In the Supreme Court of the Yuma Indian Nation

THOMAS SMITH and CAROL SMITH,

Appellants/Petitioners,

v.

YUMA INDIAN NATION; YUMA INDIAN NATION ECONOMIC DEVELOPMENT CORPORATION; FRED CAPTAIN, in his individual and official capacities; and MOLLY BLUEJACKET, in her individual and official capacities.

Appellees/Respondents.

On Interlocutory Appeal from the Yuma Indian Nation Trial Court

BRIEF FOR APPELLANTS/PETITIONERS

Team 114

Counsel for Appellants/Petitioners

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I. Do Yuma Indian Nation courts have personal and subject matter jurisdiction over Appellants/Petitioners Thomas Smith and Carol Smith (the "Smiths") and their claims, or in the alternative, should this Court should order a writ of mandamus for the trial court to stay this suit while the Smiths seek a ruling on that question in the Arizona Federal District Court?

II. Did the trial court err by ruling sovereign immunity protects the Yuma Indian Nation, the Economic Development Corporation, Mr. Captain, and Ms. Bluejacket from the Smiths' claims?

STATEMENT OF THE CASE

I. Statement of Facts

This case is about respecting and upholding the doctrines which comprise inherent sovereignty, while recognizing the boundaries of those doctrines. In 2007, the Yuma Indian Nation ("YIN" or "Nation") signed a contract with Thomas Smith ("Mr. Smith"), a certified financial planner. R. at 1. Under that contract, Mr. Smith agreed to provide the Nation with financial advice on an as-needed basis regarding tribal economic development issues. Id. the contract was signed at Mr. Smith's office in Phoenix, Arizona, where he lives and works. Id. The contract between the Nation and Mr. Smith required Mr. Smith to maintain confidentiality regarding tribal communications and economic development plans, and provided for "any and all disputes arising from the contract to be litigated in a court of competent jurisdiction." Id.

With the express – in fact, written – permission of the YIN Tribal Council ("Tribal Council"), in 2010 Mr. Smith extended a contract to his sister, Carol Smith ("Ms. Smith"), for Ms. Smith to provide financial advice as a licensed stockbroker to the Nation, and to the Economic Development Corporation ("EDC"). R. at 2. Ms. Smith lives and works in Portland, Oregon and has only been to the Yuma Indian Nation's reservation twice, both times while on vacation and not as part of her contracted work. Id. Ms. Smith submits monthly bills via email to the EDC Chief Executive Officer, Fred Captain ("Mr. Captain"), and the EDC in turn mails her payments for her work. Id.

Tribal Council formed the Economic Development Corporation in 2009 under a tribal commercial code authorizing the Nation to create and charter public and private corporations to operate business on and off the reservation. R. at 1. Tribal Council created the EDC via a

corporate charter as a wholly owned subsidiary of the Nation, and purportedly as an "arm-of-the-tribe." Id. As stated in its corporate charter, the EDC's primary purpose is "to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation an in southwestern Arizona." Id. Under its charter, the EDC is to be operated by its own five-member board of directors, three of whom must be citizens of the Yuma Indian Nation. Id. The initial directors were selected by Tribal Council with staggered terms, Tribal Council retaining the authority to remove a director with or without cause by a 75% vote. Id. Subsequent directors must be replaced or re-elected by a majority vote within the board. Id.

Tribal Council authorized the EDC to buy and sell real property in fee simple title on or off the reservation, to buy any other types of property in whatever form of ownership, and to sue and be sued. R. at 2. Tribal Council also provided that no debts of the EDC may encumber, or implicate in any way, the assets of the Nation. Id. Further, Tribal Council did not give the EDC the power to borrow or lend money in the name of, or on behalf of, the Nation, or to grant or permit any liens or interests of any kind to attach to the Nation's assets. Id. Upon forming the EDC, Tribal Council funded it with a one-time $10 million loan from the Nation's general fund and provided that half of all EDC net profits were to be paid back into the general fund on an annual basis. R. at 1, 2. To date, the EDC has only been able to repay $2 million of that loan. R. at 2.

Several years into its working relationship with the Smiths, Tribal Council enacted a tribal ordinance making marijuana cultivation and use legal across the entire reservation for any and all purposes. R. at 2. The EDC, already investigating the possibility of marijuana cultivation and sales, began surreptitiously pursuing the development of a marijuana

operation. Id. Marijuana is legal under Arizona state law for medical use only, R. at 2, and is illegal for all purposes under federal law. *See* 21 U.S.C. § 801 et seq. Mr. Smith, contracted for his financial advice regarding economic development, was opposed to involvement in development of a marijuana operation. R. at 1, 2. After conferring with the EDC about marijuana development, Mr. Smith had no choice but to inform the Arizona Attorney General of the Nation's plans; the Attorney General in turn issued a cease and desist letter, asking to the Nation to halt its development of recreational marijuana operations. R. at 2.

