COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
District Court, City And County Of Denver Hon. Robert S. Hyatt, 05CV1143 Colorado Court of Appeals, Hon. Steven L. Bernard, Hon. Russell E. Caparelli, and Hon. Karen S. Metzger (sitting by assignment of the Chief Justice), Case No. 07CV0582	
STATE OF COLORADO ex rel. JOHN W. SUTHERS, Attorney General, and LAURA E. UDIS, Administrator, Uniform Consumer Credit Code, Respondents/Cross-Petitioners, v. CASH ADVANCE and PREFERRED CASH LOANS, Petitioners/Cross-Respondents.	▲COURT USE ONLY▲ Case No. 08SC639

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BRIEF OF *AMICI CURIAE* THE COLORADO INDIAN BAR ASSOCIATION, THE UTE MOUNTAIN UTE TRIBE, THE AMERICAN INDIAN LAW CENTER, INC., AND THE UNIVERSITY OF COLORADO SCHOOL OF LAW AMERICAN INDIAN LAW CLINIC

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The Colorado Indian Bar Association, the Ute Mountain Ute Tribe, the American Indian Law Center, Inc. and the University of Colorado School of Law American Indian Law Clinic, as *amici curiae*, respectfully submit this brief in support of the Opening Brief submitted on this date by the Petitioners/Cross-Respondents, Miami Nation Enterprises d/b/a Cash Advance ("MNE") and SFS, Inc. d/b/a Preferred Cash Loans ("SFS") (collectively "Tribal Entities"), which are entities of the federally-recognized Miami Tribe of Oklahoma and the Santee Sioux Nation respectively. The *amici curiae* assert that the July 10, 2008 Order of the Court of Appeals[1] is contrary to established United States Supreme Court precedent and fundamental constitutional principles and should not stand in Colorado. Pursuant to C.A.R. 29, this brief is conditionally filed with a motion for leave to file brief of the *amici curiae* not specifically identified in the Court's April 13, 2009 Order inviting amicus briefing.

STATEMENT OF THE ISSUE

Whether Colorado should invent an eleven-part tribal sovereign immunity test in order to facilitate extraterritorial investigative activities directed at tribal entities by the Attorney General in a manner contrary to federal law.

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[1] Reported at *Colorado v. Cash Advance*, 205 P.3d 389 (Colo. App. 2008).

STATEMENT OF THE CASE AND OF THE FACTS

The *amici* adopt the statement of the case and statement of the facts set forth in the Opening Brief of the Tribal Entities. Additionally, the *amici* briefly summarize the proceedings and facts relevant to the issues discussed herein.

In 2004, the Colorado Attorney General's Office launched an investigation regarding internet pay-day loans made to Colorado residents via the internet by entities known as "Cash Advance" and "Preferred Cash Loans," common industry trade names used by many entities, including the Tribal Entities. When the Tribal Entities became aware of this investigation, they moved to dismiss the proceedings against Cash Advance and Preferred Cash on the basis that those entities were wholly-owned, tribally-controlled entities that functioned as arms of the Miami Nation of Oklahoma and Santee Sioux Nation respectively (collectively, the "Tribes"), thus affording those entities (known as MNE and SFS, respectively) protection from any enforcement action by the Attorney General by right of tribal sovereign immunity.

Apparently reluctant to respect the sovereignty of the Tribes, the Attorney General demanded documentation regarding the tribal nature of MNE and SFS. Although MNE and SFS produced some 3,000 pages of material evidence and four affidavits demonstrating the tribal identity of MNE and SFS, the Attorney General continued pursuit of additional documentation far beyond the scope of any issue

with respect to their status as tribal entities and, with continued zeal for the extraterritorial investigation, sought material related to the Tribes' internal governmental business affairs. The Tribes resisted Colorado's attempt to invade their sovereignty and refused to produce any additional documents beyond the volumes they had already volunteered.

