No. 21-

IN THE

Supreme Court of the United States

ACRES BONUSING, INC; JAMES RAYMOND ACRES,

Petitioners,

v.

LESTER JOHN MARSTON; RAPPORT AND MARSTON, AN ASSOCIATION OF ATTORNEYS; DAVID JOSEPH RAPPORT; COOPER DEMARSE; ASHLEY BURRELL; KOSTAN LATHOURIS; BOUTIN JONES, A CALIFORNIA CORPORATION; MICHAEL E. CHASE; DANIEL STOUDER; AMY O'NEILL; AMELIA F. BURROUGHS; MEGHAN YARNALL; ARLA RAMSEY; ANITA HUFF; THOMAS FRANK; JANSSEN MALLOY LLP, AN ASSOCIATION OF ATTORNEYS; DARCY VAUGHN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Forrester v. White,* 484 U.S. 219, 227 (1988) this Court explained an absolute immunity is "justified and defined by the *functions* it protects and serves, not the person to whom it attaches." Then, in *Antoine v. Byers Anderson,* 508 U.S. 429, 435-436 (1993), this Court explained the function absolute judicial immunity protects is "the function of resolving disputes between parties, or of authoritatively adjudicating private rights." Conduct by court employees outside this function is not protected by absolute immunity, even if it is "essential" (*Forrester,* 227) or "indispensable" (*Antoine,* 437).

Lower courts have not applied *Forrester* or *Antoine* consistently, resulting in divergent holdings and a creeping expansion of absolute immunity. For instance, the Ninth and D.C. Circuits – splitting with the Eighth, Seventh and Fifth Circuits – hold absolute immunity bars claims against court clerks for filing documents because court clerks are "integral to the judicial process." And the Ninth, Fifth and Second Circuits have all expanded absolute immunity to bar claims against court employees whose work is "intimately connected" with the work of a judge.

The question presented is: Should this Court's "functional" approach to absolute immunity be discarded to allow absolute judicial immunity to bar claims against court employees for their administrative, ministerial, or conspiratorial conduct if that employee or their conduct is "intimately connected with" or "integral to" the judicial process?

PARTIES TO THE PROCEEDING BELOW

Petitioners Acres Bonusing, Inc., and James Acres were the plaintiff/appellants below.

Respondents "The Law Offices of Rapport and Marston," David Rapport, Lester Marston, Darcy Vaughn, Kostan Lathouris, Cooper DeMarse, Ashley Burrell, Boutin Jones, Inc., Michael Chase, Daniel Stouder, Amy O'Neill, Janssen Malloy LLP., Megan Yarnall, Amelia Burroughs, Arla Ramsey, Thomas Frank, and Anita Huff were all defendant/appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Acres Bonusing, Inc. has no parent companies, and there is no publicly held company which owns 10% or more of Acres Bonusing, Inc.

Petitioner Acres is a natural person.

RELATED CASES

Acres Bonusing, Inc., and James Raymond Acres v. Lester John Marston; et al., No. 20-15959, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 5, 2021.

Acres Bonusing, Inc., and James Raymond Acres v. Lester John Marston; et al., No. 3:19-cv-05418, U.S. District Court for the Northern District of California. Judgment entered on April 15, 2020.

There are no other directly related cases within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES:

OPINIONS BELOW

The Ninth Circuit's published opinion is reported at 17 F.4th 901. App.1a-36a.

The order from the United States District Court for Northern District of California is available at 2020 WL 1877711. App.37a-58a.

STATEMENT OF JURISDICTION

The Ninth Circuit denied a petition for rehearing on December 15, 2021. App.59a-60a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The question presented concerns the nature of absolute immunity as applied to court employees. The question is one of pure common law and no statutory or constitutional provision is implicated.

STATEMENT OF THE CASE

This petition describes how several circuits have departed from this Court's absolute judicial immunity doctrine to hold absolute immunity sometimes bars claims arising from a court employee's administrative, ministerial, or conspiratorial conduct. This has led to inconsistent and conflictual results between the circuits, and to an unnecessary expansion of absolute immunity.

A: Factual Background

The Law Offices of Rapport and Marston has a longstanding relationship with the Blue Lake Rancheria. App.8a. One of the principals, Rapport, served as the tribe's general counsel. *Id.* The other principal, Marston, served as Chief Judge of Blue Lake's tribal court. App.7a.

In 2016 Judge Marston presided over Blue Lake Casino's civil action against petitioners in Blue Lake Tribal Court. App.7a. Judge Marston employed Rapport & Marston associates Burrell, DeMarse, Vaughn, and Lathouris as part-time law clerks in the case, even though all four simultaneously worked as attorneys for other Blue Lake entities. App.8a, 56a. Clerk Huff, who served as court clerk in the case, was supervised in her work by Ramsey, Blue Lake Casino's CEO. App.54a.

Acres brought two federal lawsuits against the tribal court and Judge Marston to enjoin tribal jurisdiction. App.40a. While Acres did not succeed in enjoining tribal court jurisdiction in either case, in the second case the district court ordered Judge Marston to produce his billing records. App.41a, fn.6. Ultimately, Judge Marston recused himself and was replaced in the tribal court proceeding by Justice Lambden, a retired justice from the California Court of Appeals. App.40a. Shortly thereafter, Justice Lambden granted summary judgment to Acres, and then dismissed the tribal court case in its entirety. App.41a.

B: Procedural History

Petitioners filed this present action in 2019, bringing causes of action for wrongful use of civil proceedings,

breech of fiduciary duty, and RICO.[1] App.41a-42a. The district court held sovereign immunity barred petitioners' present action in its entirety. App.46a. Alternatively, the district court also held absolute judicial immunity barred suit against Judge Marston, his law clerks, and the tribal court clerk. App.58a.

Petitioners appealed, and the Ninth Circuit reversed as to sovereign immunity, holding that under the "remedy sought" test established by this Court in *Lewis v. Clarke,* 137 S.Ct. 1285 (2017), because no remedy sought by petitioners could bind Blue Lake's policy or property, sovereign immunity was not implicated. App.10a-26a. The Ninth Circuit affirmed, however, as to judicial immunity. App.26a-31a.

Specifically, the Ninth Circuit held absolute immunity protected Judge Marston against allegations related to his employment of Blue Lake attorneys as his law clerks, because "his discussions about the case with attorneys functioning as his law clerks" was a function

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1. Prior to the filing of this suit, Acres brought a similar suit against the same defendants in Sacramento Superior Court. The state court action does not contain a RICO cause of action, and petitioners bring the RICO cause of action based upon declarations filed by respondents in the state court action. Acres Bonusing is not a party to the state court action and Acres joins below only as to the RICO cause of action. App.41a-42a.

The Sacramento Superior Court found sovereign immunity barred Acres' suit entirely. The California Court of Appeal reversed as to sovereign immunity, but found judicial immunity or prosecutorial immunity barred suit against several defendants. *Acres v. Marston,* 71 Cal.App.5th 859 (2021). Acres' petition for review to the California Supreme Court was denied on February 22, 2022.

"normally performed by a judge." App.29a. The Ninth Circuit also held absolute immunity barred claims arising from allegations a judge was conspiring with a party to predetermine the outcome of a proceeding. App.29a.

The Ninth Circuit found the court clerk, who was supervised by the CEO of Blue Lake Casino (App.54a), was protected by absolute immunity against allegations she improperly issued a summons and rejected Acres' tribal court filings because such conduct is "an integral part of the judicial process" (App.30a).

The Ninth Circuit also found Judge Marston's law clerks were protected by absolute immunity because "a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." App.30a.

Petitioners now seek review, arguing the Ninth Circuit ignored this Court's clear precedent establishing none of the conduct described above is conduct protected by absolute immunity.

REASONS FOR GRANTING THE PETITION

Suits for monetary damages are a means to "discourage conduct that may result in liability." *Forrester v. White,* 484 U.S. 219, 223 (1988). Where government officials are concerned, the threat of liability can encourage "officials to carry out their duties in a lawful and appropriate manner." *Ibid.* But, because government officials are engaged in governing, and their decisions frequently result in adverse consequences for individuals, imposing the same liability

on government officials as on other citizens may "detract from the rule of law instead of contributing to it." *Ibid.*

In fashioning its absolute immunity framework this Court has remained "[a]ware of the salutary effects that the threat of liability can have." *Id.*,223. And, because there is an "undeniable tension between official immunity and the ideal rule of law," this Court is "quite sparing in its recognition of claims to absolute official immunity." *Id.*, 223-224. With this tension in mind, official immunities are only available where they are "justified by overriding considerations of public policy." *Id.*, 224.

As an absolute immunity, judicial immunity is "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.,* 227. Therefore, rather than extending judicial immunity to judicial officers as a privileged exemption from suit, this Court justifies judicial immunity as a means to protect "the finality of judgments," "discourag[e] inappropriate collateral attacks," and "insulat[e] judges from vexatious actions prosecuted by disgruntled litigants." *Id.,* 225. This last justification springs from the fear that, if judges were exposed to suits for allegedly erroneous decisions, judges might be swayed to "avoid rendering decisions likely to provoke such suits." Such "timidity would be hard to detect," and would "detract from independent and impartial adjudication." *Id.,* 227. And so, while the Court has never defined the precise acts protected by judicial immunity (*Ibid*), under its functional approach the Court's "touchstone" for the doctrine's applicability has been "the function of resolving disputes between parties, or of authoritatively adjudicating private rights" (*Antoine v. Byers Anderson, Inc.,* 508 U.S. 429, 435-436 (1993)).

This Court's functional focus means some conduct by judges is not protected by absolute immunity. And it also means some conduct by non-judges is protected by absolute immunity.

Judges, for example, are not absolutely immune from liability for their administrative acts. This is true even when their administrative acts "may be essential to the very functioning of the courts." *Forrester,* 228. And so, when an unreconstructed Virginia county judge excluded jurors on the basis of race, judicial immunity did not protect the judge. *Ibid.* [summarizing and extending the holding from *ex Parte Virginia,* 100 U.S. 339 (1880)]. And a century later, when an Illinois county judge fired a parole officer because she was a woman (*Forrester,* 221), judicial immunity did not protect the judge (*Id.,* 231).

On other hand, non-judges employed in occupations as diverse as arbitrators, grand and petit jurors, or customs collectors selling perishable property are all protected by absolute immunity from liability for their resolution of disputes or adjudication of private rights. *Antoine*, 433 fn. 8. But, just like judges, non-judges are not immune for conduct ancillary to resolving disputes or adjudicating private rights, no matter how crucial their work. And so in *Antoine,* this Court held judicial immunity does not protect court reporters recording proceedings, even though court reporters are "highly skilled" and "indispensable to the appellate process."[2] *Id.*, 436-437.

2. In deciding that court reporters, specifically, were not cloaked in absolute immunity, this Court expressed its confidence that "the Federal Judiciary, which surely is familiar with the special virtues and concerns of the court reporting profession, will … administer justice to its members fairly." *Antoine*, 437.

Despite this Court's clear articulation of a functional, conduct-centric approach to determining the availability of absolute immunity, lower-courts frequently allow the *identity* of the parties within an action to determine the availability of absolute immunity, leading to inconsistent and unpredictable results. For the reasons argued below, this case affords the Court an ideal opportunity to correct these persistent and cross-circuit errors.

I. Review is necessary to resolve the split between the Ninth and D.C. Circuits and the Eighth, Seventh, and Fifth Circuits, as to whether court clerks are protected by absolute immunity or qualified immunity for conduct related to filing documents.

1. Below, the Ninth Circuit held absolute immunity protected Clerk Huff when she rejected filings and improperly issued summonses because "clerks have absolute quasi-judicial immunity … when they perform tasks that are an integral part of the judicial process." App.30a. In reaching this conclusion, the Ninth Circuit did not consult this Court's authority, but instead worked from its own line of authority beginning with the pre-*Antoine* case *Mullis v. U.S. Bankruptcy Ct., Dist of Nevada*, 828 F.2d 1385 (9th Cir. 1987). App.30a.

Mullis wanted to know how to file a bankruptcy petition while retaining the ability to withdraw his petition as a matter of right. So, Mullis sent his wife to bankruptcy court with his bankruptcy petition to find out. Instead of providing the requested information, or explaining clerks could not provide legal advice, Mullis alleged the bankruptcy clerks took his petition, collected his filing fee, and promised to file the petition under the

appropriate chapter of the bankruptcy code. Later, when Mullis attempted to amend his petition, a clerk refused to accept his filing because the petition had been filed under the wrong chapter. *Mullis,* 1386.