II. Statement of Proceedings

Following receipt of the Arizona Attorney General's cease and desist letter, the YIN Tribal Council hastily filed suit against Mr. Smith and Ms. Smith for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality, Case No. 17-024 R. at 3. The Smiths subsequently filed special appearances and identical motions to dismiss the suit against them, as the Nation and Tribal Court lack personal jurisdiction and subject matter jurisdiction over them and the suit and, in the alternative, for the trial court to stay the suit while the Smiths sought a ruling in Arizona District Court on the Tribal Court's jurisdiction over them. Id. After the trial court denied their motions, the Smiths filed answers under their special appearances, denying the Nation's claims against them and counterclaiming against the Nation (as well as impleading the EDC, Mr. Captain, and Ms. Bluejacket) for monies due under their contracts and for defamation for impugning their professional skills. Id. The trial court dismissed the Smiths' counterclaims against the Nation as well as their claims against the EDC, Mr. Captain, and Ms. Bluejacket, erroneously finding all were protected by tribal sovereign immunity. Id. The Smiths filed an interlocutory

appeal before the Yuma Indian Nation Supreme Court on two questions (*infra*), and the Supreme Court granted review. Id.

SUMMARY OF ARGUMENT

This case is about respecting and upholding the doctrines of tribal court jurisdiction and tribal sovereign immunity. These doctrines are central to the inherent sovereignty of the Yuma Indian Nation but, as with all doctrines, they are not without limits. Here, neither Appellant/Petitioner Thomas Smith nor Appellant/Petitioner Carol Smith are subject to the personal jurisdiction of the Yuma Indian Nation courts; further, the Yuma Indian Nation Courts do not have subject matter jurisdiction over their claims. Finally, neither the Yuma Indian Nation, the Economic Development Corporation, Mr. Captain, or Ms. Bluejacket are shielded from the Smiths' claims by tribal sovereign immunity. The trial court erroneously found all to be shielded from the Smiths' claims, and must be reversed.

The Yuma Indian Nation does not have personal jurisdiction over the Smiths nor subject matter jurisdiction over their claims because the Smiths do not have the requisite minimum contacts necessary to establish such jurisdiction and do not fall within any of the exceptions provided in *Montana v. United States*, 450 U.S. 544 (1981). Further, even if jurisdiction over the Smiths and their clams can be established, the Smiths have exhausted their tribal court remedies and are consequently permitted to seek redress in federal court.

The Yuma Indian Nation does not enjoy sovereign immunity from the Smiths' counterclaims against it because the Nation expressly waived its immunity when it agreed to litigate all claims arising from its contracts with the Smiths "in a court of competent jurisdiction," and by signing its contract with Mr. Smith at his office in Phoenix, Arizona. The policies behind tribal sovereign immunity furthermore do not support shielding the

Nation from the Smiths' claims. Next, Tribal sovereign immunity does not extend to the Economic Development Corporation because and EDC does not function as an "arm of the tribe," and additionally because the EDC waived any immunity it might have enjoyed by providing a "sue and be sued" clause in its corporate charter. Finally, Mr. Captain and Ms. Bluejacket, as EDC Chief Executive Officer and Accountant, respectively, do not enjoy sovereign immunity from the Smiths' claims both because they have been sued in their individual capacity and, to the extent they have been sued in their official capacity, remedies against them would not operate against the Nation.

For these reasons, Mr. Smith and Ms. Smith respectfully request this Court to find the Yuma Indian Nation courts do not have personal jurisdiction over them or subject matter jurisdiction over their claims, and to reverse the trial court by finding that neither the Yuma Indian Nation, the Economic Development Corporation, Mr. Captain, or Ms. Bluejacket are shielded from the Smiths' claims by tribal sovereign immunity. In the alternative, Mr. Smith and Ms. Smith respectfully request this Court to issue a writ of mandamus for the trial court to stay the proceedings, so the Smiths may seek a ruling from the Federal District Court of Arizona on the question of the Yuma Indian Nation courts' personal jurisdiction over them and subject matter jurisdiction over their claims.

ARGUMENT

I. The Yuma Indian Nation Lacks Personal and Subject Matter Jurisdiction over Thomas and Carol Smith.

The tribe does not have personal or subject matter jurisdiction over the Smiths under the "minimum contacts" rule as provided by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Additionally, the Smiths have not purposely availed themselves of the tribe's benefits and protections as required by *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A. Thomas and Carol Smith Do Not Have the Requisite Minimum Contacts Necessary for the Yuma Indian Nation to Exercise Jurisdiction.

To obtain jurisdiction over a defendant, that defendant must have "certain minimum contacts" with the forum state and having jurisdiction cannot violate "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The "minimum contacts" with the forum state should be of the nature that a defendant could reasonably anticipate being haled into court within the jurisdiction because he purposefully availed himself of the privilege of conducting activities within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). It is reasoned that if the defendant engaged in significant activities within the forum, he would have been protected by the benefits and protections of the forum's laws, and it is therefore not unreasonable for him to submit to the burdens of litigation in that same forum. Furthermore, such activities would also "reinforce the reasonable foreseeability of suit" within the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Purposeful availment requires that a defendant will not be haled into a jurisdiction based solely upon "random," "fortuitous," or "attenuated" contacts. *Keeton v. Hustler*

Magazine, Inc., 465 U.S. 770, 774 (1984); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 299. Though, jurisdiction is proper when the contacts result from the defendant's own actions, and those actions create a "substantial connection" with the forum. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). A defendant has availed herself of the benefits and protections of a forum's laws when she has deliberately engaged in significant activities within a forum, *Keeton,* 465 U.S. 781, or has created "continuing obligations and relationships with citizens" of the forum, *Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647 (1950).