Thereafter, the trial court denied the Tribal Entities' motions to dismiss, holding that whether the "Tribal Entities in this matter possess [tribal sovereign immunity] ... need not be determined" because, in the trial court's incorrect view, tribal sovereign immunity was not a bar to Colorado's power to investigate and prosecute violations of Colorado law. The trial court also issued (but stayed) bench warrants for two tribal officers, Robert Campbell and Don Brady, based on the failure of MNE and SFS to appear.

The Tribal Entities appealed on the basis that tribal sovereign immunity is an absolute bar to the Attorney General's enforcement action proceeding against wholly-owned, tribally-chartered and controlled entities that function as arms of the Tribes. Indeed, the record shows that the economic opportunities presented by MNE and SFS are rare points of hope for the Tribes' members, who generally suffer poverty with dignity in their isolated and resource-poor locations.[2]

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[2] There is nothing unusual or untoward about the Tribes' sovereign determinations to make their territories a safe-haven for credit practices disfavored by other sovereigns. This sort of economic engineering is commonplace for corporate-

The Court of Appeals largely agreed with the Tribal Entities and correctly noted that "As a general matter, although Indian tribes are subject to some forms of state governmental regulation for commercial conduct occurring beyond tribal soil, they are immune from state enforcement actions." 205 P.3d at 397. Regrettably, the Court of Appeals did not end its analysis there and simply remand for proceedings consistent with that fundamental legal premise. Instead, the Court of Appeals invented an elaborate eleven-part test for determining the connectedness of tribes and tribal entities, borrowing piecemeal from poorly reasoned decisions from various other state courts that represent outlier positions inconsistent with federal law which, in large part, predate controlling U.S. Supreme Court precedent.

The *amici curiae* urge this Court to reject the Court of Appeals' decision and to hold that state law may not be used to displace tribal sovereignty in Colorado in a manner contrary to federal law.

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friendly forums like Delaware and South Dakota, which routinely 'export' their corporate-favorable state laws upon out-of-state customers who live in states or territories with more restrictive state laws (e.g., South Dakota exports its liberal usury laws to agreements with customers in states that, under their state law, cap interest rates). This practice is common and does not subject Delaware or South Dakota to investigative proceedings by sister states. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.,* 439 U.S. 299 (1978) (concluding that that national banks can charge the highest interest rate allowed in the bank's home state, regardless of where the borrower lives). The varying credit practices and policies between sovereigns may not always seem fair, but they are not illegal and they do not give rise to a right of one sovereign to invade the sovereign domain of another.

SUMMARY OF THE ARGUMENT

For several reasons, the judicially-created eleven-part tribal sovereign immunity test crafted by the Court of Appeals should not be adopted in Colorado to defeat the application of the established United States Supreme Court precedent:

1. The eleven-part test is contrary to the unambiguous language of established United States Supreme Court precedent. According to the Court, attempts to enforce state law should fail in instances where the tribal sovereign immunity has not been clearly and unequivocally waived. Nonetheless, some state courts have forayed into inappropriate ground, weaving a tangled web of contradictory multi-factor tests that impinge the most fundamental principle of federal primacy. These courts declare that they are free to disregard United States Supreme Court precedent if, in the court's opinion, there is some policy reason to do. It is not the proper role of courts, however, to write such additional requirements into tribal sovereign immunity. These judicially-invented criteria constitute a multitude of tests to tribal sovereign immunity but disregard a fundamental fact of federal law: tribal sovereign immunity is absolute. Only Congress or a tribe's own hand may waive a tribal entity's sovereign immunity.

2. The case law supporting state-law inquiries on tribal sovereign immunity is a confusing cluster of contradictory rationales and holdings. Colorado should not follow this tangled and uncertain path. Instead, Colorado courts should join the

majority of courts to reject efforts that impermissibly intrude on tribal sovereignty and simply apply the straightforward language set forth in United States Supreme Court precedent.

