

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

LOYMAN COSSEY,)
)
 Plaintiff/Respondent,)
)
 v.) No. 105,300
)
 CHEROKEE NATION ENTERPRISES,)
 LLC, formerly known as CHEROKEE)
 NATION ENTERPRISES, INC.; and)
 CHEROKEE NATION ENTERPRISES,)
)
 Defendant/Petitioner.)

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SUPREME COURT
STATE OF OKLAHOMA
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On Petition for Certiorari to the District Court of Rogers County,
Hon. Dynda Post, District Judge

**BRIEF *AMICI CURIAE* OF THE CHOCTAW NATION OF OKLAHOMA
AND THE CHICKASAW NATION IN SUPPORT OF
DEFENDANT-PETITIONER CHEROKEE NATION ENTERPRISES, L.L.C.**

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Come now the Choctaw Nation of Oklahoma (“Choctaw Nation”) and the Chickasaw Nation (jointly, “*Amici Nations*” or “*Amici*”) with the written consent of counsel for Petitioner and Respondent (*see* Attachment 1) to timely submit this Brief *Amici Curiae* in Support of Petitioner Cherokee Nation Enterprises (“Cherokee Nation” or “CNE”) in accord with OKLA. SUP. CT. R. 1.12(a)(1), 1.12(d)(1), and 1.55.

SUMMARY OF THE RECORD

Amici Nations adopt the Summary of the Record provided by CNE in its Brief-in-Chief.

INTERESTS OF *AMICI*

The United States forcibly removed both *Amici Nations* to what is now Oklahoma in the 1830s under well known circumstances. This removal was premised on the federal promises memorialized in the Treaty of Dancing Rabbit Creek, the rights of which were later extended to the Chickasaw Nation, *see Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995). Therein, the United States guaranteed it would:

secure to the said Choctaw Nation of Red People the jurisdiction of government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants. . . ; but that the U.S. shall forever secure said Choctaw Nation from . . . all laws except . . . their own . . . , not inconsistent with the . . . Laws of the United States

Treaty of Sept. 27, 1830, art. IV, 7 Stat. 333, 334. In light of this treaty’s uniquely strong protections—which parallel those found in the treaties executed by the other of the so-called “Five Civilized Tribes”—the recognized and exercised authority of those tribes generally exceeded the federally recognized rights of other sovereign American Indian nations. *See generally Atlantic & Pac. Ry. Co. v. Mingus*, 165 U.S. 413 (1897); *Mackey v. Cox*, 59 U.S. (18 How.) 100 (1855). More recently, the Supreme Court has presumed those treaty guarantees

remain in force for purposes of matters arising within Choctaw and Chickasaw Indian country, *see Chickasaw Nation*, 515 U.S. at 466; indeed, a minority concluded therein that those guarantees retain extraterritorial import. *See id.* at 468-71 (Breyer, Stevens, O'Connor, and Souter, JJ., dissenting). The Court's ruling in this matter will almost necessarily implicate the continuing scope of those sacred treaty guarantees.¹

Both *Amici* Nations now conduct tribal government gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq.* As required by IGRA, *see* 25 U.S.C. § 2710(d)(1)(C), both conduct Class III gaming pursuant to compacts with Oklahoma that parallel each other as well as the Cherokee Compact. Accordingly, the Court's ultimate construction of the Cherokee Compact will likely impact future constructions of *Amici* Nations'.

These tribal government gaming operations generate substantial benefit for Oklahoma's tribal *and* non-tribal populations. Consistent with IGRA, *Amici* Nations' gaming revenues are expended for tribal citizen health, safety, and welfare programs and benefits that reach the two tribes' more than 175,000 combined citizenry. Additionally, pursuant to their compacts, *Amici* Nations and the Cherokee Nation support statewide programs through the annual payment to the State tens of millions of dollars. Finally, these tribal nations employ tens of thousands of persons and, on top of the compact-required payments, *voluntarily* provide additional revenues to support local and county governments. In total and looking solely at the direct financial impact, "[A]ll of Oklahoma" benefits from tribal gaming. 3A O.S. § 281, part 2(6). The Court's

¹ In the event this Court grants the requested Writ in *Dye v. Choctaw Casino of Pocola*, No. 104,737 (cert. pending), *Amicus* Choctaw Nation will invoke in those proceedings these treaty provisions, the Supreme Court's reasoning in *Chickasaw Nation*, and other arguments in addition to those offered herein. Likewise, *Amicus* Chickasaw Nation will do the same in any similar future case in which its own interests are implicated. But for present purposes, *Amici* Nations confine their arguments to the preemptive federal law backdrop that necessarily informs the present case.

consideration and resolution of this case may directly impact tribal government gaming operations—including those of *Amici* Nations—thus impacting the attendant and widespread benefits.

Finally, Congress has declared that tribal court systems are “an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.” 25 U.S.C. § 3601(5). Indeed, while in some sense many Oklahoma tribal court systems may be linked to initiatives of the 1970s, *see generally* Dennis W. Arrow, *Oklahoma Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY. U.L. REV. 5, 16-72 (1994), the tribal codes and court systems of *Amici* Nations and other Oklahoma tribes trace back a hundred years or more before Oklahoma statehood. *See id.* at 8-9 & nn.2-5. While each court system distinctly represents the tribal sovereign that created it, *Amici* Nations and the Cherokee Nation each maintain a judicial system capable of satisfying the due process requirements of its own gaming compact. This critical and ancient heritage notwithstanding, the Court’s ruling here may purport to expand state jurisdiction to the prejudice of these existing tribal governing systems.

