Appeal No. 14-16121

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETH A BODI,

Plaintiff - Appellee,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS; SHINGLE SPRINGS TRIBAL HEALTH BOARD; BRENDA ADAMS (as current Chairperson of the Shingle Springs Tribal Health Board), and DOES 1 through 30, inclusive,

Defendants - Appellants.

On Appeal from the United States District Court
For the Central District of California
Hon. Lawrence K. Karlton
Case No. 2:13-dv-01044-LLK-CKD

APPELLEE'S ANSWERING BRIEF

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I. PRELIMINARY STATEMENT

This appeal presents an issue of first impression in this Circuit regarding tribal sovereign immunity. It arises out of an employment dispute between Beth A. Bodi and the Shingle Springs Band of Miwok Indians (the "Tribe"), Shingle Springs Tribal Health Board (the "Health Board"), and Brenda Adams, a Tribe member (collectively, the "Tribal Defendants"). The gravamen of Ms. Bodi's complaint is that the Tribal Defendants wrongfully terminated her employment due to her medical conditions, in violation of state and federal law, including the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. ("FMLA"). Ms. Bodi initially filed her complaint in state court. The Tribal Defendants removed, and then moved to dismiss under Federal Rule of Civil Procedure section 12(b)(1), asserting lack of subject matter jurisdiction based on tribal sovereign immunity. The trial court denied the motion on the ground that the Tribe had waived its sovereign immunity by choosing to remove the case to federal court.

The Tribal Defendants characterize the district court's decision as "carving out an exception" to tribal sovereign immunity. They argue that the district court "implied" a waiver from their litigation strategy, referring to remarks the court made at the hearing on the motion. In fact, the district court did nothing of the kind. The district court observed that the Tribal Defendants made a deliberate choice to air their

sovereign immunity defense in federal court—even though they had the ability to present that defense in state court. Unlike the tribes in *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) and similar cases—who could vindicate their rights only by initiating litigation—the Tribal Defendants suffered no impediment to defending themselves in California's courts. Tribal Defendants justify their choice to remove by claiming an interest in having a uniform body of federal Indian law and raising a concern that state courts may misapply federal sovereignty law. If that truly were a concern, one suspects Congress would provide tribes the same universal removal jurisdiction that it provides foreign sovereigns. Congress has not done so and consequently there are a myriad of instances in which tribes find themselves in state courts or administrative proceedings asserting tribal sovereign immunity. Thus, the district court was correct: there is no principled reason why the Tribal Defendants had to seek the jurisdiction of the federal court to assert the defense. For this reason, this Court should affirm the lower court's decision.

II. STATEMENT OF JURISDICTION

Ms. Bodi agrees with the Tribe's statement of the District Court's jurisdiction.

Ms. Bodi also agrees that this Court has jurisdiction to review the portion of the district court's order denying the Tribe's motion to dismiss on sovereign immunity grounds. Although the order is interlocutory and not a final judgment, this

Court has made clear that an appeal will lie because it is among that "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action." *Burlington Northern & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1089 (9th Cir. 2007) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

Ms. Bodi does not agree, however, that this court has jurisdiction over the district court's separate and independent conclusion that it need not ascertain whether Ms. Bodi could sue the Tribal Defendants for violating the FMLA. There is no pendent appellate jurisdiction to review this separate issue. "The exception to the final judgment rule for collateral orders does not give a court jurisdiction over every claim or defense addressed by the district court's order. Instead, the court must be able to exercise jurisdiction over each issue independently." *Burlington Northern*, 509 F.3d at 1093. "A court may exercise pendent appellate jurisdiction over rulings that do not independently qualify for interlocutory review only if the rulings are inextricably intertwined with, or necessary to ensure meaningful review of, decisions that are properly before the court on interlocutory appeal." *Id.* These requirements are narrowly construed, setting "a very high bar" for the exercise of pendent appellate jurisdiction. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004).

The Tribe's challenge under the FMLA does not meet these standards. First, the tribal sovereign immunity claim and the claim that the FMLA does not allow suits

against Indian tribes are not inextricably intertwined. The court can and did decide the tribal sovereign immunity issue without considering whether the FMLA allowed Ms. Bodi to sue the Tribe. The court concluded that the Tribe had waived sovereign immunity by removing this case to federal court. That conclusion was based on the Tribe's litigation choices and not on an analysis of the FMLA. Moreover, as the Tribe's opening brief demonstrates, different legal standards apply to the analysis of each issue. Lastly, review of the court's ruling on the FMLA claim is not necessary to ensure meaningful review of the tribal sovereign immunity claim. This is not one of those rare instances in which pendent jurisdiction is appropriate.

Ms. Bodi agrees that this appeal is timely.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Ms. Bodi agrees with the first issue Tribal Defendants state that this Court should review. Ms. Bodi does not agree that the second issue—whether her claims are barred by FMLA because they transgress the tribe's right of self-government in intramural matters—is presented because, as noted above, the Court lacks jurisdiction to review that issue.

