14-425

No. _____

In the Supreme Court of the United States

MM&A PRODUCTIONS, L.L.C.,
Petitioner,

v.

YAVAPAI-APACHE NATION, a federally recognized Indian Tribe; YAVAPAI-APACHE NATIONS CLIFF CASTLE CASINO, a business enterprise of the Yavapai Apache Nation; TRIBAL GAMING BOARD; and CLIFF CASTLE CASSINO BOARD OF DIRECTORS,
Respondents.

On Petition for Writ of Certiorari to the Arizona Court of Appeals, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court has an established jurisprudence recognizing Indian sovereign immunity, and defining its scope. The Court also has an established jurisprudence on what actions will work a waiver of immunity.

This Court, however, has never decided the issue of what needs to be shown to establish authority for waiver of Indian sovereign immunity, nor whether apparent authority can be sufficient to do so. Lower courts have done so, and are split on the question of the availability of apparent authority. *E.g. Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) (apparent authority appropriately invoked); *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009) (prohibiting use of apparent authority).

The question presented is whether the authority of a tribal official who signs a waiver of sovereign immunity may be established under the doctrine of apparent authority.

STATEMENT PURSUANT TO RULE 29(6)

Petitioner MM&A Productions, L.L.C., is an Arizona Limited Liability Company. It does not have any parent corporations. No Corporation owns more than 10% of the stock or membership interest in it.

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The decision of the Arizona Court of Appeals, Division Two, of which review is sought, is reported at 316 P.3d. 1248 (Ariz. App. 2014), and is Appendix B hereto. The Minute Entry Order decision of the Pima County, Arizona, Superior Court, which was affirmed by the opinion of the Arizona Court of Appeals, is unreported, and is Appendix C hereto. The order of the Arizona Supreme Court denying Petitioner's Petition for Review of the Arizona Court of Appeals opinion is not separately reported. It is Appendix A hereto.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals, of which review is sought, was filed January 16, 2014. A timely Petition for Review of the opinion was filed February 14, 2014. The Arizona Supreme Court denied the Petition for Review on May 29, 2014.

On August 6, 2014 Petitioner filed an application to extend the time to file a petition for a writ of certiorari. Application No. 14A169. On August 14, 2014 Justice Anthony Kennedy entered an order "Application (14A169) granted by Justice Kennedy extending the time to file until October 10, 2014."

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES OR STATUTES INVOLVED

There are no constitutional provisions, treaties, or statutes which are involved in this case. That is because tribal sovereign immunity arose as a judicial

doctrine, created by this Court. *Kiowa Tribe of Okla. v. Mfg. Techs., In.*, 523 U.S. 751, 757-58 (1998). And the law respecting waiver of sovereign immunity has also been developed in cases of this Court. Therefore this case can – indeed must – be decided as a matter of federal judicial law – *i.e.* of federal common law.

STATEMENT OF THE CASE

This case arises from an action for damages for breach of contract, filed by Petitioner MM&A Productions, L.L.C. against the Yavapai-Apache Nation and its affiliated business entities which operate a gaming casino

1. The parties, the contract, and the waivers of sovereign immunity.

Petitioner MM&A Productions, L.L.C. (hereinafter "MM&A") is a limited liability company located in Arizona. It is an entertainment production consultant which produces and markets entertainment programs for Indian casinos.

The Respondent Yavapai-Apache Nation is a federally recognized Indian tribe located in Arizona. It operates the Respondent Cliff Castle Casino, a business enterprise of the Nation, under the direction of the Respondent Yavapai-Apache Tribal Gaming Board, and the Respondent Cliff Castle Casino Board of Directors.

MM&A had contracted with the Cliff Castle Casino[1] to book artists and produce events at the Casino for about seven years prior to the filing of the Complaint. MM&A had entered into numerous contracts, including a fifteen month exclusive entertainment and production contract in 2002. ROA 2, Verified Complaint, ¶ 20 & Ex. D.[2] That contract, as well as all others between the Casino and MM&A, had been signed by the Casino's Director of Marketing, and had been fully performed, ratified and honored by the Casino. *Id.* ¶ 21.

