**Case No. 19-36029**

*In the*

# United States Court of Appeals

*for the*

# Ninth Circuit

RONALD OERTWICH,
*Plaintiff-Appellant,*

v.

TRADITIONAL VILLAGE OF TOGIAK, et al.,
*Defendants-Appellees.*

*Appeal from a Decision of the United States District Court for the District of Alaska (Anchorage), Case No. 3:19-cv-00082-JWS · Honorable John W. Sedwick, District Judge*

## APPELLANT'S OPENING BRIEF

ANDY L. PEVEHOUSE
GILMAN & PEVEHOUSE
130 South Willow Street, Suite 3
Kenai, Alaska 99611
(907) 283-2600 Telephone
alpevehouse@gilmanlawak.com

DAVID H. TENNANT
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, New York 14618
(585) 281-6682 Telephone
david.tennant@appellatezealot.com

*Attorneys for Appellant Ronald Oertwich*

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## INTRODUCTION

This case presents the question whether an Alaskan tribe and its members can be sued for damages for kidnapping, imprisoning, and banishing a *non-Indian* from *non-tribal* lands. The tribal defendants committed these unlawful acts purportedly as an exercise of criminal jurisdiction that tribes do not have in Indian country, much less in a city incorporated under and governed by state law.[1]

Harboring a suspicion that a tote (a plastic container) owned by Plaintiff-Appellant Ronald Oertwich contained contraband alcohol, a tribal police officer seized the then-73-year-old's tote from a cargo hangar located at a state-owned, public-use airport located within the City of Togiak ("the City"), Alaska. The tribal defendants purportedly convicted Oertwich in tribal court *in absentia* of "possessing prohibited controlled substances" and ordered him "banished" from the City where he had lived for thirty years.

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[1] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203, 212 (1978). *See also United States v. Cooley*, 919 F.3d 1135, 1141 (9th Cir. 2019) ("A tribe has no power to enforce tribal criminal law as to non-Indians, even when they are on tribal land.") (citing *Oliphant*); *see generally* William C. Canby, Jr., American Indian Law in a Nutshell, at 195 (6th ed. 2015) ("It has been authoritatively established that tribes have no general criminal jurisdiction over non-Indians.").

A tribal police officer and a tribal "volunteer" proceeded to detain Oertwich and, after allowing him to collect a few personal belongings from his home, forcibly boarded him on a plane at the City airport bound for Dillingham, Alaska.

When Oertwich tried to return home the following day, a tribal officer (and another tribal member "volunteer") arrested Oertwich for "trespassing on tribal property," even though he was physically located within the City and not trespassing on tribal lands. The tribe nonetheless imprisoned him in the City jail for six days. A group of tribal members then forcibly removed Oertwich from his cell, handcuffed him and bound his legs with duct tape, and transported him to the City airport, where they loaded him on the back of an airplane, again bound for Dillingham. Oertwich feared returning to his home in Alaska and moved to Oregon.

Under Alaska law, the tribal defendants' actions are crimes for which the perpetrators are criminally and civilly liable.[2] Yet the court below held that the doctrine of tribal sovereign immunity bars Oertwich's suit against the tribe and the tribal officials.

[2] A list of applicable Alaska crimes and intentional torts is appended to the back of this brief (*see* Appendix).

This case raises the question whether Oertwich, as the unwilling victim of the tribal defendants' crimes and intentional torts, has a civil remedy for the serial violations of his constitutionally-protected rights as a non-Indian living on non-Indian lands. Or are these intentional tortfeasors entitled to special consideration and insulation from the consequences of their actions because they are "Indian."[3] Specifically, are they entitled to hide behind the doctrine of tribal immunity from suit even though the United States is not immune from suit for intentional torts committed by its law enforcement officers.

No federal court has ever held that tribal sovereign immunity bars claims for intentional torts committed by tribal members off-reservation. And nothing justifies the application of the doctrine here. To the contrary,

[3] In using the term "Indian," Appellant means no disrespect. "Indian" is the name ascribed to this country's indigenous populations in the Constitution (Article I and the Fourteenth Amendment); is the term widely used by the federal government in providing services to "American Indians" (*see, e.g.*, HUD's "Indian Housing Block Grant"); the leading treatise in the field uses the term in its title ("Cohen's Handbook on Federal Indian Law"); and many tribes incorporate "Indian" into their official tribal name. Indigenous populations in Alaska are generally not called "Indian" but rather "Alaska Native." Even so, for purposes of this appeal, this brief employs the more familiar term "Indian" and the larger body of federal Indian law that generally governs all tribes, with distinctions drawn as needed with respect to tribes in Alaska.

holding the tribe and its members immune from suit would perversely promote illegal and intentionally injurious conduct. The Court should decline to extend the doctrine of tribal sovereign immunity to insulate tribes and their members from their intentionally tortious off-reservation actions and reverse the decision of the district court.

## STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because (1) Plaintiff asserted claims under the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq*. and the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e *et seq*.; and (2) the question whether an Indian tribe retains the power to banish a non-Indian from non-tribal lands must be answered by reference to federal law and is a "federal question" under § 1331. The district court had supplemental jurisdiction over Plaintiff's state-law claims pursuant to 28 U.S.C. § 1367.

Plaintiff-Appellant Ronald Oertwich appeals the Order and Opinion dated September 12, 2019 (Excerpts of Record ("ER") 4-18) and Final Judgment entered October 15, 2019 (ER 1-3) in the U.S. District Court for the District of Alaska (Sedwick, J.) dismissing under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) all federal and state claims asserted in the

Complaint against the tribal defendants: (a) the tribe known as "the Traditional Village of Togiak" (and for ease of reference called here the "Togiak Tribe" or just the "Tribe"); and (b) the individual tribal defendants—collectively "Tribal Defendants."[4]

The district court certified the judgment against the Tribal Defendants as "final" under Federal Rule of Civil Procedure 54(b) finding no just reason to delay entry of a final order as to these defendants, while claims against the City defendants remained to be resolved. (ER 1-3.) Accordingly, this Court has appellate jurisdiction to review the judgment under 28 U.S.C. § 1291.

Plaintiff timely filed his appeal under Federal Rule of Appellate Procedure 4(a)(4)(A) on November 12, 2019. (ER 19.)

[4] The Complaint also named as defendants the City of Togiak, the Mayor of the City of Togiak, the Village Public Safety Officer and the State of Alaska. These defendants separately moved to dismiss the claims against them on varying grounds. The district court granted those motions by way of separate orders that are not the subject of this appeal. This appeal concerns only the claims against the Tribal Defendants.

## STATEMENT OF ISSUES

1. Does tribal sovereign immunity from suit bar intentional tort claims for the illegal search, detention, assault, kidnapping and banishment of a non-Indian from non-Indian lands based on alleged unlawful possession of alcohol?

2. Are tribal judges entitled to judicial immunity from suit when they lack subject matter and personal jurisdiction and issue illegal orders they know will serve as the basis for illegal enforcement?

3. Are tribal officials entitled to qualified immunity from suit for banishing a non-Indian from non-tribal lands when that action clearly violated constitutional limits on tribal authority?

4. Did the district court err in ordering Plaintiff to litigate his state law tort claims in tribal court with respect to certain tribal defendants who did not successfully invoke tribal immunity from suit?

## STATEMENT OF THE CASE

### I. Statement of Facts

All of the conduct involved in this case occurred on lands located within the borders of the City of Togiak, a "Second Class City"

incorporated under the laws of the State of Alaska.[5] (ER 48.) Like all other cities in Alaska, the City is a municipal corporation and political subdivision of the State. *Id.*; *see generally* 48 Alaska Stat. § 29.71.800 (13) ("'municipality' means a political subdivision incorporated under the laws of the state"). The City is governed by an elected mayor. (*See* ER 48.) It provides municipal services, including a police force, and operates a jail. (*Id.*) The State of Alaska and the City of Togiak together exercise territorial jurisdiction and governmental power over the lands located within the boundaries of the City.

On January 24, 2017, Leroy Nanalook, a tribal member acting in his official capacity as a police officer for the Tribe, seized a tote allegedly belonging to Oertwich from Everts Air Cargo, a cargo service operating at the state-owned airport located within the City boundaries. (ER 50.) Officer Nanalook seized the tote at the City airport because another tribal

[5] *See* Alaska Stat. § 29.35.250. Classifications under Alaska law are based on population size (number of permanent residents); those designations provide for varying municipal powers. A useful primer on these classifications is published by the Alaska Municipal League, available at http://www.akml.org/wp-content/uploads/2014/02/Legislative-PRIMER-WEB.pdf (last visited May 21, 2020).

member said it looked "suspicious." (*Id*.) Officer Nanalook did not alert the Alaska State Troopers that he had seized the container. He supposedly obtained a tribal court search warrant to open the tote and reported finding multiple bottles of whisky (totaling nine liters) and an allegedly stolen firearm. (ER 28, 50.)

After waiting nearly two months, Officer Nanalook allegedly presented the illegally obtained evidence to the Community of Members of the Tribe. That body consists of adult members of the Togiak Tribe. (ER 28.) The charges supposedly brought against Oertwich consisted of possession of alcohol within a "dry" municipality in violation of state and tribal law, as well as "possession of a stolen firearm [under] A[laska] S[tatute] 11.61.200(a)(3)," a weapons violation under Alaska law. (*Id*.) The alcohol offense is punishable under the tribal code by permanent banishment (as events proved) but is only a misdemeanor under state law.[6]

[6] Possession of alcohol in a dry municipality is a Class A misdemeanor under Alaska Statute 04.16.200(e)(1) given the quantities involved.

The Alaska weapons violation cited by the Tribe would be a felony under state law but was inapplicable because the gun was not stolen.[7]

The Tribe proceeded to "try" Oertwich *in absentia* on March 27, 2017, fond him "guilty of possession of prohibited controlled substances," and ordered his "permanent banishment from the Native Village of Togiak according to Togiak Tribal Code Chapter 6-2-G, [.]" (ER 28, 50.)[8] The tribal court also ordered that "the jurisdiction of this case be referred to the State of Alaska to hear the consequences of possession of controlled substances in dry community and the possession of stolen firearm" under Alaska law. (ER 28.) Five tribal court "judges"—Tribal Defendants Anecia Kritz, Esther Thompson, John Nick, Willie Wassillie and Herbert Lockuk Jr.— signed the "Togiak Community Order to Banish and Refer Jurisdiction to the State of Alaska Superior Court." (ER 28-29, 50.)

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[7] Possession of a stolen firearm is a Class C felony under state law punishable by imprisonment of up to 5 years and a fine not to exceed $50,000.

[8] "The Native Village of Togiak" refers generally to the tribal community and aboriginal lands once occupied as a Tribe but no longer deemed tribal lands under federal law (*see infra*, 26-28). The "village" in that sense has no geopolitical or geospatial existence under Alaska or federal law today. In contrast, the "Traditional Village of Togiak" is not a place at all. Rather it is the name of the Tribe.

Officer Nanalook, accompanied by tribal member "volunteer" Willie Echuck Jr., confronted Oertwich in the City. (ER 50.) They told him he was getting on the next plane out of Togiak, and escorted Oertwich to his home where he had a few minutes to gather personal belongings. (*Id.*) Nanalook and Echuck drove Oertwich to the airport where they forced him to board a plane to Dillingham, Alaska. (*Id.*)

The following day, March 28, 2017, Oertwich returned to Togiak via an All-Terrain Vehicle. (ER 50-51, 30-31.) He encountered Officer Nanalook and Village Public Safety Officer Wassillie while on his way home. (ER 50-51, 31.) They arrested him for "trespassing on tribal property," drove him to the Togiak City jail in the back of a tribal police vehicle, and placed him in a locked cell, where he remained for the next six days. (ER 50-51.)

