No. 21-1544

In The
Supreme Court of the United States

CYNTHIA LOPEZ,

Petitioner,

v.

ERIC QUAEMPTS, DAVID TOVEY, and THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BRIEF IN OPPOSITION

OPINIONS BELOW

The denial of review by the California Supreme Court dated March 9, 2022 is not published and is reproduced in the Petitioner's Appendix at App. 73. The Third Appellate District's unpublished Opinion granting Respondents' motion to quash based on the doctrine of Tribal Sovereign Immunity can be found at 2021 WL 5561997. The decision of the California Superior Court is not reported and is reproduced in the Petitioner's Appendix at App. 19-72.

ISSUES PRESENTED

I. Petitioner cannot rely on *Lewis v. Clarke* (2017) 137 S. Ct. 1285 (*Lewis*) in an attempt to circumvent and weaken Tribal Sovereign Immunity as the employees in this matter were acting in their official capacity with the tribe and serving as a function of the tribe as Tribal employees.

II. The tribe did not abrogate its sovereign immunity by express ratification of its employee's alleged tortious conduct as the alleged ratification never took place. The law regarding Tribal Sovereign Immunity is well established under *Lewis* and *Cook*.

INTRODUCTION AND COUNTERSTATEMENT OF THE CASE

Petitioner seeks a Writ of Certiorari from the United States Supreme Court on well-settled issues of law. These issues have been briefed and a thorough Opinion on these issues was issued by the Court of Appeal of California, Third Appellate District. The California Supreme Court denied the Petition for Review without a request for further briefing.

Despite the clear opinions of the Lower Courts Petitioner filed her Petition with the United States Supreme Court for a Writ of Certiorari without any substantive arguments or novel iterations of law that would require review by the Highest Court. At best, Petitioner is attempting to avoid the conclusion of a well-settled and litigated matter as to the Sovereign Immunity of all tribes including the Confederated Tribes of the Umatilla Indian Reservation (hereinafter CTUIR).

In order to correctly frame this issue Respondents note that the Third Appellate District Court found that sovereign immunity protected the CTUIR from Petitioner's suit. In drafting its opinion, the Third Appellate District relied on well-settled areas of law specifically stating, "Indian tribes are not amenable to suit brought by the states or individuals unless there is an unequivocal abrogation of Tribal Sovereign Immunity by Congress or a clear waiver by the tribe." (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-790, 188 L.Ed.2d 1071 (*Michigan*); *C & L*

Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe (2001) 532 U.S. 411, 418, 149 L.Ed.2d 623 (*C & L Enterprises, Inc.*); *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58-59, 56 L.Ed.2d 106 (*Santa Clara Pueblo*); *Puyallup Tribe, Inc. v. Department of Game* (1977) 433 U.S. 165, 170-173, 53 L.Ed.2d 667). (*Lopez v. Eric Quaempts, David Tovey, and the Confederated Tribes of the Umatilla Indian Reservation*, (2021) No. C087445, Third Appellate District Decision, Appendix page 6).

The Third Appellate District also noted, "Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' [Citation.] (*Michigan*, pp. 788-789)." (Third Appellate District Decision, Appendix page 7).

The Third Appellate District further and finally noted, on the Tribal Sovereign Immunity issue, "[i]n any event, a waiver of Tribal Sovereign Immunity cannot be implied but must be explicit and unequivocally expressed. (*Santa Clara Pueblo, supra*, 436 U.S. pp. 58-59; *C & L Enterprises, Inc., supra*, 532 U.S. p. 418; *Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1087 (*Maxwell*); *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047; *McClendon v. United States* (9th Cir. 1989) 885 F.2d 627, 629 (*McClendon*); *Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal.App.4th 1364, 1369). Waivers are strictly construed and there is a strong presumption against them. (*Ameriloan, infra*, 169 Cal.App.4th p. 94). Lopez fail[ed] to show that the Tribe

unequivocally and clearly waived its sovereign immunity from suit in this case." (Third Appellate District Decision, Appendix Page 9).

