

**IN THE SUPREME COURT**  
**STATE OF ARIZONA**

Hwal'Bay Ba: J Enterprises, Inc.

Petitioner,

v.

Honorable Lee F. Jantzen, Judge of the  
Superior Court of the State of Arizona,  
in and for the County of Mohave,

Respondent,

and

Sara and William Fox,

Real Parties in Interest.

Arizona Supreme Court  
No. CV-19-0123-PR

Court of Appeals, Division One  
No. 1 CA-SA 19-0059

Mohave County Superior Court  
No. CV2018-00428

**PETITIONER HWAL'BAY BA: J ENTERPRISES, INC.'S**  
**SUPPLEMENTAL BRIEF**

D. Samuel Coffman (011428)  
Mitesh V. Patel (031599)  
Vail C. Cloar (032011)  
DICKINSON WRIGHT PLLC  
1850 N. Central Avenue, Suite 1400  
Phoenix, Arizona 85004  
Tel: 602-285-5000  
Fax: 844-670-6009  
Email: [SCoffman@dickinsonwright.com](mailto:SCoffman@dickinsonwright.com)  
Email: [MPatel@dickinsonwright.com](mailto:MPatel@dickinsonwright.com)  
Email: [VCloar@dickinsonwright.com](mailto:VCloar@dickinsonwright.com)

Verrin T Kewenvoyouma (023305)  
KEWENVOYOUMA LAW, PLLC  
700 E. Baseline Rd., Suite C1  
Tempe, Arizona 85283  
Tel: 480-428-4590  
Fax: 480-223-6398  
Email: [verrin@vtklaw.com](mailto:verrin@vtklaw.com)

*Attorneys for Petitioner Hwal'Bay Ba: J Enterprises, Inc.*

## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. THERE IS NO GEOGRAPHIC LIMITATION TO SOVEREIGN IMMUNITY FOR TRIBAL COMMERCIAL ACTIVITY.....	2
A. Commercial activity is protected by tribal sovereign immunity.....	2
B. <i>Lewis</i> has no application here.....	3
III. GCRC IS ENTITLED TO IMMUNITY UNDER THE <i>BREAKTHROUGH TEST</i> .....	4
A. GCRC was created by the Tribe pursuant to its sovereign powers.....	6
B. The purpose behind forming GCRC indicates that it is an arm of the Tribe. ....	7
C. The Tribe’s hegemony over GCRC weighs heavily in favor of applying sovereign immunity in this case.....	10
D. The Tribe intended that GCRC be shielded from suit by sovereign immunity.....	13
E. The economic fate of the Tribe and GCRC are intertwined. ....	17
F. Applying sovereign immunity to GCRC furthers the purposes of the doctrine.....	18
IV. CONCLUSION.....	20

## TABLE OF AUTHORITIES

	Page
Cases	
<i>Allen v. Gold Country Casino</i> , 464 F.3d 1044 (9th Cir. 2006) .....	14
<i>Breakthrough Management Group, Inc. v. Chukchansi Gold Casino &amp; Resort</i> , 629 F.3d 1173 (10th Cir. 2010).....	passim
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987).....	8, 19
<i>Dixon v. Picopa Construction Co.</i> 169 Ariz. 251 (1989) .....	passim
<i>Filer v. Tohono O’Odham Gaming Enter.</i> , 212 Ariz. 167 (2006).....	9
<i>First Nat’l Bank of Birmingham v. Perfection Bedding Co.</i> , 631 F.2d 31 (5th Cir. 1980).....	18
<i>Gavle v. Little Six</i> , 555 N.W.2d 284 (Minn. 1996).....	13
<i>Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.</i> , 966 F. Supp. 2d 876 (D. Ariz. 2013) .....	15
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987) .....	16
<i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies., Inc.</i> , 523 U.S. 751 (1998) .....	3, 5
<i>Lesoeur v. United States</i> , 858 F. Supp. 974 (D. Ariz. 1992) .....	1
<i>Lewis v. Clarke</i> , 137 S. Ct. 1285 (2017).....	3, 4
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014) .....	3, 18, 19, 20
<i>Morgan v. Colorado River Indian Tribe</i> 103 Ariz. 425 (1968).....	2
<i>Navajo Nation v. U.S. Forest Service</i> , 535 F.3d 1058 (9th Cir. 2008).....	1
<i>Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 498 U.S. 505 (1991) .....	14, 18
<i>People v. Miami Nation Enters.</i> , 386 P.3d 357 (Cal. 2016) .....	5, 20

