IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

HAMAATSA, INC., a New Mexico
Not-for-Profit Corporation,

Plaintiff-Appellee,

v. No. 34,287

PUEBLO OF SAN FELIPE, a
Federally Recognized Indian Tribe,

Defendant-Appellant

RESPONSE BRIEF OF *AMICUS CURIAE* NEW MEXICO LAND TITLE ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE HAMAATSA, INC.

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NOTICE OF INTENT TO FILE *AMICUS CURIAE* BRIEF

The New Mexico Land Title Association ("NMLTA") files this brief as an *amicus curiae* in support of Appellee Hamaatsa, Inc. ("Hamaatsa"). Pursuant to Rule 12-215(B) NMRA, on January 2, 2014, NMLTA filed and served its Notice of Intent to File an *Amicus Curiae* Brief on counsel of record for Hamaatsa and the Appellant Pueblo of San Felipe ("Pueblo" or "San Felipe"), as well on counsel of record for the *amici curiae* supporting San Felipe. Thus, NMTLA's Notice was filed and served more than fourteen days prior to the filing of this *Amicus Curiae* Brief.

SUMMARY OF PROCEEDINGS

NMLTA concurs with the statement of the Summary of the Proceedings as set out in the Hamaatsa Answer Brief ["AB"], 1-3. Of the issues addressed in the Hamaatsa Answer Brief, NMLTA wishes to emphasize that the issues presented in this appeal deal not only with the sovereignty of the Pueblo, but also with the sovereignty of the State of New Mexico and the authority of New Mexico courts to adjudicate rights relating to state-owned public roads.

AMICUS STATEMENT OF INTEREST

As more fully addressed in its Motion for Leave to File an *Amicus Curiae* Brief, NMLTA has a significant interest in the issues presented in this appeal. It is

San Felipe's position that among the remedies available to Hamaatsa is that it may go "against the title insurance company from whom it obtained a policy of title insurance." [BIC, 20] For this, and other reasons discussed below, NMLTA has a stake in the outcome of this appeal.

NMLTA is an industry association with a statewide membership consisting of title insurance underwriters, title insurance agents and others interested in the conduct of the title insurance business in New Mexico. Its membership includes seven title insurance underwriters authorized to do business in New Mexico and fifty-nine title insurance agents and direct operations doing business in all thirty-three counties in New Mexico. The title insurance industry is strictly regulated in New Mexico and title insurers may only charge specified premium rates and issue policy forms and endorsements specifically approved by the Superintendent of Insurance.

This appeal is before this Court in the context of a suit by one neighboring landowner versus another for interference with access to a public road. However, the defendant landowner in this case is a federally-recognized Indian tribe that has raised tribal sovereign immunity as an absolute bar to the claims in this case. As a result, the case has significant implications for all landowners who have land located adjacent to land owned in fee by a pueblo or Indian tribe, as well as for

members of the general public who have occasion to use public roads located on or directly adjacent to such tribal fee land.

In its decision below, the New Mexico Court of Appeals described the implications to land ownership in New Mexico flowing from an inability to redress interference with a public road which is addressed in Section I.B. of this Brief. NMLTA submits that the scenarios presented below are significant threats to private land ownership and land title in New Mexico. Among the rights of land ownership that title companies insure is access. *See*, 13.14.8.28 NMAC and 13.14.8.29 NMAC. The ability of a pueblo or tribe to prevent access based merely on its fee ownership of private land and status as a federally recognized Indian tribe would be very disruptive to the current system of title and land ownership.

New Mexico is already a unique and complex state in terms of diversity of land ownership. Much of the state, particularly in more rural areas, is made up of a checkerboard of private fee lands, state lands, federal lands, and tribal lands. This mix of land ownership can also include Spanish and Mexican land grants. *See*, NMSA 1978, §§ 49-1-1 through -11 (1907 as amended through 2013). This patchwork of land ownership works only when the rights and responsibilities of adjoining landowners are clearly defined, and there are clear means of redress for any violations of these rights and responsibilities. The position advocated by San

Felipe in this case would preclude any means of redress involving fee land owned by a federally recognized tribe.