Finally, the gaming compacts Oklahoma executed with each gaming tribal government were intended to foster working and positive government-to-government relations, *cf., e.g.*, 3A O.S. § 281, part 2(3), and better secure the interests outlined above. So far, that relationship has thrived and redounded to the benefit of *all* Oklahomans. Recent Oklahoma appellate decisions, however, have misconstrued the relationship on which those compacts were based—*see Dye v.*

Choctaw Casino of Pocola, (Okla. Ct. Civ. App. Dec. 14, 2007), *pet. for cert. filed* Jan. 4, 2007²; *Bittle v. Bahe*, 2008 OK 10 (Feb. 5, 2008)³—and out of a profound concern that federal Indian law be accurately applied in Oklahoma and that tribal rights be protected, *Amici* Nations have sought the attention of this Court. We have carefully crafted this brief in the hope that its explication, information, and outline of controlling authority will furnish the Court with a useful and accurate lens for purposes of examining the case submitted to it. We are confident that, with such clear lens in hand, the Court will reaffirm its sound conclusion rendered in the materially identical matter of *Muscogee (Creek) Nation Gaming Commission v. Fitzgerald*, No. 104,726 (Okla. Sup. Ct. July 2, 2007) (unpub’d).

² *Amici* submit that *Dye* is, unfortunately, little more than a solution looking for a problem. As the Choctaw Nation has argued throughout those proceedings, each of the gaming tribes have court systems empowered to provide tort claimants with due process for purposes of Compact-related claims. Nonetheless, the *Dye* court erroneously held that the Choctaw courts lacked jurisdiction over simple tort claims. By contrast, here in *Cossey*, we have the inverse: Not only has Respondent *not* challenged the jurisdiction of the Cherokee Nation’s courts but he has asserted to the District Court that “*in the event the Court determines this action is only proper in Cherokee Nation Tribal Court, Plaintiff requests this Court transfer this action to the Cherokee Nation Tribal Court.*” See Plaintiff’s Response to Motion to Dismiss at 20, *Cossey*, No. CJ-2006-762 (D.Ct. Rogers County filed Apr. 30, 2007) (emphasis added). In other words, he has posited that proceeding in tribal court would be an acceptable resolution, and Petitioner has replied that “If such a procedure is available, CNE has no objection.” See Defendant’s Reply to the Plaintiff’s Response at 13 n.10, *Cossey*, No. CJ-2006-762 (D. Ct. Rogers County, filed June 15, 2007). By this light, it seems that the true “problem” underlying *Dye* and *Cossey* is that, here, Respondent filed his claim in the wrong court while the *Dye* plaintiffs would *prefer* to be in a state court, notwithstanding their correct filing in tribal court.

³ *Amici* Nations believe that this Court incorrectly ruled in *Bittle*, but that is of no moment, here, since *Bittle* is wholly inapplicable to this case. That is so because: (1) Indian country liquor regulation is something of an anomaly in federal Indian law, *see, e.g., Rice v. Rehner*, 463 U.S. 713 (1983); *United States v. Mazurie*, 419 U.S. 544 (1975); (2) this Court’s pending *Bittle* decision is virtually *in toto* an interpretation of 18 U.S.C. § 1161, both for purposes of state court civil-adjudicatory jurisdiction and tribal sovereign immunity, *see* 2008 OK 10, ¶¶13, 30-38, 48; (3) this Court’s alternative *Bittle* holding on the subject of tribal sovereign immunity is contingent on tribal waivers based on state and federal laws pertaining to alcoholic beverage regulation, not a compact provision, *see id.* ¶¶48-52; (4) *Bittle*, at least implicitly, invokes the “ultraplenary state power” theory stemming from Section 2 of the Twenty First Amendment, which is not implicated here, *see id.* ¶¶33-34; and (5) perhaps most importantly, *Bittle does not involve any interpretation of any gaming compact, see id. passim.*

SUMMARY OF ARGUMENT

Amici Nations have prepared this brief for purposes of a comprehensive yet accessible overview of relevant federal Indian law. The first question essentially posed by this case is: Who decides disputes arising under the relevant Compact, including disputes over which forum may hear compact-related tort claims? Accordingly, in Part I, we demonstrate that the Compact provides exclusively for enforceable arbitration and post-arbitration *de novo* federal court review of any Compact dispute, *specifically including disputes over Compact interpretation*. *Amici* therefore respectfully submit that the Compact precludes Oklahoma Courts from deciding novel matters of compact interpretation. We particularly make that argument here, where Respondent urges an assertion of State jurisdiction at odds with the preemptive federal law of Indian country civil-adjudicatory jurisdiction and which would do facial violence to the Compact. In fact, without any Executive Branch invocation of the Compact's dispute resolution machinery, Respondent presses for an unfounded and unilateral exercise of State jurisdiction that would, of itself, constitute a breach of the Compact submitted for enforcement.

Second, in Parts II and III, *Amici* Nations emphasize that careful and principled application of federal Indian law—including both its case and statutory law—is fundamentally critical to the production of a correct decision in *any* Indian law case. Though the content of that law is complex, *Amici* respectfully offer what they hope this Court will view as a roadmap that its own research can confirm. Failure to adhere to a conservative and principled application of this law risks chaos to this important area of intersovereign relations.

