

CASE NO. 25-1872

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Ex Rel,*
Movant,

and

JESSE KOENIG,

Plaintiff-Appellant,

v.

KEWEENAW BAY OJIBWA COMMUNITY
COLLEGE, LORI ANN SHERMAN, BETH LOUISE
VIRTANEN, and ROBIN CHOSA, Individually and as
Representatives of Keweenaw Bay Ojibwa Community College,
Defendants-Appellees.

On Appeal from the U.S. District Court for the
Western District of Michigan, Case No. 2:23-cv-103

BRIEF ON APPEAL OF DEFENDANTS-APPELLEES
KEWEENAW BAY OJIBWA COMMUNITY COLLEGE, LORI ANN
SHERMAN, BETH LOUISE VIRTANEN, AND ROBIN CHOSA

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 25-1872

Case Name: Koenig v Keweenaw Bay Ojibwa Comm

Name of counsel: Timothy A. Diemer

Pursuant to 6th Cir. R. 26.1, Keweenaw Bay Ojibwa Community College

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 18, 2026 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Timothy A. Diemer

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure.** With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed.**

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) **Form and Time of Disclosure.** The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

In accordance with Fed. R. App. P. 34(a) and 6 Cir. R. 34(a), Defendants-Appellees Keweenaw Bay Ojibwa Community College, Lori Ann Sherman, Beth Louise Virtanen, and Robin Chosa respectfully submit that this Appeal warrants oral argument.

Specifically, this matter involves important questions of tribal sovereign immunity, especially as it applies to “tribally controlled colleges” and their leadership. Moreover, the proper resolution of this Appeal is not only of interest to the thirty-five recognized “tribally controlled colleges” across the country, but also to Native American tribes, their members, and employees.

STATEMENT OF JURISDICTION

In his Statement of Jurisdiction, Plaintiff-Appellant Jesse Koenig argues that there are no procedural aspects of this case that would deprive either the District Court or this Court of jurisdiction. Defendants-Appellees Keweenaw Bay Ojibwa Community College (“KBOCC”), Lori Ann Sherman, Beth Louise Virtanen, and Robin Chosa (collectively referred to as “KBOCC”), do not contest any of the statements made in Mr. Koenig’s Statement of Jurisdiction pertaining to these procedural aspects. The District Court issued an Opinion and Order on August 28, 2025, granting KBOCC’s Motion to Dismiss and entered a corresponding Judgment on the same day. Opinion and Order, RE 80; Judgment, RE 81. Mr. Koenig then filed a Notice of Appeal to this Court on September 25, 2025. Notice of Appeal, RE 82.

KBOCC maintains, however, that the District Court lacked jurisdiction over all of Mr. Koenig’s claims based on tribal sovereign immunity for all the reasons elaborated in this Brief. It has long been established that sovereign immunity deprives a federal court of the jurisdiction to consider claims against a tribal defendant. *Spurr v. Pope*, 936 F.3d 478, 483 (6th Cir. 2019) (“sovereign immunity deprives us of jurisdiction to consider claims against the other two tribal defendants”). This doctrine is so fundamental to the Court’s jurisdiction that the Court must address it before proceeding to any other issue in the case. *Id.* (“But tribal

sovereign immunity is a jurisdictional doctrine. That means we must address it-and must do so first”). The District Court properly found that it lacked jurisdiction, and this decision should now be upheld on Appeal.

KBOCC does not contest that this Court now has jurisdiction to consider Mr. Koenig’s Appeal of the limited question of whether the District Court properly dismissed this case. 28 U.S.C. § 1291. While an appellate court may review a lower court’s decision on a jurisdictional question, KBOCC maintains that appellate jurisdiction is lacking, except to review the jurisdictional decision reached by the District Court.

STATEMENT OF ISSUES

- I. DID THE DISTRICT COURT PROPERLY REJECT MR. KOENIG'S ARGUMENT THAT KBOCC WAIVED TRIBAL SOVEREIGN IMMUNITY WHERE HE FAILED TO SHOW A CLEAR AND UNEQUIVOCAL WAIVER OF IMMUNITY?**

Plaintiff-Appellant answers "No."

Defendants-Appellees answer: "Yes."

The District Court would answer: "Yes."

- II. DID THE DISTRICT COURT CORRECTLY FIND THAT TRIBAL SOVEREIGN IMMUNITY EXTENDS TO EACH OF THE INDIVIDUAL DEFENDANTS, WHERE THE REAL PARTY AT INTEREST IN THIS SUIT IS KBOCC, NOT THE INDIVIDUAL DEFENDANTS?**

Plaintiff-Appellant answers: "No."

Defendants-Appellees answer: "Yes."

The District Court would answer: "Yes."

- III. DID THE DISTRICT COURT PROPERLY DISMISS THIS CASE BECAUSE KBOCC IS ENTITLED TO TRIBAL SOVEREIGN IMMUNITY?**

Plaintiff-Appellant answers: "No."

Defendants-Appellees answer: "Yes."

The District Court would answer: "Yes."

IV. DID THE DISTRICT COURT CORRECTLY FIND THAT MR. KOENIG’S CLAIMS, BROUGHT UNDER MICHIGAN LAW FOR UNPAID SICK LEAVE AND OTHER FRINGE BENEFITS, ARE ALSO BARRED BY TRIBAL SOVEREIGN IMMUNITY?

Plaintiff-Appellant answers: “No.”

Defendants-Appellees answer: “Yes.

The District Court would answer: “Yes.”

V. DOES THE DISSENTING OPINION IN *KIOWA TRIBE OF OKLAHOMA V. MANUFACTURING TECHNOLOGIES* HAVE ANY APPLICABILITY TO THIS CASE WHERE MR. KOENIG’S EMPLOYMENT WITH KBOCC CANNOT BE CONSIDERED AN “OFF-RESERVATION COMMERCIAL ACTIVITY?”

Plaintiff-Appellant answers: “Yes.”

Defendants-Appellees answer: “No.”

The District Court did not address this question.

STATEMENT OF THE CASE

This Appeal arises from a dispute between Appellant, Jesse Koenig, and his former employer, the Keweenaw Bay Ojibwa Community College (“KBOCC”). KBOCC is a non-profit, public corporation chartered by the Keweenaw Bay Indian Community (“KBIC”), providing “post-secondary, vocational, technical, and other programs and educational opportunities” to both Tribal members and individuals in the surrounding communities. 2016 Revised Charter, RE 69-8, Page ID #1217.

KBIC is a federally recognized Sovereign Nation under 81 Fed. Reg 5019, 5021, and Constitutional Tribal Government under § 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 476. *See* KBIC Constitution, RE 69-10, Page ID # 1255. KBIC is located approximately 30 miles south of Houghton, Michigan in Baraga County, with a land base including the L’Anse Reservation, the Ontonagon Reservation, and trust property in Marquette, Michigan. KBIC Constitution, RE 69-10, Page ID # 1255. The L’Anse Reservation, established under the Treaty of 1854, is the oldest and one of the largest Reservations in the State of Michigan.¹

Based on KBOCC’s ongoing relationship with the Tribe, the District Court dismissed this entire case based on the application of tribal sovereign immunity, a decision which should be upheld on Appeal.

¹ The Tribe’s Code of Ordinances, including KBOCC’s original 1975 Charter, is publicly available at <https://www.kbic-nsn.gov/tribal-governance/tribal-code/> (last visited May 18, 2026).

**KBOCC was Established in 1975 as
KBIC's Only Post-Secondary Educational Institution**

On January 4, 1975, Congress passed the Indian Self-Determination and Education Assistance Act. P.L. 93-638. In passing this Act, Congress explicitly recognized the importance of tribal sovereignty and self-determination over education for American Indian students. P.L. 93-638. On July 12, 1975, consistent with these goals, KBIC's Tribal Council chartered the "Ojibwa Community College and Learning Center" through the passage of Tribal Council Ordinance 75-1. Ordinance No. 75-1, RE 69-5, Page ID # 1194. The College was chartered to "establish and operate institutions granting post-secondary degrees and certificates, and to generally coordinate and regulate all higher education on the Keweenaw Bay Indian Reservation." Ordinance No. 75-1, RE 69-5, Page ID # 1194. The name of the College was later formally changed from "Ojibwa Community College" to the "Keweenaw Bay Ojibwa Community College." See 2009 Revised Charter, RE 69-7, Page ID # 1206. To this day, Tribal Council continues to sanction KBOCC as the Tribe's only post-secondary educational institution.

KBOCC has since been recognized by the United States Department of Interior, Bureau of Indian Education, as one of thirty-five "tribally controlled colleges and universities" in the country, and it has been similarly certified by the American Indian Higher Education Consortium ("AIHEC"). KBOCC Eligibility

Letter, RE 69-4, Page ID # 1179; see also <https://www.aihec.org/tribal-colleges-universities/> (last visited May 18, 2026). As a “tribally controlled college,” KBOCC is eligible for federal grants specifically designated for tribal institutions. KBOCC Eligibility Letter, RE 69-4, Page ID # 1179.