The Community of Members of the Tribe purportedly convened on March 30, 2017, to determine if Oertwich was guilty of violating "State, Village or Tribal Law." (ER 30-31.) Oertwich, who was still in the City jail, had no prior notice of the hearing and no opportunity to appear. The Tribe determined that he was "guilty of trespassing" on "tribal property" and ordered him "to vacate the community of Togiak." (ER 30-31.) It was

further stipulated that Oertwich "will be escorted to the Airport for immediate transportation out of Togiak." (ER 31.) On the same day, three of the five listed tribal court "judges" (Anecia Kritz, Willie Wassillie and Herbert Lockuk Jr.) signed the "Togiak Community Order Against Ronald Oertwich for Trespassing on Tribal Property" to "Banish and Refer Jurisdiction to the State of Alaska Superior Court." (*Id.*) The Tribal Defendants did not immediately escort Oertwich to the airport as directed by the tribal court order. Instead, they left Oertwich in jail for another four days. (ER 51.) Throughout his incarceration he was without adequate food or access to his insulin. (*Id.*)

On April 3, 2017, five tribal members (Officer Nanalook, "Judge" Herbert Lockuk Jr., Jimmy Coopchiak, Bobby Coopchiak, and Paul Markoff) forcibly removed Oertwich from his jail cell. (*Id.*) The five men tackled the 73-year old, pinned him to the floor of the jail cell, handcuffed his hands behind his back, and bound his legs with duct tape. (*Id.*) The tribal members then carried Oertwich to a tribal police vehicle, placed him inside, and drove him to the airport. (*Id.*) At the airport, Officer Nanalook, Peter Lockuk Sr. and Paul Markoff carried Oertwich—still bound hand and foot—to the back of a Grant Aviation airplane headed for Dillingham. (*Id.*)

Because of these violent episodes, and fearing for his safety, Oertwich permanently left Alaska. He now lives in Oregon. (*Id*.)

None of Oertwich's alleged offenses, nor any of the Tribal Defendants' tortious conduct, occurred in Indian country. In fact, Indian country does not exist in Alaska. Alaskan tribes do not have reservations (with one exception not relevant here), and the lands allocated under the Alaska Native Claim Settlement Act (ANCSA) are allocated to Alaska Native corporations, not tribes. Alaskan tribes do not exercise sovereign authority or governmental power over these allocated lands. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 523 (1998) ("*Venetie*"), and discussion, *infra*, at 26-28. The only authority exercised by Alaskan tribes is "non-territorial;" that is, it is limited to the internal affairs of the tribe and its members, and to non-members who have consented to the tribe's jurisdiction. *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 262 (Alaska 2016) (recognizing Alaska tribes possess "inherent, non-territorial sovereignty").

On fee lands such as those within the City, the Tribe does not have any jurisdiction. Criminal and civil jurisdiction resides exclusively in the State of Alaska and the City.

## II. Proceedings Below

Plaintiff filed suit against the Tribal Defendants—the Tribe, five tribal judges (Anecia Kritz, Esther Thompson, John Nick, Willie Wassillie, and Herbert Lockuk, Jr.), tribal police officer Nanalook, and tribal member "volunteers" Paul Markoff and William Echuck—as well as other parties who are not parties in this appeal.[9] (ER 47-49.) The Complaint challenges the tribal court's jurisdiction,[10] and alleges statutory violations under federal law and common law tort claims under state law. Specifically, Count I asserts a federal common law action seeking declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §

[9] The other defendants, who are not parties in this appeal, were: (a) The City of Togiak and its mayor (tribal member Teodoro Pauk) and two tribal members (William Echuck and Craig Logusak) who served as on-call jail guards at the City jail; (b) Village Public Safety Officer Roger Wassillie and (c) the State of Alaska. The Notice of Appeal filed in this case mistakenly included Defendants Roger Wassilie and State of Alaska. Plaintiff did not appeal from the separate district court orders dismissing those defendants. This Court granted unopposed motions by these two defendant/appellees to dismiss them from this appeal.

[10] Non–Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013) (citing *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir.2009) (quoting *Boozer v. Wilder,* 381 F.3d 931, 934 (9th Cir. 2004)).

2201.1 to enjoin the Tribe's ultra vires actions; Count II alleges a violation of the Indian Civil Rights Act of 1968; Count III asserts violations of the Civil Rights Act of 1964; and Counts IV, V and VI allege intentional torts under Alaska law (and other state law violations).

The Tribal Defendants moved to dismiss the Complaint under Rules 12(b)(1) and (6). (ER 6, 62.) The district court granted their motion without a hearing, dismissing all claims under tribal immunity, as well as judicial immunity and official immunity, with a single exception. (ER 15-20.) The district court concluded that Oertwich had alleged a plausible intentional tort claim against five members with respect to his unauthorized incarceration. (ER 15-16.) But even as to that non-immunized tort claim, the district court concluded that it "lacks the authority to adjudicate the claim," and dismissed it without prejudice to Oertwich refiling it in tribal court. (ER 17-18.)

## STANDARD OF REVIEW

A lower court's dismissal on the ground that the asserting party has failed to plead a claim for relief under Rule 12(b)(6) is reviewed *de novo*. *See Hodson v. Mars, Inc.*, 891 F.3d 857, 861 (9th Cir. 2018). This Court must accept all factual allegations as true and construe them in the light most

favorable to the plaintiff. *See Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019). Dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is also reviewed *de novo*. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1160 (9th Cir. 2017); *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1151 (9th Cir. 2017). This Court also reviews *de novo* issues of tribal sovereign immunity. *See Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007).

## SUMMARY OF ARGUMENT

The district court wrongly extended the doctrine of tribal sovereign immunity from suit to bar intentional torts committed by tribal members off-reservation. In doing so, the court has given the Tribal Defendants (and by extension all tribes everywhere) a traveling license to perpetrate extra-territorial intentional torts with impunity. Tribes can now go where they choose, illegally threaten and detain citizens, deprive them of their property, kidnap, beat, and jail them — with their victims powerless to sue for their injuries. With no tort liability attaching to such illegal forays, tribes and their members will be emboldened to act beyond their jurisdiction to the detriment of public safety and individual rights. This will inevitably

cause jurisdictional conflicts as states and local governments, as territorial sovereigns, exert governmental power to stop tribal intrusions.

Prior to the decision below, no court had ever held that a tribe and its members are immune from suit for intentional torts committed outside Indian country, where tribal members injure a non-Indian on non-Indian lands. Despite the plain illegality of the actions taken by the Tribe and its members—and even though long-standing precedent recognizes that individual tribal officials and members are not covered by tribal immunity from suit when they act illegally and without colorable legal authority[11]—the district court gave each Tribal Defendant a "pass," either by applying tribal sovereign immunity from suit, absolute judicial immunity for the tribal "judges," qualified immunity for other members, or by requiring Oertwich to pursue his claims against individual tribal members in tribal court. Each of these rulings misapplied the law.

The district court erred first by construing *Arizona v. Tohono O'Odham Nation*, 818 F.3d 549 (9th Cir. 2016) as barring the tort claims at issue here. In *Tohono O'Odham,* this Court held that tribal sovereign immunity barred

[11] *See Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) ("suits over plainly unlawful acts are individual capacity suits by definition").

business torts arising from a gaming compact negotiated by two sophisticated parties (the Tohono O'Odham tribe and the State of Arizona). That decision says nothing about whether tribal immunity from suit bars claims brought by an unwilling victim who is physically injured by intentional torts committed by tribal members, where those members act outside the tribe's jurisdiction and harm a non-Indian on non-Indian lands. Nor does that decision address claims for pain and suffering brought by an injured victim seeking monetary damages for those personal injuries.

Not only does *Tohono O'Odham* not control this case, several lines of existing authority counsel against extending tribal immunity to off-reservation, intentional torts:

(1) The Supreme Court has never held that tribal sovereign immunity from suit extends to off-reservation negligence actions, much less intentional torts, while consistently voicing concern that unwilling tort victims might be left without a remedy;

(2) Federal sovereign immunity does not extend to intentional torts committed by federal law enforcement officers;

(3) Criminal and civil liability routinely attach to "transborder abductions" when one sovereign enters the territory of another sovereign and abducts a fugitive without employing lawful process;

(4) Alaskan tribes exercise "inherent non-territorial" sovereignty that eliminates tribal jurisdiction over lands and renders them diminished sovereigns (relative to tribes in the contiguous states) and not "super-sovereigns" relative to the federal government and other sovereigns; and

(5) the Alabama Supreme Court in a trilogy of cases issued the same day in 2017 reviewed U.S. Supreme Court tribal immunity jurisprudence, and concluded that tribal immunity from suit does not bar ordinary negligence tort claims brought by non-Indians for off-reservation conduct.

These well-reasoned principles affirmatively support *not* extending tribal immunity from suit to insulate the Tribal Defendants from civil liability for their intentional torts committed outside the Tribe's jurisdiction. The district court's unprecedented extension of tribal immunity from suit to bar intentional tort claims brought by a non-Indian who was kidnapped and imprisoned by a tribe for possession of contraband on non-tribal lands, would make this Alaskan tribe, and by extension all tribes, super-sovereigns. They could act with impunity anywhere. No other sovereign

enjoys portable immunity for intentional torts committed outside its jurisdiction.

It is hornbook law that judges do not enjoy immunity for actions taken (as here) "in a complete absence of jurisdiction." Likewise, the defense of qualified immunity for official actions disappears when those actions clearly violate constitutional and statutory rights, as they did here in light of *Oliphant* and other controlling Supreme Court precedent barring tribes from prosecuting non-Indians.

Finally, the district court erred by forcing Oertwich to pursue his state law tort claims in tribal court. Such claims are readily tried in federal court under the court's supplement jurisdiction or remanded to state court. There is no tribal court exhaustion requirement.

This Court should reverse the district court with respect to the Tribal Defendants and allow Oertwich to proceed against the Tribe and individually named tribal members to prove liability and damages for the substantial harms inflicted on him.

## ARGUMENT

### I. Tort victims are entitled to recover personal injury damages from intentional tortfeasors, whether the party hurting them is a tribal official acting outside the tribe's jurisdiction or a federal or state official acting within their jurisdiction.

#### A. The Supreme Court has never extended tribal immunity to bar negligence actions for off-reservation conduct; this Court should not expand tribal immunity to bar intentional tort claims.

The Supreme Court of the United States has expressed an abiding concern about unwilling tort victims being left without a remedy when dealing with tribal tortfeasors. In *Michigan v. Bay Mills Indian Comty.*, 134 S. Ct. 2024 (2014) the Supreme Court addressed off reservation commercial activity by a tribe but acknowledged the plight of unwilling tort victims, with the majority stating that:

> 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 off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us.

*Id*. at 2035 n.8. The dissent in *Bay Mills*, written by Justice Thomas and joined by Justices Ginsburg, Scalia, and Alito, called for abandonment of tribal immunity from suit for off-reservation commercial activity, which the

Court first announced in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998). Justice Scalia, who had voted in the *Kiowa* majority, changed his view in *Bay Mills* and voted to overturn the *Kiowa* rule granting tribes immunity from suit for off-reservation commercial activity. 134 S. Ct. at 2045 ("I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious[.]").[12]

The facts in *Kiowa* illustrate its limitations as precedent. The tribe in that case entered into an agreement to buy stock in a non-Indian corporation and issued a promissory note to secure payment of $285,000 plus interest. The note recited it was signed at Carnegie, Oklahoma, where the Tribe has a complex on land held in trust for the Tribe. The seller of the stock claimed the Tribe executed and delivered the note to it in Oklahoma

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[12] Scalia and the other dissenters rejected the majority's observation that Congress should determine the limits of sovereign immunity.

> The majority appears to agree that the Court can revise the judicial doctrine of tribal immunity, because it reserves the right to make an "off-reservation" tort exception to *Kiowa*'s blanket rule. In light of that reservation, the majority's declaration that it is "Congress's job . . . to determine whether or how to limit tribal immunity" rings hollow.

