No. 18-15968

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILES BEAM,
Plaintiff/Appellant,

vs.

ALBAN NAHA and JASON LOBIK,
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
D.C. No.: 3:17-CV-08078-JWS

APPELLEES' RESPONDING BRIEF

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STATEMENT OF THE CASE AND JURISDICTION

On April 26, 2017, Plaintiff Miles Beam [hereafter, Plaintiff] filed his Complaint in the United States District Court for the District of Arizona against Defendants Alban Naha and Jason Lobik [hereafter Defendants]. (Document [DOC] 1]. Plaintiff alleged that his "action arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 U.S. 388 (1971), [DOC 1, ¶1], that jurisdiction of such a claim was based on 28 U.S.C. §1331, [DOC 1, ¶2], and that Defendants took adverse action against him in retaliation for his exercise of protected free speech, [DOC 1 ¶10], entitling him to damages, interest, and costs. [DOC 1, p. 10].

On May 31, 2017, Defendants filed their Answer denying liability. [DOC 8, pp. 1-13]. Among the affirmative defenses, Defendants' Answer included qualified immunity, sovereign immunity, and failure to state a claim on which relief could be granted. [DOC 8, ¶20, p. 12].

On December 21, 2017, Defendants filed their Motion to Dismiss Pursuant to Rule 12(b)(1), or in the alternative, Motion for Summary Judgment, [DOC 15, 16, 16-1]. In that Motion, Defendants contended that tribal sovereign immunity barred Plaintiff's claims against Defendants as officers or employees of a tribally controlled school, [DOC,15, pp. 2- 12], and that Defendants were entitled to qualified immunity because neither Supreme Court nor Ninth Circuit precedent recognized a clearly established right to sue officers or employees of a tribally controlled school in federal

court for monetary damages based on alleged violations of First Amendment rights. [DOC 15, pp. 12-16].

On December 21, 2017, Defendants also filed their Motion to Dismiss Pursuant to Rule 12(b)(6), or in the alternative for Summary Judgment. [DOC 17, 18, 18-1]. In that Motion, Defendants contended that a *Bivens* First Amendment retaliation claim, seeking monetary damages in federal court, did not extend to federal grant contractors or their officers and employees, [DOC 17, pp. 2-7], that Public Law 101-512 does not deem Defendants to be federal actors for purposes of a *Bivens* claim, [DOC 17, pp. 7-10], and that *Bivens* does not extend to First Amendment retaliation claims against officers or employees of tribally controlled schools. [DOC 17, pp. 10-17].

On January 29, 2018, Plaintiff filed his Response to Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment. [DOC 22, pp. 1-10]. Plaintiff contended that Defendants may be sued under Bivens because they were federal actors, [DOC 22, pp. 1-7], and that Defendants were not entitled to qualified immunity [DOC 22, pp. 7-10.] On February 1, 2018, Defendants filed their Combined Reply Brief in Support of their Motions to Dismiss Pursuant to Rule 12(b), or in the alternative, Motions for Summary Judgment [DOC 23, pp. 1-12].

On April 27, 2018, the District Court, John W. Sedwick, Judge, entered an Order on Defendants' Motions to Dismiss or, alternatively, for Summary Judgment. [DOC 24, pp. 1-17.] The District Court rejected Defendants' claim to absolute, tribal

sovereign immunity, [DOC 24, pp. 7-9], but granted summary judgment in favor of the Defendants on Plaintiff's *Bivens* claim [DOC 24, pp. 9-17.] The District Court determined that Defendants were not federal actors, [DOC 24, pp. 11-15], and that special factors weighed against expanding *Bivens* claims to officers and employees of tribally controlled schools [DOC 24, pp. 15-17].

On April 27, 2018, Judgment was entered in favor of Defendants and against the Plaintiff. [DOC 25]. On May 25, 2018, Plaintiff filed his timely Notice of Appeal. [DOC 26]. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF FACTS

Hopi Junior/Senior High School is located in Keams Canyon, Arizona, within the Hopi Reservation. Plaintiff Miles Beam has been employed as a teacher at Hopi Junior/Senior High School since 2009. (DOC 1, ¶5; DOC 8, ¶5).

Defendant Alban Naha was the Interim Superintendent of the Hopi Junior/Senior High School District during a portion of the 2016-2017 school year. (DOC 16-1, 18-1, Exhibit 1, ¶2).

Defendant Jason Lobik was the Principal of the Hopi Junior/Senior High School during a portion of the 2016-2017 school year. He also served as media teacher at the Hopi Junior/Senior High School during the 2016-2017 school year and was in charge of the school's radio station. (DOC 16-1, 18-1, Exhibit 2, ¶3).

Plaintiff Beam alleges that he engaged in protected speech on matters of public concern. (DOC 1, ¶¶10, 11). He alleges that in October 2015, he published a

letter to the editor of a local newspaper opposing the non-renewal of two custodial workers because of nepotism and abuse of power; that in October 2016, he wrote a letter to the administration opposing bus policies on safety grounds; that on March 25, 2017, he made public statements opposing the constitutional oppression of staff and students' free speech; and that over a seven (7) year period, he has been interviewed by students to speak on matters of public concern without any interference from previous administrations, including such topics as class activities, yearbook, G.A.T.E., cutting of funding for instruction, teacher and administrative turnover, and lack of classroom visits by administration. (DOC 16-1, 18-1, ¶11).

Plaintiff Beam alleges that Defendants Naha and Lobik retaliated and took adverse action against him. (DOC 1, ¶¶ 12-15).

Plaintiff's Complaint alleges that such retaliation and adverse action took the following forms: Defendants Naha and Lobik altered a March 23, 2017, Hopi Teen Radio program on which Plaintiff was scheduled to speak and issued a new media policy. (DOC 1, ¶¶12(a), (b), (c)).

Defendants Naha and Lobik placed Plaintiff on administrative leave for insubordination and unprofessional conduct, prohibited him from going on campus except for social events, and from having contact with students, parents, and employees unless directed to do, (DOC 1, ¶¶12(d), (e), (f), 15), and took away his classroom key and laptop. (DOC 1, ¶12(g)).

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On April 7, 2017, Defendant Lobik wrote a letter to parents and guardians of students concerning possible cancellation of the 2017 Hopi Junior/Senior High School Close-Up trip to Washington, D.C. (DOC 1, ¶¶12(i), (j)).

On April 10, 2017, Plaintiff's wife was escorted off School campus by security. (DOC 1, ¶12(m)).

Following an April 12, 2017, school board meeting at which some parents and students supported Plaintiff, Defendant Lobik delivered a letter of reprimand to Plaintiff at his home on April 13, 2017. (DOC 1, ¶¶12(n), (o)).

Plaintiff, his wife, and his family who live within the school compound claimed to have become "prisoners in [their] own home," and sent text messages to faculty, staff, students, and family not to visit them. (DOC 1, ¶12(q), (r), (s), (t), (u)).

On April 26, 2017, Plaintiff sent classroom supplies and lesson plans to a substitute teacher. (DOC 1, ¶12(x)).

Plaintiff alleges that Defendants have not conducted an investigation and have not responded to Plaintiff's questions concerning classroom activities, grading, and lesson plans. (DOC 1, ¶12(v), (w)).

Plaintiff's Complaint seeks damages from Defendants for physical and emotional harm and loss of reputation "in an amount to be proven at trial, plus interest, costs and such other relief as the Court deems appropriate." (DOC 1, ¶17; Demand for Relief).

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Hopi Junior/Senior High School is a Tribally Controlled School receiving grant funds from the federal government pursuant to the 1988 Tribally Controlled Schools Grants Act, 25 U.S.C. §2501, et seq. (DOC 8, ¶6).

On December 28, 1994, pursuant to Article VI, Section 1(a) of the Hopi Constitution, the Hopi Tribal Council enacted Resolution H-11-95 "authoriz[ing] the Hopi Jr./Sr. High School Governing Board to convert from BIA operated to a Part B Grant Status effective July 1 1995." (DOC 16-1, 18-1, Exhibit 3, p. 1).

