NO. 14-12007-F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RONALD COLBERT ET AL.,
PLAINTIFFS-APPELLEES

V.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 3:09-CV-998-J-20JRK

APPELLEES' BRIEF

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Ronald Colbert et al. v. United States
No. 14-12007-F

Certificate of Interested Persons and Corporate Disclosure Statement

The following persons and entities have an interest in the outcome of this case:

1. Bentley, A. Lee, III, United States Attorney;

2. Biddle, Barbara C., counsel for the United States;

3. Carter, Ronnie S., Assistant United States Attorney;

4. Colbert, Amber (one of Ronald Colbert's survivors);

5. Colbert, Jerri (individually, in her capacity as personal representative of the Estate of Ronald Colbert, and as one of Ronald Colbert's survivors), plaintiff-appellee;

6. Colbert, Ronald, III (one of Ronald Colbert's survivors);

7. Cunningham, Collette B., Assistant United States Attorney;

8. Delery, Stuart F., Assistant United States Attorney General;

9. Dore, Dennis P., Esq.;

10. Grandy, Todd B., Assistant United States Attorney;

11. Johnson, Brian, Esq.;

12. Keeler, Bill, Esq.;

13. Klindt, Hon. James R., United States Magistrate Judge;

14. Lee, Jeffrica Jenkins, counsel for the United States;

15. Martine, Kandis, defendant;

16. Mason, Patrick, Esq.;

17. Mehta, Jason P., Assistant United States Attorney;

18. Milton, David M., Esq.;

19. Myers, R. Frank, Esq.;

20. Nelson, Pamela J., Esq.

21. O'Neill, Robert E., former United States Attorney;

22. Posgay, Matthew N., Esq.;

23. P.V. Holding Corp., doing business as Budget-Rent-A-Car System, Inc. (ticker symbol CAR), defendant;

24. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;

25. Schlesinger, Hon. Harvey E., United States Senior District Judge;

26. Sorenson, Charles A., Esq., and

27. United States Of America, defendant-appellant.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case because, contrary to the Government's claim the District Court misapplied the law, the District Court simply applied the straightforward language of the Indian Self-Determination and Education Assistance Act to the facts. Therefore, the parties' briefs are sufficient to enable this Court to reach a just determination of the merits of the Government's appeal.

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APPELLEES' BRIEF

STATEMENT OF JURISDICTION

Colbert agrees with the substance of the Government's Statement of Jurisdiction.

STATEMENT OF THE ISSUE

Under the Indian Self-Determination and Education Assistance Act, employees of an American Indian tribe, tribal organization, or American Indian contractor who are carrying out a self-determination contract by performing functions under that

contract are entitled to the Federal Tort Claims Act's protection and coverage.

The sole question before this Court is whether the District Court was correct when it concluded that Kandis Martine, a Navajo Nation employee who was in Jacksonville, not to provide legal services but to carry out a self-determination contract by performing Functions Nine and Eleven of that contract, is entitled to the Federal Tort Claims Act's protection and coverage.

STATEMENT OF THE CASE

Though Colbert disagrees with the Government's characterization of the District Court's conclusion as contrary to federal law, Colbert agrees with the substance of the Government's Statement of the Case.

A. STATEMENT OF FACTS

The Government's Statement of Facts includes some necessary background information, but because the Government's Brief omits information essential to resolve the issue on appeal, Colbert will provide that information in her Statement of Facts.

1. Statutory and contractual background

The Self-Determination Act requires the United States, when requested by an American Indian tribe, to contract with that tribe to transfer to the tribe the authority to perform certain functions. *See* 25 U.S.C. §450f(a). In this case, the Government,

under the Self-Determination Act, negotiated a contract with the Navajo Nation. (App. 163) (Doc. 104-2, page 2) (Navajo Nation Self-Determination Contract). That contract – known as a basic self-determination contract – incorporated an annual funding agreement. (App. 177) (Doc. 104-2, page 16) (Navajo Nation Self-Determination Contract). The annual funding agreement referenced another document (entitled "Scope of Work") that outlined some of the functions the Navajo Nation was empowered to perform, including Function Nine (to provide education and training on the provisions of the Indian Child Welfare Act) and Function Eleven (to monitor a state's efforts to comply with the Indian Child Welfare Act, including the state's efforts to satisfy the Nation's placement preferences for Navajo children). (App. 187) (Doc. 104-5, page 3) (Annual Funding Agreement); (App. 203) (Doc. 104-6, page 3) (Scope of Work). These three documents – the basic self-determination contract, the annual funding agreement, and the scope of work that identifies Functions Nine and Eleven as functions to be performed by the Navajo Nation – constitute the entire self-determination contract.[1]

Not only did the Self-Determination Act instruct the Government to contract with the Navajo Nation to transfer to the Nation the authority to perform certain

[1]When Colbert references the self-determination contract, she is referencing the combination of these three documents.

functions, but because "a unique legal trust relationship existed between the tribal government and the federal government in these agreements," the Act also extended the protection and coverage of the Federal Tort Claims Act (FTCA) to Nation employees who were carrying out that self-determination contract:

> With respect to claims resulting from the performance of functions...under a contract,...authorized by the Indian Self–Determination and Education Assistance Act...an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract...and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract...: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act...

25 U.S.C. §450f (notes); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995) ("Congress acknowledged that the tribal governments, when carrying out self-determination contracts, were performing a federal function and that a unique legal trust relationship existed between the tribal government and the federal government in these agreements. Because of this relationship, Congress concluded that the federal government must provide liability insurance to the tribal government

for self-determination contracts").

2. Factual background

In the weeks leading up to April 2, 2007, the Navajo Nation's Children and Family Services Program (Navajo Program) – a program created under the self-determination contract to "prevent the break up of Navajo families, to protect the best interest of Navajo children and to promote the stability of Navajo families" – met to discuss the impending adoption of a Navajo child in a state court in Jacksonville, Florida. (App. 203) (Doc. 104-6, page 3) (Scope of Work); (App. 224) (Doc. 104-9, page 13) (Depo. of Regina Yazzie (pg. 60:6-21)). The Navajo Nation was objecting to the state court's attempt to place a Navajo child with a non-Navajo family. (App. 66, 79) (Doc. 47-1, pages 5, 18) (Depo. of Kandis Martine (pg. 14:16-15:3; 66:10-12)). During that initial meeting, the Navajo Program decided that the Navajo child's interests would be best served if Kandis Martine, one of the Nation's Department of Justice employees, was involved. (App. 65, 77, 84) (Doc. 47-1, pages 4, 16, 23) (Depo. of Kandis Martine (pg. 11:17-24; 13:18-21; 60:12-17; 87:12-13); (App. 224) (Doc. 104-9, page 12) (Depo. of Regina Yazzie (pg. 60:6-21)).