The Third Appellate District also found that the First Amended Complaint, as pled, asserts claims against Quaempts and Tovey in their official capacities, thus those claims are also protected by Tribal Sovereign Immunity. Quoting the Third Appellate District again, "Neither the first amended complaint nor Lopez's declaration stated that as to Quaempts and Tovey, Lopez sought a judgment against those defendants personally . . . Lopez's opposition to defendants' motion to quash and dismiss also did not make such an assertion." (Third Appellate District Decision, Appendix Page 13).

The Third Appellate District additionally contemplated the question of whether Quaempts and Tovey exceeded the scope of their official authority. The Third Appellate District found that while, "The agent of a sovereign may be sued in his or her personal capacity when his or her actions exceed the authority granted by the sovereign. (*Larson v. Domestic & Foreign Commerce Corp*. (1949) 337 U.S. 682, 689-690 (*Larson*); *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157 (*Boisclair*)). Under such circumstances the agent's conduct is not the conduct of the sovereign. (*Larson*, p. 690). But a claim of error in the exercise of delegated power or the mere allegation that the agent acted illegally is not sufficient to establish that the acts of the agent were beyond his or her authority. (*Id*.

pp. 690-691, 693)." (Third Appellate District Decision, Appendix Page 15).

The Third Appellate District again pointed out that, "[Petitioner's] declaration in opposition to defendants' motion did not aver any facts indicating that Quaempts or Tovey exceeded the scope of their authority as Department director and executive director." (Third Appellate District Decision, Appendix Page 15).

Notably Petitioner now claims that there was no remedy available to her under existing law. This is untrue and misleading as Petitioner never availed herself of the available remedies of suing Quaempts and Tovey in their individual capacities or pursuing her own remedy in Tribal Court. Petitioner's failure to properly plead the matter as to the individually named defendants upon her first filing, and amending of, the initial complaint, this was not the fault of the CTUIR or the individually named defendants.

Importantly, Petitioner's primary position lies in the theory that the CTUIR waived sovereign immunity by "ratifying" alleged tortious conduct of Quaempts and Tovey who were sued in their official capacity as Director and Executive Director.

The Third Appellate District addressed this position, as well, directly stating, "[Petitioner] argues instead that by ratifying Quaempts and Tovey's actions, the Tribe adopted the conduct as its own, necessarily accepted any liability that arose from that conduct, and thereby expressly waived sovereign immunity. However, [Petitioner] does not cite to a portion of the

record supporting her assertion that the Tribe expressly ratified misconduct by Quaempts and Tovey that was outside the scope of their employment authority . . . Although the Tribe's attorney agreed that the Tribe ratified the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description, the Tribe did not stipulate that Quaempts or Tovey committed illegal or improper conduct outside the scope of their employment authority." (Third Appellate District Decision, Appendix Page 8-9).

With this ruling, the Third Appellate District's opinion should have prevented Petitioner from taking this matter any further. At this point in litigation Petitioner has no legal theory in which to eliminate the CTUIR's Tribal Sovereign Immunity.

Indeed, the Court of Appeal was correct in its decision that (1) Tribal Sovereign Immunity protects the tribe from Lopez's suit, and (2) because the first amended complaint as pleaded asserts claims against Quaempts and Tovey in their official capacities as Director and Executive Director, that Tribal immunity also protects them. (Third Appellate District Decision, Appendix Page 2).

FACTS AND PROCEDURAL HISTORY

Respondent CTUIR is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed.Reg. 4915 (Jan. 17, 2017). The

CTUIR is a confederation of three tribes: the Cayuse, the Umatilla, and the Walla Walla. These tribes lived near the Columbia River and the Blue Mountains in what is now northeastern Oregon State and southwestern Washington.

As a federally-recognized Indian tribe, the CTUIR has exercised the authority under the Indian Self-Determination Act to contract with the Department of the Interior (hereinafter "DOI") to provide various governmental services previously provided by the Bureau of Indian Affairs, a DOI agency. The CTUIR entered a self-governance compact with the DOI under the Indian Self-Determination Act dated January 30, 2006 ("Compact") that remains in effect to this day. The purpose of the Compact is set forth in Article I Section 2 of that document, which provides that the

> compact is to carry out Self-Governance as authorized by Title IV of Pub. L. 93-638, as amended, that . . . transfer[s] control to Tribal governments, upon Tribal request and through negotiation with the United States government, over funding and decision-making of certain Federal programs as an effective way to implement the Federal policy of government-to-government relations with Indian Tribes.

