No. 00-292

In the Supreme Court of the United States

C&L ENTERPRISES, INC.,
Petitioner,

v.

CITIZEN POTAWATOMI NATION,
Respondent.

On Writ of Certiorari to the
Court of Civil Appeals of Oklahoma,
Second Division

AMICUS CURIAE BRIEF OF TEXAS, ALABAMA, ARKANSAS, KANSAS, MISSISSIPPI, NEBRASKA, AND SOUTH DAKOTA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the arbitration clause and the enforcement provisions of the construction contract between the Citizen Potawatomi Nation and C&L Enterprises, Inc., expressly waive the tribe's immunity from suit in state court?

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Tribal immunity is a well-established adjunct of tribal sovereignty; but inherent in the very notion of sovereignty is the authority and discretion to choose to waive that immunity. The courts have long recognized that the United States, the states, and even foreign countries can waive their sovereign immunity from suit by clearly expressing an intent to be subject to suit, even without the use of particular words or phrases. The Court should not adopt a more stringent standard solely for waivers of immunity by Indian tribes. Indeed, given the extraordinarily weak justification for any immunity in the context of purely commercial tribe-owned businesses, the Court should reject respondent's arguments for a paternalistic brand of immunity that must be protected

against a tribe's own efforts to waive it. For the reasons stated below, the amici states believe respondent waived its tribal immunity from suit when it entered into a construction contract with C&L Enterprises that provided for binding arbitration and for the entry of judgment on the arbitration award. Amici urge the Court to reverse the judgment of the Second Division of the Court of Civil Appeals of Oklahoma.

INTEREST OF AMICI

Although tribal immunity is a question of federal law, the amici states have a strong interest in ensuring that Indian tribes and tribal businesses comply with generally applicable, nondiscriminatory civil laws. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). The states have a distinct interest in providing a judicial forum for the fair and equitable resolution of civil contractual disputes between their non-Indian citizens and Indian tribes, particularly when the terms of a disputed contract clearly manifest the tribe's intent to waive its tribal immunity by subjecting itself to binding arbitration.

SUMMARY OF ARGUMENT

The validity of a contractual waiver of tribal immunity should be evaluated by the intent expressed in the language of the contract, not by whether specific language was used to express that intent. Contrary to the holding of the court of appeals, the tribe's stated willingness to be subject to suit on the contract was an express, not an implied, waiver of its immunity from suit. A contractual provision stating "you may sue us on this contract" is not functionally different from a provision stating "we waive our tribal immunity from suit."

The Court has previously noted that tribal immunity for commercial ventures is an anachronistic doctrine predicated on dubious legal and policy underpinnings. Although the Court has left to Congress the task of limiting or modifying tribal immunity in that context, it would be both unwise and inequitable to expand the unfair consequences of the doctrine by judicially restricting the validity of a tribe's objectively ascertainable intent to waive its immunity. Moreover, because tribal sovereignty contemplates the ability not only to assert but also to waive tribal immunity, respect for tribal sovereignty requires the Court to give effect to a tribe's waiver of its immunity from suit. To do otherwise would unfairly harm those who contract with tribal businesses believing they can rely on the plain meaning of a contract and, ultimately, the tribe's ability to contract with non-Indian citizens or businesses.

In the contract at issue in this case, respondent expressly agreed to binding arbitration and to judicial enforcement of any arbitration award. The court of appeals correctly noted that the contractual language "indicate[d] a willingness on Tribe's part to expose itself to suit on the contract." Pet. App. 7. It should have understood that nothing more was required. The Court should reverse the judgment below.

ARGUMENT

Indian tribes are considered "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). "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. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *see Oklahoma Tax Comm'n*

v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Washington Game Dep't*, 433 U.S. 165, 172 (1977).[1]

An Indian tribe may waive its tribal immunity, but the waiver "must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S., at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).[2] Amici believe that respondent

1. In *Kiowa*, the Court traced the historical development of tribal immunity. *See Kiowa*, 523 U.S., at 756-58 (discussing *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940), and *Turner v. United States*, 248 U.S. 354 (1919)). Although the Court noted that tribal immunity "developed almost by accident" and questioned "the wisdom of perpetuating the doctrine," the Court retained the anachronistic doctrine of tribal immunity, deferring to Congress to abrogate or modify the parameters of tribal immunity. *Id.*, at 757-58.

