IN THE SUPREME COURT OF THE STATE OF MICHIGAN
Appeal from the Michigan Court of Appeals

STAR TICKETS, A Michigan Corporation, Plaintiff/Appellee v. **CHUMASH CASINO RESORT**, An Entity of the Santa Ynez Band of Chumash Indians, Defendant/Appellant	Supreme Court Case No. _____ Court of Appeals Case No. 322371 Oakland County Circuit Court Case No. 2014-138263-CB Hon. James M. Alexander

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Motion for Leave to File Brief of the Indigenous Law & Policy Center at Michigan State University College of Law as Amicus Curiae in Support of Defendant-Appellant

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Dated: January 20, 2016

The Indigenous Law & Policy Center at Michigan State University College of law moves for leave to file the accompanying brief as Amicus Curiae in support of Defendant-Appellant in the above-captioned case and, in the event leave to appeal is granted, to file a brief as Amicus Curiae in support of Defendant-Appellant's position. In support of this motion, Amicus state:

1. Amicus seek to address why this Court should grant review in the above-captioned case to determine whether the Court of Appeals erred in finding that Defendant-Appellant did not retain its sovereign immunity.

2. Amicus is the Indigenous Law & Policy Center at Michigan State University College of Law. The scholarship and clinical practice of Matthew L.M. Fletcher, Director; Wenona T. Singel, Associate Director; Kathryn E. Fort, Staff Attorney; and Leah K. Jurss, Fellow of the Indigenous Law & Policy Center focuses on the subject matter areas addressed by the Court of Appeal's decision in this case: federal Indian law, tribal sovereign immunity, and legal history. The Indigenous Law & Policy Center files amicus briefs before state and federal courts when important issues concerning federal Indian law and the rights of tribes are at issue.

3. The accompanying brief will show that as a matter of legal history and respect for the sovereignty of tribal governments, this Court should grant the Defendant-Appellant's motion for leave to appeal. The brief will highlight the continued cooperation and recognition of sovereignty between the state of Michigan and tribal governments. The brief will also detail why the Court of Appeals' decision was an improper extension of state law into areas that should be covered exclusively by federal and tribal law.

4. Additionally, if this Court grants Defendant-Appellant's application for leave to appeal, Amicus wishes to file an Amicus Curiae brief in support of Defendant-Appellant's position on appeal, pursuant to MCR 7.312(H).

For the foregoing reasons, as well as those set forth in the attached brief, the Indigenous Law & Policy Center respectfully requests that this Court grant their motion for leave to file the accompanying Amicus Curiae brief and, in the event leave to appeal is granted, to allow Amicus to file an additional brief in support of Defendant-Appellant's position on appeal.

Respectfully submitted,

_____

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Lodged Brief of the Indigenous Law & Policy Center at Michigan State University College of Law as Amicus Curiae in Support of Defendant-Appellant

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Introduction and Statement of Interest of Amicus

The Indigenous Law & Policy Center at Michigan State University College of Law respectfully files this amicus curiae brief in support of the application for leave to appeal of Defendant-Appellant Chumash Casino Resort.

Amicus is the Indigenous Law & Policy Center at Michigan State University College of Law. The scholarship and clinical practice of Matthew L.M. Fletcher, Director; Wenona T. Singel, Associate Director; Kathryn E. Fort, Staff Attorney; and Leah K. Jurss, Fellow of the Indigenous Law & Policy Center focuses on the subject matter areas addressed by the Court of Appeal's decision in this case: federal Indian law, tribal sovereign immunity, and legal history.

The interest of the Center is in ensuring that cases in the field of federal Indian law are decided in a uniform and coherent manner, consistent with the foundational principles of this area of law. The proposed brief describes the historical respect for the prevailing boundaries of tribal sovereign immunity, and the need for questions of federal Indian law to be decided by federal or tribal courts, rather than state courts.

Statement of Basis of Jurisdiction

Amicus adopt by reference the Statement of Appellate Jurisdiction of Defendant-Appellant Chumash Casino Resort.

