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, d/b/a
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

PRINCIPAL AND RESPONSE BRIEF OF HOOPA VALLEY TRIBE

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Certificate of Interested Persons

The Hoopa Valley Tribe is a governmental party; thus, the Certificate of Interested Persons requirement of 5th Circuit Rule 28.2.1 and the Disclosure Statement requirement of FRAP 26.1 are not applicable.

/s/ Thane D. Somerville
Counsel of Record for Hoopa Valley Tribe

Statement Regarding Oral Argument

Hoopa Valley Tribe ("Hoopa") submits that oral argument is not necessary to resolve this appeal because the District Court plainly lacked federal subject matter jurisdiction over Appellant Mitchell's claims pursuant to any of 28 U.S.C. §§ 1331, 1332, 1367 or 2679. Thus, it is unnecessary for this Court to address any of the issues regarding tribal sovereign immunity raised by Mitchell. The Court should affirm the judgment of the District Court and affirm the dismissal of Mitchell's complaint in its entirety on the basis that the District Court lacked any basis for federal subject matter jurisdiction over Mitchell's claims.

Even if there were any statutory basis for federal subject matter jurisdiction, this case involves a straightforward application of settled law that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its sovereign immunity from suit. Here, Congress has not authorized Mitchell's suit nor has Hoopa waived its immunity from suit. Thus, while it should not have reached the question at all due to the lack of federal subject matter jurisdiction, the District Court properly found that Hoopa has sovereign immunity from suit here.

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Jurisdictional Statement

In his complaint, Mitchell erroneously alleged that the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1367. ROA.13. The District Court lacked diversity jurisdiction pursuant to 28 U.S.C. § 1332 over any of Mitchell's claims due to Hoopa's presence as a Defendant. Mitchell concedes, and federal law supports, that an Indian tribe is not a citizen of any state for purposes of diversity jurisdiction. ROA.13. Hoopa's presence in the litigation destroys the complete diversity that is required to invoke jurisdiction under 28 U.S.C. § 1332. Thus, without any basis for original jurisdiction, the District Court also lacked supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Mitchell's claims against Hoopa.

On appeal, Mitchell abandons his assertions of diversity and supplemental jurisdiction. Instead, in his jurisdictional statement, he alleges the District Court had federal question jurisdiction because of a defense raised by Defendants under the Westfall Act, 28 U.S.C. § 2679. Appellant's Brief, Jurisdictional Statement. Federal question jurisdiction depends on the claims alleged in the complaint that arise under federal law. Mitchell's complaint alleges no claims arising under federal law. ROA.12-26. Mitchell did not assert federal question jurisdiction in his complaint. ROA.13. A defense later asserted in the litigation by Defendants cannot provide the basis for federal question jurisdiction.

The District Court also lacked subject matter jurisdiction because Hoopa has sovereign immunity from suit, which has not been waived.

Statement of Issues Presented for Review

In addition to the issues presented for review by Mitchell, Hoopa presents the following issues for review on its cross-appeal:

1. Whether the District Court lacked subject matter jurisdiction under the federal diversity statute, 28 U.S.C. § 1332, due to the presence of the Hoopa Valley Tribe, a federally recognized Indian tribe, as a party?
2. Whether the District Court lacked supplemental jurisdiction under 28 U.S.C. § 1367 due to the lack of any basis for original jurisdiction over Mitchell's claims?
3. Whether the District Court lacked federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2679 because Mitchell alleged no claims arising under federal law and now bases his assertion of federal question jurisdiction solely on a defense that was proffered by Defendants in the course of the litigation?
4. Whether the District Court erred by analyzing and ruling on Hoopa's sovereign immunity from suit before first determining whether the Court possessed federal subject matter jurisdiction over Mitchell's claims and before determining whether Hoopa was the proper defendant?

Statement of the Case

A. Factual Allegations

For purposes of this appeal only, and reserving all rights to dispute factual allegations if and when necessary, Hoopa accepts that the factual allegations contained in Mitchell's Statement of the Case (Appellant's Brief, pp. 3-7) are consistent with those contained in Mitchell's complaint. Hoopa agrees that since this case was decided by the District Court on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, this Court must accept as true the allegations of the complaint. *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995).

B. Procedural History

On May 9, 2017, Mitchell filed his complaint against Orico Bailey and Hoopa. ROA.12. Mitchell's complaint asserts diversity as the basis for federal subject matter jurisdiction over his claims against Bailey and supplemental jurisdiction for his claims against Hoopa. ROA.13. Mitchell's complaint alleged a negligence cause of action against Bailey and both a negligence and breach of contract cause of action against Hoopa. ROA.12-26. No federal question jurisdiction was asserted nor were any federal claims alleged. ROA.12-26.

On August 8, 2017, Defendants filed a motion to dismiss for lack of subject matter jurisdiction. ROA.72-75. Defendants argued that sovereign immunity barred Mitchell's suit and also that Mitchell's exclusive remedy, if any, was

against the United States pursuant to the Federal Tort Claims Act (FTCA) because Defendants' activities in Texas were conducted pursuant to Hoopa's self-governance compact with the United States; thus, Bailey was deemed a federal employee for purposes of FTCA coverage. ROA.72-75. On August 18, 2017, Mitchell responded in opposition to Hoopa's argument that Bailey was acting as a federal employee or that the FTCA applied. ROA.106-124. Throughout the course of the litigation, Mitchell maintained the position that his claims were not covered by or subject to the FTCA or any other federal law. The Court did not rule on Hoopa's August 8, 2017 motion due to discovery that ensued and which led to a new schedule for motions. ROA.445-447.

On May 2, 2018, Defendants re-filed a "12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction, or In The Alternative Motion for Summary Judgment." ROA.448-464. Defendants raised their arguments regarding sovereign immunity and the FTCA and argued that the Court lacked diversity jurisdiction. ROA.448-464. In response, Mitchell again argued that the FTCA did not apply to his claims and that there was no basis to substitute the United States as Defendant. ROA.668-674. Mitchell also argued that the Court had federal question jurisdiction over his claims due solely to the FTCA/Westfall Act defense raised by Hoopa. ROA.674-675. Mitchell conceded there was no diversity jurisdiction over

Hoopa but argued there was diversity jurisdiction over his claims against Bailey and supplemental jurisdiction over his claims against Hoopa. ROA.675-676.

On June 1, 2018, Defendants filed a Motion to Substitute the United States in Place of Defendants Pursuant to the Westfall Act and/or Petition for Certification of Federal Employment Pursuant to the Westfall Act. ROA.893-906. Defendants argued that the United States was the sole proper Defendant and that Hoopa and Bailey should be dismissed from the litigation. ROA.893-906. Mitchell opposed this motion, again arguing that the United States was not the proper Defendant and that his claims were not covered by the FTCA. ROA.1000-1010. Consistent with his position throughout the litigation, Mitchell argued: "The FTCA Is Inapplicable to Matthew Mitchell's Tort Claims." ROA.1006.

On February 4, 2019, the Court granted Defendants' Motion to Dismiss solely on the basis of tribal sovereign immunity from suit. ROA.1200-1221. The Court did not address Defendants' Motion to Substitute other than declaring it moot due to the Court's order of dismissal on sovereign immunity grounds. ROA.1221. Other than mootness, the Court made no factual or legal findings regarding the Motion to Substitute. ROA.1200-1221. The Court also did not address whether it had a basis for diversity or federal question subject matter jurisdiction. ROA.1200-1221. After the Court's order, the only claims that remained were those against Bailey in his individual capacity. ROA.1221.

On October 29, 2019, Mitchell stipulated to dismiss his claims against Bailey in his individual capacity. ROA.1392-1393. The Court dismissed Bailey in his individual capacity and entered final judgment on November 13, 2019. ROA.1398-1400.

Mitchell filed an appeal to this Court on December 10, 2019. ROA.1401. Mitchell's appeal does not challenge the District Court's judgment as to Bailey; his appeal only challenges the District Court's judgment regarding Hoopa. Appellant's Brief, p. 7.

Hoopa filed a cross-appeal on December 18, 2019. ROA.1403. The basis of Hoopa's appeal is that the District Court lacked any statutory basis for federal subject matter jurisdiction. Thus, the Court should have dismissed Mitchell's complaint on that basis alone. Although the District Court properly analyzed Hoopa's sovereign immunity from suit, it erred by reaching that question at all due to the Court's lack of federal subject matter jurisdiction. The Court also erred by addressing Hoopa's sovereign immunity from suit before determining whether Hoopa (and Bailey) were the proper Defendants in the case or whether the United States should have been substituted as the sole proper Defendant. Hoopa submits that this Court should affirm the judgment of the District Court on the basis that the District Court lacked any statutory basis for federal subject matter jurisdiction. This Court should also affirm dismissal of Mitchell's complaint in its entirety.

Summary of Argument

Federal courts are courts of limited jurisdiction. Here, the District Court did not possess federal subject matter jurisdiction to adjudicate Mitchell's claims. Hoopa is a federally recognized Indian tribe and not a citizen of any state. ROA.12-13. Mitchell admits that Hoopa is not a citizen of any state in his complaint. ROA.12-13. Hoopa's presence as a defendant destroys the complete diversity of citizenship that is required to support jurisdiction under 28 U.S.C. § 1332. Since the Court lacked subject matter jurisdiction under the diversity statute, the Court also had no basis to assert supplemental jurisdiction over Hoopa under 28 U.S.C. § 1367. That latter statute is not a source of original jurisdiction.

Here, on appeal, Mitchell asserts federal question jurisdiction under 28 U.S.C. § 1331. But Mitchell did not allege any claims arising under federal law. Nor can defenses raised by Hoopa under federal law provide the federal question jurisdiction to support subject matter jurisdiction over Mitchell's claims.

The District Court erred by failing to determine whether it possessed subject matter jurisdiction over Mitchell's claims before proceeding to address the issue of Hoopa's sovereign immunity from suit. This Court should affirm the District Court's judgment for lack of subject matter jurisdiction and affirm the dismissal of Mitchell's complaint in its entirety because the District Court lacked any basis for exercising diversity, supplemental, or federal question jurisdiction.