The Navajo Program's decision to request Martine's performance of functions in Jacksonville was based on the fact that Martine was qualified to carry out certain functions under the contract. For instance, the Navajo Program's director, Regina

Yazzie, identified Martine as an employee who could provide education and training to state agencies and attorneys under the self-determination contract. (App. 217, 222-23) (Doc. 104-9, page 5, 10-11) (Depo. of Regina Yazzie (pg. 29:22-31:17; 50:20-51:11; 52:19-53:8; 54:9-16; 55:6-11; 55:16-20; 56:3-10)). The Navajo Program's director went on to explain that Martine was "well-versed and knowledgeable of the ICWA" and could

> be there to understand and advocate, to monitor, to assist the program, and ensuring that the ICWA, the intergovernmental agreement, the provisions, are being met and that coordination and collaboration between the states and the Navajo Nation are effective, efficient for children.

(App. 220) (Doc. 104-9, page 8) (Depo. of Regina Yazzie (pg. 41:8-18)). When asked whether Martine was expected to merely assist with or to actually perform functions under the self-determination contract, the Navajo Program's director replied, "To perform." (App. 220) (Doc. 104-9, page 8) (Depo. of Regina Yazzie (pg. 41:3-6)).

After deciding that Martine's activities in Jacksonville (i.e., educating and training the Jacksonville attorney and monitoring the state's compliance with the Indian Child Welfare Act) would promote the interests of the Navajo Nation and of the Navajo child up for adoption, the Program requested that Martine travel to Jacksonville for the adoption proceedings. (App. 80, 84) (Doc. 47-1, pages 19, 23) (Depo. of Kandis Martine (pg. 70:1-9; 86:1-7)); (Supp. Appx. 2) (Doc. 46-2, page 2)

(Affidavit of Kandis Martine); (Supp. Appx. 21) (Doc. 46-5, pages 16) (Depo. of Lucy Laughter-Begay (pg. 16:1-3)); (App. 224) (Doc. 46-1, page 3) (Depo. of Regina Yazzie (pg. 59:15-60:3)); (App. 241) (Doc. 110, page 7) (District Court's November 21, 2012 Order). Both the Navajo Program and the Navajo Nation's Department of Justice approved Martine's travel to Jacksonville. (App. 78, 83, 84) (Doc. 47-1, pages 17, 22-23) (Depo. of Kandis Martine (pg. 64:1-11; 64:18-65:4; 85:17-20; 89:12-15)). In fact, the Navajo Program explicitly authorized Martine's travel to Jacksonville. (App. 83) (Doc. 47-1, page 22) (Depo. of Kandis Martine (pg. 85:21-25)). Moreover, Martine used funds or sought reimbursement from the Navajo Program to pay for travel to and accommodations in Jacksonville. (App. 78, 80, 84) (Doc. 47-1, pages 17, 19, 23) (Depo. of Kandis Martine (pg. 64:18-65:11; 71:9-16; 86:12-14; 87:14-16; 89:5-11)); (Supp. Appx. 24-25) (Doc. 46-5, pages 19-20) (Depo. of Lucy Laughter-Begay (pg. 19:24-20:14)); (App. 241) (Doc. 110, page 7) (District Court's November 21, 2012 Order).

Although Martine was an attorney (licensed in New Mexico, Washington, and in the Navajo Nation) and would be in Jacksonville during some of the adoption proceedings, a Jacksonville attorney familiar with Florida's adoption laws was retained to represent the Navajo Nation in those adoption proceedings. (Supp. Appx. 3) (Doc. 46-2, page 3) (Affidavit of Kandis Martine); (App. 78) (Doc. 47-1, page 17)

(Depo. of Kandis Martine (pg. 62:15-22). Leaving the practice of law to the Jacksonville attorney, Martine would instead be in Jacksonville to educate and train the local attorney on the Indian Child Welfare Act, including the Act's placement preferences. (App. 65, 68, 78-79, 81, 85) (Doc. 47-1, pages 4, 7, 17, 18, 20, 24) (Depo. of Kandis Martine (pg. 63:13-20; 66:2-23; 77:20-23; 91:6-19; 91:25-92:11); (Supp. Appx. 3) (Doc. 46-2, page 3) (Affidavit of Kandis Martine); (Supp. Appx. 23, 25) (Doc. 46-5, pages 18, 20, 35-36) (Depo. of Lucy Laughter-Begay (pg. 18:13-18; 20:15-24; 35:1-36:4))); (App. 241, 266) (Doc. 110, pages 7, 32) (District Court's November 21, 2012 Order). In addition to her roles as educator and trainer, Martine would also monitor the state's efforts to comply with the Indian Child Welfare Act. (App. 81-82) (Doc. 47-1, page 21) (Depo. of Kandis Martine (pg. 77:24-78:3; 79:23-80:11)); (App. 223) (Doc. 104-9, page 11) (Depo. of Regina Yazzie (pg. 56:7-23)); (App. 241, 266) (Doc. 110, pages 7, 32) (District Court's November 21, 2012 Order). By performing those functions, Martine would be furthering the Navajo Program's goals of preventing "the break up of Navajo families," protecting "the best interest of Navajo children," and promoting "the stability of Navajo families." (App. 81) ((Doc. 47-1, page 20) (Depo. of Kandis Martine (pg: 75:13-76:4)).

On April 2, 2007, when Martine and a Navajo Program social worker named Lucy Laughter-Begay arrived in Jacksonville, they rented a car, either paying for the

rental car with Navajo Program funds or receiving reimbursement from the Navajo Program. (Supp. Appx. 3) (Doc. 46-2, page 3) (Affidavit of Kandis Martine); (Supp. Appx. 37) (Doc. 46-5, page 32) (Depo. of Lucy Laughter-Begay (pg. 32:13-19)); (App. 242, 270 (Doc. 110, pages 8, 36) (District Court's November 21, 2012 Order). Martine drove because the Navajo Program social worker was not comfortable driving in Jacksonville. (Supp. Appx. 3) (Doc. 46-2, page 3) (Affidavit of Kandis Martine); (Supp. Appx. 37) (Doc. 46-5, page 32) (Depo. of Lucy Laughter-Begay, pg. 32:3-12); (App. 242) (Doc. 110, page 8) (District Court's November 21, 2012 Order).

While Martine was driving to meet with the local attorney retained to represent the Navajo Nation in the adoption proceedings, Martine was involved in a crash. There is no dispute about that crash, about the injuries sustained by Ronald or Jerri Colbert as a result of that crash (including the causal connection between Mr. Colbert's subsequent death and his use of medication prescribed as a result of the injuries he sustained in the April 2, 2007 crash), or about the procedural history leading up to the District Court's November 21, 2012 Order. (Govt's brief, pages 11-19).

Martine's status as an employee at the time of the crash, however, was – and remains – a contested issue. Because Martine's status would affect Martine's entitlement to the FTCA's protection and coverage as well as the District Court's

jurisdiction over the case, the parties filed motions asking the District Court to resolve the issue. (App. 235-36, 243-45) (Doc. 110, pages 1-2, 9-11) (District Court's November 21, 2012 Order).