KBOCC Maintains Strong Ties to the Tribe

Since it was chartered in 1975, KBOCC has always maintained strong connections to KBIC. Notably, KBIC’s Tribal Council retains the power to amend KBOCC’s Charter, which it has done on at least three occasions. One such amendment in 2009 added an introductory section that recognizes the strong, ongoing connection between KBOCC and KBIC, stating, in relevant part:

Formed out of our American Indian identity, the mission of Keweenaw Bay Ojibwa Community College is to offer post-secondary education, rich in Ojibwa culture, tradition, and beliefs, that supports life-long learning.

...

The Board of Regents aspires for the College to provide an education that will promote the preservation of the customs and beliefs of the Ojibwa people. In education and knowledge, traditional values are integrated to foster understanding and to prepare students for responsible citizenship, academic excellence, and career success which will enhance the economic base of the reservation and surrounding communities. [2009 Revised Charter, RE 69-7, Page ID # 1207].

Other amendments to the Charter have established the duties of KBOCC’s President and allowed for the College’s expansion from “educational programs...on the

L’Anse Reservation” to “educational programs...on the L’Anse Reservation and at other locations.” 2009 Revised Charter, RE 69-7, Page ID ## 1208, 1209 (all emphasis added unless noted otherwise).

In 2023, Tribal Council re-codified the Tribe’s Code of Ordinances and created Title 114, Education, which formally codified KBOCC’s Charter as Tribal Law. Ordinance 2023-02, RE 69-12, Page ID # 1280.

KBOCC also maintains strong connections to the Tribe through the members of its Board of Regents who, under its own By-Laws, “must be members of the Keweenaw Bay Indian Community.” Board of Regents By-Laws, RE 69-13, Page ID # 1287. Article VIII of the Charter further requires that the “Board shall elect a chairman, vice-chairman, treasurer and secretary from within their membership who are members of the Keweenaw Bay Indian Community.” Charter, RE 69-6, Page ID # 1203. KBIC’s Tribal Council also vets and ultimately controls the slate of nominees for selection to the Board of Regents. Board of Regents By-Laws, RE 69-13, Page ID # 1287.

KBOCC’s employment policies directly promote the Tribe’s Indian Preference initiatives and its Tribal Employment Rights Ordinance, where qualified Tribal members, their descendants and spouses are given preferences for positions at KBOCC. Staff Handbook, RE 69-9, Page ID # 1232. The Tribe’s Education

Department also offers scholarships for Tribal members attending KBOCC. Declaration of Megan Haataja, RE 69-17, Page ID # 1326.

The influence of the Tribe is also evident throughout KBOCC’s campus and course offerings. KBOCC’s website directly expresses its desire to support “all learners to achieve their goals through holistic education, while promoting Anishinaabe culture, language, and lifeways.” See <https://www.kbocc.edu/about-us/> (last visited May 18, 2026). KBOCC’s current logo proudly reflects the Tribe’s Anishinaabe culture, including the colors of the Four Directions and the Medicine Wheel:



See KBOCC 2020 Board of Regents By-Laws, RE 69-16, Page ID # 1315. The Tribe also routinely engages in collaborative initiatives with KBOCC, noting it “is cognizant of the need for providing post-secondary education and training” for tribal members. See, e.g., 2008 Memorandum of Agreement, RE 69-19.

KBOCC Recently Moved its Main Campus to the Wabanung Campus and is Undergoing the Fee-to-Trust Process

KBOCC has historically maintained its principal office on the L’Anse Reservation, operating out of the Niiwin Akeaa Center. Declaration of Megan

Haataja, RE 69-17, Page ID # 1326. Due to the expansion of other Tribal programs and services at the Center, and with increasingly limited space, KBOCC recently moved its principal office to one of its satellite campuses, the Wabanung Campus. Declaration of Megan Haataja, RE 69-17, Page ID # 1326. KBOCC's move to the Wabanung Campus was made with the explicit blessing of the Tribal Council. Declaration of Megan Haataja, RE 69-17, Page ID # 1326. The move of KBOCC's principal office was formally made after Mr. Koenig was no longer employed at KBOCC. Declaration of Megan Haataja, RE 69-17, Page ID # 1326.

The Wabanung Campus is located immediately adjacent to the L'Anse Reservation in downtown L'Anse Michigan. Although it is not formally part of the Reservation, KBOCC has submitted a fee-to-trust application with the Department of Interior, Bureau of Indian Affairs, to place the Wabanung Campus in trust with the United States. Resolution KB-036-2018, RE 69-18, Page ID # 1330 ("The Keweenaw Bay Indian Community Tribal Council hereby expresses its support for KBOCC's efforts to transfer title to the property located at the site of the former Pelkie Elementary School...to the United States to be held in trust for the benefit of KBOCC").² The Bureau of Indian Affairs accepted KBOCC's application as the

² The fee-to-trust process allows tribes to essentially expand their reservations by requesting to have additional land placed into trust for their benefit by the Bureau of Indian Affairs. See <https://www.bia.gov/bia/ots/fee-to-trust> (last visited May 17, 2026) ("Trust lands establish Tribal jurisdiction and strengthen Tribal sovereignty").

“Tribe” under 25 C.F.R. Part 151.2(b) for purposes of seeking fee-to-trust status on the College’s land.

**KBOCC Has Been Recognized as a Tribal Institution
by the Higher Learning Commission for Purposes of Accreditation**

In November 2012, KBOCC was evaluated by the Higher Learning Commission for purposes of granting initial accreditation. Report, RE 69-26. The Higher Learning Commission serves as a “gatekeeper agency” to assist the federal government in advancing its “distinct interest in the role of accreditation in assuring quality in higher education for the students who benefit from federal financial aid programs.” Complaint, RE 1, Page ID # 5.

In their Report, the Higher Learning Commission evaluation team recognized KBOCC as a uniquely tribal institution, including findings that the majority of KBOCC’s students “are part-time, Native American, age 25 and older” and “KBOCC receives an annual financial subsidy and access to some tribal services from the Keweenaw Bay Indian Community.” Report, RE 69-26, Page ID # 1337.

KBOCC was initially accredited by the Higher Learning Commission in June 2013, and has since successfully participated in several cycles to maintain accreditation. See <https://www.kbocc.edu/accreditation/> (last visited May 15, 2026).

**KBOCC was Designed to Share
in the Tribe’s Sovereign Immunity**

KBIC’s Tribal Council explicitly designed KBOCC to share in the Tribe’s sovereign immunity, clarifying in the Charter that all disputes must be brought in Tribal Court. Ordinance No. 75-1, RE 69-5, Page ID # 1196 (“[t]he Corporation may sue or be sued, provided that such suit is brought in the Keweenaw Bay Tribal Court”).³ Similarly, each version of the Staff Handbook in operation while Mr. Koenig was employed at KBOCC specified that all “legal matters concerning employment at Keweenaw Bay Ojibwa Community College will be heard in KBIC Tribal Court.” *See* Staff Handbook, RE 69-9, Page ID # 1241.

Tribal Council’s intent for KBOCC to share in the Tribe’s sovereign immunity is also confirmed in KBOCC’s Charter, Article V, Bonds, Section 1, which states: “The College may issue bonds from time to time in its discretion for any part of its corporate purposes. Bonds...shall evidence claims against the obligations of the college which are justifiable in the Tribal Court.” KBOCC Charter, RE 69-6, Page

³ Of note, KBIC’s Tribal Council exercised its authority to again amend the language of KBOCC’s Charter as part of its regular review in January 2026. The Charter now explicitly confirms KBOCC’s sovereign immunity, stating: “[t]he sovereign immunity of the Keweenaw Bay Indian Community extends to all official actions of the college, the board of regents, and all agents and employees of the college during the course of their official duties...” *See* <https://www.kbic-nsn.gov/tribal-governance/tribal-code/> (this new language was formally approved on January 14, 2026, and will be added to the online Code of Ordinances with the next quarterly update). This language strongly supports KBOCC’s argument that it has always shared in the Tribe’s sovereign immunity.

ID # 1199. Similarly, Article X, Liability, Section 2 requires that KBOCC's contracts "shall designate the Tribal Court as the appropriate forum to decide liability of the Corporation." KBOCC Charter, RE 69-6, Page ID # 1204.

**Mr. Koenig Filed this Lawsuit Against KBOCC After
His Contract Expired and was Not Renewed for the 2021-2022 School Year**

Plaintiff, now Appellant, Jesse Koenig, filed this action alleging violations of the False Claims Act and Michigan law related to his previous employment against KBOCC, as well as Ms. Sherman, Ms. Virtanen, and Mr. Chosa. RE 1. Mr. Koenig's Complaint raises three claims against KBOCC and the Individual Defendants: (1) Count I: a *Qui Tam* Action on Behalf of the United States of America;⁴ (2) Count II: Unlawful Retaliation in Violation of 31 U.S.C.A. § 3730(h); and (3) Count III: Violation of M.C.L.A. § 408.473 and M.C.L.A. § 408.475 for Refusal to Pay Accrued Sick Leave/Vacation Pay. Complaint, RE 1.

Mr. Koenig was hired by KBOCC in 2010 as a non-Tribal professor, and he later became Chair of KBOCC's Liberal Studies Department. Complaint, RE 1, Page ID # 5. On July 20, 2020, Mr. Koenig received notice from KBOCC that his Contract had expired and was not being renewed for the 2021-2022 academic year. Complaint, RE 1, Page ID # 11. Mr. Koenig's claims are based on speculation that KBOCC declined to renew his contract in direct retaliation for engaging in

⁴ The United States declined to intervene in this lawsuit.