2. The Seventh Circuit has questioned "whether there really is a requirement that a tribe's waiver of sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659-60 (CA7 1996) (contrasting the requirement for congressional abrogation of tribal immunity set forth in *Santa Clara Pueblo* with an express waiver of tribal immunity by the tribe itself); *but see Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.* (*In re Ransom*), 658 N.E.2d 989, 993 n.4 (N.Y. 1995) ("[A]t least one Federal Circuit Court of Appeals has ruled that regardless of whether the waiver is externally imposed by Congress or by an act of the tribe itself, there is no distinction in the requirement of an explicit and unequivocal waiver.") (citing *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377 (CA8 1975)). The Court need not tackle that difficult question because the arbitration clause in this case explicitly and unequivocally expresses the tribe's intent to waive its immunity from suit and submit to binding arbitration in a non-tribal forum. *See infra* Part III.

expressly waived its immunity in the contractual arbitration clause at issue in this case. Amici urge the Court to reject respondent's arguments to judicially limit the validity of an attempted waiver of immunity through an artificially heightened standard for evaluating claimed waivers of immunity.

I. NEITHER PRECEDENT NOR PUBLIC POLICY JUSTIFY LIMITING A TRIBE'S ABILITY TO WAIVE ITS IMMUNITY.

The Bureau of Indian Affairs currently recognizes over 550 Indian tribes in the contiguous 48 states and Alaska. *See* Notice of Indian Entities Recognized and Eligible to Receive Services, 65 Fed. Reg. 13298-303 (Mar. 13, 2000).[3] With the newfound wealth resulting from high stakes gaming activities and other commercial ventures conducted on many of the reservations, the number of tribal businesses venturing into commercial activities with non-Indians outside Indian lands has increased dramatically. These tribal businesses not only operate as restaurants, hotels, and casinos on tribal lands—as a business person dealing with a tribe might expect—but also run construction companies, manufacturing plants, power

3. Three federally recognized tribes are located in Texas: Alabama-Coushatta Tribes, the Kickapoo Traditional Tribe, and the Ysleta Del Sur Pueblo. *See* 65 Fed. Reg. 13299-300, 13302.

plants, mining operations, banks, gas stations, pharmacies, and retail and convenience stores, employing thousands of non-Indian citizens on non-tribal lands. *See* David M. LaSpaluto, Comment, *A "Strikingly Anomalous," "Anachronistic Fiction": Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 SAN DIEGO L. REV. 743, 744 (1999). Millions of non-Indian citizens patronize tribal businesses both on and off tribal lands.

In the past decade alone, tribes have invested billions of dollars in myriad commercial enterprises off tribal lands. For many of these tribes, tribal governance has been transformed to the point that its dominant activity is overseeing tribal businesses rather than traditional governing activities. Indeed, that transformation has spurred well-deserved criticism of continued recognition of tribal immunity, particularly in the context of commercial activities off tribal lands.

Tribe-owned businesses increasingly do not perform traditional governmental functions for which immunity was created. To be sure, all governments are frequently involved in commercial transactions. Those transactions—whether for the design and construction of a new missile system, the construction of a highway, or the operation of a large port or local landfill—are virtually always conducted in the course of providing some public benefit that is a traditional governmental function. Even still, sovereign immunity has been heavily criticized in the commercial context, and, although it can be supported on a number of policy grounds, both the federal government and the states have provided administrative or judicial remedies for their commercial

partners.[4] On the other hand, tribal businesses frequently compete with private businesses in commercial markets with no ties to traditional tribal affairs. The only public benefits they provide are employment for tribe members and commercial profits for the tribe. Any grounds that may justify tribal immunity for the performance of governmental functions cannot reasonably be extended to shield purely commercial enterprises from tort and contract liability.

