STATE OF MICHIGAN
IN THE COURT OF APPEALS
DISTRICT II

STAR TICKETS,
a Michigan corporation,

Plaintiff/Appellee,

v.

CHUMASH CASINO RESORT,
an entity of the Santa Ynez Band of Chumash Indians,

Defendant/Appellant.

Court of Appeals Case No. 322371

Oakland County Circuit Court
Case No. 2014-138263-CB

[PROPOSED] Brief of the Saginaw Chippewa Indian Tribe of Michigan as Amicus Curiae in support of Defendant-Appellant

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Table of Contents

Index of Authorities

Cases

Statutes

Other Authorities

Basis of Jurisdiction of the Court of Appeals

Amicus curiae Saginaw Chippewa Indian Tribe of Michigan incorporates by reference and relies upon the Basis of Jurisdiction in Defendant-Appellant's appellate brief.

Questions Presented

Amicus curiae Saginaw Chippewa Indian Tribe of Michigan incorporates by reference and relies upon the Questions Presented in Defendant-Appellant's appellate brief.

Statement of Interest

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized Indian Tribe located within the borders of the State of Michigan. The Tribe, like the Santa Ynez Band of Chumash Indians, is a "separate sovereign[ ] pre-existing the Constitution."[1] Among the "core aspects of sovereignty that tribes possess" is the "common-law immunity from suit traditionally enjoyed by sovereign powers."[2]

This case of first impression within this state has far reaching implications for Michigan's treatment of the doctrine of tribal sovereign immunity and the federal policy supporting tribal efforts to make their own laws and be ruled by them. The Saginaw Chippewa Indian Tribe files this brief in support of the Chumash Tribe to detail other courts' treatment of sovereign immunity and faithful adherence to federal policy in allowing tribal law to define what constitutes a waiver of sovereign immunity.

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[1] *Michigan v Bay Mills Indian Community*, 572 US ___, 134 S Ct 2024, 2030, 188 L Ed 1071 (2014) (quoting *Santa Clara Pueblo v Martinez*, 436 US 49, 56, 98 S Ct 1670, 56 L Ed 2d 106 (1978)).
[2] *Id.*

Statement of Facts

The Chumash Casino Resort ("the Casino") is wholly owned and operated by the Santa Ynez Band of Chumash ("the Tribe"). The Tribe operates the Casino through a Board of Directors termed the "Enterprise Board." The Enterprise Board was established by a tribal ordinance in 2002.[3] That ordinance recognizes that the Enterprise Board shares the Tribe's sovereign immunity and outlines procedures by which the Casino can waive its immunity from suit. Under Section 5 of the Ordinance, the Casino may waive its immunity from suit if:

> (i) the waiver is in writing and expressly states that such waiver shall permit recourse and enforcement against the explicitly designated assets. Revenues, business or activity of the Enterprise; and
>
> (ii) the waiver is duly approved by the Enterprise Board.[4]

Star Tickets argues that an employee's signature on a user agreement (or, in the alternative, the Casino's part performance under that agreement) effectively waived the Casino's sovereign immunity. But the user agreement does not explicitly designate asset against which Star Tickets may seek recourse and enforcement, and so does not satisfy Section 5(i) of the ordinance. Moreover, the Enterprise Board never approved the user agreement,[5] so the user agreement does not satisfy Section 5(ii) of the ordinance. Indeed, the Enterprise Board never authorized a waiver of sovereign immunity.[6] And of course, partial performance of a contract cannot meet Section 5(i)'s first clause specifying that a waiver must be in writing.

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3 (See Appellant's Opening Br, Appendix B.)
4 (*Id.*)
5 (Appellant's Opening Br, Aff of Vincent Armenta, Chairman of the Santa Ynez Band of Chumash Indians, Appendix B.)
6 (*Id.*)

Because the user agreement did not comply with duly enacted Tribal law governing the procedure for waiver, the Tribe filed a motion for summary disposition arguing that there was no effective waiver of immunity.[7] The Oakland County Circuit Court refused to apply Tribal law to the alleged waiver of immunity and denied the motion.[8] It applied Michigan law to hold that even though the Enterprise Board did not approve the agreement, the Tribe partially performed under the contract and was estopped from arguing that the employee did not have authority to waive sovereign immunity.[9]

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[7] (See *id.*)
[8] (Appellant's Opening Br, June 6, 2014 Op & Order, p 4, Appendix D.)
[9] (*Id.*)

Argument

I. Waivers of immunity must be interpreted in accordance with applicable federal and tribal law.

In its most recent term, the Supreme Court reaffirmed that tribal sovereign immunity from unconsented suit is "[a]mong the core aspects of sovereignty that tribes possess."[10] Under the sovereign-immunity doctrine, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[11] This immunity applies to the Tribe's commercial and governmental activities, and applies to tribal businesses that act as an arm of the Tribe.[12] Tribal sovereign immunity "is a matter of federal law"[13] that requires application of specific federal rules of construction described below. But in addition to imposing these rules of construction, federal law *also* prioritizes tribal self-governance (that is, the application of tribal law) in certain matters, including internal tribal matters like allowing and effectuating waivers of tribal immunity.[14] The Circuit Court erred in failing to follow these controlling principles. This Court should reverse that error and hold that federal law requires Michigan Courts to decide questions concerning tribal authority to waive tribal immunity under applicable tribal law.

A. Federal law creates rules of construction that courts must apply to construe waivers of tribal sovereign immunity.

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[10] *Bay Mills Indian Community*, n 1 *supra*.
[11] *Kiowa Tribe of Okla v Mfg Techs, Inc*, 523 US 751, 754, 118 S Ct 1700, 140 L Ed 2d 981 (1998).
[12] *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2039 (refusing to adopt "a freestanding exception to tribal immunity for all . . . commercial conduct"); *Kiowa Tribe of Okla*, n 11 *supra*, p 754–55.
[13] *Kiowa Tribe of Okla*, n 11 *supra*, p 752.
[14] See *infra* §§ I.B.1 and I.B.2; see also *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2027 (sovereign immunity "is 'a necessary corollary to Indian sovereignty and self-governance.'") (quoting *Three Affiliated Tribes of Fort Berthold Reservation v Wold Eng'g*, 476 US 877, 890 106 S Ct 2305, 90 L Ed 2d 881 (1986)).