Addressing the merits of the parties' pleadings, the District Court concluded,

> Martine was not in Jacksonville for personal travel or tribe business unrelated to the NCFS program. Rather, at the time of the collision, Martine had traveled to Jacksonville on NCFS'[s] request for coordination of legal services to provide education and training to a local attorney on the provisions of the ICWA, and to ensure that a state court adoption proceedings' placement of the Navajo child complied with the ICWA. By helping a local attorney intervene on behalf of the Navajo Nation in the adoption proceedings of a Navajo child, Martine performed functions 9 and 11 in the "Scope of Work" and acted in furtherance of NCFS'[s] purposes to "prevent the breakup of Indian families, to protect the best interests of Navajo children and promote the stability of Navajo families." Therefore, at the time of the collision, Martine was performing functions under the 2006 self-determination contract and will be entitled to FTCA coverage if her tortious conduct occurred in the scope of her employment.

(App. 267-68) (Doc. 110, pages 33-34) (District Court's November 21, 2012 Order). The District Court also concluded (and the Government does not dispute) that Martine was acting within the course and scope of her employment when the April 2, 2007 crash occurred. (App. 268-70) (Doc. 110, pages 34-36) (District Court's November 21, 2012 Order). Because Martine, at the time of the April 2, 2007 crash,

was carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract, Martine was dismissed from the lawsuit and the United States substituted as the sole defendant. (App. 271) (Doc. 110, page 37) (District Court's November 21, 2012 Order).

The ensuing bench trial lasted for five days. At trial's conclusion, the District Court requested that each party submit proposed findings of fact and conclusions of law. Once the parties submitted their respective proposals, the District Court entered (and, on the Government's motion, revised) its order and final judgment. This appeal, limited to the issue of whether Martine was carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract, followed.

B. Standard of review

Colbert agrees with the substance of the Government's statement of the standard of review.

SUMMARY OF ARGUMENT

The Self-Determination Act extends the Government's waiver of sovereign immunity and liability under the Federal Tort Claims Act to torts committed by employees of American Indian tribes when those employees are carrying out self-determination contracts by performing one or more functions under those contracts.

In this case, the self-determination contract authorized the Navajo Nation to perform Function Nine (to provide education and training on the provisions of the Indian Child Welfare Act) and Function Eleven (to monitor a state's efforts to comply with the Indian Child Welfare Act, including the state's efforts to satisfy the Nation's placement preferences for Navajo children). The District Court concluded correctly that Martine, a Navajo Nation employee working for the Nation's Department of Justice, was performing Functions Nine and Eleven while in Jacksonville – functions identifiable in and expressly authorized by the self-determination contract. The District Court then correctly applied the Self-Determination Act's plain language to conclude that Martine, as a Navajo Nation employee who caused the April 2, 2007 crash while carrying out the self-determination contract by performing Functions Nine and Eleven, was entitled to the FTCA's protection and coverage.

The Government argues that Martine was not performing Functions Nine and Eleven while in Jacksonville, but was instead providing legal services (i.e., services the Government argues were not covered by the self-determination contract). The argument is without merit. No evidence exists that Martine, an attorney without a license to practice law in Florida, engaged in the (unauthorized) practice of law or participated as counsel during the state court adoption proceedings. Indeed, Martine denied providing any legal services while in Jacksonville. But even if Martine were

providing some legal services while in Jacksonville, nothing in the Self-Determination Act, the self-determination contract, or any statute, regulation, or case prohibited Martine from simultaneously providing legal services and performing functions under the contract. Either way, the District Court's ruling was correct.

The Government also argues that Martine was incapable of carrying out the self-determination contract because Martine was not a licensed social worker. Again, nothing in the Self-Determination Act, the self-determination contract, or any statute, regulation, or case requires a Navajo Nation employee to be a licensed social worker to perform Functions Nine or Eleven. And the Navajo Program's director testified that Martine was able and well-qualified to perform, Functions Nine and Eleven.

The Government lastly argues that the District Court impermissibly extended the Government's waiver of sovereign immunity. The District Court did no such thing. Instead, the District Court looked to the Self-Determination Act's plain language to conclude that Martine was a Navajo Nation employee who was carrying out the self-determination contract by performing Functions Nine and Eleven – functions identifiable in and clearly authorized by the contract. If this conclusion was correct (which it was for the reasons already argued), then the Self-Determination Act, by its plain language, extended the Government's waiver of sovereign immunity and entitled Martine to the FTCA's protection and coverage for her role in the April

2, 2007 crash.

For these reasons, the District Court's rulings were correct, and its judgment should be affirmed.

ARGUMENT

THE DISTRICT COURT WAS CORRECT WHEN IT CONCLUDED THAT MARTINE WAS A NAVAJO NATION EMPLOYEE CARRYING OUT A SELF-DETERMINATION CONTRACT BY PERFORMING FUNCTIONS IDENTIFIABLE IN AND EXPRESSLY AUTHORIZED BY THAT CONTRACT

This appeal is based on the Government's contention that Martine did not qualify as a federal employee for purposes of the FTCA because she was not carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract, but was instead (at least according to the Government) providing legal services that were not covered by the contract. In this case, the District Court concluded that Martine was in Jacksonville to perform Functions Nine and Eleven under the self-determination contract and was therefore entitled to the FTCA's protection and coverage under the Self-Determination Act. (App. 267-68) (Doc. 110, pages 33-34) (District Court's November 21, 2012 Order). The District Court's Order was based on the straightforward application of the following portion of the Self-Determination Act to the facts in this case:

> With respect to claims resulting from the performance of

> functions...under a contract,...an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract...and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract...

Contrary to the Government's contention, the District Court's ruling, based on the Self-Determination Act's plain language, was correct and should be affirmed. *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1199 (11th Cir. 2007) ("In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted).

The Government disagrees with the District Court's conclusion and makes four arguments to justify its disagreement. First, the Government claims the FTCA only waives sovereign immunity for a claim arising out of the tortious conduct of an employee of the Government. (Govt's Brief, page 22). Second, the Government claims Martine did not qualify as a Government employee within the meaning of the Self-Determination Act because she was not carrying out the self-determination contract at the time of the crash. (Govt's Brief, page 25). Third, the Government claims Martine was not performing the same work that Navajo Program employees performed under the social services contract because an attorney does not perform the same work as a social worker or case worker. (Govt's Brief, page 41). Finally, the

Government claims the District Court's ruling constituted an impermissible extension of the Government's waiver of sovereign immunity. (Govt's Brief, page 45). Those four claims are wrong for the following reasons:

A. Under federal law, the FTCA's protection and coverage are extended not only to actual Government employees, but to employees of an American Indian tribe, trial organization, or American Indian contractor who are carrying out a self-determination contract

The Government first claims that the FTCA only waives sovereign immunity for claims arising out of the tortious conduct of an employee of the Government. (Govt's Brief, page 22). Colbert agrees with that general statement. Colbert also agrees with the Government's general description of the FTCA as a limited waiver of sovereign immunity. (Govt's Brief, pages 22-23). Finally, Colbert agrees that the resolution of the Government's appeal depends on federal law. (Govt's Brief, page 23-24).

