

**In the
Supreme Court of the United States**

ACRES BONUSING, INC; JAMES RAYMOND ACRES,
Petitioner,

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 STOUDE; 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

**OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

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INTRODUCTION

There are at least three reasons why the Petition does not warrant this Court's review.

First, contrary to Petitioners' contention, there is not a split among several Circuits about whether judges, law clerks and court clerks possess absolute or merely qualified judicial or quasi-judicial immunity to suits for money damages. The cases upon which Petitioners base their assertion of the existence of a Circuit split involve actions arising under 42 U.S.C. § 1983 or similar statutes that allow suits for money damages for deprivation of civil rights, where the issue of absolute or qualified immunity is most relevant. No such claim is made in this case, and even in the context of cases based on claimed violations of civil rights, what Petitioners contend is a split is a difference in semantics, rather than substance.

Second, although the Ninth Circuit did not cite this Court's decision in *Antoine v. Byers Anderson*, 508 U.S. 529 (1993), the panel followed *Anderson's* analytic framework in affirming the district court's decision that the Tribal Court's Chief Judge Lester Marston ("Judge Marston"), Court Clerk Anita Huff ("Clerk Huff") and Law Clerks Ashley Burrell, Darcy Vaughn, Cooper DeMarse and Kostan Lathouris (collectively "Law Clerks") are entitled to absolute judicial or quasi-judicial immunity. The Ninth Circuit did *not* hold that absolute judicial or quasi-judicial immunity attaches to individuals simply because of their titles or performance of merely administrative duties, nor have

other Circuits under similar factual circumstances; instead, the panel focused on the Respondents' functions in the adjudicatory process.

Third, the Ninth Circuit has remanded the case to the district court for further proceedings regarding the eleven remaining defendants¹ not cloaked with absolute judicial or quasi-judicial immunity. These defendants have not yet filed answers. Instead, the remaining defendants have filed motions to dismiss under F.R.Civ.P. 12(b)(1), (2) and (6) based on the same allegations of the Complaint as apply to Judge Marston, Clerk Huff and the Law Clerks, and several also have moved under F.R.Civ.P. 12(e) for a more definite statement.² If the district court grants the motions to dismiss for failure to state a claim on which relief may be granted, and thereafter Petitioners are unable to cure the deficiencies by alleging facts sufficient to state a cognizable claim on which relief may be granted on the one federal claim in their Complaint, the case would become moot even as to Judge Marston, Clerk Huff and the Law Clerks, leaving nothing for this Court to decide.

¹ The Petition lists as "Respondents" all of the persons and entities named as defendants in the district court, but the question presented by the Petition pertains only to Judge Marston, Clerk Huff and the Law Clerks. On remand, the other Respondents remain defendants, and thus are referred to as such.

² Currently scheduled to be heard or submitted without oral argument on May 18, 2022.

STATEMENT OF THE CASE

The dispute giving rise to Petitioners' district court action originated in a lawsuit brought in the Tribal Court of the Blue Lake Rancheria ("Tribe"), a federally recognized Indian Tribe. In that case, *Blue Lake Casino Hotel v. Acres et al.*, Tribal Court for the Blue Lake Rancheria, Case No. C-15-1215 LJM, hereinafter "*Blue Lake v. Acres*", the Tribe sued Petitioners to recover the money that the Tribe paid to Petitioners for a gaming system for its Blue Lake Casino that failed to perform as Petitioners had represented. Judge Marston was the original presiding judge in the tribal court case, but later voluntarily recused himself and appointed the Hon. James N. Lambden, a retired justice from the California Court of Appeal to replace him. Eventually, Judge Lambden granted Petitioner Acres' motion for summary judgment, after which the Tribe voluntarily dismissed its claims against ABI.

