No. 21-35324

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC WEAVER,

Plaintiff-Appellant,

v.

RON GREGORY, CARMEN SMITH and ALYSSA MACY,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. D.C. 3:20-cv-00783-HZ
Hon. Judge Marco A. Hernandez

BRIEF FOR THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, AND THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae The Confederated Tribes of the Warm Springs Reservation of Oregon ("Confederated Tribes of Warm Springs" or "CTWS") is the former employer of the parties to this suit. ER 4-5. CTWS is a federally recognized, self-governing, sovereign Indian tribe. It is the legal successor in interest to the Indian signatories to the Treaty between the United States of America and the Tribes of Middle Oregon, which was executed on June 25, 1855 and ratified by the U.S. Senate on March 8, 1859 (12 Stat. 963). The Tribe is organized under a Constitution and Bylaws ratified by members of the Tribe on December 18, 1937, and approved by the U.S. Department of the Interior on February 14, 1938, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

Amicus Curiae the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") is a federally recognized, self-governing, sovereign Indian tribe. It entered into a Treaty between the United States of America and the Walla Walla,

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[1] *Amici curiae* seek leave to file this brief in accordance with Federal Rule of Appellate Procedure 29. All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* make the following attestation: none among them has any parent corporation and none issues any stock. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting this brief; and no person other than *amici* contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(e).

Cayuse, and Umatilla tribes, which was executed on June 9, 1855 and ratified by the U.S. Senate on March 8, 1859 (12 Stat. 945). The Tribe is organized under a Constitution and Bylaws ratified by members of the Tribe on November 4, 1949, and approved by the U.S. Department of the Interior on December 7, 1949.

Amicus Curiae the Columbia River Inter-Tribal Fish Commission ("CRITFC") is a political subdivision of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes and Bands of the Yakama Nation. These four tribes created CRITFC in 1977 and wholly own and govern its affairs. Each of the four tribes has separately delegated enforcement powers to CRITFC. CRITFC's enforcement program primarily operates along a 150-mile section of the Columbia River in Oregon and Washington. CRITFC's enforcement program is exclusively governed by the tribes and operates in coordination with federal, state, and local jurisdictions.

This appeal raises significant issues of tribal sovereignty relating to the authority of tribal governments in Oregon, including intertribal organizations like CRITFC, to regulate the employment of their police officers when those officers are

"authorized" under Senate Bill 412 (2011) to enforce state law.[2] Senate Bill 412 is an important cross-border law enforcement scheme enacted by the Oregon Legislature that improved public safety in Indian Country and in areas of the State adjacent to tribal territory. Senate Bill 412 expressly recognizes and does not disturb any aspect of tribal sovereignty, including the authority of tribal governments to regulate the employment of their police officers. Each of *amici curiae* have elected to participate in the Senate Bill 412 cross-border law enforcement scheme. They submit this brief to provide a greater understanding of tribal sovereignty and the proper construction of Senate Bill 412.

SUMMARY OF ARGUMENT[3]

Indian tribes are constitutionally distinct sovereign entities. Tribal governments possess inherent sovereign authority to regulate employment within their territory. Tribal law applies to internal employment actions taken by a tribal government with respect to its employees, and there is no 42 U.S.C. § 1983 claim for the alleged deprivation of constitutional rights under the color of tribal law.

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[2] Senate Bill 412 has been enrolled in the Oregon Session Laws at 2011 Or Laws, ch. 644, §§ 1 – 78. ORS 181A.680 to 181A.692 contain many of the substantive provisions of the Act.

[3] This brief's "ER" citations refer to the Excerpt of Record submitted by Plaintiff in this appeal. The "ECF" citations are to the district court docket entries, and the "DktEntry" citations are to this Court's file.

Senate Bill 412 does not regulate tribal employment actions for Oregon tribal governments that have opted to use the Act's cross-border law enforcement scheme. Plaintiff is wrong to suggest otherwise. The district court should be affirmed.