523 U.S. at 2053 n.21.

City, beyond the tribe's lands. 523 U.S. at 753-54. The *Kiowa* majority recognized "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id*. at 758. But the majority nonetheless allowed the tribe to invoke sovereign immunity from suit to bar an off-reservation commercial contract claim. 523 U.S. at 758. The dissent (written by Justice Stevens and joined by Justices Thomas and Ginsburg) gave fuller voice to the concern about extending tribal immunity beyond the reservation borders, calling the new rule "unjust." *Id*. at 766. The dissent stated:

> This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

*Id*. (Stevens, J. dissenting).[13]

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[13] Despite Justice Stevens' concern that the *Kiowa* rule potentially could be read to extend tribal immunity to negligence torts, the Supreme Court and other courts have consistently referred to *Kiowa* as dealing with immunity only in the context of a voluntary contractual relationship. *C L Enter. v. Citizen Bd. Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) ("Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts."); *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 147 (2d Cir. 2012) ("Indeed this pronouncement in *Kiowa* on the scope of

The prevailing concern for tort victims was voiced again in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), in which the Supreme Court rejected tribal immunity from suit in the context of an "ordinary negligence action" involving a car accident that occurred off-reservation on Interstate 95 in Connecticut. *Id*. at 1294. The negligent driver (who drove his car into the back of plaintiffs' car) was employed by the tribe and, as the time of the accident, was driving tribal casino patrons back to their homes in a limousine owned by the tribe. The driver was indemnified by the tribe. The plaintiffs sued the driver in his individual capacity. 137 S. Ct. at 1288. The majority concluded the driver was the real party in interest and could be sued notwithstanding the identify of his employer and the existence of the tribal indemnification agreement. In so holding, the majority ensured that "[t]he protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity." *Id*. at 1292.

Justice Ginsburg concurred in the judgment and urged the Court to adopt the dissenting views in *Kiowa*: "These dissenting opinions explain

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tribal sovereign immunity, as applied to the particular facts at issue in that case, refers only to cases involving contractual disputes.").

why tribes, interacting with nontribal members outside reservation boundaries, should be subject to nondiscriminatory state laws of general application." *Id*. at 1294; *see also Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

The Supreme Court has never applied the doctrine of tribal sovereign immunity from suit to insulate tribes for off-reservation negligent conduct; no basis exists in law or logic to *further extend* tribal immunity to off-reservation *intentional* torts. As explained below, the limited nature of tribal sovereignty—even more limited in the case of Alaskan tribes—does not justify giving tribes greater sovereign immunity from suit than that possessed by the United States, the several States, and foreign nations. Tribes are not constitutionally or statutorily—and should not be deemed judicially—"super-sovereigns."

### B. All tribes exercise limited sovereign authority, Alaskan tribes even less so.

Indian tribes "exercise inherent sovereign authority over their members and territories," *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991), but possess only "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The Supreme Court in *Lewis v. Clarke* refused to "exten[d]" tribal immunity "beyond what common-law sovereign immunity principles would recognize." 581 U.S. at 1292 ("The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.").

Tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831), that "no longer posses[s] the full attributes of sovereignty." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). They are deemed by the Supreme Court to be "quasi-sovereign entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974).[14] No justification exists to elevate tribes to *super*-sovereigns

[14] This Court characterized tribes as "semi-sovereign." *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 n.4 (9th Cir. 1979). Unlike full sovereigns, tribes possesses their sovereignty at "the sufferance" of another sovereign:

with greater immunity from suit than that possessed by the federal government and the fifty States. *See Lewis*, 137 S.Ct. at 1292 ("[t]he protection offered by tribal sovereign immunity . . . is no broader than the protection offered by state or federal sovereign immunity"); *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) ("We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles.").

Alaskan tribes, in exercising "inherent non-territorial sovereignty," possess a sovereignty that is heavily circumscribed relative to tribes in the contiguous lower 48. *See Central Council of Tlingit*, 371 P.3d at 262. The greater restrictions on tribal sovereignty in Alaska derive from ANCSA, as explained in the Supreme Court's decision in *Venetie*, 522 U.S. at 523, and the decision of the District Court of Alaska in 2012, *Koniag, Inc. v. Kanam*,

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the United States. *Wheeler*, 435 U.S. at 323 (acknowledging tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance"); *Washington v. Confederated Tribes*, 447 U.S. 134, 154 (1980) (noting tribal sovereignty is "dependent on, and subordinate to" the federal government). When one sovereign exists only at the sufferance of another sovereign, it hardly can be deemed sovereign. *See United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J. concurring) ("It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.")

No. 3:12-cv-00077-SLG (D. Alaska July 3, 2012) applying *Venetie* and granting a preliminary injunction enjoining tribal court proceedings.[15] ANCSA extinguished "Indian country" in nearly all of Alaska and, as a result, "territorial jurisdiction is not available to Alaska Native tribes on ANCSA lands." *Koniag*, No. 3:12-cv-00077-SLG, at *10 (citing *Venetie*, 522 U.S. at 532). Alaskan Native tribes retain "inherent jurisdiction to adjudicate internal domestic matters … from a source independent of the land they occupy . . . . But Alaskan Native tribes do not have territorial jurisdiction." *Id*. (citing *Venetie*). "Instead, the jurisdictional reach of Alaska Native tribal courts extends only to their members and other internal affairs." *Id*.

Accordingly, the Togiak Tribe, like other Alaskan Native tribes, possesses no territorial sovereignty over the lands allocated to it under ANCSA. Under hornbook Indian law and long-standing Supreme Court precedent, all tribes (Alaskan and those in the lower 48) have no jurisdiction over privately-owned fee lands outside reservation boundaries. They

[15] The district court proceeded to enter a permanent injunction which this Court affirmed in an unpublished memorandum decision (Slip Op. No. 16-35632 (October 20, 2017). A copy of the *Koniag* district court July 3, 2012 decision is attached.

cannot regulate the conduct of non-Indians, non-Alaskan Natives, and nonmembers occurring on those non-tribal lands. [16]

### C. The victims of off-reservation *intentional* torts are entitled to a remedy.

The doctrine of tribal sovereign immunity from suit is judge-made law based on common law principles and is subject to redrawing by the courts. The Supreme Court's stated concern for tort victims injured by the negligent acts of tribal members in off-reservation accidents is multiplied many times over in the case of intentional torts where tribal members leave tribal lands and prey upon non-Indians on non-Indian lands, *intentionally* inflicting bodily injuries.

#### 1. Tribal sovereign immunity should not be broader than federal immunity; intentional torts are a long-recognized exception to federal sovereign immunity.

The federal government, on whom tribes are "dependent," has waived its sovereign immunity for a broad class of intentional torts, as set

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[16] *See Oliphant*, 435 U.S. at 212; *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) ("[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders [.]"); *id.* at 344 ("Indian tribes generally lack legal authority to regulate the activities of nonmembers."); *Montana v. United States*, 450 U.S. 544 (1981); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 931 (9th Cir. 2019) (applying *Montana*).

forth in the Federal Torts Claim Act, 28 U.S.C. § 1346(b) ("FTCA"). *See generally* The Federal Tort Claims Act (FTCA): A Legal Overview (Congressional Research Service (updated November 20, 2019)) at 24-26. The FTCA waives immunity "with regard to acts or omissions of law enforcement officers of the United States government" for certain specified intentional torts "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process." § 2680(h); *see Tekle v. U.S.*, 511 F.3d 839, 851 (9th Cir. 2006); *see also* Statutory Exceptions to Sovereign Immunity, 14 Fed. Prac. & Proc. Juris. § 3658.2 (4th ed.).

Thus, if Oertwich had been unlawfully arrested, imprisoned, battered, and forcibly put on a plane by a federal law enforcement officer, acting within the scope of his employment, Oertwich would have been wronged just the same but would have a civil remedy. *See Tekle,* 511 F.3d at 851-852. He would be able to sue the United States for monetary damages for false imprisonment and battery under the FTCA and authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Tekle*, 511 F.3d at 842, 851-852.[17] It is not a proper answer to say that

[17] A *Bivens* claim may be asserted against tribal police officers if they have been commissioned by the Department of Interior with a "Special Law

Congress waived the federal government's immunity for intentional torts and the Togiak Tribe did not.

First, tribal immunity is based on "the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo*, 436 U.S. at 58, and any judicial construction of that doctrine should not leave tribes with immunity from suit that exceeds the protection afforded to the federal government. The United States is a full sovereign in contrast to the "quasi-sovereign" status of tribes. *Mancari*, 417 U.S. at 554.

Second, it is unjust to force tort victims to depend on the vagaries of voluntary waivers of tort immunity by each of the 573 tribal governments, many of which operate commercial businesses off reservation. The Togiak Tribe, for example, does not waive its immunity from suit except in tightly controlled proceedings in tribal court. (ER 24, 44.) Non-Indian tort victims

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Enforcement Commission" (SLEC). *Black v. United States*, 2013 WL 5214189 (W.D. Wash. Sep. 17, 2013) at *2-*3. The *Black* court concluded that a tribal police officer is a "federal law enforcement officer" for purposes of the FTCA only if the officer holds SLEC status and was enforcing federal law at the time. A tort victim's ability to recover damages for intentional torts committed by a tribal police officer should not depend on whether the officer is cross-deputized with a state/local law enforcement agency or has the requisite SLEC status with the federal government. The wrongful actions are the same, just as are the injuries suffered by the victim.

cannot negotiate a waiver of tribal immunity; nor can they engage the tribal political process to effect changes in tribal immunity policy. *See Kiowa*, 523 U.S. at 758 (holding "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."); *id*. at 766 (Stevens, J. dissenting) ("[T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity[.]").

This Court should conclude that tribal immunity does not extend to bar lawsuits for *intentional* torts committed by tribal members off reservation. This would make the tort liability for the Tribe's police officer the same as that of federal law enforcement officers who commit intentional torts. Oertwich should be allowed to proceed with his civil lawsuit against the Tribal Defendants for their intentional torts just as he would have the right to do against the federal government in like circumstances by bringing a *Bivens*-type lawsuit. *See Maxwell,* 708 F.3d at 1089.

2. Tort liability would exist for extra-territorial police actions in the form of "transborder abductions" whether committed by the United States, one of the several States, or a foreign nation.

a) General territorial limitations on police authority in the United States

"As a general principle, well established in most jurisdictions . . . a public officer for a particular county or municipality has no official power to arrest offenders beyond the boundaries of the county or district for which he is appointed." *People v. Martin*, 225 Cal.App.2d 91, 93 (1964); *see, e.g.*, *State v. Barker*, 143 Wash. 2d 915, 922 (Wash. 2001) (finding Oregon police office acted "without authority" in arresting motorist in Washington). If a peace officer is "appointed to act only within a limited district, he has no greater privilege outside of such district than a private citizen." Restatement (Second) of Torts sec. 121, cmt a, at 204 (1965).

"An arrest warrant has no validity outside the state in which it is issued, and thus may not be executed in another state." *State v. Monje*, 105 Wis. 2d 66, 70 (Wis. Ct. App. 1981) ("'It was the duty of the sheriff to arrest . . . defendant in said warrant, if found within this state. It was not his duty, nor had he the power, to arrest him out of the state. When he entered the state of Kansas, his acts were those of an individual, without either the

virtue of office or the color of office . . . .'") (quoting *Kendall v. Aleshire*, 28 Neb. 707, 45 N.W. 167, 168-69 (1890)) *rev'd sub nom. on other grounds*, *State v. Smith*, 131 Wis. 2d 220 (Wis. 1986).

b) Territorial limitations on tribal police authority

Tribal police are held to the same territorial standards as non-tribal police. They are not permitted to enforce tribal laws outside their territorial jurisdiction. *See State v. Eriksen*, 172 Wash. 2d 506, 510 (Wash. 2011) (holding "tribe's inherent sovereign powers did not authorize . . . extraterritorial stop and detention" of non-Indian off reservation). The leading Indian law treatise provides that "a valid arrest may not be made outside the territorial jurisdiction of the arresting authority." Cohen's Handbook of Federal Indian Law § 9.07, at 763 (2005) (citing Wayne R. LaFave et al., Criminal Procedure § 1.3(e) n.2 (West 3d ed. 2000)); *see also Eriksen*, 172 Wash. 2d at 510 (analyzing tribal police officer's off-reservation authority under well-established principles applicable to police authority across state lines) (citing *Barker,* 143 Wash. 2d at 922).