Petitioner Acres first filed suit in the California Superior Court³ seeking millions of dollars in damages against Judge Marston, Clerk Huff, the Law Clerks, the Tribe's Vice Chairperson/Tribal Administrator/Casino CEO Arla Ramsey ("Ramsey"), former Casino executive and Tribal Director of Economic Development Thomas Frank ("Frank"), the Tribe's outside General Legal Counsel David Rapport

³ *Acres v. Marston, et al.*, Sup. Ct. No. 34-2018-00236829-CU-PO-GDS.

("Rapport"), an association of sole practitioners known as "Rapport and Marston" ("R&M"), two law firms (Boutin Jones, and Janssen Malloy); and various individual attorneys associated with those law firms that represented the Tribe in *Blue Lake v. Acres*, and successfully defended the Tribal Court, Judge Marston and Clerk Huff against Petitioner Acres' two federal district court lawsuits that sought and failed to halt the Tribal Court proceedings.

The Superior Court dismissed the action against all of the named defendants on the basis that the Tribe was the real party in interest, and thus that the action was barred by the Tribe's sovereign immunity. As to Judge Marston, Clerk Huff and the Law Clerks, the Superior Court also held, based on its review of both federal and California case law, that the action was barred by their absolute judicial or quasi-judicial immunity.

Petitioner Acres appealed from the Superior Court's judgment dismissing the action. While that appeal was pending, Petitioner Acres and his company (ABI) filed suit in the U.S. District Court against all of the defendants named in the Superior Court action, based on exactly the same facts. The only material differences between Petitioner Acres' Superior Court action and Petitioners' district court action were that Petitioner ABI, which is wholly owned and controlled by Petitioner Acres, alone sought relief on the seven state-law claims that the Superior Court had dismissed, and both Petitioners joined in a new claim under RICO, based on the same facts as Petitioner

ABI's state-law claims.

As had the Superior Court, the district court found that the Tribe was the real party in interest, and on that basis dismissed the action against all of the named defendants, holding that they were cloaked with the Tribe's unwaived sovereign immunity. Pet. App. 56a. Citing this Court's holdings in *Stump v. Sparkman*, 435 U.S. 349 (1978) and *Mireles v. Waco*, 502 U.S. 9 (1991), the district court found as an alternative ground for dismissal of Judge Marston, Clerk Huff and the Law Clerks that their alleged acts or omissions regarding Petitioners were judicial or quasi-judicial acts directly related to performing their respective roles in the adjudication of *Blue Lake v. Acres*; thus, the action against those defendants was barred by absolute judicial or quasi-judicial immunity. Pet. App. 58a. Petitioners appealed.

The Ninth Circuit determined that the Tribe was not the real party in interest because a judgment would not expend itself on the Tribe's treasury, and on that basis reversed the district court's judgment that the Tribe's sovereign immunity compelled dismissal of the entire action. However, the Ninth Circuit affirmed the district court's dismissal of the action as against Judge Marston, Clerk Huff and the Law Clerks based on its determination that the functions these court personnel performed entitled them to absolute judicial or quasi-judicial immunity.

As to Judge Marston, the Ninth Circuit "easily conclude[d]" that he possessed absolute judicial immunity because all of his actions—initially deciding

not to recuse himself, ruling on procedural motions, discussing the case with his law clerks, and eventually recusing himself—were "all functions 'normally performed by a judge'[" Judge Marston's activities off the bench had nothing to do with either Petitioners or *Blue Lake v. Acres*, and thus were not actionable. App. 29a.

The Ninth Circuit affirmed the district court's determination that Clerk Huff possessed absolute quasi-judicial immunity, citing circuit authority recognizing that such immunity protects court clerks from actions seeking money damages based on alleged civil rights violations, "when they perform tasks that are an integral part of the judicial process."⁴ App.30a. Petitioners' Complaint did not allege that Clerk Huff violated any constitutionally protected civil rights or acted in excess of her jurisdiction; rather, the only specific acts by Clerk Huff identified in Petitioners' Complaint consisted of her initial mistaken issuance of the wrong summons—an error she promptly corrected—and her rejection of a filing by Petitioner Acres that she determined did not comply with the Tribal Court's rules. Had she allowed the filing of non-compliant papers, Judge Marston would have stricken them, so her action, which required her to evaluate the filing in light of the Tribal Court's rules, was quasi-judicial, not purely administrative.

