No. _____

In The

Supreme Court of the United States

STEVEN ROSENBERG, M.D.,

Petitioner,

v.

HUALAPAI INDIAN NATION,

Respondent.

On Petition for Writ of Certiorari To The Supreme Court of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the sovereign immunity of an Indian tribe extend to off-Indian County (extra-territorial), tortuous conduct?

   a. Does Congress, and Congress alone, have the authority to establish the boundaries of tribal sovereign immunity, a judicially-created doctrine, or may this Court define its outer boundaries, as this Court has suggested in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998)?

   b. Is tribal sovereign immunity broader than the immunity provided to foreign sovereign nations?

2. Does a tribe waive its sovereign immunity by engaging in conduct that would lead a reasonable person to believe that he or she might have recourse in a court of competent jurisdiction for the negligence acts of the tribe?

PARTIES TO PROCEEDING

Petitioner is Steven Rosenberg, M.D., Plaintiff in the Mohave County, Arizona, Superior Court, Appellant in the Arizona Court of Appeals, and Petitioner before the Arizona Supreme Court.

Respondent is the Hualapai Indian Nation, named as Defendant in the complaint filed with the Mohave County, Arizona, Superior Court.

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INTRODUCTION

When this Court last addressed the boundaries of tribal sovereign immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998), this Court held that a tribe's sovereign immunity extended to its off-reservation, commercial contract disputes. *Id.* at 760, 118 S.Ct. at 1705. This Court reached this result, however, with reluctance: "There are reasons to doubt the wisdom of perpetuating the doctrine. . . . [¶] These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule." *Id.* at 758, 118 S.Ct. at 1704-05; *see also Seielstad*, "The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty," 37 TULSA L.REV. 661, 771 (2002) ("All nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity"). Both the Majority, and Justice Stevens in dissent, expressed concern about the impact of tribal sovereign immunity on persons injured by a tribe's tortuous conduct: "In 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.*; *see also id.* at 766, 118 S.Ct. at 1708 (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; yet nothing in the Court's

reasoning limits the rule to lawsuits arising out of voluntary contractual relationship").

These sentiments have led both courts and commentators to question the scope of the *Kiowa* holding. Judge Henderson of the Northern District of California queried: "Should [Justice Stevens'] statement be taken as a definitive interpretation of the majority decision, or should it be seen as a warning call?" *Hollynn D'Lil v. Cher-Ae Heights Indian Community of the Trinidad Racheria*, 2002 WL 33942761, *6 (N.D.Cal. 2002). Some courts have viewed Justice Stevens' statement as a warning, and have upheld limitations on tribal sovereign immunity. *See, e.g., Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1133-39 (Cal. 2006) (holding that tribal sovereign immunity did not preclude action by California state agency against tribe under the Political Reform Act, Cal.Gov.Code, § 81000 *et seq.*); *D'Lil, supra*, 2002 WL 33942761, *8-9 (declining to find tribe immune from the Americans with Disabilities Act for customers at a tribal-owned hotel). Other courts have held that *Kiowa Tribe* stood for the proposition that tribal immunity is essentially limitless. *See, e.g., Foxworthy v. Puyallup Tribe of Indians Ass'n*, 169 P.3d 53, 55 (Wash.App. 2007) ("A tribe's sovereign immunity extends to tribal commercial and governmental activities both on and off the tribe's reservation, and it provides a defense to suits filed against them in state and federal courts") (citing *Kiowa Tribe*), *review granted*, 195 P.3d 89 (Wash. 2008); *Beecher v.*

Mohegan Tribe of Indians of Connecticut, 918 A.2d 880, 884 (Conn. 2007) ("Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities") (also citing *Kiowa*).

The present matter implicates the very concerns expressed by the *Kiowa* Majority and amplified by Justice Stevens in dissent. Plaintiff-Petitioner Dr. Steven Rosenberg was seriously injured while participating in an extra-territorial commercial endeavor of the Hualapai Indian Nation (the "Tribe"), his injuries caused by the gross negligence of the Tribe and its employees. Notwithstanding the fact that Dr. Rosenberg was injured due to the Tribe's tortuous conduct, occurring outside Haulapai Indian geographic territory, by one of the Tribe's commercial operations, the Tribe has successfully asserted to date that Dr. Rosenberg is barred from seeking recovery for his physical injuries from the Tribe due to its sovereign immunity. Dr. Rosenberg urges this Court to grant certiorari in this matter, and resolve the question left unanswered by the *Kiowa* Court – a question that has perplexed courts for decades -- namely, whether tribal sovereign immunity is effectively limitless, extending to the extra-territorial, tortuous conduct of a tribe.

