IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-1520 and No. 11-1947

Alltel Communications, LLC

Respondent—Appellee,

v.

Oglala Sioux Tribe, Joseph Red Cloud
and Gonzalez Law Firm

Petitioners—Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
Case No. CIV.10-mc-00024, Judge Jeffrey L. Viken

APPELLEE'S BRIEF

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

In connection with a suit filed in the Eastern District of Arkansas, Alltel Communications, LLC ("Alltel") served non-party subpoenas on the Oglala Sioux Tribe and a tribal official, Joe RedCloud (collectively, "the Tribe"), and on the Gonzalez Law Firm ("the Gonzalez Firm"). The Tribe and the Gonzalez Firm moved to quash in the U.S. District Court for the District of South Dakota ("District Court"). Both the Tribe and the Gonzalez Firm claimed attorney-client privilege and work product protection. The Tribe also invoked tribal immunity; the Gonzalez Firm did not. The District Court denied the motions on February 17, 2011.

Both the Tribe and the Gonzalez Firm sought interlocutory appellate review of the District Court's tribal immunity holding. Because the Gonzalez Firm had not invoked tribal immunity below, its appeal was dismissed. The Gonzalez Firm renewed its motion to quash before the District Court to assert tribal immunity. The motion was denied and the Gonzalez Firm appealed. Briefing for the appeals was consolidated. Because this appeal presents an issue of first impression in this Circuit and because Alltel is responding to arguments from both appellants, Alltel respectfully requests 30 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Counsel for Alltel Communications, LLC, certifies the following: Alltel Corporation is the parent corporation of Alltel Communications, LLC, and Alltel Corporation is a privately-held subsidiary of Cellco Partnership d/b/a Verizon Wireless. Verizon Wireless is a joint venture of Vodafone Group PLC and Verizon Communications Inc., both of which are publicly-traded corporations.

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JURISDICTIONAL STATEMENT

Although Alltel Communications, LLC[1] does not dispute the characterization of the District Court's underlying jurisdiction or that this Court has jurisdiction over the tribal immunity issues presented in this consolidated appeal pursuant to the collateral order doctrine, Alltel does dispute the Gonzalez Firm's characterization of one of the subpoenas at issue here. In its jurisdictional statement, the Gonzalez Firm mischaracterizes one of the subpoenas at issue as being served on "Mario Gonzalez, Oglala Sioux Tribal Attorney," *see* Firm Br. at 1,[2] and lists "Mario Gonzalez"—not the "Gonzalez Law Firm"—in the caption of its appellate brief. Alltel, however, never served a subpoena on "Mario Gonzalez." It served the subpoena at issue on the "Gonzalez Law Firm." Thus, as far as the Gonzalez Firm's immunity is concerned, the Court's jurisdiction is limited to the question whether the Gonzalez Firm itself

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[1] This brief refers to Alltel Communications, LLC as "Alltel." The Oglala Sioux Tribe and Joe RedCloud are collectively referred to as "the Tribe" unless distinction is necessary. The Gonzalez Law Firm is referred to as "the Gonzalez Firm." The U.S. District Court for the District of South Dakota is referred to as the "District Court."

[2] This brief cites the appellate brief filed by the Tribe as "OST Br." and the appellate brief filed by the Gonzalez Firm as "Firm Br."

is permitted to invoke tribal immunity to avoid complying with a federal non-party subpoena.[3]

STATEMENT OF THE ISSUES

I. Whether tribal immunity extends further than state sovereign immunity such that a federal non-party subpoena is a "lawsuit" triggering tribal immunity protection even though such a subpoena is, as a matter of law, not a "lawsuit" that triggers state sovereign immunity protection.

In re Missouri Dep't of Natural Res., 105 F.3d 434 (8th Cir. 1997).

United States v. Juvenile Male 1, 431 F. Supp. 2d 1012 (D. Ariz. 2006).

Dugan v. Rank, 372 U.S. 609, 620 (1963).

TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999).

II. Whether tribal immunity defeats a federal non-party subpoena when the tribe's interest in quashing the subpoena is solely financial and strategic.

United States v. Bryan, 339 U.S. 323 (1950).

United States v. Nixon, 418 U.S. 683 (1974).

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[3] The tribal immunity issues are the only issues properly before this Court on interlocutory appeal pursuant to the collateral order doctrine. Although the District Court also rejected attorney-client privilege and work product doctrine arguments made by the Tribe and the Gonzalez Firm, a denial of a motion to quash on attorney-client privilege or work product grounds is not immediately appealable pursuant to the collateral order doctrine. *See Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 228 (9th Cir. 1975).

Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, 476 U.S. 877 (1986).

Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774 (9th Cir. 1994).

III. Whether a tribe's immunity extends to a private law firm that represents the tribe in commercial disputes with non-tribal third parties.

Davis v. Littell, 398 F.2d 83 (9th Cir. 1968).

Stock West Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991).

Oglala Sioux Tribe: Law & Order Code, Ch. 21 § 2(a), *available at* http://www.narf.org/nill/Codes/oglalacode/chapter21-foi.htm.

STATEMENT OF THE CASE

Alltel filed a breach of contract claim against Eugene DeJordy on February 23, 2010. (JA 2)[4] Discovery is ongoing and trial is currently scheduled for the week of November 28, 2011. As part of the discovery in the DeJordy case, Alltel served non-party subpoenas *duces tecum* issued by the District Court on the Tribe, RedCloud, and the Gonzalez Firm in September and October 2010. (JA 83-99, 105-12) The Gonzalez Firm filed a motion to quash, asserting attorney-client privilege and work product protection. (JA 102-03; A 21-24) The Tribe and RedCloud

[4] This brief cites the joint appendix filed by the Tribe and the Gonzalez Firm as "JA." The separate appendix filed by Alltel is cited as "A."

filed a joint motion to quash, asserting tribal immunity, attorney-client privilege, and work product protection. (JA 113-14; A 15-20) Alltel, the Tribe, and the Gonzalez Firm filed ten briefs in connection with the motions; a hearing was held on December 2, 2010. (A 15-24, 30-36, 64-85, 222-27, 232-35, 239-304, 324-28, 331-34, 345-54, 357-71)

On February 17, 2011, the District Court rejected the claims made by the Tribe and the Gonzalez Firm in their entirety. (JA 128-62) The District Court found that tribal immunity did not shield the Tribe from the subpoenas and held that neither the Tribe nor the Gonzalez Firm had established that attorney-client or work product protections applied. (JA 151-54, 156, 160) Accordingly, the District Court ordered the Tribe and the Gonzalez Firm to submit documents for *in camera* review and a privilege log. (JA 161-62) The Tribe filed a Notice of Appeal on March 3, 2011 to challenge the District Court's ruling on tribal immunity pursuant to the collateral order doctrine. (JA 163) The Tribe's appeal was docketed by this Court on April 7, 2011.

The Gonzalez Firm joined the Tribe's March 3 Notice of Appeal (JA 163), but Alltel moved to dismiss the Gonzalez Firm from the appeal because the only issue immediately appealable pursuant to the

collateral order doctrine was tribal immunity and the Gonzalez Firm had expressly disclaimed any assertion of tribal immunity before the District Court (A 250-51). This Court dismissed the Gonzalez Firm's appeal on April 7, 2011. (A 462) The Gonzalez Firm then renewed its motion to quash before the District Court, this time invoking tribal immunity. (A 482-83) The District Court denied the Gonzalez Firm's renewed motion to quash on April 21, 2011 and the Gonzalez Firm appealed. (JA 167-81) The same day, the District Court stayed the order that the Tribe and the Gonzalez Firm produce documents pending the outcome of this appeal. This Court consolidated the briefing for the Tribe's and the Gonzalez Firm's appeals on May 2, 2011.