Even if the District Court did have federal question or diversity jurisdiction, which it did not, the District Court properly found that Hoopa has sovereign immunity from suit, which it did not waive here. An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has expressly waived its immunity. *Kiowa Tribe v. Mfg. Techs*., 523 U.S. 751, 754 (1998); *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788-791, 798-803 (2014). The Supreme Court has repeatedly declined to make any exceptions to the doctrine of tribal sovereign immunity from suit, including any exceptions for off-reservation activities. Congress has plenary authority over Indian tribes and is the only appropriate body to develop any exceptions to or limitations on tribal sovereign immunity. Congress has expressly considered and legislated on the issue of tribal sovereign immunity from tort claims and has declined to waive tribal immunity in such contexts.

Mitchell argues that the Supreme Court has not "extended" the sovereign immunity doctrine to off-reservation torts. He has the applicable law and the proper legal analysis backward. Until Congress says otherwise, Indian tribes retain the common law immunity from suit traditionally enjoyed by sovereign powers which includes immunity from damages suits arising from tort claims, whether the claim arises within or outside sovereign boundaries. The Supreme Court has repeatedly confirmed that sovereign immunity broadly bars any suit against an Indian tribe, without exception, unless Congress has authorized the suit or the

Indian tribe has expressly waived its own immunity from suit. Here, Mitchell asks this Court to ignore the will of Congress and applicable Supreme Court precedent and to judicially carve out its own policy-based exception to sovereign immunity. The Supreme Court, and every other Circuit Court of Appeal, has properly refused to carve out case-by-case exceptions to tribal sovereign immunity.

Here, the settled law is clear. Sovereign immunity bars Mitchell's suit against Hoopa unless Congress has authorized it or unless Hoopa affirmatively and expressly waived its own immunity to permit his suit. Neither Congress nor Hoopa has waived Hoopa's immunity here. The District Court properly applied the governing law and correctly ruled that sovereign immunity bars Mitchell's suit. This Court should affirm the District Court's judgment and dismissal of the case.

Argument

I. The District Court Lacked Subject Matter Jurisdiction Under 28 U.S.C. § 1332 Because There Is Not Complete Diversity of Citizenship Due to Hoopa's Presence as Defendant.

Federal courts are courts of limited jurisdiction. *Energy Mgmt. Servs., LLC v. City of Alexandria*, 739 F.3d 255, 257 (5th Cir. 2014). "It is to be presumed that a cause lies outside [of federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id. (*quoting *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994)); *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). Federal courts must strictly construe their limited jurisdiction, including that provided by the federal diversity statute. *Healy v Ratta*, 292 U.S. 263, 270 (1934). Issues of subject matter jurisdiction are reviewed *de novo* on appeal. *Adam Joseph Resources v. CNA Metals, Ltd.*, 919 F.3d 856, 862 (5th Cir. 2019).

In his complaint, Mitchell alleged the Court possessed subject matter jurisdiction over his claims against Defendant Bailey based on diversity of citizenship pursuant to 28 U.S.C. § 1332. ROA.13. Mitchell conceded that Hoopa is not a citizen of any State but alleged the District Court could exercise supplemental jurisdiction over his claims against Hoopa pursuant to 28 U.S.C. § 1367. ROA.13. Hoopa and Bailey moved to dismiss for lack of subject matter jurisdiction and argued that the Court lacked diversity jurisdiction. ROA.462-464. The Court did not evaluate or rule on that argument, instead proceeding to evaluate

Hoopa's sovereign immunity from suit. ROA.1200-1221. Although the Court analyzed Hoopa's sovereign immunity correctly, as discussed *infra*, it erred in reaching that question at all because the Court lacked subject matter jurisdiction under either 28 USC §1332 or 28 USC §1367 as Mitchell alleged in his complaint.

"[W]hile there are no Supreme Court or Fifth Circuit cases addressing the issue, virtually all courts that have considered the issue have held that Indian tribes are not citizens of any state for the purpose of diversity jurisdiction." *Payne v. Miss. Band of Choctaw Indians*, 159 F. Supp. 3d 724, 726 (S.D. Miss. 2015). Nor are Indian tribes a foreign state. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-20 (1831); *Oglala Sioux Tribe v. C&W Enters., Inc.*, 487 F. 3d 1129, 1130, n.2 (8th Cir. 2007). Indian tribes, as "stateless" entities, may not sue or be sued in federal court under 28 U.S.C. §1332. *Payne*, 159 F. Supp. 3d at 726.

Mitchell concedes that the "Hoopa Valley Tribe is not a citizen of any State." ROA.13. All Circuit Courts of Appeal to address the issue agree that Indian tribes are not citizens of any state for purposes of diversity jurisdiction. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000); *Frazier v. Brophy*, 358 Fed. Appx. 212, 213 (2d Cir. 2009); *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017, 1020-21 (8th Cir. 2007); *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002); *Gaines v. Ski Apache*, 8 F.3d 726,

729 (10th Cir. 1993); *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1276 (11th Cir. 2010). District courts in the Fifth Circuit concur. *Payne*, 159 F. Supp. 3d at 726; *Victor v. Grand Casino Coushatta*, Civ No. 2:02-CV-2348, 2003 U.S. Dist. LEXIS 24771 (W.D. La., June 27, 2003).

An Indian tribe is analogous to a "stateless person" for diversity jurisdiction purposes. *Ninigret Dev. Corp*., 207 F.3d at 27. Like Indian tribes, other domestic sovereigns such as states and the federal government also cannot sue or be sued in diversity. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) (a state is not a citizen for purposes of diversity jurisdiction); *Louisiana v. Union Oil Co.,* 458 F.3d 364, 366 (5th Cir. 2006) (a state is not a citizen for purposes of diversity jurisdiction); *General Railway Signal Co. v. Corcoran*, 921 F.2d 700, 703 (7th Cir. 1991) (federal agency cannot be sued in diversity).

In *American Vantage*, the Ninth Circuit explained that, as dependent domestic sovereign nations, Indian tribes are not state citizens. *American Vantage*, 292 F.3d at 1096. "The status of Indian tribes as sovereign entities, and as federal dependents, contradicts conventional notions of citizenship in general and *state* citizenship in particular." *Id.* (emphasis in original). The Court noted that domestic sovereigns, such as the States, cannot sue or be sued in diversity. *Id.* at 1097. The Court explained that Congress, who has plenary power over Indian tribes, has not

ever granted "citizenship" to Indian tribes. *Id.* Although Congress has revised the diversity statute many times, it has not included Indian tribes within its scope. *Id.*

Mitchell admits Hoopa is not a citizen of any State. ROA.13. Mitchell argued the District Court had subject matter jurisdiction because of diversity of citizenship between Mitchell and Defendant Bailey. Mitchell's argument is wrong, because *complete* diversity of citizenship is required to vest the District Court with subject matter jurisdiction under 28 USC § 1332. "When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for each defendant or face dismissal." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989) (one stateless party destroys complete diversity). The presence of any "stateless person" is a jurisdictional spoiler that defeats diversity jurisdiction. *Id.* at 829-30. *See also Miss. ex rel. Hood v. AU Optronics Corp.,* 571 U.S. 161, 174 (2014) ("a State's presence as a party will destroy complete diversity"); *Union Oil Co.*, 458 F.3d at 366 ("Ordinarily in an action where a state is a party, there can be no federal jurisdiction on the basis of diversity of citizenship . . . .") (internal quotations omitted); *Frey v. EPA*, 270 F.3d 1129, 1136-37 (7th Cir. 2001) (claim against federal agency destroyed complete diversity, precluding diversity jurisdiction over any defendant named in the claim).

Thus, notwithstanding the presence of other diverse parties, the presence of an Indian tribe as a plaintiff or defendant in the litigation destroys complete

diversity and precludes subject matter jurisdiction over the entire case. *Ninigret Dev. Co.*, 207 F.3d at 27; *Brophy*, 358 Fed. Appx. at 213; *American Vantage,* 292 F.3d at 1098, n. 6; *Payne*, 159 F. Supp. 3d at 727; *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe*, 966 F. Supp. 2d 876, 880-81 (D. Ariz. 2013). Hoopa's presence as a party destroys complete diversity and precludes diversity as a basis for the Court's subject matter jurisdiction over any of Mitchell's claims. *Id*.

Mitchell's only alleged basis for subject matter jurisdiction over his claims against Hoopa was supplemental jurisdiction under 28 U.S.C. § 1367. ROA.13. But supplemental jurisdiction does not stand alone; it depends on the presence of original jurisdiction. *City of Alexandria*, 739 F.3d at 259; *Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290, 294 (5th Cir. 2010) (28 U.S.C. § 1367 is not a source of original subject matter jurisdiction in federal court). Here, because the District Court lacked original jurisdiction under the diversity statute (due to Hoopa's presence), there is no basis for supplemental jurisdiction over Mitchell's claims against Hoopa. 28 U.S.C. § 1367. Supplemental jurisdiction cannot be used as a basis to assert claims against a non-diverse defendant like Hoopa. 28 U.S.C. § 1367(b); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978).

As discussed below, the District Court correctly found that Hoopa is immune from suit. However, the Court erred by reaching that question prior to determining whether it properly had federal subject matter jurisdiction. "Although

tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction." *Ninigret Dev. Co.*, 207 F.3d at 28. Because the District Court did not have subject matter jurisdiction under the diversity statute (as Mitchell alleged), this Court should affirm, on that basis, the District Court's judgment dismissing Mitchell's case. The lack of diversity jurisdiction, the only jurisdictional basis that Mitchell alleged, precludes Mitchell's suit.

II. The District Court Lacked Subject Matter Jurisdiction Under 28 U.S.C. § 1331 and 28 USC § 2679; Mitchell Asserted No Claims Arising Under Federal Law.

In his jurisdictional statement in his opening brief to this Court, and unlike the jurisdictional allegations in his complaint, Mitchell now asserts the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2679. Mitchell has abandoned the basis for subject matter jurisdiction that he alleged in the District Court, which was diversity jurisdiction under 28 U.S.C. § 1332 and supplemental jurisdiction under 28 U.S.C. § 1367.

