No. 19-51123

In the United States Court of Appeals
For the Fifth Circuit

MATTHEW MITCHELL,

Plaintiff – Appellant Cross – Appellee

v.

ORICO BAILEY,

Defendant – Appellee

HOOPA VALLEY TRIBE, doing business as
Americorps Hoopa Tribal Civilian Community Corps,

Defendant – Appellee Cross – Appellant

Appeal from the United States District Court for the
Western District of Texas, San Antonio Division; No. 5:17-CV-00411-DAE

Brief of Appellant

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

Appellant, Matthew Mitchell, respectfully requests oral argument because this appeal presents multiple issues of great doctrinal and practical importance.

Primarily, this appeal presents the important issue whether Indian tribes enjoy sovereign immunity from suit regarding their *off reservation* tortious conduct. The district court held that they do. But the United States Supreme Court has never held that and neither has this Court. Oral argument's full decisional process should occur before the Court breaks new ground on this important issue.

Alternatively, in the event Indian tribes do enjoy sovereign immunity from suit regarding their off-reservation torts, this appeal presents the subsidiary issue whether the Hoopa Valley Tribe waived that immunity. The circumstance at issue—an Indian tribe's participation in an off-reservation federal disaster response deployment pursuant to a contract with a federal agency—is likely to recur. By holding that no waiver of immunity occurred here, the district court not only took away the sole remedy available to the tort victim; it took away the sole remedy available to others who, in the future, will sustain injury or death as a result of federal disaster response deployments of Indian tribes. This waiver issue alone is an issue of sufficient importance to warrant oral argument.

Table of Contents

Page(s)

Table of Authorities

Page(s)

Cases

Constitutions and Statutes

Rules of Civil Procedure

Other Authorities

Jurisdictional Statement

With respect to Matthew Mitchell's tort claims against Orico Bailey ("Bailey") and the Hoopa Valley Tribe ("Tribe"); the defendants alleged Bailey and the Tribe were acting as "deemed employees" of the United States and the defendants sought to have the United States substituted as defendant in their stead pursuant to the Westfall Act, 28 U.S.C. § 2679. ROA.448, 458, 555-656. The defendants' request for Westfall Act relief clothed the district court with federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2679. *See Gutierrez De Martinez v. Lamagno,* 515 U.S. 417, 436-437 (1995).

The defendants disputed the district court's subject matter jurisdiction based on their claim of tribal sovereign immunity.

This Court has appellate jurisdiction because appellant timely filed a notice of appeal from a final judgment that disposed of all parties' claims. 28 U.S.C. § 1291; Fed. R. App. P. 4(a)(1)(A). Final Judgment was entered on November 13, 2019, ROA.1400, and appellant's Notice of Appeal was filed on December 10, 2019, ROA.1401.

Statement of Issues Presented for Review

1. Whether Indian tribes are entitled to sovereign immunity from suit regarding their *off-reservation* tortious conduct.

2. In the event Indian tribes have sovereign immunity from suit regarding their off-reservation torts, whether, as a matter of law, the Hoopa Valley Tribe waived such sovereign immunity.

Statement of the Case

Since this case was decided by the district court on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the reviewing court must accept as true the allegations of the complaint. *See, e.g.*, *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001); *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995).

Plaintiff/Appellant Matthew Mitchell ("Mitchell") filed this tort suit against the Hoopa Valley Tribe ("the Tribe") and Orico Bailey ("Bailey") to recover damages for bodily injuries Mitchell sustained while assisting with disaster relief operations in Wimberley, Texas. ROA.12-26. Mitchell is a Texas citizen and, at the time of the events made the subject of this appeal, he was a City of San Antonio firefighter. ROA.12, 14. Defendant/Appellee Hoopa Valley Tribe is a federally recognized Indian tribe whose reservation is located in Hoopa, California. ROA.12-13. The AmeriCorps Hoopa Tribal Civilian Community Corps ("Hoopa Tribal CCC") is a service program and arm of the Tribe that was created by the Tribe with a grant of money from the federal agency known as the Corporation for National and Community Service ("CNCS"). ROA.13, 15, 450. At all relevant times, Bailey, a California citizen, was acting in his capacity as a member of the Hoopa Tribal CCC. ROA.12, 15-19, 565, 570.

Disaster Relief Operations in Wimberley

On Saturday, June 20, 2015, Mitchell and two fellow San Antonio firefighters travelled to Wimberley, Texas, as volunteers, and undertook to participate in ongoing disaster relief efforts following massive flooding of the Blanco River. ROA.14. The flooding had uprooted trees; it had carried entire houses, automobiles, and debris downstream; and it had destroyed bridges and other infrastructure. *Id*.

In response to this massive flooding and the resulting federal disaster declaration that covered the affected Texas counties; several AmeriCorps Disaster Response Teams ("A-DRT's") from across the country were deployed to Texas by CNCS. ROA.15, 565. These A-DRT's were assigned the task of providing disaster relief services in the affected Texas counties. The Hoopa Tribal CCC was among the A-DRT's that received disaster response deployments to Texas. *Id*.

On the morning of June 20, 2015, Mitchell and his two fellow San Antonio firefighters were assisting with the removal of uprooted trees, tree limbs, and other debris that littered the riverbank of the Blanco River. ROA.15-16. At the same time and location, Bailey and members of the Hoopa Tribal CCC also were assisting with debris removal and were being supervised by two Hoopa Tribal CCC supervisors, Bishop Pagoy-Littlefeather-Rivas ("Rivas") and Tyler Breu. *Id*.

In the course of their debris removal efforts, the workers came to an area where a large uprooted Live Oak tree was draped over a stand of several smaller trees that were still rooted in the ground. ROA.16. When the flood waters receded, this large uprooted Live Oak tree had come to rest draped over this stand of smaller trees, which were bent over from the weight of the large uprooted Live Oak tree that they were supporting. *Id*.

Littering the ground in the general vicinity of this large uprooted Live Oak tree and the stand of rooted trees that were supporting it were fallen trees, tree limbs, and other debris. *Id*. As the workers were considering the best way to proceed with the removal of the debris, Mitchell spoke with Bailey and expressed his opinion that the workers' efforts initially should be directed to the removal of the debris that littered the ground before any efforts were directed at bringing to the ground the large uprooted Live Oak tree that was draped over the stand of smaller trees. ROA.16-17. Bailey expressed his understanding and agreement with this plan of action. *Id.*

Bodily Injuries Inflicted on Mitchell

Shortly after this discussion took place, and in direct contravention of the understanding that had been reached regarding the safest way to proceed with the debris removal; Bailey negligently used a chainsaw to fell a rooted Hackberry tree that was among the stand of trees that were supporting the large uprooted Live Oak

tree. ROA.17. When Bailey felled the Hackberry tree, the large uprooted Live Oak tree lost a key element of its support and it fell/rolled to the ground striking Mitchell, as a result of which he suffered severe bodily injuries including a crush injury to his pelvis. ROA.17-18. The severity of Mitchell's injuries ended his career as a firefighter. He has been relegated to a desk job as a dispatcher.

