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No. 12-1410

In the Supreme Court of the United States

TERRY TONASKET, dba STOGIE SHOP, and DANIEL T. MILLER, an individual,

Petitioners,

v.

TOM SARGENT, TOBACCO TAX ADMINISTRATOR; THE COLVILLE BUSINESS COUNCIL; MICHAEL O. FINLEY, CHAIRMAN; HARVEY MOSES JR.; SYLVIA PEASLEY; BRIAN NISSEN; SUSIE ALLEN; CHERIE MOOMAW; JOHN STENSGAR; ANDREW JOSEPH; VIRGIL SEYMOUR SR.; MIKE MARCHARD; ERNIE WILLIAMS; DOUG SEYMOUR; SHIRLEY CHARLEY; RICKY GABRIEL; and THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, a Federally Recognized Indian Tribe,

Respondents.

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

REPLY BRIEF OF PETITIONERS

ROBERT E. KOVACEVICH
Counsel of Record
818 West Riverside, Ste. 525
Spokane, Washington 99201
(509) 747-2104
kovacevichrobert@qwestoffice.net

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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RESPONDENTS' RECITATION OF QUESTION PRESENTED IS COMPLETELY WRONG

Respondents wrongfully contend that the Tribal-State cigarette compact is attacked by Petitioners.

The Trial Court, App. 12, ruled that ". . .this suit is barred by the tribal and tribal officials sovereign immunity". The decision was affirmed by the Ninth Circuit, App. 3.

Petitioner's Petition at i states "The core issue is tribal sovereignty from suit."

Respondents seek to steer away from the indefensible issue of tribal immunity from suit. The state agreement is not an issue. The attempt to conflate the issue is wrong.

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RESPONDENTS TOTALLY MISCHARACTERIZE THE REASON PETITIONERS' PETITION SHOULD BE GRANTED.

Respondents' Brief in Opposition commences at page 1 with a wrong view of Petitioners' Petition that continues throughout their brief. The Respondents' attorney firm name partner 40 years ago filed an amicus brief in this court successfully supporting what the brief now calls a tax haven. *Tonasket v. Washington,* 411 U.S. 451 (1973) successfully freeing Leonard Tonasket from the state cigarette tax. Leonard was the first generation ancestor of Petitioner Terry Tonasket, who owned the same store with the same name that operated at the same site. The firm now opposes the "tax haven" they helped create. The material factual error is that there is no tax haven as Terry Tonasket, one of the Petitioners, pays the tribal tax. What Tonasket opposes is the economic genocide of the tribe in making him pay a tax that his competitor imposes on Tonasket's sale to his customers, including Petitioner Miller. The Petitioners, the Indian retailer and his non Indian consumer ask this Court to allow them to pursue federal anti-trust law that allows the tribe to illegally force price fixing. Petitioners have not opposed the tribal tax, only the illegal competition. If the tribe ceases competition by permanent agreement, this case is over.

The irony is that the complete freedom of the tribe from federal income tax and all state tax makes it the unfair competitor against Tonasket. Like a charity, the tribe should be subject to the unrelated business income tax. 26 U.S.C. § 511 (a)(1).

At Page 2 of Respondents' brief, Respondents state that "Petitioner's adhere to their argument that CCT's collection of cigarette taxes pursuant to the Compact is unlawful and this purported by unlawful conduct waives or otherwise abrogates CCT's sovereign immunity." No citation to Petitioners' Petition is given. The statement is false. Petitioner's Petition at page 10 in bold print states that the reason for granting the Writ is: "Sovereign Immunity must be abrogated where price fixing and other competition is willfully applied by a tribe, a market competitor."

At page 1 of their answer, Respondents state "Petitioners have not identified any compelling reason for this Court to review the lower court decision." Respondents fail to recognize *Oneida Indian Nation of New York v. Madison County,* 665 F.3d 408 (2d Cir. 2011) cited at page 12 of Petitioners' Petition. The opinion, *id* at 414, notes this Court's grant of certiorari to review the issue of tribal immunity from suit. Here, the Petition seeks review for the same reason it was granted in *Oneida,* i.e. tribal sovereign immunity. This is the same compelling reason for review by this Court in granting *Oneida's* petition two years ago. Petitioner's submit that elimination of tribal sovereign immunity is high on the Court's list especially in the light of Justice Kennedy's statement in *Kiowa Tribe of Oklahoma v. Mfg. Technologies Inc.,* 523 U.S. 751, 758 (1998). "There are reasons to doubt the wisdom of perpetuating the doctrine."

