No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

BOB BURRELL and SUSAN BURRELL,

Petitioners,

v.

LEONARD ARMIJO, Governor of Santa Ana Pueblo and Acting Chief of Santa Ana Tribal Police; LAWRENCE MONTOYA, Lt. Governor of Santa Ana Pueblo; NATHAN TSOSIE, Tribal Administrator of Santa Ana Pueblo; JERRY KINSMAN, Farm Administrator of Santa Ana Pueblo; and the SANTA ANA PUEBLO;

Respondents.

_____

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

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BRIEF IN OPPOSITION

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OPINIONS BELOW

Respondents would note that the decision of the Tenth Circuit Court of Appeals, review of which is sought by the Petition in this case, is reported at 456 F.3d 1159 (10th Cir. 2006).

FACTS OF THE CASE

There are two matters of relevance here that are not clearly disclosed in Petitioners' 17-page Statement of Facts: first, as the Tenth Circuit noted, all of Petitioners' claims relative to their former lease of Santa Ana lands are foreclosed by the fact that the Bureau of Indian Affairs, on February 11, 1999, found that the Petitioners were in breach of their lease in various respects, and cancelled the lease. That decision was affirmed by the Albuquerque Area Office of the BIA, by letter dated May 26, 1999, and by the Interior Board of Indian Appeals, by decision dated May 17, 2000. Petitioners sought no further review of that decision. *Burrell v. Armijo*, 546 F.3d 1159, 1163-64 (10th Cir. 2006). That fact, the court of appeals noted, "prevents [the Burrells] from asserting a breach of lease claim here." *Id*. at 1174.

Second, notwithstanding the far-ranging character of the allegations in the Complaint,[1] the only legal claim actually asserted against the Pueblo and the individual Defendants in this case is the claim that on July 24, 1997, the Santa Ana Pueblo Tribal Council voted to buy out Petitioners' lease for $500,000, but that individual tribal officials wrongfully failed to carry out that decision. That constitutes the core of Petitioners' claim under 42 U.S.C. §1981, *see*

[1]Following remand of this case to the District Court from the Tenth Circuit Court of Appeals, Defendants filed a Motion to Strike a large portion of the Complaint, on the ground that the allegations contained therein were impertinent, immaterial and scandalous, thus warranting relief under Fed.R.Civ.P. 12(f). *Burrell v. Armijo*, No. 02-CV-00542 (D.N.M.), Docs. No. 44, 45. That motion is pending.

Complaint at ¶¶ 88 - 90, App. at 24,[2] and of their claim under §1985 (which merely alleges a conspiracy by the individual Defendants to violate the Burrells' rights under §1981); *id*. at ¶¶ 97 - 98, App. 25.

ARGUMENT

Rule 10 of the Rules of this Court notes that a petition for writ of certiorari "will be granted only for compelling reasons," and sets forth a list of the types of circumstances that would warrant this Court granting review of a decision by a federal court of appeals. That Rule states, in pertinent part, that this Court would consider contentions that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As is apparent from the Petition, Petitioners in this case urge none of these factors, or anything like them, in support of their request that this Court undertake review of the decision of the Tenth Circuit Court of Appeals in this case. Indeed, their principal objection to the decision below is that it *follows* a governing decision of this Court (along with several other decisions of

[2]"App." references are to pages of the Appendix filed by Petitioners in the Tenth Circuit Court of Appeals.

this Court that are not cited in the Petition, and numerous decisions of the Tenth Circuit and the other federal courts of appeals). The Petition presents no coherent argument supporting Petitioners' claim that this Court should reverse the decision that is its primary target, nor does it otherwise establish any sound, much less "compelling," grounds on which this Court should grant review. The Petition should be denied.

The only question for review identified in the Petition is whether the Tenth Circuit Court of Appeals "properly dismiss[ed] the Pueblo of Santa Ana based on tribal sovereign immunity." Petition at i. But virtually the entirety of Petitioners' argument is directed at the contention that this Court should overturn a nearly 30-year-old decision of this Court, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Petition fails to justify this dramatic plea with any sound legal or policy argument, however, and in any event, even were this Court to accept the invitation, the overturning of *Santa Clara*, alone, should have no effect on the decision below.