Certainly this case has broader ramifications than to just the title insurance industry. As noted, landowners and the general public will face uncertainty about their rights to public thoroughfares adjoining Indian-owned fee land. A significant right and attribute to any parcel of land affecting its value is access. Under the positions advanced by San Felipe, a purchaser would have to be wary of any land adjoining tribal fee land. Banks and other lenders would be reluctant to loan purchase money for land of this type because the value of their security could be greatly compromised with no means of redress. The positions advocated by San Felipe would have a significant chilling effect on real estate transactions in New Mexico.

STANDARD OF REVIEW

NMLTA agrees that the applicable standard of review in this appeal is *de novo*. *Gallegos v. Pueblo of Tesuque*, 2020-NMSC-012, ¶ 6, 132 N.M. 207.

ARGUMENTS

Hamaatsa, in its Answer Brief, provides the Court with an able and accurate discussion of the history, underlying public policy and proper application of sovereign immunity in the context of state court actions involving federally recognized Indian tribes. NMLTA is fully in accord with the positions articulated

by Hamaatsa and will not restate these arguments in detail in this Brief. Rather, NMLTA will focus on (1) the significant sovereign interests of the State of New Mexico in its ability to determine the status of the road at issue, referred to herein as "S.R. 2477," as a state road and how these interests must be accounted for in the analysis of whether tribal sovereign immunity applies; and (2) the limits on the application of tribal sovereign immunity where, as here, important state interests are at stake.

I. THE COURT OF APPEALS PROPERLY CONSIDERED THE SIGNIFICANT INTERESTS OF THE STATE IN DECLINING TO APPLY THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

San Felipe attempts to cast the issues in this appeal as involving an impermissible encroachment on tribal sovereignty. In actuality, this case involves an attempt by the Pueblo to exercise jurisdiction and authority over off-reservation state property and over non-tribal individuals. As addressed below, under these circumstances, New Mexico courts are not foreclosed from exercising their jurisdiction.

As noted by the Court of Appeals, this case comes before this Court on a motion to dismiss pursuant to Rule 1-012(B)(1) NMRA. Therefore, the matters pled in the Complaint are accepted as true for purposes of application of relevant law and legal standards. *Hamaatsa,* 2013-NMCA-094, ¶ 9. Contrary to the

assertions of San Felipe, the facts underlying the Complaint and procedural posture of this case are relevant to, and indeed dispositive of, the legal issues presented.

The essential facts are that San Felipe owns certain off-reservation land in fee simple over which a public road, R.S. 2477, traverses.[1] [RP, 1, ¶ 3; 2, ¶¶ 4, 11] Hamaasta, a neighboring landowner and member of the public, has used R.S. 2477 for several years as the only means of access to its property. [RP, 2, ¶ 10] However, the Pueblo is now asserting ownership of R.S. 2477 and has threatened to bring an action in trespass to prevent Hamaatsa's continued access to R.S. 2477. [RP, 3, ¶ 18]

While Hamaatsa brings this case in its capacity as a private entity, the question presented on the merits in the district court proceeding is whether R.S. 2477 is a public road owned by the state. Hamaatsa seeks not only relief for itself, but also vindication of the rights of the general public to access R.S. 2477 as a public road. [RP, 5] This Court has long recognized the rights of private individuals to sue for injunctive relief against interference with access to a public road. *See, Hindi v. Smith*, 1963-NMSC-226, ¶ 17, 73 N.M. 335. Because a public

[1] San Felipe states in its Brief-in-Chief ["BIC"] that it disputes that R.S. 2477 is a "public road", but there is no suggestion that other pertinent facts, such as the status of San Felipe's land as held in fee and outside of reservation land, or San Felipe's attempt to prohibit the public use of R.S. 2477, are or will be in dispute should this case proceed on the merits. [BIC, 3-4, 22, fn. 6] A central issue in the proceeding on the merits will necessarily involve the question of whether R.S. 2477 is a "public road."

right is directly at stake in this proceeding, New Mexico has a sovereign interest in, and its courts have jurisdiction over, the underlying controversy involving a state-owned public road.