DECISIONS BELOW

On motion of the Tribe, the Superior Court of the State of Arizona, Mohave County, dismissed Dr. Rosenberg's personal injury complaint on grounds of

tribal sovereign immunity on January 14, 2008. *Appendix 18.*

Dr. Rosenberg appealed to the Arizona Court of Appeals, Division One. The Arizona Court of Appeals affirmed the trial court's dismissal in an unpublished decision dated March 24, 2009. *Appendix 5-17.*

The Arizona Supreme Court denied Dr. Rosenberg's timely petition review of the matter on September 23, 2009. *Appendix 1.*

JURISDICTION

The Arizona Court of Appeals denied Plaintiff-Appellant's Petition For Review on September 23, 2009. *Appendix 1.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter does not involve the construction or interpretation of any Constitutional or statutory provisions.

Title 36 of the Code of Federal Regulations, Section 7.4(b), governing the Colorado whitewater boat trips, has some application to the present matter, and is reprinted below:

> (b) Colorado whitewater boat trips. The following regulations shall apply to all

persons using the waters of, or Federally owned land administered by the National Park Service, along the Colorado River within Grand Canyon National Park, upstream from Diamond Creek at approximately river mile 226:

> (1) No person shall operate a vessel engaging in predominantly upstream travel or having a total horsepower in excess of 55.
>
> (2) U.S. Coast Guard approved life preservers must be worn by every person while on the river or while lining or portaging near rough water. One extra preserver must be carried for each ten (10) persons.
>
> (3) No person shall conduct, lead, or guide a river trip unless such person possesses a permit issued by the Superintendent, Grand Canyon National Park. The National Park Service reserves the right to limit the number of such permits issued, or the number of persons traveling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area.

(i) The Superintendent shall issue a permit upon a determination that the person leading, guiding, or conducting a river trip is experienced in running rivers in white water navigation of similar difficulty, and possesses appropriate equipment, which is identified in the terms and conditions of the permit.

(ii) No person shall conduct, lead, guide, or outfit a commercial river trip without first securing the above permit and possessing an additional permit authorizing the conduct of a commercial or business activity in the park.

(iii) An operation is commercial if any fee, charge or other compensation is collected for conducting, leading, guiding, or outfitting a river trip. A river trip is not commercial if there is a bona fide sharing of actual expenses.

(4) All human waste will be taken out of the Canyon and deposited in established receptacles, or will be disposed of by such means as is determined by the Superintendent.

(5) No person shall take a dog, cat, or other pet on a river trip.

(6) The kindling of a fire is permitted only on beaches. The fire must be completely extinguished only with water before abandoning the area.

(7) Picnicking is permitted on beach areas along the Colorado River.

(8) Swimming and bathing are permitted except in locations immediately above rapids, eddies and riffles or near rough water.

(9) Possession of a permit to conduct, guide, outfit, or lead a river trip also authorizes camping along the Colorado River by persons in the river trip party, except on lands within the Hualapai Indian Reservation which are administered by the Hualapai Tribal Council; Provided, however, That no person shall camp at Red Wall Cavern, Elves Chasm, the mouth of Havasu Creek, or along the Colorado River bank between the mouth of the Paria River and the Navajo Bridge.

(10) All persons issued a river trip permit shall comply with all the terms and conditions of the permit.

STATEMENT OF THE CASE

I. Factual Background

A. The Hualapai Indian Nation and Grand Canyon National Park

The Hualapai Indian Reservation was established in 1883 by executive order of President Chester A. Arthur. *See Navajo Nation v. United States Forest Service*, 408 F.Supp.2d 886, 891 (D.Ariz. 2006), *aff'd in part, rev'd in part*, 479 F.3d 1024, *reh'g granted en banc*, 506 F.3d 717 (2007). The order expressly provided that the northern boundary of the reservation was the "southern shore" of the Colorado River, and verbal descriptions of the reservation at the time indicated that it was "devoid of water." The Tribe, however, believing that the Colorado River forms the backbone of their lifeline, have maintained that their tribal boundaries extend to the middle of the Colorado River. *See generally Lesoeur v. United States*, 21 F.3d 965, 967 n.2 (9th Cir. 1994) (describing boundary dispute). This boundary dispute remains unresolved to the present day, with the parties essentially "agreeing to disagree."