Mullis argued the clerks' conduct in failing to properly advise him, misfiling his petition, and then refusing to file his amended petition was conduct protected by qualified immunity, and not absolute immunity. *Mullis,* 1390. The Ninth Circuit disagreed, and held the clerks were protected by absolute immunity because all of the conduct alleged by Mullis was an "integral part of the judicial process." *Ibid.* To reach this holding, the Ninth Circuit reasoned that because actions are commenced through the filing of complaints or petitions, this act of filing is an "integral part of the judicial process." *Ibid.* Court clerks then, by the Ninth Circuit, are also an "integral part of the judicial process" because they are "the officials through whom such filing is done," and are therefore to be cloaked in absolute immunity. *Ibid.*

Thus, in *Mullis,* it can be seen the Ninth Circuit's touchstone lay in considering whether a task was an "integral part of the judicial process" rather than in considering whether the act performed "the function of resolving disputes between parties, or authoritatively adjudicating private rights" as this Court would later require. *Antoine,* 435-436. And, although the Ninth Circuit later recognized *Antoine* "worked a sea change" in determining the availability of "absolute quasi-judicial immunity for nonjudicial officers" (*In re Castillo,* 297 F.3d 940, 948 (9th Cir. 2002)), this turning tide did not shift the Ninth Circuit from the course it had lain for itself in *Mullis.*

Castillo's bankruptcy petition was dismissed and her home was sold at foreclosure after the bankruptcy Trustee failed to notify Castillo as to the proper date of her confirmation hearing. Castillo sued for negligence, and the Bankruptcy Appellate Panel held absolute immunity did not bar claims arising from the Trustee's failure to give proper notice of the confirmation hearing. *Castillo,* 943-944. But, after grappling with *Antoine* (*Castillo,* 948-951), the Ninth Circuit held the Trustee's failure to give notice of the hearing was protected by absolute immunity because it could not "meaningfully be separated from the act of scheduling and convening the hearing." *Castillo,* 952. In other words, despite recognizing *Antoine* as "working a sea change" in the determination of absolute immunity, the Ninth Circuit made no real departure from *Mullis,* and continued to hold absolute immunity protected "court clerks and other nonjudicial officers for purely administrative acts" when those acts are "part of the judicial function." *Castillo,* 952.

In recent years, and in its unpublished cases, the Ninth Circuit has further distilled the *Mullis/Castillo* line to categorically hold "quasi-judicial immunity extends to court clerks and other non-judicial officers for purely administrative acts." *Ibeabuchi v. Johnson,* No. 18-16653 (9th Cir. Dec. 3, 2018); *Moore v. Rosenblatt,* No. 17-55708 (9th Cir. Jan. 23, 2019) [internal quotations omitted].

Mullis' "integral part" test continues to hold sway in the D.C. Circuit as well. The D.C. Circuit imported the doctrine with its pre-*Antoine* case *Sindram v. Suda,* 986 F.2d 1459, 1460-1461 (D.C. Cir. 1993). The D.C. Circuit has perpetuated the doctrine since. E.g. *Lorenz v. Suter*, 382 F. App'x 1 (D.C. Cir. 2010) ["Clerk has absolute immunity

from damage suits for performance of tasks that are an integral part of the judicial process"]; *Arunachalam v. Harris,* 21-5102, at *1 (D.C. Cir. Oct. 27, 2021) ["Clerks, like judges, are immune from damage suits for performance of tasks that are an integral part of the judicial process"].

This broad provision of absolute immunity to court clerks and other non-judicial officers is contrary to this Court's teaching in *Forrester* and *Antoine.*

2. Several other circuits have instead applied *Forrester* and *Antoine* to hold the conduct of court clerks should generally be protected by qualified immunity instead of absolute immunity.

In *Maness v. Dist. Court,* 495 F.3d 943 (8th Cir. 2007) Maness sued a court clerk for refusing to file his petition to proceed *in forma pauperis*, and for refusing to file his post-conviction appeal. *Id.,* 944. By the Ninth Circuit's reasoning, the court clerk would be entitled to absolute immunity – the filing of an appeal commences a judicial process and so the clerk's filing of an appeal would be an "integral part of the judicial process." *Mullis,*1390.

Instead, the Eighth Circuit applied *Antoine* and found absolute immunity was not available because there was no evidence the clerk's alleged refusal to file Maness' papers was "discretionary rather than ministerial." *Maness,* 944. Indeed, the Eighth Circuit understood *Antoine* to forbid extending absolute immunity to court personnel "simply because they are part of the judicial function." *Ibid.* [cleaned up]. This did not mean, however, that Maness' suit against the court clerk could proceed. The Eighth Circuit instead held qualified immunity protected the clerk's

conduct because Maness could not show actual injury or prejudice. *Maness,* 944-945. Thus Maness' suit came to a swift conclusion without the need to cloak ministerial conduct with absolute immunity.

The Seventh Circuit's absolute immunity jurisprudence has also been true to *Antoine.* For instance, when a court clerk unfiled a petition for dissolution of marriage "because there [was] a child involved," the Seventh Circuit held absolute immunity was not available, but that qualified immunity barred the action nonetheless. *Snyder v. Nolen,* 380 F.3d 279, 281-282 (7th Cir. 2004). The Seventh Circuit reached this result by applying *Antoine's* touchstone and finding a clerk's "ministerial act of accepting technically sufficient papers" does not involve the "discretion" *Antoine* held "is at the heart of absolute judicial immunity." *Snyder,* 288-289. Instead, because Snyder could not show the clerk had deprived him of access to the court, Snyder's claim was barred by qualified immunity. *Snyder,* 291 and concurrences at 292-294. And so courts in the Seventh Circuit can also use qualified immunity to swiftly dispose of meritless suits lain against court employees.

The Fifth Circuit also distinguishes between conduct protected by absolute immunity and conduct protected by qualified immunity, and thereby allows potentially meritorious claims to proceed. For instance, after the Mississippi Supreme Court overturned Clay's conviction for armed robbery, Clay sued Allen, a court clerk, for charging excessive bail, corrupting a jury, misfiling documents, and conspiring with a court reporter to tamper with court records. *Clay v. Allen,* 242 F.3d 679, 680 (5th Cir. 2001). Because "the judge had used [her] discretion

in setting the bail," and the clerk "merely followed the judge's wishes," the Fifth Circuit held the clerk "derive[d] absolute immunity."[3] *Clay,* 682. But the same clerk could seek only qualified immunity to protect "routine duties not explicitly commanded by a court decree or by the judge's instructions." *Ibid.* Because the record had not developed so far as to "permit consideration of whether Allen's actions entitle[d] him to qualified immunity," Clay's case was allowed to continue. *Ibid.*

And there was good reason to believe Clay's action might have merit. In overturning his conviction, the Mississippi Supreme Court specifically found Clay's trial judge had "a propensity for bias" and that her bias toward Clay was "revealed by her words and her actions." *Clay v. State,* 757 So. 2d 236, 242 (Miss. 2000).

3. This Court granted certiorari in *Antoine* to resolve a conflict between the circuits as to whether court reporters were protected by absolute or qualified immunity. *Antoine,* 432. Today, despite *Antoine's* broadly applicable reasoning, there exists a clear, longstanding, and entrenched circuit split as to whether the conduct

3. Under *Antoine,* the Fifth Circuit erred in finding absolute immunity protected the court clerk in collecting the excessive bail ordered by the judge. As the Fifth Circuit itself noted, because the clerk "merely followed the judges wishes" the clerk's conduct was necessarily non-discretionary, and therefore unprotected by absolute immunity under *Antoine.*

The crucial point is that the Fifth Circuit determines the availability of absolute immunity by focusing on the conduct in question, not the officer being accused, and thereby finds court employees may be immune from liability for some conduct, while remaining exposed to liability for other conduct.

of court clerks in filing court documents is protected by absolute or qualified immunity. Indeed, the Seventh Circuit noted the split pre-dates *Antoine. Snyder,* 287 fn. 7.

In *Antoine*, this Court considered the policy argument that absolute immunity should protect the conduct of court employees in order to protect the entire judicial process from vexatious litigation. Ultimately, this Court rejected the argument, doubting the "strong medicine" of absolute immunity was needed to meet the challenge. *Antoine,* 437 [considering and rejecting policy argument]; *Forrester,* 230 [absolute immunity is a "strong medicine" of last-resort]. Time and the jurisprudence of the Fifth, Seventh, and Eighth Circuits have proven this Court correct in its belief other tools suffice to protect court employees and the courts in general. Indeed, the Fifth Circuit showed with *Clay* qualified immunity can be a superior tool, as it allows potentially meritorious claims to proceed, and can thus encourage "officials to carry out their duties in a lawful and appropriate manner." *Forrester,* 223.

While the circuit split on display here is limited to court clerks, the Ninth Circuit explicitly extends its reasoning to "other nonjudicial officers." *Castillo,* 952.

This Court should grant the petition to resolve the circuit split and establish that the administrative, ministerial, and conspiratorial conduct of court clerks, like that of every other court employee, is protected by qualified immunity and not absolute immunity.

II. Review is necessary because persistent departures from *Forrester* and *Antoine* undermine this Court's rule that absolute immunity should protect functional conduct and not official persons.

1. Absolute immunities protect functional conduct, not individuals. *Forrester,* 227. This rule is so strong that, even where judges presiding over cases are concerned, each act of conduct needs to be independently evaluated to determine whether the conduct is protected by absolute immunity. For example, in *Antoine,* this Court considered a hypothetical judge doubling as a court reporter, and doubted absolute immunity would protect the conduct of a judge setting to the task of transcribing an entire proceeding verbatim. *Antoine,* 435.

Despite this Court's clear and repeated focus on analyzing whether specific acts of functional conduct are protected by absolute immunity, there is a constant temptation for lower-courts to ask instead whether an individual's employment status within a court 'entitles' them to 'enjoy' the protection of absolute judicial immunity. The Second Circuit provided a good example of a court yielding to this temptation when it considered whether a court-appointed conservator was protected by absolute immunity in *Gross v. Rell,* 585 F.3d 72 (2d Cir. 2009).

Gross, an alert and independent octogenarian, had a conservatorship imposed on his person and his estate against his will, and spent nearly a year confined in a nursing home with a violent roommate. After his writ of habeas corpus was granted, Gross sued his court-appointed conservator, who then claimed absolute quasi-judicial immunity from suit. *Gross,* 74-79.

The conservator argued she was protected by absolute quasi-judicial immunity because "selling Gross's property, maintaining a bank account with him, changing the locks on his house, etc." were all examples of conduct typically undertaken by a conservator. *Id.,* 83. Rather than using *Antoine's* touchstone to determine whether such conduct was protected by absolute immunity, the Second Circuit adopted a two-step process. First, the Second Circuit inquired as to "whether a conservator has immunity." Then, the Second Circuit would evaluate "whether [the] complaint, *assuming there is immunity,* alleges sufficient facts to overcome it." *Ibid.* [emphasis in original]. The Second Circuit also expressed its opinion a plaintiff might defeat absolute quasi-judicial immunity through allegations that "the actions a defendant took were discretionary (as opposed to in strict compliance with court orders), undertaken in bad faith, intentional torts, etc." *Id.,* 82 [parenthetical in original].

Thus, by substituting its own two-step role-based analysis for *Antoine's* touchstone, the Second Circuit has entirely inverted this Court's absolute immunity jurisprudence. Under *Antoine,* the purpose of absolute quasi-judicial immunity is to protect "discretionary" conduct that "resolve[s] disputes between parties" or "authoritatively adjudicate[s] private rights." *Antoine,* 435-436. Where an individual exercises such discretion within their jurisdiction, the absolute immunity protecting that conduct cannot be overcome, even if it is alleged the conduct is intentionally tortious. E.g. *Mireles v. Waco,* 502 U.S. 9 (1991)[absolute immunity protects judge who, from the bench, specifically orders police officers to use excessive force to compel appearance of tardy attorney.]. The Second Circuit breaks with this Court by not only

conditioning the availability of absolute immunity on a defendant's identity, but also by then allowing that immunity to be abrogated for the precise reasons the immunity exists in the first place.[4]

2. The Second Circuit used similar "role based" reasoning to find judges' law clerks are protected by absolute judicial immunity in the pre-*Antoine* case *Oliva v. Heller* (839 F.2d 37 (2d. Cir. 1988).

Oliva was convicted by a jury and before Judge Nickerson of conspiring to rob a bank, and his conviction was upheld on appeal. Oliva then brought a motion to set aside his judgment of conviction, which Judge Nickerson denied. After this denial was affirmed on appeal, Oliva brought a motion to set aside his sentence, which the United States Attorney opposed, and Judge Nickerson denied. *Id.,* 38.

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4. Although the Second Circuit held the availability of quasi-judicial immunity was a matter of federal law (*Gross,* 79-80), the Second Circuit also found its first-step focus on "whether a conservator has immunity" presented a question of Connecticut state-law which was then certified to the Connecticut Supreme Court (*Id.,* 80).

The Connecticut Supreme Court believed itself to be in accord with this Court's absolute immunity jurisprudence. *Gross v. Rell,* 304 Conn. 234, 248-249 (Conn.2012). But it ignored *Forrester* and *Antoine* and ultimately held "absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court." *Gross v. Rell,* 304 Conn. 234, 281 (Conn.2012). This holding does not accord with *Antoine* because it only cloaks conservators in absolute immunity where conservators do not exercise independent discretion.

Heller worked as Judge Nickerson's law clerk in all these matters. Several months before Oliva's motion to set aside his sentence, Heller accepted a position with the United States Attorney which was to begin at the conclusion of her clerkship with Judge Nickerson. After accepting this new post, Judge Nickerson's policy was to only allow Heller to assist on cases in which the United States Attorney appeared with the informed consent of all parties. Through an oversight, such consent was not sought from Oliva. Oliva quickly learned of Heller's employment however, and filed a motion to reconsider less than a month after Judge Nickerson denied Oliva's motion to vacate his sentence. Judge Nickerson granted Oliva's motion to reconsider and recused himself. After Oliva's case was reassigned to a new judge, his motion to vacate his sentence was again denied on the merits. Oliva then sued Heller, and sought $5,000,000 in punitive damages for what he alleged were violations of his first and fifth amendment rights. Heller moved to dismiss, arguing that as a law clerk assisting a judge she was "entitled to absolute immunity." The district court agreed and granted her motion. *Oliva,* 38-39.

