**No. 17-024**

# In the Supreme Court of the Yuma Indian Nation

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YUMA INDIAN NATION,
*Plaintiff/Appellee*,
v.

THOMAS SMITH & CAROL SMITH,
*Defendants/Appellants.*

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*On Petition for a Interlocutory Appeal*

_____

## APPELLANT'S BRIEF ON THE MERITS

_____

*TEAM 154

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Cases:*

*Statutes, Regulations, Legislative History:*

## QUESTIONS PRESENTED

I. Whether federal or state courts may assert jurisdiction to adjudicate a matter between an Indian Nation or Indian corporate entity created by the tribe and a non-Indian when the contract expressly waives sovereign immunity, when the dispute arises off-reservation, and when the tribally chartered corporate entity engages in commercial activities off-reservation.

II. Whether an Indian Nation, tribally chartered corporation, or a tribally chartered corporation's employees have waived sovereign immunity when the tribal council included language within the corporation's charter to insulate the tribal government from possible liability by allowing the corporation to sue and be sued, in expectation of the corporation conducting business outside the reservation.

## STATEMENT OF THE CASE

### STATEMENT OF FACTS

Appellee Yuma Indian Nation is a federally recognized Indian Nation located in southwest Arizona. In 2007, at an office in Phoenix, Arizona, the Yuma Indian Nation ("YIN" or the "Nation") entered into a contract with Thomas Smith, a non-Indian certified financial planner and accountant, to provide the Nation with financial advice regarding the Nation's economic development. R. at 1. The off-reservation contract provided that all disputes would be litigated in a court of competent jurisdiction. *Id*.

In 2009 the Nation created the YIN Economic Development Corporation ("EDC") for the purposes of advancing "economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona." *Id*. The project was funded by a $10 million dollar loan from the Nation's general fund, approved by the YIN Tribal Council. *Id*. The EDC is authorized to transact in real property both on and off the reservation. R. at 2. The EDC is managed by a board of five directors, with the requirement that each director be "experienced in business endeavors" consistent with the mission of EDC. R. at 1.

Because it wishes to shield its existing assets from any liability stemming from EDC, YIN allows the EDC to "sue and be sued" but insists on a host of limitations. *Id*. First, the EDC is not authorized to encumber or implicate the assets of the Nation. *Id*. Second, the EDC cannot borrow or lend money in the name of, or on behalf of the Nation. *Id*. Third, any director of EDC may be removed, at any time, by a 75% vote. *Id*. at 1. Lastly, the EDC must provide quarterly financial reports as it repays the loan to the Nation. *Id*.

For nearly a decade, Thomas Smith provided the Nation with financial advice on a wide range of issues, largely without incident. R at 1. Smith, on several occasions, appeared in

person at the Yuma Indian Nation headquarters to present reports to Tribal Council, the majority of the work was performed from his Phoenix office, with communications primarily directed to the EDC including Fred Captain, the EDC CEO, and EDC employee/accountant Molly Bluejacket. *Id.* Consistent with the EDC's mission to pursue legal economic endeavors on and off the reservation, the YIN Tribal Council authorized a contract between Thomas Smith and his sister Carol Smith to provide the Nation and the EDC with advice regarding stocks, bonds, and securities. R. at 2. Carol Smith is a licensed stockbroker who operates out of Portland, Oregon. Carol communicates primarily with Thomas Smith, bills the EDC via email, and has not visited the Nation in a professional capacity. R. at 2. Carol Smith's contract with Thomas Smith is identical to the one Thomas Smith signed with the Nation in 2007 and includes the same choice of law provision. Carol's contract also mandates compliance with the YIN-Thomas Smith contract. R. at 2. To today, Carol Smith has performed the responsibilities of the Smith-Smith contract without issue.

In 2016, the EDC began to pursue the development of medical marijuana cultivation and sales. While medical marijuana is legal under Arizona state law, a state-wide referendum aimed at the legalization of marijuana for recreational use failed in 2016. Additionally, a 2014 memorandum from the U.S. Department of Justice extended to Indian Tribes the same marijuana policy that the federal government previously applied to states. The memo suggested that the U.S. attorneys would not prioritize the prosecution of Indian tribes selling marijuana, as long as they follow certain guidelines including "preventing the diversion of marijuana from states where it is legal under state law in some form to other states." James M. Cole, Deputy Att'y Gen. Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014). The memorandum never matured into law, and

remains at risk of being rescinded. Jeff Sessions, Att'y Gen. Memorandum, for All United States Attorney: Marijuana Enforcement. Marijuana remains a controlled substance, and its distribution is a violation of federal law.