It is true that the Court stated in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991), that Congress may have chosen to retain immunity to promote economic development and tribal self-sufficiency, but the Court in *Kiowa* subsequently recognized that tribal immunity for purely commercial enterprises cannot be justified by that rationale. 523 U.S., at 757-58.

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4. As a matter of national policy, the federal government has waived its sovereign immunity from tort liability under the Federal Tort Claims Act, *see* 28 U.S.C. §§1346(b), 2674, and from commercial activities via the Tucker Act, *see* 28 U.S.C. §1491. In enacting the Foreign Sovereign Immunities Act of 1976, Congress waived the sovereign immunity of foreign nations for claims based upon commercial activities carried on in the United States and for activities conducted elsewhere that have a "direct effect in the United States." *See* 28 U.S.C. §1605(a)(2). Moreover, nearly all of the states have statutorily waived or judicially abrogated their immunity for contractual obligations. *See, e.g.*, GA. CONST. art. I, §II, ¶IX; MD. CODE ANN., STATE GOV'T §12-201(a); NEB. REV. STAT. §81-8,302 to §81-8,306; *Quinn v. Mississippi S. Univ.*, 720 So.2d 843, 849-50 (Miss. 1998).

"At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*, at 758.

Immunity for tribal businesses creates huge economic disparities that unfairly benefit tribal businesses at the expense of non-Indian customers, suppliers, and competitors. A customer seriously injured at a tribe-owned restaurant might be surprised to learn that Congress intended to cut off her right to recover personal injury damages to promote the tribe's economic development. Likewise, a jobber with an advantageous long-term contract to deliver gasoline to a tribe-owned station might more easily be persuaded to modify the contract once informed that it would have no remedy for a breach of the contract. And a neighboring station with a similar contract might justifiably wonder why it was unable to renegotiate the terms of its contract and can no longer compete with the tribe-owned business. In short, tribal immunity for commercial enterprises serves no legitimate purpose and is a "trap" for an unsuspecting non-Indian business. *See Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (CA9 1989).

Amici continue to believe that *Kiowa* was wrongly decided, but it is not necessary for the Court to abandon or

even narrow the doctrine of tribal immunity to resolve the limited question of waiver presently before the Court. Although the Court in *Kiowa* declined to limit the scope of tribal immunity, the Court gave no indication that it would be willing to expand the unfair effects of tribal immunity. But that is precisely what respondent is asking the Court to do in this case. The Court in *Kiowa* clearly acknowledged that a tribe can waive its tribal immunity. 523 U.S., at 754, 760. Judicially restricting that waiver doctrine to require more than a clear and express acknowledgment that the tribe will be subject to suit on the contract would constitute an impermissible and unwise expansion of tribal immunity.

Respondent would have the Court narrowly interpret the concept of an express waiver to validate the waiver only if it explicitly uses the terms "waiver" and "suit immunity." Resp. Br. Opp. at 15.[5] That construction misconstrues the fundamental nature of an express waiver. A tribe's immunity is from suit, and a contractual term that states that the tribe will subject itself to suit on the contract is an "express" waiver of that immunity, even if it does not explicitly use the terms

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5. In fact, it is questionable whether recitation of the "magic words" would satisfy some tribes' interpretation of the "unequivocally expressed" requirement for waivers of tribal immunity. During oral argument in *Kiowa*, the tribe claimed an effective waiver not only required the "magic words," but also required the tribe to "select a court that they're going to go into, designate the kind of causes of action that they will be subject to," and identify "what assets can be subjected to the judgment." *See* Oral Argument of R. Brown Wallace, in *Kiowa*, 1998 WL 15116, at *5-*6 (Jan. 12, 1998).

"waiver" or "immunity." A tribe may clearly express its intent to waive its immunity by stating in a contract, "If the tribe breaches the contract, you may sue us in state district court." Respondent would presumably argue that there is no express waiver in that contractual provision because the provision did not contain the necessary terms. But requiring the use of certain words or terms creates an arbitrary and artificial obstacle that is neither inherent in the concept of an "express" waiver, nor justified by paternalistic notions of tribal protection. When a tribe has unequivocally expressed its "willingness . . . to expose itself to suit on the contract," Pet. App. at 7, it has expressly waived its immunity.