Pursuant to Article II, § 2 of the Compact, the CTUIR and DOI enter annual funding agreements to fund the governmental programs that the CTUIR administers under the Compact. The CTUIR entered a

multi-year funding agreement for the 2010-2014 period dated December 17, 2009 ("MYFA").

Indian Self-Determination Act funding pursuant to the MYFA was provided to the CTUIR for the First Foods Policy Program. Indian Self-Determination Act funding was also provided for the Executive Director position held by Defendant David Tovey, and the Natural Resources Department Director position held by Defendant Eric Quaempts.

All Defendants are located in the State of Oregon. Petitioner acknowledges that she interviewed in Oregon, relocated to Oregon, and worked in Oregon. The Petitioner interviewed with the CTUIR, including with Quaempts, and was hired in October 2013 to serve as the CTUIR First Foods Policy Program manager within the CTUIR's Department of Natural Resources at the CTUIR governmental offices on the Umatilla Indian Reservation. Plaintiff served as the First Foods Policy Program manager from October 16, 2013 to March 20, 2015. As previously noted, the CTUIR First Foods Policy Program is included within the scope of the CTUIR's Compact with DOI under the Indian Self-Determination Act, and the related multi-year funding agreement.

On March 20, 2015, Plaintiff left her position as the First Foods Policy Program manager to take Family Medical Leave, as authorized by Section 4.12 of the CTUIR's TPPM. Plaintiff failed to return to work following her Family Medical Leave which was scheduled

to end on June 12, 2015, resulting in the end of her employment relationship with the CTUIR.

Petitioner stated in her First Amended Complaint Quaempts and Tovey were acting within the scope of their employment with CTUIR. Funding for the positions of Respondents Quaempts and Tovey are paid by CTUIR and are included in the CTUIR's Compact. The lower courts in the Order to Quash/Dismiss Plaintiff's First Amended Complaint and the Third Appellate District Decision have also acknowledged that all the allegations against Quaempts and Tovey allege illegal or improper actions which were carried out while they were acting in their roles as Tribal officials and as Petitioner's supervisors.

On or about January 13, 2017, Petitioner Cynthia Lopez filed a Complaint for Damages against "Eric Quaempts, David Tovey, and The Confederated Tribes of the Umatilla Indian Reservation" for fraud, negligent misrepresentation, fraudulent misrepresentation and unfair business practices in recruiting her for the FFPP manager position.

On or about March 23, 2017, Respondents filed their Motion to Quash/Dismiss Plaintiff's Complaint on the grounds that the causes of action were barred by the Doctrine of Sovereign Immunity and Appellant failed to exhaust her remedies through the Federal Tort Claims Act. The Court heard the motion on or about April 26, 2017.

After taking the matter under submission, the Court vacated its tentative ruling and denied the

motion "without prejudice" in order to accommodate Appellant's request to (1) amend the pleading and (2) conduct "limited discovery regarding 'ratification', which [at oral argument] Plaintiff's counsel argued had a bearing upon the Tribal immunity arguments in this case." Petitioner filed her First Amended Complaint for Damages on or about October 2, 2017.

On or about November 1, 2017, Respondents filed their Motion to Quash/Dismiss Plaintiff's First Amended Complaint on the grounds of sovereign immunity and failure to exhaust the Federal Tort Claims Act remedies. Appellant again argued the alleged criminal conduct occurred in the pre-employment stage and that the individual Respondent's conduct was by definition outside the scope of their employment with CTUIR.

On or about April 27, 2018, the Honorable David I. Brown of the Sacramento County Superior Court entered an order quashing and dismissing Petitioner's First Amended Complaint (FAC) on the grounds the doctrine of sovereign immunity bars Petitioner's causes of action against CTUIR and its employees, Quaempts and Tovey.