⁴ Thus distinguishing such actions from those relating solely to internal court administration, or that are *ultra vires*, such as removing a court filing for purely personal reasons, as in *Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004).

The Ninth Circuit also determined that Judge Marston's Law Clerks' functions were "... most intimately connected with the judge's own exercise of the judicial function[,]" and on that basis affirmed their entitlement to absolute immunity. App. 30a. The Ninth Circuit noted that the outside activities of Judge Marston's Law Clerks did not form a basis for Petitioners' claims.⁵

After the Ninth Circuit entered its judgment, the California Court of Appeal entered its judgment in *Acres v. Marston*, 71 Cal. App. 5th 859 (2021), Petition for Review Denied, No. S272460 (Feb. 23, 2022). The California Court of Appeal agreed with the Ninth Circuit that the Tribe was not the real party in interest, and thus that tribal sovereign immunity did not bar the action. The California Court of Appeal also agreed with the Ninth Circuit that Judge Marston, Clerk Huff and Judge Marston's Law Clerks were protected by absolute judicial or quasi-judicial immunity under this Court's and California precedents. *Acres v. Marston*, 72 Cal. App. 5th 417, 442, 287 Cal. Rptr. 3d 327, 343 (2021). The Court of Appeal's final judgment specifically found that Petitioner Acres had not been harmed by Judge Marston's initial assignment of the case to himself,

⁵ "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." *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 916 (9th Cir. Nov. 5, 2021); *see also*, *Acres v. Marston*, 71 Cal. App. 5th 859, 884 (2021) ["But Acres has not alleged that he was harmed simply because these respondents provided legal advice on these topics."]

hiring of the Law Clerks, or by his or their activities unrelated to the adjudication of *Blue Lake v. Acres*.⁶ The Court of Appeal found likewise regarding Clerk Huff.⁷

Thus far, the "record" in this action consists of the Complaint, Respondents' initial motions to dismiss and supporting materials filed in support of their factual challenges to the district court's jurisdiction, Anti-SLAPP and other preliminary motions, and the remaining defendants' pending motions to dismiss. With the exception of the Petition's identification of the parties and a chronology of the actual proceedings in the courts below (including the Tribal Court), most of what the Petition presents as material "facts" are not facts at all; they are nothing more than accusations and suspicions unanchored in any actual evidence or Petitioners' personal knowledge. The Ninth Circuit was careful to note this by inserting qualifiers such as "allegedly" in its recitation of the record upon which it based its decision.

In the first paragraph of the Petition's "Factual Background," the Petition states that, "The Law Offices of Rapport and Marston has a longstanding

⁶ "Acres never alleged nor suggested that he suffered any harm from Judge Marston's mere assignment of the case." *Acres v. Marston*, 71 Cal. App. 5th 859, 885 (2021).

⁷ "But similar to above, even supposing all that is true, Acres never alleged that he suffered any harm from these activities, and so we fail to see the relevance of Acres's contentions." *Acres v. Marston*, 71 Cal. App. 5th 859, 885 (2021).

relationship with the Blue Lake Rancheria." Pet., p.2. The Ninth Circuit specifically noted that the Complaint *alleged* a long-standing relationship between the Law Offices of Rapport and Marston and the Tribe. App. 8a. This was not found as a fact, and it is not a fact at all. "The Law Offices of Rapport and Marston" as such is not a legal entity at all, and thus has no relationship with the Tribe. As demonstrated by the sworn and unrebutted declarations of David Rapport (Dkt. 32-6) and Lester Marston (Dkt. 32-4) submitted in support of Respondents' original factual challenge to the district court's jurisdiction based on the Tribe's sovereign immunity, David Rapport and Lester Marston are sole practitioners who share office space and overhead, but have entirely separate contractual relationships with their respective clients, including the Tribe, and they do *not* share revenues. The "Law Offices of Rapport and Marston" are exactly that: literally offices, not a law firm.

