IN THE
YUMA INDIAN NATION SUPREME COURT

CAROL SMITH AND THOMAS SMITH
Appellants,

v.

YUMA INDIAN NATION, YIN ECONOMIC DEVELOPMENT CORPORATION, FRED CAPTAIN, AND MOLLY BLUEJACKET
Appellees.

ON APPEAL FROM THE
YUMA INDIAN NATION TRIBAL COURT

BRIEF FOR APPELLANTS

Team 118
Counsel for Appellants

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QUESTIONS PRESENTED

I. Thomas Smith and Carol Smith, non-Indians officing in Arizona and Oregon, respectively, entered into contracts with the Yuma Indian Nation to provide financial advice. The Smiths primarily performed their contractual obligations from their offices, only infrequently visiting the reservation. The Nation sued the Smiths in its courts for the Smiths' disclosure of plans to develop a marijuana operation to the Arizona Attorney General. Do Yuma Indian Nation courts have personal and subject matter jurisdiction over the Smiths, or in the alternative, should the trial court stay the Nation's suit while the Smiths seek a ruling in the Arizona federal district court?

II. A tribe's sovereign immunity is not absolute. The Nation made a contract with the Smiths and subsequently sued them in tribal court for breach of contract. The Economic Development Corporation was created under the Nation's tribal code. The EDC's charter insulates the Nation from the EDC's debts and includes a "sue and be sued" provision. Fred Captain and Molly Bluejacket are employees of the EDC. The Smiths have asserted counterclaims against the Nation, the EDC, Captain, and Bluejacket for breach of contract and defamation. Does sovereign immunity, or any other form of immunity, bar the Smiths' claims against the Nation, the EDC, Captain, or Bluejacket?

STATEMENT OF THE CASE

I. Statement of the Facts

Thomas Smith ("Thomas") is certified financial planner and accountant living and working in Phoenix, Arizona. R. at 1. The Yuma Indian Nation (the "Nation") is located in Southwest Arizona. R. at 1. In 2007, the Nation contracted with Thomas to provide the Nation with financial advice regarding economic development issues. R. at 1. The parties signed the contract at Thomas's office in Phoenix, Arizona. R. at 1. Thomas's contract with the Nation provided for "any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." R. at 1. The contract also required Thomas to keep all tribal communications and economic plans confidential. R. at 1. From 2007 to 2009, Thomas provided the Nation with financial advice through emails and telephone calls with various chairs and Tribal Council members. R. at 1.

In 2009, the Nation created the YIN Economic Development Corporation (the "EDC") under the Nation's tribal commercial code. R. at 1. The EDC is organized under the Indian Reorganization Act, 25 U.S.C. § 477 (editorially classified as 25 U.S.C. § 5124). R. at Answer to Substantive Inquiry No. 4. The EDC is operated by its own board of directors separate from the Tribal Council. Under the EDC's charter, the Nation may not be held liable for any of the EDC's debts. The charter also includes a "sue and be sued" clause. Following the creation of the EDC, Thomas primarily communicated with Fred Captain, the EDC CEO ("Captain"), and Molly Bluejack, an EDC employee/accountant ("Bluejacket"). R. at 1. Thomas also presented quarterly written reports in person at Council meetings. R. at 1.

In 2010, the Nation contracted with Carol Smith, Thomas's sister and licensed stockbroker, to advise Thomas, the EDC, and the Nation on stocks, bonds, and securities issues. R. at 2. Thomas, with the written permission of the Tribal Council, signed the contract

with Carol. R. at 2. Carol lives and works in Portland, Oregon. R. at 2. Carol provides her advice directly to Thomas via email, telephone, and postal services, however, Thomas often shares her communications and advice with the Council, Captain, and Bluejacket. R. at 2. Carol's only direct communications with members of the Nation are monthly bills she submits via email to Captain, who ensures the EDC mails her payments. R. at 2. Carol has only visited the reservation twice, which occurred while she was on vacation in Phoenix. R. at 2.

In 2016, the Tribal Council enacted a tribal ordinance making marijuana cultivation and use on the reservation legal for all purposes. R. at 2. Recreational marijuana use is illegal under Arizona law. R. at 2. The EDC began developing a marijuana operation. R. at 2. The EDC conferred with Thomas on the issue. R. at 2. Thomas and Carol (collectively, the "Smiths") morally oppose being personally involved in the marijuana business. R. at 2. Ultimately, Thomas disclosed the Nation's plans to his acquaintance, the Arizona Attorney General (the A.G.). R. at 2. The A.G. subsequently sent a cease and desist letter regarding the development of a recreation marijuana operation to the Nation and the EDC. R. at 2.

II. Statement of the Proceedings

The Tribal Council filed suit on behalf of the Nation in tribal court against the Smiths for breach of contract, violation of their fiduciary duties, and violation of their duties of confidentiality. R. at 3. The Nation sought recovery of liquidated damages set out in its contracts with the Smiths. R. at 3. The Smiths filed special appearances and identical motions to dismiss the Nation's suit for lack of personal and subject matter jurisdiction over the Smiths and the suit, or in the alternative, for the trial court to stay the suit while they sought a ruling in Arizona federal district court. R. at 3. The trial court denied the Smiths' motions. R. at 3.

Continuing to litigate under their special appearances, the Smiths filed answers denying the Nation's claims and filing counterclaims against the Nation for monies due under the

contracts and for defamation. R. at 3. The Smiths also impleaded the EDC, as well as Captain and Bluejacket, in both their official and personal capacities. R. at 3. The Smiths brought the same breach of contract and defamation claims against the third-party defendants. R. at 3. The trial court found that the Nation and all the third-party defendants had sovereign immunity and dismissed the Smiths' counterclaims.

The Yuma Indian Nation Supreme Court granted the Smiths' interlocutory appeal to decide the following issues: 1) whether the Yuma Indian Nations' courts have personal and subject matter jurisdictions over the Smiths, or in the alternative, whether it should issue a writ of mandamus ordering the trial court to stay the suit; and 2) whether sovereign immunity, or any other form of immunity, bars the Smiths' claims against the Nation, the EDC, Captain, and Bluejacket. R. at 3.

ARGUMENT

I. Yuma Indian Nation Courts Lack Personal and Subject Matter Jurisdiction over Thomas Smith and Carol Smith, or in the Alternative, This Court Should Order the Trial Court to Stay the Suit While the Smiths Seek a Ruling in the United States District Court for the District of Arizona.

Yuma Indian Nation courts lack personal jurisdiction over the Smiths. The Nation's courts cannot exercise general jurisdiction over the Smiths because they are domiciled outside the reservation, and must therefore rely on specific jurisdiction. The Nation's courts may not exercise specific jurisdiction in this case because none of the Smiths' physical contacts, communications, or contracts with the Nation are sufficient minimum contacts with the Nation's reservation. Even if the Smiths' limited contacts are sufficient, the court may not exercise specific jurisdiction over the Nation's claims because the claims do not arise out of the Smiths' limited forum-based contacts.

Yuma Indian Nation courts also lack subject matter jurisdiction to adjudicate the Nation's suits against the Smiths. The limited exceptions to the general rule that tribal courts may not exercise civil jurisdiction over non-Indians do not apply in this case because the Nation's suit seeks to regulate the Smith's activities that occurred outside the boundaries of the Nation's reservation. Even if the limited exceptions in *Montana v. United States* are applicable, neither of the exceptions permit the exercise of civil jurisdiction over the Nation's suit. First, the consensual relationship exception is not satisfied because there is no nexus between the Smiths' consensual relationship, as established by their on-reservation activities, and the disclosure of information the Nation's suit seeks to regulate. Second, the tribal integrity exception is not satisfied because adjudication of the Nation's suit is not necessary to avoid catastrophic consequences for the Nation.