The EDC conferred with Thomas Smith several times on the development of a medical and recreational marijuana operation. Thomas Smith voiced his opposition to the proposed operation. The EDC quietly moved forward with its medical and recreational marijuana plans and convinced the YIN Tribal Council to enact an ordinance that would permit marijuana cultivation and legalize sale on the reservation for any and all purposes. Thomas Smith had no other choice but to report the potential crime to what he thought was the appropriate authority. As a result the Arizona Attorney General issued a cease and desist letter regarding the development of recreational marijuana.

Fueled by anger and emotion, the Tribal Council filed suit against both Thomas Smith and Carol Smith in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality.

## PROCEDURAL HISTORY

YIN seeks the recovery of the liquidated damages amount set out in the contract. The Smiths filed special appearances and identical motions to dismiss the YIN suit based on a lack of personal jurisdiction and a lack of subject matter 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 Arizona federal district court as to whether the tribal court has jurisdiction. The YIN trial court denied both motions.

Under their special appearances, the Smiths answered and denied the YIN claims, and counterclaimed against the Nation for monies due under their contracts and for defamation for impugning their professional skills. Additionally the Smiths have impleaded the EDC, the EDC CEO Fred Captain, and EDC accountant Molly Bluejacket in their official and individual capacities. The Smiths assert the same claims against the third party defendants as those made against the Yuma Indian Nation. The YIN trial court dismissed all the Smith counterclaims against YIN and claims against the third party defendants citing sovereign immunity.

The Smiths have filed an interlocutory appeal in the YIN Supreme Court seeking a writ of mandamus ordering the trial court to stay the suit. The YIN Supreme Court granted this interlocutory appeal.

## SUMMARY OF ARGUMENT

A contract must be interpreted by its terms and by the parties' intent. Because the Nation imbued the EDC with the power to sue and be sued, intended the EDC to engage in off reservation economic activities, and authorized suit in any court of competent jurisdiction by contract without expressly naming the tribal forum, it follows that the instant matter is not exclusive to the YIN tribal court. As such this matter should be heard in federal court because the tribe's explicit consent to other venues implicate the federal law policy of preserving tribal self-government, and further the collective interests of tribal economic entities that venture beyond reservation boundaries for business purposes.

There is no doubt that Indian Nations possess the common-law sovereign immunity from suit that all sovereign nations maintain. Deviation from this well-established rule may occur only when the tribe has provided express consent, or through federal authorization. Because the Nation has explicitly waived sovereign immunity to EDC's commercial endeavors, the EDC

cannot now claim the shield of sovereign immunity for itself or its employees in their individual capacity.

## STANDARD OF REVIEW

A review of the decision of the trial court, involving mixed questions of fact and law, should be reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1204 (9th Cir.), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

## ARGUMENT

### I. THE NATION HAS "UNEQUIVOCALLY EXPRESSED" A WAIVER OF SOVEREIGN IMMUNITY THROUGH THE CONTRACT'S "SUED AND BE SUED" PROVISION

It is understood that Tribal Nations enjoy sovereign immunity. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers."); Infra Part I. The extent of sovereign immunity is not generally affected by the type of remedy sought, although the Fifth Circuit has decided that claims requesting declaratory or injunctive relieve can proceed notwithstanding a claim of sovereign immunity. *TTEA v. Ysleta Del Sur Pueblo,* 181 F.3d 676 (5th Cir. 1999). Tribal sovereign immunity is not absolute, and a tribe may relinquish its immunity by a waiver of sovereign immunity that "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo, 436 U.S. at 58. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, the Court declined to limit the sovereignty doctrine to tribal government functions, and allowed for immunity to extend to tribal business ventures. 498 U.S. 505, 510 (1999). Such immunity applies whether the tribe's commercial activities are on or off tribal lands. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998).

