IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **CASE NO. S216878**

Plaintiff and Appellant,

v.

MIAMI NATION ENTERPRISES, et al.,

Defendants and Respondents.

Court of Appeal, Second Appellate District, Division 7
Case No. B242644
Superior Court of California, County of Los Angeles
Case No. BC373536
Hon. Yvette M. Palazuelos, Judge

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rules 8.208, 8.488)

Supreme Court Case Number: S216878

Case Name: *People of the State of California v. Miami Nation Enterprises, et al.*

Please check the applicable box:

X There are no interested entities or persons to list in this certificate (Cal. Rules of Court, Rule 8.208).

Respondent Miami Nation Enterprises d/b/a Ameriloan, US Fast Cash, and United Cash Loans and Respondent SFS, Inc. d/b/a Preferred Cash Loans and One Click Cash are wholly owned by the Miami Tribe of Oklahoma and Santee Sioux Nation, respectively, which are federally-recognized Indian tribes and, as such, are governmental entities and, thus, are not included within the definition of "Entity" set forth in Rule 8.208.

□ Interested entities or parties are listed below:

Name of Interested Entity or Person	**Nature of Interest (Explain)**

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INTRODUCTION

Pursuant to Cal. Rule of Court 8.204, the Specially Appearing Defendants/Respondents Miami Nation Enterprises ("MNE") d/b/a Ameriloan, US Fast Cash and United Cash Loans; and SFS, Inc. ("SFS") d/b/a One Click Cash and Preferred Cash Loans (collectively "Tribal Entities") file this Respondents' Answer Brief on The Merits.

This is a case about tribal sovereign immunity. In its Opening Brief, however, the California Department of Business Oversight Commissioner (the "State") flouts binding and persuasive tribal sovereign immunity jurisprudence that guided the decisions of the courts below, as well as the long-settled rule that new issues cannot be asserted for the first time in an opening brief before this Court. In its latest attempt to deprive federally-recognized Indian tribes of their federally-protected sovereign rights, the State boldly disregards the Court of Appeal's analysis and its decision and only raises entirely new issues on appeal.

Since June 29, 2007, when the State filed this action (1 CT 000027-41[1]), all parties and the lower courts looked to and applied controlling California and federal Indian law authorities in seeking a determination of whether the Tribal Entities are sufficiently related to their respective Tribes so that each may exercise its respective Tribe's sovereign immunity from suit. Having now lost under these long-standing principles in both the trial court and in the Court of Appeal, the State, for the first time here, rejects that established authority, ostensibly as not "nationally coherent" (Appellant's Opening Brief ("AOB") at p. 24) and desperately urges this Court to adopt "a new rule to govern determination of arm-of-the-tribe

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[1] This brief uses the following references to the record, preceded by the volume number and followed by the page number:
"CT" = Clerk's Transcript;
"SSCT" = Second Supplemental Clerk's Transcript.

status" (*id.*) using factors considered in non-tribal Eleventh Amendment immunity cases—including factors that have been expressly rejected by the United States Supreme Court in tribal immunity cases.

Surprisingly, the State does not offer a single argument that the Tribal Entities are not arms of their respective Indian Tribes under existing and controlling precedent, which perhaps explains why it does not once argue that the lower courts improperly applied existing arm-of-the-tribe jurisprudence. Instead, for the first time in the seven years of this litigation, the State now urges this Court to ignore long established tribal sovereign immunity jurisprudence—including United States Supreme Court precedent —and simply create a new hybrid "test." The State's proposed "test" would even flip the burden of proof to enable the State to evade one of the fundamental jurisprudential principles: that a plaintiff has the burden of establishing a court's subject matter jurisdiction.

The State's dubious justification for urging this Court to ignore and depart from long-standing arm-of-the-tribe jurisprudence is that there is "no nationwide consensus of how to assess arm-of-the-tribe status." (AOB at p. 24). That position, however, is undermined by the State's fatal concession that "the United States Supreme Court has [similarly] not articulated a specific test for assessing *arm-of-the-state* status" in Eleventh Amendment immunity cases. (*Id.* at p. 29) (emphasis added). Indeed, while decrying the lack of a standardized arm-of-the-tribe test, the State myopically cobbles together an *arm-of-the-state* test from selective and inapplicable Eleventh Amendment principles and then asks this Court to pronounce it a "Properly Realigned Arm-of-the-Tribe Test" (*id.* at p. 39) that would be incongruous from every jurisdiction that has ever applied the arm-of-the-tribe doctrine in tribal sovereign immunity cases. So improper (and untimely) is the State's ploy that this Court must reject it out of hand.

This Court should affirm the Court of Appeal's decision below, which properly relied upon the body of controlling arm-of-the-tribe and tribal sovereign immunity jurisprudence, including California authority, lower federal court authority, and United States Supreme Court authority. (Opinion at pp. 12-17, 19-24.) Far from fashioning a new test, the Court of Appeal prudently distilled and thoroughly analyzed all of the criteria contained in the controlling arm-of-the-tribe authority. And relying upon precisely the objective evidence contemplated by the controlling case law, the Court of Appeal properly concluded that, under California law and federal Indian law, the Tribal Entities are sufficiently related to their respective Indian tribes to benefit from tribal sovereign immunity.

The State's factual allegations and arguments outside of unequivocal appellate rules and principles are irrelevant, legally unsupportable, and inflammatory. They constitute new issues and arguments, improperly raised for the first time on appeal, in an attempt by the State to avoid the binding federal Indian law principles that govern this issue. For these reasons, both the Court of Appeal's analysis and its decision upholding the trial court's order dismissing the Tribal Entities should be affirmed.

ISSUE PRESENTED ON APPEAL

Whether the Tribal Entities are sufficiently related to their respective Indian Tribes pursuant to California and federal Indian law to benefit from the application of sovereign immunity.[2]

FACTUAL AND PROCEDURAL HISTORY

I. The Tribal Entities are Wholly-Owned Political and Economic Subdivisions of Their Respective Tribes

A. The Miami Tribe of Oklahoma, MNE and MNE Services, Inc. ("MNES")

The Miami Tribe of Oklahoma ("Miami Tribe") is a federally-recognized Indian tribe. (79 Fed Reg. 4750 (Jan. 29, 2014).) Its ancestral homelands are located in present-day Indiana, Illinois, Ohio, lower Michigan, and lower Wisconsin. Like many Indian tribes, the Miami Tribe was forcibly removed from its homelands by the United States in 1846, and many times thereafter. (5 SSCT 000981.) In 1936, the Miami Tribe organized its government pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501. The Miami Tribe is governed by a Constitution and By-laws that have been approved by the Secretary of the Interior. (*Ibid.*; 6 SSCT 001209, 001222-34.)

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[2] The State fails to describe actual legal issues for consideration by this Court in its "ISSUES PRESENTED" section on page 1 of its brief. Instead, it summarizes a truncated version of some of the State's policy arguments. The actual issues the State raises in this appeal are articulated in its "SUMMARY OF THE ARGUMENT" and "CONCLUSION" sections: (1) whether this Court should impose a new burden of proof in this matter, contrary to the weight of federal Indian law authority; and (2) whether this Court should adopt a completely new test of arm-of-the-tribe immunity derived from a handful of Eleventh Amendment immunity cases in violation of binding federal and California precedent.

The Miami Tribe's Headquarters are located on land held in trust by the United States for the Tribe's benefit in rural northeastern Oklahoma, an area far from any major metropolitan area (the nearest major city is Tulsa, Oklahoma, which is approximately ninety miles from the Miami Tribe's Headquarters). (5 SSCT 000981, 001026; 6 SSCT 001209.) This area includes a forty square mile environmental superfund site, and has been designated by the United States Small Business Administration as a "Historically Underutilized Business Zone" or "HUBZone." (5 SSCT 000981-982, 00100, 001005.)

Due to the Miami Tribe's relative geographic isolation and lack of economic opportunities, coupled with dramatic decreases in federal funds over the past decade, the Tribe has been compelled to develop tribally-owned economic ventures to build a tribal economy and sustain itself, thereby fulfilling the tribal and federal policies of promoting tribal economic development and self-sufficiency. (5 SSCT 000982, 001026, 001033; 6 SSCT 001209-10.)

Recognizing a "critical need for the development of economic activities . . . to provide for the well being of the citizens of the Miami Tribe," the Miami Tribe organized "Miami Nation Enterprises" or "MNE," a wholly-owned and controlled Tribal entity. (6 SSCT 001258.) MNE is governed by a five-member Board of Directors, pursuant to Section 201(b) of the MNE Act. (6 SSCT 001209, 001281.) Further, under Section 202(c) of the MNE Act, all of the MNE Board Members are appointed by the Chief of the Miami Tribe with the advice and consent of the Tribe's legislative body, the Tribal Business Committee. (6 SSCT 001210, 001281.) All five Board Members are enrolled members of the Miami Tribe of Oklahoma. (6 SSCT 001210.)

MNE "serves an essential government function of the Miami Tribe of Oklahoma by allowing the Miami Tribe to provide directly for the

development of tribal revenue generating activities and to acquire property." (6 SSCT 001259.) MNE is wholly owned by the Miami Tribe and enjoys the Miami Nation's sovereign immunity. (6 SSCT 001258, 001276.)

In 2008, MNE acting under Section 305(n) of the MNE Act, created a wholly-owned subsidiary company, "MNE Services, Inc.," which shares MNE's Board of Directors. (6 SSCT 001315-19.) MNE Services, Inc. ("MNES") is a governmental instrumentality of the Miami Tribe of Oklahoma, established to carry out economic advancement functions of the Tribe and its members. (6 SSCT 001317-18.) MNES, like MNE, explicitly shares in the Miami Tribe's sovereign immunity. (6 SSCT 001317-18.) The profits from MNE/MNES flow back to the Miami Tribe and enable it to fund critical governmental services to its members, including tribal law enforcement, poverty assistance, housing, nutrition, preschool, elder care programs, school supplies, and scholarships. (6 SSCT 001210, 001218-19, 001278-79; *see also* 001279-80, 001316.)

