No. 08-929

In The
Supreme Court of the United States

CHRISTOPHER COOK and LEIDRA COOK,

Petitioners,

v.

AVÍ CASINO ENTERPRISES, INC., a corporation; IAN DODD; JUAN MAJIAS; STEPHANIE SHAIK; DEBRA PURBAUGH; and ANDREA CHRISTENSEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

The Ninth Circuit Court of Appeals properly affirmed disposition of Petitioners Cooks' claims based upon sovereign immunity.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties originally named in the case. Defendant Christensen is not a party to the appeal.

DISCLOSURE STATEMENT PER RULE 29.6

Aví Casino Enterprises, Inc. is a corporation formed pursuant to the authority of an ordinance of the Fort Mojave Indian Tribe and wholly owned by the Tribe. There is no parent nor any publicly held corporation owning any of its stock.

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OPINIONS BELOW

The District Court dismissed the Respondents as defendants on grounds of sovereign immunity and lack of diversity of citizenship. Clerk's Record 38, 66. Those orders are unpublished. *Cook v. Aví Casino Enterprises, Inc.*, No. 04-1079-PCT-PGR (U.S. Dist. Ct., Dist. Ariz.) The Ninth Circuit Court of Appeals decision held that diversity jurisdiction existed, but affirmed dismissal on the ground of sovereign immunity. App. A.[1] That opinion is published at *Cook v. Aví Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008).

JURISDICTION

The case was disposed of in the District Court and in the Court of Appeals on grounds for which jurisdiction of this Court exists as set forth in 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Petitioners' reference to 18 U.S.C. § 1161 is raised for the first time in the Petition filed with this Court. That statute was never argued or considered

[1] All of the references herein to the Appendix are to the Petitioners' Appendix.

in any of the District Court proceedings nor in the Ninth Circuit appeal.

INTRODUCTION

Petitioners Cook ask this Court to decide whether a tribal corporation is entitled to sovereign immunity in an action alleging a violation of state dram-shop law. This Court should deny the Petition. In the lower courts, Petitioners advanced a single argument in opposing sovereign immunity: that a tribal corporation is not entitled to the sovereign immunity enjoyed by the tribe. The lower courts properly rejected that argument under a straightforward application of this Court's decision in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), which holds that a tribe's sovereign immunity extends to its commercial activities absent a clear waiver to the contrary.

Now, for the first time in the Petition for Certiorari, Petitioners advance a host of new arguments challenging sovereign immunity based on a reading of 18 U.S.C. § 1161 and alleging that sovereign immunity was waived. These arguments were not presented or passed on below; they are not the subject of a split of authority; and they are incorrect. Contrary to Petitioners' claims, the decision below was mandated by governing law and consistent with the holdings of sister circuits and state courts. Because

Petitioners' claims are waived, splitless, and meritless, this Court should deny the Petition.

STATEMENT OF THE CASE

As stated in his District Court complaint, Petitioner Christopher Cook ("Cook") lived and worked in California. Clerk's Record 1, ¶¶ 2, 11. During the early morning hours of May 25, 2003, he was driving his motorcycle across the Fort Mojave Indian Reservation, returning to California on his motorcycle after visiting his mother-in-law in Arizona. *Id.* ¶¶ 1, 13. According to the complaint, an off-duty employee (Christensen) was overserved and left the casino intoxicated. She allegedly used an Aví Resort & Casino shuttle bus to get to her car. While driving her own personal vehicle, Christensen crossed the center line of the tribal road, colliding with Cook on his motorcycle, causing him serious, permanent injuries. *Id.* ¶¶ 17-22. The accident occurred on "a part of the Fort Mojave Indian Reservation, along Aztec Road." *Id.* ¶ 13.