Finally, even if this Court finds it has jurisdiction over the Nation's suit, it should issue a writ of mandamus ordering the trial court to stay the suit while the Smiths seek a ruling in federal district court because whether the Nation's courts have subject matter jurisdiction is a federal question and forcing the Smiths to litigate the dispute in a court that lacks jurisdiction would cause irreparable harm to the Smiths.

A. Yuma Indian Nation Courts Lack Personal Jurisdiction Over the Smiths.

The Nation's long-arm statute permits its courts to exercise personal jurisdiction over any "person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract," and more broadly over "[a]ny person for whom the Tribal Courts may constitutionally exercise jurisdiction." YUMA TRIBAL CODE §§ 1-104(2)(a), (3) (2005). Nevertheless, the Indian Civil Rights Act ("ICRA") imposes a statutory due process clause that limits tribal courts' exercise of personal jurisdiction. 25 U.S.C. § 1302(a)(8) (2012); COHEN'S

HANDBOOK OF FEDERAL INDIAN LAW § 7.02[2] (Nell Jessup Newton ed., 2012). Tribal courts have interpreted the ICRA's due process clause by reference to the Supreme Court's precedent governing the Fourteenth Amendment's due process clause. COHEN'S, *supra*, at § 7.02[2]. Accordingly, a tribal court may only exercise personal jurisdiction over a non-Indian defendant who has sufficient minimum contacts with the tribe's reservation such that the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *See, e.g.*, *In re J.D.M.C.*, 739 N.W.2d 796, 811 (S.D. 2007) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *Rosebud Housing Auth. v. LaCreek Elec. Coop., Inc.*, 13 Indian L. Rep. 6030, 6031–32 (Rosebud Sioux Tribal Ct. 1986) (same).

To satisfy due process, tribal courts must have one of the two categories of personal jurisdictional: general jurisdiction or specific jurisdiction. *Bristol-Myers Squibb Co. v. Sup. Ct. of Calif.*, 137 S. Ct. 1773, 1779–80 (2017). Courts exercising "general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State." *Id.* at 1780. If a court lacks general jurisdiction, it may only exercise specific jurisdiction over suits arising out of the defendant's contacts with the forum. *Id.* The Nation's courts may not exercise either general or specific jurisdiction over the Smiths and thus, lack personal jurisdiction.

1. Yuma Indian Nation Courts Lack General Jurisdiction Over the Smiths.

Tribal courts may exercise general jurisdiction only over parties whose "affiliations with the [forum] are so continuous and systematic as to render them essentially at home in the forum." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation marks omitted). Individual defendants are at home in the State they are domiciled. *Id.* at 924. Individuals have only one domicile: the place of their "true, fixed, and permanent

home," where they intend on returning when they are gone. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

Yuma Indian Courts may not exercise general jurisdiction over the Smiths because they are not at home on the reservation. Thomas is domiciled in Phoenix, Arizona, where he lives and works. He only physically visits the Yuma Indian Reservation four times a year to present at Tribal Council meetings. Carol is domiciled in Portland, Oregon, where she lives and works. Carol has only visited the reservation twice, both times while she was on vacation in Phoenix. Therefore, the Nation's courts may not exercise general jurisdiction over the Smiths and must rely on specific jurisdiction.

2. Yuma Indian Nation Courts Lack Specific Jurisdiction Over the Smiths.

Tribal courts may exercise specific jurisdiction only when: (1) the defendant has sufficient minimum contacts with the forum territory; (2) the plaintiff's cause of action arises out of the defendant's forum-based contacts; and (3) the exercise of jurisdiction is reasonable and fair. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–76 (1985). The Nation's courts may not exercise specific jurisdiction because the Smiths do not have sufficient minimum contacts with the reservation and the Nation's suit does not arise out of the Smiths' limited forum-based activities.

a. The Smiths Do Not Have Sufficient Minimum Contacts with the Reservation.

Defendants have sufficient minimum contacts with a forum-territory when they purposefully direct their activities toward the forum-territory or purposefully avail themselves of the benefits of the forum-territory's laws such that it is foreseeable they would be sued there. *Id.* at 474–75. In addition, defendants' contacts must be with the forum-territory, not merely with persons that reside there. *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014). While the Smiths

have a relationship with the Nation and its members, the Smiths' limited contacts with the Yuma reservation are not sufficient for its courts to exercise specific jurisdiction.

i. The Smiths' Physical Contacts Are Insufficient.

The Smiths' minimal physical contacts do not constitute purposeful availment or make it foreseeable the Smiths would be sued in tribal courts. The Smiths have limited physical contacts with the reservation. Carol has visited the reservation only twice during a vacation to Phoenix. She has never visited as part of her work for the Nation. Thomas has visited the reservation approximately four times a year to present written reports at the Council meeting. Visiting the reservation alone does not make it foreseeable that an individual would be sued there. *Burger King*, 471 U.S. at 479. The Smiths did not maintain offices, conduct business transactions, or perform any other activities in the reservation that rise to the level of invoking the "benefits and protections" of the reservation's laws. *Id.* at 475.

ii. The Smiths' Telephone and Email Communications with the Nation's Members Are Insufficient.

It is generally established that phone calls, letters, or emails with residents of a forum-territory are in themselves not sufficient to establish minimum contacts. *Id.* at 476; *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014) (emails); *Far W. Capital v. Towne*, 46 F.3d 1071, 1077 (10th Cir. 1995) (phone calls and letters). Instead, the communications must be purposefully directed toward engaging in commercial transactions with residents or suggest that the defendant purposefully availed herself of the benefits of doing business in the territory. *Burger King*, 471 U.S. at 476.

Communications that solicit transactions or are material to the formation of a contract suggest a defendant purposefully directed her activities towards the forum-territory, while communications in furtherance of the performance of a contract are less likely to show

purposeful availment. *Compare Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (finding no contacts when a trustee only mailed notices to client that moved to another state, but did not solicit new business) *with McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (finding minimum contacts when a business solicited a reinsurance agreement with the resident of another state and the offer was accepted in that state); *see also Eagle Paper Int'l, Inc. v. Expolink, Ltd.*, No. 2:07cv160, 2007 U.S. Dist. LEXIS 102014, *13 (E.D. Va. Nov. 26, 2007) ("[I]t is well settled that mere telephone calls and electronic communications in furtherance of a transaction are insufficient to constitute purposeful activity."). This distinction is justified because communications to solicit business in a forum-territory shows intent to reach into the forum-territory to conduct business, while communication in furtherance of the performance of a contract occurs due to prior obligations and may be the result of the unilateral activity of the other party. The Smiths' communications with members of the Nation are not sufficient contacts with the reservation that make it foreseeable they would be sued in tribal courts.

