No. 10-1390

In the Supreme Court of the United States

PEGGY REED, et vir,

Petitioners,

v.

ROBERT GUTIERREZ, et al.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of New Mexico

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court abrogate the doctrine of tribal sovereign immunity?

II. Even if the doctrine of tribal sovereign immunity should not be abrogated, should the Court depart from well settled federal law and limit tribal sovereign immunity to bar claims against Indian tribes or their employees for off reservation torts?

LIST OF PARTIES

Petitioners are Peggy A. Reed and Timothy A. Reed.

Respondents are Robert Gutierrez and the Pueblo of Santa Clara, New Mexico.

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STATEMENT OF THE CASE

This case arises from an automobile accident between Robert Gutierrez and Peggy Reed which occurred on November 29, 2005 in Albuquerque, New Mexico. Alleging injuries and damages as a result of the automobile accident, Ms. Reed and her husband filed claims against both the Pueblo of Santa Clara and Robert Gutierrez, who, according to the Reeds, was acting within the scope of his employment with the Pueblo of Santa Clara at the time of the accident. The Pueblo and Mr. Gutierrez filed a motion to dismiss the Reeds' Complaint based upon tribal sovereign immunity. After reviewing the parties' briefs and hearing oral argument, the district court granted the Pueblo's motion to dismiss "on the ground that the Pueblo is immune under the doctrine of tribal sovereign immunity for plaintiffs' claims arising from off-reservation torts." App. 9.

The district court informed the parties that it would also grant Mr. Gutierrez' Motion to Dismiss if he was an employee of the Pueblo acting within the scope and course of his employment at the time of the parties' motor vehicle accident. App. 10. The court directed the parties to conduct limited discovery on the issue of Mr. Gutierrez' employment. *Id.* Shortly thereafter, the parties stipulated that Mr. Gutierrez was acting within the scope of his employment with the Pueblo at the time of the accident. *Id.* The district court then entered its order dismissing the claims against Mr. Gutierrez, finding he was "immune from suit under the doctrine of tribal sovereign immunity for plaintiffs' claims arising from off-reservation torts because he was an employee of the Pueblo acting

within the scope and course of his employment at the time of his vehicle collision with Ms. Reed." *Id.*

The Reeds filed a timely appeal, essentially arguing the New Mexico Court of Appeals should ignore the doctrine of sovereign immunity in its entirety or limit its application to off-reservation torts committed by tribes. App. 3. The court declined to do so. By Memorandum Opinion dated October 27, 2010, the Court of Appeals affirmed the district court pursuant to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) and held that the Pueblo and Mr. Gutierrez were immune from the Reeds' claims. App. 1-2.

The Reeds then petitioned the New Mexico Supreme Court for a writ of *certiorari*, again arguing that the New Mexico courts should ignore federal precedent and abrogate tribal sovereign immunity, or in the alternative, limit it to on reservation conduct. App. 14-15. The New Mexico Supreme Court rendered its decision denying the Reeds' Petition for Writ of *Certiorari* on February 9, 2011.

REASONS FOR DENYING THE PETITION

The Reed's Petition for Writ of *Certiorari* requests this Court to retread issues decided over ten years ago in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). Despite characterizing their request as one for clarification, Petitioners are in reality advocating a complete upheaval of longstanding federal law by seeking judicial abrogation or curtailment of the doctrine of tribal sovereign immunity, ignoring this Court's clearly expressed reservation about usurping Congress'

role in matters of federal Indian law. *See Kiowa*, 523 U.S. at 759 (noting the capacity of the Legislative Branch to address issues of tribal sovereign immunity warrants judicial restraint).

In advance of their argument that the doctrine of tribal sovereign immunity requires clarification, Petitioners strain to provide a single example evidencing a "conflict" between two state supreme courts and their treatment of *Kiowa*. The alleged conflict, however, involves the application of the doctrine in the context of dram shop liability. The facts presently before the Court and the legal issues affecting them are starkly different from the issue of state versus tribal rights to regulate alcohol on Indian land and whether tribal immunity applies to bar private actions against tribes for violations of state liquor laws. Petitioners' inability to conjure additional conflicts simply underscores the fact that *Kiowa* provides unambiguous parameters for federal and state courts concerning the scope of tribal sovereign immunity.

Petitioners justify their request for abrogation of tribal sovereign immunity by highlighting criticisms of the doctrine. They completely disregard the practical aftermath of such a judicial divestiture of tribal power. *Kiowa* demonstrates this Court was patently aware of both the pros and cons of the doctrine when it declined to abrogate tribal immunity or restrict it to on reservation activities. *See Id.* at 758. In fact, it was likely this awareness that lead the Court to tout the virtues of the legislative process as the proper vehicle for reaffirming or modifying tribal sovereign immunity. *See Id.* If the sovereign rights of the five hundred sixty-four federally recognized Indian tribes

referenced in the Reeds' Petition are to be restricted in favor of individual tort victims' rights, the restriction best comes from Congress via legislation reflecting input from the tribes themselves. App. 34-63.