The facts in *Eriksen* illustrate the strict territorial limits on tribal police authority. A member of the Lummi Nation Police Department observed a car being operated erratically on reservation roads and followed the car off

reservation to a gas station on ordinary state land. *Id*. at 508. The Lummi Nation police officer determined the driver was not a tribal member, questioned the driver about her operation of the car, smelled alcohol on her breath, and instructed her to get out of the car. In finding the Lummi Nation police officer acted without authority, the *Eriksen* court concluded that "[t]he inherent sovereign power [of a tribe] does not logically extend beyond reservation boundaries." *Id.* at 512. "Here, the stop and detention were made on ordinary state land, over which the Lummi had no special legal rights." *Id*. The court concluded that "the Lummi Nation did not have inherent authority to stop and detain Eriksen on ordinary state land outside the reservation, beyond the limits of the tribe's territorial jurisdiction." *Id*. at 514. Accordingly, the tribal police officer's extraterritorial stop and detention violated Eriksen's Fourth Amendment rights. *Id*. Those actions also would constitute the crimes of false arrest and impersonating an officer as illustrated in *Bishop Paiute Tribe v. Inyo Cnty.,* 2018 WL 347797 (E.D. Cal. Jan. 10, 2018) at *3. In that case, the District Attorney for Inyo County, California charged a Bishop Paiute tribal police officer with (1) false imprisonment (2) impersonating a public officer (3) assault with a Stun-Gun and (4) misdemeanor battery arising from that officer's forcible arrest of a

non-Indian *on the reservation*. *Id*. at 3.[18] Such constitutional violations support tort liability under federal and state law if the law enforcement officer acting *ultra vires* is (a) a federal law enforcement officer, (b) a state law enforcement officer or (c) a tribal law enforcement officer formally cross-deputized under state or federal law.[19]

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[18] The Bishop Paiute tribal police officer used his stun gun while on reservation land. *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1152 n.3 (9th Cir. 2017). Because of that location, this Court noted "that the Tribe has at least a colorable claim for relief." *Id.* In other words, the tribal police officer, acting within the reservation boundaries, arguably had a federal common law right to use his stun gun to subdue a non-Indian who physically resisted civil enforcement of a state-court issued order of protection. The jurisdictional question raised by Inyo County's prosecution of the tribal police officer for using a stun-gun on a non-Indian on reservation lands is absent here where all acts occurred outside the Togiak Tribe's jurisdiction. If the Bishop Paiute police officer had used a stun-gun against the non-Indian on ordinary state lands, Inyo County undoubtedly would have been within its rights to prosecute the tribal officer for engaging in illegal assaultive conduct.

[19] "Tribal officers are often delegated authority by a state or the federal government to act broadly on its behalf." *Cooley*, 919 F.3d at 1141 n.2 (citing as an example *Bressi v. Ford*, 575 F.3d 891, 894, 897 (9th Cir. 2009)). Such cross-deputization of tribal officers resolves the extraterritoriality problem. *See* 919 F.3d at 1141 n.2; *see also Eriksen*, 172 Wash. 2d at 514 (recognizing cross-deputization or mutual aid pacts "ensure that all law enforcement officers have adequate authority to protect citizens' health and safety in border areas").

c) Tort liability attaches to "cross-border abductions" committed by state law enforcement officers.

States are not permitted to conduct "transborder abductions" in furtherance of enforcing their criminal laws. This is illustrated in the case of *Mahon v. Justice*, 127 U.S. 700 (1888), which concerned efforts of Kentucky to track down and capture a fugitive wanted for murder. The fugitive, named Plyant Mahon, had fled to West Virginia. Kentucky orchestrated a cross-border abduction: "[A] body of armed men from Kentucky, and by force and against his will, conveyed [Mahon] out of the State of West Virginia into the county of Pike, in the State of Kentucky, and there confined in the common jail of the county." 127 U.S. at 703. West Virginia objected and brought suit in federal district court in Kentucky seeking a writ of habeas corpus. The Supreme Court concluded that the matter was not addressable through federal habeas corpus. Instead, it was up to the two states to resolve. The Supreme Court noted that under existing law, West Virginia's "ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by citizens of other States." *Id*. at 705. The Kentucky intruders would enjoy no sovereign

immunity from criminal prosecution in West Virginia. *Id*.[20] Nor would they be immune from tort liability for the illegal kidnapping of Mahon. *See Cook v. Hart*, 146 U.S. 183, 193 (1892) (describing *Mahon* as involving the tort of "kidnapping by the violence of unauthorized persons without the semblance of legal action a case" and further stating that in such cases "the injured parties could sue the tortfeasors").[21] Likewise, tort liability arises when employees of a "private extradition company" arrest and transport to another state a parolee to serve a sentence previously imposed in that other state. The private company and its employees are subject to liability under 42 U.S.C. § 1983 for having taken those actions "without a signed

[20] The Supreme Court in *Mahon* noted that the leader of the intruders, Frank Phillips, had been appointed by the Governor of Kentucky "as the agent of the State to receive and bring to the State of Kentucky" the fugitive Mahon from West Virginia. 127 U.S. at 703. But the Court found the Governor had not issued a warrant authorizing the extraterritorial armed foray and abduction. *Id*. Whether sovereign immunity from suit could be invoked by Phillips as the Governor's appointee was not raised. What is clear is that all of the armed Kentuckians who went into West Virginia *ultra vires* to abduct Mahon were subject to the criminal laws of West Virginia.

[21] The enactment of the federal extradition statute (18 U.S.C. § 3182) eliminates the necessity for illegal forays by states to capture fugitives. But even under the statutory procedures provided, tort liability may arise if the statute is not followed. *See Brown v. Nutsch*, 619 F.2d 758 (8th Cir. 1980).

extradition warrant, a waiver of his extradition rights, or a habeas hearing, and over his protests." *Harden v. Pataki*, 320 F.3d 1289, 1292 (11th Cir. 2003).

d) Tort liability attaches to "transborder abductions" committed by the United States.

The occurrence of international "transborder abductions" has generated considerable litigation, including in this Court.[22] These analogous cases involve the actions of one sovereign leaving its jurisdiction to abduct a wanted fugitive residing in another country. The *Álvarez-Machain* case illustrates how customary international law is violated in such "transborder forcible abductions" or "kidnappings" and can give rise to tort liability against the United States.

Humberto Alvarez-Machain was a physician who lived and practiced in Guadalajara, Mexico. *Alvarez-Machain*, 266 F.3d at 1048. DEA agents believed he participated in the kidnap, torture and murder of a DEA agent in Mexico. *Id.* The DEA agents hired a team of Mexican nationals, headed

[22] *See e.g. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991); *rev'd*, 504 U.S. 655 (1992); *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992); *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001); *Alvarez-Machain v. United States*, 331 F.3d 604, 610-11 (9th Cir. 2001), *rev'd sub nom. Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), *vacated* by 374 F.3d 1384 (9th Cir. 2004).

by Jose Francisco Sosa, to abduct Dr. Alvarez from his home in Mexico and transport him to the United States. *Id.* The Mexican team kidnapped Dr. Álvarez at gunpoint and flew him to El Paso, Texas by private plane, where federal agents arrested him. *Id.* at 1048-49.[23] "The arrest of Alvarez took place without an extradition request by the United States, without the involvement of the Mexican judiciary or law enforcement, and under protest by Mexico." *Alvarez-Machain*, 331 F.3d at 607. After being acquitted on criminal charges in federal court in Los Angeles, Alvarez filed a civil suit against the federal government under the Alien Torts Claims Act ("ATCA") and Federal Torts Claim Act, alleging his abduction violated the "law of nations" and constituted kidnapping and arbitrary detention. *Id.*[24]

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[23] A more detailed account of the forcible abduction of Dr. Alvarez is set forth in the district court's findings in *U.S. v. Caro-Quintero*, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990) (dismissing criminal charges), *aff'd*, *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992). In reversing this Court, the Supreme Court noted that Alvarez "may be correct that [his] abduction was 'shocking' and that it may be in violation of general international law principles." 504 U.S. at 656. The Supreme Court's decision "did not foreclose Alvarez from later pursuing a civil remedy." *Alvarez-Machain*, 331 F.3d at 610.

[24] The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. *Mora v. New York*, 524 F.3d 183, 192 n.10 (2d Cir. 2008).

Throughout the litigation, a central question was whether the cross-border abduction of *Alvarez* violated customary international law. Indeed, the district court in the initial proceedings "entered summary judgment for Alvarez on his claims against Sosa for kidnapping and arbitrary detention under the ATCA." *Id.* at 610. The court held that state-sponsored, "transborder abductions and arbitrary detentions violated customary international law." *Id.* at 610-11.[25] While a criminal defendant may be tried irrespective of the legality of the transborder abduction, "[i]t must be remembered that this view of the subject does not leave the prisoner or the

[25] The facts showed that Mexican arrest team did not consult with Mexican law enforcement. This Court observed:

> Had Sosa and the arrest team been Mexican law enforcement officers, authorized by Mexican law to arrest Alvarez and to hand him over to United States authorities, for example, no false-arrest claim would have been tenable. Similarly, there would have been no viable false-arrest claim if Mexican law authorized a citizen's arrest in the circumstances presented here. Indeed, Mexican and Honduran agents seized other suspects indicted along with Alvarez, respectively in Mexico and Honduras; Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government.

*Id.*, at 623, n.23; *see also Sosa*, 542 U.S. at 754. Ultimately *Alvarez* was denied relief despite uncontroverted evidence of his illegal abduction.

[other sovereign] without remedy for his unauthorized seizure within its territory." *Ker v. Illinois*, 119 U.S. 436, 444 (1886). Indeed, "the party who is guilty of [the kidnapping] could be surrendered and tried in its courts for this violation of its laws." *Id.*; s*ee also Frisbie v. Collins*, 342 U.S. 519, 520 (1952) (recognizing Federal Kidnaping Statute provides for severe punishment of the Michigan police officers who traveled to Chicago and "forcibly seized, handcuffed, blackjacked and took [fugitive] to Michigan"). Moreover, "[t]he party himself would probably not be without redress, for he could sue [the kidnapper] in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action." *Ker,* 119 U.S. at 444; s*ee also United States ex Rel. Lujan v. Gengler*, 510 F.2d 62, 65 n.3 (2d Cir. 1975) (acknowledging "those responsible for the abduction might under some circumstances be extradited for kidnapping and might be liable in a foreign court for civil damages as well") (citations omitted).[26]

[26] The tort arises where the last event necessary to liability occurs. *See Sami v. United States*, 617 F.2d 755, 761 (D.C. Cir. 1979) (citing Restatement of Conflict of Laws, § 377 (1934)).

3. Unwilling tort victims who were injured by tribal members' negligence in off-reservation car accidents were properly found to have a remedy by the Alabama Supreme Court.

In three decisions handed down the same day in September 2017, the Alabama Supreme Court answered the question of whether tribal immunity from suit bars garden variety tort actions by people who are injured (or killed) in off-reservation accidents. *See Wilkes v. PCI Gaming Auth*. 287 So. 3d 330 (Ala. 2017); *Rape v. Poarch Band Indians*, 250 So. 3d 547 (Ala. 2017); and *Harrison v. PCI Gaming Auth*., 251 So. 3d 24 (Ala. 2017).

*Harrison* involved a dram shop claim under Alabama law based on a tribal casino patron being served alcohol and later crashing at high speed and causing the death of his passenger. 251 So. 3d at 25.

*Wilkes* involved a tribal company employee (apparently a non-Indian, nonmember) who had a serious alcohol abuse problem, who showed up drunk for work and was allowed to drive a company vehicle to a warehouse. While driving, the inebriated employee struck a guardrail, bounced off it, crossed into the opposing lane, and struck another vehicle head-on. The employee's blood alcohol level was measured at ".293 approximately 1 hour and 45 minutes after the collision." *Wilkes*, 281 So. 3d at 331. The injured motorists sued the employee and various tribal

defendants for negligence/wantonness on the day of the accident as well as for negligent hiring and supervision. *Id*.

*Rape* involved a dispute about a casino patron's right to claim a jackpot of $1,377,015.30 while playing a slot machine. The casino staff advised the patron that the slot machine "malfunctioned." The disappointed gambler alleged a series of contract and tort claims including breach of contract, unjust enrichment, misrepresentation, and negligence. *Rape*, 250 So. 3d at 552.