STATEMENT OF FACTS

A. DeJordy's Employment and Separation Agreement.

For approximately twelve years, Eugene DeJordy was in-house counsel for Alltel and its predecessor.[5] (JA 2, 4) As in-house counsel for Alltel, DeJordy negotiated and signed a contract with the Tribe—the Tate Woglaka Service Agreement ("TWSA") (A 87-125)—that set out the terms under which an Alltel subsidiary would provide

[5] For ease of reference, this brief refers to both Alltel and its relevant predecessor as "Alltel."

telecommunications service on the Pine Ridge Indian Reservation ("the Reservation") in South Dakota. (JA 4) DeJordy's employment at Alltel was terminated in November 2007, and in exchange for a payment of more than $2 million, he agreed, among other things, not to violate his ethical and confidentiality duties to Alltel (now his former client) by "support[ing], assist[ing], or otherwise cooperat[ing] in any legal or administrative proceeding in a manner adverse" to Alltel. (JA 5-6, 17)

B. DeJordy and the Tribe Attempt To Obtain Alltel's Telecommunications Network Assets.

As soon as DeJordy's employment at Alltel was terminated, he began working with the Tribe on telecommunications issues on the Reservation. (JA 117) In June 2008, it was publicly announced that Alltel's parent entity had entered an agreement to merge with Verizon Wireless. Subsequently, it became public that, to secure antitrust approval for the transaction from the U.S. Department of Justice, Alltel and Verizon Wireless had to agree to divest telecommunications network assets in 24 States—including Alltel's network assets used to provide service on the Reservation. (JA 7)

The Tribe and DeJordy sought to capitalize on the divestiture requirement imposed by DOJ and attempted to obtain Alltel's network

assets on the Reservation for $1.00. (JA 8) DeJordy formed a for-profit telecommunications company, Native American Telecom, and developed a telecommunications plan for the Tribe that called for the Tribe to create and own a telephone company. (JA 24-26, 117-18) Since the Tribe lacked the network assets necessary to provide telephone service—and was unwilling to pay market price for such assets—obtaining Alltel's network assets for $1.00 was of "high importance" to the plan. (JA 8, 29)

In the fall of 2008, the Tribe and DeJordy wrote to Alltel, Verizon Wireless, the Federal Communications Commission, and others in an attempt to obtain Alltel's network assets for $1.00. (JA 8-9, 20-31) Although Alltel encouraged the Tribe to submit a bid through the divestiture auction process that had been established, the Tribe did not do so. Eventually, Alltel announced that, as a result of the bids received in the divestiture auction, it would divest the assets in 18 States, including South Dakota (and the Reservation) to AT&T Wireless, LLC ("AT&T") for a purchase price of $2.35 billion. (JA 7-8)

C. DeJordy Violates the Separation Agreement by Assisting the Tribe in a Lawsuit Against Alltel.

DeJordy and the Tribe sought to derail the $2.35 billion divestiture sale to AT&T by suing Alltel and Verizon Wireless in Oglala Sioux Tribal Court. The Tribe filed papers in Tribal Court in October 2009, claiming a right to own Alltel's assets under the TWSA—the contract that DeJordy had negotiated on behalf of Alltel—and seeking a preliminary injunction to enjoin the sale of the network assets used to provide service on the Reservation. (JA 9, 32-37) DeJordy's name was listed on the Certificate of Service. (JA 39)

DeJordy's role became clear soon thereafter. The attorney who had filed the Tribe's pleading, Deborah DuBray (an attorney who was at the time working for the Gonzalez Firm), explained to Alltel that she was acting as local counsel for DeJordy and had filed the lawsuit against Alltel in Tribal Court on DeJordy's behalf. (JA 8-9, 40-41) Counsel for Alltel wrote to DeJordy to remind him of his contractual duties to his former client not to assist the Tribe in legal actions against Alltel—particularly with respect to contracts that he himself had negotiated on Alltel's behalf. (JA 43-45) Despite that warning, DeJordy kept advising the Tribe with respect to its lawsuit against Alltel. (JA 9-

10, 43-45, 55-57) Alltel then wrote to both DeJordy and the Tribe and advised them to preserve relevant documents in the event that Alltel was forced to initiate legal action against DeJordy. (A 1-4)

After the Tribe and Alltel agreed to stay litigation in the Tribal Court to seek an amicable resolution, Alltel learned that DeJordy continued to advise the Tribe during settlement negotiations, and that DeJordy was urging the Tribe to reject Alltel's settlement efforts unless Alltel turned over its network assets to the Tribe. (JA 55-57)

D. Alltel's Lawsuit Against DeJordy and Discovery Efforts.

On February 23, 2010, Alltel filed suit against DeJordy for breach of his Separation Agreement in the U.S. District Court for the Eastern District of Arkansas.[6] (JA 2-14) Trial in that action is scheduled for the week of November 28, 2011. In September and October 2010, shortly after discovery commenced, Alltel served non-party subpoenas issued by the District Court on the Tribe, Joe RedCloud (the tribal official who had been communicating with DeJordy regarding the Tribe's legal action against Alltel), and the Gonzalez Firm. (JA 83-99, 105-12) The

[6] When DeJordy's employment with Alltel was terminated, he was working for Alltel in Arkansas, and his Separation Agreement specified that any suit based on the contract must be filed in Arkansas. (JA 17)

subpoenas seek documents showing DeJordy's communications with the Tribe and the Gonzalez Firm concerning the Tribe's litigation with Alltel related to the TWSA, and showing the support DeJordy provided to the Tribe, RedCloud, and the Gonzalez Firm in connection with that litigation. (JA 83-101, 105-12) The relevance of such documents to the breach of contract action against DeJordy is undisputed. Moreover, Alltel knows that responsive documents exist. Ms. DuBray (the attorney who filed the Tribal Court action for the Tribe while she was working at the Gonzalez Firm) told Alltel that she had filed the action acting on DeJordy's behalf (JA 40) and she has subsequently testified at deposition that she was copied on twenty to thirty emails between RedCloud and DeJordy in the months before the suit was filed.

As discussed above, the Tribe (joined by RedCloud) and the Gonzalez Firm moved to quash the subpoenas. (JA 102-03, 113-14) The Tribe invoked tribal immunity. Both the Tribe and the Gonzalez Firm invoked attorney-client privilege and work product protection.[7] DeJordy filed a declaration in support of the Tribe's motion to quash,

[7] The District Court's rejection of privilege and work product claims is not at issue in this interlocutory appeal. The only issue ripe for appellate review pursuant to the collateral order doctrine is whether tribal immunity shields the Tribe and the Gonzalez Firm from complying with the subpoenas. *See* note 3, *supra*.

explaining that he has been working with the Tribe since November 2007 and that he had entered into a for-profit joint venture with the Tribe: Native American Telecom-Pine Ridge, LLC. (JA 115-18)

E. The District Court Denies the Motions to Quash.

Both motions to quash were denied in their entirety by the District Court on February 17, 2011. (JA 128-62) The District Court held that allowing the Tribe to avoid complying with the subpoenas would create a "huge hole" in the federal discovery rules that would apply only to tribes and their agents. (JA 151) The District Court further held that creating such a hole was particularly unwise in light of the "legal[] and financial[]" interest shared by DeJordy and the Tribe, and that "[t]o allow the Tribe to advance its interests while denying Alltel access to information to pursue its claims against DeJordy is contrary to the goals and purposes of the Federal Rules of Civil Procedure." (JA 153) The District Court also rejected the attorney-client privilege and work product doctrine arguments made by both the Tribe and the Gonzalez Firm, reasoning that neither had met the burden of establishing an attorney-client relationship with DeJordy or that the work product doctrine applied. (JA 156-57, 159-60)

Having denied the motions to quash, the District Court ordered the Tribe and the Gonzalez Firm to produce responsive documents for *in camera* inspection. (JA 161-62) Rather than produce documents, the Tribe and the Gonzalez Firm filed this interlocutory appeal. (JA 163-66) On April 21, 2011, the District Court stayed the order that the Tribe and the Gonzalez Firm produce documents pending the outcome of this appeal. (JA 167-81)