Once it has been determined that a defendant has minimum established contacts within the forum, these contacts may be considered to determine whether jurisdiction would "offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Wash., 326 U.S. at 316; *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). In such cases, the courts "may evaluate the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *Burger King Corp.*, 471 U.S. at 477; *World-Wide Volkswagen* Corp., 444 U.S. at 292.

Specific jurisdiction may also be obtained under the *Calder* effects test. According to *Calder*, if the defendant's actions were "calculated to cause injury" within the forum, and the brunt of that injury is felt there. *Calder v. Jones*, 465 U.S. 783, 789-791 (1984).

The Smith's contacts with the Yuma Indian Nation were attenuated and not a result of their own actions as required by *Keeton, World-Wide Volkswagen,* and *McGee.* The contracts the Smiths had with the YIN were to give financial advice on an as-needed basis—because of

this, the YIN reached out to the Smiths whenever they wished to utilize their services. Furthermore, the Smiths did not avail themselves of any of the benefits and protections of the forum's laws. Thomas Smith was physically present only four times a year, and Carol Smith has only set foot on the reservation twice.

Because the Smiths do not have the requisite minimum established contacts, it would offend traditional notions of fair play and substantial justice to subject these unwilling defendants to tribal jurisdiction. The Smiths demonstrated this by not explicitly agreeing to be subject to tribal jurisdiction, and continuously making special appearances in tribal court. Regarding specific jurisdiction, the Smiths actions do not fit within the framework of *Calder*. Their opposition to marijuana cultivation does not equate to a calculated motivation to injure the YIN, nor does any alleged contractual violation amount to an injury the brunt of which would be felt by the tribe. Due to a lack of minimum contacts, no purposeful availment, and absence of calculated injurious actions, it would be a violation of due process to submit the Smiths to tribal jurisdiction.

Furthermore, the long-arm provision of the tribal code does not comport with the aforementioned requirements of due process. Regarding personal jurisdiction over non-Indians, 1 Y.I.N.T.C. § 104 (2015) states that "(a) 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 or by promissory estoppel or alleging fraud; (b) Any person who owns, uses, or possesses any property within the reservation, for any civil cause of action prohibited by this Code or other statute of the Tribe arising from such ownership use or protection (c) Any person who commits a tortious act on or off the reservation or engages in tortious conduct within the reservation, either in

person or by agent or representative, causing harm within the reservation for any civil cause of action arising from such act or conduct." Subsection (a) does not apply because the Smiths actions do not fall within the first exceptions designated by *Montana v. United States*, 450 U.S. 544 (1981). *See* B. *infra*. The Smiths were not in the required "consensual" relationship with the tribe, nor did they expressly consent to tribal jurisdiction in their contracts. Subsection (b) is inapplicable because the Smiths do not own property on the reservation, and obtaining jurisdiction over a defendant for mere occasional use of reservation property for work purposes extends beyond the reach of *International Shoe's* minimum contacts requirement and violates due process. Furthermore, because the torts allegedly committed by the Smiths did not take place on the reservation, Subsection (c), like (a), is limited by the first *Montana* exception. *See* B. *infra*.

B. The Activities Conducted by the Smiths Do Not Fall Within Any of the *Montana* Exceptions.

Montana states the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). Although the holding in *Montana* was limited to tribal regulation, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) extended the ruling to include tribal court jurisdiction as well. Given these holdings, "efforts by a tribe to regulate nonmembers… are presumptively invalid" and "the burden rests on the tribe to establish one of the exceptions to *Montana's* general rule." *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 330 (2008).

The first *Montana* exception states that a tribe may "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships

with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Furthermore, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) states that *Montana*'s consensual relationship exception requires that the tax or regulation imposed by the tribe must have a nexus to the consensual relationship itself. Further clarified, "a nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another." *Id.* In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the defendant had a contract with the tribe to render landscaping services and was involved in a collision on reservation land. It was found that the tribe did not have jurisdiction over the defendant because his conduct was not sufficiently related to his consensual relationship with the tribe. *Strate* is applicable here because the Smiths have contracts with the Yuma Indian Nation to provide financial advice, not to support their endeavors to subvert state and federal laws regarding recreational marijuana use.

The second *Montana* exception provides that a tribe retains the power to exercise civil authority over nonmember conduct when that 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 566. The exception is limited, and does not allow for tribal jurisdiction "beyond what is necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564. *Plains Commerce Bank, 554 U.S.* at 341, restricts the exception even further by stating that if the tribe wants to exercise jurisdiction over the nonmembers conduct, "th[at] conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community." *Plains Commerce Bank* involved the sale of formerly Indian owned fee-land to a third party. The court found that while the action was "disappointing," it could not be fairly labeled as "catastrophic." *Id.* at 341. Here, the Smith's alleged actions are by no

means catastrophic to the tribe. One indication is the liquidated damages provision of the contract—which is the remedy the tribe is ultimately seeking. In providing said remedy, it was reasonably foreseeable to the YIN that a breach could occur at some point during their agreement with the Smiths. It follows that an alleged breach of two contracts—out of the many contracts the tribe likely enters into— would be disappointing, not catastrophic. Additionally, the tribal council painstakingly constructed the EDC so that it would operate as an "arm of the tribe" and cannot burden the YIN with debts, nor could it implicate the tribe's assets in any way. Because of this, the EDC's inability to develop recreational marijuana operations could not be catastrophic to the tribe because the YIN ensured that such an occurrence could never take place.