Statement of Questions Presented

Amicus adopt by reference the Statement of Appellate Jurisdiction of Defendant-Appellant Chumash Casino Resort.

Statement of Facts and Procedural History

Amicus adopt by reference the Statement of Facts and Procedural History of Defendant-Appellant Chumash Casino Resort.

Argument

I. The federal government and the state of Michigan have a long history of acknowledging and respecting tribal sovereignty and tribal sovereign immunity.

Tribal sovereign immunity stems from Indian tribes' status as sovereign entities, "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins Cos v Crow Tribe*, 471 US 845, 851; 105 S Ct 2447, 2451 (1985). Recognized by the Supreme Court as "states" or "nations," *Worcester v Georgia*, 31 US (6 Pet) 515, 561 (1832), Indian tribes retain all sovereign powers not expressly abrogated, including sovereign immunity. *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670, 1677 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *United States v Michigan*, 471 F Supp 192, 262 (WD Mich 1979) ("Indian tribes retain all powers of self-government, sovereignty and aboriginal rights not explicitly taken from them by Congress."). Tribal sovereign immunity may only be abrogated by Congress, and "Congress has consistently reiterated its approval of the immunity doctrine." *Oklahoma Tax Comm v Citizen Band Potawatomi Indian Tribe of Okla*, 498 US 505, 510; 111 S Ct 905, 910 (1991). The long history of respect towards tribal sovereignty, as recognized in the continual enforcement of tribal sovereign immunity by federal courts and comity agreements between the tribes in Michigan and the Michigan Supreme Court, requires that the Court of Appeals opinion in this case be reversed as an unwarranted intrusion into tribal governance.

A. The federal government consistently encourages and protects tribal sovereignty and tribal sovereign immunity in its existing form.

For well over two centuries, the federal government has continuously recognized the distinct political status and sovereignty of Indian tribes. *See* Ordinance of 1789 (Northwest Ordinance), 1 Stat 50, 52 (1789) ("The utmost good faith shall always be observed toward the

Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress[.]"); US Const, art I, § 8, cl 3 ("[The Congress shall have Power] To regulate Commerce . . . with the Indian Tribes[.]"); Kappler, ed, *Indian Affairs: Laws and Treaties, Vol II* (Washington: Government Printing Office, 1904) (collecting treaties made between sovereign Indian nations and the federal government); *Worcester*, 31 US (6 Pet) at 559 ("The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"); *Winters v United States*, 207 US 564, 577-78; 28 S Ct 207, 212 (1908) (respecting tribal sovereignty by upholding reserved water rights under tribal treaties); Indian Self-Determination and Educational Assistance Act, PL 93-638, 88 Stat 2203 (1975), codified as amended at 25 USC § 450 et seq (2012) (enabling tribes to participate in the exercise of their sovereignty through increased funding and control over federal programs); *California v Cabazon Band of Mission Indians*, 480 US 202; 107 S Ct 1083 (1987) (revoking state encroachment on the exercise of tribal sovereignty due to attempted restrictions on Indian gaming economic activities); William Clinton, *Memorandum on Government-to-Government Relations With Native American Tribal Governments*, 59 Fed Reg 22,951 (May 4, 1994) ("I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.").

As "[i]mmunity from suit is an incident of sovereignty," *Bonner v United States*, 76 US (9 Wall) 156, 159 (1869), the acknowledgement of tribal sovereignty has necessarily involved the recognition of tribal sovereign immunity and the encouragement of tribal self-government. *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering, PC*, 476 US 887, 890;

106 S Ct 2305, 2313 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.").

Recently, the Court in *Michigan v Bay Mills Indian Community*, 572 US ___; 134 S Ct 2024, 2040 (2014) (Sotomayor, J., concurring), effectively illustrated "why stare decisis and deference to Congress" required upholding the status quo of sovereign immunity, and "why both history and comity counsel against limiting Tribes' sovereign immunity." Many early federal cases involving Indian tribes recognized tribal sovereign immunity, with analysis centering on both the sovereignty of tribes, as reflected through the concept of the dignity of the sovereign, and the policy need for protection of the tribal treasury from private suit. *See generally* Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 Am U L Rev 1587, 1640-54 (2013) (discussing early tribal sovereign immunity cases in detail).