First, Carol's communications do not constitute purposefully directed activity on the reservation. Carol did not solicit or negotiate her contract with members of the Nation on the reservation. Carol's contract with the Nation arose from her contacts with Thomas, and it was Thomas who signed her contract on behalf of the Nation. During her contractual relationship, Carol's only direct communications with the Nation's members on the reservation were sending monthly bills via email to Captain. Otherwise, Carol provided her advice directly to Thomas via email, telephone, and postal and delivery services where he works in Phoenix. While Thomas occasionally forwarded her communications to several of the Nation's employees, the actions of a third party cannot constitute the basis of Carol's contacts with the forum territory. *Burger King*, 471 U.S. at 474–75. Finally, the bills Carol emailed to Captain

are analogous to the notices the trustee sent in *Denckla*, neither of which constitute purposeful availment.

Second, Thomas's communications do not constitute purposefully directed activity on the reservation. There is nothing in the record that suggests Thomas solicited the Nation's business or negotiated his contract with the Nation through communications with the Nation's members on the reservation. Instead, Thomas's phone calls and emails with the Nation's members on the reservation where in furtherance of his existing contract to provide the Nation with advice on economic development. Thomas' communications were limited and did not suggest he purposefully availed himself of the benefits of conducting business in the reservation.

iii. The Smiths' Contracts with the Nation Are Insufficient.

The mere existence of the Smiths' business contracts with a forum-territory's citizen does not automatically constitute minimum contacts. *Burger King*, 471 U.S. at 478. Instead, courts look to the "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" to determine whether the "defendant purposefully established minimum contacts within the forum." *Id.* at 479. In *Burger King*, the Supreme Court held a Michigan franchisee's contract with a Florida based franchisor constituted minimum contacts with Florida. *Id.* at 482. The Court first noted that the franchisee deliberately reached outside of Michigan and negotiated with the Florida corporation to enter into a twenty-year relationship to benefit from its affiliation with the national brand. *Id.* at 479–80. The Court then noted that the parties' contract included a choice-of-law provision which provided that the contract was (1) valid only when accepted by the franchiser in Florida; (2) deemed to have been made and entered into in Florida; and (3) to be governed by Florida law. *Id.* at 481–82. The Court reasoned that the combination of the long-term relationship and the

choice-of-law provision sufficiently established the Michigan franchisee had deliberately established contacts within the forum and that it was reasonably foreseeable he would be sued in Florida.

The Smiths did not "purposefully establish minimum contacts within the forum" by entering into contracts with the Nation, nor did the provisions of the contract make it foreseeable they would be sued in tribal court. First, the Smiths' contracts with the Nation are not analogous to the contract in *Burger King*. Unlike the contract in *Burger King*, which was valid only upon acceptance in the forum state, the Smiths and the Nation executed their contracts outside the forum territory. Thomas and the Nation both executed their contract at his office in Phoenix. Carol's contract was signed outside the reservation, with Thomas signing it on behalf of the Nation.[1] Moreover, unlike the choice-of-law provision that pointed to the forum-state in *Burger King*, the Smiths' contracts to do not contain a choice-of-law provision. The contracts only state that disputes arising from the contract are to be litigated in a court of competent jurisdiction.

In addition, the Smiths' performance of their contractual obligations and course of dealings with the Nation do not establish minimum contacts with the reservation because they were performed outside the reservation. In *Burger King*, the franchiser performed activities that benefited the defendant inside the forum-State and the franchisee made all payments in the forum-State. *Id.* at 480. Here, the parties' relationship is the opposite. The Smiths performed their contractual obligations outside of the reservation, in Arizona and Oregon, while the Nation made payments to the Smiths in those states.

[1] While it is not evident from the record the exact location Carol signed her contract, it appears that she did not sign it on the reservation because she only visited the reservation twice, both times while she was on vacation in Phoenix.

Finally, there are no other facts that suggest that the Smiths' contractual relationship with the Nation satisfies the minimum contacts requirement. There is nothing in the record to suggest that the Smiths initiated the formation of the initial contract with the Nation by reaching outside of Arizona. There is also no evidence the Smiths negotiated the contract on the reservation.

In sum, Yuma Indian Nation courts may not exercise specific jurisdiction over the Smiths because the Smiths did not purposefully avail themselves of the benefits of the Nation's laws through their contracts with the Nation, or by visiting and engaging in communications with individuals on the reservation.

b. The Nations' Claims Do Not Arise Out of the Smiths' Contacts with the Reservation.

To exercise specific jurisdiction, the claims must arise out of the defendants' contacts with the forum. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780. A claim arises out of the defendants' contacts where there is "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Id.* at 1791 (quoting *Goodyear*, 564 U.S. at 919). In *Walden*, the Supreme Court held that Nevada courts lacked specific jurisdiction over a law enforcement officer even though the plaintiffs were Nevada residents and would suffer harm in Nevada because the relevant conduct occurred in Georgia. 134 S. Ct. at 1115.

The Nation seeks damages for the Smith's alleged breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. Like the officer's conduct in *Walden*, the Nation's claims arise entirely out of Thomas's off-reservation disclosure to the A.G. of the EDC's plans to pursue a marijuana operation on the reservation. In addition, the Nation does not allege that its claims arise out any of the Smiths' conduct or communications

during their visits to the reservation. Because the Nation's claims do not arise out of the Smiths' forum-based activities, Yuma Indian Nation courts may not exercise specific jurisdiction over the Smiths.

B. Yuma Indian Nation Courts Lack Subject Matter Jurisdiction Over the Smiths.

Absent a treaty or Congressional authorization, an Indian tribe's inherent sovereign powers "do not extend to regulating the activities of nonmembers." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (citing *Montana v. United States*, 450 U.S. 544, 566 (1981)). Therefore, there is a general rule that tribal courts lack civil jurisdiction over non-Indians. *Id.* at 330. In *Montana*, the Supreme Court recognized two "limited" exceptions that permit tribes to "exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 329 (internal quotation marks omitted). First, tribes may exercise civil jurisdiction over the activities of non-Indians "who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. Second, tribes may exercise civil jurisdiction over a non-Indian whose 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. Here, the Nation's courts lack subject matter jurisdiction over this case because it arises from the Smiths' conduct outside of the reservation, where *Montana*'s exceptions do not apply. Even if *Montana*'s exceptions apply, the Nation cannot establish it may exercise subject matter jurisdiction under either exception.

1. *Montana*'s Exceptions Do Not Apply to Non-Indian Activities That Take Place Outside of the Reservation. Thus, Yuma Indian Nation Courts Lack Subject Matter Jurisdiction over the Nation's Claims.

While the Supreme Court has never explicitly held that tribal courts lack civil jurisdiction to regulate the activities of non-Indians outside their reservations, the rule is "strongly implied" from *Montana* and its progeny. *Dolgencorp, Inc. v. Miss. Band of Choctaw*

Indians, 746 F.3d 167, 176 n.7 (5th Cir. 2014), *aff'd by an equally divided court*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016). Most recently, in *Plains Commerce Bank*, the Court explained that "*Montana* and its progeny permit tribal regulation of nonmember conduct *inside* the reservation." 554 U.S. at 332 (emphasis added). *Montana* itself supports this rule, as the Supreme Court prefaced the exceptions by explaining that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*." *Montana*, 450 U.S. at 565 (emphasis added).