Courts have routinely upheld contractual waivers of sovereign immunity. C.*f. Dillon v. Yanton Sioux Tribe Housing Authority,* 144 F.3d 581 (8th Cir. 1998) (forming ordinance allowing waiver insufficient absent contractual waiver); *Snowbird Construction Co. v. United*

*States*, 666 F. Supp. 1437 (D. Idaho 1987) (forming ordinance clause that allowed for waiver sufficient); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (contractual waiver upheld); *Martinez v. S. Ute Tribe*, 150 Colo. 504 (1962) (holding a valid waiver when the tribe referred to both its governmental and corporate powers in the language introducing a "sue and be sued" clause in its corporate charter). However, the reasoning in doing so is wholly inconsistent. For instance, the U.S. Supreme Court found a waiver supported by an arbitration clause that stated that all claims arising out of or relating to the contract would be decided by arbitration. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 415 (2001). The Court noted that the relevant section covered all contract-related disputes between the parties, and the contract's choice-of-law clause made it plain that jurisdiction would be enforced by the State court. *Id.* at 418-19. In another example, the Ninth Circuit held that a tribe waived sovereign immunity because the tribe agreed to refer disputes to a federal district court. *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) (noting that by intervening in action, and by agreeing to submit all disputes to federal district court, the tribe waived sovereign immunity).

To address congressional concerns that non-Indians would not do business with tribal governments that are immune from suit, Section 17 was added for the benefit of tribes organized under the Indian Reorganization Act of 1934. *See* Hearings on H.R. 7902, 73d Cong., 2d Sess. 90-100 (1934). Section 17 sets forth a means of establishing federal corporations. 25 U.S.C. § 5124. Tribal corporations incorporated, under both tribal law and Section 17, have been found to lack sovereign immunity if they have included a "sue and be sued" clause in its corporate charter. *See Dixon v. Picopa Construction Co.*, 160 Ariz. 251

(1989); *but see Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167, 173 (App. 2006) (rejecting an argument that a tribe waived sovereign immunity).

The 9th Circuit Court of Appeals has followed this pattern by finding that sovereign immunity can be expressly waived without any special verbal formula. *Oregon*, at 1014. (noting that the tribe had expressly waived sovereign immunity by agreeing to submit disputes to the jurisdiction of federal courts). *Oregon* "tests the outer limits of [the Supreme Court]'s admonition against implied waivers. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 429 (9th Cir. 1989). *Oregon* made no attempt to distinguish between the resolution of federal courts and arbitration:

> There is little substantive difference between an agreement that any dispute arising from a contract shall be resolved by the federal courts and an agreement that any dispute shall be resolved by arbitration; both appear to be clear indications that sovereign immunity has been waived.

*Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760-761 (Alaska 1983) (discussing *Oregon's* reasoning).

*Oregon* has never been expressly overruled, and two state court cases follow the Ninth Circuit's ruling that an agreement to federal jurisdiction constitutes an express waiver. *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983); *Val/Del. Inc. v. Superior Court*, 703 P.2d 502, 508 (Ariz. 1985), *cert. denied*, 474 U.S. 920 (1985) (finding that because the Tribe has "agree[d] that any dispute would be arbitrated and the *result entered as a judgement in a court of competent jurisdiction*, we find that there was an express waiver of the tribe's sovereign immunity") (emphasis added). In deciding *C & L Enterprises*, the Supreme Court cited to both *Native Village* and *Val/Del, Inc.* in finding tribes subject to state court suits premised on arbitration agreements alone. *C & L Enterprises*, 532 U.S. at 418.

Lastly, Courts have examined in detail the jurisdictional issue before turning to the exhaustion question. *See QEP Field Services Company v. Ute Indian Tribe of Uintah and Ouray Reservation,* 740 F. Supp. 2d 1274, 1280 (D. Utah 2010) (relying upon an arbitration provision to conclude that exhaustion of tribal court remedies not required, "because there was a clear and unambiguous waiver of Tribal Court jurisdiction in the Agreement, the litigation in Tribal Court is patently violative of the parties' written agreement and exhaustion is unnecessary").

Here both the 2007 Thomas Smith-YIN and the 2010 Carol Smith-YIN contracts provide that "all disputes arising from the contract to be litigated in a court of competent jurisdiction." R. at 1. Additionally, the Nation's Business Corporation Code, adopted in 2005, provides that "[a] corporation may sue and be sued, complain and defend and participate as a party or otherwise in any legal, administrative, or arbitration proceeding, in its corporate name." Yuma Indian Nation Code § 11-161 Sub. 4 Legal Capacity. This language was in place during the creation of the EDC by a 2009 tribal commercial code which authorized "the Nation, pursuant to its inherent sovereign powers, to create and charter public and private corporations to operate business on and off the reservation. R. at 1. The EDC "is authorized to…sue and be sued." *Id*. at 2. In *C & L Enterprises,* the Court considered whether an arbitration clause constituted a waiver of the tribe's sovereign immunity, despite the absence of any express waiver of sovereign immunity. C& L Enterprises, 532 U.S. 411, 418. The Court found that it did and that a contrary holding would render the arbitration clause meaningless. *Id*. Similarly here, the Nation cannot render a waiver of sovereign immunity in response to a contract they themselves initiated off-reservation, where the contract's performance occurs almost entirely off-reservation. To limit

