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

v.

Hoopa Valley Tribe, Doing Business As AmeriCorps Hoopa Tribal Civilian Community Corps,
Defendant – Appellee – Cross Appellant

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

Reply and Response Brief of Appellant – Cross Appellee Matthew Mitchell

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Argument

I. The District Court Had Diversity Jurisdiction of Mitchell's Tort Claims against Bailey under 28 U.S.C. § 1332.

Contrary to the Hoopa Valley Tribe's suggestion, Matthew Mitchell ("Mitchell") is not abandoning his reliance on the district court's diversity and supplemental jurisdiction. *See* Tribe Br. at 1. Mitchell, a Texas citizen, continues to maintain that pursuant to 28 U.S.C. § 1332, the district court had diversity jurisdiction of Mitchell's tort claims against California citizen Orico Bailey ("Bailey"). ROA.13.

In his application to become a member of the AmeriCorps Hoopa Tribal Civilian Community Corps ("Hoopa Tribal CCC"), Bailey represented that he was born in California and that he resided in California. ROA.240-243. Bailey is a citizen of the United States and of California, where he resides. *See* U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 n.10 (1987) (stating Indians are citizens of the state where they reside). Bailey was served with citation at his residence in California. ROA.42-43. Pursuant to 28 U.S.C. § 1332(a)(1), the district court had diversity jurisdiction of Mitchell's tort claims against Bailey.

II. The District Court Had Supplemental Jurisdiction of Mitchell's Claims against the Hoopa Valley Tribe under 28 U.S.C. §1367.

Mitchell relied on the district court's supplemental jurisdiction under 28 U.S.C. § 1367 to join the Hoopa Valley Tribe ("the Tribe") as a defendant—*not* diversity jurisdiction. ROA.13. Seeking to sidestep this important and crucial factual distinction, the Tribe cites numerous inapposite cases that hold Indian tribes are "stateless" entities and, due to their being stateless, cannot rely on diversity jurisdiction to bring suit in federal court as plaintiffs.[1] The Tribe also cites several inapposite cases holding a plaintiff cannot rely on diversity jurisdiction alone if a Tribe is joined as a defendant and jurisdiction is predicated solely on diversity.[2] The Tribe also cites several inapposite cases for the proposition that States and agencies of the federal government are not considered to be "citizens of states" for purposes of diversity jurisdiction and thus there cannot be diversity jurisdiction when States or agencies of the federal government bring suits as plaintiffs[3] or are joined as defendants and jurisdiction is predicated solely on diversity.[4]

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[1] *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co,* 607 F.3d 1268 (11th Cir. 2010); *Oglala Sioux Tribe v. C&W Enters., Inc.,* 487 F.3d 1129 (8th Cir. 2007); and *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21 (1st. Cir. 2000).

[2] *Frazier v. Brophy,* 358 F. Appx. 212 (2d Cir. 2009); *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation,* 495 F.3d 1017 (8th Cir. 2007); *Am. Vantage Cos., Inc. v. Table Mountain Rancheria,* 292 F.3d 1091 (9th Cir. 2002); *Gaines v. Ski Apache,* 8 F.3d 726 (10th Cir. 1993); *Payne v. Miss. Band of Choctaw Indians,* 159 F. Supp. 3d 724 (S.D. Miss. 2015); and *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe,* 966 F. Supp. 2d 876 (D. Ariz. 2013).

[3] *Miss. ex rel. Hood v. AU Optronics Corp.,* 571 U.S. 161 (2014); *Louisiana v. Union Oil Co.,* 458 F.3d 364 (5th Cir. 2006) (both appeals involved unsuccessful removals of cases to federal court where states were plaintiffs)

[4] *Frey v. EPA,* 270 F.3d 1129 (7th Cir. 2001) (Environmental Protection Agency as defendant); *General Ry. Signal Co. v. Corcoran,* 921 F.2d 700 (7th Cir. 1991) (U.S. Small Business Administration as defendant)

The Tribe fails to cite a single case that involves the factual scenario present in this case: Mitchell relied on supplemental jurisdiction under 28 U.S.C. § 1367--*not* diversity jurisdiction--to join the Tribe as a defendant. In cases like this one, where a federal court has diversity jurisdiction of claims by a plaintiff (Mitchell) against a defendant (Bailey), the district court is authorized by 28 U.S. C. § 1367 to exercise *supplemental jurisdiction* over claims against other defendants (the Tribe) in the same Article III case or controversy, even if those other claims themselves would not meet the requirements for diversity jurisdiction--provided the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. 267 (1806) is met and no plaintiff is a citizen of the same state as a defendant. *See Exxon Mobil Corp. v. Allapattah Servs,* 545 U.S. 546 (2005); *Free v. Abbott Labs,* 51 F.3d 524 (5th Cir. 1995), *aff'd per curiam by an equally divided court sub nom.,* 545 U.S. 333 (2000); *Rosmer v. Pfizer, Inc.,* 263 F.3d 110 (4th Cir. 2001); *Stromberg Metal Works v. Press Mechanical,* 77 F.3d 928 (7th Cir. 1996).

Supplemental jurisdiction was available in the district court to join the Tribe as a defendant because neither the Tribe nor any member of the Tribe is a citizen of Texas and thus the complete diversity requirement of *Strawbridge v. Curtiss* was not violated. The Hoopa Valley Tribe's reservation is located in northern California and all of the Tribe's members are citizens of California. *See* U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401; *Iowa Mut. Ins. Co.* v. LaPlante, 480 U.S. 9, 18 n.10 (1987)

(stating Indians are citizens of the state where they reside). Mitchell properly invoked the district court's supplemental jurisdiction under 28 U.S.C. § 1367 to join the Tribe as a defendant because it is not a citizen of Texas.

The district court properly exercised supplemental jurisdiction over Mitchell's tort claims against the Tribe pursuant to 28 U.S.C. § 1367 because the remaining requirements of section 1367 were met. Mitchell's claims against the Tribe are so related to the tort claims he asserted against Bailey that they form part of the same case or controversy under Article III of the Unites States Constitution. Additionally, Mitchell's tort claims against the Tribe did not predominate over his tort claims against Bailey.

The Tribe's citation of *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365 (1978) ("*Owen*") and *Moor v. County of Alameda,* 411 U.S. 693 (1973) ("Moor") in support of its challenge to the district court's exercise of supplemental jurisdiction is misplaced. *Owen* and *Moor* were decided twelve and seventeen years, respectively, ***before*** Congress enacted 28 U.S.C. § 1367. Statutory supplemental jurisdiction did not exist at the time *Owen* and *Moor* were decided. Several of the statements set forth in these two opinions concerning the scope of federal supplemental jurisdiction ceased to be good law and were abrogated when 28 U.S.C. § 1367 went into effect on December 1, 1990.

One example of a statement that was abrogated is the following rhetorical

question posed by the Supreme Court in *Owen:*

> In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim?

Owen, 437 U.S. at 367. Since 28 U.S.C. § 1367 had not yet been enacted, the Court answered this rhetorical question in the negative. Following the enactment of section 1367, the answer to *Owen*'s rhetorical question now is in the affirmative because when it enacted section 1367, Congress expressly provided an independent basis for federal supplemental jurisdiction over a third party claim--provided the prerequisites of section 1367 are met and provided the third-party defendant is not a citizen of the same state as the plaintiff so as to violate *Strawbridge v. Curtiss.* It must be pointed out that while the aforementioned rhetorical question posed by the Court in *Owen* would be answered in the affirmative today; the end result reached in *Owen* would be the same today because the plaintiff and the third-party defendant in *Owen* were both citizens of Iowa.

The Tribe has failed to cite a single case that precludes the district court's exercise of section 1367 supplemental jurisdiction over Mitchell's tort claims against the Tribe. The Tribe's citation of *Energy Mgmt. Servs. LLC v. City of Alexandria,* 739 F.3d 255 (5th Cir. 2014) ("*Alexandria*") and *Halmekangas v. State Farm Fire & Cas. Co.,* 603 F.3d 290 (5th Cir. 2010) ("*Halmekangas*") is misplaced.

Despite the clear lack of diversity between the plaintiff accounting firm and the defendant city and in *Alexandria,* and despite the clear lack of federal question jurisdiction; the city removed the accounting firm's state law claims to federal court based solely on the city's assertion of section 1367 supplemental jurisdiction. In holding the city's removal was improper, this Court explained the obvious-- section 1367 grants supplemental jurisdiction over state claims, not original jurisdiction. There must be an underlying claim over which the district court has either diversity or federal question jurisdiction to provide the requisite jurisdictional hook for removal. *Alexandria,* 739 F.3d at 259.