Additionally, although the *amici* do not further address these errors below, the amici assert that the Court of Appeals erred in determining that the trial court has authority to compel tribes to produce documents and in holding that tribal officers were not protected by tribal sovereign immunity if they acted contrary to state law. Again, these determinations ignore the absolute nature of tribal sovereign immunity and do violence by small cuts to effectively gut the tribal sovereign immunity in a manner fundamentally inconsistent with the same U.S. Supreme Court precedent relied upon and quoted extensively by the Court of Appeals. Lastly, the Court of Appeals erred in suggesting that a contractual agreement to arbitrate could potentially waive a tribe's sovereign immunity as to a third-party in a non-arbitration context. Such an implied waiver would be anything but the clear and unequivocal expression of waiver required under U.S. Supreme Court precedent.

ARGUMENT

I. THE ELEVEN-PART TEST IS CONTRARY TO FEDERAL LAW.

The Court of Appeals erred in making the remand for the trial court's determination about the status of MNE and SFS much more complicated than it

needs to be. There are 3,000 pages of material and four affidavits from tribal officers demonstrating that MNE and SFS are arms of the Tribes. The trial court should have determined based on this material that the Tribal Entities are tribal arms entitled to the defense of immunity and ended the case. No more should be necessary, but the Court of Appeals imposed an eleven-part analysis in which it directed the trial court to engage on remand:

> The factors the court should consider to resolve this issue are: (1) whether Cash Advance and Preferred Cash are organized under the Tribes' laws or constitutions; (2) whether the purposes of Cash Advance and Preferred Cash are similar to the Tribes' purposes; (3) whether the governing bodies of Cash Advance and Preferred Cash are composed predominantly of tribal officials; (4) whether the Tribes have legal title to or own the property used by Cash Advance and Preferred Cash; (5) whether tribal officials exercise control over Cash Advance's and Preferred Cash's administration and accounting; (6) whether the Tribes' governing bodies have the authority to dismiss members of the governing bodies of Cash Advance or Preferred Cash; (7) whether Cash Advance and Preferred Cash generate their own revenues; (8) whether a suit against Cash Advance and Preferred Cash will affect the Tribes' finances and bind or obligate tribal funds; (9) the announced purposes of Cash Advance and Preferred Cash; (10) whether Cash Advance and Preferred Cash manage or exploit tribal resources; and (11) whether protection of tribal assets and autonomy will be furthered by extending immunity to Cash Advance and Preferred Cash.

205 P.3d at 406. This complex creation misunderstands sovereign immunity, is inconsistent with binding federal authority, and imports and compounds errors by other state courts.

A. The Origins of Tribal Sovereign Immunity Reflect Its Inherent Nature.

The Court of Appeals' folly in creating its sovereign immunity test collage stems in part perhaps from its misunderstanding of the nature of tribal sovereign immunity. Tribal sovereign immunity is recognized as being an inherent attribute of sovereignty, not "created to protect tribal interests, preserve tribal cultural autonomy, and promote self-government" as the Court of Appeals indicated. 205 P.3d at 398. Only a bright-line test should attend judicial determinations regarding tribal sovereignty because there is no basis, as the Court of Appeals improperly held, upon which to "balance tribal sovereign immunity" with any competing interest. *Id.* at 405. Rather, sovereign immunity is akin to pregnancy in that there are no degrees of immunity. An entity cannot be a little bit sovereign immune; an entity is either a tribal one to which sovereign immunity attaches, entitled to an immunity defense, or it is not. *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991); *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (both refusing to distinguish tribal commercial enterprises from tribal governments with respect to tribal sovereign immunity).

The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as sovereign governments. Governmental immunity from suit is something that is consistently recognized as 'inherent' to sovereignty. "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union." The Federalist No. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961). Tribal sovereign immunity is no less inherent than any other governmental immunity and indeed, "predates the birth of the Republic[.]" *R.I. v. Narragansett Indian Tribe,* 19 F.3d 685, 694 (1st Cir. 1994). Indian tribes are "distinct, independent political communities, retaining their original natural rights ... ." *Worcester v. Ga.,* 31 U.S. 515, 559 (1832). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority... . Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 58 (1978). Tribes, like states, the federal government, and foreign nations, continue to enjoy a natural

immunity from suit, an immunity that has been derived from the recognition under federal law of each entity's sovereign status.