<i>S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.</i> , 138 Ariz. 378 (1983)	7, 10
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	15
<i>Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering</i> , 476 U.S. 877 (1986)	20
<i>Tracy v. Superior Court</i> , 168 Ariz. 23 (1991)	16
<i>United States v. Nordic Village Inc.</i> , 503 U.S. 30 (1992)	15
<i>United States v. Testan</i> , 424 U.S. 392 (1976)	15
<i>WD at the Canyon, LLC v. Hwal’Bay Ba:j Enters., Inc.</i> , Hualapai Court of Appeals No. 2015-AP-004	1, 16
<i>White Mountain Apache Indian Tribe v. Shelley</i> , 107 Ariz. 4 (1971)	passim
<i>White v. Univ. of Cal.</i> , 765 F.3d 1010 (9th Cir. 2014)	5, 6
<i>Williams v. Big Picture Loans, LLC</i> , 929 F.3d 170 (4th Cir. 2019)	passim
Other Authorities	
<i>Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction</i> , 26 Ariz. L. Rev. 169 (1994)	10
Hualapai Const. Art. XVI	15, 16
Hualapai Constitution Art. V	7

## I. Introduction.

GCRC is the paradigm example of a subordinate economic organization entitled to sovereign immunity. As detailed in its Petition, GCRC was created by the Tribal Council pursuant to the Hualapai Constitution, for the express declared purpose of creating economic development opportunities, jobs, and educational opportunities on the Tribe's reservation. Pursuant to that mandate, GCRC operates a number of income-producing economic activities within the exterior boundaries of the tribal reservation<sup>1</sup> and operates the Tribe's river trips on the Colorado River's sacred waters<sup>2</sup> flowing on/adjacent to its reservation.<sup>3</sup>

---

<sup>1</sup> See GCRC, Grand Canyon West, <https://www.grandcanyonwest.com/> (last visited Mar. 28, 2019) (hereinafter, "Grand Canyon West"); [WV at the Canyon, LLC v. Hwal'Bay Ba:j Enters., Inc., Hualapai Court of Appeals No. 2015-AP-004, at 6](#), [APP289].

<sup>2</sup> See *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1066 n.7 (9th Cir. 2008) ("[T]he Navajo and the Hualapai [] consider the entire Colorado River to be sacred."); Hualapai Dep't of Cultural Resources, *About the Hualapai Nation*, available at <http://hualapai-nsn.gov/wp-content/uploads/2011/05/AboutHualapaiBooklet.pdf>, at 6.

<sup>3</sup> It is the Tribe's position that the Colorado River is part of its reservation. See, e.g., *Lesoeur v. United States*, 858 F. Supp. 974, 976 n.1 (D. Ariz. 1992) (notes that the Tribe, the Navajo Nation, and the Hopi Nation each claim ownership to portions of the Colorado River). However, based on the holdings of this Court and the U.S. Supreme Court, it is of no moment for purposes of this appeal whether GCRC's activities took place on (or adjacent to) Tribal lands and, therefore, we do not address that issue in this brief.

The Tribe maintains extensive control over GCRC and its board of directors, including the ability to appoint and remove board members at its sole discretion; to eliminate the Board and replace it entirely with the Tribal Council; to set and monitor GCRC's budget; and to control disposition of GCRC's assets and assumption of debt.

In light of these dispositive and uncontested facts, GCRC's status as a subordinate economic organization is manifest. The Court should reverse the decision below, and determine that GCRC is entitled to sovereign immunity as a subordinate economic organization of the Tribe.

**II. There is no geographic limitation to sovereign immunity for tribal commercial activity.**

**A. Commercial activity is protected by tribal sovereign immunity regardless of where it occurs.**

Fox's assertion that GCRC is not entitled to "geographic based tribal sovereign immunity" [Response at 7-8] is meaningless, because no such doctrine exists. Indeed, in the very case cited by Fox, *Morgan v. Colorado River Indian Tribe*, this Court recognized that the Colorado River Indian Tribe was entitled to tribal sovereign immunity for commercial activity on the Colorado River, even though the Court held that the river was not technically part of the tribal reservation. 103 Ariz. 425, 428 (1968).