“protected conduct,” namely his submission of a letter to the Higher Learning Commission about KBOCC’s alleged noncompliance with certain requirements to obtain accreditation. Complaint, RE 1, Page ID # 13.

Mr. Koenig claims he sent a 29-page letter to the Higher Learning Commission on May 10, 2020 demonstrating that “KBOCC was perpetrating a fraud, via the *ultra vires* actions of Defendants Sherman, Virtanen, and Chosa, by misrepresenting its compliance with mandatory obligations for continued accreditation.” Brief on Appeal, p 20. Mr. Koenig highlights that Higher Learning Commission responded to his letter on May 18, 2020, stating that it raised “potential concerns.” Brief on Appeal, p 22 (citing HLC Letter to Koenig, RE 77-11, PageID # 1721). After a full investigation, however, the Higher Learning Commission determined that “that the matters raised in the complaint do not indicate substantive noncompliance with the HLC requirements noted previously” and confirmed that “[n]o additional review will be conducted by HLC regarding this matter.” HLC December 17, 2020 Letter, RE 69-28, Page ID # 1383.

The District Court Held that All of Mr. Koenig’s Claims Against KBOCC and the Individual Defendants are Barred by Sovereign Immunity

On December 30, 2024, KBOCC filed a Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(b)(1) and 12(c) arguing, in relevant part, that Mr. Koenig’s claims should be dismissed because KBOCC is cloaked with the Tribe’s sovereign immunity based on its role as a “tribally controlled college” and its

fundamental connection to the Tribe. Motion for Judgment on the Pleadings, RE 69.

The District Court granted KBOCC's Motion in an Opinion and Order issued on August 28, 2025, finding: "KBOCC is an arm of the Tribe and enjoys sovereign immunity from lawsuits" and "the immunity extends to the official claims brought against the Individual Defendants." Opinion and Order, RE 80, Page ID # 1813. As a result, the District Court dismissed Mr. Koenig's Complaint without prejudice, and a Judgment was entered the same day. Judgment, RE 81. Mr. Koenig thereafter filed a Notice of Appeal to this Court on September 25, 2025.

SUMMARY OF THE ARGUMENT

Since 2010, KBOCC has been recognized by the Bureau of Indian Affairs as a "tribally controlled college," making it eligible to receive specific funds and benefits under the Tribally Controlled Community College Assistance Act of 1978. Eligibility Letter, RE 69-4. This recognition serves as more than a designation for federal funds, however, and required KBOCC to undergo a painstaking process of review to evaluate the College's educational programs, leadership, and relationship to the Tribe. Eligibility Letter, RE 69-4. As a result, KBOCC now belongs to an exclusive group of thirty-five "tribally controlled colleges and universities" who are recognized for their unique role in advancing the sovereignty and self-determination of the tribes that chartered them.

Consistent with this designation and KBOCC's uniquely Tribal role, the District Court found that each of the three claims brought against KBOCC were barred by tribal sovereign immunity, which extends to KBOCC as an "arm of the tribe." Opinion and Order, RE 80, Page ID # 1813. Although the District Court adopted the five-factor test established in *White v University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014), this Court need not consider this test to reach the same conclusion because Congress already recognizes KBOCC as a "tribally controlled college," that is "formally controlled...formally sanctioned, or chartered by the governing body of an Indian tribe or tribes. 25 U.S.C. § 1801(a)(4). Forcing "tribally controlled colleges" to justify their sovereignty through the five-factor *White* test is unnecessary and contrary to the designation created by Congress. Nevertheless, this outcome, rooted in the strong connection between KBOCC and the Tribe, represents a proper application of tribal sovereign immunity.

Contrary to the District Court's well-reasoned finding, Mr. Koenig now argues that a broad "metamorphosis" has occurred at KBOCC, transforming the College from a "small Tribal College on a Reservation providing educational services to only Native Americans, funded exclusively by the Tribe, to a local community college operating off the Reservation, whose student population is secular." Brief on Appeal, p 14. None of Mr. Koenig's allegations, which range from mischaracterizations to blatant untruths, negate the fact that KBOCC remains a

“tribally controlled college” with strong connections to the Tribe, providing education rooted in “Ojibwa culture, tradition, and beliefs.” 2016 Revised Charter, RE 69-8, Page ID # 1217.

In addition to challenging KBOCC’s Tribal status, Mr. Koenig argues that the District Court improperly dismissed this case for five key reasons. First, he argues that KBOCC waived its sovereign immunity defense, but he fails to show any conduct constituting a “clear” and “unequivocal” waiver, as is required under Sixth Circuit law. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L. Ed. 2d 623 (2001) (“to relinquish its immunity, a tribe’s waiver must be ‘clear’”).

Second, Mr. Koenig argues that tribal sovereign immunity does not extend to the Individual Defendants because they have been sued in their individual capacities, but fails to recognize that the claims brought against each of the Individual Defendants actually implicate KBOCC and, therefore, are “official capacity” claims. *Lewis v. Clarke*, 581 U.S. 155, 158, 137 S. Ct. 1285, 1288, 197 L. Ed. 2d 631 (2017) (claims are “official capacity claims” where “the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself”).

Third, Mr. Koenig argues that KBOCC is no longer an “arm of the tribe” following its “transformation” to a secular college, an assertion which is contradicted

on its face by KBOCC's status as a "tribally controlled college" and confirmed by a thorough analysis of the *White* factors. *White*, 765 F.3d at 1025.

Fourth, Mr. Koenig argues that his claims brought under Michigan law for unpaid employment benefits should not have been dismissed because his employment had no basis on the Reservation, a statement which is contradicted by both the facts of this case and the governing law. *See Lexington Ins. Co. v. Smith*, 117 F.4th 1106, 1108 (9th Cir. 2024) ("no part of this test [for tribal jurisdiction] requires the physical presence of a nonmember on a reservation").

Finally, Mr. Koenig asks this Court to adopt the Dissenting Opinion from *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, despite the fact that the Majority Opinion has been widely cited for almost thirty years, and the conduct at the core of this case cannot be considered "off-reservation commercial activity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).

Where Mr. Koenig fails to provide any legitimate challenge to the strong principles of tribal sovereign immunity that protect KBOCC and the Individual Defendants in this case, the District Court's decision should be affirmed.

ARGUMENT

It has long been held that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572

U.S. 782, 788, 134 S. Ct. 2024, 2052, 188 L. Ed. 2d 1071 (2014). Thus, as a matter of federal law, “an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla.*, 523 U.S. at 754. This immunity shields not only the tribes themselves, but also entities deemed sufficiently close to the tribal organization, often referred to as “arms of the tribe.” *See Bay Mills Indian Cmty.*, 572 U.S. at 825 n 4.

The core question presented in this Appeal is whether KBOCC and its leadership are entitled to sovereign immunity as an “arm of the Tribe.” The facts of this case show that KBOCC did not waive tribal sovereign immunity, sovereign immunity extends to each of the Individual Defendants, and KBOCC remains a “tribally controlled college,” closely connected to KBIC and operating under a mission statement to “provide an education that will promote the preservation of the customs and beliefs of the Ojibwa people.” 2009 Revised Charter, RE 69-7, Page ID # 1207. All of these undisputed facts, along with the arguments elaborated below, confirm that the District Court properly dismissed this case based on a lack of jurisdiction. The District Court’s decision should now be affirmed.

I. STANDARD OF REVIEW

This Court reviews a lower court order dismissing a case for lack of subject matter jurisdiction *de novo*. *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005). Because “[f]ederal courts are courts of limited jurisdiction,” Fed. R. Civ.

P. 12(b)(1) provides that a complaint's dismissal is appropriate when a court lacks subject matter jurisdiction over a dispute. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919-20 (6th Cir. 2009) ["[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction"). *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003). Where the District Court makes any findings of fact when deciding a motion to dismiss, these findings are reviewed for clear error. *Jones v. City of Lakeland*, 175 F.3d 410, 413 (6th Cir. 1999) (overruled on other grounds).

II. THE DISTRICT COURT PROPERLY REJECTED MR. KOENIG'S ARGUMENT THAT KBOCC WAIVED TRIBAL SOVEREIGN IMMUNITY WHERE HE FAILED TO SHOW A CLEAR AND UNEQUIVOCAL WAIVER OF IMMUNITY

Mr. Koenig's Complaint raises a series of broad claims and grievances against KBOCC and each of the Individual Defendants, Ms. Sherman, Ms. Virtanen, and Mr. Chosa. Complaint, RE 1. Mr. Koenig fails to acknowledge, however, the fact that his lawsuit is fully barred by tribal sovereign immunity. *Kiowa Tribe of Okla.*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized a suit or the tribe has waived its immunity"). As demonstrated below, KBIC's sovereign immunity extends to KBOCC, an educational institution chartered by the Tribe, organized and operating under the laws of the Tribe, and recognized as a "tribally controlled college" under federal law.