The Alabama Supreme Court examined the U.S. Supreme Court tribal immunity jurisprudence and identified in it the recurring concern about "unwilling tort victims" being left without a remedy. *See Harrison*, 251 So. 3d at 29-33; *Wilkes*, 285 So. 3d at 334. The Alabama Supreme Court concluded in both personal injury cases (*Harrison* and *Wilkes*) that it would not "extend the doctrine of tribal immunity to actions in tort, in which the plaintiff has no opportunity to bargain for a waiver and no other avenue for relief." *Harrison*, 251 So. 3d at 33 (citing *Wilkes* and refusing to "extend[] to the tribal defendants immunity from responsibility for the life-ending injuries to Benjamin allegedly caused by their negligent or wanton serving of alcohol to a visibly intoxicated patron"). The Alabama high court concluded in the commercial dispute (*Rape*) that the conduct was either

authorized by federal gaming laws or illegal under state law and provided no basis for relief and therefore had no need to decide the issue of tribal immunity from suit. 250 So. 3d at 552.

The Alabama Supreme Court's opinion in *Rape,* however, provides a scholarly analysis of tribal immunity from suit that undergirds the holdings in *Harrison* and *Wilkes*. The *Rape* opinion makes a valuable contribution to the body of tribal immunity law by examining the nature of tribal sovereignty as expressed in cases decided by the Supreme Court, and how the defense of tribal immunity from suit has been informed by, and tied to, the concept of tribal sovereignty itself. *See Rape*, 250 So. 3d at 553-58. In essence, sovereign immunity from suit is designed to protect the sovereign's legitimate protectable interests. *See id.* at 554.

More specifically, tribal sovereignty is of a "unique and limited character" and that it "centers on the land held by the tribe and on tribal members within the reservation." *Id.* at 558 (recognizing "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'") (quoting *Nevada v. Hicks*, 533 U.S. 353, 565 (2001) (footnote omitted)). The Alabama Supreme Court further observed that:

> Sovereignty corresponds with, and is a function of, authority over some portion of the earth's surface—some "territory." It is not freestanding. "[F]ull and absolute territorial jurisdiction . . . [is] the attribute of every sovereign." T*he Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). As the Restatement (Third) of Foreign Relations Law § 201 (1987) explains, "[u]nder international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."

250 So. 3d at 554. The connection between sovereign territory and sovereignty is strong. But "[a]s to a matter over which a government has no regulatory authority, it is not sovereign." *Id*. at 553 (quoting Black's Law Dictionary 1631 (10th ed. 2014)).

The Alabama Supreme in *Rape* explained that:

> The very reason for the existence of sovereign immunity is to facilitate the sovereignty of the sovereign. Thus, it is the essential nature of sovereign immunity that it is coextensive with the sovereignty it serves; by nature it operates only within the physical boundaries and the regulatory and adjudicatory boundaries of that sovereignty. "It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." The Federalist No. 81, p. 511 (Alexander Hamilton) (B. Wright ed. 1961).

*Id*. at 554. The principle that tribal immunity is tied to the tribe's territorial sovereignty—with its scope defined by the tribe's legitimate protectable sovereign interests—led the court to conclude that off reservation

negligence torts were not encompassed by tribal immunity from suit. *See Harrison*, 251 So. 3d at 29-33; *Wilkes*, 285 So. 3d at 334. In reaching this conclusion the Alabama high court further explained:

> The principle that sovereign immunity is coextensive with the sovereignty it serves, so too sovereign immunity naturally exists only in the courts that themselves derive from and serve that same sovereignty, and that thus operate within the same physical and regulatory boundaries that define that sovereignty.

*Rape,* 250 So. 3d at 554.

The reasoning employed by the Alabama Supreme Court, which is rooted in core principles of common law sovereignty and the Supreme Court's tribal immunity jurisprudence, is persuasive authority on the particular question presented in those personal injury cases: Whether car accident victims, hurt in off-reservation crashes, have a remedy against the tribes and tribal tortfeasors and can sue them for personal injuries (and wrongful death) in an ordinary negligence lawsuit.[27] But beyond providing

[27] Contrary to the Alabama Supreme Court's holding in *Harrison* (permitting suit against tribal members under the Alabama Dram Shop Act), the Eleventh Circuit concluded in *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224, 1237 (11th Cir. 2012) that tribal immunity barred a wrongful death action under the Florida Dram Shop Act. *Id*. at 1237. The Eleventh Circuit did not undertake a meaningful review of tribal immunity jurisprudence but rather decided it was for Congress to address the plight of unwilling tort victims. *Id*. ("The doctrine of tribal sovereign immunity may well be anachronistic and overbroad in its application, especially

that specific answer, the Alabama high court's analysis of tribal immunity demonstrates the important connection between the doctrine of sovereign immunity from suit and the legitimately protectable interests of the sovereign. The sovereignty of all tribes is fundamentally circumscribed to begin with, and Alaskan Native tribes exercise even fewer sovereign powers as "non-territorial sovereigns." The legitimate, protectable interests of the Togiak Tribe are internal only. They do not extend to *any* territory and cannot be projected extra-territorially. Any time the Tribe acts in relation to non-Indians on non-tribal lands it does so outside its jurisdiction and beyond any legitimate protectable sovereign interests it possesses. The Tribe and its members should be held accountable for their intentional torts committed against a non-Indian, on non-tribal lands.

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when applied to shield from suit even the most sophisticated enterprises of Indian tribes, including commercial activities—such as the sale of alcohol—that have obvious and substantial impacts on non-tribal parties. But it remains the law of the land until Congress or the Supreme Court tells us otherwise.")

## II. The district court wrongly relied on a business torts case, *Arizona v. Tohono O'Odham Nation,* to find tribal immunity barred intentional tort claims seeking redress for personal injuries.

The district court concluded that tribal immunity from suit required dismissal of Oertwich's intentional tort claims under "binding" circuit precedent, citing *Arizona v. Tohono O'Odham Nation*, 818 F.3d 549 (9th Cir. 2016). (ER 11.) That case did not involve battery, imprisonment, kidnapping and other intentional personal-injury torts committed off reservation against an individual non-Indian/non-member. Rather, *Tohono O'Odham Nation* addressed a dispute between "sophisticated, represented parties" concerning their commercial dealings in relation to a gaming compact. *Id.* at 553. The State of Arizona asserted commercial tort claims against the Tohono O'Odom tribe for fraud in the inducement and material misrepresentation concerning the gaming compact, arguing that the tribe had failed to disclose its intentions to build a casino in Phoenix. *Id.* at 553-55.

In affirming the dismissal of those contract-related tort claims based on tribal immunity from suit, this Court applied the holding of *Kiowa* regarding tribal commercial ventures off reservation. *Id.* at 562. The Supreme Court in *Kiowa* held that tribal sovereign immunity is not

restricted to commercial activities conducted by the tribe on its reservation but attaches to its business activities off reservation as well. 523 U.S. at 751, 755-761. In the context of commercial contracts and other consensual business activities, a consenting party is able to negotiate a waiver of immunity from suit, or failing that, forgo the deal. Those practical considerations do not apply in the case of unwilling tort victims injured by tortious acts of a tribe off reservation.

This Court in *Tohono O'Odham* had no occasion to address the issue presented here, namely, whether tribal immunity from suit should be *extended* to immunize the intentional torts committed by tribal police who leave the reservation and physically assault a non-Indian / non-member on non-tribal lands. Indeed, no Supreme Court case (or circuit or district court case) has ever applied tribal immunity from suit to bar a personal injury lawsuit alleging *intentionally* tortious conduct by tribal members *acting outside the tribe's territorial jurisdiction.*

Just imagine if any 1 of the 109 federally recognized tribes in California similarly invoked sovereign immunity from suit to bar civil lawsuits arising from intentional torts committed by their police officers outside Indian country. Take this example:

*The Tribe is a federally-recognized tribe with a reservation in Merced County. The Tribe maintains a police force. The tribal police officers are not cross-deputized with any state or local police force. Nor are they "commissioned" by the Department of Interior to enforce federal laws. The tribal police leave their reservation (and tribal jurisdiction ) in a tribal police car that looks official with an emergency light bar on its roof and "Tribal Police" emblazoned on its doors. As the tribal officers drive south on State Route 99, a public highway under the concurrent jurisdiction of Merced County and the State of California, the officers decide to stop an African American motorist. The tribal police activate their emergency lights and use a bullhorn to order the motorist to pull over. The police direct the driver to step out of the car and lay face down on the pavement with hands held behind his head. The officers approach at gunpoint and pat him down, then direct him to stand up. They ask if he is Indian. He says "no" and identifies himself as a resident of Merced City.*

*The detained motorist then sees "Tribal Police" badging on the police vehicle and questions the officers' authority to stop and question him. In response, the officers rough him up, arrest him for disorderly conduct, and transport him back to*

*the reservation with his hands handcuffed behind his back and his feet bound together with duct tape, and imprison him.*[28]

It is hard to imagine any court concluding that tribal immunity from suit prevents the injured motorist from suing the tribal police officers for the intentional torts of battery, false arrest, and false imprisonment. Those officers clearly acted outside their jurisdiction in blatant disregard of the United States Constitution, the California State Constitution, Supreme Court precedent and other federal and state laws. The victim would be allowed to sue for monetary damages to compensate him for physical pain and mental anguish, would he not? What if the illegal "stop and frisk" escalated into a fatal police shooting? Would the family of the slain

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[28] The legal authority of tribal police is strictly curtailed with respect to interactions with non-Indians *within tribal territory*. *See Bressi*, 575 F.3d at 896-97, holding:

> We conclude that a roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians.

California resident be deprived of a wrongful death action against the tribe and its officers?

The unlawful extraterritorial actions of the Togiak Tribe taken to banish Oertwich are no different than those of the tribal police in the above example. In each case, the police act outside their jurisdiction and purport to exercise criminal jurisdiction over a non-Indian forbidden by the Supreme Court. The police act without any colorable claim to have jurisdiction over the location where they are "policing" and possess no legal authority to arrest a non-Indian resident of the state.

The doctrine of sovereign immunity from suit was never meant to be weaponized and carried offensively into the territory of another sovereign to immunize intentional torts. Tribes and tribal members should be held accountable for their own intentionally tortious acts, especially in the case of "extraterritorial" policing actions against non-Indians on non-tribal lands. This is especially true in the case of the Togiak Tribe which exercises an inherently diminished form of sovereignty that places it rungs below tribes in the contiguous states, which are already substantially limited sovereigns.

To allow Indian tribes and tribal members to be immune to intentional tort lawsuits when other sovereigns are not constitutes

impermissible discrimination. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 698 (9th Cir. 2004) (stating "'[d]iscrimination' is defined as '[d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored'") (quoting Black's Law Dictionary (8th ed. 2004))

## III. Oertwich's individual capacity claims against the individual tribal defendants are not barred by official immunity.

### A. Absolute judicial immunity is unavailable here because the tribal judges acted completely without jurisdiction.

"Judicial immunity from suit does not attach to judicial actions that are taken "in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12 (1991) (holding "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction") (citing *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978)); *see also Mullis v. U.S. Bankruptcy Ct., Dist. of Nevada*, 828 F.2d 1385, 1389 (9th Cir. 1987) ("A clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction.").[29] *See also Rankin v. Howard*, 633 F.2d 844, 848-49 (9th Cir.

[29] As this Court stated in *United States v. Henderson*, "territorial restrictions are *jurisdictional* limitations." 906 F.3d *1109*, 1115 (9th Cir. 2018) (emphasis original). The *Henderson* panel found invalid a search warrant issued by a magistrate judge in the Eastern District of Virginia, authorizing a search of a computer in California, because it exceeded the issuing court's territorial

1980) (concluding "a judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity"). This Court in *Rankin* stated that judicial immunity is lost if the judge "acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction." 633 F.2d at 849.