This Court's holding in *Morgan* is entirely consistent with the United States Supreme Court's holding in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The Court in *Kiowa* unequivocally held that the doctrine of tribal sovereign immunity applies to tribal enterprises both on and off the reservation unless abrogated by Congress. *Id.* at 758–60.

Since the *Kiowa* decision in 1998, the U.S. Supreme Court has left no doubt about its holding in *Kiowa*, and has reaffirmed the continuing vitality of tribal sovereign immunity in the context of off-reservation commercial conduct. “[T]he decision [in *Kiowa*] could not have been any clearer: ‘We decline to draw any distinction’ that ‘would confine immunity to reservations or to noncommercial activities.’” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (quoting *Kiowa*, 523 U.S. at 758). *Kiowa*, *Bay Mills*, and *Morgan* control, and are dispositive of Fox's argument here.

**B. *Lewis* has no application here.**

Fox's reliance on *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), is completely misplaced. *Lewis*' holding, and the only issue before the U.S. Supreme Court in that case, was whether a suit against a tribal employee in his individual capacity was barred by the doctrine of sovereign immunity. *Id.* at 1291. But, as outlined below, GCRC is an arm of a sovereign power, and is a part of the

Tribe that formed it. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 7 (1971). Neither *Lewis* nor any authority indicates that a corporation can act in an “individual capacity.” And *Lewis* has nothing to add to, and had no moment to comment upon, the proper analysis of divining whether a tribal entity is a subordinate economic organization entitled to sovereign immunity. No court has adopted (or even discussed) the strained interpretation of *Lewis* proffered by Fox, and that case has no application here.

### **III. GCRC is entitled to immunity under the *Breakthrough* test.**

As outlined in its Petition, GCRC is entitled to the protection of sovereign immunity under a straightforward application of this Court’s longstanding authority and federal law. To the extent, however, that the Court believes it advisable to provide guidance to lower courts by adopting a set of standards to guide their analyses in similar cases, the Court should adopt the federal test as set forth in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). Because tribal sovereign immunity “is a matter of federal law not subject to diminution by



the States,” *Kiowa*, 523 U.S. at 756, this case presents an opportunity to clarify a standard that comports with federal jurisprudence.<sup>4</sup>

A number of courts, including the Ninth Circuit, have adopted the *Breakthrough* test to determine whether a particular tribal entity is an “arm of the tribe” entitled to sovereign immunity. See *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); see also *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019); *People v. Miami Nation Enters.*, 386 P.3d 357, 367, 371 (Cal. 2016) (explaining that the *Breakthrough* test “appears most influential” among the federal courts).

Under the *Breakthrough* analysis, a court considers five factors, including:

- (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.

---

<sup>4</sup> Although GCRC believes that the Court can easily distinguish *Dixon v. Picopa Construction Co.* 160 Ariz. 251 (1989), *Dixon* is relied upon incorrectly and extensively for the proposition that off-reservation commercial conduct is beyond the scope of tribal sovereign immunity. [Petition at 8, 18; Amicus Brief of Grand Canyon Custom Tours, Inc. (“GCCT”) at 10.] Post *Dixon*, the U.S. Supreme Court has held that is not correct. Thus, the Court’s jurisprudence warrants clarification in this regard.

*White*, 765 F.3d at 1025 (quoting *Breakthrough*, 629 F.3d at 1187). Further, the Court considers a sixth factor, “the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.” *Breakthrough*, 629 F.3d at 1187.

The Court’s inquiry should *not* be, as Fox suggests, be determined with reference to a specific alleged act of negligence or accident. [Response at 13.] Such a rule has no basis in this Court’s case law or federal case law, and may potentially lead to inconsistent results from one case to the next, even with respect to the same tribal entity. Instead, the proper inquiry looks to the *legal status* of the entity claiming immunity. A proper analysis of the *Breakthrough* factors leads to the conclusion that GCRC is a subordinate economic entity that is entitled to sovereign immunity.