In his complaint, Mitchell did not allege federal question jurisdiction under 28 U.S.C. § 1331 or 28 U.S.C. § 2679. ROA.13. Mitchell's complaint alleged no federal claim of any kind. ROA.12-26. Mitchell's complaint does not plead a federal question to support subject matter jurisdiction under 28 USC § 1331 nor does it mention 28 USC § 2679. ROA.12-26. Mitchell's claims are limited to

negligence and breach of contract. ROA.12-26. Mitchell did not allege any federal law that his claims might arise under. ROA.12-26.

It is hornbook law that when determining whether a claim arises under federal law, a court will examine the well pleaded allegations of the complaint and ignore potential defenses:

> For a litigant to invoke general federal question jurisdiction, it is necessary both that the case 'arise under' the Constitution or some other aspect of federal law and that this fact appear on the face of a well-pleaded complaint. Issues that defendant raises in the answer, or issues relating to a defense that plaintiff anticipates in the complaint, are irrelevant for jurisdictional purposes. No matter how important, and even decisive, federal law may turn out to be in the later stages of the litigation, if a substantial federal issue is not raised as a legitimate part of plaintiff's own cause of action, there is no federal question jurisdiction under [28 U.S.C. 1331].

Friendenthal et al., Civil Procedure (Second Edition), §2.4, p. 20 (1993).

"[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). This "well-pleaded complaint" rule mandates that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's complaint. *Id.; Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-11 (1983). Neither the presence of a federal defense or a federal counterclaim is sufficient to establish federal question jurisdiction. *Id.*; *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831-

32 (2002). *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999) ("Nor can the possibility that the Tribe might invoke [federal law] as a defense to TTEA's action confer federal jurisdiction"). Mitchell made no allegation in his complaint that any of his claims arose under federal law. ROA.12-25. 28 U.S.C. § 1331 provides no basis for the District Court's subject matter jurisdiction here.

Now, on appeal, Mitchell asserts that federal question jurisdiction exists on the sole ground that "the defendants alleged Bailey and [Hoopa] 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." Appellant's Brief, Jurisdictional Statement. Mitchell asserts that "the defendants' request for Westfall Act relief clothed the district court with federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2679." Appellant's Brief, Jurisdictional Statement. Mitchell's argument is precluded by the "well-pleaded complaint" rule. A defense raised by Hoopa and Bailey in this case does not provide federal question jurisdiction over Mitchell's claims. For example, an Indian tribe's sovereign immunity defense, though based on federal law, does not provide federal question jurisdiction over a complaint that does not otherwise allege federal claims. *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841-42 (1989); *Ninigret Dev. Corp.,* 207 F.3d at 28; *Oglala Sioux Tribe*, 487 F.3d at 1131. A court cannot entertain defenses asserted under federal law until it

determines that it properly has subject matter jurisdiction based on the claims alleged in the complaint. *Id.* Mitchell alleged no claims arising under federal law. The District Court lacked federal question jurisdiction.

The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for some tort claims and provides the exclusive remedy to compensate a federal employee's tortious acts committed within the scope of his or her employment. *See Booten v. United States*, 233 F. Supp. 2d 227, 229 (D. Mass. 2002). To give effect to the FTCA, when a federal employee is sued for a wrongful or negligent act, the Westfall Act empowers the Attorney General to certify that the federal employee was acting within the scope of his office or employment at the time of the incident. *Id.* Upon certification, the defendant employee is dismissed from the action and the United States is substituted as defendant. *Id.*

Here, Mitchell did not allege that Bailey was a federal employee entitled to coverage under the Westfall Act. ROA.12-26. Nor did Mitchell present any claim under the Westfall Act, the FTCA, or any other federal law. ROA.12-26. Rather, after the complaint was filed, Defendants raised the FTCA/Westfall Act issue as a defense and moved to substitute the United States as the proper defendant because, at the time of the accident, Defendants were acting pursuant to a self-governance compact between Hoopa and the United States. ROA.893-906. Mitchell opposed Defendants' motion – arguing that Bailey was not acting as a federal employee at

the time of the accident and that neither the Westfall Act nor the FTCA had any application here. ROA.1000-1010. Mitchell maintained this position throughout the litigation. The District Court never addressed the factual or legal merits of Defendants' Westfall Act defense or motion to substitute in any respect, finding it moot following its determination that Hoopa (and Bailey in his capacity as a tribal employee) possessed sovereign immunity from Mitchell's suit. ROA.1200-1221.

In support of his current argument that the Westfall Act vested the District Court with subject matter jurisdiction, Mitchell relies solely on *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). *Lamagno* offers no support to Mitchell. The issue in *Lamagno* is whether a certification made by the Attorney General under the Westfall Act, 28 U.S.C. § 2679(d)(1), is reviewable in federal court. *Id.* at 420. In *Lamagno*, the plaintiff filed a tort case against a federal employee, invoking diversity (not federal question) jurisdiction. *Id.* at 421. After the Attorney General certified, pursuant to the Westfall Act, that the federal employee was acting within the scope of his federal employment at the time of the accident, the United States was substituted as defendant. *Id.* at 420. Upon being substituted, the United States moved to dismiss the case due to an exception to liability arising in the FTCA. *Id.* The plaintiff (unhappy with the results flowing from the Attorney General certification) desired judicial review of the Attorney General's certification in an effort to overturn it and to continue suit against the

tortfeasor in his individual capacity. *Id.* The Court held that federal courts may review a certification issued by the Attorney General under the Westfall Act. *Id.*

Lamagno does not support Mitchell's claim of federal question jurisdiction here. Mitchell does not seek to challenge any certification of the Attorney General here. In fact, Mitchell did not assert any claims under the FTCA or any other federal law and has maintained throughout this litigation that the FTCA is wholly inapplicable. The well-pleaded complaint rule bars any contention that the Westfall Act defense raised by Hoopa and Bailey can vest the Court with federal question jurisdiction over Mitchell's claims, which are exclusively non-federal. *Lamagno*, a case where diversity jurisdiction existed at the outset, is no precedent for subject matter jurisdiction for Mitchell's suit where diversity does not exist.

The District Court lacked federal subject matter jurisdiction over Mitchell's claims, which do not arise under federal law and which lack complete diversity. This Court should affirm the judgment of the District Court and affirm the Court's dismissal of Mitchell's complaint in its entirety due to the lack of any basis for exercise of federal subject matter jurisdiction. There is not the complete diversity required under 28 U.S.C. § 1332 due to Hoopa's presence as defendant. There is no federal question alleged in Mitchell's complaint and no jurisdiction arising under 28 USC § 1331 or 28 USC § 2679. Under the well-pleaded complaint rule,

the defense raised by Defendants under the FTCA/Westfall Act cannot provide the basis for federal question jurisdiction over Mitchell's claims. [1]

III. The District Court Lacked Subject Matter Jurisdiction Because Hoopa Has Sovereign Immunity From Suit.

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe v. Mfg. Techs*., 523 U.S. 751, 754 (1998). Congress has not authorized Mitchell's tort suit against Hoopa. Nor, as discussed *infra*, has Hoopa waived its immunity. The sovereign immunity of Indian tribes from suit is "settled law." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 789 (2014). Absent Congressional approval

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[1] Assuming *arguendo* that the District Court had any federal subject matter jurisdiction (which it did not), Hoopa submits it was error for the District Court to fail to address the merits of Defendants' motion to substitute before addressing Hoopa's sovereign immunity defense. The District Court ruled that Hoopa's sovereign immunity rendered the Westfall Act issues moot, but the District Court conducted its analyses in the wrong order. If the United States is the proper defendant in this case, as Defendants' argued, then Hoopa is not a proper party and its sovereign immunity from suit is not at issue. While the District Court correctly ruled that Hoopa has sovereign immunity from Mitchell's claims, as discussed *infra,* it was error for the Court to reach that question for two separate reasons: (1) the District Court had no federal subject matter jurisdiction as discussed herein; and (2) the District Court failed to determine, as requested by Defendants, whether the United States is the sole proper Defendant. If this Court were to find that the defense raised under the Westfall Act provides any basis for federal question jurisdiction in this case (which it clearly should not), the scope of that jurisdiction would be strictly limited to determining whether the United States is the sole proper defendant and, if so, dismissing Defendants. Under the well-pleaded complaint rule, there is no merit to Mitchell's contention that the Westfall Act (raised as a defense - and opposed by Mitchell) creates federal question jurisdiction to support Mitchell's tort claims alleged against Hoopa or Bailey.

or tribal waiver, the Supreme Court has recognized no exceptions authorizing suit against an Indian tribe. *Id.* at 789-790. The District Court correctly ruled that Hoopa, a federally-recognized Indian tribe, is immune from Mitchell's suit here.

The Fifth Circuit Court of Appeals has strongly affirmed tribal sovereign immunity. In *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), the Court considered whether the Seminole Tribe was immune from a garnishment action. This Court explained that: "Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization." *Id.* at 520. This Court properly declined to carve any exceptions into the sovereign immunity doctrine and affirmed that the Tribe was immune from the garnishment action. *See also TTEA*, 181 F.3d at 680-81 (affirming dismissal of damages suit based on tribal sovereign immunity).

"Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 572 U.S. at 788 (internal quotations omitted). As dependent sovereigns, tribes are subject to plenary control by Congress. *Id.* Yet, Indian tribes remain separate sovereigns pre-existing the Constitution. *Id.* Unless and until Congress acts, Indian tribes

retain their historic sovereign authority. *Id.* "Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the common law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (internal quotation marks omitted). *See Franchise Tax Bd. v. Hyatt*, 587 U.S. ___, 139 S.Ct. 1485, 1492 (2019) (holding that states retain immunity from private tort suit in both their own and other states' courts; overruling *Nevada v. Hall*, 440 U.S. 410 (1976)).

A. Tribal Sovereign Immunity Applies Both Within and Outside Reservation Boundaries

Affirming the settled law that Indian tribes are immune from any suit absent Congressional authorization or tribal waiver, the Supreme Court has rejected invitations to carve exceptions into the sovereign immunity doctrine. In *Kiowa*, an Indian tribe was sued in a case involving off-reservation commercial conduct. *Kiowa*, 523 U.S. at 753-54. The plaintiff urged the Court to limit the applicability of sovereign immunity to on-reservation or noncommercial activities. *Id.* at 754-760. The Court declined. *Id.* The Court explained that its past cases "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Id.* at 754. In *Kiowa*, the Court again declined to draw any distinction or limitation on sovereign immunity based on where the activity occurred or the type of activity involved. *Id.* at 758-60. Reversing the lower

court's decision, the Court held that the Indian tribe was immune from suit arising from its off-reservation activities. *Id.* "Congress has not abrogated this immunity, nor has [the Tribe] waived it, so the immunity governs this case." *Id.* at 760.