The Tribe ignores the fact that the district court had diversity jurisdiction of Mitchell's tort claim against Bailey, which was the "jurisdictional hook" that allowed the district court to exercise supplemental jurisdiction over Mitchell's claims against the Tribe.

Halmekangas was similar to *Alexandria*--the defendants impermissibly removed the plaintiff's state law tort and contract claims to federal court and relied solely on the naked assertion of section 1367 supplemental jurisdiction for federal jurisdiction.

III. The District Court Had Federal Question Jurisdiction Pursuant to 28 U.S.C. §§ 2679 and 1331.

In their initial pleadings, defendants alleged they were acting as deemed employees of the United States and they sought to have the United States substituted

as defendant in their stead pursuant to the Westfall Act, 28 U.S.C. § 2679. ROA.44-48, 72-76. When defendants filed their motion/petition for substitution of United States as defendant and for certification of federal employment, they named the United States of America as Respondent; they requested service of process on the United States; and they expressly invoked the district court's federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2679(d)(3). ROA.893-907. The United States appeared as third-party defendant and opposed defendants' motion/petition for substitution of United States as defendant and for certification of federal employment. ROA.1183-1186, 1291-1326. Under this set of facts, the district court unquestionably had federal question jurisdiction of the entire case pursuant to 28 U.S.C. §§ 2679 and 1331. *See, Osborn v. Haley,* 549 U.S. 225 (2007) ("Osborn"); *Gutierrez De Martinez v. Lamagno,* 515 U.S. 417 (1995) ("*Lamagno"*).

In *Lamagno,* the Supreme Court expressly held requests for Westfall Act relief under 28 U.S.C. § 2679(d)(3) clothe federal courts with federal question jurisdiction under 28 U.S.C. § 1331.

> The certification, removal, and substitution provisions of the Westfall Act, 28 U.S.C. §§ 2679 (d) (1)-(3), work together to assure that when scope of employment is in controversy, that matter, key to the application of the FTCA, may be resolved in federal court. To that end, the Act specifically allows employees whose certification requests have been denied by the Attorney General, to contest the denial in court. § 2679(d)(3). If the action was initiated by the tort plaintiff in state court, the Attorney General, on the defendant-employee's petition, is to enter the case and may remove it to the federal court so that the scope [of employment] determination can be made in the federal forum.

Lamagno, 515 U.S. at 430-431.

In *Osborn* the Court revisited the issue of a federal court's subject matter jurisdiction over cases in which a defendant has requested Westfall Act relief. The Court was faced with the question whether the district court's federal subject matter jurisdiction extends over the plaintiff's state-law claims or solely over the defendant's request for Westfall Act relief. This question is important in a situation where it ultimately is determined that a defendant is not entitled to the requested Westfall Act relief, the sole remaining claims are state-law claims, and there is no diversity jurisdiction.

The Court held that a case in which a defendant requests Westfall Act relief raises a question of substantive federal law at the very outset and the entire case is deemed to arise under federal law as that term is used in Article III of the U.S. Constitution. For that reason, the Court held the district court has federal subject matter jurisdiction to decide the plaintiff's state-law claims. *Osborn,* 549 U.S. at 244-245.

Yet the Tribe asserts the district court lacked any basis for federal subject matter jurisdiction of this case. Tribe Br. At 7, 21. This assertion makes no sense in light of the following facts: the defendants expressly invoked the district court's federal subject matter jurisdiction under 28 U.S.C. §§ 2679(d)(3) and 1331; the defendants filed a third party claim against the United States; and the United States

appeared in this case and opposed defendants' motion/petition for substitution of United States as defendant and for certification of federal employment. The Tribe's assertion about a lack of federal subject matter jurisdiction flies in the face of the Supreme Court's decisions in *Lamagno* and *Osborne*.

Ignoring *Lamagno* and *Osborne*; the Tribe erroneously contends a federal district court cannot have federal question jurisdiction of a case *unless* federal question jurisdiction appears "on the face of a well-pleaded complaint." *See* Tribe Br. at 17. The Tribe undertakes to support its contention by citing several Supreme Court decisions whose pronouncements about the well-pleaded complaint rule have been abrogated by statute.

For example, the Tribe cites the Supreme Court's 1908 decision in *Louisville & National R.R. Co. v. Mottley,* 211 U.S. 149 (1908) ("*Mottley"*) in support of its plea for rigorous application of the "well-pleaded complaint rule." The Tribe fails to note that *Mottley* was decided long before the Westfall Act was enacted. The Westfall Act expressly provides for federal subject matter jurisdiction when a defendant requests relief under the Act—regardless whether federal claims have been asserted in the complaint. *See* 28 U.S.C. § 2679.

Mottley's holding that federal question jurisdiction must appear on the face of the plaintiff's complaint, unaided by the defendant's answer, also was abrogated by Congress' enactment of the Employee Retirement Income Security Act of 1974, 29

U.S.C. §§ 1001, *et seq*. *See, e.g., Ingersoll-Rand Co. v. McClendon,* 498 U.S. 122 (1990) (holding ERISA pre-empted the plaintiff's state common law wrongful termination claims and that federal question jurisdiction existed despite the plaintiff's failure to assert any federal causes of action in his complaint); *Romney v. Lin,* 105 F.3d 806 (2nd Cir. 1996) (holding federal question jurisdiction is not dependent on the well-pleaded complaint rule and that the court had federal question jurisdiction based on the defendant's answer).

The Tribe's citation of *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983) likewise is misplaced. A mere four years after it decided *Franchise Tax*, the Supreme Court found itself in the position of having to sidestep that case's pronouncements concerning the well-pleaded complaint rule. *See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987) (expressly holding that *Franchise Tax*'s pronouncements concerning the "well-pleaded complaint rule" are not absolute—they merely are guidelines and those guidelines are subject to statutory exceptions such as ERISA).

The Tribe has cited *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.,* 535 U.S. 826 (2002) for the proposition that "[n]either the presence of a federal defense or a federal counterclaim is sufficient to establish federal question jurisdiction." The holding for which the Tribe has cited *Holmes* was abrogated by the Leahy-Smith America Invents Act, PL 112-29, 125 Stat 284 (2011) ("America

Invents Act"), which expressly provides that counterclaims arising under federal patent law can provide the district court with federal question jurisdiction of the case regardless whether the plaintiff's complaint is sufficient to establish federal question jurisdiction. *See, e.g., Microsoft Corp. v. GeoTag, Inc.,* 817 F.3d 1305 (Fed. Cir. 2016) (holding that the federal court had subject matter jurisdiction of the plaintiff's cause of action pursuant to 28 U.S.C. § 1338(a) *even* if *the plaintiff's complaint did not establish subject matter jurisdiction* because the defendant's counterclaim alleged infringement of its patent).

Another case underscoring the fallacy of the Tribe's reliance on the well-pleaded complaint rule is *Cahnmann v. Sprint Corp.,* 133 F.3d 484 (7th Cir. 1998) ("*Cahnmann*") (expressly rejected Sprint's argument that federal subject matter jurisdiction exists only when the plaintiff's complaint alleges claims arising under federal law—unaided by any defense set forth in the defendant's answer).

The Tribe's allegation that the district court lacked federal subject matter jurisdiction is devoid of merit.

IV. If the District Court Lacked Federal Subject Matter Jurisdiction, As the Tribe Alleges, the District Court's Judgment for Defendants Would Have to Be Reversed.

The Tribe argues that "the district court lacked any statutory basis for federal subject matter jurisdiction" and "should have ***dismissed*** Mitchell's complaint on that basis alone." Tribe Br. at 7. After asserting that the district court should have

dismissed Mitchell's complaint for lack of federal subject matter jurisdiction; the Tribe says this Court should *affirm* the district court's order granting the defendants' 12(b)(1) motion to dismiss based on tribal sovereign immunity *and* the district court's judgment for the defendants. *See* Tribe Br. At 7, 21.

But if the district court lacked federal subject matter jurisdiction, it did not have jurisdiction to address the merits of the Tribe's motion to dismiss based on tribal sovereign immunity and it lacked jurisdiction to grant judgment for the Tribe.