The matter was then appealed to California's Third Appellate District. The appellate court correctly concluded Quaempts and Tovey's solicitations were only made pursuant to their employment and official positions within the CTUIR, thus extending Tribal Sovereign Immunity to the individuals. Therefore, Quaempts and Tovey were not acting in their personal

capacities rather, they were acting in the shoes of the CTUIR. Therefore, the doctrine of sovereign immunity barred Petitioner's action in state court.

Additionally, every level of the lower Courts found that CTUIR did not abrogate their immunity through express waiver, as Petitioner has continued to argue, and noted that the "Ninth Circuit has extended Tribal Sovereign Immunity to Tribal employees where the plaintiff sought to hold the tribe or a Tribal entity vicariously liable for the actions of the employees. (*Cook v. AVI Casino Enterprises* (9th Cir. 2008) 548 F.3d 718, 720, 726-727 (*Cook*); *Linneen v. Gila River Indian Community* (9th Cir. 2002) 276 F.3d 489, 492; *Hardin v. White Mountain Apache Tribe* (9th Cir. 1985) 779 F.2d 476, 479-480)." (Third Appellate District Decision, Appendix Page 12).

The matter was then appealed to the California Supreme Court where it was dismissed without comment.

ARGUMENT

Petitioner's assertion that *Lewis* has given her the ability to proceed in suit regardless of *any* sovereign immunity the tribe may assert is inherently incorrect and misleading to the Court. Petitioner's claims based on the actions of the individual employees fail as the actions were all authorized and took place through their official capacity of Tribal functions. The CTUIR did not abrogate or waive its sovereign immunity at

any point during the hiring or employment period of Petitioner.

A. The CTUIR did not waive Sovereign Immunity

As an initial point the CTUIR did not expressly waive Tribal Sovereign Immunity at any time throughout this litigator or the events that led to this litigation. It is well-settled that any waiver of sovereign immunity must be "strictly construed and there is a strong presumption against them. (*Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81 p. 94)."

Furthermore, Indian tribes are not amenable to suit brought by the states or individuals unless there is an unequivocal abrogation of Tribal Sovereign Immunity by Congress or a clear waiver by the tribe. (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-790, 188 L.Ed.2d 1071 (*Michigan*); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe* (2001) 532 U.S. 411, 418, 149 L.Ed.2d 623 (*C & L Enterprises, Inc.*); *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58-59, 56 L.Ed.2d 106 (*Santa Clara Pueblo*); *Puyallup Tribe, Inc. v. Department of Game* (1977) 433 U.S. 165, 170-173, 53 L.Ed.2d 667).

At no time during the lifetime of this litigation has Petitioner accused the CTUIR of expressly waiving Tribal Sovereign Immunity nor has the CTUIR stipulated to or waived Tribal Sovereign Immunity in any matter.

B. This Is Not an Issue of First Impression

Petitioner argues on page 16-17 of her Petition that this was an issue of first impression. This is untrue. While Petitioner's attempt at instituting a new phraseology of "Tribal ratification" may be novel, the concepts and the facts underly this matter are not.

Petitioner essentially concludes that the Tribe should be held liable for any tort caused by a Tribal official's actions. However, the current case law would say otherwise. In *Acres Bonusing, Inc. v. Marston*, (2021) 17 F.4th 901 at 913, the 9th Circuit Court of Appeal references *Cook v. AVI Casino Enterprise, Inc.* (9th Cir. 2008) 548 F.3d 718 stating, "[i]n *Cook*, the plaintiff's asserted a respondeat superior theory of liability that would have made the tribe liable for the Tribal official's actions. *See* 548 F.3d 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 1088; *see also Pistor*, 791 F.3d 1113 (analogous discussion of *Cook*)."

The facts of the present matter are nearly identical to that of *Cook* as explained in *Acres* in that Petitioner sued the individual defendants in order to establish vicarious liability at to the CTUIR. To claim that this was an issue of first impression as to the California courts is knowingly misleading.