The federal law that governs tribal immunity limits courts' discretion in several important respects. *First*, any waiver of immunity—by Congress or the tribe—must be clear and unambiguous. *Second*, any waiver of immunity must be strictly construed with any ambiguity resolved in favor of the sovereign tribe. And *third*, courts must dismiss any suit against an unconsenting tribe for lack of subject-matter jurisdiction.

1. Only clear and unambiguous language can waive tribal immunity.

As the Supreme Court described this term, "[t]he baseline position, we have often held, is tribal immunity[.]"[15] Accordingly, Circuit Courts recognize "a strong presumption against waiver of tribal sovereign immunity."[16] To move off this baseline, any "waiver of sovereign immunity cannot be implied but must be unequivocally expressed."[17] Decades ago, the Eighth Circuit held that any contrary suggestion that a tribe's immunity can be waived by implication must be rejected "on the basis of overwhelming precedent alone[.]"[18] In the thirty years since, that overwhelming federal precedent has only grown.[19]

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[15] *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2031.
[16] *Demontiney v US ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F3d 801, 811 (CA 9 2001).
[17] *Santa Clara Pueblo v Martinez*, 436 US 49, 58, 98 S Ct 1670, 56 L Ed 2d 106 (1978) (citations omitted) (internal quotation marks omitted).
[18] *Am Indian Agr Credit Consortium, Inc v Standing Rock Sioux Tribe*, 780 F2d 1374, 1378 (CA 8 1985).
[19] E.g., *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2031–32; *Memphis Biofuels, LLC v Chickasaw Nation Indus*, 585 F3d 917, 921 (CA 6 2009) (any "abrogation of tribal-sovereign immunity must be clear and may *not* be implied.") (emphasis in original) (citing *Okla Tax Comm'n v Citizen Band Potawatomi Tribe of Okla*, 498 US 505, 509, 111 S Ct 905, 112 L Ed 2d 1112 (1991) and *Santa Clara Pueblo*, n 17 *supra*, p 58).

2. Courts must strictly construe any waiver of immunity.

The Supreme Court has consistently held that "[a] waiver of sovereign immunity must be strictly construed in favor of the sovereign."[20] The same rule applies to Indian tribes.[21] Because a waiver of immunity "'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'"[22] Thus, "if a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'"[23] To the extent that any term or clause is ambiguous, courts must resolve the ambiguity in favor of preserving sovereign immunity.[24]

3. Without a waiver of tribal sovereign immunity, a court lacks subject-matter jurisdiction to hear claims against the Tribe.

"[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."[25] Plaintiffs who sue tribes bear the burden of establishing that Congress, the tribe, or the relevant tribal entity

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[20] *Orff v United States*, 545 US 596, 601–02, 125 S Ct 2606, 162 L Ed 2d 544 (2005) (citing *Dep't of Army v Blue Fox, Inc*, 525 U.S. 255, 261, 119 S Ct 687, 142 L Ed 2d 718 (1999)).

[21] *United Tribe of Shawnee Indians v United States*, 253 F3d 543, 547 (CA 10 2001) ("Any waiver [of sovereign immunity] must be construed strictly in favor of the sovereign and not enlarged beyond what its language requires." (alteration, quotation omitted)); *Rupp v Omaha Indian Tribe*, 45 F3d 1241, 1245 (CA 8 1995) (same); *Seneca-Cayuga Tribe of Okla v Okla ex rel. Thompson*, 874 F2d 709, 715 (CA 10 1989) (same).

[22] *Missouri River Servs v Omaha Tribe of Nebraska*, 267 F3d 848, 852 (CA 8 2001) (citing *Am Indian Agr*, n 18 *supra*, p 1378 (quoting *Beers v Arkansas*, 61 US 527, 529, 20 How 527, 15 L Ed 991 (1857))).

[23] *Id.* (citing *Namekagon Dev Co v Bois Forte Res Hous Auth*, 517 F2d 508, 510 (CA 8 1975)).

[24] *Bank of Oklahoma v Muscogee (Creek) Nation*, 972 F2d 1166, 1171 (CA 10 1992) (finding tribal immunity from federal suit because waiver allowing tribal-court suit did not unambiguously consent to suit in federal court).

[25] *Enahoro v Abubakar*, 408 F3d 877, 880 (CA 7 2005).

waived tribal immunity from suit.[26] If, with all inferences drawn in favor of preserving immunity, a plaintiff cannot prove that Congress or the tribe clearly and unambiguously waived sovereign immunity, then "it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."[27] Once a court determines that a tribe remains immune from suit, it must immediately dismiss the action against it.[28]

The Supreme Court requires immediate dismissal of an unconsented suit because "[s]overeign immunity is a jurisdictional question: if the Tribe possessed sovereign immunity, then the district court had no jurisdiction to hear the counterclaims."[29] Courts around the country describe this "jurisdictional question" as one that sounds in subject-matter jurisdiction.[30] Their treatment of the question further confirms that the doctrine divests a court of subject-matter jurisdiction over the action.[31]