More recently, in *Bay Mills*, the Supreme Court addressed a suit by the State of Michigan against an Indian tribe arising from off-reservation activity. 572 U.S. at 785-788. The Court reaffirmed the settled nature of tribal sovereign immunity. *Id.* at 788-791. It explained that its precedents on tribal sovereign immunity have "established a broad principle, from which [the Court] thought it improper suddenly to start carving out exceptions." *Id.* at 790. The law was clear: "Unless Congress has authorized Michigan's suit, our precedents demand that it be dismissed." *Id.* at 791.

Finding no Congressional authorization or tribal waiver, Michigan asked the Court to "revisit" its prior decisions and rule that Indian tribes lack immunity for "illegal commercial activity outside their sovereign territory." *Id.* at 797. The Court declined, explaining that "*stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion." *Id.* at 798 (internal citations and quotations omitted). The Court explained that *Kiowa* was not a "one-off" and that *Kiowa* reflected a long line of precedents affirming the doctrine of tribal sovereign immunity without any

exceptions, such as for commercial or off-reservation conduct. *Id.*[2] The Court again rejected the invitation to carve exceptions into the settled doctrine of tribal sovereign immunity and again stated that any such exceptions must come from Congress itself and not from the Supreme Court (or lower courts). *Id.* at 799-804.

Kiowa and *Bay Mills* destroy Mitchell's argument that sovereign immunity does not apply outside reservation boundaries. Mitchell argues that "the extent to which tribes enjoy sovereign immunity from suit concerning their off-reservation activities is still being fleshed out by the Supreme Court." Appellant's Brief, p. 11. That is not correct. The Supreme Court in *Kiowa* and *Bay Mills* affirmed the doctrine of tribal sovereign immunity as settled law and expressly rejected similar invitations to limit the doctrine to claims arising within reservation boundaries.

Ignoring the binding holdings from *Kiowa* and *Bay Mills*, Mitchell focuses on assorted dissents, concurrences, and footnoted dictum. From these non-binding sources, Mitchell extrapolates an argument that the Court has "manifested a diminishing enthusiasm for the doctrine of tribal sovereign immunity." Appellant's Brief, p. 12. Mitchell is wrong. For over 100 years, the Supreme Court has consistently and without exception affirmed the doctrine of tribal sovereign immunity in a variety of contexts. *Bay Mills*, 572 U.S. at 804 (Sotomayor, J.,

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[2] Here, although occurring outside the reservation, it is undisputed that Hoopa's activities at issue in this case were governmental in nature (a humanitarian service project), not commercial. ROA.12-15.

concurring). This Court should reject Mitchell's invitation to gauge the possible enthusiasm of individual Supreme Court Justices; rather, it must apply the Supreme Court's binding precedents. Nor should this Court rely on views of individual dissenting Justices that conflict with the Supreme Court's binding majority rulings. The applicable binding rule of law that governs this case is that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754. No exceptions.

Since *Bay Mills*, the Supreme Court has addressed tribal sovereign immunity on two occasions, neither of which help Mitchell. In *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. ___, 138 S.Ct. 1649 (2018), the Supreme Court reversed the Washington Supreme Court's decision that allowed a quiet title suit to proceed against an Indian tribe relating to off-reservation land. *Id.* at 1652. The Washington Supreme Court, relying on *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992) ruled that tribal sovereign immunity does not bar *in rem* jurisdiction to quiet title in a parcel of land. *Id.* The U.S. Supreme Court held that was error, because *County of Yakima* was not a sovereign immunity case and did not establish any *in rem* exception to tribal sovereign immunity. *Id.* In *Lundgren*, the respondent raised an alternative argument that the doctrine of sovereign immunity (of all sovereigns: federal, state, foreign, and tribal) does not limit actions involving immovable property located in

the territory of another sovereign. *Id.* at 1653. That argument was not raised in the Washington Supreme Court; thus, the U.S. Supreme Court vacated and remanded the case. *Id.* at 1653-55.

Lundgren is consistent with the Supreme Court's settled precedents that Indian tribes are immune from suit (within and outside reservation boundaries) absent Congressional authorization or waiver. *Lundgren* does not suggest there is anything unsettled about the immunity of Indian tribes acting outside reservation boundaries – the only uncertainty in *Lundgren* stemmed from doctrines regarding *in rem* suits against sovereigns of all types. Justice Roberts' concurrence (joined by Justice Kennedy), which Mitchell relies on, joined the Court's opinion affirming the Tribe's off-reservation sovereign immunity in full. 138 S.Ct. at 1655.

The Supreme Court addressed off-reservation sovereign immunity in the context of off-reservation torts in *Lewis v. Clarke*, 581 U.S. ___, 137 S.Ct. 1285 (2017). In that case, a tribal employee acting within the scope of his tribal employment was involved in an off-reservation motor vehicle crash. The Supreme Court started with the premise that Indian tribes are immune from all suits, but the issue in *Lewis* was whether the tribal employee could be sued in his individual capacity. *Id.* at 1289. Recognizing that individual tortfeasors can be sued in their individual capacity for torts committed within the scope of their federal or state

government employment, the Supreme Court held that the same rule applies with regard to tribal employees. *Id.* at 1291-92.

The U.S. Supreme Court has made it clear that tribal sovereign immunity applies both within and outside reservation boundaries absent Congressional authorization of a suit or tribal waiver. *Bay Mills*, 572 U.S. at 788-791, 797-804; *Kiowa*, 523 U.S. at 754. But Mitchell argues that sovereign immunity should not apply because the conduct at issue in this case occurred very far away from the Hoopa reservation. Mitchell cites no case (and there is none) that makes any distinction or exception to sovereign immunity that is based on how far the conduct occurred from the reservation. Whether Hoopa's conduct occurred 2000 miles away in Texas or 2 feet beyond its reservation boundaries, it is immune from any suit absent Congressional authorization or waiver. *Kiowa*, 523 U.S. at 754.

B. Tribal Sovereign Immunity Applies to Tort Claims, Both On and Off Reservation, Absent Congressional Authorization or Tribal Waiver.

Mitchell argues that the Supreme Court has not "extended" sovereign immunity to tort claims, but Mitchell has the law and proper analysis backward. That is, absent an express holding of the Supreme Court that sovereign immunity does not apply to tort claims, the binding and applicable rule is that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa*, 523 U.S. at 754.

Mitchell repeatedly uses the words "extend" and "expand" in his brief, characterizing *Kiowa* as a decision that "extends" sovereign immunity to off-reservation commercial transactions and arguing that the dissenters in *Kiowa* did not think sovereign immunity should "extend" to a tribe's off-reservation activities. But the question in *Kiowa* was not whether to *extend* tribal sovereign immunity to off-reservation or commercial activities. The issue was whether the Supreme Court should create an *exception* to the broad governing doctrine of tribal sovereign immunity from suit. Mitchell argues that "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." Appellant's Brief, p. 26. But the District Court here did not "expand" the sovereign immunity doctrine to off-reservation torts because sovereign immunity already applies to such claims under existing Supreme Court precedent. "An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754. "The baseline position . . . is tribal immunity." *Bay Mills*, 572 U.S at 790. There is no Congressional authorization, no tribal waiver, and no exception recognized by the Supreme Court for tort claims. Mitchell's suit is barred.

Sovereign immunity broadly applies to prevent any suit against an Indian tribe. *Bay Mills*, 572 U.S. at 789. While litigants have repeatedly asked the Supreme Court to carve exceptions into that broad protective doctrine, the Court

has always declined, deferring instead to Congress. *Id.* at 800-803. That deference to Congress is especially appropriate in the context of tribal sovereign immunity from tort claims – a subject that Congress has repeatedly analyzed and legislated on. *Id.* at 801-802. *Infra*, pp 48-52. Federal appellate and district courts have repeatedly affirmed that Indian tribes are immune from tort claims, whether on or off reservation and regardless of the extent of the damage or harm suffered by the plaintiff. *Infra*, pp. 34-39. This is consistent with immunity of other sovereigns who are also immune from tort claims absent an affirmative waiver by the relevant sovereign. *Hyatt*, 139 S.Ct. at 1492 (holding, in case involving private tort claims, that states retain sovereign immunity from suits in courts of other states).

This Court is bound by the Supreme Court's holdings in *Bay Mills* and *Kiowa* (and its other cases affirming tribal sovereign immunity). Mitchell's argument that this Court may ignore those precedents because they did not expressly involve the same type of claim as his lacks merit. Tribal sovereign immunity broadly applies to any suit (including Mitchell's) unless Congress says otherwise. *Bay Mills*, 572 U.S. at 789-91.

In addition to *Kiowa*, *Bay Mills*, *Lundgren*, and *Lewis,* which affirm a broad and all-inclusive doctrine of tribal sovereign immunity, the Supreme Court has affirmed tribal sovereign immunity in cases involving torts. Approximately 100 years ago, in *Turner v. United States*, 248 U.S. 354 (1919), members of the

Muscogee (Creek) Nation allegedly destroyed property of a non-Indian who sought compensation from the Tribe. *Id.* at 356. While the facts of the case were complicated because the United States subsequently took control over the Tribe and its assets, the Supreme Court made clear that the Indian tribe itself could not have been sued without Congressional authorization: "Without authorization from Congress, the [Tribe] could not then have been sued in any court; at least without its consent." *Id.* at 358. If sovereign immunity does not apply to tort claims, that statement of applicable law in *Turner* would have been inaccurate.