The Grand Canyon was designated as a National Monument in 1908, and upgraded to National Park status in 1919. It southern boundary includes, for a considerable stretch, the northern boundary of the Hualapai Indian Reservation. The Colorado River runs along the bottom of the Canyon.

Whitewater rafting along the Colorado River is a major activity within the Park. For the most part, whitewater raft operators are regulated by the United States Government. *See* **36 C.F.R. § 7.4(b)**. Section 7.4(b) provides that all whitewater raft operators must possess a permit issued by the Park Superintendent. The Superintendent can only issue a permit upon a determination that "the person leading, guiding, or conducting a river trip is experienced in running rivers in white water navigation of similar difficulty, and possesses appropriate equipment. . . ." **36 C.F.R. § 7.4(b)(3)(I)**.

There is, however, one important caveat to the National Park Service's regulation of whitewater rafters within the Park. Specifically, the regulations apply only to whitewater rafters that occur "upstream from Diamond Creek at approximately river mile 226." **36 C.F.R. § 7.4(b)(1)**. As the United States Court of Appeals for the Ninth Circuit has explained, this limitation on the Service's regulation of whitewater rafters was added in 1977 specifically to accommodate the Hualapai tribe: "The Tribe's tours enter the river at Diamond Creek and operate solely downstream from this point." *Lesoeur*, 21 F.3d at 967 n.1. In other words, the rafting operations of the Hualapai Indian Nation are exempt from the regulations and oversight of the National Park Service.

B. Dr. Rosenberg's Whitewater Rafting Trip

Acting through his travel agent in or near Chicago, Dr. Rosenberg and his son purchased a river tour from the Hualapai River Runners, the business name of the Hualapai tribe's Grand Canyon river tours. *Appendix 36.* On June 21, 2005, Dr. Rosenberg and his son traveled to the Hualapai Indian Reservation. *Id.* The next morning, they participated in the rafting tour conducted by the Hualapai River Runners. *Id.*

Before they were permitted to leave for the tour, the River Runners required Dr. Rosenberg and his son to sign a form entitled "Assumption of Risk and Responsibility and Release of Liability." *Appendix 36.* In this form, the tribe required the tour participants to acknowledge that "there are inherent dangers in this activity," and that they released the tribe of any liability as a result of these inherent risks. The Release specifically states that "I have read the foregoing acknowledgement of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights." *Appendix 36-37; see also Appendix 53-56* (copy of Release, as attached to Plaintiff's First Amended Complaint).

Nowhere in this form does the tribe indicate that either it believes it has "sovereign immunity" and therefore, the tour participants had (according

to the Tribe) no "legal rights." They had no rights purportedly to waive. *Appendix 37.*

Dugan Steele was the tour guide and pilot of the boat in which Dr. Rosenberg and his son were passengers. *Id.* The raft was equipped with an outboard motor, which in turn was (or should have been) equipped with a "kill" switch that would stop the motor instantly in the event that the guide was thrown from the boat. *Appendix 38.*

At the 232 Mile Rapids, Dugan Steele steered the boat directly towards a rock on the north side of the River. *Appendix 37.* The Rosenbergs, two guides, and two other passengers were thrown out of the raft. *Id.* Steele was not using the "kill switch" for the boat's engine. The boat's motor continued running and the propeller struck both Dr. Rosenberg's head and left hand at full speed. *Appendix 38.* His sustained serious injuries. *Id.*

The 232 Mile Rapids and the location of the accident at issue was not within the geographic confines of the Hualapai Indian Reservation or Nation. *Id.*

The River Runners were ill-prepared to deal with Dr. Rosenberg's injury. *Id.* at ¶ 24. The other passengers, and not the guides, provided assistance to Dr. Rosenberg. *Id.* One passenger described Dr. Rosenberg's treatment as follows:

> The guides, and I'm only telling you this because I was just appalled by it, he went, I said do you have a first aid kit, he needs to wrap, his hand needs to be wrapped. They found the first aid kit, or were looking for it or something, and he said yea, we have an Advil, give him an Advil. And I remember to myself, just sitting there, and I was still in shock, I was going, okay, you're kidding me, I mean, we didn't know if his airways were open at the time, I mean that was their idea of first aid.

