IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Appellant,

Case No. 3D16-2826
L.T. Case No. 2016-CA-21856

vs.

LEWIS TEIN, P.L., GUY LEWIS AND MICHAEL TEIN,

Appellees.

Appeal from non-final order rendered by the Circuit Court of the 11th Judicial Circuit Miami-Dade County, Florida in Case No. 2016-CA-21856

UNITED SOUTH AND EASTERN TRIBES, INC. (USET) *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. ("USET") is a non-profit organization representing 26 federally recognized Indian Tribal Nations in 12 states stretching from Texas to Maine.[3] Established over forty years ago, USET works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member Tribal Nations, and operates a number of programs for the benefit of its membership.

USET has particular expertise in the doctrines of tribal sovereignty and sovereign immunity. Due to their location in the Southern and Eastern regions of the United States, the USET member Tribal Nations have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties that established the government-to-government relationship between Indian tribes and the United States. These early relationships formed the basis for

[3] The USET member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

recognition of tribal sovereignty and sovereign immunity under United States federal law. *See* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1623-24 (2013).

In the modern era, tribal sovereign immunity has taken on new significance for Indian tribes across the United States. As Indian tribal economies have had an increasingly significant impact on the surrounding communities and economies, tribes have developed advanced court systems, adopted government tort claims acts similar to federal and state governments, and entered into countless contracts and agreements where they have carefully negotiated limited waivers of sovereign immunity for a myriad of purposes and as part of a bargained-for exchange. All of these developments are based on established doctrines regarding the nature of tribal sovereign immunity found in federal law and set forth in this memorandum. The decision below tears at the fabric of these doctrines in a manner that destabilizes this area of law and would undermine well-recognized tribal authority to define the terms of sovereign immunity waivers. USET therefore has a strong interest in dispelling the misconceptions regarding tribal sovereign immunity and tribal waiver of immunity that undergird the decision below and in urging this Court to overturn the lower court's erroneous decision.

SUMMARY OF ARGUMENT

Tribal sovereign immunity is a matter of federal law, and limitations on its scope are within the exclusive province of the United States Congress and Indian tribes themselves. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) ("tribal immunity is a matter of federal law and is not subject to diminution by the States."). The Supreme Court has rendered a number of decisions on the scope of tribal sovereign immunity, establishing that such immunity is "a necessary corollary to Indian sovereignty and self-governance[,]" *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986); that only Congress—not the States or the courts—may impose limitations on Indian tribes' inherent common law sovereign immunity, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031, 2039 (2014); and that congressional abrogation "cannot be implied but must be unequivocally expressed[,]" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Likewise, the Supreme Court has established that any tribal waiver of sovereign immunity must be "clear." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Further, the Supreme Court has held that tribal immunity extends even to compulsory counterclaims,

unless specifically waived, and that an Indian tribe's initiation of the original lawsuit (let alone participation in prior lawsuits) does not constitute such a waiver. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509-10 (1991). Though an Indian tribe can waive sovereign immunity without using those specific words, any such waiver must still be clear and unambiguous, such as an "express" contractual agreement to submit to certain dispute resolution procedures. *C & L Enters. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 420 (2001). The Supreme Court has never found a tribal waiver of sovereign immunity to suit based on "conduct" such as prior lawsuits or allegedly criminal or bad faith acts, nor do its precedents support such a ruling in any manner.

Misapplication of the doctrine of tribal sovereign immunity in a single state court case, even where the facts of the case are unique or unusual, can have profound impacts on tribes throughout the state as well as the country and can impinge on legitimate tribal sovereign interests. Because the court below misapplied federal law and exceeded its proper jurisdiction, its decision should be reversed.

ARGUMENT

IV. The Origins and Scope of Sovereign Immunity and its Application to Indian Tribes

Within the Anglo-American legal system, all sovereigns possess immunity from suit as an inherent part of their sovereignty. "The generation that designed and

adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing *Chisholm v. Georgia*, 2 Dall. 419, 437-46, 1 L.Ed. 440 (1793) (Iredell, J., dissenting) (surveying English practice); *cf. Nevada v. Hall*, 440 U.S. 410, 414 (1979)). *See also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent") (quoting The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton)).

It follows naturally that because the United States recognizes Indian tribes as sovereigns, it also recognizes tribal sovereign immunity. *See, e.g., Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."). Indeed, the earliest cases recognizing tribal sovereign immunity in the United States utilized the same reasoning as, and relied on, early federal case law acknowledging the sovereign immunity of federal, state, and foreign governments and recognizing Indian tribes as independent sovereigns on a similar footing with the States. *See* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1610-22 (2013) (Part II, comparing the reasoning and analysis of early

foundational state, federal, and foreign immunity cases with the reasoning and analysis in early tribal sovereign immunity cases); *id*. at 1640-54 (Parts III.D and III.E, reviewing early tribal sovereign immunity cases).