**A. GCRC was created by the Tribe pursuant to its sovereign powers.**

Where a tribal entity is created via a tribe’s sovereign powers, pursuant to tribal law, and under that tribe’s constitution, the first factor of the *Breakthrough* test weighs in favor of finding that the entity is a subordinate economic entity. *Id.* at 1191; *White*, 765 F.3d at 1025 (holding that the first factor weighed in favor of immunity where the entity was “created by

resolution of the Tribes, with its power derived directly from the Tribes' sovereign authority"). Stated differently, "[f]ormation under tribal law weighs in favor of immunity." *Williams*, 929 F.3d at 177. Based on this Court's teachings, Arizona law has long been in accord. *Shelley*, 107 Ariz. at 5 (holding that entity was entitled to immunity in part because it was created pursuant to a tribal constitution); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.*, 138 Ariz. 378, 380 (App. 1983) (same).

Fox does not dispute, nor can she reasonably dispute, that GCRC was formed pursuant to the Tribe's sovereign powers under the Hualapai Constitution. *See* Hualapai Constitution Art. V, ¶ (x), [APP033] (granting the Tribal Council the power "to establish and to regulate subordinate organizations for economic and other purposes"). In the exercise of that power, the Tribal Council formed GCRC to promote economic development, create job opportunities, and attract "clean" business to the Tribe's reservation. [APP279]. Little else need be said. This factor weighs in favor of holding that GCRC is an arm of the Tribe.

**B. The purpose behind forming GCRC indicates that it is an arm of the Tribe.**

The formation of a tribal entity for reasons that benefit the tribe via job creation and economic development militates in favor of holding an entity

to be an arm of the tribe. To be sure, an entity that assists with “governmental purposes” is unquestionably a subordinate economic organization under this Court’s authority. *See Dixon*, 160 Ariz. at 257. It is also clear that the fact that an entity is engaged in commercial activity is of no moment in the analysis, so long as the commercial activity redounds to the benefit of the tribe. *Shelley*, 107 Ariz. at 7.; *Williams*, 929 F.3d at 178 (“The stated purpose need not be purely governmental to weigh in favor of immunity as long as it relates to the broader goals of self-governance.”).

Economic activity is integrally related to tribal sovereignty and self-governance. “Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987).

Thus, revenue raising for the tribe is a valid purpose militating in favor of extending sovereign immunity to a tribal entity. *Breakthrough*, 629 F.3d at 1192 (holding operation of a casino for raising revenues for the tribe was a purpose weighing in favor of sovereign immunity). And a stated purpose of job creation and economic growth in addition to revenue raising also weighs in in favor of holding an entity to be a part of the tribe. *Shelley*, 107 Ariz. at 6

(holding that a tribal entity created for “economic development,” job “training,” and creating “employment opportunities” was a subordinate economic organization); *Filer v. Tohono O’Odham Nation Gaming Enter.*, 212 Ariz. 167, 172 ¶ 17 (2006) (holding that entity created by the tribe “to achieve economic self sufficiency” was engaged in purposes other than pure commercial activity); *Williams*, 929 F.3d at 178.

Here, GCRC not only raises revenue for the Tribe for critical governmental services, but “creat[es] economic development opportunities for the Hualapai Indian Tribe.” [APP071.] GCRC’s core purpose, as stated in its Plan of Operation, is to further Tribal economic development by, *inter alia*, “[i]mproving the *employment opportunities* for Hualapai tribal members,” [a]ttracting ‘*clean*’ off-reservation businesses and industries to locate on the Reservation,” and “[e]stablishing *opportunities for educating tribal members* in the field of business.” [*Id.* (emphasis added).] In this regard, GCRC is virtually identical to the entity in *Shelley*, which this Court held comprised a subordinate economic organization because of its stated purpose of economic development. *Shelley*, 107 Ariz. at 6.

This prong of the *Breakthrough* test lays bare the differences between GCRC and the entity at issue in *Dixon* (upon which Fox primarily relies) and

renders that case inapposite. The entity in *Dixon* served no governmental function, and had no role in furthering tribal self-governance or autonomy. Instead, as this Court indicated, “[s]o far as its articles or any extrinsic evidence show, Picopa was simply a for-profit corporation involved in construction projects.” *Dixon*, 160 Ariz. at 257. Because the record and evidence clearly reflect that GCRC was organized to fulfill critical economic development, job creation, and educational roles, it is an arm of the Tribe. *Shelley*, 107 Ariz. at 6; *S. Unique*, 183 Ariz. at 381; *Williams*, 929 F.3d at 178.