Liability of Bailey and Hoopa Valley Tribe

Since Bailey was acting in the course and scope of his membership in the Hoopa Tribal CCC when he negligently felled the Hackberry tree and since his supervisor Rivas was negligent in his supervision of Bailey, Mitchell asserted tort causes of action against Bailey and the Tribe, doing business as the Hoopa Tribal CCC. ROA.14-21, 23-26.

Defendants' Rule 12(b)(1) Motion to Dismiss

Despite the fact that the Defendants' negligence occurred in Texas, more than 2,000 miles from the Tribe's northern California reservation; the Tribe and Bailey filed a Rule 12(b)(1) motion to dismiss asserting they were shielded from Mitchell's tort suit by "tribal sovereign immunity." ROA.448-554.

As a fallback to their sovereign immunity argument, the defendants sought to avoid liability for Mitchell's injuries by alleging the following: (a) At the time Mitchell was injured, Bailey and the Tribe were acting as "deemed" employees of the United States; (b) as federal employees, their tortious conduct was covered by

the Federal Tort Claims Act ("FTCA:"); and (c) the United States must be substituted as defendant in their stead pursuant to the Westfall Act, 28 U.S.C. § 2679. ROA.458-462, 555-656.

The District Court's Ruling

Holding tribal sovereign immunity barred Mitchell's tort suit against the Tribe and against Bailey in his official capacity, the district court granted the defendants' Rule 12(b)(1) motion to dismiss. ROA.1200-1221. Having determined that tribal sovereign immunity deprived the court of subject matter jurisdiction; the district court denied as moot the defendants' Westfall Act motion to substitute the United States as defendant. *Id.* The district court denied Mitchell's motion for reconsideration. ROA.1222-1247, 1339-1355.

In accordance with Rule 41(a)(1)(A)(ii), the parties filed a stipulation and order of dismissal of the tort claim asserted by Mitchell against Bailey in his individual capacity. ROA.1398-1399. The district court subsequently granted a final judgment for the defendants. ROA.1400.

In this appeal, Mitchell does not challenge the district court's judgment as to Orico Bailey; Mitchell's appeal challenges only the district court's judgment with respect to the Hoopa Valley Tribe, which should be reversed.

Summary of Argument

The district court decided the Hoopa Valley Tribe enjoys sovereign immunity from suit concerning its ***off-reservation*** tortious conduct despite the fact the United States Supreme Court has never recognized or held Indian tribes enjoy sovereign immunity from suit regarding their *off-reservation* tortious conduct. There is no binding precedent by the United States Court of Appeals for the Fifth Circuit or by any other Circuit that supports the district court's conclusion.

Contrary to the district court's expansive view of tribal sovereign immunity, the Supreme Court has emphasized the sovereignty enjoyed by Indian tribes is a "limited sovereignty" and is "not coextensive with that of the States." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018). The Court has stated unequivocally that it has never held tribal sovereign immunity extends to suits against tribes for their off-reservation torts and it has expressed concern with and reluctance to approve an expansive application of the "judge-made" doctrine of tribal sovereign immunity in situations where someone who has not chosen to deal with a tribe, as in the case of a tort victim, suffers injury or harm as a result of the tribe's off-reservation conduct and has no alternative way to obtain relief. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 n.8 (2014).

The correct view of the scope of tribal sovereign immunity with respect to the *off-reservation* tortious conduct of Indian tribes is that expressed by the Supreme

Court of Alabama in *Wilkes v. PCI Gaming Authority*, 287 So.3d 330 (Ala. 2017), *cert denied, Poarch Band of Creek Indians v. Wilkes*, 139 S. Ct. 2739 (2019). The Supreme Court of Alabama has held that Indian tribes *do not* enjoy sovereign immunity from suit concerning their *off-reservation* tortious conduct.

None of the federal policies underlying the doctrine of tribal sovereign immunity from suit would be furthered by this Court's holding Indian tribes enjoy sovereign immunity from suit concerning their *off-reservation* tortious conduct. Tribal sovereign immunity from suit should apply only when its application would further the federal policies underlying the tribal sovereign immunity doctrine.

In the event Indian tribes do enjoy sovereign immunity from suit regarding their off-reservation tortious conduct, the Hoopa Valley Tribe waived sovereign immunity from suit concerning its activities as an AmeriCorps Disaster Response Team funded by the Corporation for National and Community Service, an agency of the United States. As a precondition to its qualifying for the *privilege* of serving as an A-DRT and receiving federal off-reservation disaster response deployments, CNCS required the Tribe to carry and the Tribe agreed to carry liability insurance that would afford coverage for the injuries the Tribe and its members/participants might inflict on others in the course of their participating in federal disaster response deployments. ROA.693, 720, 722.

The Tribe's contract with CNCS, ROA.712-730, operated as a waiver of tribal sovereign immunity from suit concerning the Tribe's off-reservation disaster response activities as an A-DRT funded by the United States. To hold otherwise would make a mockery of the Tribe's contractual agreement with the United States that, as a pre-requisite to its being afforded the *privilege* of serving as an A-DRT, the Tribe would have in force liability insurance that would provide coverage for the injuries/damages the Tribe and its members/participants might inflict on others in the course of the Tribe's federal disaster response deployments.

Argument

I. Indian Tribes Do Not Have Sovereign Immunity from Suit Regarding Their Off-Reservation Tortious Conduct.

This Court applies a *de novo* standard of review to the granting of a motion dismiss for lack of subject matter jurisdiction. *See, e.g.*, *Adam Joseph Resources v. CAN Metals, Ltd.*, 919 F.3d 856, 861 (5th Cir. 2019); *Venable v. Louisiana Workers' Comp. Corp.*, 740 F.3d 937, 941 (5th Cir. 2013). The district court erred in holding that Indian tribes are entitled to sovereign immunity from suit regarding their *off-reservation* tortious conduct.

A. The limited sovereignty retained by Indian tribes does not include immunity from suits seeking redress for tribes' off-reservation torts.

The doctrine of tribal sovereign immunity from suit does not have its origin in the United States Constitution nor is it the product of Congressional legislation. Rather, as the U.S. Supreme Court candidly has admitted, it was the Supreme Court, "with little analysis" and "almost by accident" that pronounced the limited sovereignty retained by Indian tribes includes sovereign immunity from suit. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) ("*Kiowa*").

