Supreme Court of the United States.
Rita J. CARLS, and Nicholas Anthony Bernardoni and Andrea R. Bernardoni, minors by and through their Guardian ad Litem Peter Bernardoni, Petitioners,
v.
BLUE LAKE HOUSING AUTHORITY as successor-in-interest to J&L Properties, Respondent.
No. 07-1037.
February 7, 2008.

On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

Petition for Writ of Certiorari

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QUESTION PRESENTED

Petitioners purchased a new home from a commercial construction company. The home was not on Indian tribal land or within a tribal *reservation*, and neither petitioners nor the company had any connection whatever to any **Indian tribe**. Respondent, a tribal business entity, then voluntarily acquired the construction company, assuming its liabilities. Petitioners' home suffered from water intrusion, resulting in high levels of toxic mold that left Petitioners ill and the house uninhabitable.

Question: When a tribe voluntarily acquires a non-tribal business, with existing contract obligations, does sovereign immunity allow the tribe to repudiate those obligations?

LIST OF ALL PARTIES

Petitioners; Rita J. Carls, and Nicholas Anthony Bernardoni and Andrea R. Bernardoni, minors and through their Guardian ad Litem Peter Bernardoni.

Respondent: Blue Lake Housing Authority as successor-in-interest to J&L Properties.

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Rita J. Carls, and Nicholas Anthony Bernardoni and Andrea R. Bernardoni, minors by and through their Guardian ad Litem Peter Bernardoni, respectfully petition for a writ of certiorari to the California Court of Appeal, Third Appellate District.

OPINIONS BELOW

The decision of the California Third District Court of Appeal is reproduced in the Appendix at A. The order of the California Supreme Court denying Petitioners' petition for review is reproduced in the Appendix at B. The opinions of the trial court and the court of appeal are unreported. The ruling of the California Superior Court granting Respondent's motions to quash is reproduced in the Appendix at C.

JURISDICTION

The order of the California Supreme Court denying review in this matter was entered on October 10, 2007. Appendix at B. On December 17, 2007, Justice Kennedy granted Petitioners' application for an extension of time within which to file this petition, to and including February 7, 2008.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

In March, 2000, Rita Carls purchased a home in El Dorado Hills, California, from J&L Properties, doing business as JTS Communities. Appendix (App.) at I17. J&L Properties was a non-tribal California general partnership that constructed non-tribal housing for sale on non-tribal land. *Id.* at A1. Ms. Carls moved into her home on March 31, 2000. Throughout the next few years, her grandchildren, Nicholas and Andrea Bernardoni, often stayed with her in the house.

Ms. Carls alleges that, in October, 2003, she discovered that her home suffered from construction defects that caused water intrusion and damage. App. at A2. J&L Properties performed certain repairs, which they claimed remedied the problems. *Id.* But in March, 2004, an environmental specialist proved J&L Properties wrong, discovering extremely high levels of toxic mold throughout the property resulting from the water intrusion. *Id.* Concerned about her and her grandchildren's health,

Ms. Carls immediately abandoned the house.

In February, 2005, Ms. Carls and her grandchildren (collectively, Ms. Carls) filed a complaint for damages to their persons and to the home. The complaint named as defendants JTS Communities and J&L Properties dba JTS Communities, among others, and alleged various tort, statutory, and contract causes of action based on the construction defects in Ms. Carls's home that had resulted in the presence of water intrusion and toxic mold. The action was filed in the California Superior Court, for the County of El Dorado.

After filing the complaint, Ms. Carls was surprised to learn that J&L Properties no longer existed. App. at All. About seven months earlier, on June 30, 2004, Blue Lake Housing Authority (Blue Lake) "acquired the assets and liabilities of J&L Properties, which ceased to exist as of that date." *Id.* at A3. Blue Lake is operated and controlled by a federally recognized **Indian tribe**, Blue Lake Rancheria, and is engaged in the business of home-building. *Id.*

Pursuant to a "Purchase and Sale Agreement for Assets and Liabilities," Blue Lake and J&L Properties agreed to a *de facto* merger, whereby Blue Lake became J&L Properties' "successor-in-interest." App. at A9, H2. Blue Lake thereby assumed the obligations and liabilities of J&L Properties. *Id.* at H5.