In *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 878 (1986), an Indian tribe brought tort and contract claims against a nonmember in state court. The North Dakota Supreme Court ruled that the Tribe could not sue in state court unless it consented pursuant to a North Dakota law to waive its sovereign immunity to state law claims. *Id.* at 887-90. The U.S. Supreme Court reversed, holding that requiring such a waiver was "unduly intrusive on the Tribe's common law sovereign immunity." *Id.* at 891. The Supreme Court's decision affirmed and protected the Tribe's immunity from any claims that could be asserted against it in state court, which included tort claims. *Id.*

Mitchell cites no Supreme Court precedent (nor is there any) that excepts tort claims from the protections of tribal sovereign immunity. Instead, *Mitchell* relies heavily on a footnote in the *Bay Mills* majority opinion, which states:

> Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies. . . . We need not consider whether the situation would be different if no alternative remedies were available. 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. The argument that such cases would present a 'special justification' for abandoning precedent is not before us.

Bay Mills, 572 U.S. at 799, n. 8. The Court's footnote lacks legal or factual relevance to this case for many reasons. First, the footnote is discussing the importance of *stare decisis* in sovereign immunity cases. In this case, the District Court correctly applied binding law to find Hoopa immune from suit. Second, the footnote is expressly reserving (not deciding) the question of whether an exception to sovereign immunity could or should apply in the context of off-reservation, commercial torts, where the tort victim has no alternative remedies. The footnote acknowledges that sovereign immunity, when applied "in the ordinary way," should bar Mitchell's suit. *Id.* Third, the facts of Mitchell's case do not fall within the scope of the footnote because this case does not involve commercial conduct. Hoopa was not engaging in business activities off the reservation when the injuries at issue occurred; rather, it was engaged in a governmental service project. Also, this case does not involve a situation where the tort victim lacked alternative remedies. Mitchell could and did sue the individual tortfeasor who, in his individual capacity, is not protected by sovereign immunity. *Lewis*, 137 S.Ct. at

1291-92. In addition, Mitchell could have (but did not) sue the United States pursuant to the FTCA because Bailey was acting as a deemed federal employee at the time of the injuries and the United States has waived its own sovereign immunity from tort claims in such circumstances. The *Bay Mills* footnote is both legally and factually irrelevant here. Sovereign immunity bars Mitchell's suit against Hoopa because there has been no Congressional authorization or waiver.

Recognizing that sovereign immunity applies broadly to any suit unless Congressional authorization or waiver occurs, every federal Circuit Court of Appeal to address the question has applied sovereign immunity to tort claims, whether those torts occurred on or off the reservation and regardless of the gravity of harm at issue. In *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2012), an Indian tribe was sued in tort for allegedly overserving alcohol to a woman who subsequently drove away in her car while intoxicated and was killed in a car crash. *Id.* at 1226. The Eleventh Circuit correctly stated that the "Supreme Court has made clear that a suit against an Indian tribe is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity." *Id.* The Court found no Congressional abrogation and properly declined the plaintiff's invitation to carve out an exception on its own. "Cobbling together a new exception to tribal immunity would directly conflict with the Supreme Court's straightforward doctrinal statement . . . that an

Indian tribe is subject to suit in state or federal court 'only where Congress has authorized the suit or the tribe has waived its immunity.'" *Id.* at 1236, *citing Kiowa* (emphasis in original).

In *Cook v. AVI Casino Enters*., 548 F.3d 718, 720-21 (9th Cir. 2008), a tribal employee became intoxicated at work and then injured a motorcycle driver in an off-reservation car crash. The Ninth Circuit affirmed dismissal of the tort suit on sovereign immunity grounds. *Id.* at 725-727. *See also Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1101 (9th Cir. 2017) (finding that Indian tribe would be immune from suit on abuse of process and tortious interference claims); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 n. 8 (9th Cir. 2016) ("we have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law"); *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086-87 (9th Cir. 2013) (finding tribal fire department immune from off-reservation tort involving a woman's death, but allowing tort claims to proceed in individual capacity against tribal paramedics).

Like the Eleventh and the Ninth Circuit, the First, Second, Fourth, Sixth, Eighth, and Tenth Circuit Courts of appeal have unanimously applied tribal sovereign immunity to claims sounding in tort. *See Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, 917 F.3d 451, 453 (6th Cir. 2019) (affirming dismissal on sovereign immunity grounds of suit alleging

avoidance and recovery of allegedly fraudulent transfers from tribal casino); *Santana v. Muscogee (Creek) Nation*, 508 Fed. Appx. 821, 822-24 (10th Cir. 2013) (affirming dismissal of tort claims after finding no tribal waiver of sovereign immunity); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356-58 (2d. Cir. 2000) (affirming dismissal of copyright infringement claims against Tribe on sovereign immunity grounds); *Rosebud Sioux v. Val-U Constr. Co.*, 50 F.3d 560, 561 (8th Cir. 1995) (affirming dismissal of tort counterclaims against Indian tribe because the tribe did not waive sovereign immunity); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) (dismissing suit alleging off-reservation trespass claims due to tribal sovereign immunity); *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957) (affirming dismissal of tort suit seeking damages for injuries sustained when swinging bridge collapsed; stating that the "rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument").

Mitchell relies on the Alabama Supreme Court's decision in *Wilkes v. PCI Gaming Authority*, 287 So.3d 330, 335 (Ala. 2017), *cert. denied, Poarch Band of Creek Indians v. Wilkes*, 139 S.Ct. 2739 (2019) ("Wilkes"), which allowed tort claims to proceed against an Indian tribe in Alabama state courts. The Alabama Supreme Court's decision in *Wilkes* is not binding authority here. Nor, given the many flaws in its reasoning and refusal to apply binding precedent, is it persuasive.

In *Wilkes*, the Alabama Supreme Court improperly conducted its legal analysis backwards. Instead of starting its analysis with the governing law that sovereign immunity applies unless Congress has authorized suit or the Tribe was waived immunity, as directed by the U.S. Supreme Court in *Kiowa* and *Bay Mills*, the Alabama Supreme Court searched for a U.S. Supreme Court case that had applied sovereign immunity to the exact fact pattern at issue in *Wilkes*. *Id.* at 333-335. Failing to find any Supreme Court case that expressly addressed the tort claims presented in *Wilkes*, the Alabama Supreme Court determined it was free to chart its own course and judicially craft its own exception to tribal sovereign immunity. *Id.* The *Wilkes* court's analysis and decision directly conflict with binding and applicable Supreme Court precedent in *Bay Mills*, *Kiowa*, and its other cases that broadly affirm tribal sovereign immunity from any suit. *Wilkes* stands alone as an outlier in sovereign immunity jurisprudence and should be disregarded.[3]

In addition to the U.S. Supreme Court, and all federal Circuit Courts of Appeal to consider the issue of tribal immunity from tort claims, the Supreme Courts of at least six states have rendered decisions contrary to *Wilkes* that affirm

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[3] Nor is it relevant or persuasive that the U.S. Supreme Court denied certiorari in *Wilkes*. *See Oertwich v. Traditional Vill. of Togiak*, Case No. 3:19-cv-00082, 2019 U.S. Dist. LEXIS 156227 (D. Alaska, Sept. 12, 2019) (declining to rely on *Wilkes*). "As even a first year law student should know, the denial of a petition for certiorari does not constitute a decision on the merits by the Supreme Court." *Id.* at *7-8.

tribal sovereign immunity from tort claims, including tort claims that arose outside of reservation boundaries.[4] Many other intermediate state appellate courts have applied tribal immunity to tort claims of non-tribal members including tort claims that arose outside of reservation boundaries.[5] Federal district courts in the Fifth

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[4] *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 416 P.3d 401, 410-413 (Utah, 2017) (affirming dismissal of tort claims against tribe based on sovereign immunity); *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 369-372 (Okla. 2013) (tribe and casino immune from dram shop claims); *Seneca Tel. Co. v. Miami Tribe of Okla.*, 253 P.3d 53, 54-57 (Okla. 2011) (applying sovereign immunity to off-reservation tort claim even though the victim "did not have the opportunity to negotiate a waiver of the sovereign immunity [and] was an innocent third party to the negligence of a tribal enterprise"); *Beecher v. Mohegan Tribe of Indians*, 918 A.2d 880, 882-887 (Conn. 2007) (sovereign immunity protected Indian tribe from tort claims); *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668, 671-673 (N.M. 2002) (tribe immune from personal injury lawsuit); *Gross v. Omaha Tribe of Nebraska*. 601 N.W.2d 82 (Iowa 1999) (same); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 422-24 (Ariz. 1968) (tribe immune from negligence claims arising outside of reservation boundaries).

[5] *See, e.g., Miccosukee Tribe of Indians v. Lewis Tein, P.L.,* 227 So. 3d 656, 661, 668 (Fla. Dist. Ct. App. 2017) (dismissing tort claims against Indian tribe arising from off-reservation conduct on sovereign immunity grounds); *Koscielak v. Stockbridge-Munsee Cmty*., 811 N.W.2d 451, 453-459 (Wis. Ct. App. 2012) (dismissing tort claims against Indian tribe arising from off-reservation conduct on sovereign immunity grounds); *Foxworthy v. Puyallup Tribe of Indians Ass'n*, 169 P.3d 53, 59 (Wash. Ct. App. 2007) ("Indian tribes have long enjoyed inherent sovereign immunity from private tort actions"); *Filer v. Tohono O'odham Nation Gaming Enter*., 129 P.3d 78, 80-85 (Ariz. Ct. App. 2006) (applying tribal sovereign immunity to bar dram shop action); *Sevastian v. Sevasatian*, 808 A.2d 1180, 1182-1183 (Conn. App. Ct. 2002) (tribal sovereign immunity bars tort claims arising on off-reservation land); *Doe v. Oneida Indian Nation*, 717 N.Y.S.2d 417, 418 (App. Div. 2000) (affirming that tribal sovereign immunity barred tort suit arising outside the reservation); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. Ct. App. 1997) (finding Indian tribe immune from private tort suit arising under state dram shop law).

Circuit also apply tribal sovereign immunity to tort claims. *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes*, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999) (rejecting argument that tort claims are not barred by tribal sovereign immunity); *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 733-735 (E.D. Texas 1994) (applying tribal sovereign immunity to fraud claims arising off-reservation); *Morgan v. Coushatta Tribe of Indians of La.*, No. 1:00-CV-398, 2001 U.S. Dist. LEXIS 25291 (E.D. Tex., Sept. 21, 2001) (dismissing tort claim against tribe).