II. If Jurisdiction Is Found, the Smiths Have Exhausted Their Tribal Court Remedies, as Required by *National Farmers Union*, and Are Permitted to Seek Redress in Federal Court.

National Farmers Union states that tribal courts shall be given a full opportunity to evaluate whether it has jurisdiction over a matter. *National Farmers Union*, 471 U.S. 845, 857 (1985). *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) interpreted this requirement to mean that "exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." This holding is limited by *Strate*, 520 U.S. 438, 450, 453, which states that the tribal court exhaustion requirement from *National Farmers Union* is not a jurisdictional rule, but is instead a "prudential" rule. *National Farmers Union* also provides three exceptions to tribal court exhaustion: (1) when assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) when the action is patently violative of express jurisdictional prohibitions, or (3) where exhaustion would be futile because of the lack of an adequate

opportunity to challenge the court's jurisdiction. *Id.* at 857. In this case, a review of jurisdiction by the YIN Supreme Court (1 Y.I.N.T.C. § 202(2) (2015) "The Winnebago Supreme Court of Appeals shall be the appellate court for the Winnebago Tribe of Nebraska") is not necessary because it is patently clear that the tribal court is going out of its way to deny the Smiths a forum in which their claims can be heard. The trial court denied the Smith's motions for lack of jurisdiction in addition to denying all their claims against the YIN and third-party defendants. It is clear that the YIN trial court is acting in bad faith. In denying all of the Smiths claims without analyzing any of the merits, the court effectively declared that the Smiths should be subject to their jurisdiction—but only in terms of potential negative judgments against them.

III. Neither Sovereign Immunity, Nor Any Other Form Of Immunity, Shields the Yuma Indian Nation, the Economic Development Corporation, Mr. Captain, or Ms. Bluejacket from the Smiths' Claims.

Indian tribes, as domestic dependent nations, exercise inherent sovereign authority over their lands and members. *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1831). Tribal sovereignty serves the primary purpose of promoting tribal economic development and self-sufficiency. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757 (1998). The focus of tribal sovereignty is "what is necessary to protect tribal self-government or to control internal relations." *Montana v. United States*, 450 U.S. 544, 564 (1981). As a matter of both tribal and federal law, tribes possess sovereign immunity and are subject to suit only where Congress has expressly authorized the suit or where a tribe has clearly waived its sovereign immunity. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*,

436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). *See also Johnson v. Navajo Nation*, 1987 Navajo Sup. LEXIS 15 (Nav. Sup. Ct., 1987). Tribal sovereign immunity may only extend to a tribal entity, including a tribal corporation, if it functions as an "arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008). Tribal sovereign immunity does not, however, extend to tribal officers or employees, even when acting in their official capacity, if a remedy against them would not operate against the tribe employing them. *Lewis v. Clarke*, 137 S.Ct. 1285 (2017); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Here, the Yuma Indian Nation does not enjoy sovereign immunity over the Smiths' counterclaims because it expressly waived its immunity when agreeing in its contract with Thomas Smith to litigate all disputes arising out of the contract in a "court of competent jurisdiction," and by signing the contract at his office in Phoenix, Arizona. Further, the YIN Economic Development Corporation does not enjoy tribal sovereign immunity both because it does not function "as an arm of the tribe," and because it waived any sovereign immunity it might have enjoyed by including a "sue and be sued" clause in its corporate charter, which was approved by the Nation. Finally, tribal sovereign immunity does not extend to Mr. Captain or Ms. Bluejacket, respectively the EDC Chief Executive Officer and Accountant, both because they have been sued in their individual capacities and, to the extent they have been sued in their official capacities, not only would a remedy against them *not* operate against the Nation, but the Nation has waived its sovereign immunity.

A. The Yuma Indian Nation Does Not Enjoy Sovereign Immunity From The Smiths' Counterclaims Against It.

Tribal sovereign immunity is a core principle of every tribe's inherent sovereignty. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831). In keeping with that sovereign authority, however, a tribe is not immune from suit where it has expressly waived its immunity. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 412 (2001); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Not only has the Nation expressly waived its sovereign immunity by agreeing to litigate all claims arising from its contracts with the Smiths "in a court of competent jurisdiction" and by signing the initial contract with Mr. Smith at his office in Phoenix, Arizona, but the policies which initially shaped the doctrine of tribal sovereign immunity and comprise it now simply do not support its application to the Smiths' claims.

