

No. 17-024

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**IN THE  
YUMA INDIAN NATION SUPREME COURT**

YUMA INDIAN NATION,  
*PLAINTIFF/APPELLEE,*

v.

THOMAS SMITH AND CAROL SMITH  
*DEFENDANTS/APPELLANTS.*

—————  
**On Writ of Certiorari to  
Yuma Indian Nation Trial Court**

—————  
**BRIEF FOR THE APPELLANTS**

—————  
Team No. 228  
*Counsel for Appellants*

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## **QUESTIONS PRESENTED**

1. Does the Yuma Indian Nation have grounds to assert personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, should the tribal court stay this suit pending a ruling from the Arizona federal district court?
2. Did the lower court error in dismissing the tort claims against the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC employees under the guise of sovereign immunity?

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

In 2007, the Yuma Indian Nation (“YIN”) contracted with Thomas Smith for financial advising services in an office in Phoenix, Arizona. Record (“R”) at 1. In 2010, Carol Smith entered into a contract with Thomas Smith to provide additional financial advice to the YIN, specific to her role as a stockbroker, from her home in Portland, Oregon. *Id.* Both contracts provided that any and all litigation would ensue in a court of competent jurisdiction. *Id.* The Smiths provided regular advice to the YIN through telephone, email, and mail. *Id.* Thomas Smith also presented quarterly reports to the tribal council on the reservation. *Id.*

In 2009, the YIN formed the Yuma Indian Nation Economic Development Council (“EDC”) through a corporate charter under the tribal commercial code. *Id.* The primary objective of the EDC is to facilitate economic developments on tribal land and throughout southwest Arizona. *Id.* The EDC is operated by its own Board of Directors. *Id.* The EDC does not have the authority to financially encumber the Nation or guarantee any liens or interests of any kind that might negatively affect the Tribe. *Id.* at 2.

In 2016, the EDC under the direction of CEO Fred Captain persuaded the YIN to begin pursuing marijuana cultivation to increase tribal revenue. *Id.* The EDC made numerous attempts to engage Thomas Smith in their endeavor. Each time he and Carol Smith voiced their concern about the tribe engaging in illegal activity. Thomas Smith ultimately made the difficult but responsible decision to inform his acquaintance, the Arizona Attorney General, that the YIN was engaging in illegal activities. *Id.* The Attorney General issued a cease and desist letter to the Tribe demanding that they cease all development of recreational marijuana operations. *Id.*

## **II. STATEMENT OF PROCEEDINGS**

The YIN Tribal Council filed suit against the Smiths in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality, seeking recovery of liquidated damages as provided in the contracts.

In response, the Smiths filed special appearances and identical motions to dismiss the YIN suit based on lack of subject matter and personal jurisdiction over them and this suit, and in the alternative, for the trial court to stay the suit while the Smiths pursue a ruling in the Arizona federal district court. The trial court denied both motions.

Continuing under their special appearances, the Smiths counterclaimed against the YIN for monies due under their contracts and for defamation for disparaging their professional reputation. The Smiths also impleaded the EDC, and the EDC's CEO Fred Captain and accountant Molly Bluejacket in their official and individual capacities for the same claim they made against the YIN.

The trial court dismissed all of the Smiths' counterclaims against YIN and claims against the third-party defendants due to sovereign immunity.

The Smiths filed an interlocutory appeal in the YIN Supreme Court requesting that the Court decide these issues and issue a writ of mandamus ordering the trial court to stay the suit.



## SUMMARY OF ARGUMENT

This case involves the scope of tribal jurisdiction and sovereign immunity in the suit between the YIN, members of the tribe, and Thomas and Carol Smith (the “Smiths”).