Turning to the particular dispute presented, *Amici* finally argue in Part IV that to validly exercise any judicial power over anyone, a court must have jurisdiction over *both* the subject

matter *and* the person of the defendant. *See, e.g., Abraham v. Homer*, 102 Okla. 12, 14, 226 P. 45, 47 (1924). Those prerequisites to jurisdiction are distinct, with the presence (or absence) of one not signifying the presence (or absence) of the other. *See, e.g., Jack H. Friedenthal, et al., CIVIL PROCEDURE* 9 (4th ed. 2005). Equally axiomatic, subject matter jurisdiction and personal jurisdiction must be ascertained “in compliance with all existing mandatory law,” including the federal law of Indian affairs that controls here. *See Abraham*, 102 Okla. at 14, 226 P. at 47. *Accord* U.S. CONST., art. VI, cl. 2. In this case, federal law—including but not limited to Public Law 280—preempts Oklahoma from exercising subject matter jurisdiction over a compact-related tort claim brought against a tribal government entity. As in *Williams v. Lee*, 358 U.S. 217 (1959), this analysis is wholly separate and distinct from any construction of a *waiver of tribal sovereign immunity*.⁴ And contrary to what is erroneously implied in *Dye*, no waiver of sovereign immunity or other affirmative defense to personal jurisdiction can make up for a court’s lack of subject matter jurisdiction. This limitation, as explained more fully below, is preserved at Part 9 of the Compact and controls this case.

ARGUMENT AND AUTHORITIES

I. THE COMPACT’S COMPREHENSIVE REMEDIAL PROVISIONS (PART 12) ARE EXCLUSIVE, AND A UNILATERAL ASSUMPTION OF STATE JURISDICTION OVER THIS CASE WOULD CONSTITUTE A BREACH OF THAT INTERSOVEREIGN AGREEMENT.

The threshold issue in this case is who decides what the Compact means? Happily, the Compact itself answers that question with unmistakable clarity. To wit:

⁴ *Amici* Nations do not dispute that Part 6(C) of the Compact effectuates a limited waiver of immunity for purposes of compact-related tort claims brought in the appropriate *tribal* fora.

In the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, *including . . . dispute[s] over the proper interpretation of the . . . Compact . . .*:

2. [E]ither party may refer a dispute arising under this Compact to *arbitration . . .* subject to *enforcement or* pursuant to *review* as provided by paragraph 3 of this Part *by a federal district court.*
3. [E]ither party . . . may bring an action against the other in a *federal district court* for the *de novo review* of any arbitration award

See 3A O.S. § 281, part 12 (emphasis added). This provision is consistent with the state-tribal policy choices made throughout the compact document. For example, Part 2(3) of the Compact states the mutual goal of promoting and maintaining a government-to-government relationship between the parties, and Part 2(24) defines the “State” as the *whole State*, including the Judicial Branch. The neutral forum and process established by Part 12 furthers not only this healthy intersovereign relationship but, equally clearly, also the uniform interpretation of compact provisions, taking those matters out of the hands of the judiciaries of the compacting parties and avoiding the multiplicity of rulings and directions that could otherwise (and unnecessarily) result.

But in the present case, Respondent has made no attempt to invoke this provision for purposes of resolving the current compact interpretation dispute. As the Compact itself proves, Respondent has no right—nor does Oklahoma—to legally place such matter before the State’s judicial branch. Such action, in fact, risks a violation of the specific and limited dispute resolution mechanisms provided for at Part 12.

For comparison and substance, note that Parts 3(13), 3(26), 5(A), and 6(A) make explicit that the obligation to provide casino patrons with due process for tort claims falls on the gaming

tribe, not the state. Part 6(A) expressly provides that compact-related tort claims are, first, subject to a *tribal administrative process* and that exhaustion of such administrative process is an *absolute and unavoidable prerequisite* to any judicial proceeding. Further, Part 8(D) *precludes the State* from “regulat[ing] the tribe’s government,” including its fulfillment of its compact obligations—*e.g.*, the provision of due process to compact-related tort claimants. Any tribe that failed to fulfill these prospective obligations would risk being caught up in the Part 12 machinery and, upon any continued breach, would almost certainly have its casinos closed by the National Indian Gaming Commission. *See, e.g.*, 25 U.S.C. § 2710(d)(1)(C); 25 C.F.R. part 573. *Amici* submit that any compacting tribe that refused to fulfill its compact obligation—*e.g.*, Parts 3(13), 3(26), 5(A), and 6(A)—would reap what it had sown. Regardless, no such situation is now before this Court, as there is no allegation—let alone proof—that the Cherokee Nation has refused any process to which Respondent is due.

Amici Nations emphasize Part 12 to demonstrate: (a) the compacting parties’ express contemplation of disputes such the one presented here, (b) the gravity of the matter now before the Court, and (c) that a route for resolution exists that does no violence to federal Indian law, the compacts, or Oklahoma tribal-state relations. Accordingly, prudence—not to mention the law—counsel for the sober consideration of this case in accord with the principled and conservative application of well established rules of federal Indian law.

II. INDIAN COUNTRY JURISDICTIONAL DISPUTES REQUIRE METICULOUS ATTENTION TO THE CONTROLLING FEDERAL CASE LAW.

Amici Nations have carefully prepared this brief in the hope that it will serve as a clarifying lens through which to view the complexities of the controlling federal law of Indian country jurisdiction. To that end, this section provides a (relatively) succinct yet comprehensive

overview of the relevant law and legal principles that control this case. Not to put too fine a point on it, but failure to appreciate the importance of these foundational principles risks generation of a chaotic, arbitrary, and capricious body of precedent based *not* on the principled application of the law but on the perceived politics of the moment. Sadly, the vast corpus of Indian law provides ample examples of that fact. *Amici* Nations accordingly and respectfully submit that, regardless of outcome, the principled and conservative adherence to well established federal Indian law analytic frameworks will ultimately best serve state, tribal, and federal interests of both private and public scope.