In *Parks v Ross*, the Supreme Court recognized that federal courts lacked the "power . . . to arrest the public representatives or agents of Indian nations . . . [or] compel them to pay the debts of their nation, either to an individual of their own nation, or a citizen of the United States." 52 US (11 How) 362, 374 (1885). This language is an early recognition of tribal sovereign immunity, analogous to the language used in state sovereign immunity cases of the time. See Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz St LJ 137, 150 n 84 (2004). Cases throughout the late nineteenth and early twentieth centuries continued to affirm the unwavering presence of tribal sovereign immunity. See *Thebo v Choctaw Tribe of Indians*, 66 F 372, 376 (8th Cir 1895) (finding that the Choctaw Tribe was "[s]ubstantially, on the plane occupied by the states under the eleventh amendment"); *Adams v Murphy*, 165 F 304, 308 (8th Cir 1908) (noting that "Indian tribes are exempt from civil suit[,]" and "[t]hat has been the settled doctrine of the government from the beginning"). *In re Ayers*, quoted by both *Thebo* and *Murphy* as explicative

of the state corollary to the issue of tribal sovereign immunity, details the prevailing view of sovereign immunity in the late nineteenth century: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." 123 US 443, 505; 8 S Ct 164, 183 (1887).

Tribal sovereign immunity as a general principle was firmly established by the time the Supreme Court formally acknowledged it in *Turner v United States,* 248 US 354; 39 S Ct 109 (1919) and well before it was explicitly affirmed in *United States v US Fidelity & Guar Co*, 309 US 506; 60 S Ct 653 (1940). The United States' federal courts and the Supreme Court have "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills Indian Community*, 134 S Ct at 2030-31 (quoting *Kiowa Tribe of Okla v Manufacturing Technologies, Inc*, 523 US 751, 756, 118 S Ct 1700, 1703 (1998)). Tribal sovereign immunity has always existed as a natural extension of tribal sovereignty, in part because of the dignity inherent in all sovereigns.

B. There is an increasing recognition of the dignity of the tribal sovereign as a reason for protecting tribal sovereign immunity from encroachment by states.

The Supreme Court has recently returned to the original underpinnings of state sovereign immunity: the dignity of the sovereign and the need to protect the state's fiscal reserves. These reasons, recognized in the early jurisprudence of the Court, have returned as justifications for upholding state sovereign immunity. In *Alden v Maine*, the Court explained that states "retain the dignity, though not the full authority, of sovereignty." 527 US 706, 715; 119 S Ct 2240, 2247 (1999). In *Federal Maritime Comm v South Caroline State Ports Auth*, the Court pulled the dignity of the sovereign as the primary reason for state sovereign immunity. 535 US 743, 769;

122 S Ct 1864, 1879 (2002) ("[T]he primary function of sovereign immunity is not to protect state treasuries, . . . but to afford the States the dignity and respect due sovereign entities.").

As reflected in the tribal sovereign immunity cases of the late nineteenth and early twentieth centuries, see *Parks*, *Thebo*, *Murphy*, *Ayers*, *supra*, the dignity of the sovereign is becoming recognized again as an important principle underlying tribal sovereign immunity. Several Supreme Court Justices have, in recent cases, reflected upon the principle of the dignity of the tribal sovereign. Justice Ginsburg has considered the dignity of the tribal sovereign twice in her tenure. In *Plains Commerce Bank v Long Family Land & Cattle Co*, where she concurred in part and dissented in part, she questioned the majority's distinction between the lease and the sale of Indian lands, indicating that issues of "tribal self-rule and dignity" are present in each. 554 US 316, 347; 128 S Ct 2709, 2730 (2008) (Ginsburg, J, concurring in part and dissenting in part). In *Wagnon v Prairie Band Potawatomi Nation*, Justice Ginsburg dissented, invoking "a tribe's independence and dignity" during a discussion of shifting the legal incidence of a tax. 546 US 95, 121; 126 S Ct 676, 692 (2005) (Ginsburg, J, dissenting).