I. *Kiowa* Does Not Require Further Clarification By This Court, But Rather Constitutes A Reiteration Of Well Settled Federal Law.

The doctrine of tribal sovereign immunity is settled law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977)"). It is subject to eradication or diminution only by Congress or the tribes themselves. *See e.g. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C.,* 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *United States v. United States Fid. & Guar. Co.,* 309 U.S. 506, 512 (1940). While application of the doctrine may lead to untoward results on occasion, restricting its scope lies with Congress, not the Courts. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

In *Kiowa*, this Court unequivocally expressed its deference to Congress insofar as limiting the doctrine is concerned, refusing to restrict its application to on reservation conduct or governmental activities. *See Id.* The Court stated as follows:

> Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.' It has not yet done so.

Id. at 759.

The rationale embraced in *Kiowa* stands today. The *Kiowa* Court wisely recognized the complexities inherent in modifying the doctrine, acknowledging that Congress is in the best position to evaluate and address the nuances involved, including the policy interest in maintaining positive relations between federal, state and tribal governments. *See Id.*

Petitioners urge the Court to rethink its position in *Kiowa*, and circumvent existing federal law to either abrogate or modify tribal sovereign immunity. As Petitioners note, *Kiowa* discussed not only the existing federal law which mandated perpetuating the doctrine, but also pointed out peculiarities of the doctrine with an explicit invitation to Congress to address those issues. *See Id.* at 758. In support of their argument that this Court should now act to eliminate the doctrine, Petitioners cite to the fact that Congress has not "rewarded the Court's deference by legislating in any way on that issue." Petition for Writ of Cert., pg. 10.

Of course, it is unlikely that the absence of legislation pertaining to tribal sovereign immunity following *Kiowa* and its progeny is due to Congress being oblivious to the subject, but rather reflects a conscious decision to leave the doctrine intact. The *Kiowa* Court cited to a series of federal statutes in which Congress expressed an intention to restrict the doctrine in some situations, while declining to limit it in others. *See Id.* at 758-59.[1]

Thus, Congress' inaction in the wake of *Kiowa* is no more compelling than it was at the time the case was decided. The abrogation or limitation of tribal sovereign immunity remains Congress' and the tribes' milieu. Any decision to the contrary by this Court necessarily requires retracting its position that as a matter of well settled federal law, "a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *See Kiowa,* 523 U.S. at 754.

A. There Is No Split Among State Supreme Courts Or Federal Circuit Courts Justifying Review.

In an effort to demonstrate a conflict in states' treatment of tribal sovereign immunity, Petitioners contrast two state supreme court decisions which

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[1] "Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. See, *e.g.*, 25 U.S.C. § 450f(c)(3) (mandatory liability insurance); § 2710(d)(7)(A)(ii) (gaming activities). And in other statutes it has declared an intention not to alter it. See, *e.g.*, § 450n (nothing in financial-assistance program is to be construed as 'affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe')...."

address tribal sovereign immunity in the context of alcohol regulation. In *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 129 P.3d 78 (Ariz.App.Div. 2 2006), the Court of Appeals of Arizona addressed whether tribal sovereign immunity barred a plaintiff's claim for personal injury and wrongful death against a tribally owned casino.

Plaintiff's claim arose from a motor vehicle accident. *Filer*, 129 P. 3d at 80. According to plaintiff, casino employees allegedly furnished excessive quantities of alcohol to a casino patron, who then crashed his car into the plaintiff's, injuring the plaintiff and killing the plaintiff's wife. *Id.* The trial court dismissed plaintiff's claims against all of the defendants, including the casino and its employees. *Id.* On appeal, the plaintiff argued the defendants were not entitled to sovereign immunity when faced with a dram shop action filed pursuant to the state's dram shop statute. *Id.* Although the plaintiff acknowledged the tribe's casino was entitled to the same immunity as the tribe, he claimed tribal immunity could not defeat the jurisdiction of an Arizona state court for claims involving the service of alcohol pursuant to an Arizona liquor license. *Id.*

The Court of Appeals of Arizona decided the casino, a tribal entity, and its employees were, in fact, immune from suit. While the *Filer* Court agreed Arizona has a legitimate right to regulate liquor sales in Indian country by requiring tribes to obtain liquor licenses, the Court determined enforcement of violations of the dram shop act via a civil suit by a private citizen was a different matter. *Id.* at 82, *citing Kiowa,* 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and

the means available to enforce them."). The Court went on to note "a state's power to regulate certain tribal activities and its ability to bring a lawsuit against a tribe in state or federal court are not necessarily coextensive." *Id.* at 83.

