

No. _____

**In The
Supreme Court of the United States**

—◆—
CHRISTOPHER WRIGHT,

Petitioner,

v.

COLVILLE TRIBAL ENTERPRISE CORPORATION,
COLVILLE TRIBAL SERVICES CORPORATION,
and DON BRAMAN,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The Supreme Court For
The State Of Washington**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
PHILIP J. BURI
Counsel of Record
BURI FUNSTON MUMFORD, PLLC
1601 F Street
Bellingham, Washington 98225
(360) 752-1500

Attorney for Petitioner

QUESTION PRESENTED

Does tribal sovereignty immunize for-profit corporations created under tribal law from liability for state law torts committed outside the Tribe's reservation?

PARTIES TO THE PROCEEDING

Christopher Wright, a resident of Washington State, is the petitioner in this Court and was the respondent in the Washington State Supreme Court.

The following parties are respondents in this Court and were petitioners before the Washington State Supreme Court: Colville Tribal Enterprise Corporation, incorporated under the Colville Tribal Law & Order Code and registered to do business in Washington State as a foreign corporation; Colville Tribal Services Corporation, incorporated under the Colville Tribal Law & Order Code and registered to do business in Washington State as a foreign corporation; and Don Braman, a resident of Washington State and employee of Colville Tribal Services Corporation.

Because petitioner is not a corporation, a corporate disclosure statement is not required under Rule 29.6.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
A. Federal And State Courts, Including The Court Below, Conflict On The Scope Of Sovereign Immunity For Corporations Created Under Tribal Law	10
B. Corporate Sovereign Immunity Is An Issue The Supreme Court Should Decide	16
CONCLUSION	19
APPENDIX	
A. <i>Wright v. Colville Tribal Enterprise Corp.</i> , ___ Wn.2d ___, 147 P.3d 1275 (2006)	App. 1
B. <i>Wright v. Colville Tribal Enterprise Corp.</i> , 127 Wn. App. 644, 111 P.3d 1244 (2005)	App. 30
C. Washington Court of Appeals Order Denying Motion for Reconsideration	App. 46
D. Island County Superior Court, Order Grant- ing Defendants' Motion to Dismiss	App. 47
E. Island County Superior Court, Judgment For Defendants on Defendants' Motion to Dismiss... App.	49
F. Colville Tribal Law and Order Code Chapter 7-1.. App.	51

TABLE OF AUTHORITIES

Page

CASES:

<i>Allen v. Gold Country Casino</i> , 464 F.3d 1044 (9th Cir. 2006).....	11
<i>Bassett v. Mashantucket Pequot Tribe</i> , 204 F.3d 343 (2nd Cir. 2000).....	12
<i>C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001).....	16
<i>Dillion v. Yankton Sioux Tribe Hous. Auth.</i> , 144 F.3d 581 (8th Cir. 1988).....	12
<i>Dixon v. Picopa Construction Company</i> , 160 Ariz. 251, 772 P.2d 1104 (1989).....	9
<i>Gavle v. Little Six, Inc.</i> , 555 N.W.2d 284 (Minn.1996)...	9, 15
<i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.</i> , 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)	9, 13, 15
<i>Ningret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.</i> , 207 F.3d 21 (1st Cir. 2000)	12
<i>Oklahoma Tax Commission v. Graham</i> , 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989)	9
<i>Padilla v. Pueblo of Acoma</i> , 107 N.M. 174, 754 P.2d 845 (1988)	9
<i>Pink v. Modoc Indian Health Project, Inc.</i> , 157 F.3d 1185 (9th Cir. 1998).....	12
<i>Ransom v. St. Regis Mohawk Educ. And Community Fund, Inc.</i> , 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995)	8, 9, 14

TABLE OF AUTHORITIES – Continued

	Page
<i>Runyon ex rel. B.R. v. Association of Village Council Presidents</i> , 84 P.3d 437 (2004)	9, 15
<i>Trudgeon v. Fantasy Springs Casino</i> , 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65 (1999)	9
<i>Wright v. Colville Tribal Enterprise Corp.</i> , __ Wn.2d __, 147 P.3d 1275 (2006)	7, 8, 13, 15
<i>Wright v. Colville Tribal Enterprise Corp.</i> , 127 Wn. App. 644, 111 P.3d 1244 (2005)	6, 7