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IV. STATEMENT OF THE CASE

A. Factual Background[1]

Ms. Bodi is a member of the Shingle Springs Band of Miwok Indians (the "Tribe"). (E.R. 326:11-12.) The Tribe is a federally-registered and recognized Indian tribe. (E.R. 322:7-8.) The Tribe is governed by a seven member body called the Shingle Springs Tribal Council (the "Tribal Council"). (E.R. 322:14-15.) In approximately 1995, the Tribal Council established the Shingle Springs Tribal Health Program (the "Health Program"). (E.R. 322:27-28.) In approximately 1998, the Council established the Shingle Springs Tribal Health Board (the "Health Board"). (E.R. 323:3-5.) The Health Board's members are appointed by the Tribal Council. (E.R. 323:5-6; 322:14-15.) Among other things, the Health Board operates and governs the Shingle Springs Tribal Health Clinic (the "Clinic"). (E.R. 323:6-10.) In this capacity, the Health Board is responsible for hiring the Executive Director of the Clinic. (E.R. 323:13-16.) The Executive Director manages the day-to-day operations of the Clinic and reports monthly to the Health Board. (E.R. 323:23-25.)

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1 The Tribal Defendants' statement of facts draws largely on the Declaration of Ernest Vargas, Jr. and supporting exhibits, which comprise all of Volume II of the Excerpts of Record. However, when there is a factual attack on jurisdiction, in the absence of a full-fledged evidentiary hearing, disputes as to the pertinent facts are viewed in the light most favorable to the non-moving party. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996). Although it does not appear that there are any disputed facts on the question of waiver, Ms. Bodi summarizes the facts based on the allegations in her second amended complaint.

The Clinic provides health services not just to members of the Tribe but also to other Native Americans and the general public located in El Dorado County. (E.R. 324:1-5.) The Clinic has approximately 14,000 registered patients, of which approximately 12,500 are non-tribal residents of El Dorado County and 1,500 are Native American. (E.R. 324:5-7.) The Tribe itself comprises about 500 members of whom about 100 live on the Shingle Springs Rancheria. (E.R. 322:8-9.)

From February 1997 through August 3, 2012, Ms. Bodi was employed by the Health Program. (E.R. 326:12-19). For most of the last eleven of these years, she was its Executive Director, a capacity in which she reported to the Health Board. (E.R. 326:18-19; 327:6-9; 327:12-14.)

In June 2011, Ms. Bodi was diagnosed with cancer. (E.R. 327:24-27). Prior to starting chemotherapy, she met with both the Health Board's chairperson, Rhondella Dickerson, and the Tribe's Human Resources Director, Brenda Adams. (E.R. 328:3-6.) At this meeting, Ms. Bodi indicated that she wanted to take unpaid, job-protected leave under the FMLA. (E.R. 328:6-11). The Tribal representatives told her that she need not rely on the FMLA because she was in no danger of losing her job and that she could take off as much time as she wanted. (E.R. 328:12-14.) Accordingly, Ms. Bodi did not take FMLA leave and devised a work schedule to accommodate her chemotherapy treatments. (E.R. 328:14-28.) Ms. Bodi's chemotherapy regime successfully concluded six months later, in December 2011. (E.R. 329:1-3.)

On June 19, 2012, Ms. Bodi met with Board member James Adams and Board member and Human Resources Director Brenda Adams. (E.R. 329:22-24.) During the meeting, the Board members provided Ms. Bodi with a written performance evaluation, her first since 2000. (E.R. 329:23-24.) Mr. Adams had prepared the evaluation, which was dated April 3, 2012, and Ms. Adams had signed it. (E.R. 329:11-16; 329:19.) During the meeting, Mr. Adams told Ms. Bodi that the evaluation covered the April 2011 - April 2012 period (*i.e.*, a period encompassing the time during which Ms. Bodi was diagnosed and treated for cancer). (329:25-330:3.) She was given an overall rank of 2 (on a scale of 1 to 5, with 5 being the most favorable). (E.R. 330:10-14.) According to the evaluation, this level meant, "Serious effort is needed to improve performance." (E.R. 330:13-14.) When asked, Ms. Adams confirmed that Ms. Bodi's mark would have been better if she had taken time off from work while undergoing chemotherapy. (E.R. 330:4-6.)

Nine days after she received this evaluation, on June 28, 2012, Ms. Bodi broke her ankle at work. (E.R. 330:22-23.) The injury was extensive enough to require corrective surgery. (E.R. 330:23-24.) Ms. Bodi's physicians placed her on temporary disability leave through July 24, 2012. (E.R. 330:25.) Her orthopedic surgeon later ordered her to remain off work until August 6, 2012. (E.R. 331:3-4.) Ms. Bodi also applied for FMLA leave, which she believed took effect starting June 28, 2012. (E.R. 330:10-331:2.)