A. DEPENDING ON THE FACTS AND PARTICULAR STATUTORY FRAMEWORK, A TOTAL OF TWELVE CATEGORIES OF JURISDICTION GENERALLY CAN BE ASSERTED IN INDIAN COUNTRY.

Federal law establishes one factor—the existence of “Indian country”—as a condition precedent to *most* (but not all) federal Indian law analyses. Federal law pursues the rest of its inquiries by segmenting into four groups the specific *type of jurisdiction* sought to be exercised: (1) criminal, (2) civil-adjudicatory,⁵ (3) regulatory, and (4) taxation. In any given case, each of the three sovereigns with colorable interests within Indian country—*i.e.*, the federal and relevant

⁵ As a historical matter, the phrase “civil-adjudicatory jurisdiction” entered the federal Indian law lexicon following the United States Supreme Court’s decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976). Although “civil” often denotes “noncriminal,” in light of extrinsic statutory text, policy, and the federal-Indian law canons of construction, *see, e.g., infra* at pp. 20-21, the *Bryan* Court construed Public Law 280’s use of “civil” in a narrower sense, *i.e.*, denoting only *adjudicatory* jurisdiction, not “regulatory” or “taxation.” *See* 426 U.S. at 378-93. *Accord* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (employing the adjective “civil,” but making clear that the type of jurisdiction to which the Court refers is the *civil-adjudicatory* exercise of *judicial* power by tribal courts). The Supreme Court subsequently adopted the four-part taxonomy outlined above as useful for cases *not* involving Public Law 280, as well. *But it must be noted in non-Public Law 280 states—such as Oklahoma—the state’s status as such is virtually always dispositive for purposes of assessing state civil-adjudicatory jurisdiction.*

state and tribal governments⁶—may seek to claim jurisdiction within one of those four groups, giving us our twelve-category matrix of Indian country jurisdictional disputes. Within that matrix, *Cossey* is a State civil-adjudicatory jurisdiction case. The general rules that apply to each category within this matrix are typically (but not always) generated by federal common law, and Congress, of course, is free to alter or amend those rules pursuant to its asserted plenary and exclusively federal authority over Indian affairs.⁷

B. THE STATUS (E.G., TRIBAL OR NON-TRIBAL) OF THE SUBJECT-PARTY MAY BE DETERMINATIVE OF THE JURISDICTIONAL ANALYSIS.

Within each of the twelve categories in our matrix, the status of the interests—*i.e.*, Indian, tribal, or non-Indian, non-tribal—that would be criminally sanctioned, civilly adjudicated, regulated or taxed is often dispositive. This status, for example, will determine criminal jurisdiction under the federal Major Crimes Act and civil-adjudicatory authority under Public Law 280, assuming the question arises in a state that has accepted responsibility with respect to Indian country matters under that federal statute. This point has proved crucial in cases such as *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), wherein the Supreme Court has rejected assertions of *tribal* civil-adjudicatory jurisdiction over (1) state officers executing a search warrant attendant to the investigation of an off-reservation crime (*Hicks*) and (2) non-Indian tort claims filed against non-Indians and arising

⁶ See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) (“Indian tribes are sovereigns.”). See also *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980) (“[I]t must be remembered that tribal sovereignty is . . . subordinate to only the Federal Government, not the States.”).

⁷ See, e.g., IGRA, 25 U.S.C. § 2701, *et seq.* (statutorily modifying *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)). Accord generally *United States v. Lara*, 541 U.S. 193 (2004) (affirming Congress’s authority to modify the exerciseable bounds of inherent tribal sovereignty).

on the equivalent of non-Indian fee lands within a reservation (*Strate*).⁸ Other than this Court's recent and as-yet unpublished ruling in *Bittle*,⁹ undersigned counsel are unaware of *any* case affirming *state* civil-adjudicatory jurisdiction over an Indian tribe or tribal government entity for actions tied to Indian country—such as is the case here—outside of specific and express statutory contexts not relevant here.

C. AN ASSESSMENT OF THE SUBJECT-PARTY'S STATUS FOR SUBJECT MATTER JURISDICTION GROUNDS IS NOT AN ASSESSMENT OF A TRIBAL SOVEREIGN IMMUNITY DEFENSE, ASSUMING SUCH DEFENSE IS EVEN AVAILABLE.

Finally, in querying the status of the subject-party, it is *critical* to recognize that *the question, at this stage, is not whether the subject entity or interests possesses a sovereign immunity from suit*, a waivable affirmative defense to personal jurisdiction; *the question is whether the would-be prosecuting, adjudicating, regulating, or taxing sovereign has non-consentable jurisdiction over the subject matter*.¹⁰ For example, the Supreme Court's ruling in the state civil-adjudicatory case of *Williams v. Lee, supra*, turned on (1) the locus of the transaction giving rise to the cause of action, *i.e.*, Indian country; and (2) the status of the would-be defendant, *i.e.*, a tribal citizen. The Court's analysis *in no way rested on tribal sovereign immunity*; it instead turned on the subject matter jurisdiction of the state courts to interfere with tribal self-government. Conversely, in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Supreme Court indicated that *even if* subject matter jurisdiction lay with the

⁸ See Briefing of Appellees at 12-15, *Dye*, No. 104,737 (Okla. Ct. Civ. App. filed Sept. 10, 2007) (distinguishing *Hicks* and *Strate* for purposes also relevant herein), of which *Amici* Nations request the Court take judicial notice.

⁹ See *supra* at n.3 and accompanying text.

¹⁰ See, *e.g.*, *Blatchford*, 501 U.S. at 785-86 n.4; *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989).

state, its assertion of that authority can be foreclosed by tribal sovereign immunity.