Since Mitchell relied on diversity jurisdiction concerning assertion of his tort claims against Bailey and on the court's supplemental jurisdiction concerning his assertion of claims against the Tribe, 28 U.S.C. § 1367(d) expressly provides for dismissal without prejudice in the event this Court determines the district court lacked supplemental jurisdiction of Mitchell's claims against the Tribe. Section 1367(d) provides as follows:

> The period of limitations for any claim asserted under subsection (a) [Mitchell's claims against the Tribe] …shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[5]

28 U.S.C. § 1367(d).

If this Court were to find the district court lacked federal subject matter jurisdiction, the proper course for this Court would be to *reverse* the district court's

[5] Texas law provides tolling for a period of 60 days after a case is dismissed for lack of jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.064.

order of dismissal predicated on tribal sovereign immunity, to reverse the district court's judgment for defendants, and to remand this case to the district court with instructions to dismiss Mitchell's complaint *without prejudice* due to the district court's lack of federal subject matter jurisdiction. *See, e.g., Halmekangas v. State Farm & Cas. Ins. Co.,* 603 F.3d 290 (5th Cir. 2010) (district court lacked federal subject matter jurisdiction and thus did not have jurisdiction to grant summary judgment for defendants; summary judgment reversed and case remanded to district court with instruction to remand case to state court); *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation,* 495 F.3d 1017 (8th Cir. 2007) (district court lacked federal subject matter jurisdiction and thus did not have jurisdiction to grant summary judgment for insurance company; summary judgment reversed and case remanded to district court with instruction to dismiss case for want of jurisdiction).

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

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

The Tribe erroneously asserts the immunity from suit that tribes enjoy concerning activities occurring on tribal lands extends to the full panoply of tribes' off-reservation activities and that only Congress can create exceptions to tribal sovereign immunity from suit. The Tribe argues courts are powerless to address the

issue whether Indian tribes enjoy sovereign immunity from suit regarding their off-reservation tortious conduct because only Congress can make an exception to the absolute sovereignty of Indian tribes postulated by the Tribe.

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

A review of the Court's majority and dissenting opinions in *Kiowa* and in *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024 (2014) and a review of the Court's majority, concurring, and dissenting opinions in *Upper Skagit Indian Tribe v. Lundgren,* 138 S. Ct. 1649 (2018) demonstrate that Congress is not the sole arbiter regarding the extent to which tribes enjoy sovereign immunity from suit regarding their off-reservation activities.

The four dissenting justices in *Bay Mills* stated Indian tribes should not enjoy sovereign immunity from suit regarding any of their off-reservation activities. They pointed out that extending tribal sovereign immunity to tribes' off-reservation activities could harm those who are unaware they are dealing with an Indian tribe,

those who do not know of tribal immunity, and those who have no choice in the matter—"*as in the case of tort victims*." *Bay Mills,* 134 S. Ct. at 2049 (Thomas, J., *dissenting*) (emphasis added). In no way did these four dissenting justices subscribe to the view that Congress alone can determine the boundaries of the judge-made doctrine of tribal sovereign immunity from suit.

The *Bay Mills* majority responded to the dissenting justices expressed concern about tort victims who are injured by tribes' off-reservation activities by stating in a footnote that the Court has never held tribal sovereign immunity extends to suits against tribes for their off-reservation torts.

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

Bay Mills, 134 S. Ct. at 2036 n.8. (emphasis added). If only Congress can make exceptions to tribes' absolute immunity from suit as postulated by the Tribe; then one must ask why the *Bay Mills* majority wrote footnote 8. If only Congress can "create an exception" that would allow the victims of tribes' off-reservation tortious conduct to sue the tribes, why didn't the majority express that fact in footnote number 8 rather than state the question whether tribes enjoy sovereign immunity from suit by off-reservation tort victims was undecided?

The Court's decision in *Lundgren* illustrates that Congress does not have the sole voice on the extent to which tribes enjoy sovereign immunity from suit concerning their off-reservation activities. *See* Brief of Appellant at 14-17. *Lundgren* focused on the off-reservation activity of the Upper Skagit Indian Tribe. The tribe had purchased land outside of its reservation and had threatened adjoining landowners with its stated intention to tear down their fence, to clear cut an acre of their land, and to erect a new fence in the "correct" location. The issue before the Supreme Court was whether the Washington Supreme Court had jurisdiction to entertain the adjoining landowners' suit to quiet title to the disputed land.

The Tribe asserts that *Lundgren* supports the Tribe's argument that tribes enjoy absolute immunity from suit and that only Congress can create exceptions to that immunity. Tribe Br. At 27-28. This assertion is without merit. In *Lundgren,* the Supreme Court remanded the landowner's boundary suit to the Washington Supreme Court with instructions that the State's highest court should ***revisit*** the issue whether the Upper Skagit Indian Tribe enjoyed sovereign immunity from the neighboring landowners' suit to quiet title. If Congress has sole authority to create exceptions to tribes' postulated absolute immunity from suit as alleged by the Hoopa Valley Tribe, why would the Supreme Court remand the case to the Washington Supreme Court with instructions that the state court should address an issue that only Congress allegedly can address? If tribes enjoy sovereign immunity from suit

regarding their off-reservation activities and only Congress can create exceptions to that immunity, there would have been nothing for the Washington Supreme Court to revisit on remand as far as the immunity issue is concerned.

If tribal sovereign immunity from suit is absolute and only Congress can make exceptions, the following statements in Chief Justice Robert's concurring opinion in *Lundgren* would be meaningless:

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

Lundgren, 138 S. Ct. at 1655 (Roberts, C.J. concurring) (emphasis added). Chief Justice Roberts was expressing his misgivings with any view of the scope of tribal sovereign immunity that would leave a private individual who had no prior dealings with a tribe without a remedy for a tribe's *off-reservation* wrongs. Justice Kennedy joined in Chief Justice Roberts' concurring opinion.

In expressing his misgivings, Chief Justice Roberts expressly referred to footnote number 8 in *Bay Mills,* which he described as "*reserving the question* whether sovereign immunity would apply if a 'plaintiff who has not chosen to deal with a tribe[ ] has no alternative way to obtain relief for [an Indian tribe's] off-reservation commercial conduct.'" *Lundgren,* 138 S. Ct. at 1655 (Roberts, C.J.

concurring) (emphasis added), quoting in part, *Michigan v. Bay Mills Indian Community,* 134 S. Ct. at 2036 n.8. The Tribe's assertion that only Congress can make exceptions to the scope of tribal sovereign immunity is totally at odds with Justice Roberts' assertion that in *Bay Mills,* the Court had reserved the question whether sovereign immunity would apply if an individual who has not chosen to deal with a tribe is harmed by the off reservation activities of a tribe and has no alternative way to obtain relief.

B. The sovereign immunity of Indian tribes is not equivalent to the sovereign immunity of the States or the United States.

The Tribe incorrectly asserts Indian tribes enjoy the same sovereign immunity as is enjoyed by the States and by the United States. Tribe Br. At 40-45. Contrary to the Tribe's expansive view of tribal sovereign immunity, the Supreme Court has emphasized on numerous occasions that the sovereignty enjoyed by Indian tribes is a "limited sovereignty" and that it is "not coextensive with that of the States" or that of the United States *Lundgren,* 138 S. Ct. at 1654. In *Three Affiliated Tribes of Ft. Bethold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890 (1986), the Court stated that because of their "peculiar quasi-sovereign status," the sovereign immunity of Indian tribes "is not congruent with that which the Federal government or States enjoy." In *Kiowa,* the Court stated that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa,* 523 U.S. at 7550756. In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court distinguished

State sovereign immunity from tribal sovereign immunity observing that unlike State sovereign immunity, tribal sovereign immunity has no constitutional origin.

Indeed, contrary to the Tribe's representations regarding the exalted status of tribal sovereign immunity, the Supreme Court has backed away from the idea that tribes enjoy *inherent* sovereignty.

> Our cases reveal a "'trend . . . away from the idea of inherent Indian sovereignty as [an independent] bar to state jurisdiction and toward reliance on federal pre-emption.'" *Rice v. Rehner*, 463 U.S. 713, 718 (1983) (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (footnote omitted)). Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to "pre-empt" state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read.
>
> Accordingly, we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, *an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law*."

Wold Engineering, 476 U.S. at 884 (emphasis added). *Wold Engineering* embraces "policy analysis" as a touchstone in determining the scope of tribal sovereign immunity from suit as did the Alabama Supreme Court in *Wilkes v. PCI Gaming Authority,* 287 So.3d 330 (Ala. 2017), *cert denied, Poarch Band of Creek Indians v. Wilkes,* 139 S. Ct. 2739 (2019) and as did the Arizona Supreme Court in *Dixon v. Picopa Construction Co.,* 772 P. 2d 1104 (Ariz. 1989). Despite the Tribe's withering objection to policy analysis, "Tribal immunity should only apply when doing so

furthers the federal policies behind the immunity doctrine." *Dixon,* 772 P.2d at 1111.