In his Brief on Appeal, Mr. Koenig first argues that the District Court should not have even reached the question of whether sovereign immunity applies in this case because KBOCC waived any claim it has to sovereign immunity through a “panoply of admissions made in Answer to the Complaint, Admissions, Interrogatory Answers, and in response to a Joint Status Order.” Brief on Appeal, p 31. The single statement cited by Mr. Koenig falls far short of a “clear” waiver of sovereign immunity. *C & L Enters., Inc*, 532 U.S. at 418 (“to relinquish its immunity, a tribe’s waiver must be ‘clear’”). This is particularly true where KBOCC has maintained throughout this case that it has sovereign immunity, including in its Answer and Affirmative Defenses. Defendants’ Answer and Affirmative Defenses, RE 17, Page ID # 117 (“Defendants have sovereign immunity from claims of the type brought by Plaintiff”).

The District Court properly confirmed there was no express waiver or abrogation. See Opinion and Order, RE 80, Page ID # 1808. Mr. Koenig, once again, presents no evidence or legal argument suggesting otherwise.

Further, Mr. Koenig appears to argue that KBOCC’s “consent to abide by all statutory, regulatory, and program requirements to obtain federal financial aid” also serves as evidence that that they waived their sovereign immunity. Brief on Appeal, p 43. Federal Courts, however, have regularly held that a tribe’s intention or agreement to comply with federal law cannot serve as a waiver of sovereign

immunity. *See Nanomantube v. Kickapoo Tribe*, 631 F.3d 1159 (10th Cir. 2011) (holding that a tribe’s agreement to comply with Title VII, without more, does not constitute an unequivocal waiver of tribal sovereign immunity); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1289 (11th Cir. 2001); *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1044 n. 2 (8th Cir. 2000).

The District Court correctly found there was no clear waiver or abrogation of sovereign immunity under either of these theories, and this decision should be upheld on *de novo* review.

A. KBOCC’s One-Line Response About Jurisdiction in the Joint Status Report Does Not Meet the High Standard Required to Show a “Clear” and “Unequivocal” Waiver of Sovereign Immunity

Mr. Koenig now argues that, because tribal sovereign immunity is “quasi-judicial,” it may be “forfeited through failure to timely assert it or through conduct inconsistent with its preservation.” Brief on Appeal, p 37. He argues KBOCC forfeited its sovereign immunity defenses through a series of “admissions and acknowledgements,” including its alleged “judicial admission” in the Joint Status Report that the “[District] Court has jurisdiction over the claims in this case.” *See* Brief on Appeal, p 38-39; Joint Status Report, RE 20, Page ID # 130.

It has long been held under federal law that tribes, similar to states and other sovereigns, are generally immune from suit. *Kiowa Tribe of Okla.*, 523 U.S. at 757.

Under this doctrine, “an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Id.* at 754. Although tribal immunity may be waived, the governing law holds that any such waiver must be “clear,” “unequivocal,” and “cannot be implied from conduct.” *See Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009); *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). “The test employed to determine whether a state has waived immunity ‘is a stringent one.’” *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002).

Mr. Koenig focuses on KBOCC’s response in the Parties’ Joint Status Report, where KBOCC stated: “[t]he Defendants acknowledge this Court has jurisdiction over the claims in this case.” Joint Status Report, RE 20, Page ID # 129. He argues that this minor statement, made in a routine Joint Status Report, is dispositive on the issue of sovereign immunity. Brief on Appeal, p 38. The mere fact that KBOCC did not contest the District Court’s jurisdiction over this case in a routine filing, however, does not indicate a “clear” intention to waive sovereign immunity. Mr. Koenig’s argument is particularly unavailing where KBOCC directly asserted its sovereign immunity later in that same document under their Statement of the Case. Joint Status Report, RE 20, Page ID # 130 (“The Defendants will also assert sovereign immunity as a subdivision of the Keweenaw Bay Indian Community”).

This argument is also contradicted by KBOCC's statement in their very first filing in this case. Defendants' Answer and Affirmative Defenses, RE 17, Page ID # 117 ("Defendants have sovereign immunity from claims of the type brought by Plaintiff"). The District Court was correct to reject a waiver argument where the document purporting to include a waiver has an express assertion of sovereign immunity within it.

There is generally a "strong presumption against waiver of tribal sovereign immunity." *Demontiney*, 255 F.3d at 811. Cases finding a sufficient waiver have regularly involved a tribe's explicit, affirmative conduct, not a mere passing statement made in the course of litigation. *C & L Enters., Inc.*, 532 U.S. at 415 (finding a waiver of the tribe's sovereign immunity where the tribe proposed a contract with explicit language providing that "[a]ll claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association..."); *see also Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) (tribe's affirmative request of the district court "to order the defendants to assert any claims in the disputed they possessed against the Tribe and exercise its equitable powers to, among other things, quiet title in the Tribe's name" was sufficient evidence of a waiver of sovereign immunity).

Mr. Koenig, in footnote 8 of his Brief on Appeal, argues “[t]he Charter makes very clear the intent of the KBIC/KBOCC to relinquish and waive any potential sovereign immunity and perform **any** condition, under any Federal, State, or local law, even as early as 1998, so as to enable the KBOCC to be independently accredited and qualify for FFA...” Brief on Appeal, p 40, fn 8 (emphasis in original). It is unclear where Mr. Koenig finds this “clear intent” of KBIC and KBOCC to “relinquish and waive any potential sovereign immunity.” Brief on Appeal, p 40, fn 8. Not only does KBOCC’s charter not explicitly state that it is waiving sovereign immunity, Article X, Liability, states: “[t]he Corporation may sue or be sued, provided that such suit is brought in the Keweenaw Bay Tribal Court.” See KBOCC Charter, RE 69-6, Page ID # 1204. This alone is sufficient to rebut Mr. Koenig’s claim of an explicit waiver of sovereign immunity.

B. KBOCC’s Compliance with the Requirements to Receive Federal Funding Was Not Intended as a Waiver of its Sovereign Immunity

Mr. Koenig next argues that “the Court failed to examine the metamorphosis of the KBOCC from a tribal college named Ojibway, operating exclusively on tribal lands, to the KBOCC whereby a change in the Charter that allowed the KBOCC to make any agreement, and perform any conditions thereto, with federal and state agencies to acquire accreditation and qualify for FFA.”⁵ Brief on Appeal, p 32. To

⁵ Mr. Koenig refers to KBOCC as “Ojibway” throughout his Brief. As a note of clarification, KBOCC’s name was never solely “Ojibway.” It was originally

the extent Mr. Koenig argues that KBOCC waived its sovereign immunity by accepting federal benefits, or by acting in compliance with the requirements to obtain federal benefits, this argument also fails. Brief on Appeal, p 37.

It has been widely held that a tribe's intent or agreement to comply with federal law, without more, is insufficient to serve as a waiver of sovereign immunity. See *Nanomantube*, 631 F.3d at 1159 (holding that a tribe's agreement to comply with Title VII, without more, does not constitute an unequivocal waiver of tribal sovereign immunity); *Sanderlin*, 243 F.3d at 1289 (holding that a tribe's promise to comply with a federal statute "in no way constitute[s] an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court"); *Demontiney*, 255 F.3d at 811 ("Moreover, Demontiney provides no support for the proposition that the Tribe's incorporation of [the Indian Civil Rights Act] into its constitution and bylaws shows an intent to waive sovereign immunity in federal court"); *Hagen*, 205 F.3d at 1044 n. 2 ("Nor did the [tribal] College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964").

In a similar vein, Mr. Koenig claims that "KBOCC should not be entitled to greater protection than other similarly situated state universities/colleges that in

chartered as the "Ojibwa Community College and Learning Center," and its name was later amended to "Keweenaw Bay Ojibwa Community College." Ordinance No. 75-1, RE 69-5, Page ID # 1194; 2009 Revised Charter, RE 69-7, Page ID #1206.

exchange for funding, the college or university consents to abide by all statutory, regulatory, and program requirements to obtain federal financial aid.” Brief on Appeal, p 43. Mr. Koenig broadly discusses Congressional Spending Power and its ability to “attach conditions on the receipt of federal funds.” Brief on Appeal, p 44. Although this argument is not entirely clear, he appears to suggest that Congress, by “attach[ing] conditions on the receipt of federal funds” may have intended to abrogate tribes’ sovereign immunity.

Notably missing from this line of reasoning, however, is any “unequivocal” evidence that Congress did, in fact, intend to abrogate tribal sovereign immunity. Much like a waiver, if Congress seeks to abrogate sovereign immunity, it must do so “unequivocally.” *Bay Mills Indian Cmty.*, 572 U.S. at 790 (“[t]o abrogate [such] immunity, Congress must ‘unequivocally’ express that purpose”) (citing *C & L Enterprises, Inc.*, 532 U.S. at 418).

Further, if a “tribally controlled college’s” choice to comply with federal accreditation standards deprived it of sovereign immunity, every accredited “tribally controlled college” would be at risk of losing its sovereign status. This directly contradicts the principles of the Indian Self-Determination and Education Assistance Act, which directly encouraged tribal sovereignty and self-determination over education for Tribes and Tribal Students. *See* P.L. 93-638, January 4, 1975, 88 Stat 2203 (“The Congress hereby recognizes the obligation of the United States to

respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational...programs”).