the waiver to a tribal forum would undermine the Nation's Business Corporate Code allowing participating in legal, administration, or arbitration proceedings in a "court of competent jurisdiction." R. at 1. Instead it would replace the contract's verbiage of "a court of competent jurisdiction" with a reading that in effect suggests that the Tribal Court is the only and exclusive court of competent jurisdiction. This decision would only hurt Yuma Indian Nation. Potential business partners and contractors, having performed due diligence on the Nation's codes, will be dissuaded to learn that their reasonable expectations will not be met. An erosion in confidence will only inspire attacks on well-established theories of tribal civil jurisdiction. Supra Part II. While Appellants concede that the Yuma Indian Nation has not waived tribal sovereign immunity, there is no question that the Nation has unequivocally expressed a waiver of sovereign immunity for both the Economic Development Corporation and EDC agents.

## II. THE YIN TRIBAL COURT'S SUBJECT MATTER JURISDICTION EXISTS CONCURRENTLY UNDER WATER WHEEL AND A CONTRARY FINDING RISKS UNFAVORABLE TREATMENT UNDER A MONTANA AND HICKS ANALYSIS

### a. The Montana Progeny and Subject Matter Jurisdiction

In *Montana v. United States*, the Court stated a general rule that tribes lack jurisdiction over non-Indians in civil cases. 450 U.S. 544, 565 (1981). There are two exceptions to the general presumption of Montana: first, a tribe can assert civil jurisdiction over a non-Indian if the non-Indian has a "consensual relation with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Id*. Second a tribe may assert civil

jurisdiction over a non-Indian if the non-Indian's 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. Montana murkies an already complicated field, and contributes to an "unstable jurisdictional crazy quilt." *See Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

This case presents questions of sovereign immunity and subject matter jurisdiction, and while the concepts are related, sovereign immunity and subject matter jurisdiction present two distinct issues. *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 923-24 (9th Cir. 2009). The U.S. Supreme Court has held that where tribes possess authority to regulate activities of nonmembers, jurisdiction presumptively lies with the tribal court. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). However, the civil jurisdiction over the activities of non-Indians on reservation lands may be limited by "specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. La Plante*, 480 U.S. 9, 18 (1987). As such a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, and is limited to disputes which the tribe may regulate under federal law. *Strate*, 520 U.S. at 438. Where a tribe cannot legislate over nonmembers, then the tribal court's jurisdiction only includes its own tribal members, absent an express or implied consent to tribal court jurisdiction. For disputes that arise off the reservation, the question turns on whether an assumption of state jurisdiction would infringe on "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The Yuma Indian Nation (YIN), has expressed its subject-matter jurisdiction over civil matters in its tribal code:

> The tribal Court may exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Tribe, the Indian Civil Rights Act of 1968, as amended, any specific restrictions or prohibitions contained in federal law.

Yuma Indian Nation Code § 2-102.

Appellants concede that in applying *Montana*, the Tribal Courts have concurrent subject-matter jurisdiction as the parties have established a consensual relationship with the Tribe through contract. *Montana*, 450 U.S. at 565-66 (internal citations omitted). Here, however, the tribal entity has waived its sovereign immunity and has consented to jurisdiction in federal court. R. at 1 ("any and all disputes arising from contract to be litigated in a court of competent jurisdiction"). As such, there remains a question as to whether a contract entered and performed substantially *off the reservation* is subject to the exclusive subject-matter jurisdiction of the Tribe. *See, e.g. Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir. 1980), *cert. denied.*, 451 U.S. 911 (1981) (28 U.S.C. § 1362 does not extend to a breach of contract action by tribe against architects for design and construction of a youth center on the reservation); *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975) (28 U.S.C. § 1362 does not extend to breach of contract for failure to construct campsites on reservation land); *c.f. Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014) (holding that the sovereign immunity of tribes from lawsuits applies to commercial activities conducted on land outside Indian reservations). *Bay Mills* was decided by a split-vote that affirmed the Fifth Circuits decision, and threatens a future consideration. Specifically, footnote eight seems to invite courts to recognize "special justifications" for exceptions to tribal immunity for torts and other situations falling outside the holdings of *Kiowa* and *Bay Mills*. *Bay Mills* at fn. 8. Furthermore, the issues present a compelling question of federal law. Supra Part III.