On May 9, 2006, the Casino signed a contract with MM&A that granted MM&A the exclusive right to be the booking agent and producer of entertainment at the Casino for five years, beginning March 31, 2007 and continuing through March 30, 2012. *Id.* ¶ 8. & Exhibit A. In connection with the Agreement of 2006, on June 30, 2006 the Casino and MM&A also executed a Waiver and Sovereign Immunity Addendum to the Agreement. *Id.* ¶ 9 & Exhibit B. The Agreement of 2006 and the

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[1] MM&A's direct business activities and contracts were with the Cliff Castle Casino. MM&A's complaint alleged that the Respondents Nation, Gaming Board, and Board of Directors were liable upon the claims alleged in the complaint. In this Petition, for simplicity of reference, the Respondents will collectively be referred to as "the Casino," unless context requires more individual reference.

[2] The record in this case had originally been certified to the Arizona Court of Appeals in an earlier appeal in this case, bearing that Court's No. 2CA-CV 2012-0040. Therefore, as was the case before the Arizona Court of Appeals, Record references in this Petition are to the Record On Appeal in No. No. 2CA-CV 2012-0040.

Waiver were signed by the Director of Marketing for the Casino, just as the previous contracts had been. *Id.*

The Casino had also signed a Waiver of Sovereign Immunity in 2003. Agreement. *Id.* ¶ 15 & Exhibit C.

Both Waivers were explicit and unequivocal in their terms. The March 27, 2003 Waiver stipulated:

> "Tribe hereby expressly and irrevocable [sic] waives its sovereign immunity from any breach or alleged breach in connection with Tribe's obligations and considerations under any and all the Contract(s) between Tribe and [MM&A], including but not limited to, Artist Booking Agreement(s), Production Agreement(s) and Exclusive Agreement(s) or any suit or action in connection therewith including, without limitation, any suit brought under tort or contract theories of recovery by [MM&A], Artist, their representative agents or employees. " *Id.* ¶ 1.

The 2006 Contract was signed on May 18, 2006. On June 30, 2006 a "Waiver of Sovereign Immunity Addendum" was signed by the parties. It was even broader, more explicit and irrevocable than the March 2003 Waiver had been:

> "YAVAPAI-APACHE NATION, YAVAPAI-APACHE CLIFF CASTLE CASINO AND CLIFF CASTLE CASINO hereby expressly and irrevocably waives its sovereign immunity from breach or alleged breach in connection with CASINO's obligations and considerations under any and all Contract(s) and Addendum(s),

> including, but not limited to, Exclusive Entertainment and Production Agreement(s) between CASINO and MM&A, and/or any suitor [sic – suit or] action in connection therewith including, without limitation, any suit brought under tort or contract theories of recovery by MM&A for any and all injuries or damages, and in addition, any other remedies MM&A may have at law or in equity, monetary damages or similar remedies." ROA 2, Ex. B ¶ 1.

In sum, it could not be clearer that if the respective Marketing Directors of the Casino, who signed the Waivers, had either actual or apparent authority to sign these documents, there was a valid waiver by the Nation of its sovereign immunity and that of its business entities.

2. Provisions of the Nation's governing documents pertaining to waiving sovereign immunity.

The Yavapai-Apache Constitution "declares that, in exercising self-determination and its sovereign powers to the fullest extent, the Tribe is immune from suit except to the extent that the Tribal Council expressly waives sovereign immunity, or as provided by this Constitution." ROA 8, Ex. A p. 16.

The Nation's Constitution also empowers the Tribal Council "to appoint subordinate committees, commissions, boards, tribal official and employees not otherwise provided for in this constitution and to prescribe their compensation, tenure, duties, policies and procedures." *Id.* p. 9. Article V subpart (p).