A. San Felipe's Arguments Ignore New Mexico's Significant Interests In and Sovereignty Over Its Property Interests.

San Felipe, and its supporting *amici curiae*[2], urge this Court to apply an over-expansive interpretation of the doctrine of sovereign immunity applicable to Native American tribes. Under the positions advanced by the Pueblo, the bare invocation of sovereign immunity by a tribe in response to a state court action would, *ipso facto*, deprive New Mexico courts of subject matter jurisdiction regardless of the issues presented. San Felipe contends that New Mexico courts cannot consider the nature of the relief sought [BIC, 31-33], or give any consideration to equity or fairness in applying sovereign immunity. [BIC, 17-21] Similarly, San Felipe contends that New Mexico courts cannot consider whether the action involves non-Indian lands [BIC, 6], or is in the nature of an *in rem* versus *in personam* proceeding. [BIC, 24-31] Indeed, New Mexico courts should not even evaluate the allegations of an underlying complaint because, according to

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[2] The *amici curiae* supporting San Felipe address two contentions in their *Amicus* Brief: (1) federal law recognizes tribal immunity regardless of the location of the tribal activity or type of lawsuit; and (2) the underlying Court of Appeals opinion violates federal law. [*Amicus* Brief, 2-8] These same contentions, among others, are addressed in San Felipe's Brief in Chief and, therefore, NMLTA will make no distinction in addressing these arguments between the *amici curiae* and the Pueblo.

the Pueblo, any "fact" alleged is "entirely irrelevant to the legal issues presented in the Pueblo's appeal." [BIC, 22, fn. 6] NMLTA respectfully disagrees and submits that state courts are not so limited in their determination of tribal sovereign immunity.

As Justice Stevens recognized in his dissent in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 761, 140 L.Ed.2d 981, 118 S.Ct. 1700 (1994), an Indian tribe's assertion of immunity in a state judicial proceeding implicates the law of three different sovereigns: the tribe, the State and the federal government. The Supreme Court has recognized that in assessing claims of tribal sovereignty, the "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry of the nature of the state, federal and tribal interests as stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,145, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Significantly, in its Brief in Chief, San Felipe completely ignores any interest that New Mexico has in protecting and preserving its public roads and offered no discussion of New Mexico's sovereign authority or interest in this matter. Apart from the Pueblo's conclusory assertion that the Court of Appeals ruling below is contrary to applicable federal judicial

precedent, San Felipe has also not identified any specific federal law which it contends will be violated by the trial court's exercise of jurisdiction.

B. State Sovereignty is Rooted in Federal Constitutional Principles and Must be Considered in the Application of the Doctrine of Tribal Sovereign Immunity.

State sovereignty has foundations in the United States Constitution. Under the Tenth Amendment to the U.S. Constitution, the powers that are not delegated to the federal government or prohibited to states under the Constitution are expressly reserved to the states. Correspondingly, the states enjoy broad immunity from suit under the Eleventh Amendment to the U.S. Constitution. By contrast, tribal sovereign immunity is not based on any Constitutional foundation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Congress retains the plenary right to divest tribes of any or all attributes of sovereignty. *United States v. Jicarilla Apache Tribe*, 131 S.Ct. 2313, 2323, 180 L.Ed.2d 187 (2011) (citing *United States v. Wheeler*, 435 U.S. 313, 319, 98 S.Ct. 1079, 55L.Ed.2d 203 (1978)). The immunity possessed by Indian tribes is not coextensive with that of the states. *Kiowa*, 523 U.S. at 755. Certainly, there is nothing in the applicable Supreme Court precedent to suggest that tribal sovereignty is paramount to the sovereignty of the states.

