IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 17-56003

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally recognized Indian tribe, on its own behalf and as parens patriae for its members,
Plaintiff-Appellant,

v.

RIVERSIDE COUNTY, et al.,
Defendants-Appellees,

DESERT WATER AGENCY,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California

No. 5:14-cv-00007-DMG-DTB | The Honorable Dolly M. Gee

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLEES COUNTY OF RIVERSIDE ET AL

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I. CORPORATE DISCLOSURE STATEMENT [F.R.A.P., Rule 29(b), 20(a)(4)(A), 26.1]

Amici Curiae California State Association of Counties ("CSAC") and International Municipal Lawyers Association ("IMLA") are both non-profit corporations. Neither CSAC nor IMLA has a parent corporation or any publicly held corporation that owns 10% or more of its stock.

II. AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE [F.R.A.P. Rule 29(b), 29(a)(4)(D)]

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

IMLA is a non-profit organization dedicated to advancing the interests and education of local government lawyers. Based in the Washington D.C. area, IMLA offers more than 2,500 members across the United States and Canada continuing legal education courses, research services, membership in substantive law sections, and litigation assistance in the form of amicus briefs.

CSAC and IMLA are interested in this case because the issues presented here directly and uniquely impact local government, including the members of CSAC and IMLA. The district court's decision preserves the stability of a complex tax structure, as well as the revenues derived therefrom. The opinion enables local agencies to continue providing critical and valuable services to residents. From the effect an adverse ruling would have to statewide property tax structures, to what it would mean for counties already struggling to meet the needs of all their residents, CSAC and IMLA have a strong interest in attempts to change to settled tax law.

III. STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT [F.R.A.P. Rule 29(b), 29 (a)(4)(E)]

No party's counsel authored this amicus brief in whole or in part. No party or party's counsel contributed money intended to fund preparation or submission of this amicus brief. No one other than amici and their counsel contributed money intended to fund preparation or submission of this amicus brief.

IV. STATEMENT CONCERNING CONSENT TO FILE [Circuit Rule 29-2(a), 29-3]

All parties have consented to the filing of this brief.

V. STATEMENT OF FACTS

Amici join in and refer to Appellees' Statement of Relevant Facts found in Appellees' Answering Brief ("Appellees' Brief" at 6).

VI. INTRODUCTION

In California, a one percent tax is imposed on possessory interests, including possessory interests that are held on property that would otherwise be tax-exempt. Cal. Rev. & Tax §§ 107, 107.1. The main issue in this case is whether the County of Riverside's assessment of this possessory interest tax ("PIT") on non-Indian lessees who use and occupy Indian land on the Agua Caliente Indian Reservation ("ACIR") is preempted by Section 5 of the Indian Reorganization Act ("IRA"). 25 U.S.C. § 465. The lower court's conclusion that there is no preemption should be affirmed.

First, the tax code relating to Indian land and non-Indian interests held on that land is comprehensive and complicated, but is also well-settled. For decades, the courts have found that the PIT is properly applied to non-Indian lessees on Indian land. Reversing the District Court would unnecessarily disrupt this system, creating uncertainly and instability in application of the PIT in California and other jurisdictions.

Second, the revenue generated by the PIT is used to provide important and critical services to both tribal and non-tribal interests. Because of the

significant restrictions local governments face in California on the ability to impose or increase taxes and fees, loss of the PIT will not be replaced by another revenue source. The result of a reversal here, therefore, would mean all other taxpayers would bear the burden of the loss of revenue caused by a non-tribal interest avoiding the PIT, a tax that would clearly be paid if the possessory interest were occurring on non-tribal land.

For these reasons, as well as those put forth in Riverside County's Answer Brief, the District Court was correct in granting the County's motion for summary judgment and holding the County's PIT on ACIR lands is not preempted by federal law. CSAC and IMLA therefore urge this Court to affirm, and uphold the County's practice of collecting the PIT from non-Indian lessees on Indian land.

VII. ARGUMENT

A. Plaintiff's Argument Would Create Disruption in a Complicated, But Settled, Tax System.

To be sure, the tax structure in California as applied to Indian tribes and Indian land is complicated. Whether and how a tax is assessed depends on the nature of the tax, who the tax is assessed against, the nature of the transaction or property being taxed, the location of the tax payer, and many other variables. *See, e.g.*, Calif. Dept. of Tax and Fee Administration, Publication 146, *Sales to American Indians and Sales in Indian Country*

(Oct. 2017).[1] Indeed, "[t]here are numerous federal and state laws, in addition to opinions issued by the courts, that impact the application of [California]-administered taxes and fees to transactions involving Indians." *Id.* at p. i.