The Aví Resort & Casino facility is operated by Aví Casino Enterprises, Inc., which is a corporation of the Fort Mojave Indian Tribe (the "Tribe"), a federally recognized tribe. *Id.* ¶ 3. The Tribe's reservation (the "Reservation") straddles three states: California, Arizona, and Nevada. As acknowledged by Cook, the Aví Resort & Casino facility is located on the Nevada side of the Nevada-Arizona border. *Id.* ¶ 14. As noted

in the corporate articles (Sixth Article), the casino's gaming compact is not with Arizona, but with Nevada. Clerk's Record 13, Exhibit A; Clerk's Record 25, Exhibits 2, 4. Although never cited to in the record below, Cook's Petition (at 4) herein also notes that Aví Resort & Casino operates with a liquor license issued by the State of Nevada.[2]

Although the Aví Resort & Casino is located on the Tribe's Reservation, the corporation was formed on the Reservation pursuant to a Tribal ordinance, it is wholly owned and operated by the Tribe, and the accident occurred on the Reservation. Cook did not file any suit in Tribal court. Although Cook and two of the original individual defendants are California residents, California has no dram-shop law, and Cook did not file any complaint in the state or federal courts in California. Although Aví Resort & Casino is on the Nevada part of the Reservation, and the casino's gaming compact and liquor license are with Nevada, Nevada has no dram-shop law, and Cook did not file any complaint in the state or federal courts in Nevada. Instead, Cook filed his suit in Arizona, which has no nexus with the accident, but which does recognize dram-shop liability. Clerk's Record 1.

The Tribe itself was never named as a defendant in this case. To avoid an obvious lack of diversity of

[2] The public record Petitioners now cite for the first time is for a liquor license issued by the State of Nevada two years *after* Cook's accident.

citizenship, Petitioners agreed to dismiss two defendant-employees who were California residents, like Cook. Clerk's Record 21. Along with court-directed supplemental briefing, Respondents filed motions to dismiss. Clerk's Record 13, 26, 47. The motions raised issues of diversity of citizenship, sovereign immunity, whether the Tribe was an indispensable party, and whether choice of law analysis would require application of Nevada law, where there is no dram-shop liability. Cook opposed the motion to dismiss with respect to the sovereign immunity question on the ground that Aví Casino Enterprises, Inc. was distinct from the Tribe itself and not entitled to sovereign immunity. The District Court held that sovereign immunity of the Tribe precluded suit against all Respondents and, alternatively, that Aví Casino Enterprises, Inc. had dual citizenship in Nevada and California, destroying diversity. Clerk's Record 38, 60. The District Court did not reach the issues of indispensable party or choice of law (both of which were asserted as cross-issues in the appeal to the Ninth Circuit).

The Court of Appeals held that, for diversity purposes, the business activities of Aví Casino Enterprises, Inc. were primarily in Nevada, and that it is, accordingly, a citizen of Nevada. App. A at 10a-11a. Having found that it had diversity jurisdiction over the matter, the Court of Appeals proceeded to the question of sovereign immunity and rejected the claim of Petitioners Cook that a tribal corporation does not enjoy tribal sovereign immunity. Citing this

Court's decision in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), as well as circuit precedent, the Court of Appeals held that Aví Casino Enterprises, Inc. was an arm of the Tribe and therefore entitled to the Tribe's sovereign immunity absent a clear waiver of that immunity. App. A at 16a. Finding no clear waiver, the Court of Appeals affirmed the dismissal of Petitioners' claims.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' Determination that the Tribal Corporation Functions as an Arm of the Tribe and Has Sovereign Immunity Was Correct and Is Not the Subject of a Circuit Split.

The sovereign immunity issue as presented to the Court of Appeals was whether a tribal corporation is entitled to tribal sovereign immunity.[3] That question

[3] Cook urges (Petition at 23) that he did not sue the Tribe. That is not a distinction favoring Cook here. As urged below, the Tribe is an indispensable party. *See* Clerk's Record 47 at 5-9. Since the revenue of the Tribal corporation inures to the Tribe and is deposited in the Tribal treasury, no remedy could be fashioned without the Tribe, which cannot be joined because of its immunity. *See Kescoli v. Babbit*, 101 F.3d 1304, 1310-11 (9th Cir. 1996); *Kickapoo Tribe v. Lujan*, 728 F. Supp. 791, 796-97 (D.D.C. 1990). "The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 559-60, 635 N.Y.S.2d 116, 120, 658 N.E.2d 989, 993 (1995).

barely appears in the Petition for Certiorari, but its absence is not surprising. The Court of Appeals' determination that the Tribal corporation, Aví Casino Enterprises, Inc., is entitled to sovereign immunity is plainly correct under this Court's precedent, and in line with numerous decision from other courts.