The Miami Tribe, through MNE/MNES transacts its Internet lending business under the trade names "Ameriloan," "US Fast Cash," and "United Cash Loans." (6 SSCT 001216.) MNE d/b/a Ameriloan, US Fast Cash, and United Cash Loans is governed by and licensed under Miami Tribal law, including the Miami Tribe's statutes governing Interest Rates and Loans and Cash Advance Services and the Miami Business Regulatory Act. (5 SSCT 001097-98; 7 SSCT 001467-1518, 001524-36.) The Tribe strictly regulates the lending activities in accordance with Tribal law. (*Ibid.*; 5 SSCT 001026-27.) As part of its business, MNE accepts on-line applications for short-term loans from qualified individuals who desire to enter into loan transactions with MNE. Applications are approved by MNE on federal trust land under the sovereign jurisdiction of the Tribe. (6 SSCT 001217.) The loan agreements are governed by the laws of the Miami

Tribe of Oklahoma. (5 SSCT 001097-98; 7 SSCT 001467-1518, 001524-36.)

B. The Santee Sioux Nation and SFS, Inc.

The Santee Sioux Nation (formerly the Santee Sioux Tribe of Nebraska) ("Santee Sioux Nation") is a federal-recognized Indian tribe. (79 Fed. Reg. 4751 (Jan. 29, 2014).) The ancestral homeland of the Santee Sioux Nation is located in present-day Minnesota. Following the 1862 hanging in Mankato, Minnesota of 38 Santee Sioux—the largest mass-execution in U.S. history—the U.S. government abrogated its prior treaties with the Santee Sioux and forcibly relocated them first to present-day South Dakota and later to present-day northeastern Nebraska. (5 SSCT 000983.) The land where the Santee Sioux were relocated is ill-suited for farming, and what little arable land that existed on the reservation was flooded by the federal government to provide hydroelectric power to surrounding non-Indian communities. (*Ibid.*) Located in this isolated rural region, the Santee Sioux Reservation is severely economically depressed, and in a "HUBZone." (*Ibid.*; 5 SSCT 001000, 001006.)

The Santee Sioux Nation is governed by a Constitution that has been approved by the Secretary of the Interior. The Santee Sioux Nation is organized "for the common welfare of the Nation and its posterity and to insure domestic tranquility . . . and establish this constitution according to the Act of Congress, dated June 18, 1934 (48 Stat. 984)." (4 SSCT 000769.) The Santee Sioux Nation is governed by the "Tribal Council," which consists of eight elected members. (4 SSCT 000771-772.) The Santee Sioux Nation's Constitution vests the Tribal Council with the authority to "charter subordinate organizations for economic purposes," and to "safeguard, regulate and promote the peace, safety, morals and general

welfare of the nation by regulating the conduct of trade . . . ." (4 SSCT 000773.)

The Santee Sioux Nation, acting through its Tribal Council, created SFS, Inc., which is a wholly-owned and controlled tribal corporation. SFS's sole purpose is to generate revenue to fund the Santee Sioux Nation's governmental operations and social welfare programs. SFS's Articles of Incorporation specifically provide that SFS enjoys the Santee Sioux Nation's sovereign immunity from suit, which can be waived only by a resolution of the Santee Sioux Tribal Council. (4 SSCT 000802-06.) SFS is governed by a Board of Directors that consists of the members of the Santee Sioux Tribal Council. (4 SSCT 000803.) SFS is licensed pursuant to the laws of the Santee Sioux Nation to operate an online lending business utilizing the trade names "Preferred Cash Loans" and "One Click Cash," although it does not currently utilize the trade name "Preferred Cash Loans" for new customers. (4 SSCT 000764-765; 5 SSCT 000957-70.) The loans are governed by laws of the Santee Sioux Nation that were enacted to regulate short term lending. (6 SSCT 00918-30.) This business is the primary source of revenue for SFS. (4 SSCT 000765.) The profits garnered by SFS are used to fund the Tribe's operations, expenditures, and social welfare programs, including elderly programs, childcare, building maintenance, and members' medical and burial needs. (*Ibid.*)

SFS approves loan applications on reservation land under the sovereign jurisdiction of the Tribe. (4 SSCT 000764.) The loan agreements are governed by the laws of the Santee Sioux Nation. (6 SSCT 00918-30.) The transactions are therefore consummated on Tribal lands, and are subject to, and fully compliant with, the laws and regulations of the Tribe.

II. Procedural Background

On June 29, 2007, the State sued various trade names, including "Ameriloan," "US Fast Cash," "United Cash Loans," "One Click Cash," and "Preferred Cash Loans" for alleged violations of the California Deferred Deposit Transaction Law. (1 CT 000027-46.) The Tribal Entities appeared specially and moved to quash for lack of subject matter jurisdiction based on tribal sovereign immunity. The Tribal Entities asserted that, as a matter of law, Indian tribes enjoy sovereign immunity from suit, including state enforcement actions. (*Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 86, 90 (hereafter *Ameriloan*) [citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 755 (hereafter *Kiowa*); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe* (1991) 498 U.S. 505, 510 (hereafter *Potawatomi*)].) The Tribal Entities further asserted that, as wholly-owned instrumentalities of their respective Tribes operating on behalf of their Tribes, they are entitled to sovereign immunity from suit, and therefore, the trial court lacked subject matter jurisdiction. (*Ameriloan, supra*, at pp. 84-89.)

The trial court denied the motion to quash, and the Tribal Entities petitioned for writ of mandate asking the Court of Appeal to vacate the trial court's order. (*Ameriloan, supra*, 169 Cal.App.4th at pp. 88-89.) Following summary denial of the petition, this Court granted review and transferred the case to the Court of Appeal with instructions to issue an alternative writ. (*Id.* at p. 88.)

On January 14, 2009, the Court of Appeal issued an order granting in part and denying in part the petition for writ of mandate. The Court of Appeal found the trial court erred in numerous respects, namely by concluding as a matter of law that sovereign immunity does not apply to

off-reservation commercial activity. (*Ameriloan*, *supra*, 169 Cal.App.4th at pp. 89-90.) Accordingly, the Court of Appeal directed the trial court to vacate its order denying the Tribal Entities' motion to quash and to "consider the criteria expressed by the Courts of Appeal in *Trudgeon* [*v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 638 (hereafter *Trudgeon*)] … and *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 389 (hereafter *Redding Rancheria*))…, including whether the tribe and the entities are closely linked in governing structure and characteristics and whether federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the business entity." (*Ameriloan*, *supra* at p. 98.) To this end, the Court of Appeal permitted the State to conduct "limited discovery, directed solely to matters affecting the trial court's subject matter jurisdiction" on remand. (*Ibid.*)

On remand, the trial court properly allowed discovery to proceed in accordance with the specific contours of the arm-of-the-tribe factors set forth in *Trudgeon* and *Redding Rancheria.* Although the State repeatedly sought documents far afield from those contours, resulting in imposition of monetary sanctions against the State,[3] it did not dispute that California and federal arm-of-the-tribe authorities govern these questions. Consistent with the trial court's tailored scope of jurisdictional discovery, the Tribal Entities produced organizational documents, articles of incorporation, bylaws, Tribal laws and resolutions, licenses, and entity meeting minutes. (See 24 CT 005764-67.)

Upon completion of jurisdictional discovery, the Tribal Entities renewed their motion to quash. (5 SSCT 000972-98.) The State filed a motion for preliminary injunction, which the trial court deemed to be the State's opposition to the motion to quash. (24 CT 005759.) The trial court

[3] The sanction award was confirmed by the Court of Appeal. (Opinion at p. 7, fn. 3.)

conducted an evidentiary hearing and, based upon the relevant evidence, found that the Tribal Entities are sufficiently related to their respective Indian Tribes to benefit from tribal sovereign immunity. Accordingly, the trial court dismissed the case for lack of subject matter jurisdiction. (24 CT 005754-69.) The State appealed.

The Court of Appeal, relying on California and federal Indian law authorities, also concluded that the Tribal Entities are arms of their respective Tribes protected by tribal sovereign immunity from suit and affirmed the trial court's dismissal. (Opinion at p. 24-25.)

STANDARD OF REVIEW AND BURDEN OF PROOF

The United States Supreme Court recently emphatically reaffirmed the importance of tribal sovereign immunity and explicitly confirmed both that Indian tribes are shielded from judicial process arising from off-reservation commercial conduct and that courts may not diminish or abrogate that immunity. (*Michigan v. Bay Mills Indian Community* (2014) ___ U.S. ___, ___ [134 S.Ct. 2024, 2030-32] (hereafter *Bay Mills*).) Thus, as the Court of Appeal aptly recognized, Indian tribes possess "absolute immunity from suit in federal or state court, absent an express waiver of that immunity or congressional authorization to sue." (*Ameriloan*, *supra*, 169 Cal.App.4th at p. 89 [citing *Kiowa*, *supra*, 523 U.S. at p. 754].) Courts must strictly construe any alleged waivers or diminishments of tribal sovereign immunity. (E.g., *Ameriloan*, *supra*, at p. 94; *Rupp v. Omaha Indian Tribe* (8th Cir. 1995) 45 F.3d 1241, 1245.) Further, as a matter of federal law, to the extent that such a diminishment has been alleged, courts must interpret such allegations in favor of the tribes as a function of traditional notions of sovereignty. (See, e.g., *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143-44 ["Ambiguities in federal law have been construed generously in order to comport with these traditional

notions of sovereignty. . . ."].) Absent clear and unequivocal waiver by the tribe itself, any diminution or abrogation of tribal sovereign immunity is within the sole authority of Congress, and courts may not restrict, impair or limit tribal sovereign immunity based on the type of activity in which a tribe engages. (*Bay Mills*, *supra*, at pp. 2031, 2036.) Instead, "the doctrine of tribal immunity—***without any exceptions*** for commercial or off-reservation conduct—is settled law." (*Id.* at p. 2036 [emphasis added].) Tribal sovereign immunity also extends beyond the tribes to "for-profit commercial entities that function as 'arms of the tribes.'" (*Ameriloan*, *supra*, at p. 97 [citing cases]; see, e.g., *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort* (10th Cir. 2010) 629 F.3d 1173, 1183 (hereafter *Breakthrough*); *Cash Advance and Preferred Cash Loans v. Colorado* (Colo. 2010) 242 P.3d 1099, 1107-08, 1109 (hereafter "*Cash Advance*").)