Mitchell incorrectly complains that the cases cited by the District Court do not support its ruling. The District Court properly relied on *Kiowa* and *Bay Mills*, which are dispositive here. In addition to those binding Supreme Court precedents, the District Court cited to a few of the many cases throughout the nation that have properly applied sovereign immunity to tort claims within and outside of reservation boundaries. Other than the singular, non-binding, and unpersuasive precedent of the Alabama Supreme Court in *Wilkes*, Mitchell offers no precedent, binding or otherwise, to support his claim. The District Court's ruling was correct. Hoopa has sovereign immunity from Mitchell's suit here.

C. <u>The Court Should Ignore and Reject Mitchell's Policy-Driven Argument.</u>

Mitchell argues that recognition of tribal immunity from off-reservation tort claims is bad public policy and will lead to dangerous consequences for non-Indians injured by Indian tribes' off-reservation torts. This argument fails for

many reasons. As the Supreme Court has repeatedly and recently recognized, it is the job of Congress to weigh the competing policy interests and to create exceptions to sovereign immunity if appropriate. *Bay Mills*, 572 U.S. at 800-804. Congress has in fact considered and, in some instances, legislated on the issue of tribal sovereign immunity from tort suits. *Id.* It is not this Court's job to make new exceptions to sovereign immunity based on Mitchell's policy arguments. *Id.* The relative dearth of case law evaluating tribal sovereign immunity from off-reservation torts indicates that off-reservation tort claims are relatively uncommon, which further undermines Mitchell's policy argument for a tort claim exception.

Mitchell's policy arguments against tribal sovereign immunity would equally apply to the well-settled immunity of other domestic sovereigns. For example, a person injured by a federal or state government employee acting in the course of their government employment may (like Mitchell here) have no idea that the government-employee tortfeasor is protected by sovereign immunity (at least in an official capacity). Nor would that injured person likely have any opportunity to negotiate a waiver of state or federal immunity in advance. While both Congress and the State of Texas have expressly waived their sovereign immunity for some (but not all) torts committed by some (but not all) of their government employees, that simply confirms the fact that sovereign immunity, as a matter of common law, generally prohibits tort suits against a sovereign absent waiver. *Hyatt*, 139 S.Ct. at

1493 (integral component of the States' sovereignty, pre-existing the Constitution, was immunity from private suits). Like federal and state sovereigns, Indian tribes have authority to and often do legislate waivers of their sovereign immunity from suit. *See, e.g., Lewis*, 137 S.Ct. at 1290 (explaining Mohegan Tribe enacted limited waiver of sovereign immunity from tort claims); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 720 (W.D. Mich. 2017) (discussing Indian tribe's partial waiver of sovereign immunity in Tribal Tort Claims Ordinance). Unlike state sovereigns, tribal immunity can also be limited or abrogated by Congress without tribal consent.

Mitchell argues that recognizing Hoopa's sovereign immunity from tort 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 . . . ." Appellant's Brief, p. 18, citing TEX. CONST. ART I, § 13. Mitchell fails to mention that the Texas Supreme Court has affirmed that "in Texas a governmental unit is immune from tort liability unless the Legislature has waived immunity." *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998); *see also Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) ("Sovereign immunity protects the State [of Texas] from lawsuits for money damages"). And while Texas, like the United States and some Indian tribes around the nation, has

affirmatively waived its sovereign immunity from some torts, the Texas Supreme Court has found the state's statutory waiver of immunity is not all-inclusive. *Bossley*, 968 S.W.2d at 342. Rather, it is intended as a limited waiver of the State of Texas's sovereign immunity that would typically prohibit all tort claims absent legislative waiver. *Id. See also State Dep't of Crim. Justice v. Miller*, 51 S.W. 583, 587 (Tex. 2001) (Texas Tort Claims Act is a limited waiver of sovereign immunity that allows suits only in certain, narrowly defined circumstances).

The Texas Supreme Court has also expressly rejected Mitchell's argument that the Texas Constitution guarantees a remedy against immune sovereigns such as the State of Texas (or here, Hoopa). *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 409-12 (Tex. 1997) (applying sovereign immunity from suit to contract claims against State of Texas does not violate Texas Constitution; holding that Article I, Section 13 of Texas Constitution (cited by Mitchell) does not supersede sovereign immunity; and explaining "the State's immunity to suit is, purely as a matter of sovereignty, impervious to due process concerns."). In these cases, the Texas Supreme Court recognized that it is the job of the Texas legislature, not the court, to craft exceptions to the sovereign immunity doctrine. *Federal Sign*, 951 S.W.2d at 409. The same is true here: Congress, not this Court (nor the Supreme Court) is charged with crafting any exceptions to tribal sovereign immunity.

This discussion of how sovereign immunity applies to Texas state government merely illustrates that Mitchell is very wrong when he argues that recognizing tribal sovereign immunity in this context "would violate every legal norm." Appellant's Brief, p. 18. Absent legislative waiver, Texas governmental units are immune from tort suits, immune from money damages, and Texas courts hold that such immunity does not run afoul of the Texas Constitution or the legal rights of Texas citizens. *Supra*, pp. 41-42.

The U.S. Supreme Court has also confirmed that Texas could not be subject to the tort suit of a private citizen in the courts of its own or other states absent its affirmative waiver. *Hyatt*, 139 S.Ct. at 1492. Nor could the States of Oklahoma, Louisiana, California, or any other state be sued in tort in Texas courts in the event that one of their governmental employees injured a Texas citizen while on government business, unless the Legislatures of those states affirmatively waived their immunity. *Id.* This is true even if the injured person had no idea at the time of the injury that the tortfeasor was a government employee. The tribal sovereign immunity affirmed by the District Court in this case is consistent with sovereign immunity recognized for all federal and state sovereigns. *TTEA*, 181 F.3d at 680 (suggesting that tribal sovereign immunity should apply in manner consistent with state sovereign immunity).

In *Hyatt*, the Supreme Court expressly overruled its prior decision in *Nevada v. Hall*, 440 U.S. 410 (1979). In *Hall*, an individual resident of California was injured in California in a vehicle accident that involved another vehicle driven by an employee of the University of Nevada. *Id.* at 411. The California resident brought a tort suit in California state court against the State of Nevada. *Id.* at 411-12. The Court in *Hall* allowed the suit to go forward, finding that California was not required to recognize or apply Nevada's sovereign immunity. *Id.* at 426-27. But now, given the Court's decision in *Hyatt*, which expressly overruled *Hall*, it is clear that if Mitchell was injured by an employee of the State of California (instead of Hoopa), Mitchell could not sue the State of California to recover for his injuries absent California's express waiver of its own sovereign immunity from suit.

Mitchell's argument would also lead to the anomaly that Hoopa could be sued by Texas and its citizens for any form of tort claim without its consent while Hoopa, at the same time, could not sue Texas in any court if Texas officials or employees harmed Hoopa or its members (unless Hoopa's claim fell expressly within the scope of the Texas Tort Claim Act). *Seminole Tribe v. Fla*., 517 U.S. 44 (1996) (barring Indian tribe's suit against State based on state's sovereign immunity); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (same). The District Court's recognition that Hoopa, as a sovereign government, is immune from tort suits, places Hoopa on a level playing field with all other

sovereigns who retain their common law immunity from suit (with the only difference being that Congress can limit tribal sovereign immunity).

Seeking to undermine the legal validity of tribal sovereign immunity, Mitchell argues that the doctrine of tribal sovereign immunity was judicially created by the Supreme Court "with little analysis" and arose "almost by accident." Appellant's Brief, p. 11. The Supreme Court did not create tribal sovereign immunity; rather, it has recognized that Indian tribes are domestic dependent sovereigns that "have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Martinez*, 436 U.S. at 58.

Tribal sovereign immunity is no "accident." "The doctrine of tribal sovereign immunity has been part of American jurisprudence for well over a century." *Bay Mills*, 572 U.S. at 804 (Sotomayor, J., concurring), *citing Parks v. Ross*, 52 U.S. 362 (1851). In 1895, in *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373-76 (8th Cir. 1895), the Eighth Circuit dismissed a suit seeking recovery of attorney fees against an Indian tribe based on the "well-established" principle that a sovereign nation cannot be sued without its consent. "It has been the settled policy of congress not to sanction suits generally against these Indian nations, or subject them to suits upon contracts *or other causes of action* at the instance of private parties." *Id.* at 376 (emphasis added). In *Adams v. Murphy*, 165 F. 304 (8th

Cir. 1908), the Court again explained that tribal immunity bars suits and that this exemption of Indian tribes from suit "has been the settled doctrine of the government *from the beginning*." *Id.* at 308-09 (emphasis added). In *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (*USF&G*), the Supreme Court favorably cited these Eighth Circuit cases, holding that Indian tribes were immune from lawsuits absent Congressional authorization. *Id.* at 512, n. 11. Sovereign immunity from suit is a fundamental attribute of Indian tribal sovereignty that has been recognized by the United States, its courts, and Congress "from the beginning." *Adams*, 165 F. at 308. Absent Congressional approval (or express tribal waiver), there are no exceptions to the doctrine that Indian tribes are immune from suit. *Bay Mills*, 572 U.S. at 798.

All sovereign immunity, including that of the federal government, states, and tribes has common law roots. State sovereign immunity, like tribal immunity, arises from the common law – not from the Eleventh Amendment to the Constitution, which confirms it. *Hyatt*, 139 S.Ct. at 1493. The immunity of the federal government from suit also arises from the common law. *See Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821) (stating that the sovereign immunity of the United States is a "universally received opinion"); *United States v. Lee*, 106 U.S. 196, 207 (1882) (noting that the principle of federal sovereign immunity "has never been discussed or the reasons for it given, but it has always been treated as

an established doctrine"). By the late 1700's, sovereign immunity was seen as "inherent in the nature of sovereignty." THE FEDERALIST NO. 81, at 446 (Alexander Hamilton). The common law underpinning of sovereign immunity does not undermine the doctrine's validity nor does it give this or any other Court license to judicially carve out exceptions. *Kiowa*, 523 U.S. at 758-760.