The lower court erred when it granted tribal jurisdiction over this suit. The inherent sovereign powers of an Indian tribe typically do not extend to non-Indians. *Montana v. United States*, 450 U.S. 544, 565 (1981). Therefore, in order to exercise civil jurisdiction over a non-Indian defendant, a tribal court must show<sup>1</sup> both subject matter and personal jurisdiction. *Cohen’s Handbook of Federal Indian Law* §7.02 (2017). *Montana* gives two exceptions to the general rule, extending tribal subject-matter jurisdiction when a non-Indian enters into a consensual relationship with the tribe or when conduct on tribal land threatens the tribal community. *Montana*, 450 U.S. at 565. Subject-matter jurisdiction may also be limited by competing state interests. *See Nevada v. Hicks*, 533 U.S. 353 (2001). Personal jurisdiction requires the non-Indian defendant have sufficient minimum contacts with the tribal to satisfy fairness and justice considerations. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Contrary to the petitioner’s claim, the general rule restricting tribal civil jurisdiction over non-Indians applies to this suit. The suit-inducing conduct took place off tribal land, so the *Montana* exceptions do not extend subject-matter jurisdiction. If this court makes an unprecedented decision to apply *Montana* off tribal land, the facts of this case do not support an application of the *Montana* exceptions. The suit lacks a nexus with the consensual relationship between the YIN and the Smiths and the suit-inducing conduct does not affect the survival of the tribal community. Additionally, due to the State’s competing interest in

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<sup>1</sup> The burden is on the tribe to show elements of jurisdiction are met. *Plains Commerce Bank v. Long Family Land & Cattle Co.* 544 U.S. 316, 330 (2008).

enforcing state drug laws over the YIN, tribal jurisdiction is limited. Even if all foregoing jurisdiction questions were decided in the YIN's favor, the Smiths lack the minimum contacts necessary for this court to exert personal jurisdiction.

The lower court also erred in its dismissal of the Smiths' counterclaims against the YIN and all co-defendants citing sovereign immunity. Tribal sovereign immunity is a federal common law doctrine, but Congress has plenary authority over tribal matters. *United States v. Kagama*, 118 U.S. 375 (1886). It is, therefore, inappropriate for the Supreme Court to apply sovereign immunity to Indian affairs. Even if this Court finds that the application of sovereign immunity is appropriate, it should not be applicable to tort cases. No other government is immune to suit for tortious conduct and no other sovereign is as actively involved in private economic development as tribal governments. It is fundamentally unfair to apply sovereign immunity in this case.

The extension of sovereign immunity to the EDC as an entity of the tribe and to its employees is also inappropriate in this situation. For sovereign immunity to apply to an entity of a tribe its purpose must be so closely tied to the tribe that it operates as an arm of the tribe. *Breakthrough Mgmt. Group v. Chukchansi Gold Casino and Resort*, 629 F. 3d 1173, 1183 (10<sup>th</sup> Cir. 2010). The purpose of the EDC is economic development, but it is not limited to the benefit of the tribe or to the reservation. It is self-governed with minimal tribal involvement, so it should not be considered an arm of the tribe. The Supreme Court has ruled that tribal officials can be sued for acting outside of their official capacity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1979). The EDC and its employees were acting against the interest of the tribe and contrary to the purpose of the EDC, therefore they were acting outside their official capacity and applying sovereign immunity would be a misapplication of the law.

## ARGUMENT

### I. YIN CANNOT SHOW SUBJECT-MATTER JURISDICTION OVER THE SMITHS BECAUSE IT LACKS REGULATORY AND ADJUDICATORY JURISDICTION.

Tribal civil jurisdiction is determined through “careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished”, *Nat’l Farmers*, 471 U.S. at 856, and the application of subject-matter and personal jurisdiction principles. 42 *C.J.S. Indians* § 62. Tribes retain ‘elements of quasi-sovereign’ authority due to their incorporation into the Federal Government, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978), but such authority is of a “unique and limited character.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Tribes maintain authority over matters relating to their members and their territory, *id.* at 323, but such authority does not typically extend to non-Indians, even on tribal land. *Montana*, 450 U.S. at 565. Indian tribes are prohibited from exercising tribal authority beyond what is necessary to protect self-government or control internal relations. *Id.* at 564.