As the tribal sovereign immunity doctrine has emerged in six United States Supreme Court cases since 1977, it has become clear that tribal entities are immune from lawsuits and court process in both state and federal courts unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 758; *C&L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001); *Okla. Tax Comm'n*, 498 U.S. 505; *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977). The precedent of the Court couches tribal sovereign immunity as a veritable truth or natural law of sovereignty. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty,* 37 Tulsa L. Rev. 661 (2002).

The Court has consistently affirmed tribal immunity, deciding that Congress is the appropriate body to determine whether to abrogate it, because Congress is in a better position "to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, 523 U.S. at 759. The federal framework provides that sovereign immunity extends to tribes' commercial as well as governmental

activities, and to activities occurring outside Indian Country (*id.* at 760; *Puyallup Tribe*, 433 U.S. at 172-173) and that it applies to suits for damages as well as those for declaratory and injunctive relief (*Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991)). Tribal sovereign immunity applies irrespective of the competing sovereignty of the other litigant; Indian tribes are immune from lawsuits filed by states. *Florida v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999). Federal law holds that arms of tribes are cloaked with tribal immunity (*Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328 (D. Conn. 2001)) and that tribal immunity likewise protects tribal officials acting within the scope of their authority. *Fletcher v. U.S.*, 116 F.3d 1315, 1334 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

Although vested with plenary authority with respect to Indian tribes, Congress has, to date, declined to implement any changes to the federal common law regime on tribal sovereign immunity. The natural, inherent quality of tribes' immunity persists with respect to tribes themselves, tribal entities, and tribal officers acting within the scope of their authority.

B. Under the Plain Language of Established United States Supreme Court Precedent, Tribal Sovereign Immunity Holds Firm Unless Abrogated by Congress or the Tribe Itself.

Federal law is clear: tribal sovereign immunity "is not subject to diminution by the States," *Kiowa Tribe*, 523 U.S. at 756, and this is true whether relevant tribal conduct occurs on or off the reservation or with respect to governmental or commercial activity. *Id.* at 760. The Court of Appeals correctly recognized this fact and quoted this exact language. 205 P.3d at 398-399. The Court of Appeals also correctly recognized that federal law appreciates that the nature and scope of tribal sovereign immunity may leave state regulators without a judicial remedy[3] and the United States Supreme Court has expressly said as much " ... a State may have authority to tax or regulate tribal activities occurring within the State but outside of Indian country. To say substantive state laws apply to off reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit." *Kiowa Tribe*, 523 U.S. at 755, referenced in *Cash Advance*, 205 P.3d at 399.

Where the Court of Appeals erred, however, was in imposing state-law burdens on tribal sovereign immunity inconsistent with the immunity doctrine developed in federal precedent and the inherent nature of that immunity recognized as to all governments from the earliest days of the republic. As discussed above,

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[3] The *amici* note that Attorney General could pursue non-litigation remedies such as restricting the Tribal Entities ability to do business in Colorado or negotiating the terms upon which the Tribal Entities may do business in Colorado (e.g., by agreeing to waive immunity for enforcement actions).

under the Supreme Court's jurisprudence, tribal entities are not subject to legal process unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 758. Neither event has occurred in this case. However, despite the Court of Appeals' correct recognition of this binding authority, the panel inappropriately abandoned the federal 'natural character' of tribal immunity as a defense and expressed a mistaken understanding of immunity somehow attached to a notion of necessity for a prior congressional grant that has no basis in federal law.