Moreover, because the Court has recognized that tribal immunity for commercial enterprises is barely, if at all, defensible, there is no justification for judicially wrapping that immunity in a protective sheath that circumscribes a tribe's ability to waive its immunity from suit. The weak foundation for tribal immunity strongly recommends a relaxed standard for evaluating the validity of a claimed waiver of immunity. Certainly Congress has never acted to restrict Indian tribes' ability to waive their immunity, and respondent cannot articulate a valid policy rationale for a judicially imposed common-law limitation. *Kiowa* simply cannot support a doctrine of judicial paternalism that would protect tribes from their own voluntary and express waivers of immunity.

To the contrary, *Kiowa* explicitly rejected paternalistic ideals as a justification for tribal immunity and suggested that, if anything, it is those who interact with the tribal business who need protection from the tribe, or at least to be put on an equal footing with the tribe. 523 U.S., at 758. For instance, although a tribe will know the existence and scope of its

immunity in a commercial transaction, a non-Indian business may not even realize it is contracting with a tribal business with immunity. The non-Indian business may not foresee the need to negotiate a waiver of immunity in a contract instead of an ordinary binding arbitration clause.[6] After all, in most states, as in Oklahoma, when a party agrees to a binding arbitration clause, the party is understood to have agreed to the specific enforcement of the arbitration clause and the entry of judgment on any arbitration award in the state or federal courts of the state. *See, e.g.*, OKLA. STAT. tit. 15, §802; ARK. CODE ANN. §16-108-217; NEB. REV. STAT. §25-2618(a); TEX. CIV. PRAC. & REM. CODE §171.081 ("The making of an agreement . . . that provides for or authorizes an arbitration in this state . . . confers jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.").[7]

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6. *See Kiowa*, 523 U.S., at 758 ("In this economic context, [tribal] immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."); *see also* Brian C. Lake, Note, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1 COLUM. BUS. L. REV. 87, 99-104 (1996) (identifying the possible "informational imbalance between Tribes and non-Tribal entities" as one of the fundamental problems with extending sovereign immunity to tribal businesses operating outside of Indian country).

7. Having agreed that Oklahoma law governs the contract, the tribe should not now be heard to complain that Oklahoma law requires them to submit to arbitration and judicial enforcement of any arbitration award. *See Volt Info. Scis., Inc. v. Board of Trs. of*

The Court has never required anything more than a tribe's clear expression of its intent to waive tribal immunity. Clarity of intent, not specific vocabulary, has always been the touchstone for determining the validity of a waiver, and it would be both inequitable and unwise for the Court to judicially restrict the validity of waivers that do not use specific language. Regardless of the language used, a tribal business expressly waives its tribal immunity whenever the business enters into a contract that unequivocally expresses its intent to subject itself to binding arbitration or to suit in any non-tribal forum.

II. A TRIBE UNEQUIVOCALLY EXPRESSES ITS INTENT TO WAIVE ITS IMMUNITY WHEN THE TRIBE CONSENTS TO BINDING ARBITRATION IN A NON-TRIBAL FORUM.

Although most lower courts have recognized that tribal immunity waivers "must be unequivocally expressed" under *Santa Clara Pueblo*, their analyses of the specificity required to qualify as an "unequivocally expressed" waiver have rendered "the line between explicit and implicit waivers [] unclear." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (CA7 1996). The confusion has left a few courts reluctant to recognize any waiver of tribal immunity in contracts absent "magic words" waiving tribal immunity—*e.g.*, "The Tribe hereby expressly waives its tribal immunity from suit for breach of this contract in the federal district courts of this State." *See Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 563 (CA8 1995).

Leland Stanford Junior Univ., 489 U.S. 468, 476, 479 (1989).