The scope of tribal jurisdiction over a non-Indian is a federal question under 28 U.S.C. §1331. *Nat’l Farmers*, 471 U.S. at 852. Case law establishes that absent authorization by federal statute or treaty, tribal jurisdiction over non-Indians is limited.<sup>2</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). In order to exercise civil jurisdiction over a non-Indian defendant, a tribal court must show it has both subject matter jurisdiction, consisting

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<sup>2</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978): “Criminal jurisdiction over non-Indians for offenses committed on tribal land does not presumptively lie in the tribal courts”; See *Montana* 450 U.S. 544 at 565, extending *Oliphant* to civil actions: “Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles of which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”

of regulatory and adjudicative jurisdiction, and personal jurisdiction. *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 809 (9<sup>th</sup> Cir. 2011).

Subject matter jurisdiction pertains to “the ability of a court to hear a particular kind of case, either because it involves a particular subject matter or because it is brought by a particular type of plaintiff or against a particular type of defendant”. *Cohen’s Handbook of Federal Indian Law* §7.01 (2017). Subject-matter jurisdiction requires both regulatory and adjudicatory authority. *Water Wheel*, 642 F.3d at 809. *Montana’s* general rule bars tribal civil jurisdiction over non-Indian conduct, but provides two exceptions that extend tribal regulatory authority: the ‘consensual relationship’ and ‘threat-to-tribe’ exceptions. *Montana*, 450 U.S. at 565. Adjudicatory jurisdiction cannot exceed its regulatory jurisdiction, *Strate*, 520 U.S. at 453, so the first step in analyzing subject-matter jurisdiction is to determine if the tribe has regulatory jurisdiction. Once regulatory jurisdiction is found, adjudicatory jurisdiction exists unless limited by Congress or competing state interests. *Water Wheel*, 642 F.3d at 814.

**A. YIN Does Not Have Regulatory Jurisdiction Over the Smiths.**

YIN does not have regulatory jurisdiction over the Smiths because even if *Montana* governs on non-tribal land, neither *Montana* exception applies to this suit. Additionally, YIN’s adjudicatory authority is limited by competing State interests in the marijuana operation. Without regulatory jurisdiction and adjudicatory jurisdiction, this court has no subject-matter jurisdiction over the Smiths.

Absent a Congressional provision<sup>3</sup>, a tribe does not have regulatory jurisdiction over non-Indian conduct on non-Indian land unless an exception enumerated in *Montana* applies. *E.g., Strate*, 520 U.S. at 453. Regulatory authority granted under a *Montana* exception applies to non-Indian land within the reservation, on which the tribe “exercises absolute and undisturbed use and occupation.” *Id.* at 550. The YIN’s claim arises from Thomas Smith’s conduct that took place off tribal land, so *Montana* does not apply. No statute or treaty otherwise grants YIN tribal authority; therefore, YIN cannot show regulatory jurisdiction over the Smiths. Even if this court applies *Montana* to off-reservation conduct, neither *Montana* exception qualifies to extend YIN’s regulatory jurisdiction.

### **1. *Montana* Does Not Apply to Off-Reservation Conduct.**

Tribes have no regulatory authority over non-Indians outside of reservation boundaries. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). Regulatory authority goes “hand in hand” with the tribe’s sovereign power to exclude. *Id.* at 335. From this power, tribes retain authority to “condition the entry of non-Indians who enter tribal land.” *Montana*, 450 U.S. at 557. However, the authority to regulate or condition non-Indian conduct on the reservation “cannot apply to lands held...by non-Indians,” *Id.* at 559, because the “exercise of tribal power beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of the tribe.” *Id.* at 564. Therefore, *Montana* only governs tribal authority “over non-Indian fee land *within a reservation.*” *Strate*, 520 U.S. at 453 (emphasis added).

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<sup>3</sup> See *United States v. Lara*, 541 U.S. 193, 200 (2004) (Congress has “plenary and exclusive” powers to legislate in respect to Indian tribes).