In addition, *Montana*'s rationales and the Supreme Court's application of its exceptions support the adoption of this general rule. The Court has repeatedly explained that *Montana*'s limited exceptions are rooted in the "limited nature of tribal sovereignty," which "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327. Indeed, each of the cases cited in *Montana* in explanation of the exceptions "involved regulation of non-Indian activities *on the reservation*." *Id.* at 332 (emphasis added); *Montana*, 554 U.S. at 565–66.[2] Moreover, the Supreme Court's cases following *Montana* have exhibited a clear "pattern" of only permitting jurisdiction over "certain forms of nonmember conduct on tribal land." *Plains Commerce Bank*, 554 U.S. at

[2] The cases cited in support of *Montana*'s first exception involved disputes or taxes on nonmembers' economic activity on a reservation. *See Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152–53 (1980) (tax on on-reservation cigarette sales to nonmembers); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (contract dispute arising from on-reservation sales transaction); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tribal tax on nonmember's grazing cattle on the reservation); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (tax on nonmembers for the privilege of doing business within the reservation). The cases cited in support of *Montana*'s second exception were more diverse, but each related to activity on the reservation. *See Fisher v. Dist. Court of Sixteenth Jud. Dist.*, 424 U.S. 382, 386 (1976) (adoption of one resident tribal member by another); *Williams*, 358 U.S. at 220 (contract dispute arising from on-reservation sales transaction); *Mont. Catholic Missions v. Missoula Cnty.*, 200 U.S. 118, 128–29 (1906) (tribal interest in non-Indian fee land did not exempt economic activity on the land from state taxation); *Thomas v. Gay*, 169 U.S. 264, 273 (1898) (state could tax nonmember owned cattle grazing on leased tribal land.)

333. This is strong evidence that tribes cannot regulate non-Indian activity outside the reservation.

Finally, this general rule has been adopted by several of the Circuit Courts of Appeals. *See Stifel v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015) ("limit[ing] its consideration to the on-reservation actions of the [Defendants]"); *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 940 (8th 2010) (requiring the tribe to "show that the conduct it seeks to regulate occurred within the Meskwaki Settlement"); *Philip Morris U.S. v. King Mt. Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009) (explaining that the "jurisdiction of tribal courts does not extend beyond tribal boundaries."); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) (explaining that "to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country.").

Here, *Montana*'s exceptions are inapplicable because the Nation seeks to regulate the off-reservation activities of the Smiths, neither of whom are members of the Nation. The Nation's suit seeks damages from the Smiths for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. While the Smiths entered into contracts with the Nation, the contracts were signed off the reservation and involved obligations to be performed in their offices in Arizona and Oregon. The Smiths' alleged breach of contract and violation of duties occurred when Thomas informed the A.G. of the plans to pursue the development of a marijuana operation. The Nation's lawsuit thus seeks to regulate the Smiths' ability to communicate allegedly confidential information to other non-Indians outside of the reservation. Indeed, none of the Nation's claims seek to regulate any of the Smiths' conduct that occurred on the reservation or their interactions with the Nation's members. Therefore,

Montana's exceptions do not apply, and Yuma Indian Nation courts cannot exercise subject matter jurisdiction over the case.

2. Even if *Montana*'s Exceptions Are Applicable, the Nation Lacks Subject Matter Jurisdiction Under Either Exception.

To overcome the presumption against tribal jurisdiction over non-Indians, the Nation has the burden to establish that subject matter jurisdiction is permissible under one of the *Montana* exceptions, which are not to be "construed in a manner that would swallow the rule, or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330. The Nation cannot meet its burden under either exception.

a. *Montana*'s First Exception Is Not Satisfied.

A tribe may regulate the activities of non-Indian under the first *Montana* exception when: (1) the non-Indian has a consensual relationship with the tribe or its members, and (2) the tribe's regulation (here, the exercise of civil jurisdiction) has "a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The extent of a non-Indian's consensual relation is determined by the non-Indian's activities on the reservation. *Stifel*, 807 F.3d at 207; *see also Atkinson Trading Co.*, 532 U.S. at 656 (no nexus between the imposition of a hotel occupancy tax and non-Indian's status as a licensed "Indian trader"); *Strate v. A-1 Contrs.*, 520 U.S. 438, 458 (1997) (no nexus between a lawsuit arising from a contractor's car accident and its subcontract to do landscaping work on the reservation). A nexus between the non-Indian's on-reservation activity and the tribe's regulation is necessary to ensure a non-Indian is not subjected "to tribal regulatory authority without commensurate consent." *Plains Commerce Bank*, 554 U.S. 337. Indeed, a "nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not in for a penny, in for a Pound." *Atkinson Trading Co.*, 532 U.S. at 656.

Here, the Smiths' activities on the reservation were minimal and have no nexus to the alleged disclosure. Thomas visited the reservation in person approximately four times a year to present quarterly written reports at Council meetings. Carol only visited the reservation in person twice, both times with Thomas while she was on vacation in Phoenix. The disclosure alleged in the Nation's lawsuit has no relation to Thomas's presentation of the quarterly written reports or Carol's two visits. The rest of the Nation's relationship with the Smiths occurred outside the reservation. The contracts were signed outside the reservation and Thomas and Carol performed their obligations from their offices in Phoenix and Portland. Neither Thomas nor Carol can fairly be said to have consented to tribal jurisdiction over their entire contractual relationship because they visited the reservation.

Moreover, none of the Nation's allegations arise from the Smiths' actions during their visits. For example, the Nation's suit may have a nexus if the Nation had alleged that Thomas had made misrepresentations during his presentation to the Council. *See, e.g.*, *Stifel, Nicolaus & Co. v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, No. 13-cv-0012, 2014 U.S. Dist. LEXIS 83360, *31 (W.D. Wis. June 19, 2014). Allowing tribal courts to exercise subject matter jurisdiction over an entire contractual relationship because the non-Indian party once visited the reservation would greatly expand the first exception to the point it swallows the rule.

In addition, the existence of the Smiths' contracts with the Nation are insufficient to meet the nexus requirement. The cases that have relied on a contract between a non-Indian and a tribal member to establish civil jurisdiction over a non-Indian's off-reservation conduct have relied on the contract being made or performed on the reservation. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 885 (8th Cir. 2013) (finding a colorable claim of jurisdiction over a

claim arising from enforcement of a contract to provide satellite television service on the reservation); *Luckerman v. Narragansett Indian Tribe*, 965 F. Supp. 2d 224, 229–30 (D.R.I. 2013) (finding a colorable claim of jurisdiction over a breach of contract claim arising from a contract for legal services made on the reservation). Here, the Smiths' contracts were both made and performed off the reservation.

Finally, the Smiths' counterclaims against the Nation, the EDC, and its employees do not constitute consent to tribal jurisdiction. Courts have recognized the first *Montana* exception may be satisfied when a non-Indian consents to tribal jurisdiction by filing claims in tribal courts. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1136–37 (9th Cir. 2006). In *Salish Kootenai College*, the Ninth Circuit held that tribal courts had subject matter jurisdiction over a nonmember plaintiff who pursued his cross claim in the tribal court after all other claims had settled because pursing his claims through trial constituted a sufficient consensual relationship. *Id.* at 1140. Here, the Smiths did not enter into a consensual relationship with the Nation's courts by filing their counterclaims and impleading the EDC and its officers. Unlike the nonmember in *Salish Kootenai College*, the Smiths challenged the tribal court's subject matter jurisdiction. *Id.* at 1133. In addition, the Smiths filed their answers and counterclaims while continuing to litigate under special appearances entered to challenge the tribal court's jurisdiction. Finally, unlike the nonmember in *Salish Kootenai College* whose suit was realigned prior to trial so that he was a plaintiff, the Smiths are defendants and do not have "full control over the forum" in which to prosecute their claims. *Id.* at 1137.