The Tribal Council adopted a "Cliff Castle Casino Board of Directors Act." ROA 9 Ex. B. Section Fourteen both established the authority for approving and executing contracts, and constituted a delegation to the Casino Board the power to waive the sovereign immunity of the nation. It vested in the Board the power to negotiate and approve contracts. *Id.* ¶ 1. It delegated to the Chairperson of the Board the authority to execute contracts approved by a majority of the Board. *Id.* ¶ 2. And, under the Heading of Section Fourteen which included the title "Limited Waiver of Sovereign Immunity," it stated that "All contracts shall to the greatest extent possible be drafted or negotiated to include language preserving the sovereign immunity of the Nation." *Id.* ¶ 4.

Thus, clearly, the Tribal Council authorized the Casino Board to waive sovereign immunity. What occurred between the Casino Board and the signing of the contract of 2006 and its Sovereign Immunity Waiver Addendum was what was at issue in this case.

3. The filing of suit, the Casino's Motion to Dismiss in the trial court, and MM&A's evidence of apparent authority.

In 2008 the Casino breached the 2006 Agreement. MM&A filed suit in the Arizona Superior Court, seeking damages. ROA 2 ¶¶ 35 – 58.

The Casino filed a motion to dismiss the complaint pursuant to Ariz. R. Civ. P. 12(b)(1). It alleged that because all of the defendants were clothed with the sovereign immunity of the Nation, that the Superior Court lacked subject matter jurisdiction.

Along with its Motion to Dismiss, the Casino filed declarations from the secretary of the Tribal Council and the custodian of records of the Casino Board. Each claimed that no resolution authorizing the contracts or waivers of sovereign immunity could be found in the records of the respective entities. ROA 8, Ex. C, D.

MM&A opposed the motion, arguing that the signers of the Agreement and of the sovereign immunity waivers had both actual and apparent authority to do so. ROA12 p. 2.

Together with its opposition to the Motion to Dismiss, MM&A filed affidavits of Paul Miller, the Executive Director of MM&A, who personally negotiated the contracts of 2002 and 2006 with the Casino. ROA 12, Ex. A; ROA 17 Ex. 1. Mr. Miller testified in the affidavits that:

- In connection with the 2002 contract, J.P. LaFors, then the Director of Marketing for the Casino, told Miller that the Tribal Council had approved the contract, and that LaFors had authority to sign it. *Id.* ¶ 3. (Thereafter the Casino honored the 2002 contract and made payments pursuant to it. The Casino never disagreed with or repudiated the assurances of Mr. LaFors, even though it obviously was aware of the contract, and taking advantage of it.)

- LaFors also told Miller in 2003 that the Tribal Council had approved the Waiver of Sovereign Immunity Addendum, and that LeFors had authority to sign it. *Id.* (Once again, the Casino continued to honor the 2002 contract, make payments upon it, and never disagreed with or

repudiated the assurances of Mr. LaFors, while it continued to take advantage of the 2002 contract.)

- Evidence that the Casino performed and accepted the benefits of the 2002 Agreement and 2003 Waiver of Sovereign Immunity included an Event Production Agreement between the Casino and MM&A on August 25, 2005, and an Artist Booking Agreement between the parties on March 9, 2006. ROA 17, Ex. 1 A, B.

- In 2006 Steven Wood was the Marketing Director. *He* approached *Miller* about MM&A entering into an exclusive entertainment and production agreement. ROA 12, Ex. A, ¶ 5. Miller was told in 2006 that the Tribal Attorney General had approved the contract, and that the Casino Board of Directors had given Wood, the Marketing Director, authority to sign the Contract and the Waiver of Immunity.[3] *Id.* (MM&A performed the contract in 2007 and 2008. MM&A was never told that Wood could not sign the contract and the waiver. MM&A was not aware of any alleged lack of authority until two years later, in 2008, when the Casino repudiated the contract, and suit was filed.)

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[3] In the trial court, the Casino disputed Miller's assertion that the Attorney General had approved the contract, with a declaration of the Nation's Attorney general. But the dispute does not detract from the fact that the statement made to Miller was evidence of apparent authority for the Marketing Director to sign the Agreement and Waiver.