For "nearly two centuries," Indian tribes have been recognized as sovereign nations which have "territorial boundaries, within which their authority is exclusive, and have a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Each tribe exercises inherent authority over its members and territories, and jurisdiction over civil disputes arising on the reservation is specifically vested in the tribal court and governed by tribal law. *See Williams v. Lee*, 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

Inherent in that sovereignty is the affirmative defense of sovereign immunity. *United States v. USF&G Co.*, 309 U.S. 506, 512-13 (1940). Tribal sovereignty includes immunity from suit "absent a clear waiver by the tribe or congressional abrogation." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

This Court stated in *Kiowa* that sovereign immunity extends to a tribe's business activities, as well as its governmental functions.[4] No distinction is made "between governmental and commercial activities of a tribe," or whether they occur on or off the reservation. 523 U.S. 751, 754-55 (1998). Although the *Kiowa* Court recognized the breadth of its sovereign immunity ruling, it explicitly declined to revisit the issue and instead stated that it was up to Congress whether to continue to permit tribal sovereign immunity. *Id.*

Applying *Kiowa*, the Court of Appeals here held that the Tribal corporation's commercial character was not a bar to sovereign immunity so long as it functioned as an arm of the Tribe. The Court of

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[4] This Court has recognized that gaming as a tribal business activity is a governmental function promoting the self-determination of Indian tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987) ("[T]ribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.") Congress also has recognized the importance of gaming enterprises to tribal self-governance. The Indian Gaming Regulatory Act, which governs all Indian gaming, requires that revenues from gaming be used only "(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B).

Appeals correctly concluded that this was the case. As the Court of Appeals explained, the corporation was created "pursuant to a tribal ordinance and intergovernmental agreement" and is "wholly owned and managed by the Tribe." Furthermore,

> the economic benefits produced by the casino inure to the Tribe's benefit because [its] articles of incorporation state that all capital surplus from the casino shall be deposited in the Tribe's treasury and because the Tribe, as the sole shareholder, enjoys all of the benefits of an increase in the casino's value.

App. at 14a. In addition, a majority of the Tribal corporation's board members must be Tribe members, and the "Tribe's council performs corporate shareholder functions for the benefit of the Tribe." *Id.*[5]

The Court of Appeals' conclusion that the Tribal corporation was entitled to sovereign immunity on these facts is consistent with its prior authority and a host of cases from around the country finding sovereign immunity appropriate under similar circumstances.

> With the Tribe owning and operating the Casino, there is no question that these

[5] *See also* Clerk's Record 25, Exhibit 3. Additionally, the bylaws include a section entitled "Sovereign Immunity" and provide that Aví Casino Enterprises can only waive its sovereign immunity in a contract or written obligation, and that "[t]he corporation retains its sovereign immunity to the extent not expressly waived within said instrument, contract or other written obligation." *See* Clerk's Record 54, Exhibit A.

> economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. . . . ***In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.***

Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006), *cert. denied*, 549 U.S. 1231 (2008) (emphasis added). *See Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) ("immunity extends to subdivisions of a tribe, and even bias suits arising from a tribe's commercial activities"); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21, 29 (1st Cir. 2000) (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"). *See also Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 169, 129 P.3d 78, 80 (Ct. App. 2006); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 638-42, 84 Cal. Rptr. 2d 65, 69-71 (1999); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 294-96 (Minn. 1996); *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 559, 635 N.Y.S.2d 116, 119, 658 N.E.2d 989, 992 (1995); *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash. 2d 108, 112-13, 147 P.3d 1275, 1279 (2006).