The YIN's suit against the Smiths arose from Thomas Smith's disclosure of tribal information to the Arizona Attorney General. Smith's disclosure occurred off tribal land, so *Montana's* exceptions do not apply to govern his conduct. Applying *Montana* to govern non-Indian conduct outside the boundaries of tribal land would be an unprecedented extension of tribal authority. Such extension would be "an exercise of tribal power" inconsistent with YIN's status, therefore this court should not apply *Montana* to this suit. No other regulatory jurisdiction exists. YIN cannot exert sovereign authority over Smith, a non-Indian, and there is no statute or treaty that grants civil jurisdiction in this suit, therefore YIN lacks regulatory jurisdiction over the Smiths.

## **2. Even If *Montana* Applies, Its Exceptions Are Not Met.**

Even if this court extends *Montana* to govern this suit, neither *Montana* exception applies. *Montana's* first exception, the 'consensual relationship' exception, allows a tribe to regulate, "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. *Montana's* second exception, the 'threat-to-tribe' exception, allows a tribe to retain their "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

The 'consensual relationship' exception does not apply to this suit because there is no nexus between the suit-inducing conduct and the consensual relationship between YIN and the Smiths. The 'threat-to-tribe' exception doesn't apply because Smith's suit-inducing conduct did not imperil the YIN's tribal community.

**a. The Consensual Relationship Exception Does Not Apply Because There Is No Nexus Between the Smiths' Relationships with The YIN and The Suit-Inducing Conduct.**

The contracts between YIN and the Smiths do not meet the requirements of the consensual relationship exception. It is not enough that a non-Indian party has a consensual relationship with a tribe, the relationship must also “share a nexus” with the suit-inducing conduct. *Atkinson*, 532 U.S. at 656. A nexus exists if the suit-inducing conduct is directly related to the consensual relationship and provides the non-Indian defendant with reasonable anticipation that his interactions would trigger tribal authority. *Plains Commerce*, 554 U.S. at 338.

The Smiths have a clear consensual relationship with YIN due to their business relationship but there is no nexus between the suit-inducing conduct and the business relationship. The suit did not arise directly from the Smiths' business relations because Thomas Smith's disclosure of the illegal marijuana operation is unrelated to the Smiths' roles as financial and economic consultants for the tribe.

The Smiths contracted with the YIN to provide consulting services related to economic, financial, and accounting issues. Thomas Smith's disclosure to the Attorney General had nothing to do with his role as a business consultant for the YIN. Instead, his disclosure stemmed from his personal and moral concerns related to marijuana use, a substance illegal under Arizona state law. The tribe may consider marijuana cultivation a matter of economic development related to Smith's contract but Smith's professional role and moral beliefs do not encompass advising the tribe on illegal marijuana operations. Moreover, Carol Smith did not take part in the disclosure to the Attorney General and the YIN was not a party to her contract. Carol Smith is technically “a stranger” to the suit,

therefore her consensual relationship with YIN is completely unrelated to the suit-inducing conduct. *Strate*, 520 U.S. at 457.

Furthermore, the Smiths' consensual relationships with the YIN did not provide them with reasonable anticipation of tribal jurisdiction. No mention of tribal jurisdiction was made in their contracts. In fact, the contracts provided that litigation would ensue in a court of competent jurisdiction. If the contract had not mentioned jurisdiction at all, the Smiths may have questioned if tribal jurisdiction would apply. However, because the YIN made no mention of tribal authority when the contract specifically addressed litigation, the Smiths reasonably assumed they would not be subject to the YIN's tribal jurisdiction. Additionally, the YIN did not attempt to exert its tribal authority during contract formation: the contracts were not signed on tribal land and the YIN authorized Thomas Smith to subcontract with Carol Smith but did not sign the contract itself. Because the Smiths had no notice of YIN tribal jurisdiction, and there was no nexus between their relationships and the suit-inducing conduct, the consensual relationship exception does not apply.