The importance of a policy analysis to the issue whether Indian tribes enjoy sovereign immunity from suit regarding their *off-reservation* tortious conduct is underscored by the Supreme Court's decisions in *Nevada v. Hall,* 440 U.S. 410 (1979) and in *Franchise Tax Bd. of California v. Hyatt,* 139 S. Ct. 1485 (2019). These cases underscore the important and crucial difference between the limited sovereignty enjoyed by Indian tribes and the sovereignty of the States—a difference that the Tribe impermissibly ignores.

In *Hall,* two California residents suffered severe injuries in an automobile collision that occurred on a California highway. The driver of the other vehicle, an employee of the University of Nevada, was driving an automobile owned by the state of Nevada and he was on official business at the time of the collision. The injured California residents brought tort causes of action in California state court against the state of Nevada, the University of Nevada, and against the estate of the deceased Nevada driver. Nevada filed a motion to dismiss based on its claim of sovereign immunity. The California Supreme Court held the state of Nevada was amenable to suit in California courts for it tortious conduct in California. The Supreme Court granted certiorari and it affirmed the holding of the California Supreme Court.

Observing that it was addressing for the first time the question whether a State may claim immunity from suit in the courts of another State, the Supreme Court in *Hall* held a State cannot claim sovereign immunity from suit regarding its tortious conduct in another state. Despite the established legal doctrine that no sovereign may be sued in its own courts without its consent, the Court held that States do not enjoy sovereign immunity from suit in another State's courts regarding the defendant State's tortious conduct in the host State's territory. Of especial import to the issue before this Court—whether Indian tribes enjoy sovereign immunity for suit regarding their off-reservation tortious conduct--the Supreme Court specifically recognized and specifically held California's interest in providing full protection to those injured on its highways over road Nevada's claim of sovereign immunity.

> In this case, California has "declared its will"; it has adopted as its policy full compensation in its courts for injuries on its highways resulting from the negligence of others, whether those others be residents or nonresidents, agents of the State, or private citizens. Nothing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada.

Hall, 440 U.S. at 429.

Likewise, nothing in the Federal Constitution authorizes or obligates this Court to frustrate the policy of Texas as set forth in the Due Process Clause of the Texas Constitution out of respect for the limited sovereignty of the Hoopa Valley Tribe. *See* Brief of Appellant at 18-19. Contrary to the Tribe's protestations, *Hall* demonstrates that policy considerations are relevant to this Court's addressing the

Tribe's claim that its sovereignty trumps the sovereignty of the state of Texas despite the fact that the Tribe's tortious conduct on Texas soil severely injured a Texas citizen. Texas has an interest in seeing that Mitchell receives compensation from the tortfeasor in order that he does not become a charge on the State's resources and economy.

Hall remained the law of this nation from the time the decision was handed down in 1979 until it was reversed in 2019 by the Court's decision in *Hyatt.* Based solely on a revised interpretation of the constitutional basis for State sovereignty, *Hyatt* reversed *Hall* and in a 5-4 decision held States are not amenable to suits in the courts of sister States. *Hyatt* did not question the policy considerations that led to the Court's decision in *Hall*. Rather, the Court held the sovereignty enjoyed by the States derives from the understanding that existed between the colonies when the Constitution was drafted, from the Constitution itself, and from the Eleventh Amendment.

The "limited sovereignty" of Indian tribes does not derive in any sense from the U.S. Constitution and thus the Tribe errs in citing *Hyatt* as alleged support for its argument that Indian tribes enjoy sovereign immunity from suit regarding their off-reservation tortious conduct. Since tribal sovereign immunity from suit, unlike State sovereignty, does not derive its existence from the negotiations that led to the drafting of the constitution, from the constitution itself, or from the Eleventh

Amendment; the Court's reasoning in *Hall* applies with full force to the Tribe's tortious conduct in Texas. The Tribe's limited sovereignty does not shield it from Mitchell's suit regarding the Tribe's off-reservation tortious conduct in Texas.

C. The Tribe's cited cases do not support its argument that tribes enjoy sovereign immunity from suit regarding their off-reservation tortious conduct.

It is well-established that Indian tribes enjoy sovereign immunity from suit concerning activities that occur ***on the tribes' reservations***. Further, as established in *Kiowa* and *Bay Mills*, when persons or entities knowingly and voluntarily enter into commercial transactions with Indian tribes, they can negotiate waivers of tribal sovereign immunity regarding their commercial transactions with the tribes; they can conduct business with the tribes at their peril; or they can choose not to do business with the tribes. The victims of tribes' off-reservation tortious conduct, who have not voluntarily chosen to conduct business with tribes, have no such ability to protect themselves from the tribes' harmful conduct. The Tribe's citing in its brief more than thirty cases that involve disputes over activities that occurred on tribal lands or that involve commercial transactions with Indian tribes does not further an analysis of the issue before this Court: Whether Indian tribes enjoy sovereign immunity from suit regarding their off-reservation tortious conduct.

The Tribe erroneously alleges the Supreme Court addressed the question whether Indian tribes enjoy sovereign immunity from suit regarding their off-reservation tortious conduct in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). Tribe Br. At 28-29. The Court did not address this issue in *Lewis* because the tribe was ***not*** a party to the suit. The defendant was a limousine driver who was employed to transport customers from a tribally owned casino to their homes in Connecticut. The limousine driver negligently rear-ended the plaintiffs' automobile on a Connecticut roadway, off the tribe's reservation. The Connecticut residents sued the limousine driver in Connecticut state court. They **did not** sue the tribe or the tribe's limousine service. The Supreme Court of Connecticut held that tribal sovereign immunity barred the suit against the tribe's limousine driver. The U.S. Supreme Court granted certiorari and in a unanimous opinion held tribal sovereign immunity did not bar the suit against the limousine driver *despite the fact that the driver's contract with the tribe's limousine service provided he would be indemnified by the tribe.*

Since no tort claim was asserted against the tribe in *Lewis*, the Court did not have occasion to address the question that was reserved in footnote number 8 of *Bay Mills* and that later was referenced by Chief Justice Roberts in his concurring opinion in *Lundgren*—whether tribal sovereign immunity shields tribes from suits by individuals who are harmed by tribes' off-reservation tortious conduct.

The Tribe cites *Turner v. United States,* 248 U.S. 354 (1919), for the proposition that "the Supreme Court has affirmed tribal sovereign immunity in cases involving torts." Tribe Br. at 31-21. The Tribe's reading of *Turner* is incorrect. In *Kiowa,* the Supreme Court set forth an extensive and detailed analysis of *Turner. See Kiowa,* 523 U.S. at 757-758. After noting that "the doctrine of tribal sovereign immunity… developed almost by accident," the Court expressly rejected the notion that *Turner* was the source of the doctrine of tribal sovereign immunity from suit. *Kiowa*, 523 U.S. at 757. Contrary to the Tribe's assertion, *Turner* does not address in any way the issue before this Court: Whether Indian tribes enjoy sovereign immunity from suit regarding their *off-reservation* tortious conduct.

The Tribe also cited *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877 (1986) for the proposition that tribes enjoy immunity from any claims in state court including tort claims. Tribe Br. at 32. The Tribe's assertion is incorrect and is highly misleading.

The dispute being litigated in *Wold Engineering* arose from a contract between an Indian tribe and a construction company for construction of a water-supply system *on the tribe's reservation*. The tribe filed suit against the construction company in North Dakota state court alleging negligence and breach of contract concerning the company's construction of the water-supply system. The construction company filed a counterclaim seeking a setoff or recoupment of

damages for the tribe's failure to pay under the contract. Contrary to the Tribe's erroneous representation, the Supreme Court **did not** hold tribal sovereign immunity protected the tribe from the construction company's counterclaim and the Court said absolutely nothing about the tribe's being protected by sovereign immunity from tort claims.

The Tribe cites eleven cases in support of its representation that "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.*" Tribe Br. at 34-36. Of the eleven cases cited by the Tribe, only two involved off-reservation tortious conduct—*Maxwell v. County of San Diego,* 708 F.3d 1075 (9th Cir. 2013) and *Maynard v. Narragansett Indian Tribe,* 984 F. 2d 14 (1st Cir. 1993). The other nine cases do not involve off-reservation tortious conduct and are irrelevant to the issue before this Court.

In *Maxwell*, a woman was shot by her husband in San Diego. Pursuant to a mutual aid agreement between a California fire protection district and a California Indian tribe, an ambulance from the tribe's fire department was dispatched to transport the shooting victim to a helicopter pad for emergency air transport to a hospital. The patient bled out and died while in transit in the ambulance. The patient's wrongful death beneficiaries sued many parties including the tribe's fire department and two of the fire department's paramedics. The tribe itself was not a

party to the case. Without detailed analysis, the Ninth Circuit affirmed the district court's dismissal of the tribe's fire department based on tribal sovereign immunity while it reversed the dismissal of the fire department's paramedics, who it held did not enjoy tribal sovereign immunity.