As a result of this uncertainty, legal commentators have noted that, in some places, negotiating an effective waiver of tribal immunity in a contract may be "nearly impossible." *See* LaSpaluto, 36 SAN DIEGO L. REV., at 759; Steven W. Bugg, *The Business Ramifications of Tribal Sovereign Immunity: Life After* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 53 CONSUMER FIN. L.Q. Rep. 59, 60-61 (Winter 1999). The differing approaches for evaluating the effectiveness of a waiver of immunity are best exemplified by two arbitration clause cases that reached opposite results on similar facts.

In *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (CA9 1989), the tribe contracted to construct and operate a reservation bingo enterprise. In the contract, the tribe agreed to submit contract disputes to binding arbitration pursuant to the rules of the American Arbitration Association. *See id.*, at 419. The bingo contractor eventually sued the tribe for enforcement of the contract provisions. The tribe asserted its tribal sovereign immunity. After reviewing this arbitration clause, the Ninth Circuit concluded the clause "simply [did] not contain that unequivocal expression of tribal consent to suit necessary to effect a waiver of the [tribe's] sovereign immunity." *Id.* The court concluded that federal courts have consistently declined to find tribal consent to suit "[a]bsent an affirmative textual waiver in the terms of a contractual agreement." *Id.* The court added that in the absence of the "express" or "magic" waiver words, "Pan Am in essence asks th[e] court to imply a waiver of tribal sovereign immunity from the text of the arbitration clause" and that, according to

the Ninth Circuit, "offends the clear mandate of *Santa Clara Pueblo*." *Id.*[8]

In contrast, in *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560, 561 (CA8 1995), the tribe contracted for the construction of a medical facility on its reservation. The contract provided that all "questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." *Id.*, at 562. The Eighth Circuit concluded "that this clause is a clear expression that the Tribe has waived its immunity with respect to claims under the contract." The court characterized the text of the arbitration

8. In another arbitration clause case, the Alaska Supreme Court distinguished *Pan American* in two ways, thereby limiting the case to its particular facts. *See Hydaburg Coop. Assoc. v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992). First, the court noted that *Pan American* "did not involve a suit to compel arbitration or enforce an arbitration award. Instead, by challenging the validity of a tribal ordinance, Pan American directly attacked the tribe's authority to regulate affairs on its reservation." *Id.*, at 754. Therefore, according to the court, "[a]rguably, even under *Pan American*, an agreement to arbitrate disputes arising out of a contract constitutes a tribe's consent to suit for the limited purposes of compelling arbitration or enforcing an arbitration award." *Id.* Second, the court distinguished the case because the parties in *Pan American* "did not subject themselves to the jurisdiction of either federal or state courts" in the contract. *Id.*, at 755. The arbitration clause simply subjected the parties "to the jurisdiction of the American Arbitration Association," without providing any court with jurisdiction to order arbitration or to enter judgment on an arbitration award. *Id.*

clause as "spare but explicit." The court ruled that "[b]y designating arbitration in accordance with specified arbitration rules as the forum for dispute resolution, the parties clearly intended a waiver of sovereign immunity with respect to resolving disputes under the contract." *Id.* "By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense." *Id.* Thereafter, the court expressly rejected the requirement of any "'magic words' stating the tribe hereby waives its sovereign immunity." *Id.*, at 563.

The majority of state and federal courts that have considered the issue have sided with *Rosebud*,[9] which

9. *See, e.g., Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659-60 (CA7 1996) ("The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. To agree to be sued is to waive any immunity one might have from being sued."); *Nenana Fuel Co. v. Native Vill. of Venetie*, 834 P.2d 1229, 1233 (Alaska 1992) (per curiam); *Hydaburg Coop.*, 826 P.2d, at 754-55; *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760-61 (Alaska 1983) ("[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. . . . The arbitration clause would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed."); *Val/Del, Inc. v. Super. Ct.*, 703 P.2d 502, 509 (Ariz. Ct. App. 1985) ("Before entering into the arbitration agreement, the respondent tribe was free from suit by petitioner. However, after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction,

properly recognizes that the Court has never required "magic words" to find a valid waiver of sovereign immunity. *See Mueller v. Thompson*, 133 F.3d 1063, 1064 (CA7 1998) (citing *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984)); *Rosebud*, 50 F.3d, at 563 (noting the Court "has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity"); *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.* (*In re Ransom*), 658 N.E.2d 989, 993 n.4 (N.Y. 1995). But given *Pan American* and its progeny (including this case),[10] the Court should reiterate that neither *Santa Clara Pueblo* nor any of the Court's subsequent cases impose a heightened burden for showing a waiver of tribal immunity, but instead demand only a clear expression of intent to be subject to suit, without dictating the vocabulary that must be used to do it.