In the second paragraph of the Petition's "Factual Background" (Pet. p. 2), Petitioners state that Tribal Court Clerk Anita Huff "was supervised in her work by Ramsey, Blue Lake Casino's CEO." Petitioners repeat this allegation in the fourth paragraph of their statement of the case's procedural history. Pet. p. 4. This is incorrect. In fact, Ramsey occupied multiple positions in the Tribe's government, including elected Vice Chairperson, Tribal Administrator, and Associate Judge of the Tribal Court (although not in the Tribe's lawsuit against Petitioners), as well as serving as the Casino's CEO.

Respondent Huff also performed multiple duties for the Tribe, including serving as the Tribal Court Clerk. As the district court found, "[i]n 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." App. 54(a). In other words, Ramsey did not supervise Clerk Huff in Ramsey's capacity as Casino CEO.

Finally, the Petition assumes, with absolutely no evidentiary support, and contrary to the sworn declarations of David Rapport (Dkt. 32-6) and Lester Marston (Dkt. 32-4), that Respondents Marston, Huff, and Judge Marston's four Law Clerks all somehow were involved in a malicious conspiracy against Petitioners. Adjectives and speculation are not facts, and Respondents' unrebutted sworn declarations show exactly the opposite: *i.e.*, Judge Marston knew nothing of either the agreement between the Tribe and Petitioners or *Blue Lake v. Acres* until he reviewed the Tribe's Complaint filed in that action, and had no *ex parte* contacts with any of the lawyers or parties involved in that action; although Clerk Huff mistakenly issued an incorrect summons in *Blue Lake v. Acres*, she quickly corrected her error and issued the correct summons, she rejected one of Petitioner Acres' Tribal Court filings as non-compliant with the Tribal Court's rules, and she served orders and received and filed pleadings in that action; and none of the Law Clerks had prior knowledge of *Blue Lake v. Acres* and no involvement in that action other than assisting Judge Marston by performing legal research, drafting

opinions and orders for his use, and assisting him in conducting hearings in the case.

Unlike the court employee in *Forrester v. White*, 484 U.S. 219 (1988) whose suit against the judge who demoted and then discharged her was based on violating her federally-protected rights against discriminatory treatment, neither Judge Marston's hiring of the Law Clerks, nor Clerk Huff's mistaken issuance of the original summons in *Blue Lake v. Acres*, violated Petitioners' federally-protected civil rights.

REASONS FOR DENYING THE PETITION

The Petition purports to present the question whether,

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?

For the reasons set forth in the Introduction of this brief in opposition to the Petition, in the context of this case this question is a pure abstraction, because the Ninth Circuit's decision substantively applied the "judicial function" approach to applying absolute judicial and quasi-judicial immunity established by *Forrester v. White*, and *Antoine v. Byers Anderson: i.e.*,

functions directly involved in and necessary for the adjudication of disputes. Moreover, the entire action is likely to be mooted by its dismissal on remand. Accordingly, the Petition should be denied.

I. THE PETITION SHOULD BE DENIED AS PREMATURE.

As noted above, all eleven defendants remaining in the action on remand from the Court of Appeals have filed motions to dismiss under F.R.Civ.P. 12(b)(1), (2) and/or (6), or in the alternative under F.R.Civ.P. 12(e) for an order requiring Petitioners to file a more definite statement. Those motions are set for hearing on May 18, 2022.