This case echoes the issues raised by the non-Indian parties in the case considered by the Fifth Circuit and affirmed by the Supreme Court. *Dolgencorp, et al v. the Mississippi Band of Choctaw Indians, et al*, 746 F.3d 167 (5th Cir. 2014), *aff'd by Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. __ (2016). There, the non-Indian party claimed that the *Plains Commerce* decision should narrow the first Montana exception, and that for tribal jurisdiction to apply, the tribe must show (1) the nontribal entity or individual agreed to a consensual relationship; *AND* (2) the relationship impacts to some degree tribal self-government or internal relations. *Id*. at 174 (emphasis added).

Appellants do not wish to reiterate arguments made in Dolgencorp which suggests a lack of subject-matter jurisdiction based on off-reservation conduct. Since 1980, Tribes have been largely unsuccessful in their assertion of subject matter jurisdiction. See *Montana*, 450 U.S. at 557 (no subject matter to regulate hunting and fishing on fee lands by a non-tribal member); *Strate*, 520 U.S. at 442 (no subject matter jurisdiction over vehicle collision on a state highway); *Hicks*, 533 U.S. at 564 (no subject matter jurisdiction over a Nevada State police officer executing a warrant); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008) (no subject matter jurisdiction over non-Indian bank sales of their own lands). Instead appellants wish to enjoin tribal court proceedings based on a waiver of sovereign immunity, and consent to federal jurisdiction.

**b. The Tribal Exhaustion Doctrine Should Not Apply to the Present Case**

The Supreme Court has diverted from the *Montana* precedent in two cases involving nonmember defendants challenging tribal court jurisdiction, and in both cases the court neither applied the Montana presumption against tribal authority nor did the Court address whether tribal court jurisdiction would be upheld. Rather, the Court created the "tribal court

exhaustion" doctrine, which mandates defendants to exhaust their remedies in tribal court before challenging tribal jurisdiction in federal court. In the first case, the court endorsed a requirement of tribal court exhaustion, consistent with a congressional "policy of supporting tribal self-government and self-determination." *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). The second case held that as a matter of comity, defendants are required to exhaust tribal court remedies in cases in which the tribal court defendant filed in federal court on grounds of diversity jurisdiction. *Iowa Mutual* at 16-17. The *National Farmers* Court noted that federal courts retained jurisdiction to hear the case, explaining that "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law…" *Id*. at 852. The Court also stated:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

*Id*. at 855-56.

The Supreme Court created four exceptions to the Doctrine of Exhaustion, articulating the first three in *National Farmers*. Exhaustion is not required: first, where an assertion of tribal court jurisdiction "is motivated by a desire to harass or is conducted in bad faith"; second, "where the action is patently violative of express jurisdictional prohibitions"; and lastly, "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id*. at 856 n. 21. The fourth exemption applies specifically to the *Montana* exceptions, and circumvents the exhaustion doctrine when "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by

Montana's main rule" such that the exhaustion requirement, in effect, would only delay proceedings. *Id*. at 19 n. 12. Eventually, the Supreme Court reconciled the relationship between the *Montana* line of cases and the exhaustion requirement doctrine set forth in *National Farmers* and *Iowa Mutual*, "[W]e reiterate that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement…These decisions do not expand or stand apart from *Montana's* instruction on the inherent sovereign powers of an Indian tribe." *Strate v. A-1 Contractors*, 520 U.S. 438 at 453. Additionally, the *Strate* court held that until Congress chose to increase a tribe's civil jurisdiction, its "adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id*. In *Strate*, the Court focused on and limited Montana's second exception, suggesting that tribal jurisdiction relying on the threatening conduct exception would be found only in cases where the non-Indian conduct had a substantial impact on tribal government or internal tribal affairs. *Id*. at 459.