**C. The Tribe’s hegemony over GCRC weighs heavily in favor of applying sovereign immunity in this case.**

The third *Breakthrough* factor focuses on the control that the tribe exerts over the tribal entity, including its ownership and formal governance structure. An entity’s separate corporate form apart from a tribe is of no moment in the sovereign immunity analysis. *See Breakthrough*, 629 F.3d at 1184 (“The tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure.” (quoting William V. Vetter, *Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 174 (1994))). The appropriate inquiry is

whether, on balance, the relationship and structure of the tribal enterprise demonstrate tribal control over the entity.

Fox goes to great lengths to insist that GCRC has a “robust” corporate structure separate and apart from the Tribe. Not so. GCRC’s organic documents make clear that virtually every facet of GCRC owes its existence to the Tribe’s discretionary exercise of its sovereign power, and is owned exclusively by the Tribe. First, GCRC was created by the Tribal Council to foster economic development as authorized by the Hualapai Constitution. [APP279.] The Tribe is the only lawful shareholder of GCRC, the Tribe’s interest cannot be divested in any way, and the Tribal Council votes on any matters requiring shareholder approval. [APP071, §§ 3.1–3.2.] GCRC holds its annual meetings in the Tribal Council’s chambers, and every shareholder meeting is noticed and open to every member of the Tribe. [APP072, §§ 3.3, 3.5.] All of GCRC’s initial funding came exclusively from the Tribe. [*Id.*, § 4.1.]

Fox’s assertion that GCRC is a “robust” corporation with an “independent” board [Response at 8] is unfounded. GCRC’s board of directors is not “independent,” but serves at the grace of the Tribal Council. GCRC’s board consists exclusively of members appointed by the Tribal

Council, and its members may be terminated or suspended by the Tribal Council for any reason or no reason. [*Id.*, § 5.1; APP075, § 5.14.] Indeed, the Tribal Council may “at its option” elect to operate GCRC themselves “temporarily, indefinitely [,] or otherwise.” [APP072.]

Similarly, GCRC’s purportedly clear separate identity is undercut by GCRC’s Plan of Operation: GCRC’s budget is set by the Tribal Council [APP076, § 5.17]; GCRC must report on its compliance with that budget [*id.*]; the Tribal Council enacts bylaws for GCRC without consultation with its board of directors or its officers [*id.*, § 6.1]; and disposition of assets requires the Tribal Council’s approval [APP079, ¶ E.]

GCRC’s bylaws, as enacted by the Tribal Council, also reflect a striking amount of control by the Tribal Council. GCRC must receive Tribal Council approval before it takes on any debt, before it expends any sum greater than \$50,000, before it enters into any transaction regarding property valued at more than \$50,000, and before it enters into any agreement regarding specific entities. [APP088, § 7.03.] To say that GCRC exercises significant independence separate and apart from the Tribe defies credulity.

In light of the overwhelming amount of control that the Tribal Council exercises over GCRC, Fox attempts to move the goalpost by claiming that



because the Tribal Council does not exercise “day-to-day” control over GCRC, it is not entitled to sovereign immunity. [Response at 5–6, 8–12.] But that is not the test. The fact that the tribe does not control the day-to-day operations of a subordinate entity does not, without more, weigh against application of sovereign immunity. *Williams*, 929 F.3d at 182–83 (citing *Miami Nation*, 386 P.3d at 373).

Instead, it is clear that “control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management.” *Gavle v. Little Six*, 555 N.W.2d 284, 295 (Minn. 1996); *see also White*, 765 F.3d at 1025 (finding committee to be an arm of the tribe where tribes appointed delegates who act on behalf of the tribes); *Williams*, 929 F.3d at 182–183 (citing *Miami Nation*, 386 P.3d at 373). Indeed, this Court’s case law makes clear that the existence of a corporate board – even one that, unlike GCRC’s board, is terminable only for cause – does not render sovereign immunity inapplicable. *Shelley*, 107 Ariz. at 6.