Finally, the distinction between subject matter jurisdiction and tribal sovereign immunity is well founded. Indeed, Tenth Circuit very recently affirmed it in a case arising in Oklahoma:

In Blatchford, the Supreme Court . . . explained “[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct.” *The district court erred when it conflated the distinct concepts of subject matter jurisdiction and sovereign immunity.*

Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm’n, 2007 WL 4553668 (10th Cir. Dec. 26, 2007) (citations omitted) (final emphasis added). While this distinction may sometimes result in a valid and legally correction conclusion that, for example, a state has the right to regulate without the power to enforce,¹¹ the Supreme Court has indicated that is a function of the law that is for Congress, not the courts, to alter.¹²

III. ABSENT A FEDERAL STATUTE SPECIFICALLY AUTHORIZING STATE JURISDICTION, FEDERAL LAW MAY BAR ASSERTIONS OF SUCH AUTHORITY ON ANY ONE OF THREE SEPARATE GROUNDS: INFRINGEMENT, PREEMPTION, OR BALANCE-OF-INTEREST.

Within the matrix outlined above, federal law has created three distinct bases for rejecting state jurisdiction over tribal Indian country matters: (1) infringement, (2) preemption, and (3) balance-of-interests. Any of those bases can, independently, bar the assertion of state authority. Where multiple bases are implicated, the ejection of state authority is virtually

¹¹ See, e.g., *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998) (“There is a difference between the right to demand compliance with State laws and the means available to enforce them.”).

¹² *Id.*

assured.

In *Williams v. Lee*, *supra*, the United States Supreme Court held that Arizona's attempted exercise of civil-adjudicatory jurisdiction over a non-Indian's effort to collect a debt from a tribal citizen and arising from an Indian country transaction was invalid as having "infringe[d]" on fundamental and inherent tribal rights to self-governance. *See id.* at 220. The Court subsequently clarified its *Williams* holding in *McClanahan v. State Tax Commission*, 411 U.S. 164, 179 (1973), wherein it noted that *Williams* and its progeny have primarily involved non-Indian plaintiffs seeking relief against tribal entities relating to Indian country-based causes of action. The Court further explained that "[t]he *Williams* test was designed to resolve [the] conflict [between the competing tribal and state interests] by providing that the State could protect its interest *up to the point* where tribal self-government would be affected." (Emphasis added.) In other words, the Court held that a state's attempt to adjudicate a matter that should rightly be tried in a tribal forum *interfered with tribal self-governance* and was accordingly barred by federal law.

In *McClanahan*, the Supreme Court further noted that the jurisprudential trend in state civil-adjudicatory cases was *away* from sole reliance on inherent sovereignty and *toward* federal pre-emption. *See* 411 U.S. at 172. This point helps to emphasize a basic distinction between "infringement" and "preemption": On the one hand, infringement focuses on interference with *tribal sovereignty* while, on the other, preemption turns on interference with *federal law*. Both are valid and independent bases for barring state jurisdiction. The Supreme Court has reemphasized since *McClanahan* that "a State will *certainly* be without jurisdiction if its authority is preempted under *familiar* principles of preemption," *New Mexico v. Mescalero*

Apache Tribe, 462 U.S. 324, 334 (1983) (emphasis added).

Finally, in addition to reaffirming *Williams* infringement and clarifying the application of federal law preemption principles in the Indian law context, *McClanahan* effectively paved the way for a third grounds for barring state authority. Reasoning that the “Indian sovereignty doctrine . . . provides a *backdrop* against which the applicable treaties and federal statutes must be read,” 411 U.S. at 172, the Court created a “balancing” *aspect* of “preemption” by which federal, tribal, and state interests would be weighed as a (dispositive) “backdrop” to any arguably preemptive treaties or federal statute. As the Court later explained, either *Williams* infringement or *McClanahan* preemption can be an individually and independently sufficient basis for holding state law inapplicable to an activity undertaken within Indian country or by tribal members, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980), and because “preemption” would itself henceforth consist of *two* conceptually discrete components—*i.e.*, (1) “familiar” Supremacy Clause preemption and (2) what may usefully be named “preemption/balancing”—in the absence of a specific federal statute affirmatively *granting* jurisdiction to a state, federal Indian law provides *three* potential doctrinal barriers to any state assertion of Indian country jurisdiction. *See id.* at 143-45.¹³

¹³ The United States Supreme Court has explicitly held that “a State will *certainly* be without jurisdiction if its authority is preempted under *familiar principles of preemption*.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (emphasis added). If those “familiar” principles did *not* apply, Congress could enact a preemptive Indian law statute that could trigger “balancing” and conceivably result in *state* interests outbalancing, by some measure, implicated tribal and *federal* interests. Such a result would absurdly stand the Supremacy Clause on its head but are not required by the law. “Familiar” Supremacy Clause preemption means *preemption*, plain and simple, and “familiar” preemption neither triggers balancing nor tolerates quasi-common-law theorization. *See* U.S. Const. art. VI, para. 2 (“[T]he *Laws of the United States* . . . shall be the *supreme Law of the Land*; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (Emphasis added.)

IV. FEDERAL INDIAN LAW OF CIVIL-ADJUDICATORY JURISDICTION BARS OKLAHOMA FROM EXERCISING JURISDICTION OVER TORT CLAIMS BASED ON ALLEGATIONS ARISING WITHIN INDIAN COUNTRY AGAINST AN INDIAN TRIBE, NOTWITHSTANDING ANY PURPORTED WAIVER OF CHEROKEE NATION SOVEREIGN IMMUNITY.