Among the obligations that Blue Lake acquired was the warranty contained in the purchase contract between Ms. Carls and J&L Properties. The purchase contract provides for arbitration of warranty-related disputes and expressly recognizes the jurisdiction of California and federal courts:

Contract Supplement/Addendum, Warranty Coverage Procedures:

[A]ll Disputes in any way related to the coverage of this Warranty shall be resolved according to ... Section 5 .... [T]his Warranty requires Home Owner(s) to complete the entire process described below before filing any lawsuit against JTS Communities ***in state or federal courts.*** ... [T]he parties agree that any offers of compromise or settlement are not admissible as evidence in the Arbitration or ***any later litigation.*** ... [U]nresolved aspects of the Dispute shall be resolved by Arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association .... Home Owner(s) has the right to refuse to accept the results of Arbitration and take legal action ***in state or federal courts*** after the Arbitration decision ha[s] been issued. App. at I23, I24, I26-27 (emphasis added).

Contract of Purchase, Section 5:

Judgment upon the award rendered by arbitration [of disputes regarding liquidated damages] may be entered *in any court* having jurisdiction hereof. The parties have the right to discovery in accordance with Code of Civil Procedure § 1283.05. App. at I3 (emphasis added).

Contract of Purchase, Section 23:

In the event legal action is brought to enforce or interpret any provision of this Agreement or the escrow instructions executed pursuant thereto, the prevailing party shall be entitled to costs and reasonable attorney's fees and shall be fixed ***by the court.*** App. at I16 (emphasis added).

At the time the complaint was filed, Ms. Carls had no knowledge that Blue Lake had acquired the assets and liabilities of J&L Properties, or that J&L Properties had since ceased to exist. App. at All. Neither Blue Lake nor J&L Properties had provided Ms. Carls with notice of the acquisition. *Id.* When Ms. Carls did find out, she filed an amended complaint in November, 2005, adding Blue Lake as a defendant and as successor-in-interest to J&L Properties. But her service of the complaint and summons on J&L Properties and Blue Lake was met with motions to quash. *Id.* at A1.

Blue Lake filed two motions to quash - one as a named defendant and the other as successor-in-interest to J&L Properties. App. at A1. Relying upon its affiliation with a tribe, Blue Lake argued that it was immune from suit under the doctrine of

tribal sovereign immunity and that it did not consent to the superior court's jurisdiction. The superior court granted both motions to quash. *Id.* This, despite the fact that, in support of its motions to quash, Blue Lake filed the declaration of its chief operations officer, Michael Hansen, admitting that Blue Lake "acquired the assets and liabilities of J&L Properties, which ceased to exist as of that date." *Id.* at H5.

The Third District Court of Appeal of California affirmed. App. at A2. The court held that Blue Lake was entitled to immunity as a tribal business entity organized for a governmental purpose and closely linked in governing structure to the tribe. *Id.* at A6. The court rejected Ms. Carls's argument that Blue Lake had waived its immunity by acquiring J&L Properties' obligations and liabilities, including the warranty obligations in the home purchase contract containing the arbitration language. *Id.* at A8-A10. The court insisted upon proof of "some affirmative, express, clear and unequivocal action by Blue Lake agreeing to be bound by the terms of such contract" - apparently, something clearer and more express than Mr. Hansen's unqualified admission that Blue Lake had " 'acquired' the assets and liabilities of J&L Properties," as its "successor in interest." *Id.* at A9.

The court was nevertheless "sympathetic" to Ms. Carls's plight. App. at A10-11. It observed that Ms. Carls

can have had no notice at the time of buying her house, which was not on any tribal land, from J&L Properties, a company apparently unconnected with any **Indian tribe**, that she would eventually run into the obstacle of tribal sovereign immunity when she tried to bring a court action seeking damages from alleged construction defects in the house.

Id. Ms. Carls's plight is worse than that: Even if she had found out about Blue Lake's purchase of J&L Properties on the day it occurred, she would have had no recourse against Blue Lake in **tribal court**. The acquisition of J&L Properties took place *after* the tribe's 90-day statute of limitations would have expired on Ms. Carls's tort claims, and *after* the 180-day statute of limitations would have expired on her contract claims. *Id.* at G5-G6.