The Hopi Tribal Council acknowledged that "the Hopi Board of Education, through formal action, on September 23, 1994 approved and supports this request by the Hopi Jr./Sr. High School Governing Board" to convert to a tribally controlled grant school and "agree[d] with the Board and Hopi Board of Education that by converting from a Bureau of Indian Affairs (BIA) operated to a grant school increased financial resources and control will significantly contribute to providing a more efficient and effective educational program." (DOC 16-1, 18-1, Exhibit 3, p. 1.) Resolution H-11-95 further provided:

> BE IT FURTHER RESOLVED that the Hopi Jr./Sr. High School Governing Board will be designated as the grantee and will control all operations of the school which includes, but is not necessarily limited to educational services, financial, personnel, purchasing, administrative costs, transportation and related service. (DOC 16-1, 18-1, Exhibit 3, p. 2).
>
> BE IT FURTHER RESOLVED that the Hopi Jr./Sr. High School plan at least one (1) meeting at each local day school to inform parents of this decision and discuss its benefits. (DOC 16-1, 18-1, Exhibit 3, p. 2).

> BE IT FURTHER RESOLVED that the Hopi Jr./Sr. High Board in conjunction with Hopi Board of Education provide Tribal Council and the Hopi Department of Education the opportunity to review and made recommendations on the proposed policies and procedures which will govern the grant school before the grant is finalized. (DOC 16-1, 18-1, Exhibit 3, p. 2).
>
> BE IT FURTHER RESOLVED that the Hopi Jr./Sr. High Board report to Tribal Council in July, 1996, concerning its first year of operation as a grant school. (DOC 16-1, 18-1, Exhibit 3, p. 2).
>
> BE IT FURTHER RESOLVED that the Hopi Jr./Sr. High Board that passage of this resolution does not affect authority of Ordinance No. 36; Hopi Education Ordinance. (DOC 16-1, 18-1, Exhibit 3, p. 2).
>
> BE IT FINALLY RESOLVED that the Hopi Tribal Council fully supports the Hopi Jr./Sr. High School Governing Board's position of mandating the Director, Office of Indian Education Programs to provide adequate funds to meet the BIA minimum academic standards, to increase ISEP funding and to fund the Administrative Cost Grant Funds at 100%. (DOC 16-1, 18-1, Exhibit 3, p. 2).

Hopi Tribal Council Resolution H-11-95 acknowledges that "the Hopi Board of Education, through formal action, on September 23, 1994, approved and supports this request by the Hopi Jr./Sr. High School Governing Board" to become a tribally controlled school" and resolved "that the passage of this resolution does not affect the authority of Ordinance No. 36; Hopi Education Ordinance." Ordinance No. 36 establishes "the framework for cooperative and mutually beneficial association of all educational entities located on the Hopi Indian Reservation and serving Hopi people" and defines comprehensively "Hopi educational interests" and the authorities for pursuing such interests. (DOC 16-1, 18-1, Exhibit 3).

Section 12.1.A of Ordinance No. 36 provides: "It shall be the policy of the Hopi Board of Education to insure that self-determination be initiated to the greatest extent possible and be exercised to be [sic] greatest extent possible at the local school board level." (DOC 16-1, 18-1, Exhibit 4).

Pursuant to Hopi Tribal Council Resolution H-11-95 and Ordinance No. 36, Hopi Jr./Sr. High School became a tribally controlled grant school and entered into grant agreements with the United States Department of the Interior, Bureau of Indian Education, pursuant to Public Law 100-297 authorizing Tribally Controlled School Grants. (DOC 16-1, 18-1, Exhibits 3 & 4).

Effective July 1, 2016, and expiring June 30, 2017, Grant Agreement Number A16AV00776 set forth accounting, educational, environmental, and safety standards, (Exhibit 5, p. 1, ¶¶ 1-12), but provided: "None of the foregoing provisions in this assurance statement are intended to impinge on Tribal sovereignty, however are intended to maintain program integrity and ensure accountability." (DOC 16-1, 18-1, Exhibit 5, p. 1, ¶13).

The July 1, 2016, letter from the United States Department of the Interior, Bureau of Indian Education, to Hopi Junior Senior High School Board contained "a listing of the statutes and regulatory requirements that address your responsibilities as Public Law 100-297 grantee or a Public Law 93-6389 Contractor." (DOC 16-1, 18-1, Exhibit 6, p. 1). The list of statutory and regulatory requirements includes the "Tribally Controlled Schools Act of 1988, as amended, 25 U.S.C. §2501 et seq." and

the "Tribally Controlled Schools Act regulations, 25 C.F.R. Part 44." (DOC 16-1, 18-1, Exhibit 6, p. 1.) Under that statute, a tribe's or tribal organization's "application and the timing of such application shall be strictly voluntary," 25 U.S.C. §2502(d)(1)(2), and tribally controlled school grants "shall not terminate, modify, suspend, or reduce the responsibility of the Federal Government to provide a program." 25 U.S.C. 2502(e). (DOC 16-1, 18-1, Exhibit 6).

Referring to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §5301, the Tribally Controlled Schools Act's "declaration of policy" recognizes that "the inherent authority of Indian nations, was and is a crucial positive step toward tribal and community control and that the United States has an obligation to assure maximum Indian participation in the direction of educational services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities." 25 U.S.C. §2501(a). To this end, "Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children through the establishment of a meaningful Indian self-determination policy for education that will deter further perpetuation of Federal bureaucratic domination of programs." 25 U.S.C. §2501(b).

Under the Tribally Controlled Schools Act, "a national goal of the United States is to provide the resources, processes, and structure that will enable tribes and

local communities to obtain the quantity and quality of educational services and opportunities that will permit Indian children – (1) to compete and excel in areas of their choice; and (2) to achieve the measure of self- determination essential to their social and economic well-being." 25 U.S.C. §2501(c). Congress further affirmed that "(1) true self-determination in any society of people is dependent upon an educational process that will ensure the development of qualified people to fulfill meaningful leadership roles; (2) that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities; and (3) that those needs may best be met through a grant process." 25 U.S.C. §2501(d). Finally, "Congress declares a commitment to the policies described in this section and support, to the full extent of congressional responsibility, for Federal relations with the Indian nations," 25 U.S.C. §2501(e)," and rejected "any policy of unilateral termination of Federal relations with any Indian nation." 25 U.S.C. §2501(f).

The Tribally Controlled Schools Act provides that the Interior "Secretary shall provide grants to Indian tribes, and tribal organizations that – (A) operate contract schools under title XI of the Education Amendments of 1978 [25 U.S.C. 2000 et seq.] and notify the Secretary of their election to operate the schools with assistance under this chapter rather than continuing the schools as contract schools; (B) operate other tribally controlled schools eligible for assistance under this chapter and submit applications (which are approved by their tribal governing bodies) to the Secretary

for such grants; or (C) elect to assume operation of Bureau-funded schools with the assistance under this chapter and submit applications (which are approved by their tribal governing bodies) to the Secretary for such grants." 25 U.S.C. §2502(a)(1). Grant funds "shall be deposited into the general operating fund of the tribally controlled school with respect to which the grant is made." 25 U.S.C. §2502(a)(2). Grant funds "shall be used to defray, at the discretion of the school board of the tribally controlled school with respect to which the grant is provided, any expenditures for education related activities for which any funds that compose the grant may be used under the laws described in section 2504(a) of this title, including expenditures for – (i) school operations, academic, educational, residential, guidance and counseling, and administrative purposes; and (ii) support services for the school, including transportation." 25 U.S.C. §2502(a)(3)(A). Grant funds also "may, at the discretion of the school board of the tribally controlled school with respect to which such grant is provided, be used to defray operations and maintenance expenditures for the school if any funds for the operation and maintenance of the school are allocated to the school under the provisions of any of the laws described in section 2504(a) of this title." 25 U.S.C. §2502(a)(3)(B). Indian tribes or tribal organizations are limited to one grant "per fiscal year," 25 U.S.C. §2502(b)(1), and may not use such funds "in connection with religious worship or sectarian instruction." 25 U.S.C. §2502(b)(2).