While it has become well-established that Indian tribes enjoy sovereign immunity from suit concerning activities that occur on the tribes' reservations, the extent to which tribes enjoy sovereign immunity from suit concerning their off-reservation activities is still being fleshed out by the Supreme Court. As becomes

apparent when one compares the Court's majority and dissenting opinions in *Kiowa* with the Court's majority and dissenting opinions in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014) ("*Bay Mills*") and with the Court's majority, concurring, and dissenting opinions in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) ("*Lundgren*"); the Court has manifested a diminishing enthusiasm for the doctrine of tribal sovereign immunity. The Court has expressed in no uncertain terms a reluctance to extend the doctrine of tribal sovereign immunity from suit to tribes' off-reservation torts.

In *Kiowa*, the Court for the first time addressed the question whether the tribal sovereign immunity it previously had recognized "with little analysis" should insulate an Indian tribe from suit on a promissory note that was executed by the tribe off-reservation and that was payable by the tribe off-reservation. Despite its expressly reciting there "are reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity from suit]," the Court in a 6-3 opinion held tribal sovereign immunity extends to suits against Indian tribes for their off-reservation commercial transactions. *Kiowa*, 523 U.S. at 758. The three dissenting members of the Court argued the doctrine of tribal sovereign immunity should not extend to any of a tribe's off-reservation activities. *Kiowa*, 523 U.S. at 760.

When the Court revisited the issue whether tribal sovereign immunity extends to tribes' off-reservation commercial activities in *Bay Mills*; in a 5-4 decision the

Court again held it does. In *Bay Mills*, the state of Michigan sought to enjoin a tribe's operation of an off-reservation gambling casino. Holding the tribe enjoyed sovereign immunity from Michigan's suit, the majority stated the Court was bound by the precedent of *Kiowa*. The Court sought to soften that pronouncement by observing Michigan was not without a remedy because it could shut down the tribe's off-reservation casino by pursuing injunctive relief against and criminal prosecution of the tribe's officers, employees, and customers, who were not protected by sovereign immunity.

Two members of the former *Kiowa* majority, Justices Scalia and Alito, switched positions and dissented in *Bay Mills*. Justice Scalia forcefully explained his change in position:

> In *Kiowa*…., [citation omitted], this Court expanded the ***judge-invented doctrine*** of tribal immunity to cover off-reservation commercial activities. [citation omitted]. I concurred in that decision. For reasons given today in Justice Thomas' dissenting opinion, which I join, I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that ***Congress clean up a mess that I helped make***, I would overrule *Kiowa* and reverse the judgment below.

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. at 2045 (Scalia, J., dissenting) (emphasis added).

Bay Mills' four dissenting Justices were unimpressed by the majority's argument that in its gaming compact with the tribe, Michigan contractually could have protected itself from the dilemma in which it found itself. The dissenters

pointed out that extending tribal sovereign immunity to tribes' off-reservation activities could harm those who are unaware they are dealing with an Indian tribe, those who do not know of tribal immunity, and those who have no choice in the matter—"*as in the case of tort victims*." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. at 2049 (Thomas, J., dissenting) (emphasis added).

In response to the dissenting justices and as admonition to Indian tribes, the five Justices in the *Bay Mills* majority stated unequivocally in a footnote that the Court has never held tribal sovereign immunity extends to suits against tribes for their off-reservation torts.

> We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for [a Tribe's] *off-reservation* commercial conduct.

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. at 2036 n.8. (emphasis added).

Mitchell's tort suit against the Hoopa Valley Tribe falls squarely within the ambit of footnote 8 in *Bay Mills*. Mitchell has sued the Tribe for its ***off-reservation tortious conduct***—a suit the *Bay Mills* majority expressly stated the Court never has held is barred by tribal sovereign immunity, and Mitchell has no alternative way to obtain relief for his bodily injuries and resulting damages.

When the Supreme Court revisited the issue whether tribal sovereign immunity extends to tribes' off-reservation commercial activities in *Lundgren*, the

Court clearly articulated that the scope of tribal sovereign immunity from suit remains unsettled concerning tribes' *off-reservation* conduct. In *Lundgren,* a northwestern Washington Indian tribe purchased a 40-acre plot of land in the State of Washington, outside the boundaries of the tribe's reservation. After conducting a survey of the 40 acres, the tribe became convinced that a fence owned by two adjoining landowners encroached on its 40 acres and that one acre of the tribe's land was on the neighbors' side of the fence. The Tribe informed the adjoining landowners that it intended to tear down their fence; it intended to clear cut the acre of land that it claimed to own; and that it intended to erect a new fence in the "correct" location.

In response to the tribe's threats, the adjacent landowners filed suit in Washington state court to quiet title to the disputed acre of land. In its answer to the suit, the tribe asserted it enjoyed sovereign immunity from suit and that its sovereignty deprived the Washington state court of subject matter jurisdiction.

Based on its interpretation of the United States Supreme Court's prior decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251 (1992) ("*Yakima*"), the Washington Supreme Court rejected the tribe's claim that it enjoyed sovereign immunity from suit concerning the Washington landowners' suit to quiet title to the disputed acre of land. The Washington Supreme Court interpreted *Yakima* as standing for the principle that tribal sovereign immunity

does not apply to cases where the trial court is exercising *in rem* jurisdiction over land as opposed to its exercising *in personam* jurisdiction over an Indian tribe.

The U.S. Supreme Court granted certiorari in *Lundgren* in order to clarify its prior decision in *Yakima.* In *Lundgren,* the Supreme Court explained that *Yakima* did not address the scope of tribal sovereign immunity, but instead was focused on the statutory construction of the Indian General Allotment Act of 1887. The Court held the Washington Supreme Court had erred in citing *Yakima* for the principle that Indian tribes lack sovereign immunity in *in rem* lawsuits. The Court reversed the Washington Supreme Court's decision insofar as it was predicated on *Yakima,* and the Court remanded the case to the Washington Supreme Court with instructions that it should revisit the issue whether the Upper Skagit Indian Tribe was entitled to claim sovereign immunity from suit concerning the neighboring landowners' suit to quiet title.

In reversing the decision by the Washington Supreme Court, *Lundgren* discussed the landowners' argument that the Upper Skagit Indian Tribe could not assert sovereign immunity as a defense because the landowners' lawsuit related to immovable property located in the State of Washington, outside the tribe's reservation, which the tribe had purchased in the character of a private individual. The landowners argued sovereign immunity does not deprive a court of jurisdiction in an action to determine ownership rights in immovable property located outside a

sovereign's lands (outside an Indian tribe's reservation). This doctrine is known as the doctrine of "immovable property."

After discussing the doctrine of immovable property at length, the Supreme Court declined to determine whether tribal sovereign immunity barred the landowners' suit. Instead, the Court remanded the case to the Washington Supreme Court and invited it to address the landowners' argument and to revisit the issue regarding "the limits on the sovereign immunity held by Indian tribes." *Lundgren,* 138 S. Ct. at 1654.