Specifically, the panel found it significant that "[u]nlike in the gaming industry, there is no congressional declaration that quick cash loans are closely linked to the well-being of a tribe." 205 P.3d at 405. Neither Congress nor the Supreme Court has ever married consideration about the nature of a tribal enterprise with the existence of that entity's sovereign immunity. To the contrary, any abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58. Under prevailing federal law, nothing about a tribal enterprise's type of activity implicates anything about its immunity.

But that is exactly the sort of type-of-business-by-type-of-business inquiry imposed by the Court of Appeals, particularly with sub-parts (2) and (9) of its eleven-part test. Those factors direct analysis of "(2) whether the purposes of Cash

Advance and Preferred Cash are similar to the Tribes' purposes; and "(9) the announced purposes of Cash Advance and Preferred Cash." 205 P.3d at 406. Federal law holds that there is nothing *implied* about tribal immunity with regard to the "purposes" of a tribal activity or any other characteristic. Any abrogation of tribal immunity must always be express and unequivocal. *See C&L Enters.*, 532 U.S. at 418.

Moreover, the *amici* posit that it is not for Colorado to sit in judgment of the "purposes" of tribal enterprises in any manner. States may take a dim view of Indian gaming, cigarette sales, or pay-day loan business, but whether or not to engage in those economic development activities is solely a matter of tribal sovereign prerogative and no State should substitute its values for an Indian tribe's. Colorado judges should not be assessing the Indian-ness of a given enterprise and using that assessment as one weapon in an arsenal designed to strip away sovereignty.[4]

The powers of Indian tribes, like the powers of sovereigns generally, are not frozen in time or constrained by disapproving views of outsiders. *See U.S. v. Lara*, 541 U.S. 193, 202 (2004) ("[M]ajor policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty"); *Regina v. Van der Peet*,

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[4] The *amici* note that Colorado has prudently shunned getting into the business of judicial determination of Indian-ness. *See In re N.B.*, 199 P.3d 16 (Colo. App. 2007) (declining to import the judicially-created "Existing Indian Family" doctrine into Colorado law with respect to Indian Child Welfare Act cases).

83 C.C.C. 3d 289, 296 (1993) (Supreme Court of Canada) ("The Indian right to trade his fish is not frozen in time ... . He is entitled ... to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money"). Colorado should regard tribal sovereignty as dynamic and respect that tribal sovereign choices may differ from Colorado's sovereign choices. The Court of Appeals' eleven-part test inappropriately invites state dominance over tribal government.

C. There Is A Split Of Authority Regarding Whether State Law May Burden Tribal Sovereign Immunity. Colorado Should Follow the Majority Rule.

Despite the unambiguous language from the U.S. Supreme Court with respect to tribal sovereign immunity, some state courts have refused to recognize the strength of the doctrine and have imposed additional burdens on tribal sovereign immunity beyond those enunciated by Congress or agreed by tribes themselves. The Court of Appeals identified, analyzed, browsed these outlier decisions (and one dissent) as a veritable buffet, selecting various items referenced therein for its patchwork eleven-part test. 205 P.3d at 403-406 (discussing *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 992 (N.Y. 1995); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 294-295 (Minn. 1996); *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989); *Runyon ex rel. B.R. v. Ass'n of Village Council Presidents,* 84 P.3d 437, 439 (Alaska 2004); *Wright v. Colville*

Tribal Enter. Corp., 147 P.3d 1275 (Wash. 2006) (Court of Appeals relied upon plurality/dissent language)). It appears that five states have countenanced state-law burdens on tribal sovereign immunity (all through judicial decisions, of course).

Not surprisingly, most of the cases adopting the state-law burdens on tribal sovereign immunity predate *Kiowa Tribe*.[5] Since *Kiowa Tribe*, the momentum of the case law has swung sharply away from such judicial creativity. The Court of Appeals' July 10, 2008 Order marks the only published Colorado decision mentioning judicially-imposed burdens on tribal sovereign immunity and places Colorado in a small group of outlier jurisdictions.