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The Tribally Controlled Schools Act defines the funding sources, uses, limitations, and accounting standards for grants, 25 U.S.C. §2503, grant eligibility, 25 U.S.C. §2504, duration of eligibility determination, 25 U.S.C. §2505, and grant payments and fund investment, 25 U.S.C. §2506.

The Tribally Controlled Schools Act incorporates into grant applications certain provisions from the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §2501, et seq. (formerly 25 U.S.C. §450, et seq.), assigns grant review and approval to the Director of the Office of Indian Education Programs, 28 U.S.C. §2508, and permits tribally controlled grant schools to establish an endowment trust fund, 28 U.S.C. 2510.

The Interior Secretary is authorized "to issue regulations relating to the discharge of duties specifically assigned to the Secretary under this chapter", but is forbidden from issuing regulations for "all other matters relating to the details of planning, developing, implementing, and evaluating grants under this chapter." 28 U.S.C. §2509.

The July 1, 2016, letter from the United States Department of the Interior, Bureau of Indian Education, to the Hopi Jr./Sr. High School Board includes the "Indian Self-Determination and Education Assistant Act of 1975, as amended," among the "listing of the statutes and regulatory requirements that address your responsibilities as Public Law 100-297 grantee or a Public Law 93-6389 Contractor." (DOC 16-1, 18-1, Exhibit 6, p. 1.) That statute's declaration of policy

"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." 25 U.S.C. §5302(a). To this end, "Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. §5302(b). The "major national goal of the United States" in enacting the statute "is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 25 U.S.C. §5302(c).

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In addition to the Tribally Controlled Schools Act, the Bureau of Indian Education's July 1, 2016, letter lists the "Tribally Controlled Schools Act regulations, 25 C.F.R. Part 44" as being applicable to the grant. (DOC 16-1, 18-1, Exhibit 6). 25 C.F.R. Part 44-102 provides: "This does not: (a) Affect in any way the sovereign immunity from suit enjoyed by Indian tribes; (b) Terminate or change the trust responsibility of the United States to any Indian tribe or individual Indian; (c) Require an Indian tribe to apply for a grant; or (d) Impede awards by any other Federal agency to any Indian tribe or tribal organization to administer any Indian program under any other law."

The July 1, 2016, letter, advised Hopi Jr./Sr. High School of the applicability of the Federal Tort Claims Act to tribally controlled grant schools when it set forth that the grant is subject to "Pub. L. 103-138, Title III, §308, November 11, 1993, 107 Stat, 1416, extending FTCA coverage to tribally controlled schools operated per Pub. L. 100-297 and their employees, set out as a note to 25 U.S.C. §450f." (DOC 16-1, 18-1, Exhibit 6). Under that statute, as to claims resulting from the performance of functions under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance or the Tribally Controlled Schools 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 or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its

employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement …" The implementing regulations state that the FTCA is the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract. 25 C.F.R. Part 900.204; 25 C.F.R. Part 44.111. The regulations also advise that there are claims against self-determination contractors which are not covered by the FTCA, claims which may not be pursued under the FTCA, and remedies that are excluded by the FTCA. 25 C.F.R. Part 900.183. (DOC 16, 18, pp. 13-16).

The Federal Tort Claims Act explicitly excludes constitutional claims. 28 U.S.C. §2679(b)(2) provides that the Act "does not extend or apply to a civil action against an employee of the Government—(A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."

As contemplated by Hopi Tribal Council Resolution H-11-95, the Hopi Jr./Sr. High School promulgated policies and procedures. Pursuant to those policies, and after being placed on administrative leave on April 3, 2017, Plaintiff Beam was issued a formal letter of reprimand on April 13, 2017, for insubordination and lack of professionalism, and was informed that he could appeal the formal letter of reprimand pursuant to Policy GCQF, a copy of which was attached to the April 13, 2017, letter. (DOC 16-1, 18-1, Exhibit 9) Policy GCQF provides:

Minor Disciplinary Action

> A staff member may be disciplined for any conduct that, in the judgment of the School, is inappropriate. Minor disciplinary action includes, without limitation thereto, verbal or written reprimands, suspension with pay, or suspension without pay for a period of five (5) days or less. Minor disciplinary action shall be imposed by the staff member's supervisor. A staff member who wishes to object to a minor disciplinary action shall submit a written complaint to the supervisor's superior within five (5) work days of receiving notice of the disciplinary action. The supervisor's superior will review the complaint and may confer with the staff member, the supervisor, and such other persons as the supervisor's superior deems necessary. The decision of the supervisor's superior will be final. (DOC 16-1, 18-1, Exhibits 8 & 9)

Plaintiff Beam did not submit a written complaint to his supervisor's superior within five (5) working days after receiving the April 13, 2017, letter of reprimand. Policy GCFQ provides that "Failure to object to a disciplinary action or take other action within the time limitations set forth in this policy shall mean that the employee does not wish to pursue the matter further," that "Complaints filed after the expiration of the applicable time limitation will not be considered," and that "[a] complaint relating to minor disciplinary action, suspension without pay for more than five (5) days, or dismissal shall not be processed as a grievance." (DOC 16-1, 18-1, Exhibit 9).

The Constitution and By-laws of the Hopi Tribe Arizona was approved on December 19, 1936. Article IX, Section 2 provides: "All members of the tribe shall be free to worship together in their own way, to speak and write their opinions, and to meet together." (DOC 16-1, 18-1, Exhibit 7).

Article VI, Section 1(g) of the 1936 Hopi Constitution empowers the Hopi Tribal Council "to set up courts for the settlement of claims and disputes, and for the trial and punishment of Indians within the jurisdiction charged with offenses against such ordinances." Section 1.4.4 of the Hopi Tribal Code (2012) provides that the Hopi "Trial Court has original jurisdiction over all civil actions or controversies, whether at law or equity, arising under the Constitution, laws, customs, and traditions of the Tribe, including cases in which the Tribe or its officials and employees shall be a party. All civil causes of action arising within the Jurisdiction of the Tribe shall be brought in the Trial Court before they can be litigated in any other court." Hopi Tribal Courts have the power "to interpret the Hopi Constitution and laws of the tribe, and to invalidate laws if the [sic] conflict with the constitution," Section 1.5.1(h), and "to issue all remedies in law and in equity," **Hopi Tribal Code, §1.5.1(i)**. (DOC 16-1, 18-1, Exhibit 7).

The Indian Civil Rights Act, 25 U.S.C. §1302(a)(1) provides: "No Indian tribe in exercising powers of self-government shall – (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. . . " 25 U.S.C. §1303 provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

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STANDARD OF APPELLATE REVIEW

Reviewing the grant of summary judgment *de novo*, the Court of Appeals views the evidence in a light most favorable to the nonmoving party to determine whether any genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014) "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Arguments based on conjecture or speculation are insufficient." *McIndoe v. Huntington Ingalls, Inc.,* 817 F.3d 1170, 1073 (9th Cir. 2016) (internal citation and quotation marks omitted). The Court of Appeals "may affirm the district court's grant of summary judgment on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground if the movant is entitled to judgment as a matter of law" *In re AMT Fee Antitrust Litigation (Brennan v. Concord EFS, Inc,),* 686 F.3d 741, 748 (9th Cir. 2012) (internal citation and quotation marks omitted).

SUMMARY OF ARGUMENT

The District Court correctly held that Plaintiff could not b ring a First Amendment retaliation claim in federal court because Defendants were not acting under color of federal law for *Bivens* purposes. Even if *Bivens* applies to Defendants as private actors, the availability of alternative remedies and special factors should

bar the extension of *Bivens* claims against officers, employees, or agents of tribally controlled grant schools. Alternatively, Defendants are entitled to qualified immunity because no clearly established law recognizes a *Bivens* claim, brought in federal court, against officers, employees, or agents of tribally controlled grant schools who allegedly engaged in prohibited, First Amendment retaliation.