By letter from Mr. Adams dated August 1, 2012, the Health Board informed Ms. Bodi that she was "hereby terminated from [her] employment with the Shingle Springs Band of Miwok Indians, Shingle Springs Tribal Health Program, effective immediately." (E.R. 331:13-17.) The letter stated that she was being terminated "for inadequate performance" because of alleged deficiencies occurring "during the last several months." (E.R. 331:20-22.) The letter also noted that the termination had "nothing to do with your request and use of Family Medical Leave. All actions referenced above occurred prior to your request for Family Medical Leave and the Board's decision to terminate you from employment is strictly a business decision based on your inadequate performance, especially in light of the Program's financial crisis." (E.R. 331:23-27.)

Ms. Bodi believes she was terminated due to her illness and injury. (E.R. 333:26-28.) In addition, she believes she was terminated because of her objections to the termination of the Health Program's Medical Director (who had complained about patient loads), her own complaints about patient loads, her calling of attention to troubling accounting irregularities at the Health Program, and her objection to the Tribe moving its Office of Tribal Administration to the Health Clinic. (E.R. 333:2-27.)

Around January 28, 2013, the Tribe hired Ms. Bodi as Executive Assistant to the Tribal Council Chairman, Nicholas Fonseca, a position that paid much less than

her previous position as the Health Program's Executive Director. (E.R. 334:5-8.) On March 19, 2013, Ms. Bodi sent the Tribe a communication in which she complained about her termination from the Health Program and expressed her willingness to seek redress in state court. (E.R. 334:12-14.) Two days later, the Tribe placed Ms. Bodi on administrative leave, and approximately three weeks later, the Tribe terminated Ms. Bodi's employment. (E.R. 334:9-12.)

B. Procedural Background

Ms. Bodi commenced this action by filing a complaint for damages in the Superior Court of California for the County of El Dorado on April 22, 2013. (E.R. 355) The complaint sought relief under state law and under the FMLA. (E.R. 368-69.) On May 28, 2013, the Tribal defendants removed the action to the United States District Court for the Eastern District of California, asserting federal question jurisdiction under 28 U.S.C § 1331. (E.R. 347; 350:1-351:5.) On July 12, 2013, Ms. Bodi filed the operative Second Amended Complaint, which pleads claims under the FMLA and various state laws. (E.R. 321-344.)

On August 5, 2013, the Tribal Defendants moved to dismiss on the ground that the Tribe, as a federally-recognized tribal entity, is immune from suit, and that the other Tribal Defendants are similarly immune due to their relationships with the Tribe. (E.R. 319:7-15.) The Tribal Defendants also sought dismissal based on a separate argument that the FMLA did not extend to Ms. Bodi's claims because the

termination of her employment was an internal tribal matter. (E.R. 319:15-17; 314:1-316:17.) After briefing on the motion was complete, the district court issued an order directing the parties to provide further briefing on two additional issues. (E.R. 384 (Doc. 40).) The first issue—and the one that is pertinent to this appeal—was whether an Indian tribe's removal of a case to federal court waived its sovereign immunity. (E.R. 384 (Doc. 40, page 4).) The parties submitted supplemental briefing on this issue as directed by the court. (E.R. 384, (Docs.44-47).) The matter came on for hearing on March 3, 2014. (E.R. 27-34.)

On May 13, 2014, the district court denied the Tribal Defendants' motion in a 22-page opinion. (E.R. 5-26.) After reviewing the scant, conflicting case law and carefully distinguishing the only federal appellate decision to address the issue, the district court concluded that "the Tribe had unequivocally waived any claim of sovereign immunity through removal." (E.R. 21:18-20.) The remaining defendants' derivative claims of immunity failed as well. (E.R. 21:20-23.) The district court observed that the Tribal Defendants had "invoked the jurisdiction of the federal courts to raise a jurisdictional defense that could equally have been raised in the state court" and had advanced "no principled reason" for removing the action before asserting immunity. (E.R. 21:12-16 (internal quotes omitted).) Given the finding of waiver, the district court also concluded that "it need not assess the extent to which Congress may have abrogated tribal immunity in enacting the FMLA." (E.R. 24:7-

10.)

The Tribal Defendants filed a timely notice of appeal on June 10, 2014. (E.R. 1.)

V. SUMMARY OF ARGUMENT

Because of their unique history, Indian tribes have common law immunity from suit. That immunity can be waived by Congress or by the tribe itself. In this case, Ms. Bodi asserted federal claims under the FMLA and state law in a lawsuit filed in state court. The Tribe could have defended itself in state court on the ground that all of Ms. Bodi's claims were precluded by tribal sovereign immunity. Instead, the Tribe chose to remove her complaint to federal court on the basis of federal question jurisdiction and then assert immunity.