**b. The Threat-To-Tribe Exception Does Not Apply Because Smith's Conduct Did Not Imperil the Tribal Community.**

The second *Montana* exception exists to protect tribal self-government, such as the right of the tribe to make their own laws and be ruled by them. *Strate*, 520 U.S. at 459. The non-Indian conduct must do more than merely injure a tribe, it must "imperil the subsistence" of the tribe, *Montana*, 450 U.S. at 566, and cannot be applied in a way that "shrinks the rule." *Strate*, 520 U.S. at 458. The extension of tribal regulatory authority under this exception must be "necessary to avert catastrophic consequences". *Plains Commerce*, 554 U.S. at 341. Thus, the threat-to-tribe exception is very limited.



The second exception does not apply to this suit because Thomas Smith's conduct did not imperil the subsistence of the tribe nor create 'catastrophic' consequences. Thomas Smith's disclosure resulted only in a cease and desist letter from Arizona's Attorney General. If the tribe is required to end its marijuana operations under state law, it will create some financial loss for the tribe but otherwise results in no other negative consequences. In the alternative, if the tribe is not allowed to cultivate marijuana under state law, then Thomas Smith's disclosure actually benefitted the tribal community at large, by stopping their participation in illegal drug activity.

Furthermore, the regulation of the marijuana operation depends on the relationship between the tribe's sovereignty and state jurisdiction. If the state lacks authority to regulate YIN's marijuana operation, then Smith's disclosure would have no ill-effect on the tribe. YIN could ignore the cease and desist letter and continue with its plans. If state law has authority to shut down the YIN's marijuana operation, the negative financial implications would be caused by the tribe's participation in illegal activity, and not because of Thomas Smith's conduct. Even though Smith's disclosure made him the initial whistle-blower, it is probable the state would have eventually discovered YIN's marijuana operation, regardless of Smith's involvement. Therefore, Smith's conduct does not rise to the level of the threat to tribe exception and YIN's regulatory authority over the Smiths cannot be established.

**B. YIN'S Adjudicatory Jurisdiction Is Limited by Competing State Interests.**

A tribe's adjudicatory jurisdiction cannot exceed its regulatory jurisdiction. *Strate*, 520 U.S. at 453. Absent limitations delineated by Congress or the Supreme Court, adjudicatory jurisdiction is presumed to exist as long as the tribe first can show regulatory

jurisdiction. *Water Wheel*, 642 F.3d at 810. The Supreme Court has limited tribal adjudicatory jurisdiction when state interests compete with tribal jurisdiction. *See, Nevada v. Hicks*, 533 U.S. 353, 360-64 (2001). Noting that state sovereignty does “not end at a reservation’s border,” the Hicks court held that a tribe’s right to self-government does not “exclude all state regulatory authority on the reservation.” *Id.* at 361. When analyzing tribal adjudicative jurisdiction, “there must be an accommodation between the interests of the Tribes and the Federal government, on the one hand, and those of the State, on the other.” *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980).

*Hicks* restricted tribal jurisdiction over on tribal land when state law enforcement officials entered Indian-owned tribal land to investigate a tribal member’s involvement in a crime committed off the reservation. *Hicks*, 533 U.S. at 355. The *Hicks* court determined that state interests in investigating and applying off-reservation laws were more important than tribal interests in their right to self-government, and limited tribal jurisdiction. *Id.* This decision is significant because it was the first time *Montana* was applied to Indian-owned tribal land. The Supreme Court’s restriction on tribal jurisdiction, considering its “federal policy of deference to tribal courts,” *Iowa Mut.* 480 U.S. at 16, indicates the importance of preserving state authority when the state has an interest in the suit-inducing conduct.