CONCLUSION – ARGUMENT I

Mr. Koenig’s claims that KBOCC “waived” sovereign immunity fail. A waiver of immunity must be both “clear” and “unequivocal,” and the party asserting a waiver must overcome the strong presumption against it. Mr. Koenig’s showing comes nowhere close. The District Court’s finding that KBOCC did not waive its sovereign immunity defense was correct and should be upheld on *de novo* review.

III. THE DISTRICT COURT CORRECTLY HELD THAT TRIBAL SOVEREIGN IMMUNITY EXTENDS TO EACH OF THE INDIVIDUAL DEFENDANTS WHERE THE REAL PARTY AT INTEREST IN THIS SUIT IS KBOCC, NOT THE INDIVIDUAL DEFENDANTS

Mr. Koenig next argues that, even if KBOCC has not waived its sovereign immunity, “[t]he District Court erred where it held tribal sovereign immunity extended to individual defendants Sherman, Chosa, and Virtanen, sued in their individual capacity for retaliation in violation of 31 U.S.C. § 3730 of the False Claims Act.” Brief on Appeal, p 32. As a general rule, Tribal officials enjoy sovereign immunity from claims brought against them in their official capacities under either federal or state law. *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 887 (11th Cir. 2024). Tribal sovereign immunity, however, does not extend to suits

brought against tribal officials acting in their individual capacity. *Lewis*, 581 U.S. at 158.

Where, as here, there is a dispute as to whether tribal sovereign immunity extends to individually-named defendants, courts must determine whether, at its core, a suit involves an “official-capacity claim,” where “the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself,” or an “individual-capacity claim” seeking to impose “individual liability upon a government officer for actions taken under color of state law.” *Id.* (citations omitted). In other words, courts must determine who is the “real party at interest” – the tribe or the individual. *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3009, 87 L.Ed.2d 114 (1985).

Here, as the District Court correctly found, “the real party at interest in this case is the KBOCC/Tribe, not the Individual Defendants.” Opinion and Order, RE 80, Page ID # 1812. Mr. Koenig brings these claims for actions that fall squarely within the Individual Defendants’ duties as President, Dean of Instruction, and Board Chairman, including a decision not to renew Mr. Koenig’s contract upon its expiration in 2020. Mr. Koenig also seeks monetary relief that cannot be categorized as anything other than normal, employment-based compensation paid by his employer, KBOCC and, in turn, the Tribe. As such, the District Court properly found

that sovereign immunity extends to each of the Individual Defendants in this case, and all of Mr. Koenig's claims against them must also be dismissed.

A. Each of the Claims Raised in Mr. Koenig's Complaint Directly Implicate KBOCC, not the Individual Defendants

Mr. Koenig maintains that the claims brought in this case against the Individual Defendants are brought against them in their "individual capacity" and, therefore, sovereign immunity does not apply. Brief on Appeal, p 46. This argument relies upon the allegations in his Complaint against each of the Individual Defendants, which state: "suit in this instant is brought against [Defendant] in [his/her] individual capacity, and [he/she] is the real party in interest for [his/her] intentional and unlawful submission of false claims and retaliation pursuant to the FCA..." Complaint, RE 1, Page ID # 3. The Supreme Court has stressed, however, that "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 581 U.S. at 162. Based on all of the allegations in Mr. Koenig's Complaint, the remedy sought in this case is truly against KBOCC and, therefore, the claims against the Individual Defendants cannot be classified as individual-capacity claims.

The fact that these claims are truly "official-capacity" claims is evident when looking at the relief Mr. Koenig seeks. His claims for damages include wage loss,

benefits, fringe benefits, sick leave, pension benefits and other monetary compensation, as well as future damages to commute to his new employment and associated expenses, interest, costs, attorney fees, exemplary, and punitive damages. Complaint, RE 1, Page ID # 12, 15. These are all types of employment-based compensation normally paid by his employer, KBOCC, and ultimately, the Tribe. There is no basis to argue that the Individual Defendants, in their individual capacity, would be liable to pay him these damages, including “fringe benefits, sick leave, etc...that he would have received but for the retaliatory and discriminatory conduct...” *See* Complaint, RE 1, Page ID # 12.

In arguing that these are “individual-capacity” claims, Mr. Koenig relies on *Lewis v Clarke*, arguing that it is “identical to the situation in this case.” Brief on Appeal, p 51. *Lewis* involved claims of ordinary negligence brought against defendant Clarke, a Tribal Gaming Employee driving a limousine in the course of his employment, after he caused an automobile accident involving the Lewis plaintiffs. *Lewis*, 581 U.S. at 159. The Supreme Court found that, at its core, this was “not a suit against Clarke in his official capacity,” it was “simply a suit against Clarke to recover for his personal actions, which ‘will not require action by the sovereign or disturb the sovereign's property.’” *Id.* at 163. The Court clarified:

We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time

the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. *Id.* at 158.

Lewis is not “identical” to this case. Here, unlike in *Lewis*, the Individual Defendants did not merely happen to be “acting within the scope of [their] employment” at the time of the underlying events, and the claims brought in Mr. Koenig’s Complaint cannot be characterized as “simply a suit...to recover for [their personal actions].” *Id.* Rather, the Individual Defendants are being sued for actions that cannot logically be separated from their official duties as Dean of Instruction, President and Board Chairman. This includes their interactions with the Higher Learning Commission, their decisions regarding the administration and operation of the College, their interpretation of the College’s employment and grievance policies, and their decision not to renew Mr. Koenig’s contract upon its expiration. In other words, they are being sued not for actions that coincidentally occurred while they were working for KBOCC, they are being sued for the actions inherently taken as representatives of KBOCC.

The claims brought against the Individual Defendants are textbook “official-capacity” claims, where “the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.” *Lewis*, 581 U.S. at 162; *see also Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 262 (7th Cir. 2023) (finding that a lawsuit brought against tribal health center employees in their individual capacities was actually brought against them in their official

capacities, because “Mestek requested front pay, back pay, damages, reinstatement and injunctive relief...” and “any monetary relief would come from the Heath Center’s coffers”). Mr. Koenig’s bare allegations that the Individual Defendants acted *ultra vires* does not make it so.

Moreover, Mr. Koenig’s Complaint fails to even state a claim for retaliation under the False Claims Act against the Individual Defendants where they cannot be classified as his “employer” under the Act. “To establish a prima facie case [of False Claims Act retaliation], Mr. Koenig must show the following elements: (1) [he] was engaged in a protected activity; (2) [his] employer knew that [he was engaged in the protected activity; and (3) [his] employer discharged or otherwise discriminated against the employee as a result of the protected activity.” *Jones-McNamara v. Holzer Health Sys.*, 630 F. App’x 394, 398 (6th Cir. 2015). Mr. Koenig makes no allegations that any of the Individual Defendants were his “employer.”

This fatal flaw similarly extends to Mr. Koenig’s claims under Michigan law, as each of the relevant statutes, M.C.L.A. § 408.473 and M.C.L.A. § 408.485, are also directed at an “employer.” *See* M.C.L.A. § 408.475(1) (“An employer shall pay to an employee voluntarily leaving employment all wages earned and due...”); MCLA 408.473(3) (“An employer shall pay fringe benefits to or on behalf of an employee in accordance with the terms set forth in the written contract or written policy”).

Looking at Mr. Koenig's claims as a whole, the acts each of the Individual Defendants are alleged to have taken could not have been performed by them outside of their official capacities. As such, each of the Individual Defendants are cloaked with the Tribe's sovereign immunity, and the District Court properly dismissed the claims against them.

B. Alternatively, the Claims Against the Individual Defendants are Barred by Qualified Immunity

KBOCC, in its Motion for Judgment on the Pleadings, alternatively argued that Mr. Koenig's claims against each of the Individual Defendants were barred by qualified immunity. Although the District Court found that the entire case must be dismissed on separate jurisdictional grounds and, therefore, declined to weigh in on this question or grant KBOCC's request to amend its complaint to fully assert its qualified immunity defenses, KBOCC maintains that qualified immunity presents a separate ground for dismissal of the claims against the Individual Defendants.

Although there is no direct authority in the Sixth Circuit on the question of whether qualified immunity applies to tribal employees, persuasive case law from other federal courts supports a finding that the Individual Defendants, acting in their official capacities, are entitled to immunity under the qualified immunity doctrine. *See, e.g., Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (finding that qualified immunity may apply to tribal officials or tribal employees of a tribe's casino because

the casino is an arm of the tribe”); *Aces Bonusing, Inc. v. Ramsey*, No. 19-CV-05418-WHO, 2022 WL 17170856, at *15 (N.D. Cal. Nov. 22, 2022) (finding that tribal officials are entitled to qualified immunity).

Here, qualified immunity applies to the Individual Defendants and bars Mr. Koenig’s claims because they were acting in their official capacities at all times relevant to his Complaint. “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Mr. Koenig’s Complaint brings claims against each of the Individual Defendants for duties performed as part of the administration and operation of KBOCC, including discretionary decisions about accreditation requirements, employee performance obligations, and grievance and appeal procedures. Mr. Koenig never convincingly alleges that the Individual Defendants acted outside of the scope of their employment, and each are identified in their official capacities. Complaint, RE 1, Page ID # 1 (referring to Individual Defendants as “(President),” “(Dean of Instruction),” and “(Chairman of the Board)”). Accordingly, the claims against the Individual Defendants would also be properly dismissed based on qualified immunity.