**D. The Tribe intended that GCRC be shielded from suit by sovereign immunity.**

The Tribe’s intent to vest GCRC with sovereign immunity is manifest, and weighs in favor of finding sovereign immunity in this case. As indicated

by GCRC's Plan of Operation, "GCRC shall be entitled to all the privileges and immunities of the Hualapai Indian Tribe. GCRC and its directors, officers, employees, and agents while acting in the[ir] official capacities *are immune from suit.*" [APP077, § 11.1 (emphasis added).] Indeed, the Tribe made clear that GCRC has *no authority* to waive its own sovereign immunity—jeopardizing Tribal resources—but instead must obtain written consent of the Tribal Council. [APP078, § 11.2.]

Fox's contention that the Tribe's intent is of little concern widely misses the mark. The policy underlying the very doctrine of tribal sovereign immunity is to promote and defend tribal self-governance, self-sufficiency, and economic development. *E.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir. 2006); *Dixon*, 160 Ariz. at 258. In a reasoned policy decision, the Tribe and its members have determined that GCRC should remain immune from suit. Overruling such a determination and decision of the Tribe's governing body is a tremendous step, and one that is unwarranted here.

Fox also contends that the Tribe intended to *waive* sovereign immunity predicated upon a historic charter for some unused tribal entity. [Response at 16–17.] But that supposition makes little sense as a matter of law and fact.

First, any purported waiver of tribal sovereign immunity must be clear, not equivocal, and is strictly construed in favor of immunity. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976))); *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (requiring waivers of sovereign immunity to be strictly construed); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.*, 966 F. Supp. 2d 876, 882 (D. Ariz. 2013). An ancient corporate charter for an entity unrelated to GCRC (by name or otherwise) is not a clear and unequivocal renunciation of immunity by the Tribe.

Indeed, the Hualapai Constitution reflects exactly the opposite intent. “The Hualapai Tribe declares that, in exercising self-determination and sovereignty to its 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.” Hualapai Const. Art. XVI, § 1, [APP041.]

And before even the Tribal Council can waive sovereign immunity, the Hualapai Constitution requires an affirmative vote of the Tribe's members. *Id.*, at § 2, [APP042]. It is difficult to imagine a more pronounced intent to retain the right of sovereign immunity.

Finally, the Hualapai Court of Appeals, the Tribe's highest court, has explicitly rejected the notion that a historic 1943 or 1955 corporate charter – which contained a sue and be sued clause – has anything to do with GCRC. *WD at the Canyon, LLC v. Hwal'Bay Ba:J Enters., Inc.*, No. 2015-AP-004, at 9–10 [APP297–98.] Further, that court held *expressly* that GCRC was created pursuant to the Hualapai Constitution to be a subordinate economic organization of the Tribe. *Id.*

The existence and identity of a tribal entity is a matter of tribal law, to which significant deference is owed. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (“[T]ribal courts are best qualified to interpret and apply tribal law.”). The Hualapai Court of Appeals is best positioned to rule on the Tribe's intent, and the effect of the Tribal Council's compliance with the Hualapai Constitution. This Court has made clear that such holdings are entitled deference under principles of comity. *Tracy v. Superior Court*, 168

Ariz. 23, 25 (1991). Put plainly, the Tribe's intent was unequivocal, and weighs in favor of finding GCRC to be an arm of the Tribe.

**E. The economic fate of the Tribe and GCRC are intertwined.**

The economic relationship between GCRC and the Tribe are unquestionably interrelated. The Tribe provided all funds necessary to create GCRC in the first instance. [APP072, § 4.1.] GCRC's budget is established by the Tribal Council, and GCRC must send an executive officer to report GCRC's compliance with the budget established. [APP076, § 5.17.] As detailed above, under its bylaws GCRC is prohibited from, *inter alia*, taking on debt, expending any sum greater than \$50,000, and entering into any transaction for property valued at more than \$50,000 without Tribal Council approval. [APP088, § 7.03.]

This Tribal control over GCRC's finances is not surprising. There is no gambling on the Tribe's lands, and the Tribe's financial independence relies almost entirely upon a tourism economy. Hualapai Tribe, *About the Hualapai Tribe*, <http://hualapai-nsn.gov/about-2/> (last visited September 26, 2019). GCRC is tasked with generating those funds by offering views from "Skywalk" (a glass bridge over the rim of the Grand Canyon), as well as

helicopter tours, boat tours, and other excursions.<sup>5</sup> *Id.* The funds generated by those activities belong as a matter of equity to the Tribe as the sole shareholder of GCRC. *E.g., First Nat'l Bank of Birmingham v. Perfection Bedding Co.*, 631 F.2d 31, 33 (5th Cir. 1980) (explaining that “stockholders are the equitable owners of a corporation’s assets”). Stated simply, the Tribe controls GCRC to such an extent because GCRC is virtually its sole source of income and their economic fates are intertwined – for richer or for poorer.