There are competing state interests in this suit that will limit YIN’s adjudicative jurisdiction. Smith’s conduct brought to light YIN’s plans to engage in illegal marijuana operations. Recreational marijuana use is illegal under Arizona state law, and for that reason, Smith felt compelled to disclose the information to state authorities. Smith’s conduct arose from his motive to protect Arizona’s state interests. The impact of Smiths conduct depends exclusively on Arizona’s authority to regulate YIN’s marijuana operation, so the interests of

applying state law on tribal land will limit YIN's jurisdiction in this suit. If the *Hicks* court was willing to restrict tribal jurisdiction on *tribal* land because of state interests, it will likely provide the same restriction to YIN's jurisdiction over conduct *off tribal* land. Therefore, YIN's adjudicatory authority, and subsequently, its subject-matter jurisdiction does not exist over the Smiths.

**C. YIN Does Not Have Personal Jurisdiction Over the Smiths Due to Their Lack of Minimum Contacts with The Tribe.**

*Personal jurisdiction* is the ability of a court to require a particular defendant to defend a lawsuit and be bound by the court's judgment. *Cohen's Handbook of Federal Indian Law* §7.01 (2017). A court may exercise personal jurisdiction over a defendant if the defendant has sufficient minimum contacts with the forum so the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. A court may not make a binding judgment against an individual with whom the forum "has no contacts, ties, or relations." *Cohen's Handbook of Federal Indian Law* §7.01 (2017). Minimum contacts are analyzed by considering the relationship among the defendant and the forum to determine, whether under the circumstances, the defendant should "reasonably anticipate being hauled into court." *Water Wheel*, 642 F.3d at 842-43.

The personal jurisdiction element of 'justice' is frequently considered in the analysis of tribal jurisdiction. For example, the *Plains Commerce* court emphasized the risk of subjecting non-Indian parties to tribal jurisdiction. *Plains Commerce*, 554 U.S.316 at 337. "Tribal sovereignty, it should be remembered, is outside the basic structure of the Constitution" so non-Indian parties should not be forced to appear in a tribal court without their reasonable notice or consent. *Id.*

The Smiths lack the minimum contacts necessary to show YIN's personal jurisdiction over the suit, especially considered in light of fairness and justice issues. Carol Smith has had very little contacts with the tribe. She corresponded with Thomas Smith regarding tribal matters, and only contacted the tribe via mail to bill for her services. Carol Smith resides out of state in Portland, Oregon and has only visited the tribe on two occasions, both for recreational purposes. The tribe is not even a party to the contract signed by Ms. Smith. Additionally, Carol Smith had no involvement in the suit-inducing conduct (disclosure of tribal information to the attorney general). For the foregoing reasons, Ms. Smith lacks minimum contacts necessary for tribal personal jurisdiction.

Thomas Smith has had more contact with the tribe but not enough to meet the necessary threshold of personal jurisdiction. Thomas Smith resides on non-tribal land, in Phoenix, Arizona, where the contract with YIN was signed. The majority of Mr. Smith's correspondence with the YIN occurred off the reservation through email, phone, and mail. Even though he visited the reservation each quarter to present reports to the tribal council, these were merely informational visits for the tribe. Aside from presenting these quarterly reports, Smith did not conduct business on the reservation. In light of fairness and due process issues that would subject Mr. Smith to an unfamiliar tribal court, his contact with the tribe does not rise to the level necessary to bestow personal jurisdiction. Therefore, both of the Smith parties lack minimum contact necessary for the YIN to exert personal jurisdiction over them.

**II. THE LOWER COURT ERRED WHEN THEY DISMISSED THE CLAIMS AGAINST THE YUMA TRIBE, THE EDC AND THEIR EMPLOYEES AS TRIBAL SOVEREIGN IMMUNITY DOES NOT APPLY TO THE ILLEGAL ENDEAVORS THEY WERE UNDERTAKING.**

Sovereign immunity is a fundamental protection available to governments to protect their individual interests. The United States federal government recognizes the sovereign immunity of states and foreign nations. Additionally, the Supreme Court has established the common law doctrine of applying the same sovereign immunity to Indian tribes and tribal governments. *See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) (held sovereign immunity applies to tribal business transactions); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (held tribal sovereign immunity applies to counterclaims brought against a tribe). This power is derived from the inherent authority of tribes. “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority...Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–58 (1979).