Furthermore, a similar issue was addressed in *Lewis*, the matter that Petitioner relies on. This Court in *Lewis* noted that the holding in *Lewis* "follows naturally from the principles discusses above. Indeed, we have applied these same principles to a different question before – whether a state instrumentality may invoke the State's immunity from suit even when the Federal Government has agreed to indemnify that instrumentality against adverse judgement. In *Regents of Univ. of Cal. v. Doe*, [citations omitted in original] an individual brought suit against the University of California, a public university of the State of California, for breach of contract related to his employment at a laboratory operated by the university pursuant to a contract with the Federal Government. We held that the indemnification provision did not divest the state instrumentality of the Eleventh Amendment immunity. 519 U.S. 425, 117 S. Ct. 900 (1997). Our analysis turned on where the potential *legal* liability lay, not from whence the money to pay the damages award ultimately came. Because the lawsuit bound the university, we held, the Eleventh Amendment applied to the litigation even though the damages award would ultimately be paid by the federal Department of Energy." (*Lewis*, 137 S. Ct. 1292).

Here again the decision is remedy focused. As plead, Petitioner's First Amended Complaint directly invokes the CTUIR as well as Quaempts and Tovey in their official capacities. Thus, Tribal Sovereign Immunity barred the action.

C. Petitioners Reliance on *Lewis* is Misplaced as Quaempts and Tovey were not sued in their Individual Capacities

It is long established precedent by the Ninth Circuit Court of Appeals, that Tribal Sovereign Immunity extends to Tribal employees where the plaintiff seeks to hold the tribe accountable for the actions of the employees. *Cook v. AVI Casino Enterprises* (9th Cir. 2008) 548 F.3d 718, 720, 726-727 (*Cook*); *Linneen v. Gila River Indian Community* (9th Cir. 2002) 276 F.3d 489, 492; *Hardin v. White Mountain Apache Tribe* (9th Cir. 1985) 779 F.2d 476, 479-480).

In *Lewis*, the plaintiffs sued the driver of a limousine personally, and did not name the tribe as a defendant. (*Lewis*, 137 S. Ct. 1289-1290). The United States Supreme Court determined that defendants in an official-capacity action may assert sovereign immunity, however defendants in an individual capacity action may not, though personal immunity defenses can apply. (*Id.* pp. 1291-1292).

What *Lewis* held is, "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." The

United States Supreme Court continued, "[t]hat 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" (emphasis added). (*Lewis*, 137 S. Ct. 1289).

In the matter at bar, it is clear that Petitioner sued Quaempts and Tovey in their official capacities as representatives of the tribe and not in their individual capacities. Thus, the *Lewis* case in inapplicable in this matter. *Lewis* allows for a Plaintiff to file suit against a Tribal member, individually, even though they may have been working in an official capacity when the alleged tortious actions occurred.

The Third Appellate District Court correctly found, after a review of all the submitted pleadings, that the first amended complaint, as pleaded, asserts claims against Quaempts and Tovey in their official capacities and not as individuals, thus they are also protected by Tribal Sovereign Immunity. "Tribal sovereign immunity protects Tribal employees sued in their official capacities." (*Lewis v. Clarke* (2017) ___ U.S. ___, 197 L.Ed.2d 631, 137 S. Ct. 1285, 1294 (*Lewis*).

Petitioner also states that she is left without state remedies that *Lewis* is intended to provide. However, Petitioner never invoked the remedies addressed in *Lewis* as she did not sue Quaempts or Tovey in their individual capacity. She also asserts that the California Court's approach leaves tort victims empty-handed

with no state remedies whenever a tribe ratifies a Tribal business employee's allegedly tortious conduct.

This is misleading however, for two reasons. First the tribe never ratified any tortious conduct, as shown by the lack of any supporting evidence in the record and second, because Petitioner never invoked the available state remedy of suing Quaempts and Tovey in their individual capacities.

It is clear that Petitioner's reliance on *Lewis* is misplaced as the individual defendants were never sued in their individual capacity, which is the very situation contemplated by *Lewis*.