In sum, because the Nation's lawsuit does not seek relief for any of the Smiths' consensual activities on the reservation, the nexus requirement is not satisfied, and the first Montana exception does not apply. *Stifel*, 807 F.3d at 208.

b. *Montana*'s Second Exception Is Not Satisfied.

Montana's second exception permits tribes to exercise civil jurisdiction over a non-Indian only when his or her conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565. The Supreme Court defined the exception narrowly, only permitting tribal courts to exercise civil jurisdiction over conduct "necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459. The Court has further explained the non-Indian's conduct must do more than injure the tribe, "it must imperil the subsistence of the tribal community" by imposing "catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation marks omitted) (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.03[c], at 232 n.220 (Nell Jessup Newton ed., 2005)). Here, none of the Smiths' conduct rises to the "elevated threshold" necessary to establish it threatened the integrity of the Nation. *Id.*

First, Thomas's alleged disclosure related to developing a marijuana business did not impair the Nation's self-government or internal relations. Although the alleged disclosure related to internal discussions, it did not impair internal relations because the disclosure would only affect the Nation's *external* relations with the State of Arizona. In addition, the disclosure would not affect the Nation's self-government because the Tribal Council had already passed an ordinance legalizing marijuana cultivation and use. The disclosure itself does not prevent the EDC from pursuing its development of a marijuana operation, but rather is threatened by the A.G.'s cease and desist letter, which relied on the laws of Arizona prohibiting the recreational use of marijuana. Moreover, the A.G. likely would have sent a similar letter at later date when the operations became large enough to become public knowledge.

Second, even assuming the operation was not discovered later and challenged by the A.G., the potential negative economic effects from stopping a marijuana operation are not sufficient to satisfy the second *Montana* exception. The marijuana operation is not yet in existence and its success and importance for providing services to members of the Nation is highly speculative. More fundamentally, permitting tribal jurisdiction under the second *Montana* exception "whenever the economic effects of [a tribe's] commercial agreements affect a tribe's ability to provide services to its members . . . would swallow the general rule." *Stifel*, 807 F.3d at 209. Such a broad rule would encompass virtually any business decision that would affect the Nation or its members. Thus, the second *Montana* exception is not satisfied because the Smiths' alleged disclosure of the plans to develop a marijuana operation does not threaten the Nation's integrity or impose catastrophic consequences.

C. In the Alternative, This Court Should Issue a Writ of Mandamus Ordering the Trial Court to Stay the Suit While the Smiths Seek a Ruling in the United States District Court for the District of Arizona.

A non-Indian may challenge a tribal courts' exercise of jurisdiction in federal court after exhausting the available tribal court remedies. *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). A non-Indian has exhausted the available tribal remedies following appellate review in the tribe's courts. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); *Enlow v. Moore*, 134 F.3d 993, 996–97 (10th Cir. 1998). Thus, even if this Court finds that Yuma Indian Nation courts have both personal and subject matter jurisdiction over the Smiths and this suit, the Smiths may challenge the tribal courts' exercise of jurisdiction in a federal district court.

Forcing the Smiths to litigate in a trial court that does not have jurisdiction over them will cause irreparable harm by causing them to expend unnecessary time, money, and effort to defend themselves. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011).

Because the Smiths face a significant risk of irreparable harm if the Court finds Yuma Indian Nation courts have jurisdiction, this Court should issue a writ of mandamus ordering the trial court to stay the suit while the Smiths seek a ruling in the United States District Court for the District of Arizona.

II. Neither Tribal Sovereign Immunity, Nor Any Other Form of Immunity, Bars the Smiths' Claims Against the Nation, the EDC, Fred Captain, or Molly Bluejacket.

Tribal sovereign immunity is "settled law" that protects tribal sovereignty. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1998). Nevertheless, sovereign immunity's protections are not absolute. *Id.* at 754. Sovereign immunity does not bar the Smiths' claims against the Nation. The Nation waived its immunity by entering into a contract with the Smiths that allowed any and all disputes arising from the contract to be litigated in a court of competent jurisdiction. The Nation also waived its immunity for the Smiths' contract claims by suing the Smiths for breach of contract. Furthermore, sovereign immunity should not bar the Smiths' defamation claims because doing so would be fundamentally unfair to tort victims.

In addition, sovereign immunity does not bar the Smiths' claims against the EDC. The EDC is not an arm of the tribe entitled to sovereign immunity because its corporate charter shields the Nation from the EDC's debts. Extending sovereign immunity to the EDC does not serve to advance the policies underlying the doctrine. Alternatively, the Nation waived any sovereign immunity the EDC might have enjoyed by including a "sue and be sued" clause in the EDC's charter.

Finally, sovereign immunity does not bar the Smiths' claims against Fred Captain, the EDC's CEO, or Molly Bluejacket, the EDC's accountant. Captain and Bluejacket did not act within the scope of their official capacities and a judgment against them will not harm the

Nation's treasuries. Qualified immunity also does not bar the Smiths' claims against Captain and Bluejacket because they unreasonably acted outside their delegated authority.

A. Sovereign Immunity Does Not Bar the Smiths' Claims Against the Nation.

Sovereign immunity does not protect tribes when "Congress has authorized the suit or if the tribe has waived its immunity." *Id.* The Nation waived its sovereign immunity, and independently, sovereign immunity should not protect the Nation from the Smiths' tort claims.

1. The Nation Waived Its Sovereign Immunity for Disputes Arising from Its Contracts with the Smiths.

First, the terms of the contracts between the Nation and the Smiths waived the Nation's immunity for claims arising from the contracts. Second, the Nation waived immunity for the Smiths' breach of contract claims when it filed its suit against the Smiths in tribal court.

a. The Nation Waived Its Sovereign Immunity for Disputes Arising from Its Contracts with the Smiths by Agreeing to the Contract Terms.

A tribe does not necessarily waive its sovereign immunity by entering into a commercial off-reservation contract. *See Kiowa*, 523 U.S. at 758. Nevertheless, a tribe may waive its immunity by entering into a contract that includes terms that waive immunity "with the requisite clarity." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). There are no "magic words" that must be included in a contract to waive immunity, but even "sparse" contractual language can be sufficient. *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562–63 (8th Cir. 1995). In *C & L Enterprises*, the Supreme Court held that a tribe waived its immunity by entering into a contract with an arbitration clause that could be enforced "in any court having jurisdiction thereof." 532 U.S. at 414. The Court reasoned that if the provision did not waive the tribe's immunity, the enforcement clause would be "meaningless." *Id.* at 422 (quoting *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)).

Here, the contract terms make it clear the Nation waived its immunity. The Nation entered into almost identical contracts with Thomas and Carol. Both contracts provided for "*any and all* disputes arising from the contract to be litigated in a court of competent jurisdiction." R. at 1 (emphasis added). The provision clearly waived the Nation's immunity from claims arising from the contract. Like the contract terms in *C & L Enterprises*, the provision identifying a forum to litigate disputes would be rendered meaningless if the Nation did not waive its immunity from suit. The inclusion of "any and all disputes," by its own terms, includes both claims asserted by and *against* the Nation. If Nation did not waive its sovereign immunity, claims against it could not be litigated in a court of competent jurisdiction. The Smith's breach of contract and tort claims clearly fall within the Nation's waiver. The contract claim arises from a dispute over the money owed and services performed under the contract. The defamation claim also arises from the contract because the defamatory words regarded the Smiths' professional services rendered under the contracts.