Notwithstanding the variety of rules that apply to different types of transactions and interests concerning Tribal land and Tribes, the law on taxable possessory interests on non-Indian interests held on Tribal land is well-established and has been settled for decades. Nearly 50 years ago, this Court concluded that the possessory interests of non-Indians on Indian land were taxable because the PIT "does not purport to tax the land as such, but rather taxes the 'full cash value' of the lessee's interest in it." *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1186 (9th Cir. 1971). This court relied on the United States Supreme Court's decision of *United States v. City of Detroit*, 355 U.S. 466 (1958), to distinguish between "a tax upon the use of property" and "a tax upon the property itself." *Agua Caliente,* 442 F.2d at 1187. Those same principles were affirmed just five years later in *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976).

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[1] Available online at: http://www.cdtfa.ca.gov/formspubs/pub146.pdf.

For nearly half a century, California has relied on this settled law in administering its PIT. For example, the California Board of Equalization's Assessor's Handbook details assessing the PIT against non-Indian lessees on Indian land, stating, "Real property on an Indian reservation or [. . .] otherwise held in trust by the U.S. Government [. . .] is nontaxable. If the possessor is a non-Indian, however, a taxable possessory interest in Indian lands will exist[.]" Cal. Assessor's Handbook, Section 510, *Assessment of Taxable Possessory Interests*, p. 13 (Dec. 2002, rep. Jan. 2015).

The same line of cases relied upon by the California Board of Equalization was relied upon by the lower court here in determining that a non-Indian's possessory interest in using Indian land is a taxable interest. In defining the taxable interest, the lower court also referenced *United States of America v. County of Fresno* ("*Fresno*"), 50 Cal. App. 3d 633 (Cal. App. 1975). *Fresno* held that a PIT, such as the one at issue here, is assessed against the individual making use of the interest, not against the government interest tied to the land. *Fresno*, 50 Cal. App. 3d at 640. *Fresno* relied upon a 1958 decision finding that "it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them[.]" *City of Detroit v. Murray Corp*., 355 U.S. 489, 469 (1958).

Plaintiff-Appellant provides no justification for upending nearly fifty years of California's tax system and the long-standing legal determination that a tax upon a possessory interest is distinguishable from a tax upon the land on which the interest exists. To the contrary, our courts have "long recognized the dangers inherent in disrupting the administration of state tax systems, and the corresponding need for federal court restraint when deciding cases that will affect these delicate state operations." *Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir. 1986), citing *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 102 (1981), *Perez v. Ledesma*, 401 U.S. 82, 127 n. 17 (1971)(concurring op.).

In addition, courts should avoid overturning clear precedent absent special justification. "Overruling precedent is never a small matter. Stare decisis—in English, the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.' Application of that doctrine, although 'not an inexorable command,' is the 'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble v. Marvel Entertainment*,

135 S. Ct. 2401, 2409 (2015), citing *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014), *Payne v. Tennessee*, 501 U.S. 808, 827-828 (1991).

This Court should, therefore, continue to affirm the principles of PIT assessment and uphold the lower court.

B. Local Government Relies on Tax Revenue, Including the Possessory Interest Tax, to Provide Critically Important Services to Residents, Including Tribes.

All manner of local agencies in California receive a portion of the PIT, including cities, counties, schools and special districts. The services provided by these local agencies are varied and important to the public safety and quality of life for California's residents, services such as public safety, emergency response, water delivery, parks and recreation, and much more. Virtually every aspect of the lives of this State's residents is touched on a daily basis by the services provided by local agencies.

At the same time, the ability of local agencies to raise revenue in this State is restricted. In 1978, the voters approved Proposition 13, which imposes a direct constitutional limit on the ability of local agencies to adopt and levy taxes. Cal. Constit., art. XIII A. One year later, the voters adopted Proposition 4, which added article XIII B to the California Constitution. Proposition 4, among other things, establishes an appropriations limit each

fiscal year for each entity of government, which cannot be exceeded. Cal. Const., art. XIII B, § 1; *Santa Barbara County Taxpayers Ass'n v. Bd. of Supervisors*, 209 Cal. App. 3d 940, 944 (Cal. App. 1989). The measure was intended to be a "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." *County of Placer v. Corin*, 113 Cal. App. 3d 443, 446 (Cal. App. 1990). Articles XIII A and XIII B "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." *Department of Finance v. Commission on State Mandates*, 1 Cal. 5th 749, 763 (Cal. App. 2016).