STATUTES AND REGULATIONS

Article I, Section 8, Clause 3 of the United States Constitution	2
Tenth Amendment to the United States Constitution	2
Article 4, Section 6 of the Constitution of the State of Washington	2
28 U.S.C. § 1257(a)	1
RCW 23B.15.050(2)	4, 18
RCW 37.12.010	3
RCW 49.60	6
RCW 49.60.030	2
RCW 49.60.180(3)	3

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Eric Henson and Jonathan B. Taylor, “Native America at the New Millennium”, page 107, Harvard Project on American Indian Economic Development (April 2002) (available online at http://www.ksg.harvard.edu/hpaied/pubs/pub_004.htm).....	17
Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988)	11
William V. Vetter, <i>Doing Business With Indians And The Three “S”es: Secretarial Approval, Sovereign Immunity, And Subject Matter Jurisdiction</i> , 36 Ariz. L. Rev. 169, 174-175 (1994).....	12

PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Wright respectfully requests a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Washington entered December 7, 2006.

**OPINIONS BELOW**

The opinion of the Washington Supreme Court (Pet.App. 1-29) is reported at 147 P.3d 1275 (2006). The opinion of the Washington Court of Appeals (Pet.App. 30-45) is reported at 127 Wn. App. 644, 111 P.3d 1244 (2005). The order of the Court of Appeals denying reconsideration (Pet.App. 46) is unpublished. The trial court's Order Granting Defendant's Motion to Dismiss under CR 12(b)(1) (Pet.App. 47-48) and Judgment for Defendant on Defendants' Motion to Dismiss under CR 12(b)(1) (Pet.App. 49-50) are also unpublished.

**JURISDICTION**

The Washington Supreme Court entered judgment on December 7, 2006. This petition is timely under Rule 13.1. Mr. Wright invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).



**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. Article I, Section 8, Clause 3 of the United States Constitution provides:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes; . . .

2. The tenth amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. Under Article 4, Section 6 of the Constitution of the State of Washington,

. . . The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; . . .

4. Under the Revised Code of Washington 49.60.030,

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil

right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

* * * *

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

5. Under the Revised Code of Washington 49.60.180(3),

It is an unfair practice of any employer: . . . To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

6. Under the Revised Code of Washington 37.12.010,

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session) . . .

7. Under Revised Code of Washington 23B.15.050,

(1) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this title.

(2) A foreign corporation holding a valid certificate of authority shall have no greater rights and privileges than a domestic corporation of like character. Except as otherwise provided by this title, a foreign corporation is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on a domestic corporation of like character.

(3) Except as otherwise provided in chapter 23B.19 RCW, this title does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.



STATEMENT OF THE CASE

Christopher Wright is a pipe layer and heavy equipment operator. From July 2002 until February 2003, he worked for Colville Tribal Services Corporation (“Services Corporation”), laying a water line for a United States Navy housing project in Oak Harbor, Washington. His employer, Services Corporation, is a for-profit corporation created under the Colville Tribal Law and Order Code. (Pet.App. 2-3) The Confederated Tribes of the Colville Reservation (“Colville Tribe”) is a federally recognized Indian Tribe with a reservation in eastern Washington, near Omak, Washington. (Pet.App. 1-2) To work outside

the Colville reservation, Services Corporation registered with the Washington Secretary of State as a foreign corporation and bid on the Navy job against other local contractors. (Pet.App. 16) Mr. Wright is not a tribal member, and all his work for Services Corporation took place hundreds of miles from the reservation.