More recently, Justice Sotomayor framed a section of her concurrence in *Bay Mills Indian Community* around the theory of tribal dignity. 134 S Ct at 2041 (Sotomayor, J, concurring). Justice Sotomayor argued that "respect for the dignity of Tribes" could not be accomplished by reducing tribal sovereign immunity in the manner requested by the dissent. *Id.* at 2042. Justice Sotomayor acknowledged that the case was about federal courts, but a similar lack of respect for the dignity of the tribal sovereign would result regarding "tribal sovereign immunity in state courts." *Id.* at n 1. During the oral argument of the *Bay Mills* case, Justice Kagan also referred to the concept of dignity as supporting tribal sovereign immunity: "Well, I think that all of our cases suggest that sovereign immunity is quite important to a sovereign's

dignity . . . ." *Michigan v Bay Mills Indian Community*, 2013 WL 6908194 (Oral Argument Dec 2, 2013), pp 25-26.

C. The Michigan Supreme Court has a history of acknowledging the full sovereignty of tribes by respecting tribal laws and procedures, and encouraging cooperative agreements between the state and tribal governments.

For the last several decades, the Michigan Supreme Court and the Michigan state government have worked to recognize the sovereignty of Michigan tribes. Michigan Court Rule 2.615 exemplifies the mutuality of respect between the state and tribal sovereigns in Michigan. This Court Rule allows the judicial acts of federally recognized tribal courts within Michigan to have the "same effect" as judicial acts of any other Michigan court, provided prerequisite procedural requirements are met. MCR 2.615(A)-(B); CAVANAGH, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U Det Mercy L Rev 709, 713-14 (1999). Formally adopted by the Michigan Supreme Court in 1996, MCR 2.615 acts as a comity provision, requiring state courts to recognize the judgments of tribal courts, provided those tribal courts have enacted reciprocal provisions, even if the tribe lies outside of the state of Michigan. See CAVANAGH, *The First Tribal/State Court Forum and the Creation of MCR 2.615*, Indigenous Law & Policy Center Working Paper 2007-16, p 11 (Oct. 29, 2007).

In other contexts, Michigan has shown respect to the tribal nations within its borders by respecting tribal laws and procedures, even when they are in conflict with state laws on the issue. See *Kobogum v Jackson Iron Co*, 76 Mich 498; 43 NW 602 (1889) (recognizing a polygamous marriage between tribal members as valid under tribal laws). In *People v Wemigwans*, the Michigan Court of Appeals acknowledged the complete sovereignty of the Saginaw Chippewa Indian Tribe of Michigan by allowing the use of prior tribal court convictions to enhance a defendant's drunk driving sentence in state court, even though the tribal court's procedures

varied from state court procedures. *People v Wemigwans*, unpublished opinion per curiam of the Court of Appeals, issued Mar 4, 2003 (Docket No. 239736), p 3.

Through grants received from the National Center for State Courts and because of the support from former Chief Justice MICHAEL CAVANAGH, in 1992 the Michigan Tribal Court/ State Court Forum was created, bringing together state and tribal court judges to reduce conflict and strengthen the relationships between the sovereign governments in the state.[1] Bransky & Hood, *The State/Tribal Court Forum: Moving Tribal and State Courts from Conflict to Cooperation*, 72 Mich B J 420, 421 (May 1993). This one year grant-funded program created many avenues for respecting tribal sovereignty, including MCR 2.615, *supra*; the creation of an American Indian Law Standing Committee and an American Indian Law Section in the Michigan Bar; the listing of each of Michigan's tribal courts in the State Bar's annual directory issue; the placement of tribal law in the State Law Library in Lansing, Michigan; and the continued facilitation of conversation between tribal and state court judges. *Michigan's Story*, 76 U Det Mercy L Rev at 711-15. The spirit of cooperation and recognition began by the Michigan Tribal Court/ State Court Forum has continued with the creation of the Michigan Tribal State Federal Judicial Forum by Michigan Supreme Court Administrative Order in June 2014. Michigan Supreme Court Administrative Order No. 2014-12, __ Mich __ (2014). This current Forum works to improve the "working relationships among the court systems and the interaction of state, tribal, and federal court jurisdiction in Michigan." *Id.*; see also Michigan Tribal State Federal Judicial Forum, *Naakonigewin (Charter)* (2014), *available at*