1. The Nation expressly waived its sovereign immunity from the Smiths' counterclaims.

Tribes can waive their own sovereign immunity, but that waiver must be unambiguous. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). Provisions of a contract may constitute an express waiver of tribal immunity to suit where the contract itself does not mention sovereign immunity or a waiver. *Id.* at 418-420, 423. In *C & L Enterprises*, a unanimous Supreme Court found that the Citizen Band Potawatomi Indian Tribe of Oklahoma had expressly waived its sovereign immunity by agreeing to arbitrate all claims arising from the contract "in a court of competent jurisdiction," and by including a choice-of-law provision directing that the contract would be governed by the law of the place where the performance agreed to in the contract, a construction project, was located. 532 U.S. at 412. The contract between the

Nation and the Smiths readily satisfies both prongs of the test established by the Supreme Court in *C & L Enterprises*.

First, the Nation waived its sovereign immunity with respect to the Smiths' counterclaims by providing in its contract with Mr. Smith that all disputes would be "litigated in a court of competent jurisdiction." *See* R. at 1. Although the contract in *C & L Enterprises* provided for arbitration of all disputes arising from the contract, litigation is equally binding and therefore can be easily analogized for the purpose of a sovereign immunity waiver. The first prong of the test established by *C & L Enterprises* is easily satisfied.

Second, the Nation further waived its sovereign immunity when it signed the contract with Mr. Smith in Phoenix, Arizona, his place of business, and subsequently authorized him to enter into an identical contract with Ms. Smith. R. at 1, 2. The choice-of-law provision present in *C & L Enterprises* provided for the law of the place of performance to govern the contract at issue. 532 U.S. at 412. That choice-of-law provision is commonplace and is found here as well. Foundational conflict of law principles dictate that in a contractual setting, the law of either the place where the parties made the contract or the place of performance generally governs their dealings under the contract. *See* Restatement of Conflict of Laws §§ 311, 355 (1934). In this case, as Phoenix, Arizona is both the place where the contract was signed and the place where Mr. Smith conducts business (the performance the Nation contracted him for). Arizona law governs regardless of which test is used.

To a unanimous Supreme Court in *C & L Enterprises*, Oklahoma law governing the contract paired with the agreement to arbitrate "in a court of competent jurisdiction" constituted an express waiver by the tribe of its sovereign immunity from claims arising from

that contract. 532 U.S. at 412-413. Here, Arizona law governing the contract paired with the agreement to litigate "in a court of competent jurisdiction" similarly constitutes an express waiver by the Yuma Indian Nation of its sovereign immunity from claims arising from its contract with Mr. Smith. Further, by expressly authorizing an identical contract with Ms. Smith, the Nation similarly waived its immunity under her contract. The Nation is therefore not shielded from the Smiths' claims by its sovereign immunity.

2. The policies behind tribal sovereign immunity are not served by shielding the Nation from the Smiths' counterclaims.

There are several public policy concerns at play regarding the Nation's use of sovereign immunity against the Smiths' claims. First, there is a complete and total lack of support by the policy considerations which formed the foundation of the doctrine of tribal sovereign immunity for its application here. Second, tort liability is not an appropriate application of tribal sovereign immunity, particularly where the victims of the tort have no alternative relief. Finally, by leapfrogging the State of Arizona with its legalization of recreational marijuana, the Yuma Indian Nation has created what might be viewed as an island of illegality, exposing itself to greater legal scrutiny and undermining the state and federal interests implicated by the doctrine of tribal sovereign immunity.

Early cases upheld the doctrine of tribal sovereign immunity in part out of concern for the threat posed to tribal treasuries by subjecting them to suit. See, e.g., *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 13 (1831) (finding a lack of jurisdiction over the Cherokee Nation absent its consent, and analogizing the federal-tribal trust relationship as one of a guardian to its ward). More recently, the purpose of tribal sovereign immunity has been articulated as being "a corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). In

the present case, the Yuma Indian Nation appears to have done its best to insulate the tribal treasury from any liability incurred by the Economic Development Corporation or its officers and employees through the tribal corporate charter and has effectively created an island of illegality to provide for recreational use of marijuana, thereby eliminating public policy support for shielding the Nation from the Smiths' claims.

Tribal sovereign immunity should not apply to tortfeasors. "It has been the settled policy of the United States not to authorize [suits against tribes] except [where] public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction." *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895) (citing *Beers v. Ark.*, 61 U.S. 527 (1857)). Such jurisdiction over the Nation is certainly required here. The Smiths each entered into contracts to provide professional financial advice to the Yuma Indian Nation. R. at 1, 2. The Nation subsequently began to covertly research and develop marijuana, a substance illegal to use recreationally under Arizona law and illegal to use both recreationally and medicinally under federal law. R. at 2. The Smiths found themselves between the proverbial rock and a hard place, seemingly contractually bound to advise on the development of a substance to which they were not only personally opposed, but for which they might face criminal liability under either Arizona or federal law. Upon Mr. Smith's decision to blow the whistle on the Nation's activities, the Yuma Indian Nation, Economic Development Corporation, Mr. Captain, and Ms. Bluejacket defamed both him and Ms. Smith. "In this economic context, immunity can harm those who … do not know of tribal immunity, or who have no choice in the matter, as in tort victims." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). *See* also *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2036 (2014) (questioning whether sovereign

immunity is appropriate if a tort victim has no alternative relief). Defamation - a tort - is not a liability from which sovereign immunity was meant to shield tribes. Further, because the Smiths contract directly with the Nation, only the Nation is liable for claims arising from those contracts. If the Nation can claim immunity, the Smiths have no alternative relief. This Court not only has jurisdiction over the Nation, but public policy dictates the Court should exercise its jurisdiction over the Yuma Indian Nation.