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[26] *Amerind Risk Mgmt Corp v Malaterre*, 633 F3d 680, 685–86 (CA 8 2011).
[27] *Puyallup Tribe, Inc v Dep't of Game of State of Washington*, 433 US 165, 172, 97 S Ct 2616, 53 L Ed 2d 667 (1974).
[28] See, e.g., *Bay Mills Indian Community*, n 1 *supra*, 134 S. Ct. 2027 (describing as "settled law" the doctrine's requirement that courts "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)."; *Citizen Band Potawatomi Indian Tribe*, n 19 *supra*, p 509 ("Suits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); *Santa Clara Pueblo v Martinez*, n 17 *supra*, p 59 (in the absence of an effective waiver, "suits against the tribe . . . are barred by its sovereign immunity from suit"); *Bank of Oklahoma v Muscogee (Creek) Nation*, n 24 *supra*, p 1169 ("The basic law of sovereign immunity for Indian tribes is quite clear: Suits against Indian tribes are barred by sovereign immunity absent either a clear waiver by the tribe or congressional abrogation.").
[29] *Rupp v Omaha Indian Tribe*, 45 F3d 1241, 1244 (CA 8 1995).
[30] *Native Am Distrib v Seneca-Cayuga Tobacco Co*, 546 F3d 1288, 1293 (CA 10 2008) (describing its sovereign-immunity inquiry as one concerning subject-matter jurisdiction); *Warburton/Buttner v Superior Court*, 103 Cal App 4th 1170, 1181, 127 Cal Rptr 2d (2002) (stating that raising sovereign immunity "put[s] subject matter jurisdiction into question[.]"); *World Touch Gaming, Inc v Massena Mgmt, LLC*, 117 F Supp 2d 271, 274 (ND NY 2000) (dismissing case for lack of subject matter jurisdiction where tribe had not waived immunity from the suit).
[31] See *Amerind Risk Mgmt Corp*, n 26 *supra*, p 686 (courts may raise tribal-immunity questions *sua sponte*); *Hagen v Sisseton-Wahpeton Cmty Coll*, 205 F3d 1040, 1044 (CA

B. Federal law directs courts to construe sovereign-immunity waivers in accordance with applicable tribal law.

In examining federal law's treatment of tribal sovereign immunity, though, it is important to note the emphasis of federal law and policy on fostering and protecting tribal self-governance. Although tribal immunity is a matter of federal law, where the question of authority to execute a waiver arises, federal law requires courts to rely on applicable *tribal* law to answer the question. This makes sense. Because it is the Tribe's decision whether to waive sovereign immunity at all, its own law governing how that decision is made and is effective must govern the analysis.[32]

1. Federal law and policy directs courts to respect tribal self-governance.

The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."[33] Congress has manifested this commitment in myriad statutes,[34] and the executive branch, too, emphasizes the

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8 2000) (parties may raise tribal-immunity questions at any stage of proceedings); *Warburton/Buttner*, n 30 *supra*, p 1181 (same).

[32] See, e.g., *Missouri River Servs*, n 22 *supra*, p 852 (citing *Beers*, n 22 *supra*, p 529); *Am Indian Agr*, n 18 *supra*, p 1378; and *Namekagon Dev Co*, n 23 *supra*, p 510).

[33] *Iowa Mut Ins Co v LaPlante*, 480 US 9, 14, 107 S Ct 971, 94 L Ed 2d 10 (1987) (citing *Wold Eng'g*, n 14 *supra*, p 890; *Merrion v Jicarilla Apache Tribe*, 455 US 130, 138, n 5, 102 S Ct 894, 71 L Ed 2d 21 (1982); *White Mountain Apache Tribe v Bracker*, 448 US 136, 143–144, and n 10, 100 S Ct 2578, 65 L Ed 2d 665 (1980); *Williams v Lee*, 358 US 217, 220–221, 79 S Ct 269, 3 L Ed 2d 251 (1959)); see also *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2027 ("unless and 'until Congress acts, the tribes retain' their historic sovereign authority.") (quoting *United States v Wheeler*, 435 US 313, 323, 98 S Ct 1079, 55 L Ed 2d 303 (1978)); *California v Cabazon Band of Mission Indians*, 480 US 202, 216, 107 S Ct 1083, 94 L Ed 2d 244 (1987) (describing the "congressional goal of Indian self-government"). Although they use a different analytical framework, cases as early as the mid-nineteenth century emphasize the importance of tribal governance of internal affairs and the limited role of state authority over such matters. E.g. *In re Kansas Indians*, 72 US (5 Wall) 737, 744, 18 L Ed 667 (1866); *In re New York Indians*, 72 US (5 Wall) 761, 18 L Ed 708 (1866).

[34] See, e.g., Indian Tribal Justice Act, 25 USC 3601, *et seq.*; Violence Against Women Act, 25 USC 1301, *et seq.* (recognizing and affirming tribal-court jurisdiction over

importance of tribal self-determination to federal policy.[35] Today, the federal commitment to tribal self-governance—evidenced in both positive law and case law—is an enduring hallmark of federal law.

2. Federal courts routinely apply tribal law to potential waivers of immunity to determine whether the waivers are enforceable.

In light of this federal emphasis on fostering tribal self-governance, it is unsurprising that federal courts considering immunity-waiver questions strictly construe potential waivers of immunity to ensure their compliance with *tribal* law. For example, before the Seventh Circuit Court of Appeals enforced a tribal corporation's immunity waiver, it confirmed that the waiver complied with tribal law.[36]

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criminal cases brought by tribes against non-members—including non-Indians); Indian Self-Determination and Education Assistance Act, 25 USC 450, *et seq.* (evincing the United States' commitment to "supporting and assisting Indian tribes in the development of strong and stable tribal governments"); Indian Gaming Regulatory Act, 25 USC 2701, *et seq.* (declaring that a principle goal of federal Indian policy is "to promote tribal economic development, tribal self sufficiency, and strong tribal government"); Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act, PL 112-151 (promoting greater tribal self-determination by allowing tribes to develop and implement their own regulations governing certain leasing on Indian lands); Indian Employment, Training, and Related Services Demonstration Act of 1992, 25 USC 3401, *et seq.* (advocating the provision of employment, training, and related services by Indian tribal governments in order "to serve tribally-determined goals consistent with the policy of self-determination") and Indian Financing Act of 1974, 25 USC 1451, *et seq.* (declaring the policy of Congress to help develop and utilize Indian resources "to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources"); *Iowa Mut Ins Co,* n 33 *supra,* p 14 (describing the federal commitment to tribal self-governance and citing 25 USC 450, 450a (Indian Self-Determination and Education Assistance Act); 25 USC 476–479 (Indian Reorganization Act); 25 USC 1301–1341 (Indian Civil Rights Act)).