Maynard technically could be considered to involve an allegation of off-reservation tortious conduct. The First Circuit described the dispute as follows:

> The present action arose out of a boundary dispute with the Tribe, relating to Maynard's allegations that tribal officials repeatedly trespassed on his property.

Maynard, 984 F.2d at 16-17. The landowner sued the tribe to enjoin further trespass on his land. The First Circuit affirmed the trial court's dismissal of the suit based on tribal sovereign immunity. This boundary dispute case provides no precedent concerning Mitchell's suit against the Tribe for its tortious conduct in Texas, 2,000 miles from the Tribe's northern California reservation.

The remaining nine of the Tribe's eleven cited cases do not involve off-reservation tortious conduct and are irrelevant to the issue before this Court.

Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224 (11th Cir. 2012) and *Cooke v. AVI Casino Enters.,* 548 F.3d 718 (9th Cir. 2008), were dram shop cases where the consumption of alcohol took place in tribally owned casinos *on the tribes' reservations*. The dispute in *Quinault Indian Nation v. Pearson,* 868 F.3d 1093 (9th Cir. 2017) involved the collection of cigarette taxes on tobacco products

sold in a convenience store *located on the tribe's lands*.

Arizona v. Tohono O'odham Nation, 818 F.3d 549 (9th Cir. 2016) (*Tohono*") was a lawsuit very much like *Bay Mills* except, unlike *Bay Mills,* all of the claims being asserted against the defendant tribe pertained to its *on-reservation* activities. The Ninth Circuit pointed out that the parcel of land on which the defendant tribe intended to build its casino legally was part of the tribe's reservation and thus the construction of the disputed casino did not violate the tribe's gaming compact with Arizona. There was no off-reservation tortious conduct.

Buchwald Capital Advisers, LLC v. Sault Ste. Marie Tribe of Chippewa Indians, 917 F.3d 451 (6th Cir. 2019) was a case arising from the bankruptcy of a tribally owned casino. The bankruptcy trustee filed a complaint alleging the tribe's holding company had fraudulently transferred money to or for the benefit of the tribe. The tribe's motion to dismiss predicated on tribal sovereign immunity was granted, with the Sixth Circuit holding that tribal sovereign immunity was not abrogated by 11 U.S.C. § 106(a) of the Bankruptcy Code. Holding to the contrary is *Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055 (9th Cir. 2004), wherein the Ninth Circuit held Congress abrogated tribal sovereign immunity in bankruptcy proceedings under 11 U.S.C. §§ 106(a) and 101(27).

Santana v. Muscogee (Creek) Nation, 508 F. Appx. 821 (10th Cir. 2013) involved a suit by a gambling addict concerning his gambling in the defendant tribe's casino, *on the tribe's reservation*. There was no off-reservation tortious conduct.

Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343 (2d Cir. 2000) arose from a contract between the plaintiff and the defendant tribe that called for the plaintiff to develop and produce a film for exhibition at the tribe's museum located on the tribe's reservation. There was no off-reservation tortious conduct. The plaintiff knowingly and voluntarily entered into a commercial transaction with the tribe and could have insisted on a waiver of tribal sovereign immunity or could have chosen not to deal with the tribe.

In *Rosebud Sioux v. Val-U Constr. Co.,* 50 F.3d 560 (8th Cir. 1995), a construction company entered into a contract to build housing units *on the tribe's reservation*. The Eighth Circuit held that the arbitration clause in the construction contract operated as an implied waiver of the tribe's sovereign immunity concerning the construction company's breach of contract counterclaim but not as a waiver regarding the company's tort counterclaim. The case did not involve any off-reservation tortious conduct by the tribe.

In *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957), the last of the Tribe's eleven cited cases, a non-Indian was injured while crossing a swinging bridge located *on the defendant tribe's reservation*. The plaintiff entered the tribe's

reservation at his own peril just as a person who visits Mexico does so at his own peril.

The Tribe cites six cases in support of its assertion that "the Supreme Courts of at least six states have rendered decisions contrary to *Wilkes* that affirm tribal sovereign immunity from tort claims, *including tort claims that arose outside of reservation boundaries.*" (emphasis added). Tribe Br. at 37-38. In reality, none of the Tribe's six cited cases involve off-reservation tortious conduct of an Indian tribe, and none of these six cited cases is contrary to *Wilkes.*

In *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation,* 416 P.3d 401 (Utah 2017), the defendant tribe's reservation was a major site of oil and gas production. The tribe issued permits to various oil and gas companies allowing them access to its reservation for oil and gas production. The plaintiff rented heavy equipment to companies that worked on the reservation and the plaintiff's equipment was used on the reservation. When the tribe revoked the plaintiff's permits to conduct business on the tribe's reservation, the plaintiff sued the tribe. In dismissing the plaintiff's tort claims, the Utah Supreme Court summarized the case as follows:

> Any harm actually suffered by Harvey [the plaintiff] is tied to whether the tribal officials had the authority to require him to obtain a permit, revoke his permit, and issue a letter telling oil and gas companies that they would suffer sanctions if they continued to use Harvey and operate on tribal lands. The central question thus becomes whether the tribal officials were regulating who may come onto tribal land. Whether the tribe may demand that Harvey obtain a permit is a jurisdictional question that must be heard in the tribal courts in the first instance. Whether the tribal officials unlawfully revoked Harvey's

> permit is a question of tribal law, as the regulation of who may enter tribal lands is a matter of self-governance.

Harvey, 416 P.3d at 418. Contrary to the Tribe's assertion, the Utah Supreme Court's decision is not contrary to *Wilkes* in any respect.

Sheffer v. Buffalo Run Casino, PTE, Inc., 315 P.3d 359 (Okla. 2013) is a dram shop case involving the sale of alcohol at the tribe's casino located on the tribe's reservation. Dismissing the plaintiff's suit based on tribal sovereign immunity, the trial court observed, "Plaintiffs' claim is a tort arising on Indian land." *Sheffer,* 315 P. 3d at 363. The Supreme Court of Oklahoma affirmed the dismissal holding that Oklahoma state courts were not courts of competent jurisdiction to adjudicate tort claims against Indian tribes for tribal activity on tribal lands. *Sheffer,* 315 P. 3d at 367. Again, this decision is not contrary to *Wilkes* in any respect.

Contrary to the Tribe's assertion, *Seneca Tel. Co. v. Miami Tribe of Okla.,* 253 P.3d 53 (Okla. 2011) ***did not*** involve off-reservation tortious conduct. A construction company that was an arm of the Miami Tribe of Oklahoma was hired by the Shawnee Tribe to perform excavation work on Shawnee tribal lands. In the course its performing the excavation work for the Shawnee Tribe, the Miami Tribe's construction company damaged the plaintiff's underground telephone lines, which were located on Shawnee's tribal lands and which provided service to structures owned by the Shawnee Tribe and located on Shawnee tribal lands. The plaintiff sued the Miami Tribe in Oklahoma state court for damage to its telephone lines.

Since the alleged tortious conduct occurred "in Indian Country," the Oklahoma Supreme Court held it did not have subject matter jurisdiction.

Beecher v. Mohegan Tribe of Indians, 918 A.2d 880 (Conn. 2007), did not involve any off-reservation tortious conduct and is not contrary to *Wilkes*. The Mohegan Tribe filed suit against a former employee of its tribally owned gaming commission seeking to enjoin the employee from disclosing confidential information obtained during the course of his employment with the tribally owned gaming commission. The tribe's suit was concluded with entry of a permanent injunction enjoining the former employee and his wife from communicating any confidential information pertaining to the tribe or its gaming commission. After the suit was concluded, the employee sued the tribe alleging that the concluded lawsuit was vexatious litigation. The Connecticut Supreme Court held the former employee's action for vexatious litigation was not part of the same transaction or occurrence made the subject of the tribe's lawsuit and thus the tribe did not waive its sovereign immunity regarding the former employee's claim.

In *Gallegos v. Pueblo of Tesuque,* 46 P.3d 668 (New Mexico 2002) and in *Gross v. Omaha Tribe of Neb.,* 601 N.W.2d 82 (Iowa 1999), both of the plaintiffs were injured while patronizing tribally owned casinos located on the tribes' reservations. Each of the plaintiffs filed a bodily injury claim in state court. In light of the fact that the plaintiff's injuries were sustained on the tribe's reservation, the

New Mexico Supreme Court held the plaintiff's lawsuit fell within the exclusive jurisdiction of the tribal court. In the same vein, the Iowa Supreme Court held the tribe was immune form suit in Iowa state court regarding an incident that occurred on the tribe's reservation.