The inherent sovereign immunity of tribes is not absolute and all encompassing. It can apply to tribal officials and tribal entities but only in specific situation. The facts of this case do not support an application of sovereign immunity in this case. The lower court erred in their decision to dismiss the Smiths’ claims against the Yuma Tribe, the Yuma Economic Development council and the CEO and accountant of the Economic Development council. Sovereign Immunity is not applicable in this case. Additionally, the dismissal of the Smiths’ claims is unfair and contrary to the interest of justice.

**A. The EDC Employees Are Not Protected by Tribal Sovereign Immunity in This Case as They Were Acting Outside of The Scope of Their Duties When They Recommended the Tribe Pursued Illegal Activity.**

Tribal officials can be sued in their unofficial capacity. *See, Santa Clara Pueblo*, 436 U.S. 49; *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). Work done by a tribal official outside of the scope of their duties is not done in an official capacity. *Clarke*, 137 S. Ct. at 1285. The Court has found that the question of whether an employee is acting in their individual and not official capacity is paramount to the analysis about the application of sovereign immunity to the employee. Sovereign immunity exists to protect the interest of the tribe. Actions taken by employees that are contrary to the interests of the tribe should logically be viewed as outside of the scope of an employee's official capacity and, therefore, not applicable to sovereign immunity.

Fred Captain, EDC CEO, and Molly Bluejacket, EDC Accountant, were not operating in their official capacity as tribal officials when they persuaded the tribe to pursue marijuana cultivation on the Yuma Indian nation reservation. Fred Captain's official capacity is to run and oversee the Yuma Indian Nation Economic Development Corporation. His job is to oversee legal economic endeavors on the reservation and in southwestern Arizona. The cultivation of marijuana remains illegal despite some states individually decriminalizing it. 21 U.S.C. § 811. By persuading the Yuma tribe to begin working in an illegal business, Fred Captain acted outside of his authority as the CEO of the EDC. His unofficial conduct was the direct cause of this litigation. Therefore, Fred Captain is not protected by sovereign immunity. This Court should overturn the lower court's dismissal of the claim against Fred Captain.

Molly Bluejacket is the accountant for the Economic Development Corporation. Her position is responsible for handling the finances of the EDC. Her official capacity is to focus

in the financial solvency of the EDC. Her part in persuading the tribe to pursue an endeavor that involved illegal activity is well outside of the scope of her official capacity for the tribe. Because this claim results from behavior so far outside of her responsibility as a tribal official, she should not have access to protection under a claim of sovereign immunity. She was acting outside of her official capacity when she advised the tribe to engage in illegal activity and, therefore, cannot invoke sovereign immunity in this claim.

**B. The Economic Development Council is Not Protected by Sovereign Immunity Because They Are a Wholly Separate Entity Of The Tribe And Were Engaged In Illegal Activity.**

Governments are not all-powerful entities. They often create practical solutions to handle the day to day operations of various aspects of a governance, such as administrative agencies or corporations. Often, sovereign immunity applies to these corporations but the Courts have found compelling reasons to not allow an application of sovereign immunity to these entities. *See, Standard Oil Div., Am. Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975). While the Supreme Court has not outlined a clear test as to how determine but the appellate circuits have all illustrated their own individual tests. The most common theme throughout these tests is whether the tribe intended for the corporation to operate in an independent business-like way. An example is the Seventh Circuit Court of Appeal's analysis in *Standard Oil Div., Am. Oil Co. v. Starks*. The Court held that the statutory language of the legislation indicated that Congress intended for the Postal Service to operate as an autonomous entity and, therefore, had not intended for it to share in the federal government's sovereign immunity. *Id.*

The Supreme Court has never applied such a test to tribal governments and their entities. However, the Tenth Circuit Court of Appeals described the factors to be considered

to include the method and purpose of their creation, their structure and management, and the “whether the purposes of tribal sovereign immunity are served by granting immunity to the entities.” *Breakthrough Mgmt. Group v. Chukchansi Gold Casino and Resort*, 629 F. 3d 1173, 1181 (10<sup>th</sup> Cir. 2010). Entities of the tribe can enjoy protection through sovereign immunity so long as the relationship between the tribe and the entity is sufficiently close. *Id* at 1183.