Presiding Justice Arthur Scotland dissented from the decision. App. at All. Justice Scotland concluded that the home purchase contract's arbitration clause providing that an award could be enforced in "any court having jurisdiction" operates as a waiver of immunity. *Id.* at A12. By acquiring the assets and liabilities of J&L Properties, Blue Lake "stepped into J&L Properties' shoes, effectively becoming a party to all the contracts between J&L and the buyers of the homes that it built." *Id.* Blue Lake is presumed to have known of the arbitration clause in the contract it expressly assumed. *Id.* Therefore, Justice Scotland opined, Blue Lake waived its sovereign immunity. *Id.* at A13.

Ms. Carls's petition for review in the California Supreme Court was denied. App. at B1.

REASONS FOR GRANTING THE WRIT

Whether tribal immunity should be expanded to allow a tribe to avoid expressly assumed obligations involves an important federal question with significant consequences. The unprecedented rise in tribal commercial transactions across the county makes it all the more vital that tribes and non-tribal businesses and individuals understand the nature and scope of tribal immunity.

Issues of tribal sovereign immunity are matters of federal law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759 (1998). Federally recognized **Indian tribes** have long been afforded broad immunity from suit in state and federal courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57-58 (1978). Although this Court has questioned the wisdom of applying sovereign immunity when tribes engage in off-reservation commercial conduct, it has been reluctant to narrow the doctrine.

In *Kiowa*, 523 U.S. at 756-58, dissent at 760-66,

both the majority and dissent traced the history of tribal sovereign immunity, noting its questionable origins as a legal doctrine and the wisdom of perpetuating the doctrine in the context of off- reservation commercial activities. Nevertheless, in that case, this Court reaffirmed the application of tribal immunity where a federally recognized tribe agreed to purchase stocks from a non-Indian business and then defaulted on a promissory note. "[A]n **Indian tribe** is not subject to suit in a state court - even for breach of contract involving off-reservation commercial conduct - unless 'Congress has authorized the suit or the tribe has waived its immunity.' " *C&L Enterprises, Inc. v. Citizen Band Potawatomi **Indian Tribe** of Oklahoma,* 532 U.S. 411, 414 (2001), quoting *Kiowa Tribe* at 754.

More recently, *C&L Enterprises,* this Court addressed the waiver issue, holding that a tribe waives its immunity by agreeing to a contract containing arbitration and choice of law provisions for adjudication in state or federal courts. *Id.* at 420-21. The facts of the instant case are similar to those in *C&L Enterprises;* the contract in this case contains an arbitration clause providing that California law applies and accepting the jurisdiction of the state and federal courts. App. I3, I23-I30.

This case is different from *C&L Enterprises* in that the **Indian tribe** is not a party to the contract containing the waiver language. The tribe here is the successor-in-interest to the non-Indian construction company that built Ms. Carls's home on non-Indian land. But this is a distinction without legal significance. The waiver rule in *C&L Enterprises* logically should apply when a tribe purchases a preexisting business, and voluntarily and expressly assumes all the benefits and liabilities of that business, including the liabilities in preexisting contracts providing for arbitration of warranty issues. The decision of the court below, upholding the tribe's immunity, works an unwarranted expansion of sovereign immunity. It holds that a tribe may avoid, by tribal immunity, even those obligations it has unqualifiedly assumed. The negative consequences of the decision are substantial.

I SIGNIFICANT NEGATIVE CONSEQUENCES RESULT FROM AN EXPANSION OF TRIBAL IMMUNITY THAT RELEASES TRIBES FROM EXPRESSLY ASSUMED OBLIGATIONS

The negative implications of the lower court's expansion of sovereign immunity are significant. As a matter of federal law, an **Indian tribe** is subject to suit where it has waived its sovereign immunity. *Kiowa,* 523 U.S. at 754. To relinquish its immunity, a tribe's waiver must be clear. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma,* 498 U.S. 505, 509 (1991) (**Indian tribes** exercise inherent sovereign authority and suits against those tribes are thus barred by sovereign immunity absent a clear waiver.). And it must be unequivocally expressed. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 58 (1978) citing *United States v. Testan,* 424 U.S. 392, 399 (1976), quoting *United States v. King,* 395 U.S. 1, 4 (1969) ("[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "). However, a clear and unequivocal expression of waiver need not use particular language or terms of art, such as an explicit statement that sovereign immunity is waived. *See e.g., Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.,* 50 F.3d 560, 561 (8th Cir. 1995).