Those general propositions, while not inaccurate, are inapposite because they fail to incorporate a significant federal law: the Self-Determination Act. The Self-Determination Act – the primary federal statute at issue in this case – provides:

> With respect to claims resulting from the performance of functions...under a contract,...an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract...and its

> employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract...

The District Court was correct in concluding that Martine, who carried out the self-determination contract by performing Functions Nine and Eleven, was, under the Act, an "employee of the Bureau...." *See Lowery*, 483 F.3d at 1199 ("In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted). The Government, however, asserts in conclusory fashion that the District Court's conclusion was erroneous. (Govt's Brief, page 24-25). But the Government is wrong – and the District Court was right – as explained in the following sections of Colbert's Brief.

B. Martine, by performing Functions Nine and Eleven under the self-determination contract, was carrying out the contract by performing functions identifiable in and expressly authorized by the contract

The Government challenges the District Court's conclusions by claiming that Martine was not carrying out the self-determination contract because she was not performing functions under the contract, but was instead providing legal services. (Govt's Brief, page 25-29). Framing the dispute, the Government stated, "[T]he proper focus in this case should be on whether Martine was 'carrying out' an

identifiable function of the relevant contract at the time of the accident." (Govt's Brief, page 29).[2] Clarifying its definition of the phrase "carrying out," the Government also explained, "In other words, the phrase does not encompass the performance of functions or activities that go beyond what the contract expressly authorized the Tribe to perform." (Govt's Brief, page 29). Though the Government is wrong to claim that Martine was providing legal services in Jacksonville, Colbert agrees that the issue in this case is whether Martine was in Jacksonville to carry out the self-determination contract by performing functions identifiable in and expressly authorized by the contract.

In this case, there is no dispute: the self-determination contract identifies and expressly authorizes the Navajo Nation's performance of Functions Nine and Eleven. (App. 187) (Doc. 104-5, page 3) (Annual Funding Agreement); (App. 203) (Doc. 104-6, page 3) (Scope of Work). Further, there should be no dispute: Martine was in Jacksonville to educate and train the local attorney on the Indian Child Welfare Act, including the Act's placement preferences. (App. 65, 68, 77, 78-79, 81, 84-85) (Doc.

[2]There are other instances in the Government's Brief where the Government recognizes the issue as whether Martine was carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract. *See* Govt's Brief (page 33) ("Here, the inquiry is whether Martine was actually carrying out an identifiable transferred function listed in the contract,..."); Govt's Brief (page 45) ("[A] plain reading of [the Self-Determination Act] requires that a tribal contractor's employee must be carrying out an identifiable contract function in order to qualify as an employee of the BIA for purposes of FTCA coverage").

47-1, pages 4, 7) (Depo. of Kandis Martine (pg. 63:13-20; 66:2-23; 77:20-23); (Supp. Appx. 2-3) (Doc. 46-2, pages 2-3) (Affidavit of Kandis Martine). In addition to her roles as educator and trainer, Martine was also in Jacksonville to monitor the state's efforts to comply with the Indian Child Welfare Act. (App. 81-82) (Doc. 47-1, pages 20-21) (Depo. of Kandis Martine (pg. 77:24-78:3; 79:23-80:11)). In other words, Martine was in Jacksonville to perform functions identifiable in and expressly authorized by the self-determination contract. Accordingly, the District Court concluded, "At the very least, by retaining [the Jacksonville attorney], instructing her on the requirements of the ICWA, and monitoring the state court adoption proceedings, Martine was performing functions 9 and 11 in the 'Scope of Work.'" (App. 266) (Doc. 110, page 32) (District Court's November 21, 2012 Order).

The Government criticizes the District Court for referring to Martine's *performance* of functions instead of her *carrying out* functions, insisting that the District Court, by evaluating Martine's performance of functions instead of determining whether Martine was carrying out functions under the self-determination contract, improperly expanded the Government's waiver of sovereign immunity. (Govt's Brief, pages 26-27). This allegation ignores the text of the Self-Determination Act, which extends the FTCA's protection and coverage to employees of an American Indian tribe, tribal organization, or American Indian for "claims resulting from the

performance of functions...under a contract....” (emphasis added).

The Government also ignores the fact that the only way for the District Court to decide if Martine was carrying out the self-determination contract was by determining whether Martine was performing functions under the contract. Thus, contrary to the Government’s assertion, the District Court’s evaluation of Martine’s performance of functions is actually consistent with the Self-Determination Act. The District Court, by evaluating Martine’s performance of functions, was simply applying the plain language of the law to this case. *See Lowery*, 483 F.3d at 1199 (“In interpreting a statute, we look first to the statute’s plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end”) (citations omitted). And in this case, despite the Government’s attempts to recast Martine’s activities in Jacksonville as the provision of legal services, the District Court concluded, “At the very least, by retaining [the Jacksonville attorney], instructing her on the requirements of the ICWA, and monitoring the state court adoption proceedings, Martine was performing functions 9 and 11 in the ‘Scope of Work.’” (App. 266) (Doc. 110, page 32) (District Court’s November 21, 2012 Order).

Stuck with the District Court’s conclusions, the Government attempts to transform Martine’s performance of Functions Nine and Eleven – functions identifiable in and expressly authorized by the self-determination contract – into the

provision of legal services. (Govt's Brief, pages 25-26, 30-32). But in this case, the Jacksonville lawyer retained to represent the Navajo nation – not Martine – provided the necessary legal services. (Supp. Appx. 3) (Doc. 46-2, page 3) (Affidavit of Kandis Martine). There is no evidence that Martine engaged in the practice of law or participated as counsel during the state court adoption proceedings. Rather, the record evidence shows that Martine simply monitored state court adoption proceedings.

The absence of any record evidence of Martine's provision of legal services is consistent with the fact that Martine denied providing any legal services while in Jacksonville. (App. 78) (Doc. 47-1, page 17) (Depo. of Kandis Martine (pg. 63:1-11)). The absence of any record evidence of Martine's provision of legal services, as well as her denial of the provision of any legal services, is also consistent with the fact that Martine was not licensed to provide legal services in Florida. (App. 65) (Doc. 47-1, page 4) (Depo. of Kandis Martine (pg. 12:25-13:2); (App. 267) (Doc. 110, page 33) (District Court's November 21, 2012 Order).