ARGUMENT

A. Defendants Are Tribal, Not Federal, Actors For *Bivens* Purposes.

The District Court correctly ruled that "significant federal funding alone does not support a finding of governmental action." (DOC 24, pp. 12-13). Hopi Junior/Senior High School's receipt of extensive federal funds under the Tribally Controlled Schools Act does not make it a federal actor when its officers or agents take allegedly adverse employment action against teaching personnel like the Plaintiff. Supreme Court and Ninth Circuit precedent "make it clear that neither financing nor contractual relationships by themselves suffice to make a private entity a governmental actor." *International Olympic Committee v. San Francisco Arts & Athletics,* 781 F.2d 733, 737 (9th Cir. 1986). *Accord: Vincent v. Trend Western Technical Corporation*, 828 F.2d 563, 568 (9th Cir. 1987) (a *Bivens*-based, First Amendment retaliation claim against a government contractor failed because "Vincent's allegation that Trend 'received all of its revenues from the United States Government for the work it performed under its contract with the Air Force thus cannot provide a basis for holding that his dismissal represented government

action."); *Sever v. Alaska Pulp Corporation*, 978 F.2d 1529, 1538 (9th Cir. 1992) (Alaska Pulp's allegedly retaliatory action against Sever after he wrote articles critical of it and testified before Congress contrary to its economic interest did not constitute governmental action because "the fact that defendants rely heavily on governmental contracts does not, by itself, transform their action into state action.")

The District Court also determined correctly that substantial governmental regulation of the financing of tribally controlled schools, 25 U.S.C. §§2502—2006, did not transform Defendants' conduct into federal action because "plaintiff has not pointed to any federal regulation that encouraged, influenced, or coerced Defendants' decision." (DOC 24, p. 13.) Under the Tribally Controlled Schools Act, the federal trust responsibility for the education of Indian children is achieved, not by continuing federal control, but "through the establishment of a meaningful Indian self-determination policy for education that will deter further perpetuation of Federal bureaucratic domination of programs." 25 U.S.C. §2501(b). The Indian Self-Determination and Education Assistant Act "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," 25 U.S.C. §5302(a), and "will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in

the planning, conduct, and administration of those programs and services." Federal disengagement, not federal encouragement, influence, or coercion, in tribally controlled education and personnel matters is now the loadstar of federal Indian education policy. The federal government did not facilitate, encourage, or play a dominant role in the actions of which Plaintiff complains. *Villegas v. Gilroy Garlic Festival Association*, 541 F.3d 950, 956 (9th Cir. 2008) (*en banc*) (private entity conducting a garlic festival in a city park was "not a state actor" because providing security services was not the major or dominant purpose of the corporation, the city retained control of security for which it was paid, and there was "no indication in the record that the City of Gilroy plays a dominant role in controlling the actions of the organization or the control of the festival."); *Brunette v. Humane Society of Venture County*, 294 F.3d 1205, 1212, 1214 (9th Cir. 2002) (a private news organization, invited by a state actor to observe and photograph a search for broadcast, did not act under color of state law because the state actor did not exercise editorial or executive control over the news organization's newsgathering or publication decisions, "did nothing to facilitate the Media's news gathering function, and did not control or affect the footage to be photographed or the events to be memorialized."); *Broad v. Sealaska Corporation,* 85 F.3d 422, 431 (9th Cir. 1996) ("That Sealaska's action was authorized by federal law does not transmute it into government action sufficient for the Fifth Amendment. Without encouragement or coercion, action taken by private

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corporations pursuant to federal law did not transmute into government action under the Fifth Amendment.")

Contrary to Plaintiff's assertion, government oversight of a tribally controlled school's financial reports, accounting records, internal budget controls, leases, and property donations does not make Defendants federal actors for *Bivens* purposes. This case is not connected with the provision, management, and use of grant funds. Instead, it arises from school personnel decisions over which the federal government exercises no influence whether by compulsion, encouragement, or otherwise. "Ninth Circuit precedent does not suggest that governmental compulsion, without more, is sufficient to deem a truly private entity a governmental actor in the circumstances of this case. Instead, the plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some willful participation in a joint activity by the private entity and the government. Plaintiff here fails to allege any such nexus." *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 843-844 (9th Cir. 1999). *See also: Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995) ("no nexus between the State and the challenged termination existed where "the complaint makes no allegation that the State in any way participated in the decision to terminate Parks, nor was the termination made pursuant to any state regulation or policy."); *Gorenc v. Salt River Project Agricultural, Improvement & Power District*, 869 F.2d 503, 507 (9th Cir. 1989) ("for the purposes of employment, there is not a

sufficiently close nexus between Arizona and Salt River to make the actions of Salt River that of the State itself" because Salt River's governmental powers were limited to levying property taxes, selling tax-exempt bonds, and exercising eminent domain powers for reclamation and electrical generating purposes."); *American Bankers Mortgage Corporation v. Federal Home Loan Mortgage Corporation*, 75 F.3d 1401, 1410 (9th Cir. 1995) ("although appellants point to the requirement of 12 U.S.C. §14-56(f)(2)(j) that Freddie Mac reports to Congress and HUD on, among other matters, the race and gender of approved seller-servicers, they offer no suggestion of how this requirement might even be related to the particular termination decision challenged here, let alone how this requirement presents a sufficiently close nexus for state action purposes.")

In *Bressi v. Ford,* 575 F.3d 891, 898 (9th Cir. 2009), a non-Indian's *Bivens* claim against four Tohono O'odham Police Department officers failed as a matter of law because no evidence existed of interdependence between the federal government and the Tribal Police Department during the operation of the roadblock. Federal agents were on the scene when plaintiff arrived at the roadblock and told him to comply with the tribal officers' request, but "no federal agents were consulted for the initiation of the roadblock—at most [Tribal Police] Officer Ford may have contacted the U.S. Customs and Border Patrol agencies beforehand to alert them that the Tribal Department could be sending suspected federal violators their way." The federal customs agent's "independent decision to approach Bressi does not amount

to a substantial nexus between the Officers' conduct and that of the federal agencies." The fact that tribal officers told the federal customs officials that they would "send federal violators their way" did not make them federal actors. "Merely referring suspected federal law violations to the appropriate authorities is not tantamount to acting under color of federal law." The Court concluded that the roadblock "was clearly a tribal initiative." 575 F.3d at 898.

Similarly, in *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir. 1996) a custodial staff officer, employed by a private entity operating a correctional facility under a contract with San Diego County, was discharged because he brought safety and security violations to the attention of his employer's management. 91 F.3d at 1229. Despite defendant's concession "that incarceration is a traditionally exclusive state function," plaintiff's First Amendment retaliation claim failed because "the relevant inquiry" was whether or not defendant's "role as an employer was state action." Concluding that it was not, the Court accepted that defendant's contract with the county "granted certain powers and privileges under the law to allow it to function adequately as a prison," but found that plaintiff "offers no indication [defendant] has become the government for employment purposes." 91 F.3d at 1230 (internal citations, brackets, and quotation marks omitted.) Plaintiff's discharge was not geographically or symbolically linked to the government, nor did the government force Pacific to discharge George. 91 F.3d at 1231-1232. No "nexus" existed between defendant's decision to fire plaintiff and the governmental

functions defendant performed, even though the county contract incorporated state correction regulations containing "extensive requirements for the training and monitoring of detention facility employees," prohibited defendant "from hiring individuals who have participated in the Community Furlough Program," required criminal and background checks of employees, and specified that the county retained "the right to preclude [Pacific] from employment or continued employment of any individual at the facility." 91 F.3d at 1231. The Court explained:

> There is, however, no County or state regulation of Pacific-initiated employment termination or disciplinary processes. While the County retains the right to dismiss Pacific employees, the County has neither legally regulated nor contractually specified the manner in which Pacific disciplines or terminates its own employees. As opposed to government involvement with prisoner treatment and the County and state prerequisites for Pacific employees, the County and state have shown no interest in George's type of dispute, a contractor-initiated termination involving Pacific's day-to-day management. The day-to-day management of private contractors performing government functions does not generally constitute state action. *Blum v. Yaretsky*, 457 U.S. 991, 1011-12, 102 S.Ct. 2777, 2789-90, 73 L.Ed.2d 534 (1982.) George has failed to plead a nexus between the government and the complained-of action. 91 F.3d at 1231.