CONCLUSION – ARGUMENT II

Mr. Koenig’s Brief on Appeal argues that his claims against the Individual Defendants are not barred by sovereign immunity because immunity “does not apply when an employee is sued in their individual capacity for personal acts, and in this case for acts that are *ultra vires*.” Brief on Appeal, p 32. Each of the “*ultra vires*” acts alleged by Mr. Koenig, however, fall squarely within the Individual Defendants’ roles as KBOCC’s leadership, including their interpretation of the employment and grievance policies, their decision not to renew Mr. Koenig’s contract, and their decisions regarding KBOCC’s compliance with Higher Learning Commission accreditation requirements. They are, therefore, being sued solely for official actions taken within their official capacities and are entitled to either sovereign immunity, as the District Court found, or qualified immunity. The District Court properly dismissed the claims against the Individual Defendants on this basis, and this decision should now be upheld on *de novo* review.

IV. THE DISTRICT COURT PROPERLY DISMISSED THIS CASE BECAUSE KBOCC IS ENTITLED TO TRIBAL SOVEREIGN IMMUNITY

It has long been held that tribal sovereign immunity shields not only tribes themselves, but “extends to arms of the tribe acting on behalf of the tribe.” *White*, 765 F.3d at 1025. In evaluating whether KBOCC was entitled to sovereign immunity in this case, the District Court adopted and applied the “arm of the tribe” test created

by the Ninth Circuit in *White v University of California*. Opinion and Order, RE 80, Page ID # 1804. In *White*, the Ninth Circuit utilized five factors to determine whether an entity functions as an “arm of the tribe” such that it is entitled to sovereign immunity. These factors include: “(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.” *White*, 765 F.3d at 1025.

Although the *White* factors have been adopted by several other Circuits, this Court has never explicitly adopted this test or applied it to an “arm of the tribe” analysis. *See, e.g., Ransom v. GreatPlains Fin., LLC*, 148 F.4th 141, 148 (3d Cir. 2025) (“Today, we join our sister circuits in adopting that test”); *Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 259 (7th Cir. 2023) (“In joining our fellow circuits, we similarly conclude that determining whether an entity is acting as an arm of the tribe requires consideration of the following factors”); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019). Although the District Court utilized the *White* test to evaluate the questions of sovereign immunity, the unique facts of this case do not require the use of this test to find that KBOCC is entitled to sovereign immunity. As a “tribally controlled college,”

KBOCC is uniquely tribal, and should be considered a *de facto* arm of the tribe without the need for a five factor test.

Nevertheless, even if this Court decides to adopt the *White* test, a full analysis of the factors compels the outcome that KBOCC is an “arm of the tribe” entitled to sovereign immunity. In fact, Mr. Koenig’s Brief on Appeal does not even bother to analyze each of the factors. The District Court properly dismissed this case on this basis, and its decision should now be upheld on *de novo* review.

A. This Court Should Find that a Tribal College, Chartered Directly by the Tribe and Recognized by the Federal Government as a “Trially Controlled College” is *De Facto* Entitled to Sovereign Immunity as an “Arm of the Tribe”

In *White*, the Ninth Circuit adapted a set of factors to determine when an entity is an “arm of the tribe” from a Tenth Circuit decision, *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1180 (10th Cir. 2010). *Breakthrough* involved the question of whether a tribal casino, along with the economic development authority that owned and operated the casino, were entitled to share in the tribe’s sovereign immunity. *Breakthrough*, like many of the cases that have since adopted the *White* factors, involved strictly commercial entities like casinos or lending operations targeting off-reservation economic opportunities with non-tribal business partners. *See Ransom*, 148 F.4th at 141 (determining whether online consumer lender created by tribe was considered an “arm of the tribe”);

Williams, LLC, 929 F.3d at 185 (determining whether two payday lending operations were entitled to immunity as “arms of the tribe”); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 726 (9th Cir., 2008) (considering whether tribal casino functioned as an “arm of the tribe”).

At their core, the *White* factors involve an “examination of the entity’s background, business purpose, and operations to ascertain whether it is truly a tribal enterprise.” *Mestek*, 72 F.4th at 260. This thorough examination, however, is not similarly needed to determine whether a college recognized by the federal government as a “tribally controlled college or university” is “truly a tribal enterprise.”

In 1978, Congress passed the Tribally Controlled Colleges and Universities Assistance Act, P.L. 95-471, with the specific goal of “provid[ing] grants for the operation and improvement of tribally controlled community colleges to insure continued and expanded educational opportunities for Indian students.” 25 U.S.C. § 1802. The Act defines a “tribally controlled college or university” as “an institution of higher education which is formally controlled, or has been formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes, except that no more than one such institution shall be recognized with respect to any such tribe.” 25 U.S.C. § 1801(a)(4). Today, there are only thirty-five accredited tribal colleges and universities across the United States, making KBOCC a member of this exclusive

group. Simply put, “tribally-controlled colleges and universities” are, by definition, in the unique position to advance the sovereignty and self-determination of the tribes that chartered them.

The fact that “tribally controlled colleges” are recognized for their unique connection to their corresponding tribes creates a clear distinction from many of the purely commercial enterprises that have formed the basis of the “arm of the tribe” litigation. Although these commercial enterprises have regularly been considered “arms of the tribe” for purposes of tribal sovereign immunity, it is logical to require a full analysis of the *White* factors before making that determination. Alternatively, where the enterprise at issue is a “tribally controlled college,” chartered directly by the tribe and recognized for its unique tribal connection, the *White* factors are not needed.

Instead, “tribally controlled colleges” should not be forced into the position of having to justify their sovereignty through the application of the five-factor test where Congress has already declared their status as tribal institutions that are “formally controlled...formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes.” 25 U.S.C. § 1801(a)(4). Congress’s plenary power over tribes is well established. *Haaland v. Brackeen*, 599 U.S. 255, 272, 143 S. Ct. 1609, 1627, 216 L. Ed. 2d 254 (2023) (“In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as ‘plenary and

exclusive”). Therefore, Congress’s designation of these institutions as “tribally controlled colleges” to ensure “continued and expanded educational opportunities for Indian students,” confirms their status as an “arm of the tribe” without the need for further analysis. 25 U.S.C. § 1802.

Consistent with these goals, KBOCC now asks this Court to find that an institution, formally designated by the federal government as “tribally controlled college” under the definition established by Congress in the Tribally Controlled Colleges and Universities Assistance Act is *de facto* an “arm of the tribe” for purposes of sovereign immunity.

B. Even if the Court Decides to Adopt the *White* Test, a Full Evaluation of the Five Factors Leads to the Undeniable Conclusion that KBOCC is an “Arm of the Tribe” Entitled to Sovereign Immunity

Mr. Koenig’s Brief on Appeal highlights the alleged “transformation of the KBOCC from a tribal college, (Ojibway), operating exclusively on tribal lands, for tribal students, financed by the Tribe, to a secular off Reservation community college that is marketed towards non-Native Americans, attracts more secular students than Native Americans, and has the vast majority of its professors who are not Native Americans.” Brief on Appeal, p 61. This extreme mischaracterization of KBOCC could not be further from reality.

As discussed above, the strong relationship between KBIC and the College warrants a finding that KBOCC, like any college explicitly recognized as a “tribally

controlled college” by the federal government, is inherently an “arm of the Tribe,” even without evaluating each of the *White* factors. Even if this Court disagrees and finds that a full evaluation of the *White* factors is still necessary, each of these factors weighs heavily in favor of a finding that KBOCC has always been an “arm of the Tribe” entitled to share in its sovereign immunity. Opinion and Order, RE 80, Page ID # 1808.

i. KBOCC was created as and remains an institution with deep ties to KBIC

The first *White* factor asks courts to evaluate “the method of creation of the economic entities.” *White*, 765 F.3d at 1025. Generally, this factor weighs in favor of finding an entity is an “arm of a tribe” when the entity is (i) established, chartered, or authorized under tribal law, (ii) has tribal governance, and (iii) was incorporated under tribal law as a tribal non-profit. *See Cain v. Salish Kootenai Coll., Inc.*, No. CV-12-181, 2018 WL 2272792, at *1 (D. Mont. May 17, 2018). This factor also considers whether the entity was “created by the tribe, rather than a preexisting entity absorbed by the tribe.” *Ransom*, 148 F.4th at 150.

Mr. Koenig argues that the District Court erred under this factor by placing too much emphasis on the creation of KBOCC, rather than its current status. Brief on Appeal, p 62 (“The focus on the past, clouded the Opinion of the District Court”). This factor, however, specifically asks courts to evaluate the “method of creation.”

White, 765 F.3d at 1025. Mr. Koenig’s challenge to the District Court’s focus is contradicted by the language of *White* itself.