F. Thwarted Discovery Efforts Against DeJordy.

Alltel has tried to get the same documents at issue in the subpoenas here directly from DeJordy as well. Alltel served Requests for Production on DeJordy in September 2010. (A 5-14) After requesting (and being granted) extensions of time to respond, DeJordy asserted on November 5, 2010 that all of his communications with the Tribe were protected by attorney-client privilege or the work product doctrine. To support those claims, however, DeJordy refused to assert straightforwardly that he was acting as the Tribe's lawyer when the Tribe sued Alltel concerning the TWSA (the contract DeJordy had negotiated for Alltel when he was Alltel's in-house lawyer). If he had made such an admission in a court filing, of course, it would have

definitively proved Alltel's breach of contract claim against him. Instead, therefore, DeJordy simply attached the brief the Tribe had filed in support of its motion to quash in South Dakota. (A 28-29) Alltel duly filed a motion to compel, the District of Arkansas court rightly recognized that DeJordy's assertion of attorney-client privilege was an effort to give Alltel (and the court) the run-around, and the court ordered DeJordy to produce the requested documents. In response, however, DeJordy has produced only *three* documents and has claimed that no other responsive documents exist—despite the fact that Alltel warned him on December 23, 2009 to preserve relevant documents. (A 1-2) DeJordy did not even produce an email that RedCloud himself had forwarded to Alltel showing that DeJordy was advising the Tribe concerning settlement negotiations. (JA 55-57, A 382-83)

Nearly twenty months after sending both DeJordy and the Tribe document preservation notices, ten months after serving both discovery requests against DeJordy in Arkansas and subpoenas against the other custodians who might have the documents in South Dakota (the Tribe, RedCloud, and the Gonzalez Firm), and despite Ms. DuBray's sworn testimony that responsive documents exist, Alltel has yet to receive the

documents showing DeJordy's communications with the Tribe concerning the Tribe's litigation against Alltel.

SUMMARY OF ARGUMENT

The assertion of tribal immunity in this case is fatally flawed at the outset for one simple reason: federal non-party subpoenas are not "lawsuits" for sovereign immunity purposes and do not trigger the protections of tribal immunity. The Supreme Court has explained that sovereign immunity is implicated only if "the judgment sought would expend itself on the public treasury or domain." *See Dugan v. Rank*, 372 U.S. 609, 620 (1963). Thus, that an entity may enjoy sovereign immunity from suit—like the Tribe here, or like States, state officials, and state agencies—does not mean that such an entity is immune from federal court process. Indeed, it is settled law that States and their agencies cannot escape complying with federal subpoenas by invoking sovereign immunity. As this Court (among others) has held: "[t]here is simply no authority for the position that [sovereign immunity] shields government entities from discovery in federal court." *In re Missouri Dep't of Natural Resources*, 105 F.3d 434, 436 (8th Cir. 1997) (citing *United States v. Procter & Gamble*, 356 U.S. 677, 681 (1958)).

The Tribe's efforts to escape the force of that precedent are meritless. First, the Tribe contends that state sovereign immunity case law is inapposite because, according to the Tribe, tribal immunity is *broader* and *more robust* against the powers of federal courts than state sovereign immunity. That is incorrect. The position of the Native American tribes as "domestic dependant nations" under the federal government, *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831) (Marshall, C.J.), does not give them greater immunity than the States. Unlike state sovereign immunity, tribal immunity is not enshrined in the Constitution and is subject to complete defeasance at the will of the federal government. It would be incongruous if federal courts created a judge-made rule treating tribal immunity as more expansive than the protections of sovereignty afforded to the States, which are "coordinate" sovereigns with the United States under the Constitution. *Cf. Printz v. United States*, 521 U.S. 898, 921 (1997). The Tribe's primary "authority" for its theory of über-immunity for Native American tribes is an anonymous student law review note—hardly firm footing for the novel expansion of tribal immunity the Tribe asks this Court to adopt.

Second, the Tribe cherry-picks a handful of outlier cases addressing tribal immunity and cobbles together various aspects from them to claim that tribes are immune from federal non-party subpoenas that are: (1) "issued" by private parties (2) in civil (as opposed to criminal) federal court litigation where (3) the underlying federal lawsuit rests on diversity jurisdiction. These supposed distinctions have no basis in the law and are derived from a flat misreading of the various cases. The Tribe's error is readily demonstrated by the fact that other sovereigns (like state agencies) are regularly required to comply with federal subpoenas served by private parties in civil suits even where the underlying suit rests on diversity jurisdiction. Moreover, the cases the Tribe relies on are all based on a single Ninth Circuit decision—*United States v. James*, 980 F.2d 1314 (9th Cir. 1992)—that has been so widely criticized by courts and commentators that even district courts within the Ninth Circuit have effectively declined to follow it whenever possible.

Even if this Court were to find that federal non-party subpoenas trigger tribal immunity, however, the District Court should be affirmed because it correctly determined that the Tribe's interest in avoiding

compliance with the subpoenas is purely financial and strategic. The District Court properly applied the balancing test used to determine whether a claimed privilege or immunity trumps the bedrock rule that the public is entitled to every man's evidence. Courts recognize exceptions to that rule only when the party resisting discovery has a "substantial" interest that outweighs the public interest in the truth. Here, as the District Court found, the Tribe has identified no legitimate interest in quashing the subpoenas, much less a substantial one. That is because the Tribe and DeJordy have a financial and strategic interest in ensuring that the documents requested by Alltel never see the light of day. The Tribe and DeJordy are business partners: they have established a for-profit telecommunications company on the Reservation; they have worked together for years in an attempt to wrest millions of dollars of telecommunications network assets away from Alltel; and they have cooperated with one another to keep the requested documents in the dark.

The Tribe's financial and strategic interest in quashing the subpoenas cannot be given weight when placed in the balance against the public interest in the truth. The Supreme Court has rejected

interests far more weighty than the Tribe's as insufficient to override the public interest in the truth. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 712 (1974) (rejecting President's claim that executive privilege excuses compliance with a subpoena even though the President's "interest in preserving confidentiality is weighty" and "entitled to great respect"). Moreover, since interests like the Tribe's would not excuse federal or state agencies from complying with federal non-party subpoenas, the repercussions of a holding that tribal financial and strategic interests can defeat valid federal subpoenas would, as the District Court observed, crater the federal discovery rules with a "huge hole" available only to Native American tribes.

Finally, the Gonzalez Firm has no claim to immunity because any claim it has is wholly derivative of the Tribe's erroneous claim. In any event, even if the Tribe did have immunity here, it would not extend to the Gonzalez Firm. Tribal immunity extends only to tribal officials operating in their official, governing capacities. The Gonzalez Firm does not claim that it is a tribal official, and it offers no explanation of how an entire private law firm could possibly be a tribal official. Nor was the Gonzalez Firm operating in an official, governing capacity on

behalf of the Tribe. A tribe's lawyer representing the tribe in a commercial dispute with a company like Alltel is not, as a matter of law, an "official" acting in a "governing capacity" entitled to immunity.

STANDARD OF REVIEW

The District Court's purely legal conclusions regarding the scope of tribal immunity are subject to *de novo* review. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994). To the extent tribal immunity requires courts to balance relevant interests to determine whether immunity permits a tribe to withhold documents responsive to a federal non-party subpoena, the District Court's balancing of the relevant interests is reviewed under an "abuse of discretion" standard. *Webster v. Doe*, 486 U.S. 592, 604 (1988) (explaining that "[t]he District Court has the latitude to control any discovery process which may be instituted so as to balance" the needs of the parties seeking and resisting discovery); *Moran v. Clarke*, 296 F.3d 638, 650 (8th Cir. 2002) (appellate review of a district court's discovery rulings is "both narrow and deferential" and relief will be granted "only where the errors 'amount to a gross abuse of discretion resulting in fundamental

unfairness'") (quoting *Bunting v. Sea Ray, Inc.*, 99 F.3d 887, 890 (8th Cir. 1996)).