It is true that tribal immunity is a matter of federal law and not subject to diminution by the states, *Kiowa*, 523 U.S. at 756.[3] However, it does not follow that state sovereign authority cannot be a consideration in determining the applicability and scope of tribal immunity. To the contrary, *Bracker* requires a "particularized inquiry" into the interests of New Mexico in determining if tribal sovereign immunity is applicable. 448 U.S. at 145.

The Court of Appeals properly considered the state's significant interests in the underlying case by noting that the "legal and practical effect of permitting the Pueblo to assert sovereign immunity in its facial challenge at this stage of the proceedings would be to permit the Pueblo to assert control over a public road, but to deprive Hamaatsa, or any other member of the public, any opportunity for legal recourse." *Hamaatsa*, 2013-NMCA-094, ¶ 15. The Court of Appeals went on to discuss that imposition of tribal sovereign immunity would mean that "a pueblo or tribe could acquire, in fee simple, subject to an existing state public road, one or more lot or acreage virtually anywhere in New Mexico and immediately deny the motoring public and all neighboring property owners access." *Id.* ¶16.

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[3] San Felipe misreads the Court of Appeals' opinion in *Hamaatsa* to suggest that the court found that the issue of tribal sovereign immunity is a matter of state law. [BIC, 12-14] A thoughtful reading of the opinion confirms that the court's statement concerning state law was only in reference to the merits of the underlying case to determine whether R.S. 2744 is a public road. The court correctly noted that "'[w]hether an easement-a public road at that-exists across land held in fee simple is clearly an issue of state law (cite omitted).'" *Hamaatsa*, 2013-NMCA-094, ¶14.

San Felipe contends that consideration of the foregoing interests by the Court of Appeals was an erroneous consideration of "equity and fairness." [BIC, 17-21] However, the Supreme Court in *Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005) considered very similar issues in declining to allow the Oneida Indian Nation ("OIN") to exercise sovereign authority over historical tribal land that it had acquired in fee. While the Court gave consideration to the fact that the subject land had been out of tribal control for many years, it noted that the tribe's "unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences . . . ." *Id.* 219. The Court further noted that "[a] checkerboard of alternating state and tribal jurisdictions in New York State – created unilaterally at OIN's behest- would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches (cite omitted)." *Id.* 219-220. These are essentially the very same factors that the Court of Appeals considered in declining to dismiss San Felipe's suit based on its claim of tribal sovereign immunity.

The Court of Appeals did not only assess the interests of the State in its analysis. The court also considered San Felipe's interests and concluded that apart from a generalized inherent interest in maintaining its sovereignty "the Pueblo has shown no other attribute of sovereignty-such as a property, treasury or governance

interest in or sovereign authority over the road-that could bestow immunity from inherent sovereignty." *Id.* ¶14 Based on these and other considerations, the Court of Appeals properly ruled that "the Pueblo cannot have such carte blanche immunity on a Rule 1-012(B)(1) facial attack when it acquires property in fee simple subject to a state public road as it did here." *Id.* ¶16.

II. THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY IS NOT AN ABSOLUTE BAR TO STATE COURT JURISDICTION WHERE IMPORTANT STATE INTERESTS ARE AT STAKE.

This Court has recognized that "[a]lthough Indian tribes enjoy sovereign immunity over their members and territories, their immunity from suit in state court is not absolute." *Gallegos*, 2002-NMSC-012, ¶ 7. Moreover, this Court has affirmed that the State retains the authority to enforce New Mexico's laws outside of Indian reservations. *Srader v. Verant*, 1998-NMSC-025, ¶ 16, 125 N.M. 521. Similarly, the Supreme Court in *Kiowa* acknowledged that states have the authority to tax or regulate tribal activities within the state but outside of Indian country. 523 U.S. at 755. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983), the Supreme Court went so far as to state that "we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status, that under certain circumstances a State may validly assert authority over the activities of

nonmembers on a reservation, and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." NMLTA respectfully submits that the attempt by San Felipe to exert sovereignty over an off-reservation, State-owned public road represents an exceptional circumstance justifying the assertion of State jurisdiction.