A judge who issues an order beyond the court's subject matter jurisdiction is acting "in the clear absence of all jurisdiction." *Stump*, 435 U.S. at 356. The Supreme Court gave two examples to help illustrate what it means for a court to act in the complete/clear absence of all jurisdiction. In the first, a probate court judge, who possesses subject matter jurisdiction over trust and estates, chooses to preside over a criminal trial. In that case, immunity does not attach to judicial actions taken in the criminal case. 435 U.S. at 357 n.7. In the second example, a criminal court judge convicts a defendant of a nonexistent crime. In that case, the judge would merely be acting in excess of his jurisdiction and would be immune. *Id.*

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jurisdiction, but agreed suppression was not warranted because the federal agents acted in good faith. *Id.* at 118-119.

1. Subject matter jurisdiction does not exist

Subject matter jurisdiction is altogether missing in the case at bar because tribal courts do not have authority to adjudicate crimes committed by non-Indians, *see Oliphant,* 435 U.S. at 212, and further lack "civil authority over nonmembers on non-Indian land," *Hicks*, 533 U.S. at 360. The Supreme Court in *Hicks* addressed the circumstance of state officials who executed process on reservation lands concerning a crime that occurred off reservation. Even though the claims arose from actions taken within the boundaries of an Indian reservation, a tribal court did not have jurisdiction to adjudicate trespass and other tort claims against the state officials. *See id.*

2. Personal jurisdiction does not exist

Personal jurisdiction is entirely absent here because the Togiak Tribe's court possesses no geographic jurisdiction whatsoever, *see Venetie* 522 U.S. at 523, *Central Council of Tlingit*, 371 P.3d at 26, and cannot project its criminal laws to reach non-Indians residing on non-tribal fee lands.

Thus, the Togiak tribal court acted in the complete and clear absence of both subject matter and personal jurisdiction. The tribal court had no authority to extend its criminal laws to Oertwich as a non-Indian, or to

enforce those laws on non-tribal land under the jurisdiction of the City and State. Under these circumstances judicial immunity does not attach to the tribal court actions; each "judge" is properly subject to suit.

The district court reached the opposite conclusion only by ignoring the "clearly valid . . . caselaw [*Oliphant*] expressly depriving [the tribal court] of jurisdiction." *Rankin*, 633 F.2d at 849. Instead the district court cited *Imbler v. Pachtman*, 424 U.S. 409 (1976), for the general proposition that judges enjoy absolute immunity for judicial actions when they act with jurisdiction. Citing that case just begs the question; *Oliphant* provides the unmistakable answer. The complete absence of all jurisdiction prevents the application of judicial immunity as a matter of law. *Mireles*, 502 U.S. at 12.

### B. Qualified immunity does not apply because the tribal defendants clearly violated constitutional prohibitions against tribes exercising criminal jurisdiction over non-Indians.

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted); *see also Reed v. Lieurance*, 863 F.3d 1196, 1207 n.4 (9th Cir. 2017). Where, as here, "the suit is over plainly unlawful acts" it is an

"individual capacity suit[] by definition" and is not barred by tribal sovereign immunity from suit. *Maxwell*, 708 F.3d at 1089.

The district court concluded that Oertwich could not show the tribal officials violated clearly established constitutional rights. That conclusion is wrong as a matter of law. The Tribal Defendants violated the clearly and long-established constitutional prohibition against tribes criminally prosecuting non-Indians as set forth by the Supreme Court, long-recognized by this Court, and otherwise violated clear constitutional and statutory restrictions against exercising territorial sovereignty over non-Indians on non-tribal lands. All actions taken by the Togiak Tribe against Oertwich were "extraterritorial," outside the Tribe's jurisdiction, ultra vires, and plainly unlawful.

### C. The "volunteers" who committed intentional torts against Oertwich are not entitled to official immunity.

The Tribe claims two tribal members (Paul Markoff and Bobby Coopchiak) volunteered to subdue Oertwich in the City jail, and otherwise willingly participated in his abuse, even though neither man held an official position with the Tribe. (ER 22-23.) Such unofficial, private actions fall outside the defense of qualified immunity available to government

officials. *See Conner v. City of Santa Ana,* 897 F.2d 1487, 1492 n.9 (9th Cir. 1990) (reversing grant of immunity to towing company because "private parties acting under color of state law are not entitled to the qualified immunity defense") (citing *F.E. Trotter, Inc. v. Watkins,* 869 F.2d 1312, 1318-19 (9th Cir. 1989)*; Howerton v. Gabica,* 708 F.2d 380, 385 n.10 (9th Cir. 1983) (holding "there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights.*"); see also Warner v. Grand County*, 57 F.3d 962 (10th Cir. 1995). Markoff and Coopchiak voluntarily assumed the role of "enforcers" by tackling, subduing and forcibly carrying Oertwich. Their private actions are legally indistinguishable from the lawless actions of a mob assembled by a sheriff at the jail, in which the "volunteers" seek retribution rather than justice. Qualified immunity plainly is not available to insulate such thug-like behavior.

## IV. Plaintiff's claim (Count I) seeking prospective injunctive relief is not barred by tribal sovereign immunity from suit.

Tribal officials may be individually sued under the doctrine of *Ex Parte Young* for prospective injunctive relief, which requires the plaintiff to show a continuing violation of federal law. *See Bay Mills,* 134 S. Ct. at 2035

("As this Court has stated before, analogizing to *Ex parte Young*, [209 U.S. 123 (1908)], tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct.") (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978)); *see also Carsten v. Inter-Tribal Council of Nev.*, 599 F. App'x 659, 4 n.2 (9th Cir. 2015) (recognizing *Ex Parte Young* provides for prospective injunctive relief against tribal officials); *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (applying the *Ex Parte Young* framework to tribal officers). This Court stated in *BNSF v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007), that "[i]n determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether [the plaintiff] has alleged an ongoing violation of federal law and seeks prospective relief." *Id.* at 1092 (citing *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645-46 (2002) (emphasis in original)). Given the Togiak Tribe's ultra vires permanent banishment order issued in violation of *Oliphant*, which continues in effect to this day, Oertwich's claims for prospective injunctive relief against the individual Tribal Defendants satisfy the *Ex Parte Young* pleading requirements. The district court erred in dismissing Count I.

## V. The district court erred in requiring Oertwich to take actionable state law claims (not barred by any form of immunity) to tribal court.

The district court misapprehended the allegations contained in paragraphs 36 and 38 of the Complaint. The lower court correctly determined that the tortious actions detailed in those two paragraphs (regarding Oertwich's imprisonment) were actionable against the individual tribal defendants, but wrongly concluded they were actionable only under the Indian Civil Rights Act. (ER 17-18.) That would explain the district court's determination that the court "lacked jurisdiction to hear them." In fact, the allegations make out the state law tort claims of false imprisonment (Count IV) battery (Count V) and intentional infliction of emotional distress (Count VI) against the individual tribal defendants. Those state law tort claims are properly heard in federal court under the district court's supplemental jurisdiction. If that court declines to exercise supplemental jurisdiction over the state law tort claims, the district court should remand them to the State of Alaska Superior Court, not the Togiak tribal court.

## VI. Plaintiff should be allowed to amend his complaint to expressly state a federal civil rights claim under 42 U.S.C. § 1983.

The Tribal Defendants' filings in support of their motion to dismiss under 12(b)(1) show a confluence of state and tribal law in the Togiak Tribe's unlawful effort to exercise criminal jurisdiction over Oertwich. (ER 28, 30-31.) This includes the tribal court expressly referencing state criminal law violations in its orders and referring the state law charges to the Alaska Superior Court. (28, 30.) The Tribe's overlapping efforts to hold Oertwich accountable under state and tribal laws, based on the same unlawful seizure of evidence, may be sufficient on its face to establish that the tribal officer and other individual defendants were acting under color of state law, as well as tribal law. *See Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989) (reversing district court and holding that "color of state law" predicate for section 1983 liability was sufficiently pled against individual tribal defendants based on allegation that they "acted jointly with the City police in instigating the seizures and arrests at issue"); *see generally Degrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (recognizing that "private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions")

(quoting *Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980)). Oertwich should be allowed to plead and prove that the Tribe's enforcement of tribal laws was expressly conditioned on state enforcement. Together with the documented intertwining of state and tribal law enforcement by the Togiak tribal police and courts plainly stated on the face of the tribal court orders, Oertwich can demonstrate that the tribal officials operated under color of state law for purposes of section 1983 liability.

## CONCLUSION

Plaintiff-Appellant Ronald Oertwich seeks to hold the Tribal Defendants accountable for their intentional torts committed against him, a non-Indian, where the tribal tortfeasors acted outside their jurisdiction on non-tribal lands. This Court should not extend tribal immunity from suit to insulate such abhorrent conduct and in the process elevate tribes to super-sovereigns.

Dated May 22, 2020

/s/ David H. Tennant

David H. Tennant
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, NY 14618
Tel.: 585.281.6682
david.tennant@appellatezealot.com
*Attorneys for Plaintiff-Appellant*

# APPENDIX

## CHART LISTING ALASKA CRIMES AND INTENTIONAL TORTS

| CONDUCT | ALASKA CRIME | INTENTIONAL TORTS |
|---|---|---|
| Forcibly detained, arrested, bound, jailed, transported to airport | Kidnapping (unclassified felony) Alaska Stat. § 11.41.300(a)(1)(C) and (E); (b)(2)(B) | Battery<br>False imprisonment<br>Intentional infliction of emotional distress |
| | Conspiracy to commit kidnapping (class A felony) AS 11.31.120<br><br>Impersonating a public servant in first degree (class C felony) AS 11.56.827 | |
| Tackled to ground, hog-tied with handcuffs and duct tape | Assault (class A misdemeanor) AS 11.41.230(a)(1) | Battery<br>False imprisonment<br>Intentional infliction of emotional distress |
| Entered Plaintiff's home without permission to demand he leave town | Burglary first degree (class B felony) AS 11.46.300<br><br>Criminal trespass first degree (class A misdemeanor) AS 11.46.330 | Trespass to land |

| | | |
|---|---|---|
| Threatened to physically injure Plaintiff if he did not leave his home or if he returned | Coercion (class C felony)<br>AS 11.41.530 | Assault |
| Seized and kept Plaintiff's firearms | Theft in second degree (class C felony)<br>AS 11.46.130 for | Trespass to chattels |

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font, and contains 13,648 words.

Dated May 22, 2020

/s/ David H. Tennant
David H. Tennant
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, NY 14618
Tel.: 585.708.9338
david.tennant@appellatezealot.com

*Attorneys for Plaintiff-Appellant*

## STATEMENT OF RELATED CASES

Appellant here certifies that, to Appellant's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

# ADDENDUM

Case No. 3:12-cv-00077-SLG
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

# Koniag, Inc. v. Kanam

Decided Jul 3, 2012

Case No. 3:12-cv-00077-SLG

07-03-2012

KONIAG, INC., an Alaska Corporation, and MICHAEL P. O'CONNELL, an individual, Plaintiffs, v. KURT KANAM, individually and as Tribal Attorney for the Native Village of Karluk, and ORBIE MULLINS, individually and as Village of Karluk Tribal Court Judge for the Karluk Tribal Court for the Native Village of Karluk, Defendants.

Sharon L. Gleason

## DECISION AND ORDER GRANTING PRELIMINARY INJUNCTION

Koniag, Inc. instituted this action on April 9, 2012.[1] That same day, Koniag filed a Motion for a Temporary Restraining Order and Preliminary Injunction.[2] Koniag seeks an order that would enjoin the tribal attorney and judge of the Karluk Tribal Court from proceeding in the tribal court against Koniag and from attempting or threatening to record or enforce any order or judgment of the Karluk Tribal Court against Koniag. Koniag appended to its motion a number of Karluk Tribal Court documents, including a document entitled Original Complaint for Declaratory Judgment that was filed in the Karluk Tribal Court case entitled *The Native Village of Karluk, Plaintiff, v. Koniag* 2 *2 *Corporation, Defendant,* Cause No. 3-19-12-1.[3] In that case, the Native Village of Karluk seeks an order from the tribal court that its voting members be "de-merged" from the Koniag Corporation. The Native Village of Karluk maintains that it is entitled to "the same awards as the other parties who were fraudulently misled" by the Koniag Corporation in a 1984 state court proceeding.[4]

1 Compls. (Docket 1, Docket 2).

2 Docket 5.

3 Docket 9-1.

4 *Id.*

On April 11, 2012, this court entered an order denying Koniag's request for a temporary restraining order.[5] This court found then that Koniag had not demonstrated that any harm it may incur if the tribal court were to exceed its jurisdiction "is of such a degree and immediacy so as to warrant the entry of a temporary restraining order."[6]And this court expressly noted that Koniag could elect to enter a special appearance in the tribal court solely to contest that court's jurisdiction.[7]

5 Order Denying Mot. for TRO (Docket 12).

6 *Id.* at 2.