In *Lundgren,* Justice Roberts wrote a concurring opinion, joined by Justice Kennedy, which contains the following important observation:

> What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. *The correct answer cannot be that the tribe always wins no matter what*; otherwise a tribe could wield sovereign immunity as a sword and seize property with immunity, even without a colorable claim of right.

Lundgren, 138 S. Ct. at 1655 (Roberts, J. concurring) (emphasis added).

Similarly, if Indian tribes enjoy sovereign immunity from suit regarding their off-reservation torts, they would be free to travel across the various states of the United States, availing themselves of the privileges and protections afforded by those states' laws, while wielding sovereign immunity as a defensive sword whenever they cause bodily injury or death to the citizens of the various states.

Application of tribal sovereign immunity from suit to Indian tribes' *off-reservation* torts would leave the injured citizens of the various States bereft of a remedy—they would become charges on the public coffers of their domiciliary states. That cannot be the law of tribal sovereignty.

A judicial ruling that sovereign immunity immunizes the Hoopa Valley Tribe from Mitchell's tort claim would be an affront to the sovereignty of the state of Texas and would deprive Mitchell of a fundamental right guaranteed him by the "Due Process" clause of the Texas Bill of Rights, which provides as follows: "[E]very person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law." TEX. CONST. Art. I, § 13.

The Hoopa Valley Tribe is asserting that its limited tribal sovereignty trumps Texas' sovereignty. It is asking this Court to rewrite the Due Process Clause of the Texas Constitution to read as follows:

> [E]very person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law--*except when the injury is inflicted by an Indian tribe, in which case this Constitutional guarantee shall be of no force and effect*.

Such holding would violate every legal norm. Allowing the judge-made doctrine of tribal sovereign immunity to intrude on such a fundamental aspect of state sovereignty contradicts the U.S. Constitution's design, which "'leaves to the several States a residuary and inviolable sovereignty.'" *Lundgren,* 138 S. Ct. at 1663 (*quoting New York v. United States,* 505 U.S. 144, 188 (1992)).

When an Indian tribe leaves its reservation, travels 2,000 miles across the United States to a state (Texas), avails itself of the privileges and protections afforded by the host state's laws, and then negligently injures a resident of the host state—that tribe cannot be heard to state its "sovereignty" trumps the sovereignty of the host state, leaving the host state's citizens bereft of the protections guaranteed by the host state's constitution and without a remedy. That cannot be the law of tribal sovereign immunity—yet that is the very law of sovereignty that was applied by the district court in this case.

In his concurring opinion in *Lundgren,* Justice Roberts expressed misgivings with any view of the scope of tribal sovereign immunity that would leave a private individual who had no prior dealings with a tribe without a remedy for a tribe's *off-reservation* wrongs. *Lundgren*, 138 S. Ct. at 1655 (Roberts, J., concurring). In expressing his misgivings about the scope of tribal sovereign immunity urged by the Upper Skagit Indian Tribe, Justice Roberts expressly referred to footnote number 8 in *Bay Mills*, which he described as "reserving the question whether sovereign immunity would apply if a 'plaintiff who has not chosen to deal with a tribe[ ] has no alternative way to obtain relief for [an Indian tribe's] off-reservation commercial conduct.'" *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. at 2036 n.8).

Mitchell's tort claim against the Hoopa Valley Tribe falls directly within the scope of this reserved question that was flagged by the majority in *Bay Mills* and

that was flagged again by Justice Roberts in his *Lundgren* concurring opinion. Mitchell had no prior contractual relationship with the Tribe. He did not choose to deal with Tribe when, as a volunteer, he travelled to Wimberley to participate in ongoing disaster relief operations. Mitchell has no alternative way to obtain relief for the grievous injuries he sustained as result of the Tribe's off-reservation tortious conduct other than his asserting a tort suit against the Tribe.

B. Absent controlling precedent or federal legislation, the Alabama Supreme Court ruled Indian tribes do not enjoy sovereign immunity from suit concerning their off-reservation torts.

In the absence of federal legislation or Supreme Court precedent that immunizes Indian tribes from suits regarding their *off reservation tortious conduct,* the Alabama Supreme Court recently held that Indian tribes do not enjoy sovereign immunity from suit concerning their off-reservation torts. *See Wilkes v. PCI Gaming Authority*, 287 So.3d 330 (Ala. 2017), *cert denied, Poarch Band of Creek Indians v. Wilkes*, 139 S. Ct. 2739 (2019) ("*Wilkes*"). In *Wilkes,* an intoxicated employee from an Indian tribe's casino was involved in a vehicular collision 8 miles off of the Tribe's reservation. In the ensuing tort suit against the Tribe, its wholly owned casino, and the casino's employee; the trial court granted the defendants' motion to dismiss predicated on tribal sovereign immunity. The Alabama Supreme Court reversed the dismissal and expressly held Indian tribes *do not* enjoy sovereign immunity from suit with respect to their *off-reservation* tortious conduct. The

Alabama Supreme Court observed that the tort case before it presented precisely the scenario that was referenced in footnote 8 of *Bay Mills*--the Alabama tort victims in *Wilkes* would have no way to obtain relief if the doctrine of tribal sovereign immunity extended to the tribe's off-reservation tortious conduct.

The district court's holding that the doctrine of tribal sovereign immunity from suit shields tribes from tort suits concerning their off-reservation tortious conduct is not supported by *Kiowa*, *Bay Mills*, *Lundgren*, or any other decision of the United States Supreme Court. Unable to support its holding with citation of a decision by the U.S. Supreme Court or this Court, the district court cited four lower court cases as precedent supporting its holding. ROA.1200-1221, 1212, 1213.

C. The cases cited by the district court do not support its holding.

The district court erred in its citation of *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes*, 72 F. Supp. 717 (E.D. Tex. 1999) as precedent in support of its dismissal of Mitchell's tort suit. The plaintiff in *Tribal Smokeshop* asserted a claim for *breach of a contract* that was entered into *on the tribe's reservation* for the construction and operation of a commercial venture *on the reservation.* *Tribal Smokeshop* did not involve off-reservation activities of any kind much less off-reservation tortious conduct.

Likewise, the district court's reliance on *Arizona v. Tohono O'odham Nation*, 818 F.3d 549 (9th Cir. 2016), was misplaced. *Tohono* did not involve an Indian

tribe's *off-reservation* tortious conduct. It was a lawsuit very much like *Bay Mills* except, unlike *Bay Mills,* all of the claims being asserted against the defendant Indian tribe pertained to its *on-reservation activities.* The Ninth Circuit pointed out that the parcel of land on which the defendant tribe intended to build its casino legally was part of the tribe's reservation and thus the construction of the disputed casino did not violate the tribe's gaming compact with Arizona.