ARGUMENT

I. A FEDERAL NON-PARTY SUBPOENA IS NOT A "LAWSUIT," SO SOVEREIGN IMMUNITY DOES NOT APPLY.

The claim of tribal sovereign immunity advanced by the Tribe and the Gonzalez Firm is fatally flawed at the outset for one simple reason: a federal non-party subpoena is not a "lawsuit" that implicates the doctrine of sovereign immunity at all. Courts routinely require state agencies that are protected by sovereign immunity to comply with federal non-party subpoenas. The Tribe tries to escape the force of that precedent by asking this Court to ignore the case law from the state sovereign immunity context and to be the first U.S. Court of Appeals to hold that, as far as federal non-party subpoenas are concerned, tribes are entitled to *greater* immunity than the States. There is no basis in law for such a radical holding.

A. Federal Non-Party Subpoenas Do Not Implicate Sovereign Immunity.

The federal non-party subpoenas served by Alltel do not implicate sovereign immunity because they do not seek any judgment—particularly a monetary judgment—that would impair the Tribe's sovereign interests. The Supreme Court long ago explained that sovereign immunity is implicated only "if 'the judgment sought would expend itself on the public treasury or domain.'" *Dugan*, 372 U.S. at 620 (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)). Conversely, of course, subjecting a sovereign to judicial compulsion that does *not* expose the sovereign to a judgment against the treasury does not trigger sovereign immunity protection.[8]

Thus, the overwhelming majority of courts that have addressed whether federal non-party subpoenas trigger sovereign immunity in the

[8] The same principle—that the threat of a monetary judgment provides the touchstone for determining when sovereign immunity is implicated—underpins the entire *Ex parte Young* doctrine. *See* 209 U.S. 123 (1908). Under *Ex parte Young* and its progeny, sovereign immunity bars suits seeking monetary damages from States, but does not bar suits seeking injunctive relief against state officers. *Id.* at 159-60. Thus, under *Ex parte Young*, sovereign immunity is not implicated when a sovereign is merely compelled to act through its officers. The principles announced in *Ex parte Young* apply to tribes just as they do to States. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994).

state sovereign immunity context have held that they do not.[9] This Court, for example, squarely rejected the claim that state entities may invoke sovereign immunity to escape the discovery provisions of the Federal Rules. In *In re Missouri Department of Natural Resources*, the Court explained that "[g]overnmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts. *There is simply no authority for the position that [sovereign immunity] shields government entities from discovery in federal court*." 105 F.3d 434, 436 (8th Cir. 1997) (citing *Procter & Gamble*, 356 U.S. at 681) (emphasis added).[10]

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[9] The circuits differ on the distinct question whether federal non-party subpoenas trigger *federal* sovereign immunity. This Circuit has not addressed the issue. Most circuits have held that federal agencies, like state agencies, are not immunized from complying with federal non-party subpoenas. *See, e.g.*, *Linder v. Calero-Portocarrero*, 251 F.3d 178, 180 (D.C. Cir. 2001); *Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994). Although some other circuits have held that federal agencies are immune from federal non-party subpoenas, they have emphasized that the subpoenaing party can obtain review of an agency's decision not to comply through the Administrative Procedure Act. *See E.P.A. v. General Elec. Co.*, 197 F.3d 592, 598 (2d Cir. 1999) *opinion amended on reh'g*, 212 F.3d 689 (2d Cir. 2000); *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 277-78 (4th Cir. 1999). Because there are no alternative methods of reviewing a tribe's decision not to comply with a federal non-party subpoena, a holding that tribes are immunized from complying with such subpoenas would extend greater immunity to tribes than to federal agencies.

[10] The holding in *In re Missouri Department of Natural Resources* is exactly what the drafters of the Federal Rules intended. As Edson R. Sunderland, one of the drafters of the Federal Rules, explained long ago: "No distinction is made in the federal discovery and deposition rules between private parties and the officers and

This Court is not alone in observing that sovereign immunity is no defense to a federal non-party subpoena. *See, e.g.*, *Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008) ("The writ sought in this case would if granted be like an order commanding a state official who is not a party to a case between private persons to produce documents in the state's possession during the discovery phase of the case; such orders, because they do not compromise state sovereignty to a significant degree, do not violate the Eleventh Amendment.") (Posner, J.) (citing, *inter alia*, *In re Missouri Dep't of Natural Res.*, 105 F.3d at 436). State officials are routinely required to comply with federal non-party subpoenas notwithstanding claims of sovereign immunity.[11]

In the tribal context, the most thorough analysis of the issue comes from the District of Arizona in *United States v. Juvenile Male 1*,

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agencies of government." *Discovery Before Trial Under the New Federal Rules*, 15 Tenn. L. Rev. 737, 742 (1939). *See also* Raoul Berger & Abe Krash, *Government Immunity From Discovery*, 59 Yale L.J. 1451, 1465-66 (1950) ("It has long been considered that all persons have a duty to produce relevant evidence, upon the assumption that the interest of the public in seeing that justice is done out-weighs the right to privacy. The Rules have merely underscored that duty . . . [T]he terms of the third party subpoena-deposition provisions are unqualified, and no considerations of policy can afford an exemption to the Government, though they might have some bearing upon the measure of the asserted privilege.").

[11] *See, e.g.*, *Allen v. Woodford*, 543 F. Supp. 2d 1138, 1144 (E.D. Cal. 2008); *Grine v. Coombs*, 214 F.R.D. 312, 342 (W.D. Pa. 2003); *Jackson v. Brinker*, 147 F.R.D. 189, 193 (S.D. Ind. 1993); *Laxalt v. McClatchy*, 109 F.R.D. 632, 634-35 (D. Nev. 1986).

431 F. Supp. 2d 1012 (D. Ariz. 2006). There, the court held that a federal non-party subpoena served on a tribal agency does not trigger tribal immunity. The court pointed out that "[t]he service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe." *Id.* at 1016; *see also Miccosukee Tribe of Indians of Fla. v. United States*, 730 F. Supp. 2d 1344, 1349 n.7 (S.D. Fla. 2010) (a non-party federal subpoenas is not a "'suit against the sovereign'") (quoting *Dugan*, 372 U.S. at 620 (alterations in original omitted)). Observing that "[f]ederal subpoenas routinely issue to state and federal employees to produce official records or appear and testify in court and are fully enforceable despite any claim of immunity," the *Juvenile Male* court remarked that "[i]t would be strange indeed if a federal subpoena were operative against the greater sovereign and its officers but not the lesser." 431 F. Supp. 2d at 1016. The *Juvenile Male* approach is straightforward and logical: if a State is not immune to a federal non-party subpoena, and if tribal immunity is no greater than state sovereign immunity, then a tribe cannot be immune to a federal non-party subpoena, either.

B. Tribal Immunity Extends No Further than State Sovereign Immunity.

Faced with this weight of authority, the Tribe attacks the premise that tribal immunity is no greater than state sovereign immunity. But the Tribe cites no case holding that tribal immunity extends further than the sovereign immunity enjoyed by the States of the Union; indeed, the precedent shows that the opposite is true.

The several States enjoy sovereign immunity because they were independent sovereigns prior to the ratification of the Constitution and did not fully surrender their sovereignty upon forming the Union. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."). The States became "coordinate" sovereigns in the federal system and surrendered only so much of their sovereignty as specified in the Constitution. For States, sovereign immunity from suit became "constitutionalized" with the passage of the Eleventh Amendment. Thus, the sovereign immunity retained by the States after the creation of the Constitution can be further limited

solely by amending the Constitution. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999) ("[S]tate sovereign immunity . . . is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends.") (emphasis in original).