The Tribe cites seven cases in support of the following assertion: "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*." Tribe Br. at 38. In reality not a single one or the cited cases involved tortious conduct of a tribe off of tribal lands or property. Three of the cited cases are dram shop cases involving the sale of alcohol at tribally owned casinos located on the tribes' reservations.[6] In one case a customer fell on the parking lot of a tribally owned and operated golf course.[7] One case involved a dog bite at a tribally owned housing unit occupied by the tribe's tenant.[8] In another of the cited cases, a guest in a tribally owned and operated resort hotel filed a bodily injury claim against the tribe for an injury sustained at the tribe's hotel.[9] The seventh of the Tribe's cited cases involved a series of lawsuits between a tribe and lawyers who had been hired to represent two members of the tribe concerning their involvement in a vehicular collision.[10]

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[6] *Foxworthy v. Puyallup Tribe of Indians Assn.,* 169 P.3d 53 (Wash. Ct. App. 2007); *Filer v. Tohono O'odham Nation Gaming Enter.,* 129 P.3d 78 (Ariz. Ct. App. 2006); *Holguin v. Ysleta Del Sur Pueblo,* 954 S.W.2d 843 (Tex. App.—El Paso 1997).
[7] *Koscielak v. Stockbridge-Munsee Cmty.,* 811 N.W.2d 451 (Wis. Ct. App. 2012).
[8] *Sevastian v. Sevastian,* 808 A.2d 1180 (Conn. App. Ct. 2002).
[9] *Doe v. Oneida Indian nation,* 717 N.Y.S.2d 417 (App. Div. 2000).
[10] *Miccosukee Tribe of Indians v. Lewis Tein, P.L.,* 227 So.3d 656 (Fla. Dist. Ct. App. 2017).

The Tribe also cites three cases in support of the following assertion: "Federal district courts in the Fifth Circuit also apply tribal sovereign immunity to tort claims." Tribe Br. at 38-39. It is unclear why the Tribe has cited these cases since not one of them involved off-reservation tortious conduct of an Indian tribe. *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes,* 72 F. Supp.2d 717 (E.C. Tex. 1999) was a suit for breach of a contract that was entered into on the tribe's reservation for construction and operation of a commercial venture on the tribe's reservation. In *Elliott v. Capital Int'l Bank & Trust, Ltd.,* 870 F. Supp. 733 (E.D. Tex. 1994), the plaintiff voluntarily and knowingly engaged in banking transactions with a bank chartered, governed, and owned by an Indian tribe. In *Morgan v. Coushatta Tribe of Indians of La.,* 2002 U.S. Dist. LEXIS 25291 (E.D. Tex. 2001), the plaintiff's husband slipped and fell in the tribe's casino located on the tribe's reservation.

After citing a large number of inapposite cases and incorrectly inferring the cases support the proposition that Indian tribes enjoy sovereign immunity from suit regarding their off-reservation tortious conduct; the Tribe admits on page 40 of its brief that there is a "dearth of case law evaluating tribal sovereign immunity from off-reservation torts" and that "off-reservation tort claims are relatively uncommon." The Tribe asserts that this Court and the Supreme Court must defer to Congress to address the issue whether tribes enjoy sovereign immunity from suit regarding their off reservation tortious conduct—yet the Tribe fails to explain what would motivate

Congress to address this issue if there is a "dearth of cases" involving tribes' off-reservation tortious conduct.

The infrequency of off-reservation tortious conduct is small consolation to the individuals who lose their lives or suffer grievous bodily injury due to tribes' off-reservation torts. There should be remedy for the victims of tribes' off-reservation tortious conduct. Contrary to the Tribe's assertions, *Bay Mills, Lundgren, Wilkes, Dixon, and Hall* demonstrate this Court's hands are not tied. This Court is free to recognize and should hold tribes do not enjoy sovereign immunity from suit regarding their off-reservation tortious conduct. When tribes leave their reservations, enter the sovereign territory of the States and injure or kill citizens in those States, they cannot be heard to say their sovereignty outweighs or over rides the sovereignty of those States, leaving the States powerless to protect their citizens.

Citing *Seminole Tribe v. Florida,* 517 U.S. 44 (1996) and *Blatchford v. Native Village of Noatak,* 501 U.S. 775 (1991), the Tribe asserts it would be unfair to hold tribes' liable for their off-reservation tortious conduct when tribes are unable to sue the States. The Tribe fails to appreciate that which the Supreme Court repeatedly has stated--the sovereignty enjoyed by Indian tribes is a "limited sovereignty" that is "not coextensive with that of the States." *Lundgren,* 138 S. Ct. at 1654. That legal principle was underscored in *Seminole* and in *Blatchford.*

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

The Supreme Court recognized in *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411 (2001), that an Indian tribe can contractually waive its sovereign immunity from suit with respect to its *off-reservation* commercial activities and can do so without expressly referencing "waiver" or "sovereign immunity." In *C & L Enterprises,* an Indian tribe contracted with a roofing company to install a roof on a building that was located off of the tribe's reservation. The contract contained an arbitration clause that provided all disputes between the tribe and the roofing company would be decided by arbitration and that judgment on the arbitrator's award could be entered by any court having jurisdiction.

While the tribe in *C & L Enterprises* did not agree in clear and unambiguous terms that it was waiving its sovereign immunity from suit regarding disputes under the contract, the Supreme Court recognized that the tribe's retaining its sovereign immunity from suit was incompatible with the tribe's agreement to arbitrate disputes and its agreement that arbitration awards could be confirmed by any court of competent jurisdiction. If the tribe retained its sovereign immunity from suit, the tribe's contractual agreement concerning arbitration would have been rendered a nullity—a result the Court rejected when it held the tribe had contractually agreed

to waive its sovereign immunity from suit regarding disputes under the contract.

In an effort to limit the meaning and applicability of *C & L Enterprises,* the Tribe repeatedly asserts that in order for a tribe to contractually waive its sovereign immunity from suit, the tribe's waiver must be "unequivocally expressed" and the waiver of immunity must be in "clear" and "unmistakable terms." Tribe Br. at 62. The requirements the Tribe seeks to impose for contractual waiver of sovereign immunity from suit are not the requirements articulated by the Supreme Court in *C & L Enterprises*. Indeed there would have been no waiver of sovereign immunity in *C & L Enterprises* if the Tribe's postulated requirements were the law.

The Tribe cites a large number of cases in support of its postulated requirements for a tribe to contractually waive its sovereign immunity from suit. None of the Tribe's cited cases involve a contract such as that before the Court in *C & L Enterprises*—a contract between an Indian tribe and a person or entity regarding an activity or activities that was to take place off of the tribe's reservation. None of the Tribe's cited cases involve a contractual agreement by an Indian tribe that was incompatible with the tribe's retaining sovereign immunity from suit and that would have been rendered a nullity if the tribe retained its sovereign immunity from suit. The Tribe's cited cases do not support the Tribe's effort to sidestep the Supreme Court's holding in *C & L Enterprises* that the tribe had contractually waived its sovereign immunity from suit *without* the tribe's "unequivocally expressing" its

intent to waive its sovereign immunity in "clear" and "unmistakable terms."

A. The Tribe contractually waived sovereign immunity from suit regarding the injuries and damages the Tribe inflicted on Mitchell during its federal disaster relief deployment to Texas.

The Hoopa Tribal CCC was in Wimberley, Texas, pursuant to a disaster relief deployment by CNCS. *See* Brief of Appellant at 28-34. The Hoopa Tribal CCC was in Texas exercising the privilege that had been extended to it by the United States as a CNCS AmeriCorps Disaster Response Team ("A-DRT"). The Hoopa Tribal CCC was in Texas pursuant to the Tribe's contract with the United States of America. That contract ***expressly required*** the Tribe to have liability insurance that would provide coverage to individuals like Mitchell who suffered injury or harm as a result of the Tribe's providing off-reservation disaster relief services. The undisputed facts at the time of the events made the subject of this case were as follows:

Existing AmeriCorps chapters such as the Hoopa Tribal CCC could apply to CNCS for the *privilege* of their becoming AmeriCorps Disaster Response Teams ("A-DRTs"), who would be eligible to receive CNCS disaster relief deployments to federally declared disaster sites across the United States. AmeriCorps chapters did not have a "right" to become an A-DRT; it was a privilege extended by CNCS to "qualified" AmeriCorps chapters. ROA.688-710; 680-686.