Petitioners contrast *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008) with *Filer* to suggest a split among state courts concerning the application of tribal sovereign immunity. Like the *Filer* Court, the Supreme Court of Oklahoma, considered whether the operator of a tribally owned casino could be subject to state court jurisdiction for a private tort action against the tribe based upon a violation of the State's dram shop act. In *Bittle,* the Oklahoma Supreme Court focused upon whether 18 U.S.C. § 1161, which authorizes a state to control the sale and distribution of alcohol within its borders through licensing regulations, authorizes state court jurisdiction over disputes alleging a tribe's alcoholic beverage transactions did not conform to state law. 192 P.3d at 816.

Relying upon this Court's analysis in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court found that the state had adjudicatory authority over the plaintiff's private action because there is no tradition of tribal sovereign immunity in the area of alcoholic beverage regulation and Congress authorized the states and the Indian tribes to regulate alcoholic beverages in 18 U.S.C. § 1161. *Id.* at 827. The *Bittle* decision is limited to dram shop actions, as it is premised upon a statutory scheme that gives states and Indian tribes coextensive regulatory authority over the sale of alcohol on tribal land.

Recently, the Oklahoma Supreme Court had an opportunity to address tribal sovereign immunity outside the context of liquor regulation in *Seneca Telephone Company v. Miami Tribe of Oklahoma*, 2011 OK 15. The defendant Tribe in *Seneca* allegedly damaged telephone lines while performing excavation work for another tribe. *Seneca*, ¶ 0. The telephone company filed four separate suits against the Tribe, and recovered money damages in each of the cases. *Id.* The Tribe appealed and the Court of Civil Appeals affirmed the judgments and held that Oklahoma district courts have jurisdiction over a tribe's violation of the state's statute pertaining to underground facilities. *Id.* at ¶ 4. Applying *Rice v. Rehner*, the court reasoned that Congress authorized states to regulate intrastate telecommunication facilities on tribal land, that Oklahoma had enacted a statute addressing damage to underground facilities, and that the Tribe had violated the statute by negligently cutting the plaintiff's underground lines. *Id.*

The Oklahoma Supreme Court rejected the Court of Civil Appeals' analysis. In reviewing the federal statute concerning the states' regulatory authority over intrastate telecommunications, the Court concluded Congress did not authorize suits against the Tribe or expressly waive the Tribe's sovereign immunity in the statute, nor did the Tribe waive its immunity. *Id.* at ¶ 11. In reaching its decision, the Court applied *Kiowa* to the tort claims before it, distinguishing *Rice* and *Bittle* as cases which focus upon the regulation of alcoholic beverages. *Id.* at ¶10.

To the extent a conflict exists between Arizona and Oklahoma case law involving tribal sovereign immunity, the conflict exists in the context of dram

shop claims. The case at bar is not premised upon dram shop liability, making Petitioners' focus on the distinctions between *Filer* and *Bittle* inapposite. Petitioners point to no conflict in the federal circuit courts' application of *Kiowa*. Thus, Petitioners have failed to identify any conflict between either state supreme courts or circuit courts which warrant clarification of existing federal law and its treatment of tribal sovereign immunity.

II. Encroaching Upon A Tribe's Sovereign Immunity Is Harmful To Tribal Sovereignty.

The Court's decision in *Kiowa* is in keeping with its earlier decision in *Oklahoma Tax Comm'n Potawatomi Tribe*, 498 U.S. 505 (1991). In *Potawatomi*, the Court highlighted both its own reaffirmation of the doctrine in a number of cases, including *Turner v. United States*, 248 U.S. 354, 358 (1919) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) and Congress' consistent approval of tribal sovereign immunity. The Court pointed to the Indian Financing Act, 88 Stat. 77, 25 U.S.C. § 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 et seq. as examples of congressional approval of the doctrine: "These Acts reflect Congress' desire to promote the 'goal of Indian self-government, including its `overriding goal' of encouraging tribal self-sufficiency and economic development.' *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." 498 U.S. at 511.

The concept of tribal sovereign immunity stems from the recognition that the tribes were independent societies, with their own organization and laws predating the influx of Europeans into what is now the United States.[2] While obviously not identical, a tribe's

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[2] "Felix Cohen's *Handbook of Federal Indian Law* -widely considered the foremost secondary authority on federal Indian law-describes the independent origin of tribal sovereignty as follows:

Most Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them. The forms of political order included multi-tribal confederacies, governments based on towns or pueblos, and systems in which authority rested in heads of kinship groups or clans. For most tribes, these forms of self-government were also sacred orders, supported by creation stories and ceremonies invoking spiritual powers....

The history of tribal self-government forms the basis for the exercise of modern powers. Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as "distinct, independent political communities," qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty. The right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. They necessarily are observed and protected by the federal government in accordance with a relationship designed to ensure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished by lawful federal authority. Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. Once recognized as a political body of the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty.