[1] Michigan's State Court/ Tribal Court forum was not unique among cooperative efforts between states and tribal courts. See Tribal Law & Policy Institute, *Tribal-State Court Forums: An Annotated Directory* (2015), *available at* <http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/jcip/2015TribalStateCourt Convening/Tribal-State%20court%20forum%20document%20DRAFT%20FINAL%207-2015.pdf> (detailing the tribal-state forums active in Arizona, California, Idaho, Michigan, Minnesota, New Mexico, New York, North Dakota, Utah, and Wisconsin).

<http://courts.mi.gov/Courts/tribalCourts/Documents/TSF%20Judicial%20ForumNaakonigewinfinal.pdf>.

The tax agreements negotiated between the state of Michigan and tribes also reflect the state's respect for tribal sovereignty. Beginning in 1997, the state of Michigan began to repeal the individual tax agreements it held with tribes in an effort to work towards a uniform agreement. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U Det Mercy L Rev 1, 6-7 (2004). Face-to-face negotiations between the sovereigns in 2001 established a Uniform Tax Agreement that has been continually honored in the decade since. *Id.*; see *State/Tribal Tax Agreements & Amendments*, Michigan Dep't of Treasury, <http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html> (last visited Jan 14, 2016) (storing copies of the tax agreements and related documents). The Uniform Tax Agreement "brought predictability to a disputed area." Brief for Amici Curiae National Intertribal Tax Alliance et al. (No. 04-631) p 28, *Wagnon v Prairie Band Potawatomi Nation*, 546 US 95; 126 S Ct 676 (2005). The federal government and the United States Supreme Court have continually worked to ensure a similar predictability in the area of tribal sovereign immunity. If the Michigan Supreme Court refuses to address the Court of Appeals application of state common law exceptions to the doctrine of tribal sovereign immunity, the predictability that was once found in the area of law will be lost, replaced with forum shopping and inconsistent decisions that will destroy the careful relationship that has been built between the state of Michigan and the sovereign tribes it comes into contact with.

D. Tribal sovereign immunity plays a vital role in safeguarding the financial and governmental resources of tribes.

Tribal sovereign immunity is vital to the fiscal health and well-being of tribal governments. State sovereign immunity is based both in dignity and in the necessity of

protecting the treasury of the citizens. The Supreme Court has placed the fiscal need of states behind their dignity as sovereigns, but it remains an important justification for the doctrine of sovereign immunity. *See Federal Maritime Comm*, 535 US at 769 ("As we have previously noted, however, the primary function of sovereign immunity is not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities.").

Just as state sovereign immunity serves as protection for the treasury, so too does tribal sovereign immunity serve as a necessary protection of tribal resources. Tribal treasuries are directly linked to the provision of essential governmental services to tribal citizens. Absent tribal sovereign immunity, and thus a full tribal treasury, those essential police, fire, sanitation, and emergency services cannot be provided to tribal members. *See Tribal Sovereign Immunity: Hearing Before the S Comm on Indian Affairs*, 105th Cong, 105-595 p 590 (1998) (statement of Wayne Taylor, Jr.) ("What is overlooked by those who hold up Federal and State waivers of immunity in contrast to tribal waivers of immunity is the fact that Federal and State governments with their huge tax bases are in a much better position to grant broad waivers of immunity than are the Tribes which have historically been hamstrung by the lack of a tribal tax base, partly as a result of the dual taxation problem engendered by state taxation of transactions within Indian country, and partly as a result of struggling tribal economies which are only now beginning to see the light of day."). As "[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding," *Bay Mills Indian Community*, 134 S Ct at 2043 (Sotomayor, J., concurring), adding increased barriers to tribal governmental sovereign immunity will make it more difficult for tribes, like the Santa Ynez Band of Chumash Indians, to fund their governments and will create a precedent in opposition to federal directives.