Martine's lack of a Florida law license, however, did not prevent her from educating and training on the Indian Child Welfare Act or from monitoring Florida's compliance with that Act. Martine, by educating, training, and monitoring despite the fact that she was not licensed to practice law in Florida, understood the distinction between the provision of legal services (e.g., signing pleadings, making legal

arguments to a judge) and the performance of functions under the self-determination contract.

That distinction has practical implications beyond this case. If, as the Government argues, Martine was practicing law when she provided education and training on the Indian Child Welfare Act, or was practicing law when she monitored the state's compliance with that Act, then anybody who performs those same functions without a law license would be guilty of the unlicensed practice of law. For example, under the Government's interpretation, a social worker could not carry out the self-determination contract by providing education and training on the Indian Child Welfare Act, or by monitoring a state's compliance with that Act, because that worker would be providing legal services without a law license. To prevent the unlicensed practice of law, the Navajo Nation, just to provide education and training on the Indian Child Welfare Act or to monitor a state's compliance with the Act (only two of eleven functions), would have to hire attorneys in each of the fifty states. There is no evidence that the Navajo Nation or the Government wrote such an onerous and expensive burden into the self-determination contract.

There is also no evidence – nor would it make sense – that a Navajo Nation employee's activities (i.e., education, training, and monitoring under the self-determination contract) would be classified as educational or legal based solely on

the employee's educational or professional background. Irrespective of the education or professional background of the person performing those activities, the activities are what they are: educating, training, and monitoring. Yet the Government, without citing any statutes, regulations, or case law, wants this Court to focus on parts of Martine's background instead of the District Court's conclusions regarding the substance of Martine's conduct. Shifting the focus to anything but the substance of Martine's conduct, however, contravenes the Self-Determination Act, which reads, without reference to an employee's educational or professional background,

> With respect to claims resulting from the performance of functions...under a contract,...an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract...and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract...

See also Lowery, 483 F.3d at 1199 ("In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted); *see also* Thomas W. Christie, AN INTRODUCTION TO THE FEDERAL TORT CLAIMS ACT IN INDIAN SELF-DETERMINATION ACT CONTRACTING, 71 Mont. L. Rev. 115, 120 (2010) (discussing the relationship between the FTCA and self-determination contracts and noting the law's focus "on

the activities performed by an employee rather than the person performing activities") (citations omitted).

Perhaps an analogy would illustrate Martine's ability to act in different roles (i.e., attorney v. educator, trainer, monitor) at different times. Consider an expert on issues of legal malpractice. The expert, as an attorney, would certainly be capable of providing legal services to clients. But when that expert is educating a jury on the standard of care in a legal malpractice lawsuit, that expert, while drawing on his or her legal training, is not providing legal services. In this case, Martine, as a lawyer, could – and in some cases did – litigate for the Navajo Nation. But when Martine was in Jacksonville to provide education and training on, and to monitor the state's compliance with, the Indian Child Welfare Act, Martine was not providing legal services. Instead, Martine – as an expert on the Indian Child Welfare Act – was carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract.

Even if Martine provided some legal services while in Jacksonville, nothing in any statute, regulation, or case law prevents an attorney from providing legal services and performing non-legal functions under a self-determination contract. The District Court made this observation in its Order. (App. 266) (Doc. 110 at page 32) (District Court's November 21, 2012 Order) ("While it is true that during her

Jacksonville visit, Martine was presumably discussing legal strategies with [the Jacksonville lawyer] and Begay – a function not mentioned in the 2006 self-determination contract – this fact alone did not preclude her from performing contract functions").[3]

After trying to recast Martine's performance of Functions Nine and Eleven into the provision of legal services, the Government next tries to convince this Court that the exclusion of attorneys from the definition of "key personnel" means legal services are not covered by the self-determination contract. (Govt's Brief, pages 30-31). The Government, however, has not cited any facts or law proving that the provision of legal services to further the purpose of the self-determination contract was not a covered function. Moreover, the Government's argument is predicated on the assumption that because Martine was a lawyer, Martine, regardless of the context, could only provide legal services. Section B of Colbert's Brief has already addressed the fallibility of this assumption. *See* Colbert's Brief (pages 21-24). But more importantly, Martine was not providing legal services; instead, as the District Court concluded, Martine was in Jacksonville to perform Functions Nine and Eleven –

[3]The discussion of legal strategies is not necessarily a legal service. And even if the discussion of legal strategies were a legal service, the District Court did not cite to record evidence, but was presuming for the sake of argument that Martine discussed legal strategies with the Jacksonville attorney.

functions identifiable and expressly authorized by the self-determination contract.

At this point in the Government's Brief, the Government criticizes the District Court's reference to the self-determination contract's liberal construction clause. (Govt's Brief, pages 32-33). But the Government fails to cite any statute, regulation, or case to sustain its critique. On the other hand, the District Court cited several cases and explained the basis for invoking the liberal construction clause, opining,

> And even if the Court were sympathetic to the United States' argument, it would still broadly interpret what counts as "performing work under the contract" because interpreting the meaning of "work under the contract" requires the Court to decide what "functions" were transferred "from the Federal Government to the [Navajo Nation]" – a topic clearly within the reach of the liberal construction provision, even under the United States' reading of it. The Court will therefore liberally construe, in the Navajo Nation's favor, those portions of the contract relevant to determining whether Martine was performing a contract function at the time of the April 2007 collision.

(App. 256) (Doc. 110, pg. 22) (District Court's November 21, 2012 Order).

Even though the District Court's reference to the self-determination contract's liberal construction clause was justified, none of that analysis is necessary because the District Court looked at the facts, read the plain language of the law, and concluded that Martine was carrying out the self-determination contract by performing Functions Nine and Eleven – functions identifiable in and expressly

authorized by the contract. *See Lowery*, 483 F.3d at 1199 ("In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted).

The Government also claims Martine was not performing work *under* the self-determination contract because she was not a tribal employee engaged in social services activities. (Govt's Brief, page 33). The Government's definition of employee is too narrow. Rather, to be defined as an employee for purposes of the Self-Determination Act, a person must be an employee of an American Indian tribe, a tribal organization, or an American Indian contractor:

> With respect to claims resulting from the performance of functions...under a contract,...*an Indian tribe, tribal organization or Indian contractor* is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract...*and its employees* are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract...

(emphasis added). In this case, Martine, though not a licensed social worker, was an employee of an American Indian tribe (i.e., the Navajo Nation) who was carrying out the self-determination contract by performing Functions Nine and Eleven. In other words, Martine fits within the Self-Determination Act's broad definition of employee. *See Lowery*, 483 F.3d at 1199 ("In interpreting a statute, we look first to the statute's

plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted).

On a related point, a provision in the contract actually accounts for the participation of Navajo Nation employees whose jobs are not funded by the contract (e.g., employees who are not licensed social workers). That provision, found in the Annual Funding Agreement and incorporated into the self-determination contract, states,

> For purposes of Federal Tort Claims Act coverage, the Navajo Nation and its employees are deemed to be employees of the Federal government while performing work under the contract. This status is not changed by the source of the funds used by the Navajo Nation to pay the employees['] salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Navajo Nation.