A. PART 9 OF THE COMPACT PRESERVES THE STANDING FEDERAL LAW PREEMPTION OF OKLAHOMA CIVIL-ADJUDICATORY JURISDICTION IN THIS CASE, EVEN WITHOUT REFERENCE TO TRIBAL SOVEREIGN IMMUNITY.

As noted in Part III, there are three independent bases for the displacement of state jurisdiction in any of the four jurisdictional groups, which groups are generally described in Part II. Compelling “infringement” and “preemption/balancing” arguments relating to Oklahoma’s civil-adjudicatory jurisdiction are here available. However, given the power and vitality of the “familiar” preemption analysis in this case, we have chosen to focus on it.¹⁴

In its entirety, Part 9 of the Compact provides: “This Compact *shall not alter* tribal, federal, or *state civil adjudicatory* or criminal *jurisdiction.*” OKLA. STAT. tit. 3A, § 281 (emphasis added). No embellishment can enhance the clarity of those words, and they raise a critical question: What is the law that was not altered? It is *Amici* Nations’ position that the relevant and controlling federal law that Part 9 expressly preserved—intact and without any jurisdictional shifting—preempted and preempts Oklahoma’s exercise of civil-adjudicatory jurisdiction in this case. *See, e.g., Doe v. Santa Clara Pueblo*, 154 P.3d 644, 649 (N.M. 2007) (“[A]s a general proposition of Indian law . . . tribal courts have *exclusive jurisdiction* over claims arising on tribal lands against tribes” (Emphasis added.)).

Public Law 280, 67 Stat. 588 (1953), was the first federal jurisdictional statute of general applicability to Indian country. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 471

¹⁴ *See* n.13, *supra*.

(1979). Standing alone, it is a preemptive “governing Act of Congress.” See *Kennerly v. District Ct.*, 400 U.S. 423, 427 (1971), and it establishes the *sole method* through which states not otherwise granted general Indian-country civil-adjudicatory jurisdiction—*e.g.*, through state-specific blanket statutes¹⁵ or granted Indian-country civil-adjudicatory jurisdiction over limited and enumerated categories of cases¹⁶—may acquire it. See *id.* at 424-27.¹⁷ *Amici Nations*

¹⁵ See, *e.g.*, Pub. L. No. 81-785, Act of Sept. 13, 1950, ch. 947, 64 Stat. 845, 846 (granting New York civil-adjudicatory jurisdiction over actions to which an Indian is a party, wherever arising).

¹⁶ In *Bittle*, this Court noted the existence of a “series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts.” See *Bittle*, 2008 OK 10 at n.7 (citing *Williams v. Lee* at n.6, which cites UNITED STATES DEP’T OF INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 985-1051 (1958 ed.)). The sixty-six page excerpt from the Department of the Interior’s 1958 revision of Felix Cohen’s original 1941 *Handbook of Federal Indian Law* that the *Williams* Court cited, and on which this Court in turn relied, reveals that those pages are the *entirety* of the last section (“Special Laws Relating to Oklahoma”) of that work’s Chapter XI (“Special Groups and Laws”), which outlines and discusses, *inter alia*, the federal statutes that explicitly provide Oklahoma state courts with civil-adjudicatory jurisdiction over narrowly defined *Indian-country probate, guardianship, and some related conveyancing matters*. See generally, *e.g.*, Act of May 27, 1908, ch. 199, § 6, 35 Stat. 312, 313 (providing “[t]hat the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma”); *id.* § 8, 35 Stat. 315 (granting concurrent civil-adjudicatory jurisdiction in enumerated will-approval cases, formerly exercised exclusively by United States territorial courts or commissioners, to “judge[s] of a county court of the State of Oklahoma”); Act of June 14, 1918, ch. 101, § 1, 40 Stat. 606 (providing “[t]hat a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes who may die or . . . heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma . . . [may be appealed] to the court provided by law for the appeal in cases of appeal in probate matters generally”); Act of Apr. 10, 1926, ch. 115, § 1, 44 Stat. 239, 240 (retroactively validating all conveyances by full-blood Indian heirs previously approved by Oklahoma probate courts under the authority of Section 9 of the Act of May 27, 1908, “except where more than one such conveyance of the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties”); Act of May 10, 1928, ch. 517, § 2, 45 Stat. 495 (extending, with exceptions, the force of Section 9 of the Act of May 27, 1908, as amended, through April 26, 1956); Act of Aug. 4, 1947, ch. 458, § 3, 61 Stat. 731, 732 (granting Oklahoma civil-adjudicatory jurisdiction over, and requiring their approval of, conveyances of interests in land, including oil, gas, and mineral leases, previously acquired by a half-blood-or-more Five Nations member heir or devisee when such interest “was restricted in the hands of the person from whom such Indian heir or devisee acquired same”). Contrary to implications of certain statements in *Bittle*, *none* of these statutes indicate that the American Indian tribes of Oklahoma somehow possess a “less than” version of inherent tribal sovereignty; instead, these statutes demonstrate that Congress (a) knows how to vest Oklahoma with civil-adjudicatory jurisdiction and (b) has only rarely and very narrowly ever done so.

submit, emphatically, that *Public Law 280 has at least the same preemptive force in Oklahoma as it has in any other "optional" Public Law 280 state whose courts were not otherwise explicitly invested with Indian country civil-adjudicatory jurisdiction by some other federal statute. See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993). As is well established, "the procedural requirements of Public Law 280 must be strictly followed," see *Yakima*, 439 U.S. at 484, and those procedural requirements include both state legislative action and tribal consent, see Pub. L. No. 90-284, tit. IV, § 402(a), 82 Stat. 79, 25 U.S.C. § 1322. See *Yakima*, 439 U.S. at 484. Oklahoma has never satisfied those requirements, see *Sac & Fox*, 508 U.S. at 115, and has even been counseled by the United States Supreme Court as to how it could proceed if it so chose, *i.e.*, "seek appropriate legislation from Congress," not activist law making by the courts. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 514 (1991). For purposes of this case, Oklahoma has taken no such step, and therefore, in view of the Part 9 of the Compact, the matter remains foreclosed as a matter of Supreme Court precedent.