II. State courts are not the proper forum for the interpretation of federal Indian law or tribal law.

A. The Michigan Supreme Court is bound by the decisions of the United States Supreme Court when interpreting federal law questions, including questions of tribal sovereign immunity.

The Court of Appeals used state common law to interpret questions of tribal sovereign immunity, a question that must be answered solely under federal law. The Michigan Supreme Court is "bound to follow the prevailing opinions of the United States Supreme Court" when the question before it is based in federal law. *Harper v Brennan*, 311 Mich 489, 493; 18 NW2d 905, 906 (1945) (citing *People v Lechner*, 307 Mich 358, 360; 11 NW2d 918, 919 (1943)); *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325, 327 (Mich 2004) ("[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]"). The United States Supreme Court has squarely established that tribal sovereign immunity "is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 US at 756. The preeminence of federal law remains in tribal sovereign immunity questions even when state substantive laws govern the underlying contract. See *id.* at 755 ("To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.").

Beyond establishing that tribal sovereign immunity is a question of federal law, the Supreme Court has consistently reaffirmed the boundaries of the immunity. Tribal sovereign immunity may only be modified by the Tribe or by Congress. *Kiowa*, 523 US at 754. That immunity also may not be waived by unauthorized officials. *US Fidelity & Guar Co*, 309 US at 513 ("It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials."). Subject to one narrow

exception,[2] state common law doctrines of agency and ratification have not been found sufficient to modify the bounds of tribal sovereign immunity, and never when the tribe had a formal ordinance on the process of waiving tribal sovereign immunity. See, e.g., *Sanderlin v Seminole Tribe of Florida*, 243 F3d 1282, 1287 (11th Cir 2001); *World Touch Gaming, Inc v Massena Mgmt, LLC*, 117 F Supp 2d 271, 272 (ND NY 2000). For recent state appellate decisions applying the same principles, see *Wells Fargo Bank v Apache Tribe of Oklahoma*, 2015 OK Civ App 10, at ¶ 21 (Okla Civ App 2015); *Leasing v Oneida Seven Generations Corp*, No 1-14-3443, at ¶¶ 34-35 (Ill App 2015); *MM&A Productions, LLC v Yavapai Apache Nation*, 234 Ariz 60, 66; 316 P3d 1248 (Ariz App 2014) (cert denied, 574 US ____ (Dec 15, 2014)).

B. The Court of Appeals decision was an unwarranted intrusion by a state court into the interpretations of tribal laws and procedures and the business judgement of the tribe.

The Supreme Court has been unwilling to take the reins away from Congress on determining the breadth of tribal sovereign immunity. *Bay Mills Indian Community*, 134 S Ct at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). For the Court of Appeals in this case to hold more power than the United States Supreme Court, the federal congress, or Michigan's state legislature would disrupt nearly every settled doctrine regarding the chain of authority and Indian tribes. See *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 323; 685 NW2d 221, 229 (2004) ("The Legislature is prohibited from unilaterally imposing its will on the tribes[.]"). State courts are not the proper place for deciding new interpretations of federal Indian law; in other federal Indian law doctrines state courts become divested of jurisdiction when their decisions extend too far into the internal workings of the tribe. See *Iowa Mut Ins Co v LaPlante*, 480 US 9, 15; 107 S Ct 971, 976 (1987)

[2] See *Luckerman v Narragansett Indian Tribe*, 965 F Supp 2d 224, 233 (D RI 2013) (finding an implicit waiver of tribal sovereign immunity through the state common law exceptions of agency and ratification because the Narragansett Tribe did not have a contrary tribal law enacted).