The assertion of sovereign immunity from suit challenges a court's subject matter jurisdiction. (E.g., *Ameriloan*, *supra*, 169 Cal.App.4th at p. 85; *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 182.) When sovereign immunity is raised, the plaintiff bears the burden of proving by a preponderance of the evidence that the court has jurisdiction. (*Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 206 [citing *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369].)

Appellate courts must afford great deference to the factual conclusions reached by the trial court. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564). And where factual inferences are in conflict, the appellate courts must defer to the trier of fact. (E.g., *Ibid.*; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1312.) "[A] reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact. . . . [T]he reviewing court should

not substitute its judgment for [the trial court's] express or implied factual findings that are supported by substantial evidence." *In re Charlisse C.* (2008) 45 Cal.4th 145, 159 [internal citations and quotation marks omitted].)

ARGUMENT

The question of whether an entity constitutes an arm of a federally-recognized Indian tribe is governed by longstanding principles of federal Indian law, which the United States Supreme Court, lower federal courts and California courts have refined and elaborated based upon the unique nature of tribal sovereigns. As such, this Court should proceed rationally and according to those binding and persuasive authorities.

The State's arguments, which are a series of clumsy and misleading maneuvers, turn this rational and principled process on its head. After seven years of litigating these issues under accepted federal Indian law authorities and precedent in California, the State recognizes that it cannot prevail under the controlling sovereign immunity analysis. Instead, the State abruptly reverses course at the eleventh hour, and urges this Court to throw out both long-standing principles governing tribal sovereign immunity (including principles that the State itself advocated in the courts below) and the well-established burden of proof in these jurisdictional challenges and replace them with a new test that has never been applied in tribal sovereign immunity cases and contravenes binding Indian law. This Court should not do so.

The State ignores that existing federal Indian law principles and California law interpreting those principles have guided every motion, hearing, and order in this proceeding until now, and its effort to challenge these fundamental legal concepts for the first time on review to this Court is astounding. The State cannot justify its radical diversion that flouts the

general rule that "matters not raised in the trial court will not be considered on appeal." (4 Cal. Jur. 3d Appellate Review (2014) § 257.)

To mount its improper legal challenge, the State manufactures from whole cloth a purported conflict in arm-of-the-tribe jurisprudence that simply does not exist. The State glosses over myriad case law, both federal and California, that squarely analyzes the essential questions that should be considered in determining whether a tribal instrumentality is an arm of its Indian tribe. Those cases, which highlight the importance of applying federal Indian law to this analysis, were the foundations upon which both the trial court and the Court of Appeal ruled below. The federal circuit courts have uniformly agreed that arm-of-the-tribe immunity is governed by settled principles of federal Indian law (see *White v. University of California* (9th Cir. Aug. 27, 2014, No. 12-17489) ___ F.3d ___ [2014 WL 4211421] (hereafter *White*); *Breakthrough*, *supra*, 629 F.3d 1173), and their analysis is consistent with California arm-of-the-tribe jurisprudence.

Tellingly, the "test" that the State has concocted to enable it to look at extraneous factors and evidence to avoid tribal sovereign immunity, is completely disconnected from controlling tribal sovereign immunity principles. Its application would not only contravene well-recognized federal tribal immunity authority, but it would violate controlling United States Supreme Court precedent. The State offers no legal authority for its proposed evisceration of tribal sovereign immunity principles, and its efforts to rewrite the law should be rejected.

Based upon the controlling analyses of arm-of-the-tribe sovereign immunity—the core elements of which both the trial court and the Court of Appeal properly recognized and applied—and the ***undisputed*** evidence relevant to this analysis, the lower courts correctly found that SFS and MNES constitute arms of their respective Tribes and are protected from the

State's enforcement action by tribal sovereign immunity. For these reasons, the opinion of the Court of Appeal should be affirmed.

I. The State Cannot Raise New Issues, Arguments and Standards for the First Time in Its Appeal to this Court

It "is well settled that the theory upon which a case is tried must be adhered to on appeal." (*Ernst v. Searle* (1933) 218 Cal. 233, 240.) A change in theory will only be permitted on appeal "when a question of law only is presented on the facts appearing in the record." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) This rule derives from the underlying principle that "the opposing party should not be required to defend for the first time on appeal against a new theory that contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." (*Ibid.* [internal quotations omitted]; *see also Ernst v. Searle*, *supra*, 218 Cal. at pp. 241-42 [holding that to permit a party to change his position on appeal "would not only be unfair to the trial court, but manifestly unjust to the opposing litigant"].) This doctrine applies equally to appeals from matters reviewed for abuse of discretion (see, e.g., *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-92) as it does to appeals from matters reviewed *de novo* (see, e.g., *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 593-95; *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488-89; *McDonalds Corp. v. Board of Sup'rs* (1998) 63 Cal.App.4th 612, 617-18).

Although the State has attempted throughout its Opening Brief to suggest that the adoption of its new "test" is a pure legal issue, insisting at one point that this Court could rule on the "existing record" (AOB at p. 3), the reality is that the new "test" contemplates new "facts" that are not in the record, including whether the entity generates its own revenue or instead receives funds from the sovereign treasury, and "the extent of the

sovereign's actual control . . . over the entity's business activities," a notion explicitly excluded from the analysis of both the trial court (24 CT 005763-66) and the Court of Appeal (Opinion at p. 22), consistent with *Trudgeon, supra*, 71 Cal.App.4th at p. 641.

The State recognizes that this is not a pure legal issue by requesting remand for further proceedings applying its proposed "new test" under its proposed "new burden of proof" on the Tribal Entities. (E.g., AOB at p. 47.) Further, the State presents new facts in its Opening Brief, including the wholly irrelevant questions of records on file with the United States Patent Office and information contained on the lending websites. (AOB at pp. 8-10, 14-16.)

The general rule restricting new theories on appeal exists for a good reason. The "test" that the State promotes requires factual considerations specifically relevant to the "arm-of-the-***state***" analysis, which were never admitted or tested below. And the State admits that the limited, jurisdictional arm-of-the-***tribe*** facts that informed the proceedings below would not satisfy its new theory on the appeal. Thus, if this Court were to accept the State's new legal theories and burden of proof, virtually every ruling and order issued by the trial court below in reliance on the State's previous legal positions, and every fact and exhibit admitted into evidence in reliance upon that legal position, would become a nullity—a seven-year long waste of the California judicial system's efforts and resources. This cannot be permitted.

II. The Court of Appeal Properly and Consistently Applied Binding and Persuasive Federal Indian Law Principles and Existing California Jurisprudence

Contrary to the State's assertions, California arm-of-the-tribe jurisprudence is coherent and consistent with binding and persuasive federal Indian law authorities, and the principles upon which the Court of

Appeal Opinion were based have recently been confirmed by both the United States Supreme Court and the Ninth Circuit Court of Appeals. (See *Bay Mills*, *supra*, 134 S.Ct. 2024; *White*, *supra*, 2014 WL 4211421.) The State's characterization of existing arm-of-the-tribe jurisprudence as so fatally flawed as to require total extermination of its federal Indian law origin is manifestly wrong.

A. The Court of Appeal Properly Applied Federal Indian Law and California Authorities in Analyzing Arm-of-the-Tribe Immunity

A major defect in the State's reasoning derives from its failure to acknowledge the basic precedential doctrines that underlie a California court's analysis of tribal sovereign immunity. This Court is the highest authority in the State of California. (E.g., *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1366.) The decisions of sister states—even the highest courts of the sister states—are not binding, and will be persuasive only in the absence of other controlling authority. (E.g., *Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 170; 16 Cal. Jur. 3d (2014) Courts § 317.)

When faced with questions of federal law, this Court is bound by decisions of the United States Supreme Court. (16 Cal. Jur. 3d (2014) Courts § 322; see also *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 672.) Decisions of federal circuit courts, while not binding upon this Court, are persuasive and entitled to great weight. (E.g., *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320.) And where multiple lower federal courts agree, this Court "should hesitate to reject their authority." (*Id.* at p. 321; see also *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133 [noting that "generally a refusal to adhere to federal precedent occurs where federal decisions provide scant authority for the proposition urged or are divided on an issue"].)

It is well established that "tribal immunity is a matter of federal law and is not subject to diminution by the States." (*Bay Mills*, *supra*, 134 S.Ct. at p. 2031 [quoting *Kiowa*, *supra*, 523 U.S. at p. 756; see also *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering* (1986) 476 U.S. 877, 891 (hereafter *Wold*); *Washington v. Confederated Tribes of Colville Reservation* (1980) 447 U.S. 134, 154].) The question squarely before this Court is what factors should be considered in determining whether MNES and SFS are entitled to tribal sovereign immunity. Thus, this Court's analysis must be guided by federal Indian law principles. Accordingly, this Court is bound by the decisions of the Supreme Court and should give great weight to the federal circuit decisions that have addressed these issues.

The Court of Appeal properly relied on binding and persuasive federal decisions analyzing arm-of-the-tribe status, as well as prior decisions of its own and sister districts. The Court of Appeal was required by stare decisis to follow the prior decisions of its own district (see, e.g., *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 503-05), and was entitled to give its sister district decisions deference. (See, e.g., *Mega Life and Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.) Although this Court is not so constrained, it should affirm the Opinion of the Court of Appeal as it correctly applied well-recognized Indian law principles and binding Supreme Court precedent to determine MNES and SFS are sufficiently related to their respective tribes to share in their tribal sovereign immunity.

B. The Court of Appeal Properly Synthesized and Applied Existing Binding and Persuasive Arm-of-the-Tribe Law

The Court of Appeal properly adhered to its obligations to consider and apply binding and persuasive federal Indian law, as well as existing California decisions when deciding questions of tribal sovereign immunity.