As in *Bressi* and *George*, no nexus exists here between the personnel actions of which the Plaintiff complains and the federal government. As the District Court observed, the record established "that the applicable federal regulations do not address personnel matters," and Defendants' undisputed evidence established "that the Hopi School's governing board had control over employment decisions." (DOC 24, p. 13.) Defendants' alleged acts or omissions were taken solely as employees of

a Hopi tribal entity without supervision, direction, or compulsion by any federal governmental entity. Federal regulations governing tribally controlled schools, 25 C.F.R. Part 44, do not establish substantive or procedural guidelines governing employment or personnel decisions made by the tribally controlled schools. To the contrary, the primary policy of the Tribally Controlled Schools Act is to remove federal control from the school's operations and to lodge it with the Indian tribes to further the purposes of tribal self-determination. Federal withdrawal, not federal engagement, charts the court of contemporary, federal Indian education policy. Plaintiff's *Bivens* claims fail for the same reasons the *Bivens* retaliation claim failed in *Vincent*: There could not be maintained against a federal contractor because "[t]here is no federal law, regulation, or policy mandating anything as inherently illogical as the dismissal of employees of governmental contractors who attempt to warn the government that these contractors are cheating it." 828 F.2d at 568. *See also: Mathis v. Pacific Gas & Electric Company,* 75 F.3d 498, 502-503 (9th Cir. 1996) (a discharged employee's *Bivens* claim failed as a matter of law because the federal regulations did not create the "standard of decision" for the private entity's personnel decision, no formal or informal federal policy was established compelling the private entity's decision, and there was "no indication that the NRC had proposed a standard that would have required PG & E to exclude him."); *Caviness v. Horizon Community Learning Center, Inc.,* 590 F.3d 806, 817 (9th Cir. 2010) (a private charter school did not act under color of state law when it took employment-related

action against the plaintiff, even though state statutes designated it as a "public school" and subjected it to a number of statutory obligations applicable to public schools, because plaintiff did not establish "that the state was involved in the contested employment actions, or that it showed any interest in the school's personnel matters.")

The District Court also properly rejected Plaintiff's contention that a symbiotic relationship existed between Defendants and the federal government because Hopi Jr./Sr. High School's "governing board operates the school and makes personnel decisions," and "there is nothing to suggest the challenged conduct financially benefitted the government or that the federal government had any plenary control or even influence over employment decisions at the school." (DOC 24, p. 14.) In *Morse* no "symbiotic relationship" existed because there was "no evidence here that the federal government profited from any alleged constitutional violation in the PPC's decision to approve Morse's termination." 118 F.3d at 1343. In *Vincent*, "there was no symbiotic relationship between Trend and the Air Force," even though "Trend may have been dependent economically on its contract with the Air Force," because "the government did not profit from Trend's alleged unconstitutional conduct," and "Trend was most certainly not an indispensable element in the Air Force's financial success." 828 F.2d at 569. So too here, no symbiotic relationship exists because the federal government did not profit from Defendants conduct and was not indispensably dependent on Defendants or Hopi Jr./Sr. High School for its

financial success. To the contrary, the actions of which Plaintiff complains were taken by tribally controlled school officials independently of any federal involvement. *Collins v. Womancare*, 878 F.2d 1145, 1155-1156 (9th Cir. 1989) ("The police officer's issuance of citations based on the citizen's arrest does not constitute joint action. Nor is there even an allegation that the prosecutor failed to exercise independent judgment in prosecuting the charges."); *Kirtley v. Rainey*, 326 F.3d 1088, 1095 (9th Cir. 2003) (a guardian appointed, paid, and regulated by the state was not a state actor because the guardian reports to the court "as an independent investigator" and "occupies a role distinct from the court before which she advocated.")

The District Court correctly ruled that Defendants did not act under color of federal law because the education of Indian children is not the "exclusive province" of the federal government", but instead "is within the scope of a tribe's inherent sovereignty." (DOC 24, p. 13-14.) Both tradition and exclusivity are necessary to satisfy the public function test. In *Vincent,* the Court stated that "the repair and maintenance of military aircraft or facilities may 'traditionally' have been a function of the government," it was "hardly one of the government's 'exclusive prerogatives.' To hold that maintenance of military equipment was a traditional exclusive prerogative of the state would transform virtually all of the private companies that perform such tasks under contracts with the government into government actors." 828 F.2d at 569. Holding that private parties soliciting initiative petition signatures

with the help of state authorities did not become state actors, the Court stated that plaintiff's "claim that defendants are state actors because they engaged in a traditional state function fails, since legislation in Oregon is not the exclusive prerogative of the state." *Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1416 (9th Cir. 1995).

In *Morse v. North Coast Opportunities, Inc.,* 118 F.3d 1338, 1342-1343 (9th Cir. 1997), the Ninth Circuit held that a Head Start Parents' Council, organized pursuant to federal law, was not liable for alleged constitutional violations in approving an employee's termination despite her allegation "that this decision was made in retaliation for complaints she had raised regarding the Head Start program." 118 F.3d at 1339. The Court applied "the test for governmental action as laid out in *Rendell-Baker*" to plaintiff's *Bivens*-based, free speech retaliation claims because the Court had held "that the standard for determining the existence of federal government action can be no broader than the standard applicable to State action under §1983." 118 F.3d at 1342. The Court found that "the fact that NCO's Head Start program is funded almost exclusively by the federal government does not support a finding of governmental action here." *Id*. The decision to discharge plaintiff was not compelled, encouraged, or influenced by the federal government even though federal regulations authorized creation of the Parent's Council, specified that it must have 50% parental membership, "and entrusted the PPC with approving all hiring and firing decisions." 118 F.3d at 1342. Concluding "that the

federal regulations authorizing the PPC, specifying its composition, and giving it authority to approve firing decisions do not support a finding that the PPC's decision can be fairly attributed to the federal government," the Court explained:

> The regulations concerning the PPC include no substantive standard which could have compelled or influenced the PPC to decide whether to fire Morse. Nor did the regulations create any procedural guidelines which the PPC was required to follow in considering the question. No government employees served on the PPC, and all of its members were private individuals making decisions about a number of Head Start matters. Rather than suggesting a concern with personnel decisions as such, we think it is clear that the regulations cited by Morse demonstrate a concern to involve parents in making decisions about the overall Head Start experience for their children. 118 F.3d at 1342.

Contrary to Plaintiff's contention, the District Court properly applied *Morse* to conclude that "there is nothing in the record to suggest exclusivity of such a function," and "the primary purpose of the Tribally Controlled Schools Act is to remove the federal government from the provision of Indian education, and to lodge it in the control of Indian tribe." (DOC 24, pp. 13-14.) The federal government has been a traditional, but not exclusive, provider of Indian education. The 1819 Indian Civilization Act, Public Law 15-85, 3 State 516b, authorized up to $10,000.00 per year to support the efforts of religious and benevolent groups and individuals willing to live among and teach Indians. Supported by federal funds, missionary and benevolent societies provided much of the Indian education throughout the nineteenth century until the rise of Bureau of Indian Affairs boarding and day schools at the end of the nineteenth and early twentieth century. By the mid-

twentieth century, state schools provided Indian education because of the 1934 Johnson-O'Malley Act, 25 U.S.C. §5342 *et seq*., authorizing the Interior Secretary to enter into contracts with states and territories to pay for Indian education, and the 1950 Impact Aid Act, Public Law, P.L. 815, 64 Sat. 967, and Public Law 874, 64 Stat. 1100, authorized payment to state public schools serving reservation children because of the tax exemption for Indian trust and federal land. Professors Reyhner and Eder characterized the 1988 Bureau of Indian Affairs *Report on BIA Education* as follows: "It found that the number of BIA boarding students declined from 24,051 in 1965 to 11,264 in 1988, and from 1968 to 1986, BIA-funded school enrollment declined from 51,448 students to 38,475, whereas non-BIA school enrollment almost doubled (see table 4). By 1987 contract schools enrolled 27.8 percent of students." Table 4 indicates that in 1986 only 38,475 (9.82%) students were enrolled in BIA-funded schools, compared to 353,462 (90.18%) students enrolled in state and private schools. Jon Reyhner & Jeanne Eder, *American Indian Education: A History,* pp. 301-302 (2d. ed., University of Oklahoma Press, 2017).