As acknowledged by the Ninth Circuit in this case, the "arm of the Tribe" concept is similar to the "arm of the state" concept discussed in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), which decided whether a state instrumentality could invoke the state's sovereign immunity.[6] In *Regents*, the plaintiff sought to sue the state university, through its regents, for an alleged violation of a contract to employ him. The university maintained that pursuant to the Eleventh Amendment, it was immune from such suit in federal court. This Court agreed.

> It has long been settled that the reference to actions "against one of the United States" encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities. . . . Thus, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

Id. at 429 (citations omitted).[7]

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[6] "[S]tate sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens." *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 765 (2002).

[7] *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (where the sovereign immunity was of the United States

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"When deciding whether a state instrumentality may invoke the State's immunity, our cases have inquired into the relationship between the State and the entity in question." *Id.* The relationship between the Tribe and Aví Casino Enterprises, Inc. has been stated above. The corporation is not a mere business. It was created under tribal law and is wholly owned and managed by the Tribe through its Tribal Council. The corporation is a device (an arm of the tribe)[8] through which the Tribe carries out part of its tribal functions. The economic benefits of the corporation are required to inure to the Tribe. Cook's damages suit against the Tribal corporation "is in essence one for the recovery of money from the [Tribe], [so] the [Tribe] is the real, substantial party in interest and is entitled to invoke its sovereign immunity." *Id. See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("here the College serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity"); *Duke v. Absentee Shawnee Tribe Housing Authority*, 199 F.3d 1123, 1125-26 (10th Cir. 1999)

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and the court said naming individual officers or employees did not change that it was really a suit to collect from the government and barred).

[8] When an Indian tribe and a corporation considered an "arm of the tribe" sought to be recognized as "persons" for purposes of a federal statute, this Court denied such status to both the tribe and its corporation, with no distinction between the two, because both were sovereign entities, in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701, 704 & 705 n.1 (2003).

(housing authority was "an enterprise designed to further the economic interests of the Absentee Shawnee tribe," so exempt from the asserted federal law); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (health corporation created and controlled by tribe "served as an arm of the sovereign tribes, acting as more than a mere business," so entitled to tribal immunity); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) ("we must treat the Authority as a tribal agency rather than a separate corporate entity created by the tribe"); *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (age discrimination law inapplicable to construction company chartered and wholly owned by tribe).

Cook has no argument other than to claim that *Kiowa* involved a contract or that *Kiowa* should be revisited by this Court. The notion that *Kiowa* was limited to commercial contracts is belied by the opinion's language, which explicitly envisioned sovereign immunity for "torts," and by the host of cases, cited above, applying it in a variety of actions, including tort cases. As for Cook's request to revisit *Kiowa*, this Court has already decided in that case that questions of sovereign immunity are appropriately addressed to Congress. There is no warrant for the Court to now reconsider its judgment on that point.

II. Petitioners' Principal Arguments Regarding Regulation of Alcohol Were Not Presented or Passed on Below, Do Not Create any Split of Authority, and Are Meritless.

Perhaps recognizing that the issues raised below are an entirely inadequate basis for granting the Petition, Petitioners advance an entirely new set of arguments before this Court. Petitioners now contend that Congress has abrogated the sovereign immunity of tribes with respect to state liquor laws under 18 U.S.C. § 1161, and that Respondents have waived sovereign immunity in any event. Neither of these grounds was presented to nor passed upon by the lower courts. (Indeed, the lower courts expressly noted that Cook had not made a waiver argument.)[9] Petitioners' failure to present these arguments below is an independently sufficient basis to deny the Petition because this Court "ordinarily do[es] not consider claims that were neither raised nor addressed below." *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455 (2007). *See also Clingman v. Beaver*, 544 U.S. 581, 598 (2005); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970). Even if this Court were inclined to consider Petitioners' arguments (and it should not), there

[9] App. A at 15a & n.6; Clerk's Record 60 at 7 n.7.

would still be no persuasive basis for granting the Petition.