Moreover, the provision clearly waived the Nation's sovereign immunity even though it did not provide for arbitration. Cases examining whether contractual arbitration clauses waive tribal sovereign immunity focus on whether the contract terms allow for judicial enforcement of disputes. *See* William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, And Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 184 (1994). Lower courts have held that contracts that allow parties to subsequently litigate an arbitration result in court waive sovereign immunity. *See, e.g.*, *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30–31 (1st Cir. 2000) (contract waived immunity when arbitration was "specifically enforceable under prevailing law"); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th

Cir. 1996) (contract waived immunity when its terms allowed courts to review arbitration awards); *Val/Del, Inc. v. Super. Ct. of Ariz.*, 703 P.2d 502, 508 (Ariz. Ct. App. 1985) (contract waived immunity when arbitration judgment could be "entered in any court having jurisdiction thereof"). Courts have also found that agreements waive sovereign immunity when the terms allow courts to litigate disputes arising from the agreement, even when the agreement does not include an arbitration clause. *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (tribe waived immunity by entering into a treaty that agreed to submit fishing disputes to litigation). In contrast, contracts that include arbitration clauses but do not mention litigation in court do not waive a tribe's immunity. *See Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989). Thus, the critical issue is not the existence of an arbitration clause, but instead, whether the Nation agreed to litigate claims arising from the contract in court. Here, the contract terms explicitly state that disputes are to be litigated in a court of competent jurisdiction. Therefore, the Nation waived its immunity.

Finally, even if the Nation did not universally waive its sovereign immunity, the provision waived the Nation's immunity for suits arising out of the contract in its own courts. The Supreme Court's sovereign immunity jurisprudence governing States provides persuasive authority that the Nation waived its sovereign immunity for claims in tribal court. Supreme Court precedent provides that State statutes that authorize suits against a state in "any court of competent jurisdiction" expressly waive state sovereign immunity when the suit is brought in a state's own courts. *C & L Enters.*, 532 U.S. at 421 n.4. Tribal sovereign immunity is no broader than State or Federal sovereign immunity because it is based in the same source of "common-law immunity." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The Nation's contracts with the Smiths expressly provide that disputes should be resolved in "a

court of competent jurisdiction." Therefore, the Nation's sovereign immunity does not bar the Smiths' claims because the Smiths brought their claims in the Nation's courts.

b. The Nation Waived Its Sovereign Immunity for the Smiths' Breach of Contract Counterclaims by Initiating a Lawsuit for Contract Damages Against the Smiths.

In general, a sovereign's initiation of a lawsuit does not constitute a waiver of sovereign immunity for counterclaims brought by the defendant. *See McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). However, the Supreme Court has recognized an exception to this general rule. In the context of the United States' sovereign immunity, the Court held that the United States waives its sovereign immunity regarding all claims asserted by a defendant in recoupment when it initiates a lawsuit for contract damages. *Bull v. United States*, 295 U.S. 247, 260–63 (1935). Lower courts recognize this exception applies equally to tribal sovereign immunity. *Berrey v. Asarco Inc.*, 439 F.3d 636, 644 (10th Cir. 2006); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 553 (8th Cir. 1989).

Recoupment is "a defendant's right . . . to cut down the plaintiff's demand," because the plaintiff has failed to comply with a "cross obligation" of the contract or because the plaintiff failed to perform a legal duty created by the contract. *Ste. Marie v. Bouschor*, No. 276712, 2008 Mich. App. LEXIS 2266, at *36–38 (Mich. Ct. App. Nov. 18, 2008) (internal quotations omitted). A recoupment action has three requirements: (1) the counterclaim arises out of the same contract, (2) the counterclaim seeks similar "monetary relief," and (3) the waiver is only for an amount less than that sought by the Tribe. *A & P Steel, Inc.*, 874 F.2d at 552–53.

Here, the court should apply the recoupment exception because the Nation initiated a claim for contract damages and the Smiths' breach of contract counterclaim is a recoupment action. First, the counterclaim arises from the same set of contracts as the Nation's claims. The

Nation seeks liquidated damages as provided by the contracts, while the Smiths seek money owed under the contracts. Second, both the Nation's breach of contract claim and the Smiths' breach of contract counterclaim seek monetary damages. Finally, the Nation seeks liquidated damages, therefore, it waived its immunity for the Smiths' breach of contract counterclaim up to the liquidated amount.

2. The Nation Should Not Enjoy Sovereign Immunity from the Smiths' Tort Claim.

Sovereign immunity should not bar tort claims against the Nation because it is inherently unjust to tort victims. Allowing sovereign immunity to bar tort claims harms victims that unaware they are dealing with a tribe, who do not know of sovereign immunity, and who have "no opportunity to negotiate for a waiver of sovereign immunity." *Kiowa*, 523 U.S. at 758; *Id.* at 766 (Stevens, J., dissenting). Courts developed the doctrine to shield nascent tribal governments from outsiders, not as a "sword tribes may wield to victimize outsiders." *Ex parte Poarch Band of Creek Indians*, 155 So. 3d 224, 230 (Alaska 2014). Nothing in Supreme Court precedent requires a contrary result. Indeed, the Supreme Court has cautioned against "the wisdom of perpetuating" sovereign immunity for tort claims. *Kiowa*, 523 U.S. at 758. And, more recently, the Supreme Court has questioned "whether immunity should apply in the ordinary way if a tort victim . . . has no alternative way to obtain relief," noting that it may constitute a "special jurisdiction" for denying immunity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 n.8 (2014).

This case illustrates the fundamental unfairness of applying sovereign immunity to tort claims. Although the Nation impugned Smiths' professional skills, the Smiths will have no recourse for the Nation's tortious acts if sovereign immunity bars their claims. Therefore, the court should not apply sovereign immunity to the tort claims.

B. Sovereign Immunity Does Not Bar the Smiths' Claims Against the EDC.

The Supreme Court has never explicitly held that a corporation affiliated with an Indian tribe is protected by sovereign immunity. *See Inyo Cty. v. Paiute-Shoshone Indians of Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 n.1 (2003). The Court has, however, determined that tribal entities do not have their own sovereign immunity. *See id.*; *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E. 3d 928, 934 (N.Y. 2014). Instead, any immunity an entity may possess must flow from the Tribe itself. *See Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 69 (Cal. Ct. App. 1999). A tribe's immunity extends to a separate entity only if the entity is an "arm" of the tribe. *See Breakthrough Mgmt. Group v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010).

The EDC was created by corporate charter pursuant to 25 U.S.C. § 477 and is a "section 17 corporation." *See GNS, Inc. v. Winnebago Tribe*, 866 F. Supp. 1185, 1188–89 (N.D. Iowa 1994). Therefore, the EDC does not have sovereign immunity because it is not an arm of the tribe. In addition, the policy considerations underlying sovereign immunity counsel against extending sovereign immunity to the EDC. Finally, even if the EDC is an arm of the tribe, the Nation waived any immunity the EDC might have enjoyed by including a "sue and be sued" clause in the EDC's corporate charter.