(App. (198) (Doc. 104-5, page 14) (Annual Funding Agreement). A federal regulation emphasizes the same point. In 25 C.F.R. §900.197, it reads,

> Does the FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract? Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

In this case, Martine was a Navajo Nation employee who carried out the self-determination contract by performing Functions Nine and Eleven. The preceding

contractual provision and federal regulation, by accounting for the participation of Navajo Nation employees like Martine in carrying out the self-determination contract, confirm the propriety of the District Court's conclusion.

The Government also criticizes the District Court for referencing opinions from other courts, explaining, "[T]he district court's ruling is not supported by any controlling case law. Indeed, the cases relied on by the district court are distinguishable or unpersuasive." (Govt's Brief, page 34). The Government's critique, however, fails to mention that neither the District Court or Colbert identified the cases cited as binding, and the District Court, in its ruling, did not claim to be bound by any of those cases. Moreover, the Government's suggestion – that the cases cited by the District Court in its order are either distinguishable or unpersuasive – is incorrect.

The Government first claims *Andrade* is easily distinguishable because the tortfeasor in *Andrade* was controlled and supervised by the tribal contractor identified in the self-determination contract, while Martine was not controlled or supervised by the Navajo Program. (Govt's Brief, page 35). *Andrade ex rel. Goodman v. U.S.*, No. 05-3240-PHX-MHM, 2008 WL 4183011 (D. Ariz. September 8, 2008). That distinction is based on an incomplete reading of *Andrade*.

In *Andrade*, the district court opined, "Although[] the Tribe created a specific

social services entity to carry out the [self-determination] contract, that does not preclude other tribal employees from assisting in the administration of the Tribe's social services program, i.e., performing work under the [self-determination] contract." *Andrade*, 2008 WL 4183011, at *7. Emphasizing that observation and noting the irrelevance of the source of funds used to pay the tortfeasors' salaries, the district court explained, "[T]he Court finds that to the extent that CRIT CPS and its employees assisted in carrying out the Tribe's social services program under the [self-determination- contract, as occurred here, CRIT CPS and its employees are employees of the Federal government for purposes of FTCA coverage." *Andrade*, 2008 WL 4183011, at *7.

The *Andrade* court went on to provide an alternative and independent basis to support its ruling, a ruling based on an employer's right to control its agents: "In addition, even if the Court found that the Contractor under the [self-determination] contract in question was CRIT Social Services rather than CRIT, the laws of agency dictate the same result." *Id.* That alternative and independent basis is the part of the opinion the Government relies on to make what it claims is a significant distinction between *Andrade* and this case. But, as illustrated by a complete review of *Andrade*, the Government's distinction is misleading because the Government's argument presents the *Andrade* court's alternative and independent basis for its opinion as the

only basis for its opinion. The Government's argument ignores *Andrade*'s primary rationale.

Not only does the Government's argument ignore *Andrade*'s primary rationale, but *Andrade* actually supports the District Court's conclusion. In this case, Martine was an employee of the American Indian tribe, tribal organization, or American Indian contractor (i.e., the Navajo Nation). Martine, as a Navajo Nation employee, was carrying out the self-determination contract by performing Functions Nine and Eleven – functions identifiable in and expressly authorized by the contract. Those undisputed facts invalidate the Government's purported distinctions between *Andrade* and this case.

Next, the Government attacks the District Court's cite to *Buchanan*, insisting *Buchanan* is not applicable to this case. (Govt's Brief, page 35-37). *Buchanan v. U.S. Dept. of Health & Human Services*, 177 F.Supp. 2d 1005 (N.D. Ca. 2001). The Government asserts, "*Buchanan* thus did not involve the question presented in our case, that is, whether the activity performed by the alleged tortfeasor was in actuality a function transferred from the federal government to a tribal contractor under a [self-determination] contract." (Govt's Brief, page 36-37).

Though the Government is correct when it says *Buchanan* does not address the primary issue in this case, the Government's statement on *Buchanan* is puzzling

because the pertinent issue in this case is not whether Functions Nine and Eleven (the functions Martine was performing) were actually transferred from the Government to the Navajo Nation.[4] Functions Nine and Eleven were indisputably included in the self-determination contract and were, therefore, transferred to the Navajo Nation. Rather, the issue, as framed by the Government on page 29 of its Brief, is "whether Martine was 'carrying out' an identifiable function of the relevant contract at the time of the accident." And in this case, as the District Court concluded, "At the very least, by retaining [the Jacksonville attorney], instructing her on the requirements of the ICWA, and monitoring the state court adoption proceedings, Martine was performing functions 9 and 11 in the 'Scope of Work.'" (App. 266) (Doc. 110, page 32) (District Court's November 21, 2012 Order).

The District Court cited *Big Crow* merely as part of a string citation on a minor point. *Big Crow v. Rattling Leaf*, 296 F.Supp. 2d 1067 (Dist. S.D. 2005). The

[4]In *Buchanan*, the primary issue was whether the tortfeasor's activity, though not expressly identified in the self-determination contract, was covered by the self-determination contract. *Buchanan*, 177 F.Supp. 2d at 1008. Resolving the issue, the district court in *Buchanan* reviewed the self-determination contract's liberal construction clause and concluded that the tortfeasor's activity was covered by the contract. *Id.*

Though the issue in *Buchanan* is not the issue on appeal in this case, *Buchanan* can still be helpful. For instance, if the Government contends that Martine's activities were not identifiable in and expressly authorized by the self-determination contract (e.g., legal strategy), those activities, under *Buchanan* and in light of the self-determination contract's liberal construction clause and the parties' interpretation and performance of the contract, would still be covered by the contract. *See* Colbert's Brief (page 26).

Government, however, discusses *Big Crow* for the sole purpose of distinguishing it – and, by inference, the District Court's Order. The Government claims the tortfeasor in *Big Crow* was entitled to the FTCA's protection and coverage while performing functions under one self-determination contract only because the tortfeasor was employed to perform functions under another self-determination contract. (Govt's Brief, page 38). While those might have been the facts in *Big Crow*, nothing in *Big Crow* – and nothing in the self-determination contract or in any statute, regulation, or case – requires a tortfeasor to be employed under a self-determination contract before that tortfeasor receives the FTCA's protection and coverage. *See also* Colbert Brief (pages 27-29). Instead, the Self-Determination Act, referencing only the tortfeasor's status as an employee of an American Indian tribe, a tribal organization, or an American Indian contractor, reads:

> With respect to claims resulting from the performance of functions...under a contract,...an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract...and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract...

And in this case, Martine, under the Self-Determination Act's plain language, was a Navajo Nation employee who was carrying out the self-determination contract by

performing Functions Nine and Eleven. *See Lowery*, 483 F.3d at 1199 ("In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted).