ARGUMENT

I. INDIAN TRIBES ARE CONSTITUTIONALLY DISTINCT POLITICAL COMMUNITIES.

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of self-government. *United States v. Cooley*, 141 S.Ct. 1638, 1642 (2021) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832)). Tribal sovereignty predates the founding of this nation. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (tribes remain "separate sovereigns pre-existing the Constitution"). Because of their ancient sovereign status, the Constitution recognizes "Indian tribes" together with "foreign Nations" and the "several States." U.S. Const., art I., § 8. Indian tribes are not foreign Nations or States in the constitutional sense; they are " ' domestic dependent nations' " that "exercise 'inherent sovereign authority.' " *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). The sovereign authority retained by Indian tribes is "unique" and carries certain limitations subject to the plenary authority of Congress. *Cooley*, 141 S.Ct. at 1642–43 (internal citation and

quotation marks omitted). Congress's broad power to regulate tribal affairs and the inherent sovereignty retained by Indian tribes, however, generally insulates Indian tribes from state control. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

II. INDIAN TRIBES HAVE INHERENT SOVEREIGN AUTHORITY TO REGULATE EMPLOYMENT WITHIN THEIR TERRITORY.

The longstanding policy of the United States is to encourage tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). The policy reflects the fact that Indian tribes "retain 'attributes of sovereignty over both their members and their territory.' " *Id*. (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). The scope of tribal sovereign authority includes the authority to engage in policing for protection of the health and welfare of the Indian tribes and their members. *See Cooley*, 141 S.Ct. at 1644. Indian tribes possess broad authority to regulate tribal-member and nonmember conduct within their territory. *See generally FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 931–32 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1046 (2021).

Tribal sovereignty includes the authority to regulate employment within its territory. *Cf. Salt River Project Agr. Imp. And Power Dist. v. Lee*, No. 08-cv-08028-PCT-JAT, 2013 WL 321884 at *15 (D. Ariz. Jan. 28, 2013) (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 334–35 (2008)). The

Supreme Court in *Plains Commerce Bank* recognized that tribal sovereign interests include the protection of tribal self-government and control of internal relations. 554 U.S. at 334. The scope of tribal sovereign authority includes regulating "behavior that implicates tribal governance and internal relations." *Id.* at 335. Tribal law applies to, and governs the relations between, a tribal government and its employees. *See Locklear v. Mendoza*, 585 F. App'x 402 (9th Cir. 2014) (termination of tribal government employee occurred under color of tribal law).

III. THE PRIVATE RIGHT OF ACTION CREATED BY 42 U.S.C. § 1983 APPLIES TO PERSONS ACTING UNDER THE COLOR OF STATE, NOT TRIBAL, LAW.

To maintain an action under section 1983 in the Ninth Circuit, a plaintiff must show "(1) that the conduct complained of was committed by a person acting under the color of *state* law; and (2) that this conduct deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015) (quoting *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) (emphasis in original)). " '[A]ctions under section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law.' " *Id*. (quoting *Evans*; citing *Bressi v. Ford*, 575 F.3d 891, 895 (9th Cir. 2009), *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983)). The termination of employment of a tribal government employee occurs under the color of tribal law. *See Locklear*, 585

F. App'x at 403. There is no private right of action for tribal employment disputes under section 1983. *See id.*

IV. THE DISTRICT COURT PROPERLY DISMISSED THE SUIT BECAUSE DEFENDANTS WERE ACTING UNDER THE COLOR OF TRIBAL LAW WHEN THEY TERMINATED PLAINTIFF'S EMPLOYMENT.

Plaintiff was a tribal police officer for the Warm Springs Police Department until he was terminated in September 2019. ER-79. Plaintiff alleges that he "witnessed and was subjected to sexual, racial, and derogatory comments and offensive and unwanted touching during his employment for the Warm Springs Police Department." *Id*. Plaintiff also alleges that he reported this conduct to his supervisors and that his complaints were passed on to Defendant Gregory, the acting Chief of Police of the Warm Springs Police Department. *Id*. He asserts that in January 2019, Defendants Gregory and Smith, the Manager of Public Safety for CTWS, called a department-wide meeting and "singled out Plaintiff by staring at him repeatedly, minimized his complaints, and discouraged the bringing of grievances up the chain of command." *Id*. Plaintiff alleges that he also reported the misconduct to Defendant Macy, the Chief Operations Officer for CTWS, but no remedial action was taken. *Id*.