C&L Enterprises, 532 U.S. at 411, involved a construction contract between a federally recognized **Indian tribe** and C&L Enterprises, Inc. (C&L), whereby C&L agreed to install a roof on a tribe-owned commercial building located on non-tribal land. The contract provided for arbitration of disputes. "All... disputes ... arising out of ... the Contract ... shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association .... The award ... shall be final, and judgment [] entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id.* The American Arbitration Association Rules provide that "judgment upon the arbitration award may be

entered in any federal or state court having jurisdiction thereof." *Id.* And the contract provided that "[t]he contract shall be governed by the law of the place where the Project is located." *Id.* This Court held that the tribe had waived its sovereign immunity. *Id.* at 423.

The contractual language in this case is similar. Blue Lake Housing Authority (Blue Lake) is an entity organized and operated by Blue Lake Rancheria, a federally recognized **Indian tribe**. App. at H5. Blue Lake acquired the assets and liabilities of J&L Properties on June 30, 2004. *Id.* On that date, J&L Properties ceased to exist. *Id.* Ms. Carls purchased a home from J&L Properties early in 2000. Carls subsequently learned that the home suffered from numerous construction defects and water intrusion problems.

Ms. Carls timely filed a complaint in state court for damages against J&L Properties, and others, after construction defects and related water intrusion resulted in the presence of toxic mold. The water and resulting mold caused property damage, personal injury, and other losses. It was not until after the complaint was filed that Ms. Carls discovered that J&L Properties had been sold to an **Indian tribe**, at which time she amended the complaint to name the tribe. The tribe claimed immunity from suit in the state court, filing two motions to quash--one as Blue Lake Housing Authority and one as successor in interest to J&L Properties. App. at A2. The motions were granted.

Blue Lake supported its motions to quash with the declaration of its Chief Operations Officer, Michael Hansen. App. at H5-6. Mr. Hansen explained that Blue Lake Housing Authority purchased J&L Properties and, as successor-in-interest, "acquired the assets and liabilities of J&L [P]roperties, which ceased to exist as of that date." *Id.* at H2, H5. The acquisition of the liabilities of J&L Properties included the liabilities associated with the warranty provisions of the preexisting contracts. The purchase contract between J&L Properties and Ms. Carls (hereafter home purchase contract) includes an agreement to arbitrate disputes and related provisions that are like those in the contract at issue in *C&L Enterprises.*

Like the contract in C&L, the home purchase contract in this case provides for arbitration of "all Disputes in any way related to the coverage of [the] Warranty." App. at I23; *see also* App. at I3. Disputes are to be resolved pursuant to the Commercial Arbitration Rules of the American Arbitration Association (App. at I26-27), and the results of arbitration can be challenged in state or federal courts (App. at I27; *see also* App. at I30). It is clear that *C&L Enterprises* compels a conclusion that Blue Lake would have waived any tribal immunity had *it* entered into the relevant contract with Ms. Carls.

The lower court's decision to uphold immunity where Blue Lake assumed the contract's warranty obligations by assuming the liabilities of J&L Properties, rather than by "express" words, works an expansion of immunity that is wholly unjustified for the reasons expressed by Justice Stevens in his dissent in *Kiowa. Kiowa,* 523 U.S. at 760-66. There, Justice Stevens noted that the majority's decision to extend sovereign immunity ignored state interests and preempted state power. "The reasons that undergird our strong presumption against construing federal statutes to preempt state law, ... apply with added force to judge-made rules." *Id.* at 764. Justice Stevens's concern was buttressed by seven States who joined in an amicus brief urging this Court not to expand sovereign immunity to instances where a tribe is a party to a contract.

[S]tates have a strong interest in ensuring that **Indian tribes** and tribal businesses comply with generally applicable, nondiscriminatory civil laws, ... [and] a distinct interest in providing a iudicial forum for the fair and equitable resolution of civil contractual disputes between their non-Indian citizens and **Indian tribes**.