CNCS published the qualifications that AmeriCorps chapters would have to meet and the application form that would have to be completed in order for an AmeriCorps chapter to qualify for the privilege of its becoming an A-DRT. (ROA.688-710). The first seven pages of the application form detailed the qualifications the applicants would have to meet and the ***assurances*** the applicants would have to give the United States/CNCS in order to qualify for the privilege of entering into a contract with the United States/CNCS known as the Disaster Response Cooperative Agreement ("DRCA"). Only after it signed the DRCA would an AmeriCorps chapter become an A-DRT that was eligible for federal disaster relief deployments across the United States. ROA.688-695.

The remaining fourteen pages of the application form contained blanks where the applicant was to provide requested information and to give assurances to the United States/CNCS that the applicant met the qualifications requisite to the applicant's becoming an A-DRT. ROA.696-709.

One of the qualifications that the applicant had to satisfy related to liability insurance coverage. That qualification and was spelled out in the application form as follows:

> **What level of liability coverage is required to allow for members/participants to deploy under a DRCA?** ROA.693 (emphasis in original)
>
> ...At a minimum, you ***must*** provide coverage for both injuries that may afflict your members/participants **and damages that members/participants may**

> **inflict upon the community in the provision of their service.** Additionally, if your program is to deploy out of state, **that liability coverage must be applicable to those out of state deployments.** ROA.693 (emphasis added).

With full knowledge of this liability insurance requirement; the Tribe knowingly and intentionally applied for the privilege of entering into a DRCA with the United States/CNCS and to thereby become an A-DRT. The Tribe's completed application form is part of the record. ROA.696-710.

In its completed application, the Hoopa Valley Tribe listed itself as the "applicant" and its organizational unit was identified as the "AmeriCorps Hoopa Tribal Civilian Community Corps." ("Hoopa Tribal CCC") ROA.704. The Tribe gave the United States/CNCS its assurance that it possessed liability insurance that would provide the required coverage. ROA.699. Additionally, the Tribe submitted certification of its liability insurance coverage with its completed application. ROA.710.

The United States/CNCS relied on the Tribe's representation that it had liability insurance that would provide the mandated coverage and its submission of its certificate of liability insurance by allowing the Tribe to enter into a DRCA with the United States/CNCS. The DRCA signed by the Tribe and the United States is part of the record. ROA.712-730.

As the DRCA expressly provided, the Tribe was entering into a contract with the United States of America by signing the DRCA:

> This cooperative agreement is entered into between the **United States of America,** …represented by the Corporation for National and Community Service, hereinafter called CNCS, and the Hoopa Tribal Community Corps, hereinafter called Program…. ROA.713.

The DRCA signed by the Tribe expressly provides that any narrative statement or assurance by the Tribe "which was included as part of the Program's application and approval by CNCS for this Agreement **is incorporated into this agreement by reference.**" ROA.714. Thus, the Tribe's representation and assurance in its application regarding its having the requisite liability insurance that would provide "coverage for both injuries that may afflict your members/participants and damages that members/participant may inflict upon the community in the provision of their service" was incorporated into the DRCA by reference.

The DRCA also expressly provides that the Tribe's completed "application" was "incorporated by reference into this Agreement". ROA.714. Paragraph VI.D on page 9 of the DRCA expressly provides that the "grantee [Hoopa Valley Tribe] ***must*** comply with … the Assurances [and] certificate of liability insurance" that were submitted as part of its application. ROA.719. Page 10 of the DRCA provides as follows regarding the required insurance coverage:

> INSURANCE: Program and members ***must*** be covered by workers' compensation or occupational insurance **and liability insurance.** ROA.720 (emphasis added).

Article IX.B. on page 12 of the DRCA provides as follows:

> **LIABILITY, TRAINING AND SAFETY:** The Program(s) ***must*** **have**

> adequate safety training programs and **liability insurance coverage** (and/or including Workers' Compensation) **for the organization and for individuals engaged in activities under the Grant to engage in disaster relief activities.**

ROA.722 (emphasis added). The requirement of liability insurance coverage was not a mere afterthought. The United States/CNCS made it a key qualifying requirement to become an A-DRT.

As a responding party to this case, the United States weighed in on the liability insurance requirement and represented to the district court that "the Hoopa Tribal Civilian Corps agreed in writing on two separate occasions, and in two separate and distinct grant agreements to obtain both liability and health insurance to cover its members for acts of negligence." ROA.1303.

Appellant has gone into this detailed discussion of the contract documents between the United States and the Tribe and the clear and manifest requirement regarding liability insurance coverage to respond to the Tribe's effort on pages 53 and 57 of its brief to dismiss and undermine the insurance coverage requirement.

The United States afforded the Tribe the privilege of its participating in the AmeriCorps State and National program by funding the Tribe's AmeriCorps chapter. ROA.793-794. The United States afforded the Tribe the privilege of its participating in the CNCS disaster relief program and the United States reimbursed the Tribe for its disaster relief deployment to Texas. ROA.849-850, 852-855, 858. What did the United States ask for in return for its providing the Tribe with these

privileges? It asked for and ***required*** the Tribe to have in place a liability insurance policy that would afford coverage for the persons who might sustain injury or damage as a result of the Tribe's tortious conduct while engaging in CNCS disaster relief deployments. The Tribe acknowledged this requirement when it applied for the privilege of becoming an ADRT and it gave the United States/CNCS written assurance that it carried the requisite liability insurance. The Tribe is estopped from claiming tribal sovereign immunity from suit regarding the Hoopa Tribal CCC's negligently injuring Mitchell. To hold otherwise would be render a nullity the Tribe's contract with and assurances to the United States/CNCS. To hold that the Tribe did not waive its tribal sovereign immunity from suit regarding Mitchell's tort claim would be to sanction fraud on the United States/CNCS by the Tribe.

B. The Tribe's cited cases do not support its argument that it did not waive sovereign immunity from suit regarding its federal disaster relief deployments.

The Tribe has cited inapposite cases involving alleged waiver of the United States' sovereign immunity[11] and alleged waivers of States' sovereign immunity.[12] Given that the limited sovereignty of Indian tribes is not equivalent to or congruent with the sovereignty of the United States or the States, cases that focus on federal and State immunity are not germane to the issue before this Court, which involves

[11] *Charles v. McHugh,* 613 F. Appx. 330 (5th Cir. 2015)
[12] *Martinez v. Tex. Dept. of Crim. Justice,* 300 F.3d 567 (5th Cir. 2002); *Sossaman v. Texas,* 563 U.S. 277 (2011).

the Tribe's waiver of its sovereign immunity from suit regarding its off-reservation disaster relief deployments.

The Tribe cites numerous other inapposite cases involving activities occurring on tribal lands and involving tribal members or visitors who are on tribal lands for recreation or for business purposes. What it takes to effect a waiver of a tribe's sovereignty from suit regarding activities occurring on tribal lands bears no relevance to the issue whether a tribe contractually has waived its sovereign immunity from suit regarding its off-reservation activities.

Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011 (9th Cir. 2016), is irrelevant to the waiver issue before this Court. In *Bodi,* a member of the defendant tribe was employed in the tribe's health clinic located on the tribe's reservation. After her tribal employment was terminated, Bodi sued the tribe in California state court alleging the tribe had violated the Family Medical Leave Act, which by its express terms does not apply to Indian tribes. The tribe removed the case to federal district court and filed a Rule 12(b)(1) motion to dismiss based on tribal sovereign immunity. The Ninth Circuit held the tribe's exercise of its right to remove the case to federal court, standing alone, did not operate to waive the tribe's sovereign immunity from suit regarding an employment dispute between the tribe and its employee.

In the same vein as *Bodi* is *Wilhite v. Awe Kualawaache Care Ctr.,* 2018 U.S. Dist. LEXIS 180905 (D. Mont. 2018), which involved an employment dispute between a nurse and a tribally owned long-term nursing facility located on the tribe's reservation. The federal district court dismissed the disgruntled nurse's employment suit against the tribe holding that the Department of Health and Human Service's provision of liability insurance coverage for the tribe's nursing facility did not operate to waive the tribe's sovereign immunity from suit regarding activities occurring solely on the tribe's reservation and involving the tribe's employee.