- After the 2006 Waiver of Sovereign Immunity was signed, Miller was told by members of the Nation that the Board of Directors and the Council were aware of and approved of the waiver of sovereign immunity, and that the Director of Marketing had authority to sign it. These tribal members included Darlene Rubio, a member of the Tribal Council which had delegated to the Gaming Board the power to waive sovereign immunity, and Deborah Johnson, the Chair of the Gaming Board's Board of Directors, to which the Tribal Council had delegated that power. *Id.* ¶ 6.

- Not only did Deborah Johnson, the Gaming Board Chair who was vested by the tribal council with authority to waive sovereign immunity upon the vote of her board, tell MM&A through Mr. Miller that the waiver was authorized, she signed at least two contracts pursuant to the 2006 Agreement and Waiver. ROA 17, Ex. 1 D (Artist Booking Agreement April 18, 2007) and Ex. 1 E (Event Production Agreement June 24, 2007).

The Superior Court dismissed the complaint. The Court held that the record did not establish that the signers to the waiver agreements had actual authority to do so. App. C, ¶ 4 The Court then necessarily turned to the question whether apparent authority was available to MM&A.

The trial court held that the doctrine of apparent authority was unavailable to a plaintiff, for the waiver of indian sovereign immunity. *Id.* ¶¶ 5, 6. The court acknowledged that precedents were divided upon the

issue. It followed precedent refusing to allow apparent authority. *Id.* ¶ 6.

4. State Appellate Review, and Petitioner's presentation of the question presented in the state courts.

The Arizona Court of Appeals, in a published opinion, App. B, affirmed the dismissal of the complaint. It did so by holding that as a matter of law Petitioner MM&A could not claim the benefits of the doctrine of apparent authority. Although, as detailed above, Petitioner presented a strong factual predicate for the legal doctrine of apparent authority, neither the trial court nor the court of appeals decided the facts of whether Petitioner would be entitled to the benefits of apparent authority. Each court ruled as a matter of law that apparent authority could not be used for waiver of Indian sovereign immunity.

Petitioner timely filed in the Arizona Supreme Court a petition for review of the court of appeals decision. As is customary when the Arizona Supreme Court choose not to exercise its discretion to review an appellate court decision, it issued no opinion about the case. It simply denied review. Thus, the opinion of the Court of Appeals is the "highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a).

Petitioner asserted in the state courts the question presented here, at all stages that it could, and should, under state law, do so.

In the Superior Court, Respondent Casino asserted its sovereign immunity in a motion to dismiss the complaint for lack of subject matter jurisdiction. MM&A, in its opposition, asserted that "Mr. Wood, the

Director of Marketing and the individual who signed the Contract, had at least apparent authority to do so." ROA 12, p 2. In that Response, Petitioner then made an argument, headed "Wood had apparent authority to sign the waivers, which is sufficient to bind the Casino." ROA 12, p. 7. Petitioner elaborated upon that contention, in legal argument which discussed the split of opinion in cases which brings the question to this Court. *Id.* p. 7 et. seq.

In the Arizona Court of Appeals, Petitioner presented in its Opening Brief the question: "Was it error for the trial court to refuse MM&A the benefit of the doctrine of apparent authority?" Inst. 15, p. 14.[4] Petitioner presented argument on that question on pages 22 – 32 of that brief. In its Reply Brief, Inst. 10, Petitioner's argument II, on pages 13 – 28 of the brief, was devoted to the question presented here.

In the Arizona Supreme Court, in Case No. CV-14-0019 PR, Petitioner's Question 1 was "whether the doctrine of apparent authority, by which a principal who, by its own words or deed has led another to believe that his agent has authority to act for the principal, applies to the waiver by an Indian tribe of its sovereign immunity." Petitioner presented argument on that question on pages 7 – 13 of the Petition for Review. A Petition for Review is the only pleading allowed a party seeking the Arizona Supreme Court's discretionary review of a lower court opinion.

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[4] Contrary to the need to reference trial court documents to the record of the earlier appeal in this case, n. 2, *supra,* reference to the Court of Appeals Opening and Reply briefs are to Instrument numbers in the appeals court file in this case.