Plaintiff's reliance on *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982) is also misplaced. In *Rendell-Baker,* "public funds accounted for at least 90%, and in one year 99%, of respondent's operating budget." 457 U.S. at 832. As a condition for such funding, the school was required to comply with "detailed regulations concerning matters ranging from record-keeping to student-teacher ratios," including personnel policies containing "written job descriptions and written

statements describing personnel standards and procedures, but they impose few specific requirements." 457 U.S. at 833. The school's contracts with the state included only "general requirements, such as an equal employment opportunity requirement," but did "not cover personnel policies." While one grant concerning vocational counselors like the plaintiff provided for approval of the school's initial hiring decision by a state criminal justice committee, this requirement was intended "to insure that the school hires vocational counselors which meet the qualifications described in the school's grant proposal to the Committee; the Committee does not interview applicants for counselor positions." 457 U.S. at 833-834. The Supreme Court held that the school was not acting under color of state law in discharging petitioner. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts," even though "the State pays the tuition of the students." 457 U.S. at 841. Likewise, despite "extensive and detailed" state regulations, "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation," the state "regulators showed relatively little interest in the school's personnel matters," and the state's power to approve persons hired as vocational counselors "is not sufficient to make a decision to discharge, made by private management, state action." 457 U.S. at 841-842. The Court accepted that "the education of maladjusted high school students is a public function" provided "at public expense," but found that the provisions of such service was not the state's

"exclusive province" and determined: "That a private entity performs a function which serves the public does not make its acts state action." 457 U.S. at 842. This supports Defendants, not the Plaintiff.

Nothing in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), supports a contrary conclusion or even Plaintiff's position. That case concerned only "the question whether federal law pre-empts a state tax imposed on the gross receipts that a non-Indian construction company receives from a tribal school board for the construction of a school for Indian children on the reservation." 458 U.S. at 834. The Court described the school as "a Navajo 'tribal organization,'" funded by both the federal government and the Navajo Nation and "organized as a nonprofit corporation to be operated exclusively by members of the Ramah Navajo Chapter." 458 U.S. at 834-835. The Court stated: "Although the early focus of the federal efforts in this area concentrated on providing federal or state educational facilities for Indian children, in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation." 458 U.S. at 840. Thus, the 1975 Indian Self-Determination and Education Assistance Act "declares that a 'major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.' In achieving this goal, Congress expressly

recognized that 'parental and community control of the educational process is of crucial importance to the Indian people.'" *Id*. Not involving any employment-related issues, this characterization of federal Indian education policy supports Defendants, not Plaintiff.

Far from supporting Plaintiff, *Boney v. Valline,* 597 F.Supp.2d 1167, 1175-1177 (D. Nev. 2009), further supports the Defendants. In *Boney,* the Court determined that "the enforcement of federal law may 'traditionally [be] the exclusive prerogative of the federal government," but that "the enforcement of a tribe's own tribal laws against members of the tribe is certainly within the scope of the tribe's inherent sovereignty." 597 F.Supp.2d at 1175. The "Defendant was not performing a function that was traditionally the exclusive prerogative of the federal government" when he "went to the scene to enforce tribal law against a member of the Tribe, which constitutes conduct within the Tribes inherent sovereignty." 597 F.Supp.2d at 1176. Moreover, the federal government did not "exercise plenary control over the Tribe's law enforcement activities and certainly had no intervention with the specific incident that occurred on July 15, 2004 on the Reservation." 597 F.Supp.2d at 1176-1177. The District Court properly found the same to be true here in granting Defendants' summary judgment motion.

Equally misguided is Plaintiff's contention that employment relations in tribally controlled grant or contract schools are somehow controlled by the Bureau of Indian Education. Plaintiff wrongly asserts that 25 C.F.R. Part 38 applies to

tribally controlled grant schools because those provisions are confined to Bureau of Indian Education controlled schools only. 25 C.F.R. Part 38.1(a) states that "this part applies to all individuals appointed or converted to contract education positions as defined in §38.3 in the Bureau of Indian Affairs after November 1, 1979." 25 C.F.R. Part 38.3 defines "education position" to mean "a position *in the Bureau* the duties and responsibilities of which: (a) Are performed on a school term basis principally i*n a Bureau elementary and secondary school* . . ." and "(b) Are performed *at the Agency level of the Bureau and involve the implementation of education-related Bureau programs."* (emphasis added.) Neither Plaintiff nor Defendant hold contractual positions in the Bureau, work in a Bureau elementary school, perform educational activities at the Bureau's agency level, or implement Bureau educational programs. As to tribally controlled contract or grant schools, 25 C.F.R. Part 38.1, *et seq*. thus does not impose EEO or staff grievance procedures, does not regulate employee standards or the conditions of employee discharge, and does not confer rights of appeal or review of tribally controlled school board action to the Bureau of Indian Education. Plaintiff and Defendants are employed by a tribally controlled school, not a Bureau of Indian Affairs School, and are not subject to 25 C.F.R. Part 38, which is not listed among the statutory or regulatory provisions in the grant assurances, (DOC 16-1 & 18-1, Exhibit 5) or the Bureau of Indian Education's July 1, 2016, letter to Hopi Junior Senior High School, (DOC 16-1 & 18-1, Exhibit 6.) Even if the opposite held true, Plaintiff's claims should be rejected under the Federal

Circuit Court of Appeals' holding that no *Bivens* claim will lie against Bureau of Indian Education officials for employment-related action in BIE schools given available, alternative remedies which the Plaintiff did not pursue. *Volk v. Hobson*, 866 F.2d 1398, 1402-1404 (Fed. Cir. 1989).

For similar reasons, Plaintiff incorrectly cites 25 C.F.R. Part 42 to assert mistakenly that the government controls curricula, instructional programs, and student rights in tribally controlled schools. Like 25 C.F.R. Part 38, 25 C.F.R. Part 42 is not listed among the statutory or regulatory provisions in the grant assurances, (DOC 16-1 & 18-1, Exhibit 5) or the Bureau of Indian Education's July 1, 2016, letter to Hopi Junior Senior High School, (DOC 16-1 & 18-1, Exhibit 6). As the Bureau of Indian Education's July 1, 2016, letter to Hopi Junior Senior High School states, only the Tribally Controlled School Act regulations, 25 C.F.R. Part 44, apply to tribally controlled grant or contract schools, and these regulations state nothing about the terms and conditions of employment, curricula, instructional programs, or student rights which, in any event, are not involved in this case. (DOC 16-1 & 18-1, Exhibit 6). 25 C.F.R. Part 42 applies only to "Bureau-funded schools," 42 C.F.R. Part 42.1, not tribally controlled grant or contract schools. In *Rendell-Baker*, the Court foreclosed Plaintiff's attempt to bootstrap his claims by tangential and cursory allusions to non-party student rights when it stated that "the relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students." 457 U.S. at 841. "It is a well-established rule that a litigant

may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties." *Coalition of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002).

Finally, Plaintiff wrongly suggests that Public Law 101-512 should be judicially extended to make Defendants federal actors for *Bivens* purposes. By deeming tribally controlled grant school employees a part of the Bureau of Indians Affairs when carrying out the grant agreement and affording them "the full protection of the Federal Tort Claims Act," Public Law 101-512 inferentially precludes deeming tribally controlled school employees to be federal officers for any non-Federal Tort Claims Act purpose, including *Bivens*-based, constitutional claims which are barred by 28 U.S.C. §2679(b)(2)(A). Ninth Circuit precedent holds that "Congress, however, did not intend section 314 to provide a remedy against the United States in civil actions unrelated to the FTCA" because "all the officers work on the reservation to serve the interests of the tribe and reservation governance," and "the purpose of the ISDEAA is to increase tribal participation in the management of programs and activities on the reservation." *Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004). *Accord: Demontiney v. United States*, 255 F.3d 801, 807 (9th Cir. 2001); *Wide Ruins Community School, Inc. v. Stag*o, 281 F.Supp. 2d 1086, 1089 (D.Ariz. 2003).