On appeal, the Second Circuit affirmed, holding law clerks are protected by absolute immunity because "a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." *Oliva,* 40. However, even while the Second Circuit agreed with the Fifth Circuit that "[law c]lerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be," it also explained "the work done by law clerks is supervised, approved and adopted by the judges who

initially authorized it." *Ibid.* This means that "[a] judicial opinion is not that of the law clerk, but of the judge" and that "[l]aw clerks are simply extensions of the judges at whose pleasure they serve." *Ibid.*

The Second Circuit erred. Even though law clerks are skilled professionals performing important work, their work cannot be protected by absolute immunity because law clerks have no authority to "resolv[e] disputes between parties" or "adjudicate[e] private rights." *Antoine,* 435-436. Furthermore, just as with court reporters, we can be confident the federal judiciary is familiar with "the special virtues and concerns" of law clerks and can "administer justice to [law clerks] fairly" without absolute immunity. *Antoine,* 437.

In Heller's case the absence of absolute immunity would have resulted in the same swift dismissal of Oliva's meritless case. Because Oliva's motion to vacate his sentence was reconsidered, reassigned, and denied again Oliva could not articulate any harm flowing from Heller's failure to disclose her upcoming employment with the United States Attorney. Therefore, qualified immunity would more than have sufficed to defeat Oliva's suit. E.g. *Maness,* 944-945 [qualified immunity defeats inmate's suit against clerk where inmate cannot show actual harm].

The Fifth Circuit followed *Oliva* in holding that a law clerk assisting a judge "enjoys absolute judicial immunity." *Mitchell v. McBryde,* 944 F.2d 229, 231 (5th Cir. 1991). Post-*Antoine,* the Ninth Circuit followed *Oliva* and *McBryde* to hold a judge's law clerks "enjoy[] absolute immunity." *Moore v. Brewster,* 96 F.3d 1240, 1244-45 (9th Cir. 1996). Significantly, *Moore* did not consider *Forrester* or *Antoine.*

3. Below, instead of following *Forrester* or *Antoine,* the Ninth Circuit consulted *Moore* to apply *Oliva's* reasoning and hold Judge Marston's law clerks were "entitled to absolute immunity" because a law clerk's "duties and responsibilities are most intimately connected with [a] judge's own exercise of the judicial function." App.30a. This application of absolute immunity based upon job title has the pernicious effect that various defendants engaged in identical conduct are either absolutely immune from liability, or exposed to liability, based upon their job title.

For instance, the complaint alleges both Rapport and DeMarse aided the Boutin Jones defendants in Acres' federal actions to divest Blue Lake of jurisdiction over the underlying tribal court dispute. App.42a, fn.8, 56a. DeMarse, a law clerk, is absolutely immune from liability for this conduct. App.30a. If the conduct was truly judicial in nature, then absolute immunity should also shield Rapport. But Rapport is exposed to liability because the complaint does not allege he "performed a judicial or quasi-judicial role." App.31a. It thus appears DeMarse's conduct assisting Boutin Jones in advocating against Acres was only protected by absolute immunity because DeMarse was also a law clerk in the underlying tribal court dispute. This result is anathema to this Court's absolute immunity jurisprudence because the absolute immunity is protecting DeMarse himself and not his conduct.[5]

5. Phrased the other way around, it appears Rapport would 'enjoy' absolute immunity if only Judge Marston had also hired Rapport to work as a law clerk. The Ninth Circuit awarded immunity based on role, not function.

Nor is this the only instance in which the case at bar immunizes a person instead of conduct. The Ninth Circuit summarized the complaint as alleging "Blue Lake and its confederates sought ruinous judgments, within a court they controlled, before a judge they suborned." App.7a. Rapport & Marston was instrumental in this subornation and, because the complaint does not allege the firm "performed a judicial or quasi-judicial role," the firm, like Rapport, is exposed to liability for its corruptive conduct. App.31a. But Marston, also a Rapport & Marston principal, is absolutely immune from liability for the same corruptive conduct because he also happened to be a judge in the court his firm corrupted. App.29a. Again, this result is anathema to this Court's absolute immunity jurisprudence because the absolute immunity is protecting Marston himself and not his conduct.

The petition for review should be granted so this Court can enforce its rule that absolute immunity protects conduct, not individuals.

III. Review is warranted to establish that the availability of an absolute immunity does not turn on a party's identity.

No authority holds the availability of an absolute immunity turns on the identity of a party. This is because absolute immunities protect conduct in the service of specific functions. Indeed, when absolute immunity is applied to protect conduct serving the judicial function, the immunity defeats civil allegations from any and all plaintiffs, regardless of their identity. *Stump v. Sparkman,* 435 U.S. 349 (1978) is instructive.

After an adolescent girl spent several nights out with "older youth" her mother obtained an ex-*parte* sterilization order from an Indiana judge in order to "prevent unfortunate circumstances." A few days later the ruse of an appendectomy was used to perform a secret tubal ligation. Time passed, the girl grew into a woman, married, and, frustrated in her desire to become a mother, discovered she had been sterilized. *Id.,* 351-353. Her suit against Judge Stump was barred by absolute immunity because the consideration of ex-*parte* motions regarding the care of minors was within Judge Stump's jurisdiction. *Id.*, 355-364. Even though her husband was not subject to the original order, his suit against Judge Stump was barred for the same reason. *Ibid.*

One can certainly disagree with this Court's holding Judge Stump's conduct should be protected by absolute judicial immunity. (*Id.,* 364-370 [dissents].) But one must agree that, whatever result is reached for Mrs. Sparkman, the same result must obtain for Mr. Sparkman, and anyone else who might complain against Judge Stump's conduct in granting the ex-*parte* sterilization order. This is because an absolute immunity is "justified and defined by the *functions* it protects." *Forrester,* 227 [emphasis in original.] Because absolute immunity protects functional conduct, the identity of the parties is irrelevant to the availability of the immunity.

The point can be further elucidated by considering a hypothetical variation on *Forrester* itself. Forrester alleged Judge White fired her because she was a woman. *Forrester,* 221. This Court held absolute immunity did not bar her suit because a judge's employment decisions are not protected by absolute immunity. *Id.,* 230. If we imagine

that, instead of hiring Forrester, Judge White instead hired the less-qualified Miller, because Miller was a man, Forrester could still sue Judge White. Because a judge's employment decisions are not protected by absolute immunity, absolute immunity would not bar relief from Forrester's allegations she was harmed by Judge White's employment decision to hire the less-qualified Miller. Forrester's identity as a fired-employee or a never-hired-employee is neither here nor there. Absolute immunity does not protect employment decisions even when those decisions are made by judges.

Below, however, the Ninth Circuit held absolute immunity barred allegations Judge Marston harmed petitioners through his employment decision to engage attorneys working for Blue Lake as part-time law clerks to aid in presiding over Blue Lake's tribal court action.[6] App.8a [part-time nature of employment], 29a-30a [absolute immunity], 56a [services of law clerks "retained" by Marston]. But, if we are to imagine a hypothetical in which Forrester applied to work for Judge Marston as a part-time law clerk in the same case, and she were to allege she was harmed because Judge Marston declined to hire her because of her race, absolute immunity would not bar her claims. Petitioners' claims they were harmed by Judge Marston's employment decisions should not be defeated by absolute immunity for the same reason Forrester's hypothetical claims would not be – a judge's

6. In passing, the Ninth Circuit comments the law-clerks "outside work" does not form a part of petitioners' complaint. App.31a. The comment is dicta. It is also contradicted by the Ninth Circuit's prior comment, when discussing Judge Marston, that petitioners "challenge" Judge Marston's "discussions about the case with attorneys functioning as his law clerks." App.29a.

employment decisions are not protected by absolute immunity.

It seems probable the Ninth Circuit held absolute immunity barred petitioners' claims solely because of petitioners' identity as defendants in Judge Marston's court. The petition for review should be granted to establish that the availability of absolute immunity is determined solely by the nature of the conduct being challenged, and that a party's identity is irrelevant in considering whether an absolute immunity can bar the conduct from being challenged.

IV. This case presents an ideal vehicle for resolving the question presented because the undisputed record is straight-forward, and because petitioner's suit is not a collateral attack seeking to challenge or overturn any judicial decision.

Absolute judicial immunity exists to protect the finality of judgments, to discourage inappropriate collateral attacks, and to protect the independence of judges from vexatious actions prosecuted by disgruntled litigants. *Forrester,* 225. The record clearly shows none of these important goals are threatened by this petition.

Petitioners do not seek to challenge or overturn the result of the tribal court proceedings because petitioners prevailed in the tribal court. App.41a.

Nor can petitioners be painted as unreasonably disgruntled or vexatious. The record shows Judge Marston and his law clerks continued to work as attorneys for Blue Lake while presiding over Blue Lake's tribal

court case against petitioners. App.8a, 55a. Petitioners press a reasonable argument that judges and law clerks who choose to work as attorneys for parties over whom they preside should be held liable for the harm they cause.

This case affords the Court an ideal vehicle to answer the question presented, and affirm that absolute immunity does not insulate court employees from civil liability for their administrative, ministerial, or conspiratorial conduct.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-15959

ACRES BONUSING, INC;
JAMES RAYMOND ACRES,

Plaintiffs-Appellants,

v.

LESTER JOHN MARSTON; RAPPORT AND MARSTON, AN ASSOCIATION OF ATTORNEYS; DAVID JOSEPH RAPPORT; COOPER DEMARSE; ASHLEY BURRELL; KOSTAN LATHOURIS; BOUTIN JONES, A CALIFORNIA CORPORATION; MICHAEL E. CHASE; DANIEL STOUDER; AMY O'NEILL; AMELIA F. BURROUGHS; MEGHAN YARNALL; ARLA RAMSEY; ANITA HUFF; THOMAS FRANK; JANSSEN MALLOY LLP, AN ASSOCIATION OF ATTORNEYS; DARCY VAUGHN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California.
D.C. No. 3:19-cv-05418-WHO
William Horsley Orrick, District Judge, Presiding

Appendix A

February 12, 2021, Argued and Submitted,
San Francisco, California;
November 5, 2021, Filed

Before: Andrew D. Hurwitz and Daniel A. Bress,
Circuit Judges, and Gary Feinerman,* District Judge.

Opinion by Judge Bress;
Concurrence by Judge Feinerman.

SUMMARY**

Tribal Sovereign Immunity

The panel affirmed in part and reversed in part the district court's dismissal on the ground of tribal sovereign immunity and remanded for further proceedings in a RICO action brought by Acres Bonusing, Inc., and James Acres.

Blue Lake Rancheria, a federally recognized Tribal Nation, sued Acres and his company in Blue Lake Tribal Court over a business dispute involving a casino gaming system. Acres and Acres Bonusing prevailed in tribal court but brought suit in federal court against the tribal court judge and others. The defendants fell into two general

* The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

groups. The Blue Lake Defendants consisted of tribal officials, employees, and casino executives and lawyers who assisted the tribal court. The second group consisted of Blue Lake's outside law firms and lawyers. The district court concluded that tribal sovereign immunity shielded all of the defendants from suit.

Reversing in part, and following the framework set forth in *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), the panel held that tribal sovereign immunity did not apply because Acres sought money damages from the defendants in their individual capacities, and the Tribe therefore was not the real party in interest. The panel held that *Lewis* and similar Ninth Circuit case law were not distinguishable on the ground that the alleged tortious conduct occurred in the tribal court, which is part of the Tribe's inherently sovereign functions. The panel concluded that California Court of Appeal cases cited by the district court did not follow a proper analysis.

Affirming in part, the panel held that some of the defendants were entitled to absolute personal immunity, and the district court properly dismissed Acres's claims against them on that basis. As to the Blue Lake Defendants, the panel held that the judge, his law clerks, and the tribal court clerk were entitled to absolute judicial or quasi-judicial immunity.

The panel remanded for further proceedings as to the remaining defendants not entitled to absolute personal immunity.

Appendix A

Concurring in part and concurring in the judgment, Judge Feinerman wrote that he agreed with his colleagues on the disposition of this appeal, and parted company with only a certain aspect of the majority's analysis. Judge Feinerman wrote that a tribe is the real party in interest in a suit against tribal officers or agents, requiring dismissal on sovereign immunity grounds, if the judgment sought would (1) expend itself on the public treasury or domain, or (2) interfere with the public administration, or (3) have the effect of restraining the tribe from acting, or compelling it to act. Judge Feinerman agreed that this test's second component did not apply because a retrospective monetary judgment against the named defendants, based wholly on liability for their past conduct, would not interfere with the Tribe's administration of its own affairs. Judge Feinerman, however, could not endorse the majority's suggestion that tribal sovereign immunity did not apply because "[a]ny relief ordered by the district court will not require Blue Lake to do or pay anything." Judge Feinerman wrote that this rationale paid heed to the first and third components of the sovereign immunity test but left no room for independent operation of the second component.

OPINION

BRESS, Circuit Judge:

Blue Lake Rancheria, a federally recognized Tribal Nation, sued Acres Bonusing, Inc. ("ABI") and James Acres, ABI's owner, in Blue Lake Tribal Court over a business dispute involving a casino gaming system. Acres

and his company prevailed. Unsatisfied, they then sued in federal court nearly everyone involved in the tribal court case, including the tribal court judge, his law clerks, the clerk of the tribal court, tribal officials, and outside law firms and lawyers that represented the Tribe. Acres sued everyone, it seems, except the Tribe itself.