REASONS FOR GRANTING THE WRIT

The issue of whether apparent authority should be recognized in these circumstances has never been decided by this Court. But the issue has been litigated in numerous cases, with conflicting results. At least two doctrinal approaches have been invoked in these cases, to reach opposite results. Consequently there exists a conflict among state appellate courts and federal courts of appeal. This conflict has far-reaching consequences. Tribal commerce with non-Indians has reached tens of billions of dollars. Hundreds of Indian tribes engage in commercial endeavors. The question presented here can potentially arise in any tribal commercial activities.

The question presented to this Court is a narrow one. It is highly important to thousands, if not tens of thousands, of litigants; but it is narrow. Petitioner does not ask this Court to vacate, overrule, or even modify any of its prior precedents defining and regulating Indian sovereign immunity. Petitioner does ask this Court to decide, as a matter of first impression here, whether apparent authority should be available to restrain the actions of an Indian tribe whose leaders hold out the promise that sovereign immunity has been waived, only to renounce the waiver as having not really been valid.

Absent a decision by this Court on the question presented here, tribes may deal with counter parties under circumstances leading such parties into the mistaken belief that sovereign immunity has been waived.

The doctrine of apparent authority – well established in other contexts – would remedy such mistakes and redress injustices caused by actions of tribal officials leading counter parties into the predicament of having dealt with a tribe under the belief that a waiver of sovereign immunity provided them remedies, when in fact it had not.

1. Lower court cases are divided on the question whether Indian sovereign immunity may be waived by an agent acting with apparent authority. This Court has not decided the issue, and should do so.

The question is cleanly presented in this case. As explained in the Statement of the Case, *supra*, there is no question that the waiver in this case was clear, as is required by this Court's cases such as *Merrion v. Jicarilla Apache Indian Tribe,* 455 U.S. 130, 148, (1982) and *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, (1978).

On the record as it stood in the trial court, actual authority for the waiver was not established. Thus, the lower court decision denying Petitioner the benefit of apparent authority was case dispositive, and prompted the final dismissal of Petitioner's complaint.

"[T]he whole field" of Indian tribal immunity is one of federal law, *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991), including whether "the tribe has waived immunity," *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Therefore this Court is the proper body to decide the question.

This Court should decide the question because lower courts are in conflict about the proper rule.

a. Cases like that of the opinion below, which do not analyze the principles of apparent authority.

The Arizona court denied Petitioner's claim of apparent authority by following cases which hold that apparent authority is prohibited because of this Court's requirement that express waivers be "unmistakable" and "unequivocal," *e.g. Merrion v. Jicarilla Apache Indian Tribe,* 455 U.S. 130, 148, (1982); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, (1978). Such cases do not explain how the requirement of *clarity* of the waiver affects the issue of *authority* to give an express waiver.

The approach followed by the court below was first taken in *World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F.Supp.2d 271 (N.D. N.Y. 2000).

World touch Gaming held that because of this Court's cases requiring unmistakable and unequivocal waivers of sovereign immunity, no such waiver could be supported by apparent authority. *Id.* That court engaged in no analysis. It merely expressed a holding, contained in one sentence and the citation of two of this court's "express waiver" cases:

> "[Apparent] authority is insufficient to waive the Tribe's sovereign immunity. *See Merrion v. Jicarilla Apache Indian Tribe,* 455 U.S. 130, 148, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982) (sovereign power "remain[s] intact unless surrendered in unmistakable terms"); *Santa*

> *Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed") (internal quotation omitted)." 117 F.Supp.2d at 276.

This conflation of the question of authority to waive sovereign immunity with the requirement that the waiver itself be "unequivocally expressed" in "unmistakable terms" was thereafter adopted and followed in several subsequent cases, which themselves did not analyze or explain this conflated reasoning, and which adopted the conflated, unexplained, conclusion of *World Touch. E.g. Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009) (citing *World Touch*); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) (citing *Merrion*, *supra* , and its "express waiver" requirement); *Sanderlin v. Seminole Tribe*, 243 F.3d 1282 (11th Cir. 2001) ("The Supreme Court has made it plain that waivers . . . cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed."); *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516 (Ok. 2011) (citing *Merrion,* and also citing *Memphis Biofuels* and *Native American Distributing*, *supra*). One of these cases has built upon another, so that the analytical flaw has been repeated. But repetition does not equal validation.

b. Case law analyzing apparent authority and holding it appropriately invoked.