¹⁷ In *Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007), the New Mexico Supreme Court concluded that in addition to the Public Law 280 procedures, IGRA "authorized the tribes to contract for jurisdiction shifting to state courts, *if they wished*." See *Doe*, 154 P.3d at 656 (construing 25 U.S.C. § 2710(d)(3)(C)(ii)) (emphasis added). Whether *Doe*'s interpretation of IGRA is correct is irrelevant to this case, however, because Part 9 of the Compact, here, evidences that its parties—unlike those in *Doe*, where the opposite intent was *explicit—intended and made no shift at all*.

Furthermore, it may be noted that the exercise of civil-adjudicatory jurisdiction by Oklahoma courts herein would be *redundantly* preempted by the line of statutes indirectly referenced in this Court's recent *Bittle* ruling, which statutes demonstrate the specific statutory attention that Congress has paid—from the dawn of statehood until shortly before Public Law 280—to Oklahoma's Indian country civil-adjudicatory jurisdiction. *See generally, e.g., Bittle*, at ¶30; *supra* at n.16. Furthermore, *none of those statutes is even arguably applicable to this case*. Thus, to whatever extent Oklahoma may be "different" from other non-Public Law 280 states for purposes of civil-adjudicatory jurisdiction, it is a difference that inures to Oklahoma's jurisdictional *detriment*. Simply stated, this body of statutes suggest that those matters of jurisdiction *not expressly covered* would be preempted *even if Public Law 280 did not exist*.¹⁸

In sum, there is no generally applicable "Oklahoma is different" exception in federal Indian law, and the preemptive force of Public Law 280 is *at least* as applicable to Oklahoma as it is to any other state. Given that threshold, Oklahoma's having not acquired civil-adjudicatory jurisdiction under Public Law 280's *exclusive procedures* preempts it from exercising it in *Cossey*. Finally, the congressional statutes granting Oklahoma courts Indian country civil-adjudicatory jurisdiction over narrowly-defined categories of cases demonstrates that (a) Congress knows how to provide jurisdiction where it wants to and (b) it has not for this case.

¹⁸ *See generally Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983).

B. PARTICULARLY IN LIGHT OF OKLAHOMA'S LACK OF CIVIL-ADJUDICATORY JURISDICTION, THE CHEROKEE NATION'S LIMITED WAIVER OF IMMUNITY IN A "COURT OF COMPETENT JURISDICTION" CANNOT COHERENTLY BE READ AS A SPECIFIC WAIVER TO SUIT IN OKLAHOMA COURTS.

In what may in a broad sense be deemed the "personal jurisdiction" arena, federal law also—and independently—occupies the field where a defendant is a federally recognized American Indian tribe.¹⁹ As is well established, this body of federal law demands that, to be effective, a tribal waiver of immunity must be clear and unambiguous as to all of its elements—such as its creation, its scope, and the court or courts in which the immunity is waived. Since, for all purposes material to this case, tribal sovereign immunity is at least as comprehensive as that preserved for the states by the Eleventh Amendment,²⁰ a tribe's immunity, like a state's, encompasses "not merely *whether* it may be sued but *where* it may be sued."²¹ The "unequivocality" component of this standard is a stringent one,²² and waivers cannot be found by implication.²³ Although "Congress has always been at liberty to dispense with . . . tribal immunity or to limit it," and "has occasionally authorized limited classes of suits against Indian

¹⁹ See *Kiowa*, 523 U.S. at 758 ("[T]ribal immunity is a matter of federal law."). See generally *Clark v. Bernard*, 108 U.S. 436, 447 (1883) (characterizing sovereign immunity as "a personal privilege" that may be "waive[d] at pleasure").

²⁰ See, e.g., *Kiowa*, 523 U.S. at 756; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268-69 (1997); *Blatchford*, 501 U.S. at 782. See generally *Alden v. Maine*, 527 U.S. 706, 719-24 (1999) (characterizing the Eleventh Amendment as having restored the states' sovereign immunity from suit after the United States Supreme Court had misanalyzed the issue in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

²¹ *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); see also, e.g., *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 503 (Conn. 2002).

²² See *Kiowa*, 523 U.S. at 754-60.

²³ See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509-10 (1991); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 173 (1977).

tribes,” it “has consistently reiterated its support of the immunity doctrine.”²⁴ In fact, the United States Supreme Court has explicitly deferred to Congress on that issue.²⁵ Finally, “[t]ribal immunity . . . is not subject to diminution by the States,” including those made by state courts.²⁶

Amici Nations submit that this collection of bedrock federal rules concerning tribal sovereign immunity weighs heavily—if not dispositively—against any conclusion that the Compact’s limited waiver provision vests Oklahoma courts with any jurisdiction over a compacting tribe. The Compact’s waiver provision only reaches to “a court of competent jurisdiction,” *i.e.*, a court that has jurisdiction over the subject matter. As already amplified above, such court is *not* an Oklahoma court for purposes of compact-based tort claims. To hold otherwise would merely crowbar the waiver into a pigeon hole for which it was never intended.