At that time, four prior California decisions had addressed arm-of-the-tribe immunity. The earliest decision was *Trudgeon*, *supra*, 71 Cal.App.4th 632, decided by the Fourth District Court of Appeal in 1999. *Trudgeon* adopted a three-factor arm-of-the-tribe test arising from the Minnesota Supreme Court's decision in *Gavle v. Little Six, Inc.* (Minn. 1996) 555 N.W.2d 284 (hereafter *Gavle*): (1) whether the business is organized for a purpose governmental in nature, rather than commercial; (2) whether the tribe and the business entity are closely linked in governing structure and characteristics; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity. (Opinion at p. 15 [citing *Trudgeon*, *supra*, 71 Cal.App.4th at p. 638] [citing *Gavle*, *supra*, at pp. 294-95]].) Notably, *Trudgeon* correctly expressed reservations about the viability of *Gavle's* first factor given the United States Supreme Court's subsequent holdings that sovereign immunity extends specifically to tribal ***commercial*** enterprises. (*Trudgeon*, *supra*, at p. 639.)

The second decision, *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384 (hereafter *Redding Rancheria*), was decided by the Third District Court of Appeal in 2001. *Redding Rancheria*, incorporated, but did not elaborate upon, the Fourth District's analysis in *Trudgeon*. (*Redding Rancheria*, *supra*, at p. 389 [citing *Trudgeon*, *supra*, 71 Cal.App.4th at pp. 639-42].)

The third decision, *Ameriloan*, was the Second District's 2008 opinion in the instant case on remand from this Court with a mandate to reconsider its prior erroneous decision that commercial, off-reservation conduct was not covered by tribal sovereign immunity, as this was contrary to *Kiowa*, *supra*, 523 U.S. 751. (*Ameriloan*, *supra*, 169 Cal.App.4th 81.) *Ameriloan* properly incorporated *Trudgeon* and *Redding Rancheria* and only refined the arm-of-the tribe analysis to take out the "purpose" factor to

comply with *Kiowa,* explaining: "the relevant question for purposes of applying tribal sovereign immunity '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 those of the tribe.'" (*Ameriloan*, *supra*, at p. 98 [quoting *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046].)

California's arm-of-the-tribe analysis was both internally consistent and consistent with persuasive federal authorities until the Fourth District's decision in *American Property Management Corp. v. Superior Court* (2012) 206 Cal.App.4th 491 (hereafter *American Property*). *American Property* was the first California case to consider an arm-of-the-tribe analysis articulated by the Tenth Circuit Court of Appeals in *Breakthrough*, *supra*, 629 F.3d 1173.[4] Recognizing that federal law is highly persuasive in tribal sovereign immunity matters, the Fourth District found the Tenth Circuit's analysis to be "helpful." (*American Property*, *supra*, at p. 501.) *American Property* also considered arm-of-the-tribe discussions in such persuasive and relevant authority as *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Colony* (2003) 538 U.S. 701; *Allen v. Gold Country Casino*, *supra*, 464 F.3d at p. 1046; and *Trudgeon*, *supra*, 71 Cal.App.4th at p. 638 (*American Property*, *supra*, at pp. 500-01), and noted correctly that "although the [*Breakthrough*] factors overlap somewhat when applied, they accurately reflect the general focus of the applicable federal and state case law" (*id.* at p. 501).

Accordingly, *American Property* adopted *Breakthrough's* six-part test, which considers: (1) method of creation; (2) purpose; (3) structure, ownership, and management, including amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal

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[4] *American Property* was decided after the trial court entered its order dismissing the complaint.

sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities. (*American Property*, *supra*, 206 Cal.App.4th at p. 501 [citing *Breakthrough*, *supra*, 629 F.3d at p. 1181].) In applying those factors, *American Property* examined collateral authority across various jurisdictions and ultimately concluded that the subject entity was not an arm of the tribe, primarily because it was incorporated under state law. (*American Property*, *supra*, at pp. 502-08 ["As we have explained, the most significant fact is [the entity's] organization as a California limited liability company."].)

Thus, when the Court of Appeal analyzed whether MNES and SFS are arms of their respective Tribes, there were two related analyses that had been utilized by California courts: (1) the *Trudgeon/Redding Rancheria/Ameriloan* analysis, excluding the impermissible "governmental purpose" question;[5] and (2) the *American Property* analysis, adopting the *Breakthrough* factors, which stood alone. Although slightly different, both analyses "reflect[ed] the general focus of the applicable federal and state case law." (*American Property*, *supra*, 206 Cal. App.4th at p. 501). In the courts below, the State advocated for a *Breakthrough* analysis as set forth in *American Property*. The Tribal Entities advocated for a *Trudgeon/Redding Rancheria/Ameriloan* analysis, but also noted that application of the *Breakthrough* factors, as espoused and applied by the Tenth Circuit, supported finding tribal sovereign immunity here.

In response, the Court of Appeal took a judicious and considered approach and thoroughly examined both analyses applied in California, as well as that of the Colorado Supreme Court in *Cash Advance*, *supra*, 242

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[5] See *Ameriloan*, *supra*, Cal.App.4th at p. 98 [quoting *Allen v. Gold Country Casino*, *supra*, 464 F.3d at p. 1046].

P.3d 1099.[6] (Opinion at pp. 16-17.) Based upon consideration of all of these analyses, the Court of Appeal astutely concluded that they all arose from unique principles of federal Indian law, and "[r]egardless of how many nonexclusive and overlapping factors a court identifies, the relevant inquiry is ultimately the same: Are the tribal entities sufficiently related to their respective tribes to be protected by tribal sovereign immunity?" (*Id.* at p. 19.) The Court of Appeal went on to properly reject considerations contained within the various analyses that were incompatible with federal Indian law principles and binding United States Supreme Court precedent—the very considerations the State asks this Court to adopt here.

1. The Court of Appeal's Analysis of the Tribal Entities' Financial Relationship with the Tribes Was Consistent with Existing Authority

The Court of Appeal squarely addressed the State's arguments regarding the vulnerability of the tribal treasury under the "financial relationship" factor. Relying on federal Indian law, the Court of Appeal determined that the notion "[t]hat tribal assets might not be directly jeopardized if [the tribal entity] were allowed to be sued does not appear to be significant since the very purpose of creating any subordinate corporate entity is to create the opportunity for economic gain while protecting the tribe from potential liabilities. . . . ." (Opinion at p. 20.)

The Court of Appeal correctly relied upon the Ninth Circuit's analysis in *Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718 (hereafter *AVI*), which rejected the argument that tribal entities organized as corporations, enjoying the rights and privileges of a corporation, and competing in the economic mainstream are not protected

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[6] *Cash Advance* considered: "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty." (*Cash Advance*, *supra*, 242 P.3d at p. 1110.)

by tribal sovereign immunity. (*Id.* at p. 725; accord *Kiowa*, *supra*, 523 U.S. at p. 758 ["[T]ribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce."] .) The Ninth Circuit recognized that courts cannot limit tribal sovereign immunity based on corporate structure or commercial activities because such "restrictions on tribal immunity are for Congress alone to impose." (*AVI*, *supra*, at p. 725 [citing *Kiowa*, *supra*, 523 U.S. at pp. 758, 760].) The Court of Appeal also relied upon the Sixth Circuit's decision in *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.* (6th Cir. 2009) 585 F.3d 917, which held that the act of incorporating does not divest a tribal entity of sovereign immunity from suit. (*Id.* at pp. 920-21; see also, *American Vantage Companies, Inc. v. Table Mountain Rancheria* (9th Cir. 2002) 292 F.3d 1091, 1099.)

In fact, the Court of Appeal's conclusion was also consistent with the proper application of the Tenth Circuit's analysis in *Breakthrough*, which *American Property* wrongly interpreted.[7] *American Property* improperly considered whether monies were flowing ***away*** from the tribe to third parties. (*American Property*, *supra*, 206 Cal.App.4th at p. 506.) *American Property* overlooked the fact that *Breakthrough* focused only

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[7] Importantly, *American Property* did not derive the notion of a vulnerable tribal treasury from *Breakthrough,* but from a **pre-*Kiowa*** decision from New York, *Ransom v. St. Regis Mohawk Educ. & Community Fund* (N.Y. 1995) 86 N.Y.2d 553, 558-60 (hereafter *Ransom*). (*American Property*, *supra*, 206 Cal.App.4th at p. 506 [citing *Ransom*, *supra*, at pp. 558-60].) Besides improperly restricting tribal immunity by imposing a "tribal treasury" limitation (see *AVI*, *supra*, 548 F.3d at p. 725), *Ransom* focused on governmental purpose, which was explicitly rejected by *Kiowa* and has now been rejected by *Bay Mills*. (*Ransom*, *supra*, at p. 558-59; *Kiowa*, *supra*, 523 U.S. at p. 760; *Bay Mills*, *supra*, 134 S.Ct. at p. 2031.) Thus, *Ransom* has largely been discredited and should not be followed. (See *Cash Advance*, *supra*, 242 P.3d at p. 1010, fn. 12 [finding *Ransom's* analysis contravenes *Kiowa*]; see also *AVI*, *supra*, 548 F.3d at p. 725.)

upon the question of how money flowed ***from the entity to the tribe for tribal benefit,*** analyzing only "whether an adverse judgment against [the entity] would … reduce the Tribe's income." (*Breakthrough, supra*, 629 F.3d at pp. 1194-95.) As set forth fully in Part III(C)(1) infra, this analysis comports with the unique purposes of tribal sovereign immunity to promote tribal self-sufficiency, self-government, and economic development by allowing tribes to participate in the economic mainstream. The correct analysis of *Breakthrough's* financial relationship factor clearly forecloses vulnerability of the tribal treasury as a consideration.

The Court of Appeal properly relied on these binding and persuasive federal authorities for guidance in assessing whether it should consider the vulnerability of the Tribes' respective treasuries as a factor in the financial relationship. The Court of Appeal correctly resolved any inconsistencies presented by *American Property* in favor of these federal Indian law principles, which focus on the benefit the entity provides for its tribe. (Opinion at pp. 20-21.) Accordingly, the Opinion of the Court of Appeal should be affirmed.