Tribal immunity, in contrast, is of a far more "limited nature." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Tribes, unlike States, have a "peculiar quasi-sovereign status" under federal law. *Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering*, 476 U.S. 877, 890 (1986); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (tribes retain only "quasi-sovereignty"). A tribe's sovereign immunity "exists only at the sufferance of Congress, and is subject to complete defeasance." *Wheeler*, 435 U.S. at 323. Thus, tribal immunity, unlike state sovereign immunity, can be wiped out completely—simply with an act of Congress. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) ("Congress has always been at liberty to dispense with . . . tribal immunity or to limit it."); *Santa Clara Pueblo*, 436 U.S. at 58 (tribal immunity "is subject to the superior and plenary control of Congress");

see also Vann v. Kempthorne, 534 F.3d 741, 746 (D.C. Cir. 2008) ("Congress may whittle away tribal sovereignty as it sees fit.") (citing *Santa Clara Pueblo*, 436 U.S. at 56).

Given the limited, readily-defeasible nature of tribal immunity, it would make no sense to suggest (as the Tribe does) that the statutory authority given to federal courts to issue subpoenas is operative against the States, but is somehow insufficient to operate against Indian tribes. *See* OST Br. at 19. At best, tribal immunity is "analogous to" or "similar to" state sovereign immunity. *See In re Mayes*, 294 B.R. 145, 150 (10th Cir. Bkr. App. Panel 2003); *State Eng'r of State of Nevada v. South Fork Band of Te-Moak Tribe*, 66 F. Supp. 2d 1163, 1173 (D. Nev. 1999). It cannot be treated as *greater* than State sovereign immunity. Indeed, the Supreme Court has made clear that, precisely because the Indian tribes retain only a quasi-sovereign status under federal law, tribal immunity "is not congruent with that which the Federal Government, or the States, enjoy." *Three Affiliated Tribes* 476 U.S. at 890. As the Fifth Circuit flatly stated when it considered this issue more than a decade ago: "There is no reason that the federal common law doctrine of tribal sovereign immunity . . . should extend further

than the now-constitutionalized doctrine of state sovereign immunity." *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999).

Contrary to the Tribe's assertions, the authorities the Tribe invokes certainly do not "make it clear" that tribal immunity "is broader than" state sovereign immunity. *See* OST Br. at 18-24. The primary "authority" the Tribe cites (and quotes extensively) is an anonymous student note, not a federal court decision. And the note is merely an advocacy piece: it laments "the demise of tribal immunity" and argues for a broader concept of tribal immunity. Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1062 (1982). Nowhere does the note purport to establish that under existing law tribal immunity is broader than state sovereign immunity. And the state court opinion the Tribe cites, *see* OST Br. at 20-23 (citing *Cash Advance and Preferred Cash Loans v. Colorado*, 242 P.3d 1099 (Colo. 2010)), is inapposite. *Cash Advance's* entire analytical framework was designed to address a very different issue: the relative powers of States and tribes when it comes to tribal immunity from *state* process. *Id.* at 1107-08. Nowhere does *Cash Advance* suggest that tribes have greater immunity than

States when it comes to federal subpoenas. The case did not even address that issue.

Nothing the Tribe cites provides any basis for the radical expansion of tribal immunity the Tribe seeks here. Indeed, if the Tribe's position were accepted, this Court would be the first of the U.S. Courts of Appeals to hold that tribal immunity to a federal subpoena extends further than state sovereign immunity.

C. *United States v. James* and Its Progeny Do Not Require a Different Result.

1. *James* Is Not Binding on this Court—and Even the Courts that *Are* Bound by *James* Find Ways Around It.

Refusing to accept that state sovereign immunity cases are relevant, the Tribe focuses solely on a handful of cases in the tribal immunity context and cherry-picks a few outliers to support its position. OST Br. at 13-15. The Tribe's cases, however, are all based on a single Ninth Circuit opinion that has become so discredited for its sovereign immunity analysis that not even district courts in the Ninth Circuit follow it. *See United States v. James*, 980 F.2d 1314 (9th Cir. 1992).

In *James*, a criminal defendant served a subpoena on a non-party tribe seeking alcohol and drug records of his alleged rape victim. The

Ninth Circuit affirmed a partial grant of a motion to quash. To the extent the court even analyzed tribal immunity as grounds for quashing the subpoena, its analysis was exactly one sentence long: "By making individual Indians subject to federal prosecution for certain crimes, Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced." 980 F.2d at 1319. Ultimately, the Ninth Circuit based its holding on an entirely different rationale: the sensitive nature of the drug counseling documents requested. The court held that "[t]here is an increased privacy interest on the part of tribal members in documents which detail emotional, mental, or physical problems of tribal members . . . . The tribal interest arises in protecting the details of the counseling from disclosure in order to promote free communication by tribal members needing those services." *Id.* at 1320. Thus, in *James*, the court's justification for permitting the tribe to withhold documents was, in the end, not really based on tribal immunity at all. Rather, the court based its holding on privacy concerns of the sort that animate the doctor-patient privilege.

Nevertheless, invoking *James*, a number of tribes have done just what the Tribe has done here when served with valid federal non-party subpoenas: claimed tribal immunity and refused to comply. Most courts faced with *James* have been critical of it and have refused to follow it—even district courts in the Ninth Circuit. In *Juvenile Male*, for example, the District of Arizona criticized *James* for "not discuss[ing] how tribal immunity from suit extended to a case in which the tribe was not a party and no suit was filed against it." 431 F. Supp. 2d at 1018. The court explained that "[w]ere we free to do so, we . . . would reject *James*. But we are not." *Id.* Although the *Juvenile Male* court was technically bound by *James*, it nevertheless held that "[t]he service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe." *Id.* at 1016. And numerous courts beyond the Ninth Circuit have expressly refused to follow *James*. *See, e.g.*, *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 29-30 (1st Cir. 2006) (en banc) (holding that State did not violate tribal immunity by executing search warrant on tribal settlement lands); *United States v. Velarde*, 40 F. Supp. 2d 1314, 1315-16 (D.N.M. 1999) ("I disagree with the *James* conclusion."); *see also* Joshua Jay Kanassatega, *The Discovery Immunity*

Exception in Indian Country—Promoting American Indian Sovereignty by Fostering the Rule of Law, 31 Whittier L. Rev. 199, 269 (2009) (criticizing reasoning in *James*).

Even in *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002)—relied on by the Tribe, *see* OST Br. at 13-16—the district court did not hold that a federal subpoena should be quashed based on tribal immunity. Although *Catskill* relied heavily on *James*, the court ultimately found requested documents to be discoverable on waiver grounds. 206 F.R.D. at 89-90.

Finally, the recent decision of the Colorado Supreme Court in *Cash Advance* is wholly inapposite. *Cash Advance* addressed whether tribes are immune from *state* process, not federal court process. *See* 242 P.3d at 1107-08 ("[W]e hold that tribal sovereign immunity applies to this *state investigative* subpoena enforcement action.") (emphasis added). *Cash Advance* therefore only reaffirms the long-standing rule that, absent a waiver, tribes are not subject to state court process. *See id.* at 1107 ("'[T]ribal immunity is a matter of federal law and is not subject to diminution by the States.'") (quoting *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998)); *see also Puyallup*

Tribe, Inc. v. Department of Game, 433 U.S. 165, 173 (1977) ("[A]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.").