There are at least two good reasons to grant the Petition in this case. The first is that unlike *Oneida* and the recent denial in *Miller v. Wright,* No. 12-1237 denied June 17, 2013, this case has only one compelling

issue and that is tribal immunity. A reversal would annihilate tribal immunity in violation of federal anti-trust law now allowable by the approximately 562 tribes in this country. It would put tribal business competition on a level field with all other competition. The second reason is that abrogation by this Court would eliminate any argument of origin of the doctrine, or whether Congress has sole control of tribal sovereignty. *Turner v. United States,* 248 U.S. 354 (1919) is cited for authority for the tribal immunity doctrine. It is "not a reasoned statement of doctrine", *Kiowa, supra,* at 757.

If tribal immunity is to be upheld, the reason and extent must be defined. At the present time, it is widely applied with harsh results. See *Furry v. Miccosukee Tribe of Indians of Florida,* 685 F.3d 1224 (11th Cir. 2012).

RESPONDENTS' ARGUMENT CONTAINS UNFOUNDED ASSERTIONS.

At page 7, Respondents contend that the Respondent does not set minimum prices. This argument ignores the Complaint, App. 36 and 39-40, alleging that the tribe forces Tonasket to pay more for his inventory. App. 40 refers to the Tribe/State of Washington compact provisions 6.2.1 requiring more than minimum pricing. The Compact imposes 100% of the state cigarette tax. App. 93. Cigarettes must be purchased at wholesale from Washington state certified wholesalers who charge more than on a free market. Among other cited precedent, Petitioners cite *Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 563 (1990) on wholesale price fixing. Tonasket is not the only

Petitioner. His customers also seek relief from this price fixing. The statement that Tonasket can sell at any price he wants, is unrealistic. If the Tribe makes him pay more, they set his retail price. If he does not sell at a profit, he will be out of business. The Tribe cannot be a competitor and regulator. It price fixes by forcing a rebate to the Tribe, a competitive retailer. It is a type of resale discrimination that in other contexts would be enjoined by federal enforcement. *L.G. Balfour v. F.T.C.,* 442 F.2d 1, 14 (7th Cir.1971). 15 U.S.C. § 45. It is also a violation of 15 U.S.C. § 13 and 13(a).

The arguments on incidence by Respondents at page 10 of tax are wrong as the incidence of cigarette tax is always on the consumer. These arguments, like the argument at page 9, that by competing with Tonasket the Tribe is saving him from the State of Washington, is not the issue. Likewise, although not material, without any evidence the Respondents at page 3 accuse Miller of tax avoidance by an imaginary motive. The State of Washington does not operate a retail store in the same market area. Tonasket was doing fine until the Tribe went into the retail cigarette business. The repeated "tax haven" assertions are wrong. All the states charge different cigarette taxes. Miller could save cigarette taxes by driving 15 miles to Idaho and saving about $2.50 per pack.

THE INDIVIDUAL DEFENDANTS HAVE NO TRIBAL IMMUNITY.

Respondents infer at page 14 that no prospective relief is sought. The Petitioners' Complaint at App. 50-52 requests injunction and declaratory judgments

alleging irreparable harm. The Complaint, App. 62, seeks a permanent injunction against price conspiracy. At page 17, Petitioners' Petition cites cases upholding injunctions against tribal officials acting in violation of the law. These allegations seek obvious prospective relief.

At page 9, the Petitioners cite *Vann v. United States Dept. of Interior,* 701 F.3d 927 (D.C. Cir. 2012) allowing suits against tribal officers for prospective relief in their official capacity even if the Tribe is not a party. *Burlington Northern and Santa Fe Ry. Co. v. Vaughn,* 509 F.3d 1085, 1092 (9th Cir. 2007) is directly in point and cited at page 17 of Petitioner's Petition. It holds that a tribal official is not immune from suit for prospective relief when acting in violation of federal law.

CONCLUSION

Respondents' Answer adds nothing to dispel the need to abrogate tribal immunity from federal anti-trust laws. The Petition for Writ of Certiorari should be granted.

DATED this 11th day of July, 2013.

Respectfully Submitted,

ROBERT E. KOVACEVICH
Counsel of Record
818 West Riverside, Ste 525
Spokane, WA, 99201-0995
Phone: (509) 747-2104
kovacevichrobert@qwestoffice.net

Counsel for Petitioners