The jurisdictional exception to normal exhaustion requirements was pronounced in *Nevada v. Hicks*. 533 U.S. at 353. The Court, finding that the tribe in the case did not have legislative power over the nonmember defendant, held that there was no adjudicatory jurisdiction over the defendants. Id. at 358. The decision also considered whether exhaustion of tribal remedies had been necessary, and answered in the negative. Id. The Court's decision suggests that when deciding whether a tribal court has jurisdiction, land ownership may sometimes be dispositive, but when a competing state interests exists, courts should balance that interest against the tribes. *Id*. at 360, 370; *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (holding that "where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state

interests at play, the tribe's statute as landowner is enough to support regulatory jurisdiction without considering Montana"). Therefore, the main emphasis in *Hicks* was the paramount importance of the state's interest in investigating off-reservation crime. Additionally, in *Plains Commerce* the Court held that "the Tribal Court lack[ed] jurisdiction to hear the [plaintiffs'] discrimination claim because the Tribe lack[ed] the civil authority to regulate [the underlying issues]. 554 U.S. 316, 358 (2008). The relationship between a tribe's regulatory and adjudicatory jurisdiction remains shrouded in mystery. *Hicks*, 533 U.S. at 358 ("[This] leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction.").

We do not invite inquiry into some of *Hick's* more threatening dicta. *Id.* at 364 ("[The] State's interest in execution of process [concerning off-reservation crimes] is considerable, and it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government"); see also Id. at 361 ("State sovereignty does not end at a reservation's border"). However, there is reason to believe that this case is more than an alleged breach of contract and that it implicates questions of federal law best answered in a federal forum.

## III. THIS CASE PRESENTS COMPELLING QUESTIONS OF FEDERAL LAW THAT ARE BEST CONSIDERED UNDER FEDERAL JURISDICTION

It is clear that, regarding the underlying substantive dispute, federal question jurisdiction exists under 28 U.S.C. § 1331. According to 28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

It is important to highlight the relevant restrictions. First, federal question jurisdiction does not exist merely because an Indian tribe is a party to the case, or because the case involves a contract with an Indian tribe. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir. 1980), *cert. denied.*, 451 U.S. 911 (1981). Such a rule prevents the federal court from acting as a small claims court.

The more difficult question is whether federal question jurisdiction exists when the claim is presented under non-federal law. A recent First Circuit decision is instructive. There the court considered an issue that potentially involved an "embedded" federal question. *Rhode Island Fisherman's Alliance v. Rhode Island Department of Environmental Management*, 583 F.3d 42, 48 (1st Cir. 2009). The Supreme Court describes this category of cases invoking federal jurisdiction as "slim." *Gunn v. Minton*, 568 U.S. 251 (2013) (finding there is no dispute that state legal malpractice claim alleging negligence in prosecuting patent infringement suits fall within federal reach). Yet the Court prescribed an approach, explaining that federal jurisdiction is appropriate if the federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Id*. at 258.

Here, the Smith's claims necessarily raise questions of federal law. The Court is necessarily faced with the question of whether Appellees actions, underlining the circumstances of the alleged breach of contract, amount to abuse and misuse of federal laws, rules, and policies. Whether marijuana may be legal in Indian County is unclear at best. No federal court has yet to resolve these questions with any amount of certainty. *See Menominee Indian Tribe of Wisconsin v. Drug Enforcement Administration*, 190 F. Supp. 3d 843, 854 (E.D. Wis. 2016) (finding that the exception to the Controlled Substances Act's prohibition

of hemp cultivation did not apply to the Tribe, with the issue being whether Wisconsin allowed the growing and cultivation of hemp, and not whether those laws were enforceable on the Tribe's reservation). Federal Law continues to prohibit the manufacturing of marijuana on a large commercial scale. 21 U.S.C. §§ 841(a)(1); 21 U.S.C. § 846; *see, e.g.* Tribal Marijuana Sovereignty Act of 2016, 114 H.R. 5014 (This unpassed bill sought to "protect the legal production, purchase, and possession of marijuana by Indian tribes, and for other purposes"). Similarly, Arizona criminalizes the development of recreational marijuana operations. R. at 2. The Smith's claims rely on the complicated relationship between Tribe and the Federal Government against a backdrop of State laws and interests and a fundamental dispute of federal law: the status of marijuana on Indian lands.

If Marijuana remains unequivocally prohibited on the reservation, then the Smith's alleged breach of contract stems from the report of unlawful conduct which may preclude finding that the Smith's breached their contract. In a recent case the U.S. District Court for the Southern District of California considered whether public interest allowed companies to protect their confidential and proprietary information at the expense of protecting employees who disclose confidential information in furtherance of a whistleblower complaint. *Erhart v. Bofl Holding, Inc.*, 2017 WL 588390 (S.D. Cal. Feb 14, 2017). The court denied several of the corporation's affirmative defenses noting that in certain circumstances, and explained that the balance of public policy considerations weigh in favor of whistleblowing over corporation's interest in confidentiality and non-disclosure. Id. The court relied on Section 178 of the Restatement (Second) of Contracts, noting that "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by

a public policy against the enforcement of such terms." *Erhart* suggests that federal law should reflect a strong public policy in favor of whistleblowing and protecting whistleblowers from retaliation.