[35] E.g., *Cabazon Band,* n 33 *supra,* p 218–19 (describing Presidential policy statements in favor of tribal self-determination and executive agencies' actions in furtherance of that goal).

[36] *Altheimer & Gray v Sioux Mfg Corp,* 983 F2d 803, 812 (CA 7 1993). In *Altheimer,* the tribal code allowed the corporation to limit its immunity in its charter, and the charter directed that the corporation's immunity "is hereby expressly waived with respect to any written contract entered into by the Corporation." *Id.* Because, under tribal law, the

Moreover, federal courts around the country—including the circuit court within which Michigan sits—have refused to enforce potential waivers of immunity that were *ultra vires* or otherwise unenforceable under tribal law. For example:

- The Eighth Circuit Court of Appeals has held that a tribal corporation did not waive its immunity because the corporate charter only allowed the corporation to waive immunity by resolution of its board of directors, but the plaintiffs presented no evidence that the board of directors ever adopted such a resolution.[37]

- The Sixth Circuit Court of Appeals has held that a potential waiver of immunity was ineffective because the tribal corporation's agent did not obtain the board-of-director approval required by tribal law.[38]

- The Eleventh Circuit Court of Appeals has held that a tribal chief lacked actual or apparent authority to waive the tribe's sovereign immunity where a tribal ordinance only allowed the tribal council to effect a waiver by passing an enacted resolution.[39]

Lower courts, too, faithfully apply tribal law to determine whether a waiver of immunity was valid.[40]

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execution of the written contract effected a waiver, the tribal corporation lacked immunity from suit. *Id.*

[37] *Amerind Risk Mgmt Corp*, n 26 *supra*, p 687–88.

[38] *Memphis Biofuels*, n 19 *supra*, p 922.

[39] *Sanderlin v Seminole Tribe of Fla*, 243 F3d 1282, 1287–88 (CA 11 2001).

[40] E.g., *Stillaguamish Tribe of Indians v Pilchuck Group II*, unpublished opinion of the Western District of Washington, issued Sept 7, 2011 (Docket No. C10-005RAJ), 2011 WL 4001088, p *6 and *6, n 5 (stating that "[t]he court thus reaches two conclusions: state law plays no role in deciding whether a Tribe has waived its sovereign immunity; and where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions[,]" and criticizing state-court applications of state agency law to tribal sovereign immunity); *Colombe v Rosebud Sioux Tribe*, unpublished opinion of the District of South Dakota, issued Aug 17, 2011 (Docket No. CIV 11-3002-RAL), 2011 WL 3654412, p *8 ("For a waiver of sovereign immunity to be effective it must comply with tribal law."); *ERTC, LLC v Los Coyotes Band of Cahuilla and Cupeno Indians*, unpublished opinion of the Southern District of California, issued Oct 28 2011 (Docket No. 11CV2148-WQH-NLS), 2011 WL 5118772, p *5 ("Courts have found that equitable doctrines cannot supersede a specific tribal law provision, such as the Los Coyotes Eviction and Exclusion Ordinance."); *Winnebago Tribe of Neb v Kline*, 297 F Supp 2d 1291, 1303 (D Kan 2004) ("[F]or a waiver of sovereign immunity to be effective, the waiver must be in compliance with tribal law."); *World Touch Gaming*, n 30 *supra*,

In this analysis, a non-tribal party's failure to familiarize itself with governing tribal law may be unfortunate.[41] But it is immaterial to whether a tribe actually effected a waiver of immunity.[42] A nationwide body of federal common law demands that courts judge the enforceability of tribal waivers of immunity by applicable tribal law. The Circuit Court's failure to consider—or even mention[43]—any of this law was error. This appeal affords this Court the opportunity to correct that error and clarify that Michigan Courts must decide questions concerning tribal authority to waive tribal immunity under applicable tribal law.

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p 275–76 (holding that, "regardless of any apparent or implicit, or even express, authority[,]" and notwithstanding "subsequent acts, or acquiescence in carrying out the contract entered into with apparent authority[,]" a senior vice president's signature to an agreement with an express waiver of sovereign immunity provision did not waive sovereign immunity where "according to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity[.]"); cf. *First Bank & Trust v Mayhahonah*, 313 P3d 1044, 1052-53 (Ct Civ App Okla 2013) (recognizing that the absence of positive tribal law concerning who has authority to waive that tribe's immunity is not "grounds for applying state common law to questions of tribal authority" and refusing to hold that "in the absence of an identified procedure or process by which the Tribe can authorize waiver of its immunity, anyone who is authorized to act on the Tribe's behalf for any particular purpose is by virtue of that authority to act, authorized to waive the Tribe's immunity."). Star Tickets relies on two state-court cases applying state agency law, but both did so where tribal law was silent concerning who had authority to waive the tribe's immunity. *Storevisions, Inc v Omaha Tribe of Neb*, 795 NW2d 271, 279–80 (Neb 2011); *Rush Creek Solutions, Inc. v Ute Mountain Ute Tribe*, 107 P3d 402, 407 (Colo Ct App 2004). Moreover, neither case addressed the federal policy of supporting tribal self-governance or the Supreme Court's infringement and preemption tests. Indeed, in *Storevisions*, the tribal council enacted a resolution ratifying the waivers, essentially satisfying the Tribe's proffered argument that only the tribal council had authority to waive immunity. *Storevisions, Inc*, n 40 *supra*, p 279.

[41] See *Memphis Biofuels*, n 19 *supra*, p 922.

[42] *Id.*; see also *Native Am Distrib*, n 30 *supra*, p 1295. In light of this, Star Ticket's attempt to distinguish Missouri River Servs, n 22 supra, is unpersuasive. Parties interacting with a sovereign are charged with knowledge of that sovereign's laws. Hughes v Almena Twp., 284 Mich App 50, 78, 771 NW2d 453, 470 (2009). In its words, Star Tickets "is one of the nation's leading entertainment ticketing companies[.]" (Appellant's Br p 1.) Any failure to familiarize itself with governing law is its own.