The principal question in this appeal is whether, as the district court concluded, tribal sovereign immunity shielded all defendants from suit. We hold that the district court erred in that respect. Acres sought money damages from the defendants in their individual capacities. Under *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), and our precedents, the Tribe was not the real party in interest and tribal sovereign immunity thus did not preclude this suit. Some of the defendants, however, are entitled to absolute personal immunity, and the district court properly dismissed Acres's claims against them on that basis. There may yet be grounds to dismiss what remains of this case, but the district court did not reach these issues and we leave them to the district court on remand.

For the reasons we now explain, we affirm in part, reverse in part, and remand for further proceedings.

I

Because this appeal arises from the district court's grant of defendants' motion to dismiss, we recite the facts as set forth in the plaintiffs' complaint. *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 408 (9th Cir. 2020).

Appendix A

Blue Lake Rancheria ("Blue Lake" or the "Tribe") is a federally recognized Tribal Nation in Humboldt County, California. The Blue Lake Tribal Court is an arm of the Tribe. Blue Lake operates the Blue Lake Casino & Hotel under a Class III gaming compact with the State of California.

In 2010, the Casino purchased from ABI an "iSlot" gaming system, "a novel iPad based gaming platform" used for Las Vegas-style slot machine games. A dispute arose over the performance of the system and, ultimately, whether ABI needed to return a $250,000 deposit.

When ABI refused to return the funds, the Casino sued ABI and Acres in Blue Lake Tribal Court for breach of contract and fraud. Acres filed two cases in federal court to halt the tribal court case, but those efforts were unsuccessful. *See, e.g., Acres v. Blue Lake Rancheria*, 692 F. App'x 894 (9th Cir. 2017).

The Casino's tribal court case initially proceeded before Chief Judge Lester Marston, a Blue Lake Tribal Court judge. After Acres raised repeated claims of bias and conflicts of interest, Chief Judge Marston recused. Justice James N. Lambden, a retired justice from the California Court of Appeal, replaced him. The next month, Boutin Jones, the law firm that had been representing Blue Lake in tribal court, withdrew. The firm of Janssen Malloy replaced them as counsel. In July 2017, Justice Lambden granted summary judgment to Acres. The next month, he dismissed the claims against ABI.

Two years later, Acres and ABI filed this case in federal court. They alleged eight causes of action against various configurations of defendants and sought millions of dollars in damages. Acres and ABI allege that Blue Lake officials wrongfully pursued the tribal court case and were in a conspiracy with Chief Judge Marston. Plaintiffs essentially press a malicious prosecution theory, with allegations of racketeering mixed in (the complaint alleges a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*). According to the complaint, "Blue Lake and its confederates sought ruinous judgments, within a court they controlled, before a judge they suborned, on conjured claims of fraud and breach of contract."

The defendants fall into two general groups. The first group, which we refer to as the Blue Lake Defendants, consists of tribal officials, employees, and casino executives, and lawyers who assist the tribal court (essentially, law clerks):

- Lester Marston, Chief Judge of the Blue Lake Tribal Court.

- Arla Ramsey, CEO of the Casino, Blue Lake's Tribal Administrator, a judge on the tribal court, and vice-chair of the Blue Lake Business Council.

- Thomas Frank, formerly an executive at the Casino and the Tribe's Director of Business Development. Frank verified the casino's discovery responses and filed declarations in the tribal court case.

- Anita Huff, the Clerk of the Blue Lake Tribal Court (as well as other roles not relevant here).

- David Rapport, described as the equivalent of the general counsel to the Tribe, who was also associated with Marston as sole practitioners. Rapport had no role in the tribal court case, but he helped defend against Acres's earlier federal lawsuits.

- "Rapport and Marston" (R&M), described as "an association of sole practitioners." R&M did not appear on behalf of Blue Lake in the tribal court case. Plaintiffs allege that R&M had a longstanding relationship with Blue Lake. Chief Judge Marston's declaration includes his resume on letterhead with the "Law Offices of Rapport and Marston," "Sole Practitioners," at the top.

- Ashley Rose Burrell, Cooper Monroe DeMarse, and Darcy Catherine Vaughn were allegedly Associate Judges of the Blue Lake Tribal Court. Along with Kostan Lathouris, they supported Chief Judge Marston by conducting legal research and preparing draft orders, essentially functioning as part-time law clerks for Chief Judge Marston while also performing work for clients, including Blue Lake entities. All four were allegedly associated with R&M.

The second group consists of Blue Lake's outside law firms and lawyers:

- Boutin Jones, Inc. and its lawyers Michael Chase, Dan Stouder, and Amy O'Neill (collectively, Boutin Jones) initially represented Blue Lake in the tribal court case and defended Blue Lake in Acres's earlier federal court actions against the Tribe.

- Janssen Malloy LLP and its lawyers Megan Yarnall and Amelia Burroughs (collectively, Janssen Malloy) replaced Boutin Jones in the tribal court case. Ramsey allegedly selected Janssen Malloy.

The district court dismissed the case. It held that tribal sovereign immunity barred the claims against all defendants because they "were acting within the scope of their tribal authority, *i.e.*, within the scope of their representation of Blue Lake Casino." In the district court's view, tribal sovereign immunity applied because "adjudicating this dispute would require the court to interfere with the tribe's internal governance." The court also concluded that judicial and quasi-judicial immunity independently barred the claims against most Blue Lake Defendants. The defendants advanced other arguments for why Acres and ABI failed to state claims for relief, which the district court did not address.

ABI and Acres appealed.[1]

1. Acres filed a similar suit in California state court which was also dismissed based on tribal sovereign immunity and personal immunity defenses. An appeal is pending.

II

We review issues of tribal sovereign immunity and personal immunity *de novo*. *See Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

A

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (quotations omitted). A core attribute of sovereignty is immunity from suit. *Alden v. Maine*, 527 U.S. 706, 716-17, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Indian tribes "remain separate sovereigns pre-existing the Constitution" and, absent congressional action, "retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (quotations omitted). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n*, 498 U.S. at 509.

This lawsuit is not against the Tribe or any tribal entity (such as the Blue Lake Tribal Court or the Casino). It is instead against tribal officers and employees and the outside lawyers that represented the Tribe in the tribal court case and ancillary litigation. The main question

here is whether this damages suit against the defendants in their individual capacities—based on actions relating to a tribal court case—was properly dismissed on tribal sovereign immunity grounds.

Tribal sovereign immunity is "quasi-jurisdictional," in the sense that we do not raise the issue on our own. *Pistor*, 791 F.3d at 1110-11. Tribal sovereign immunity "may be forfeited where the sovereign fails to assert it and therefore may be viewed as an affirmative defense." *Id.* at 1111 (quotations and alterations omitted). But "[a]lthough sovereign immunity is only quasi-jurisdictional in nature, [Federal Rule of Civil Procedure] 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit." *Id.*

As a result, when a defendant timely and successfully invokes tribal sovereign immunity, we lack subject matter jurisdiction. *See, e.g., Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 562-63 (9th Cir. 2016) (holding that when tribal sovereign immunity applied, "the district court correctly concluded that it lacked subject matter jurisdiction"); *Miller v. Wright*, 705 F.3d 919, 927 (9th Cir. 2013) (holding that because the plaintiffs "failed to successfully challenge the Tribe's sovereign immunity, we affirm the district court's holding that it lacked subject matter jurisdiction to adjudicate the claims asserted against the Tribe"); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007) ("Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." (citations omitted)); *see also Pistor*, 791

F.3d at 1111 ("[A]s the tribal defendants invoked sovereign immunity in an appropriate manner and at an appropriate stage, i.e. in a Rule 12(b)(1) motion to dismiss, if they *were* entitled to tribal immunity from suit, the district court would lack jurisdiction over the claims against them and would be required to dismiss them from the litigation.").

Because we may not issue a "judgment on the merits" and assume our "substantive law-declaring power" before first confirming we have jurisdiction, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 433, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (quotations omitted), we address tribal sovereign immunity at the outset.

B

Following the framework set forth in *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), we hold that tribal sovereign immunity does not bar this action for damages against individual tribal employees and tribal agents in their personal capacities.

In *Lewis*, William Clarke, a tribal employee, was driving tribal casino patrons in a limousine when he rear-ended Brian and Michelle *Lewis*'s vehicle. *Id.* at 1289. The *Lewis*es sued Clarke for negligence in Connecticut state court. *Id.* Clarke argued the suit should be dismissed for lack of subject matter jurisdiction under the doctrine of tribal sovereign immunity because he was an employee of the tribal Gaming Authority "acting within the scope of his employment at the time of the accident." *Id.* The Connecticut Supreme Court agreed. *Id.* at 1290. But the United States Supreme Court did not. *Id.* at 1288.

"The protection offered by tribal sovereign immunity," *Lewis* held, "is no broader than the protection offered by state and federal sovereign immunity." *Id.* at 1292. A suit against a governmental official may be a suit against the sovereign, but not always. In these contexts, courts "look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id.* at 1290. The critical question is "whether the *remedy sought* is truly against the sovereign." *Id.* (emphasis added); *see also Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 994 (9th Cir. 2020).

Whether the remedy sought is one against the sovereign or the individual officer turns on "[t]he distinction between individual-and official-capacity suits." *Lewis*, 137 S. Ct. at 1291. An official-capacity claim, although nominally against the official, "in fact is against the official's office and thus the sovereign itself." *Id.* In such suits, "when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation." *Id.* Because the relief requested effectively runs against the sovereign, the sovereign is the real party in interest, and sovereign immunity may be an available defense. *See id.*

Suits against officials in their personal capacities, *Lewis* explained, are different. In those cases, the plaintiff "seek[s] to impose *individual* liability upon a government officer for actions taken under color of . . . law." *Id.* (quoting *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)). Then "the real party in interest is the individual, not the sovereign." *Id.* So, although the defendants "may be able to assert *personal* immunity

defenses" (like the judicial immunity we discuss below), sovereign immunity does not bar the suit. *Id.*

Under *Lewis*, that same result obtains even if the sovereign agreed to indemnify the official for any liability. "[A]n indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." *Id.* at 1292. The immunity "analysis turn[s] on where the potential *legal* liability l[ies], not from whence the money to pay the damages award ultimately" comes. *Id.* Thus, "[t]he critical inquiry is who may be *legally bound* by the court's adverse judgment, not who will ultimately pick up the tab." *Id.* at 1292-93 (emphasis added).

Significantly, *Lewis* then held that the general rules governing sovereign immunity applied equally to tribal sovereign immunity. *Id.* at 1291. This meant that tribal sovereign immunity did not preclude the tort suit against Clarke: "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Id.* at 1288. True, Clarke crashed into the *Lewis*es while performing his job as a tribal employee. But that "an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Id.*

The suit against Clarke was therefore not one against him in his official capacity but was merely a suit for damages based on Clarke's personal, allegedly tortious

conduct. *Id.* at 1291. Tribal sovereign immunity could not apply because "the *judgment* will not operate against the Tribe." *Id.* (emphasis added); *see also id.* at 1293 (explaining that, in resolving the suit, "the Connecticut courts exercise no jurisdiction over the Tribe or the [tribal] Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way"). The Connecticut Supreme Court therefore erred in "extend[ing] sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees." *Id.* at 1291-92.

Precedents in our circuit forecast the Supreme Court's analysis in *Lewis*. *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015), contains our most substantial treatment of the tribal sovereign immunity issue and is instructive here.

The plaintiffs in *Pistor* were "advantage gamblers" who won big at an Apache tribal casino. *Id.* at 1108. The Chief of the tribal police department, the General Manager of the casino, and a Tribal Gaming Office Inspector took the gamblers from the casino floor, handcuffed them, and questioned them in interrogation rooms. *Id.* The tribal defendants also took from plaintiffs "significant sums" of cash and other personal property. *Id.* at 1108-09. The gamblers sued the tribal defendants for damages both under state tort law and under 42 U.S.C. § 1983 for violating their Fourth and Fourteenth Amendment rights. *Id.* at 1109. We held that tribal sovereign immunity did not bar the suit. *Id.* at 1115.

Anticipating *Lewis*, *Pistor* emphasized that the same principles that "shape state and federal sovereign immunity" apply to tribal sovereign immunity. *Id.* at 1113 (quoting *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087-88 (9th Cir. 2013)). *Pistor* explained that the tribal sovereign immunity analysis turns on whether the suit is against the tribal official in his personal or official capacity, and thus whether "any remedy will operate against the officers individually, and not against the sovereign." *Id.* (discussing the "remedy-focused analysis" that applies for tribal sovereign immunity (quotations omitted)).

Tribal sovereign immunity did not bar the gamblers' claims in *Pistor* because "the defendants were sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe." *Id.* at 1108. The gamblers had not sued the Tribe itself and were not seeking money directly from the tribal treasury. *Id.* at 1113-14. Again presaging *Lewis*, we further held that "[e]ven if the Tribe agrees to pay for the tribal defendants' liability," "'[t]he unilateral decision to insure a government officer against liability does not make the officer immune from that liability.'" *Id.* at 1114 (quoting *Maxwell*, 708 F.3d at 1090).

Our earlier decision in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), tracks *Lewis* and *Pistor*. In *Maxwell*, we held that two tribal employees could not invoke tribal sovereign immunity in a damages suit against them for providing allegedly deficient medical care following a shooting incident. *Id.* at 1087. Hearkening to the sovereign immunity principles that apply to state

and federal sovereign immunity, we explained that the tribal paramedics "do not enjoy tribal sovereign immunity because a remedy would operate against them, not the tribe." *Id.* Because the plaintiffs had sued the tribal employees in their personal capacities for money damages, tribal sovereign immunity did not apply. *Id.* at 1089.[2]

Applying *Lewis*, *Pistor*, and our earlier precedents to the case before us, we conclude that tribal sovereign immunity does not bar this suit. Acres and ABI seek money damages against the defendants in their individual capacities. Any relief ordered by the district court will not require Blue Lake to do or pay anything. Because any "judgment will not operate against the Tribe," *Lewis*, 137 S. Ct. at 1291, Blue Lake is not the real party in interest, and tribal sovereign immunity does not apply.