Appendix 38-39.

II. Procedural Background

Dr. Rosenberg sustained serious injuries to his head and hand as a result of this incident. He respectfully requests that this Court reverse the dismissal of his complaint and remand for a trial on the merits. He filed his original complaint against the Tribe on February 16, 2007. *Appendix 24-31.* The Hualapai Indian Nation appeared in the matter and moved to dismiss Plaintiff's complaint. Following oral argument on October 10, 2007, Dr. Rosenberg filed an amended complaint. *Appendix 32-57.* Four days thereafter, the trial court granted Defendant's motion to dismiss, holding that the Tribe was protected by sovereign immunity. *Appendix 22.* Specifically, the trial court held: "IT IS ORDERED granting the motion to dismiss on the grounds that the Hualapai Indian Nation is

absolutely immune from suit in state court." *Id.* The trial issued a signed order of dismissal on January 16, 2008. *Appendix 18.*

Dr. Rosenberg appealed to the Arizona Court of Appeals, Division One. The Court of Appeals affirmed in an unpublished decision dated March 24, 2009. *Appendix 5-17.* The Arizona Court of Appeals held that Indian tribes have immunity greater than that enjoyed by foreign nations, *Appendix 10,* and that Congress, and not the judiciary, had the sole authority to determine the parameters of tribal sovereign immunity, *Appendix 12-13* ("Congress, not the judiciary, sets the parameters of tribal immunity. The courts merely interpret Congress's intent. . . .").

Following the denial of his motion for reconsideration, *Appendix 3,* Dr. Rosenberg filed a timely petition for review to the Arizona Supreme Court. The Arizona Supreme Court denied review without comment on September 23, 2009. *Appendix 1.* He now seeks relief in this Court.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari To Clarify The Limited Scope Of Its Holding In *Kiowa Tribe.*

A. The Doctrine Of Tribal Sovereign Immunity Was Intended To Recognize The Sovereign Status Of Indian Tribes And, As Such, Is Effectively Co-Extensive With The Concept Of Foreign Sovereign Immunity.

The evolution of tribal sovereign immunity is a curious one. The concept of sovereign immunity stems from the "ancient maxim that 'the King can do no wrong.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 n.2, 116 S.Ct. 1114, 1146 n.2 (1996) (Stevens, J., dissenting) (citing 1 W. Blackstone, Commentaries). The doctrine was first acknowledged by this Court in 1821 in *Cohens v. State of Virginia*, 19 U.S. 264 (1821), where the Supreme Court observed that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." *Id.* at 411-12.

Ironically, the concept that foreign nations were immune from suit in United States courts was recognized even earlier by the Supreme Court. In *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), the courts were asked to decided the ownership of a French military vessel. Declaring that the government of France was immune to the suit, Chief Justice Marshall, writing for the Court, stated:

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137. In prevailing, the United States Attorney argued that "[i]f the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war." *Id.* at 126.

The United States Supreme Court recognized that Indian tribes were independent sovereigns twenty years thereafter, in the matter of *Worcester v. State of Georgia*, 31 U.S. 515 (1832). In *Worcester*, the Court stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and

> sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning.

Id. at 559-60 (emphasis added).[1]

In 1919, the Supreme Court formally acknowledged the obvious corollary to its conclusion that Indian nations were sovereign entities, namely, that they were also entitled to sovereign immunity. In *Turner v. United States*, 248 U.S. 354 39 S.Ct. 109 (1919), the Court held that "Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace." *Id.* at 357-58, 39 S.Ct. at 110.

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[1] Justice Marshall referred to tribes as "domestic dependent nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831). He stated:

> It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations.

Id. at 2.