In *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) the Colorado Court of Appeals held that apparent authority applied to the waiver of immunity by a tribal officer. It rejected

a contention by the Tribe that cases such as *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130 (1982) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), holding that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," prohibited invocation of the doctrine of apparent immunity. The Tribe had cited *World Touch Gaming, supra*, to the *Rush Creek* court to support that argument.

Rush Creek rejected the reasoning of *World Touch Gaming*, explaining:

> "To the extent *World Touch* might stand for the Tribe's proposition that the authority to waive sovereign immunity, like the waiver itself, may not be implied, we disagree with the analysis in that case. . . . The court held that, despite any authority, express or otherwise, that the third party had to bind the tribe to a contract, it was insufficient to authorize the third party to waive the tribe's sovereign immunity. The court supported its holding by citing *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L. Ed. 2d 21 (1982) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L. Ed. 2d 106 (1978), which concluded that waivers of sovereign immunity must be clear and express. The *World Touch* court thereby implied that, like a waiver itself, the authority to waive must also be expressly granted.
>
> "We do not read *Merrion* and *Santa Clara Pueblo* to mean that, because waivers of sovereign immunity must be express, the

> authority to sign admitted waivers cannot be established by apparent authority." 107 P.3d at 407.

The opinion below in this case expressly rejected *Rush Creek* without discussing that court's analysis. App. B., pp. 11-12 ¶ 14. Its adoption of the *World Touch Gaming* line of cases was grounded on precious little other than citation to and a description of the facts in those cases.

In *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271 (Neb. 2011), cert. den., 132 S. Ct. 1016 (2012), the Supreme Court of Nebraska found the reasoning of *Rush Creek, supra ,* to be persuasive: "We adopt the reasoning of *Rush Creek Solutions* and apply agency principles, specifically the principles of apparent authority, to the purported waiver in this case." *Id.* 280 . The Nebraska court continued:

> "Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority. Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships. Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. Manifestations include explicit statements the principal makes to a

> third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.
>
> "For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction." 795 N.W.2d at 246, 247 (footnotes omitted).

The Nebraska Supreme Court subsequently amended two paragraphs that followed the above reasoning and holding, and replaced them with language which, instead of explicitly stating that the tribal officials had "apparent authority," stated that they had "the requisite authority." *StoreVisions, Inc. v. Omaha Tribe*, 802 N.W.2d (Neb. 2011) (modifying, in part, overruling rehearing, and issuing supplemental opinion).

But the Nebraska Supreme Court did not withdraw, amend or otherwise criticize the discussion and adoption of apparent authority quoted above, which preceded the amended paragraphs. This Court denied certiorari *sub. nom. Omaha Tribe of Neb. v. StoreVisions, Inc.* 132 S. Ct. 1016 (2012).

Thus, *StoreVisions* holds that apparent authority is available; and along with *Rush Creek, supra*, conflicts with *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*,

546 F.3d 1288 (10th Cir. 2008); and *Sanderlin v. Seminole Tribe*, 243 F.3d 1282 (11th Cir. 2001).

This Court should review this case to resolve a conflict between the 6th, 10th and 11th Circuits on the one hand, and the Nebraska Supreme Court and the Colorado Court of Appeals, on the other. This is particularly so given the importance of the issue to Indian commerce and waivers of sovereign immunity.

c. Some lower court cases are unclear on the issue, which is an additional reason for this Court to review the question.