**F. Applying sovereign immunity to GCRC furthers the purposes of the doctrine.**

The contents of the Complaint below and Fox’s briefing before this Court are designed to evoke a visceral reaction. But perspective is critical. As the U.S. Supreme Court has explained, tribal sovereign immunity is “a necessary corollary to Indian sovereignty and self-governance,” subject to Congress’ power to modify the doctrine. *Bay Mills*, 572 U.S. at 788. The doctrine of tribal sovereign immunity is a determination by Congress that tribal sovereign immunity promotes “tribal self-sufficiency and economic development.” *Potawatomi*, 498 U.S. at 510.

---

<sup>5</sup> Grand Canyon West is the name for the amalgam of tourism attractions operated by GCRC. *See Grand Canyon West, supra* (indicating that “Grand Canyon West” is a federally registered copyright held by GCRC).

Despite Fox’s protestations to the contrary, the U.S. Supreme Court has, “in a long line of precedents,” indicated that the doctrine of tribal sovereign immunity applies to commercial conduct by Indian tribes, regardless where that activity occurs. *Bay Mills*, 572 U.S. at 798–99 (citing cases). Despite multiple opportunities to do so, Congress has not modified the doctrine, and the Court has refused to override that declination. *Id.* The reason is simple—without the funds generated by commercial activities, self-governance and economic advancement would be beyond the grasp of many tribes. “Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.” *Cabazon*, 480 U.S. at 219. As this Court has stated, the protection of tribal assets is among the most critical reasons the doctrine of tribal sovereign immunity exists in the first instance. *Dixon*, 160 Ariz. at 258.

Granting sovereign immunity here protects the “corollary” of self-governance that is inherent in the Tribe—a corollary which does not drop away because of the use of a subordinate economic entity. *Shelley*, 107 Ariz. at 6; *Breakthrough*, 629 F.3d at 1187. Upsetting the expectations of the Tribe—as well as those of every other tribe in Arizona— regarding the law of tribal sovereign immunity is neither necessary nor appropriate. *Bay Mills*, 572 U.S.

at 798–99 (outlining the significant reliance on prior holdings regarding off-reservation commercial activity).

Fox will claim that her alleged wrong will go without a remedy if tribal immunity applies to GCRC. Again, perspective matters. The application of any immunity doctrine may well leave an alleged wrong with a somewhat imperfect remedy.<sup>6</sup> *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 893 (1986); *Miami Nation*, 386 P.3d at 375. Congress has determined that the imperfect remedy is outweighed by the critical function served by tribal sovereign immunity. It is the function of Congress – not this Court – to alter that long-standing paradigm. *Bay Mills*, 572 U.S. at 800.

#### **IV. Conclusion.**

For the foregoing reasons, GCRC asks that the Court to reverse the superior court’s erroneous denial of GCRC’s motion to dismiss.

---

<sup>6</sup> Whether this is the case here is an open question. Fox has also sued a vendor, GCCT, alleging, among other things, that she was injured by GCCT’s failure to abide its obligation to distribute notice of GCRC’s tribal sovereign immunity. [APP04, ¶ 24; Amicus Brief of GCCT at 4.]



DATED this 1st day of October, 2019.

**DICKINSON WRIGHT PLLC**

By: s/ Vail C. Cloar  
D. Samuel Coffman  
Mitesh V. Patel  
Vail C. Cloar  
Dickinson Wright PLLC  
1850 N. Central Avenue, Suite 1400  
Phoenix, AZ 85004  
*Attorneys for Petitioner*

**KEWENVOYOUA LAW, PLLC**

By: s/ Verrin T. Kewenvoyouma  
Verrin T. Kewenvoyouma  
Kewenvoyouma Law, PLLC  
700 E. Baseline Road  
Tempe, AZ 85283  
*Attorneys for Petitioner*