The Tribe's voluntary decision to remove waived its sovereign immunity because removal was unnecessary to protect the Tribe's rights. This Court has never examined this issue. The only other appellate court to examine the issue concluded differently but that conclusion was flawed.

The Tribe justifies its decision on the ground that tribes have a strong interest in having federal courts decide their sovereign immunity claims and because a contrary decision would require tribes to initiate litigation in federal court to stave off state court lawsuits. Both justifications are specious.

First, the only reason this case is in this Court is because Ms. Bodi sought

relief under the FMLA. Removal is available to the Tribe so that a federal court can determine the meaning, scope and application of the FMLA—not because of tribal sovereign immunity. Had Ms. Bodi sought relief only under California state law, a California court would and could have decided the Tribe's sovereign immunity defense. To the extent the Tribe argues that California courts can not be trusted in this regard, nearly two hundred years of federal precedent on the subject and a plethora of California decisions adhering to it suggest otherwise. That state courts on occasion may interpret the law differently or be reversed does not undermine the integrity of the California judiciary. Moreover, tribes litigating sovereign immunity in California state courts have virtually the same right to interlocutory review of trial court decisions as federal litigants.

Second, the supposed "race to the courthouse" threat suffers from the same false assumption that tribes can't get a fair hearing in California's courts. They can and they do. Moreover, the district court's ruling is just as likely to lead to less litigation in the federal courts.

The Tribal Defendants assert alternatively that even if they waived their immunity Ms. Bodi can not make a claim against them under the FMLA because it would intrude on "exclusive rights of self-governance in purely intramural matters." First, this issue is not reviewable because it is not a collateral order and is not inextricably intertwined with the district court's ruling on sovereign immunity.

Second, the district court never addressed this defense, which raises issues of fact and law. Third, taking all the facts in the light most favorable to Ms. Bodi, she can maintain an action against the Tribe under the FMLA. At most, this Court should remand to the district court to make a ruling on this question.

VI. ARGUMENT

A. The Tribe Waived Sovereign Immunity When It Chose To Remove This Case To Federal Court.

1. A Tribe May Waive Its Sovereign Immunity.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Tribal Defendants repeatedly cite *Santa Clara Pueblo* and other cases for the proposition that a tribe is subject to suit only where it (or Congress) has "unequivocally" expressed consent to suit. That standard, however, only applies to whether Congress has abrogated tribal immunity. The standard in determining tribal waiver is somewhat different. "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 418 (2001), quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509 (1991). A waiver may be clear even if the tribe does not

explicitly say that it is waiving its immunity. *Id.* at 419-20. Hence, in *C&L Enterprises*, the Supreme Court held that a tribe had clearly waived its sovereign immunity by agreeing to an arbitration clause that allowed an arbitral award to be enforced in court even though the clause did not say that the tribe was waiving its sovereign immunity. *Id.* at 418-421.[2]

2. Just Like The State In *Lapides*, The Tribe Waived Its Immunity In This Case.

Tribal Defendants maintain that the "congressionally authorized removal of federal claims to federal court, followed immediately by a motion to dismiss—seeking a ruling that the Tribe's immunity deprives any court of the power to adjudicate the merits of plaintiff's claims—in no way express the Tribe's unequivocal consent to the federal court's assertion of jurisdiction to adjudicate the suit's merits." (Appellants Opening Brief, page 17.)

This Court has not addressed tribal sovereign immunity in this context, and the three district courts in this circuit that have addressed the issue arrived at different conclusions.[3] For this reason, Tribal Defendants rely heavily on the only federal

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2 Tribal Defendants also cite *Pan Am. Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416 (9th Cir. 1989), which involved whether a tribe's agreement to an arbitration provision constituted a waiver of immunity, for the proposition that waiver can't be based on "acquiescence" or "implication." AOB at 21.n4, 33. The holding in *Pan Am* was questioned in *C&L*, however, and probably does not reflect current law.

3 In *State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians*, 66 F. Supp. 2d 1163, 1173 (D. Nev. 1999), the court found that removal to federal court constituted a "clear and unequivocal waiver" of tribal immunity. Tribal Defendants

appellate decision that has addressed the issue, *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200 (11th Cir. 2012). There, the court held that tribes do not waive their immunity by removing a case to federal court. The plaintiffs in *Contour Spa* argued that the rule established in *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) should be applied to tribes. In *Lapides,* the Supreme Court held that the State of Georgia waived Eleventh Amendment immunity when it removed a case to federal court. The court in *Contour Spa* rejected this argument on the ground that "an Indian tribe's sovereign immunity is not the same thing as a state's Eleventh Amendment immunity" and that a tribe's waiver of immunity "must be unequivocally expressed." *Contour Spa*, 692 F.3d at 1206. The court analogized tribal immunity to foreign sovereign immunity. After quoting the