Further proof that this Court should decide the question presented is the fact that some cases discuss and decide the issue of authority to waive sovereign immunity by referring to the doctrine of apparent immunity, either explicitly or by citing cases involving it, but do not explain either whether they adopted apparent authority, or found that facts seeming to indicate only the existence of apparent authority actually constituted a grant of actual authority. *E.g. Bates Assoc. v. 132 Assoc., LLC*, 799 N.W.2d 177, 182-84 (Mich. App. 2010) (stating "We note that the United States Supreme Court has not addressed this issue and has not required anything other than clear, unequivocal language for a valid waiver," noting *Memphis Biofuels, supra,* but not following it). *Cf. StoreVisions, Inc. v. Omaha Tribe*, 802 N.W.2d (2011) (changing its labeling in supplemental opinion to "requisite authority," from "apparent authority," but not retreating from its earlier opinion explicitly approving *Rush Creek*, *supra,* and explicitly identifying apparent authority as applicable to the facts of *StoreVisions*.

2. The question of apparent authority raised in this case would not impose upon Indian tribes an obligation to take or withhold any action that could not be traced to any explicit action by their officials.

One of the reasons given by the Arizona court for its conclusion was that to allow apparent authority "would allow waivers that could not be traced to any explicit action by a tribe." Op., Ex. B, ¶ 13, pp. 10-11. But that is not at all what would result from recognizing apparent authority.

An understanding of the precise nature of the question presented shows the error of the above statement of the Arizona court. It also demonstrates both the narrowness of the question, and the modest degree to which answering the question in Petitioner's favor might impose any burdens on Indian Tribes.

Apparent authority is a doctrine of law which imposes liability upon a principal for the act of an agent, even if no actual authority exists for the agent's actions. This liability arises when acts or manifestations of the principal lead the opposite party to believe that the agent's actions were done with authority.

The doctrine of apparent authority is well-established in federal law. This Court defined it for federal cases in *Am. Society of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, n. 5 (1982):

> "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, *arising from and in accordance with the*

> *other's manifestations to such third persons.* RESTATEMENT (SECOND) OF AGENCY § 8 (1957)." (Emphasis supplied.)

"The other" in this Restatement rule refers to the principal. That is, if the principal has "manifested" to third persons facts or circumstances from which the "third person" would reasonably believe the agent had authority to act, then apparent authority holds that the agent *did* have authority to bind the principal. The newest version, RESTATEMENT (THIRD) AGENCY § 2.03 (2013), describes the principle a bit more clearly:

> "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal *and that belief is traceable to the principal's manifestations*." (Emphasis supplied).

The question presented is simply whether manifestations by tribal officials – statements or actions – leading Petitioner to believe that what was a crystal clear waiver of the Nation's sovereign immunity was authentic, should bind the Nation to that waiver. To answer that question in the affirmative would not spring any surprise upon the tribal officials. It would not cause any disruption in existing doctrines of Indian sovereign immunity. On the other hand, to answer that question in the negative *will* sanction what is a frequent surprise, and trap, for a party contracting with a tribe, which had been led to believe the waiver had been authorized.

3. Petitioner does not ask this Court to vacate, overrule or modify any of its existing jurisprudence on the existence or scope of sovereign immunity, nor on what tribal actions may constitute such a waiver.

This Court has recognized that "there are reasons to doubt the wisdom of perpetuating the doctrine" of Indian sovereign immunity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 758 (1998). As Justice Stevens noted in an oft-cited concurrence: "The doctrine of sovereign immunity is founded upon an anachronistic fiction." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (Stevens, J., concurring). It has been said that the manifold commercial enterprises that Indian tribes now engage in "look the same as any other—except immunity renders the tribes largely litigation-proof." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2051 (2014) (Thomas, J., dissenting). The doctrine has the potential to do harm to those dealing with tribes. *Kiowa, supra*, 523 U.S. at 758.

But Petitioner does not here challenge the existence or scope of sovereign immunity. The question Petitioner presents would, however, help blunt the unfairness and inequity that this Court recognizes can arise, by permitting apparent authority to set right situations where tribal officials, themselves, have led counterparties into the mistaken belief that all had been done which needed to be done in order to deliver a valid and binding waiver of sovereign immunity.