[43] (See generally Appellant's Opening Br, June 6, 2014 Op & Order p 4, Appendix D.)

II. State law cannot require a tribe to defend against a suit to which the tribe has not consented.

In direct contrast to federal law's deference to tribal law in determining the scope of waivers of immunity, the Supreme Court has repeatedly made clear that "tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."[44] That is, the federal law that controls this case demands that courts apply federal and tribal law—*but not state law*—to determine whether the Tribe waived its immunity from suit. Under these circumstances, the Circuit Court's reliance on state-law principles to find an implied waiver of immunity was error. A "deeply rooted" federal policy "of leaving Indians free from state jurisdiction and control[,]"[45] has resulted in two independent but related barriers to the state's exercise of jurisdiction in Indian law cases; infringement and preemption.[46] The Circuit Court's application of state law to supplant controlling tribal law fails both of these tests.

A. The Circuit Court's application of agency and municipal law violated the Supreme Court's Indian law infringement rule.

Under the infringement rule, state authority must not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."[47] Although counsel for the amicus Saginaw Chippewa Indian Tribe of Michigan were not able to locate any Michigan decisions expressly applying this rule, as early as 1889 the Michigan

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[44] *Three Affiliated Tribes*, n 14 *supra*, p 891; see also *Kiowa Tribe of Okla*, n 11 *supra*, p 752 (same).

[45] *McClanahan v Ariz State Tax Comm'n*, 411 US 164, 168, 93 S Ct 1257, 36 L Ed 2d 129 (1973) (citing *Rice v Olson*, 324 US 786, 789, 65 S Ct 989, 89 L Ed 1367 (1945)).

[46] See *New Mexico v Mescalero Apache Tribe*, 462 US 324, 334 n 16, 103 S Ct 2378, 76 L Ed 2d 611 (1983) (describing the independent barriers).

[47] *White Mountain Apache Tribe*, n 33 *supra*, p 142–43 (internal quotation omitted) (citing *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 502, 99 S Ct 740, 58 L Ed 2d 740 (1979); *Fisher v District Court*, 424 US 382, 96 S Ct 943, 47 L Ed 2d 106 (1976) (*per curiam*); *Kennerly v District Court*, 400 US 423, 428–29, 91 S Ct 480, 27 L Ed 2d 507 (1971); *Williams*, n 33 *supra*, p 220).

Supreme Court recognized that "[t]he United States supreme court and the state courts have recognized as law that no state laws have any force" over tribal affairs, refused to apply Michigan law to an inheritance dispute, and instead applied tribal law.[48] Other states applying the federal infringement rule have determined that the rule forbids state courts from applying state law to on-reservation custody disputes[49] and domestic disputes,[50] adjudicating on-reservation motor-vehicle accidents,[51] and substituting state law for tribal worker's-compensation law.[52] If a state's law cannot set a tribe's workers' compensation obligations, it certainly may not change the terms upon which a tribe agrees to be sued—an internal matter integral to tribal affairs.[53]

In its decision, the Circuit Court applied state laws of agency to the Tribe's potential waiver of immunity while refusing to apply on-point Tribal law defining the circumstances under which the Tribe will allow itself to waive its own immunity from suit.[54] By supplanting duly enacted Tribal law with the State's common law of agency, the Circuit Court's decision ignored the enactments of tribal representatives.[55] This

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[48] *Kobogum v Jackson Iron Co*, 76 Mich 498, 507, 43 NW 602, 605 (1889).
[49] *Matter of Adoption of Buehl*, 87 Wash 2d 649, 662, 555 P2d 1334 (1976).
[50] *St Germaine v Chapman*, 178 Wis2d 869, 873, 505 NW2d 450 (Ct App 1993).
[51] *Winer v Penny Enterprises, Inc*, 2004 ND 21, 674 NW2d 9, 17 (2004).
[52] *Middleton Rancheria of Pomo Indians v WCAB*, 60 Cal App 4th 1340, 1438, 71 Cal Rptr 2d (1998); see also *Aasen-Robles v Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 267 Wis2d 333, 348 n 7, 671 NW2d 709 (Ct App 2003) ("Indian tribes generally are not subject to the laws of the state wherein their territory resides. . . . Because worker's compensation is a matter left to the states, Indian tribes are not subject to these schemes, regardless of whether they are compulsory for every other employer in the state.").
[53] See *Three Affiliated Tribes*, n 14 *supra*, p 891 ("[T]ribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Kiowa Tribe of Okla*, n 11 *supra*, p 752 (same).
[54] (Appellant's Opening Br, June 6, 2014 Op & Order p 4, Appendix D.)
[55] Cf. *Stand Up v Sec'y of State*, 492 Mich 588, 638–39, 822 NW2d 159 (2012) (describing the constitutional right of the people to have the enactments of

fundamentally "infringed on the right of reservation Indians to make their own laws and be ruled by them[,]"[56] and so was prohibited by federal law.

The Circuit Court's analogy to Michigan municipal law further demonstrates this point. The Michigan Supreme Court, through its case law, made and directed its lower courts to follow certain legal rules concerning its municipalities' contracting.[57] It made its own law and expected to be ruled by it. But it cannot expect to apply that law to separate sovereigns.

The Tribe duly enacted legislation specifying "the terms and conditions on which it consents to [Chumash] be[ing] sued,"[58] namely, only in a writing expressly stating what assets or revenues Chumash consents to allow recourse against, and only if that "waiver is duly approved by" the Chumash Board of Directors.[59] It made its own law and expected to be ruled by it. The Circuit Court's decision to supplant this dispositive law with Michigan municipal law that it found persuasive (but not dispositive)[60] further "infringed on the right of reservation Indians to make their own laws and be ruled by them[,]"[61] and so was prohibited by federal law. Simply put, federal law forbids Michigan's courts from displacing controlling law that the Tribe enacted to govern itself with state law. The Circuit Court's decision to nevertheless do so was error. In contrast, holding that Michigan Courts must decide questions concerning tribal authority to

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representatives respected and given timely effect, i.e., the right to a republican form of self-government[.]") (citing Const 1963, art 4, § 1).