1. The EDC Is Not an Arm of the Tribe.

The Supreme Court has never provided a specific test to determine when an entity is an arm of the tribe. Some lower courts apply a financial relationship test, while others use a multi-factor test to determine if a corporation is an arm of the tribe. The EDC is not an arm of the tribe under either test.

a. The EDC Is Not an Arm of the Tribe Under the Financial Relationship Test.

Under the financial relationship test, a corporation is not an arm of the tribe if a judgment against the corporation will not reach the tribe's assets. *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440–41 (Alaska 2004) (holding that the financial relationship was a threshold issue of "paramount importance"). This court should adopt the financial relationship test instead of a multi-factor test because the primary purpose of extending tribal sovereign immunity to tribal corporations is to prevent judgments against the corporation from depleting the tribal treasuries. *Id.* (analogizing tribal and state sovereign immunity). The purpose of protecting tribal treasuries is best served by focusing on the financial relationship when determining whether an entity is an arm of the tribe.

The EDC is not an arm of the tribe under the financial relationship test. Although the EDC pays a portion of its net profits to the Nation, the EDC may not borrow or lend money on the Nation's behalf or grant or permit liens or interests of any kind to attach to the Nation's assets. More fundamentally, its corporate charter legally insulates the Nation from the EDC's potential debts arising from the Smiths' claims by stating that "no debts of the EDC [can] encumber, or implicate in any way, the assets of the Nation." R. at 1. Neither the Smiths' claims against the EDC, nor any other claims against it, can deplete the Nation's treasuries. Thus, the EDC fails the financial relationship test and is not an arm of the tribe.

b. The EDC Is Not an Arm of the Tribe, Even If the Court Applies the Multi-Factor Test.

Under the multi-factor test, courts consider: (1) the financial relationship between the tribe and the entity; (2) the entity's method of creation; (3) the amount of control the tribe has over the entity; and (4) the purpose of the entity. *See Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1187–88.

The balance of the factors confirms the EDC is not an arm of the tribe. First, the legally insulated nature of the financial relationship weighs strongly against extending immunity to the EDC. Second, the method of creation weighs in favor of extending immunity to the EDC because it was incorporated under the Nation's Tribal Code and is called an "arm-of-the-tribe" in its charter. R. at 1. However, no court has found that the method of creation factor is alone dispositive. Third, the amount of tribal control is neutral. The EDC is operated by its own board of directors separate from the tribal council, however, the Nation retains authority to remove EDC directors. Fourth, the EDC's purpose weighs against extending immunity. An entity that operates with a business purpose is not an arm of the tribe, instead the entity must advance a governmental purpose. *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1111 (Ariz. 1989). Governmental purposes include "providing housing, health and welfare services." *Ransom v. St. Regis Mohawk Educ. & Comm. Fund*, 86 N.Y.2d 553, 558–59 (N.Y. 1995). The EDC is focused on developing a marijuana business, not providing services to the Nation or its members. Therefore, on balance, the factors weigh against finding that the EDC is an arm of the tribe.

2. Policy Considerations Weigh Against Extending Sovereign Immunity to the EDC.

In addition to determining whether an entity is an arm of the tribe, courts consider whether the policy considerations that underlie tribal sovereign immunity support the extension of sovereign immunity to the entity. Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 COLUM. L. REV. 173, 183, 186 (1988). The policies that underlie the sovereign immunity doctrine include: the protection of tribal assets, the preservation of tribal culture and self-determination, and the promotion of commercial dealings between Indians and non-Indians. *Dixon*, 772 P.2d at 1111.

Extending sovereign immunity to the EDC only serves to undermine these policies. First, extending immunity is not necessary to protect the Nation's assets because the EDC's charter shields the Nation from EDC debts. Moreover, there is nothing in the record to indicate that granting EDC immunity to develop an illegal marijuana business would preserve tribal culture and self-determination. It is more likely to expose the Nation's members to federal criminal charges under the Controlled Substance Act. *See* 21 U.S.C. §§ 801–904 (2012) (categorizing marijuana as a Class I controlled substance). Granting immunity does not advance the Nation's interest in self-determination because the EDC acted in contravention to its chartered purpose. In the charter, the Nation granted the EDC the authority to develop only "legal" businesses, however, its marijuana enterprise is illegal and beyond the scope of its authority. R. at 1. Furthermore, refusing to extend immunity to the EDC furthers the purpose of promoting commercial dealings between Indians and non-Indians because the suit involves disputes over the performance of a business contract between the EDC and non-Indians. Extending immunity too broadly may deter non-Indians from undertaking commercial activity relating to tribes, which has "deleterious effects on a tribe's economic development. *Dixon,* 772 P.2d at 1112. Therefore, sovereign immunity should not bar the claims against the EDC.

3. Even if the EDC Is An Arm of the Tribe, the Nation Waived Any Immunity the EDC May Have Enjoyed by Including a "Sue and Be Sued" Clause in the EDC's Corporate Charter.

A tribe has the authority to waive the sovereign immunity of an arm of the tribe. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492–93 (9th Cir. 2002). A tribe waives the sovereign immunity of a section 17 corporation by including a "sue and be sued" clause in the corporation's charter. *Id.*; *A & P Steel, Inc.*, 874 F.2d at 552. A sue and be sued clause in a corporate charter does not waive the tribe's own immunity, but does bar the corporation from asserting immunity as a defense. *Linneen,* 276 F.3d at 493. Here, the Nation's tribal code

authorizes it to waive the sovereign immunity of a tribal corporation. YUMA TRIBAL CODE § 11-1003(3) (2005). The Nation waived the EDC's immunity by including a sue and be sued clause in the EDC's charter.

Furthermore, the few cases that have held that "sue and be sued" clauses do not waive tribal sovereign immunity are distinguishable. For instance, in *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, the Sixth Circuit held that a "sue and be sued" clause in a charter did not waive immunity because the charter also required the board of directors approve all legal actions. 585 F.3d 917, 921–22 (6th Cir. 2009). That is not the case here because the EDC's charter does not contain such a qualification to the "sue and be sued" clause. Therefore, the Smiths' claims against the EDC are not barred by sovereign immunity.

C. Neither Sovereign Immunity, Nor Any Other Form of Immunity, Bars the Smiths' Claims Against Fred Captain and Molly Bluejacket.

Fred Captain and Molly Bluejacket are employees of the EDC. Captain is its CEO and Bluejacket is an accountant. The Smiths' claims against them are not barred because Captain and Bluejacket are not entitled to sovereign immunity or any other form of immunity.

1. Sovereign Immunity Does Not Bar the Smiths' Claims Against Captain and Bluejacket.

Sovereign immunity "does not immunize the individual members of the Tribe." *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165, 171–72 (1977). Rather, it flows from the tribe to individuals in limited circumstances. *Lewis v. Clarke*, 137 S. Ct. 1285, 1295 (2017). Therefore, sovereign immunity does not bar claims against individuals if the tribe does not possess immunity for those claims. *Trump Hotels & Casino Resorts Dev. Co. v. Rocow*, No. X03CV034000160S, 2005 Conn. Super. LEXIS 1215, at *20 (Conn. Super. Ct. May 2, 2005) (noting that individuals are not entitled to sovereign immunity if the tribe has waived

immunity). Thus, as a threshold matter, Captain and Bluejacket are not entitled to sovereign immunity because the Nation has waived its immunity.