("If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.") (citing *Fisher v District Court*, 424 US 382 (1976); *Williams v Lee*, 358 US 217 (1959)). The decision on behalf of the Court of Appeals is a divisive policy decision made to change the current boundaries of tribal sovereign immunity and second-guess the internal procedures and business relationships of the Santa Ynez Band of Chumash Indians. Cf. *Huron Pot v Stinger*, 227 Mich App 127, 132; 547 NW2d 706, 709 (1997) (finding that Michigan's corporate laws are not applicable to questions of tribal sovereign immunity unless Congress has explicitly authorized its application).

The United States Supreme Court has acknowledged that both federal and state courts are improper places to question tribal laws and procedures. See *LaPlante*, 480 US at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."). By second-guessing the internal procedure the Santa Ynez Band has established for waiving sovereign immunity, the Court of Appeals is interfering with the "right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 US at 220. Refusing to acknowledge the sovereign immunity ordinance passed by the Santa Ynez Band is direct interference in the business decisions made by the tribal government, interference that courts do not participate in with respect to either private corporations, *Shlensky v Wrigley*, 237 NE2d 776 (Ill App 1968) (refusing to question the business judgment of a corporation's director), or other sovereigns, *Ferguson v Skrupa*, 372 US 726, 731; 83 S Ct 1028, 1032 (1963) (refusing "to sit as a 'superlegislature to weigh the wisdom of legislation'" by reviewing a Kansas statute regulating business practices that was not in violation of the Constitution (quoting *Day-Brite Lighting, Inc v*

Missouri, 342 US 421, 423; 72 S Ct 405, 427 (1952))). Cf. McMillan, *The Business Judgment Rule as an Immunity Doctrine,* 4 Wm & Mary Bus L Rev 521 (2013).

Countless law firms and practitioner guidance publications routinely publish articles that serve to make lawyers and corporations aware of the importance of tribal sovereign immunity and the need to look to individual tribal resolutions regarding the process for entering into a contract that waives sovereign immunity. An article in one gaming management publication emphases the need for stand-alone waivers of sovereign immunity if tribal law requires separate approval of waivers:

> In many instances it is beneficial for the limited waiver of sovereign immunity to be set forth in a stand-alone document, such as a resolution of the tribal council or other governing body. . . . This is particularly important if the contract requires particular governmental approvals in order to be effective or enforceable; in the event a contract is voided for failure to receive the necessary approvals, it is very possible that the waiver provisions set forth in the voided contract could be eliminate as well.

Carleton & Kovacs, *In Matters of Sovereignty, Clarity is King,* Casino Enterprise Mgt Magazine 20, 22 (Apr 2014). In another, the importance of executing due diligence to discover applicable tribal laws surrounding sovereign immunity is espoused:

> Whether persons purporting to act on behalf of a tribe or a tribal entity have the power and authority to speak for their entities is a function of tribal law and custom, the nature of the entity, and the entity's organizational documents. Reviewing the underlying organizational documents (such as the constitution, codes of law, ordinances, or resolutions) of the tribe and of the tribal business (such as a charter of incorporation or operating agreement) is essential to determining whether they limit the tribe's or the entity's ability to waive immunity.

Appleby, *Doing Business on Tribal Lands*, Risk Management Ass'n J 52, 54 (July-Aug 2012); see also Rubacha, *Construction Contracts with Indian Tribes or on Tribal Lands*, Construction Lawyer 12, 14 (Winter 2006) ("In summary, the careful . . . practitioner should investigate the constitution, bylaws, charter, ordinance, or whatever foundational documents exist for each tribe

or tribal entity to determine what governing body, chairperson, president, or other officer is authorized to execute a waiver [of sovereign immunity.]").