Since *Turner*, the Supreme Court has addressed the scope and effect of this sovereign immunity on numerous occasions. Several key principles have emerged from these cases, the most importance of which, for purposes of the present petition, is that tribal sovereign immunity is essentially co-extensive with that of foreign sovereign immunity. This Court has restated this principle on numerous occasions. *See C & L Enterprises*, 532 U.S. 411, 421 n. 3, 121 S.Ct. 1589, 1595 n.3 (2001) ("Instructive here is the law governing waivers of immunity by foreign sovereigns"); *Kiowa*, 523 U.S. at 759, 118 S.Ct. at 1705 ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-269, 117 S.Ct. 2028, 2034 (1997) ("Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity") (citation omitted); *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 841-842, 109 S.Ct. 1519, 1521 (1989) (citing cases construing foreign sovereign immunity in resolving issue involving tribal immunity). In *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578 (1991), the Court considered whether an Indian nation could sue a state, much as one state may sue another. In rejecting the contention, the Supreme Court expressly noted the similarities between foreign nations and Indian tribes:

> Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

Id. at 782, 111 S.Ct. at 2582-83.[2]

Put simply, Indian tribes are sovereign entities, and as the doctrine of tribal sovereign

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[2] Following unsuccessful efforts by the federal government to assimilate tribes, tribal sovereign immunity has been invoked to further the "overriding goal" of "encouraging tribal self-sufficiency and economic development." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510, 111 S.Ct. 905, 910 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 1092 (1987)).

immunity recognizes, are to be accorded the trappings of this status, much like foreign states.

B. Foreign Nations Are Not Immune For Their Tortious Conduct, Occurring Extra-territorially, By Their Commercial Endeavors.

Although foreign nations have long enjoyed sovereign immunity in the courts of the United States, it has also long been held that such immunity is limited when the activities occurring within the territory of the United States are commercial. For example, in *Hannes v. Kingdom of Roumania Monopolies Institute*, 20 N.Y.S.2d 825 (N.Y.App. 1940), a New York appellate court explained:

> The development of the practice of states undertaking commercial activities has led to a distinction in considering the question of immunity between acts of a private nature said to be *jure gestionis* as contrasted with acts of a public nature which are *jure imperii*. Controversies in the first class are sometimes held to be subject to the jurisdiction of foreign courts, while those in the latter are not.

Id. at 833. This general rule was summarized by the Second Circuit several decades later, noting that the "commercial activities" exemption within the Foreign

Sovereign Immunities Act derived from "the very large body of case law which existed in American law upon passage of the Act in 1976" and "current standards of international law." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309-10 (2d Cir. 1981) (quotations omitted), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012 (1982), *overruled on other grounds*, *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azberbaijan Republic*, 582 F.3d 393 (2d Cir. 2009).

When a foreign nation conducts a commercial activity within the geographic boundaries of the United States, the foreign nation is liable for harm caused by the torts caused by this commercial activity. *Restatement (Third) of Foreign Relations Law* §§ 453(1), (2)(a) and (b); *see also Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1477 (9th Cir. 1995) (holding that the commercial activities exception to sovereign immunity included both personal injury torts and economic torts).

There are important reasons for these limitations on sovereign immunity. Obviously, a sovereign engaging in a commercial activity is not doing so as a "act of state," but in order to expand its coffers. Thus, it is only reasonable for the sovereign to include in its financial calculus the potential harm that its activities might cause to others. As the Arizona Supreme Court stated in *Bryant v. Silverman*, 703 P.2d 1190 (Ariz. 1985), "[t]he basic policies underlying tort law are to provide compensation for the injured victims, and to deter

intentional and deliberate tortious conduct. . ." *Id.* at 1195.

C. *Kiowa* Is Fully Consistent With These Principles Of Tribal Sovereignty, And This Court Should Grant Certiorari To Clarify The Limited Holding Of *Kiowa*.

In *Kiowa*, a tribe agreed to purchase certain stock issues by Clinton-Sherman Aviation, Inc., and signed a promissory note with the plaintiff to finance the stock purchase. The tribe delivered the note to a company in Oklahoma City – off tribal land – and promised to make the payments in Oklahoma City, again, beyond tribal land.

This Court ultimately concluded that tribal sovereign immunity attached to this commercial transaction. In so doing, this Court reiterated the relationship between tribal sovereign immunity and that of foreign nations. *Kiowa*, 523 U.S. at 759, 118 S.Ct. at 1705 ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries"). This Court did observe that tribal sovereign immunity does possess one attribute not necessarily present in matters involving foreign nations, namely, the domestic public policy of "promot[ing tribal] economic development and tribal self-sufficiency." *Kiowa*, 523 U.S. at 757, 118 S.Ct. at 1704. In light of these concerns, the Court invited Congress to revisit the potential scope of tribal

immunity. *Id.* at 758-59, 118 S.Ct. at 1705. Ultimately, the Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760, 118 S.Ct. at 1705 (emphasis added).