Santa Clara involved a claim by a female member of the Pueblo of Santa Clara that a provision of Santa Clara law, that forbade children of female members of the Pueblo who married outside the Pueblo from ever becoming members of the Pueblo, discriminated against her on the basis of her sex and against her children on the basis of their ancestry, and thus violated the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. §1302(8) ("ICRA"). From the time of that Act's enactment ten years earlier, the federal district and appellate courts had repeatedly and virtually unanimously held that it was enforceable by private actions in federal court, and in most cases they had held that the ICRA abrogated tribal sovereign immunity for purposes of actions brought to enforce its terms. *See, e.g.*, *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975). In *Santa Clara*, however, considering the ICRA for the first time, this

Court disagreed. In a 7-to-1 decision, the Court held that Congress had not intended to create any private cause of action for enforcement of the ICRA in the federal courts (except with respect to claims by persons who were held in tribal custody, who had been given a *habeas corpus* remedy under 25 U.S.C. § 1303), and that the exclusive forum for such enforcement was the tribal court of the tribe against whom the claim was brought. It further ruled (by a 6-to-2 vote) that in any event the Act did not abrogate tribal sovereign immunity.

The ruling that the ICRA could not be enforced by an action in federal court was by far the principal and most notable aspect of the *Santa Clara* decision. That issue has never again come before this Court. Yet for this Court to overturn that decision would be of no assistance to the Petitioners herein, as Petitioners have never pleaded, invoked or otherwise asserted any claim under any provision of the ICRA in any pleading filed in this case, at any stage during the nearly ten years that this dispute has been in litigation. The only claims asserted in the Complaint herein are claims based on 42 U.S.C. §§ 1981, 1983 and 1985, a claim based on the Burrells' former lease, and a claim entitled "Count Based on Respondent Superior." *See* Complaint at ¶¶ 86 - 105; App. at 23-26.

Moreover, overturning *Santa Clara* would be of little value to Petitioners even on the tribal sovereign immunity issue, which is, after all, the sole issue on which they are actually seeking this Court's review. This Court has repeatedly, before and since *Santa Clara*, affirmed the sovereign immunity of federally recognized tribes from unconsented suit, most recently in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *and see C&L Enters., Inc. v. Citizens Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) (affirming the doctrine of tribal sovereign immunity, but finding that the tribe had effectively waived that immunity by agreeing

to an arbitration clause in a contract). Petitioners do not ask that this Court overturn any of those cases, yet without undoing this Court's entire body of tribal sovereign immunity jurisprudence, Petitioners would not seem able to achieve the reversal of the portion of the Tenth Circuit decision below to which they object.

It might be noted, additionally, that while Petitioners point out that this Court has acknowledged that the rule of *stare decisis* is somewhat less inflexible when the decision in question involves a matter of constitutional interpretation than it is where interpretation of a statute is involved, *see* Petition at 22-23, Petitioners fail to acknowledge that *Santa Clara* was of the latter category, not of the former. *Santa Clara* only purported to interpret the Indian Civil Rights Act, not any constitutional provision involving Indians. Congress has been free to amend the ICRA so as to undo this Court's decision in *Santa Clara*, throughout the nearly three decades since it was decided, but has taken no such action.[3]

Indeed, in *Kiowa Tribe*, while observing that the doctrine of tribal sovereign immunity appears to have "developed almost by accident," 523 U.S. at 756, and that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," *id*. at 758, this Court declined to accept the Respondent's invitation to repudiate or limit the doctrine, stating, "we defer to the role Congress may wish to exercise in this important judgment." *Id*.

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[3]In contrast, Congress acted swiftly to undo the effect of a later decision of this Court, *Duro v. Reina*, 495 U.S. 676 (1990). That case held that the dependent status of Indian tribes under federal supervision meant that those tribes had no criminal jurisdiction over non-member Indians. Less than a year after it was decided, Congress amended the ICRA by adding to the definition of "powers of self-government" in 25 U.S.C. §1301(2) the phrase, "and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." The validity and effectiveness of that enactment, in restoring tribal criminal jurisdiction over non-member Indians, was recently affirmed by this Court in *United States v. Lara*, 541 U.S. 193 (2004).