The scope and application of tribal sovereign immunity, to the extent not specifically abrogated by Congress or waived by an Indian tribe itself, is thus the same as that of the immunity possessed by federal and state governments (again, to the extent not abrogated by Congress or waived by those sovereigns). *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (stating that the "qualified nature of Indian sovereignty" modifies the general principle of sovereign immunity "only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands"). In other words, tribal sovereign immunity is not an anomaly. The differences in scope and application that do exist between tribal, state, and federal sovereign immunity today exist because the sovereign immunity of those governments has been waived and abrogated under different circumstances and for different reasons—not because the underlying scope or rationale of sovereign immunity is fundamentally different for those governments.[4]

[4] One example of these differences is that the States agreed as part of the Constitutional Convention to surrender their sovereign immunity for purposes of suits by sister States, while Indian tribes—who were not participants in the Constitutional Convention—have not agreed to those same limitations. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2031.

As it originated in the common law, sovereign immunity was "extraterritorial and absolute in scope and applied to all types of legal actions, no matter the relief sought." William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1597 (2013). *See also id*. at 1596, 1660-61 (explaining that modern day limitations on federal, state, and foreign sovereign immunity in federal and state courts, as with tribal sovereign immunity, are the result of congressional abrogation or voluntary waiver, but that otherwise the common law rule of extraterritorial and absolute immunity remains intact). In the modern era, the United States Supreme Court has consistently upheld the doctrine of tribal sovereign immunity.[5] As stated in these decisions, tribal sovereign immunity applies to tribal governments in the course of their governance as well as their commercial ventures, and to conduct or activity both within and outside of Indian country. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55, 760 (1998). Further, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged

[5] Specifically, the Court has addressed tribal sovereign immunity in seven major decisions since 1977: *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014); *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); and *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165 (1977).

from diminution by the States." *Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 891 (1986).

V. The Primary Role of the United States Congress in Altering the Scope of Tribal Sovereign Immunity

It is a central tenet of the United States Supreme Court's tribal sovereign immunity jurisprudence that only Congress—not the states or the courts—may impose limitations on Indian tribes' inherent common law sovereign immunity. In *Kiowa* and again in *Bay Mills*, the Court affirmed that its precedent had "established a broad principle" of tribal sovereign immunity "from which [the Court] thought it improper suddenly to start carving out exceptions." *Bay Mills Indian Cmty.*, 134 S. Ct. 2024 at 2031 (citing *Kiowa*, 523 U.S. at 758, 760). Instead, the Court made clear that it is for Congress alone to determine when to limit the scope of tribal sovereign immunity. *Id*. at 2039; *Kiowa*, 523 U.S. at 760.

As it is a corollary of sovereignty, recognition of tribal sovereign immunity represents a fundamental respect for tribes, their sovereign authority, and the government-to-government relationship between Indian tribes and the United States. Even when the Supreme Court, as in *Kiowa*, has suggested that there may be "reasons to doubt the wisdom of perpetuating the doctrine[,]" *Kiowa*, 523 U.S. at 758, the Court also recognized that:

> Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels

> some caution by us in this area. Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.'... It has not yet done so. … In light of these concerns, we decline to revisit our case law and choose to defer to Congress.

Id. at 759-60 (internal citation omitted). Only two years ago, and sixteen years after *Kiowa*, the Court reaffirmed this position. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2037-38 (Congress "has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved in the issue") (internal citation omitted); *id*. at 2039 ("As *Kiowa* recognized, a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty. … '[A] proper respect … for the plenary authority of Congress in this area cautions that [the courts] tread lightly'[.]") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)) (internal citations omitted). Public policy concerns that may weigh against the doctrine of sovereign immunity in certain cases, whether as applied to Indian tribes or to other sovereigns, thus do not grant license for the courts to apply new limitations on its scope or to imply abrogation where none exists.[6]

[6] *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (Stevens, J., concurring) ("In my opinion, all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct. The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law.").

Moreover, while the Supreme Court recognizes congressional power to abrogate tribal sovereign immunity, any such abrogation "cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). For example, in *Santa Clara Pueblo v. Martinez* the Court held that Congress had not abrogated tribal immunity with the Indian Civil Rights Act (ICRA) when it extended the right of equal protection under the law to tribal jurisdictions. Even though this potentially left individuals without a way to enforce the ICRA's equal protection guarantee against tribal governments,[7] the Court held that sovereign immunity remained intact because Congress had not included any language in the Act that clearly expressed an abrogation. 436 U.S. 49, 58 (1978). As the Court more recently explained, "[t]hat rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2031-32.