For nearly a decade, the Nation entrusted Thomas and Carol Smith with sensitive financial, economic, and proprietary information. R. at 1. Only when the Nation began to pursue a questionable marijuana marker, did they then question the Smith's loyalty. The Smith's appropriately expressed their concerns and conferred with the EDC. R. at 2. Only after the EDC continued their unlawful pursuit was Thomas Smith compelled to report the EDC's conduct. Id. Furthermore, the Arizona Attorney General's letter discussed only the development of recreational marijuana operations, the unlawful conduct, and did not implicate any of the other sensitive information that Thomas Smith was privy to.

By not allowing federal inquiry into possible whistleblower defenses, this court opens itself to the most destructive effects of the *Montana* and *Hicks* progeny on appeal.

## IV THE EDC IS NOT AN "ARM OF THE TRIBE" ENTITLED TO TRIBAL SOVEREIGN IMMUNITY

The EDC is not so closely linked to the nation in governing structure or other dispositive characteristics that is should be given tribal sovereign immunity against the wishes of the tribe. Understanding that this is a new issue for this Supreme Court, here the Court should look to an slightly altered New York's "arm of the tribe" test to determine if the Economic Development Corporation is truly an "arm of the tribe" with a governmental function beyond mere profit making. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928, 935 (N.Y. 2014). *citing Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995). While none of the following factors are singularly dispositive, each may weigh heavily in favor of or against the application of tribal sovereign

immunity for an entity purported to be an arm of the tribe. *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 374 (Cal. 2016). First, what is the financial relationship between the tribe and the entity? Second, what is the entity's purpose? Third, what is the level of control the tribe has over the entity? Fourth, what was the entity's method of creation? And finally, did the tribe intend to share its sovereign immunity with the entity? Despite the Yuma Indian Nation's creation of the Economic Development Corporation as a technical "arm of the tribe," there is little that would implicate a tribal interest in self-government or economic safety. *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 375 (Cal. 2016). As each case requires a fact-specific analysis, the synthesis of these factors does not lean toward immunity, in this instance. *Id.* The tribe has attempted to have it both ways, issue a corporate charter to an official sounding entity and insulate itself from any liability the corporation could incur. In this case, the tribe is a passive owner, which weighs more heavily against asserting immunity. *Id.* If the EDC is an arm of the tribe and if the tribe truly extends sovereign immunity over the EDC, then this arm of the tribe should not be held at arm's length.

First focusing on the financial relationship between the Yuma Indian Nation and the EDC, we should first look to the purpose of the financial situation at play. As the court found in *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, the heart of the issue is who is most likely to be financially hurt if the entity is held liable. In that case, the tribe created the business with their law and order code for the purpose of decreasing tribal unemployment, and the business had to be run by elected tribal chiefs. The business was funded by the tribe and if the business could be sued, the tribe was the likely payer of the award. The ninth

circuit has stated that economic independence is of the utmost importance to tribal sovereignty. *Id.*

In this instance, although there are similarities the distinguishing mark is that the EDC is not directly funded by the tribe on any ongoing or permanent basis. The EDC's funds received were in the form of a loan, which must be re-payed to the tribe. Although the tribe would have this court believe the financials of the company are under control of the tribe, the EDC is not capable of accessing the tribal general fund for its needs. It may not borrow, lend, or implicate the tribal fund in any way; and the EDC may not operate financially in the name of the tribe. R at 2. To date, the EDC has only re-payed 2 million dollars of the 10-million-dollar loan they were given by the tribe to begin their business, which is not proof that the tribe has control over the financial aspect of the business any more than an understanding and generous private bank would. *Id*. The tribe's financial security and economic potential is not implicated by EDC being subject to suit. *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 375 (Cal. 2016). There would be an argument that there is a specified amount of money that the EDC owes the tribe every year, however the amount is minimal considering the businesses failings. R at 2. The amount owed is 50% of profits, but that is not inclusive of the payments the EDC must make to repay the loan. It is more like a donation to the tribe. Even though the EDC has agreed to make a generous 50% donation of their profits to the tribal general fund per year. *Id.* There is no indication in the record that the EDC's yearly donation is intended to fund government operations, nor provide services for tribal members. Thus far the impact of the EDC has been minimal in both it's ability to pay the tribe for its loan and to fulfil its stated purpose to "create and assist" in the tribe's economic success. Therefore, the impact of allowing the Smith's to sue the EDC would also be

minimal to the stability and function of the Nation's government and economic assets. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E.3d 928, 935 (N.Y. 2014).