Proposition 13 capped the revenue that counties could collect from property taxes. Proposition 13 had the effect of shifting power over property taxes from local agencies to the State government. When the State found itself in charge of lowering local taxes statewide, "the state relied on the existing property tax distributions to implement the [one] percent rate set by Proposition 13." California Legislative Analyst Office, *Common Claims About Proposition 13* at p. 4, Sept. 2016.[2]

[2] Available online at: http://lao.ca.gov/reports/2016/3497/common-claims-prop13-091916.pdf.

As a result, the share of the property tax revenue a county receives is set to the percentage of the property tax that it received right before 1978. How much this share is worth depends on property values, something a county cannot control. For example, when housing prices plummeted during the Great Recession, local property tax revenue in California was reduced by about $7 billion statewide, an amount equal to a 15 percent reduction in total property taxes. California Legislative Analyst Office, *Property Tax Reductions to Diminish as Housing Market Improves* at p. 9, May 5, 2014.[3] It takes many years to begin to recover those lost property tax values, which can only be adjusted upward once the value of the home returns to the original purchase price. *Id*. at p. 10.

Subsequent voter-adopted constitutional provisions further restrict the ability of local agencies to impose taxes or fees. Proposition 218, adopted in 1996, added articles XIII C and XIII D to the California Constitution. Under Proposition 218, the only taxes, assessments, fees, or charges that local government may impose on a parcel or a person "as an incident of property ownership" are (1) ad valorem property taxes, special taxes, assessments, which are subject to the majority protest procedure of article XIII D, section

[3] Available online at: http://lao.ca.gov/reports/2014/finance/property-tax/property-tax-050514.pdf.

4; and (2) fees or charges for a property-related service, which must be approved by a 2/3 vote of the electorate. Cal. Const. art. XIII D, §§ 3, 6. In 2010, the voters adopted Proposition 26, which extended various constitutional limitations on the authority of local government to impose fees. Cal. Const. art. XIII A, § 3; Cal. Const. art. XIII C, § 1. As a result of the various constitutional provisions restricting local tax and fee authority, the loss of tax revenue is a significant issue for local agencies, and one not easily remedied by replacement revenue streams.

Further, the question in this case – assessment of PIT on non-trial interests that are on tribal land – impacts counties beyond Riverside. California is home to 110 federally recognized tribes. With the exception of the unique situation in Alaska with its large number of tribal corporations, California has the largest number of tribes living within its borders of any State in the nation. California Tribal-Court State-Court Forum, *Native American Statistical Abstract: Population Characteristics*, p.2 (Mar. 2012).[4]

Eliminating the revenue generated by the PIT against non-Indian lessees of Indian land while continuing requiring local agencies to provide the wide-array of services county residents require would effectively shift

[4] Available online at: http://www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf.

the burden from the individual or entity enjoying the benefit of the possessory interest to the taxpayers at large. Without a way to raise enough revenues through other sources, counties would be providing services while facing an economic deficit. For example, as Riverside County has aptly shown, reversing the lower court's decision in this case would mean a loss of more than three million dollars of PIT to the County, while the County must still provide residents on ACIR land with all necessary services. Riverside County Answer Br., p. 13.

VIII. CONCLUSION

The District Court's opinion should be affirmed. First, the system for assessing PIT on non-Indian possessory interests that are on Indian lands has been established for nearly half a century. Federal courts should avoid interfering in state tax administration in a manner that would create instability in systems that are already quite complicated, and should affirm prior precedent absent special circumstances that are not present here.

Additionally, exempting the PIT in the manner advocated by plaintiff-appellant would only shift the burden from the person who enjoys the benefit of the possessory interest to the rest of the taxpayers. Local agencies are severely restricted in their ability to raise new revenue, so the

loss of the existing PIT would necessitate service cuts or constitutionally-approved revenue increases.

For the foregoing reasons, as well as those presented in Riverside County's brief, Amici respectfully request that the Court affirm the district court and hold the County's PIT against non-Indian lessees on Indian land is not preempted by Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465.

Dated: March 29, 2018

Respectfully submitted,

By: /s/ Jennifer B. Henning

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPESTYLE REQUIREMENTS

I certify as follows:

1. The foregoing amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29-2(c)(2) because it contains 2,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. The foregoing amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in font size 14, and font style Times New Roman.

Dated: March 29, 2018

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