The Court was notably silent on whether immunity extended to a tribe's commercial, extra-territorial tortuous conduct. Moreover, the language of *Kiowa* suggests that its holding reflected the outer limits of such tribal immunity. Although ultimately ruling for the tribe, the Court did so with little enthusiasm. The majority opinion took it upon itself to critique, rather than defend, its own holding:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In 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.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Id. at 758, 118 S.Ct. at 1704-05 (citations omitted; emphasis added).

All nine Justices expressed some degree of displeasure with or concern about tribal sovereign immunity in *Kiowa*. *See id.*; *see also Seielstad*, *supra*, 37 TULSA L.REV. at 711 ("All nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity"); Wilson, *Nations Within A Nation: The Evolution of Tribal Immunity*, 24 AM.IND.L.REV. 99, 126 (2000) ("While the ultimate holding of *Kiowa* upheld the tribe's immunity from suit, the Court was clear in its disdain for the doctrine"). Nonetheless, lower courts have consistently construed *Kiowa* as a watershed decision, substantially increasing the scope and breadth of tribal sovereign immunity. Specifically, courts have construed *Kiowa* as defining tribal sovereign immunity as essentially limitless, *see Beecher v. Mohegan Tribe of Indians of Connecticut*,

918 A.2d 880, 884 (Conn. 2007) ("Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities," citing *Kiowa*); *Rosenberg v. Hualapai Indian Nation*, No. 1-CA-CV 08-0135 (March 24, 2009), *Appendix 9-10* ("Even the dissenting Justices in *Kiowa* recognized that nothing in the Court's reasoning limited its application to lawsuits arising out of voluntary contractual relationships").[3] In light of this Court's clear displeasure with the doctrine, and the limited issue before it, an expansive reading of *Kiowa* is incorrect, and Dr. Rosenberg urges this Court to grant certiorari to resolve the questions unanswered by *Kiowa*.

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[3] *See also Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Tex. ex rel. Tribal Council*, 72 F.Supp.2d 717, 719 (E.D.Tex. 1999) ("Nothing in *Kiowa* could be construed to limit sovereign immunity to contractual claims in fact, the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities"); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 637 (1999) (citing Justice Stevens' dissent in *Kiowa* for the proposition that this Court extended sovereign immunity to extra-territorial tort claims). As one judge noted, however, Justice Stevens' dissenting statement was less descriptive than it was predictive: "Should this statement [by Justice Stevens] be taken as a definitive interpretation of the majority decision, or should it be seen as a warning call?" *Hollynn D'Lil v. Cher-Ae Heights Indian Community of the Trinidad Racheria*, 2002 WL 33942761, *6 (N.D.Cal. 2002).

D. This Court Should Also Grant Certiorari To Clarify That Courts, Which Created The Doctrine, Have Authority To Define The Outer Bounds Of The Doctrine In The Absence Of Congressional Action.

In a related vein, many lower courts have concluded that *Kiowa* stands for the complete abdication of judicial review of tribal immunity, concluding that Congress, and only Congress, can either modify or limit the otherwise limitless doctrine of tribal immunity. *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) ("The Court expressly declined to confine a tribe's sovereign immunity to its governmental and/or on-reservation activities, reasoning that it was for Congress, not the judiciary, to adjust the boundaries of tribal immunity"); *Rosenberg, supra, Appendix 13* ("Congress, not the judiciary, sets the parameters of tribal immunity"); *see also In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992) ("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component").

However, this reasoning is inconsistent, even with this Court's own statements in *Kiowa*. This Court expressly recognized that the doctrine itself was a judicial creation, *see Kiowa*, 523 U.S. at 756-57, 118 S.Ct. at 1703-04, and that the Court itself

had "taken the lead in drawing the bounds of tribal immunity," *id.* at 759, 118 S.Ct. at 1705. The *Kiowa* Court's invitation for Congressional action was a temporal matter. The Court decided *Kiowa* in 1998, at a time when Congress was considering several bills significantly altering various aspects of tribal sovereignty, including their immunity. In fact, congressional hearings conducted, and to be conducted, with respect to such legislation were expressly discussed during oral arguments in *Kiowa*. *See Seislstad, supra*, 37 TULSA L.REV. at 711-12. Thus, this Court's deference to Congress in *Kiowa* was a matter of pragmatism, not jurisprudence.