D. Tribal Sovereign Immunity Extends to Employees Acting in Their Official Capacities and Within the Scope of their Authority

The Ninth Circuit Court of Appeals has held that sovereign immunity extends to Tribal employees, provided they are "acting in their official capacity and within the scope of their authority." *Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718, 727. Sovereign immunity applies with equal force both on and off reservation, and for both governmental and commercial activities. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 760, this Court held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off reservation." California courts

have followed this rule. *See*, *e.g.*, *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 390 (reversing trial court and holding that Tribal casino was immune from suit under sovereign immunity for activities taken by the casino off Tribal property).

In *Cook*, as here, the Petitioner sued individual employee defendants in name, but sought recovery from the tribe by alleging that it was vicariously liable for its employees' actions. In *Cook*, the court observed that the principles that motivate the immunizing of Tribal officials from suit – protecting a tribe's treasury, as well as preventing a plaintiff from bypassing Tribal immunity simply by naming a Tribal official – apply equally to Tribal employees when they are sued in their official capacity. *Cook*, 548 F.3d 727. The individual respondents, Quaempts and Tovey, are clearly sued in their official capacities; this is seen in both the Appellate Opinion and First Amended Complaint. Further, Petitioner cannot circumvent sovereign immunity through mere artful pleading in her First Amended Complaint. *Cook*, 548 F.3d 727.

Despite her argument, Petitioner is asserting claims against the individually named Respondents in their official, not individual capacities. Moreover, recent cases have applied a "remedy sought" analysis to determine whether Tribal Sovereign Immunity would apply to a Tribal employee. *Maxwell v. County of San Diego* (9th Cir. 2012) 697 F.3d 941. Those cases expressly recognize that where the tribe is the real, substantial party in interest, Tribal Sovereign Immunity bars a suit against the Tribal employees.

Petitioner's continued attempts to diminish the reality that Quaempts and Tovey were operating in their official capacity, and were sued in their official capacity, and as such are entitled to sovereign immunity are of no avail. In *Pistor*, The Ninth Circuit Court of Appeals has held that Tribal Sovereign Immunity does not extend to a Tribal employee sued in his or her individual capacity. *Pistor v. Garcia* (9th Cir. 2015) 791 F.3d 1104, 1111. The Ninth Circuit Court of Appeals held that Tribal Sovereign Immunity did not bar the suit because the plaintiffs sought to hold the Tribal defendants liable in their individual capacities and did not seek money damages from the tribe, and the Tribal defendants did not show that a judgement would interfere with Tribal administration or restrain the tribe from acting. (*Id.* pp. 1108, 113-114). The Ninth Circuit Court of Appeals also noted that the plaintiffs had not sued the tribe in *Pistor.* (*Id.* pp. 1113).

Additionally, when an action challenges the employment decisions of a tribe, it can affect Tribal governance and administration. (*EEOC v. Karuk Tribe Housing Authority* (9th Cir. 2001) 260. F. 3d 1071, 1080-1082).

It is evident that when a litigant wants to sue an individual in their individual capacity, they will only sue the individual, and not the tribe as well. Therefore, while Petitioner has alleged that this is a novel area of law for alleged Tribal Ratification, it is in fact established law and precedent that when a tribe and its employees are sued, that sovereign immunity applies.

E. Quaempts and Tovey Were Acting in Official Capacity At All Times Relevant in This Matter

Petitioner has alleged that the Appellate Court has wrongfully held that Quaempts and Tovey's actions were in their representative or official capacities and not their individual capacities. (Third Appellate District Decision, Appendix Page 17). However, Petitioner fails to acknowledge that neither the first amended complaint nor Petitioner's declaration to the lower court stated that Petitioner was seeking damages as to Quaempts and Tovey, individually. Instead, it was clear from the pleadings that Petitioner sued Quaempts and Tovey in their official capacities.