The district court's reliance on *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733 (E.D. Tex. 1994), likewise was misplaced. In *Elliott,* the plaintiff voluntarily and knowingly engaged in banking transactions with a bank chartered, governed, and owned by an Indian tribe. The plaintiff sued the bank alleging the bank's chief executive officer had "bilked" him out of $200,000. The tribal owner of the bank filed a Rule 12(b)(1) motion to dismiss predicated on tribal sovereign immunity. The plaintiff argued that since the bank engaged in extensive commercial activity off the tribe's reservation, sovereign immunity should not apply. As the Supreme Court was to later hold in *Kiowa,* the district court held tribes enjoy sovereign immunity concerning their commercial transactions both on and off the reservation.

Unlike individuals who have not chosen to deal with Indian tribes, such as the tort victims mentioned in footnote 8 of *Bay Mills* and unlike the landowners in *Lundgren*, the plaintiff in *Elliott* chose to engage in commercial transactions with

the defendant tribe's bank. He could have protected himself by not patronizing the tribe's bank or, like the state of Michigan in *Bay Mills*; he could have protected himself by demanding a waiver of tribal sovereign immunity in his contract with the tribe's bank.

The district court cited the Arizona Supreme Court's decision in *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968), as support for its order of dismissal. In *Morgan*, a girl was run over by a motorboat and killed while swimming in the Colorado River adjacent to the reservation of the Colorado River Indian Tribe, which operated the Blue Water Marina Park. In the ensuing wrongful death suit, the tribe asserted it owned the submerged lands and navigable waters where the incident occurred pursuant to an 1876 Executive Order of President Grant. The Arizona Supreme Court disagreed and ruled that the situs of the boating accident was outside the exterior boundaries of the tribe's reservation, but that the tribe nevertheless was entitled to rely on tribal sovereign immunity from suit to avoid the plaintiffs' wrongful death suit.

A subsequent decision by the Arizona Supreme Court places the continued viability of *Morgan* question. In *Dixon v. Picopa Construction Co.*, 772 P. 2d 1104 (Ariz. 1989), a dump truck owned by a tribally-owned construction company rear-ended an automobile on an Arizona roadway, off the tribe's reservation, injuring the automobile's driver and passenger. The tribe's liability insurance company settled

the passenger's bodily injury claim, but it denied the claim of the seriously injured driver, who then filed a tort suit against the tribe's construction company.

The Arizona Supreme Court rejected the tribally owned construction company's attempt to escape liability predicated on its assertion of tribal sovereign immunity. The construction company failed to meet its burden of proving that it was the tribe's subordinate economic organization and thus was an arm of the tribe. Not content to rest its ruling solely on this basis, the Arizona Supreme Court noted that none of the federal policies underlying the doctrine of tribal sovereign immunity would be furthered by its holding the plaintiff's suit against the tribally owned construction company for its off-reservation tort was barred by tribal sovereign immunity.

D. None of the federal policies underlying preservation of the limited sovereignty of Indian tribes would be furthered by extending such limited sovereignty to include immunity from suits seeking redress for tribes' off-reservation torts.

With especial applicability to the Hoopa Valley Tribe's motion to dismiss, the Arizona Supreme court stated the following: "Tribal immunity should only apply when doing so furthers the federal policies behind the immunity doctrine." *Dixon v. Picopa Construction Company*, 772 P.2d at 1111.

In *Dixon*, the Arizona Supreme Court focused on the following federal policies underlying the doctrine of tribal sovereign immunity: (a) protection of tribal assets; (b) preservation of tribal cultural autonomy; (c) preservation of tribal self-

determination; and (d) promotion of commercial dealings between Indians and non-Indians. The Court held that none of those policies would be furthered by its clothing the tribe's wholly owned construction company with tribal sovereign immunity regarding its involvement in an off-reservation vehicular collision.

Likewise, no federal policy would be furthered by clothing the Hoopa Valley Tribe with sovereign immunity from suit regarding its off-reservation tortious conduct in Wimberley, Texas.

The federal principle of protecting tribal assets is not implicated or undermined by Mitchell's tort suit. The Tribe has $10,000,000 in liability insurance coverage applicable to Mitchell's tort claim. ROA.710, 734-791. The Tribe contractually agreed with CNCS that it would carry and maintain this liability insurance in order to afford coverage for individuals like Mitchell who might suffer injury, death, or property damage in connection with the Tribe's federal disaster response deployments. ROA.693, 720, 722.

The federal policy of preserving tribal cultural autonomy likewise is not implicated or undermined by Mitchell's tort suit. The tortious conduct on which Mitchell's suit is predicated occurred in Texas, 2,000 miles from the Tribe's California reservation. The Tribe's cultural autonomy and its right of tribal self-determination are not connected in any way with the events that occurred in Texas.

Finally, Mitchell's tort suit would not undermine or threaten the federal policy of promoting commercial dealings between Indians and non-Indians. Mitchell was not engaged in and had not chosen to engage in any commercial transaction with the Tribe. Mitchell was not injured while patronizing a tribally owned casino on tribal lands. He was injured in Texas while voluntarily providing assistance to fellow Texans who had suffered devastation due to massive flooding.

No federal policy is furthered by the district court's expanding the doctrine of tribal sovereign immunity to bar Mitchell's tort suit against the Tribe. The district court's ruling is not supported by precedent or by any federal policy underlying the doctrine of tribal sovereign immunity and should be reversed.

II. The Hoopa Valley Tribe Waived Sovereign Immunity From Suit Concerning Injuries/Damages Inflicted During Its Disaster Response Deployments.

Even if one were to assume for the sake of argument that the doctrine of tribal sovereign immunity from suit extends to tribes' off-reservation torts; the Hoopa Valley Tribe waived its sovereign immunity concerning injuries and damages inflicted on others in connection with the Hoopa Tribal CCC's federal disaster response deployments.

The Supreme Court has recognized that an Indian tribe can contractually waive its sovereign immunity from suit with respect to its off-reservation commercial activities and can do so without expressly referencing "waiver" or

"sovereign immunity." *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001). In *C & L Enterprises*, the Potawatomi Indian Tribe contracted with a roofing company to install a roof on a building that was located off of the tribe's reservation. The contract contained an arbitration clause that provided all disputes between the tribe and the roofing company would be decided by arbitration and that judgment on the arbitrator's award could be entered by any court having jurisdiction.