Second, the EDC's purpose is "to create and assist in the development of successful economic endeavors, of any *legal* type or business, on the reservation and in southwestern Arizona." R at 1, *emphasis added*. It is stated in the tribal commercial code that the tribe may create and charter public and private corporations to operate businesses on and off the reservation. *Id.* The Yuma Indian Nation states that in its creation, the EDC is created under the code "to promote the prosperity of the Nation and its citizens." *Id.* In Bay Mills, the court says they will not make a freestanding exception to tribal immunity where Congress has not intended to diminish the sovereign immunity of tribes. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2039 (2014). The EDC's purpose would be more compelling if they were created with a purpose more akin to governmental functions such as to "enhance the health, education and welfare of Tribe members." *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, 658 N.E.2d 989, 993 (N.Y. 1995)

However, in this case the EDC is acting against its own chartered purpose. The EDC began pursuing the growth and sale of medicinal and recreation marijuana, even though the tribe does not necessarily have to consult state law on or off the reservation in every instance, recreational marijuana propagation and sale is illegal federally because marijuana is still considered schedule 1. 21 U.S.C. § 811. The EDC even went so far as to subversively entice the tribal council to change tribal law to legitimize their pursuit of marijuana beyond the scope of what is legal federally. R at 2.

Third, the Yuma Indian Nation's control over the EDC is tenuous. There remains the option for the tribe to exert control over the corporation, but it is not mandated. Nor is it necessary. R at 2. While the tribal council chose the first board of directors, they merely maintained the ability to remove any director by a vote. R at 1. The regular operations of the business and the ultimate decision making power of the EDC remains with the board, who operate as an autonomous organism. The EDC sitting board members are vested with the power and expectation to elect or re-elect the expiring seat's member at their discretion. The only stipulation the tribe maintains is that there must be three seats held by tribal citizens and two seats held by non-Indians or non-member Indians. *Id.* The tribe's lack of control over the EDC is also evidenced by their separation of resources and responsibilities. The EDC is only required to provide reports to the Council as it would shareholders. *Id.* The EDC is kept from accessing any of the tribal general fund. And as the New York Court of Appeals in *Sue/Perior Concrete, supra,* found most persuasive, despite the tribe's assertions that it wishes to extend its inherent sovereign immunity over the EDC, and its employees, the Yuma Indian Nation has elected to insulate itself from any obligations, duties, liabilities, or encumberances the EDC may incur. R at 1,2.

Fourth, we will look to the EDC's method of creation. The charter is issued by the Yuma Indian Nation. R at 1. The EDC was funded with a one time loan. The EDC is purported to be an "arm of the tribe" and as a wholly owned subsidiary. R at 1. However, the Nation has authorized the EDC to deal in real property in whatever form of ownership, whether on or off the reservation, and to sue and be sued. No debts of the EDC are intended to implicate the tribe in any way. The tribe does not assume ownership of EDC property directly. *Id.* at 2. While the corporate charter has a tribal hiring and contracting preference

requirement, the EDC has only maintained an average of 25 tribal citizen employees every year since its creation in 2009. *Id* at 2. While this does not deny tribal interest or involvement, it does deny impact the corporation has purported. However, the clause in the charter in which the tribe allows the corporation to sue and be sued is the biggest argument for denying immunity in this instance. *Id.* at 2. Although some courts, such as the New York Court of Appeals, have found that language such as "sue and be sued" are not express waivers, but merely acknowledgement that a waiver could be given. *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, 658 N.E.2d 989, 994 (N.Y. 1995). Although the U.S. Supreme court "has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity" *Id.*

Finally, we will look to see if the tribe intended to share its sovereign immunity with the EDC. Although it expressly stated that it intended to do so, it did not act as such when setting out the foregoing factors. It maintains a distance from the EDC, not for autonomy, but for protection. Much like the fox who might find his foot in a trap, the Yuma Indian Nation has prepared itself to gnaw off the EDC if it needs. And in that way, the Yuma Indian Nation Council and the EDC have set up a corporation which will allow them to assert tribal sovereign immunity when it best suits them, while making contracts with parties that purport to waive the immunity but are really just declaring that the Nation has the ability to sue in any court it desires. *Ransom.*

## CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus ordering the trial court to stay the suit.