2. The Court of Appeal's Analysis of Third-Party Management Was Consistent with Existing Authority

Likewise, the Court of Appeal properly relied on federal Indian law authorities to determine whether California's arm-of-the-tribe inquiry should consider the existence of third-party business management under the "control" factor discussed in *American Property*. (Opinion at pp. 22-23 [citing *American Property*, *supra*, 206 Cal.App.4th at p. 505].) The Court of Appeal examined *Native American Distributing v. Seneca-Cayuga Tobacco Co.* (10th Cir. 2008) 546 F.3d 1288, 1294, which held that sovereign immunity protected a tribal business despite expressly considering a nontribal third-party's management of the entity, and *Cabazon Band of Mission Indians v. County of Riverside* (9th Cir. 1986)

783 F.2d 900, 901, *affd. sub nom. California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, which noted with approval that the entity was "operated by non-Indian professional operators." Notably, the Court of Appeal's conclusion was also consistent with the proper application of the Tenth Circuit's analysis of the control factor in *Breakthrough*, which *American Property* also wrongly interpreted and applied.[8] (See *Breakthrough*, *supra*, 629 F.3d at p. 1193.)

More importantly the third-party management concept is contrary to existing California authority, including *Trudgeon*, which expressly held that "control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management." (*Trudgeon*, *supra*, 71 Cal.App.4th at p. 641 [quoting *Gavle*, *supra*, 555 N.W.2d at p. 295].) The proper inquiry focuses on the composition and appointment of the entity's Board of Directors. (*Trudgeon*, *supra*, at p. 641.) The third-party management concept is also entirely inconsistent with federal law, which expressly encourages Indian tribes to engage the skills and expertise of third-party managers and consultants to promote development of tribal businesses and economic endeavors.

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[8] Once again, *American Property* did not derive its focus on third-party management from *Breakthrough*, but from another **pre-*Kiowa*** decision out of Arizona, *Dixon v. Picopa Const. Co.* (Ariz. 1989) 772 P.2d 1104, 1109 (hereafter *Dixon*) (*American Property*, *supra*, 206 Cal.App.4th at p. 505.) *Dixon,* which relied solely on a footnote to a dissent in a factually inapposite case involving a non-Indian subcontractor, *Smith Plumbing Co., Inc. v. Aetna Cas. and Sur., Co.* (Ariz. 1986) 720 P.2d 499, 508, fn. 1 (Feldman, J. dissenting) also contravenes *Kiowa*. (*Dixon*, *supra*, at p. 1109.) Thus, like *Ransom*, *Dixon* has been discredited and should not be followed. (See *Cash Advance*, *supra*, 242 P.3d at p. 1010, fn. 12 [finding that the arm-of-the-tribe analysis in *Dixon* is not narrowly tailored to the nature of the relationship between the tribe and the entity "in contravention of *Kiowa*"].)

Congress has enacted the Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301, et seq., in which it has explicitly approved and directed tribes to avail themselves of "the resources of the private market," including "technical expertise" to achieve "economic self-sufficiency and political self-determination …." (25 U.S.C. § 4301(12).) The Act expressly contemplates the creation of tribal entities that seek "investment from outside sources" and that enter into "economic ventures with outside entities that are not tribal entities." (*Id.* at § 4301(9).) Congress's position on this matter controls, as "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." (*Bay Mills*, *supra*, 134 S.Ct. at p. 2039.)

Accordingly, binding and persuasive federal Indian law, as well as existing California authority, demonstrates that the State's focus on third-party management of business minutiae is misplaced and improper. The Court of Appeal properly concluded that "[a] tribal entity engaged in a commercial enterprise that is otherwise entitled to be protected by tribal immunity does not lose that immunity simply by contracting with non-tribal members to operate the business." (Opinion at pp. 22-23.) The Court of Appeal also properly held that how such contractors are compensated, including whether the tribes negotiated for profit sharing with a third party must also be irrelevant. (Opinion at p. 23.) Once again, the Court of Appeal correctly resolved any inconsistencies presented by *American Property's* misguided reliance on pre-*Kiowa* decisions from other states in favor of protecting tribal sovereign immunity.

3. The Court of Appeal Engaged in a Proper Analysis of Tribal Sovereign Immunity for Instrumentalities of Indian Tribes

Based upon the authorities discussed above, the Court of Appeal properly excluded the improper inquiries made by *American Property* (vulnerability of the tribal treasury and control of day-to-day operations) in its analysis of whether MNES and SFS are sufficiently related to their respective Indian tribes to enjoy sovereign immunity from suit. The Court of Appeal distilled the various arm-of-the tribe analyses that have been applied in California and federal courts and recognized that these authorities, while containing numerous "nonexclusive and overlapping factors …," are all ultimately governed by the same relevant inquiry: "Are the tribal entities sufficiently related to their respective tribes to be protected by tribal sovereign immunity?" (Opinion at p. 19.) Thus, there is one fundamental arm-of-the-tribe test:

> Absent an extraordinary set of circumstances not present here, a tribal entity functions as an arm of the tribe if ***it has been formed by tribal resolution and according to tribal law, for the stated purpose of tribal economic development and with the clearly expressed intent by the sovereign tribe to convey its immunity to that entity, and has a governing structure both appointed by and ultimately overseen by the tribe.***

(*Id.* at p. 24.) The Court of Appeal, relying upon *American Property*, *supra*, 206 Cal.App.4th at p. 501, which in turn relied upon *AVI*, *supra*, 548 F.3d at p. 726; *Trudgeon*, *supra*, 71 Cal.App.4th at pp. 640, 641; *Wright v. Colville Tribal Enterprise. Corp.* (Wash. 2006) 147 P.3d 1275, 1279; and *Gavle*, *supra*, 555 N.W.2d at p. 295, correctly held that "the tribe's method and purpose for creating a subordinate economic entity are the most significant factors in determining whether it is protected by a tribe's sovereign immunity and should be given predominant, if not necessarily dispositive, consideration." (Opinion at p. 20.)

Finally, the Court of Appeal properly acknowledged that "tribal immunity does not depend on [a court's] evaluation of the respectability or ethics of the business in which a tribe or tribal entity elects to engage" (Opinion at p. 24), and inflammatory allegations of violations of law are irrelevant, as "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation. Rather it represents a pure jurisdictional question." (*Ibid.* [quoting *Ameriloan*, *supra*, 169 Cal.App.4th at p. 93 [internal punctuation omitted].) These important principles of tribal sovereign immunity are not unique to California (e.g. *Chemehuevi Indian Tribe v. California State Bd. of Equalization* (9th Cir. 1985) 757 F.2d 1047, 1052, fn. 6), and have been recently affirmed by the United States Supreme Court and the Ninth Circuit Court of Appeals. (See *Bay Mills*, *supra*, 134 S. Ct. 2024; *White, supra*, (2014) WL 4211421.)

i. *Michigan v. Bay Mills Indian Community*

In *Bay Mills,* the Supreme Court broadly reaffirmed the following important general principles of tribal sovereign immunity:

- Tribal sovereignty from suit is a "core aspect[] of sovereignty that tribes possess." (*Bay Mills*, *supra*, 134 S.Ct. at p. 2030 [citing *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 (hereafter *Santa Clara*)].)
- Tribal sovereign immunity is "'a necessary corollary to Indian sovereignty and self-governance.'" (*Bay Mills*, *supra*, at p. 2030. [quoting *Wold*, *supra*, 476 U.S. at p. 890].)
- Tribal sovereign immunity may only be abrogated by Congress. (*Bay Mills*, *supra*, at p. 2030. [citing *United States v. U.S. Fidelity & Guar. Co.* (1940) 309 U.S. 506, 512].)

- The doctrine of sovereign immunity constitutes ***settled law***. (*Bay Mills*, *supra*, at p. 2030-31. [quoting *Kiowa*, *supra*, 523 U.S. at p. 756].)
- "[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" (*Bay Mills*, *supra*, at p. 2031 [quoting *Kiowa*, *supra*, 523 U.S. at p. 756 [citing *Wold*, *supra*, 476 U.S. at p. 891; *Washington v. Confederated Tribes of the Colville Reservation*, *supra*, 447 U.S. at p. 154]].)

In addition, the Supreme Court resolved all doubt concerning the key arm-of-the-tribe issues in dispute here.

First, the Supreme Court made clear that courts may not weigh equities in the arm-of-the-tribe analysis, as it has repeatedly "barred a State seeking to enforce its laws from filing suit against a tribe, ***rejecting arguments grounded in the State's own sovereignty***" (*Bay Mills*, *supra*, 134 S.Ct. at p. 2031 [emphasis added] [citing *Puyallup Tribe, Inc. v. Department of Game of State of Wash.* (1977) (hereafter *Puyallup*) 433 U.S. 165, 167-68, 172-73; *Potawatomi, supra* 498 U.S. at pp. 509-10]), because "tribal immunity is a matter of federal law and is not subject to diminution by the States" (*Bay Mills*, *supra*, at p. 2031 [citing *Wold*, *supra*, 476 U.S. at p. 154].) Thus, the Court of Appeal properly refused to consider equities-based arguments couched in the inflammatory allegations raised by the State here.