The EDC’s purpose is to facilitate economic development on the reservation and surrounding areas. Its primary focus and mission is economic development. This development is not limited to the benefit of the tribe or even limited to the development on the reservation. It is a money-making entity. The EDC is overseen by an independent Board of Directors, not the YIN. The YIN can only become involved in the management of the EDC in the event that the organization breaks down and the CEO needs to be removed. While it was created by the YIN and does have a requirement for the EDC to employ tribe members, the EDC is operated entirely independently of the tribe with limited interaction between the entity and the Tribe. Additionally, the actions of the EDC have no possibility to impact the ability of the Tribe to govern and the sovereignty of the tribe does not protect the EDC from liability accrued in the regular course of business. There is not a sufficient relationship between the YIN and the EDC to justify an extension of tribal sovereign immunity to include the Economic Development Corporation.

### **C. Tribal Sovereign Immunity is Fundamentally Unfair in Tort Cases with Private Citizens.**

It would be fundamentally unfair to allow the tribe to enter into a contract with private citizens who have no recourse to recover damages from the tribe in the event of a



breach. In *Kiowa*, the Supreme Court ruled that a tribe is immune from suit by a corporation they entered into a contract with. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). However, a corporation is significantly more sophisticated than an individual financial advisor. While a corporation might have access to or the foresight to explore all of the implications of tribal sovereign immunity before entering into such an agreement. Under the Federal Tort Claims Act and the Arizona Tort Claims Act, a private citizen retains the right to sue the government in tort cases. While a corporation's legal department might be aware that a tribal government would not be able to be sued in tort cases, it is unrealistic for this Court to hold a private citizen to such a high standard as to understand a very complex area of federal law. It is inherently unjust to hold individual citizens to the same high standard that we hold well-funded corporate entities to.

Tribal Sovereign Immunity is considered a settled common law doctrine. *Kiowa*, 523 U.S. at 756. Despite that Justice Kennedy readily admits that the doctrine appears to have occurred almost by accident. *Id.* Common law doctrines are highly inappropriate for any regulation concerning Indian tribes. Congress has plenary authority over Indian tribes. *United States v. Kagama*, 118 U.S. 375 (1886). Yet Congress has remained distinctively silent on the issue of tribal sovereign immunity despite numerous Supreme Court decisions regarding this issue. With respect to the sovereign authority of the Yuma Tribe, it is not appropriate to allow common law doctrine to dictate any area of tribal relationships as it is contrary to the long-standing rule that Indian tribal law is the full discretion of Congress.

Congress has not remained silent on sovereign immunity in relation to other sovereign authorities. After Justice Marshall explored sovereign immunity with foreign nationals in 1812, Congress specifically responded by explicitly passing legislation to

formalize the process of applying sovereign immunity to foreign nations and foreign nationals. *Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812). The rules for developing economic relationships with foreign nations is predictable as a result. States have immunity derived either from the constitutional convention or treaties agreed upon on entering the Union. They also have predictable outcomes based on established laws. Congress has not specifically passed any such laws in relation to tribal sovereign immunity despite having ample opportunity to since the first case suggesting the tribes might have immunity. *Turner v. United States*, 248 U.S. 354 (1919). Congress' failure to act should not be interpreted by this Court as an endorsement of tribal sovereign immunity but instead as a rejection of it.

### **CONCLUSION**

For the reasons stated above, this Court should reverse the ruling of the lower court and stay these proceedings pending a ruling from the Arizona federal district court.

Respectfully submitted,

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