The Appellate Court acknowledged that "claims against individual Tribal defendants were not shielded by the tribe's sovereign immunity because the claims were explicitly alleged against the Tribal defendants in their individual capacities and if the plaintiff prevailed on its claims against the Tribal defendants, only they personally and not the tribe would be bound by the judgement" as stated in *JW Gaming Development v. James* (9th Cir. 2019) 778 Fed.Appx. 545, 545-546. (Third Appellate District Decision, Appendix Page 13) As the Appellate Court rightfully addressed, Petitioner named the tribe in the First Amended Complaint and sought to hold the tribe vicariously liable for the conduct of Quaempts and Tovey. (Third Appellate District Decision, Appendix Page 13) This argument fails as stated by the *Acres* court and recited above.

In this instance, Petitioner's request for a Writ of Certiorari should be denied as this is a settled area of law that has been established by *Lewis*.

F. Petitioner's Ratification Theory Does Not Apply to the Facts of this Case

Petitioner's ratification argument is based on a false premise which makes little sense in this application. Petitioner is arguing that the CTUIR by "ratifying" the alleged illegal conduct of Quaempts and Tovey has waived sovereign immunity.

Again, the Third Appellate District found no support for this argument stating, "[Petitioner] does not cite to a portion of the record supporting her assertion that the Tribe expressly ratified misconduct by Quaempts and Tovey that was outside the scope of their employment authority . . . Although the Tribe's attorney agreed that the Tribe ratified the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description, the Tribe did not stipulate that Quaempts or Tovey committed illegal or improper conduct outside the scope of their employment authority." (Third Appellate District Decision, Appendix Page 8-9).

Petitioner's ratification argument is, by allegedly ratifying the allegedly tortuous actions of the individual defendants the tribe has adopted the actions of the individuals which Petitioner alleges were outside the scope of the individual's employment and because of this the CTUIR has waived sovereign immunity.

As stated by the Appellate Court, Petitioner did not cite to any portion of the record that shows CTUIR expressly ratified misconduct by Quaempts and Tovey that was outside of their employment authority. (Third Appellate District Decision, Appendix Page 8).

The Appellate Court has provided extensive case law establishing that waiver of Tribal Sovereign Immunity cannot be implied but must be explicit and unequivocally expressed. (Third Appellate District Decision, Appendix Page 9). Additionally, while Petitioner may believe that CTUIR's ratification of the employee's conduct is an express waiver of sovereign immunity, it is simply a gross mischaracterization of established case law regarding the abrogation and waiver of sovereign immunity that is well established and is not an unsettled or novel area of law.

Petitioner also has not presented a clear theory of how the CTUIR's alleged ratification of Quaempts and Tovey action waives sovereign immunity. Petitioner has included a thorough explanation of "ratification" but has not cited to any cases that relate the ratification of illegal actions to the loss of sovereign immunity.

Additionally, the entire ratification argument is based on the false premise that, while not included in this Petition, was as issue presented in the Petition to the California Supreme Court, namely, "[i]t is undisputed that *after* Dr. Lopez commenced her lawsuit and while sovereign immunity was at issue, the CTUIR voluntarily elected, by express ratification, to adopt the alleged fraudulent and illegal pre-employment actions

of Quaempts and Tovey," (Petition for California Supreme Court Review at 28) and that "the CTUIR accepted the unauthorized conduct as its own and thereby necessarily accepted the accompanying liability to Quaempts and Tovey." (Petition for Review California Supreme Court Review at 28). Respondents vigorously dispute this characterization of the prior events and further take issue with Petitioner making any representation as to undisputed facts at any time throughout this litigation.

The CTUIR approved the recruitment and hiring of Petitioner and tasked Quaempts and Tovey to hire and oversee her *prior* to this initial suit being filed. Therefore, the CTUIR gave Quaempts and Tovey the authority to hire Petitioner in their official capacity. Quaempts and Tovey hired and supervised Petitioner in their official capacity. The actions of Quaempts and Tovey are inextricably linked to their positions within the CTUIR which implies that this an official capacity matter as held by the Appellate Court.

CONCLUSION

Pursuant to the foregoing, Petitioner has failed to present any issue of fact reviewable by the United States Supreme Court as Petitioner has failed to establish that there are unsettled legal principles. The Appellate Opinion reflects the application of settled law. Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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