Second, the Supreme Court unambiguously rebuked any notion that tribal sovereign immunity may hinge on a governmental purpose, holding that "the doctrine of tribal immunity—***without any exceptions*** for commercial or off-reservation conduct—is settled law" that is the product of a long line of Supreme Court precedents. (*Bay Mills*, *supra*, 134 S.Ct. at p. 2036 [emphasis added].) The Supreme Court noted the wide variety of commercial contexts in which it has upheld tribal immunity, including

fishing, selling cigarettes, and leasing coal mines, and revisiting its reasoning in *Kiowa*, held these cases have "established a broad principle from which we thought it improper to suddenly start carving out exceptions." (*Id.* at p. 2031 [citing *Kiowa*, *supra*, 523 U.S. at pp. 754-55].) Thus, courts analyzing tribal sovereign immunity from suit may not consider the nature of the commercial industry in which the tribe or the tribal entity is engaged. Whether an industry involves gaming under the Indian Gaming Regulatory Act, or the sale of cigarettes, or short-term Internet lending is not relevant to the tribal immunity analysis, and consideration of such facts would impermissibly carve out exceptions to tribal sovereign immunity in violation of a long line of binding United States Supreme Court precedent and usurp powers reserved explicitly to Congress. (See *Bay Mills*, *supra*, at pp. 2031, 2036.)

ii. *White v. University of California*

On August 27, 2014, the Ninth Circuit Court of Appeals decided *White v. University of California*, in which it considered whether a tribal cultural repatriation agency was an arm of the tribe for purposes of tribal sovereign immunity in a suit concerning the fate of ancient human remains discovered on University property. (*White*, *supra*, at *1-7, 10-11.) *White* unequivocally affirmed the specific analysis the Court of Appeal engaged in here, by applying *Breakthrough's* six factors to undisputed, limited, and objective jurisdictional facts, and concluded that the agency constituted an arm of the tribe for purposes of tribal sovereign immunity. (*Id.* at *10-11 [citing *Breakthrough*, *supra*, 629 F.3d at p.1187].)

Contrary to the State's efforts to portray arm-of-the-tribe jurisprudence as in chaos, the Ninth Circuit did not equivocate on what test to use or what facts to consider; it certainly did not include any Eleventh Amendment immunity considerations in its analysis. Rather, the Ninth

Circuit agreed with the Tenth Circuit and confirmed that arm-of-the-tribe immunity should be analyzed under federal Indian law principles. Where multiple lower federal courts agree, this Court "should hesitate to reject their authority." (*Etcheverry v. Tri-Ag Service, Inc.*, *supra*, 22 Cal.4th at p. 321.)

The Court of Appeal's analysis and opinion is fully consistent with these important Indian law doctrines and the controlling authority intended to guide California courts in analyzing arm-of-the-tribe sovereign immunity. The State's attempt to undermine tribal sovereign immunity with a subterfuge that California's arm-of-the-tribe test lacks cohesion and is fraught with conflict[9] is not borne out by examination of controlling law.

III. Adoption of Eleventh Amendment Immunity Principles Would Impermissibly Restrict Tribal Sovereign Immunity and Violate Binding Precedent

Completely ignoring the consistent and cohesive analyses that have been applied to arm-of-the-tribe immunity cases, which have been described as settled law, the State suggests that California should throw out any arm-of-the-tribe analysis and replace it with a "better-developed" state law test. (AOB at p. 28.) To avoid the insurmountable hurdles the State faces if Indian law principles are applied, it urges this Court to "announce[] a new rule …" cobbled together from Eleventh Amendment immunity cases involving state sovereign immunity questions (*id.* at p. 24). But the State's claim that Eleventh Amendment immunity principles are analogous to tribal sovereign immunity principles is plainly false, it improperly shifts the burden of proof, and its analysis violates binding United States Supreme Court precedent.

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[9] The State's anxiety over the lack of a ***national*** arm-of-the-tribe doctrine (AOB at pp. 24-26) rings hollow because controlling authorities here render sister state authority immaterial. (E.g., *Gutierrez v. Superior Court*, *supra*, 24 Cal.App.4th at p. 170; see also 16 Cal. Jur. 3d (2014) Courts § 317.)

A. Eleventh Amendment Immunity Is Not Analogous to Tribal Sovereign Immunity

The Eleventh Amendment limits the Article III power of a federal court to decide a case brought against a state by a private party; it is not applicable to suits in the state courts. (E.g., *Hilton v. South Carolina Public Railways Com'n* (1991) 502 U.S. 197, 204-05.) The United States Supreme Court has declined to equate the Eleventh Amendment's specific limitation on the federal judiciary with subject matter jurisdiction to entertain the suit. (See *Wisconsin Dept. of Corrections v. Schacht* (1998) 524 U.S. 381, 389 [stating that the Eleventh Amendment does not automatically destroy original federal court jurisdiction] (hereafter *Schacht*). In contrast, it is settled that a state court may not exercise jurisdiction over a federally-recognized Indian tribe. (*Puyallup*, *supra*, 433 U.S. at p. 172.) Moreover, unlike an Eleventh Amendment defense, a waiver of which can be implied from a state's conduct (see *Schacht*, *supra*, 524 U.S. at p. 390), a waiver of tribal sovereign immunity from suit "cannot be implied but must be unequivocally expressed." (*Santa Clara*, *supra*, 436 U.S. at p. 58.)

The differences between an Eleventh Amendment defense and tribal sovereign immunity from suit are deeply rooted in history. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (*Santa Clara*, *supra*, 436 U.S. at p. 58.) Unlike the Eleventh Amendment, which was added to the United States Constitution in 1795, tribal sovereign immunity "predates the birth of the Republic." (*Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority* (1st Cir. 2000) 207 F.3d 21, 29; see also *Bay Mills*, *supra*, 134 S.Ct. at p. 2040 (Sotomayor, J., concurring).) Moreover, as the United States Supreme Court recently observed, unlike the States, which "surrendered [their] immunity from suit by sister States"

at the Constitutional Convention, tribes "were not even parties" to that Convention, and hence it would be "absurd" to subsume tribes under the inapposite Eleventh Amendment immunity analysis. (*Bay Mills*, *supra*, 134 S.Ct. at p. 2031 [quoting *Blatchford v. Native Village of Noatak* (1991) 501 U.S. 775, 782].) Indeed, the *Bay Mills* court likewise emphasized the singularity of tribal sovereign immunity, noting that tribes enjoy broader sovereignty than other sovereigns, including states, "for commercial activities outside their territory." (*Bay Mills*, *supra*, 134 S.Ct. at p. 2037.) The reasons for this exceptionally broad tribal sovereign immunity are manifold and derive primarily from the unique history of tribal sovereigns vis-à-vis their sister state and federal sovereigns. The disastrous nineteenth century federal Indian land policies, forced removal of tribes to isolated and unproductive lands, the insistence of the states upon taxing on-reservation interests,[10] the inability of tribes to derive adequate revenues by taxation, and endemic reservation poverty have all meant that "tribal business operations [have become] critical to the goals of tribal self-sufficiency because such enterprises in some cases may be ***the only means by which a tribe can raise revenues***." (*Id.* at pp. 2043-45 (Sotomayor, J., concurring) [emphasis added].)

An Eleventh Amendment defense "occupies its own unique territory." (*U.S. ex rel. Burlbaw v. Orenduff* (10th Cir. 2008) 548 F.3d 931, 941 [quoting *Floyd v. Thompson* (7th Cir. 2000) 227 F.3d 1029, 1035].) It is not within the province of a state court to impose limitations that are

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[10] Justice Sotomayor astutely notes the grim irony arising from the fact that states that oppose tribal commercial enterprises are likewise regular opponents of tribes' ability to raise revenue in traditional ways. (*Id.* at p. 2043 (Sotomayor, J. concurring) [noting that to tribes, the importance of tribal business enterprises "is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means."].)

unique to the Eleventh Amendment onto the doctrine of tribal sovereign immunity from suit. As the United States Supreme Court repeatedly has stated, "tribal immunity is a matter of federal law and not subject to diminution by the States." (E.g., *Bay Mills*, *supra*, 134 S.Ct. at p. 2031; *Kiowa*, *supra*, 523 U.S. at p. 756; *Wold*, *supra*, 476 U.S. at p. 891.)

B. The Jurisdictional Burden of Proof Is Properly on the Party Asserting Jurisdiction of the Court

The State urges this Court, based on its flawed arguments that tribal sovereign immunity and Eleventh Amendment immunity are functionally identical, to change long-standing law as to the burden of proving that a court has subject matter jurisdiction to hear a case. (See AOB at pp. 25, 33-34.) As discussed above, unlike Eleventh Amendment immunity, tribal sovereign immunity is a pure jurisdictional bar (*Puyallup*, *supra*, 433 U.S. at p. 172; *Schacht*, *supra*, 524 U.S. at p. 389), and a waiver of tribal sovereign immunity from suit "cannot be implied but must be unequivocally expressed" (*Santa Clara*, *supra*, 436 U.S. at p. 58).

Tribal sovereign immunity authorities almost unanimously hold[11] that when sovereign immunity is raised, the plaintiff bears the burden of proving by a preponderance of the evidence that the court has jurisdiction. (E.g., *Garcia v. Akwesasne Housing Authority* (2d Cir. 2001) 268 F.3d 76, 84; *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, *supra*, 201 Cal.App.4th at 206; *Lawrence v. Barona Valley Ranch Resort and Casino*, *supra*, 153 Cal.App.4th 1364, 1369; *Campo Band of Mission Indians v. Superior Court*, *supra*, 137 Cal.App.4th at p. 183; *Cash Advance*, *supra*,

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[11] *Gristedes Foods, Inc. v. Unkechuage Nation* (E.D.N.Y. 2009) 660 F.Supp.2d 442, is the lone exception, but is plainly distinguishable as it dealt with a tribe that was not a conventionally federally-recognized Indian tribe. (*Id.* at pp. 465-66, 469-77.)

242 P.3d at p. 1102.) The State's desire to avoid its burden in this matter cannot defeat this settled rule of federal Indian law.

C. The Arm-of-the-State Test Undermines Tribal Sovereign Immunity Principles and Violates Controlling Precedent

The fact that the Eleventh Amendment immunity analysis has no application to federal Indian law principles is borne out by the gross dissonance between "arm-of-the-state" factors and fundamental tribal sovereign immunity doctrines. The State urges adoption of the following "arm-of-the-state" test that it has fashioned from various authorities:[12]

> (1) The financial relationship between the entity and the state, including whether a money judgment would be satisfied out of state funds;
>
> (2) Whether the entity performs central governmental functions such that an action or judgment against the entity would effectively interfere with state governmental prerogatives; and
>
> (3) Whether the entity is under the state's legal and actual control, or instead is independent.