7 *Id.* at 2, n.4.

Later that same day, on April 11, 2012, Koniag filed an Amended Complaint that added Michael P. O'Connell as a plaintiff.[8] Mr. O'Connell is an attorney at the law firm that represents Koniag.[9] Mr. O'Connell was added as a plaintiff in this case based on allegations that on April 9, 2012, the Native Village of Karluk had filed a second lawsuit in the Karluk Tribal Court. Mr. O'Connell 3 was named as a defendant in that case, along *3 with a number of state bar associations.[10] In that

second tribal court action, the Native Village of Karluk seeks a declaration that an April 5, 2012 letter that Mr. O'Connell wrote to Judge Orbie Mullins of the Karluk Tribal Court constituted the "intentional intimidation of a judge."[11]

8 Docket 13.

9 *See* Letter of Apr. 5, 2012, Ex. C to Decl. of Michael O'Connell (Docket 8-3).

10 Summons in *Native Village of Karluk v. Michael P. O'Connell, et al.,* Karluk Tribal Court Cause No. 4-09-12-1 (Docket 14-1).

11 *Id.* at 9.

On April 17, 2012, the plaintiffs filed a Second Motion for Preliminary Injunction in this case.[12] The motion sought to obtain the same preliminary injunctive relief for Mr. O'Connell as Koniag had sought in its initial Motion for Preliminary Injunction. Among the attachments to that motion was a copy of a special limited entry of appearance by attorney Stephen Kelly in the Karluk Tribal Court on behalf of Koniag, and a motion to dismiss the tribal court case filed by Koniag.[13] Mr. Kelly is another attorney at the firm that represents Koniag in this action.

12 Docket 17.

13 Ex. D to Decl. of John Evans at 1-6 and 47-63 (Docket 20-4).

On April 25, 2012, Judge Mullins filed a response to the plaintiffs' motions in this court and a Motion for Enlargement of Time.[14] He maintained that Koniag had consented to the tribal court's jurisdiction since it had entered an appearance in the tribal court with the motion to dismiss that it had filed there.[15] And he asserted that Mr. *4 O'Connell's letter to the tribe resulted in conferring tribal court jurisdiction over him.[16]Finally, Judge Mullins requested that this federal case be deferred pending the tribal court's determinations in *The Native Village of Karluk, Plaintiff, v. Koniag Corporation, Defendant.* [17]Included in the attachments to Judge Mullins' filing is an order from the tribal court dated April 17, 2012 that accords to the Native Village of Karluk an unspecified amount of time within which it may respond to the motion to dismiss that Koniag had filed in that tribal court case.[18]

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14 Opp. Re Second Mot. for Prelim. Inj. and Mot. for Enlargement of Time (Docket 23) (duplicative filing at docket 22) [hereinafter Opp. and Mot. for Enlargement].

15 *Id.* at 3. Judge Mullins' assertion that the special limited entries of appearance, done after this court's suggestion in the Order Denying Temporary Restraining Order, operated to confer tribal court jurisdiction over Koniag and Mr. O'Connell is at odds with the express limitations set forth in each entry of appearance, and inconsistent with the requirements of procedural Due Process. It is also inconsistent with Rule 12(b) of the Federal Rules of Civil Procedure, which the Karluk Tribal Court has indicated it has adopted for the cases before it. *See* Resp. to Bar Appl. at 2, Ex. A-2 to Decl. of John R. Evans (Docket 9-2). *See also MacArthur v. San Juan County,* 309 F.3d 1216, 1224-1225 (10th Cir. 2002) (when attorney became a member of Navajo Nation Bar Association, he did not enter into a consensual relationship with the Navajo Nation so as to confer tribal court jurisdiction over him). Even if the special limited appearances sufficed to confer *personal* jurisdiction over Koniag and Mr. O'Connell, they would not suffice to confer *subject matter* jurisdiction over them, which is the relevant analysis at this time. *See Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 809 (9th Cir. 2011) ("To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction.").

16 Opp. and Mot. for Enlargement at 3 (Docket 23).

17 *Id.*

18 Ex. B to Opp. and Mot. for Enlargement (Docket 23-2).

On May 3, 2012, the plaintiffs in this action filed their reply to Judge Mullins' opposition to the plaintiffs' motions for injunctive relief, as well as their opposition to Judge Mullins' motion for an extension of time.[19] The plaintiffs noted that Judge Mullins' motion was in effect a request to stay this court's proceedings until the tribal court proceedings were concluded. The plaintiffs
5 asserted that request should be denied *5 because "there is no possible basis for Tribal Court jurisdiction over non-members Koniag and O'Connell."[20] Included with this filing were copies of a motion for special and limited appearance and a motion to dismiss for lack of jurisdiction that attorney Stephen Kelly had filed on April 26, 2012 in the second tribal court case, *The Native Village of Karluk v. Michael P. O'Connell, et al.,* Cause No. 4-09-12-1, on behalf of Mr. O'Connell.[21]

19 Reply to Opp. Re Second Mot. for Prelim. Inj (Docket 24); Opp. to Mot. for Enlargement (Docket 25).

20 Opp. to Mot. for Enlargement at 2 (Docket 25).

21 Ex. B to Decl. of John Evans (Docket 26-2); Ex. E to Decl. of John Evans (Docket 26-5).

On May 21, 2012, defendant Kurt Kanam filed a response to the plaintiffs' motions for injunctive relief in this action, together with an affidavit in support of a motion for dismissal.[22] Mr. Kanam asserted that this federal action should be dismissed because the concerns that Koniag and Mr. O'Connell had raised about the tribal court proceedings had now been addressed through a First Amended Complaint that the Native Village of Karluk Corporation had filed in the tribal court.[23] Mr. Kanam indicated that the First Amended Complaint in the tribal court case lists all of the voting shareholders of the Native Village of Karluk Corporation as plaintiffs.[24] And he asserted that Koniag had entered into a consensual relationship with Karluk, referring to 1980 Articles of Merger that he appended to his filing.[25]
6 Mr. Kanam also asserted that Mr. *6 "O'Connell is not under any indictment or subject to any sanctions from the Native Village of Karluk tribal court," such that Mr. O'Connell's federal claims should also be dismissed.[26] Mr. Kanam included copies of two orders issued by the Karluk Tribal Court dated May 14, 2012, one in each of the two pending actions in that court. In the *Koniag* case, the tribal court ordered Koniag to "to show cause by June 15, 2012. . . why this court does not have jurisdiction" to grant the relief requested by the Native Village of Karluk,[27] and in the *O'Connell* case, the tribal court ordered Mr. O'Connell to show cause "why this court should not grant Plaintiff's requested relief."[28]

22 Resp. to Pl.'s Inj. and Aff. in Supp. for Mot. for Dismissal (Docket 28).

23 *Id.* at 3.

24 First Am. Compl., Karluk Tribal Court Cause No. 3-19-12-1, Ex. A to Resp. to Pl.'s Inj. and Aff. in Supp. for Mot. for Dismissal (Docket 28-1).

25 Articles of Merger, Ex. D to Resp. to Pl.'s Inj. and Aff. in Supp. for Mot. for Dismissal (Docket 28-4).

26 Resp. to Pl.'s Inj. and Aff. in Supp. for Mot. for Dismissal at 4 (Docket 28).

27 Order to Show Cause at 2, Ex. D to Resp. to Pl.'s Inj. and Aff. in Supp. for Mot. for Dismissal (Docket 28-4 at 12).

28 Order Granting Defs. Add'l Time to Answer at 2, Karluk Tribal Court Cause No. 4-09-12-1, Ex. A to Resp. to Pl.'s Inj. and Aff. in Supp. for Mot. for Dismissal (Docket 28-1 at 10).

On May 25, 2012, the plaintiffs filed their reply to Mr. Kanam's opposition, and maintained their requests for injunctive relief.[29] They asserted that the 1980 Articles of Merger that Mr. Kanam had appended to his May 21, 2012 filing were between Koniag and the Karluk Native Corporation—and not with the Native Village of Karluk.[30] They also asserted that the addition of the shareholders of the Native Village of Karluk as parties in the tribal court proceedings did not operate to confer tribal court jurisdiction, particularly since none of these added parties were parties to the 1980 merger.[31]
7 The *7 plaintiffs also disagreed with Mr. Kanam's assertion that this action is moot, maintaining that there exists a "live dispute between the parties" that necessitates a ruling.[32]

29 Reply to Resp. to Second Mot. for Prelim. Inj. (Docket 29).

30 *Id.* at 2.

31 *Id.* at 2.

32 *Id.* at 4.

To date, neither defendant has filed an answer in this case, and no party has filed any copies of Karluk Tribal Court documents since May 21, 2012.

## I. This Court's Subject Matter Jurisdiction.

This court has previously stated, and again holds, that it is well established that the district court has the authority to determine whether a tribal court has exceeded the lawful limits of its jurisdiction.[33]

33 *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) ("whether a tribal court has adjudicative authority over nonmembers is a federal question") (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985)). *See also* Order Denying TRO and Mot. for Hearing on Shortened Time at 2 (Docket 12).

## II. Standard for Preliminary Injunctive Relief.

A party seeking preliminary injunctive relief must establish that "(1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest."[34] "Under the 'sliding scale' approach to preliminary injunctions observed in [the Ninth Circuit], 'the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.'"[35] But in any event, even with the sliding
8 scale approach, "plaintiffs must *8 establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction."[36]

34 *Sierra Forest Legacy v. Ray*, 577 P.3d 1015, 1021 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

35 *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

36 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

For purposes of the preliminary injunction motions before this court, the first question is whether the Karluk Tribal Court has a colorable claim of tribal court jurisdiction over Koniag and Mr. O'Connell, non-members of its tribe.[37] For if no such colorable claim exists, then the defendants are likely to succeed on the merits of their claim for permanent injunctive relief from this court, such that preliminary injunctive relief may be warranted at this time.

37 *See Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 934 (9th Cir. 2009).

## III. The Scope of the Tribal Court's Jurisdiction.

### A. Tribal Court Jurisdiction Generally.

It is well-settled that Indian tribes are "distinct, independent political communities" . . . qualified to exercise many of the powers and prerogatives of self-government[.]"[38] But the sovereignty of Indian tribes, centering as it does on lands held by the tribe and on tribal members, is "unique and limited[.]"[39] Tribes have authority to legislate and tax activities on tribal land, to determine tribal membership, to exclude outsiders from entering tribal land, and to regulate tribal members' domestic relations.[40] *9

38 *Plains Commerce,* 554 U.S. at 327 (citing *Worcester v. Georgia,* 6 Pet. 515, 559 (1832); *United States v. Wheeler,* 435 U.S. 313, 322-323 (1978)).

39 *Id.*

40 *Id.*

In *Montana v. United States,* [41] the United States Supreme Court established the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe[.]"[42] Only under limited circumstances can tribes exercise jurisdiction over non-members. In *Montana,* the Court recognized two circumstances in which tribes may exercise authority over non-members of the tribe:

> Indian tribes retain inherent sovereign power to exercise some form of civil jurisdiction over non-Indians *on their reservations,* even on non-Indian lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements . . , A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[43]

But as the first sentence of the above quote makes clear, these *Montana* exceptions confer jurisdiction over non-Indians only with respect to activities on the Indian tribe's reservation, including land within reservation borders that has been sold in fee simple to non-Indian owners.[44] *10

41 450 U.S. 544 (1981).