A. The Supreme Court's Decision in Kiowa *Does Not Preclude New Mexico Courts From Asserting Jurisdiction Over State-Owned Public Roads.*

San Felipe places great reliance on the Supreme Court's holding in *Kiowa* for the Pueblo's assertion of sovereign immunity in this case and, as noted in Section I.A. above, asserts that *Kiowa* is a bar to state court jurisdiction under almost any conceivable scenario. While *Kiowa* maintained the doctrine of tribal sovereign immunity, the majority opinion noted that the doctrine "developed almost by accident" and that, *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919), the seminal Supreme Court case most cited as establishing tribal sovereign immunity, "simply does not stand for that proposition." *Kiowa* at 756. *Kiowa* characterized the *Turner* decision as a "slender reed" for supporting the principle of tribal sovereign immunity. *Kiowa* at 757. The majority opinion in *Kiowa* even questions "the wisdom of perpetuating the doctrine" and notes that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of torts." 523 U.S. at 758. With these criticisms and caveats from a majority of

justices, *Kiowa* should not be read as blanket barrier to state court jurisdiction over tribal activities that impinge on State sovereignty.

As discussed in Hamaatsa's Answer Brief, *Kiowa* is properly read for the rather limited proposition that Indian tribes are immune from suits for contract damages by a private party, regardless of where the contract was entered. [AB, 31] The limited scope of the holding in *Kiowa* was confirmed in the Supreme Court's subsequent ruling in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 412, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) which described the scope of Kiowa as "holding that an Indian tribe is not subject to suit in a state court-even for breach of contract involving off-reservation commercial conduct-unless 'Congress has authorized the suit or the tribe has waived its immunity (cite omitted).'" This holding is not directly applicable to the facts in the present case which do not involve a suit on a contract or a claim for monetary damages.

Significantly, *Kiowa* did not overrule any prior Supreme Court precedent that tribal sovereignty does not preclude the exercise of state jurisdiction over certain tribal actions. *See e.g,. Montana v. United States*, 450 U.S. 544, 564-65, 101 S.Ct. 1245, (1981) (holding that tribal sovereignty would not allow an Indian tribe to prohibit non-tribal members from hunting or fishing on non-Indian fee lands even within the tribal reservation.) *Id. See also, Mescalero Apache Tribe v.*

Jones, 411 U.S. 145, 157, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973) (holding that State had the authority to impose property taxes on off-reservation tribal lands held in fee); and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (holding that state may collect taxes on cigarette sales to non-tribal members from a tribal convenience store on Indian trust lands). Accordingly, state authority over tribal activities under appropriate circumstances remains a viable concept. Indeed, it was confirmed by the Supreme Court post-*Kiowa* in *Sherrill* where the right of New York to impose property taxes on land held in fee by the OIN was upheld. 544 U.S. at 219-20.

B. San Felipe's Attempt to Distinguish Between "Sovereign Authority" and "Sovereign Immunity" Does Not Bar the Court from Adjudicating the Respective Rights As Between San Felipe and Hamaatsa.

San Felipe contends that the Court of Appeals below confused tribal sovereign authority with tribal sovereign immunity in denying the Pueblo's motion to dismiss. [BIC, 14-17]. In support of this contention, San Felipe cites to the opinion of the Second Circuit Court of Appeals in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010) ("*Oneida II*"), which is the same case as *Sherrill* following remand, and which discussed the differences between these two sovereignty concepts. While the Court in *Oneida II* ruled that the counties in that case could not foreclose on Indian-owned fee land *Id.* 158, as

explained below, *Oneida II* does not foreclose courts from adjudicating the legal rights and relationships between a tribe and a state.