This understanding is reflected in the numerous strategic business decisions made by tribal governments to execute limited waivers of sovereign immunity for economic advantages. Leonhard, *Tribal Contracting: Understanding and Drafting Business Contracts with American Indian Tribes* (Chicago: ABA Publishing, 2009), p 17 ("Despite the significance of sovereign immunity, most tribes will agree to grant limited waivers of immunity provided they are clearly defined and limited in scope"). See, e.g., *Odawa Economic Development Management, Inc Corporate Charter*, Little Traverse Bay Bands of Odawa Indians, art IX (2011) (authorizing a tribal business to "effectuate limited waivers of its sovereign immunity for conducting day-to-day business"); *Mno-Bmadsen Charter*, Pokagon Band of Potawatomi Indians, § VI(A)(i) (2012) (permitting "recourse against explicitly identified [business] assets" if a valid limited waiver of sovereign immunity has been executed); Grand Traverse Band of Ottawa and Chippewa Indians Code, tit. 6, ch. 2, § 201 (2012) (providing "for the waiver of sovereign immunity in those Economic Development Corporation commercial transactions for which such waiver is necessary and beneficial to the Tribe"); Sault Ste. Marie Tribe of Chippewa Indians Code, ch. 44, § 107 (2015) (waiving sovereign immunity for tribal entities "when necessary to secure a substantial advantage or benefit to the Tribal entity or the Tribe"). Furthermore, tribes recognize the advantage of waiving tribal sovereign immunity in certain circumstances to comport with tribal traditions and cultural teachings on fairness.[3]

[3] A remedy designed to curb absolute leadership control and ensure that contracts are followed is consistent with the philosophies and traditions of many tribes. By authorizing a limited waiver of sovereign immunity, tribal leaders can recognize their place within Creation—which does not include causing harm without giving something in return—yet still retain their tribe's complete sovereignty, unabridged by outside forces.

The awareness of the role tribal sovereign immunity plays in business negotiations within Indian country is also reflected in the businesses that enter into contractual agreements with tribes without first obtaining a waiver of sovereign immunity because of the economic advantages that Indian country offers. See Miller, *Reservation "Capitalism": Economic Development in Indian Country* (Santa Barbara: Praeger, 2012), p 100 (explaining that the presence of tribal sovereign immunity does not scare investors away from the lucrative tribal gaming industry); Julian & Iyer, *Avoid the Pitfalls of Doing Business with Tribal Government and Entities*, The Primerus Paradigm 28, 28 (Fall 2012) ("The tribe's absolute immunity from suit . . . [c]an be intimidating for individuals or companies seeking a business relationship with a tribe; however, those who take the time to understand the law and plan for the pitfalls, may reap many lucrative economic opportunities."). In this case, Star Tickets was continually paid under the contract with Chumash Casino Resort. Without the recourse of a waiver of sovereign immunity after the contract ended, Star Tickets has still earned millions of dollars during the period of the contract.

This robust economic field of decisions should not be impinged upon by the Michigan Court of Appeals. The decision authored by the Court of Appeals intrudes into the business decisions of tribal governments to the detriment of economic activity within Indian country across the State of Michigan. Tribes carefully consider when to waive sovereign immunity for business advantages, and when to keep sovereign immunity, as evidenced by the Santa Ynez

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For Anishinaabe tribes, this practice aligns with many of the Seven Grandfather Teachings. Minaadenamowin (respect) requires a tribe to treat all individuals as important, whether tribal members or not. Waiving sovereign immunity so a company can find compensation for a broken contract in a tribal court shows respect for the opposing party. A limited waiver of sovereign immunity can also be thought of as a form of gwayakwaadiziwin (honesty or compassion), acknowledging that the tribe should not hold itself above other parties in a contract in importance in Creation to Gichimanidoo.

Band of Chumash Indians' formal ordinance governing the proper procedure for the waiver of sovereign immunity. These are calculated businesses decisions that should not be upended by a policy decision made by a state court unfamiliar with tribal procedures.

Conclusion

Amicus Curiae respectfully request this Court to reverse the decision of the Court of Appeals.

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Certificate of Service

I hereby certify that on January 20, 2016, I filed four copies, including one original, of the foregoing Amicus Brief on behalf of the Indigenous Law & Policy Center, and this certificate of service with the Clerk of the Supreme Court of Michigan at the Michigan Hall of Justice, 925 W. Ottawa Street, Lansing, MI 48912.

I also certify that on January 20, 2016, I served one copy of the foregoing Amicus Brief on each counsel for the Appellee/Plaintiff and counsel for Appellant/Defendant via the United States Postal Service, First Class at:

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