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B. No Bivens, First Amendment Retaliation Claim Lies Against Tribally Controlled School Officers And Employees.

The District Court also determined correctly that special factors and alternative remedies counsel against expanding *Bivens* to the facts and circumstances of this case. The District Court explained:

> Here, the court concludes that special factors weigh against expanding *Bivens* to this context. Allowing a *Bivens* claim to proceed in these circumstances simply because the Hopi School receives federal grants to operate and is subject to governmental regulations that are not related to the challenged conduct "implicates the tribe's inherent sovereignty." A tribe's sovereignty "constitutes a special factor militating against extending *Bivens*." Indeed, the Tribally Controlled Schools Act was enacted to promote tribal self-determination in the context of education and to allow increased tribal autonomy in operating its schools. Subjecting administrators of the schools who are not federal employees to actions for damages because of personnel decisions would undermine the tribe's autonomy. In light of these sovereignty considerations, "the creation of a private right of action against tribal [educators] for civil rights violations . . . is a decision more appropriately left to legislative judgment" and no one to be impliedly recognized by courts. Moreover, as more fully explained in *Boney*, the possibility of an alternate remedial process in tribal courts under the Indian Civil Rights Act provides further reason to disallow the extension of Bivens here. (DOC 24, pp. 16-17, footnotes and citations omitted).

This determination properly applies *Bush v. Lucas*, 462 U.S. 367 (1983) in which the Supreme Court held: "Petitioner asks us to authorize a new nonstatutory damage remedy for federal employees whose First Amendment rights are violated by their superiors. Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be

inappropriate for us to supplement that regulatory scheme with a new judicial remedy." 462 U.S. at 368.

In *Bush*, "the special factors counselling hesitation in the creation of a new remedy" focused on the availability of civil service remedies. Recently, the "Court has clarified what constitutes a 'special facto[r] counselling hesitation'" when it stated that the inquiry "'must concentrate on whether the Judiciary is well suited, absent congressional action or instruction to consider and weigh the costs and benefits of allowing a damage action to proceed.'" *Hernandez v. Mesa*, 137 S.Ct. 2003, 2006 (2017) quoting *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857-1858 (2017).

Consistent with *Bush*, Ninth Circuit precedent has long held: "The Supreme Court has 'responded cautiously to suggestions that *Bivens* remedies be extended into new contexts . . . When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Walleri v. Federal Home Loan Bank of Seattle,* 83 F.3d 1575, 1584 (9th Cir. 1996) quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423, 423 (1988). *See also: Saul v. United States*, 928 F.2d 829, 839-840 (9th Cir. 1991); *Rivera v. United States,* 924 F.2d 948, 951 (9th Cir. 1991); *Kotarski v. Cooper,* 866 F.2d 311, 312 (9th Cir. 1999); *Karamanos v. Egger*, 882 F.2d 447, 452 (9th Cir. 1989); *Daly-Murphy v. Winston,* 820 F.23d 1470, 1478 (9th Cir. 1987); *David v. United States*, 820 F.2d 1038, 1041 (9th Cir. 1987); *Clemente v. United*

States, 766 F.2d 1358, 1364 (9th Cir. 1985). As the Court held in *Blankenship v. McDonald*, 176 F.3d 1192 (9th Cir. 1999),

> Because congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees, we hold that the CSRA precludes a *Bivens* remedy in this case. Congress has given judicial employees certain employment benefits and remedies, such as back pay, severance pay, family and medical leave, and health and retirement benefits. Congress has withheld other benefits and remedies, such as review of adverse personnel decisions. This demonstrates that the lack of more complete remedies was not inadvertent. 176 F.3d at 1195 (internal citations omitted).

In *Farkas v. Williams*, 823 F.3d 1212, 1215 (9th Cir. 2016), the employee, a golf instructor at a naval base, was excluded from protection under the Civil Service Reform Act but "was not without remedies against the base administrator." 823 F.3d at 1216. The whistleblower protection scheme "vests the Secretary of Defense with the responsibility to prevent and correct retaliation against NAFI employees who report illegal or wasteful activities; the Secretary has adopted regulations to carry out that responsibility." In addition, the Navy Department "promulgated grievance procedures for NAFI employees who suffer adverse personnel action." The Court held: "These special factors counsel against recognizing a *Bivens* action for Farkas's employment-related claims, and we hold that the district court properly declined to do so." 823 F.3d at 1215-1216. The Court concluded: "The fact that Congress excluded NAFI employees from the CSRA's remedial scheme does not prevent the Act from precluding Farkas's employment-related *Bivens* claim. Even inadequate

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statutory remedies counsel against recognizing a *Bivens* claim if there are indications that congressional action has not been inadvertent." 823 F.3d at 1215.

Similarly, in *Vega v. United States*, 881 F.3d 1146 (9th Cir. 2018), the Court "decline[d] to expand *Bivens* to include Vega's First and Fifth Amendment Claims against private employees of a residential reentry center" operating as a Federal Bureau of Prisons contractor. 881 F.3d at 1153. Addressing "whether the claim arises in a new *Bivens* context, *i.e.,* whether the case is different in a meaningful way from previous *Bivens* cases decided by this Court," the Court determined that because "neither the Supreme Court nor we have expanded *Bivens* in the context of a prisoner's First Amendment access to court or Fifth Amendment procedural due process claims arising out of a prison disciplinary process, the circumstances of Vega's case against private defendants plainly present a 'new context' under *Abbasi.*" 881 F.3d at 1153. The Court then held that an alternative remedial structure may limit the ability of the judicial power to infer a new *Bivens* claim, "including administrative, statutory, equitable, and state law remedies." 881 F.3d at 1154. Both federal administrative and state law remedies existed for Vega's alleged violations of his First Amendment rights by the private defendants. 881 F.3d at 1154-1155. Observing that "no court has held that the plaintiff's lack of success due to inadequate pleading while pursuing alternative remedies provides a basis for *Bivens* relief," the Court concluded: Expanding *Bivens* in this context, therefore, seems imprudent given the Court's admonition that any alternative, existing process for

protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. 881 F.3d at 1155 (internal citations and quotation marks omitted).

Underlying *Farkas* and *Vega* is the Ninth Circuit's recognition that a variety of alternative remedies may foreclose a *Bivens* action. Barring an employee's First Amendment retaliation claim under *Bivens* despite the unavailability of statutory whistleblowing protection, the Ninth Circuit pointed to a collective bargaining agreement providing grievance procedures with arbitration as the final step, departmental procedures allowing for reinstatement with back pay, and "potential remedies" under the National Labor Relations Act when it held: "Indeed, this court previously has relied on administratively created remedies to bar the creation of a *Bivens* remedy." 22 F.3d at 878. *Bricker v. Rockwell International Corporation*, 22 F.3d 871, 877-878 (9th Cir. 1994). *See also: Pereira v. U.S. Postal Service*, 964 F.2d 873, 876 (9th Cir. 1992) (Refusing to recognize a First Amendment retaliation claim under *Bivens* where the collective bargaining agreement contained comprehensive, binding grievance procedures, subject to arbitration); *Berry v. Hollander*, 925 F.2d 311, 315 (9th Cir. 1991) (rejecting plaintiff's contention "that his claims are not precluded by *Bush v. Lucas* because he had no administrative remedy" because he "was entitled to file a grievance to protest any work-related action with which he was dissatisfied."); *Moore v. Glickman*, 113 F.3d 988, 993-994 (9th Cir. 1997) (entitlement to severance pay, retirement system, group life and health insurance

benefits, but not coverage under Civil Service Reform Act, barred a *Bivens* claim where regulations governing the suspension and removal of employees involved administrative review, appeal, and judicial review.)