C&L Enterprises, Inc. v. Citizen Potawatomi Nation, S. Ct. Case No. 00-292, 2000 WL 1873817, *2, U.S. (Dec. 14, 2000). Amicus Brief of Texas, Alabama, Arkansas, Kansas, Mississippi, Neb-

raska, and South Dakota in Support of Petitioner, in *C&L Enterprises, Inc.*, 532 U.S. 411. States are precluded from exercising these interests under the expansion of sovereign immunity adopted by the court below.

The lower court's expansion of sovereign immunity in this case effectively preempts, indeed nullifies, various California statutes when a non-Indian seeks to enforce a contract against an Indian tribal entity. Blue Lake is the successor-in-interest to J&L Properties, App. at H2, and expressly states that it acquired J&L Properties' liabilities, App. at H5. Under California law, those liabilities include the warranty obligations J&L Properties acquired when entering into purchase contracts with home buyers like Ms. Carls.[FN1]

FN1. "He who takes the benefit must bear the burden." Cal. Civ. Code § 3521. "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." *Id.* § 1589; Cal. Code of Civ. Proc. § 1293; *see also* App. at F.

The result of the lower court's decision is also "strikingly anomalous," in that it permits Blue Lake to utterly extinguish Ms. Carls's bargained-for contractual rights. *See Kiowa* at 766 (Stevens, J., dissenting). The result is particularly unjust because Ms. Carls did not voluntarily enter into a contractual relationship with a tribe, and had no opportunity to negotiate for a waiver of immunity from suit. *See Kiowa* at 766. And the negotiated terms of the home purchase agreement are nullified. The application of sovereign immunity allowed Ms. Carls to be blind-sided: without her knowledge, without notice, or fair warning, J&L Properties sold itself to an **Indian tribe** leaving her subject to the vagaries of tribal council law. The sale of the construction company occurred after the tribe's statute of limitations had expired, thus creating the situation wherein Ms. Carls's timely-filed State Court complaint is untimely to the **tribal court**, denying her any forum to bring her claims against Blue Lake.

For all the reasons described in Justice Stevens's dissent in *Kiowa*, sovereign immunity should not be expanded to relieve Blue Lake of its obligations to Ms. Carls.

II THE INCREASED NUMBER OF TRIBAL COMMERCIAL TRANSACTIONS WITH NON-TRIBAL BUSINESSES AND INDIVIDUALS ON NON-TRIBAL LANDS MAKES THE QUESTION PRESENTED ALL THE MORE PRESSING

There are 108 federally recognized **Indian tribes** in California. Fifty-seven of those tribes have casino operations, some reaping up to $300 million a year. Stephen Magagnini, *The New Chiefs: A Quest for Recognition*, The Sacramento Bee, Dec. 1, 2007, at A1. The Bureau of Indian Affairs recognizes 561 tribal governments nationwide. *See* http: / /www.doi.gov/bureau-indian-affairs.html, (last visited Jan. 28, 2008). Tribes own or operate "smoke shops, fuel stations, convenience stores, casinos, hotels, golf courses, agribusinesses, and banks on more than 300 Indian reservations located throughout the United States." R. Spencer Clift, III, *The Historical Development of* ***American Indian Tribes****; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of* ***Indian Tribes*** *Under the Bankruptcy Code and Related Matters*, 27 Am. Ind. L. Rev. 177, 179 (2002-2003); David M. LaSpaluto, *A "Strikingly Anomalous," "Anachronistic Fiction": Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 San Diego L. Rev. 743, 747 (1999) (same). "It is anticipated that such economic growth and development, along with budding political influence, will substantially increase over the next ten years." Clift, *supra*, at 179-180.

As tribal businesses continue to increase their commercial activities off tribal lands, serious concerns regarding the propriety of the kind of expanded sovereign immunity endorsed by the lower court in this case are surfacing:

As tribes and tribal organizations enter into more commercial transactions in an effort to promote their self-determination and economic development, they have used sovereign immunity as a "trap for the unsuspecting," leaving the business they enter into an agreement with, without a judicially enforceable remedy for breach of contract.