When the tribe breached the roofing contract, the roofing company submitted a demand for arbitration. The tribe asserted sovereign immunity and refused to participate in arbitration. The roofing company went forward with arbitration without the tribe's participation and obtained a favorable damages award from the arbitrator. The roofing company then filed suit in Oklahoma state court to obtain judicial confirmation of the arbitration award. The tribe filed a motion to dismiss based on its claim of tribal sovereign immunity. The tribe asserted the Oklahoma state court did not have subject matter jurisdiction and thus could not judicially confirm the arbitration award.

After a protracted appellate history, the U.S. Supreme Court ultimately held the tribe had waived its sovereign immunity with respect to the roofing company's suit to confirm the arbitration award. The Court reasoned that the roofing contract's arbitration clause would be meaningless if it did not constitute waiver by the tribe of

its sovereign immunity concerning suits to confirm arbitration awards. *C & L Enterprises, Inc.*, 532 U.S. at 422.

A. The Tribe contractually waived sovereign immunity from suit regarding injuries and damages inflicted during its federal disaster response deployments.

The Hoopa Valley Tribe contractually waived any right it might theoretically have to claim sovereign immunity as a defense to Mitchell's tort suit. The Tribe was in Wimberley, Texas, where it negligently injured Mitchell, pursuant to a contract with a federal agency, the Corporation for National & Community Service ("CNCS"). ROA.712-730. That contract and the representations made by the Tribe as part of the application process to be allowed the *privilege* of entering into the contract waived tribal sovereign immunity concerning tort claims arising from the Tribe's participating in federal disaster response deployments.

CNCS was established in 1994 pursuant to the National and Community Service Trust Act of 1993, 42 U.S.C. §§ 12601, *et seq*. In accordance with its enabling legislation and administrative regulations, CNCS makes financial grants for the creation of AmeriCorps chapters around the country. The AmeriCorps programs funded by CNCS include the following: (1) AmeriCorps Vista, a program focused on fighting poverty; (2) the AmeriCorps National Civilian Community Corps, a full-time residential program for men and women ages 18-24, which combines practices of civilian and military service; and (3) AmeriCorps chapters

created by "States, subdivisions of States, territories, Indian tribes, public or private nonprofit organizations and institutions of higher education" with CNCS funding provided under CNCS's AmeriCorps State and National Program.[1] CNCS made a grant to the Hoopa Valley Tribe under CNCS's AmeriCorps State and National Program, which enabled the Tribe to create the AmeriCorps Hoopa Tribal CCC. ROA.793-794.

After undergoing the requisite training, an AmeriCorps chapter can apply to CNCS for eligibility to enter into a Disaster Response Cooperative Agreement ("DRCA") with CNCS. If selected and allowed to enter into a DRCA, the AmeriCorps chapter becomes an AmeriCorps Disaster Response Team ("A-DRT") and thereby becomes eligible for the *privilege* of being deployed by CNCS, at federal expense, to federally-declared disaster sites across the United States, where the A-DRT's provide disaster relief services. ROA.680-686, 1011-1018.

The Hoopa Tribal CCC's formal application to enter into a DRCA with CNCS contained information concerning CNCS's disaster response program and the eligibility requirements each AmeriCorps chapter would have to meet to become eligible to enter into a DRCA with CNCS. ROA.688-710. As is reflected on page

[1] *See* 42 U.S.C. § 12572; AmeriCorps National Civilian Community Corps Member Handbook on CNCS's website; "2015 Terms and Conditions for AmeriCorps State and National Grants, effective May 1, 2015" on CNCS's website; and CNCS publication, "AmeriCorps Reaches One Million Members, taken from CNCS's website.

MM0119 of the DCRA application form, ROA.693, the Hoopa Tribal CCC, as an applicant, was required to have liability insurance that would cover injuries/damages the "members/participants [of the Hoopa Tribal CCC and other AmeriCorps chapters] may inflict upon the community in the provision of their [disaster response] services." Page MM0126 of the DRCA application form directed the Hoopa Tribal CCC to attach documents "verifying the liability coverage provided to your members and program." ROA.700. In accordance with this directive, the Hoopa Tribal CCC attached to its completed DRCA application a copy of the Hoopa Valley Tribe's Certificate of Liability Insurance reflecting the Hoopa Valley Tribe had a liability insurance policy that provided $10,000,000 in coverage per occurrence for personal injuries. ROA.710.

Relying on the information provided by the Hoopa Tribal CCC, including its certification that it carried the required liability insurance coverage, CNCS allowed the Hoopa Tribal CCC the *privilege* of entering into a DRCA with CNCS. ROA.712-730. In Article VIII, page 9 of the DRCA, ROA.720, the Hoopa Tribal CCC agreed to maintain a liability insurance policy that would cover its program staff and members with respect to their CNCS disaster response deployments. In Article IX.B, page 11 of the DRCA, ROA.722, the Hoopa Tribal CCC agreed that its maintaining liability insurance would be a pre-requisite to its receiving CNCS

disaster response deployments and to its receiving reimbursement for the expenses associated with its disaster response deployments.

Liability insurance was crucial because, like other AmeriCorps chapters, the Hoopa Tribal CCC's members/participants were youths ages 17-24, who were earning a stipend of only $5,550, plus room and board, for their nine months of - AmeriCorps service. ROA.731-732. CNCS required its A-DRT's to have liability insurance because it knew the A-DRT's young members would lack the personal financial resources to respond in damages for harm they might cause during their disaster response deployments.

Following FEMA's issuance of a federal disaster declaration concerning the massive flooding in central Texas, ROA.647-648, the Hoopa Tribal CCC applied to CNCS for a disaster response deployment to Texas and submitted its pre-deployment budget to CNCS. ROA.1122-1123. Following completion of this disaster response deployment, the Hoopa Tribal CCC filed its post-deployment request to CNCS for reimbursement of its expenses. ROA.1125-1129. CNCS subsequently reimbursed the Hoopa Tribal CCC for its disaster response deployment expenses. ROA.1131.

When it deployed the Hoopa Tribal CCC to Texas and when it reimbursed the Tribe for its disaster deployment expenses, CNCS relied on the Tribe's contractual agreement that it carried and would continue to carry the requisite liability insurance that would provide coverage for the injuries/damages the Hoopa Tribal CCC and its

members/participants might inflict on others in the course of the Hoopa Tribal CCC's disaster response deployments. The Tribe cannot be allowed to nullify the availability of that insurance coverage and make a mockery of its contract with CNCS by claiming sovereign immunity from suit regarding the injuries/damages the Hoopa Tribal CCC and its members inflicted on Mitchell.

Why should the Tribe enjoy immunity from suit concerning the injuries/damages it inflicted on Mitchell during its federal disaster response deployment when the other ADRT's under CNCS's State and National Program do not enjoy such immunity?[2] If Congress had intended the ADRT's under CNCS's State and National Program to enjoy immunity from suit, it expressly would have provided such immunity by deeming the members of these AmeriCorps chapters to be federal employees covered by the Federal Tort Claims Act as it did with respect to members of the AmeriCorps Vista program and members of the AmeriCorps National Civilian Community Corps. *See* 42 U.S.C. § 5055 (AmeriCorps VISTA) and 42 U.S.C. § 12620 (AmeriCorps National CCC).