In *Sokaogon Gaming Enterprise Corporation v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659 (CA7 1996), the court recognized that "[t]o agree to be sued is to waive any immunity one might have from being sued." *Id.* Therefore, the court concluded that if the tribe "agrees to submit disputes arising under the contract to arbitration, to be bound by the

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we find that there was an express waiver of the tribe's sovereign immunity.").

10. *See Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 112-13 (S.D. 1998) (concluding tribe did not waive its sovereign immunity by fully participating in arbitration proceeding under the Federal Arbitration Act); *but see id.*, at 117 (Sabers, J., dissenting) ("Here, participation and acquiescence in arbitration constituted a 'clear waiver' of Tribe's sovereign immunity. Tribe waived any objections to arbitration by participating without objection.").

arbitration award, and to have its submission and the award enforced in a court of law," then the tribe expressly waives its tribal immunity. *Id.* The Seventh Circuit's rationale for testing the validity of waivers of tribal immunity for binding arbitration clauses is both reasonable and consistent with the Court's prior holdings.

The analysis adopted in *Sokaogon* logically parallels the test for waivers of state and federal sovereign immunity. *See Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 843 (N.J. Super. Ct. Law Div. 1999) ("Certainly the principles governing the extent to which a sovereign may consent to suit also should be applicable to this tribe.").[11] A state waives its Eleventh Amendment immunity only if it "makes a 'clear declaration' that it intends to submit itself to [federal court] jurisdiction." *See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 675-76 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). The Federal Tort Claims Act and the Tucker Act do not state that they "waive sovereign immunity"; instead, the acts create a right to sue. *See Sokaogon*, 86 F.3d, at 660 (citing 28 U.S.C. §§1491, 2674). And, as Justice Scalia has noted, although this rule does not permit implicit waivers, courts should not interpret explicit waivers in an "implausible" manner in order to avoid finding a waiver of immunity. *See United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring).

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11. Of course, the arbitration clauses in this case would have no effect on a state's Eleventh Amendment immunity from suit in federal court unless the arbitration clause evidenced the state's intent to subject itself to the jurisdiction of the federal courts.

If an Indian tribe enters into a contract with a binding and enforceable arbitration clause, then the tribe unequivocally expresses its intent to waive its tribal immunity and the provision should be upheld as a valid waiver of tribal immunity.

III. RESPONDENT UNEQUIVOCALLY EXPRESSED ITS INTENT TO WAIVE ITS TRIBAL IMMUNITY IN THIS CASE.

The Oklahoma Court of Civil Appeals erred because it disregarded the "willingness on [the] Tribe's part to expose itself to suit on the contract." Pet. App. 7. The court recognized that the tribe agreed to binding and enforceable arbitration; however, the court refused to find any waiver in the absence of explicit language specifically referring to waiver and immunity, *i.e.*, "The tribe hereby waives its tribal immunity." The court erroneously found that the "leap from that willingness [on the Tribe's part to expose itself to suit] to a waiver of immunity is one based on implication, not an unequivocal expression." *See* Pet. App. 7.

In so ruling, the state court wholly failed to recognize that "[t]o agree to be sued is to waive any immunity one might have from being sued." *See Sokaogon*, 86 F.3d, at 659. The court instead permitted the omission of certain terms or phrases to override the unequivocally expressed intent of the tribe to waive its tribal immunity. Thus, the court joined *Pan American* in requiring "an affirmative textual waiver in the text of the contract," *i.e.*, "The Tribe waives its tribal immunity." Whether or to what extent an arbitration clause waives tribal immunity turns on the terms of the contract. *See Pan Am.*, 884 F.2d, at 418. In this case, just as in *Sokaogon*,

the waiver of tribal immunity "is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the [magic] words 'sovereign immunity.'" 86 F.3d, at 660.