Finally, the principle that tribes "have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980)). In this case, neither federal nor state (nor, for that matter, tribal) interests are served by the Nation's marijuana carte blanche: The federal government has doubled down on enforcement of marijuana under the Controlled Substances Act, 21 U.S.C. § 801 et seq., making marijuana development in Indian Country an uncertain if not reckless endeavor for not only tribes, but particularly for associates of a tribe involved in that development. See, e.g., *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2015). Further, the doctrine of tribal sovereign immunity as applied to the Smiths' claims against the Yuma Indian Nation would so impermissibly burden the ability of the State of Arizona to administer its criminal laws regarding recreational marijuana as to justify the abandonment of the doctrine in connection with the Nation's efforts to develop recreational marijuana. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991). This was the sole request of the Arizona Attorney General in her cease and desist letter. R. at 2. By leapfrogging the State of Arizona with its aggressive legalization of

marijuana, the Nation has failed to accommodate background state and federal interests implicated by the doctrine of tribal sovereign immunity. Refusing to uphold the Yuma Indian Nation's sovereign immunity in a case where the Nation's contracted financial advisors merely sought to distance themselves from such activities is an appropriate remedy.

Not only do public policies forming both the foundation of tribal sovereign immunity and its current application dictate that the Nation should not be shielded from the Smiths' claims by its immunity, but the Nation has expressly waived that immunity.

B. Tribal Sovereign Immunity Does Not Extend To the Economic Development Corporation, and So Does Not Shield It From the Smiths' Claims Against It.

The United States Supreme Court has never held that tribal corporations enjoy tribal sovereign immunity. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 548 (2014). Further, any tribal sovereign immunity enjoyed by the Yuma Indian Nation cannot extend to the Economic Development Corporation because the Yuma Indian Nation does not function as an arm of the tribe. Additionally, the Economic Development Corporation is not protected by sovereign immunity because the Yuma Indian Nation waived any sovereign immunity the EDC may have enjoyed by including a "sue and be sued" provision in its corporate charter.

1. The EDC does not function as an "arm-of-the-tribe."

The Ninth Circuit Court of Appeals has found entities (including corporations) established by a tribe only enjoy the tribe's sovereign immunity if the entity "*functions* as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (emphasis added); *Cook v. AVI*

Casino Enterprises, Inc., 548 F.3d 718, 725 (9th Cir. 2008). Conversely, an entity that does not function as an arm of the tribe, even if purporting to, does not enjoy the sovereign immunity of the tribe. Several factors determine if an entity functions as an arm of the tribe, including whether "the economic advantages created by the [entity] 'inured to the benefit of the Tribe,' and that 'immunity of the [entity] directly protected the sovereign Tribe's treasury.'" *Cook*, 548 F.3d at 726 (quoting *Allen,* 464 F.3d at 1046-47). Applying these factors to the case at hand dictates the conclusion that even though the Economic Development Corporation was created as a purported "arm-of-the-tribe," R. at 1, it does not function as such, and consequently does not enjoy the sovereign immunity of the Yuma Indian Nation.

In both *Allen* and *Cook*, the Ninth Circuit found each factor to be answered in the affirmative and consequently concluded that the entity in each case (both lucrative casinos) functioned as "an arm of the Tribe" and accordingly enjoyed tribal immunity. *Allen*, 464 F.3d at 1047; *Cook*, 548 F.3d at 726. Here, however, neither factor can be found in the affirmative. Although the EDC's corporate charter dictates that half of its net profits are to be paid to the Nation's general fund on an annual basis, this is a far cry from the substantial economic advantages inured to the tribes in both *Allen* and *Cook*, where successful casinos paid *all* net profits to their tribe, for the EDC since its creation in 2010 has only repaid the Nation $2 million of the $10 million it was initially loaned by Tribal Council. R. at 2. Finally, and most consequently, is the fact that immunity for the EDC would not directly protect the Nation's treasury. In the EDC's corporate charter, Tribal Council provided that "no debts of the EDC may encumber, or implicate in any way, the assets of the YIN." R. at 2. In both *Allen* and *Cook*, the immunity of the entities at issue each directly protected their respective tribe's

treasury, "which is one of the historic purposes of sovereign immunity in general." *Allen*, 464 F.3d at 1047. That is certainly not the case here; consequently, the activities of the EDC are not those of the Nation.

By failing to provide a substantial economic benefit to the Nation and further, by failing to protect the tribal treasury were sovereign immunity to apply, the EDC also fails to qualify as an "arm of the tribe," and so cannot be shielded by the Nation's sovereign immunity.

2. The EDC expressly waived any sovereign immunity the it might have enjoyed.

Section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., authorizes the Secretary of the Interior to issue corporate charters for tribes organized under that section. 25 U.S.C. § 477. Such corporate charters often contain a clause allowing the corporation to "sue and be sued," a provision which has been found to expressly waive the immunity of the tribal corporation. *See Lineen v. Gila River Indian Community*, 276 F.3d 489, 492-93 (9th Cir. 2002). The Yuma Indian Nation was incorporated under Section 17, and Title 11 of the Yuma Indian Nation Tribal Code 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." 11 Y.I.N.T.C. § 11-161 (2015). That "sue and be sued" clause constitutes an explicit waiver of any sovereign immunity the EDC might have enjoyed.