Despite the attempt by San Felipe to paint a stark contrast between sovereign authority and sovereign immunity, they are actually just two sides of the same sovereignty coin. San Felipe references the string of cases cited by the Court of Appeals in ¶14 of the *Hamaatsa* opinion as involving only issues of tribal authority as opposed to tribal immunity. [BIC, 14] However, in each of the listed cases, there was necessarily an underlying lawsuit and an adjudication of the respective rights of the parties, including the tribes, to proceed with these suits. Therefore, these cases implicitly confirm that tribal sovereign immunity is not a bar to the adjudication of the scope of tribal sovereign authority. Similarly, tribal sovereign immunity does not bar Hamaatsa's suit in this case for declaratory relief on the issue of San Felipe's sovereign authority over S.R. 2477.

To the extent that there is any distinction between sovereign authority and sovereign immunity, the difference lies only in the scope of relief that might be granted. The Supreme Court has recognized that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them" with respect to Indian tribes. *Kiowa*, 523 U.S. at 755; *see also*, *Antonio v. Inn of the Mountain Gods*, 2010-NMCA-077, ¶14, 148 N.M. 858 ("It is a recognized principle of federal Indian law that certain laws . . . may be applicable

to tribes, although the tribes still enjoy immunity from suit."). Thus, while the Supreme Court in *Potawtomi* confirmed that Oklahoma had the authority to collect taxes on certain cigarette sales on tribal lands within the state, the state could not resort to judicial action against the tribe to collect the taxes. 498 U.S. at 512.

NMLTA submits that because of the significant state interests at stake in this case, affirmative relief against San Felipe would be appropriate. However, even if this Court were to find that Hamaatsa's remedies against San Felipe were somehow limited, this does not mean that a favorable district court ruling would be for naught. There is still utility, both public and private, in obtaining a judicial determination concerning the status of S.R. 2477. Moreover, there is also no question about the authority of a district court to grant declaratory relief "whether or not further relief is or could be claimed." NMSA 1978, § 44-6-2 of the New Mexico Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15. Therefore, there are no prudential limits on the ability of the court to proceed on the merits, even if San Felipe elects not to participate.

Further, even were relief precluded against San Felipe, the Supreme Court has recognized that the doctrine of sovereign immunity does not immunize individual members of a tribe from injunctive relief. *Puyallup Tribe, Inc. v. Department of Game and Fish*, 433 U.S. 165, 171-2, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *see also*, *Santa Clara,* 436 U.S. at 59 (holding that an officer of a

pueblo is not protected by the tribe's immunity from suit.) Thus, to the extent that individual tribal members or officers might attempt to interfere with access to S.R. 2477 following a determination of its status as a public road, they would be subject to the district court's jurisdiction, including appropriate relief.

CONCLUSION

The doctrine of tribal sovereign immunity is not implicated in every case involving an Indian tribe, nor should it be applied in a purely mechanical method, devoid of consideration of the nature of the underlying action or the various legal interests at issue. Rather, courts should undertake, as did the Court of Appeals in the present case, a careful analysis of the competing sovereign and private interests to determine if sovereign immunity is applicable. San Felipe has failed to demonstrate that the Court of Appeals erroneously refused to apply the doctrine of tribal sovereign immunity under the procedural posture and facts as presented. Accordingly, the Court of Appeals should be affirmed.

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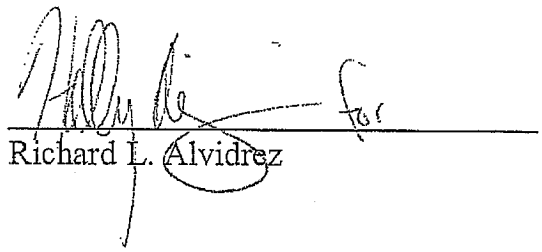

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