[56] *Williams*, n 33 *supra*, p 220.

[57] E.g., *Webb v Wakefield Twp.*, 239 Mich 521, 527–29, 215 NW 43 (1927); *E. Jordan Lumber Co. v E. Jordan*, 100 Mich 201, 205, 58 NW 1012 (1894).

[58] *Missouri River Servs*, n 22 *supra*, p 852 (citing *Am Indian Agr*, n 18 *supra*, p 1378 (quoting *Beers*, n 22 *supra*, p 527)).

[59] (See Appellant's Opening Br, Appendix B, § 5.)

[60] (Appellant's Opening Br, June 6, 2014 Op & Order p 4, Appendix D.)

[61] *Williams*, n 33 *supra*, p 220.

waive tribal immunity under applicable tribal law would realign Michigan with controlling federal law.

B. The Circuit Court's application of agency and municipal law violated the Supreme Court's Indian law preemption rule.

Under the related but distinct preemption rule, "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[62] Unlike traditional statutory-preemption cases, the preemption rule at work in this case does not depend on the preemptive force of a particular statute.[63] Counsel for the amicus Saginaw Chippewa Indian Tribe of Michigan were not able to locate any Michigan decisions applying this rule, but the appellate courts of the neighboring state of Wisconsin recognize that this "comprehensive preemption inquiry . . . examines not only the congressional plan, but also the nature of the state, federal, and tribal interests at stake" in order "to determine whether, in the specific context, the exercise of state authority would violate federal law."[64] As the United States Supreme Court has described it:

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[62] *Cabazon Band*, n 33 *supra*, p 216 (quoting *Mescalero Apache Tribe*, n 46 *supra*, p 333).

[63] *Confederated Tribes of Siletz Indians of Oregon v State of Oregon*, 143 F3d 481, 486 (CA 9 1998) ("[I]n the Indian law context, state law is preempted not only by an explicit congressional statement but also if the balance of federal, State and tribal interests tips in favor of preemption.").

[64] *St Germaine*, n 50 *supra*, p 451 (quoting *Big John*, 146 Wis2d 741, 748, 432 N.W.2d 576 (1988)); see also *Cabazon Band*, n 33 *supra*, p 221 (California's "interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises[.]"); *Mescalero Apache Tribe*, n 46 *supra*, p 334 (balance of interests preempted New Mexico's interference with a tribe's regulation of hunting and fishing); *White Mountain Apache Tribe*, n 33 *supra*, p 148–49 (balance of interests preempted state taxation of on-reservation logging).

> Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial "backdrop," against which any assertion of State authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes. Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.[65]

This case—concerning services at a casino operated by the Tribe in accordance with the federal Indian Gaming Regulatory Act—presents just such a scenario.

The federal interests in this case are strong and concrete, and mirror the Tribe's:

- Time after time, the United States Supreme Court has upheld the doctrine of tribal sovereign immunity,[66] confirming that only Congress or the tribe itself can waive immunity,[67] and that any waiver of immunity must be clear and unequivocal.[68] The Circuit Court's use of state law (rather than an express statement of either Congress or the Tribe) to *imply* a waiver of immunity violates this law and jeopardizes federal and tribal interests in consistent application of controlling law.

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[65] *Mescalero Apache Tribe*, n 46 *supra*, p 334–36 (internal citations omitted).
[66] *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2039 (refusing to reverse *Kiowa Tribe of Okla*); *Kiowa Tribe of Okla*, n 11 *supra*, p 760 (refusing to reverse earlier cases recognizing, applying, and defining tribal sovereign immunity).
[67] *Bay Mills Indian Community*, n 1 *supra*, 134 S Ct 2030–31 (citing *Kiowa Tribe of Okla*, n 11 *supra*, p 756).
[68] *Id.*, p 2032 (citing *C & L Enterprises, Inc. v Citizen Band Potawatomi Tribe of Okla*, 532 US 411, 418, 121 S Ct 1589, 149 L Ed 2d 623 (2001) (quoting *Santa Clara Pueblo*, n 1 *supra*, p 58)).

- All three branches of the federal government have repeatedly reaffirmed their commitment to tribal self-determination and self-governance.[69] The Circuit Court's decision to supplant enacted Tribal law governing the Tribe itself with the common law of Michigan is necessarily incompatible with the federal commitment to tribal self-governance.

In contrast, Michigan has little interest in standing between the Tribe and its immunity law. In *Frydrych v Wentland*, this Court considered whether a Michigan trial court erred in refusing to apply Wisconsin immunity law to a Wisconsin school district.[70] This Court held that it did and reversed.[71] Under Michigan's choice-of-law analysis, this court first considered the "foreign state['s] interest in having its law applied[.]"[72] Here, that interest is substantial and buttressed by federal concern.

Frydrych teaches that the foreign sovereign's interest can be overcome by a substantial State interest, but that there is little Michigan interest (and a potential due-process concern[73]) in applying a state's law where that state's only contact with the case is "the plaintiff's residency."[74] So it is here. The Michigan plaintiff reached out to the west coast to do business with the sovereign Tribe in the Tribe's territory, and the breach of contract, if any, occurred on the Tribe's land.[75] As in *Frydrych*, Michigan has little interest in blocking the application of a foreign sovereign's immunity law to that separate sovereign.[76] Setting the strong and express federal and tribal interests in applying a Tribe's law to itself against Michigan's admittedly insubstantial interest in

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[69] See *supra*, § I.B.1.
[70] 252 Mich App 360, 652 NW2d 483 (2002).
[71] *Id.*, p 365.
[72] *Id.*, p 363.
[73] *Id.*, p 363-64.
[74] *Id.*, p 364. The Michigan court was unconcerned that applying Wisconsin immunity law to the case instead of Michigan immunity law resulted in partial summary disposition in favor of the *Frydrych* defendant, leaving the defendant without a remedy. See generally *Id.*, p 363-66.
[75] (Pl. Comp., p ¶ 13.)
[76] *Frydrych*, n 70 *supra*, p 365.

blocking Tribal law, "in th[is] specific context, the exercise of state authority . . . violate[d] federal law."[77] In contrast, holding that Michigan Courts must decide questions concerning tribal authority to waive tribal immunity under applicable tribal law complies with the Supreme Court's preemption rule.