Petitioners herein offer no rationale for this Court to depart from that considered judgment, nor do the facts of this case suggest any such rationale. Petitioners are asking the federal courts essentially to interpret unwritten Santa Ana Pueblo tribal law, to determine that certain tribal officials violated their official duties, based on some vaguely articulated discriminatory animus toward Petitioners, by failing to carry out a decision that Petitioners claim was made by the Pueblo's tribal council (and that, were it ever made, which Respondents emphatically deny, was indisputably repudiated by the Council not long afterward; *see* Armijo Aff., App. 31-34). The matters at issue in this case, thus, consist solely of internal matters of the Pueblo's traditional tribal government, and its dealings with a lessee of tribal land, and it has the very kind of "meaningful nexus to the tribe's land [and] its sovereign functions," *Kiowa Tribe*, 523 U.S. at 764 (Stevens, J., dissenting) that would presumably even have satisfied the dissenters in *Kiowa Tribe.*[4]

The lack of any principled basis for Petitioners' attack on the sovereign immunity ruling in the decision below is revealed plainly in their Petition at 27, where they back away from asking the Court to eliminate the tribal sovereign immunity doctrine altogether, and suggest rather that it should only be abrogated as to the Pueblo of Santa Ana alone, on the ground that, as Petitioners claim, "this Indian tribe is far from poor, as it has made gigantic amounts of money with its casino, and has extensive commercial enterprises." Just abrogating Santa Ana's immunity, Petitioners suggest, "could still leave open the possibility that other Indian tribes, who

[4]Respondents would note, moreover, that the Tenth Circuit did not leave Petitioners without a remedy, despite its dismissal of the claims against the Pueblo. It reversed the portion of the district court decision dismissing the claims against the individual defendants based on 42 U.S.C. §§ 1981 and 1985, and remanded those for further consideration.

are not rich, could still have sovereign immunity issues addressed on a case by case basis." *Id*. There is of course nothing in the record of this case (other than the ravings in Petitioners' Complaint, repeated in the Petition's Statement of Facts) as to the "wealth" of the Pueblo of Santa Ana (and Respondents would simply note that Petitioners' unfounded hyperbole on this subject is as baseless as it is beside the point), but this Court has never held that tribal sovereign immunity is in any respect tied to or dependent on wealth or impecuniousness. In short, Respondents respectfully suggest that Petitioners have failed to set forth any sound grounds for upsetting *Santa Clara* or the doctrine of tribal sovereign immunity, as to Santa Ana Pueblo alone or as to all or any group of Indian tribes.

That should be the end of it, but Petitioners also, in the body of their Petition (but not in the question presented), urge that their claim based on 42 U.S.C. § 1983 should be revived. *See* Petition at 24, 29. That claim was thrown out not on sovereign immunity grounds, but because it was apparent from the Complaint that no valid claim was stated under that section. As the Tenth Circuit noted, *Burrell*, 456 F.3d at 1174, the Burrells' Complaint "alleges that the individual tribal officials acted under color of tribal law, as opposed to state law." An action under § 1983, it observed, "is unavailable 'for persons alleging deprivation of constitutional rights under color of tribal law.'" *Id*. (quoting *R. J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983)). Petitioners' new theory, set out for the first time in their Petition, at 24-25, is that there might be some unknown possibility that Santa Ana received state money for its police department, which might provide a basis for arguing that defendant Leonard Armijo was acting under state rather than tribal law when he requested Mr. Burrell to stop baling hay at night, under a theory adopted in a Ninth Circuit case, *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). This

flimsy chain of speculation fails to establish any basis for overturning the Tenth Circuit decision on this ground. First, only in the most "exceptional circumstances" does this Court address arguments made for the first time in a petition for writ of certiorari, *see, e.g., Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958), a standard plainly not met here. But more to the point, Petitioners' factual scenario is at odds with the record (defendant Armijo was clearly acting in his capacity as Governor, not as a tribal police officer, *see* Petition at 9, especially since the Pueblo has no criminal jurisdiction over the Burrells; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)), and the mere receipt of state money by the Pueblo, if there were any, would not establish "state action" as required for a § 1983 claim, even under *Evans*. In that case, the tribal officers were also employed by the City of Browning, and were allegedly acting in that capacity, in concert with city police officers. 869 F.2d at 1348. No facts anywhere close to those are even imagined by Petitioners, much less suggested by the record here. Petitioners' suggestion that the § 1983 claim might have some viability is merely frivolous.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the Petition be denied.

Respectfully submitted,

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