Most courts to have considered the issue have chosen to apply the plain language expressed by the U.S. Supreme Court and to reject the imposition of

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[5] Indeed, *Kiowa Tribe* expressly resolved conflict between state courts regarding state-law burdens on immunity posed by uncertainty with respect to the proper deference to be given to tribal immunity in the context of commercial dealings. Prior to *Kiowa Tribe*, the supreme courts of two states – Oklahoma and New Mexico – had held that tribes lost their immunity from suit by engaging in off-reservation commercial activity. *Aircraft Equip. Co. v. Kiowa Tribe*, 939 P.2d 1143 (Okla. 1997); *Padilla v. Pueblo of Acoma,* 754 P.2d 845 (Okla. 1988). The Oklahoma case, *Aircraft Equipment*, was the very case overturned by the Supreme Court in *Kiowa Tribe. Aircraft Equipment*, 939 P.2d at 1148, overruled by, *Kiowa Tribe,* 523 U.S. 751. In *Padilla*, in a suit between a private roofing contractor and an Indian pueblo doing business as a construction firm, the New Mexico Supreme Court held that off-reservation business conduct by the Pueblo of Acoma was not clothed with standard sovereign immunity. *Padilla,* 754 P.2d at 850. *Kiowa Tribe* gutted those decisions and reinforced the exclusive, federal, absolute nature of sovereign immunity. An judicial imposition of state-law burdens on tribal immunity is necessarily at odds with the essential thrust of *Kiowa Tribe*.

additional judicially-created burdens on tribal sovereign immunity. *See e.g., Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000); *Wampanoag Tribe v. Massachusetts Comm'n Against Discrimination*, 63 F. Supp. 2d 119, 123 (D. Mass. 1999); *Ogden v. Iowa Tribe of Kan. & Neb.*, 250 S.W.3d 822 (Mo. App. 2008); *Thompson v. Crow Tribe of Indians*, 962 P.2d 577 (Mont. 1998); *Welch Contr., Inc. v. N.C. DOT*, 622 S.E.2d 691 (N.C. App. 2005); *C & B Invs. v. Wisconsin Winnebago Health Dep't*, 542 N.W.2d 168 (Wisc. App. 1995). The clear mandate of Kiowa Tribe provides that a tribe's inherent immunity "extends to a tribe's for-profit business entities when the entity is operating on behalf of the tribe." *Ameriloan v. The Superior Court of Los Angeles County.*, 169 Cal. App. 4th 81, 84 (Cal. App. 2008), as amended, 2009 Cal. App. LEXIS 42, *1 (Cal. App. Jan. 14, 2009) ("an Indian tribe's sovereign nation status confers an absolute immunity from suit in federal or state court absent an express waiver or congressional authorization to sue").

The *amici* note that the majority rule does not preclude Colorado from relief. While the majority rule does not leave the State with the remedy it desires –

litigation – the State does have remedies available to it.[6] In fact, Colorado has experience in this regard and has resolved disputes through negotiation and compacting with both the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe. C.R.S. §§ 24-61-101, 24-62-101. Other states also routinely enter into agreements with Indian tribes to resolve disputes.[7]

The weight of authority supports non-litigation remedies and rejects the imposition of state-law judicially-imposed burdens on tribal sovereign immunity. It is difficult, to say the least, to discern doctrinal consistency in the state-law burden jurisprudence from which the Court of Appeals plucked its eleven test components. Colorado should eschew this legal morass. Colorado should join the

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[6] The Supreme Court has recognized this fact multiple times. *See e.g., Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 498 U.S. at 514 ("States may also enter into agreements with the tribes to adopt a mutually satisfactory regime").