Even if the Nation retains its sovereign immunity, it does not extend to Captain and Bluejacket. Sovereign immunity does not protect individuals if the tribe is not the real party in interest. *Lewis*, 137 S. Ct. at 1292. The tribe is the real party in interest only when the individuals are tribal officials acting in the scope of their official capacities. *Id.* at 1295. Furthermore, a tribe is not the real party in interest if a judgment against the individual is not binding against the tribe's own treasuries. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1087–90 (9th Cir. 2013). Therefore, sovereign immunity does not extend to Captain and Bluejacket because they are not tribal officials acting in the scope of their official duties and the Nation will not bound by a judgment against Captain and Bluejacket.

a. The Nation Is Not the Real Party in Interest Because Captain and Bluejacket Are Not Tribal Officials Acting in the Scope of Their Official Duties.

Captain and Bluejacket are not tribal officials but businesspeople. Captain and Bluejacket are employed by the EDC as its CEO and accountant. Neither Captain nor Bluejacket work for or perform duties on behalf of the Nation.

Even if they are tribal officials, the EDC employees did not act within the scope of any official duties for either the contract or tort claim. First, Captain and Bluejacket did not act within the scope of their official duties when they failed to pay the Smiths the amount owed under their contract. Individuals do not act within the scope of their official duties when they act in violation of state law. *Rocow*, 2005 Conn. Super. LEXIS 1215, at *20 (citing *Puyallup Tribe, Inc.*, 433 U.S. at 171–72). Furthermore, individuals do not act within in the scope of their official duties if they take actions that are beyond the authority granted to them by the tribe. *See Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 308 (N.D.N.Y. 2003). In

contrast, individuals act within the scope of their official duties when they carry out orders given to them by a tribe or a tribal council. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–80 (9th Cir. 1985). Here, the EDC employees violated state law and there are no facts in the record that indicate that the Nation ordered the EDC employees to cease payments to the Smiths. Thus, sovereign immunity does not bar the contract claim.

Moreover, Captain and Bluejacket acted outside the scope of their official duties when they defamed the Smiths by impugning their professional skills. Individuals do not act within the scope of their official duties when they commit torts, even if they are acting within the scope of their employment, because the wrongdoer and target of the suit is the individual defendant. *Lewis*, 137 Sup. Ct. at 1292. Here, the EDC employees defamed the Smiths and are the tortfeasors. Their status as employees of the EDC is not sufficient to protect them from suit. Thus, sovereign immunity does not bar the Smiths' tort claim.

b. The Nation Is Not the Real Substantial Party at Interest Because the Nation Will Not be Bound by a Judgment Against Captain and Bluejacket.

Courts consider whether a tribe will be bound by a judgment against an individual defendant to determine whether an individual is entitled to sovereign immunity. *Id.* at 1294 (rejecting the application of sovereign immunity when a judgment would not bind the tribe); *Maxwell*, 708 F.3d at 1088 (conducting a "remedy-focused" analysis). If "the relief is sought not from the [government] treasury but from the officer personally," the tribe is not the real party in interest and sovereign immunity does not apply. *See Alden v. Maine*, 527 U.S. 706, 757 (1999) (state sovereign immunity); *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015) (tribal sovereign immunity); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296–97 (10th Cir. 2008) (tribal sovereign immunity).

The Nation is not the real party at interest for the Smiths' claims against Captain and Bluejacket. For both the breach of contract and defamation claims against Captain and Bluejacket, the Smiths seek monetary relief from the individuals. The Nation is not legally required to pay for a judgment against Captain or Bluejacket because they are employees of the EDC, not the Nation itself. In fact, the EDC's charter clarifies that actions taken by the EDC do not encumber the Nation's assets "in any way." R. at 2. Therefore, the Nation is not the real party in interest because the relief sought from Captain and Bluejacket is not from the Nation's treasury. Therefore, sovereign immunity does not bar the Smiths' claims.

2. Qualified Immunity Does Not Bar the Smiths' Claims Against Captain and Bluejacket.

Each sovereign may define the limits of personal immunities afforded to its officials in its own courts. *Stone v. Somday*, No. APCV82-208, 1984 Colville App. LEXIS 1, *6 (Colville May 6, 1984) (tribal court holding that it had authority to determine its own qualified immunity doctrine). The official seeking protection from suit has the burden of proving qualified immunity. *See Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997). Qualified immunity should not protect Captain and Bluejacket because (1) they acted outside the scope of the authority granted to them by the Nation, (2) they acted unreasonably, and (3) the purpose of the qualified immunity doctrine is not served by shielding them from suit.

First, qualified immunity should not protect Captain and Bluejacket because they acted outside the scope of the authority delegated to them by the Nation. While some tribal courts have granted tribal officials qualified immunity, tribal officials do not receive qualified immunity if they exceed the scope of the authority granted to them by a tribe. *Id.* at 6–9; *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 658 (Ariz. 1971). Captain and Bluejacket were not acting within the scope of the authority granted to them because the Nation

did not authorize them to breach the contracts or defame the Smiths. Thus, qualified immunity does not apply.

Second, qualified immunity should not protect Captain and Bluejacket because they acted unreasonably. Even if the EDC employees acted within the scope of their delegated authority, they are not entitled to qualified immunity. Immunity for tribal officials does not protect individuals "who willfully violate a known right." *Gavle v. Little Six, Inc.*, No. C5-99-430, 2000 Minn. App. LEXIS 42, at *12–16 (Minn. Ct. App. Jan. 11, 2000). Qualified immunity only protects individuals who act with "objectively reasonable reliance on existing law." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). Captain and Bluejacket violated the Smiths' known contractual rights and acted unreasonably in light of existing tort law when they defamed the Smiths. Thus, qualified immunity does not apply.

Third, the purpose of the doctrine of qualified immunity is not served by protecting Captain and Bluejacket from suit. The purpose of qualified immunity is to protect government officials who must make swift discretionary decisions in the course of their official duties "from the fear of personal liability that might deter independent action." *Terwilliger v. Hennepin Cnty.*, 561 N.W.2d 909, 913 (Minn. 1997). Therefore, the government's interest in protecting its officials is strongest when an official has broad discretion and must make quick decisions in their official capacity. *See Gavle*, 2000 Minn. App. LEXIS 42, at *13. For example, qualified immunity's purpose is well served when applied to a police officer engaged in a high-speed chase and should protect the official from suit. *Id.*

However, qualified immunity should not protect officials that are not required to make quick decisions as part of their official duties. *Id.* In cases without swift discretionary decision-making, the government interest in protecting officials is outweighed by society's interest in

having cases decided on the merits and the injured party's interest in obtaining full and fair relief. For example, in *Gayle*, a tribal casino manager was not protected by qualified immunity because high pressured and quick decision-making was not involved in casino administration, despite being in a leadership position in the business. *Id.* at *13–16.

Here, the purpose of qualified immunity is not served by protecting Captain and Bluejacket from suit. The position of CEO or accountant of a section 17 corporation's marijuana business is more similar to a tribal casino manager than a police officer making split-second decisions in the line of duty. Therefore, qualified immunity should not protect Captain and Bluejacket.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and hold that Yuma Indian Nation courts do not have personal or subject matter jurisdiction over the Smiths, or in the alternative, the Court should issue a writ of mandamus ordering the trial court to stay the suit while the Smiths seek a ruling on jurisdiction in the United States District Court for the District of Arizona. The Court should hold that neither sovereign immunity, nor any other form of immunity, bars the Smiths' claims against the Nation, the EDC, Fred Captain, or Molly Bluejacket.