Plaintiff also claims Defendants retaliated against him for reporting the alleged harassment and discrimination issues. ER-80. Plaintiff brings several claims

against Defendants based on actions taken in their "individual" and "official" capacities, including two claims for deprivation of constitutional rights under section 1983. Defendants moved to dismiss the suit. *Id.*

The district court recognized that there is no private right of action under section 1983 for persons alleging a deprivation of constitutional rights for actions taken under the color of tribal law. ER-85 (citing *Evans*, 869 F.2d at 1347). The district court also correctly understood that Defendants' "internal employment actions against a tribal employee are inherently actions taken under the color of tribal law." *Id.* The court also rejected Plaintiff's contention that Defendants had become "state actors by receiving state training and resources and by reporting his termination to the Oregon Department of Public Safety Standards and Training ("DPSST"). ER-85. In rejecting that contention, the district court relied on the "state-action test" from *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). ER-85–86. The *Lugar* test provides that the deprivation of constitutional rights "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible." *Lugar*, 458 U.S. at 937. The district court concluded that Defendants were not engaging in state action when they "allegedly violated Plaintiff's constitutional rights." ER-86. The district court dismissed Plaintiff's section 1983 claims, and this appeal followed.

V. SENATE BILL 412 DOES NOT REGULATE INTERNAL TRIBAL GOVERNMENT EMPLOYMENT ACTIONS INVOLVING TRIBAL POLICE OFFICERS.

On appeal, Plaintiff does not dispute that Indian tribes, including *amici*, possess inherent sovereign authority to regulate employment within their territory. DktEntry 20-1 at 11–16. Nor does Plaintiff dispute that tribal law generally applies to internal employment actions taken by a tribal government with respect to its employees, or that there is no section 1983 claim for the alleged deprivation of constitutional rights under the color of tribal law. *Id.* Plaintiff's contention is more narrow: he argues that Defendants' internal employment actions are under the color of state law because *amicus* Confederated Tribes of Warm Springs has opted to take advantage of the cross-border law enforcement scheme authorized by Senate Bill 412. *Id.* Plaintiff's "in for a penny in for a pound" argument is misplaced. Senate Bill 412 does not regulate internal tribal employment actions for Oregon tribes and intertribal organizations that have opted to use the Senate Bill 412 scheme.

Senate Bill 412 was precipitated by the uncertainty created by a decision of the Oregon Court of Appeals. The decision arose out of a traffic stop by a CTWS tribal police officer of a non-Indian outside the boundaries of the Warm Springs Reservation following a pursuit that began on the Reservation. *State v. Kurtz*, 233 Or. App. 573, 228 P.3d 583 (2010). The defendant was prosecuted in county court and was convicted under Oregon law for attempting to elude a police officer

and resisting arrest by a peace officer. *Id.* This pattern and practice of enforcement measures had operated in Oregon for many years prior to the defendant's arrest. The Court of Appeals reversed the conviction, concluding that the tribal police officer did not qualify as a police or peace officer under Oregon law. *Id.*

The Court of Appeals decision in *Kurtz* precipitated a legislative effort in 2011 to recognize the importance of tribal law enforcement capacities and authorize tribal police officers to exercise, under certain conditions, the powers of state law enforcement officers. During the legislative session, the Oregon Supreme Court reversed the Court of Appeals. *State v. Kurtz*, 350 Or. 65, 249 P.3d 1271 (2011)). The legislature proceeded with and ultimately passed Senate Bill 412 because the bill addressed important issues left unanswered by the courts.

Construed in accordance with the statutory interpretation framework laid down by the Oregon Supreme Court, Senate Bill 412 does not regulate the internal employment decisions of Oregon tribal governments and intertribal organizations relating to their law enforcement officers. *See State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009) (court's "paramount goal" is to discern the legislative intent through examination of the statutory text, context, legislative history, and, if necessary, maxims of statutory construction). The purpose of Senate Bill 412 "is to provide authorized tribal police officers with the ability to exercise the powers of, and to receive the same authority and protections provided to, law enforcement officers

under the laws of [Oregon] … .” ORS 181A.690(1). An “authorized tribal police officer” is a police officer who is acting in accordance with Senate Bill 412 while “employed by a tribal government that is in compliance” with the bill. ORS 181A.680(1) (defining “authorized tribal police officer”). A tribal government is statutorily defined to mean a “federally recognized sovereign tribal government whose borders lie within this state or an intertribal organization formed by two or more of those governments.” ORS 181A.680(2).