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argue that *State Eng'r* is distinguishable because of its different procedural features and because the court also concluded that there was a waiver based on the Tribe's other activities in connection with the Humboldt Decree. Nevertheless, the court separately and independently concluded that there was a waiver: "In the instant case Respondent Tribe joined in the removal to federal court, answered the complaint, and opposed a motion to remand on immunity grounds. If the Tribe were a state, that would clearly be sufficient to waive the state's sovereign immunity. We see no reason to treat the Tribe differently. As such, we treat the Tribe's actions as amounting to a *clear and unequivocal waiver* of immunity in this Court." *Id.* at 1173 (emphasis added). In *Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians*, No. C-01-4125 VRW, 2002 U.S. Dist. LEXIS 28087, 2002 WL 34727095 (N.D. Cal. Dec. 26, 2002), the district court concluded that removal did not constitute a waiver of tribal immunity because "at least in the context of finding waiver, Indian tribes are more akin to foreign sovereigns than to states," *Id.*, at 19. In *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953, 961 (E.D. Cal. 2009) the court relied heavily on *Sonoma Falls* to conclude, with some uncertainty,

Supreme Court for the proposition that "[l]ike foreign sovereign immunity, tribal immunity is a matter of federal law," *Kiowa Tribe*, 523 U.S. at 759, the court concluded that "[m]uch like foreign sovereigns, Indian tribes have an interest in a uniform body of federal law in this area.: *Contour Spa*, 692 F.3d at 1207. Ultimately, the court was not inclined to force a tribe to "either forego its immunity from suit by removing the case or assert its immunity—itself a matter of federal law—only in state court." *Id.*

Although *Lapides* is distinguishable because it involved a state's Eleventh Amendment immunity, it nevertheless stands for the proposition that removal is a volitional act that *may* support a finding of waiver. As the Court concluded, "we believe the rule is a clear one, easily applied by both federal courts and the states themselves. It says that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." *Id.* at 623-24. This rule should be applied to tribes unless there is something peculiar about tribal sovereignty that mandates a different result. There is not.

3. Principles From State or Foreign Sovereign Immunity Do Not Resolve Whether The Tribe's Removal Constituted Waiver Of Its Sovereign Immunity.

As the district court noted below, tribal sovereign immunity is *sui generis*,

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that removal does not trigger a waiver of tribal immunity.

which complicates comparisons to state sovereign immunity or foreign sovereign immunity. Tribal sovereign immunity is rooted in Chief Justice Marshall's identification of tribes as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). "The doctrine [of tribal sovereign immunity] was originally enunciated by [the Supreme] Court and has been reaffirmed in a number of cases." *Potawatomi*, 498 U.S. at 510 (citing *Turner v. United States*, 248 U.S. 354, 358 (1919). The contours of tribal sovereign immunity have largely been drawn by the Supreme Court, abrogated from time to time by Congressional action. *Kiowa Tribe*, 523 U.S. at 759.

Tribes, like any other litigant, may remove a case filed in state court that raises claims under federal law to federal court. 28 U.S.C. §§ 1331, 1441. If there is no basis for federal jurisdiction, however, tribes, like any other litigant, must defend themselves in state court. That the tribe has a sovereign immunity defense does not in and of itself create federal jurisdiction. *Oglala Sioux Tribe v. C&W Enterprise Inc. Appellee* 487 F 3d 1129, 1131 (2007) ("the existence of a federal cause of action depends upon the plaintiff's claim rather than any defense that may be asserted by the defendant. The existence of a tribal immunity defense… will not convert a claim based on state law into a federal cause of action,"); *see also Okla. Tax Comm'n v. Graham,* 489 U.S. 838, 840-41 (1989). Although tribal sovereign immunity is a creation of the federal courts, the immunity may be invoked equally in state and

federal courts. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983).

By contrast, Congress provided foreign sovereigns with a statutory right of removal when it enacted the Foreign Sovereign Immunities Act of 1976. While the court in *Contour Spa*, 692 F.3d at 1200, acknowledged this fact, it failed to satisfactorily explain why the absence of a similar statutory right of removal for tribes is not fatal to the comparison between the two forms of immunity, at least where waiver-through-removal is concerned.

State sovereign immunity is a creation of the U.S. Constitution. *See, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'"). It goes without saying that tribes did not voluntarily enter into the Union, which diminishes the utility of comparisons to the states in this regard.

4. The Tribe's Interest In A Uniform Body Of Federal Law Does Not Compel That They Did Not Waive Their Tribal Sovereign Immunity.

What remains then is the interest of tribes in a uniform body of federal law

concerning tribal sovereign immunity. Both the Tribal Defendants and the *amici* contend this interest necessitates the conclusion that the Tribe did not waive its immunity by removing the case to the district court. While tribes may have an interest in a uniform body of law, however, reality undercuts the conclusion that tribes must be able to claim sovereign immunity after removal.