2. The Distinctions Drawn by the Tribe Are Irrelevant.

The Tribe erroneously claims that the case law shows host of distinctions that bear upon whether a federal non-party subpoena can be enforced against a tribe. According to the Tribe, whether the subpoena can be enforced turns on whether a case is criminal or civil, whether the subpoena arises from a case where the underlying jurisdictional basis is federal question or diversity, and whether the subpoena was "issued" by the United States or a private party. *See* OST Br. at 14-16. Those distinctions are irrelevant. None has any bearing on the threshold point that a subpoena is not a lawsuit that triggers sovereign immunity protection. In fact, precedent shows that sovereigns are routinely required to comply with subpoenas in situations just like this one: non-party federal subpoenas served by private plaintiffs in civil actions, regardless of the federal court's underlying jurisdictional basis. *See, e.g.*, *Wilson v. Venture Fin. Grp., Inc.*, No. 09-5768, 2010 WL 4512803, at *1-2 (W.D. Wash. Nov. 2, 2010)

(private plaintiff subpoenaed non-party State and court "rejected as irrelevant the State's argument for applying a state's sovereign immunity because 'no judgment or other relief of any kind is sought against' the state, which would invoke Eleventh Amendment protections") (quoting *Allen v. Woodford*, 544 F. Supp. 2d 1074, 1079 (E.D. Cal. 2008)); *Arce v. Cotton Club of Greenville, Inc.*, No. 94-cv-169, 1995 WL 1945567, at *4 (N.D. Miss. June 23, 1995) (State agency required to comply with non-party subpoenas in connection with diversity breach of contract and defamation action); *Laxalt v. McClatchy*, 109 F.R.D. 632, 634 (D. Nev. 1986) (State required to comply with non-party subpoenas in connection with diversity libel action).

In any event, the supposed distinctions the Tribe invokes make no difference to the enforceability of a federal subpoena. To start, the Tribe's distinction based on who "issued" the subpoena, *see* OST Br. at 14, reflects a misunderstanding of how federal non-party subpoenas work. All federal non-party subpoenas are "issued" by a federal district court. It is the federal court's authority that gives the subpoena force, not the status of the particular litigant who happens to invoke the

court's authority by seeking and serving the subpoena. Put simply, a subpoena issued by a federal court does not have varying degrees of force depending upon the identity of the party that invoked the court's subpoena authority. The Tribe's litigant-dependent approach to assessing the force of a federal subpoena would produce absurd results. Under the Tribe's approach, in litigation between a federal entity and a private entity, the federal entity could successfully enforce subpoenas against a Tribe or a State, but the private entity could not, leaving it wholly disadvantaged in discovery. That is simply not the law.

The Tribe's misunderstanding of how federal subpoenas work is nowhere more apparent than in its attempt to distinguish *Juvenile Male* based on an analysis of who "issued" the subpoena in that case. *See* OST Br. at 15-16. The Tribe treats *Juvenile Male* as if it was the United States that served the subpoena on the tribe in that case and argues that the case held that "'tribal immunity has no application to claims *made by the United States*.'" *Id.* at 15 (quoting *Juvenile Male*, 431 F. Supp. 2d at 1017 (emphasis added by Tribe)). But in *Juvenile Male*, it was the *defendant* in the criminal case, not the United States, that served the subpoena on the tribe. The case thus refutes precisely

the distinction the Tribe advances with its theory that a subpoena "issued [*sic*] by a non-governmental party" cannot be enforced against a Tribe. OST Br. at 15. *Juvenile Male* held that a subpoena served by a non-governmental litigant will be enforced against a tribe.

Juvenile Male did hold that "tribal immunity has no application to claims made by the United States," 431 F. Supp. 2d at 1017, but in that passage the court was not referring to the identity of the party that had sought a federal subpoena. Instead, the court was recognizing that a subpoena is issued under the authority of a federal court and thus that *all* federal subpoenas (regardless of who serves them) are in that sense orders exercising the sovereign power of the United States. Thus, the court went on to explain that "tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers." *Id.* (internal quotation marks omitted).

Next, the Tribe also invokes *Juvenile Male* to argue that only subpoenas in criminal cases, not civil cases, are effective against tribes. *See* OST Br. at 15. *Juvenile Male* is plainly not so limited. The court's primary holding was that federal non-party subpoenas do not trigger tribal immunity at all. *See* 431 F. Supp. 2d at 1016 ("The service of a

federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe."). It clearly makes no difference to that rationale whether the subpoena was issued in a civil or criminal case.

Finally, the Tribe seizes on dictum from *Velarde*, a New Mexico district court case, *see* OST Br. at 16-17, to argue that a federal court's subpoena power is weaker when the court's underlying jurisdictional basis is diversity jurisdiction rather than federal question jurisdiction. That flatly misreads the discussion in *Velarde*. The *Velarde* court was not analyzing whether a federal court with *diversity* jurisdiction may enforce a *federal* subpoena against another sovereign (such as a State or Indian tribe). Rather, it was explaining in *dicta* that a federal court exercising *removal* jurisdiction (a situation not before the court) would likely not be able to enforce a *state* subpoena against a federal agency. The case *Velarde* cited for that proposition, *Connaught Laboratories, Inc. v. SmithKline Beecham, P.L.C.*, 7 F. Supp. 2d 477 (D. Del. 1998), and the cases cited in *Connaught*, *see, e.g.*, *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989), make clear that the court was considering the question of enforcing a state subpoena against a federal official. In these cases, the underlying litigation was in state court and the

subpoena in question had been issued by a state court. The federal courts had limited removal jurisdiction under 28 U.S.C. § 1442(a) to address whether the subpoenas were enforceable against a federal officer.[12] When the *Velarde* court said that "the balancing of the sovereign interests shifts [when] the federal court has only removal jurisdiction based on an underlying state law claim," *see* 40 F. Supp. 2d at 1316, it was explaining why a federal court cannot enforce a *state* subpoena against a federal officer. That is hardly surprising. Many courts have held that state subpoenas are unenforceable against the federal government absent waiver, no matter what court is asked to do the enforcing. *See, e.g.*, *Louisiana v. Sparks*, 978 F.2d 226, 235 (5th Cir. 1992) ("'[W]e are aware of no authority . . . plac[ing] an affirmative obligation on, and vest[ing] jurisdiction in, a federal court to enforce a state court subpoena. . . . [T]he prerogative of a federal court to enforce

[12] Section 1442(a)(1) provides, in relevant part:

> A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: . . . (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

state process absent specific authorization remains doubtful.'") (quoting *Giza v. Secretary of Health, Educ. & Welfare*, 628 F.2d 748, 752 (1st Cir. 1980) (alterations in original)). But this case does not involve a state court subpoena. Thus, the *dicta* in *Velarde* and its discussion of state court subpoenas are irrelevant.

II. EVEN IF SUBPOENAS TRIGGER TRIBAL IMMUNITY, THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE THE TRIBE'S INTERESTS IN QUASHING THE SUBPOENAS ARE PURELY FINANCIAL AND STRATEGIC.

Even if the protection of tribal immunity were somehow triggered by a federal non-party subpoena, the District Court correctly balanced the interests at stake to determine that the Tribe cannot hide behind tribal immunity where, as here, it does so merely to advance its own short-term financial and strategic interests.

A. The District Court Properly Applied a Balancing Test To Determine Whether Tribal Immunity Justifies an Exception to the Federal Discovery Rules.

"For more than three centuries it has now been recognized as a fundamental maxim . . . that the public has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950). That maxim underlies the federal discovery rules, which have long been "accorded a broad and liberal treatment." *See Hickman v. Taylor*, 329

U.S. 495, 507 (1947). Federal courts are loath to create exceptions to that general rule. As the Supreme Court explained in rejecting a sitting President's claim that executive privilege should shield him from the federal discovery rules, "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 709-10.

Courts often apply a balancing test to address claims that certain privileges or immunities shield a party from discovery. Under such a balancing, exceptions to the discovery rules are made only when a "substantial" interest outweighs the "public interest in the search for truth." *Bryan*, 339 U.S. at 331; *see also Nixon*, 418 U.S. at 709-10 (applying *Bryan* balancing test to executive privilege claim); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (applying *Bryan* to hold that need for peer review materials outweighed confidentiality interest in same); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 926-27 (8th Cir. 1997) (executive privilege gives way when a subpoenaing party shows that the requested documents are needed and relevant) (citing, *inter alia*, *Bryan* and *Nixon*). Courts apply the same balancing test when considering sovereign immunity claims. *See Exxon Shipping Co.*

v. United States Dep't of Interior, 34 F.3d 774, 779-80 (9th Cir. 1994). Indeed, some district courts (even those bound by *James*) have applied a balancing test to assess whether tribal immunity may shield a tribe from complying with a federal subpoena. *See, e.g.*, *United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995); *see also Velarde*, 40 F. Supp. 2d at 1316 ("[C]ourts often perform this type of balancing where sovereign immunity is asserted in an effort to quash a subpoena."). Thus, even if a federal non-party subpoena were to trigger tribal immunity, the District Court took the proper approach: it rejected a bright-line rule that tribal immunity defeats a federal subpoena—no questions asked—and instead balanced the relevant interests.[13]

B. The District Court Correctly Identified the Tribe's Interest in Quashing the Subpoenas as a Short-Term Strategic and Financial Interest in Alltel's Litigation with DeJordy.