VI. Tribal Waiver of Sovereign Immunity

Apart from congressional abrogation, tribal sovereign immunity can only be overcome by voluntary waiver of the tribe itself. And, like congressional abrogation,

[7] As a practical matter, in most cases relief is available in tribal court or through other established tribal procedures.

the United States Supreme Court has insisted that a Tribe's waiver of sovereign immunity must be clear. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

Even when an Indian tribe brings a suit in state or federal court, it is not waiving its sovereign immunity from counterclaims or cross-claims. In *Oklahoma Tax Commission*, the Citizen Band Potawatomi Indian Tribe filed suit against the Tax Commission to enjoin the collection of state taxes on cigarette sales that took place on tribal trust lands. 498 U.S. at 507. The State counterclaimed, seeking enforcement of its claim for the very same unpaid taxes and an injunction against the Tribe from selling untaxed cigarettes in the future. *Id*. at 507-08. The State argued that by filing its suit for an injunction against the Tax Commission the Citizen Band Potawatomi had waived its sovereign immunity for purposes of the State's counterclaim, which was compulsory under Federal Rule of Civil Procedure 13(a) and arose out of the same facts as the Tribe's original claims. The Supreme Court, however, noted that it had rejected that argument—and held that tribal immunity extends to cross-suits—a half-century earlier in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12. *Okla. Tax Comm'n*, 498 U.S. at

509. The Court held, therefore, that the Citizen Band Potawatomi had not waived its sovereign immunity by filing its own action against the State. *Id*. at 509-10.[8]

Indeed, even entering into a contract does not mean that an Indian tribe has waived its sovereign immunity, unless the contract expressly so provides, whether through a sovereign immunity waiver or specific agreement by the Tribal Nation to dispute resolution provisions. In *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001), the Court reiterated that waivers of tribal sovereign immunity must be clear. In that case, the Court found that a detailed contractual arbitration clause unambiguously waived the Tribe's sovereign immunity for purposes of enforcing arbitration awards under the contract where: the Tribe had been the party to prepare and propose the contract; the arbitration clause specified that all claims would be decided by arbitration in accordance with the Industry Arbitration Rules of the American Arbitration Association; the arbitration clause further stated that any arbitration award would be final and enforceable "in accordance with applicable law in any court having jurisdiction thereof"; under the American Arbitration Association rules specified in the arbitration clause as

[8] The Court further rejected the State's invitation to narrow the doctrine of tribal sovereign immunity on the grounds that, according to the State, cigarette sales are "detached from traditional tribal interests[.]" *Okla. Tax Comm'n*, 498 U.S. at 510. As it has repeatedly done, see Part II *supra*, the Court deferred to Congress, noting that body "has occasionally authorized limited classes of suits against Indian tribes," but "has never authorized suits to enforce tax assessments." *Id*.

applicable, arbitration awards could be entered in any federal or state court having jurisdiction thereof; the contract's choice-of-law clause provided that the contract would be governed by Oklahoma law; and Oklahoma law provided that making an arbitration agreement in the state confers jurisdiction on the state courts to enforce that agreement. *Id*. at 415; 418-20.

Though the contract at issue in *C & L Enterprises* never used the specific term "sovereign immunity," the Court held in that case that the Tribe had "agreed, ***by express contract***, to adhere to certain dispute resolution procedures" that included enforcement of arbitration awards in Oklahoma state court. *Id*. at 420 (emphasis added). The arbitration clause, the Court held, was unambiguous and would have no meaning if it did not encompass a waiver of sovereign immunity to permit its implementation. *Id*. at 422-23. Thus, while the Court in *C & L Enterprises* found a waiver, the case did not relax the high standards applicable to such waivers as established in *Oklahoma Tax Commission*.

Nothing in the decision below rises to the level that would justify a finding that the Miccosukee Tribe has waived its sovereign immunity. Rather, the decision below rests on a misreading of *C & L Enterprises* and the Supreme Court's sovereign immunity precedent as a whole. *Oklahoma Tax Commission* clearly establishes that immunity is not waived even where a tribe makes use of state or federal courts for related purposes, and *C & L Enterprises* simply illustrates one of the ways that Indian

tribes may clearly, *by written contract*, agree to waive their sovereign immunity. The lower court's conclusion that a "clear" waiver of sovereign immunity can be implied from allegedly bad faith conduct in connection with *prior* litigation falls far outside these guidelines and is wholly unsupported by U.S. Supreme Court precedent.

CONCLUSION

Because tribal sovereign immunity is a matter of federal law that cannot be infringed by the states, and because state court decisions like the ruling below can have far-reaching consequences for Indian tribes throughout the state and across the country, *amicus curiae* respectfully urges this Court to reverse the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic mail, unless otherwise noted, on this 23rd day of January 2017 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Craig A. Pugatch
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