After criticizing the District Court's references to non-binding cases, the Government, in its Brief, cites two of its own non-binding cases. First, the Government cites *Shirk v. United States*, claiming the district court in *Shirk* "held that 'tribal employees are deemed federal employees for purposes of the FTCA to the extent they act within the scope of their employment, *as defined by an ISDEAA contract*.'" (Govt's Brief, page 39). *Shirk v. United States*, No. CV-09-01786-PHX-NVW, 2010 WL 3419757 (D. Ariz. 2010). *Shirk* does not mean what the Government might be suggesting *Shirk* means.[5]

In *Shirk*, two tribal law enforcement officers – officers authorized to enforce federal and tribal law when on the tribe's reservation – were involved in a crash while attempting to make contact with an erratic driver. *Shirk* , 2010 WL 3419757, at *5. Notably, the two officers were not on the tribe's reservation when they tried to stop the driver, nor were the officers attempting to enforce federal or tribal law. *Shirk*,

[5]It is difficult to divine the Government's reason for citing *Shirk* because the Government's reference to and analysis of *Shirk* is cursory. Thus, Colbert is forced to assume that the Government is using *Shirk* to argue that key personnel – personnel whose positions are listed explicitly in a self-determination contract – are the only personnel authorized to carry out that contract.

2010 WL 3419757, at *5. The district court observed,

> Here, it is undisputed that [the officers] were outside the boundaries of the Reservation when they attempted to make contact with [the erratic driver]. That alone is enough to place the officers' conduct outside the scope of the [self-determination] Contract. Even if that were not enough, the officers were not attempting to enforce either federal or tribal law, the only law contemplated by the [self-determination] Contract.

Shirk v, 2010 WL 3419757, at *5.

Shirk does not mean, as the Government appears to be implying, that key personnel (i.e., personnel whose positions are listed explicitly in a self-determination contract) are the only personnel authorized to carry out that contract by performing functions under the contract. Rather, *Shirk* highlights the importance of identifying a self-determination contract's functions to determine whether a tribal employee's activities entitled that employee to the FTCA's protection and coverage. In this case, Martine, unlike the tribal officers in *Shirk* who were not performing any functions listed in a self-determination contract, was performing functions identifiable in and expressly authorized by the self-determination contract.

Next, the Government cites *Snyder v. Navajo Nation*, claiming *Snyder* recognized that not all tribal employees are federal employees "'for all purposes.'" (Govt's Brief, 39). *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004). Read in

isolation, *Snyder* could appear to support the Government's argument; but read in context, the Government's reference to *Snyder* is meaningless. In *Snyder*, two tribal law enforcement officers brought Fair Labor Standards Act (FLSA) suits against both their tribe and the Government. *Snyder*, 382 F.3d at 894. The officers' tribe was party to a self-determination contract with the Government; thus, the officers argued that, under the Self-Determination Act, the claims should go forward against the Government. *Snyder*, 382 F.3d at 894. Rejecting the officers' argument, the Ninth Circuit opined,

> Appellants assert that the provision means they are employees of the BIA *for all purposes* and can properly bring their FLSA suit against the United States [under federal law]. Congress, however, did not intend [the Self-Determination Act] to provide a remedy against the United States in a civil action unrelated to the FTCA.

Snyder, 382 F.3d at 897 (emphasis added).

The Government plucked three words from *Snyder* to make its argument, but *Snyder*, when read properly, simply means that BIA employees are not employees under the Self-Determination Act for alleged violations of the FLSA (i.e., "for all purposes"). In this case, there is a simple distinction that makes all the difference: Colbert's claims are based, not on violations of the FLSA for which Martine would not be entitled to the FTCA's protection and coverage, but on tort claims under the

FTCA and the Self-Determination Act. *Snyder* does not apply.

Finally, the Government cites *Seneca v. USET*, attempting to distinguish the only Eleventh Circuit case – an unpublished, non-binding case – referencing the Self-Determination Act. (Govt's Brief, pages 39-40). *Seneca v. United South & Eastern Tribes*, 318 Fed. Appx. 741 (11th Cir. 2008) (unpublished). The facts in *Seneca* do not align perfectly with the facts in this case, but *Seneca* is still instructive.

In *Seneca*, a Center for Disease Control (CDC) employee working with a tribal organization claimed he was defamed by the organization. *Seneca*, 318 Fed. Appx. at 743. The CDC employee filed suit against the tribal organization and its employees, but the Government certified the tribal organization's employees as federal employees under the Self-Determination Act. *Id*. Accordingly, the Government was substituted as the sole defendant, and the case was ultimately dismissed for failure to exhaust administrative remedies. *Id*.

On appeal, one of the issues was whether the tribal employees were acting within the scope of the self-determination contract when the alleged tort was committed. *Id*. at 745. Affirming the district court's conclusion regarding the tribal employees' status, this Court opened its discussion by observing,

> When an Indian tribe or tribal organization operates pursuant to a self-determination contract and its employees operate within the scope of their employment in carrying

> out such a contract or agreement, the organization is considered a part of the Federal government and its employees are considered Federal employees for the purposes of the FTCA.

(citing the Self-Determination Act). *Id.* at 744.

Though *Seneca* is not exactly analogous, there is nothing in *Seneca* to suggest, as the Government does on page 41of its Brief, that Martine's activities constituted the provision of legal services or that legal services were not covered by the self-determination contract. But *Seneca* is still useful because *Seneca* affirms the inclusiveness of the Self-Determination Act's definition of employee.

C. Martine was not providing legal services or performing case management work, but was performing Functions Nine and Eleven under the self-determination contract

The Government suggests that Martine does not deserve the FTCA's protection and coverage because her activities in Jacksonville constituted the provision of legal services that were not provided for in the self-determination contract. (Govt's Brief, page 42). To support its argument, the Government points to what it alleges are Martine's law-related activities. (Govt's Brief, pages 43-45). But Martine's activities in Jacksonville, as explained above in Section B of Colbert's Brief (pages 20-24), did not constitute the provision of legal services.

Even if some of Martine's activities in Jacksonville constituted the provision

of legal services, nothing in the self-determination contract or in any statute, regulation, or case law prevented Martine from simultaneously performing both legal services and non-legal functions under a self-determination contract. Section B of Colbert's Brief (pages 24-25) presents Colbert's argument on this point.

Not only did the Government argue that Martine was not carrying out the self-determination contract because she was an attorney providing legal services, but the Government also argued that Martine could not carry out the contract because she was not a licensed social worker. (Govt's Brief, page 42). Citing Function Four of the self-determination contract to imply that the entire contract was a contract to provide case management services, the Government stated, "The BIA contracted with the Tribe to '[p]rovide case management services to eligible Navajo children and families.'" (Govt's Brief, page 42). Granted, one of eleven paragraphs of the self-determination contract's scope of work provided for case management services; presumably, Martine would not be qualified to provide those specific services because the provision of those specific services probably required a background in social work. But in this case, Martine was not providing case management services under Function Four; instead, Martine, as the District Court concluded, was performing Functions Nine and Eleven.