In the absence of Congressional legislation providing tort immunity for the ADRT's, CNCS requires all ARDT's under CNCS's State and National Program,

[2] The ADRT's include AmeriCorps St. Louis ERT, California Conservation Corps, Coconino Environmental Corps, Conservation Corps of Minnesota and Iowa, Hoopa Tribal CCC, Iowa Commission on Volunteer Service, Montana Conservation Corps, Rocky Mountain Youth Corps, Southwest Conservation Corps, St Bernard Project, Student Conservation Association, Inc., Texas Conservation Corps & American Youthworks, Utah Conservation Corps, Washington Conservation Corps, and YouthBuild USA. ROA.1011, 1018.

including the Hoopa Tribal CCC, to carry liability insurance that would provide coverage for the injuries/damages the ADRT's and their members/participants might inflict on others during their CNCS disaster response deployments. No federal policy would be furthered by this Court's clothing the Hoopa Valley Tribe with immunity that Congress did not provide and that CNCS did not contemplate when it required all A-DRT's to carry liability insurance coverage.

If the Tribe's agreement to carry liability insurance did not constitute waiver of sovereign immunity concerning disaster-deployment related tort claims, the Tribe's agreement to carry liability insurance would be meaningless because a *liability* insurance policy provides coverage only if the policyholder (Hoopa Valley Tribe) could be found *liable* for the injured party's damages. If the Hoopa Valley Tribe retained sovereign immunity with respect to its disaster-deployment related torts, such immunity would make CNCS's requirement that the Hoopa Tribal CCC carry liability insurance coverage meaningless.

In *C & L Enterprises, Inc.*, the Potawatomi Tribe was held to have waived its sovereign immunity from suit by agreeing in its roofing contract that arbitration awards under the contract could be confirmed by any court having jurisdiction. Likewise, the Hoopa Valley Tribe waived its sovereign immunity from suit by agreeing in the DCRA with CNCS that it would carry liability insurance that would afford coverage for injuries/damages the Hoopa Tribal CCC and its

members/participants might inflict on others in connection with the Hoopa Tribal CCC's federal disaster response deployments. If the Tribe's agreement to carry liability insurance did not constitute a waiver of sovereign immunity, Mitchell would be left with no remedy for the injuries he suffered as a result of the Tribe's federal disaster response deployment to Texas.

B. CNCS required the Tribe to carry liability insurance to provide a remedy for persons injured as a result of the Tribe's federal disaster response deployments.

The district court incorrectly characterized the liability insurance coverage mandated by CNCS and carried by the Hoopa Valley Tribe as being "intended to protect tribal resources." ROA.1200-1221, 1217-1218. Based on that incorrect characterization, the district court refused to find the Tribe waived sovereign immunity from suit in the Tribe's DCRA with CNCS. *Id*.

Contrary to the district court's mischaracterization of the purpose of the Tribe's liability insurance coverage, CNCS left no doubt that the reason it was requiring the Hoopa Valley Tribe and the Hoopa Tribal CCC to carry liability insurance was to "provide coverage for …injuries …and damages that members/participants [of the Hoopa Tribal CCC] may inflict upon the community in the provision of their service." ROA.693. CNCS was not concerned with protecting tribal resources—it was concerned with the Tribe's possessing liability insurance that would afford a remedy to members of the public who might suffer

bodily injury, death, and/or property damage as a result of the tortious conduct of the Hoopa Tribal CCC and its members/participants. *Id.*

CNCS' insurance requirement is analogous to the U.S. Department of Transportation's ("DOT") requiring the owners/operators of heavy commercial trucks to carry liability insurance coverage as a prerequisite to their qualifying for the *privilege* of operating their heavy commercial trucks on the highways and roadways of the nation. *See, e.g.,* 49 CFR § 387.

The Hoopa Valley Tribe operates a fleet of 20 heavy commercial trucks. It has made application for and has received from DOT a federal motor carrier permit allowing it to exercise the *privilege* of operating its heavy commercial trucks on the roadways of the nation, outside the Tribe's reservation.[3] In order to receive that privilege, the Tribe was required to carry and does carry the liability insurance mandated by DOT.

The Hoopa Valley Tribe operates its heavy commercial trucks, ROA.1247, in connection with its operation of the Hoopa Valley Forestry Department, which manages over 87,000 acres of timberland on the Tribe's northern California

[3] *See* information set forth on website of U.S. Department of Transportation, Federal Motor Carrier Safety Administration: https://safer.fmcsa.dot.gov/query.asp?searchtype=ANY&query_type=queryCarrierSnapshot&query_param=USDOT&original_query_param=NAME&query_string=2621301&original_query_string=HOOPA%20VALLEY%20TRIBAL%20COUNCIL

reservation. The Tribe manages its timberland as a commercial resource and the Tribe engages in commercial logging. ROA.1245.

Like all other operators of heavy commercial trucks, when the Tribe exercises the *privilege* of operating its heavy trucks off of the Tribe's reservation over the highways of California and Oregon on their way to a lumber mill, it must comply with the laws of the United States and with the laws of the states of California and Oregon that require liability insurance coverage in stated minimum amounts varying from $750,000 to $5,000,000. *See* 49 CFR § 387; CAL. VEH. CODE § 34631.5; ORS § 825.160; OREGON DEPT. TRANSP. Rule 740-040-0020. These financial responsibility statutes and the insurance coverage that they mandate are not intended to protect the assets of the operators of heavy commercial trucks. The required liability insurance coverage is intended to provide a remedy for members of the public who have the misfortune to suffer injury, death, and/or property damage as a result of the negligent operation of heavy commercial trucks.

If one of the Tribe's logging trucks were to negligently collide with an elementary school bus in California or Oregon while on its way to a lumber mill, would this Court or the U.S. Supreme Court rule the Tribe is protected by tribal sovereign immunity from the tort claims that would ensue? Would this Court or the Supreme Court hold the liability insurance coverage mandated by the DOT and/or mandated by the states of California and Oregon merely is "intended to protect the

Tribe's resources" as postulated by the district court and thus is unavailable to compensate the tort victims because the Tribe allegedly is shielded by tribal sovereign immunity from suit regarding its off-reservation torts? What federal policies would cause this Court or the Supreme Court to reach such result? What precedent? This Court certainly would not be constrained to reach such result by *Kiowa*, *Bay Mills,* or *Lundgren.*

Yet application of the district court's holding in this case would mandate that members of the public injured as a result of the Tribe's *off-reservation* negligent operation of one of its logging trucks would have no remedy against the Tribe. The district court's holding would eviscerate the liability insurance requirements set forth in the regulations and statutes of the United States and the various states concerning the operation of heavy commercial trucks.

