they merely claimed they were acting for or on behalf of a federally acknowledged Indian tribe. Any suit or claim would thus be dismissed without ever having a trial or hearing to determine if the acts and omissions alleged were in fact authorized by the Indian tribe or were actually within the scope of authority or done with the consent of the immune tribe.

Thus since the decision in Bay Mills, the logical question arises how a plaintiff or claimant can establish the lack of tribal immunity when individual defendants are sued for their torts or ultra vires acts.

In the present case the Bankruptcy Court should have allowed a hearing on all the sanctionable conduct by Chairman Armenta including those that occurred outside of, but in connection with the Debtor's claims for unpaid invoices and the tribe's frivolous creditor's claim for $3,000,000.

I declare under penalty of perjury the foregoing is true and correct to the best of my own knowledge. Executed this 30th day of October, 2015.

James E. Marino
Counsel for Petitioner