"Such 'sue and be sued' clauses waive immunity with respect to a tribe's corporate activities, but not with respect to its governmental activities." *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002). The test used in *Lineen* was whether the actions forming the basis of the suit were "clearly governmental rather than corporate in

nature." *Id.* at 493. The purpose of the EDC as laid out in its charter is to "to create and assist in the development of successful *economic* endeavors," R. at 1 (emphasis added), and while its economic endeavors have not been particularly successful to date, its function as a buyer and seller of land is decidedly not a governmental one. As a clearly corporate entity formed under Section 17, the EDC's "sue and be sued" clause expressly waives its sovereign immunity.

The EDC's express waiver of sovereign immunity is not defeated by Title 11, Article 10 of the Yuma Indian Nation Tribal Code. Although Section 11-1003 purports to confer "[t]he sovereign immunity of the tribe … on all Tribal corporations wholly owned, directly or indirectly, by the Tribe," 11 Y.I.N.T.C. § 11-1003 (2015), and although the EDC is wholly owned by the Nation, a tribe cannot extend its immunity "where it otherwise would not reach." *Lewis v. Clarke*, 137 S.Ct. 1285, 1288 (2017). Further, although Section 11-1003 goes on to specify the manner in which a corporation may consent to be sued "in the [Tribal] Court, and in all other courts of competent jurisdiction," that section is inoperative here because a provision of the charter itself constitutes the express waiver, and the charter must have been approved by the Nation in order to take effect. Section 11-1003 is therefore preempted by the EDC's waiver through the charter. The EDC does not enjoy sovereign immunity from the Smiths' claims against it.

C. Mr. Captain And Ms. Bluejacket Do Not Enjoy Sovereign Or Individual Immunity From The Smiths' Claims Against Them.

Neither individual tribal officers nor individual tribal employees are protected by tribal sovereign immunity when sued in their individual capacities. *Lewis v. Clarke*, 137 S.Ct. 1285 at 1288 (2017); *Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013). To the extent Mr. Captain, EDC Chief Executive Officer and a tribal officer, and Ms.

Bluejacket, EDC Accountant and a tribal employee, have been sued in their individual capacities by the Smiths, they are foreclosed from enjoying the sovereign immunity of the Yuma Indian Nation. The Supreme Court has even indicated that tribal officers sued in an official capacity may be similarly unprotected by tribal sovereign immunity when sued in their official capacities. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (where, as an officer of the tribe, the Governor was not protected by the tribe's immunity from suit). *See* also *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, at 171-172 (1977); cf. *Ex parte Young*, 209 U.S. 123 (1908). In keeping with the principle established by *Ex parte Young*, a party claiming that a tribe is acting beyond its power under federal law can sue tribal officials to enjoin enforcement. *Michigan v. Bay Mills Indian Community*, 132 S.Ct. 2024, 2025 (2014). Where the relief sought is damages, the suit may be maintained against tribal officials in their official capacity if the relief will not run directly against the tribe itself. *See Lewis v. Clarke*, 137 S.Ct. 1285, 1292-1293 (2017); *Cook v. AVI Casino Enters.*, 548 F.3d 718, 727 (9th Cir. 2008). Here, it is Mr. Captain and Ms. Bluejacket, not the Nation, who are the real parties in interest in the Smiths' claims against them. Relief against them will not bind the tribe, and so they do not qualify for its sovereign immunity.

To the extent either Mr. Captain or Ms. Bluejacket may be citizens of the Yuma Indian Nation, sovereign immunity does not extend to members of the tribe simply because of their status as members. *See Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173 (1977). Further, tribes may not protect their officers or employees by extending tribal sovereign immunity where it otherwise would not exist. *Lewis v. Clarke*, 137 S.Ct. 1285, 1288 (2017). The employee indemnification clause in the EDC corporate charter is therefore inoperative as against the Smiths' claims against Mr. Captain and Ms. Bluebird.

Finally, because tribal officers are not protected from sovereign immunity where the tribe has already waived it, *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008), Mr. Captain and Ms. Bluejacket cannot be protected from claims arising from the contracts with the Smiths in which the Nation waived its immunity (*see infra*).

1. The Smiths sued Mr. Captain and Ms. Bluejacket in their individual capacities.

There is a "general rule that individual officers are liable when sued in their individual capacities." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013). In other words, tribal officers sued in their individual capacities are not protected by tribal sovereign immunity. The same rule applies to individual employees. *Lewis v. Clarke*, 137 S.Ct. 1285 at 1288 (2017). Mr. Captain, EDC Chief Executive Officer, and Ms. Bluejacket, EDC accountant, have been sued by the Smiths in their individual capacities for defamation, a tort. R. at 1, 3. Mr. Captain and Ms. Bluejacket simply do not qualify for tribal sovereign immunity in that respect, and therefore do not enjoy it.