(AOB at p. 31.) Application of these factors, however, is incompatible with long-standing tribal sovereign immunity principles and violates binding Supreme Court precedent.

1. Consideration of Vulnerability of the Tribal Treasury is Inconsistent with Tribal Sovereign Immunity Principles

The State's claim that tribes may only avail themselves of arm-of-the-tribe immunity by creating economic subdivisions that expose the tribal treasury to liability is wholly at odds with the unique purposes and origin of

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[12] The State criticizes the Court of Appeal for distilling federal and California arm-of-the-tribe tests into a single analysis, while at the same time proffering its own test haphazardly thrown together by cherry-picking Eleventh Amendment elements that the State thinks it can prove here. (AOB at pp. 34-39.)

tribal sovereign immunity from suit. Congress has explicitly directed tribes to participate in the economic mainstream by creating traditional business entities (25 U.S.C. § 4301), and the Supreme Court has unequivocally affirmed the critical connection between tribal economic development enterprises and tribal sovereign immunity from suit without any limitation as to structure or industry and emphasized that tribal immunity is broader and distinct from that of other sovereigns. (E.g., *Bay Mills*, *supra*, at pp. 2031, 2036, 2037.)

The Eleventh Amendment cases that articulate the "arm-of-the-tribe" rules are inapposite. As the State notes, *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.* (9th Cir. 1993) 5 F.3d 378, 381 (hereafter, *Alaska Cargo*), focused on the "state's practical fiscal responsibility for [the entity] should it face financial need." (AOB at p. 35.) Other arm-of-the-state tests analyze the same financial question: whether the sovereign's treasury financially supports and is vulnerable to a subordinate entity's financial liabilities. (See, e.g., *Hess v. Port Authority Trans-Hudson Corp.* (1994) 513 U.S. 30, 45-46; *ITSI T.V. Productions, Inc. v. Agricultural Associations* (9th Cir. 1993) 3 F.3d 1289, 1293-94 (hereafter *ITSI*.)) In other words, the salient arm-of-the-state financial question is ***whether the entity is financially dependent upon the sovereign***.

This analysis contemplates a sovereign with a treasury built from duly collected tax revenues that has created a subordinate entity to provide extra-governmental services for the convenience or enjoyment of its citizens, like a railway or a county fair. (See *ITSI*, *supra*, 3 F.3d 1289; *Alaska Cargo*, *supra*, 5 F.3d 378.) It does not contemplate the opposite: a sovereign with a treasury that contains little to no tax revenues that creates a subordinate entity to participate in the mainstream of commerce and, hopefully, produce profits that can flow into its treasury to fund the basic functions of government. Tribal entities are not financially dependent upon

the sovereign; ***the tribal sovereign is financially dependent upon the entity***. And tribal sovereign immunity explicitly exists to promote this relationship. (E.g., *Bay Mills*, *supra*, at pp. 2031, 2036-37; see also 25 U.S.C. § 4301.) Eleventh Amendment authorities have no applicability here. And tribal immunity cases that conflict with this (e.g., *American Property, supra*, 206 Cal.App.4th at p. 506) are wrong.

Further, the notion that tribal entities may not otherwise take on a corporate structure suffers from the same flaw, as federal law explicitly directs tribes to participate in the mainstream of commerce and empowers tribes to create conventional commercial entities. (E.g., 25 U.S.C. § 4301 *et. seq*; *Bay Mills*, *supra*, at p. 2036-37; see also *AVI*, *supra*, 548 F.3d at p. 725.) And the United States Supreme Court has held that a sovereign's efforts to protect itself from the effects of liability may not defeat a finding of sovereign immunity. (See *Regents of the University of California v. Doe* (1997) 519 U.S. 425, 431.)

2. Binding Authority Explicitly Prohibits Requiring a Central Governmental Function

Even the State acknowledges that *Bay Mills* and the overwhelming weight of federal authority explicitly prohibit courts from considering commercial versus governmental functions in tribal sovereign immunity analyses. (AOB at p. 37.) Notwithstanding, the State urges this Court to adopt exceptions to that rule, essentially arguing for the existence of two unequal tribal entity classes: purely commercial and quasi-governmental. (AOB at pp. 36-37, 41, 45.) The State asks this Court to create an exception to the prohibition against considering commercial versus governmental purpose to require a tribal entity to show that it regularly contributes sufficient money to the tribe to cause the tribe to rely "substantial[ly]" upon the entity's revenue. (AOB at p. 42.)

Bay Mills, however, provides no room for the judicial creation of exceptions to the general rule that tribal sovereign immunity protects tribal commercial conduct. To the contrary, the Supreme Court has repeatedly refused to restrict tribal immunity to specific commercial considerations, because tribal immunity precedents have "established a broad principle, from which … it [would be] improper suddenly to start carving out exceptions." (*Bay Mills*, *supra,* 134 S.Ct. at p. 2031; *Kiowa*, *supra*, 523 U.S. at pp. 758, 760.) The power to create exceptions to tribal sovereign immunity is within the sole purview of Congress, and no court may suddenly inject such subjectivity into the analysis without violating settled federal law. (See *ibid.*)

3. Governmental Managerial Control of an Entity Does Not Function in the Arm-of-the-Tribe Test

Again borrowing from Eleventh Amendment cases, the State insists that a tribe should exert direct control over the day-to-day management of the tribal entity in order for the entity to share in tribal sovereign immunity. (AOB at p. 39 [citing *Alaska Cargo*, *supra*, 5 F.3d at p. 382], 43-44, 45-46.) The State urges this Court to consider the frequency of a tribal entity's board meetings and the extent to which a third-party's employees or contractors maintain access to the tribal entity's bank accounts. (*Id.* at pp. 43-44, 45-46.) As above, this analysis flies in the face of basic principles of tribal sovereign immunity announced by the highest federal authorities, which urge tribes to create economic development enterprises, protected by tribal sovereign immunity from suit, and having a goal toward increasing tribal self-sufficiency and self-determination. Congress has specifically directed tribes to avail themselves of outside technical and financial expertise in order to properly and successfully manage these businesses (see 25 U.S.C. § 4301(9), (12)), and courts have long contemplated that such arrangements were a proper way for tribes to participate in the

economic mainstream. (See, e.g., *Bay Mills*, *supra*, 134 S.Ct. at pp. 2036-37; *AVI*, *supra*, 548 F.3d at p. 725; *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, *supra*, 546 F.3d at p. 1294; *Cabazon Band of Missions Indians v. County of Riverside, supra*, 783 F.2d at p. 901.)

The Court of Appeal, recognized these important principles (Opinion at pp. 22-23) and held in such a way that was consistent with *Trudgeon's* conclusion that "control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management." (*Trudgeon*, *supra*, 71 Cal.App.4th at p. 641 [citing *Gavle*, *supra*, 555 N.W.2d at p. 295].) Such considerations are anathema to tribal sovereign immunity principles.

IV. The Tribal Entities Are Arms of Their Respective Tribes Pursuant to Controlling California and Federal Precedent

The facts and evidence that may be considered in analyzing the jurisdictional question of whether a tribal instrumentality is an arm of the tribe is strictly limited to ***only*** those things relevant to the controlling arm-of-the-tribe test (*Ameriloan*, *supra*, 169 Cal.App.4th at p. 98), as the benefit of immunity is lost forever once the inquiry ranges outside the limits of the jurisdictional inquiry. (See, e.g., *Puerto Rico Aqueduct and Sewer Authority. v. Metcalf & Eddy, Inc.* (1993) 506 U.S. 139, 144 [quoting *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526] [immunity "is effectively lost if a case is erroneously permitted to go to trial"]; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1189 ["An immunity defense is effectively lost if an immune party is forced to stand trial or face the other burdens of litigation."]; *Kiowa Indian Tribe of Oklahoma v. Hoover* (10th Cir. 1998) 150 F.3d 1163, 1172 ["The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation."]; *Burlington Northern &*

Santa Fe Ry. Co. v. Vaughn (9th Cir. 2007) 509 F.3d 1085, 1090 ["**tribal sovereign immunity** ... is effectively lost if a case is erroneously permitted to go to trial"] [emphasis added].)

Further, as set forth above, the proper test of arm-of-the-tribe immunity derives from federal and California authorities, which unequivocally hold: (1) tribal immunity applies without exception to tribes' commercial, off-reservation conduct, regardless of the industry in which the entity is engaged (*Bay Mills*, *supra*, 134 S.Ct. at p. 2036); (2) the vulnerability of the tribal treasury and an entity's corporate structure are not proper inquiries (*id.* at pp. 2031, 2036-37; 25 U.S.C. § 4301); (3) tribes need not be enmeshed in the day-to-day management of the business entity (*Bay Mills*, *supra*, 134 S.Ct. at pp. 2031, 2036-37; 25 U.S.C. § 4301; see also *Trudgeon*, *supra*, 71 Cal.App.4th at p. 641 [citing *Gavle*, *supra*, 555 N.W.2d at p. 295]); and (4) courts may not consider the respectability or ethics of the business in assessing the existence of tribal sovereign immunity from suit. (*Bay Mills*, *supra*, 134 S.Ct. at pp. 2030, 2031.) As such, the State's collateral factual allegations focused on these prohibited areas of inquiry are improper and must be rejected. (AOB at pp. 9, 10, 13, 14-15, 15-16, 17, 18-19).

A. *Breakthrough/White* Factor One: The Tribes Created MNES and SFS Pursuant to Tribal Law

The controlling authorities agree that the method of creation factor is satisfied when an entity has been created by a tribe under the authority of tribal law. Courts examine very specific evidence in this analysis, including tribal resolutions creating the entity, organizational documents created under the authority of tribal law, and a tribe's own descriptions of the entity. (*White*, *supra,* at *11; *Breakthrough*, *supra*, 629 F.3d at pp. 1191-92; see also *Trudgeon*, *supra*, 71 Cal.App.4th at p. 641.) A tribal entity that was "created by the Tribe acting in its governmental capacity" and under its tribal

constitutional authority as demonstrated by the tribal resolution establishing the entity satisfies the method of creation factor. (*Breakthrough*, *supra*, at pp. 1191-92 [relying on the tribe's descriptions of the entity in the relevant tribal documents describing the nature of its creation]; *White*, *supra*, at *11; see also *Trudgeon*, *supra*, at p. 641.) In contrast, as recognized by *American Property*, organization of an entity under state law weighs against a finding of immunity. (*American Property*, *supra*, 206 Cal.App.4th at pp. 501-03.)