C. To the extent it applies state law to questions of tribal immunity, *Bates* is inconsistent with federal law and should be reversed.

The Circuit Court's opinion relied heavily on *Bates Assocs., LLC v 132 Assocs. LLC*[78] to apply state law to evaluate the potential wavier of immunity. *Bates* is easily distinguished. In that case, the tribe and tribally owned business "hereby expressly waive[d] their immunity from suit[,]" using unambiguous language much clearer than the potential waiver of immunity in this case, and "the Tribe conceded in the trial court" that the operative waivers of immunity met the requirements of tribal law,[79] "waiv[ing] any argument that they were invalid because they were not supported by a tribal resolution."[80]

But *Bates* is not just distinguishable; more importantly, it is bad law. In suggesting that Michigan courts may ignore tribal law when determining whether a waiver of immunity is effective, the *Bates* court departed from established federal immunity law and ventured into territory forbidden by the Supreme Court of the United States. This Court should take this opportunity to revisit *Bates* and realign Michigan law

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[77] *St Germaine*, n 50 *supra*, p 871–72 (quoting *Big John*, n 63 *supra*, p 748–49); see also *Cabazon Band*, n 33 *supra*, p 216; *Mescalero Apache Tribe*, n 46 *supra*, p 333.
[78] 290 Mich App 52; 799 NW2d 177 (2010).
[79] *Id.*, p 63.
[80] *Id.*, p 64.

with controlling federal law[81] by holding that Michigan Courts must decide questions concerning tribal authority to waive tribal immunity under applicable tribal law.

1. *Bates*' refusal to follow federal immunity law was error that should be corrected.

The *Bates* Court acknowledged that tribal sovereign immunity is "a matter of federal law[.]"[82] But to decide whether to apply tribal law to the tribal waiver, the *Bates* Court reviewed two divergent cases—one from the Sixth Circuit Court of Appeals and one from the California Court of Appeals. It held that "[w]e are not bound by decisions of the United States Court of Appeals for the Sixth Circuit," and determined to follow the California case.[83]

While it is true that state courts are not bound by federal circuit decisions,[84] Michigan's courts must nevertheless afford those decisions "respectful consideration."[85] They "adhere[] to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions[.]"[86] Thus, where confronted with uniform federal case law, this court defers to these federal interpretation of federal law.[87] And time and

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[81] See *People v McKinley*, 496 Mich 410, 424, 852 NW2d 770 (2014) (Stare decisis is a "'principle of policy' rather than 'an inexorable command,' " and we are not constrained to follow precedent that is badly reasoned.").
[82] *Bates Associates, LLC v 132 Associates, LLC*, 290 Mich App 52, 56, 799 NW2d 177 (2010) (quoting *Kiowa Tribe of Okla*, n 11 *supra*, p 754).
[83] *Id.*, p 59.
[84] *State Treasurer v Sprague*, 284 Mich App 235, 242, 772 NW2d 452 (2009).
[85] *Yellow Freight System Inc v Michigan*, 464 Mich 21, 29 n 10, 627 NW2d 236 (2001), rev'd on other grounds 537 US 36, 123 S Ct 371 (2002).
[86] *Outdoor Sys, Inc v City of Clawson*, 273 Mich App 204, 208-09, 729 NW2d 893 (2006) (quoting *Yellow Freight System*, n 85 *supra*, p 29 n. 10).
[87] *Id.* (applying uniform federal interpretation to prevailing-party question under 42 USC 1988). Although Michigan's Supreme Court has stated that it is not itself bound by a uniform body of federal decisions, it is not clear whether it has extended this rule to Michigan's Courts of Appeal. *People v Gillam*, 479 Mich 253, 261, 734 NW2d 585 (2007) (stating ""[W]hen there is a conflict of authority among the lower federal courts, *this Court* is free to follow the authority it deems the most appropriate. Indeed, even when

again, federal case law holds that authority to waive tribal sovereign immunity must be judged by applicable tribal law.[88] The Sixth Circuit Court of Appeals case that *Bates* refused to follow fell squarely within this federal body of law.[89]

In contrast, the California case that *Bates* relied on lacked persuasive force. Unlike the facts of this case, the California court "was not presented with a situation in which a tribal agent signed a contract without authority to act on the tribe's behalf."[90] Indeed, as *Bates* recognized, the tribal council in the California case approved the contracts by resolution, satisfying the tribal-law requirement that the waiver be accomplished by resolution of the tribal council.[91] That is, the California court held that the waiver *did* satisfy tribal law.[92] Indeed, later California case law limited *Smith* to this holding, clarifying that "[a] waiver is ineffective if the person purportedly waiving immunity lacks authority to do so."[93] Thus, even within California, *Smith* is now limited to the proposition that "an otherwise ineffective waiver may become binding if it is later ratified by the tribe's governing body."[94]

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there is no conflict among the lower federal courts, *we* are free to follow or reject their authority.") (emphasis added).

[88] E.g., *Amerind Risk Mgmt Corp*, n 26 *supra*, p 687–88; *Sanderlin*, n 39 *supra*, p 1287–88; *World Touch Gaming*, n 30 *supra*, p 275–76.

[89] *Memphis Biofuels*, n 19 *supra*, p 922.

[90] *Bates*, n 82 *supra*, p 61 (citing *Smith v Hopland Band of Pomo Indians*, 95 Cal App 4th 1, 8, 115 Cal Rptr 2d 455 (2002) modified on denial of reh'g (Feb. 6, 2002)).

[91] *Id.* (citing *Smith*, n 90 *supra*, p 7–8).

[92] *Smith*, n 90 *supra*, p 9; see also *id.*, p 11 ("[A] person with actual authority [under tribal law] to execute a contract on behalf of the Tribe did so, and then the contract, which included terms which explicitly waived the Tribe's sovereign immunity, was approved by resolution of the tribal council.").