C. The district court's cited cases do not support its holding that the Tribe did not waive sovereign immunity from suit regarding its federal disaster response deployments.

The district court cited *Atkinson v. Haldane,* 569 P.2d 151 (Alaska 1977), in support of its holding that the Hoopa Valley Tribe did not waive sovereign immunity from suit concerning its federal disaster response deployments. In *Atkinson*, two *members of an Alaskan Indian tribe* were killed in an automobile accident that occurred *on the tribe's reservation* while they were fleeing *from the tribe's police officers.* Bypassing tribal court, the personal representative of these deceased tribal

members filed a wrongful death suit in the superior court for the state of Alaska. The defendants included the tribe, tribal officials, and four tribal police officers. The defendants filed motions to dismiss based on tribal sovereign immunity. The plaintiffs alleged the Alaskan Indian tribe had waived tribal sovereign immunity concerning the challenged activities that occurred *on its reservation* and that involved only *members of the tribe* merely because the tribe had liability insurance coverage.

Unlike the situation before this Court where the Tribe was required by an agency of the federal government to carry and have in effect liability insurance coverage as a pre-condition to the Hoopa Tribal CCC's having the *privilege* of serving as an A-DRT and being eligible to receive *off-reservation* federal disaster response deployments, the Indian tribe in *Atkinson* purchased insurance coverage on its own volition. The Alaska Supreme Court predictably and correctly held that in the case before it, which involved *on-reservation injuries* suffered by *members of an Alaskan Indian tribe* and allegedly caused by the negligence or improper conduct of the *tribe's police officers*, the tribe's sovereign immunity was not waived merely because the tribe voluntarily purchased liability insurance.

Another of the cases cited by the district court, *Wilson v. Umpqua Dev. Corp.*, No. 6:17–cv–00123–AA, 2017 WL 2838463 (D. Oregon 2017) ("*Wilson*"), likewise does not support the district court's order of dismissal. In *Wilson*, a customer of a

tribally owned casino fell and was injured in the casino, *on the tribe's reservation*. The injured plaintiff initially filed suit in tribal court. The suit was dismissed because the plaintiff failed to give proper written notice as required by the Tribal Tort Claims Code. The plaintiff's appeal to the Appellate Division of the tribal court was unsuccessful. Thereafter, the plaintiff sued the tribe, its casino, and the tribal court judge in federal district court. All three defendants filed Rule 12(b)(1) motions to dismiss predicated on tribal sovereign immunity.

The plaintiff in *Wilson* unsuccessfully argued the tribe had waived its sovereign immunity because it had a liability insurance policy that contained a provision stating that the insurance company could not itself raise sovereign immunity as a defense to payment of claims under the policy. The trial court correctly held this insurance policy provision did not waive the tribe's sovereign immunity from suit concerning allegedly tortious conduct that occurred *on the tribe's reservation*.

Another of the district court's cited cases, *Seminole Tribe v. McCor*, 903 So.2d 353 (Fla. App. 2005) ("*McCor*"), is in the same vein as *Wilson.* While patronizing a Florida Indian tribe's casino *located on the tribe's reservation*, the plaintiff sustained bodily injury. She sued the tribe in Florida state court and the tribe sought dismissal based on tribal sovereign immunity. The Florida Court of Appeals held the tribe was entitled to sovereign immunity regarding a tort claim that occurred *on*

its reservation and it rejected the plaintiff's argument that the tribe's voluntary purchase of insurance served to waive its sovereign immunity. Like *Wilson*, *McCor* did not involve off-reservation activities and it did not involve insurance coverage that was mandated by the federal government to protect the public regarding the tribe's *off-reservation* activities.

As precedent in support of its holding that the Tribe did not waive sovereign immunity in its contract with CNCS, the district court cited *United States v. Testan*, 424 U.S. 392 (1976) ("*Testan*") for the following proposition: "[A] waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" ROA.1217. The district court's citation of *Testan* is misleading and misplaced because there is no parallel between the expansive sovereignty of the United States and the limited sovereignty retained by Indian tribes.

In *Testan*, two civil service attorneys sought to have their civil service grades raised, arguing that their duties were identical to those of civil service attorneys employed by another federal department. When the Civil Service Commission rejected their request for reclassification, they sued the United States in the Court of Claims seeking reclassification and back pay. The Court of Claims denied their back pay claim and remanded the case to the Civil Service Commission with directions that the Commission was to reconsider the attorneys' requests for reclassification.

The Supreme Court granted *certiorari* and held the Court of Claims did not have jurisdiction to entertain the plaintiffs' suit against the United States for reclassification and back pay because the United States' sovereign immunity from suit had not been waived. The Court held the United States, as sovereign, is immune from suit except to the extent it statutorily has consented to be sued and the terms of its consent must be expressly stated in a statute, not implied.

In stark contrast to the broad sovereign immunity of the United States, as discussed in *Testan*, the Supreme Court has emphasized Indian tribes are not possessed of the full attributes of sovereignty; instead they possess only "limited sovereignty." *See United States v. Wheeler,* 313 U.S. 313, 322; 98 S. Ct. 1079, 1086; 55 L. Ed. 2d 303 (1978) ("*Wheeler*"). In *Wheeler*, the Court explained that Indian tribes possess only those aspects of sovereignty "not withdrawn by treaty or statute, ***or by*** *implication as a result of their dependent status.*" *Id.*

When the Supreme Court states the sovereignty of Indian tribes is not absolute and instead is withdrawn "by implication" as a result of tribes' dependent status, the Court is referring to situations such as the one before this Court involving injuries the Tribe inflicted during its federal disaster response deployment. The Tribe cannot be heard to claim it is clothed with tribal sovereign immunity concerning injuries it inflicted during its federal disaster response deployment when the contract pursuant to which that deployment was made required the Tribe to carry liability insurance

that would afford coverage for injuries the Tribe might inflict during federal disaster response deployments.

The DRCA between the Hoopa Tribal CCC and CNCS served to waive/circumscribe the Tribe's ability to assert sovereign immunity as a defense concerning its off-reservation activities as an A-DRT funded by the United States. To hold otherwise would be to make the Tribe's contract with CNCS and the Tribe's agreement to have in force liability insurance coverage for its disaster response related activities a nullity.

Conclusion

The district court's judgment should be reversed and this case should be remanded to the district court for trial of Mitchell's tort claims against the Hoopa Valley Tribe.

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Respectfully submitted,

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On March 9, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished by the appellate CM/ECF system to the following:

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