The purported factual allegations of the Complaint are the same for all of the defendants, including the Tribal Court personnel. Thus, if the district court grants the pending motions to dismiss for failure to state a claim upon which relief may be granted, the entire action would become moot as to all named defendants, including Judge Marston, Clerk Huff, and the Law Clerks. Even if the district court were to determine that Petitioner ABI has stated one or more claims based on California law, if the district court were to determine that Petitioners have not stated and cannot state a claim for relief under RICO, the district court most likely would exercise its discretion to decline to exercise supplemental jurisdiction over Petitioner ABI's non-federal claims. In either event, there no longer would be a live case or

controversy left for this Court to adjudicate.

II. SUBSTANTIVE REASONS FOR DENYING THE PETITION.

Petitioners contend that various federal appellate circuits, including the Ninth Circuit in this case, have departed from what Petitioners describe as this Court's long-established principle that judges and others in a government's judicial system who are performing functions unrelated to the resolution of disputes between adversarial litigants possess only qualified immunity to suits for money damages when sued in their individual capacities. In fact, the Ninth Circuit's decision in this case is entirely consistent with this Court's "judicial function" test for absolute judicial or quasi-judicial immunity as articulated in *Antoine v. Byers Anderson* and *Forrester v. White*,⁸ because the acts for which Petitioners contend that Respondents Judge Marston, Clerk Huff and the Law Clerks may be sued individually for money damages all were directly related to the Tribal Court's adjudication of *Blue Lake v. Acres*: *i.e.*, presiding over hearings and issuing orders (Judge Marston); issuing Tribal Court

⁸ *Forrester v. White* was superseded by an amendment to 42 U.S.C. § 1983 "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." The amendment did not otherwise alter absolute judicial immunity to suits for money damages based on acts performed in a judicial capacity.

process, determining that a pleading does not comply with court rules, and serving orders on parties (Clerk Huff); and performing legal research for and assisting Judge Marston's drafting of opinions and orders (the Law Clerks). All of these functions were integral to the actual adjudication of *Blue Lake v. Acres*, not to the Tribal Court's internal administration, none were purely ministerial, and none violated Petitioners' constitutional rights.

Of the cases cited by Petitioners to substantiate their assertion that the Ninth and District of Columbia Circuits have failed to adhere to this Court's "functional" standard for absolute vs. qualified judicial and quasi-judicial immunity as articulated in *Antoine v. Anderson Byers* and *Forrester v. White*, almost all⁹ involved actions asserting violations of constitutional rights, most commonly brought pursuant to federal statutes such as 42 U.S.C. §§ 1983 or 1985 that create causes of action for money damages, where the distinction between absolute and qualified immunity is most relevant.¹⁰ Moreover, contrary to Petitioners'

⁹ *Ibeabuchi v. Johnson*, 744 F. App'x 449 (9th Cir. 2018); *Moore v. Rosenblatt*, 749 F. App'x 604 (9th Cir. 2019); *Maness v. Dist. Ct.*, 495 F.3d 943 (8th Cir. 2007); *Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004); *Clay v. Allen*, 242 F.3d 679 (5th Cir. 2001); *Gross v. Rell*, 585 F.3d 72 (2nd Cir. 2009); *Oliva v. Heller*, 839 F.2d 37 (2nd Cir. 1988); *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996); *Sindram v. Suda*, 986 F. 2d 1459 (D.C. Cir. 1993) (while not an action under 42 U.S.C. § 1983, the plaintiff alleged an unconstitutional deprivation of access to the courts).

¹⁰ Had Petitioners asserted such a claim, their remedy would have been limited to petitioning the district court for a writ

assertion, both the Ninth and D.C. Circuits actually analyze immunity based on function in relation to the adjudicatory process, not on mere job titles or matters of internal court administration.

The other cases cited by Petitioners as illustrative of a purported split among the Circuits are readily distinguishable, or do not show a split at all. *Lorenz v. Suter*, 382 F.App'x 1 (D.C. Cir. 2010) did not involve an adjudication of whether the this Court's Clerk possessed absolute or qualified immunity; rather, the D.C. Circuit Court of Appeals held that no court other than the Supreme Court has jurisdiction to review any action by the Supreme Court or its staff.