The facts of this case show that KBIC was chartered in 1975 under Keweenaw Bay Indian Community Tribal Council Ordinance No. 75-1. Ordinance 75-1, RE 69-5, Page ID # 1194. The language of the Ordinance confirms that it was chartered directly by the Tribe under Tribal law. Ordinance 75-1, RE 69-5, Page ID # 1194. The Tribe also exercises continued governance over KBOCC, as it reviews slates of nominees for selection to KBOCC’s Board of Regents and maintains the authority to amend KBOCC’s Charter, which it has done on numerous occasions. Finally, Article VI of KBOCC’s Charter confirms that KBOCC was founded as, and remains, a non-profit corporation: “The purposes of the corporation are as follows...To operate exclusively for non-profit purposes; and no part of the income or assets of the corporation shall be distributed to, nor be to the benefit of, any individual.” 2016 Revised Charter, RE 69-8, Page ID # 1219. Each of these facts strongly support a finding that KBOCC is an “arm of the Tribe.”

ii. KBOCC’s overarching purpose is to provide educational programs for Tribal Members and the local community, as well as support and preserve the Tribe’s Anishinaabe culture

The second *White* factor asks courts to evaluate the stated purpose for which the entity was created. *White*, 765 F.3d at 1025. Under this factor, a “clear nexus” between the purpose of the entity and the broader goals of tribal self-governance

supports a finding that the entity is an “arm of the tribe.” *Mestek*, 72 F.4th at 260. As part of this evaluation, courts often look to whether the entity is designed to (i) advance tribal self-sufficiency, (ii) preserve cultural or educational traditions, or (iii) provide economic or social benefits primarily for the benefit of the tribe and its members. *See Cook*, 548 F.3d at 725-26.

Mr. Koenig again argues that the District Court erred by focusing on the past, noting that “[i]n 1975 the purpose of the KBIC in creating Ojibway on the reservation would have supported a finding that Ojibway, at that time, was an ‘arm-of-the-tribe,’” but now “the purpose has been on expanding KBOCC to make such agreements as were necessary with all branches of secular government.” Brief on Appeal, p 62.

The Court need look no further than the opening paragraph of KBOCC’s Charter to see that Mr. Koenig’s argument is baseless. The first page of the version of KBOCC’s Charter in effect when Mr. Koenig was employed with the College, reaffirms its overall purpose and mission, stating: “Founded out of our American Indian Identity, the mission of Keweenaw Bay Ojibwa Community College is to offer post-secondary education, rich in Ojibwa culture, tradition, and beliefs, that supports life-long learning.” 2016 Revised Charter, RE 69-8, Page ID # 1217. Consistent with this purpose, KBOCC provides scholarships for Tribal members attending KBOCC, and gives preference to Tribal members for hiring decisions.

Declaration of Megan Haataja, RE 69-17, Page ID # 1326; Staff Handbook, RE 69-9, Page ID # 1232.

Mr. Koenig argues that “[t]he metamorphosis of KBOCC” demonstrates a change in purpose from a Tribal college to a secular college. Brief on Appeal, p 63. This factor, and the entire “arm-of-the-tribe” test, however, does not ask whether a corporation or business entity is strictly operating on a reservation, for tribal members, without any interaction or employment of individuals from the broader community. This finding would negate almost all the current “arm of the tribe” analysis finding that entities, including tribally owned casinos and lending companies, are “arms of the tribe.” See, e.g., *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1195; *Williams*, 929 F.3d at 185.

KBOCC’s stated purpose, “to offer post-secondary education, rich in Ojibwa culture, tradition, and beliefs, that supports life-long learning” is uniquely tribal. The District Court properly found that “the purpose factor weighs in favor of finding that KBOCC is an arm of the tribe.” Opinion and Order, RE 80, Page ID # 1805.

iii. KBOCC is Subject to the Control of KBIC’s Tribal Council

The third *White* factor asks courts to evaluate an entity’s “structure, ownership, and management, including the amount of control the tribe has over the entities.” *White*, 765 F.3d at 1025. This question essentially asks “whether the entities leaders come from the tribal government, are tribal members, or are at least

tribal appointees.” *Ransom*, 148 F.4th at 151. “At root, the question is: Who calls the shots?” *Id.*

Mr. Koenig does not address this factor in his Brief on Appeal. The overwhelming evidence in this case, however, shows sufficient Tribal control over KBOCC, including Tribal Council’s full authority to amend KBOCC’s Charter. *See* 2009 Revised Charter, RE 69-7; 2016 Revised Charter, RE 69-8. KBIC’s Tribal Council also vets and ultimately controls the slate of nominees for selection to KBOCC’s Board of Regents.

To the extent KBOCC has leadership that is separate from the Tribe, this is specifically required for them to qualify as a “Tribally controlled college” under the Tribally Controlled Colleges and Universities Act. *See* Eligibility Letter, RE 69-4, Page ID # 1182 (“The tribal institution’s governing board includes tribal members and is sufficiently autonomous from the administration and ownership to assure the integrity of the institution”).

Each of these facts support a finding that KBIC and its Tribal Council exercise a significant level of tribal control over KBOCC. The District Court properly found that this factor supports KBOCC’s status as an “arm of the Tribe.” Opinion and Order, RE 80, Page ID # 1807.

iv. The Tribe Explicitly Intends to Share its Sovereign Immunity with KBOCC

The fourth *White* factor asks courts to consider “the tribe’s intent with respect to the sharing of its sovereign immunity.” *White*, 765 F.3d at 1025. This factor often considers the language of the founding documents to determine whether there is “evidence that the tribe intended to share sovereignty with the entity,” including evidence that a tribe “expressly limit[s] the College’s power to sue and be sued in Tribal Court.” *McCoy*, 334 F. Supp. 3d at 1123.

Mr. Koenig, again, does not directly address this factor in his Brief on Appeal. The language of the Charter, along with other related documents, supports a finding that KIBC intended for KBOCC to share in its sovereign immunity. All of KBOCC’s governing documents clarify that the College can only sue and be sued in Keweenaw Bay Tribal Court. *See* 2009 Revised Charter, RE 69-7, Page ID # 1214. The Charter further requires that “[a]ll contracts, and appropriate forms signed or issued by the Corporation shall designate the Tribal Court as the appropriate forum to decide the liability of the Corporation.” 2009 Revised Charter, RE 69-7, Page ID # 1214. Consistent with this requirement, every Staff Handbook while Mr. Koenig was employed by KBOCC specified that any “legal matters concerning employment at Keweenaw Bay Ojibwa Community College will be heard in KBIC Tribal Court.”

Staff Handbook, RE 69-9, Page ID # 1241. As such, this factor also weighs in favor of finding that KBOCC is an “arm of the Tribe.”⁶

v. *The Tribe and KBOCC are Financially Connected*

The fifth *White* factor asks courts to consider the financial relationship between the tribe and the entity. *White*, 765 F.3d at 1025. Although the heart of this factor asks courts to evaluate the overall relationship between the two entities, it can be relevant to consider “how a judgment against the [entity] would affect the tribe’s finances.” *Ransom*, 148 F.4th at 15. Direct tribal liability for an entity’s actions, however, “is neither a threshold requirement for immunity nor a predominant factor in the overall analysis.” *Williams*, 929 F.3d at 184.

Here, the District Court evaluated the evidence presented by both parties and found that “the Tribe and KBOCC are financially connected,” noting that the “Tribe has made financial contributions to KBOCC” and that KBOCC “receives an annual financial subsidy and access to some tribal services.” Opinion and Order, RE 80, Page ID # 1808. The District Court also correctly noted that but for KBOCC being chartered by the Tribe, KBOCC would not have become a member of the American

⁶ Additionally, as noted above, KBIC’s Tribal Council exercised its authority to again amend the language of KBOCC’s Charter in January 2026 to confirm that KBOCC shares in the Tribe’s sovereign immunity. Section 114-32 of the KBOCC Charter now states: “The sovereign immunity of the Keweenaw Bay Indian Community extends to all official actions of the college, the board of regents, and all agents and employees of the college during the course of their official duties...”

Indian Higher Education Consortium, an organization of American Indian Tribal Colleges. Opinion and Order, RE 80, Page ID # 1808.

Regardless of the amount of funding KBOCC directly receives, it remains financially dependent on the Tribe. If KBOCC was to lose its federal funding for any reason, the Tribe would be required to step in and fully fund the College. This factor, therefore, weighs in favor of finding that KBOCC is an “arm of the Tribe.”

CONCLUSION – ARGUMENT III

Taken together, the *White* factors strongly support a finding that KBOCC is an “arm of the Tribe” entitled to share in KBIC’s sovereign immunity. Each of the *White* factors, however, are essentially a restatement of what was already determined by the United States Department of Interior, Bureau of Indian Education, when it designated KBOCC as one of thirty-five “tribally controlled colleges and universities” in the country. This status should compel a finding that KBOCC, like all “tribally controlled colleges and universities” are *de facto* “arms of the tribe” entitled to share in a tribe’s sovereign immunity without a separate consideration of the five-factor test. Regardless of the approach taken by this Court, however, the Trial Court’s finding that KBOCC was entitled to sovereign immunity should be affirmed on *de novo* review.