The Supreme Court has repeatedly affirmed tribal sovereign immunity from suit despite the fact it would leave persons, including States, without a remedy against tribes. That is the nature of sovereign immunity. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509-10 (1991), the Supreme Court unanimously affirmed dismissal, on sovereign immunity grounds, of the State of Oklahoma's claim to collect certain cigarette taxes from the Tribe. While the Supreme Court found that the State, as a legal matter, could impose its tax on the Tribe's sales of cigarettes to non-Indians, sovereign immunity prevented the State from suing the Tribe to collect such taxes. *Id.* at 514. Although this provided the State a legal right without an effective remedy, that was the result of sovereign immunity. *Id.* All the Supreme Court's tribal sovereign immunity jurisprudence necessarily involves situations where a claimant is seeking some form of relief, typically under state law. Yet, without exception, the Supreme Court has affirmed that Indian tribes are immune from suit absent Congressional authorization or waiver. *Bay Mills*, 572 U.S. at 788-791. This case is no different.

Congress has not authorized the suit and Hoopa has not waived its immunity. Thus, the District Court properly dismissed the suit.

D. Congress Is the Appropriate Body to Develop and Enact Waivers or Exceptions to Tribal Sovereign Immunity: It Has Considered But Rejected Authorization of Tort Claims Against Indian Tribes.

The Supreme Court has repeatedly declined to carve exceptions to the doctrine of tribal sovereign immunity and has deferred to Congress as the proper body to weigh the competing public policy interests and craft any necessary exceptions to the doctrine. *Bay Mills*, 572 U.S. at 798-804. Congress has in certain circumstances limited tribal immunity while in other statutes affirmatively declared an intention not to alter the doctrine. *Id.* at 801. For example, the Indian Self-Determination and Educational Assistance Act of 1975, Pub. L. No. 93-638, §103(c), 88 Stat. 2203, 2207 originally required Indian tribes to obtain liability insurance and required insurance carriers to waive the defense of tribal sovereign immunity in suits related to certain contracts between the United States and the tribe. Congress later amended this requirement, mandating the Secretary of the Interior to acquire insurance to cover certain tort claims against Indian tribes. Indian Self-Determination and Educational Assistance Act Amendments of 1988, Pub. L. No. 100-472, §201(a), 102 Stat. 2285, 2289. Congress also extended coverage of the FTCA to cover certain tort claims arising under a self-

determination contract or self-governance compact with an Indian tribe. *Colbert v. United States*, 785 F.3d 1384, 1390 (11th Cir. 2015); 25 C.F.R. § 900.197.

Following *Kiowa*, Congress again considered legislation to modify tribal immunity, including immunity from tort claims. *Bay Mills*, 572 U.S. at 801-802. Congress considered bills directly addressing tribal immunity from tort claims such as the American Indian Tort Liability Insurance Act, S. 2302, 105th Cong. (1998), which would have waived tribal sovereign immunity from tort actions in federal courts, and the American Indian Equal Justice Act, S. 1691, 105th Cong. (1998), which would have waived tribal sovereign immunity from certain tort claims in state and federal courts. Neither bill passed. Instead, Congress passed the Indian Tribal Economic Development and Contract Encouragement Act, § 2, 114 Stat. 46 (codified at 25 U.S.C. § 81(d)(2)), which more narrowly mandates that certain contracts with Indian tribes requiring federal approval either disclose or waive immunity. *Bay Mills*, 572 U.S. at 802.

In *Bay Mills*, the court not only recognized that Congress is the proper authority to develop any exceptions to tribal sovereign immunity but also found it important that Congress has affirmatively considered the issue and has opted, in general, to not waive tribal immunity from suit. *Id.* at 802-803. That Congress had affirmatively considered the issue, both before and after *Kiowa*, left the Court even more convinced that it would be improper for the Court to judicially craft

exceptions to immunity. *Id.* This holds true in the tort context. While Congress has expressly considered and passed legislation addressing tribal immunity from tort claims, it has not generally authorized private tort claim suits against Indian tribes. Mitchell asks this Court to ignore Supreme Court precedent and to ignore Congress' policy determinations to make its own policy-based exception to tribal sovereign immunity that allows his suit. The Court should affirm the correct decision of the District Court that Hoopa is immune from Mitchell's suit.

Mitchell continues his policy-driven argument by contending that the policies underlying tribal sovereign immunity do not support immunity from his suit. Citing a non-binding decision of the Arizona Supreme Court, Mitchell argues that "tribal immunity should only apply when doing so furthers the federal policies behind the immunity doctrine." Appellant's Brief, p. 24. The argument is wrong. The applicable law is that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa*, 523 U.S. at 754. The Supreme Court has expressly refused to weigh policy in cases involving tribal sovereign immunity and has steadfastly applied the doctrine and deferred to Congress to make any changes or exceptions. *Bay Mills*, 572 U.S. at 803-804.

Mitchell is also wrong that federal policy would not be furthered by applying Hoopa's immunity here. More than 100 years of federal jurisprudence has affirmed that Indian tribes retain immunity from suit. Congress has never

generally authorized tort suits against Indian tribes despite affirmatively considering the merits of such an exception. Tribal sovereign immunity is federal policy - as repeatedly affirmed and applied by the Supreme Court and Congress. *Bay Mills*, 572 U.S. at 788-791, 797-814.

If this Court were to make new law, inconsistent with Supreme Court precedent and Congressional directives, that Indian tribes lack sovereign immunity from off-reservation tort claims, that would not only affect Hoopa but would affect (at minimum) all Indian tribes that conduct governmental or commercial activities within the Fifth Circuit and would increase the prevalence of arguments for judicial exceptions to immunity nation-wide. The principle of protecting tribal assets is clearly implicated by a ruling that allows private tort suits against Indian tribes. Some tribes may lack insurance and could be effectively bankrupted by tort claims seeking millions of dollars as Mitchell does here. Some Indian tribes, like Hoopa, have insurance policies with large self-insured retentions. Insurance costs would undoubtedly go up if Indian tribes were found generally subject to tort suits.

Federal policies supporting tribal self-determination and commercial interaction with Indian tribes would also be undermined if this Court created an exception to tribal sovereign immunity for private tort claims. Congressional policy focuses on tribal self-determination and economic self-sufficiency. *Bay Mills*, 572 U.S. at 805-814 (Sotomayor, J., concurring). Indian tribes, who have

very limited taxing powers at their disposal, rely on commercial activities to fund their governmental and social service operations. *Id.* If Indian tribes were exposed to multi-million-dollar tort claims, the federal policy of tribal self-determination and economic self-sufficiency would be gravely threatened. These policy issues are not for this Court to address or resolve. Congress has already addressed and resolved them in Hoopa's favor. This Court is bound to honor Congress's determination, as well as binding Supreme Court precedent, and affirm the District Court's ruling that Hoopa is immune from Mitchell's suit here.

IV. Hoopa Did Not Waive Its Immunity From Mitchell's Suit.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Martinez*, 436 U.S. at 58. As with other sovereigns, it is well settled that an Indian tribe's voluntary waiver of its sovereign immunity from suit cannot be implied but must be unequivocally expressed. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016). "That expression must also manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms." *Id. See also Charles v. McHugh*, 613 Fed. Appx. 330, 332-333, 335 (5th Cir. 2015) (waiver of federal government's sovereign immunity must be "unequivocally expressed"); *Martinez v. Tex. Dep't of Crim. Justice*, 300 F.3d 567, 575 (5th Cir. 2002) (a State's waiver of sovereign immunity must be "unequivocally expressed"). A strong

presumption exists against waiver of tribal sovereign immunity. *Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). The party asserting waiver of immunity has the burden of proof. *Elliott*, 870 F. Supp. at 735; *Morgan v. Coushatta Tribe of Indians of La*., Case No. 1:00-CV-398, 2001 U.S. Dist. LEXIS 25291 (E.D. Tex., Sept. 21, 2001), at *7-8.

Mitchell's sole argument regarding waiver is that Hoopa expressly waived its sovereign immunity from suit, as a matter of law, through Hoopa's contract with the Corporation for National & Community Service (CNCS). Mitchell's argument is unsupported by legal authority and is flawed for numerous reasons. First, the CNCS contract does not contain any language expressly waiving Hoopa's sovereign immunity from suit and Mitchell does not argue otherwise. Second, the contract contains no relevant provisions regarding dispute resolution, jurisdiction, forum selection, or anything similar to the contract at issue in *C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411 (2001) (*C&L*), which is the only case Mitchell relies upon in his waiver argument. Third, unlike the plaintiff in *C&L*, Mitchell is not a party to Hoopa's contract with CNCS. Fourth, the contract's references to liability insurance (to the extent they even require Hoopa to maintain liability insurance, which is debatable) do not evidence any intent by Hoopa to waive its sovereign immunity from Mitchell's suit. Fifth, Mitchell cites no legal authority in support of his argument that an agreement to

obtain insurance equates, as a matter of law, to an express waiver of sovereign immunity and the cases that have addressed that issue directly contradict Mitchell's argument. Finally, Mitchell's policy arguments, in addition to being erroneous, are no basis to imply a waiver of Hoopa's immunity. The District Court correctly found that Hoopa did not waive its sovereign immunity from Mitchell's suit.

Mitchell's waiver argument relies on Hoopa's contract with CNCS. ROA.712-730. There is no language in the CNCS contract that expressly waives (or that even mentions) Hoopa's sovereign immunity. As legal support, Mitchell relies solely on *C&L*. In *C&L*, although the contract did not explicitly reference sovereign immunity, the Supreme Court found that an Indian tribe had clearly expressed its intent to waive its sovereign immunity from the plaintiff's suit by entering a contract that: (1) required resolution of all contract-related disputes between the contracting parties by binding arbitration; (2) provided that ensuing arbitral awards may be reduced to judgment in any court with jurisdiction; and (3) affirmatively selected Oklahoma state law as governing. 532 U.S. at 414-422. Oklahoma state law conferred jurisdiction on state courts to enforce arbitration agreements and enter judgment on any arbitration awards entered thereunder. *Id.* at 419-420. In *C&L*, the Tribe had unambiguously agreed "to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law" – specifically

Oklahoma state court. *Id.* at 420. The contract "specifically authorize[d] judicial enforcement of the resolution arrived at through arbitration." *Id.* at 422.