[7] For example, the State of Kansas recently entered into an inter-governmental agreement with the Prairie Band Potawatomi Nation respecting excise taxes, an agreement which sought "to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction." Brief for United States as Amicus Curiae at 3, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (No. 04-631). Michigan, too, has negotiated and concluded numerous tax agreements with various tribes dealing with everything from the purchase of motor homes by tribal members to regulation and enforcement of the state business tax on tribal businesses. *See e.g.* State-Tribal Tax Agreement Between Bay Mills Indian Community and the State of Michigan, *available at* http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html. In fact, numerous states have enacted legislation enabling their local governments and agencies to enter into agreements with Indian tribes. Joel H. Mack and Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 Pepp.L.Rev. 1295, n.128 (1993). Of course, the key to such compacts is the recognition by one sovereign of another's sovereignty.

majority of jurisdictions around the country that reject any state-law judicially-imposed burden on tribal sovereign immunity and simply apply the straightforward approach of federal law.

D. Following Federal Law Marks the Best Policy for Colorado.

Any state-law judicially-imposed burden on tribal sovereign immunity does violence to the Tribes' ability to govern their affairs because that immunity represents the most fundamental protection mechanism for tribal interests. Tribal immunity exists by virtue of the sovereign status of Indian tribes because, for all governments, sovereign immunity is a vital part of the right of self-government. *See* The Federalist No. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961). It protects governments' right to determine how (e.g. through legislation, judicial action, mediation, or other methods) conflicts that inevitably arise in the exercise of their sovereign authority may be resolved. As such, it has been recognized, from the earliest days of the United States, as an essential feature of any sovereign's authority. *Id.*

Consistent with *Kiowa Tribe* and the majority rule, this Court should conclude that the eleven-part test designed by the Court of Appeals clashes irreconcilably with the purpose of tribal sovereign immunity and federal authority recognizing its nature as an essential attribute of sovereignty. To do this, Colorado need only look to a tribe's intent. Did the tribe intend for an entity to share in its

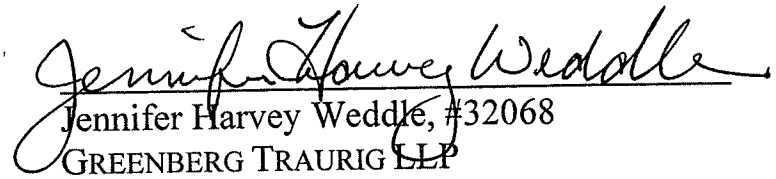
immunity? To find the answer, courts should look to the tribal law that created the entity. In the record below, there is a tome of evidence to indicate the Tribes' intent to extend their immunity to the Tribal Entities with their operation as arms of the Tribes. Such a basic 'intent' analysis is exactly the sort of inquiry federal law envisions. "The question is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen*, 464 F.3d at 1046.

Should the Court be determined to fashion a test to that would inform the Colorado courts about tribal intent and whether or not a tribal entity could be considered an arm of a tribe, the amici support the sort of bright-line rule proposed by the Tribal Entities at p. 31 of their Opening Brief, focusing on the tribal law genesis of the entity.

CONCLUSION

The eleven-part tribal sovereign immunity test created whole cloth by the Court of Appeals is contrary to both the United States Supreme Court precedent and fundamental constitutional principles. Accordingly, this Court should decline to adopt the eleven-part test and should decline to affirm the Court of Appeal's order crafting the test and refusing to afford the proper deference to the Tribal Entities' entitlement to a sovereign immunity defense.

Respectfully submitted,



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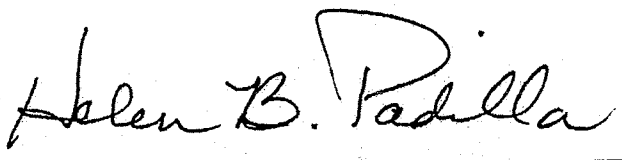

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I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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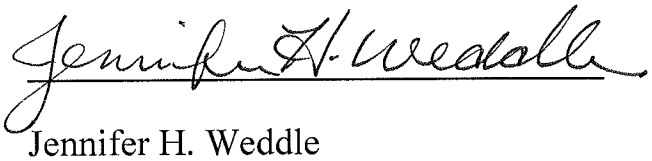

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