Furthermore, nothing in Functions Four, Nine, or Eleven – and nothing in the

self-determination contract or any statute, regulation, or case – requires a person to be a licensed social worker before educating and training attorneys on, or monitoring the state's compliance with, the Indian Child Welfare Act. If the self-determination contract's drafters intended to allow only licensed social workers to educate or train others on, or to monitor a state's compliance with, the Indian Child Welfare Act, the drafters would have plainly stated such an odd restriction. But the drafters did not do so. Indeed, such a restriction is not even hinted at in the self-determination contract.

To the extent that the Government is suggesting that Martine was incapable of carrying out the self-determination contract because she was not qualified, the undisputed testimony of the Navajo Program's director contradicts that suggestion. *See* Colbert's Brief (page 6). And as the District Court concluded, "At the very least, by retaining [the Jacksonville attorney], instructing her on the requirements of the ICWA, and monitoring the state court adoption proceedings, Martine was performing functions 9 and 11 in the 'Scope of Work.'" (App. 266) (Doc. 110, page 32) (District Court's November 21, 2012 Order).

D. The District Court's ruling was not an impermissible extension of the Government's waiver of sovereign immunity, but was instead a straightforward interpretation and application of the Self-Determination Act and self-determination contract

The Government raises the specter of unlimited liability, assailing the District

Court's ruling as "stunning" because, "[t]aken to the extreme, the court's ruling could apply to *any* tribal employee so long as the employee was performing *any* activity (no matter how inconsequential) tangentially related to a 638 contract, regardless of whether that activity was explicitly contracted to the Tribe under the agreement." (Govt's Brief, pages 20, 45-50).

Without claiming or demonstrating how the Self-Determination Act is ambiguous, the Government tries to complicate the issue by launching into a discussion of what the Government insists is the Self-Determination Act's legislative history. (Govt's Brief, pages 46-48). But unless the Self-Determination Act is ambiguous, references to legislative history and intent are unnecessary and improper. *See, e.g., Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 133 (2002) ("The Court of Appeals correctly recognized that reference to legislative history is inappropriate when the text of the statute is unambiguous") (citation omitted); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 730 (1995) (acknowledging the impropriety of using legislative history "to contradict, rather than clarify, what is in its totality and unambiguous statutory text") (citation omitted); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) ("'In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to

the contrary, that language must ordinarily be regarded as conclusive'"") (citations omitted).

In this case, the Government has not claimed or demonstrated how the Self-Determination Act is ambiguous. Nor has the Government established how the Act's purported legislative history and intent express a clear legislative intent to withhold the FTCA's protection and coverage from Navajo Nation employees who carry out the self-determination contract by performing functions identifiable in and expressly authorized by the contract. And, as this Court has observed, "In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end." *Lowery*, 483 F.3d at 1199 (citations omitted).

That said, if it is necessary to look beyond the language of the Self-Determination Act because the Act is considered ambiguous, this Court must consider well-established canons of statutory construction. In a case involving American Indians, the following canon is the foremost canon: "[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes v. Wold Enginering, P.C.*, 467 U.S. 138, 149-50 (1984); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1285 (11th Cir. 2001)

("'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

The Self-Determination Act was passed for the benefit of all American Indians. *See generally Demontiney v. United States*, 255 F.3d 801, 806 (9th Cir. 2001) ("Congress enacted the ISDEAA to encourage Indian self-determination and tribal control over administration of federal programs for the benefit of Indians"). Thus, if it is necessary to look beyond the Self-Determination Act's plain language, the Act should be construed liberally.

Despite the injunction to liberally interpret all doubtful statutory expressions (in statutes passed for the benefit of American Indians) in favor of American Indians, the Government would have this Court interpret the Self-Determination Act to exclude from the FTCA's protection and coverage a Navajo Nation employee who was carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract. That interpretation would restrict the Navajo Nation's discretion in assigning tribal employees to perform various functions and would contravene Congress's express intent to provide American Indian tribes with as much autonomy as possible. *See* 25 U.S.C. §450a(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation

in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities"). That interpretation would also hinder a state's compliance with the Indian Child Welfare Act and would, therefore, harm the Navajo children and the Navajo Nation (now and in the future). Conversely, interpreting the Self-Determination Act's doubtful provisions (if any) to acknowledge Martine's entitlement to the FTCA's protection and coverage would promote the Navajo Nations' autonomy and would encourage more efficient, effective compliance with the Indian Child Welfare Act.

Although the Self-Determination Act's purported legislative history and intent does not exclude Martine from the FTCA's protection and coverage, and although canons of statutory construction actually favor an interpretation of the Act that provides Martine with the FTCA's protection and coverage, none of that analysis is necessary because the District Court looked at the facts, read the plain language of the law, and concluded that Martine was carrying out the self-determination contract by performing Functions Nine and Eleven – functions identifiable in and expressly authorized by the contract. *See Lowery*, 483 F.3d at 1199 ("In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end") (citations omitted).

Admittedly, the Government's concern about the impermissible extension of the Government's waiver of sovereign immunity might be warranted if, hypothetically speaking, Martine were: a) not a Navajo Nation employee; or b) not performing a function identifiable in and expressly authorized by the self-determination contract. *See also* 25 C.F.R. §900.183 (outlining claims against self-determination contractors which are not covered by the FTCA). But in reality, Martine was a Navajo Nation employee carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract. And because those functions were identifiable in and expressly authorized by the self-determination contract, they were not, as the Government asserts, inconsequential or only tangentially related to the contract, but were important and integral to the contract.

The Government wants this Court to consider farfetched scenarios (i.e., scenarios not before this Court) instead of the established facts of this specific case. (Govt's Brief, page 48). But, as the Government noted, "[T]he proper focus in this case should be on whether Martine was 'carrying out' an identifiable function of the relevant contract at the time of the accident." (Govt's Brief, page 29). In this case, Martine was carrying out the self-determination contract by performing functions identifiable in and expressly authorized by the contract. Accordingly, this case fits

squarely within the express language of Self-Determination Act and self-determination contract, and the District Court's conclusion was correct. The District Court's Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 11,104 words. This brief also complies with the typeface and type style requirements of Rules 32(a)(5) and (6) because it has been prepared in proportionally spaced typeface using WordPerfect 14-point Times New Roman font.

/s/ David Maxwell Milton
David Maxwell Milton
Attorney for Appellees

CERTIFICATE OF SERVICE

I certify that on November 13, 2014, I electronically filed this Brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, which constitutes service on all parties under the Court's rules.

I further certify that on the same day, I caused seven copies of this Brief to be dispatched via Federal Express (overnight delivery) to the Clerk of the Court, and one copy to counsel as follows:

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