§ 4.01[1][a], at 204-06 (Matthew Bender, 2005)." *Cash Advance and*

sovereign immunity is clearly similar to a state's immunity from suit, in that both entities' sovereignty is designed to protect their economic stability and right to self-governance. In *Alden v. Maine*, 527 U.S. 706, 750 (1999), the United States Supreme Court described the dangers of permitting suits against nonconsenting states:

> Private suits against nonconsenting States may threaten their financial integrity, and the surrender of immunity carries with it substantial costs to the autonomy, decisionmaking ability, and sovereign capacity of the States. A general federal power to authorize private suits for money damages would also strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public fisc, necessitating difficult decisions involving the most sensitive and political of judgments. A national power to remove these decisions regarding the allocation of scarce resources from the political processes established by the citizens of the States and commit their resolution to judicial decrees mandated by the Federal Government and invoked by the private citizen would blur not only the State and National Governments' distinct responsibilities but also the separate duties of the state governments' judicial and political branches.

Preferred Cash Loans v. State ex rel. Suthers, 242 P.2d 1099, 1106 (Colo. 2010).

These same threats apply to authorization of private suits for money against nonconsenting Tribes. Moreover, while immunity is essential to protecting a sovereign's economic interests and decisionmaking capabilities, another of the doctrine's key purposes is to accord a sovereign the respect it is due. *See e.g. Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743 (2002)(discussing the functions of states' sovereign immunity), *citing Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The rationale for immunity becomes even more compelling when viewed against the background of Native American rights and the history of subjugation with which many Indian tribes have been forced to contend. Petitioners aptly note a Tribe's immunity from suit for torts may prevent some litigants from having an avenue for redress, yet they neglect to explain why a Tribe's immunity from suit is any more unjust than the individual states' immunity from suit, nor do they demonstrate any appreciation for the practical effects of divesting Indian tribes of a key aspect of their sovereign powers.

III. The Court of Appeals Of New Mexico Properly Deferred to United States Supreme Court Precedent When it Dismissed Petitioners' Claims.

In affirming the trial court's dismissal of the Reeds' Complaint, the New Mexico Court of Appeals held pursuant to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) that the Defendant Pueblo of Santa Clara and its employee, Robert Gutierrez, were immune from the Reeds' claims. App. 2. The New Mexico Court of Appeals correctly interpreted *Kiowa* as "reaffirming

the notion that States may not abrogate tribal immunity in any way", quoting this Court's holding that "'the immunity possessed by Indian tribes is not coextensive with that of the [s]tates.' *Id.* at 756. Such immunity exists both on and off the reservation and may only be circumvented by an act of Congress or waiver by the tribe itself.' *Id.* at 760." App. 4. Consequently, the New Mexico Court of Appeals found that *Kiowa* and New Mexico Supreme Court case law interpreting *Kiowa* mandated the conclusion that tribal sovereign immunity extends to off-reservation torts. App. 7.

Not only does the New Mexico Court of Appeals' decision comport with *Kiowa*, but it also mirrors other courts' interpretation and application of *Kiowa* to off reservation conduct. For example, the California Court of Appeals has acknowledged that "suits for off-reservation torts are not excepted from the general immunity rule." *Redding Rancheria v. Super. Ct.*, 88 Cal.App.4th 384, 390 (2001)("any change or limitation to the doctrine (e.g. to exclude off-reservation tort suits) must come from Congress."); *see also Freemanville Water Sys., Inc. v. Poarch Bank of Creek Indians*, 563 F.3d 1205, 1206 (11th Cir. 2009)(declining to draw distinction based upon where tribal activity occurred in light of *Kiowa*).

CONCLUSION

Petitioners are requesting this Court to circumvent its own precedent and abrogate a doctrine that only Congress, or Indian tribes themselves, have the right to restrict. If this Court were to abrogate or limit tribal sovereign immunity contrary to well settled federal law, it would essentially be flouting its

explicitly expressed deference to Congress in such matters. A judicially proactive approach to modifying tribal sovereign immunity makes little sense considering the Court's well stated rationale for refusing to legislate in this area; namely, the Court's conviction that Congress is in the best position to weigh the competing interests and shape an appropriate solution to dissatisfaction with the doctrine where appropriate.

Although Petitioners raise legitimate concerns regarding individual citizens' right to a forum, Petitioners turn a blind eye to the interests tribal immunity serves. Indian tribes in this country have been subjected to a litany of injustices over the decades. Recognition of the tribes' sovereignty is a small step toward acknowledging the tribes' right to determine their own destiny, including their right to economic prosperity and self-governance.

For the foregoing reasons, Respondents respectfully request this Court to deny the Reeds' Petition for Writ of *Certiorari*.

Respectfully Submitted,

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