There is no resemblance whatsoever between the contract at issue in *C&L* and Hoopa's contract with CNCS that Mitchell relies on here. The CNCS contract contains no dispute resolution provision, no arbitration provisions, and no consent to any suit or any jurisdiction in any forum. *See Bank One, N.A. v. Shumake*, 281 F.3d 507, 515 (5th Cir. 2002) (stating that the Court in *C&L* held that when a tribe consents to dispute resolution by arbitration, it waives its sovereign immunity; but declining to extend *C&L* to different facts). *C&L* does not support Mitchell's argument that boilerplate contract provisions regarding maintenance of liability insurance constitute an express and unambiguous waiver of Hoopa's sovereign immunity from Mitchell's suit here.

C&L is also not relevant here because, unlike *C&L*, Mitchell is not a party to the CNCS contract. Waivers of immunity contained in contracts can only be invoked by the contracting parties. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998) ("[I]n cases in which implied waiver [of sovereign immunity] based upon a contract has been found, the contract was between the parties suing and being sued"). The District Court rejected Mitchell's argument that he is a third-party beneficiary of the CNCS contract (ROA.1209) and Mitchell does not challenge that ruling on appeal. *See also McVay v. Allied World Assur. Co.*, 16 F.

Supp. 3d 1202, 1207-08 (D. Nev. 2014) (rejecting tort plaintiff's argument that she was intended beneficiary of federal laws requiring tribes to have liability insurance), *aff'd,* 650 Fed. Appx. 436 (9th Cir. 2016).

Even if the CNCS contract contained any waiver of Hoopa's sovereign immunity from suit (which it does not), any such waiver must be strictly and narrowly construed. *Sossaman v. Texas*, 563 U.S. 277, 285 (2011); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1009-10 (10th Cir. 2015). Thus Mitchell, as a non-party to the contract, could not invoke it to bring his tort claims against Hoopa. *See Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1152-53 (10th Cir. 2011) (dismissing employment discrimination claim against Indian tribe and finding that contractual agreement to comply with Title VII did not constitute express waiver of sovereign immunity); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1044, n.2 (8th Cir. 2000) ("Nor did the College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964"); *Sheffer*, 315 P.3d at 371 (holding tribe did not waive its sovereign immunity by applying for and accepting a liquor license – requiring the tribe to agree not to violate federal, state, or municipal law – because by doing so the tribe merely promised to comply with those laws, not to subject itself to lawsuits).

Mitchell argues that the CNCS contract's references to liability insurance establish waiver. Mitchell relies on Article VIII of the contract (ROA.720), which identifies allowable and reimbursable costs that the Program (Hoopa TCCC) may include in a deployment budget. Article VIII identifies insurance as an allowable reimbursable cost but does not explicitly mandate that Hoopa obtain liability insurance. ROA.719-720. Mitchell also cites Article IX, which states the Program (Hoopa TCCC) "must have adequate safety training programs and liability insurance coverage (and/or Workers' Compensation) for the organization and for individuals engaged in activities under the Grant to engage in disaster relief activities." ROA.723. Article IX does not explicitly require liability insurance; rather, it allows for the alternative of workers compensation. ROA.723. Even if the CNCS contract did require Hoopa to maintain liability insurance, such contract terms are nothing like the dispute resolution and jurisdiction terms that were found to constitute an express waiver of immunity from suit in *C&L.*

Mitchell argues that the liability insurance terms indicate that CNCS intended for Hoopa to be subject to suit. But CNCS, as a federal agency, is well aware that Hoopa, as a federally-recognized Indian tribe, has sovereign immunity from suit. If CNCS wanted Hoopa to waive its sovereign immunity and be subject to suit, it could have negotiated for such a provision in the contract. There is no evidence in the record that the issue of sovereign immunity was addressed or

discussed at all. Nor has CNCS suggested that Hoopa has acted improperly, or in violation of the agreement, by asserting its sovereign immunity here. In any event, Mitchell wholly fails to show that *Hoopa* clearly intended to expressly waive its sovereign immunity from suit through the liability insurance provisions. *Bodi*, 832 F.3d at 1016. As the District Court correctly noted, from Hoopa's perspective, the liability insurance provisions were in place to protect its own financial interests especially if its sovereign immunity was subsequently ignored or abrogated. ROA.1218.

Mitchell provides no legal authority whatsoever for his argument that an Indian tribe's contractual agreement to obtain liability insurance constitutes an express waiver of tribal sovereign immunity as a matter of law. In contrast, every case to address the issue holds that an Indian tribe's procurement of liability insurance does not waive tribal sovereign immunity. *Atkinson v. Haldane*, 569 P.2d 151, 169-170 (Alaska 1977) (rejecting claim that tribe's purchase of liability insurance constituted waiver of the tribe's immunity); *Seminole Tribe v. McCor*, 903 So.2d 353, 359 (Fla. Dist. Ct. App. 2005) (purchase of insurance by Indian tribe not sufficient to demonstrate a clear waiver of tribe's sovereign immunity); *White Mountain Apache Tribe v. Industrial Comm'n of Ariz.*, 696 P.2d 223, 228-229 (Ariz. Ct. App. 1985) (a tribe's purchase of workers' compensation insurance does not constitute an express waiver of sovereign immunity from a worker's

compensation action); *Graves v. White Mountain Apache Tribe*, 570 P.2d 803, 805 (Ariz. Ct. App. 1977) (purchase of liability insurance by Indian tribe did not waive the tribe's governmental immunity); *Wilhite v. Awe Kualawaache Care Ctr.*, No. 18-cv-80-BLG, 2018 U.S. Dist. LEXIS 180905, at **6-7 (D. Mont., Oct. 22, 2018) (rejecting argument that Indian tribes waive their sovereign immunity by purchasing insurance); *Wilson v. Umpqua Indian Dev. Corp.*, No. 6:17-cv-00123-AA, 2017 U.S. Dist. LEXIS 101808, at *13-14 (D. Or. June 29, 2017) (a provision requiring the tribe to obtain liability insurance "falls short of the high bar to show waiver of sovereign immunity").

Mitchell argues that the District Court improperly relied on liability insurance cases that addressed on-reservation tort claims. But Mitchell offers no rationale as to why (in his view) purchase of liability insurance should be found to waive sovereign immunity as a matter of law only for off-reservation torts, but not for on-reservation torts. Nor does Mitchell offer any authority whatsoever for his contention that a contract's reference to liability insurance constitutes an express waiver of tribal sovereign immunity from suit as a matter of law.

Congress does not believe that procurement of liability insurance acts as a waiver of tribal sovereign immunity. For example, in the Indian Self-Determination and Educational Assistance Act of 1975, Pub. L. No. 93-638, §103(c), 88 Stat. 2203, 2207, 93rd Cong. (1975). Congress required Indian tribes to

obtain liability insurance when implementing contracts authorized under that Act, but expressly required insurance carriers to waive the right to assert a tribal sovereign immunity defense in covered suits arising under those contracts. *See also* Pub. L. No. 100-472, § 201(c)(3)(A) (1988) (requiring insurers to waive right to assert tribe's sovereign immunity in certain instances). That latter provision (regarding assertions of sovereign immunity) would have been wholly unnecessary if Congress intended the mere presence of liability insurance to waive tribal sovereign immunity from suit.

In the context of state governments, courts have held that (unless a state statute dictates otherwise) sovereign immunity is not waived by a state government's purchase of insurance. That is, absent a contrary state statute, the procurement of liability insurance by a state government does not by itself constitute a waiver of the state government's sovereign immunity from suit. *Karpovs v. Mississippi*, 663 F.2d 640, 646 (5th Cir. 1981) (finding state purchase of fidelity bonds did not waive state's sovereign immunity and that "the majority of jurisdictions have held that procurement of insurance by a governmental unit to protect it from tort liability does not effect a waiver of immunity"); *Reeves v. City of Jackson*, 608 F.2d 644, 654, n. 6 (5th Cir. 1979) (under Mississippi law, a state municipality did not waive its immunity by purchasing liability insurance); *Wood v. N.C. State. Univ.*, 556 S.E. 2d. 38, 43 (N.C. App. 2001) (purchase of liability

insurance does not waive state sovereign immunity beyond statutory waiver established in state's tort claim act); *Bartley v. Sp. Sch. Dist. of St. Louis Cty.*, 649 S.W.2d 864 (Mo. 1983) (school district did not waive its sovereign immunity by reason of maintaining liability insurance on the claims alleged); *Thompson v. Druid City Hosp. Bd.*, 184 So. 2d 825, 826 (Ala. 1966) (quoting 68 A.L.R.2d 1437 (1959) ("[A] governmental unit's immunity from tort liability is unaffected by its procurement of insurance which purports to protect it from such liability.")).

Some states have enacted statutes that waive sovereign immunity for some tort claims to the extent and limits of liability insurance. Congress could do the same with respect to Indian tribes and effectively did (for some claims) in the context of insurance procured by the Secretary of Interior to cover implementation of self-determination contracts with Indian tribes. Pub. L. No. 100-472, § 201(c)(3)(A) (1988). Congress has considered, and in some cases legislated on, issues of tribal liability insurance and tort claims, but it has not enacted any law that generally waives tribal sovereign immunity based on an Indian tribe's purchase of (or agreement to purchase) liability insurance. Absent action by Congress, the procurement of (or agreement to procure) liability insurance by an Indian tribe does not constitute a waiver of the tribe's immunity from suit.

Mitchell raises a number of policy arguments in support of his argument that this Court should imply a waiver of sovereign immunity from the contractual

liability insurance provisions. It would be inappropriate for this Court to do so. *Ute Distribution Corp v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.* Much of Mitchell's argument again focuses on the fact that the claims here arise off-reservation. The Supreme Court has affirmatively rejected similar arguments, holding that sovereign immunity applies both within and outside reservation boundaries. That is no less true here.

Conclusion

This Court should affirm the District Court's judgment dismissing Mitchell's complaint in its entirety. The District Court lacked subject matter jurisdiction. Also, Hoopa has sovereign immunity from Mitchell's damages suit.

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Certificate of Service

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