A. Congress Did Not Unequivocally Abrogate Tribal Sovereign Immunity from a Private Tort Damages Suit Merely by Allowing a State to Exert Regulatory Authority Over Alcohol Transactions.

Petitioners argue at length that the decision of the Court of Appeals conflicts with *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), a dram-shop liability case decided by the Oklahoma Supreme Court. That is incorrect. In *Bittle*, the Oklahoma court concluded that 18 U.S.C. § 1161 resulted in a waiver of tribal sovereign immunity with respect to alcohol-related transactions. That holding plainly does not conflict with the decision below because Cook never presented any argument based on 18 U.S.C. § 1161, and thus the Court of Appeals issued no "conflicting" ruling concerning it here. In any event, *Bittle* also was wrongly decided.

Congressional authorization for suit against a tribe "cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[10] When faced with a claim that Congress has statutorily waived a tribe's immunity,

[10] The same language is used in determining whether there has been Congressional abrogation of sovereign immunity of the states. *See Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

courts should "tread lightly in the absence of clear indications of legislative intent." *Id*. at 60.

There is no federal statute which specifically eliminates an Indian tribe's immunity from liability for damages in a private law suit under a state dram-shop statute. Cook argues here that Congress has ***impliedly*** abrogated tribal sovereign immunity from private tort actions under state dram-shop laws and 18 U.S.C. § 1161 as applied in *Rice v. Rehner*, 463 U.S. 713 (1983).

In *Rice v. Rehner*, this Court held that there was no tradition of tribal sovereign immunity in the context of licensing and transactions for the distribution of alcoholic beverages. It did not address whether an individual could maintain a private action for damages against a tribe. The Court also found that the legislative history of 18 U.S.C. § 1161 indicated that Congress had intended to allow state law to apply to the regulation of tribal alcohol transactions. 463 U.S. at 726. That same legislative history discloses no intent that tribes be subject to private causes of action and civil damage suits for dram-shop liability.[11]

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[11] The sections referred to within 18 U.S.C. § 1161 are all federal criminal statutes. The statute contains no express or implied waiver for private dram-shop actions in state court. It does not even mention tribal immunity. Allowing a state to enforce its liquor regulations by allowing state court prosecutions of Indians for violations occurring on a reservation has no

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Rice is a regulation case. Sovereign immunity was not in issue. The background facts of the *Rice* case are instructive on the limits of the Court's holding. *Rice* did not involve a claim against a tribe, a tribal enterprise, or a tribal employee, much less a tort claim arising from an automobile accident or under a state dram-shop law. It did not involve a private action for damages at all. Rather, in *Rice*, an individual Indian trader brought a declaratory judgment action against the Director of the California Department of Alcoholic Beverage Control to determine whether the state could require the trader to obtain a state liquor license to sell alcohol on Indian lands. This Court resolved only the narrow question of "whether the State of California may require a federally-licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption." 463 U.S. at 715. The Court held that California could require the trader to obtain a state liquor license to sell alcohol on Indian lands. This exercise of regulatory authority does not imply an abrogation of sovereign immunity for tribes or tribal enterprises.

Cook suggests that private dram-shop actions are part of the type of state regulation of alcohol-related

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bearing on whether a tribe can be subject to a suit in state court for monetary damages for negligently overserving alcohol.

activities of Indian tribes.[12] This proposition, however, conflates the distinction recognized in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. . . . To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . ***There is a difference between the right to demand compliance with state laws and the means available to enforce them.***

523 U.S. at 755 (emphasis added). State regulation of alcohol transactions permitted by 18 U.S.C. § 1161 does not involve a loss of tribal sovereign immunity from suit.

As noted in *Kiowa*, the distinction between being subject to state regulation and being subject to a damages suit is illustrated by a series of cases involving cigarette sales. Those cases established that a state may regulate the on-reservation sale of cigarettes to non-Indians with respect to the state's tax laws. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of the Colville*

[12] Although alcohol regulation is a valid exercise of the state's police power, the state cannot delegate its police powers to individuals. Allowing governmental regulation by a state is not the same as allowing private causes of action by individuals for money damages.