The district court concluded otherwise on the theory that "all of the defendants were functioning as the Tribe's officials or agents when the alleged acts were committed." The defendants similarly argue that "a Tribe's sovereign immunity extends not only to its arms, but also to tribal officials and agents, including legal counsel, when they act in their respective official capacities and within the scope of the authority the Tribe lawfully may confer upon them." But as we explained in *Pistor*, "tribal defendants

2. On remand, the district court granted summary judgment to the tribal paramedics based on qualified immunity, and this Court affirmed. *Maxwell v. County of San Diego*, 714 F. App'x 641, 644 (9th Cir. 2017). That result shows how tribal defendants in individual capacity suits can still enjoy personal immunity defenses, an issue we take up below.

sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties." 791 F.3d at 1112. That is the same principle that the Supreme Court reaffirmed two years later in *Lewis*. *See* 137 S. Ct. at 1288.

C

The defendants' primary response to the foregoing is that this case is different because the tortious conduct allegedly occurred in tribal court, and tribal courts are part of the Tribe's inherently sovereign functions. The district court had a similar perspective. It viewed *Lewis, Pistor*, and *Maxwell* as distinguishable because the wrongs alleged in those cases were "garden variety torts with no relationship to tribal governance and administration." It therefore thought that "the real party in interest here is the tribe because adjudicating this dispute would require the court to interfere with the tribe's internal governance." This reasoning, while understandable, does not comport with *Lewis, Pistor*, and our other prior cases.

The district court and defendants relied most heavily on the following passage from *Maxwell*:

> In any suit against tribal officers, we must be sensitive to whether "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act."

708 F.3d at 1088 (quoting *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992)) (alterations omitted); *see also Pistor*, 791 F.3d at 1113 (same). This language was itself a formulation of general sovereign immunity principles from earlier Supreme Court cases, *see, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963), although not a particular formulation that the Supreme Court has invoked recently.

Defendants point specifically to the reference to "interfer[ing] with the public administration" of the tribe. Reading this language broadly, defendants assert that a case against tribal officers and employees about a past tribal court case has a relationship to tribal governance and will therefore interfere with it.

Although the quoted excerpt caused some confusion here, properly considered, this passage does not make the tribal sovereign immunity analysis turn on a freestanding assessment of whether the suit related to tribal governance in some way. Nor did it create special rules for cases involving "garden variety" torts. Instead, this passage is fully consistent with the "remedy-focused analysis," *Maxwell*, 708 F.3d at 1088, that the Supreme Court validated in *Lewis*.

That passage framed the inquiry in terms of whether "*the judgment sought* would . . . interfere with the public administration, or if the effect *of the judgment* would be to restrain the sovereign from acting, or to compel it to act." *Maxwell*, 708 F.3d at 1088 (quotations and alterations

omitted) (emphasis added); *see also Lewis*, 137 S. Ct. at 1291 (explaining that tribal sovereign immunity does not apply when "the *judgment* will not operate against the Tribe" (emphasis added)).

The tribal sovereign immunity inquiry thus does not revolve around whether issues pertaining to tribal governance would be touched on in the litigation. The question is whether "any *remedy* will *operate* . . . against the sovereign." *Pistor*, 791 F.3d at 1113 (emphasis added). Or as the Supreme Court put it, "[t]he critical inquiry is who may be legally bound by the court's adverse judgment." *Lewis*, 137 S. Ct. at 1292-93. References to "interfering with the public administration" of the tribe can thus only be understood in connection with the fundamental principle that the "remedy sought" governs the tribal sovereign immunity analysis. *See id.* at 1290; *Maxwell*, 708 F.3d at 1088. As we recognized in *Pistor*, where a plaintiff sought "'money damages not from the tribal treasury but from the tribal defendants personally,'" "*[g]iven the limited relief sought*, the tribal defendants have not shown that 'the judgment would . . . interfere with tribal administration.'" 791 F.3d at 1113-14 (quoting *Maxwell*, 708 F.3d at 1088) (emphasis added; alterations omitted).[3]

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3. Our fine colleague in concurrence suggests we have "diminish[ed]" or even "excise[d]" the "interference" prong of the sovereign immunity test. That is not correct. We have merely applied that prong according to its terms, which asks whether "*the judgment sought* would . . . interfere with the public administration" of the tribe. *Maxwell*, 708 F.3d at 1088 (quotations and alterations omitted) (emphasis added). That is consistent with

Confirming this point, neither *Lewis* nor our prior cases evaluated the degree to which the suits could involve consideration of issues that relate to tribal governance or administration. Such an analysis would likely prove difficult because any suit against a tribal employee for conduct in the course of her official duties almost inevitably has some valence to tribal governance. And if that were the test, we would seemingly end up applying tribal sovereign immunity whenever a tribal employee was acting within the scope of her employment—which is precisely what the Supreme Court in *Lewis* said not to do. *See* 137 S. Ct. at 1288.

Pistor provides a good example of why the sovereign immunity analysis does not turn on any perceived distinction between "garden variety torts" and ones with a "relationship to tribal governance." *Pistor* was a suit against a tribal police chief and other tribal officials relating to the detention, seizure, and interrogation of persons that tribal officials claimed were engaged in unlawful gambling practices. *See* 791 F.3d at 1108-09. The

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our decision in *Palomar Pomerado Health System v. Belshe*, 180 F.3d 1104 (9th Cir. 1999), on which the concurrence relies. In Palomar, the plaintiff, a state political subdivision, sued state employees seeking to enjoin their enforcement of state regulations. *Id.* at 1105-07. We held that the action was really one against the state itself because "the purpose of the injunction and other orders [plaintiff] seeks is to 'restrain the Government,'" such that "*[t]he result* [plaintiff] seeks would 'interfere with the public administration.'" *Id.* at 1108 (emphasis added). Here, the judgment sought would not have that effect because "any recovery will run against the individual tribal defendants, rather than the tribe." *Pistor*, 791 F.3d at 1108.

lawful detention of persons and seizure of property is of course a core function of the sovereign. *Cf. United States v. Lara*, 541 U.S. 193, 199, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (explaining that "the source of [the] power to punish" member and nonmember Indian offenders is a part of "inherent tribal sovereignty" (quoting *United States v. Wheeler*, 435 U.S. 313, 322, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)). If the suit in *Pistor* had gone forward, litigation over the gamblers' claims could well involve consideration of the tribe's law enforcement practices, which might in turn influence how the tribe approached these issues going forward.

But if those were the benchmarks for tribal sovereign immunity, *Pistor* should have come out the other way. Nor do we think *Pistor* can be fairly described as a "garden variety" tort case. Just as there was no "search and seizure" exception to tribal sovereign immunity's "remedy-focused analysis," there is likewise no exception for malicious prosecution claims, even though this case (if otherwise allowed to proceed) could touch on tribal court practices, as the district court surmised. Instead, because plaintiffs' suit for damages against tribal employees and agents "will not require action by the sovereign or disturb the sovereign's property," and any "judgment will not operate against the Tribe," tribal sovereign immunity does not apply. *Lewis*, 137 S. Ct. at 1291.

Our prior decisions in *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), do not compel a different conclusion. In *Cook*, the plaintiffs

asserted a respondeat superior theory of liability that would have made the tribe liable for the tribal official's actions. *See* 548 F.3d at 727 ("Here, *Cook* has sued Dodd and Purbaugh in name but seeks recovery from the Tribe; his complaint alleges that ACE [a tribal corporation] is vicariously liable for all actions of Dodd and Purbaugh."). We thus held the suit barred by sovereign immunity because the tribe was the real party in interest. *Id.* As we explained in *Maxwell*, the plaintiff in *Cook* "had sued the individual defendants in their official capacities in order to establish vicarious liability for the tribe," which meant that *Cook's* invocation of tribal sovereign immunity was "consistent with the remedy-focused analysis" that properly governs the sovereign immunity inquiry. 708 F.3d at 1088; *see also Pistor*, 791 F.3d at 1113 (analogous discussion of *Cook*).

In *Hardin*, the plaintiff, who had resided on reservation land leased from the tribe, was convicted of concealing property stolen from a federal observatory on the reservation. 779 F.2d at 478-79. After the tribal council voted to exclude him from the reservation, he sued the tribe, tribal entities, and tribal officials for injunctive relief and damages, challenging his ejectment. *Id.* at 478. We held that the tribe was protected by sovereign immunity and that the immunity "extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Id.* at 479.

As we explained in *Maxwell*, although "*Hardin* did not mention the 'remedy sought' principle when it granted sovereign immunity," "it did not need to do so" because

"*Hardin* was in reality an official capacity suit." 708 F.3d at 1089. The plaintiff in *Hardin* "did not (1) identify which officials were sued in their individual capacities or (2) the exact nature of the claims against them." *Id.* The lack of any such allegations and the nature of the relief sought indicated that the tribal officials were sued in their official capacities as part of the plaintiff's effort to challenge his removal from tribal lands. *See id.*

In short, neither *Cook* nor *Hardin* stand for the proposition that tribal sovereign immunity turns on a freestanding inquiry into whether a suit involves a "garden variety" tort or generally relates to tribal governance.[4]

D

The defendants also heavily rely on two cases from the California Court of Appeal cited by the district court: *Brown v. Garcia*, 17 Cal. App. 5th 1198, 225 Cal. Rptr. 3d 910 (Ct. App. 2017), and *Great Western Casinos Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 88 Cal. Rptr. 2d 828 (Ct. App. 1999). These cases do not change the result.

In *Great Western*, the plaintiff sued the tribe, the tribal council, individual tribal members, counsel

4. Defendants' reliance on *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), is also inapposite. Davis involved the issue of whether the tribe had "bestowed" on its officers the personal defense of absolute immunity. *See id.* at 84-85. Whether tribal officials enjoy personal immunities from suit is a different question from whether tribal sovereign immunity applies. *See Lewis*, 137 S. Ct. at 1291.

for the tribe, and a law firm that acted as the tribe's outside counsel, relating to the tribe's cancellation of a casino management agreement. 88 Cal. Rptr. 2d 828 at 831-32. After concluding that the tribe had not waived tribal sovereign immunity, *Great Western* held that the individual defendants were immune because the suit was "in substance against the tribe itself." *Id.* at 838.

In *Great Western*, the complaint "allege[d] no individual actions by any of the tribal officials on the tribal council named as defendants," and instead attacked the tribal council's decision to terminate the casino management agreement. *Id.* at 838-39; *see also id.* at 839 ("[I]t was the collective action by the tribal council after the votes which caused GWC's alleged injuries. . . . In other words, the substance of the complaint's allegations concerning the individual Indian defendants are again in reality against the tribe's allegedly wrongful actions."). Properly considered, this aspect of *Great Western* simply concluded that based on the nature of the allegations, the suit was one brought against these tribal officials in their official capacities for actions taken by the tribe itself, such that tribal sovereign immunity would apply.

Great Western is less clear about its basis for granting immunity to the non-Indian counsel and outside law firm advising the tribe. Although *Great Western* stated that counsel "in allegedly advising the tribe to wrongfully terminate the management contract are similarly covered by the tribe's sovereign immunity," the court had earlier explained that the tribe "enjoys sufficient independent status and control over its own laws and

internal relationships to be able to accord absolute privilege to its officers within the areas of tribal control." *Id.* at 840 (quoting *Davis*, 398 F.2d at 84). To the extent *Great Western* held that these lawyers were entitled to a personal immunity defense (essentially as quasi-executive officers), that conclusion would not on its own contravene *Lewis*. But to the extent *Great Western* extended tribal sovereign immunity to the individual defendants merely because they were sued for conduct within the scope of their employment for the tribe, that conclusion would be at odds with *Lewis* and not one we could follow. *See* 137 S. Ct. at 1288.

The reasoning in the California Court of Appeal's decision in *Brown*, 225 Cal. Rptr. 3d at 915-17, is likewise inconsistent with *Lewis* and our precedents. There, the plaintiffs sued other members of the tribe for damages based on allegedly defamatory statements they made in a tribal council order. *Id.* at 911. The California Court of Appeal declined to follow the "remedy-focused general rule applied in *Maxwell, Pistor* and *Lewis*" because those cases, in its view, involved "garden variety torts with no relationship to tribal governance and administration." *Id.* at 916. For the reasons we set forth above, that is not the proper analysis for tribal sovereign immunity.

III

Although tribal sovereign immunity does not bar this action, defendants may still avail themselves of personal immunity defenses. *See Lewis*, 137 S. Ct. at 1291 (explaining that although "sovereign immunity does not

erect a barrier against suits to impose individual and personal liability," "[a]n officer in an individual-capacity action . . . may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances" (quotations omitted)); *Pistor*, 791 F.3d at 1112.

The district court held in the alternative that the Blue Lake Defendants (except perhaps Ramsey and Rapport) were entitled to absolute judicial or quasi-judicial immunity. That determination was correct as to Chief Judge Marston, his law clerks, and the tribal court clerk.