The Tribe does not—and cannot—identify any substantial tribal interest in quashing the subpoenas that could outweigh the "public interest in the search for truth." *See Bryan*, 339 U.S. at 331. The Tribe does not contend that revealing the documents requested by Alltel

[13] Indeed, even in the few circuits that have held that the federal government is immune from a federal non-party subpoena have emphasized that the federal government's decision not to comply is reviewable under the APA. *See* note 9, *supra*.

would impede tribal officials in making decisions of government, as was argued in *Nixon*. Nor does it assert, as in *James*, that the requested documents contain sensitive personal information. The point of immunity is to ensure that sovereigns and their agents can execute their governing duties unencumbered by the threat of being subject to liability for their governing acts. *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968). But nowhere in the Tribe's lengthy discourse asserting the importance of tribal immunity in promoting self-governance, *see* OST Br. at 19-22, does it explain how complying with a non-party subpoena focused on the Tribe's communications with DeJordy and the Tribe's lawsuit against Alltel would in any way impede that interest.

The Tribe is unable to articulate any interest in quashing the subpoenas, much less a substantial one, because its interest is purely a strategic and financial interest in Alltel's litigation with DeJordy, as the District Court found. DeJordy has been supporting and advising the Tribe in connection with its telecommunications efforts since his employment as Alltel's in-house counsel was terminated in November 2007. (JA 24-26, 117-18) In 2008, he helped the Tribe develop a tribal telecommunications plan. (JA 24-26) Originally, at DeJordy's

suggestion, the Tribe's plan was to provide telecommunications services by using network assets obtained from Alltel—assets worth millions of dollars—for $1.00. (JA 8-10) Indeed, obtaining Alltel's network assets at a nominal price was "of high importance" to DeJordy's tribal telecommunications plan. (JA 8, 29) When Alltel did not hand over the assets, DeJordy advised the Tribe to threaten to derail the $2.35 billion divestiture sale to AT&T by suing Alltel in Tribal Court based on the TWSA (the very contract that DeJordy had negotiated and signed on behalf of Alltel when he was Alltel's in-house lawyer). And then DeJordy assisted the Tribe during its settlement negotiations with Alltel, encouraging the Tribe to reject Alltel's overtures unless Alltel turned over its network assets to the Tribe. (JA 8-10, 40-45, 55-57)

The Tribe and Alltel have been engaged in litigation and arbitration for nearly two years, and the Tribe and DeJordy have worked together the whole time. Indeed, since the Tribe initiated litigation against Alltel, it has teamed up with DeJordy to create a for-profit joint venture, Native American Telecom-Pine Ridge, to provide telecommunications services on the Reservation. (JA 116-17) Both the Tribe and DeJordy have fought furiously to keep the requested

documents—essentially, the communications between DeJordy and the Tribe regarding the Tribe's lawsuit—from seeing the light of day by claiming a laundry list of protections: sovereign immunity, attorney-client privilege, and work product. (A 15-20, 28) The Tribe and DeJordy have supported one another in this joint effort. The Tribe has submitted a declaration from DeJordy in support of its argument that the subpoenas should be quashed (JA 115-18), and DeJordy submitted the Tribe's pleadings in his effort to stymie discovery in the underlying litigation in Arkansas (A 28).

Every protection claimed by the Tribe and DeJordy has been rejected by every court that has considered the issues.[14] Nonetheless, now, more than ten months after Alltel served the subpoenas, it has yet to receive a single responsive document from the Tribe or the Gonzalez Firm. Given the business relationship between the Tribe and DeJordy and their extensive cooperation in this litigation, it is no surprise that the District Court found that "it is evident the Tribe has an interest,

[14] Both the District Court and the Eastern District of Arkansas have rejected the attorney-client privilege and work product claims.

both legally and financially, in the outcome of the inquiry into its relationship with the DeJordy Group." (JA 153)

C. The Tribe's Strategic and Financial Interest Is Outweighed by the Public Interest in the Search for the Truth and Alltel's Need for the Requested Documents.

The District Court correctly found that having failed to identify a legitimate interest—let alone a substantial one—the Tribe cannot possibly overcome the general rule that the public is entitled to every man's evidence. *See Bryan*, 339 U.S. at 331. The Supreme Court has held that interests far more weighty than the Tribe's do not merit an exception to that long-standing rule. *See, e.g.*, *Nixon*, 418 U.S. at 712 (rejecting President's claim that executive privilege excuses compliance with a subpoena even though the President's "interest in preserving confidentiality is weighty" and "entitled to great respect"). Moreover, the Tribe's position, if accepted, would undermine the uniform and predictable application of the federal discovery rules. As the District Court observed, allowing the Tribe to invoke an immunity exception that other sovereigns cannot would "'create[] a huge hole in [the discovery rules] as it carves out an immunity-based exception that applies only when . . . information is sought from a non-party who is

either an Indian tribe, tribal agency, tribal official or employee.'" (JA 151 (quoting Kanassatega, 31 Whittier L. Rev. at 268)) The Tribe has offered no justification that would warrant making the offices of tribal officials discovery-free zones where evidence vital to the search for the truth in ongoing litigation can conveniently be locked away to stymie all efforts at disclosing wrongdoing by those working in conjunction with a tribe. Cratering the federal discovery rules with a tribe-sized hole makes no sense particularly in light of the Supreme Court's long-standing command that the Federal Rules are to be liberally construed. *See Hickman*, 329 U.S. at 507.[15]

Finally, the Tribe's strategic and financial interest in quashing the subpoenas must give way to Alltel's demonstrated and specific need for the documents it has requested. *See Nixon*, 418 U.S. at 713 (a "generalized assertion of privilege must yield to the demonstrated,

[15] Scholarly commentators have observed that broadening tribal immunity would not only harm non-tribal third parties, but would ultimately hinder tribal self-governance as well. *See* Kanassatega, 31 Whittier L. Rev. at 200-02 (blanket tribal immunity from discovery would diminish tribes' need to enact and enforce "public policies and substantive laws . . . with respect to regulating the public's access to the Indian government's officials, employees and records" and discouraging this type of legislation is ultimately unfavorable to tribal self governance because "the best expression of Indian tribal sovereignty and self determination is active, robust legislative activity, not resorting to claims of immunity").

specific need for evidence"). It is undisputed that the documents requested by Alltel are relevant to Alltel's litigation with DeJordy and that Alltel is entitled to them barring a legitimate privilege claim. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). The requested documents are not only relevant: they are the key documents in Alltel's case against DeJordy. The litigation pending in the Eastern District of Arkansas is a breach of contract case based on the assistance that DeJordy, Alltel's former attorney, has provided to the Tribe in connection with the Tribe's litigation against Alltel. (JA 3) The subpoena at issue here seeks precisely the communications between DeJordy and the Tribe regarding the Tribe's suit against Alltel and the materials that DeJordy has created for the Tribe in connection with that suit. (JA 87-88)

Alltel has reason to believe that the requested documents exist. The Tribe's attorney that filed the suit against Alltel stated that she had been acting as local counsel for DeJordy (JA 40-41) and later confirmed in deposition that she had been copied on twenty to thirty emails between RedCloud and DeJordy about the suit. Alltel warned

both the Tribe and DeJordy nearly twenty months ago to preserve relevant documents. (A 1-4) Alltel has attempted to get the requested documents from their only other potential source—DeJordy himself—but he has claimed that such documents no longer exist. (A 382-85)

As the District Court held, "[t]o allow the Tribe to advance its interests while denying Alltel access to information to pursue its claims against DeJordy is contrary to the goals and purposes of the Federal Rules of Civil Procedure." (JA 153) The Tribe's financial and strategic interest in quashing the subpoenas is wholly insubstantial when weighed against the public interest in the search for the truth and Alltel's demonstrated need for the requested documents. Thus, even if federal subpoenas trigger the protection of tribal immunity, the District Court's decision should be affirmed.