Indian Reservation, 447 U.S. 134 (1980), "hold that if the legal incidence of a state excise tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting that tax from the purchasers." *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985). *Chemehuevi* held that the state could require the tribe to collect an excise tax on cigarettes sold to non-tribal members, but the lower court's holding that the tribe itself was immune from any counterclaim for taxes due was not disturbed. *Id.* In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991), the state sought to extend the aforementioned holdings to require the tribe to pay to the state certain uncollected cigarette taxes. This Court again held that the state was permitted to impose taxes on the tribe's cigarette sales to non-tribal members, but sovereign immunity was applied to bar the tax on sales to tribal members and any counterclaim by the state to collect from the tribe for uncollected back taxes or to enjoin future tax-free sales.[13] "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives." *Id.* at 514 (noting among the alternatives that the

[13] Thus, the fact that a state regulatory law may apply to a sovereign tribe does not necessarily mean that state (or federal) court jurisdiction follows as a matter of course. "[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000).

state could seek the tax from cigarette suppliers to the tribe, or seize cigarettes off the reservation, or negotiate a mutually acceptable agreement with the tribe).

The only other cases examining 18 U.S.C. § 1161 in circumstances similar to *Bittle* have all concluded that it does not result in a waiver of tribal sovereign immunity with respect to a private right of action for tort damages. *See Foxworthy v. Puyallup Tribe of Indians Ass'n*, 141 Wash. App. 221, 231-32, 169 P.3d 53, 58 (2007);[14] *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 172, 129 P.3d 78, 83 (Ct. App. 2006);[15] *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. Ct. App. 1997).[16]

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[14] *Foxworthy* was a case involving an injured motorist who sought in state court to sue the tribe operating a casino where the intoxicated driver who collided with the plaintiff was alleged to have been overserved alcohol. The Washington Court of Appeals held that the tribe's inherent sovereign immunity from private tort actions was not abrogated nor waived because of the state's authority to tax or otherwise regulate alcohol sales on the reservation pursuant to 18 U.S.C. § 1161. 141 Wash. App. at 232-34, 169 P.3d at 58-59.

[15] In *Filer,* the Arizona Court of Appeals concluded that 18 U.S.C. § 1161 did not abrogate tribal sovereign immunity with regard to litigation related to dram-shop act violations and that *Rice v. Rehner* was distinguishable because it did not address a private right of action to enforce a state law against Indian tribes. *Filer*, 212 Ariz. at 171-72, 129 P.3d at 82-83.

[16] In *Holguin*, the Texas Court of Appeals held that 18 U.S.C. § 1161 did not abrogate tribal immunity from a private dram-shop lawsuit for damages in state court even if the statute subjected the tribe to state liquor regulation. 954 S.W.2d at 854.

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Hence, accepting for purposes of argument that a state's dram-shop law might be considered a part of its exercise of the police power with respect alcohol enforcement, it still does not follow that a tribe which is subject to the state's regulatory laws for alcohol transactions is also subject to a private party's suit for damages for negligence or an alleged violation of such a regulatory law. "[T]he right to demand compliance with state [alcohol] laws" does not mean that private damage suits are among "the means available to enforce them." *Kiowa*, 525 U.S. at 755.[17] Indian tribes have a history of sovereign immunity from liability from damage suits, including private tort

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The court also held that tribal sovereign immunity barred private suits for personal injuries resulting from noncompliance with the Texas Dram Shop Act. *Id.*

[17] As the Arizona Court of Appeals said in *Filer*:

> Thus, a state's power to regulate certain tribal activities and its ability to bring a lawsuit against a tribe in state or federal court are not necessarily coextensive. That is to say, sovereign immunity may bar the latter but not the former. And a private suit, even if deemed a valid exercise of the state's regulatory power, is subject to the same limitations. As the Gaming Enterprise argues, "[i]f a state cannot directly enforce its alcohol laws against a tribe in a civil suit in federal court, then a private party certainly cannot prosecute a suit for monetary damages against a tribe in state court."