A tribal police officer is “authorized” under Senate Bill 412 if, among other things, the officer is employed by a tribal government that has adopted certain provisions in its “tribal law.” ORS 181A.685(4)(d). First, the tribal government must have a law that requires it to participate in, and be bound by, a deadly physical force plan approved under state law. ORS 181A.685(4)(d)(A). Second, the tribal law must also require the retention of records related to the exercise of Senate Bill 412 authority in a manner substantially similar to Oregon State Police record retention requirements. ORS 181A.685(4)(d)(B). Third, the tribal law must provide the public with the right to inspect the tribal government’s records in cases where Senate Bill 412 authorities are exercised by the tribal program. ORS 181A.685(4)(d)(C). Fourth, the tribal law must require the tribal government to meet certain standards regarding the preservation of biological evidence collected during a criminal investigation conducted under Senate Bill 412. Fifth, the tribal law must contain a

waiver of sovereign immunity as to tort claims asserted in the tribal government's court that arise from the conduct of an authorized tribal officer. ORS 181A.685(4)(d)(D). The tribal government must also comply with certain pretrial discovery requirements. ORS 181A.685(4)(e).

There is nothing in Senate Bill 412 that could be reasonably construed as an intent by the Oregon legislature to regulate the internal employment decisions of Oregon tribal governments and intertribal organizations relating to their "authorized" law enforcement officers. That conclusion is reinforced by ORS 181A.690(8), which confirms that an authorized tribal police officer is "not an officer, employee, or agent of the State of Oregon or of any other public body" for purposes of the Oregon Tort Claims Act. Further, Senate Bill 412 itself is careful to note that nothing in the Act "[a]ffects the existing status and sovereignty of tribal governments whose traditional lands and territories lie within the borders of the State of Oregon … ." ORS 181A.690(9)(b).

Senate Bill 412 provides tribal governments and intertribal organizations with the opportunity for their police officers to become eligible to exercise the powers of law enforcement officers under the laws of the State of Oregon. Senate Bill 412 cannot be reasonably construed as an attempt by the State to regulate internal tribal government employment decisions. To conclude that the statute somehow implicitly regulates such decisions runs afoul of the maxim of statutory construction to

construe statutes in a manner that avoids unconstitutional results. *See State v. Kitzman*, 323 Or. 589, 602, 920 P.2d 134 (1996) (recognizing maxim).[4] Only Congress has the constitutional authority to abrogate tribal sovereignty; the Oregon Legislature does not possess such authority. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Further, to exercise that abrogation power, " 'Congress must unequivocally express that purpose,' " and a reviewing court must have " 'perfect confidence' " that Congress has done so. *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1159 (9th Cir. 2021) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014), *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018)).[5] Even if the Oregon legislature had the constitutional power to abrogate tribal sovereignty (it does not), Senate Bill 412 contains no unequivocal expression of an intent to regulate internal tribal government employment actions.

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[4] It would also violate the statutory maxim not to insert terms that the legislature has omitted. *See* ORS 174.010. And, such an interpretation would run afoul of the maxim to interpret statutes liberally in favor of the tribes. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also State v. Begay*, 312 Or. App. 647, 495 P.3d 732 (2021) (recognizing maxim).

[5] Tribes may also waive their sovereignty; like Congressional abrogation, such waivers "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (applying standard in context of waiver of sovereign immunity) (internal quotation marks and citations omitted).

Defendants were not acting under the color of Oregon law when they allegedly violated Plaintiff's constitutional rights. They were, rather, exercising their authority under CTWS law within the boundaries of the Warm Springs Reservation. The district court correctly concluded as much and properly dismissed Plaintiff's section 1983 claims. If Plaintiff believed he suffered wrongdoing at the hands of other CTWS employees while working for the CTWS tribal government on the Warm Springs Reservation, he had the ability to file suit in tribal court to redress those claims under tribal law. He chose not to do so.

CONCLUSION

Defendants' actions taken in connection with Plaintiff's employment as a tribal police officer for Warm Springs Police Department were actions taken under the color of tribal law. Plaintiff does not have a section 1983 claim for any alleged deprivation of constitutional rights arising out of those actions. The district court's decision must be affirmed.

Dated: January 14, 2022

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FOR THE NINTH CIRCUIT

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