To be sure, the *Amici* Nations maintain that arguments briefed herein support this Court’s reaffirming its ruling in *Fitzgerald*, *supra* at p.4. Nonetheless, we respectfully submit that in the event that this Court has any doubt on the matter or otherwise construes the waiver as at all ambiguous as to any element,²⁷ then disposition of this appeal is controlled by the “eminently sound and vital canon,” *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7

²⁴ *Citizen Band Potawatomi*, 498 U.S. at 910.

²⁵ *See Kiowa*, 523 U.S. at 759-60.

²⁶ *See id.* at 756, 760.

²⁷ No less an authority than the United States Supreme Court has held the language relevant here—“court of competent jurisdiction”—to be “*at least* ambiguous.” *United States v. Morgan*, 467 U.S. 822 (1984) (emphasis added). Such general language seems particularly appropriate for narrow and careful construction where, as here, the dispute arises as to whether it authorizes suits in the court of a separate sovereign. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573 (1946).

(1976), that doubtful expressions in treaties, federal statutes, or federal Indian policies be resolved in favor of the Indians, *see, e.g., South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). *See also Bittle*, ¶15 (citing additional authority). Indeed, even the misguided *Dye* panel recognized this requirement. *Dye*, ¶35 (“[A]mbiguity in the Compact . . . would require resolution in favor of the Tribe.”).²⁸

While *Amici* Nations aver that decision in this case is properly based on subject matter (civil-adjudicatory) grounds, ambiguity in the waiver provides a likewise compelling basis for affirming this Court’s prior ruling in *Muscogee (Creek) Nation Gaming Commission v. Fitzgerald*, No. 104,726 (Okla. Sup. Ct. July 2, 2007) (unpub’d).

CONCLUSION

For the reasons stated herein, *Amici* Nations—the Choctaw Nation of Oklahoma and the Chickasaw Nation—respectfully submit to this Court that the matter of *Cossey v. Cherokee Nation Enterprises, LLC, et al.*, should be dismissed. As grounds therefore, we assert that Oklahoma lacks civil-adjudicatory jurisdiction over the subject matter, or alternatively, that the Cherokee Nation’s limited waiver of sovereign immunity does not specifically subject it to jurisdiction of the State’s courts for purposes of this dispute. *Amici* further submit that Respondent should be directed to proceed in the Compact-required tribal process, if still timely, and/or petition the Executive Branch of the State to initiate the Part 12 dispute resolution

²⁸ While summarily denying the existence of any ambiguities in the Compact, *see Dye*, at ¶35, the *Dye* Court does note elsewhere that: “Regrettably, neither ‘court of competent jurisdiction’ nor ‘judicial proceeding’ is defined by the Compact,” *id.* at 18 & 11 n.16; and that “Part 12 . . . includes a more precise consent to jurisdiction than Part 6,” *id.* at 24 & 16.

process. This substantive result—the removal of Oklahoma courts from the process and adherence to plan Compact dispute resolution provisions—is in accord with a principled application of the federal Indian law that controls this case and, as a result, best serves the general public interest in the furtherance of coherent and conservative precedent.

Respectfully submitted,

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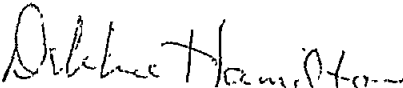
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CERTIFICATE OF MAILING

I hereby certify that on February 13, 2008, I caused true copies of the foregoing BRIEF *AMICI CURIAE* OF THE CHOCTAW NATION OF OKLAHOMA AND THE CHICKASAW NATION IN SUPPORT OF DEFENDANT-PETITIONER CHEROKEE NATION ENTERPRISES, L.L.C. to be separately served on Larry A. Tawwater and Darren M. Tawwater of the Tawwater Law firm, P.L.L.C., at One Leadership Square 211 N. Robinson, Suite 1950 Oklahoma City, OK 73102; and Stratton Taylor, Sean Burrage, Bradley H. Mallett, and Mark H. Ramsey attorneys at P.O. Box 309 Claremore, OK 74018.


Debbie Hamilton

ATTACHMENT 1

Stephen Greetham

From: Bob Rabon [rawol@sbcglobal.net]
Sent: Tuesday, February 12, 2008 3:53 PM
To: Stephen Greetham
Subject: Cossey v. Cherokee Nation

----- Original Message -----

From: Brenda Dryer
To: rawol@sbcglobal.net
Sent: Friday, February 08, 2008 11:55 AM
Subject: Cossey v. Cherokee Nation

The Tawwater Law Firm was contacted by Robert Rabon regarding Choctaw and Chickasaw filing an amicus brief in Cossey v. Cherokee Nation Enterprises, L.L.C., Supreme Court of Oklahoma Case No. CI-105300. This firm has no objection.

Brenda Dryer

Legal Assistant to Darren M. Tawwater
- The Tawwater Law Firm, P.L.L.C.
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ATTACHMENT 1

Stephen Greetham

From: Mark Ramsey [MRamsey@soonerlaw.com]
Sent: Tuesday, February 12, 2008 4:54 PM
To: Rabon, Wolf & Rabon; Stephen Greetham
Cc: Arrow, Dennis; Conni Werther
Subject: Cossey v. Cherokee Nation Enterprises, et al., Okla. Sup. Ct. Case No. 105,300

The Defendants/Petitioners, Cherokee Nation Enterprises, L.L.C., formerly known as Cherokee Nation Enterprises, Inc., and Cherokee Nation Enterprises, Inc., hereby consent to the filing of a brief or briefs as *amici curiae* by the Choctaw Nation, the Chickasaw Nation, and/or any related or affiliated commercial or governmental entity.

Mark H. Ramsey
For the Defendants/Petitioners