[93] *Big Valley Band of Pomo Indians v Superior Court*, 133 Cal App 4th 1185, 1191, 35 Cal Rptr 3d 357 (2005) (citing *Warburton/Buttner*, n 30 *supra*, p 1188).

[94] *Id.* (citing *Smith*, n 90 *supra*, p 9).

Although the *Bates* Court opined that the California case "ruled that federal law rather than tribal law was applicable[,]"[95] the *actual* language of the California court only "question[ed] the premise that the issue whether the Tribe has waived its sovereign immunity by entering into this contract should be determined by reference to a tribal law."[96] It recognized "some substantive differences between tribal sovereign immunity and the law applicable to waiver of immunity by foreign sovereigns" but nevertheless analyzed the facts under the law of foreign immunity as an *alternate* basis of decision.[97] This was error. As this brief describes, the unique relationship between the United States and tribal governments within its borders has resulted in federal law emphasizing and fostering tribal self-governance.[98] No analogy exists in federal foreign policy or federal law concerning foreign nations, rendering foreign-immunity law inapplicable to this question.[99] By following the musings of the California court (but not its analysis of

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[95] *Bates*, n 82 *supra*, p 62.
[96] *Smith*, n 90 *supra*, p 10.
[97] *Id.*, p 10.
[98] *Supra*, § I.B.1.
[99] See, e.g., *Amerind Risk Mgmt Corp*, n 26 *supra*, p 687–88; *Memphis Biofuels*, n 19 *supra*, p 922; *Sanderlin*, n 39 *supra*, p 1287–88; *World Touch Gaming*, n 30 *supra*, p 275–76. As a third alternate basis of decision, *Smith* reasoned that tribal law should not apply "because the contract itself specifies that it is to be governed by *California law*." *Smith*, n 90 *supra*, p 10. A Court, though, must determine that it has jurisdiction over a contract claim before it can apply the terms of a contract—including a choice-of-law clause—to the dispute. See, e.g., *Bridgestone/Firestone North America Tire, LLC v Harborside Capital Group, LLC*, 161 Fed Appx 456 (CA 6 2005) (conducting diversity-jurisdiction and personal-jurisdiction analyses under federal law before examining a choice-of-law question); *Michigan Southern R.R. Co. v Branch & St. Joseph Countles Rail Users Ass'n*, 287 F3d 568 (CA 6 2002) (conducting federal-question inquiry and dismissing for lack of jurisdiction before looking to the contents of the disputed contracts); *Aaronson v Lindsay & Hauer Intern Ltd*, 235 Mich App 259, 597 NW2d 227 (1999) (conducting federal due-process personal-jurisdiction inquiry before reviewing the terms of the contract). Because the question of whether sovereign immunity divests a court of jurisdiction "is a matter of federal law[,]" *Kiowa Tribe of Okla*, n 11 *supra*, p 752, a court must apply that federal law to determine its jurisdiction over a contract claim before it can look to any underlying choice-of-law provisions. Accord *Offerdahl v*

facts much different than the case at bar) instead of federal case law, *Bates* imported errors into its own immunity analysis and, as demonstrated in the next section, doomed the trial court to violate federal law. Revisiting *Bates* now and holding that Michigan Courts must decide questions concerning tribal authority to waive tribal immunity under applicable tribal law would remedy this error and realign this court's precedent with persuasive federal case law.

2. *Bates*' immunity analysis is forbidden by federal Indian law.

Bates' suggestion that Michigan courts need not consider applicable tribal law in immunity questions is more than just badly reasoned. It is foreclosed by controlling Supreme Court precedent. Just as the Circuit Court's failure to follow tribal law unlawfully infringed on the Tribe's right to make its own law and be ruled by it,[100] so too did *Bates*' suggestion that such an outcome could be appropriate. And just as the strong tribal and federal interests in applying tribal immunity law preempted the application of Michigan immunity law to the tribe,[101] so too do they preempt *Bates'* contrary suggestion.

Time and again, the Supreme Court has made clear that "[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control[.]'"[102] Federal law directs courts to apply federal *and* tribal law—but *not* state law—to decide tribal-immunity disputes. By applying Michigan law but not federal or Tribal law to the immunity question in this

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Silverstein, 224 Mich App 417, 420, 569 NW2d 834 (1997) (contract clauses "though otherwise valid, may not be enforced against one not bound by the contract.").

[100] See *supra*, § II.A.

[101] See *supra*, § II.B.

[102] *Mescalero Apache Tribe*, n 46 *supra*, p 332 (quoting *White Mountain Apache Tribe*, n 33 *supra*, p 142 (quoting *United States v Mazurie*, 419 US 544, 557, 95 S Ct 710, 42 L Ed 2d 706 (1975))).

case, the Circuit Court flipped the jurisdictional paradigm in direct violation of Supreme Court authority forbidding that result.[103] Reversing the Circuit Court, revisiting *Bates*, and holding that Michigan Courts must decide questions concerning tribal authority to waive tribal immunity under applicable tribal law would realign this court with controlling federal law.

Conclusion

Although the Supreme Court instructs that tribal sovereign immunity "is a matter of federal law[,]"[104] and federal law directs courts to examine whether a purported waiver complies with tribal law, the Circuit Court refused to do so. In so holding, it impermissibly infringed on the Tribe's right to make its own laws and be ruled by them, and purported to assert state authority in a manner preempted by federal Indian law. Following controlling Supreme Court precedent, this Court should reverse the Circuit Court's decision and direct it to apply Tribal law to determine the validity of the Tribe's potential waiver of immunity. The Court should also correct *Bates*' wrong turn and provide a clear rule of law that Michigan Courts must decide questions concerning tribal authority to waive tribal immunity under applicable tribal law.

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[103] See *Cabazon Band*, n 33 *supra*, p 216; *Mescalero Apache Tribe*, n 46 *supra*, p 333.
[104] *Kiowa Tribe of Okla*, n 11 *supra*, p 752.

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