The Ninth Circuit's decision in *In re Castillo*, 297 F.3d 940, 951 (9th Cir. 2002), upheld the absolute quasi-judicial immunity of a bankruptcy trustee on grounds consistent with *Antoine v. Byers Anderson*: "Both the scheduling and giving of notice of hearings are part of the judicial function of managing the bankruptcy court's docket in the resolution of disputes." Immunity would not protect a bankruptcy trustee's handling of property that is not part of the bankruptcy estate.

Ex Parte Virginia, 100 U.S. 339 (1880), did not involve a civil action for money damages based upon a judge's commission of acts in the absence of all jurisdiction. It was a federal criminal prosecution of a state court judge accused of violating a federal statute

of *habeas corpus* pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1303; see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

that prohibited racial discrimination in the jury-selection process.

Petitioners posit several hypotheticals that they describe as variations on *Forrester v. White* to illustrate their contention that the Ninth Circuit acknowledged absolute judicial or quasi-judicial immunity based on the identity of the Tribal Court's personnel, rather than the functions they performed in that court's adjudication of *Blue Lake v. Acres*. However, those hypotheticals simply make no sense in the context of this case.

Forrester allowed a state court *employee* whom a judge first demoted and then fired for discriminatory reasons to sue the judge under, *inter alia*, 42 U.S.C. § 1983, for violating her federally-protected civil rights. *Forrester* did *not* entitle a *litigant* in a case pending before that same judge to sue the judge for having wrongfully discharged the court employee; if nothing else, the litigant would lack standing to do so.

Neither did *Forrester* allow a litigant in a case pending before a judge to sue the judge for a decision to retain the services of particular law clerk to work on the litigant's case, or to sue the law clerk for accepting employment and performing services for the judge in the litigant's case. At neither the district court nor Ninth Circuit level has any Respondent asserted entitlement to absolute immunity based solely on the title of the position held; rather, Respondents' arguments are, as the Ninth Circuit correctly determined, based on the judicial or quasi-judicial *functions* they performed in relation to the

adjudication of *Blue Lake v. Acres*.

Contrary to Petitioners' assertion that the "undisputed" and "straight-forward" record in this case makes it an "ideal vehicle for resolving the question presented[,].. (Petition at p. 28), the record in this case is neither undisputed nor straight-forward.

The record in this case consists of far more than the Complaint's vague, conclusory and speculative allegations, most of which are not based on Petitioners' personal knowledge, and many of which are little more than collections of pejorative adjectives, not actual facts. The record also contains sworn—and unrebutted—declarations submitted in support of their original factual challenge to the district court's jurisdiction, and those declarations provide ample support for the Ninth Circuit's determination, consistent with this Court's decision in *Antoine v. Anderson Byers*, that Petitioners' action against the Tribal Court Judge, his Law Clerks and the Court Clerk is barred by absolute judicial or quasi-judicial immunity based on Respondents' *functions* in the adjudication of *Blue Lake v. Acres*, not their job descriptions or the identities of either Tribal Court personnel or Petitioners. Moreover, the Petition does not allege or substantiate that the circumstances addressed in the Petition have occurred or are likely to reoccur with sufficient frequency as to present a problem serious enough to warrant this Court's attention.

CONCLUSION

Because the Petition fails to demonstrate the existence of a split among Circuits on the existence of absolute judicial or quasi-judicial immunity in cases such as this, because the Ninth Circuit based its recognition of Respondents' absolute judicial or quasi-judicial immunity on Respondents' respective functions in the adjudication of a dispute pending before the Tribal Court, and because proceedings in the district court on remand from the Ninth Circuit may render the entire action moot before the action proceeds to a judgment on the merits, and for all of the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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