Virtually all of the cases cited by the Tribe are like *Bodi* and *Wilhite.* They involve activities that occurred entirely on tribal lands and litigants' attempts to use State or federal courts rather than tribal courts as forums to resolve the litigants' disputes with the Indian tribes on whose lands the activities took place. These efforts to displace the jurisdiction of tribal courts and to impose State or federal jurisdiction on Indian tribes regarding matters that occurred entirely on tribal lands universally have been rejected as impermissible usurpation of tribal sovereignty. The Tribe's citation of a large number of such cases does nothing to further this Court's analysis of the issue before the Court, which involves a contract between an Indian tribe and the United States/CNS pursuant to which the Tribe was able to exercise the privilege of its engaging in federal disaster relief activities 2,000 miles from the Tribe's California reservation.

The first sentence of *Demontiney v. United States ex rel. Dept. of Interior, Bureau of Indian Affairs,* 255 F.3d 801, 804 (9th Cir. 2001) ("*Demontiney*"), summarizes the case:

> This case arises from a *contract dispute* among an Indian tribal member, the tribe, and a federal agency *over a construction project on tribal land.* (emphasis added).

Demontiney, 255 F.3d at 804. The contract in question expressly provided it was to be governed and construed in accordance with tribal law and that the tribe's tribal court was to have "exclusive jurisdiction … over disputes arising under the agreement." *Demontiney*, 255 F.3d at 813.

In *Bank One, N.A. v. Shumake,* 282 F.3d 507 (5th Cir. 2002), a door-to-door salesman sold satellite systems to several members of the Choctaw tribe at their homes *on the tribe's reservation.* Bank One provided credit for these sales. When a dispute arose regarding these transactions, this Court recognized and held that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty over tribal lands.

McVay v. Allied World Assur. Co., 16 F. Supp. 3d 1202 (D. Nev. 2014), *aff'd,* 650 F. Appx. 436 (9th Cir. 2016) was a slip-and-fall case where the plaintiff fell at a tribally owned gas station located on the tribe's reservation. After suffering an adverse judgment in tribal court, the plaintiff filed a direct action against the tribe's liability insurance carrier in federal district court. Unlike Louisiana, Nevada is not

a direct action state and the lawsuit was dismissed.

Wilson v. Umpqua Indian Dev. Corp., 2017 U.S. Dist. LEXIS 101808 (D. Or. 2017) is another slip-and-fall case, this time at a tribally owned casino on the tribe's reservation. After suffering dismissal of her claim in tribal court, the plaintiff sued the tribally owned casino and the tribe's management company in federal district court. The district court held the tribal entities enjoyed sovereign immunity from suit regarding the activities that occurred solely on the tribe's reservation and that the tribe's voluntary purchase of liability insurance did not operate to waive the tribe's sovereign immunity.

Sheffer v. Buffalo Run Casino, PTE, Inc., 315 P.3d 359 (Okla. 2013) was a dram shop case where the intoxicated driver consumed alcohol in the tribe's casino located on the tribe's reservation. The Oklahoma Supreme Court held Oklahoma's state courts did not have jurisdiction to "adjudicate tort claims against Indian tribes *for tribal activity on tribal land.*" *Sheffer,* 315 P.3d at 367 (emphasis added).

Atkinson v. Haldane, 569 P. 2d 151 (Alaska 1977) and *Seminole Tribe v. McCor,* 903 So.2d 353 (Fla. Dist. Ct. App. 2005) are to the same effect and likewise involve activities occurring on tribal lands. *See* Brief of Appellant at 37-39.

White Mountain Apache Tribe v. Industrial Comm'n, 696 P.2d 223 (Ct. App. Ariz. 1985) is in the same vein as *Atkinson* and *Sheffer.* A member of the tribe was injured *on the tribe's reservation* while employed by the tribe's timber company.

The Arizona Court of Appeals held Arizona worker's compensation laws do not operate within the boundaries of tribes' reservations and the tribe's voluntary purchase of worker's compensation insurance coverage for its employees did not operate to waive the tribe's sovereign immunity from suit regarding matters occurring on tribal lands.

Graves v. White Mountain Apache Tribe, 570 P.2d 803 (Ct. App. Ariz. 1977) is another case involving injury to one of the tribe's members at the tribe's timber company. The Arizona Court of Appeals rejected the plaintiff's argument that the tribe's purchase of liability insurance served to waive the tribe's sovereign immunity from suit regarding a matter that occurred on tribal lands and involved a member of the tribe.

In *Nanomantube v. Kickapoo Tribe,* 613 F.3d 1150 (10th Cir. 2011), the former manager of the tribe's casino located on the tribe's reservation alleged employment discrimination under Title VII and sued the tribe in federal district court rather than in tribal court despite the fact that Title VII expressly exempts Indian tribes from its coverage. The plaintiff argued the tribe had waived its sovereign immunity from suit in federal court because a single sentence in the tribe's employee handbook stated that the tribe would comply with the provisions of Title VII as well as with the tribe's civil rights ordinance. The Tenth Circuit held this single sentence did not manifest the tribe's consent to being sued in federal court rather than in tribal

court concerning employment disputes with its employees.

Hagen v. Sisseton-Wahpeton Cmty. College, 205 F.3d 1040 (8th Cir. 2000) is to the same effect as *Nanomantube.* It involved an employment discrimination suit filed in federal district court by two faculty members against their former employer, a tribally owned community college located on the tribe's reservation. The plaintiffs argued they were entitled to sue the tribally owned college in federal district court rather than in tribal court because the tribe had executed a certificate of assurance with the Department of Health and Human Services that it would abide by Title VI of the Civil Rights Act of 1964. The Tenth Circuit held the certificate of assurance did not operate to dispossess tribal courts of their jurisdiction or to waive the tribe's sovereign immunity from suit regarding matters that occurred on tribal lands.

The Tribe erroneously cites *Pere v. Nuovo Pignone, Inc.,* 150 F.3d 477 (5th Cir. 1998) for the proposition that since Mitchell was not a party to the Tribe's contract with the United States/CNCS, he is not protected by the Tribe's contractual agreement to maintain liability insurance that would provide coverage for Mitchell's injuries. In *Pere*, the plaintiff's husband was killed while working on an oil and gas exploration platform off the coast of Africa due to failure of a turbine manufactured by the defendant Italian company. The Italian company asserted it was owned by the Italian government and was entitled to sovereign immunity from the plaintiff's wrongful death suit. The plaintiff relied on a contract between the Italian

manufacturer and the decedent's employer as a waiver of sovereign immunity. The Fifth Circuit held the choice of law provision in the contract provided no evidence that the Italian company intended to be responsible to third parties for failure of the turbine.

By contrast, the DRCA between the Tribe and the United States/CNCS expressly incorporated by reference the Tribe's application form, which stated the following:

> At a minimum **you** [Hoopa Valley Tribe] **must provide coverage for … damages that members/participants may inflict upon the community in the provision of their services.** ROA.693 (emphasis added).

Unlike *Pere*, the Tribe had no doubt when it signed the application and when it signed the DRCA that it was obligating itself to provide coverage for individuals like Mitchell who might suffer injury or harm as a result of the Tribe's off-reservation disaster relief deployments.

As the Tenth Circuit discussed in great detail, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah,* 790 F.3d 1000 (10th Cir. 2015) was a continuation of decades of litigation between the Ute Indian Tribe and the State of Utah over ownership of tribal lands. The appellate court described the most recent of those many lawsuits as an attempt by Utah to prosecute tribal members in state court for conduct (minor traffic offenses) occurring within tribal boundaries. The Ute Indian Tribe sued the State of Utah and Utah counties seeking to enjoin their prosecution

of Indians for petty crimes including traffic offenses occurring on Indian lands. The defendants asserted counterclaims alleging the tribe had waived its sovereign immunity to suit in three contracts.

In dismissing the defendants' counterclaims, the Tenth Circuit held two of the contracts the defendants relied on as alleged support for the tribe's alleged contractual waiver of its sovereign immunity had expired several years before. The remaining contract the defendants sought to rely on expressly reserved tribal sovereign immunity rather than waive it. *Utah,* 790 F.3d at 1011.

The Tribe cannot be heard to claim it is clothed with tribal sovereign immunity concerning injuries it inflicted during its federal disaster response deployment to Texas when the contract pursuant to which that deployment was made required the Tribe to carry liability insurance that would afford coverage for injuries and damages the Tribe might inflict during its federal disaster relief deployments. In its contract with the United States/CNCS, the Tribe waived its sovereign immunity from suit concerning its off-reservation disaster relief activities as an A-DRT. To hold otherwise would nullify the Tribe's assurance to and its agreement with the United States/CNCS that the Tribe carried the required liability insurance policy that would provide the mandated coverage for persons who might be injured as a result of the Tribe's federal disaster relief deployments.

Conclusion

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

May 21, 2020

Respectfully submitted,

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Certificate of Service

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This filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 and Fifth Circuit Rule 32 because it contains 12,670 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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