Tribal officials, like federal and state officials, can invoke personal immunity defenses. In *Lewis*, the Supreme Court described the availability of personal immunity defenses in the context of discussing generally applicable principles of individual and official capacity suits, and then explained that "[t]here is no reason to depart from these general rules in the context of tribal sovereign immunity." 137 S. Ct. at 1291. Those "general rules" thus included possible common law personal immunity defenses. *See also id.* at 1292 n.2 (noting that "personal immunity defenses [are] distinct from sovereign immunity" but declining to address Clarke's request for personal immunity as not before it).

Consistent with *Lewis*, various cases have addressed personal immunity defenses in the context of suits against tribal officials. *See, e.g., Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003) (judicial immunity); *Runs After v. United States*, 766 F.2d 347, 354-55 (8th Cir. 1985)

(legislative immunity); *Oertwich v. Traditional Vill. of Togiak*, 413 F. Supp. 3d 963, 972 (D. Alaska 2019) (judicial immunity); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe*, 966 F. Supp. 2d 876, 885-86 (D. Ariz. 2013) (legislative immunity); *Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992) (judicial immunity); *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976) (judicial immunity); *cf. Kennerly v. United States*, 721 F.2d 1252, 1259-60 (9th Cir. 1983) (assuming, without deciding, that a *Bivens* or § 1983 action could be brought against tribal officials acting in conjunction with state or federal officials, and that "individual tribal officials would be entitled to claim the same qualified immunity accorded state and federal officials in section 1983 and *Bivens* actions").

Turning to the Blue Lake Defendants, we start with Chief Judge Marston. The district court correctly concluded that Chief Judge Marston enjoys absolute judicial immunity. "A long line of [Supreme Court] precedents acknowledges that, generally, a judge is immune from a suit for money damages." *Mireles v. Waco*, 502 U.S. 9, 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (per curiam). That immunity extends to tribal court judges: "[a] tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges." *Penn*, 335 F.3d at 789; *see also* Charles A. Wright, Arthur R. Miller & Richard D. Freer, 13D Fed. Prac. & Proc. Juris. § 3579 (3d ed., Apr. 2021 Update); William C. Canby., Jr., American Indian Law in a Nutshell 77 (7th ed. 2020); *Sandman*, 816 F. Supp. at 452; *Brunette*, 417 F. Supp. at 1386.

Courts have articulated only two circumstances in which judicial immunity does not apply. "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11-12 (citations omitted). "[W]hether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.* at 12 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). Because judicial immunity is an immunity from suit and not just from damages, it cannot be "overcome by allegations of bad faith or malice." *Id.* at 11.

We easily conclude that Chief Judge Marston is entitled to absolute judicial immunity. Acres and ABI challenge Chief Judge Marston's initial decision not to recuse, his rulings on procedural motions, his discussions about the case with attorneys functioning as his law clerks, and his eventual decision to recuse. These are all functions "normally performed by a judge" and for which the defendants "dealt with the judge in his judicial capacity." *Id.* at 12. And to the extent plaintiffs allege that Chief Judge Marston was conspiring against them, "a conspiracy between judge and [a party] to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc).

Defendant Anita Huff is also entitled to absolute immunity. Plaintiffs allege that Huff was the Clerk of the Blue Lake Tribal Court. Although plaintiffs allege that Huff also performed other roles for the tribe, they challenge only actions she took in her role as Clerk. "Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process." *Mullis v. U.S. Bankr. Court for Dist. of Nev.*, 828 F.2d 1385, 1390 (9th Cir. 1987); *see also Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996); *Sindram v. Suda*, 986 F.2d 1459, 1461, 300 U.S. App. D.C. 110 (D.C. Cir. 1993).

According to the plaintiffs, Huff issued an improper summons in the tribal court case and rejected a filing from Acres for not conforming with a tribal court rule. These actions were an integral part of the judicial process, *see Mullis*, 838 F.2d at 1390, and so Huff is entitled to absolute immunity.

The attorneys functioning as Chief Judge Marston's law clerks—defendants Burrell, DeMarse, Vaughn, and Lathouris—are also entitled to absolute immunity. We have explained that "[t]he concern for the integrity of the judicial process that underlies the absolute immunity of judges is reflected in the extension of absolute immunity to certain others who perform functions closely associated with the judicial process." *Moore*, 96 F.3d at 1244 (quotations omitted). That includes law clerks, because "a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." *Id.* (quotations omitted).

The plaintiffs allege that Burrell, DeMarse, Vaughn, and Lathouris functioned as law clerks, drafting orders and otherwise assisting Judge Marston. The complaint alternatively refers to three of these attorneys as Associate Judges of the Tribal Court. Although the complaint also asserts that these defendants performed other outside work, that outside work does not form the basis of any of plaintiffs' claims. Burrell, DeMarse, Vaughn, and Lathouris were thus properly dismissed based on absolute immunity.

The complaint does not, however, allege that the remaining Blue Lake Defendants—Ramsey, Frank, Rapport, and R&M—performed a judicial or quasi-judicial role. At oral argument, the Blue Lake Defendants conceded that Ramsey, Frank, Rapport, and R&M would not be entitled to judicial or quasi-judicial immunity. The outside counsel defendants (Boutin Jones, Janssen Malloy, and the individual attorneys associated with those firms) also do not claim they are entitled to judicial immunity.

* * *

Having concluded that tribal sovereign immunity does not bar this suit and that on this record only certain defendants enjoy absolute personal immunity, we remand this case to the district court. The defendants who remain in the case are Ramsey, Frank, Rapport, "Rapport and Marston," Boutin Jones, Chase, Stouder, O'Neill, Janssen Malloy, Yarnall, and Burroughs.

Various combinations of these defendants have made other arguments for why this case or certain claims should be dismissed. The district court has yet to rule on these issues. On remand, the district court can consider these and other arguments that the remaining defendants may advance, including whether defendants are otherwise immune from suit on grounds the district court has yet to address.

All parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Appendix A

FEINERMAN, District Judge, concurring in part and concurring in the judgment in part:

I agree with my colleagues on the disposition of this appeal, and part company with only a certain aspect of the majority opinion's analysis.

A tribe is the real party in interest in a suit against tribal officers or agents, requiring dismissal on sovereign immunity grounds, if "the judgment sought would [1] expend itself on the public treasury or domain, or [2] interfere with the public administration, or [3] if the effect of the judgment would be to restrain the [tribe] from acting, or to compel it to act." *Pistor v. Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015) (quoting *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (quoting *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992))). This disjunctive, three-part test is one that we and the Supreme Court have consistently articulated and applied when a party invokes sovereign immunity, be it federal, state, or tribal. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) ("The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration, *or* if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.") (emphasis added) (internal quotation marks omitted) (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963)); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 826-27, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976) ("A suit against an officer of the United States

is one against the United States itself . . . if the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration; *or* if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.") (emphasis added) (internal quotation marks and citations omitted); *Dugan*, 372 U.S. at 620 ("The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration, *or* if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.") (emphasis added) (internal quotation marks and citations omitted); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999) (same) (quoting *Dugan*, 372 U.S. at 620); *Shermoen*, 982 F.2d at 1320 (same) (quoting *Dugan*, 372 U.S. at 620).

In holding that tribal sovereign immunity bars this suit, the district court relied on the test's second component—which asks whether "the judgment sought would . . . interfere with the public administration"—reasoning that "adjudicating this dispute would require the court to interfere with the tribe's internal governance." I agree with my colleagues that, under the circumstances of this case, a retrospective monetary judgment against the named defendants, based wholly on liability for their past conduct, would not interfere with the Tribe's administration of its own affairs.

That said, I cannot endorse the majority opinion's suggestion that "tribal sovereign immunity does not apply" because "[a]ny relief ordered by the district court

will not require Blue Lake to do or pay anything." Slip op. at 16; *see also* slip op. at 21 ("[B]ecause plaintiffs' suit for damages against tribal employees and agents 'will not require action by the sovereign or disturb the sovereign's property,' and any 'judgment will not operate against the Tribe,' tribal sovereign immunity does not apply."). That rationale pays heed to the first ("the judgment sought would expend itself on the public treasury or domain") and third ("the effect of the judgment would be to restrain the [tribe] from acting, or to compel it to act") components of the sovereign immunity test, but it leaves no room for independent operation of the second ("where the judgment sought would . . . interfere with the public administration"). Diminishing or excising the second component in that way cannot be reconciled with the Supreme Court's (and our) articulation of the test in a disjunctive manner, with three separate and independent grounds for sovereign immunity. Nor can it be reconciled with precedents resting sovereign immunity solely on the ground that the suit could interfere with a sovereign's public administration. *See Palomar Pomerado*, 180 F.3d at 1108 (holding that sovereign immunity barred the suit because "[t]he result [the plaintiff] seeks would 'interfere with the public administration'"). And if the second component of the test is diminished or excised for purposes of tribal sovereign immunity, it is as well in the federal and state sovereign immunity context. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *Maxwell*, 708 F.3d at 1087-88 ("Tribal sovereign immunity derives from the same

common law immunity principles that shape state and federal sovereign immunity.").[1]

Although it is not necessary in this case to mark the precise boundaries of the "interfere with the public administration" component of the sovereign immunity test, nor is there any need to effectively suggest that the component is a dead letter. With these observations, I join the judgment and all but the above-referenced aspect of the majority opinion.

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1. The majority opinion's assertion that it neither diminishes nor excises the second component of the sovereign immunity test is not persuasive. The majority states that it has applied the second component "according to its terms, which asks whether 'the judgment sought would . . . interfere with the public administration' of the tribe." Slip op. at 19 n.3. But, as noted, the majority elsewhere states that sovereign immunity does not apply because the judgment sought would not require Blue Lake "to do or pay anything." Slip op. at 16. "[P]ay anything" corresponds with the first component of the test ("expend itself on the public treasury or domain"), while "do . . . anything" corresponds with the third ("restrain the [tribe] from acting, or to compel it to act"). The sovereign immunity test's inclusion of the second component as a separate ground for immunity must mean that there are at least some circumstances in which immunity applies where the judgment sought would "interfere with the public administration" in a manner not requiring the tribe (or federal government or State) to do or pay anything.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED APRIL 15, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-05418-WHO

ACRES BONUSING, INC, *et al.*,

Plaintiffs,

v.

LESTER MARSTON, *et al.*,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS; DENYING ANTI-SLAPP MOTIONS AND MOTION TO STRIKE ANTI-SLAPP MOTIONS AS MOOT

Re: Dkt. Nos. 29, 30, 31, 32, 33, 35, 38, 42, 50

Plaintiffs James Acres and Acres Bonusing, Inc. ("ABI") bring this malicious prosecution action against multiple lawyers, law firms, and court personnel who were involved in a previous contractual fraud case filed against plaintiffs by Blue Lake Casino & Hotel ("Blue Lake Casino") in Blue Lake Rancheria Tribal Court. They sue three sets of defendants: (i) law firm Boutin Jones,

Inc., and associated individual attorneys[1], that filed the initial complaint in tribal court on behalf of Blue Lake Casino (hereinafter the "Boutin Jones" defendants); (ii) law firm Janssen Malloy LLP, and associated individual attorneys[2], that replaced Boutin Jones as attorneys for Blue Lake Casino (hereinafter the "Janssen Malloy" defendants) (Boutin Jones and Janssen Malloy defendants are collectively "Attorney Defendants"); and (iii) Blue Lake Tribal Court Chief Judge Lester Marston, Court Clerk Anita Huff, two elected tribal officials[3], law firm "Rapport and Marston" and associate tribal judges/attorneys[4] (hereinafter the "Blue Lake Defendants").

Before me are seven dispositive motions: motions to dismiss and motions to strike for being sued for conduct protected by California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, filed by each of the three sets of defendants as well as a motion to strike the anti-SLAPP motions by plaintiffs. For the reasons set forth below, I GRANT the motions to dismiss as to all three sets of defendants [Dkt. Nos. 29, 32, 33] on grounds of tribal sovereign immunity. Because I am granting the motion to dismiss on this basis, I need not address defendants'

1. Michael Chase, Daniel Stouder, and Amy O'Neill.

2. Megan Yarnall and Amelia Burroughs.

3. Blue Lake Rancheria elected Vice Chair/Tribal Administrator/Tribal Associate Judge/Blue Lake Casino & Hotel CEO Arla Ramsey and former Tribal Casino executive/Tribal government Economic Development Director Thomas Frank.

4. David Rapport, Ashley Burrell, Cooper DeMarse, Darcy Vaughn, and Lathouris Kostan.

failure to state a claim argument. I DENY the anti-SLAPP motions [Dkt. Nos. 30, 31, 50] and motion to strike the anti-SLAPP motion [Dkt. No. 38] as moot.[5]

BACKGROUND

I. FACTUAL BACKGROUND

The Blue Lake Rancheria is a federally recognized Tribal Nation in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria. Complaint ("Compl.") [Dkt. No. 1] ¶ 9. The Blue Lake Tribal Court, which is not named as a defendant in this action, is an established judicial arm of the Tribe. *Id.* ¶ 11.

Acres was the owner of ABI, a Nevada gaming company. Compl. ¶ 8. In 2010, Blue Lake Casino and Acres negotiated an agreement whereby Blue Lake Casino purchased an iSlot gaming system from ABI. *Id.* ¶ 44. In 2015, a dispute arose between them regarding the return of a $250,000 advance deposit. *Id.* ¶¶ 48-52. In January 2016, Boutin Jones filed a complaint in Blue Lake Tribal Court on behalf of Blue Lake Casino against ABI for contract-based claims and against Acres personally

5. Boutin Jones' motion to join and adopt Janssen Malloy's opposition to plaintiffs' motion to strike the anti-SLAPP motion [Dkt. No 42] is DENIED as moot. Boutin Jones' request for judicial notice of documents related to its anti-SLAPP motion [Dkt. No. 30-2] and plaintiffs' request for judicial notice of documents related to its opposition to the anti-SLAPP motions [Dkt. No. 55] are also DENIED as moot.

for fraudulent inducement. *Id.* ¶ 5; *see also id.*, Ex. 1 (underlying complaint in *Blue Lake Casino & Hotel v. Acres et al.*, Blue Lake Tribal Court Case No. 15-1215IJM) (hereinafter "*Blue Lake Casino v. Acres*").