In determining the real party in interest, "[t]he critical inquiry is who may be bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis v. Clarke*, 137 S.Ct. 1285, 1292-1293 (2017). In *Lewis v. Clarke*, the defendant (an employee of the tribe's Gaming Authority), was sued in his individual capacity to recover for tortious conduct occurring within the scope of his employment; however, a judgment against the employee would not operate against the Tribe, and so the sovereign immunity of the Tribe did not extend to him. 137 S.Ct. at 1288. As laid out in *Lewis v. Clarke*, in the context of lawsuits against state and federal employees or entities, courts look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. *Id.* at 1293. The primary inquiry is whether the remedy sought is truly against the sovereign. *See Hafer v.*

Melo, 502 U.S. 21, 25 (1991). Because the Smiths seek to hold Mr. Captain and Ms. Bluejacket individually liable for their tortious conduct, resulting remedies would be against Mr. Captain and Ms. Bluejacket – not the Nation. Mr. Captain and Ms. Bluejacket accordingly are not shielded from the Smiths' claims against them in their individual capacity by the Nation's sovereign immunity.

This outcome is not changed by the Nation's indemnification statute of its employees. *See* Title 11 Article 5, 11-521, Indemnification. Indemnification by a tribe of a tribal officer who has been sued in his or her individual capacity does not make the tribe the real party in interest, and so does not extend the tribe's sovereign immunity to that officer. *See Lewis v. Clarke*, 137 S.Ct. 1285 at 1293 (2017). Here, the Nation's indemnification statute does not make it the real party in interest to the Smiths' claims against Mr. Captain and Ms. Bluejacket, to the extent they have been sued in their individual capacities. In that regard, the Nation's sovereign immunity does not extend to Mr. Captain or Ms. Bluejacket.

2. To the extent the Smiths sued Mr. Captain and Ms. Bluejacket in their official capacities, a remedy against them would not operate against the Nation.

"That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Lewis v. Clarke*, 137 S.Ct. 1285, 1288 (2017). In suits against tribal officers, a court "must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (quoting *Shermoen v. United States*, 892 F.2d 1312, 1320 (9th Cir. 1992)). In other words, the focus is

whether a remedy against tribal officers would effectively operate against the tribe they serve. Here, a remedy against Mr. Captain and Ms. Bluejacket would not operate against the Nation, and so they do not enjoy the Nation's sovereign immunity. Finally, in a suit against tribal officials in their official capacity, tribal officials do not enjoy tribal sovereign immunity if the tribe itself has waived sovereign immunity. *See Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).

In determining whether tribal sovereign extends to tribal officers, courts look at whether the judgment sought would come out of the tribal treasury or domain, or restrain the tribe from acting or compel it to act. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). The Smiths seek to recover in part for defamation of character against Mr. Captain and Ms. Bluejacket in their official capacity as EDC CEO and Accountant, respectively. Any award of damages stemming from their conduct would not come from the Nation's treasury, as provided in the tribal corporate charter. *See* 11 Y.I.N.T.C. § 11-1003(3)(a)(ii)(b) (providing that "any recovery against such corporation shall be limited to the assets of the corporation"). Remedies against Mr. Captain and Ms. Bluejacket, even in their official capacity, simply will not operate directly against the tribe because of the intermediary function of the EDC as their employer. Tribal sovereign immunity therefore does not protect them from the Smiths' claims against them in their official capacity.

Next, although the tribe utilizes a tribal hiring preference that is applicable to the EDC, R. at 2, to the extent either Mr. Captain or Ms. Bluejacket may be citizens of the Yuma Indian Nation, sovereign immunity does not extend to them simply because of their status as members. *See Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173 (1977). The Nation may also not indemnify Mr. Captain or Ms. Bluejacket from the Smiths'

claims against them in their official capacities, as tribes may not extend tribal sovereign immunity where it otherwise would not protect their officers or employees. *Lewis v. Clarke*, 137 S.Ct. 1285, 1288 (2017). Here, sovereign immunity does not shield Mr. Captain or Ms. Bluejacket because a remedy against them would not bind the tribe, and the tribe cannot circumvent that outcome merely by purporting extend its immunity. Finally, tribal officers are not protected from sovereign immunity where the tribe has already waived it. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Because the Nation has waived its sovereign immunity under the Smiths' contracts, its officers and employees, even when sued in their official capacity, cannot be shielded by that waived immunity from claims arising from the contract. For a multitude of reasons, Mr. Captain and Ms. Bluejacket simply do not enjoy tribal sovereign immunity from the Smiths' claims, and neither do the Economic Development Corporation or Yuma Indian Nation.

CONCLUSION

For the foregoing reasons, this Court should find the Yuma Indian Nation courts do not have personal jurisdiction over the Smiths or subject matter jurisdiction over their claims, and should reverse the trial court by finding that neither the Yuma Indian Nation, the Economic Development Corporation, Mr. Captain, or Ms. Bluejacket are shielded from the Smiths' claims by tribal sovereign immunity. In the alternative, this Court should issue a writ of mandamus for the trial court to stay the proceedings, so the Smiths may seek a ruling from the Federal District Court of Arizona on the question of the Yuma Indian Nation courts' personal jurisdiction over them and subject matter jurisdiction over their claims.