The construction contract between the Citizen Potawatomi Nation and C&L Enterprises was a form agreement issued by the American Institute of Architects. The contract provided that all contractual disputes "arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." Pet. App. 46. The arbitration clause further provides that the arbitration award would be "final, and judgment [could] be entered upon it in accordance with applicable law in any court having jurisdiction thereof." In addition, the clause provided that arbitration was "specifically enforceable under applicable law." Pet. App. 47. The contract was "governed by the law of the place where the Project [was] located." Pet. App. 56. The project was located on non-tribal land in Shawnee, Oklahoma. *See* Pet. App. 33. Thus, Oklahoma law governed the construction contract.

There is nothing ambiguous or unclear about the terms of the arbitration clause. Respondent clearly and unequivocally agreed to have the contract governed by Oklahoma law, to submit all contractual disputes to arbitration, to be bound by the arbitration award, and to have the arbitration award confirmed as a judgment. Respondent thus agreed to submit its contractual disputes to a non-tribal judicial forum for resolution under Oklahoma law. The tribe unequivocally expressed its agreement to be sued for breach of contract in a non-tribal forum. No one reading this clause could doubt that

the effect was to make the tribe "suable" for breach of contract claims. *See Sokaogon*, 86 F.3d, at 660. Any other conclusion would simply be implausible. Respondent thus waived its tribal immunity from suit by agreeing to arbitration governed by Oklahoma law.

In deciding this case, the Oklahoma court considered only two arbitration clause cases. The court noted that the Alaska Supreme Court ruled "that an arbitration clause, along with a mention of court enforcement, constituted a tribe's waiver of immunity." Pet. App. 5 (quoting *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)). Although the court accepted the "logic of the *Native Village* court [as being] unassailable," the court nevertheless concluded the Alaska court erred by relying on an implied waiver since the contract did not say the tribe "waived its sovereign immunity."

In sole support of this conclusion, the court cited a second arbitration clause case, *American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985). But *Standing Rock* is distinguishable. *See Sokaogon*, 86 F.3d, at 660; *Rosebud*, 50 F.3d, at 563 (both distinguishing *Standing Rock* in arbitration clause cases). In *Standing Rock*, the Eighth Circuit concluded the tribe did not waive its immunity simply because it entered into a loan agreement with a "rights and remedies" clause. As the Eighth Circuit has noted in a subsequent arbitration clause case, the terms of the agreement did not provide for binding arbitration or otherwise "submit any dispute over repayment on the note to a particular forum." *See Rosebud*, 50 F.3d, at 563. In addition, the terms did not state that the tribe agreed to be bound by any judgment. Thus, the Eighth Circuit concluded that the agreement did not unequivocally and expressly waive

tribal immunity. *See also Sokaogon*, 86 F.3d, at 660 ("Although the [*Standing Rock*] case is distinguishable, we do not mean to suggest that we agree with it."). In this case, in stark contrast to the terms of the agreement in *Standing Rock*, respondent clearly manifested its intent to resolve contractual disputes by arbitration under Oklahoma law and the Rules of the American Arbitration Association.

Finally, in its brief in opposition, the tribe argued that it did not waive tribal immunity, because it "did not consent to the suit in the district court of Oklahoma." *See* Resp. Br. Opp. at 17. Respondent cannot "transmogrify the doctrine of tribal immunity into one which dictates that the tribe never loses a lawsuit." *See Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (CA8 1995) (citing *United States v. Oregon*, 657 F.2d 1009, 1014 (CA9 1981)). Nothing in this Court's waiver jurisprudence requires a party to specifically identify the court in which suit may be brought to find a valid waiver of tribal immunity.

◆

CONCLUSION

For these reasons, amici urge the Court to reverse the judgment of the Court of Civil Appeals of Oklahoma.

Respectfully submitted,

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