Boutin Jones represented Blue Lake Casino in tribal court until February 2017, when Janssen Malloy substituted into the case to serve as counsel for Blue Lake Casino. Compl. ¶¶ 27-29, 111. Blue Lake Rancheria Tribal Court Chief Judge Marston was the original presiding judge until December 2016 when he voluntarily recused himself and Justice James N. Lambden, a retired justice from the California Court of Appeals, replaced him. *Id.* ¶¶ 16, 31, 104.

While the tribal court case was pending, Acres filed two federal court actions asserting that the tribal court lacked jurisdiction over him. On August 10, 2016, I dismissed his initial federal action for lack of subject matter jurisdiction because he failed to exhaust tribal remedies. *Acres v. Blue Lake Rancheria Tribal Court*, No. 16-CV-02622-WHO, 2016 U.S. Dist. LEXIS 105786, 2016 WL 4208328, at *4 (N.D. Cal. Aug. 10, 2016) (hereinafter "*Acres I*"). The following month, Acres and ABI filed another suit arguing that although they did not exhaust tribal remedies, the bad faith exception applies because Judge Marston did not disclose his conflicts of interest and recuse himself. *Acres v. Blue Lake Rancheria*, No. 16-CV-05391-WHO, 2017 U.S. Dist. LEXIS 26447, 2017 WL 733114, at *1 (N.D. Cal. Feb. 24, 2017) (hereinafter "*Acres II*"). After granting limited discovery on the issue

of bad faith, I dismissed the second federal action for failure to exhaust tribal remedies, which was affirmed by the Ninth Circuit on June 30, 2017. *Acres v. Blue Lake Rancheria*, 692 F. App'x 894 (9th Cir. 2017).[6]

The underlying tribal court case continued. In July 2017, Justice Lambden issued an order granting Acres summary judgment and dismissing him from the suit. Compl. ¶ 5 & Ex. 2. In August 2017, Justice Lambden dismissed the suit in its entirety. *Id.* ¶ 5 & Ex. 3. Because no notice of appeal was timely filed according to tribal law, Acres and ABI contend that ABI's claims for wrongful use of civil proceedings are ripe and that the statute of limitations has not expired. *Id.* ¶ 5.

On July 13, 2018, Acres filed a malicious prosecution action in Sacramento County Superior Court, *Acres v. Marston*, Case No. 34-2018-00236829, that he concedes

6. On January 9, 2020, Acres filed a discovery dispute statement regarding his 118 requests for production of documents identified in Judge Marston's billing records, which were produced in *Acres II*. Plaintiffs' Discovery Dispute Statement [Dkt. No. 35]. On January 10, 2020, the Blue Lake Defendants objected to this discovery because they have raised a threshold challenge to this court's jurisdiction over them and argued that the requests go far beyond jurisdictional discovery. Defendants' Discovery Dispute Statement [Dkt. No. 36]. In their February 3, 2020 joint stipulation, parties indicated that although the dispute was not resolved, the Blue Lake Defendants have told plaintiffs that "Blue Lake Rancheria may shortly provide evidence [that] Blue Lake wishes to share its sovereign immunity with Defendants." Stipulated Rescheduling of Threshold Motions [Dkt. No. 37]. This discovery dispute is VACATED as moot because I am dismissing the Complaint as barred by sovereign immunity.

is substantially similar to the action before me. Compl. ¶ 32 n.5. The first seven claims are virtually identical to the seven causes of action Acres unsuccessfully asserted against the same defendants on the same facts in state court. *Id.* These seven causes of actions are: (i) wrongful use of civil proceedings; (ii) aiding and abetting wrongful use of civil proceedings; (iii) conspiracy to commit wrongful use of civil proceedings; (iv) breach of fiduciary duty; (v) aiding and abetting breach of fiduciary duty; (vi) constructive fraud; and (vii) aiding and abetting constructive fraud.[7]

The only material differences between Acres' state court complaint and this federal action are that ABI was not a party to the former and that this action asserts an eighth cause of action based upon the same facts under the Racketeer Influenced and Corrupt Organizations ("RICO") Act. Almost all of the factual assertions about the defendants' respective roles in the underlying tribal action are identical between the two complaints, except for the few added assertions plaintiffs make based on a declaration filed by defendants in the state court action. *See, e.g.*, Compl. ¶¶ 73, 93.[8]

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7. The state court decision provides a lengthy summary of plaintiffs' allegations and the alleged roles of the moving defendants in relation to those allegations. *See Acres v. Marston*, 2019 WL 8400827, at *2.

8. For example, plaintiffs added an allegation that Rapport and DeMarse also rendered legal services to the tribe's attorneys providing backup to the Boutin Jones attorneys defending the tribal court in both federal court actions *Acres I* and *Acres II*. This added paragraph, in addition to the few others, amount to minor differences between the complaints filed here and in state court.

Appendix B

On February 11, 2019, the Sacramento County Superior Court granted motions to dismiss as to all three sets of defendants and found the anti-SLAPP motions moot. *See Acres v. Marston*, No. 34-208-00236829, 2019 WL 8400827 (Cal. Super. Feb. 11, 2019); *Acres v. Marston*, No. 34-2018-00236829, 2019 WL 8400826 (Cal. Super. Feb. 11, 2019).[9] On April 11, 2019, Acres appealed both dismissal decisions to the California Court of Appeals, Third District, Case No. C089344, where it is currently pending. Compl. ¶ 32 n. 6.

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9. Copies of the state court's decisions are also submitted as Exhibit A to Janssen Malloy's motion to dismiss and as Exhibit 2 to Blue Lake Defendants' request for judicial notice. *See* Exhibit A to Janssen Malloy Motion to Dismiss [Dkt. No. 34] (copy of Sacramento County Superior Court opinion as to Attorney Defendants); Defendants' Request for Judicial Notice, and Declaration of Counsel in Support Thereof ("Blue Lake RJN") [Dkt. No. 32-7] Ex. 2 (copy of Sacramento County Superior Court opinion as to Blue Lake Defendants).

Blue Lake Defendants' request for judicial notice of this state court decision is GRANTED because it is a matter of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citing Fed. R. Evid. 201). Their request for judicial notice of other documents relating to their motion to dismiss is also GRANTED because these documents are matters of public record and/or incorporated by reference by the Complaint. *See* Blue Lake RJN, Ex. 1 (copy of the Nevada Secretary of State's listing for ABI, in which Acres is identified as ABI's president, secretary, treasurer and director); Ex. 3 (copy of Class III gaming compact Blue Lake Casino has with the State of California); and Ex. 4 (copy of "Order Granting Limited Discovery RE Bad Faith Exception and Issuing Protective Order" in *Acres II*).

II. PROCEDURAL BACKGROUND

On August 28, 2019, Acres and ABI filed this action, which, as stated above, brings the same claims against the same defendants in the state court action, except for an added RICO claim.

The Attorney Defendants move to dismiss based upon sovereign immunity under Rule 12(b)(1) and/or for failure to state a claim under Rule 12(b)(6). *See* Specially Appearing Defendants Boutin Jones Inc., Michael Chase, Daniel Stouder & Amy O'Neil's Memorandum of Points & Authorities in Support of Their Rule 12(b)(1) and Rule 12(b)(6) Motion to Dismiss Plaintiffs' Complaint ("Boutin Jones MTD") [Dkt. No. 29-1]; Notice of Motion and Motion of Defendants Janssen Malloy LLP, Megan Yarnall and Amelia Burroughs to Dismiss the Verified Complaint of Plaintiffs Based Upon Sovereign Immunity under FRCP 12(b)(1) and/or Failure to State a Claim under FRCP 12(b)(6) ("Janssen Malloy MTD") [Dkt. No. 33]. The Blue Lake Defendants also move to dismiss based on sovereign immunity under Rule 12(b)(1). *See* Memorandum of Points and Authorities in Support of Motion to Dismiss under FRCP 12(b)(1), (2) ("Blue Lake MTD") [Dkt. No. 32]. These motions were fully briefed. Because the motions could be decided on the papers, I vacated the hearing.

LEGAL STANDARD

A motion to dismiss filed pursuant to Rule 12(b)(1) is a challenge to the court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of

limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *Id.*

A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are insufficient "on their face" to invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inference in favor of the party opposing dismissal. *See Wolfe*, 392 F.3d at 362.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. To resolve this challenge, the court "need not presume the truthfulness of the plaintiff's allegations." *Id.* (citation omitted). Instead, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* (citations omitted). Once the moving party has made a factual challenge by offering affidavits or other evidence to dispute the allegations in the complaint, the party opposing

the motion must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *see also Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

DISCUSSION

As sovereigns, Tribal Nations are generally immune from suit. *Lewis v. Clarke*, 137 S. Ct. 1285, 1288, 197 L. Ed. 2d 631 (2017). Sovereign immunity extends to tribal officials when they act in their official capacity and within the scope of their authority; however, when tribal officials act beyond their authority they lose their right to the sovereign's immunity. *See id.*; *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Sovereign immunity does not always extend to tribal employees sued in their individual capacities. *See Lewis*, 137 S. Ct. at 1288. Even when a tribal employee is sued for actions taken within the scope of her employment, a personal suit can proceed unless the court determines that "the sovereign is the real party in interest." *Id.* at 1290-91. Sovereign immunity therefore bars suits when "the remedy sought is truly against the sovereign." *Id.* at 1290.

For the reasons set forth below, I find that all of the defendants were functioning as the Tribe's officials or agents when the alleged acts were committed and dismiss the Complaint based on tribal sovereign immunity.

Appendix B

I. ATTORNEY DEFENDANTS' MOTION TO DISMISS

Attorney Defendants point to *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 88 Cal. Rptr. 2d 828 (1999) as an illustrative example of when tribal sovereign immunity extends to a tribe's outside legal counsel. The plaintiff in that case filed suit against a tribe, the tribal council, individual tribal council members, the tribe's general counsel, and an attorney and her private law firm regarding the tribe's cancellation of a contract. 74 Cal. App. 4th at 1413. The plaintiff alleged multiple fraud claims, abuse of process, and a RICO claim. *Id.* at 1414. The trial court dismissed the suit based upon tribal sovereign immunity and the California Court of Appeal affirmed, finding in relevant part that the non-Indian law firm and general counsel were protected by tribal sovereign immunity from liability for actions taken or opinions given in rendering legal services to the tribe to the same extent of immunity entitled to the tribe, tribal council, and tribe members. *Id.* at 1423.

The court held that "[i]n providing legal representation—even advising, counseling and conspiring with the tribe to wrongfully terminate the management contract—counsel were similarly immune from liability for those professional services." 74 Cal. App. 4th at 1423 (citing *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968)). The court continued: "Refusing to recognize an extension of a tribe's sovereign immunity to cover general counsel's advice to the tribe could not only jeopardize the tribe's interests but could also adversely influence

counsel's representation of the tribe in the future. For these reasons, counsel, in allegedly advising the tribe to wrongfully terminate the management contract, are similarly covered by the tribe's sovereign immunity." *Id.*

Attorney Defendants in this suit are immune from liability based on acts done in the course of representing Blue Lake Casino in tribal court for its dispute with plaintiffs. The Complaint does not allege that Attorney Defendants acted outside of the scope of authority granted to them in their representation of Blue Lake Casino; rather the allegations describe actions typically done in rendering legal services. *See, e.g.*, Compl. ¶¶ 23-25, 27-29,111, 115, 116; *see Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 91 (S.D.N.Y. 2002) (relying on *Great W. Casino* and finding "[a]s a general proposition, a tribe's attorney, when acting as a representative of the tribe and within the scope of his authority, is cloaked in the immunity of the tribe just as a tribal official is cloaked with that immunity").

Plaintiffs argue that *Great W. Casinos* is overruled by *Lewis* because it "failed to use the 'who-may-be-bound' test required by *Lewis*." Plaintiffs' Opposition to Defendant Boutin Jones' Motion to Dismiss ("Oppo. Boutin Jones MTD") [Dkt. No. 43] 14. The Sacramento County Superior Court rejected this argument, as do I. *See Acres v. Marston*, 2019 WL 8400826, at *11. The extension of tribal sovereign immunity to the tribe's legal counsel in *Great W. Casinos* is not inconsistent with the official-capacity and personal-capacity dichotomy identified in *Lewis*.

Appendix B

The Supreme Court in *Lewis* made clear that "[t]he identity of the real party in interest dictates what immunities may be available." 137 S. Ct. at 1291. The tribal employee in *Lewis* was sued for negligence when he allegedly caused a motor-vehicle accident while shuttling customers for the tribe. *Id.* He was not entitled to sovereign immunity because the Supreme Court found that a "judgment will not operate against the Tribe" and "will not require action by the sovereign or disturb the sovereign's property." *Id.*

Two other Ninth Circuit cases also declined to extend sovereign immunity because they were factually-similar to *Lewis*. In *Pistor v. Garcia*, internal governance concerns were not implicated by plaintiffs, who were allegedly detained at a tribal casino and sued the tribal police chief, gaming office inspector and the casino's general manager in their individual capacities for violating their Fourth and Fourteenth Amendment rights and other state tort laws. 791 F.3d 1104, 1113 (9th Cir. 2015). In *Maxwell v. County of San Diego*, sovereign immunity did not apply because the lawsuit named tribal fire department paramedics as individual defendants and sought monetary damages for their negligence that would "come from their own pockets, not the tribal treasury." 708 F.3d 1075, 1089 (9th Cir. 2013).