Consistent with *Farkas* and *Vega*, the District Court correctly drew upon *Boney v. Valline,* 597 F.Supp.2d 1167 (D. Nev. 2009), to conclude that alternative remedies and special factors barred a *Bivens* claim in this case. In *Boney*, the Court held "that allowing a *Bivens* action against a tribal law enforcement officer solely on the basis of an Indian tribe having a 638 contract with the BIA implicates the tribe's inherent sovereignty, which constitutes a special factor militating against extending *Bivens* to this new context." 597 F.Supp.2d at 1183. Invoking "the Federal Government's longstanding policy of encouraging tribal self-government," the Court explained: "Given the facts of the present case—tribal law enforcement officers enforcing tribal law against a tribe member on tribal territory—extension of *Bivens* to this particular context has dangerous implications for disrupting the long-recognized boundaries between the sovereignty of the United States and that of Indian tribes and disregarding Indian tribes' inherent right of self-government." Moreover, "alternative remedies existed in the tribal courts" because the Indian Civil Rights Act, 25 U.S.C. §1302(1) provides: "No Indian tribe exercising powers of self-government shall—(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people to peaceably to assemble and to petition for a redress of grievances." The Court

found this to be a special factor cutting against a *Bivens* remedy because judicial and nonjudicial "tribal forums are available to vindicate rights created by the ICRA" and "have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 597 F.Supp.2d at 1183-1184 quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65 (1978). Even in cases involving non-Indians as parties, the Court was "persuaded that the unique and delicate nature of the relationship between the sovereignty of the United States and that of Indian tribes is a special factor counseling against extension of *Bivens* to this particular context." 597 F.Supp.2d at 1185-1186.

The same holds true here as the District Court correctly ruled. In *Ziglar*, the Court stated that where "Congress' failure to provide a damage remedy might be more than mere oversight, and that congressional silence might be more than inadvertent, a *Bivens* remedy is inappropriate." 137 S.Ct. at 1862. By restricting federal courts to habeas corpus remedies for violations of the free speech mandates of 25 U.S.C. §1302(1), Congress has barred *Bivens* claims for monetary damages. As *Boney* recognizes, under *Santa Clara Pueblo*, remedies other than habeas corpus, such as claims for money damages, may exist only in tribal courts in furtherance of federal policy promoting tribal self-determination. In *Santa Clara Pueblo*, the Court made this clear when it stated that "the structure of the statutory scheme and legislative history of Title I suggest that Congress' failure to provide remedies other

than habeas corpus was a deliberate one." 436 U.S. at 61. In this way, the Indian Civil Rights Act constitutes "a comprehensive, congressionally-created remedial scheme" which should bar *Bivens* claims in federal court against tribally controlled school employees. In *Ziglar,* the Court stated that, "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new Bivens cause of action." 137 S.Ct. at 1858.

As *Boney* recognizes, potential remedies in tribal court under the free speech provisions of 25 U.S.C. §1302(1) are complemented by possible remedies under tribal law. Plaintiff could have, but did not, pursue administrative remedies under Hopi Junior/Senior High School Policy GCQF, invoking the free speech provisions of the Indian Civil Rights Act and Article IX, Section 2 of the Hopi Constitution. If such administrative remedies proved to be unsuccessful, Plaintiff could have, but did not, pursue review of his speech-related grievances in the Hopi Tribal Court pursuant to Sections 1.4.4 and 1.5.1 of the Hopi Tribal Code. Plaintiff's knowing and intentional tactical choice to forsake such remedies does not militate in favor of creating a *Bivens* remedy in federal court. As the Court stated in *Santa Clara Pueblo*: "By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may have considered that resolution of statutory issues under [25 U.S.C.] §1302, and in particular those likely to arise in a civil contest, will frequently depend on questions of tribal tradition and

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custom which tribal forums may be in a better position to evaluate than federal courts." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 71 (1978).

As the District Court rightly recognizes, subjecting tribally controlled schools to *Bivens* claims in federal court would intrude impermissibly into tribal self-determination which the Tribally Controlled Schools Act and the Indian Self Determination in Education Act were designed to promote. The Ninth Circuit has held: "Congress' stated purpose in enacting the ISDEAA was to increase Indian tribal autonomy in running federally administered programs. But subjecting an Indian organization to an individual action for damages for every decision to hire a non-Indian for a particular position would undermine the Indian organization's autonomy, not enhance it." *Solomon v. Interior Regional Housing Authority,* 313 F.3d 1194, 1199 (9th Cir. 2002).

C. No Clearly Established Bivens First Amendment Claims Exists Against Tribally Controlled School Officer and Employees

In the District Court, Defendants asserted that they were entitled to qualified immunity because no clearly established law supported Plaintiff's claim that a First Amendment Bivens claim lies against officers, employees, or agents of a tribally controlled school. (DOC 15, pp.12-17; DOC 22, pp. 7-10). An official is entitled to qualified immunity unless Plaintiff establishes that the official violated a clearly established statutory or constitutional right at the time of the challenged conduct. Defendants "cannot be said to have violated a clearly established right unless the

right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. In other words, "existing precedent must have placed the statutory or constitutional question confronted by the official 'beyond debate.'" *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023, 188 L.Ed.2d 1056 (2014) quoting *Ashcroft v. al-Kidd*, 131 S.Ct. 1074, 1080, 2081-2084 (2011). As the Supreme Court explained in *District of Columbia v. Wesby*, 199 L.Ed.2d 453 (2018):

> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 577 U.S. ___, ___ (2015) (*per curiam*) (slip op. at 6). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff, supra,* at ___-___ (slip op. at 12-13) (internal quotation marks and citations omitted).199 L.Ed.2d at 467-468.

In *Wesby*, the Court observed that "the fact that a case is unusual, we have held, is an important indication . . . that [the defendants'] conduct did not violate a clearly established right." *Id*. This is so because a clearly established legal principle "must have a sufficiently clear foundation in then-existing precedent." 199 L.Ed.2d at 467. "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id*.

At the time of Defendants' conduct, Supreme Court and Ninth Circuit precedent refused to extend *Bivens* to First Amendment retaliation claims brought in federal court against private actors performing traditional governmental functions. In *Vega*, the Ninth Circuit recently "decline[d] to expand *Bivens* to include Vega's First and Fifth Amendment Claims against private employees of a residential reentry center" operating as a Federal Bureau of Prisons contractor. 881 F.3d at 1153. In so holding, the Court echoed *Farkas* and *Bush,* which refused to extend *Bivens* to allow First Amendment retaliation and related whistleblowing claims to be brought in federal court where, as here, alternative remedies exist and other special factors counsel against extending *Bivens* to cases like this. The District Court here, like the Court in *Boney*, rightly recognized that a tribal court action under the Indian Civil Rights Act and the policy of tribal self-determination both provide alternative remedies and constitute special factors that disfavor extending *Bivens* to this case.

CONCLUSION

In *Ziglar,* the Court stated unequivocally "that expanding the *Bivens* remedy is now a 'disfavored' judicial activity" and that for at least three decades "it has consistently refused to extend *Bivens* to any new context or new category of defendants," including "a First Amendment suit against a federal employer." 137 S.Ct. at 1857. In *Santa Clara Pueblo*, the Court stated that "implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to

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Congress' objective of extending constitutional norms to tribal self-government." 436 U.S. at 65-66.

Under these principles, no *Bivens* actions should be recognized in this case. Defendants did not act under color of federal law in taking any alleged acts or omissions about which Plaintiff complains. No clearly established precedent supports the existence of a First Amendment retaliation claim brought in federal court against officers or employees of a tribally controlled school under *Bivens*. Accordingly, the District Court's Judgment granting Defendants' Motion to Dismiss or, Alternatively, for Summary Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of November, 2018.

MANGUM, WALL, STOOPS & WARDEN, P.L.L.C.

By /s/Kenneth H. Brendel
Kenneth H. Brendel
Attorneys for Defendants/Appellees Alban Naha and Jason Lobik

9th Circuit Case Number(s) 18-15968

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