42 *Plains Commerce,* 554 U.S. at 330 (citing *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 651, 659 (2001)). *See also Big Horn County Elec. Co-op., Inc. v. Adams,* 219 F.3d 944, 951 (9th Cir. 2000) *("Montana's* main rule is that absent a treaty or a federal law, a tribe has no civil regulatory authority over tribal nonmembers.") (citing *Montana,* 450 U.S. at 564-65).

43 *Montana,* 450 U.S. at 565 (citations omitted) (emphasis added).

44 *Montana,* 450 U.S. at 565. Another source of authority over non-members is a tribe's inherent sovereign right to exclude non-members from its lands, which "necessarily includes the lesser authority to set conditions on their entry through regulations." *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 811 (9th Cir. 2011).

### B. Tribal Court Jurisdiction in Alaska.

The authority of most Alaska Native tribes is significantly more circumscribed than that of other tribes. The United States Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government* held that the Alaska Native Claims Settlement Act of 1971 (ANCSA) extinguished "Indian country" in nearly all of Alaska.[45]As a

result, territorial jurisdiction is not available to Alaska Native tribes on ANCSA lands.[46] Instead, the jurisdictional reach of Alaska Native tribal courts extends only to "their members and other internal affairs."[47]

45 522 U.S. 520, 532 (1998) (holding that ANCSA lands are not "Indian country," as they do not satisfy the set-aside and federal superintendence requirements for "dependent Indian communities" under 18 U.S.C. § 1151). While there are exceptions to this general statement, such as the Metlakatla Indian Community on the Annette Island Reserve, those exceptions are very limited and not relevant to this case. *Id.* at 524. *See also* 18 U.S.C. § 1151; *Atkinson Trading Co.,* 532 U.S. at 653 n.5 (18 U.S.C. § 1151 definition of "Indian country" generally applies to civil as well as criminal jurisdiction) (citations omitted).

46 *See* David Case, *Alaska Natives and American Laws* 399 (2d ed. 2002).

47 *See id.* at 437.

Following *Venetie,* decisions of the Alaska Supreme Court have recognized the unique jurisdictional reach of Alaska Native tribal authority, and further refined the limits of that reach.[48] In *John v. Baker,* the Alaska Supreme Court explained:

48 *See John v. Baker,* 982 P.2d 738, 751 (Alaska 1999) ("the [United States] Supreme Court has articulated a core set of sovereign powers that remain intact even though Indian nations are dependent under federal law; in particular, internal functions involving tribal membership and domestic affairs lie within a tribe's retained inherent sovereign powers.) (citing *Wheeler,* 435 U.S. at 326; *Montana,* 450 U.S. at 564).

> Because the traditional reservation-based structure of tribal life in most states forms the backdrop for the federal cases, courts have not had occasion to tease apart the ideas of land-based sovereignty and membership sovereignty. Consequently, the federal decisions do not conclusively answer the question of what
>
> 11 *11 happens when a law like ANCSA separates membership and land completely by allowing a federally recognized tribe to redefine its relationship to state and federal governments by eliminating the idea of Indian country.[49]

49 *Id.* at 754.

The Alaska Supreme Court rulings make clear that Alaska Native tribes have inherent sovereign jurisdiction to "adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy."[50] But Alaska Native tribes such as the Native Village of Karluk do not have territorial jurisdiction, in light of the United States Supreme Court's holding in *Venetie* that by and large extinguished "Indian country" within Alaska.[51]

50 *State v. Native Village of Tanana,* 239 P.3d 734, 743 (Alaska 2011) (citing *John v. Baker,* 982 P. 2d at 754).

51 522 U.S. 520.

**C. The Native Village of Karluk Tribal Court Lacks Jurisdiction.**

The Native Village of Karluk is a federally recognized Indian tribe in Alaska eligible to receive services from the United States Bureau of Indian Affairs.[52] It is not a village corporation established under ANCSA.[53] Koniag has asserted, and the Native Village of Karluk has not disputed, that the Old Karluk Reservation was revoked by ANCSA.[54] Koniag is the ANCSA regional corporation for Kodiak Island.[55] Any land owned

by either the Native Village of Karluk or Koniag is
12 not "dependent Indian *12 communities" or "Indian country" under federal law.[56] And it is undisputed that Koniag and Mr. O'Connell are not members of the Native Village of Karluk.

52 75 Fed. Reg. 60810, 60814 (Oct. 1, 2010).

53 43 U.S.C. § 1601.

54 Mem. in Supp. of Mot. for TRO and Prelim. Inj. at 2. (Docket 6).

55 *Id.*

56 *Venetie,* 522 U.S. at 523-24.

Because Koniag and Mr. O'Connell are non-members of the Native Village of Karluk, there is no basis for the Karluk Tribal Court to exercise jurisdiction over them. The Karluk Tribal Court cannot exercise territorial jurisdiction in light of the United States Supreme Court's holding in *Venetie.* And these tribal court claims against non-members of the tribe are not internal domestic matters as to which the Native Village of Karluk may possess an inherent sovereign jurisdiction to adjudicate. The plaintiffs have demonstrated a clear likelihood of success on the merits of their claim for declaratory relief before this court.

## IV. Analysis of the Other Elements for Injunctive Relief.

As set forth above, a party seeking preliminary injunctive relief must establish three other elements in addition to a likelihood of success on the merits.[57] Each of these is discussed in turn below.

57 *Supra* at 7-8.

### A. The Plaintiffs Are Likely to Suffer Irreparable Harm if the Tribal Court Action Proceeds.

The plaintiffs have asserted that requiring them to litigate in tribal court in these circumstances would result in irreparable harm to them. They assert that if the tribal court proceedings go forward, they will incur the costs of litigating in that forum and they will also be exposed to the risk of an adverse judgment entered by that court.
13 They note *13 that the Native Village of Karluk seeks a tribal court order which it intends to register in the federal District Court under the "Uniform Foreign Judgments Act."[58]

58 Proposed Declaratory Judgment at 2 in *Native Village of Karluk v. Koniag,* Karluk Tribal Court Cause No. 3-19-12-1, Ex. A-1 to Decl. of John Evans (Docket 9-1 at 6).

This court concurs with the plaintiffs that the likelihood of irreparable harm has been demonstrated. The plaintiffs have shown that there is a significant risk that both Koniag and Mr. O'Connell, together with their counsel, will be forced to expend unnecessary time, money and effort litigating these issues in the Karluk Tribal Court. Indeed, the plaintiffs have already been required to expend considerable time and resources in tribal court and before this court seeking to terminate the tribal court actions against them.[59] And in addition to these economic harms, the plaintiffs have demonstrated that a very real risk of registration of an adverse judgment from a court that is without jurisdiction to enter such a judgment is likely to result in an unwarranted and irreparable harm to both Koniag's and Mr. O'Connell's reputation.[60]

59 *Cf. Crowe & Dudley, P.C. v. Stidham,* 640 F.3d 1140, 1157 (10th Cir. 2011) (affirming preliminary injunctive relief to law firm that was sued in tribal court regarding attorney's fees).

60 Specifically with respect to Mr. O'Connell, the likely injury to reputation of an adverse judgment by the tribal court could be significant. Judge Mullins appears to have already entered a tribal court order in Cause No. 3-19-12-1, before Mr. O'Connell had an opportunity to be heard, finding that "Mr. P. O'Connell has threatened the judge of this court and as such has committed

Judicial intimidation." Order Assigning Counsel dated Apr. 9, 2012, Ex. A to Decl. of John Evans (Docket 20-1).

**B. The Balance of Equities Tips to the Plaintiffs.**

The balance of equities tips sharply in favor of both Koniag and Mr. O'Connell. These plaintiffs are entitled to an order that precludes the defendants from proceeding against them in a court which so clearly lacks jurisdiction over them. And as the *14 plaintiffs correctly note, granting the preliminary injunctive relief that the plaintiffs seek here would not preclude the Native Village of Karluk from seeking to have its claims addressed in state or federal court.[61] But, as Koniag asserts and this court has concluded, "the applicable law leaves no doubt that the Tribal Court is not the proper forum for resolution of the issue[s] raised by the Native Village of Karluk in the Tribal Court proceeding."[62] Thus, this court finds that the balance of equities tips sharply in favor of Koniag and Mr. O'Connell.

61 Mem. in Supp. of Mot. for TRO and Prelim. Inj. at 21 (Docket 6).

62 *Id.*

**C. Preliminary Injunctive Relief is in the Public Interest.**

For the same reasons that this court has found the balance of equities tips sharply in favor of the plaintiffs in this case, preliminary injunctive relief is in the public interest. There is a strong public interest in not allowing court proceedings to go forward in a tribunal that is clearly without jurisdiction over the proceedings.

## V. Judge Mullins' Motion for Enlargement of Time.

Judge Mullins' Motion for Enlargement of Time is, in effect, a request that this court abstain from proceeding with this action in order "to give the Native Village of Karluk Tribal Court time to act on this matter."[63] The plaintiffs acknowledge that as a general rule, a federal court should defer its exercise of jurisdiction until after a tribal court "has had a full opportunity to determine its own jurisdiction."[64] But the plaintiffs *15 maintain that such abstention is unwarranted here because it is plain that the Karluk Tribal Court lacks jurisdiction, and the United States Supreme Court has held that abstention is not required in such circumstances.[65] Because the Karluk Tribal Court's lack of jurisdiction is clear, according to the tribal court an opportunity to determine the scope of its jurisdiction over this matter "would serve no purpose other than delay."[66]Therefore, abstention is inappropriate and the motion for an enlargement of time so as to allow the tribal court to first address this jurisdictional issue is denied.

63 Opp. Re Second Mot. for Prelim. Inj. and Mot. for Enlargement of Time at 2 (Docket 23).

64 Mem. in Supp. of Mot. for TRO and Prelim. Inj. at 18 (Docket 6) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856 n.21 (1985)). *See also Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 16 (1987).

65 *Strate v. A-1 Contractors,* 520 U.S. 438, 459 n.14 (1997); Mem. in Supp. of Mot. for TRO and Prelim. Inj. at 18. (Docket 6).

66 *Strate,* 520 U.S. 459 at n.14.

## VI. Mr. Kanam's Motion to Dismiss.

For the foregoing reasons, this court has determined that preliminary injunctive relief is warranted. Accordingly, Mr. Kanam's motion to dismiss this action is denied.

## CONCLUSION

For the foregoing reasons, IT IS ORDERED:

1. Koniag, Inc. and Michael P. O'Connell's Motions for Injunctive Relief are GRANTED as follows:

Defendants Kurt Kaman and Orbie Mullins, and their officers, agents, servants, employees and attorneys, and all other persons who are in active concert or participation with them, are enjoined from:

• retaining, exercising, or threatening to retain or exercise jurisdiction, or
• attempting or threatening to record or enforce any order or judgment of
16 *16 the Karluk Tribal Court for the Native Village of Karluk against or with respect to Koniag, Inc. or Michael P. O'Connell as to any matters related to the Karluk Tribal Court Documents.[67]

67 The Karluk Tribal Court Documents are comprised of an Original Complaint for Declaratory Judgment, Order to Show Cause, Proposed Declaratory Judgment or Summons in those certain Karluk Tribal Court cases captioned (1) *The Native Village of Karluk, Plaintiff, against Koniag Corporation, Defendant,* Cause No. 3-19-12-1 and (2) *The Native Village of Karluk v. Michael P. O'Connell et al.,* Cause No. 4-09-12-1.

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2. Pursuant to Civil Rule 65(c), this restraining order is effective as of the date and time that the plaintiffs shall have placed with the clerk of the court a cash bond or other appropriately secured undertaking in the amount of $1,000 (One Thousand Dollars), which this court considers proper to pay costs and damages sustained by any party found to have been wrongfully enjoined or restrained. It shall remain in effect pending further order of this court.

3. Defendant Orbie Mullins' Motion for an Enlargement of Time is DENIED.

4. Defendant Kurt Kanam's Motion for Dismissal is DENIED.

5. The defendants are each ordered to file an Answer to the plaintiffs' First Amended Complaint within 21 days of the date of this order.

DATED at Anchorage, Alaska, this 3rd day of July, 2012.

Sharon L. Gleason

United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephen Moore
Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS INC.