First, Congress has not provided tribes with the same universal removal rights that it has provided foreign states. Apparently, the tribes' interest in a uniform body of federal law is not significant enough to cause Congress to take this simple step. Consequently, there is at least an implied recognition that state courts are capable of applying federal Indian law uniformly enough.

Second, it also appears that state courts grapple with questions of tribal sovereign immunity fairly frequently—and maybe almost as much as federal courts. A search on Lexis Advance on January 23, 2015, for state law decisions that included the phrase "tribal sovereign immunity" generated a list of 578 decisions, 48 of which were from California. A search for the same phrase in all the federal district and appellate courts generated a list of 657 cases, 222 of which were venued within this Circuit.

Examples abound of decisions from California courts applying federal tribal sovereign immunity law in favor of tribes. *See, e.g., People ex rel. Dept. of Transportation v. Naegele Outdoor Adver. Co.,* 38 Cal. 3d 509 (1985) (reversing

judgment, *inter alia,* on grounds that Congress did not authorize "state regulation of outdoor advertising on Indian reservation lands"); *Cal. Parking Servs. v. Soboba Band of Luiseno Indians,* 197 Cal. App. 4th 814 (2011) (upholding denial of plaintiff's motion to compel arbitration on the grounds that arbitration clause did not clearly waive tribal sovereign immunity); *Trudgeon v. Fantasy Springs Casino,*71 Cal. App. 4th 632 (1999) (upholding summary judgment in favor of defendants on the basis of tribal sovereign immunity). In fact, at least one case involved defendant Tribe: *Shingle Springs Band of Miwok Indians v. Workers' Comp. Appeals Bd.*, No. C032701, 2001 WL 1529124, (Cal. Ct. App. Sep. 26, 2001). There, a Health Clinic employee filed a workers' compensation claim against the Tribe; the Tribe, in turn, asserted sovereign immunity as a defense. California's Third District Court of Appeals agreed that the Tribe would ordinarily be immune from the administrative proceedings, but remanded to the Workers' Compensation Appeals Board to determine whether the Tribe had waived immunity.

The Tribal Defendants point to examples where they claim California courts have misapplied tribal sovereign immunity law. (AOB, p. 35.) But one or two possibly misguided decisions does not lead to the conclusion that all California courts are incapable of correctly interpreting and applying federal tribal sovereign immunity

law. Again, the alleged "problem" has not caught the attention of Congress.[4]

The Tribal Defendants also claim that there is a right to an immediate appeal of a decision such as the one the district court made here and that in California a tribe would have recourse only to a rarely granted extraordinary writ. But, the very case they cite makes it clear that immediate appellate relief is also available in California. *Big Valley Band of Pomo Indians v. Superior Court,* 133 Cal. App. 4th 1185, 1189-90 (2005) (interlocutory writ appropriate to review denial of tribal sovereign immunity). Thus, this reason to remove to federal court lacks foundation.

Lastly, the Tribal Defendants argue that the rule established by the district court would result in a "race to the courthouse." This is highly speculative. It is equally plausible that tribes would decide to preserve their sovereign immunity defense—a knockout blow if there ever was one—and remain in state court, which would reduce the federal court case load.

5. The *Potawatomi* Decision Does Not Compel A Different Conclusion.

The Tribal Defendants cite *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505 (1991) and *McClendon v. United States,* 885 F.2d 627, 630 (9th Cir. 1989) to support their position that removal does not constitute a waiver.

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4 In response to the argument of the *amici* that state courts have been hostile to Indian tribes (which is only tangentially supported by the authority they cite) and that federal courts have a long history of protecting tribes, Amicus Curiae Brief, p. 17, Ms. Bodi notes that no such concern about parochialism is presented in this case—Ms. Bodi is a Tribal member.

These cases, and the principal cases they rely on, all involve circumstances that are quite different from those here. In *Potawatomi,* the tribe initiated an action in federal court to enjoin the state from assessing it for failing to collect sales taxes on the sale of cigarettes. The state counterclaimed for the amount of the unpaid taxes. The tribe moved to dismiss the counterclaim based on sovereign immunity. The state argued that the tribe had waived its immunity by initiating the lawsuit.

The Supreme Court, with very little discussion, held that the tribe had not waived its immunity, citing *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940). In that case, a tribe initiated a lawsuit in Oklahoma against a surety on a bond after the principal had gone into receivership in Missouri. The tribe had previously asserted claims against the principal in the Missouri proceedings. The surety asserted cross-claims against the tribe based on a judgment against the tribe in the Missouri proceedings. The Supreme Court held that the prior judgment was void because the tribe had sovereign immunity. Notably, the tribe could assert its claims against the principal only in the receivership proceedings in Missouri. At that time, there was no statute authorizing the principal to assert cross-claims against the tribe in Missouri. In these circumstances, the Supreme Court held that, even though it had voluntarily asserted claims in the receivership proceeding, the tribe was immune from the cross-suit because it was immune from a direct suit. The Supreme Court also recognized, however, that "[t]he sovereignty possessing immunity should not be

compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent." *Id*. at 512. In other words, the tribe had no choice but to assert a claim against the principal in the receivership proceeding because that was the only forum in which it could assert the claim.