Congress disregarded this Court's invitation in *Kiowa*. This inaction alone, however, does not provide a basis for inferring not only Congressional intent but, indeed, the concept of complete Congressional pre-emption of this common law doctrine.[4] "Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent." *Schweiker v. Chilicky*, 487 U.S. 412, 440, 108 S.Ct. 2460, 2476 (1988) (citing *Bob Jones University v. United States*, 461 U.S. 574, 600, 103 S.Ct. 2017, 2032 (1983); *Zuber v. Allen*, 396 U.S. 168, 185-186, n. 21, 90 S.Ct. 314, 323-325, n. 21 (1969). This Court should grant certiorari to clarify that, with respect to sovereign immunities created by the courts and not pre-empted by express statute, the courts not only

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[4] Congress' enactment of the Foreign Sovereign Immunities Act demonstrates that Congress knows how to, and is willing to, occupy a field of immunity that had previously been resolved through common law and judicial fiat.

retain jurisdiction to establish the parameters of such immunities but, in fact, should exercise this jurisdiction and authority when proper disputes regarding the outer limits of such immunities are presented to the courts.

E. Summary

This Court should accept review to clarify that *Kiowa* did not hold that tribal sovereign immunity was limitless, providing complete immunity for extra-territorial tortuous conduct, and that Courts retain the jurisdiction and authority to define the outer limits of the doctrine. Indeed, this Court has never endorsed complete extra-territorial immunity. *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 (1973) ("But tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities not on any reservation"); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories").[5]

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[5] At least one court has stated that a tribe could be held liable for its extra-territorial, commercial tortuous conduct. In *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M.App.), *cert. denied*, 903 P.2d 844 (1995), the New Mexico Court of Appeals held that a tribe had sovereign immunity for tortious conduct at a tribally-owned business on-reservation, but not for off-reservation tortious conduct. *Id.* at 1068.

II. This Court Should Grant Certiorari To Clarify Its Holding In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001), Is Not Limited To Arbitration Clauses, But That Other Contractual Provisions By A Tribe, Inconsistent With Its Sovereign Immunity, Can Act As A Waiver.

The Tribe requested that Dr. Rosenberg, as a precondition to his participation in the whitewater rafting tour, sign a General Release of Liability, acknowledging that whitewater rafting was inherently dangerous and, therefore, absolving the Tribe of potential tort claims. Notably, the Release did not in any manner specify or indicate that the Tribe was immunity from liability, regardless of the Release. This release, which acknowledges that the signor had legal rights that could be waived, constitutes a waiver of sovereign immunity.

In *Kiowa*, this Court clearly acknowledged that a tribe can waive its tribal immunity. *Kiowa*, 523 U.S., at 754, 760, 118 S.Ct. at 1703, 1705. This Court specifically addressed the issue of contractual waiver in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001). In *C & L Enterprises*, the tribe provided a pre-printed contract to its vendors, which indicated that any disputes were subject to arbitration. When an aggrieved vendor sought to invoke the arbitration clause, the tribe

sought to dismiss the dispute, claiming it was immune from suit. In a unanimous decision, this Court disagreed, declaring that the arbitration clause acted as an express tribal waiver of sovereign immunity. This Court stated:

> The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe. . . . [¶] For the reasons stated, we conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit.

Id. at 423, 121 S.Ct. at 1596-97.

Other courts have reached similar results. In *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), the Oklahoma Supreme Court considered a dram shop action brought by an individual severely injured when involved in a head-on collision with an individual who had allegedly left a tribal casino intoxicated. The casino, the Oklahoma high court noted, had consented to being bound by the laws of Oklahoma when it applied for and obtained a license to sell alcoholic beverages at the casino. This agreement, made in the licensing application, was

sufficient to waive the tribe's immunity for civil dram shop acts. "[A]n effective waiver," the court noted, "does not require specific or magic words." *Id.* at 826. "In the licensing application, Thunderbird casino agreed to be bound by the laws of the State of Oklahoma. . . . [¶]There is nothing in Thunderbird casino's agreement to be bound by the laws of this state which limits the state's enforcement mechanisms, and we will not find a limitation that is not there." *Id.* at 827.