Nor does this case present the question of whether the waiver was "clear and unequivocal." *Merrion v. Jicarilla Apache Indian Tribe,* 455 U.S. 130, 148, (1982); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, (1978). The clarity of the waiver was not at issue below, nor is it a question presented here. Petitioner obtained the clearest possible waiver that it could, from the officials that responsible officials of the Respondent Yavapai-Apache Nation manifested by word and deed to MM&A were authorized to do so. ROA 2, Ex. B, C. They fully complied with, *e.g. Merrion, supra* , and *Santa Clara*, *supra* . Petitioner does not seek review involving this Court's cases requiring clarity. Indeed, that law is, itself, clear.

But when the time came to rely upon that waiver, when the contract was breached, Respondent Casino surprised Petitioner by repudiating its previous representations that the waiver had been authorized. So the question presented in this case involves the apparent authority of the involved tribal officials to execute and deliver the clear waiver that they did. That is *not* a question implicating this Court's existing case law on sovereign immunity, no matter how long-past or how recent. It *is* a question never yet dealt with by this Court.

4. The question presented here is important and warrants this Court's determination. The large number of Indian tribe dealings with counterparties demonstrates the broad impact this question may have. Further, permitting tribal officials to act in a way which would manifest apparent authority, but excusing liability, permits patent injustice in tribal dealings with others.

The vast extent of Indian tribal commerce with others is well known, and needs no belaboring here. Just last term, in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), this Court recognized the vast scope of modern Indian commerce:

- There are a reported 564 federally recognized Indian tribes. 134 S. Ct. at 2043 (Sotomayor, J, concurring).[5]
- In addition to gaming, tribes engage in "tourism, recreation, mining, forestry, and agriculture[.] [T]ribes engage in 'domestic and international business ventures' including manufacturing, retail, banking, construction, energy, telecommunications and more. . . . They sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting cards companies, national banks, cement plants, ski

[5] *Citing* A. Meister, Casino City's Indian Gaming Industry Report 28 (2009-2010 ed.)

resorts, and hotels." 134 S. Ct. at 2050, 51 (Thomas, J, dissenting).[6]

- In 2012, the Combined tribal gaming revenues in 28 States were $27.9 billion. 134 S. Ct. at 2050 (Thomas, J, dissenting).[7]

There can be no doubt that the issue of the authority of a tribal official to engage in the various kinds of transactions that may arise in this myriad of different businesses is an important and recurring one. It is one which this Court has not addressed, but should.

It may be that, after consideration, this Court might conclude that Indian tribes ought not to be subject to apparent authority. But the issue deserves plenary consideration, because that result would permit misleading and unjust dealings by tribes, with counterparties. The facts of *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271 (Neb. 2011) demonstrate the point.

The waiver of immunity at issue in *StoreVisions* was signed by the chairman and vice chairman of the Tribe, in the presence of five of the seven members of the tribal council. 795 N.W.2d at 247. Nonetheless, when there came a falling out, the Tribe denied having waived sovereign immunity, claiming that only a

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[6] *Citing* Graham, *An Interdisciplinary Approach to American Indian Economic Development,* 80 N.D. L. REV. 597, 600-604 (2004).

[7] *Citing* National Indian Gaming Commission, 2012 Indian Gaming Revenues Increase 2.7 Percent (July 23, 2013).

resolution voted upon by the full council would have granted authority for the waiver. As noted above, the *StoreVisions* court discussed and approved application of the doctrine of apparent authority. It held that the waiver was valid.

However, if *StoreVisions* had rejected apparent authority, an obvious injustice would have resulted. StoreVisions would have been misled into a business transaction reasonably believing, based upon manifestations of tribal officials, that a valid waiver had occurred. It then would have been left with no remedy.

With the existing circuit split, the potential for injustice and for misleading counterparties is real and can occur, in the 6th, 10th and 11th circuits. In the state courts of Colorado and Nebraska, however, that is not the case.

If the harsh rule now extant in three circuits is to stand, it should only be so after this Court has considered the issue. Petitioner asserts that the reasonable approach taken by the Colorado and Nebraska courts should govern. In any event, however, the split of court positions on the question should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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