Michael Stoffregen, *The Inferred Explicit Standard - Waiver of Sovereign Immunity Via An Arbitration Clause*, 1997 J. Disp. Resol. 165.

The courts have underscored the importance of deciding the scope of sovereign immunity - and, specifically, whether it should apply to commercial activities with non-Indians off Indian land. For example, Judge Pamela Rymer of the Ninth Circuit Court of Appeals has concluded that "whether tribal sovereign immunity now extends to commercial activities is an important, complex, and unresolved question." *Greene v. Mt. Adams Furniture*, 980 F.2d 590, 600 (9th Cir. 1992) (Rymer, J., concurring). That is so because "[the] common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions." *Id.*

While expansion of tribal immunity produces serious negative consequences, particularly for the unwitting non-tribal party, it advances none of the historical policies favoring **Native Americans**. This Court and legal commentators have at various times characterized the policy behind tribal sovereign immunity as promoting "Indian self-government, self-sufficiency, and economic development." *Oklahoma Tax*, 498 U.S. at 505-06; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 892 (1986) (describing the "federal interest" in "guarding Indian self-governance"); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 Cal. L. Rev. 799, 848 n.83 (2007) ("Despite its controversial nature, tribal sovereign immunity is essential to tribal self-government."); Sandra J. Schmieder, Comment, *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*, 74 U. Colo. L. Rev. 765, 792 (2003) ("Tribal sovereign immunity facilitates the independence of **Indian tribes** ...."). But allowing a tribe to avoid expressly assumed obligations and liabilities does *nothing* to advance tribal self. government, self-sufficiency, or economic development.

First, purely commercial transactions like the one at issue in this case - the acquisition of a non-tribal home construction business on non-tribal land--have no bearing on self-government. Even if they did, tribal self-government would receive no benefit from expanded tribal immunity. Self-government is promoted by recognizing the power of tribes to control their own affairs, without improper interference by federal, state or local governments. Holding a tribe to its express assumption of obligations and liabilities does just that: It respects and upholds the business decisions voluntarily made by a tribe, in its exercise of self-governance.

Second, expansion of tribal immunity does nothing for tribal self-sufficiency. In fact, such expansion works the exact opposite effect. It makes tribes unduly dependent upon the courts for special treatment in the performance of commercial transactions. Though a tribe might voluntarily and expressly assume certain obligations in business dealings, its ever-growing scope of immunity will allow the tribe to rely upon the courts to undo those commitments. This is not tribal sell sufficiency; it is judicial paternalism.

Third, tribal economic development derives no benefit from judicial expansion of tribal immunity. If anything, permitting tribes to avoid expressly assumed obligations under the cover of immunity positively undermines their economic development. It discourages non-tribal businesses and individuals from transacting with tribes out of fear that, with the help of the courts, tribes will be able to avoid obligations and liabilities--let alone an adequate forum for disputes. As one commentator has

noted,

As tribes continue to become commercially attractive to outside partners, investors, and the public, the need exists for tribes to establish 'legal certainties' by adopting the necessary and predictable business codes and designating legal fora for resolving commercial and noncommercial disputes. The tribes' sovereign status as independent nations make legal disputes frustrating and intimidating to many nontribal entities, ultimately leading to complex, time-consuming, and expensive jurisdictional disputes. In an effort to exude an amicable commercial disposition, tribes oftentimes will, as a practical matter and business decision, accept limitations or waive sovereign immunity in certain legal fora in order to garner valuable and necessary commercial interaction with the private and public sectors.

Clift, *supra*, at 180.

Even if just a few tribes are able to obtain judicial expansions of tribal immunity to avoid assumptions of obligations, the rest suffer. Non-tribal entities and individuals will find it risky to transact with **Indian tribes**. This result does not advance tribal economic development; it impedes it.

CONCLUSION

This case presents the Court with an important opportunity to make clear the scope of sovereign immunity, particularly given the unmitigated costs of its continued expansion. The growth of tribal commercial transactions makes it all the more imperative for tribes, and their non-tribal business partners and customers, to have a clear understanding of whether and to what extent tribal obligations can be avoided.

The petition for writ of certiorari should be granted.

Carls v. Blue Lake Housing Authority
2008 WL 378893 (U.S.)

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