V. THE DISTRICT COURT CORRECTLY FOUND THAT MR. KOENIG'S CLAIMS BROUGHT UNDER MICHIGAN LAW FOR UNPAID SICK LEAVE AND OTHER FRINGE BENEFITS ARE ALSO BARRED BY TRIBAL SOVEREIGN IMMUNITY

Mr. Koenig also takes issue with the District Court's finding that "[e]ven if Koenig requested prospective relief regarding his state law claim, it would be barred by sovereign immunity because the conduct occurred on Indian land." Brief on Appeal, p 64 (citing Opinion and Order, RE 80, Page ID #1810 fn 4). First, for all the reasons stated above, Mr. Koenig cannot maintain any of the claims raised in this case, including his claims brought under Michigan law, because KBOCC and the Individual Defendants are protected by Tribal sovereign immunity. Regardless, the District Court was correct in finding that Mr. Koenig's state law claims would nevertheless be barred by sovereign immunity because the relevant conduct occurred either directly on, or with a sufficient connection to the L'Anse reservation. Opinion and Order, RE 80, Page ID #1810 fn 4.

A. Mr. Koenig's Employment with KBOCC Bore a Direct Connection to the L'Anse Reservation

Mr. Koenig now argues that "[e]very class Koenig taught from 2015/2016 until his termination was not on the Reservation, was not on Tribal land, was not funded by the KBIC, and involved a secular group of students and professors who were overwhelming [sic] non-Native American." Brief on Appeal, p 65. He cites to *The Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267 (1973), which

held: “when a tribal government goes beyond matters of internal self-governance and enters into an off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest.” Brief on Appeal, p 66. Mr. Koenig’s employment at KBOCC, however, can in no way be considered merely an “off-reservation business transaction,” and any claim that his employment had no relevant ties to the Tribe or the Reservation is plainly contradicted by the facts of this case. “Tribal land literally and figuratively underlies the contract at issue here,” regardless of where Mr. Koenig physically taught. *See Lexington Ins. Co.*, 117 F.4th at 1110 (citing *Lexington Ins. Co. v. Smith*, 94 F.4th 870, 881 (9th Cir. 2024), *cert. denied sub nom. Lexington Ins. Co. v. Suquamish Tribe*, 145 S. Ct. 2701, 221 L. Ed. 2d 966 (2025)).

Mr. Koenig applied for and received a job with KBOCC, a college chartered by KBIC with the explicit mission of “provid[ing] post-secondary, vocational, technical, and other programs and educational opportunities, by bringing to the reservation programs from other institutions and/or by establishing and operating institutions granting certificates and post-secondary degrees on the L’Anse Indian Reservation or other locations” *See* 2009 Revised Charter, RE 69-7, Page ID # 1207. His employment, like all other operations of the College, was managed by KBOCC’s Board of Regents, which was composed entirely of “members of the Keweenaw Bay Indian Community” based on the L’Anse Reservation. Board of Regents By-Laws, RE 69-13, Page ID # 1287. The Staff Handbook given to Mr. Koenig during his

employment further expressed that “legal matters concerning employment at Keweenaw Bay Ojibwa Community College will be heard in KBIC Tribal Court,” also located directly on the Reservation. Staff Handbook, RE 69-9, Page ID # 1241.

Mr. Koenig focuses on the alleged premise that all of his benefits were earned while working adjacent to – but allegedly never actually stepping foot on – the Reservation. What he fails to address, however, is that his employment always had a direct tie to the Reservation. KBOCC’s core administrative operations were always conducted on the L’Anse Reservation, and Mr. Koenig’s paychecks were issued directly from the main administrative office located there. Even if Mr. Koenig’s work took him to a satellite campus – which happens to be immediately adjacent to the Reservation and is currently proceeding through the fee-to-trust process – this does not allow him to ignore the portion of his employment that was rooted on the Reservation or avoid tribal jurisdiction in favor of state jurisdiction.

B. Mr. Koenig Was Obligated to Pursue His Claims in Tribal Court, but He Chose Instead to File a Federal Case, in Violation of the Principles of Tribal Exhaustion

Mr. Koenig further argues that the District Court’s Opinion “essentially leaves the vast majority of employees of the KBOCC, working off the Reservation and overwhelmingly secular, without a remedy.” Brief on Appeal, p 67. This is patently untrue, as the Staff Handbook and KBOCC’s Charter explicitly provide that any disputes arising in relation to KBOCC, including employment disputes, must be

brought in the Keweenaw Bay Tribal Court. The fact that Mr. Koenig failed to fully exhaust his tribal remedies before filing this suit provided an independent reason for the District Court to stay its hand and decline to adjudicate his claims.

The Tribal Exhaustion doctrine, first recognized by the United States Supreme Court in *National Farmers Union Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), requires that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987) (“As *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a ‘full opportunity’ to consider the issues before them and ‘to rectify any errors’”). Tribal exhaustion is based on principles of comity and the restraint of federal courts from interfering with reservation affairs and tribal court authority. *Id.* at 15 (“although the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court”). Tribal courts have consistently been found “as competent to interpret federal law as [they are] state law.” *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993); *see also Iowa Mutual*, 480 U.S. at 19 (alleged incompetence of tribal courts not an exception to exhaustion requirement).

Mr. Koenig now argues that KBOCC waived any claim to tribal exhaustion, arguing that it is “an affirmative defense that must be pled and proven by a Defendant.” Brief on Appeal, p 59. This alleged “waiver” does not exist. KBOCC specifically pleaded in its Answer and Affirmative Defenses that they “have sovereign immunity.” Defendants’ Answer and Affirmative Defenses, RE 17, Page ID # 117. Federal courts have regularly held that the initial question of “whether a tribe may be sued, or whether it is immune from suit pursuant to the doctrine of tribal immunity” must also be considered by the tribal court before it may be litigated in the federal court system. *See Sober v. Soaring Eagle Casino & Resort*, No. 08-11522-BC, 2009 WL 3254355, at *2 (E.D. Mich. Oct. 9, 2009); *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (“Nor did the district court err in concluding that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity.”).

Mr. Koenig further argues that KBOCC reaches the tribal exhaustion question based on the “faulty premise” that “Koenig is suing the KBIC Tribe.” Brief on Appeal, p 59. This argument is baseless. KBOCC has never suggested that Mr. Koenig is suing the Tribe directly, because Mr. Koenig is not suing the Tribe directly. Tribal exhaustion applies even when the entity being sued is an “arm of the tribe.” *See Sharber*, 343 F.3d at 976 (finding tribal exhaustion applied in case brought against tribal casino); *Sober*, 2009 WL 3254355, at *2 (same).

Even assuming for the sake of argument that the District Court decided sovereign immunity did not apply, the principles of tribal exhaustion would still have prevented the District Court from granting Mr. Koenig the relief he seeks. This is particularly true where Mr. Koenig actively avoided bringing his claims in the Keweenaw Bay Tribal Court, despite being required to do so under the terms of his Staff Handbook. *See* Staff Handbook, RE 69-9, Page ID # 1241.

For these reasons, the tribal exhaustion rule, coupled with Mr. Koenig's explicit consent to Tribal Court jurisdiction, provided an alternate basis for the dismissal of this lawsuit.

CONCLUSION – ARGUMENT IV

Mr. Koenig's claims that he "never taught on the Reservation since 2015/2016" and "earned [his] monies off the Reservation" have no impact on the fact that his claims for benefits brought under Michigan law are barred by sovereign immunity. Additionally, these claims are untrue where his employment with KBOCC always had a substantial connection to the Reservation, even when he was teaching on a campus immediately adjacent to it. As such, the Trial Court properly found that Mr. Koenig's state law claims must also be dismissed, and this finding should be upheld on *de novo* review.

VI. THE DISSENTING OPINION IN *KIOWA TRIBE OF OKLAHOMA V. MANUFACTURING TECHNOLOGIES* HAS NO APPLICATION HERE WHERE MR. KOENIG’S EMPLOYMENT WITH KBOCC CANNOT BE CONSIDERED AN “OFF-RESERVATION COMMERCIAL ACTIVITY”

As a final, “catch-all” argument, Mr. Koenig argues that “this Court should embrace the opinions of Justices Stevens, Thomas & Ginsburg in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, where the dissenting justices would have found that there is no federal statute or authority that should extend to the judicial made doctrine of sovereign immunity to pre-empt authority of state courts.” Brief on Appeal, p 54-55.

In *Kiowa Tribe*, the Supreme Court was faced with an issue where a federally recognized Indian Tribe was being sued for a promissory note for “off-reservation commercial activities.” Mr. Koenig argues that this was “[s]imilar to the KBOCC running a community college, off the reservation, actively competing and marketing itself against other non-tribal colleges and universities.”

Contrary to Mr. Koenig’s argument, his employment with KBOCC cannot be considered an “off-reservation commercial activity” for all of the reasons explained above. This case provides no basis for the Court to reconsider any portion of *Kiowa Tribe of Oklahoma*, a United States Supreme Court case which has been cited as binding law for more than thirty years.

CONCLUSION AND RELIEF REQUESTED

For all of the reasons stated above, the District Court properly found that each of Mr. Koenig’s claims against KBOCC and the Individual Defendants are barred by tribal sovereign immunity. As such, the District Court lacked subject matter jurisdiction over this case, and it was properly dismissed. The District Court’s August 28, 2025 Opinion and Order should be affirmed.

Respectfully Submitted,

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1. This document complies with [the type-volume limit of Fed. R. App. P. [32(a)(7)(B)(i)]] [the word limit of Fed. R. App. P. [n/a]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [n/a]]:

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/s/ Timothy A. Diemer

Attorney for Appellees

Dated: 5/18/26

**ADDENDUM – DESIGNATION OF RELEVANT LOWER COURT
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