212 Ariz. at 172, 129 P.3d at 83 (citing *Holguin*). *See also Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 387, 105 Cal. Rptr. 2d 773, 775 (2001) ("a state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe").

actions, and the fact that tribes have been subject to regulation in some instances has not been accompanied by a wholesale abrogation of their immunity from suit.

B. The Tribe Did Not Unequivocally Waive Its Sovereign Immunity from a Private Tort Damages Suit.

Cook also argues for the first time[18] in the Petition that Respondents waived sovereign immunity. That argument is also incorrect.

Waiver requires the intentional relinquishment of a known right. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973). "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizens Band Potawatomi Tribe*, 532 U.S. 411, 418 (2001).[19] *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe"). Even if this Court were willing to overlook Petitioners' failure to raise a waiver argument below,

[18] Both lower courts noted Cook's failure to make a record on waiver. App. A at 15a & n.6; Clerk's Record 60 at 7 n.7.

[19] A similar requirement applies with respect to the sovereign immunity of the United States. "Such waiver cannot be implied, but must be unequivocally expressed." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

there has been no clear waiver by the Tribe of its sovereign immunity with respect to Cook's tort claim.

Cook's Petition (at 22) only argues that the Tribe impliedly waived its immunity by incorporating its business enterprise as Aví Casino Enterprises, Inc. That is not an express waiver. To the contrary, as previously noted, the Tribal corporation's bylaws expressly disclaim any intent to waive sovereign immunity. *See* Restated Bylaws, Section 5.6, Clerk's Record 54, Exhibit A.

Cook merely suggests (Petition at 4) that by accepting a state liquor license, the Tribe somehow waived its sovereign immunity and agreed to be bound by state liquor laws, including dram-shop laws.[20] This is another argument for waiver by implication and would not constitute the "clear" waiver required to be shown.

First, Aví Resort & Casino operated pursuant to a gaming compact with Nevada and a liquor license issued by Nevada. To the extent Cook's argument depends upon a purported waiver by the Tribe, this hypothetical waiver must be for the purpose

[20] According to *Kiowa*, 523 U.S. at 756, "tribal immunity is a matter of federal law and is not subject to diminution by the states," so it would seem incongruous to find that by Arizona enacting a dram-shop law, somehow the Tribe here is deemed to have waived any immunity as a result of receiving a liquor license from Nevada which has no dram-shop law.

of applying Nevada law, not Arizona law.[21] Hence, even if 18 U.S.C. § 1161 required application of the "laws of the state," here, as Cook acknowledges in the Petition (at 18, n.40), that would be Nevada which has no dram-shop law.

Second, as discussed with regard to *Rice v. Rehner* above, this hypothetical waiver would be with respect to the licensing and regulation of liquor transactions.[22] There has been no intentional relinquishment of the right to be immune from private causes of action for tort damages.

As already stated, Cook failed to make any waiver argument below, which was noted by both the District Court and the Ninth Circuit. To the extent

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[21] Cook's Petition (at 18-19), seeks to convert this to an undecided conflict of laws question, but the Arizona state court decision has rendered that question moot. The Arizona court found that the accident involved a California plaintiff, accusing a Tribal entity and Tribal employees of overserving alcohol on the Reservation, allegedly contributing to a collision which occurred on the Reservation. Those same factors leading to a determination of no personal jurisdiction of the Arizona court also illustrate that if any state law applies, it would be Nevada – a state with no dram-shop liability.

[22] In *Potawatomi*, it was the tribe which had initiated a suit against the state to enjoin it from assessing the cigarette tax. This Court held that such an action nevertheless did not waive the tribe's sovereign immunity with respect to the counterclaim in which the state sought to collect the unpaid taxes. 498 U.S. at 509-10. *See also World Wide Minerals v. Kazkhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) ("waivers of sovereign immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the language requires.' ").

Cook now seeks to make such an argument, it should not be considered. In any event, there is nothing in the record which shows the requisite clear, unequivocal waiver of sovereign immunity.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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