In the present matter, Dr. Rosenberg made his arrangements to participate in the River Runners' tour several months in advance. *Appendix 36.* When he and his son arrived at the rendezvous point for the excursion, he was asked to sign, on his behalf and that of his son, an "Assumption of Risk and Responsibility and Release of Liability." *Appendix 36-37; 53-56* (copy of Release). The form stated that "[t]here are significant elements of risk in any adventure or activity associated with whitewater rafting and incidental camping," and required the signatory to acknowledge the various risks. The signatory was to absolve the Tribe of any liability as a result of this inherently dangerous activity, noting that the signatory "may be waiving valuable legal rights." *Id.*

Presumably, this Assumption and Release became a part of Dr. Rosenberg's contract with the tribe, and was enforceable to the extent that such forms are enforceable under general contract law principles. However, by now asserting that it is

immune from suit, the Tribe acknowledges that this part of the contract, which it drafted, was completely meaningless and highly misleading. With or without the release, the participants simply had no "valuable legal rights" to waive if Appellee is correct.

The Tribe's construction of its own contract is nonsensical. "In interpreting a contract, we attempt to reconcile and give meaning to all its terms." *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co.*, 152 P.3d 1227, 1233 (Ariz. App. 2007). Moreover, a contract should be construed to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless. *Scholten v. Blackhawk Partners*, 909 P.2d 393, 396 (Ariz. App. 1995); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1144 n.9 (Ariz. 1993) ("[A] contract should be interpreted, if at all possible, in a way that does not render parts of it superfluous").

Here, there are two possible ways of construing the contract at issue. The first is that the Tribe waived its sovereign immunity, but did so only under the terms of the Assumption and Release that it prepared and had its customers sign. This construction renders all parts of the contract meaningful.[6]

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[6] Although entitled a "release," such documents do not automatically absolve the negligent party of liability. In fact, under Arizona law, a "release" does nothing more than create an issue of fact for the jury. *See Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003, 1013 (Ariz. 2005) (Under Arizona law, the

In contrast, there is the construction of the contract offer by the Tribe. The Assumption and Release is meaningless. Its customers never had any "valuable legal rights" to waive. The Assumption and Release was, apparently, a charade.

Under well settled legal principles, including that of this Court in *C & L Enterprises*, the proper construction is clear. Accordingly, Dr. Rosenberg urges this Court to grant certiorari and hold that contracts must be viewed as a whole, and that contractual provisions inconsistent with absolute immunity constitute a waiver of such immunity.

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enforceability of a release of liability is always a question for the jury).

CONCLUSION

Is a tribe's sovereign immunity limitless, so that it and its commercial offshoots may freely commit tortuous acts beyond the geographic boundaries of Indian country without any obligation to provide redress to its victims? That is the ultimate question Dr. Rosenberg urges this Court to address in the present petition. As the Oklahoma Supreme Court stated in *Bittle v. Bahe*: "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Id.* at 819. In commenting on this Court's *Kiowa* opinion, one scholar noted:

> Given the expanding scope of tribal activities, tribal immunity can present a danger to those who are harmed by a tribe's activities yet have no forum in which to argue their claims. In other words, tribal immunity has developed into a doctrine that is more than large enough to protect the legitimate interests of tribes, but so large that it unnecessarily harms those who interact with tribes and are injured by them.

Wilson, *Nations Within Nations: The Evolution Of Tribal Immunity*, 24 AM.IND.L.REV. 99, 126 (2000).

Recognition of tribal sovereignty and encouragement of tribal economic independence are laudable objectives and goals. However, such goals

and objectives can be achieved without leaving those are injured or killed by the tortuous, extra-territorial conduct of tribes remediless. Accordingly, Petitioner Stephen Rosenberg respectfully requests that this Court grant certiorari in this matter and define the outer limits of such sovereignty, holding that it does not extend to a tribe's extra-territorial tortuous conduct.

RESPECTFULLY SUBMITTED this 21st day of December, 2009.

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