Services Corporation is a wholly owned subsidiary of Colville Tribal Enterprise Corporation (“Enterprise Corporation”), another for-profit corporation. (Pet.App. 31) Both Enterprise Corporation and Services Corporation were created by the Colville Business Council (the Council), a group of 14 Colville tribe members that governs the Colville Tribe. (Pet.App. 31) The Council members are the shareholders of Enterprise Corporation, acting in their representative capacity on behalf of the Tribe. Enterprise Corporation’s primary responsibility is to oversee the 14 tribal business enterprises, including Service Corporation. (Pet.App. 31) Three of the 14 enterprises are casinos, and 80 percent of the casino net income goes directly to the Tribe. But only twenty-five percent of Enterprises’ non-casino net income is distributed directly to the Tribe; the remaining funds cover Enterprise Corporation’s capital expenditures and business development. The Tribe is not liable for Enterprise Corporation’s debts and obligations. (Pet.App. 32)

During the seven months Wright worked for Services Corporation, his Native American coworkers repeatedly and progressively harassed him because of his race. (Pet.App. 32) Mr. Wright stated that he was called a “white bitch” and that his Native American coworkers drove his car without permission. (Pet.App. 32) As the Washington Court of Appeals described,

Wright states that he complained verbally to Respondent Don Braman, his supervisor, as well as in writing to management. Wright claims that at an October 2002 meeting with the coworkers in question and management, he was assured that the behavior would not be tolerated and that individuals who used racial slurs would be fired. However, Wright asserts that the harassment continued after the meeting, with Braman's full knowledge. Wright claims that he was finally forced to resign in February 2003 because he could not bear the harassment and intimidation any longer and realized his employer was not going to correct it.

Wright v. Colville Tribal Enterprise Corp., 127 Wn. App. 644, 647, 111 P.3d 1244 (2005) (Pet.App. 32).

Mr. Wright sued Services Corporation, its owner, Enterprise Corporation, and his supervisor, Don Braman, in Island County Superior Court, the venue where the harassment occurred. He alleged four claims: (1) racial discrimination in violation of the Washington Law Against Discrimination, RCW Ch. 49.60; (2) hostile work environment in violation of the Law Against Discrimination; (3) negligent supervision; and (4) negligent infliction of emotional distress.

On February 23, 2004, the trial court dismissed Mr. Wright's claims for lack of subject matter jurisdiction. (Pet.App. 47) The court concluded that the sovereign immunity granted under federal law to the Colville Tribe immunized both Services Corporation and Enterprise Corporation from suit in state court. (Pet.App. 32-33)

Mr. Wright appealed to the Washington Court of Appeals, which reversed the trial court.

Some courts have held without analysis that immunity inheres to a tribal corporation because “an action against a tribal entity is, in essence, an action against the tribe itself.” *Local IV-302 Int’l Woodworkers Union v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.Wis.1984). A different approach was articulated in *Runyon ex rel. B.R. v. Ass’n of Village Council Presidents*, 84 P.3d 437 (Alaska 2004). The *Runyon* Court held that an entity associated with a tribe takes on tribal sovereign immunity only if the tribe is the real party in interest. *Runyon*, 84 P.3d at 440. The Court explained that “[t]he entity’s financial relationship with the tribe is therefore of paramount importance—if a judgment against it will not reach the tribe’s assets or if it lacks the ‘power to bind or obligate the funds of the tribe,’ it is unlikely that the tribe is the real party in interest.” *Runyon*, 84 P.3d at 440 (citations omitted). The Court concluded that the entity at issue, a nonprofit Alaska corporation consisting of native villages, did not bind the assets of the villages, and so did not share the villages’ tribal immunity. *Runyon*, 84 P.3d at 438, 441. We believe this to be the more reasoned approach.

Wright v. Colville Tribal Enterprise Corp., 127 Wn. App. 644, 654-655, 111 P.3d 1244 (2005) (Pet.App. 41-42). The Court of Appeals denied the Corporations’ motion to reconsider.

On discretionary review before the Washington Supreme Court, a divided court reversed the Court of Appeals and reinstated the trial court’s dismissal. *Wright v. Colville Tribal Enterprise Corp.*, ___ Wn.2d ___, 147 P.3d

1275 (2006). Four justices concluded that the Colville Tribe's ownership of Enterprise Corporation, which in turn owned Services Corporation, qualified the entities for sovereign immunity.

Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws. Tribal law corporations are assumed to be a subdivision of the tribal government. A tribal corporation must explicitly "hold itself out as a separate and distinct entity" in order to waive immunity. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654, 656 (1971). Because the Council must create, own, and control every tribal governmental corporation governed by chapter 7-1 CTC [Colville Tribal Code], they enjoy the protection of tribal sovereign immunity.

Wright, 147 P.3d at 1279 (citation omitted) (Sanders, J.) (Pet.App. 6-7).

Two justices concurred, applying a multi-factor test described in *Ransom v. St. Regis Mohawk Educ. And Community Fund, Inc.*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995) to decide whether tribal immunity extends to the business corporations. *Wright*, 147 P.3d at 1283-84 (Madsen, J., concurring) (Pet. App. 17) ("while neither the United States Supreme Court nor this court has formulated a test for determining whether tribal immunity extends to tribe-created business corporations, other jurisdictions have addressed this issue"). Finally, three justices dissented, concluding that "we should remand to the trial court for a factual determination of whether the corporations constitute tribal entities and are

thereby protected by sovereign immunity.” *Wright*, 147 P.3d at 1288.

Because state courts disagree on whether tribal sovereign immunity extends to tribally-created corporations, and no guiding federal caselaw exists on this federal question, Mr. Wright respectfully petitions this Court for a writ of certiorari.



REASONS FOR GRANTING THE WRIT

The scope of tribal sovereign immunity is an issue of federal law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). But the defense of tribal sovereign immunity does not, on its own, support federal question jurisdiction. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 841, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989) (“existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law”).

For this reason, state courts have primarily had to decide whether for-profit corporations organized under tribal law are immune from suit in state court. *See e.g.*, *Runyon ex rel. B.R. v. Association of Village Council Presidents*, 84 P.3d 437 (2004); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65 (1999); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn.1996); *Ransom v. St. Regis Mohawk Educ. And Community Fund, Inc.*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995); *Dixon v. Picopa Construction Company*, 160 Ariz. 251, 772

P.2d 1104 (1989); *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988).

Petitioner Wright requests this Court to review this body of caselaw for two reasons. First, the Washington Supreme Court's decision on sovereign immunity conflicts with decisions of these other state courts. Second, with the proliferation of entities incorporated under tribal law and doing business nationwide, Mr. Wright's case presents an important question of federal law that has not been, but should be, settled by the Supreme Court.

A. Federal and State Courts, Including The Court Below, Conflict On the Scope Of Sovereign Immunity For Corporations Created Under Tribal Law.

Relevant federal and state opinions provide at least three related standards for deciding whether a tribal corporation benefits from sovereign immunity. The first standard examines whether a tribal entity serves as an arm of the sovereign tribe. A recent decision from the Ninth Circuit illustrates this test:

Although the Supreme Court has expressed limited enthusiasm for tribal sovereign immunity, the doctrine is firmly ensconced in our law until Congress chooses to modify it. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-60, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This immunity extends to business activities of the tribe, not merely to governmental activities. *See id.* at 760, 118 S.Ct. 1700; *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir.2002). When the tribe establishes an entity to conduct certain activities, the entity is immune if

it functions as an arm of the tribe. *See, e. g., Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir.2006) (holding that Blackfeet Tribe's sovereign immunity extends to Blackfeet Housing Authority); *Redding Rancheria v. Super. Ct.*, 88 Cal.App.4th 384, 388-89, 105 Cal.Rptr.2d 773 (2001) (holding that off-reservation casino owned and operated by tribe was arm of the tribe, and therefore was entitled to sovereign immunity); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 642, 84 Cal.Rptr.2d 65 (1999) (recognizing sovereign immunity of for-profit corporation formed by a tribe to operate the tribe's casino). The question is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.

Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006).

This first test does not distinguish between two very different types of tribal corporations. Under the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988), Congress authorized tribes to incorporate themselves and their agencies under federal law.