In accordance with these controlling authorities and the ***undisputed*** evidence below, including tribal resolutions creating the Entities (4 SSCT 000800-06, 6 SSCT 001315-20) and the Tribes' respective Tribal constitutions and statutes (4 SSCT 000769-99, 000814-904; 5 SSCT 000905-17; 6 SSCT 001222-34, 001236-1313, 001351-56; 7 SSCT 1357-1457), both the trial court and the Court of Appeal properly concluded that the Santee Sioux Nation and the Miami Tribe of Oklahoma created the Tribal Entities under Tribal law and under their authority endowed by Tribal ordinances and regulations. Therefore, the method of creation factor was satisfied in favor of arm-of-the-tribe immunity.

B. *Breakthrough/White* Factor Two: The Tribal Entities were Formed to Benefit and Promote Economic Sustainability of Their Respective Tribes

Breakthrough considered the purpose of the tribal entities by analyzing whether the entities "were created for the financial benefit of the Tribe." (*Breakthrough*, *supra*, 629 F.3d at p. 1192.) This "weigh[ed] strongly in favor of immunity." (*Ibid.*) The *Breakthrough* court reviewed tribal documents, including the tribal resolution creating the entity, as well as a tribal official's description of the entity as having been created to encourage tribal self-sufficiency and benefit the tribe. (*Id.* at pp. 1192-93.) This analysis is consistent with *Trudgeon*, which likewise reviewed tribal organizational documents, including tribal resolutions, to support that the

entity's purpose promoted tribal self-determination and self-sufficiency. (*Trudgeon*, supra, 71 Cal.App.4th at p. 640.)

The Tribal Entities' ***undisputed*** documentary evidence, including Tribal resolutions (4 SSCT 000800-01; 6 SSCT 001315) and Entity Articles of Incorporation (4 SSCT 000802-06; 6 SSCT 001316-19), clearly identifies the purposes for which they were created. The Santee Sioux Nation explicitly created SFS "to facilitate the achievement of goals relating to the Tribal economy, self-government, and sovereign status of the Santee Sioux Nation…." (4 SSCT 000800, 000802.) Likewise, the Miami Tribe explicitly created MNES "[t]o increase the economic well being of the members of the Tribe in accordance with the economic development and tribal self-determination policies and plans of the Tribe…." (6 SSCT 001316.)

C. *Breakthrough/White* Factor Three: The Tribes Control MNES and SFS

The question of "control" is the subject of a simple calculation under *Breakthrough* and *White*. In order to determine whether an entity has satisfied the control factor, courts should examine the objective fact of the tribe's ownership, the composition of the entity's governing body, as well as the management structure. (*Breakthrough*, *supra*, 629 F.3d at p. 1193.) Both *Breakthrough* and *White* specifically examined whether the members of the board of directors were members of the tribe. (*Ibid.*; *White*, *supra*, *11.) This is consistent with *Trudgeon*, where the court similarly examined whether the board of directors was comprised of tribal members. (*Trudgeon*, *supra*, 71 Cal.App.4th at p. 641.)

Here it is ***undisputed*** that SFS is governed by a Board of Directors that consists of the members of the Santee Sioux Tribal Council. (4 SSCT 000803.) Likewise, MNES and MNE share a Board of Directors comprised solely of tribal members who are appointed by the Tribal Business

Committee. (6 SSCT 001209, 001210, 001281, 001315-19.) Thus, the Tribes themselves, by and through these Boards of Directors, govern and control MNES and SFS as required for the Tribal Entities to share in the Tribes' sovereign immunity.

D. *Breakthrough/White* Factor Four: The Tribes Intended for the Tribal Entities to Have Tribal Sovereign Immunity

Whether a Tribe intended its entity to share in its sovereign immunity is not susceptible to any interpretation. The only evidence required to satisfy this factor is the Tribe's own statement in its tribal documents that it intends the entity to share in its immunity. (*Breakthrough*, supra, 629 F.3d at pp. 1193-94.) This is consistent with *American Property*, where the court noted the lack of any indication in the record that the tribe had stated its intention to share its immunity, and thus it failed to satisfy this factor. (*American Property*, *supra*, 206 Cal.App.4th at p. 505.)

Here it is ***undisputed*** pursuant to SFS's Articles of Incorporation that the Santee Sioux Nation explicitly has endowed SFS with its sovereign immunity from suit, which can be waived only by a resolution of the Santee Sioux Tribal Council. (4 SSCT 00802-06.) Likewise, it is ***undisputed*** pursuant to MNES's Articles of Incorporation that the Miami Tribe explicitly has endowed MNES with its sovereign immunity from suit, which can be waived only by a resolution of the Miami Business Committee. (6 SSCT 001317-18.) Thus, this factor was satisfied in favor of tribal sovereign immunity for MNES and SFS.

E. *Breakthrough/White* Factor Five: Revenues from the Tribal Entities Flow to the Tribes and Benefit the Tribes

The financial relationship factor required the trial court, based on the evidence presented, to determine whether revenues generated by MNES and SFS flow back to their respective Tribes to support tribal economic development and tribal self-sufficiency. (*Breakthrough*, *supra*, 629 F.3d at pp. 1194-95.) In *Breakthrough*, the court determined that the entity had satisfied this factor as the evidence clearly demonstrated that the revenues flowed back to the tribe with a purpose to support tribal programs and tribal economic development, and further that any reduction in entity revenue would hurt the tribe. (*Breakthrough, supra*, 629 F.3d at p. 1195.) This is consistent with *Trudgeon,* which determined that the mere fact that the resolution creating the entity referenced the goal of promoting self-determination was sufficient to demonstrate the relationship between the entity and the Tribe. (*Trudgeon*, *supra*, 71 Cal.App.4th at p. 640.)

Here, as noted above, it is ***undisputed*** that each of the Tribes here created their Tribal Entity with the explicit goal of promoting self-determination and self-sufficiency. It is further ***undisputed***, as demonstrated by the sworn testimony of an SFS officer that the profits garnered by SFS are used for the benefit of the Santee Sioux Nation, including funding of the Tribe's operations, expenditures, and social welfare programs. (4 SSCT 007655.) Likewise, it is ***undisputed***, as demonstrated by the sworn testimony of the MNES CEO and the Chief of the Miami Tribe that profits garnered by MNES are used for the benefit of the Tribe, including funding of the Tribe's operations, payroll, and social welfare programs. (6 SSCT 001209-10, 001218-19, 001278-79.) It is also ***undisputed*** that each of these Tribes would suffer substantially if they were deprived of the revenues that their economic tribal instrumentalities generate on their behalf.

F. *Breakthrough/White* Factor Six: The Purposes of Tribal Sovereign Immunity are Served by Granting the Tribal Entities Sovereign Immunity

The last *Breakthrough* factor is whether the purposes of Tribal sovereign immunity would be served by granting immunity to the tribal entity. As *American Property* observed, "this factor overlaps significantly with other factors" discussed above. (*American Property*, *supra*, 206 Cal.App.4th at p. 507.) Pursuant to *Breakthrough*, this factor focuses on whether the Tribal Entities "promote and fund the Tribe's self-determination through revenue generation and the funding of diversified economic development." (*Breakthrough*, *supra*, 629 F.3d at p. 1195.) Evidence that demonstrates this factor includes the tribe's declared objective as to the entity. (*Ibid.*) Entities that do not serve the purposes of sovereign immunity lack "'any declared objective of promoting the tribe's general tribal or economic development.'" (*Ibid.* [citing *Trudgeon*, *supra*, 71 Cal.App.4th at p. 640]; see also *American Property*, *supra*, at p. 507.)

All of the ***undisputed*** documentary evidence presented by the Tribal Entities to the trial court below established that both the Miami Tribe and the Santee Sioux Nation declared that the explicit objective of each Tribal Entity is to promote their general tribal and economic development, and the Tribal Entities distribute much-needed funds to their respective Tribes to fund important tribal governmental functions and services. Thus, this factor is also satisfied in favor of granting Tribal sovereign immunity to SFS and MNES.

CONCLUSION

The Court of Appeal properly analyzed the relationship between MNES and SFS to their respective Tribes under controlling and persuasive federal Indian law and consistent California law. The ***undisputed*** and objective evidence in the record clearly demonstrate that the Tribal Entities are sufficiently related to their respective Tribes to benefit from the protection of tribal sovereign immunity from the State's enforcement action. For all of the foregoing reasons, the opinion of the Court of Appeal should be affirmed.

Dated: October 2, 2014

FREDERICKS PEEBLES & MORGAN LLP
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By: /s/ John Nyhan
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. RULES OF COURT 8.04(c)(1)

I certify that:

Pursuant to Cal. Rule of Ct. 8.04(c)(1), the attached Defendants-Respondents' Brief is printed in Times New Roman typeface with 13 point font and contains 13,265 words (excluding cover, tables, and certificate of service and compliance), according to the count of the computer program Microsoft Word used to prepare the brief.

October 2, 2014

/s/ John Nyhan
John Nyhan
Attorney

PROOF OF SERVICE

I declare I am employed in the County of Douglas, State of Nebraska. My business address is: 3610 North 163rd Plaza, Omaha, Nebraska 68116. I am over the age of eighteen (18) years and not a party to the within action.

On **October 2, 2014**, I served the within:

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X **By overnight delivery** service by placing a true copy thereof in an overnight delivery envelope and placing the envelope in a Federal Express drop box at Omaha, Nebraska.

___ **By Email** to the addressee(s) listed herein.

___ **By Facsimile** to the addressee(s) listed herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **October 2, 2014**, at Omaha, Nebraska.

/s/ Carol Cyriacks