Similarly, in *McClendon*, the tribe, through the United States as trustee, initiated a lawsuit to assert its title to certain lands. After the lawsuit was resolved, a subsequent leaseholder of the lands initiated suit against the tribe for damages arising out of a dispute over the development of the property. This Court affirmed dismissal of the suit on tribal sovereign immunity grounds, finding that the tribe's participation in the prior litigation did not waive its immunity from suit for related matters. *McClendon,* 885 F.2d at 630.

What these and the related cases reaching the same conclusion have in common is that in each the tribes could enforce their rights only by initiating litigation—and only in a venue in which they could reach the defendant. As such, the courts concluded that tribes should not forgo vindicating their rights if the downside was the loss of their sovereign immunity. Here, by contrast, the Tribal Defendants could just as easily have asserted sovereign immunity in state court. They chose removal instead. This line of authority, then, does not require the reversal of the district court's order.

* * * *

In sum, there is no good reason to treat the Tribe differently from the defendant in *Lapides*. Since the immunity of the Health Board and Ms. Adams derive from the Tribe, their claims of immunity fail as well. The district court reached the correct conclusion and should be affirmed.

B. This Court Lacks Jurisdiction to Decide Whether Ms. Bodi's Claims Under the FMLA Are Barred; and In Any Event They Are Not.

1. The Court Should Allow The Trial Court The Opportunity To Make A Record And Rule On This Pendent Claim

As explained in the Statement of Jurisdiction, Ms. Bodi contends that this Court does not have jurisdiction to review the Tribal Defendants' pendent claim that Ms. Bodi can not sue them under the FMLA. In addition to the argument in the Statement of Jurisdiction, Ms. Bodi also notes that this defense would not dispose of the whole case but only the claims under the FMLA. Second, the district court did not consider this claim, which includes an evaluation of the facts. Third, although the district court did not need to address the request, Ms. Bodi asked to take discovery on this claim so that she could develop factual support for her position. (E.R. 384, Doc. 31, at 8:8-11.) Lastly, Ms. Bodi notes that this issue has not previously been addressed by this Court. For all of these reasons, this Court should not decide this issue. Rather, the Court should allow the normal fact-finding process complete itself in the District Court. At most, the Court could remand to the district court with

instructions to make a ruling on this issue. The Tribal Defendants suggest the same. (AOB, p. 45.)

2. Ms. Bodi May Sue The Tribe Under The FMLA

In any event, Ms. Bodi's claims are not barred by the "intramural dispute" exception. The FMLA applies to all levels of government, all public agencies, including local, State and Federal employers, and schools. In enacting the FMLA, Congress specifically found that, "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 28 U.S.C. 2601(a)(4). Congress authorized private civil suits by employees against employers for violations of the FMLA. The federal statute provides that it is unlawful for "any employer" to interfere with, restrain, or deny the exercise of any right provided by FMLA. 29 U.S.C. section 2615(a).

i. General Acts of Congress Apply to Indians, Unless Clearly Expressed Otherwise.

"[G]eneral acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary." *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 120 (1960); *United States v. Farris,* 624 F.2d 890, 893 (9th Cir. 1980) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations"); *United States v. Baker,* 63 F.3d 1478, 1484 (9th Cir. 1995) ("Federal laws of general applicability are presumed to apply with equal force to Indians").

However, a law of general applicability will not apply to a tribe when: "(1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or, (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980). If any of these situations exist, Congress must expressly state that the statute applies to Indians in order for it to apply to them.

ii. FMLA Is A Federal Law Of General Applicability.

Congress could have, but chose not to, exempt tribes from the FMLA. Tribal governments were excluded from Title VII, for example. At 42 U.S.C. section 2000e, Title VII of The Civil Rights Act of 1964 specifically states the term "employer" … does not include … an Indian tribe"]. Indian tribes are also specifically excluded from the Americans with Disabilities Act of 1990, 42 U.S.C. 12111(5)(B)(i): "the term 'employer'… does not include … an Indian tribe."

Apparently Congress was concerned that Title VII's prohibition against national origin and race discrimination would require tribal employers to hire non-Indians, thereby exacerbating the high unemployment on reservations and undermining tribes' ability to maintain control over their internal affairs. *See* 110

Cong. Rec. 13702 (June 13, 1964) (remarks of Sen. Mundt, "To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces."); *see also Morton v. Mancari*, 417 U.S. 535, 545-49 (1974).