Tribal immunity questions would be less perplexing if tribal activities were less diverse. That diversity is not necessarily inherent; in part it results from federal measures intended to increase Indian economic opportunities. In 1934, Congress adopted the "Indian Reorganization Act" (I.R.A.) authorizing the creation of tribal organizations, subject to Interior Department assistance and approval. Section 16 of that Act provides for the organization of tribal

governments. Section 17 provides for the organization of tribal business corporations. Section 17 was added because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit. However, I.R.A. § 16 governments are not precluded from engaging in economic activities; the existence of an I.R.A. § 17 corporation does not limit the related I.R.A. § 16 government's powers.

William V. Vetter, *Doing Business With Indians And The Three "S"es: Secretarial Approval, Sovereign Immunity, And Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 174-175 (1994).

These corporations, authorized and created by federal law, are different from the for-profit corporations at issue in this case. Both Enterprise Corporation and Services Corporation are creatures of Colville Tribal Law, business entities created under the tribal code much like a business corporation created under Washington or Delaware law.

Courts appropriately treat specific tribal entities created under federal law as an arm of the tribe – they are inextricably linked with each other. *See, e.g., Ningret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2nd Cir. 2000); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998); *Dillion v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583-84 (8th Cir. 1998). But the same analysis does not answer whether a tribe's sovereign immunity should protect a corporation created under tribal law. An I.R.A. or other federally-approved corporation will always retain strong connections to the tribe. In contrast, a business corporation created under tribal law, like its counterpart

created under state law, may evolve into any number of businesses, limited only by its articles of incorporation and shareholders' consent. What begins as a tribal corporation tied exclusively to tribal interests may transform into a multi-national corporation with little if any contact with tribal and reservation interests.

Asking only whether a corporation created under tribal law is an "arm of the tribe" inappropriately blends two types of corporation into one category. As illustrated by the Washington Supreme Court decision below, this first test results in overextending the reach of sovereign immunity. *Wright*, 147 P.3d at 1280 ("tribal sovereign immunity protects a tribal government corporation unless the tribe waives or Congress abrogates immunity"). (Pet.App. 8) Under this test, any for-profit corporation organized under tribal law qualifies for sovereign immunity, a rule far beyond the scope of this Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

The second related test examines eleven factors to decide whether a corporation qualifies for immunity.

Although no set formula is dispositive, in determining whether a particular tribal organization is an "arm" of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: the entity is organized under the tribe's laws or constitution rather than Federal law; the organization's purposes are similar to or serve those of the tribal government; the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the

organization; and the tribe's governing body has power to dismiss members of the organization's governing body (*see*, Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity and Subject Matter Jurisdiction*, 36 Ariz.L.Rev. 169, 176 [1994]). More importantly, courts will consider whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the subentity has the "power to bind or obligate the funds of the [tribe]" (*Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 809 [7th Cir.1993], *cert. denied*, 510 U.S. 1019, 114 S.Ct. 621, 126 L.Ed.2d 585). The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe.

Ransom v. St. Regis Mohawk Educ. And Community Fund, Inc., 86 N.Y.2d 553, 559, 658 N.E.2d 989, 992-93, 635 N.Y.S.2d 116, 119-20 (1995). In the court below, two concurring justices advocated this approach, rejecting the plurality's bright-line decision extending sovereign immunity to all tribal governmental corporations. *Wright*, 147 P.3d at 1283-84.

The third test collapses 11 factors into three.

[W]e conclude that the principal factors to be considered in determining whether tribal sovereign immunity extends to a tribal business entity are three:

- 1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;

2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and

3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.

Gavle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996). As noted above, the Alaska Supreme Court reduced this test further to one factor: is the tribe the real party at interest in the lawsuit. *Runyon ex rel. B.R. v. Association of Village Council Presidents*, 84 P.3d 437 (2004).

The difficulty with these various tests is that a corporation could be immune from suit in Washington and New York, while subject to suit in Alaska and Minnesota. For reasons of uniformity alone, a clear federal rule is necessary for both the corporation and the entities it does business with.

The decisions from this Court have not answered the questions posed by this case. In *Kiowa Tribe*, this Court found sovereign immunity for a *tribe*, not a tribal corporation, contracting business off the reservation.

Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760, 118 S.Ct. 1700, 1705, 140 L.Ed.2d (1998). As the concurring justices in *Wright* noted, lower courts question whether the reasoning of *Kiowa Tribe* extends beyond a tribe's contractual disputes to include a corporation's tort liability. *Wright*, 147 P.3d at 1283 n.5 ("the United States Supreme Court has not yet set forth a standard for determining when tribal immunity extends to

tribal corporations”). (Pet.App. 17) The appropriate standard remains unresolved.

The Court’s most recent decision regarding tribal contracting outside the reservation, *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), dealt exclusively with waiver of sovereign immunity.

The question presented is whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards “in any court having jurisdiction thereof.” We hold that, by the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of contractor C & L.

C & L Enterprises, Inc., 532 U.S. at 414 (2001). It does not address whether a corporation, as opposed to a tribe, is immune from suit.

The Washington Supreme Court’s inability to issue a majority opinion in Mr. Wright’s case aptly illustrates the conflict over corporate sovereign immunity. State courts have not agreed on a standard, let alone have reached a uniform result on the issue. The various tests can lead to contradictory outcomes in different states, an untenable anomaly for a federal doctrine.

B. Corporate Sovereign Immunity Is An Issue The Supreme Court Should Decide.

The economic impact of tribal business has grown significantly in the last 20 years, and it includes much more than casinos and gaming.

In a 1998 study, it was noted that tribal governments account for \$1.2 billion in off-reservation spending for goods and services and that reservation businesses account for \$4.4 billion in off-reservation spending.

Eric Henson and Jonathan B. Taylor, "Native America at the New Millennium", page 107, Harvard Project on American Indian Economic Development (April 2002) (available online at http://www.ksg.harvard.edu/hpaied/pubs/pub_004.htm).

Tribes that separate tribal governance from corporate governance have had the greatest economic success.

Tribes operating under the nation-building model have taken steps to isolate their enterprise managers from political opportunism by, for example, instituting independent boards of directors. These boards encourage the use of outside business expertise and an emphasis on profitability over job creation; however their most important contribution seems to be the isolation of enterprise from political interference. This impact is underscored by a survey of tribal leaders from tribes owning 73 enterprises. The survey found that enterprises independent of tribal control were four times more likely to be profitable than those that were not.

Henson and Taylor, *supra*, at 110-111. With increasing independence from tribal government, tribal corporations will move away from the factors that provide immunity from suit. This legal question of sovereign immunity will only become more complicated as tribal enterprises grow and prosper.

The growth of business corporations created under tribal law will also cause greater problems for state regulators. In Washington state, a corporation created out of state must register as a foreign corporation. All foreign corporations must comply with Washington law as a condition of registration.

A foreign corporation holding a valid certificate of authority shall have no greater rights and privileges than a domestic corporation of like character. Except as otherwise provided by this title, *a foreign corporation is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on a domestic corporation of like character.*

RCW 23B.15.050(2) (emphasis added). Yet the Washington Supreme Court has exempted tribal corporations from this provision. Corporations created under tribal law have immunity from state tort claims and may act as free agents in the state economy. This benefits no one, especially tribal corporations seeking outside investors.

The issue of corporate sovereign immunity is ready for Supreme Court review. For more than 30 years, state courts have attempted to identify when a corporation created under tribal law is immune from state jurisdiction. This question will continue to vex state courts until this Court establishes the proper standard. Mr. Wright's case provides the Court a timely opportunity to resolve this conflict.



CONCLUSION

The question of sovereign immunity for corporations created under tribal law has many answers with little if any consistency. Given the legal and economic interests at stake, Christopher Wright respectfully requests this Court to grant his petition for a writ of certiorari.

DATED this 7th day of March, 2007.

Respectfully submitted,

PHILIP J. BURI

Counsel of Record

BURI FUNSTON MUMFORD, PLLC

1601 F Street

Bellingham, Washington 98225

(360) 752-1500

Attorney for Petitioner