Although the Ninth Circuit declined to extend sovereign immunity to the defendants in *Maxwell*, it nonetheless cautioned against entertaining individual suits which are in reality against the tribe:

> In any suit against tribal officers, we must be sensitive to whether the judgment sought would

> expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.

Maxwell, 708 F.3d at 1088. As examples of such suits, *Maxwell* pointed to *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985). In *Cook*, the plaintiffs' object was to reach the public treasury through a respondeat superior ruling against the tribal officials, and therefore the suit was barred by sovereign immunity because the real party in interest was the tribe. *Cook*, 548 F.3d at 727. In *Hardin*, sovereign immunity barred the plaintiff from litigating a case against high-ranking tribal council members seeking to hold them individually liable for voting to eject the plaintiff from tribal land; to hold otherwise, the Ninth Circuit ruled, would interfere with the tribe's internal governance. *Hardin*, 779 F.2d at 478. "*Hardin* was in reality an official capacity suit, barred by sovereign immunity, because the alternative, to [h]old[ ] the defendants liable for their legislative functions[,] would . . . have attacked the very core of tribal sovereignty." *Maxwell*, 708 F.3d at 1089 (internal quotation marks and citation omitted).

This case is like *Hardin* and *Cook*. The alleged acts occurred when Attorney Defendants were acting within the scope of their tribal authority, *i.e.*, within the scope of their representation of Blue Lake Casino. Accordingly, the real party in interest here is the tribe because adjudicating

this dispute would require the court to interfere with the tribe's internal governance.[10]

Despite the nature of their allegations, plaintiffs still contend that sovereign immunity is inapplicable because Attorney Defendants are sued in their individual capacities. Oppo. Boutin Jones MTD 14. The California Court of Appeals rejected a similar argument made by plaintiffs in *Brown v. Garcia*, 17 Cal. App. 5th 1198, 225 Cal. Rptr. 3d 910 (2017). In that case, plaintiff tribe members brought a defamation action against other tribe members who published an "Order of Disenrollment" that accused plaintiffs of multiple legal violations that could be punishable by loss of membership. *Id.* at 1200-01. Those plaintiffs denied that their action would require the court to adjudicate an intra-tribal dispute or insert itself in tribal law, custom, practice or tradition; instead, they argued that they were "simply asking that the Defendants, in their individual capacities, be held accountable for their defamations of fellow Californians." *Id.* at 1201.

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10. Plaintiffs also attempts to analogize this case to *JW Gaming Dev., LLC v. James*, in which I found tribal defendants were not entitled to sovereign immunity. No. 3:18-CV-02669-WHO, 2018 U.S. Dist. LEXIS 172773, 2018 WL 4853222 (N.D. Cal. Oct. 5, 2018), *aff'd*, 778 F. App'x 545 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1297, 206 L. Ed. 2d 376, 2020 WL 1124446 (2020). The facts alleged in that case were different. JW Gaming alleged that individual defendants, who happened to be tribal officials, engaged in fraud when entering into contracts with outside vendors and therefore the "individual defendants—not the Tribe—will be bound" in the event of an adverse judgment. 2018 U.S. Dist. LEXIS 172773, [WL] at *4. By contrast, this case is about actions taken by attorneys who represented a tribe before a tribal court.

Looking to Ninth Circuit authorities discussed above, the *Brown* court rejected the plaintiffs' contentions and found that "sovereign immunity will nonetheless apply in appropriate circumstances even though the complaint names and seeks damages only from individual defendants." *Id.* at 1205 (citing *Pistor*, 791 F.3d at 1113). It found that "[n]otwithstanding plaintiffs' assertion that their action is purely about harmful publications and does not require a court to interfere with any membership or governance decisions, . . . adjudicating the dispute would require the court to determine whether tribal law authorized defendants to publish the Order and disenroll plaintiffs, which itself requires an impressible analysis of Tribal law and constitutes a determination of non-justiciable inter-tribal dispute." *Id.* at 1206-07 (internal quotation marks omitted). It differentiated the circumstances from *Maxwell*, *Pistor* and *Lewis*, in which "[t]he wrongs alleged . . . were garden variety torts with no relationship to tribal governance and administration." *Id.* at 1206.

Looking beyond the façade of a facially-pleaded individual-capacity lawsuit, I find that "entertaining [this] suit would require the court to adjudicate the propriety of the manner in which tribal officials carried out an inherently tribal function." *Brown*, 17 Cal. App. 5th at 1207. Attorney Defendants persuasively raise these concerns: "If the court were to wade in and decide what actions are or are not permissible in Tribal Court it necessarily asserts control of that Court. Is this Court, as Plaintiffs contends, supposed to rule on what pleadings are appropriate in Tribal Court or how an action in Tribal

Court must be plead[ed]? . . . Is it to determine when, in Tribal Court, an attorney has misused the Tribal Court's judicial process . . . or whether the Tribal Court correctly followed its own procedures?" Janssen Malloy MTD 13.

As the Sacramento County Superior Court found, "[t]hese are not insignificant or immaterial questions in the malicious prosecution action, since the case involves alleged malicious prosecution *only in the Tribal Court*." *Acres v. Marston*, 2019 WL 8400826, at *12 (emphasis in original). Just as entertaining the suit in *Brown* would require the court to question an inherently tribal function, entertaining this suit would require me to question the judicial function of the Blue Lake Rancheria Tribal Court. The real party in interest here is the Tribe itself. For these reasons, Attorney Defendants' motion to dismiss on grounds of tribal sovereign immunity is GRANTED.

II. BLUE LAKE DEFENDANTS' MOTION TO DISMISS

Plaintiffs also sue tribal court personnel and other officials who were involved in the underlying tribal action. The Blue Lake Defendants consist of: (i) Chief Judge Marston, (ii) Clerk Huff, (iii) elected tribal officials Ramsey and Frank, (iv) an alleged law firm "Rapport and Marston" (v) tribal attorneys Rapport and DeMarse; (vi) and tribal court associate judges/law clerks Burrell, Vaughn and Lathouris.

Judge Marston is alleged to have served as the Chief Judge of the Blue Lake Tribal Court, and he originally

presided over the underlying tribal action *Blue Lake Casino v. Acres*. Compl. ¶ 16. Clerk Huff is alleged to have been the Clerk of the Tribal Court during *Blue Lake Casino v. Acres*, and while acting as Clerk, she was also employed by Tribe in various other roles, like "Grants and Contracts Manager." *Id.* ¶ 15. During *Blue Lake Casino v. Acres*, most of the orders issued by the Tribal Court were served by Clerk Huff upon the parties. *Id.* ¶ 123.

Ramsey is alleged to have been the Chief Executive Officer of Blue Lake Casino during *Blue Lake Casino v. Acres* and also served as Tribe's Tribal Administrator, as a judge of Blue Lake's Tribal Court, and as the vice-chair of the Blue Lake Business Council. Compl. ¶ 13. In her role as Tribal Administrator, Ramsey was responsible for the day to day business affairs of the Tribal Government, and supervised the work of Clerk Huff. *Id.*

Frank is alleged to have held various executive roles for Tribe over the past 15 years, including as a Blue Lake Casino executive (until 2009) and as Director of Business Development for Tribe (from 2010 until at least 2015). Compl. ¶ 14. During *Blue Lake Casino v. Acres*, Frank verified Blue Lake Casino's discovery responses to Acres, and made several sworn declarations. *Id.* ¶ 122.

Rapport allegedly provided attorney services to the Tribe in partnership with Judge Marston since at least 1983. Compl. ¶ 18. Rapport & Marston is alleged to be a law firm consisting of Judge Marston and Rapport, but this is repeatedly disputed in their motion papers. *Id.* ¶ 17.

DeMarse is alleged to be an associate judge of the Blue Lake Tribal Court, and a licensed California attorney associated with Rapport and Marston. Compl. ¶ 20. DeMarse performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake Casino v. Acres*. *Id.* ¶ 128.

Burrell is alleged to be an associate judge of the Blue Lake Tribal Court, and a licensed California attorney associated with Rapport and Marston. Compl. ¶ 19. Burrell performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake Casino v. Acres*. *Id.* ¶ 125.

Vaughn is alleged to be an associate judge of the Blue Lake Tribal Court, and a licensed California attorney associated with Rapport and Marston. Compl. ¶ 21. Vaughn performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in *Blue Lake Casino v. Acres*. *Id.* ¶ 126.

Lathouris is alleged to be an attorney licensed in Nevada and associated with Rapport and Marston. Compl. ¶ 22. Lathouris performed legal services for Tribe, and also provided legal service to Judge Marston in his role as judge in Blue Lake Casino v. Acres. *Id.* ¶ 127

As explained above with respect to the Attorney Defendants, plaintiffs' facial characterization that this case only seeks to sue the Blue Lake Defendants individually is unconvincing. This case is more similar to *Hardin*, where the tribe was a real party in interest because plaintiffs

sued high-ranking tribal council members for voting to eject him, than it is to *Lewis*, where the tribe was not a real party in interest because plaintiffs sued a tribal employee for negligence in driving casino customers to their homes off of the tribe's lands.

The Blue Lake Defendants are named as individual defendants but the tribe is the real party in interest. It was the tribe, not any of the individual Blue Lake Defendants, who sued plaintiffs in the underlying tribal court case. The tribe appointed Judge Marston and Clerk Huff and both were exercising tribe judicial powers in operation of court. Acting in his capacity, Judge Marston retained services of Burrrell, Vaughn, and Lathouris to assist in exercising governmental powers in the underlying tribal court case. The tribe then retained Rapport and DeMarse as its general counsel to provide the tribe with legal advice in defending Acres' subsequent federal suits. Allowing this litigation to proceed will necessarily impact the ways in which tribal employees and officials carry out their official duties and question a tribe's right to set up and operate its own courts under its own rules and laws.

For the reasons discussed above, I dismiss the Complaint against Blue Lake Defendants because of tribal sovereign immunity. In addition, I will briefly address the Blue Lake Defendants' alternative defenses of judicial immunity and quasi-judicial immunity.

Judges are absolutely immune from civil liability for damages for acts performed in their judicial capacity. *See Pierson v. Ray*, 386 U.S. 547, 553-55, 87 S. Ct. 1213,

18 L. Ed. 2d 288 (1967). Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities. *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction. *Id.* at 356-57 (internal quotation marks and citation omitted); *see also Mireles v. Waco*, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (judicial immunity is not overcome by allegations of bad faith or malice); *Sadoski v. Mosley*, 435 F.3d 1076, 1079 n. 2 (9th Cir. 2006) (mistake alone is not sufficient to deprive a judge of absolute immunity).

Courts have recognized "the long-standing federal policy supporting the development of tribal courts" for the purpose of encouraging tribal self-government and self-determination. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987) ("[A] federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts."). Accordingly, a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges. *See Acres v. Marston*, 2019 WL 8400827, at *11 (citing *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003)).

Plaintiffs concede that "Judge Marston enjoys absolute immunity from suit for any conduct that was essentially judicial in nature," but nonetheless attempt

to hold Judge Marston liable for what they characterize as "non-judicial acts." Compl. ¶ 16. However, all of the alleged acts by the Blue Lake Defendants with judicial roles (all except Ramsey and Rapport) were either judicial or quasi-judicial acts. None of the alleged acts could be characterized "non-judicial" and whether the acts were malicious or fraudulent does not overcome the protection of this immunity. Accordingly, I also dismiss the Blue Lake Defendants on the alternate grounds of judicial immunity and quasi-judicial immunity.

CONCLUSION

The Attorney Defendants' and Blue Lake Defendants' motions to dismiss are GRANTED on grounds of tribal sovereign immunity, judicial immunity and quasi-judicial immunity. The anti-SLAPP motions and motion to strike the anti-SLAPP motions are DENIED as moot. Accordingly, this case is DISMISSED and the Clerk shall close the case.

IT IS SO ORDERED.

Dated: April 15, 2020

/s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED DECEMBER 15, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-15959 D.C.
No. 3:19-cv-05418-WHO
Northern District of California, San Francisco

ACRES BONUSING, INC;
JAMES RAYMOND ACRES,

Plaintiffs-Appellants,

v.

LESTER JOHN MARSTON; RAPPORT AND MARSTON, AN ASSOCIATION OF ATTORNEYS; DAVID JOSEPH RAPPORT; COOPER DEMARSE; ASHLEY BURRELL; KOSTAN LATHOURIS; BOUTIN JONES, A CALIFORNIA CORPORATION; MICHAEL E. CHASE; DANIEL STOUDER; AMY O'NEILL; AMELIA F. BURROUGHS; MEGHAN YARNALL; ARLA RAMSEY; ANITA HUFF; THOMAS FRANK; JANSSEN MALLOY LLP, AN ASSOCIATION OF ATTORNEYS; DARCY VAUGHN,

Defendants-Appellees.

Appendix C

Before: HURWITZ and BRESS, Circuit Judges, and FEINERMAN,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Hurwitz and Bress voted to deny the petition for rehearing en banc, and Judge Feinerman so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. No. 53) is **DENIED**.

* The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.