III. EVEN IF THE TRIBE IS SHIELDED BY TRIBAL IMMUNITY, THE GONZALEZ FIRM IS NOT.

The Gonzalez Firm's immunity claim is solely derivative of the Tribe's. As a result, because the Tribe itself has no claim to immunity, neither does the Firm. But even if this Court were to hold that the Tribe is entitled to tribal immunity, the Gonzalez Firm has no right to invoke that immunity here. Tribal immunity does not extend to private

law firms representing tribes in disputes with third parties. The Gonzalez Firm's tribal immunity claim should be rejected accordingly.

As a threshold matter, the Gonzalez Firm nowhere claims that it qualifies as a "tribal official," nor does it explain how an entire private law firm can be a "tribal official" for purposes of tribal immunity. Tribal immunity extends only to tribal officials carrying out duties related to governance of a tribe. *See Stock West Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir. 1991); *Catskill*, 206 F.R.D. at 91 (tribal attorney is cloaked in the tribe's immunity only insofar as he is acting as a governing official of the tribe and may qualify as a "tribal official" if actions are "'clearly tied to their roles in the internal governance of the tribe'") (quoting *Stock West*, 942 F.2d at 644-65). Here, the Gonzalez Firm does not even assert that it is a tribal official, nor does it assert that Mario Gonzalez, the Gonzalez Firm's principal, is a tribal official. In any event, Alltel served a subpoena on *the Gonzalez Firm*—a for-profit, private law firm—not on Mr. Gonzalez himself.[16] (JA 105-12; A

[16] As discussed in Alltel's jurisdictional statement, *see supra* p. 1-2, the Gonzalez Firm mischaracterizes the relevant subpoena as being served on "Mario Gonzalez." Alltel never served a subpoena on "Mario Gonzalez"; it served a subpoena on the "Gonzalez Law Firm." Because the Court's jurisdiction over the Gonzalez Firm's appeal is based solely on the collateral order doctrine, and because the question whether "Mario Gonzalez" is immune from complying with a subpoena

305-12) The Gonzalez Firm does not explain how the entire Firm could be a "tribal official." And the cases cited by the Gonzalez Firm do not suggest that an entity, rather than an individual, can claim status as a tribal official.

Nor could the Gonzalez Firm now claim that it is somehow an arm of the Tribe entitled to immunity. No such argument was ever raised below, and in any event the Tribe's Law and Order Code ("Tribal Code") establishes unequivocally that the Gonzalez Firm cannot qualify as a Tribal entity. The Tribal Code defines "Tribal entity" as follows:

> [A]ny committee, office, program or project of the Oglala Sioux Tribe established by the tribal council for the benefit of the Oglala Sioux people. This shall include all chartered organizations *except privately chartered profit and non-profit corporations chartered for individual tribal members.*

Tribal Code Ch. 21 § 2(a) *available at* http://www.narf.org/nill/Codes/oglalacode/chapter21-foi.htm (emphasis added). The Gonzalez Firm is simply a private, for-profit law firm and is thus expressly excluded from the definition of "Tribal entity."

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was never presented to the District Court, this Court lacks jurisdiction to consider whether "Mario Gonzalez" could assert tribal immunity. In any event, as discussed below, even if Mario Gonzalez as an individual were, in some capacity, a tribal official, his actions at issue in this case (communicating with Eugene DeJordy about suing Alltel on a commercial contract) cannot qualify as official, governing acts and therefore tribal immunity would still be inapplicable here.

Moreover, even if the Gonzalez Firm were a tribal official, tribal immunity extends only to tribal officers carrying out duties related to the governance of the tribe and acting in their official capacity. It does not extend to private lawyers representing a tribe in its disputes with others. *Stock West*, 942 F.2d at 664-65; *see also Baker Electric Coop.,* 28 F.3d at 1471. The rationale for extending tribal immunity to tribal officers is to ensure that tribal officers are able to discharge their official duties related to functions of government free from the threat of suit. Similar protection is unnecessary for non-official acts. *See Davis*, 398 F.2d at 85. Consistent with that rationale, courts have extended tribal immunity to lawyers only when the lawyers have designated official positions in tribal government and governing duties. Immunity extends to acts taken pursuant to the lawyer's role in the internal governance of the tribe but no further. *See id.* (immunity extends to tribe's General Counsel only if role "encompasses public duties, official in character").

The Ninth Circuit's decision in *Davis* illustrates why the Gonzalez Firm has no plausible claim to tribal immunity here. In *Davis*, the Ninth Circuit held that tribal immunity should extend to a tribe's

designated General Counsel because the tribe's legal code specifically charged the General Counsel with aiding "in the administration of public affairs." 398 F.2d at 85. The court emphasized that the General Counsel's "[d]uties [we]re not limited to representing the Tribe in its disputes with others." *Id.* Here, however, the documents called for in the subpoena to the Gonzalez Firm are tied solely to the Gonzalez Firm's "represent[ation of] the Tribe in its disputes with others" and have nothing to do with "the administration of public affairs." *See id.* As the Gonzalez Firm explained to the District Court, it was "advising and representing the Tribe in matters relating to issues involving the [TWSA], Eugene DeJordy, Native American Telecom, LLC and Alltel." (A 21) And the Gonzalez Firm further explained that the documents requested by Alltel were "created in [the Gonzalez Firm's] representation of the [T]ribe to secure redress related to the [TWSA] from Alltel[]." (A 252-53) The subpoena thus does not seek anything in connection with "the administration of the public affairs of the Tribe" or any other official duties on the part of the Gonzalez Firm. *See Davis*, 398 F.2d at 85. It merely seeks non-privileged communications with

DeJordy, which were generated in connection with the Gonzalez Firm's "represent[ation of] the Tribe in its disputes with others." *Id.*

Courts consistently reject lawyers' claims of immunity in situations where, as here, a lawyer's actions are not "clearly tied to their roles in internal governance of the tribe." *Stock West*, 942 F.2d at 665. In *Stock West*, for instance, the Ninth Circuit overruled the district court's extension of immunity to a tribe's "Reservation Attorney" who had represented the tribe in contracting with a private, non-tribal company to build and operate a sawmill on the reservation. The Ninth Circuit distinguished *Davis* because *Davis* involved claims "against tribal officials for actions clearly tied to their roles in the internal governance of the tribe," and did not "even involve[] dealings with (off-reservation) third parties on behalf of the tribe, much less dealings with a non-Indian third party." *Id.* Here, as in *Stock West*, the Gonzalez Firm was advising the Tribe in its "dealings with (off-reservation) third parties." *See id.* By representing the Tribe in matters relating to issues involving the TWSA, DeJordy, and Alltel, the Gonzalez Firm was not acting as a governing official of the tribe and thus is not entitled to an extension of tribal immunity.

CONCLUSION

For the reasons above, the District Court's decision should be affirmed.

DATED: July 26, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Fed. R. App. P. 32(a)(7)(B), for a brief produced using the following font: proportional serif font, has a typeface of 14 points or more, and contains 11,340 words. This brief was prepared using Microsoft Word 2007.

DATED: July 26, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2011, the foregoing Appellee's Brief was electronically filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Ragan Naresh