In contrast, there is no comparable reason for Congress to carve out an exception for Indian tribes under the FMLA. Rather, Congress could reasonably have concluded that the importance of its national scheme for allowing family and medical leave in the workplace outweighed competing concerns of tribal sovereignty.

Congress is presumed to act, "intentionally and purposely in the disparate inclusion or exclusion" of language in statutes. *Russello v. United States*, 464 U.S. 16, 23 (1983) (held that Congress purposefully defined "interest" broadly in the RICO statute). Where there is a difference between the language adopted in different statutes (as here), courts should not, "presume to ascribe this difference to a simple mistake of draftsmanship." *Russello, supra*, 464 U.S. at 23; *Lorillard v. Pons,* 434 U.S. 575 at 584-85 & n.14 (1978) (differences between Title VII and the Age Discrimination in Employment Act, "suggest that Congress had a very different intent in mind in drafting the later law").

Cases from other circuits that the Tribal Defendants relied on below are not on point. In *Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004), in which the plaintiff was *in pro per,* the court addressed whether the FMLA specifically provided that it

applied to Indians and did not address the law in section II(B)(1) above. Also, *Chayoon* noted that the potential applicability of the immunity has to be made on a case by case basis because, unlike some other federal statutes, the FMLA does not specifically reference tribes. As noted previously, neither the parties nor the district court have had a full opportunity to address the facts that would be involved in this analysis.

iii. The Tribal Self-Governance Exception Does Not Apply Here.

The FMLA governs general labor and employment regulation. This Court has applied other similar labor and employment statutes to tribes. *NLRB v. Chapa De Indian Health Program, Inc.* 316 F.3d 995, 998 (9th Cir. 2003). The *Chapa De* case involved a health care clinic that was chartered by a resolution made by a federally recognized tribe. The organization was formed to contract with Indian Health Services (IHS) on behalf of the Tribe to provide free health services to qualifying Native Americans. The court ruled that employment laws which sought to regulate a tribal health care clinic did not touch exclusive rights of self-governance in purely internal matters. In discussing the tribal self-government exception, the court noted that tribal self-government does not embrace all tribal business and commercial activity. *Chapa De, supra,* 316 F.3d at 999.

The court also examined the tribe's claim that the provision of health care services to tribal members is intramural and thus not subject to federal laws of

general applicability because of the "tribal self-government" exception. The court denied the claim and noted that the provision of health care services was made to non-Indians as well as Indians and thus was not an intramural matter. In sum, the court affirmed the rule that, "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." *Id.,* at 999-1000, *citing Coeur d'Alene*, 751 F.2d at 1116. The court held that NLRB rules, along with OSHA and ERISA are "generally applicable" to tribes.

In *U.S. Department of Labor v. Occupational Safety & Health Review Commission,* 935 F.2d 182 (9th Cir. 1991) this Court examined whether the federal OSHA statute applied to a tribal timber mill on its reservation. The court found that where about half of the mill's employees were non-Indian, and where most of the mill's revenue came from sales to non-Native Americans, application of OSHA regulations to the mill did not interfere with tribal rights of self-government. This Court has also upheld application of ERISA to a tribal sawmill. *Lumber Indus. Pension Fund v. Warm Springs Forest Prod*, 939 F.2d 683, 685 (9th Cir. 1991).

For these reasons, Ms. Bodi contends that the FMLA does not intrude on the Tribal Defendants rights of self-government in intramural matter and thus they are subject to suit.

VII. CONCLUSION

Indian tribes may waive their tribal sovereign immunity. The waiver must be clear. States that remove a case to federal court waive their sovereign immunity by doing so. Even though state sovereign immunity and tribal sovereign immunity are different, there is no reason to treat them differently here. The district court's conclusion that the Tribal Defendants waived their sovereign immunity when they removed this case to federal court is correct. This Court should affirm the district court's decision.

Date: January 23, 2015

Respectfully Submitted,

AD ASTRA LAW GROUP

By: /s/ David Nied
Attorneys for Plaintiff and Appellant
Beth A. Bodi

Statement of Related Cases

Pursuant to Rule 28-2.6 of the Ninth Circuit Court, Court of Appeals, the Appellee, Beth Ann Bodi, states that she is unaware of any related cases pending before this Court.

Certificate of Compliance

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 8,039 words, exclusive of those parts excluded by Federal Rules of Appellate Procedure Rule 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Federal Rules of Appellate Procedure Rule 32(a)(7)(B). The text of this brief is 14 Point Times New Roman, which is proportionally spaced. See Federal Rules of Appellate Procedure Rule 32(a)(5)(6).

Date: January 23, 2015

Respectfully Submitted,

AD ASTRA LAW GROUP

By: /s/ 

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Beth A. Bodi

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System on January 23, 2015.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

Executed on January 23, 2015, at San Francisco, California.

/s/ 

David Nied